

and commercially sensitive.” *Id.* Vote Solar counters that it has complied with the confidentiality requirements of Utah Admin. Code r. 746-1-601 and is “amenable to additional reasonable protections.” *Id.* at 3.

The Office opposes Vote Solar’s Motion. As written the Motion requires the disclosure of customer identification information and contemplates a third party using this information to contact customers to enquire about their electricity usage. As more fully discussed below, the Motion impinges on customers’ reasonable expectation of privacy and subjects consumers to annoyance and harassment. In the alternative, the Office moves the Commission to enter an Order granting additional protective measures by requiring Rocky Mountain Power to contact its Schedule 135 and 136 customers on the behalf of Vote Solar to notify them of Vote Solar’s intent and provide them an opportunity to participate.

Utah Admin. Code r. 746-1-601(2)

Utah Admin. Code r. 746-1-601(2)(b) provides that a party to a docket may petition this Commission for protective measures in addition to those provided in Rules 746-1-601 through 746-1-605, by setting forth (1) the basis for the claim, (2) the specific additional protective measures requested, and (3) the reasonableness of the requests. Because Rule 746-1-601(2) is similar in effect to Utah R. Civ. P., 37(a)(7), governing discovery protective orders, Rule 37(a)(7) and case law interpreting this rule are relevant to a petition for additional protective measures under Rule 746-1-601(2)(b).¹ Utah Admin. Code r. 746-1-105.

¹ The Office is an appropriate party to bring this Motion. Under Rule 37(a)(7), and its federal counter party Rule 26(c), Fed. R. Civ. P., a party whose information is sought can bring a Motion for a Protective Order. *See, e.g., Caisson Corp. v. County West Bldg. Corp.*, 62 F.R.D. 331, 334 (E.D. Pa. 1974). The Office is the representative of the residential customers, including Schedule 135 and 136 customers, in matters before the Commission. Utah Code § 54-10a-301(1). In addition, federal cases concerning Rule 26(c) are relevant to a Motion for additional protective measures under Rule 746-1-601(2)(b). Rule 746-1-106 provides that state cases deal with the Utah rules of civil procedure “and case law interpreting these rules are persuasive authority in Commission adjudications . . .” and state case law regularly rely on

(1) Basis for the Claim. As the Commission is aware, utility consumers have a reasonable expectation that their customer identification data be kept private and not be made available to third parties without the consumers consent. While in some circumstances customer lists may not be considered confidential, utility customers as captured customers of a company providing essential services stand on a different footing than customers of other companies. The recent case of *Dominion Energy's Gas Line Coverage Letter*, Docket No. 18-057-07, demonstrates both the customers' expectation of privacy and this Commission's concern over the misuse of customer information. Indeed, this Commission is presently involved in rulemaking concerning the appropriate use and manner of disclosure of utility customer data. *Proposed Rulemaking Concerning Utility/Customer Relations Regarding Third-Party Solicitation*, Docket Nos. 18-R460-01, 18-057-19 and 18-035-40. Moreover, the prospect of a third-party contacting customers to enquire about their electricity usage exposes customers to potential of "annoyance, embarrassment, oppression, or undue burden." Utah R. Civ. P., 37(a)(7). Accordingly, Vote Solar's Motion impinges on a protectable interest sufficient to justify denial of the Motion or, in the alternative, to support an Order of additional protective measures under Rule 746-1-601(2)(b).

2. Specific Additional Protective Measures Requested. The Office proposes that the Commission order Rocky Mountain Power and Vote Solar to confer and agree upon a mailer Rocky Mountain Power will send to Schedules 135 and 136 customers that meets the following requirements: (1) be on Rocky Mountain Power letter head and in a Rocky Mountain Power envelope, (2) describe the purpose of the Export Credit docket, (3) describe Vote Solar and the position it takes in the docket, (4) describe the information Vote Solar will seek from the

federal case law in interpreting analogist federal rules. *See, e.g., Carter v. Utah Power & Light Co.*, 800 P.2d 1095, 1099 (Utah 1990)(relying on federal cases interpreting Rule 26(c)).

customers, (5) provide a phone number or other contact information for Vote Solar to allow the customer to opt-in to the study, (6) provide that the customers may opt-out of the study at any point in time. Vote Solar will bear the expense of the mailer.

3. Reasonableness of the Request. This approach is reasonable from the customers' perspective because it protects customers' privacy expectations in their identification information, prevents third parties from contacting customers to enquire about their electricity usage without the customers' prior consent and allows the Commission some control over the manner the customers are initially contacted. This approach is also reasonable from the perspective of Rocky Mountain Power because it protects any confidentiality interest Rocky Mountain Power has in its customer lists and should not be significantly more burdensome than generating "anonymous customer identifiers" for each Schedule 135 and 136 customers, particularly with the expense being borne by Vote Solar. Finally, this approach is reasonable from Vote Solar's perspective because it will provide it with all information that Vote Solar is entitled to and accelerates the process of gathering the information needed to conduct the study.

Moreover, the fact that this approach requires Rocky Mountain Power and Vote Solar to undertake affirmative action to complete discovery is appropriate. Protective Orders under Rule 37(a)(7) routinely provide for the parties to undertake affirmative action to resolve discovery disputes. *See e.g. F.D.I.C. v. Brudnicki*, 291 F.D.F. 669, 673 (N.D. Fla. 2013) (requiring all potential witnesses contacted to sign confidentiality agreement); *Reid v. Richardson-Merrell, Inc.*, 37 F.D.R. 363, 363 (N.D. Ga. 1964) (requiring party to place 107,000 pages of documents on microfilm).² Accordingly, this Commission should grant the instant Motion for additional protective measures. In the alternative, if this Commission does not find the additional protective

² As explained *supra* note 1, federal cases interpreting Federal Rule 26(c), concerning protective orders, are relevant to Motions for additional protective measures under Rule 746-1-601(2)(b).

measures to be in the public interest then it should protect customer confidentiality by denying Vote Solar's motion.

Conclusion

This Commission should deny Vote Solar's Motion seeking to compel the production of Rocky Mountain Power's Schedule 135 and 136 customer list and instead issue an order for additional protective measures as proposed by the Office.

Respectfully submitted, May 7, 2019.

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