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Before the Public Service Commission of Utah

In the Matter of Potential Amendments to Utah Administrative Code R746-100 and R746-100-3	Docket No. 16-R100-01 Docket No. 16-R100-02 Final Comments of the Office of Consumer Services
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Pursuant to Utah Code Ann. § 54-10a-301 and Administrative Code r476-100, the Office of Consumer Services (Office) submits these Final Comments.

BACKGROUND

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 that revealed several deficiencies with the existing Rule and proposing several amendments. On July 18, 2016, Comments were submitted by the Office, the Division of Public Utilities (Division), 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 (CenturyLink). Several

of these Comments requested this Commission to schedule a technical conference to discuss the proposed amendments and merge the docket with docket 16-R100-01, regarding the proposal to amend the Rule 746-100-3 to allow for paperless filing. On August 1, 2016, in response to these Comments, this Commission scheduled a technical conference to be held on October 11, 2016, in both the dockets 16-R100-01 and 16-R100-02. The Office submitted Reply Comments on August 15, 2016.

At the October 11th technical conference, discussions were held on the Commission's proposed amendments and the Comments submitted by the parties. However, no final determination was reached. On October 14th, 2016, the Commission issued a Notice of Opportunity to File Concerns and Questions Regarding Available Protocol for Paperless Filing. On October 20th, 24th, and 25th, Rocky Mountain Power, CenturyLink and Questar, respectively, filed their questions and concerns regarding paperless filings protocol. On November 8, 2016, this Commission filed a Response to Concerns and Questions Regarding Available Protocol for Paperless Filing and Request for Final Comments Regarding Proposed Rule 746-100. As part of this filing, this Commission proposed several amendments to Rule 746-100. Pursuant to this request, the Office hereby files these Final Comments.

PROPOSED CHANGES

In these Final Comments, the Office proposes both substantive and stylistic changes to the proposed amendments to Rule 746-100. The substantive changes will impact the manner in which proceedings are conducted before this Commission and may be contested by some parties. The stylistic changes merely impact the wording of the rule and are likely to be uncontested.

A. Substantive Changes.

R746-1-501 Discovery. The Office asserts that the suggested changes regarding objections to discovery requests presented in the newly proposed amendments are grossly insufficient to redress the current problems with objections that were raised in the Office's August 15th Reply Comments and were discussed at length during the October 11th technical conference.

Specifically, in the context of arguing whether an objecting party should be required to file a motion to quash with its discovery objection, the Office observed:

[I]n 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 constraints 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 discovery request are either partially or fully avoided.

(Office's August 15th Reply Comments.) At the technical conference, several parties argued that the problems identified by the Office relate more to the timing of the resolution of discovery request rather than what party has the burden to move this Commission for resolution of discovery disputes.

Counsel for CenturyLink suggested an intriguing solution to the problems raised by the Office. Rather than focusing on which party should be required to move this Commission for resolution of discovery disputes,

CenturyLink suggested that objections to discovery request should be required to be served several days prior to the date the discovery response is due to allow the parties to promptly resolve any disputes. If the parties cannot resolve the disputes informally, either party can move the Commission and proceedings on discovery disputes would be conducted on an expedited basis.

While the Office cannot assert that during the technical conference an agreement was reached on this point, it appeared that a consensus was reached that CenturyLink's proposal represents the best approach to resolve the issues raised by the Office. Indeed, the Commission's proposed amendments allow, but do not require, such an approach. Specifically, this Commission's proposed amendments provide: "On request from a party or on the presiding officer's own initiative, the presiding officer may include in a scheduling order deadlines for: . . . (b) objecting to discovery requests. . . . (f) filing . . . evidentiary motions." Proposed Rule 746-1-501(3)(b) and (f).

However, the Office believes that such an approach is insufficient to handle the Office's concerns and, in fact, could exacerbate the problems identified by the Office. Therefore, the Office suggests that the following language be added to Rule 746-1-501:

(3) Unless otherwise agreed by the parties or ordered by the Commission, objections to discovery requests are to be served on the requesting party no later than:

- (a) five days after the discovery request is served, or
- (b) two days after identifying the basis for the objection.
- (4) If the objection is served more than five days after service of the discovery request pursuant to R746-1-501(3)(b), the objection shall be accompanied by a written explanation as to why the basis for the objection was not discovered timely, failure to promptly review the discovery requests is an insufficient basis for not serving the objection within five days.
- (5) If an objection is only directed at a portion of the discovery request, the responding party must timely answer the remainder of the request not implicated by the objection.
- (6) Failure to comply with Rule 746-1-501(3), (4) or (5) will result in the waiver of the objection.
- (7) Discovery disputes will be heard on an expedited basis.

The above language will provide a default position for objections to discovery request that is significantly preferable to the approach taken in the proposed amendments. First, because the problems with objections to discovery requests occur regularly, the current proposal would force the Office and other parties to file briefs arguing for limitations on objections prior to almost every scheduling conference, resulting in unnecessary and repetitive filings wasting state resources.

Also, because the scope of discovery in proceedings in front of this Commission is exceedingly broad, valid objections to discovery requests should be rare. Therefore, the suggested procedures are not likely to place any significant burden on responding parties. Moreover, by explicitly providing an expedited procedure for resolutions of discovery disputes in Rule 746-1, this Commission will

signal to parties its intent to prevent gamesmanship with respect to discovery issues and ensure that this Commission decides matters on the basis of a complete record.

R746-1-701 Witness Subpoenas. This Commission has proposed changes to existing Rule 746-100-10D, which deals with the authority of the Commission and its presiding officers to issue subpoenas. The proposed Rule 746-1-701 does not deal with the authority of the Commission to issue subpoenas but simply provides procedures for issuing subpoenas for hearings. This change creates the possibility for the argument that the Commission's subpoena power is limited to subpoenas for hearings only thereby significantly circumscribing this Commission's subpoena power and greatly limiting the party's ability to conduct formal discovery, pursuant to R746-1-501.

Subpoenas are clearly provided for to assist in conducting formal discovery pursuant to the Utah Rules of Civil Procedure. *See* Utah R. Civ. P. 30(b)(4). The existing rules clearly provide that the Commission and its officers can issue subpoenas to compel compliance with discovery directed to nonparties. First, existing Rule 746-100-8B, as well as proposed Rule 746-1-501(2), provide for the availability of formal discovery "according to Rules 26 through 37 of the Utah Rules of Civil Procedure." In turn, Rule 30(b)(4), of the Utah Rules of Civil Procedure, in conjunction with Rules 34 and 45 of the Utah Rules of Civil Procedure, provide for the issuance of subpoenas to compel nonparties to attend depositions on oral examination and for the production of documents and tangible things. Moreover, existing Rule 746-100-8 clearly provides for formal discovery from nonparties and

existing Rule 746-100-10D authorizes the Commission and its officers to issue subpoenas. Accordingly, under the existing rules, the Commission is clearly authorized to issue subpoenas to assist in formal discovery.

However, proposed Rule 746-1-701 by only addressing subpoenas in the context of compelling nonparties to testify at hearing creates confusion as to the ability of parties to obtain subpoenas for discovery purposes and thereby conceivably places proposed Rule 746-1-701 in direct conflict with proposed Rule 746-1-501 -- which again incorporates rules of civil procedure that expressly provide for the issuance of subpoenas to assist in discovery. Therefore, the Office proposes the following changes.

The title to Rule 746-1-701 should be changed from "Witness Subpoenas" to "Subpoenas to Compel Attendance at a Hearing." The rest of the proposed rule can remain unchanged. A new rule, 746-1-702, should follow entitled "Subpoenas to Assist in Formal Discovery." This Rule should simply read, "If the Commission grants a party the right to conduct formal discovery under Rule 746-1-501(2), the Commission may issue subpoenas to assist in discovery pursuant to the procedures contained in Utah Rules of Civil Procedure, 30, 34, and 45."

A new rule is necessary because it is extraordinarily impractical to attempt to merge the complex requirements and procedures contained in Rules 30, 34 and 45 (which include time limits at variance with those contained in proposed Rule 745-1-701, *see* Rule 34(b)(2), Utah R. Civ. P.) with the straight forward procedures contained in the proposed rule. Moreover, there is a substantial body of law on the

procedures outlined in Rules 30, 34 and 40, Utah R. Civ. P., that can provide guidance in a case where an administrative subpoena is challenged on a motion to quash. Therefore, it is best to tie the rules regarding administrative subpoenas as closely as possible to the existing rules of civil procedure.

R746-1-203. Form and Content of Complete Filing. The Office believes that a direct reference to Rule 11, Utah R. Civ. P., should be included in subsection 746-1-203(1)(d), regarding the signing of pleadings. The proposed rule 746-203-(1)(d) reads that a filing must “be signed by an individual who has read the filing and believes that it is supported in fact and law . . .” At the technical conference this language was suggested to be included to ensure filings complied with the good faith requirement of Rule 11. It was noted at the conference that Rule 11 already applied to filings before this Commission under Rule 746-100-1C., which provides: “In situations for which there is no provision in these rules, the Utah Rules of Civil Procedure shall govern, unless the Commission considers them to be unworkable or inappropriate.” Therefore, a suggestion was made at the conference that Rule 11 should be referenced in Rule 746-1-203(1)(d). Apparently, this suggestion has been rejected based on the arguments at the conference that Rule 11 applies to attorneys and Rule 746-1-203(1)(d) applies to attorneys and unrepresented parties and a reference to a rule of civil procedure would only confuse unrepresented parties.

Upon further consideration, the Office has concluded that arguments against including a reference to Rule 11 are unavailing and the failure to include a reference

to Rule 11 could arguably result in a contention that Rule 11 no longer applies to filings before this Commission. This could create significant confusion regarding the standard to be applied resulting in the opposite effect that the inclusion of the terms “is supported in fact and in law” was intended to achieve.

First, the argument a reference to Rule 11 is inappropriate because Rule 11 applies to attorneys while Rule 746-1-203(1)(d) applies to attorneys and unrepresented parties is simply incorrect. By its express terms Rule 11 applies to both attorneys and unrepresented parties. Rule 11(a)(1), Utah R. Civ. P. Second, the argument that a reference to a rule of procedure would only serve to confuse unrepresented parties is also misplaced. The propose Rule 746-1, is replete with reference to the Rules of Civil Procedure, Utah Supreme Court Rules of Professional Practice, the Utah Administrative Procedure Act, and the Utah Public Utilities Code. If the proposed language is objected to because it references another source of law, half of the proposed rules must be rejected.

Most importantly, however, is that the inclusion of the phrase that a filing “be signed by an individual who has read the filing and believes that it is supported in fact and law,” can be read as supplanting Rule 11 not incorporating Rule 11. Existing Rule 746-100-1C. provides that the rules of procedure govern in “situations were there is no provision in these rules.” Proposed Rule 746-1-105 provides that the “Utah Rules of Civil Procedure and case law interpreting these rules are persuasive authority . . . unless otherwise provided by: . . . (2) Utah Administrative Code R746 et seq.” Accordingly, both these rules provide that a Rule of Civil

Procedure can be superseded by a rule in the Administrative Code R746-1. Because the added language in proposed Rule 746-1-203(1)(d) touches on the same subject matter and uses similar language as Rule 11, an argument could be made that the new language constitutes its own rule unique from, and in place of, Rule 11.

This could create confusion as to whether the procedural aspects of Rule 11 apply under the new Rule and whether case law addressing Rule 11 is applicable in addressing the new Rule. This result is the exact opposite of what was intended when the language was proposed in the technical conference. Therefore, the Office proposes the following language: “(1) In order to be considered complete, a filing other than a complaint shall: . . . (d) in accordance with Rule 11, Utah Rule of Civil Procedure, which is incorporated herein, be signed by an individual who has read the filing and believes it is supported in fact and in law.” This language will preserve the intent of the proposed language in R746-1-203(1)(d).

R746-1-601. Identification of Information Claimed to Be Confidential or Highly Confidential in Commission Proceedings. The Office opposes the changes made in proposed Rule 746-1-601 in regards to the sequence and timing in which a party seeks additional protections for material claimed to be highly confidential. Specifically, existing Rule 746-100-161.f. provides that if a party believes that additional protective measures are necessary for highly confidential material that party “shall promptly inform the requester (Requesting Party) of the claim of highly sensitive nature of identified material and the additional protective measures requested If the Providing Party and the Requesting Party are unable

to promptly reach agreement on the treatment of the Highly Confidential Information, the Providing Party shall petition the Commission for an order granting additional protective measures.”

Conversely, proposed Rule 746-1-601(2)(a) provides: “A person that files or is requested to provide information that the person considers to be highly confidential may: (i) negotiate with the other parties mutually agreeable protections; or (ii) petition the Commission for an order granting additional protective measures.” The important substantive difference in these two provisions is the deletion of the requirement that a party claiming additional protections act promptly, both initiating negotiations and seeking a protective order. In addition, the proposed rule removes the requirement that the parties attempt negotiations prior to moving this Commission for additional protection. The Office believes that both these requirements should be retained.

First, absent the requirement to act promptly a party seeking additional protection for material claimed to be highly confidential could improperly frustrate the discovery process and delay the proceedings. Similarly, the requirement that the parties’ attempt to negotiate a resolution to the dispute over protective measures prior to moving the Commission also helps to expedite procedures and is consistent with other rules requiring parties to attempt to resolve discovery disputes informally before involving a tribunal. *See Utah R. Civ. P. 37(a)(2)(B)*. Finally, the party seeking additional protection should be required to set forth the basis for its claim whether the remedy is negotiated or petitioned for.

Accordingly, the Office recommends that proposed Rule 746-1-601(2)(a) should be changed to read: “(2)(a) A person that files or is requested to provide information that the person considers to be highly confidential shall: (i) set forth the particular basis for the claim; (ii) promptly initiate negotiations with the requesting parties to mutually agree on additional protective measures; and (iii) if an agreement on additional protective measures is not promptly reached, petition the Commission for an order granting additional protective measures.”

R746-1-605. Receipt of Confidential and Highly Confidential Information into Evidence. The Office recommends several edits to proposed Rule 746-1-605 to ensure that staff and retained experts of the Division and Office can directly receive confidential and highly confidential material and that the Division and Office can retain confidential and highly confidential material in their files. In its initial Comments, the Office argued that for reasons of efficiency and to prevent the waste of state resources, the proposed rules should reflect the current practice of allowing the Division and Office’s staff and retained experts, who have signed a confidentiality agreement, to directly receive confidential material and allowing the Division and Office to retain confidential information in their files. (Office’s July 18, 2016 Initial Comments, at pg. 3-4.) At the technical conference, these suggestions went unchallenged and the Office was left with the impression that a consensus was reached in favor of the Office’s arguments.

However, some modifications need to be made to proposed rule 746-1-605 to reflect this consensus. First, subsection 746-1-605(1)(b)(iii) must be modified to

read: “(b) A party that is not able to comply with Subsection R746-1-605(1)(a) shall: . . . (iii) ensure that the confidential section of the filing is served only on: (A) the Division, its counsel, staff and retained experts who have signed a nondisclosure agreement; (B) the Office, its counsel, staff and retained experts who have signed a nondisclosure agreement; and (C) counsel of record or other designated representative of the party (one copy each) who has signed a nondisclosure agreement.”

In addition, subsection 746-1-1(4) must be modified to read: “(b) The Division and the Office may retain confidential information as part of notes, work papers, and other documents. (c) Counsel for a party may retain confidential information as part of notes, work papers, and other documents: (i) constituting work product; and (ii) subject to privilege or other applicable disclosure restrictions.” These changes should be sufficient to bring the wording of the proposed rule in line with the consensus reached at the technical conference.

B. Stylistic Changes.

The following changes only impact the wording of the proposed rules and the Office believes that there is no substantive controversy involved in these changes. However, other parties may disagree with these proposed changes on stylistic grounds.

R746-1-103. Definitions. The Office believes that the definition section should include a definition of the term “SFTP server,” which first appears in proposed rule R746-1-203(1)(b)(ii) without explanation. Because the SFTP server

is a new term and a new concept, it would be helpful to those unfamiliar with these proceeding to define the term. The Office proposes the following language. “The SFTP server means the Secure File Transfer Protocol (SFTP) server maintained by the Utah Public Service Commission for the purpose of receiving, in a secure manner, confidential and highly confidential material.”

R746-1-105. Utah Rules of Civil Procedure. This is an extremely minor edit. However, in R746-1-105(2) the proposed rule reads “Utah Administrative Code R746 et seq.” The use of the term et seq. is inconsistent with other provisions of the proposed rule that simply refer to the entirety of the rules as R746-1. *See* R746-1-101. The term et seq. is also used in proposed Rule 746-1-103(10)(b)(ii) and 746-1-606(2). However, the use of the term et seq. has fallen out of favor in legal parlance. The Office proposes that, for consistency, the term et seq. should be removed from the rules and replaced with the title of the statute or rule that is referenced.

R746-1-106. Computation of Time. This rule simply references rules for computation of time contained in Utah Code § 68-3-7. However, the following section of the Code, section 68-3-8, also deals with the computation of time in cases where the time for filing lands on a holiday. As such, the Office believes that Rule 746-1-106 should also include a reference to section 68-3-8. Therefore, the proposed Rule should be changed to read: “Unless Subsection R746-1-106(2) applies, periods of time in Commission proceeding shall be computed pursuant to Utah Code Ann. §§ 68-3-7 and 68-3-8.”

R746-1-202. Title of Pleadings. The title of the pleadings contained in Rule 746-1-202 is inconsistent with the parallel rule of the Utah Rules of Civil Procedure, Rule 10(a)(3), and lacks the inclusion of important information, such as an email address and bar number of the attorney filing the pleading. For consistency, the Office proposes that R746-1-202(b) be changed to read: “address, telephone number and email address of the person identified in Subsection R746-1-202(a) and, if filed by an attorney, the bar number of the attorney and the party on whose behalf the pleading is filed.”

R746-1-203. Form and Content of Complete Filing. Rule 746-1-203(5)(b) provides that in the case of paper filing, the filing must be “typed in a font of at least 12 points and double-spaced . . .” However, there is no corollary for font size and spacing for documents filed electronically. For consistency, ease of reading and to prevent the manipulation of page limitations that might be placed on a filing by the Commission, the Office believes that the size of font and the proper spacing should be included in the provisions for electronic filing. Accordingly, the Office proposes that a provision should be inserted prior to subsection (4) reading “(4) pleadings filed electronically shall be in a font size of at least 12 points and double-spaced.”

R746-1-206. Responsive Pleadings. The Office asserts that the term “initial” should be inserted prior to “pleadings” in propose Rule 746-1-206 to ensure that the rule is correctly read to refer only to filings that instigate an action before this Commission. Rule 746-1-206 reads: “A response to a pleading or complaint shall be filed in accordance with Utah Code Ann. § 63G-4-204.” Section 63G-4-204

deals with the requirements for responding to filings that initiate agency adjudicative proceedings, generally, notices of agency actions or requests for agency actions. See Utah Code Ann. §§ 63G-4-201 and 63G-4-201. It is clear, therefore, that the term “pleading” in proposed Rule 746-1-206 refers to initial pleadings instigating adjudicative actions before this Commission.

Moreover, the term “pleadings” by itself is ambiguous and can be read to refer to various filing before the Commission, including motions. However, section 63G-4-204 provides for 30 days to respond to a notice or request for agency action and proposed Rule 746-1-301 provides 15 days to respond to a motion. This is another indication that the term “pleadings” in proposed Rule 746-1-206 was meant to refer only to initial pleadings. Accordingly, the Office proposes that the following language be included in Rule 746-1-206: “A response to an initial pleading or complaint shall be filed in accordance with Utah Code Ann. § 63G-4-204.”

R746-1-603(2)(b). Treatment of Confidential and Highly Confidential Information. The Office asserts that the term “within the confines of good faith” should be inserted in proposed Rule 746-1-603(2)(b). Proposed Rule 746-1-603(2)(b) reads: “(2) A person that is require by law to disclose confidential or highly confidential information outside of a Commission proceeding shall . . . (b) cooperate with the person that first provided the information to obtain a protective order or similar assurance of confidentiality.” To ensure that the Rule does not imply that counsel representing a party holding confidential and/or highly confidential information must pursue any claim counsel believes to be invalid in

cooperating with the owner of confidential and/or highly confidential material to obtain a protective order, the term “within the confines of good faith” should be inserted at the beginning of subsection 746-1-603(2)(b).

CONCLUSION

The Office submits these proposals and recommendations for the amendment of Utah Administrative Code R746-100 for this Commission’s consideration.

DATED, December 7, 2016.

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