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State of Utah
DEPARTMENT OF COMMERCE
Office of Consumer Services

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To: Utah Public Service Commission

From: Office of Consumer Service
Michele Beck, Director
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Date: July 18, 2016, 2016

Subject: In the Matter of Potential Amendments to Utah Administrative Code R746-100. Docket No. 16-R100-02

Introduction and Background

On May 17, 2016, the Public Service Commission (Commission) issued a Request for Comments in the above entitled docket. The Commission stated that it had undertaken a review of Utah Administrative Code R746-100 titled "Practice and Procedures Governing Formal Hearings". The Commission's review revealed five concerns:

1. Some of the rule sections needlessly duplicate statutory language.
2. Some of the rule sections do not set forth a requirement, process, or prohibition applicable to public utilities. Rather, these sections provide lengthy explanations of the Commission's internal procedures—for example, the office procedure for numbering dockets.
3. In general, the language is unnecessarily complicated, repetitive, and wordy.
4. In general, the numbering system is awkward and inconsistent.
5. Some of the specific requirements, which were promulgated decades ago, are no longer necessary.

The Commission proposes to remedy these concerns by repealing and re-enacting the rules governing its administrative procedures. To that end the Commission prepared an initial draft and requested comments regarding the proposal be submitted no later than Monday, July 18, 2016, and reply comments no later than Monday, August 15, 2016.

In accordance with the Commission's schedule the Office of Consumer Services (Office) submits the following comments.

General Comments

The Office supports the Commission's efforts to clarify and clean up this rule. However, the Office has two overarching concerns.

First, the purpose of rules entitled "Public Service Commission's Administrative Procedures Act Rule" should be to allow parties or individuals to gain an overall understanding of how to participate in Commission proceedings. While the Office understands a desire not to be duplicative of other governing statutes, by simply referencing those statutes and removing specific instructions for operations at the Commission these rules add complexity for the less experienced individual or party who would try to participate in this system. Thus, the Office asserts that the goal of reducing complexity has not entirely been met.

Second, the Office asserts that this sort of "clean up" of the rule should strive to match the practical realities of processes in front of the Commission, unless the Commission desires to clarify that the practice should more closely match the rule. The Office has concerns that some of the rule changes appear to create substantive changes in operations of Commission dockets. We will discuss specific examples in the section that follows. The Office suggests that the substantive changes included in this rule change could benefit from additional discussion and clarification.

Specific Comments

The Office presents its comments regarding specific sections of the proposed rule change in chronological order below.

1. R746-1-104

The Office is concerned that the Commission is quietly changing complaints from formal to informal proceedings. First, the Office is unable to fully assess whether an informal proceeding provides customers and parties with the current level of rights and protections, or whether this change fundamentally impacts those protections. Second, the Office is concerned about whether informal proceedings will allow other parties to participate in the case when the individual complaint has implications that go beyond the specifics of that case. Finally, the Office is concerned about the need to clearly communicate to customers specific details about the complaint procedures. The Office, the Division, and the Commission have communication materials describing a much different process than what is envisioned in the new rule. The Office recommends that additional discussion should take place in two formats: 1) a technical conference to discuss best practices and process improvements, both those contained in the rule change and potential additions; and 2) a careful coordination among the agencies to ensure that all communication material is accurate and updated simultaneous to the enactment of any rule change.

2. R746-1-207

This section simply states that responses to pleadings should be filed in accordance with Utah Code 63G-4-204 “unless the Commission establishes a different response deadline.” However, the Office notes that the referenced section of statute simply gives a thirty-day response period. Typically, the Commission has allowed comments thirty days after a filing and at least reply comments fifteen days following. This section is a good example where the Commission could put into rule the specifics of its own practices and provide better guidance for parties who desire to participate, rather than just referencing a statute that has a much broader scope.

3. R746-1-501

The Office is concerned about the new language in subpart (3) regarding a motion to quash in accordance with R746-1-301 (which specifies responses to motions in 30 days with replies 15 days later.) It is unclear how this timeline is consistent with the schedule in the vast majority of Commission dockets. Specifically, 45 days may put the resolution of the matter long past the time for preparation of testimony after the initial round of direct testimony.

4. R746-1-602

The Office is concerned about the practical implementation of the new subpart (2) in this section of the proposed rule. The rule does not specify a process to indicate who can allege a competitive advantage, whose burden it is to prove the allegation or the denial of the allegation, how disputes would be resolved and on what timeline. Absent better clarification of the process, this new rule could serve to undermine the participation of specific parties through unfounded disputes about competitive advantage.

5. R746-1-605

The Office would like to clarify that it is the Commission’s intent that (1)(b)(iii)(A) continues to give the Office the ability to designate representatives to receive confidential information in addition to the specification of counsel for the Office stated in (1)(b)(iii)(C). In addition, the Office is concerned about the specification that only one copy of the confidential information is given. In many cases this adds critical time to the analytical process within very time limited dockets. For example, if only one set of information is given to the Office in a docket for which we have hired experts, and the information arrives on a Friday, the Office would be required to make its own copies of the material and send via an overnight mail service likely delaying receipt by its experts until Monday. The Office urges the Commission to continue to consider more efficient methods of simultaneously distributing confidential material to all individuals designated by the Office, especially in the current environment of an ongoing high workload with frequent requests for expedited treatment of utility pleadings.

The Office is also concerned about the broad scope contained in section (2)(b). The Office acknowledges that the underlying issue in this section is unchanged from rules currently in effect and further acknowledges that current practice may not be entirely consistent with these rules. However, the Office asserts that this rulemaking change is an opportunity for the Commission to further clarify this requirement and potentially make changes to better reflect the timelines that most Commission dockets follow. In many cases, a party would be using another person's confidential information as evidence because that party initially presented it as evidence. Does the rule require that a party who is using something already introduced as evidence and labeled confidential follow this provision? Also, many dockets have short timeframes between comments and reply comments or rebuttal and surrebuttal testimony, making a ten day notification difficult or impossible.

Finally, the Office is concerned about the significant change to subpart (4)(a) regarding return or destruction of confidential information. The new proposed rule only allows counsel to retain confidential information as attorney work product. This change materially impairs the state agencies' ability to maintain continuity of their work. The attorneys who represent the Office are assigned by the Attorney General's office. In most cases, those attorneys do not have the longevity or administrative staff to maintain files from one case to the next. In contrast, the Office is established by state statute to perform a specific purpose in Commission proceedings. The Office should be able to maintain files, treating confidential information appropriately, to ensure continuity and to carry out its statutory duties.

Overall, these rules propose many substantive changes regarding the treatment of confidential information. To help ensure that these rules reflect best practices and do not materially undermine the statutory roles of certain agencies the Office recommends that the Commission give careful consideration to these changes before enactment. At a minimum, the Commission should hold a technical conference to further discuss how to best protect the public interest.

6. R476-1-801(3)(4)

The Office acknowledges that the underlying provision is in current rule. However, the Office believes this provision is inconsistent with state law and recommends the rule change provides a good opportunity to remedy the inconsistency. The provision states that a petition for reconsideration is not required for a party to exhaust its administrative remedies prior to appeal. Utah Code 54-7-15 deals with judicial review of Commission matters. 54-7-15 (2)(b) states that an "applicant may not urge or rely on any ground not set forth in the application [for rehearing] in an appeal to any court. Thus, if someone were to rely on R746-1-801(4) in failing to seek Commission reconsideration or review prior to appeal they would have, in effect, nothing they could present the appellate court. In addition there is case law that is consistent with this view. See for instance *Beaver v Quest, Inc 331 P.3d 1147 (2001) ¶ 30 "[T]he parties' failure to request rehearing before*

the PSC leave the Court without subject matter or the petition" citing Williams v Pub. Serv. Comm'n 745 P.2d 641,48-49 (Utah 1988)

Recommendations

The Office recommends as follows:

1. That the Commission establish a technical conference following the first round of responses so that all interested parties can clarify their concerns and hear from the Commission regarding the proposed change to the rules. Because the proposed changes are extensive more than one technical conference may be appropriate. The Commission may also want to consider adjusting the current schedule in this docket to allow time for technical conferences and discussion to better understand and clarify positions of parties and the Commission. This will help ensure that the final rule changes are in the public interest.

2. That the Commission eliminate proposed rule R746-1-801(4)

3. That customer complaints and related matters retain the robust protections currently provided and that the public communication materials of the Commission, the Division and the Office be modified as necessary to accurately describe the complaint process.

4. That in attempting to simplify the rules the Commission not so dilute the explanatory materials that the public is given insufficient guidance on Commission procedures. For instance, response times under R746-307 and the burden of proof under R746-602

5. That the rules unambiguously direct that the designated Office personnel and consultants receive copies of all confidential material directly from the entity providing that material and that the Office be able to retain confidential material in its files following the completion of a docket,