

**BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS**

**MAR 11 2013**

by  
State Corporation Commission  
of Kansas

In the Matter of Kansas City Power & Light )  
Company's Compliance with the ) Docket No. 13-KCPE-463-CPL  
Commission's Order in Docket No. 13- )  
GIME-391-GIE. )

**KANSAS CITY POWER & LIGHT COMPANY'S RESPONSE  
TO CURB'S PETITION FOR RECONSIDERATION**

Kansas City Power and Light Company ("KCP&L") responds as follows to the Petition For Reconsideration filed by the Citizen's Utility Ratepayer's Board ("CURB") on March 1, 2013:

**I. BACKGROUND AND OVERVIEW**

1. On December 13, 2012, the Kansas Corporation Commission ("Commission" or "KCC") issued its *Order Opening General Investigation Docket* in Docket No. 13-GIME-391-GIE ("the 391 Docket"). The Commission's Order addressed Senate Substitute for HB 2526 amending K.S.A. 66-1260 which required, in part, that the Commission provide a report to the legislature on or before March 1 of each year on the statewide retail rate impact related to the Renewable Energy Standard ("RES"). House Bill 2526 also allows the Commission to require submission of information related to a utility's portfolio requirement through either an order or rules and regulations. The Commission directed electric utilities to update their August 2012 RES report to provide a retail rate impact, and ordered that future RES reports should include a retail rate impact calculation. The Commission indicated it would continue to receive input from electric utilities on whether changes to regulations on this matter are needed.

2. Pursuant to the Commission's December 13, 2012 Order, on January 16, 2013, KCP&L filed its Updated Version of its August 2012 RES Report in the 391 Docket. The Commission decided administratively that company-specific updates would be filed in separate compliance dockets. For KCP&L, the Commission opened this docket and directed KCP&L's Updated Version of its August 2012 RES Report to be filed herein instead of in the 391 Docket.

3. On January 24, 2013, CURB filed a Petition to Intervene and Motion for Protective Order.<sup>1</sup> On February 13, 2013, the Commission issued an Order granting CURB's intervention, but limiting it to receiving notice of filings in this docket ("Commission's Order"). The Commission stated that CURB's intervention would not include access to confidential filings or the right to file discovery motions, protests, or other litigious filings. As such, the Commission denied CURB's Motion for a Protective Order.<sup>2</sup>

4. On March 1, 2013, CURB filed a Petition For Reconsideration of the Commission's Order ("CURB's Petition").

5. KCP&L supports the Commission's Order, and objects to CURB's request that the Commission grant CURB's Motion for a Protective Order and CURB access to all filings in the docket, including confidential filings. KCP&L also objects to CURB's alternative request that it be granted access to redacted versions of confidential filings made in the docket.

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<sup>1</sup> When the Commission diverted KCP&L's Updated Version of its August 2012 RES Report from the 391 Docket to this new docket, the new docket's service list did not include KCP&L's counsel and representative from the service list in the 391 Docket. Instead, it only included an individual at KCP&L who is no longer involved in the matter for the Company. As such, KCP&L did not file a response to CURB's initial Motion for Protective Order because the appropriate people for the Company were unaware of the filing by CURB until after the Commission had issued its February 13, 2013 Order denying the motion.

<sup>2</sup> Commission's Order, ¶4.

## II. ARGUMENT

### A. *This is a Non-Adjudicative Investigatory Docket.*

5. Compliance dockets are non-adjudicative investigatory proceedings to which the standards of due process do not attach. The Commission and its Staff regularly engage in fact-finding activities where the agency seeks information for future use rather than in the context of an adjudicative proceeding in which action is to be taken against a utility. An investigation is not adversarial, and the analysis concerning the rights of a party to intervene and participate is not the same as it would be in a docket opened for the purpose of adjudicating a matter.

6. In *Atchison, Topeka & Santa Fe Railway Company v. Kansas Commission on Civil Rights*, 215 Kan. 911 (1974), the Kansas Supreme Court addressed the distinction between an administrative agency's investigatory processes versus its adjudicative processes. It found that an administrative investigation is essentially informal, not adversary, and is not required to take any particular form. The Court stated that, "where an administrative agency makes a determination of a quasi-judicial nature, the parties to the adjudication must be accorded the traditional safeguards of a trial; but when such an agency is conducting nonadjudicative, fact-finding investigations, rights such as appraisal, confrontation, and cross-examination generally do not obtain."<sup>3</sup> The Supreme Court quoted the passage from *State ex rel. v. American Oil Co.*, 202 Kan. 185, 188, which states,

The inquisition procedure here involved is an historically well-known legislative device enabling the state's chief law enforcement officer to gather information necessary for effective enforcement of our antitrust laws. The proceeding is not adversary *but is ex parte*; it is investigative and not adjudicatory. Of course, facts uncovered through it may lead to an adjudicatory hearing, civil or criminal, the same as information disclosed by any other method of investigation. (Emphasis added.)

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<sup>3</sup> *Atchison*, at 918.

7. In *Bush v. City of Wichita*, 223 Kan. 651 (1978), the Kansas Supreme Court considered an investigation by the Commission on Civil Rights that resulted in a finding of “no probable cause” on an alleged complaint of discrimination. The Court found that the fact-gathering engaged in by the Commission was an investigatory function and no right of judicial review of the decision was available. The Court cited to *Atchison* for its holding that an agency is not acting in a quasi-judicial capacity until its investigation ends and a hearing is set. “While it is true...that the KCCR may later exercise quasi-judicial functions, a determination of probable cause is an investigatory function which must be satisfied before the commission may begin its adjudicatory functions.”<sup>4</sup> The *Bush* court stated that,

As noted in the *Atchison* and *American Oil* cases, supra, an investigation is traditionally a function of state law enforcement officers, not the courts, and is concerned with gathering information for future use. Determination to proceed is an executive function. Such is the case with the investigating commissioner’s determination relative to probable cause. The investigating commissioner, like a prosecutor or state law enforcement officer, is concerned with ***gathering information to be used in the future in an adjudicatory, adversary proceeding*** against the named employer, if future procedures are warranted. (Emphasis added.)<sup>5</sup>

8. The Kansas Corporation Commission and its Staff are charged with the obligation to regulate public utilities, which includes gathering information and monitoring activities to ensure compliance with Orders, laws and regulations. The Commission has the statutory power to require a regulated public utility to submit records and information to the agency. The Kansas Legislature has not granted any other partisan interest group the authority to monitor, investigate or demand information from a public utility. Further, these special interest groups do not have a legal right to access such information simply because it is submitted to Staff pursuant to an investigation.

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<sup>4</sup> *Bush* at 658.

<sup>5</sup> *Id* at 659.

9. This docket is an information gathering docket. CURB acknowledges that fact.<sup>6</sup> The Commission did not have to open any docket to perform this function; it could have simply requested the information informally from the companies, as was its practice historically. Assigning a docket number to the investigation does not change its nature or purpose. CURB is incorrect when it asserts that “(t)here is no justification for a different set of rules for “compliance” dockets that are functioning as investigative dockets.”<sup>7</sup> As the case law cited above establishes, the Commission’s investigative functions are considered to be very different than adjudicative proceedings in which CURB and other parties are allowed intervention and the full participation of litigants. The Commission’s decision to limit CURB’s intervention is reasonable and is supported by Kansas law.

10. The Commission is using this docket to gather the information it needs to meet its obligation to present its annual report to the legislature, as required by K.S.A. 66-1260. Only the Commission has this obligation. Non-Commission entities have no purpose or right to shadow the Commission as it performs this function. KCP&L recognizes that the Commission has previously found that CURB has certain statutory standing to intervene in Commission “proceedings”,<sup>8</sup> but the Commission’s power to limit participation in a proceeding under K.S.A. 77-521(c) is as equally applicable to CURB as it is to any other party.

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<sup>6</sup> CURB Petition, ¶19 (“The Commission is in the process of gathering evidence, not ensuring compliance or monitoring progress after the main proceeding has ended”; and ¶30 (“This docket is not functionally a compliance docket, but is being used to gather evidence for the investigation in the 391 Docket.”)

<sup>7</sup> CURB Petition, ¶25.

<sup>8</sup> See KCC Docket No. 12-KCPE-258-CPL, *In the Matter of the Application of Kansas City Power & Light Company’s Compliance Filings as Required by Commission Order in Docket No. 11-KCPE-581-PRE*, Order Granting CURB Intervention dated January 30, 2012.

*B. The Information Submitted by the Companies Contains Confidential Information and There is a Cost and Burden Associated with Preparing Redacted Versions.*

11. Finally, CURB claims that the information filed in the reports by the utilities should not contain much information that is “confidential”<sup>9</sup>, and that providing redacted copies is not burdensome.<sup>10</sup> On the contrary, a substantial portion of the information will be considered classified as confidential and it requires time and resources to review each filing to identify and redact confidential information. The reports discuss KCP&L’s business plans for developing and/or purchasing renewable power, including costs estimates as well as cost incurred for past projects. There is no question that this information is commercially sensitive and must be kept confidential. This information is contained throughout the report and will have to be redacted. To accomplish the redactions, the Company’s counsel and regulatory staff must review each report, line-by-line, to identify confidential information. Office staff must then prepare the redacted copy, which is then reviewed again by regulatory staff to ensure that all redactions were made. Furthermore, a party may challenge the confidential designations made by the Company, which requires additional legal and staff time to address. Preparation of redacted copies can be costly and burdensome.

**III. CONCLUSION**

Compliance dockets involving the gathering of information to monitor compliance with Commission orders, or as in this case, to allow the Commission to prepare legislatively mandated reports, are not adjudicatory proceedings. These activities were historically conducted by Staff outside of a formal docket involving only the company which was providing the information and its regulator – the Commission. Assigning a docket number to the compliance filing does not

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<sup>9</sup> CURB Petition, ¶27.

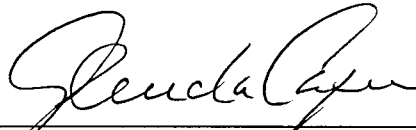
<sup>10</sup> CURB Petition, ¶24.

change the nature of the activity. KCP&L does not believe intervention by non-Commission parties is appropriate in these dockets, but to the extent such intervention is granted, the intervention should be limited as the Commission has done with CURB in this case.

WHEREFORE KCP&L respectfully requests the Commission affirm its February 13, 2013 Order limiting CURB's intervention as stated therein, and denying CURB's Motion for a Protective Order.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Kansas City Power & Light Company's Response to CURB's Petition for Reconsideration was hand-delivered or served electronically on this 11<sup>th</sup> day of March, 2013 to:

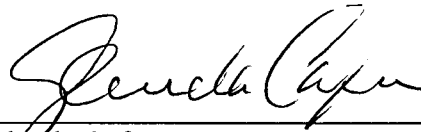
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