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Before the Public Service Commission of Utah

In the Matter of Potential Amendments to Utah Administrative Code Rule 746-100	Docket No. 16-R100-02 Comments of The Office of Consumer Services

Pursuant to Utah Code Ann. § 54-10a-301 and Administrative Code r476-100, the Office of Consumer Services submits these Reply Comments.

INTRODUCTION

On May 17, 2016, the Utah Public Service Commission ("Commission") issued a request for Comments in docket 16-R100-02, stating that it had undertaken a review of Utah Administrative Code R746-100 entitled "Practices and Procedures Governing Formal Hearings" that revealed several deficiencies with the Rule as it now stands. Accordingly, the Commission requested comments on the Rule's proposed amendments. Pursuant to this request for Comments, on July 18, 2016, comments were submitted by the Division of Public Utilities ("Division"), the Office of Consumer Services ("Office"), Questar

Gas Company (Questar), the Utah Rural Telecom Association ("URTA"), PacifiCorp d/b/a Rocky Mountain Power, and Qwest Corporation d/b/a/ CenturyLink QC. In response to these comments, the Commission scheduled a technical conference on Tuesday, October 11, 2016. Reply comments are due, today, August 15, 2016.

In these reply comments, the Office only addresses only two specific comments, one from Questar, regarding the need to file a motion to quash in conjunction with a objection to a discovery request, the other from URTA, regarding the procedures for disclosing confidential and highly confidential information. This does not mean that the Office agrees with all other issues raised in the comments submitted in this docket. It does not. Consideration of every proposed change to Rule 746-100 is best left to the technical conference. However, the Office believes that these two issues are of sufficient import that these matters should be brought to this Commission's attention prior to the technical conference.

REPLY COMMENT REGARDING THE NEED TO FILE A MOTIION TO QUASH

In its July 18th Comments, Questar notes that the record is unclear as to whether the Commission is suggesting that an objection to a discovery request must be accompanied by a Motion to Quash. However, if the Commission is suggesting that a Motion to Quash must accompany an objection, Questar opposes such an approach. Questar argues that the current procedures work well and that the proposed changes would require Commission involvement in every discovery dispute and prevent informal methods of dispute resolution.

The Office argues that the current system is not working well and that the proposed changes would eliminate many of the existing problems and would not require Commission involvement in every discovery dispute or prevent informal resolutions of discovery issues. Accordingly, regardless of whether the Commission intended to propose that an objection to a discovery request be accompanied with a Motion to Quash, the Office suggest that such an approach be included in the new Rule.

Questar argues,

> To require an objecting party to file a motion to quash for every objection will result in unnecessary administrative burden for both the responding party and the Commission. In the Company's experience, a written objection is sufficient to prompt the parties to meet and confer in an attempt to resolve the matter. In the overwhelming majority of cases, the Company has successfully resolved any conflicts related to objections without any Commission intervention.

(Questar's July 18th Comments, at pg. 3.)

However, the Office's view with respect to objections to discovery requests is not as sanguine. In the Office's experience, in far too many cases, discovery requests are met with questionable objections that eventually prompt the parties to discuss the matter but these discussions can be prolonged and unfruitful. Often these discussions lead to supplemental discovery requests, which are also subject to questionable objections and the process repeats itself. Soon circumstances overtake the ongoing dispute, written testimony on the subject of the discovery request becomes due, time schedules force the abandonment of issues due to lack of evidence before

disputes are resolved, as the hearing approaches matters of preparations take precedence over prolonged discovery disputes. In many cases, the discovery requests are either partially or fully avoided.

The instant proposal eliminates many of these problems and does not prohibit parties from resolving matters informally or require Commission involvement in every discovery dispute. It merely imposes a reasonable time frame for the resolution of disputes and correctly places the burden to resolve these issues on the responding party.

Under the proposed rule, if a responding party believes that a discovery request is objectionable, that party can institute a meet and confer with the requesting party prior to the time the discovery requests are due. The issue can then be resolved, without Commission involvement, within a reasonable time frame. If more time is needed, at the request of the responding parties, the parties can agree to a reasonable extension.

Discovery in cases before the Commission is extremely broad, given this Commission's task of regulating legal monopolies. Therefore, in most cases, valid objections to discovery requests should be rare and obvious in nature so that they can easily be resolved. By placing the burden on the responding party to initiate the meet and confer and to move to Quash if an agreement cannot be reached, the proposed Rule would discourage spurious objections that needlessly delay and add expense to the proceedings and often results in relevant evidence not being disclosed. The fact that such an approach places the burden on the responding party to initiate discussions seeking to resolve

discovery disputes and to move the Commission if the disputes cannot be resolved is appropriate. Accordingly, the proposed rule requiring the filing of a Motion to Quash with an objection to a discovery request should be adopted.

REPLY COMMENT REGARDING PROCEDURES GOVERNING DISCLOSURE OF CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION.

The URTA argues,

> **R746-1-603. Treatment of Confidential and Highly Confidential Information.**
>
> URTA proposed a modification to subsection (1)(b). Confidential and highly confidential information should not be disclosed in interrogatories or other forms of discovery, or administrative investigative requests for information or documents. Rather, confidential and highly confidential information should only be disclosed pursuant to a valid subpoena, court order, or GRAMA request.

(URTA's July 18th Comments, at pg. 6.)

This proposal constitutes a profound and unreasonable change to the manner in which this Commission, and those before the Commission, deal with confidential and highly confidential information ("confidential information".) It seeks to impose unreasonable and unworkable requirements on the disclosure and relies on extraneous proceedings that are largely legally nonsensical.

First, the requirement that a party, even a governmental party, be required to undertake extraneous procedures to uncover any confidential information implies that a party has a right not to disclose relevant information based solely on the claim of confidentiality. Otherwise, these

procedures would be unnecessary. Regulated utilities have an obligation to provide the regulators with the necessary information to allow a complete review of the utility's proposal to insure it is in the public interest. It is likely that this kind of review will frequently include confidential information. The right not to disclose information that is relevant indeed may be dispositive, in an administrative proceeding on the grounds that it is claimed to be confidential, has never been recognized by this Commission.

Second, given the large amount of information that is often designated as confidential, the requirement of undertaking extraneous proceeding to uncover this information will obviously result in a significant and needless loss of time and the increase of expense. This is particularly important for time sensitive matters such as rate cases. Because there is no legal justification for withholding all information based solely on the claim that it is confidential, the requirement of undergoing extraneous procedures will only serve to increase the burden of administrative proceedings and add to the possibility that this Commission will be deprived of critical information needed to properly exercise its statutory authority.

Third, the procedures suggested by URTA as necessary to the disclosure of confidential information are legally nonsensical. Subpoenas, for example, are a tool to bring non-parties under a Commission's or a Court's jurisdiction for the purpose of obtaining evidence relevant to a case before the Commission or Court that issued the subpoena. *See* Utah Admin. Code r746-100-10D; Utah

Rule Civ. P. 45. They have no application to parties to a case who are by virtue of their status already under the jurisdiction of the Commission or Court. Likewise, requiring a Court Order to obtain confidential information is legally dubious. Assuming that a Court would agree to run a parallel proceeding to an administrative docket simply to rule on issues of confidentiality, it is unlikely that the court would have jurisdiction to do so. Trial courts lack the jurisdiction to rule on matters under the exclusive jurisdiction of this Commission. *Beaver v. Qwest, Inc.*, 2001 UT 81, ¶ 9.

Finally, GRAMA requests are only applicable if directed at the governmental parties, the Division or the Office. However, because of their status as regulatory governmental bodies, neither the Division nor the Office is likely to have their own relevant confidential information, i.e., relevant information that "constitutes a trade secret or is otherwise of such a highly-sensitive or proprietary nature that public disclosure would be inappropriate." Utah Admin. Code r746-100-16A.1.a. Moreover, although we cannot speak for the Division, the Office has no intention of withholding any of its own relevant confidential information, if it ever possess any, until it receives a valid GRAMA requests.

In sum, URTA's proposal that the new rule require that "confidential information should only be disclosed pursuant to a valid subpoena, court order, or GRAMA request," implies that any information may be withheld from this Commission merely upon the assertion of confidentiality; would require

expensive time consuming procedures for the disclosure of necessary information; and rests on legal principles that are, at best, problematic. Accordingly, this Commission should reject the URTA's proposed changes to the Rule under consideration.

RECOMENDATIONS

The Office recommends that the proposal that a Motion to Quash must accompany an objection to a discovery request be included in the new rule. In addition, the Office recommends that the proposal that confidential information may only be disclosed pursuant to a valid subpoena, court order or GRAMA requests be rejected.

Respectfully Submitted, August 15, 2016

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