THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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

In the Matter of the Investigation into the Affiliate Transactions between UtiliCorp United, Inc. (UCU) and its Unregulated Businesses.	))))	Docket No. 02-UTCG-701-GIG

CURB's Response to Order of March 18, 2005 Regarding Confidentiality

With this filing, the Citizens' Utility Ratepayer Board (CURB) responds to the Kansas Corporation Commission's *Order Addressing Motions to Remove Confidential Designation, Establishing Procedural Schedule Related Thereto and Ordering Aquila to File its Answer to Staff's February 14, 2005 Report*, which was issued in the above-captioned docket on March 18, 2005. In the order, the Commission solicited the parties' comments on the appropriate legal standard under which the Commission shall determine whether to enforce confidential treatment of major portions of the Commission Staff's *Report and Recommendation Analyzing Aquila Inc.'s February 9, 2004 Financial Plan and Containing Staff's Cash Flow Analysis* (Staff Report), which was filed in this docket on February 14, 2005. CURB sets forth the appropriate legal standard below.

I. Introduction

1. The basic process for determining whether to accord information confidential treatment consists of two steps. The first step is to determine whether the information is confidential. If not, it may be disclosed. The burden is on the party seeking confidential

treatment of information to establish that it is confidential.

2. If the Commission finds that the party has established that the information is confidential, the next step is to determine whether the public interest or other factors justify disclosure. **It is essential to remember that just because information is confidential does not mean it cannot be disclosed.** As discussed below, disclosure often contributes to transparency in decision-making, which is a key factor in maintaining public accountability of government action.

II. Government in the sunshine is state policy

3. Kansas laws and administrative regulations support the policy of the state to facilitate representative government by fostering an informed electorate. Therefore, open meetings and records are the rule rather than the exception in Kansas. Deliberations behind closed doors are frowned upon under Kansas law, and should be conducted only under circumstances that clearly justify secrecy. (*See* K.S.A. 75-4317 – 4320, known as the Kansas Open Meetings Act, and K.S.A. 45-215 – 223, known as the Kansas Open Records Act). Further, the Kansas Administrative Procedures Act specifies that hearings shall be "open to public observation, except for the parts that the presiding offer states to be closed pursuant to a provision of law expressly authorizing closure." K.S.A. 77-523. This Commission routinely issues protective orders that require the parties, when asking questions about confidential information, to "make every effort at hearings to ask and answer questions in such a way as to preserve the confidentiality of the information without the need to close the hearing." (*See e.g., Protective Order*, Mar. 4, 2003, at ¶10).

4. Thus, although measures are available to protect information that is truly confidential, the clear preference is to preserve public accountability by making as much information as possible available to the public by keeping hearings open to all. Furthermore, where a utility's "ability to perform its public utility functions" has been the subject matter of a docket, the Commission has found that "the need for public disclosure outweighs the need for confidentiality in light of the purpose of the investigation and the statutes designed for public accountability." *Order No. 50, Removing Confidential Designations*, Nov. 7, 2002, at ¶20, Docket No. 01-WSRE-949-GIE. **In other words, the public interest trumps private interests when investigating matters as critical as whether a public utility's financial condition will permit it to continue to meet its public service obligations to its customers.**

III. Statutes diminish a regulated public utility's interest in privacy.

5. Under state and federal law, a regulated public utility has little expectation of privacy in its financial matters. The public interest in fair and reasonable rates demands heightened scrutiny of the financial records of a utility. K.S.A. 66-131 requires a public utility to submit to the jurisdiction of the Commission to obtain a permit to transact business in Kansas. The Commission may issue the permit, called a certificate of convenience, only after finding that the "public convenience will be promoted" by the transaction of business by the applicant. *Id.* This necessarily requires that the utility come forward with evidence supporting its application.

6. Moreover, K.S.A. 66-129 and 66-129a specifically grant authority to the Commission to prescribe the kind of records kept by a public utility, and to examine a public utility's books, records and associated papers as a routine matter, not merely for special purposes.

K.S.A. 66-123 provides penalties for a utility that fails, neglects or refuses to file reports or statements required by the Commission. More severe penalties are prescribed if the utilities' records are intentionally falsified, or if they are destroyed without the permission of the Commission. K.S.A. 66-137.

7. Certainly, where the financial troubles of a regulated utility may threaten the ratepayers' statutory right to safe and reliable service, the utility should expect thorough and perhaps intense scrutiny of its financial records and activities. Obviously, resolution of complex issues and hammering out differences of opinion will be much facilitated for the Commission if free and open discussion is permitted. Decision-making will be, if not simple, at least simpler if confidential treatment of evidence is unnecessary.

8. Furthermore, when members of the public and the legislature have access to the same evidence as the Commission, they can judge for themselves the wisdom of decisions the Commission makes. When decisions are consistent with the evidence presented, confidence in the decisions made by the Commission is enhanced. The legislature has made it the public policy of this state to foster an informed electorate, which favors disclosure over confidential treatment of evidence, with a few narrow exceptions.

IV. The burden is on the party seeking confidential treatment of information

9. The statutes and administrative regulations governing the treatment of confidential information in Commission proceedings make it clear that **the burden of proof is on the party seeking confidential treatment**. The primary statute governing the treatment of confidential information in the Commission proceedings is K.S.A. 66-1220a. The primary

administrative regulation governing confidentiality of information in proceedings before the Commission is K.A.R. 82-1-221a, which sets forth quite detailed requirements that parties must meet in designating confidential information and in requesting disclosure of material so designated. The substance of these requirements is set forth in a protective order for virtually every docket in which a party requests one. The protective order for this docket was issued on March 4, 2003.

10. The first step—too often forgotten—is that the party claiming confidentiality has the burden of establishing that the information in the document is confidential commercial information or a trade secret. K.S.A. 66-1220a. Protective orders issued by the Commission routinely require the company to make claims of confidentiality in "good faith." *See e.g., Protective Order*, Mar. 4, 2003, at ¶3. As the Commission has previously stated, "If information is not confidential information, then there is no justification for keeping the information secret from the public. Moreover, the company asserting confidentiality has the burden of proving that the information is a trade secret or confidential commercial information." *Order No. 50, Removing Confidential Designations*, Nov. 7, 2002, at ¶7, Docket No. 01-WSRE-949-GIE. As a Kansas court operating under federal rules similar to those of Kansas has said,

> Business documents as a category do not qualify as intrinsically confidential and personal. Their disclosure does not necessarily cause a clearly defined and serious injury. Some documents may be confidential or personal. The party seeking to protect them, however, bears the burden to show that . . . . The movant must do more than simply state that such documents are proprietary and confidential.

Dahdal v. Thorn Americas, Inc., 1997 WL 599614 (D. Kan.), at 2. Therefore, a party who simply asserts that it prefers not to release information that has yet to be made public has not made a good faith effort to establish that it is private, and therefore, confidential.

11. An important part of this first step of establishing the case for confidential treatment is contained in Commission regulations, which state that "a written explanation of the confidential nature of each document shall accompany each page for which confidential status is sought." K.A.R. 82-1-221a (a)(5). While multiple pages may be designated by one explanation, the "explanation shall be specific to the document in question and shall state whether the information constitutes a trade secret or confidential commercial information." *Id.*

The Kansas Uniform Trade Secrets Act defines a trade secret as:

> . . . information, including a formula, pattern, compilation, program, device, method, technique, or process that . . . derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and . . . is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

K.S.A. 66-3320.

12. The protective order issued in this docket defines confidential information as

> . . . information, which, if disclosed, would likely result in harm to a party's economic or competitive interest or which would result in harm to the public interest generally and which is not otherwise available from public sources. Confidential information may include but is not limited to: (1) material or documents that contain information relating directly to specific customers; (2) employee-sensitive information; (3) marketing analyses or other market-specific information relating to service offered in competition with others; (4) reports, work papers or other documentation related to work produced by internal or external auditors or consultants; (5) strategies employed, to be employed, or under consideration; (6) contract negotiations; and (7) information concerning trade secrets, as well as private technical, financial and business information.

Protective Order, Mar. 4, 2003.

13. It must be emphasized that the focus of this inquiry is whether the

***information* is confidential, rather than the document or record itself**. "It is the substance of the information not the format which is relevant to the Commission's determination." (*Order No. 39, Order on Motions Challenging Confidential Designation of Certain Matters*, June 27, 2002, at ¶20; *see also* K.A.R. 82-1-221a.) Thus, while a particular document may have been kept under wraps, if the information it contains is publicly available elsewhere, no claim of confidentiality for the information may be sustained. For example, specific accounting records may not have been released for public scrutiny, but if their contents have been disclosed in the company's filings with the Securities and Exchange Commission or other government agencies, the records may not be deemed private or confidential because their content is no longer confidential. *See e.g., Ruckelshaus v. Monsanto Co. 467 U.S. 986, 1011 (1984); CNA Financial Corp. v. Donovan,* 830 F.2d 1132, 1154 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 977 (1988).

14. Similarly, it follows that it is appropriate to abandon the confidential treatment of information that was once properly designated as confidential if the reasons for keeping the information confidential are no longer valid. One example would be a utility's internal and confidential projections of future operating results: once the future arrives and the results are known, there is no longer a need for confidential treatment of the information. Another example would be information pertaining to a utility's secret negotiations to merge with another utility: once the utilities seek approval for the merger from the Commission, there is no reason to consider the information confidential.

15. Most of the controversies over whether information is confidential arise out of disagreements over whether the information is "private technical, financial and business information," or whether it would be harmful if disclosed to competitors. Under

the protective order issued in this docket (and in virtually all other dockets where confidential information is under scrutiny), when the confidential designation is challenged, the party claiming confidentiality has the burden to establish "that the confidential designation is proper, and . . . whether disclosure is warranted under K.S.A. 66-1220a." *Protective Order*, Mar. 4, 2003, at ¶3.

16. Recent KCC history demonstrates that the Commission regards as its first obligation to distinguish whether the information is genuinely confidential or a trade secret, or whether the party claiming confidentiality has overreached with its claims. The "mere fact that [the utility] attempts to keep the information to itself is insufficient for the Commission to make a finding that the materials are trade secrets or confidential commercial information. The Commission also must find, *inter alia*, that the information itself 'derives independent economic value'." K.S.A. 60-3320; *Order No. 50, Removing Confidential Designations*, Nov. 7, 2002, at ¶11, Docket No. 01-WSRE-949-GIE. The party claiming confidentiality must also establish "a reasonable nexus between public disclosure and any harm to [the utility's] economic or competitive interest." *Id.*, at ¶10. In other words, without a reasonable possibility of financial harm to the utility as a result of disclosure, there is no need for confidential treatment.

V. Confidential information may be disclosed under K.S.A. 66-1220a.

17. It is essential to remember that **even if the information is found to be confidential, the circumstances may warrant disclosure**. It is also important to remember that the balancing test provided by K.S.A. 66-1220a is utilized only after the Commission has

determined that the information is confidential. *Order No. 50, Removing Confidential Designations*, Nov. 7, 2002, at ¶7, Docket No. 01-WSRE-949-GIE. Under K.S.A. 66-1220a, the Commission is prohibited from disclosing confidential information "unless the Commission finds that disclosure is warranted after consideration of the following factors:

> (1) Whether disclosure will significantly aid the commission in fulfilling its functions;
> (2) the harm or benefit which disclosure will cause to the public interest;
> (3) the harm which disclosure will cause to the corporation, partnership or sole proprietorship; and
> (4) alternatives to disclosure that will serve the public interest and protect the corporation, partnership or sole proprietorship."

K.S.A. 66-1220a(a). Thus, there is no guarantee whatsoever that information that the company has proved to be confidential will be accorded confidential treatment if, in balancing the factors for and against disclosure listed in K.S.A. 66-1220a, the Commission finds that the factors favoring disclosure outweigh those favoring nondisclosure.

18. Furthermore, the subject matter of the docket may serve to tip the balance towards disclosure. **Where the utility's "ability to perform its public utility functions" is the subject matter of the docket, the Commission has found that "the need for public disclosure outweighs the need for confidentiality in light of the purpose of the investigation and the statutes designed for public accountability."** *Order No. 50, Removing Confidential Designations*, Nov. 7, 2002, at ¶20, Docket No. 01-WSRE-949-GIE. In other words, the public's interest in continuing to receive safe and reliable service at reasonable rates weighs heavy in the balancing test when considering whether disclosure is warranted.

VI. An illustrative case history of the application of these standards

19. A recent KCC case suitably illustrates the appropriate application of these legal standards when the Commission is reviewing challenges to a company's request for confidential treatment of information. The Commission's *Order No. 50* in the Westar Energy restructuring case terminated a lengthy and hotly contested battle over the alleged confidentiality of thousands of pages of information in the record by ordering the public release of all but a handful of documents. (*See generally,* Docket No. 01-WSRE-949-GIE). Westar, then known as Western Resources, had attracted regulators' attention with a controversial plan to split off its non-utility businesses from its utility business while leaving the corporate debt with the utility. Public concerns with the split-off plan, the company's accounting and financial practices, transactions with its unregulated affiliates, and the utility's ability to continue to provide safe and reliable service at reasonable rates, said the Commission, made the "public accountability of the decision-making process" of the Commission "especially critical." *Order No. 50, Removing Confidential Designations*, Nov. 7, 2002, at ¶¶1, 13, Docket No. 01-WSRE-949-GIE.

20. The Commission viewed the purpose of its investigation to "determine the causes of [Westar's] financial problems, and to develop solutions that will produce proper allocation of debt and equity within the corporate family, and prevent abusive inter-affiliate transactions." *Id.*, at ¶20. With the exception of two documents for which Westar claimed attorney-client privilege and the Commission deemed "inconsequential" to the matters under consideration, the Commission determined that the company had

failed to meet its burden of establishing the confidentiality of thousands of pages of information, including hearing transcripts, prefiled testimony, attachments, schedules and exhibits introduced at hearing. *Id*, at ¶13.

21. In reviewing the claims put forth by the company, the Commission found that the company's "generalized statements" were inadequate to establish that the information in the documents was confidential commercial information or trade secrets, and "even assuming confidentiality," failed to establish the "reasonable nexus between public disclosure and any harm to [Westar's] economic or competitive interest." *Id.*, at ¶13. The Commission's order emphasized its reluctance to allow broad, nonspecific claims of confidentiality, especially where there are no reasonable explanations of how disclosure would harm the company.

22. For example, the Commission rejected the company's claim of confidentiality concerning "Information and Documents Regarding Future Assets Sales," information that the company "rather sweepingly" described as "the most closely guarded." *Id.*, at ¶10. In addition to the fact that the documents contained historic information that was unrelated to future assets sales, the company failed to "attempt to identify with any particularity what information relates to what transactions that might be contemplated by" the company. *Id.*

23. The Commission's analysis found that, even if the information could have qualified as confidential, the company "had failed to show the public disclosure of the information would result in any harm to [Westar's] economic or competitive interest." *Id.* Even information that the company designated as "highly sensitive" and "related to

its 'competitive position'" failed to meet the requirements for nondisclosure of confidential information, because the company failed to demonstrate that the information itself "derive[d] independent economic value." *Id.*

24. Thus, a company's broad, nonspecific claims of confidentiality must fail for lack of specificity sufficient to meet the standards set forth in K.A.R. 82-1-221a. A company must specifically identify the information the company seeks to designate as confidential, and must provide sufficient information to establish a legitimate claim of confidentiality under K.A.R. 82-1-221a, K.S.A. 66-3320 or the specific terms of the protective order issued in the docket. In so doing, the company must be able to tie the need for confidentiality to a discernable economic or competitive harm that would result from disclosure.

25. In the Westar case, after finding that Westar had not met its burden of establishing sufficient justification for treating the information confidentially, the Commission noted that the purpose of the docket made concern for public accountability "especially critical." *Id.*, at ¶13. Given "the public concern about electric service to be provided by [Westar], the rates charged for that service, the accounting and financial practices of [Westar], and affiliate transactions within the [Westar] corporate family," the Commission viewed it especially important to make the record public. *Id.* Earlier in the docket, the Commission had noted that the purpose of the Open Meetings Act and the Open Records Act "are to ensure public accountability. Public access to the Commission and information presented for its consideration makes the Commission accountable not only for the decision itself but also for the manner in which the decision was made."

Order No. 39, Order on Motions Challenging Confidential Treatment of Certain Matters, June 22, 2002, ¶19. Thus, transparency of the decision-making process was essential, given the important purpose of the docket and the strong public interest in its outcome.

26. In reviewing the history of the Commission's disclosure of thousands of pages of information that Westar initially claimed as confidential, **it is important to note the positive outcome of the Commission's actions in that docket**. Disclosure contributed to public and legislative support of the Commission's actions in ordering the company to divest itself of unregulated affiliates, to reduce its staggering debt load and to restore its financial integrity with shareholders. As a result of the Commission's aggressive stance in the Westar case, the company has restored its stock values to healthy levels, has adopted numerous policies that ensure enhanced accountability of management to the Commission and to its board of directors, and has reduced its debt to more acceptable levels. These advancements have eased public concerns about the company's ability to function well as a public utility.

27. The disclosure of the vast majority of so-called "confidential" information in the Westar case secured the confidence of the public and policy makers in the Commission's decisions and aptly demonstrated how vital public accountability is to the preservation and exercise of the discretionary powers of the Commission. Without disclosure in the Westar case, the Commission's actions might have appeared draconian to those not privy to the essential information driving its actions. With disclosure, the public understood the necessity for the Commission's decisions—and the legislature saw no need to intervene. The legislature's grant of broad discretionary powers to the KCC

will remain unfettered so long as the legislature has confidence that the Commission will judiciously exercise those powers. That confidence is founded in large part on the transparency of the decision-making process at the Commission.

VII. Conclusions

28. The proper legal standard for review of claims of confidentiality requires that the Commission review whether the party seeking confidential treatment of information has met its burden in providing sufficient and reasonable explanations of why the information is confidential and why disclosure would be harmful to the party. If the burden is not met, the information may be disclosed. If the burden is met, then the Commission should consider whether disclosure would be appropriate under the circumstances by balancing several factors that weigh the various private and public interests for and against disclosure. Where public interest in the outcome is high, such as when the Commission is seeking solutions to remedy the faltering financial condition of a public utility, this factor weighs heavily in favor of disclosure. Given that state policy favors government in the sunshine, public disclosure of evidence before the Commission serves to make Commission decisions more transparent, providing accountability of the

Commission to the public for the decision it makes, and ensures the legislature's continued confidence in its discretionary powers.

Respectfully submitted,

Niki Christopher #19311
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Road
Topeka, KS 66604
(785) 271-3200
(785) 271-3116 Fax

VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

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

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

Niki Christopher

SUBSCRIBED AND SWORN to before me this 30th day of March, 2005.

Notary of Public

My Commission expires: 2-18-2006.

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 30th day of March, 2005, to the following:

W. ROBERT ALDERSON, JR., ATTORNEY
ALDERSON ALDERSON WEILER CONKLIN BURGHART & CROW LLC
2101 SW 21ST STREET (66604)
PO BOX 237
TOPEKA, KS 66601-0237
Fax: 232-1866
boba@aldersonlaw.com

JAMES G. FLAHERTY, ATTORNEY
ANDERSON & BYRD, L.L.P.
216 SOUTH HICKORY
PO BOX 17
OTTAWA, KS 66067
Fax: 785-242-1279
jflaherty@abrfh.com

JON R. EMPSON, SR VP, REGULATORY, LEGISLATIVE & GAS SUPPLY
AQUILA, INC.
D/B/A AQUILA NETWORKS - WPK / AQUILA NETWORKS - KGO
1815 CAPITOL AVENUE
OMAHA, NE 68102

RANDAL P. MILLER, VICE PRES. FINANCE & TREASURER
AQUILA, INC.
D/B/A AQUILA NETWORKS - WPK / AQUILA NETWORKS - KGO
20 WEST 9TH STREET
KANSAS CITY, MO 64105

LESLIE PARRETTE, JR., SR VP, GENERAL COUNSEL & CORP SECRETARY
AQUILA, INC.
D/B/A AQUILA NETWORKS - WPK / AQUILA NETWORKS - KGO
20 WEST 9TH STREET
KANSAS CITY, MO 64105
Fax: 816-783-5175

NIKI CHRISTOPHER, ATTORNEY
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604
Fax: 785-271-3116
n.christopher@kcc.state.ks.us
**** Hand Deliver ****

DAVID SPRINGE, CONSUMER COUNSEL
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604
Fax: 785-271-3116
d.springe@kcc.state.ks.us
**** Hand Deliver ****

WENDY TATRO, ASSISTANT GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3354
w.tatro@kcc.state.ks.us
**** Hand Deliver ****

JAMES P. ZAKOURA, ATTORNEY
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH STREET
SUITE 750
OVERLAND PARK, KS 66210
Fax: 913-661-9863
zakoura@smizak-law.com

Niki Christopher