THE STATE CORPORATION COMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
Robert E. Krehbiel
Michael C. Moffet

In the Matter of the Investigation Into the Affiliate Transactions Between UtiliCorp, Inc. (UCU) and Its Unregulated Businesses.	))))	Docket No. 02-UTCG-701-GIG

PUBLIC VERSION

POST-HEARING BRIEF OF THE CITIZENS' UTILITY RATEPAYER BOARD ON CONFIDENTIALITY

1. Introduction

A major issue at stake in the parties' dispute with Aquila is whether the company has legitimately exercised its privilege to designate information as confidential or whether its actions constitute abuse of the administrative process. CURB maintains that Aquila has abused the administrative process and has denied the rights of the other parties and subjected them to undue delay, denied the public's legitimate right to have access to nonconfidential information, and has wasted the time of the parties and the Commission to the detriment of all involved. Furthermore, if the Commission allows Aquila to persist in this course of action, the results will be abrogation of the power and authority of the Commission, and a precedent that will create a far stricter standard of confidentiality than is mandated by state laws and Commission regulations.

2. Determining whether information deserves confidential treatment

The Commission has already requested and received briefs on the standards for determining whether information deserves confidential treatment. The standards were discussed extensively in the parties' briefs and at the hearing, and quite elegantly set forth by counsel for Staff at the hearing. (Tatro, T. Vol. 1 at 83 - 89). CURB and the other parties have acknowledged in previous filings and at the hearing that the company has a legitimate privilege under statute, Commission regulations and case law to protect its confidential commercial information. There is no dispute among the parties as to the applicable standard for determining whether information is confidential commercial information, and no dispute about the process by which the Commission should weigh competing public and private interests to determine whether information that is confidential nevertheless should be made public. Since extensive briefs are already in the record on the standards, CURB will not restate the standards here.

3. Non-confidential information does not merit "confidential" treatment.

Were it not for the fact that a dangerous precedent would be set if the parties ceded to Aquila's stance on these matters, it would be difficult for the parties to justify continuing this absurd battle over what information should be treated confidentially in this docket. While the parties are agreed on what the confidentiality standards are, seeking reasonableness in the application of the standards from Aquila has been, to a large degree, a waste of time. The delays in release of information erroneously designated by the Company as "Confidential" were not, as the company has alleged, mainly attributable to the large volume of data to be reviewed, but were initially attributable to the delays agreed to by the parties in response to Aquila's offer to

negotiate with the parties in good faith. The negotiations were largely fruitless due to Aquila's refusals to allow clearly non-confidential information to be released.

This process has been going on since February 14, 2005—over three months. It began when the Staff Report was released as a 100% confidential document, without an accompanying redacted version for the public. CURB was astonished at this omission, as was the group of Large Volume Customers. While the confidential version apparently was released to the parties to the docket as a good faith effort on the part of Staff to get the Report out to the parties while it negotiated with the Company over how much of the Report should be redacted in the public version, it is rare in a docket of this importance for Staff not to make a public version of a major report available contemporaneously with the filing of a confidential version. In response, CURB and the LVC group joined in moving that the entire Report be released to the public.

The company responded by contacting CURB and the LVC group, requesting that the parties hold their motions in abeyance until after the company's March 14 conference call. The clear message from Aquila executives and counsel was that the company would be much more amenable to removing confidential designations after that date. In good faith, the intervenors agreed to ask the Commission to hold their motions to release the information in abeyance until after March 14. Then, they continued to hold them in abeyance after that date, in order that negotiations could continue with Aquila concerning what might be released to the public.

However, after the announcement on March 14, when negotiations commenced, the company did not reciprocate with a good faith effort to be reasonable about its designations or to be timely with filing revisions. Aquila initially provided a "matrix,"

which was basically a list of individual paragraphs to which it claimed confidentiality—and which identified the vast majority of the paragraphs in the Staff Report as "confidential." The company presented this matrix as its "argument" for confidentiality. However, even the matrix itself was deemed "confidential," although legal arguments themselves rarely qualify as confidential. Furthermore, it was not a very good legal argument: although it specifically identified information the company was designating as confidential, it failed to identify with specificity why the release of the information would be harmful. The company wanted entire paragraphs redacted, even if only a small bit of information contained within the paragraph was legitimately private information. When the parties unanimously objected to this broad-brush method of redaction, negotiations began in earnest to determine specifically what the parties deemed truly confidential in the Report.

After extensive negotiations, the company relented to some extent, and allowed the matrix and additional information in the report to be released—but that was not nearly enough. The company continued to adhere to an unrealistic application of the standard of confidentiality, contending that it was entitled to redact the opinions of Mr. Proctor, his suggestions for possible future actions of the company, and his discussions of the company's cash flow and debt difficulties—matters that have been the subject of much public discussion and speculation. More hours of negotiations resulted in Aquila agreeing to a second release of more information in the report—but, once again, it was not nearly enough.

Aquila also filed successively "less" confidential versions of its witnesses' prefiled direct testimony—after the same protracted process of the company making

overly broad claims of confidentiality, followed by negotiations which resulted in a limited release of information. Similarly, the company vigorously defended challenges to confidential designations on numerous data request responses, then eventually relented: there are 24 documents that remain "confidential."[1]

4. Abuse of the administrative process through delay

When one reviews the information that Aquila initially insisted was confidential, then later ceded was not, one can only conclude that Aquila has abused its privileges under the Protective Order. For example, in Mr. Proctor's sentence, "My analysis involves examining Aquila's financial condition on a going concern basis and under specific divesture scenarios for its unregulated investments and business activities and its domestic utility businesses," (Staff Report, at 13), Aquila initially insisted on redaction of the words that are underlined. This sentence, with or without the redaction, is clearly not confidential—it does not contain any private or confidential commercial information, and merely describes what Mr. Proctor strived to do with his analysis. However, because the sentence described Mr. Proctor's intent to present an analysis that differed in some aspects from the company's revised financial plan, the company argued that it would be harmful to be released. It took several hours of negotiations before the company agreed to include the entire sentence as part of the newly-released information.

As negotiations with the company continued, the parties became increasingly frustrated by the company's expansive view of what is "confidential." For another example, these sentences in the Staff Report were initially redacted:

> "The Commission also has the authority, and the responsibility, to prevent a sub-optimal successor, chosen by Aquila, from obtaining a

[1] These 24 data request responses are not in the record and therefore the Commission cannot rule on whether they should be released.

certificate and taking over the incumbent's utility business in Kansas. Therefore, the Commission may choose to do more than just setting guidelines for consideration of recovery for acquisition premiums in utility rates."

(Report, at 12). This is simply a description of the legal obligations and powers of the KCC if a regulated utility goes on the market. However, it was only after considerable negotiations that Aquila agreed to drop its claim that these sentences are confidential on the grounds that Mr. Proctor had not adequately discussed the entire policy of the Commission concerning acquisition premiums—although the Commission's policy has been stated in several orders that are publicly available.

Other examples of instances where the company has insisted on confidentiality of non-confidential matters are numerous. Below are a just few examples. The following examples will present public information, paired with information in the record that the company still maintains is confidential, and remains redacted in the Second Public Version of the Staff Report.

PUBLIC: "The PIES [Premium Income Equity Securities] will be effectively subordinated to our secured indebtedness and to the liabilities of our subsidiaries and it is not clear the the PIES would be treated as debt claims in bankruptcy." (Exh. LVC-4, at S-24). CONFIDENTIAL: "**[redacted]**." Staff Report, Feb. 14, 2005, p. 34, para. 3.

PUBLIC: "He [Mr. Proctor] tries to characterize his results as something that 'should be disturbing' to the Commission." (Exh. LVC-6, para. 3: Information released to Aquila employees on March 23, 2005.

CONFIDENTIAL: "**[redacted]**." Staff Report, Feb. 14, 2005, p. 37, para. 2.

PUBLIC: "Unanticipated increases in the price of natural gas that we purchase for our utility customers could exhaust our liquidity in the winter months." (LVC-5, Aquila's SEC Form 10-K, Mar. 14, 2005, at p. 54 of 148).

CONFIDENTIAL: "**[redacted]**." Staff Report, Feb. 14, 2005, p. 46, at para. 3.

PUBLIC: "In 2004, we continued to implement our restructuring plan through the following actions, among others: . . . Entered into a $150 million six-month revolving credit facility secured by the accounts receivable of our regulated operations . . . . We anticipate using the combination of our $110 million five-year unsecured revolving credit facility, $150 million secured accounts receivable facility and cash on hand to meet the peak winter working capital requirements of our business." (LVC-5, Aquila's SEC Form 10-K, Mar. 14, 2005, at p. 23 of 148).

CONFIDENTIAL: "**[redacted]

[redacted]**" Staff Report, Feb. 14, 2005, p. 32, Footnotes 101, 106.

Additionally, the public versions of the prefiled testimony of the company's witnesses were heavily redacted. After the parties objected to the broad-brush redactions, the company did file second public versions of their testimony that eliminated many of the redactions.[2] But the original redactions had been entirely unreasonable. Below are a few examples of information that was originally redacted, then released in the second version. If it is not clear to the Commission yet why the parties have found the process of negotiating with the company so frustrating, and why the delays in release were so unjustifiable, these examples should make it much clearer:

"In the March 31, 2005, response to the Report Aquila will address how Aquila's repositioning plan addresses the concerns raised in the Report, how the Staff's conclusions are invalid due to the use of outdated financial information and certain errors included in the Report, and how Aquila has the financial capability now and in the future to provide adequate service to its customers." (Dir. Test., Steven R. Fisher, at 4).

[2] Counsel for CURB inquired whether, as the result of an 8-K that Aquila filed on April 20, 2005, which made public additional details of its repositioning plan, that, whether the company would further revise its confidentiality claims and provide them to the parties. Counsel for Aquila responded on April 21, 2005, that they would be made available on or about Monday, April 25—one day before this brief was due to be filed. However, given that the evidentiary record is closed on matters heard at the recent hearing, these new redactions will not be part of the record in this specific matter.

"This information being made available to the public would cause economic harm to Aquila, for much the same reasons I have described related to the Staff data response requests above." (*Id.*, at 8).

"Aquila's Restructuring Plan has been comprehensively designed with Aquila's stakeholders in mind." (Dir. Test., Raffiq Nathoo, at 2).

"The Repositioning Plan will depend on a number of key factors to be successful which, I believe, under the right circumstances are possible." (*Id.*, at 4).

"As stated earlier, on March 14, 2005, Aquila announced the next phase of its restructuring program. On March 15, 2005, Aquila's stock was upgraded by the analyst firm Robert Baird, and its stock price rose to its high price of $4.24 on March 22." (Dir. Test., Jon R. Empson, at 4).

These are just a few examples of benign, non-confidential information that were redacted originally by the company. There is absolutely nothing here that qualifies under statute, administrative regulation or case law as "confidential." There can be no possible justification for labeling it as such, other than to make negotiations more protracted.

It is entirely ridiculous to have to fight for the release of such information. But if the parties had not done so, Aquila would have continued to make sure that the public was not informed of such earthshaking secrets as the company's restatement of the statutory standard for confidential treatment, the price of its publicly-traded stock on a

given day in March, and the confident assessment of its financial advisor that he thinks the company's new repositioning plan will probably be successful. By making such absurdly broad claims to confidentiality, Aquila severely damaged its credibility with the other parties. If companies can get away with redactions as nonsensical as these without sanction, then there is no point in having statutes and administrative regulations to set standards of confidentiality.

5. Denial of the rights of the parties and undue delay

If Aquila has been unreasonable in negotiations purely for purposes of delay, it surely has succeeded beyond any reasonable expectations. Earlier in this docket, the Commission ordered similar information to the information in dispute here to be released unless the company provided the Commission—within 5 days—specific, legitimate arguments for keeping it confidential. (Order, Feb. 17, 2004, at 34- 35).[3] Had the parties pursued their motions to release the information—rather than agree to engage in the

[3] The order stated that "**Aquila's blanket designation of confidentiality without providing any explanation is not appropriate and contrary to Commission's rules of practice and procedure. The failure to follow clearly stated rules and procedures alone would warrant removal of the confidential designation.** However, out of an abundance of caution, the Commission will allow Aquila to make a written submission explaining why the information identified above in ¶¶ 12,17 and 21 should be treated as confidential and kept secret from the public. **Aquila must provide specific reasons** to explain how such information affects its economic or competitive interests and how the Company, based upon the statutory factors set forth in K.S.A. 66-1220a, would be at risk by or harmed from public disclosure. This explanation must describe the causal relationship between the disclosure and the alleged ham to its economic or competitive interest. **A bare allegation of commercial sensitivity does not provide a reasonable nexus between public disclosure and harm**, as contemplated by the Protective Order and by K.A.R. 82-1-221a. **IT IS, THEREFORE, BY** THE COMMISSION ORDERED: . . . Aquila is directed to file a written explanation, as described above, within 5 days after service of this order to assert the claim of confidentiality to **Staff's estimate of the excess cash flow, Staff's estimate of the working capital requirements and Staff's estimate of fair value, including the collateral value derived from its estimate of fair value**, as specifically identified above in 12, 17 and 21 of this order. **If no explanation is filed within the time allotted, the "Confidential" designation shall be removed.** (C) A party may file a petition for reconsideration of this Order within 15 days of the service of this Order. If this Order is mailed, service is complete upon mailing, and three days may be added to the above time frame. (D) The Commission retains jurisdiction over the subject matter of this investigation and the parties for the purpose

somewhat fruitless negotiations instead—and the Commission had issued a similar order, it is likely that the recent hearing would not have been necessary. To that end, CURB and the LVC group probably contributed to the delays by taking Aquila's good faith for granted. However, even absent such an order, the Protective Order does remain in effect, and there is simply no excuse for Aquila to abuse the administrative process by using the privilege of designation to suppress information that is in no way "confidential."

The rights of the parties are abrogated when another party is allowed to abuse the administrative process for purposes of delay. It is not only costly to the parties in terms of manpower and paperwork, but it is also wasteful of time: it diverts personnel from addressing the substantive issues of the docket to devote excessive time to trivial claims that would, absent the abuse, normally be resolved swiftly and routinely. While CURB and the Commission Staff are compensated through docket fees paid by Aquila for the excessive time spent on this matter, the LVC group is not. CURB would support an order directing Aquila to reimburse LVC for its costs incurred in these protracted disputes over confidentiality.

6. Denial of the public's right to non-confidential information

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of entering such further order or orders as it may deem necessary and proper." (Order, Feb. 14, 2004, at 34 – 35, emphasis added).

It should also be noted that this is the order that Staff has claimed is a "final" order for purposes of determining whether the company's serial meetings with Commissioners were impermissible *ex parte* communications. While CURB has not raised the *ex parte* issue in its filings, LVC has done so and CURB would note that whether the Feb. 17, 2004 order was "final" is a critical consideration in ruling on LVC's motions on the issue. CURB simply notes that the Commission did not call its order a "final" order, it ordered further action to be taken by Aquila, it retained subject matter jurisdiction for further orders if necessary, and the order pertained to similar matters still under consideration in this docket over a year later: for all intents and purposes, it does not appear to be a final order.

CURB and the other parties have legitimate concerns beyond our interest in protecting our own rights in this matter. If the Commission sustains the company's broad claims, the public's access to information would be severely curtailed. Fair debate among the parties on legitimate disputes would be impossible to conduct except behind closed doors. Furthermore, the legislature's mandate that the Commission strive to keep meetings and records open to the public would be effectively repealed—without any legislative action whatsoever.

7. The public interest in the financial matters of regulated utilities

In balancing the public and private interests involved in disclosing information that a company deems "confidential," the Commission may find that the public interest in disclosure outweighs the privacy interests involved. Much of the dispute over the company's claims of confidentiality in this case extend to what may be thought of as a "gray" area in between clearly-public information such as a company's stock price, and the clearly-confidential information such as strategic plans for marketing an asset. In between these black-and-white extremes are the opinions of Mr. Proctor, who had access to confidential information in the preparation of his report, but who is just one of many analysts who have expressed an opinion after viewing such data.

While the company's privacy interest in the confidential information is clear, there is also a strong public interest involved in the Commission's inquiry into Aquila's financial health. The KCC is the only agency charged with protecting the public interest in safe, reliable electric and natural gas service at reasonable rates. It is the Commission's duty to do everything possible to ensure that Aquila's financial health does

not deteriorate to the point where its ability to fulfill its public service obligations are diminished. To that end, the strong public interest in Aquila's financial health weighs heavily in the balance in favor of disclosure over secrecy.

There is very little that is considered private information in the corporate world these days. In the prefiled direct testimony of Dr. Randall Woolridge, and in his testimony at the hearing, Dr. Woolridge described the wide variety of information about corporations that is already available to the public, especially information about regulated companies. He provided several publicly-available reports on Aquila's credit ratings and stock values in the Appendix of his prefiled testimony. Interestingly, one of Aquila's witnesses testified that the company provided confidential information about their new financial plan to the three major credit rating firms—Standard and Poor's, Moody's and Fitch—but did not forbid these firms from making public their opinions about the company's probability of success in executing the new plan. (Fisher, T. Vol. 1 at 129, 130). None of them upgraded Aquila's credit rating, either. (*Id.*, at 130). Interestingly, however, a stock rating agency, Robert Baird, which had no access to confidential data provided by the company, upgraded Aquila's stock after the plan was released. (*Id.*, at 133). One wonders if it had been provided access to the same confidential data as the credit rating agencies whether it would have bucked the trend by upgrading the company's stock.

But regardless of such idle speculation about the value of access to confidential information, all of these ratings agencies actively engage in speculation on a daily basis: none of them have crystal balls in which they can view the future. As Dr. Woolridge said, all financial analysts receive similar training and use the same sort of analytical

tools and procedures to formulate their opinions about the future performance of a company. (Woolridge, T. Vol. 2, at 357). They may come up with different opinions, but because of the greater availability of information about regulated firms and the regulatory limits created by established rates and rates of return, the range of opinions is likely to be narrower than with an unregulated company. (*Id.).* Dr. Woolridge noted in response to Commissioner questioning that one analyst's opinion, even if it differs substantially from the majority of opinions available on a company, is unlikely to impact the overall range of opinions except "at the margin." (*Id.*, at 373). In other words, all the available range of opinions contribute incrementally to the market's view of a company, but each opinion is just a part of the whole. (*Id.*, at 371).

Forecasts and predictions of future financial performance are about the only kind of corporate financial data that is not routinely released to the public through filings with the Securities and Exchange Commission, press release or other public announcements. Regulators do not require companies to file forecasts, but companies sometimes make "forward-looking statements" that amount to forecasts, because, in the words of Dr. Woolridge, "the stock market every day tries to figure out what a stock is worth," and earnings guidance is the "most important number that's disclosed." (*Id.*, 358, 349). For instance, Aquila announced in March that, in the coming year, it expected growth in earnings, before interest and taxes (EBIT), will be in the range of 3% to 5%. (Staff Exh. 8, Press Release of Aquila, March 14, 2005). However, even without release of earnings forecasts, companies release enough data on a regular basis that most financial analysts can come up with a pretty accurate picture of the debt of a company and its future cash flow needs. Dr. Woolridge pointed out that when companies announce results in

conference calls, "the analysts will ask very specific questions about capital expenditures" and other items, because they want to plug this information into models they have developed to analyze data and formulate opinions about future performance of the company. (*Id.*, at 347). While the company may not release a forecast of, for example, what receivables are going to be next year, Dr. Woolridge noted that the analysts "know what the historical relationship is between sales and receivables . . . . they know what the growth rate is . . . . that's how they're going to build their models." (*Id.*, at 347 – 48). Even Mr. Fisher acknowledged that rating agencies' knowledge about the company's "onerous" debt burden and its impact on cash flow is "something that can be derived from public information." (Fisher, T. Vol. 1, at 132).

In other words, as the body of data builds about a company over time, analysts can often make fairly confident predictions about the future performance of a company by identifying patterns in past performance in light of the currently available data—without ever gaining access to specific figures or internal forecasts that the company has kept confidential. While no one maintains that a company should not be able to keep its forecasts or strategic information confidential, or keep it confidential until it serves the company to reveal it, the fact remains that analysts will engage in speculation about the company's future performance whether they have access to the confidential information or not. If an analyst's predictions are not rosy, the company has no right to suppress the opinions, and the public has every right to hear them. The opinion is just one of many, some of which are based solely on public information and some of which are based on confidential information in addition to the information that is publicly available. No

single opinion could do economic harm to Aquila, not even one that is contrary to the opinions of the management of the company.

It is important to note that the current trend in financial markets is for companies to disclose more rather than less financial information to the public. "The market hates uncertainty," said Dr. Woolridge. (*Id.*, at 354). Moving towards transparency, in the wake of recent events on Wall Street and the collapse of Enron, is taking the path toward gaining the confidence of investors. Because "people are suspicious about financial transactions, financial disclosures, financial statements," he said, "more disclosure, I believe, is better because you're being more forthright with . . . your different stakeholders, your customers, your – stockholders . . ." (*Id.*, at 352).

With regulated assets, the analysts do a pretty good job of valuing and predicting sales prices from publicly-available information, said Dr. Woolridge, because whether one is an analyst or a prospective buyer of a regulated utility, everyone tends to use the same data and the same procedures for analyzing the data to establish a value. (*Id.*, at 355). "We all know how regulated assets are going to sell," he commented. (*Id.*, at 355). The main reason why is that the ratemaking process establishes the book value of assets, (*Id.*) and utility commissions often limit how much a utility can recover in rates if it spends more than book value for assets. Most commissions have a stated policy on the regulatory treatment of an acquisition premium, which is the additional amount over book value that is paid for a regulated asset. Therefore, the range of evaluations among analysts tends to be fairly narrow. Whether an analyst has access to confidential data, in this instance, would not make much difference when it comes to evaluating the potential sale price of regulated assets. If one analyst's opinion differs substantially from the rest,

as Dr. Woolridge noted, it merely widens the range of opinions on their value, but does not necessarily make much impact on the final sale price.

Therefore, releasing Mr. Proctor's opinion about the value of Aquila's assets and how many of them might need to be sold for the company to maintain sufficient cash flow to meet its debt load would not bring economic harm to Aquila. His opinion is just one of many, and for the most part, is not out of the mainstream of the range of opinions.[4] Even if his opinion has material differences with those of other analysts, his contribution to potential economic impacts on Aquila is only incremental—it is the collective opinions of the universe of analysts, investors and others who influence market decisions that make the true impact.

Aquila cannot stop the world from talking about its financial future, and it should not be allowed to silence one of the many analysts who have done so, simply because it believes that his opinion is harmful to the company, or because he had access to confidential financial data. Others have had such access, and were free to issue their own opinions without censorship by Aquila. Mr. Proctor has not made an "attempt to discredit Aquila," (Empson, T. Vol. 1 at 265 – 67), as the company claims, but has made an attempt to make his own assessment of its financial future in light of particular goals that the Commission has established for Aquila. Whether it is accurate, whether it is credible, or whether it is based in part on data he was given access to by Aquila, he is not the first analyst to make public his opinion after viewing confidential data, nor will he be the last. The credibility of history writers may be based largely on the quality of the

[4] Compare, for example, Mr. Proctor's opinion with that of Barry Abramson, of Gabelli Asset Management, who manages billions in assets, including 3.19 million shares of Aquila stock (quoted in Staff Exh. 5, Steve Everly, Kansas City Star, *Aquila to sell utilities to reduce debt,* March 14, 2005.)

sources that they consult, but for financial analysts, credibility is measured by how often their predictions turn out to be accurate.

It must be noted that the company's complaints about Mr. Proctor would more properly be focused on players in the market in general, which, as Chair Moline noted at the hearing, sometimes erroneously assume that a recommendation constitutes an order of the Commission. (Moline, T. Vol. 2, at 370). It may be true that headlines can be misleading, as Mr. Empson testified, and that the general public pays more attention to them than the company's own releases. (Empson, T. Vol 1, at 300 – 01). However, it is not the job of the Commission to suppress the opinions of its Staff because the market or the press may make errors in interpreting them: it is the job of Aquila's staff of public relations professionals to manage its relations with the press and the public.

Certainly, if Aquila wants portions of the Staff Report to be kept from the eyes of the public, then it should not be expressing public criticisms of the accuracy or validity of the suppressed portions. This is an abuse of the privilege of designating information that is filed with the Commission as confidential, because none of the other parties can publicly defend the accuracy or validity of the suppressed portions without violating the protective order, and the public has only one side of the story.

8. Abrogation of the powers and authority of the Commission

As noted above, Aquila has suppressed parts of the Staff Report that simply describe the powers and authority of the Commission to act under various scenarios. If the Commission allows Aquila—or any other utility, for that matter—to prescribe the conditions under which the Commission's jurisdiction and powers may be publicly

discussed and exercised, the legislature's purpose in creating and endowing the Commission with broad powers will be thwarted, and the powers of the Commission will be surrendered to the very companies it is obliged to regulate. The company has also suppressed the opinions of a consultant to the Commission Staff, forcing discussion of the options behind closed doors. If the Commission allows Aquila to prescribe the conditions under which the Commission may choose to publicly review the options it views as reasonable in light of the evidence—this would also be a surrender of the Commission's powers. Additionally, if the Commission continues to allow Aquila to delay and suppress nonconfidential information, it will have effectively handed over control of information that is already available to the public to Aquila, and handed over control of the timeline under which the public review by the Commission of Aquila's financial plans may take place. None of these results is acceptable.

Simply put, in contemplating the order that will soon settle this dispute, the Commission should consider whether it is comfortable with issuing large parts of it in confidential form, and whether that would be appropriate in view of the state's policy of open government and open records, and in view of the amount of information that is already publicly available that addresses the subject of this docket and related matters. The Commission should consider whether it should allow a company to dictate to the Commission the conditions under which it can publicly weigh the various opinions on Aquila's financial future, given that there are already statutes and regulations in place that provide guidance on these matters to the Commission. The Commission should consider whether the order it issued on February 17, 2004, gave sufficient notice to the company that the standards would be strictly adhered to throughout this docket. Finally, the

Commission should consider whether it is satisfied to wait one, two, three months or more for the release of information that, by all rights, should have been publicly released in the first place, because a company has improperly utilized the protective order as a club to abrogate the powers of the Commission and the rights of the public and other parties, rather than utilizing it properly as a shield to protect the company from economic harm it might incur if genuinely sensitive information were to be released.

The parties are gravely concerned that this may be an effort by the company to establish precedent for a far stricter standard of confidentiality than is mandated by state laws and Commission regulations. A ruling upholding the company's broad-brush redactions and undue delays in releasing non-confidential information in this case would set a dangerous precedent that makes the utilities, not the regulators, the arbiters of what should be disclosed in these matters, and puts them in charge of deciding when, if at all, disclosures will be made.

9. Conclusions

CURB urges the Commission to take a close look at the evidence that has been presented—in particular, the exhibits presented in Dr. Woolridge's testimony and the exhibits presented by the LVC group and Staff at the hearing. It will find that the vast majority of information labeled "confidential" by the company is already in the public domain. Most of the information that is not in the public domain that is still labeled confidential by the company are opinions, speculations and recommendations of the sort that are made publicly on a regular basis by financial analysts.

Furthermore, given the important goal of this docket as a whole—which is protecting the public interest in Aquila's financial health—there is a strong public interest in making as much information available as possible. In the balancing of public and private interests involved, Aquila's interest in confidentiality extends only to information concerning the strategic plans of the company that have yet to be disclosed, and to specific numbers in internally-generated forecasts that are not stale forecasts and therefore remain confidential. The public interest in disclosure is strong, especially given that greater transparency has become the standard in corporate financial markets.

The Commission also should keep in mind that its obligations differ somewhat from that of the SEC, and therefore it should consider whether disclosure serves the interests of the constituencies of the KCC, not simply whether the information was previously disclosed in SEC filings. The SEC protects the interests of investors who need accurate information about the financial health of publicly-traded companies, but it does not strive to protect the public interest in the performance of a valuable public service, like the KCC. The Commission has a statutory obligation to protect the ratepayers as well as the shareholders. This broader mission calls for a broader view of what is legitimately the public's right to know.

CURB has confidence that the Commission can review the redacted information and make competent and fair judgments about what should be released. CURB has purposely not attempted to bring forth a line-by-line argument of what should be released to the public; it is the company's burden, not CURB's, to bring forth line-by-line arguments of what should not be released, as the Commission's order of February 17,

2004, made clear. The specific examples cited herein should be sufficient to point out the obvious—that too many redactions have been made without good reason.

Therefore, CURB respectfully requests that the Commission rule that, except for specific information that is forward-looking in nature, has not grown stale with time, and is not available elsewhere, the entirety of the Staff Report, the company's prefiled testimony and the documents provided to the Commissioners in serial meetings with the company shall be released to the public.

Respectfully submitted,

Niki Christopher # 19311
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VERIFICATION

STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is the attorney for the above named petitioner; that she has read the above and foregoing, and, upon information and belief, states that the matters therein appearing are true and correct.

Niki Christopher

SUBSCRIBED AND SWORN to before me this 26th day of April, 2005.

Notary Public

My Commission expires: 10-1-2006.

Vermona E. Runnebaum
Notary Public - State of Kansas
My Appt. Expires February 18, 2006

CERTIFICATE OF SERVICE

02-UTCG-701-GIG

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing docket was placed in the United States mail, postage prepaid, or hand-delivered this 26th day of April, 2005, to the following:

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