

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

In the Matter of the Application of Kansas)
Gas and Electric Company for Approval of)
the Amendment to the Energy Supply) Docket No. 18-KG&E-303-CON
Agreement Between Kansas Gas and)
Electric Company and Occidental Chemical)
Corporation.)

MOTION TO COMPEL RESPONSE TO STAFF'S DATA REQUEST NO. 10

The Staff of the Kansas Corporation Commission (“Staff” and “Commission,” respectively), hereby moves the Commission to compel Occidental Chemical Corporation (Occidental) to provide the 2017 invoices and Tariffs requested by Staff in its Data Request No. 10 (DR 10) issued March 20, 2018. In support thereof, Staff states the following:

Background

1. On January 16, 2018, Kansas Gas and Electric Company, d/b/a Westar Energy (Westar) and Occidental (together, “Joint Applicants”) filed a Joint Application in this docket seeking approval of a special contract¹ between Westar and Occidental. The contract involves the sale of jurisdictional retail electric service from Westar to Occidental at discounted rates.

2. The justification provided by the Joint Applicants for the necessity of the special contract is that “it provides the incentives needed to keep [Occidental] as a large, viable customer on our electric system and as a viable business in Kansas. The proposed contract will continue to

¹Referred to in the Joint Application as an Energy Supply Agreement. The word “special” in this sentence reflects the Commission’s historical terminology of contracts between utilities and customers that are not taking service under “general” tariff rates and terms applicable to the customer in a specific class such as residential, commercial, or industrial. See Order, p. 1, Docket No. 01-GIME-813-GIE (Oct. 3, 2001).

help address the electric cost disadvantages that [Occidental] has indicated its Wichita facilities are experiencing as compared to other [Occidental] plant locations.”²

3. Although not explicitly stated in the Joint Application, the discounted rates are subsidized by the remaining industrial customers while Occidental is a customer.³ However, were Occidental to leave Kansas, the result in the next full rate case would be a socialization of the remaining fixed costs paid by Occidental to all customers, not just large industrial customers.⁴ Therefore, determining whether a discount is needed to keep Occidental as a customer is highly relevant to this case.

Staff’s Data Request No. 10

4. In response to the assertion that Occidental has electric cost disadvantages at its Wichita facilities compared to its other plant locations, Staff submitted DR 10, attached hereto and incorporated herein by reference, specifically seeking “all 2017 invoices for electric service provided to these [Occidental] facilities and the Tariffs for each facility (excluding the Wichita plant).” It should be noted that Staff first attempted to request the 2017 invoices and Tariffs from Westar in Staff Data Request No 8, and Westar indicated that Westar “relied on [Occidental’s] (vocal) statements regarding paying higher prices in KS compared to elsewhere” and that Westar does “not have access to their billing statements and special contract tariffs in other service territories.”⁵

5. Occidental objected to DR 10, indicating that the data sought was “highly-confidential commercially sensitive information” and “not clearly relevant” to this proceeding.

²Pre-Filed Direct Testimony of Chad Luce on Behalf of Kansas Gas and Electric Company, p. 5 (Jan. 16, 2018); *see also* Pre-Filed Direct Testimony of Brenda Harris, p. 4-5 (Jan. 26, 2018).

³*See* Notice of Filing of Staff’s Report and Recommendation (Public Version), Report and Recommendation, p. 5 of 9, Docket No. 17-KG&E-352-CON (June 13, 2017) (17-352 R&R).

⁴*See Id.*

⁵*See* Attached Staff Data Request No. 8.

Furthermore, Occidental asserted that the statement regarding rate disadvantages could be verified by comparing publicly-filed rate tariffs of utilities serving other Occidental facilities in other states.

6. Occidental indicated in its objection that it would contact Staff to discuss possible alternative methods of verifying the claim regarding cost disadvantages in Kansas.

Staff's Golden Rule Efforts

7. On March 29, 2018, Staff counsel e-mailed a "Golden Rule E-mail" to counsel for Occidental asking to communicate regarding the objection, in an effort to resolve the discovery dispute informally. Since that time, various phone calls and e-mails have been had regarding the discovery dispute.⁶ The parties have failed to reach an agreement.

Commission's Authority to Compel Discovery

8. According to K.S.A. 77-522(a), the Commission may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure.

9. K.S.A. 60-237 is the rule of Kansas civil procedure governing motions to compel when a party fails to respond to a discovery request. Of specific importance to the current dispute, K.S.A. 60-237(a)(4) states that an evasive or incomplete disclosure, answer or response must be treated as a failure to disclose, answer, or respond.

Argument – In General

10. The Commission should compel Occidental to respond to DR 10.

11. All of Occidental's objections are either invalid or improper, as will be explained below.

Argument – Relevance

12. DR 10 is clearly relevant.

⁶The relevant e-mails are attached to this Motion to Compel.

13. Both Chad Luce and Brenda Harris have made the claim that Occidental faces electric cost disadvantages at its Wichita, Kansas facilities as compared to its other plant locations.⁷

14. The 2017 invoices and Tariffs from those plant locations are relevant to that claim. They will tend to show one of the main issues in this case: whether Occidental is at a cost disadvantage in Kansas.

Argument – Alternative Sources

15. To the extent that Occidental believes that Staff should cobble together data from publically filed tariffs to verify the cost disadvantage claim, there is simply no basis in the rules of evidence for this objection. Occidental may not dictate how Staff conducts its investigation.

16. Furthermore, the response to Staff’s request is evasive. Occidental’s objection gives the illusion that the data Staff is seeking is publically available. The data that Occidental *wants* Staff to review may be publically available. However, the 2017 invoices and Tariffs are not.

Argument - Confidentiality

17. To the extent that Occidental believes the 2017 invoices and Tariffs are “highly-confidential,” this is also not a valid objection based upon the rules of evidence.

18. Confidentiality may form the basis for a protective order, and Staff would abide by one should the Commission choose to issue such an order. However, this is not a case of Staff attempting to annoy, embarrass, or oppress Occidental by asking for the 2017 invoices and Tariffs.⁸ Furthermore, Staff cannot fathom why electric utilities in other states who issue invoices to Occidental would place trade secrets or confidential commercial information on the bill.⁹

⁷See Pre-Filed Direct Testimony of Chad Luce on Behalf of Kansas Gas and Electric Company, p. 5 (Jan. 16, 2018); *see also* Pre-Filed Direct Testimony of Brenda Harris, p. 4-5 (Jan. 26, 2018).

⁸See K.S.A. 60-226(c)(1).

⁹See K.S.A. 66-1220a.

19. Simply put, Occidental may not shield otherwise discoverable information by asserting its confidentiality.¹⁰

Concluding Remarks

20. Staff would note that Occidental did move for a Protective Order on April 12, 2018. It was alluded to in Occidental's Motion that once the Protective Order was issued, Occidental would provide Staff an "appropriate response" to its discovery request.¹¹ Through discussions held by Staff and Occidental counsel prior to that filing on April 11, 2018, it became apparent to Staff counsel that the "appropriate response" was something other than what was specifically requested in DR 10. To Staff's knowledge, Occidental will not be providing the 2017 invoices and Tariffs as requested, thus necessitating this Motion to Compel.

WHEREFORE, for the reasons set forth above, Staff respectfully requests that the Commission order Occidental to provide a full and complete response to DR 10 within three (3) days of such order.

Respectfully Submitted,



Michael Neeley, S. Ct. #25027
Litigation Counsel
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¹⁰See *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 684-85 (D. Kan. 2004).

¹¹See Motion for Protective Order, p. 6 (Apr. 12, 2018).

**Kansas Corporation Commission
Information Request**

Request No: 10

Company Name KANSAS GAS & ELECTRIC CO. KG&E
Docket Number 18-KG&E-303-CON
Request Date March 20, 2018
Date Information Needed March 29, 2018

RE: Occidental Chemical Corporation Rates

Please Provide the Following:

Occidental's witness, Brenda Harris, states on page 4-5 of her Direct Testimony, " Absent approval of the Agreement, OxyChem's Wichita facilities will be at a distinct rate disadvantage, compared to its plants - and its competitors' plants - in other states." Please provide all 2017 invoices for electric service provided to these Oxy facilities and the Tariffs for each facility (excluding the Wichita plant).

Submitted By Darren Prince

Submitted To James Zakoura

Occidental objects to this data request on the basis that it requests highly-confidential commercially-sensitive information and data which is not clearly relevant to this proceeding. Potential disclosure of this data, particularly to a competitive supplier of electric service such as Westar could severely damage Occidental's competitive position as a consumer of electric service.

Ms. Harris' statement can be readily verified by comparing publicly-filed rate tariffs of utilities serving other Occidental facilities in other states. It can also be quickly and simply verified by referencing other publicly-available data sources such as state-specific and utility-specific EIA data.

Occidental commits to assist the KCC Staff in verifying the statement that KG&E's tariff rates are above the rates paid at facilities in other states. Occidental's counsel will contact Staff to discuss possible alternative methods of verifying this statement - without disclosure of Occidental's highly confidential invoice data.

If for some reason, the above information cannot be provided by the date requested, please provide a written explanation of those reasons.

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: James P. Zakoura
Date: 3/27/18

Docket: [18-KG&E-303-CON] Occidental Contract

Requestor: [KCC] [Darren Prince]

Data Request: KCC-08 :: Oxy Facility Costs

Date: 0000-00-00

Question 1 (Prepared by Chad Luce)

Westar's witness, Chad Luce, states on page 5 of his Direct Testimony, "The proposed contract will continue to help address the electric cost disadvantages that Oxy has indicated its Wichita facilities are experiencing compared to other Oxy plant locations." Please provide all 2017 invoices for electric service provided to these Oxy facilities and the Tariffs for each Oxy facility (excluding the Wichita plant).

Response:

We have only relied on Oxy's (vocal) statements regarding paying higher prices in KS compared to elsewhere. We do not have access to their billing statements and special contract tariffs in other service territories.


Verification of Response

Westar Energy, Inc.

Docket No. 18-KG&E-303-COC

I have read the foregoing Information Request(s) and answer(s) thereto and find answer(s) to be true, accurate, full and complete, and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request(s).

Signed:

A handwritten signature in black ink, appearing to be "C. L. Lane", written over a horizontal line.

Title: VP, CUSTOMER RELATIONS

Michael Neeley

From: Michael Neeley
Sent: Thursday, March 29, 2018 10:41 AM
To: 'James Zakoura'
Subject: Golden Rule E-mail 18-303
Attachments: OXY_response_to_Staff_DR_10.pdf; Response.docx

Jim,

I was contacted by Staff regarding this Data Request response. According to Darren, he sent a DR to Westar asking for Chad to support his claim that "the proposed contract will continue to help address the electric cost disadvantages that Oxy has indicated its Wichita facilities are experiencing as compared to other Oxy plant locations." Westar indicated that the information was based on statements made by Oxy to Westar. Therefore, Darren sent a DR to Oxy for verification of this information via invoices from Oxy's plants in other locations.

Oxy objected to Darren's DR by saying it wasn't relevant, and it's confidential, and also the information is already public. I do not know the extent to which Oxy operates in other states, or whether they are on tariffed rates in those states so I do not know whether that information is public. If it's already publically available then to me it cannot also be claimed to be confidential.

I have spoken with Staff and they said that they do not consider the response to be satisfactory and want me to move to compel. They consider it extremely relevant considering the whole basis for the necessity of the contract is that Oxy threatens to leave the state thereby eliminating jobs and requiring the lost revenues to be borne by the remaining customers. Staff wants to verify that indeed the other states have better rates sufficient to incent Oxy to move its facilities and employees to those other states. Give me a call or e-mail me if you think there is a way we can work out verifying the information. If not, I intend to move forward on a Motion to Compel.

Thank you,
-Michael Neeley
(785)-271-3173

Michael Neeley
Litigation Counsel



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Michael Neeley

From: Michael Neeley
Sent: Wednesday, April 04, 2018 11:48 AM
To: 'Andrew French'
Cc: James Zakoura
Subject: RE: 18-303 Supplemental DR Response

Andrew,

I contacted Bob Glass about this e-mail. DR 10 asked for invoices from Oxy's facilities in other states. I asked Bob if Darren or someone from Econ had spoken with KIC to work out an arrangement and he said not to his knowledge. I also asked him whether price differentials would be a proper substitute for the invoices and he said they would not. He said pricing differentials would not provide him adequate proof of the rate Oxy is actually paying in those states. I don't know exactly what a pricing differential is but he indicated that it doesn't provide him the level of proof that an invoice would provide.

Could you let me know whether you have talked to Staff and reached this agreement or why, if pricing differentials show the exact same information as an invoice, Oxy cannot just provide the invoice?

Thank you,
-Mike

From: Andrew French <andrew@smizak-law.com>
Sent: Wednesday, April 04, 2018 11:18 AM
To: Michael Neeley <m.neeley@kcc.ks.gov>
Cc: James Zakoura <Jim@smizak-law.com>
Subject: 18-303 Supplemental DR Response

This is an EXTERNAL EMAIL. Think before clicking a link or opening attachments.

Hi Mike,

We are preparing a supplemental response to Staff DR 10 in 18-KG&E-303-CON. This response contains the pricing differentials between Occidental's facilities – by state.

We are designating this response confidential, as it contains highly-sensitive pricing data. If publicly disclosed, any utility could see readily determine the exact pricing Occidental receives in every other jurisdiction by applying the rate it charges Occidental to the differentials set forth in the chart.

There is not currently a protective order issued in this docket. Can you please confirm that Staff will treat this response confidentially, and it will not be disclosed publicly or disclosed to any other party – including Westar?

Thank you,

Andrew J. French
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SMITHYMAN & ZAKOURA
CHARTERED

STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

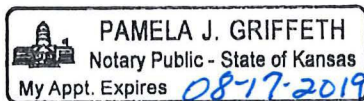
VERIFICATION

Michael Neeley, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas, that he has read and is familiar with the foregoing *Motion to Compel Response to Staff's Data Request No. 10* and that the statements contained therein are true and correct to the best of his knowledge, information and belief.



Michael Neeley # 25027
Kansas Corporation Commission of the
State of Kansas

Subscribed and sworn to before me this 13th day of April, 2018.



Notary Public

My Appointment Expires: August 17, 2019

CERTIFICATE OF SERVICE

18-KG&E-303-CON

I, the undersigned, certify that a true and correct copy of the above and foregoing Motion to Compel Response to Staff's Data Request No. 10 was served by electronic service on this 13th day of April, 2018, to the following:

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CERTIFICATE OF SERVICE

18-KG&E-303-CON



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