

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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

STATE CORPORATION COMMISSION

MAY 27 2005

 Docket Room

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

Joint Response of the Citizens' Utility Ratepayer Board (CURB)

and the Large Volume Customers (LVC) to the "Joint Motion for an Order Approving

Stipulation and Agreement of Staff and Aquila"

and the Joint Motion of CURB and LVC for the

Immediate Issuance of Orders on their Outstanding Motions

The Citizens' Utility Ratepayer Board (CURB) and the Large Volume Customers (LVC) respond below in opposition to the joint motion filed on May 18, 2005, by Aquila, Inc., and the Staff of the Corporation Commission of the State of Kansas (KCC or Commission) for approval of a stipulation and agreement that would purportedly resolve the dispute among the parties concerning Aquila's designation as confidential information material contained in a Staff Report filed in the above-captioned docket on February 14, 2005, and in Aquila's Response to the Staff Report that was filed by Aquila on March 31, 2005.

I. LVC's and CURB's Motions have been pending for as long as four months.

1. The joint motion of Staff and Aquila is yet another attempt to keep material information in the Staff Report from public view and to continue the longstanding pattern in this docket of secrecy that has resulted in multiple disputes over several years. The joint motion also does not resolve the outstanding disputes over numerous other documents that have been inappropriately labeled as "confidential" in this docket, including communications presented to the Commissioners by Aquila on February 24, 2005.

2. Before presenting their joint response in opposition to the request for approval of the stipulation and agreement, however, CURB and LVC first reiterate their repeated requests over the last several months for rulings on the following motions to make public documents and communications, and to dispel the cloud of secrecy that the Commission has for too long permitted to obscure the transparency in governmental affairs that is the public's right under Kansas law.

Filed Feb. 7, 2005—FIFTEEN WEEKS AGO: National Beef Packing Co. L.L.C., Excel Corp., and John Morrell Great Bend's Motion to Immediately Remove "Confidential" Designation From All Pleadings, Orders and Other Documents filed in this docket.

Filed Feb. 18, 2005—FOURTEEN WEEKS AGO: Motion of Large Volume Customers to Make Public, and Not Subject to Confidential Designation, "Staff's Report and Recommendation Analyzing Aquila, Inc.'s February 9, 2004, Financial Plan and Containing Staff's Cash Flow Analysis".

Filed Feb. 21, 2005—ALMOST FOURTEEN WEEKS AGO: CURB's Response to

Motion to Immediately Remove “Confidential” Designation From All Pleadings, Orders and Other Documents.

Filed Feb. 21, 2005—ALMOST FOURTEEN WEEKS AGO: CURB’s Motion to Remove Confidential Designation from Staff Report of February 14, 2005.

Filed Mar. 11, 2005—ELEVEN WEEKS AGO: Response of the Large Volume Customers to “Aquila, Inc.’s in Camera Response to LVC’s Motion and CURB’s Response to Immediately Remove ‘Confidential’ Designation From All Pleadings, Orders and Other Documents Filed in this Docket”.

Filed Mar. 15, 2005—OVER TEN WEEKS AGO: National Beef Packing Co. L.L.C. Response of the Large Volume Customers to “Aquila, Inc.’s in Camera Response to Curb and LVC’s Motion to Make Staff’s Report and Recommendation Public and Not Subject to Confidential Designation”.

Filed Mar. 29, 2005—OVER EIGHT WEEKS AGO: Motion of the Large Volume Customers for the Commission to Make Public All Documents Presented on an Ex-Parte Basis to the Commissioners on February 24, 2005.

Held April 5 and 6, 2005—OVER SEVEN WEEKS AGO: Evidentiary hearing and oral argument on these matters; CURB and LVC presented testimony and oral argument in support of the outstanding motions listed above.

Filed April 25—OVER FOUR WEEKS AGO: Post-hearing Brief of the Large Volume Customers, requesting relief consistent with their outstanding motions.

Filed April 26—OVER FOUR WEEKS AGO: Post Hearing Brief of CURB, requesting relief consistent with its outstanding motions.

3. All told, over the last four months, the parties have submitted to the Commission several hundred pages of briefs and several hundred pages of prefiled direct testimony, and the Commission also heard opening statements from counsel for the parties and heard the witnesses cross-examined on the stand. Yet the Commission has not ruled on a single motion—**not one**—relating to the public’s right to have access to public information. By this inaction, the Commission has effectively “ring-fenced” the public out of the public process, making them trespassers where they were once rightful participants.

II. LVC and CURB oppose the proposed stipulation and agreement

4. Although the stipulation and agreement proposed by Staff and Aquila would result in the release of a substantial amount of the information that Aquila has designated as confidential that CURB and the Large Volume Customers have argued in numerous pleadings should have been released to the public at the time of filing, if Staff and Aquila are in agreement that additional information should be released, there is no reason whatsoever why this information was not released at the time of the filing of the motion on May 18, 2005. Staff and Aquila have agreed to take the position that the public should be denied access unless and until the KCC approves the stipulation and agreement. LVC and CURB strongly disagree with Staff and Aquila’s position that the designated materials are subject to disclosure only by agreement of these parties—rather than by operation of the laws and regulations that protect the public interest. The law simply does not provide that a party may get away with saying, “I will only release information to the public that I want to release, and only if I don’t have to release other materials that I want to keep secret.” There might as well be no laws and regulations at all governing the

treatment of information submitted to the KCC if the Commission does not intend to enforce them.

5. CURB and LVC chose not to sign the agreement for the above reasons, and because the agreement does not resolve what has become one of the **primary issues** in this dispute: **whether the parties to this dispute have a right to obtain rulings on motions that have been outstanding for as long as fifteen weeks.** To approve the stipulation and agreement, without ruling on a single outstanding motion of LVC and CURB, would be to deny them their procedural and due process rights to object to confidential designations and have them ruled on in a timely manner.

6. Given that CURB and LVC have presented their evidence and arguments in favor of their motions in numerous pleadings and in an evidentiary hearing with oral arguments, they respectfully request that the Commission consider them as incorporated herein as evidence and argument that the joint motion for approval of the stipulation and agreement between Staff and Aquila should be denied.

7. Although there are a few minor differences in CURB's and LVC's requests and motions, CURB and LVC are united in their belief that the vast majority of information designated by Aquila in this docket as "confidential" does not merit confidential treatment. LVC and CURB are united in their belief that Aquila did not act reasonably and within the spirit or the letter of the applicable legal standards, and that it was reasonable for LVC and CURB to expect more timely rulings from the Commission on their motions. It is simply unacceptable that the public has been denied access to nonconfidential information for as long as two years in this docket, and that the parties have had to wait as long as four months for rulings on simple motions

pertaining to whether or not a filing or a document produced in discovery has been appropriately designated confidential or not under the applicable legal standard. Aquila's intermittent and incomplete releases of information formerly designated as confidential, and the failure of the Commission to rule on pending motions has resulted in an unacceptable denial of the public to access to the important proceedings of this docket.

8. Staff and the parties are in general agreement on the applicable legal standard, as the Commission noted at the hearing that was held April 5 – 6, 2005, so there should be no reason for continued delay on that regard. There is no paucity of evidence before the Commission to support a ruling on the merits, as there have been hundreds of pages of pleadings filed since February 7 containing the evidence and arguments of LVC and CURB supporting their positions, so there should be no reason for continued delay on that regard, either. The Commission took the opportunity to question witnesses at the hearing and heard extensive cross-examination by counsel for the parties, so there should be no reason for continued delay because the Commissioners have not had an opportunity to have their concerns addressed. Simply put, there is no reason for further delay.

9. Under the applicable law, Aquila has the burden of proof to demonstrate its entitlement to confidential treatment of information. It is a denial of due process when it is the burden of the party seeking confidential treatment of information to provide proof that the claimed information is confidential when such information is provided, but: (i) when the other parties challenge the designation, they have to file over ten pleadings, (ii) spend a day and a half in a hearing, (iii) and then have to wait a month, two months, three months four months or more to receive a ruling on the merits of these matters. This is simply not the result contemplated by

rules and regulations that place the burden of proof on the party seeking confidentiality.

10. Gladstone once said, “Justice delayed is justice denied.” CURB and LVC are now all too painfully aware of the wisdom of his words. What is especially vexing is that, time and time again, information has been released long after LVC and CURB argued that it was not confidential—indicating that even Aquila shares the opinion that much of this information was not of a confidential nature. These repeated delays in releasing information that is clearly not confidential has denied the right of the parties and the public to openly discuss important information that is relevant to the subject matter of this docket. The delays in rulings on the motions of LVC and CURB have denied the rights of the public to access to information that is clearly not of a confidential nature. These delays have effectively denied the public interest in fair and timely resolution of disputes concerning its right to participate in the governmental process. The delays have effectively denied the rights of the public under K.S.A. 77-545 and K.A.R. 82-1-207, which govern the appropriate treatment of *ex parte* communications with the Commission, and have denied the right of public access to such communications. The delays have created the necessity for CURB and LVC to file successive motions, when timely rulings on the earlier filed motions would have sufficed to resolve these matters. The delays have created unnecessary expenses for all the parties.

11. More importantly, CURB and LVC are fighting on behalf of the public interest by insisting on enforcement of the policy of the State of Kansas to facilitate representative government by fostering an informed electorate. Open meetings and records are the rule rather than the exception in Kansas. (*See generally*, 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). The

public's right to access to the evidence that supports governmental action is at stake in this matter.

12. LVC and CURB are aware that a ruling in favor of the stipulation and agreement would relieve the Commission of the necessity of ruling on LVC's and CURB's previous motions concerning the Staff Report, but such a ruling would not address one of the practical matters at stake in this docket: whether the Commission wants to set a dangerous precedent in tolerating the virtual destruction of the "confidential designation" process that has been established under state law and Commission regulations. Aquila's piecemeal release of information to the public over the course of the Commission's investigation has substantially eviscerated public access and frustrated its interest in open government. The belated public release of over 50 pleadings, orders and other information in this docket and the continued withholding from public view substantial information makes this docket the perfect example of why our legislature enacted "government in the sunshine" laws for state agencies and commissions. The sun is not simply setting on this docket: it is nearly in full eclipse.

13. A favorable ruling for the stipulation and agreement would appear to be an endorsement of Aquila's tactics in suppressing the release of public information, and would encourage others who would benefit from delay to use similar tactics. If the Commission looks forward to spending hundreds of hours in every future contested case and investigation in adjudicating discovery disputes such as the one that has arisen in this docket, it need only rule in favor of Aquila and against LVC and CURB on these matters.

14. On the other hand, the Commission could assert its authority to control its dockets to ensure efficient and timely government action by ruling favorably on the motions of LVC and

CURB, by denying approval of the stipulation and agreement, and demonstrating that it will strictly enforce the legal standards for confidential treatment of information and strictly enforce the provisions of the protective order that governs each docket by granting LVC and CURB the relief they have requested in previous pleadings and at the evidentiary hearing.

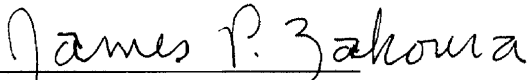
III. Request for Relief

LVC and CURB respectfully request that the Commission perform its duty to administer justice in a timely and fair manner by ruling immediately on all outstanding motions of LVC and CURB and by granting the relief they have requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

02-UTCG-701-GIG

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, or hand-delivered this 31st day of May, 2005, to the following:

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