WILLIAM J. EVANS (5276)
VICKI M. BALDWIN (8532)
CHAD C. BAKER (14541)
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

*Attorneys for Utah Industrial Energy Consumers*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

| In the Matter of an Utah Administrative Code R746-1, Amendment to Enact Provisions Consistent with the Open and Public Meetings Act, to Clarify Requirements that Apply to Persons Granted Intervenor Status, and Clarify Requirements that Apply to Attorneys Appearing before the PSC but not Licensed with the Utah State Bar | Docket No. 17-R001-01<br><br>OBJECTION<br><br>AND<br><br>COMMENTS OF UTAH INDUSTRIAL ENERGY CONSUMERS |
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In accordance with the Notice of Proposed Rule Amendment issued by the Utah Public Service Commission ("Commission") in the above referenced matter on August 1, 2017 ("Proposed Amendment"), and pursuant to the provisions of Utah Code Ann. § 63G-3-301, the Utah Industrial Energy Consumers[1] ("UIEC") hereby object to the Notice of Proposed Rule Amendment ("Notice") on the grounds that the Notice is defective, and request that the Commission either withdraw the Proposed Amendment or re-issue the Notice so that interested parties and any reviewing court can determine whether the Proposed Amendment is consistent

[1] For purposes of these Comments, the UIEC is a reference, for convenience only, of Kennecott Utah Copper LLC, Tesoro Refining & Marketing Company LLC, LafargeHolcim Ltd., and Post Consumer Brands, LLC.

with constitutional and statutory law, and within the scope of the Commission's jurisdiction and authority.

In the alternative, and without waiving the aforesaid objection, the UIEC submit the following comments on the provisions in the Proposed Amendment that would restrict the parties' ability to file comments with the Commission, and on the ambiguity in the Proposed Amendment concerning the submission of legal argument to the Commission.

**OBJECTION**

The Utah Administrative Rulemaking Act ("UARA") requires that the rule analysis in the Notice must contain "the purpose of the rule or reason for the change [in the rule]."[2] The Notice in this case is deficient because it fails to state any actual purpose or reason for Proposed Amendment. Thus, it cannot be determined what objective the Commission intends to achieve, whether that objective is in violation of constitutional or statutory law, whether it is within the Commission's legal authority, or whether there is substantial evidence to support the objective and the means that the Commission has chosen to achieve it. This deficiency also makes it impossible for parties like the UIEC, who are concerned about the effect of the Proposed Amendment, to offer comments that address the Commission's actual objective, or the proposed means to achieve it.

The Proposed Amendment introduces for the first time a restriction on intervened parties' filing comments with the Commission. The restriction is set out in three sections of the Proposed Amendment. The proposed change to R746-1-108 states:

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[2] Utah Code Ann. § 63G-3-301(8)(b).

**R746-1-108. Intervention.**

(1) …

(2) A person that is granted intervention status: (a) shall comply with the scheduling order issued in the docket; and (b) may not file public comments unless the Commission's scheduling order provides for the filing of comments by a party.

The proposed revision to R746-1-401(1) states:

**R746-1-401. Pre-Hearing Briefs, Comments and Testimony – General Requirements.**

(1) A [~~Parties~~] party to a docket [~~shall~~] may file briefs, comments, or testimony, as applicable, only as required or permitted in the Commission's scheduling order, or as otherwise directed by the Commission.

And, finally, the newly added R746-1-704(2) states:

**R746-1-704. Public Witness Evidence.**

(1) …

(2) A party to a docket may file comments only if the Commission's scheduling order provides for the filing of comments by a party.

The stated purpose for the Proposed Amendment is "to *clarify the requirements* that apply to persons granted intervenor status in an administrative proceeding." Notice of Proposed Amendment at ¶ 4(1) ("Notice"). There has never been a "requirement" that intervenors may only file comments as provided for in a scheduling order. The Proposed Amendment is, therefore, not a clarification. Instead, it imposes a *new* requirement, departing from long-standing Commission practice of accepting comments and legal argument from all parties throughout the course of a proceeding, while at the same time, failing to identify any standards the Commission must apply when deciding whether to allow comments. Thus, it is not "clarifying," but confusing, and has the effect of impeding intervenor participation in Commission proceedings, diminishing the Commission's ability to receive relevant information

necessary to effectively fulfill its obligations, and possibly violating the constitutional rights of attorneys who practice before the Commission.[3]

A proposed rule change by an agency must include a complete rule analysis that states the purpose of the rule, or the reason for the change.[4] That is so a reviewing court can determine whether the rule or rule change violates constitutional or statutory law, whether the agency has the legal authority to make the rule, or whether the rule is "supported by substantial evidence when viewed in light of the whole administrative record."[5] The requirement that the Notice identify the rationale for a proposed rule also facilitates public participation by fairly apprising interested persons of the nature of the rulemaking with sufficient clarity and particularity to allow the public to participate in the rulemaking process in a meaningful and informed manner.[6] The Commission has not stated what its objective is in precluding comments and legal argument, or why the evidence of record supports the objective or the proposed means of accomplishing the objective. This rulemaking proceeding is therefore in violation of the UARA, and any resulting rule will be invalid.[7]

The UIEC therefore, object to the Notice as insufficient to give notice of the purpose or reasons for prohibiting parties from filing comments and legal argument in Commission proceedings. The Commission should either withdraw the Proposed Amendment or, in the alternative, re-issue the Notice stating the reasons for the Proposed Amendment with sufficient

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[3] *See, infra,* n. 26 and accompanying text.

[4] *See* Utah Code Ann. § 63G-3-301(4), (8) (detailing required rule making procedure for Utah agencies).

[5] *See* Utah Code Ann. § 63G-3-602(4) (stating the grounds on which a reviewing court may declare a rule invalid).

[6] *See* the analogous federal statute at 5 U.S.C. § 553.

[7] When an agency undertakes a rule change, "the rules of an administrative agency are not valid unless the agency complies with the rule-making procedures prescribed in the Rule Making Act." Lane v. Bd. of Review of Indus. Comm'n of Utah, 727 P.2d 206, 208 (Utah 1986) (citing Williams v. Public Service Comm'n, 720 P.2d 773, 775–77 (Utah 1986)).

particularity so that a reviewing court can adjudicate a judicial challenge to the Proposed Amendment, and so that the public can meaningfully participate in the rulemaking.

**COMMENTS**

The first two sections of these comments pertain to that portion of the Proposed Amendment that prohibits parties from filing comments with the Commission unless they are allowed in the Commission's scheduling order. The restriction on filing "briefs" is addressed in Section 3 of these comments.

The Commission's proceedings must be conducted in a way designed "to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions."[8] All parties must be allowed "to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence."[9] Rather than keeping itself in the dark by precluding information, as its overriding objective, the Commission should want to glean as much information as possible from the participants as well as the public when considering matters that affect the public interest. Sworn testimony is only one way for the Commission to receive information.[10] Other sources of information, including comments from intervenors and statements from public witnesses, have always been an important means for the Commission to hear the positions, arguments, and concerns of interested persons, all for the purpose of bringing relevant information to the attention of the Commission. The Proposed Amendment is a step backwards. Any move toward excluding relevant information from Commission consideration will almost certainly result in regulation that is less informed and therefore less in line with the public interest.

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[8] Utah Code Ann. § 63G-4-206(1)(a).

[9] *Id.* at § 63G-4-206(1)(d).

[10] *Id.* at § 63G-4-206(1)(f).

### 1. <u>The Rule Apparently Does Not Serve any Legitimate Purpose.</u>

The absence of any actual reason for the Proposed Amendment begs the question, why is the Commission so reluctant to receive comments from intervenors? If the prohibition[11] on comments is meant to somehow assess the credibility of information the Commission receives, it fails because there is no basis for believing that comments of intervenors are less credible than other sources of information the Commission regularly receives. The Commission must always give due consideration to the credibility of any information submitted. If the rule is meant to ensure the prompt and orderly adjudication of proceedings, the Notice should have identified evidence showing that comments impair prompt and orderly adjudication.[12] Although the reason for the Proposed Amendment is unknown, it is clear that its effect is to keep potentially important information from the Commission, and to impede comment from intervenors who have a demonstrable interest in Commission proceedings.

#### a. <u>Restricting Comments Does Not Improve the Information Available to the Commission.</u>

The Proposed Amendment will not improve the credibility, the quality, completeness, or the full disclosure of information available to the Commission. While the Commission must make decisions based on the record, it is able to receive into the record all kinds of information for which it routinely assesses credibility and assigns weight. It may take administrative notice of facts, events, orders in other judicial and administrative proceedings, data from learned treatises, newspaper articles, none of which need to be presented through the sworn testimony of

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[11] The language in proposed R746-1-401(1) states, "<u>or as otherwise directed by the Commission</u>," but that clause is inconsistent with proposed R746-1-108 and R746-1-704(2), neither of which allow for filing comments "as otherwise directed by the Commission." A consistent reading of all three sections would appear to effectively prohibit altogether the filing of comments unless they are allowed in the scheduling order.

[12] *See, supra,* n.5 and accompanying text.

witnesses.[13] The Utah Administrative Procedures Act ("UAPA") and the Commission's rules are clear that the Commission may exclude from the record privileged material and evidence that is non-probative, irrelevant, immaterial or unduly repetitious.[14] It is not clear that the Commission has the authority to exclude other kinds of information.

The Commission regularly accepts into the record, late in the proceeding on the day of hearing, comments from unsworn public witnesses,[15] who are not known to the Commission, not subject to cross examination, and for whom the Commission usually has no way of assessing their interests or the source or credibility of the information they provide. Comments submitted by parties to a proceeding – parties with whom the Commission is familiar, and who the Commission already has determined have a significant interest in the matter under consideration – should be deemed no less credible, important, enlightening, or admissible into the Commission's record. Yet, the Proposed Amendment places public comments and intervenor comments on unequal footing, permitting the former and prohibiting the latter.

The Proposed Amendment therefore, does not appear to do anything to improve the veracity, quality, or credibility of information available to the Commission. Instead, it prevents the Commission from considering relevant information proffered in comments from a party when that same information would have been received if proffered by a public witness.

**b. Allowing an Intervenor to File Comments Does Not Impact the Orderly and Prompt Adjudication of Administrative Proceedings.**

The UAPA provides that an administrative agency may impose conditions on an intervenor's participation when "necessary for a just, orderly and prompt conduct of the

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[13] Utah Admin. Code R746-100-10(F)(1).

[14] *Id;* Utah Code Ann. § 63G-4-206(1)(b).

[15] A "public witness" is a "person expressing interest in an issue before the Commission but not entitled or not wishing to participate as a party." R746-100-2(Q).

adjudicative proceeding." Utah Code Ann. § 63G-4-207(2). Again, the Commission's Notice does not give this or any other reason for the prohibition on filing comments.

The Commission's practice has long been to accept comments into the record, treat them as unsworn statements, consider them, and assign them due weight. When intervenor comments are filed, parties who have felt the need to respond been allowed to do so in testimony or responsive comments. The fact that Rocky Mountain Power recently has moved to strike comments in other proceedings[16] is not an indication that the Commission's process has become disorderly or disrupted by intervenors filing comments. It appears to be, instead, an indication of the utility's effort to exclude opposing views instead of responding to them, and thereby keep the Commission from considering information and argument submitted by other parties. If a utility or other parties have a response to an intervenor comment, they should file it. Resistance by utilities to intervenor comments should not become a reason for the Commission to keep itself in the dark at the risk of making decisions that are less than fully informed. The Commission, instead, should ensure that the process is open and inclusive by freely accepting into the record all relevant information and viewpoints, including comments, whenever proffered, and allowing other parties to respond accordingly.

**2. Intervenor Comments are an Essential Source of Information.**

It has been said by some economists that regulation, by its nature, is imperfect because regulators have imperfect information, and because utilities naturally try to capture the regulators to assist the utility in achieving its objectives.[17] The UIEC believe that the Commission should

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[16] *See, e.g.*, Rocky Mountain Power Motion to Strike Comments of Utah Industrial Energy Consumers on the Division of Public Utilities' Final Evaluation Report on the EBA Pilot Program UIEC Comments in EBA, Docket No. 09-035-15 (Dec. 14, 2016).

[17] *See*, e.g., Albino, Dominic K., Hu, Anzi, and Bar-Yam, Yaneer, *Corporations and Regulators: the Game of Influence in Regulatory Capture*, New England Complex Systems Institute, (Oct. 2, 2013), https://arxiv.org/pdf/1310.0057.pdf, (accessed Sept. 14, 2017)

be especially vigilant in seeking out information and policy input from persons who are affected by utility actions and Commission decisions.

The Commission may receive a broad range of types of information that enable it to make decisions based on the record. It can receive documentary evidence, take administrative notice of technical or scientific facts, and even consider hearsay.[18] It is not bound by the technical rules of evidence, and "may receive *any oral or documentary evidence;* except no finding may be predicated on hearsay or otherwise incompetent evidence."[19] The law and regulations provide for expansive admission of information from all interested persons because, without it, the Commission cannot be expected to understand the impact of its decisions on the utility's customers, or how a decision might incentivize utility conduct, or what unintended consequences might follow from a decision.

Utility witnesses are employees of the utility. They must advocate the company line and provide the Commission with information that will advance the utility's objectives. They are not necessarily experts; their testimony is not any more credible by virtue of being a utility employee; the information they provide is not always complete; and the policy positions they advocate are not always sound. They cannot always foresee the adverse consequences of the positions they advocate and, if they do, they may have no obligation, and likely no incentive, to disclose them to the Commission. Yet, the utilities have vast resources, all paid for with funds collected from bill payers, that enable them to submit a mountain of data to the Commission in support of the their positions. In part due to this abundance of information, the Commission must be especially careful that the utilities' positions do not take on presumptive validity or somehow become a benchmark for other parties to rebut.

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[18] *Id.* at § 63G-4-206(1)(b).

[19] Utah Admin. Code R746-100-10(F)(1) (emphasis added).

The Division of Public Utilities ("Division"), and the Office of Consumer Services ("Office") (collectively the "Agencies") have statutory responsibilities that focus the kind of information and policy argument they present to the Commission. They are a valuable counterbalance to the utilities, but they cannot represent the interests of all customer groups or others with specific concerns. The Office, for example, has no obligation to look at the consequences of the utility's actions or Commission decisions on anyone other than residential customers and small commercial customers.[20] The Division is charged with presenting a more balanced viewpoint, but its responsibility is inherently in conflict because it must look out for the interests of both the utility and consumers.[21] Neither Agency is a bill payer, and they cannot be expected to adequately present the viewpoint of every customer class or affected interest.

We assume the Commission is interested in obtaining and understanding all of the relevant facts, all viewpoints on policy, and the positions of all interested persons when it deliberates. To that end, the Commission should want to accept all information and argument into the record that is not privileged, clearly irrelevant, immaterial, or unduly repetitious. Otherwise, it runs the risk of missing something that might lead it to unwisely implement policy, or might lead it into appealable error that it only discovers through motions for reconsideration or appeals.

Information and argument from bill payers is essential to fill the gap left when only the utility and the Agencies proffer information and argument in Commission proceedings. The Commission's historical practice of freely accepting comments from bill payers has enabled the Commission to consider information and argument on the impact of utility actions and Commission decisions that would otherwise be unavailable. To prohibit comments, or even to

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[20] *Id.* at § 54-10a-301(1).

[21] *Id.* at § 54-4a-6.

make it burdensome or inconvenient to file them, is to give even greater prominence to the utilities' agenda, and to exacerbate the imbalance between the utilities and those who are affected by the utilities' rates or practices.

### 3. Legal Argument Should Always Be Permitted.

The proposed revision to R746-1-401(1) states:

> **R746-1-401. Pre-Hearing Briefs, Comments and Testimony – General Requirements.**
>
> A [~~Parties~~] party to a docket [~~shall~~] may file briefs, comments, or testimony, as applicable, only as required or permitted in the Commission's scheduling order, or as otherwise directed by the Commission.

This rule, in its pre-Amendment form, has recently been invoked by Rocky Mountain Power ("RMP") in an attempt to exclude "Initial Comments" filed by the Association of Energy Users ("UAE") in Docket No. 14-035-114. The UAE had filed Initial Comments, which it stated were "legal in nature," not related to factual or expert testimony, and which were submitted as "unsworn public testimony."[22] RMP requested clarification of how the UAE's comments should be "handled," contending that "public comments" could only be filed by "a person not a party to the docket," and that UAE's filing amount to an unauthorized "legal brief."[23] In its "Notice of Clarification," the Commission declined to consider UAE's Initial Comments as a "legal brief," adding that "[u]nder R746-1-401, legal briefs are allowed "as required" in a scheduling order."[24] Instead, it accepted the UAE's filing as "unsworn public comments or testimony."[25]

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[22] Initial Comments of UAE, Docket No. 14-035-114 (June 8, 2017) at 1.

[23] Request for Clarification Re UAE's Filing, Docket No. 14-035-114 (July 25, 2017) at 2.

[24] Notice of Clarification Re: Utah Association of Energy User's Initial Comments, Docket No. 14-035-114 (July 31, 2017) at 2.

[25] The Proposed Amendment would, evidentially, have allowed, if not required, the Commission to exclude UAE's Initial Comments.

The Commission's Notice of Clarification appears to be a misapplication of the Rule. R746-1-401 does not say "legal" briefs, but merely "briefs." Moreover, the heading of the rule is "*Pre-Hearing Briefs*, Comments and Testimony," leaving out the word "legal." Yet, the Notice of Clarification suggests that the Commission views "legal briefs" to be subject to R746-1-401. In addition, because the Commission treated UAE's Initial Comments to be "unsworn public comments or testimony," it appears the Commission intends to subject all comments that are "legal in nature" – whether or not they are deemed to be "legal briefs" – to the same prohibition as other comments filed by an intervenor.

The Commission's application of R746-1-401, and the Proposed Amendment to the rule, reveal some troubling ambiguities. First, R746-1-401, on its face does not apply to "legal briefs." Do the terms "briefs" or "pre-hearing briefs" also mean "legal briefs?" And if so, why doesn't the Proposed Amendment say as much and avoid the ambiguity? Are all comments that are legal in nature, "legal briefs?" Moreover, what are "legal briefs?" Are they briefs filed in support of motions, or are they legal information and argument submitted to the Commission *ad hoc*, or both? Assuming "legal briefs" means any legal information or argument submitted to the Commission, what reason does the Commission have to exclude them? They are not facts, statements of policy, testimony, or evidence that comprise the factual record on which the Commission must base its decision. They are arguments made by lawyers about the law. The Commission is constrained by the state of the law whether or not the lawyers' statements are reflected in the record of Commission proceedings. So, why would the Commission refuse to freely accept legal briefs into the record? Does the Commission want to ignore them and possibly set itself up for error? This attempt to foreclose legal information and argument through

a scheduling order issued in an administrative proceeding is folly, and may be unlawful or even unconstitutional.[26]

The Notice of the Proposed Amendment fails to state any reason for the Commission refusing to accept legal information and argument unless allowed in the scheduling order, thus begging even more questions: What is the purpose for prohibiting or attempting to control the receipt or the timing of submitting legal information and argument? Where is it stated that the Commission has authority, through a scheduling order, to restrict in any manner the submission of legal information and argument?

The UIEC understand that the Commission, in the interest of managing an orderly docket, may want to set a schedule for filing and responding to dispositive motions or certain other motions that allow the Commission to reach a decision on the law at a time in the proceeding when a decision on the law must be made to proceed further. But, neither the UAPA nor the Commission's rules suggest the Commission may dictate the timing for filing other motions. And, if other motions can be filed at any time, what purpose is served by, and where is the Commission's authority for, precluding the filing of legal argument at any time when it is not accompanied by a motion?

Historically, utilities, the Agencies, and intervening parties practicing before the Commission have been allowed to submit legal argument without any corresponding motion.[27] When a legal issue arises, it is in everyone's interest that it is promptly brought to the

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[26] *See, e.g., Berndt v. California Dep't of Corr.*, No. C03-3174 TEH, 2004 WL 1774227, at *2 (N.D. Cal. Aug. 9, 2004) (addressing the constitutional standard for prior restraint of an attorney's right to present comments in administrative proceedings).

[27] *See, e,g,* Comments of UIEC on the Division of Public Utilities' Final Evaluation Report on the EBA Pilot Program, Docket No. 09-035-15 (Nov. 16, 2016); *see also,* Rocky Mountain Power's Legal Brief in Advance of the Deadline for Direct Testimony, Docket No. 14-035-114, (May 16, 2015), which was filed *without* a corresponding motion, in response to a Commission Scheduling Order (Mar. 19, 2015) (setting a deadline for *motions* and supporting briefs). Seven parties filed responses to RMP's legal brief and as a result, the Commission benefitted from an open debate about the applicable law.

Commission's attention so the Commission can avoid continuing on a path to error, and so all can be spared time-consuming and costly appeals. The UIEC understand that the Commission and other parties may not know "how to handle" legal argument filed *ad hoc*. But that is no reason to preclude it. Legal argument is always valuable to advise the Commission of the party's view of the applicable law. If another party disagrees, it should file a response. No party should ever be restricted from submitting them.

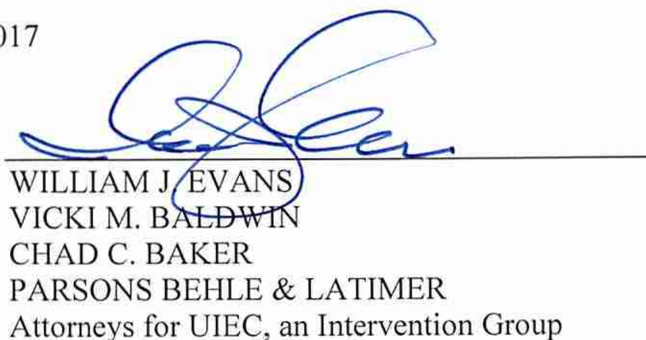
**4. Recommendations.**

The UIEC appreciate the opportunity to comment on the Proposed Amendment, and respectfully recommend:

(1) The Commission should allow any party to file comments containing information and policy argument at any time before the Commission issues a decision. Comments should be accepted into the record as information and argument reflecting the position of the party submitting them, and should be given due consideration by the Commission.

(2) The Commission should allow any party to submit legal argument at any time before the Commission issues a decision in the proceeding, with or without a corresponding motion.

DATED this 14th day of September, 2017



WILLIAM J. EVANS
VICKI M. BALDWIN
CHAD C. BAKER
PARSONS BEHLE & LATIMER
Attorneys for UIEC, an Intervention Group

**CERTIFICATE OF SERVICE**
(Docket No. 17-R001-01)

I hereby certify that on this 14th day of September 2017, I caused to be e-mailed, a true and correct copy of the foregoing **OBJECTION AND COMMENTS OF UTAH INDUSTRIAL ENERGY CONSUMERS** to:

ASSISTANT ATTORNEYS GENERAL
Patricia Schmid
pschmid@agutah.gov
Justin Jetter
jjetter@agutah.gov
Robert Moore
rmoore@utah.gov

OFFICE OF CONSUMER SERVICES
Michele Beck
mbeck@utah.gov

DIVISION OF PUBLIC UTILITIES
Chris Parker
chrisparker@utah.gov