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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

REPLY COMMENTS OF UTAH INDUSTRIAL ENERGY CONSUMERS

Docket No. 17-R001-01

Pursuant to the Response to Comments and Notice of Reply Comment Deadline (“Response”) issued by the Utah Public Service Commission (“Commission”) on September 21, 2017 in Docket No. 17-R001-01, the Utah Industrial Energy Consumers intervention group (“UIEC”)¹ hereby submits these Comments in Reply to the Response filed by the Commission.

¹ The UIEC filed its initial comments on September 14, 2017 (“Comments”). For purposes of these Comments and Reply 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.

I. REPLY TO PSC'S RESPONSE.

UIEC appreciates the opportunity to file Reply Comments in support of the Objection and Comments of Utah Industrial Energy Consumers (“UIEC Objection and Comments”) to the Notice of Proposed Rule Amendment (“Proposed Amendment”), which was filed August 1, 2017. The Commission’s Response did not address the concerns expressed by UIEC’s Objection and Comments nor remedy the Proposed Amendment’s non-compliance with the Utah Administrative Rulemaking Act (“UARA”)² and the Proposed Amendment’s infringement upon UIEC’s rights.

The UIEC’s Objection and Comments objected that the Proposed Amendment published in the Utah Bulletin failed to present sufficient information or justification for the restrictions placed on parties wishing to file comments and legal briefs. The limited information accompanying the Proposed Amendment obscured the reasons for the Proposed Amendment, the goals of the Proposed Amendment, and how the Proposed Amendment presented an acceptable method of achieving those goals. Thus deprived of a full opportunity to comment on the Proposed Amendment, the UIEC, along with raising objections and expressing concerns, explained the value that comments and legal briefs have provided in presenting information and raising issues essential to the Commission’s role in adjudicative proceedings.

The Commission’s Response expressed “one goal” that the Commission “always pursue[s] is to assess all sources of relevant information in [its] proceedings.” The Commission then declared that this goal is furthered by allowing non-parties to submit comments. Strangely, the Proposed Amendment then strips from intervenors this same

² Utah Code Ann. § 63G-3-101 *et seq.*

option unless intervenors meet what the Commission states is a practical, “modest,” burden of requesting permission to file comments or legal briefs – either through attending scheduling conferences or petitioning for leave to file or for an amendment of the scheduling order. The Commission’s Response claims that this burden on intervenors “advances both transparency and the ‘orderly and prompt conduct’ of proceedings.” As discussed in more detail below, the Commission’s Response, like the information presented in the Utah State Bulletin,³ fails to present any explanation or support for how prohibiting comments or legal briefs (unless the Commission feels inclined to grant permission for such filings), promotes transparency, orderly and prompt conduct of proceedings, or the assessment of “all sources of relevant information.”

A. The Commission’s Clarification Fails to State any Rational Reason for the Rule.

The UIEC and other parties have frequently submitted comments and legal briefs during Commission proceedings without first obtaining permission from the Commission to file them. Similarly, the Commission has a long established practice of accepting such comments and legal briefs from intervenors, even over the occasional objection of other parties.⁴ The Proposed Amendment deviates from this established practice by first

³ Utah State Bulletin, 108-110, Aug. 15, 2017, No. 16.

⁴ With respect to electric dockets only, *see, e.g.*, UAE’s Initial Comments on Rocky Mountain Power’s Compliance Filing, Docket No. 14-035-114 (June 8, 2017) (received by the Commission as “public comments;” (*see* Notice of Clarification re: Utah Ass’n Energy Users’ Initial Comments (July 31, 2017)); Rocky Mountain Power’s Legal Brief in Advance of the Deadline for Direct Testimony, Docket No. 14-035-114, (May 16, 2015) (legal brief filed *without* corresponding motion, in contravention of Commission Scheduling Order (Mar. 19, 2015) (setting a deadline for *motions* and supporting briefs); Comments of Utah Industrial Energy Consumers on the Division of Public Utilities’ Final Evaluation Report on the EBA Pilot Program, Docket No. 09-035-15 (Dec. 14, 2016) (received by Commission over Rocky Mountain Power’s Motion to Strike *see* Order on PacifiCorp’s Motion to Strike, Docket No. 09-035-15 (Jan. 12, 2017)); *see also*, Hr’g Proceedings Docket No. 09-035-15 (Jan. 17, 2017), at 13, 26–32 (discussing and affirming UIEC’s right to cross examine witness at hearing after having filed public comments); Comments of UIEC on Proposed Allocation of EBA Costs, Docket No. 13-035-32 (Sept. 13, 2013) (filed in lieu of rebuttal testimony); UIEC’s Comments on the Division of Public Utilities’ Report to the Utah Public

prohibiting comments and legal briefs from parties and then only allowing them if the Commission explicitly grants permission to file. Neither the Proposed Amendment nor the Commission's Response offers any explanation for this departure from established past practice.

Utah law prohibits agencies from departing from prior practice (in adjudicative proceedings) without adequately justifying the inconsistency. In fact, Utah law requires courts to grant judicial relief from agency action when the agency acts "contrary to [its] prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency." Utah Code Ann. § 63G-4-403(4).⁵ The same obligation to adequately justify a departure from prior practice exists when an agency attempts to use the UARA to alter prior practice. The UARA requires an agency to include a rule analysis with any proposed rule change, which must contain a statement of the purpose of the rule or reason for the change. Utah Code Ann. § 63G-3-301(8), -303(1). For a rule to be upheld on appeal, the UARA also requires that the courts find that the rule is "supported by substantial evidence when viewed in light of

Service Commission on the Collaborative Process to Discuss Appropriate Changes to PacifiCorp's Hedging Practices, Docket No. 10-035-124 (Apr. 13, 2012); Supplemental Comments of Salt Lake Community Action Program on the Low Income Arrearage Study Filed Regarding Merger, Docket No. 05-035-54 (Aug. 17, 2007); UIEC's Comments on Agreement Pertaining to PacifiCorp's September 15, 2010 Application for Approval of Amendments to Revised Protocol Allocation Methodology, Docket No. 02-035-04 (filed in lieu of direct testimony) (Aug. 18, 2011); Comments of the Land & Water Fund of the Rockies on the PacifiCorp Green Resource Tariff Proposal, Docket No. 00-035-T01 (Mar. 31, 2000); Comments Clarifying the Position of Chevron USA Products Co., Docket No. 94-2035-03 (Sept. 29, 1994). The UIEC were unable to find any instance within the past 15 years where the Commission had refused to accept into the record comments or legal briefs submitted by a party.

⁵ See *Questar v. PSC*, 2001 UT 93, ¶¶ 17–18, 34 P.3d 218 (2001) (stating judicial review is authorized to "grant a petitioning party relief from an agency decision when the agency action 'is contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency.'"). Without a justification, the Utah courts may set aside an agency's deviation from past practices. See *Questar*, 2001 UT, ¶¶ 19–20 (requiring rational basis for a PSC's deviation from past practices).

the whole administrative record,” and that the agency “follow[ed] proper rulemaking procedure.” *Id.* at § 63G-3-602(4)(a)(ii).

As stated in the UIEC Objections and Comments, the limited information accompanying the Proposed Amendment did not advance any reason for the proposed change that would restrict intervenors from filings comments and legal briefs. The Commission’s Response offers as “clarification” the assertion that imposing the “modest” responsibility on intervenors to obtain leave to file comments and legal briefs promotes “orderly and prompt” proceedings.

The UIEC respectfully disagree. It is far from evident how erecting additional procedural hurdles to an intervenor’s participation promotes “orderly and prompt” proceedings. Scheduling conferences are typically set within a week or ten days of the filing of a request for agency action. Intervention deadlines are usually set months later, often after the deadline for filing direct testimony. It is often the information developed between the scheduling conference and the intervention deadline that illuminates an intervenor’s need to participate in the proceeding or to bring to the Commission’s attention information or arguments through comments or legal briefs. To overcome the Proposed Amendment’s initial prohibition on comments and legal briefs, intervenors and potential intervenors would have to attend all scheduling conferences having even a remote connection to their interests to secure permission to file comments and legal briefs. Adding more participants and issues for resolution at a scheduling conference would seem to complicate orderly proceedings, not promote them. Similarly, efforts to amend a scheduling order later may face opposition resulting in additional motions and

argument.⁶ The potential disruption caused by additional, and potentially unnecessary, participants and motions is further compounded by the Proposed Amendment's failure to identify any standards by which the Commission will decide whether to permit or deny comments and legal briefs.

Besides the counterintuitive position that imposing procedural hurdles to advocating for legal interests advances "orderly and prompt" proceedings, the Commission does not claim that this goal is the reason for the Proposed Amendment. Nor does the Commission's Response present any evidence to suggest that the Proposed Amendment's deviation from past practice advances such a goal. Because the Proposed Amendment clearly deviates from the Commission's past practice, and because the Commission has failed to justify and support the departure or explain how the departure satisfies a legitimate goal, the Proposed Amendment is arbitrary and capricious. Accordingly, the UIEC request that the Commission withdraw the Proposed Amendment.

B. The Commission's Response Falls Short of Justifying the Proposed Amendment's Infringement on Intervenors' Constitutional Rights.

The Commission's Response to Comments and the sparse statement of purpose in the Utah Bulletin also fail to justify the burden – regardless of how minor it may be – erected to interfere with intervenors' constitutional rights to protect their legal interests. The United States' Constitutional framework requires balancing the character and

⁶ It is worth noting that intervenors' efforts to amend a scheduling order are not automatic and have faced resistance from other parties to the proceeding including arguments that intervenors' motion – although filed before the intervention deadline – should be dismissed as untimely. In the Matter of the Application of Rocky Mountain Power for Approval of a Significant Energy Resource Decision and Voluntary Request for Approval of a Resource Decision, Docket No. 17-035-40, Rocky Mountain Power's Response to Utah Industrial Energy Consumers' Motion to Stay Proceedings (Oct. 10, 2017). Although in that matter, the objection was to an intervenor's efforts to seek a stay, intervenors can reasonably expect similar opposition should parties wish to silence an intervenor's arguments.

intensity of an individual's rights against a state's justification of infringement.⁷ Even under the lowest standards of constitutional review, actions taken to deprive rights without adequate justification and support do not stand.⁸ Without a stated interest of sufficient significance to override individual rights, persons forced to adjudicate their interests through a process must be given meaningful opportunity to be heard.⁹ And once a process is established, such a process must be free of unreasoned distinctions that can only impede open and equal access[.]”¹⁰

The Proposed Amendment creates unjustified distinctions that impede intervenors – who have little choice but to participate in Commission proceedings to protect their interests – from a meaningful opportunity to be heard. The legislature's proclamation that “in all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive[.]”¹¹ essentially compels persons to intervene in commission proceedings when it becomes apparent that the proceedings may affect their rights.¹² The Commission's grant of intervention confirms that the petitioner's legal interests may be sufficiently affected and deserving of direct

⁷ See, e.g., *Boddie v. Conn.*, 401 U.S. 371, 377 (1971).

⁸ *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (reasoning that “by seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits the speech and expression upon which the courts must depend for the proper exercise of judicial power” to invalidate, on First Amendment grounds, a restriction on welfare funded lawyers from representing clients in efforts to amend or otherwise challenge the validity of welfare laws).

⁹ See *Boddie v. Conn.* 401 U.S. at 377.

¹⁰ *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996) (discussing the genesis of due process rights for parties to be free from unreasoned distinctions that impeded open and equal access to the courts, in holding that courts cannot deny a discretionary right to appeal a parental rights finding for the appellant's inability for the inability to pay for trial transcripts).

¹¹ Utah Code Ann. § 54-7-14.

¹² As discussed above, the potential impact to a petitioner's rights by the adjudicative proceeding are not readily apparent by the scheduling conference, which frequently occurs shortly after the creation of the docket and well before the deadline for intervention.

participation in a proceeding.¹³ And, as mentioned above, comments and legal briefs have proven at times to be the most appropriate vehicles for presenting arguments to effectively and efficiently protect intervenors' legitimate interests.

The Proposed Amendment first prohibits intervenors from filing comments or legal briefs, denying intervenors a right that past practice provided as well as an option of speaking that non-parties enjoy. It is only after intervenors request permission, and the Commission elects to permit them, can intervenors regain the right to voice their positions through comments or legal briefs. The requirement to first obtain permission before speaking, once intervention has been granted, amounts to a prior restraint.¹⁴ Such a prior restraint applies only to intervenors desiring to file comments or legal briefs; it does not apply to "motions," other filings, or to persons not a party.¹⁵ The Commission has failed to provide even a rational justification for these distinctions or how the disparate treatment advances the Commission's legitimate goal.

The Commission's goal to "assess all sources of relevant information in [its] proceedings"¹⁶ is consistent with the idea that often "more speech is better, . . . rarely is the public interest served by government-enforced silence, and . . . the best remedy

¹³ Utah Code Ann. § 63G-4-201(2).

¹⁴ See *Promotions, Ltd. v. Conrad*, 420 U.S. 546, 533 (1975) ("providing a brief history of cases "where plaintiffs asked courts to provide relief where public officials had forbidden the plaintiffs the use of public places to say what they wanted to say" noting that such "restraints took a variety of forms, with officials exercising control over different kinds of public places . . . and [that all] had this in common: they gave public officials the power to deny use of a forum in advance of actual expression).

¹⁵ Utah Admin Rules R746-1-203 (describing the form and content required for filing to be deemed complete); R746-1-301 (discussing timing for motions); R746-1-401 (requiring adherence to timelines for the filing for briefs, comments, or testimony if timelines for such filings are specified in a scheduling order); R746-1-704 (allowing a person not a party the opportunity to file comments any time before a hearing or provide unsworn testimony during any public witness portion of a hearing).

¹⁶ Response to Comments, Docket No. 17-R001-01.

usually is more speech not less.”¹⁷ It is far from obvious how the arbitrary distinction of a filing’s title or providing more expressive freedom to a non-party advances “transparency,” the “orderly and prompt conduct of proceedings” or the “assess[ment] of all sources of relevant information.” Because the Commission has not explained its interest in impeding intervenors’ participation in the proceedings or justified the Proposed Amendment’s restraint on an intervenor’s manner, method and content of its advocacy, the Proposed Amendment does not comply with the UARA, and it should be withdrawn.

CONCLUSION

The Proposed Amendment and the associated record fail to establish any justification for the Proposed Amendment. The result is improper notice of the Proposed Amendment, unjustified deviation from prior practice, and inadequate due process for intervenors. Because the Commission’s Response did not cure any of these flaws, the UIEC respectfully request that the Commission withdraw the Proposed Amendment.

Dated this 16th day of October, 2017.



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¹⁷ Erwin Chemerinsky, Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment, 47 Emory L.J. 859, 862 (1998) (fn.8). See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

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

I hereby certify that on this 16th day of October, 2017, I caused to be e-mailed, a true and correct copy of the foregoing **Reply Comments of Utah Industrial Energy Consumers** to:

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