

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Joint Application of)	
Great Plains Energy Incorporated, Kansas)	
City Power & Light Company, and Aquila,)	Case No. EM-2007-0374
Inc. for Approval of the Merger of Aquila,)	
Inc. with a Subsidiary of Great Plains)	
Energy Incorporated and for Other Related)	
Relief		

**AQUILA, INC.'S SUGGESTIONS IN OPPOSITION OF PUBLIC COUNSEL'S
MOTION TO MAKE CERTAIN DOCUMENTS PUBLIC AND MOTION FOR
PROTECTIVE ORDER**

Aquila, Inc. ("Aquila") opposes Public Counsel's Motion to Make Certain Documents Public and Request for Waiver and moves for a protective order prohibiting the declassification and public disclosure of certain confidential documents attached to Public Counsel's motion. Aquila opposes Public Counsel's motion and moves for a protective order on the grounds that these documents contain highly confidential and proprietary information that is protected from disclosure under 4 CSR 240-2.135.

1. Public Counsel Lacks Standing to Move for Declassification

Public Counsel asserts that Richard Green and Jon Empson Deposition Exhibits 4, 5, 7-9, and 11-24 ("the Exhibits") are not highly confidential documents. First, Public Counsel lacks the requisite standing to move for the Exhibits to be declassified as highly confidential. Under 4 CSR 240-2.135(2), when a party believes that information sought in discovery is confidential, it may designate the information as highly confidential or proprietary. Under subsection (2)(B), "*if the party seeking discovery* disagrees with the designation placed on the information, it must utilize the

information discovery dispute resolution procedures set forth at 4 CSR 240-2.090(8).” (Emphasis added). That subsection goes on to state, “[i]f *the party seeking discovery* continues to disagree with the designation placed on the information, it may file a motion challenging the designation.” (Emphasis added).

Public Counsel was not the party seeking discovery of the Exhibits subject to Public Counsel’s motion. Staff requested access to the information in data requests MPSC-0281, 0282, and 0292. That information was provided to the Staff, subject to objections, for its review. In the spirit of cooperation and consistent with Aquila’s past practices, it produced the requested highly confidential and proprietary information for the Staff to review. In past practices and in this case, Aquila has provided confidential board of directors’ material based on the Staff’s assurances that it would maintain the confidentiality of the documents in accordance with 4 CSR 240-2.135 and § 386.480 RSMo 2004.

Staff extended those assurances in this case in August 2007 after the documents were produced and then again before the depositions of Messrs Green and Empson. After the documents were produced, Aquila agreed to allow the Staff to copy some of the documents because the Staff agreed not to copy or disseminate the information, thus maintaining the confidentiality of the documents. Then before the depositions, Staff met with Aquila counsel where they discussed the confidential documents that would be introduced as exhibits at Messrs Green’s and Empson’s depositions. During that meeting, Aquila’s counsel indicated its desire to maintain the confidentiality of the documents during the deposition. Staff agreed. Again, Staff requested the

documents and made no objection to the highly confidential designations, and therefore, Aquila agreed to allow Staff to utilize the Exhibits during the depositions of Messrs Green and Empson.

At no time did Public Counsel request access to these confidential documents. Public Counsel had every opportunity to submit discovery requests seeking the same information, which would have triggered the procedural requirements in 4 CSR 240-2.135. Therefore, because Public Counsel was not the party seeking this discovery, it lacks standing to now argue in the eleventh hour that these Exhibits should be declassified.

2. Public Counsel Fail to Comply with the Discovery Dispute Procedures

Next, as Public Counsel admits in his motion, he did not comply with the dispute resolution procedures outlined in 4 CSR 240-2.090(8) in accordance with 4 CSR 240-2.135(2)(B). Under section 4 CSR 240-2.090(8), the Commission will not entertain any discovery motions until counsel for the moving party, in good faith, 1) confers or attempts to confer with opposing counsel to resolve the discovery dispute prior to filing a motion; and 2) if that process fails, counsel for the moving party is required to arrange a telephone conference with the presiding officer and opposing counsel to discuss the discovery dispute. Neither of these two requirements were met or even attempted.

Public Counsel argues that it was not provided the documents until December 1, when the transcripts of the depositions were made available. This argument lacks merit. Under § 386.480, Public Counsel had access to the Exhibits as early as August

2007 when Aquila produced the information to the Staff and posted the responses to the data requests in the electronic data room, notwithstanding the fact that Public Counsel could have submitted a data request requesting access to the same information as early as April 2007 when the application was filed. Public Counsel, however, chose not to review the materials produced.

If Public Counsel truly had a vested interest in declassifying the documents, he could have made the request in August and followed the Commission rules and procedures related to discovery disputes. Nonetheless, Public Counsel made no attempt to discuss these documents or their confidential designations during or after the depositions of Messrs Empson or Green. Public Counsel had nearly a week to follow up with Aquila's counsel to discuss the designations, but he failed to do so. Indeed, Public Counsel had constructive access to the documents for several months and failed to raise this issues in a timely manner, and therefore, its request for waiver of 4 CSR 240-2.090(8) should be denied. In addition, because Public Counsel failed to comply with the discovery procedures outlined in the commission rules, its motion to declassify these Exhibits should also be denied.

3. The Exhibits Were Properly Designated as Highly Confidential

Assuming *arguendo*, that the Commission finds that Public Counsel has standing to bring this motion or was a party to the discovery of these Exhibits and that the discovery rules can be waived, the Commission should deny Public Counsel's motion on the merits. Public Counsel argues that the Exhibits are not highly confidential in accordance with 4 CSR 240-2.135. This argument is unfounded.

The Exhibits can be divided into three categories: 1) Aquila's board of director's material handed out during the board of directors meetings (Exhibits 4, 19, and 23); 2) Aquila's board of director's minutes of its meetings (Exhibits 7 and 8); and 3) emails to and from Mr. Green and the Aquila board of directors (Exhibits 11-18 and 20 and 22).¹ Each of the Exhibits identified in these categories is highly confidential under 4 CSR 240.2-135(1)(B)(5) and/or (6)². Exhibits 9, 21, and 24, however, can be declassified because they are not confidential.

- Exhibit 4 is materials prepared for a January 20, 2007, special board meeting. These documents contain strategies employed, to be employed, or under consideration in the merger negotiations. In addition, several references are made to confidential information that a third party provided to Aquila. Aquila is bound by confidentiality agreements to protect this information from public disclosure, and releasing that information could be considered a breach of that agreement.
- Exhibit 19 is materials provided to the board at the February 6, 2007 meeting. It also, in its entirety, contains strategies employed, to be employed, or under consideration in the merger negotiations. It also contains reports and other documents related to work produced by external advisors, Lehman Brothers and Evercore Partners. The exhibit also contains the work product of the board of directors' counsel advising

¹ Exhibit 5 does not fall into any of these categories and will be discussed separately.

² Subsection (1)5. protects reports, work papers, or other documentation related to work produced by internal or external auditors or consultants and Subsection 6. protects strategies employed, to be employed, or under consideration in contract negotiations.

it with respect to the merger agreement and its duties under that agreement. Again, Aquila is obligated to protect the advisors' materials from public access under a confidentiality agreement. Therefore, releasing this information to the public would subject Aquila to a breach of the confidentiality agreement.

- Exhibit 23 is a letter from Mr. Green to the Aquila directors. It too, in its entirety, contains strategies employed, to be employed, or under consideration in the merger negotiations.
- Exhibits 7 and 8 are minutes of the board meetings, which by their very nature are highly confidential documents created with an expectation of privacy and should not be released to the public. But these particular minutes, in part, contain strategies employed, to be employed, or were under consideration in the merger negotiations. However, the first three paragraphs in Exhibits 7 and 8 can be declassified.
- Exhibits 11-18 and 20 and 22 were emails sent to and from various board of directors, including Mr. Green. Each of these emails in its entirety, contain strategies employed, to be employed, or under consideration in the merger negotiations. In addition, Exhibits 11, 12, 13, and 14 contain information about other bidders, which Aquila agreed not to disclose publicly. Exhibit 15 summarizes Great Plains Energy's non-binding indication of interest for the acquisition of Aquila as outlined in Exhibit 5, Mr. Chesser's November 21, 2006, letter to Aquila's advisors, Lehman

Brothers and The Blackstone Group L.P. This email, as well as Exhibit 5, are protected from public disclosure under the confidentiality agreement Aquila entered into with Great Plains Energy. Finally, Exhibit 22 is a candid discussion between the Aquila board of directors which discloses information about Aquila's advisors as well as its negotiation strategies.

Indeed, all of these Exhibits are properly designated as highly confidential documents, and thus should remain confidential free from public disclosure. Furthermore, these Exhibits are all proprietary in that they contain confidential and private technical, financial, and business information.

4. Aquila Will Suffer Great Harm if the Documents are Declassified

Finally, the commission should use a balancing test in weighing the public interest against any harm the company will suffer if the information is disclosed to the public. First, board materials, minutes, and emails are routinely treated as confidential because they contain a company's proprietary information. Moreover, these documents contain particular sensitive information. This type of information has routinely been protected from public disclosure by this Commission as well as other commissions. Public disclosure of this information would reasonably be expected to have a seriously adverse effect on, or be prejudicial to, the interest of Aquila and other regulated utilities.

Next, disclosure would have a chilling effect in the board room. Board members expect that their discussions in the board room will be kept in confidence, and

declassifying these documents would compromise the board's ability to engage in candid conversations or, more importantly, memorializing information that would assist it in making important decisions. Moreover, confidentiality agreements between Aquila and the bidders and advisors would be compromised if the Commission declassifies these Exhibits because these third parties expect that Aquila will maintain the confidences of their documents and proprietary information. Disclosing this confidential information would also have a chilling effect on the bidding process because bidders expect their bid and identity to remain confidential. Lastly, if this transaction fails to close and the process begins again, Aquila's proprietary information is available to the public as well as its contract negotiation strategies, which could have a damaging effect on Aquila. Therefore, the harm Aquila will be subject to if these documents are declassified far outweighs any benefits the public may have in their disclosure.

In conclusion, Aquila's highly confidential deposition exhibits should remain confidential because 1) under 4 CSR 240-2.135, the party who sought the discovery of these documents, the Staff, has not complained about their confidential designation; 2) Public Counsel failed to comply with the 4 CSR 240-2.090(8) even though he had plenty of opportunity to do so; 3) the documents were properly designated as highly confidential; and 4) the harm of disclosure far outweighs any benefit the public may have in releasing the documents.

WHEREFORE, Aquila requests that Public Counsel's Motion be denied, except for those portions of the exhibits which may be properly declassified as they are not

subject to protection under 4 CSR 240-2.135(1)(A) or (B) and for a protective order prohibiting the declassification and public disclosure of the Exhibits 4, 7, 8, 11-20, 22, and 23.

Respectfully submitted,

/s/Renee Parsons

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on this 4th day of December, 2007, to the following:

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