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 Petition for Reconsideration and Clarification of the Commission's Order on Motions Challenging Confidential Designations

Pursuant to K.A.R. 82-1-235, the Citizens' Utility Ratepayer Board (CURB) respectfully requests that the Commission reconsider or clarify several provisions of its *Order on Motions Challenging Confidential Designations*, filed in the above-captioned docket on July 12, 2005.

I. Requests for reconsideration or clarification concerning the procedures for filing confidential and redacted materials, including descriptive summaries, contained in paragraph 50.

The Commission's order appropriately reaffirmed the parties' responsibilities to file redacted public versions of confidential filings contemporaneously with the filing of the confidential version. (Order ¶50). However, CURB seeks reconsideration or clarification of several provisions contained in paragraph 50 of the order.

A. 1. The Commission states in its order that "If any party files a document that it believes contains information properly designated as confidential, then a redacted, public version must be filed contemporaneous with the filing of the confidential version." (Order ¶50). CURB requests clarification, for purposes of the provisions of

this paragraph, that counsel for Commission Staff and members of the Commission Staff are considered "parties," and therefore subject to these provisions. This matter requires clarification because, under certain circumstances, such as the statute governing *ex parte* communications with the Commission (K.S.A. 77-545), a member of the technical Staff is not considered "a party to a proceeding before the commission," and therefore free to engage in communications with parties concerning the merits of subjects pending before the Commission, although counsel for Staff is not. Since filings are made both by members of the Staff and its counsel, CURB seeks clarification that both are subject to the requirement that a redacted public version must be filed contemporaneously with a confidential document. If the Commission does not intend the members of Staff and its counsel to be subject to these provisions, CURB seeks reconsideration of this provision and requests that they be considered parties for purposes of this provision.

B. 2. In addressing the filing of voluminous documents for which the entire contents are claimed to be confidential, the Commission stated in paragraph 50 that the "filing may be represented by a single page, which provides a non-confidential description of its contents." CURB requests clarification of whether the "non-confidential description of the filing's contents" is intended to represent the "public filing" that is to be filed contemporaneously with the filing of the confidential document. The statement, as is, implies that the single-page description alone may represent the confidential document, without filing the confidential document itself. If this was the Commission's intended meaning, then CURB requests that the Commission reconsider this provision. If, on the other hand, the Commission intends that the

description be filed in addition to the confidential document itself, then CURB requests clarification of this requirement.

C. 3. Additionally, CURB seeks reconsideration of the following statement in the Commission's order:

> For future filings in this docket, if Aquila or any other party believes a descriptive summary is appropriate in place of a redacted version, that party should consult with and obtain concurrence from Staff before making such a filing.

(Order, ¶50). While CURB recognizes that informal consultation with Staff is appropriate in many instances, this statement implies that the Commission has now appointed its Staff to act as the arbiter of discretionary matters concerning confidential documents.

4. Without clear, bright-line standards in place defining the parameters of this sort of subjective decision-making, the Staff has no guidance in making such determinations. Such subjective, discretionary determinations are more appropriately made by the Commission in response to a challenge by a party, not preemptively by the Commission's Staff. Given the rather unsuccessful history of negotiations of confidential designations in this docket, it would be helpful for the Commission to set forth more specific standards, but in the absence of such standards, CURB requests reconsideration of the delegation of the Commission's discretionary powers to its Staff.

II. Request for clarification: when does a forecast become stale?

A. 5. The Commission has recognized the right of a party to confidentiality of

internal financial forecasts and other confidential forward-looking information. However, it is not clear when forward-looking information becomes stale and no longer merits confidential treatment. The Commission recognized throughout its order that confidential information may become stale through the passage of time. Surely, at some point, even forward-looking information, if based on outdated information, should be considered stale. As Aquila itself has argued, when projections are based on outdated information, the projections themselves are outdated. Aquila witness Jon Empson stated at the hearing,

> As stated earlier, the Staff Report was based primarily on an outdated plan filed with the Commission on February 9, 2004, that would not reflect current financial information and projections. So even if the Report was not flawed as detailed in our March 31, 2004, Response, the conclusions would still be irrelevant to Aquila's financial outlook today.

(Direct Testimony of Jon Empson, at 2; March 30, 2005).

6. However, the order does not make it clear in many instances why the Commission found that forward-looking information in documents dated as far back as March 2003 continues to merit confidential treatment. There must be some point where projections based on outdated information become stale and subject to disclosure, even if the projections look beyond the present. Even Aquila has recognized, as Mr. Empson's testimony reveals, that forward-looking information loses its significance as the information it is based on changes. Therefore, there should be some effort made to determine whether forward-looking information has become stale before automatically affording it confidential treatment.

7. Furthermore, the Commission's order does not reveal the standard by

which the Commission determines that forward-looking information is not yet stale. Not only does it make it difficult for the parties reviewing the Commission's decisions to understand what the standard is, but if there is no clear standard in place for determining when information becomes stale, it will be difficult for parties that have a continuing obligation to remove confidential designations to know when the information becomes stale (Order ¶73).

B. 8. It is not also not clear at what point in addressing problems with confidential information when it is appropriate to consider whether the information is stale. Does the Commission consider stale confidential information no longer "confidential," because it is no longer "forward-looking," and is therefore subject to public disclosure under the policy of open records in state government? Or does stale information retain its nature as "confidential," but becomes subject to disclosure because the benefits that flow from that same public policy of open records in state government outweigh the harm that might be incurred from disclosure of outdated confidential information? Although this may be a finer distinction than the Commission cares to draw, it is important for the parties to understand where the consideration of staleness fits into the analysis of whether information merits confidential treatment: in the step of determining whether it is truly "confidential" information, or in the step where the factors are balanced for and against disclosure. Given the continuing obligation of the parties to review for staleness of confidential filings and data responses, it would be helpful to understand the appropriate framework for analysis of staleness.

9. CURB therefore requests clarification of what standard the Commission

uses to determine what is "stale" in its analyses of challenged confidential designations, and where in the analytic process review for staleness should be made.

C. 10. Additionally, there are no findings of fact, as mandated by K.A.R. 82-1-232(a)(3), to indicate the factual basis for the Commission's decisions concerning several documents in the order. Each order of the Commission contain a "concise and specific statement of the relevant law and basic facts which persuade the commission in arriving at its decision." K.A.R. 82-1-232(a)(3). "The purpose of findings of fact as mandated by K.A.R. 82-1-232(a)(3) is to facilitate judicial review and to avoid unwarranted judicial intrusion into administrative functions [citations omitted]." *Ash Grove Cement Co. v. Kansas Corporation Commission,* 8 Kan. App. 2nd 128, 132 (1982). Therefore, CURB also requests specific clarification concerning what facts the Commission found in determining that the forward-looking information in the following documents is not stale and subject to public disclosure:

Exhibit A, Aquila's Motion for Waiver, Mar. 13, 2003 (Matrix No. 3, Order ¶33).
Confidential White Paper (in two parts), Mar. 12, 2003 (Matrix No. 3, Order ¶34).
Aquila, Inc. Debt Reduction and Restructuring Plan, First Draft, Mar. 2003 (Matrix No. 7; Order ¶35)
Confidential Financial Update to KCC, Oct. 15, 2003 (Matrix No. 13, Order ¶36).
Direct Testimony of Andrea Crane, Oct. 21, 2003 (Matrix No. 14, Order ¶37).
Direct Testimony of James Proctor, Oct. 31, 2003 (Matrix No. 1, Order ¶38).
Aquila's Confidential Financial Update to KCC, Nov. 19, 2003 (Matrix No. 17,Order ¶39).

Staff's Initial Post-Hearing Brief, Dec. 18, 2003 (Matrix No. 20, Order ¶40).
Direct Testimony of Rick Dobson and attachments, Feb. 17, 2004 (Matrix No. 29, Order ¶41).
Confidential Order No. 21, Denying Request to Pledge Kansas Assets, Feb. 17, 2004 (Matrix No. 30, Order ¶42).

III. Request for reconsideration or clarification on factors supporting nondisclosure of confidential information

A. 11. When a party challenges the designation of information as "confidential," the Commission first must determine whether the information is appropriate labeled as confidential. If the Commission has determined the designation is appropriate, then it is obligated under K.S.A. 66-1220a to analyze the circumstances to determine whether disclosure of the confidential information would be appropriate. The following factors must be considered:

> (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).

12. This balancing of the public's right to know with the company's right to keep certain kinds of information confidential is critical. Our state's policy clearly favors open government proceedings and records. There must be a valid reason to keep information in a public proceeding confidential. Without findings of fact on the record that support a decision to keep certain information confidential, the public is left wondering why, in an age of open government, it is not allowed to view the evidence that supports the Commission's decision.

Public confidence in the Commission's decisions relies almost entirely on the public's ability to recognize the reasoning behind the Commission's decisions. Without findings of fact that support the reasoning, the rationality of the decision cannot be discerned.

13. Although the Commission's order recognized that the balancing of factors for and against disclosure is necessary, and in some aspects demonstrated that it performed the analysis for some of the challenged documents, it is less than clear that it did so for several other documents. The Commission demonstrated that it had performed this four-part analysis, for example, in considering the contracts and agreements related to the Batesville agreements. (Order ¶46). The Commission noted that public disclosure of the documents in question "would not significantly aid the Commission in fulfilling its functions nor benefit the public interest." *Id.* Although the findings of fact do not demonstrate that the Commission balanced these factors with those favoring public disclosure, the explanation at least identifies which of the four factors weighed heaviest in the Commission's decision. Likewise, the Commission's discussion of its decision not to disclose the Red Lake transaction documents includes the Commission's findings, providing the minimal information required for the parties to determine which factors weighed in favor of continued confidential treatment of the documents. (Order ¶49).

14. However, for several of the challenged documents in the order, there are no findings of fact that indicate that the Commission performed the balancing of the four factors in its analysis. If the analysis was performed, there is no indication which factors supported the Commission's decision not to order disclosure. Without this information, the parties have no ability to analyze whether the Commission performed the analysis required by K.S.A. 66-1220a. Without these findings, the parties are denied the information necessary to determine whether

they agree with the Commission's decision and denied the information necessary to make a viable argument challenging the decision not to order disclosure. The public has no ability to judge for itself the rationality of the decisions to keep certain information secret.

15. CURB therefore requests reconsideration of the Commission's decision not to disclose confidential information in the following documents, on the basis that there are no findings of fact in the order that provide evidence that the four-part analysis required by K.S.A. 66-1220a was performed for the following documents:

Exhibit A, Aquila's Motion for Waiver, Mar. 13, 2003 (Matrix No. 3, Order ¶33).
Confidential White Paper (in two parts,) Mar. 12, 2003 (Matrix No. 3, Order ¶34).
Confidential Financial Update to KCC, Oct. 15, 2003 (Matrix No. 13, Order ¶36).
Direct Testimony of Andrea Crane, Oct. 21, 2003 (Matrix No. 14, Order ¶37).
Direct Testimony of James Proctor, Oct. 31, 2003 (Matrix No. 1, Order ¶38).
Aquila's Confidential Financial Update to KCC, Nov. 19, 2003 (Matrix No. 17, Order ¶39).
Staff's Initial Post-Hearing Brief, Dec. 18, 2003 (Matrix No. 20, Order ¶40).
Direct Testimony of Rick Dobson and attachments, Feb. 17, 2004 (Matrix No. 29, Order ¶41).
Confidential Order No. 21, Denying Request to Pledge Kansas Assets, Feb. 17, 2004 (Matrix No. 30, Order ¶42).

B. 16. Alternatively, in the event that the Commission, upon reconsideration, finds that it performed the four-part analysis required by K.S.A. 66-1220a in considering whether to disclose confidential information in these documents, CURB requests clarification of which factors supported the decision not to disclose the confidential information contained in each documents listed above, and requests specific findings of fact as mandated by K.A.R. 82-1-

232(a)(3)that reveal why the Commission found these factors outweighed factors supporting public disclosure.

IV. Request for reconsideration of matters concerning ex parte communications

17. CURB seeks reconsideration of the Commission's determination that it was not obligated to publicly disclose documents presented to individual Commissioners during three meetings that were held on February 24, 2005. Specifically, CURB takes exception to the Commission's reasoning that it was not necessary to determine whether the meetings were governed by prohibitions against *ex parte* communications because its obligations to protect confidential information prohibited disclosure whether they were acquired during an *ex parte* proceeding or not. CURB requests that the Commission explicitly rule on whether the meetings with Aquila constituted *ex parte* communications under K.S.A. 77-545. Had the Commission ruled on this issue on the merits, CURB is confident that the communications would have been deemed *ex parte* under K.S.A. 77-545. CURB respectfully requests that the Commission make specific findings of facts and rulings on the issue of whether *ex parte* communications took place, and requests that the Commission include in its findings a specific finding that Staff's arguments that no *ex parte* communications took place are inconsistent with public policy of the State of Kansas.

18. CURB also requests reconsideration of the decision of the Commission not to provide the remedies required under K.S.A. 77-545, including making the written *ex parte* communications available to the public.

19. Finally, CURB requests reconsideration of the Commission's conclusion that its

obligations to protect confidential information preclude it from making the documents in question available to the public. The Commission should reconsider the decision in light of the appropriate balancing of factors weighing for and against disclosure, as required by K.S.A. 66-1220a. Given the strong public policy in Kansas that favors open government and records and that discourages even the appearance of impropriety in administrative proceedings, the Commission should find that the factors favoring disclosure outweigh those favoring nondisclosure.

A. 20. Although Kansas law does not specifically define "*ex parte*," in the administrative law context, as one commissioner has put it, "A handy definition of *ex parte* communications with a Commissioner or presiding officer is 'those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter'." Brian J. Moline, Ethical Dilemmas for the Kansas Government Lawyer, 5 Kan. J.L. & Pub. Pol'y No. 1, 105 (not paginated in source consulted; footnote omitted). Concerning *ex parte* communications with the Commission, K.S.A. 77-545 makes clear what kinds of circumstances constitute prohibited *ex parte* communications with the Commission and what kinds of remedies must be implemented in the event of a breach of the prohibition.

21. Fundamentally, there are three main elements that must be present to determine that there is an *ex parte* communication with the Commission or a presiding officer of a Commission proceeding under K.S.A. 77-545:

> 1) Timing: the communication occurs "after the commission has determined and announced that a hearing should be held" and "prior to the issuance of a final order."

2) Lack of Notice to all Parties: not all the parties are afforded notice and opportunity to attend.

3) Subject Matter: the subject matter of the communications concerns "the merits of the matter or proceeding."

K.S.A. 77-545(b)(1).

22. First of all, it would be difficult to come up with a subject that could be discussed by Aquila with the Commission that would *not* touch on one of the dockets to which it is a party. It was a party to at least nine open dockets as of February 24, 2005, the date of the meetings at issue in this matter.1 However, the relevant docket to the *ex parte* matter is this docket, and the subject of this docket is to investigate and monitor the financial health of Aquila on behalf of the ratepayers of its publicly-regulated natural gas and electric utilities in the state. In particular, the Commission's concern has been focused on the high level of debt incurred by the company on behalf of its unregulated businesses, and whether Aquila's precarious financial condition would impair its ability to fulfill its responsibilities to its Kansas ratepayers or burden them with debt not associated with utility service.

23. In this docket, on May 27, 2003, the Commission imposed interim standstill provisions in this docket that requires Aquila to seek approval from the Commission to do any of

1 As of February 24, 2005, Aquila was a party to the following dockets that dealt with the subject matters indicated after the docket number: 75-GIMC-009-GIG (108,850), 03-AQLE-319-EPR, 04-AQLE-042-GIE, 02-UTCG-371-GPR: prudency of natural gas, fuel and power purchasing practices; 04-GIMX-651-GIV: customer payment alternatives; 04-GIMX-531-GIV: low-income rate programs and alternative conservation programs; 04-AQLE-1065-RTS: electric rate case; 02-GIME-365-GIE: quality of electric service;
05-AQLE-687-GIE: provision of emergency service to customers disconnected from gas in Hugoton Field area & recovery of costs; 01-AQLE-367-RTS: natural gas rate case;
02-UTCG-701-GIG (this docket): investigation and monitoring of Aquila's financial health and restructuring plans to protect Kansas utilities from adverse affects of high level of debt incurred on behalf of unregulated businesses of Aquila.

the following:

> (a) Pledge regulated utility assets, presently devoted to serving Kansas retail customers, for the benefit of its current and prospective lenders;
> (b) Invest any money in any existing or new nonutility businesses;
> (c) Incur any new indebtedness other than in the ordinary course of business;
> (d) Commit to any modification of existing indebtedness;
> (e) Pay any dividends; or
> (f) Commit to any other financial transaction that would not be reversible upon an order of this Commission.

Order Establishing Hearing Procedures, Directing Further Investigation and Extending Interim Standstill Protections, May 27, 2003. These basic "interim" provisions have been supplemented, modified and in some circumstances, waived by the Commission, but the majority of them have not been waived to date except on a circumstance-specific basis, at the request of Aquila. At no time has the Commission waived the requirement to seek approval to sell Kansas assets. In addition, in at least one order in this docket, the Commission has noted its jurisdiction and authority extends to "any transaction that constitutes a 'contract or agreement with reference to or affecting,' the certificate of convenience and necessity whether the certificate relates to the provision of electric service or natural gas service." *Order No. 21,* Feb. 17, 2004, *citing* K.S.A. 66-136.

24. Over the course of the Commission's investigation in this docket, its orders have addressed Aquila's financial plans, collateralization of assets, sale of assets, its level of debt, and a variety of other matters. Given the broad scope of this docket, hardly any subject concerning Aquila and money could be discussed that would not touch on the subject of this docket. Certainly, Aquila's proposed sale of Kansas utility assets must be considered a subject of this docket, because the standstill provisions issued in this docket require the company to obtain

Commission approval to sell any of its assets or modify its indebtedness. Furthermore, K.S.A. 66-136 requires all Kansas utilities to obtain the Commission's approval prior to the transfer of any jurisdictional assets, and this would be the logical docket in which to file for such approval, given the previous orders in this docket.

B. 25. On November 20 – 21, 2003, the Commission held a technical hearing to consider Aquila's request to pledge its regulated utility assets as collateral on its debt. In its Order No. 21, the Commission denied the request, ordered Aquila to file a written explanation of its claims of confidentiality concerning several documents, and stated that "a party may file a petition for reconsideration of this Order within 15 days." Additionally, the Commission stated that "The Commission retains jurisdiction over the subject matter of this investigation and parties for the purpose of entering such further order or orders as it may deem necessary and proper." (*Order No. 21* at 35, Feb. 17, 2004).

26. Indeed, the Commission issued ten orders in this docket after Order No. 21 and prior to February 24, 2005. Each one of those orders carried the same statement as above, asserting the Commission's continued jurisdiction to enter further orders. None of them—nor any other order issued in this docket to date—contained language indicating that it was a final order or final agency action subject to review.

27. When the Commission issues a final order, it states so explicitly, as it did in 2001 when it denied Aquila's petition for reconsideration in Docket No. 01-WPEE-489-CON: "This Order constitutes final agency action that is subject to review." *Order Denying Reconsideration*, Sept. 30, 2001; *see also, e.g., Order Denying Kansas Energy Group's Petition for*

Reconsideration, Aug. 27, 2001, Docket No. 99-GRLG-405-GIG. One must assume then, given that not a single order in this docket has contained language indicating that it constitutes "final agency action that is subject to review," that the subject matter of this docket remains pending before the Commission.

C. 28. Given the background of this docket, one cannot escape the conclusion that Aquila engaged in *ex parte* communication with the Commission on February 24, 2005. On that date, the three Commissioners (all of whom are attorneys) met individually with Aquila's attorney, one of its consultants and several of its executives in back-to-back meetings. Additionally, the Commission's general counsel and its director of utilities (also an attorney) attended the meetings. (Order ¶56). No other parties were notified of this meeting or afforded an opportunity to attend. In response to a data request of LVC, Aquila provided materials marked "Highly Confidential" that were presented to each of the Commissioners during their meetings. The materials addressed the proposed sale of some of Aquila's utilities, including its regulated Kansas electric operations, and its proposed plan for use of the proceeds from the sales to pay down debt.

29. The scheduling of the individual meetings with each Commissioner strongly suggests that the parties knew that the subject of the meetings—the sale of assets and the repayment of debt—related to the subject of an open docket. If the subject of the meetings had not related to matters pending before the Commission, Aquila could have made its presentation to all three Commissioners at once without concern that the meeting would have violated the open meetings act. The scheduling of individual serial meetings was apparently an effort to satisfy the letter, if not the spirit, of the open meetings act (K.S.A. 75-4317 *et seq.*), which would

prohibit such a meeting unless the other parties to the docket were notified of the time and place of the meetings and provided an opportunity to attend.

30. Three factors made these meetings impermissible *ex parte* communications: the timing of the meetings, the subject matter of the meetings, and the lack of notice to enable other parties to the docket to be present. The meetings were held after a hearing and prior to a final order issued in the docket. K.S.A. 77-545(b)(1); K.A.R. 82-1-207(a)(1). The company discussed a subject—the proposed sales of utility assets and repayment of debt—that touched directly on matters pending in this docket. K.S.A. 77-545. Under the standstill provisions filed in this docket, and under K.S.A. 66-136, the company must seek approval from the Commission to sell any of its Kansas jurisdictional assets or alter its debt obligations. Finally, none of the parties were given notice of the meetings or invited to attend. The meetings were clearly of an *ex parte* nature. K.S.A. 77-545(b)(1).

D. 31. Contrary to the assertions of Aquila or any other party, whether the *ex parte* meetings were "improper" is not the issue here: the issue is whether the Commission provided the appropriate remedies for engaging in *ex parte* communications with a party. The Commission clearly did not do so.

32. The statutes and regulations are specific. K.S.A. 77-545 requires that "copies of any written communications from any party regarding the proceeding that are directed to the presiding officer shall be mailed to all parties of record and proof of service shall be furnished to the Commission." Although Aquila provided the parties the presentation materials pursuant to LVC's data request, it did not serve them on the parties pursuant to the statute. Nor did the

Commission make them a part of the file and the docket and make them available to all persons who desire to use them, as the statute requires. K.S.A. 77-545(b)(2).

33. It is not clear in these circumstances how the Commission should comply with the dictate of K.S.A. 77-545(b)(3), which requires that "The person or persons to whom any *ex parte* communication has been made shall promptly and fully inform the full commission of the substances or the communication, and the circumstances thereof, to enable the commission to take appropriate action." Given that the commissioners themselves are among the "person or persons" to whom the *ex parte* communication was made, they already know about it. However, the Commission should nevertheless acknowledge the *ex parte* communications on the record and "take appropriate action," as prescribed by statutes and regulations. Additionally, counsel for Staff has the obligation to report *ex parte* communications under K.S.A. 77-545, as well. Furthermore, if the director of utilities attended the meeting in his capacity as an attorney advising the Commissioners, he is also obligated to report under K.S.A. 77-545.

34. While the Commission claims that its duty not to disclose confidential information under K.S.A. 66-1220a precludes it from disclosing the confidential information, K.S.A. 77-545 provides no exception for confidential information. While it has been difficult to find case law that addresses this particular situation, there are a few cases which, if read together, point to disclosure as the appropriate remedy. For example, while normally one's negotiations with a prospective employer are properly considered confidential, if the prospective employer is a regulated utility with a rate case pending, and the prospective employee is a public utilities commissioner—both parties are obliged to disclose the contacts with the other. *Northern States Power Co. v. Minnesota Public Utilities Commission*, 414 N.W.2d 383, 386 (1987). "While the

record contains no direct evidence that [the commissioner] unduly influenced" the decisions in the rate case, "his mere presence creates the obvious appearance of impropriety and undermines public confidence in the system." *Id.* This court cited with approval the stern admonishment of a federal court of a party that had made *ex parte* communications with a regulator and then objected to the reversal of the decision that was tainted by the contact:

> . . . surreptitious efforts to influence an official charged with the duty of deciding contested cases upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding.

Id., at 388, citing *WKAT, Inc. v. Federal Communications Commission*, 296 F.2d 375, 383 (D.C. Cir. 1961) *cert. denied* 368 S. Ct. 63 (1961). In other words, a party without clean hands should not be allowed to reap the benefit from the inappropriate contact—even if there is no evidence that the contact influenced the regulator's decision.

35. Furthermore, open records and open meetings for the conduct of governmental affairs and the transaction of government business are "declared to be the policy" of the State of Kansas. K.S.A. 76-4317(a); K.S.A. 45-216(a). To allow the party who initiated the *ex parte* contacts with regulators to shelter the communications from public scrutiny because they are "confidential" is counter to public policy in Kansas. Public disclosure of the communications is the only appropriate remedy.

36. Given that Aquila has been on notice for several years that it must seek the approval of the Commission to sell any of its Kansas utility assets or alter its debt obligations, it certainly appears that the presentations concerning such matters to the Commissioners on an *ex*

parte basis were made in anticipation of seeking the approval of the Commission at a future date. Whether or not there was an intentional attempt to influence the Commissioners to approve the sales, the appearance of impropriety is inescapable.

E. 37. The Commission has refused to make public the confidential documents that Aquila provided to the Commissioners on February 24, 2005, arguing that K.S.A. 66-1220a requires the Commission not to disclose a party's confidential information. However, K.S.A. 66-1220a allows the Commission to disclose such information, if, after consideration of several factors, it finds that disclosure is warranted. The factors to be considered are:

> (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.

38. While it is not clear whether disclosure will significantly aid the commission in fulfilling its functions, it would certainly discourage parties from seeking secret, serial meetings with the Commission if the substance of those meetings must be publicly disclosed. The benefit to the public interest of discouraging *ex parte* communications with the Commission is obvious. Although there may be some harm to the company as a result of disclosure, the party that initiates *ex parte* communications on matters pending before the Commission cannot claim clean hands in the matter. Since the statute providing for disclosure of *ex parte* communications does not contain an exception for confidential information, the company was on notice that disclosure

might be required. Finally, the alternative to disclosure, which was to allow the parties to have access to the confidential information but not the public, simply does not serve to protect the public interest in discouraging *ex parte* communications.

39. On balance, the analysis required by K.S.A. 66-1220a comes out squarely in favor of protecting the public interest in "due process, fair play, open proceedings" and "unbiased, uninfluenced decision." *Northern States*, 414 N.W.2d at 388. The only appropriate remedy that will serve the public interest is public disclosure of all of the information presented to the Commission on an *ex parte* basis—to deter parties in the future from initiating such contacts, and to satisfy the dictates of the statutes and regulations that require it. Otherwise, the Commission's decision in this matter serves as a "how-to" manual for how to get away with *ex parte* communications without incurring harm: meet with Commissioners secretly and separately, and label any materials presented as "Highly Confidential." Such an outcome cannot possibly serve the public interest. The harm to the public interest in due process and fair play that would accrue from allowing such an outcome greatly outweighs any harm that might accrue to Aquila from disclosure.

F. 40. The Commission mentioned but did not endorse Staff's argument that the meetings with Aquila were not *ex parte* because Order No. 21 was a "final" order on the subject of the hearing that preceded it, and therefore there was no hearing pending on the subject of the presentation that Aquila made. Before, on reconsideration, the Commission considers accepting this argument as the rationale for finding there was no *ex parte* communications with the Commissioners, the following repercussions to public policy should first be considered:

41. If the Commission were to hold that Order No. 21 was a final order subject to review at the time it was issued, then it must also hold that the parties were denied due process because they were not timely informed that Order No. 21 constituted final agency action subject to review. Such a decision would also cast into doubt how many of the other orders in this docket may be "final" under this rationale.

42. If the Commission, in effect, were to retroactively declare that Order No. 21 is now "final," then it should also provide the parties notice of the fact that it is now considered a final agency action subject to review, and provide an opportunity to appeal the order, to provide due process to the parties.

43. If the Commission, for whatever reason, were to hold that Order No. 21 was a "final" order for purposes of determining that the meetings with Aquila did not touch on a subject pending before the Commission, the holding would effectively overturn the prohibition against interlocutory appeals of non-final agency actions. Certainly, such a result would not "aid the Commission in fulfilling its functions." Such a result would instead contribute to judicial inefficiency, and create multiple opportunities for protracted mid-docket litigation of single issues. At the very least, confusion would reign: the distinction between final and non-final agency action would be blurred to the point of meaninglessness.

44. Lastly, and most importantly, if the Commission, for whatever reason, were to hold that Order No. 21 was a "final" order for purposes of determining that the meetings with Aquila did not touch on a subject pending before the Commission, the holding would clearly violate the purpose of the statutes and regulations that prohibit *ex parte* communications. It would create, particularly in dockets that remain open for extended periods of time, the potential

for repeated but ostensibly permissible *ex parte* communications with the Commission.

45. Under Staff's reasoning, whenever a distinct issue is resolved after a hearing on that distinct issue and while the general docket is still open, then any party would be free to engage in private communications with the Commission on subject matters in the docket, without notice to other parties, until another hearing is scheduled on those specific matters discussed. Numerous windows of opportunity would be opened for private communications with the Commission during the course of the docket. So long as the parties kept the discussions away from a specific matter that has been argued at hearing and on which an order is pending, they would be free to engage the Commissioners' in private as often as they choose. Furthermore, under the Commission's analysis in this order, so long as a party labeled information "Highly Confidential", the public would be precluded from knowing what was presented to the Commissioners during these private meetings.

46. This policy would be a nightmare for the parties who attempt to protect their due process rights. Dockets at the KCC sometimes remain open for years. They often embrace broad topics that do not lend themselves readily to isolation into discrete specific subjects. Determining which subjects would be permissible for discussion and which are not would be difficult, if not impossible. Determining when orders were final to figure out when the windows open and close on individual subjects would be a laborious and complex task.

47. Furthermore, in order to protect their rights, the parties would have to constantly monitor the Commission's calendar. The parties would have to regularly file open records requests for meticulous documentation of the schedules and meetings of the Commissioners to ensure that another party's private meetings with the Commissioners did not touch on "*ex parte*"

subjects and remained focused on "permissible" subjects on which the parties would be free to lobby the Commissioners. The result would be that the Commissioners would always be under a cloud of suspicion that they have been unduly influenced by a party. And, assuming that the parties would, under this new theory of repeated open seasons on lobbying the Commission, take full advantage of this by accelerating the frequency of such lobbying, a new era will begin where the parties spend most of their time in a docket jockeying for face time with the Commissioners and making sure that the other parties did not take unfair advantage of their face time with the Commissioners.

48. Accepting Staff's theory that, within the course of a single docket, windows will repeatedly open in which parties are free to engage in private communications with the Commissioners on certain subjects of the docket, would literally dismantle the protections that the legislature embodied in the Kansas Open Meetings Act, the Kansas Open Records Act and the prohibitions against *ex parte* communications. The notion that a state agency like CURB, in order to perform its statutory duties to protect the public interest, will have to devotedly monitor the Commission's activities on a daily basis to ensure that the public interest in fair and open proceedings is not violated is abhorrent to the principles that of open government that the public has a right to expect.

49. CURB respectfully requests that the Commission reject Staff's arguments on this issue and state explicitly in the order on reconsideration that public policy would not permit adoption of Staff's theory for why no *ex parte* communication took place, because:

--It simply cannot be the public policy of Kansas that a party may, without sanction and without penalty, engage in private communications with decisionmakers about a matter that is a subject of the docket simply because the *specific* subject of the communication is not the *specific*

subject of the most recent hearing in a docket.

--It simply cannot be the public policy of Kansas to provide numerous opportunities to the parties within the course of a docket to privately lobby decisionmakers on subject matters of the docket.

--It simply cannot be the public policy of Kansas that, in order to moot the question of whether *ex parte* communications have taken place, an administrative regulator may declare that a non-final order issued almost two years previously was a "final agency action" for purposes of determining that the *specific* subject of the challenged communications was not discussed during a period after a hearing and before final agency action in the matter.

--It simply cannot be the public policy of Kansas to deny the parties intended to be protected from *ex parte* communications the remedies provided by statute, simply because the communications are labeled confidential.

--It simply cannot be the public policy of Kansas that we value the privacy of the party who initiated prohibited *ex parte* communications over the public's interest in fair, unbiased decisionmaking and the due process rights of other parties to a proceeding.

--It simply cannot be the public policy of Kansas that we no longer value avoiding the appearance of impropriety in administrative proceedings.

50. Therefore, CURB respectfully requests that the Commission reject Staff's argument that the communications were not *ex parte* because they were made during an open window during which the specific subject of the communications was not a matter pending before the Commission.

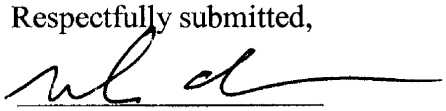
G. 51. In summary, CURB respectfully requests the Commission make a ruling on whether there were *ex parte* communications with Aquila. CURB respectfully requests that the Commission make specific findings of fact and rulings on this issue. In so doing, CURB respectfully requests that the Commission explicitly reject Staff's rationale for its assertion that no *ex parte* communications took place. CURB respectfully requests that the Commission find

that there were *ex parte* communications, and therefore hold that public policy demands that the appropriate remedy is for all the individuals involved to file a report describing the nature and substance of the meetings and place it in the record, and for the Commission to order public disclosure of the documents provided on an *ex parte* basis to the Commission.

V. Request for Relief

CURB respectfully requests that the Commission reconsider or clarify the matters discussed above, and that it provide the relief requested.

Respectfully submitted,



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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 Petition for Reconsideration, and, upon information and belief, states that the matters therein appearing are true and correct.

Niki Christopher

SUBSCRIBED AND SWORN to before me this 27th day of July, 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 document was placed in the United States mail, postage prepaid, on this 27th day of July, 2005, to the following:

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