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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Rulemaking for the Use
of Information Claimed to be Confidential in
Commission Proceedings.

**COMMENTS OF THE UTAH INDUSTRIAL
ENERGY CONSUMERS ON PROPOSED
RULE r746-100-16**

DAR File No. 32867
State Admin. Rule Filing Key 148732
PSC Docket No. 09-999-08

The intervention group identified in this docket as the Utah Industrial Energy Consumers (“UIEC”), through its counsel, and pursuant to a provision at Utah Code Ann. § 63G-3-301 (11), and Utah Administrative Code R746-100-14, hereby submit the following comments to proposed Rule for the Use of Information Claimed to Be Confidential in Commission Proceedings (“Rule”).

This proposed Rule is to incorporate the Commission’s “standard” protective order into R746-100-16 to “facilitate the exchange of information as is currently done in Commission proceedings without having to wait for a party to request a protective order, wait for responses to the request and then proceed to issue a protective order.” In the following comments, the UIEC

do not address the advisability of putting the terms of a protective order in place before a party has requested one, but simply suggest that the Commission consider whether an “automatic” protective order is necessary in light of recent utility practice to request a protective order well in advance of filing confidential information.

The UIEC offer the following comments on two other aspects of the proposed Rule/Protective Order that require are of concern.

1. Enforceability of the Rule and/or Protective Order . The UIEC recommend that the Commission take the opportunity to correct a problem with the enforceability of the protective order against parties who do not sign the confidentiality agreement, typically attached to the Commission’s protective orders as Exhibit A.

The proposed Rule (and the Commission’s standard protective order) requires that persons who receive confidential information must comply with the following provision of the Rule / Protective Order:

The Nondisclosure Agreement [Exhibit A to the Protective Order] shall require the person to whom disclosure is to be made to read a copy of this rule and any applicable Protective Order *and to certify in writing that he or she has reviewed the same and has consented to be bound by the terms . . .* such agreement shall be delivered to the providing person and counsel for the providing person prior to the expert [sic] gaining access to the confidential information.

Proposed R746-100-16(A)(1)(d) (emphasis added). By signing the nondisclosure agreement, the receiving person promises to be bound by the terms and condition of the Rule and/or Protective Order.

In contrast, members of Commission, DPU and OCS staff are not required to sign the non-disclosure agreement. The Rule provides, in relevant part, as follows:

The Commission and the Division of Public Utilities, and the Office of Consumer Services, and their respective counsel and staff under and pursuant to the applicable provisions of Title 54, Utah Code Ann., the Rules of Civil Procedure and the Rules of the Commission may have access to any Confidential Information made available pursuant to this Rule or Protective Order and shall be bound by the terms of this Rule except as otherwise stated herein and *except for the requirement of signing a nondisclosure agreement.*

Proposed R746-100-16(A)(1)(c) (emphasis added). The exemption from the requirement to sign the nondisclosure agreement creates a problem of enforcing the confidentiality obligations of members of PSC, DPU and OCS staff. Although the Rule states that staff members are bound by the Rule (or Protective Order), they do not make any promise to be bound.

The Commission's statutes provide that a public utility (which includes its officers, agents or employees) may be subject to monetary penalties for the violation of a rule or order of the Commission. Utah Code Ann. § 54-7-25. Corporations other than public utilities are subject to similar penalties. *Id.* at 54-7-27. Individuals, however, including officers or agents of the

utility, and presumably including employees of the PSC, DPU and OCS, are not liable for monetary penalties for violation of Commission rules, but may be found guilty of a Class A misdemeanor for violation of a Commission order. Id. at 54-7-26 and 28. Thus, the statute does not seem to contain any provision that would give a party who had provided confidential information in a Commission proceeding under a protective order or under the proposed Rule, a right to enjoin an individual from disclosing that party's confidential information, or to sue for damages arising from disclosure in violation of the Rule or protective order. While there may be criminal penalties for disclosure in violation of a protective order (but not for disclosure in violation of the Rule), a criminal penalty would be an entirely inadequate remedy for the party whose confidential information had, or was about to be disclosed. Under the present formulation of the Rule or protective order, an aggrieved party apparently is left only with contract and common law remedies.

For individuals who have signed the nondisclosure agreement, an aggrieved party conceivably may have a right of enforcement based on the breach of the promise made in that individual's nondisclosure agreement. In the case of staff, however, who are not required to sign the non-disclosure agreement, there would be no remedy at all.

The UIEC propose that the Commission correct the problem by removing the provision in the Rule exempting staff from the requirement to sign the non-disclosure agreement. In addition, to clarify that the non-disclosure agreement is to protect the party providing the confidential information, the UIEC recommend that the language in proposed R746-100-16(A)(1)(d) and in the corresponding Exhibit A, be amended in part as follows:

.... The agreement shall contain the signatory's full name, permanent address and employer, and the name of the person with whom the signatory is associated. Such agreement shall be delivered to the providing person and counsel for the providing person prior to the ~~expert~~signatory gaining access to the Confidential Information. The non disclosure agreement ~~may~~ shall be in the following form: "Nondisclosure Agreement. I have reviewed Public Service Commission of Utah Rule 746-100-16 and/or the Protective Order entered by the Public Service commission of Utah in Docket No. XX-XXX-XX with respect to the review and use of Confidential Information, ~~and agree~~ I acknowledge that the confidentiality requirements set forth therein are for the benefit of the person providing the Confidential Information and agree to comply with the terms and conditions of the rule and/or Protective Order."

By adopting this amended language, and requiring staff to be bound, a person who has provided confidential information in a Commission Proceeding may stand a better chance of enforcing the confidentiality of that information.

Use of Confidential Information in Other Commission Proceedings. The proposed Rule and/or Protective Order provides in several places that use of confidential information will be "solely for the purpose of the proceeding in which it was obtained." R746-100-16(A)(1)(b); id. at (A)(1)(c); see also id. at (A)(7). Yet, the Rule also states that a party may use Confidential

Information in “subsequent dockets or proceedings ... in accordance with the terms of this rule...” Id. at (A)(3)(e). In that respect, the PSC, DPU and OCS staff may retain confidential information at the conclusion of a proceeding to “facilitate their ongoing responsibility.” Id. Similarly, “counsel who are provided access to Confidential Information ... may retain the Confidential Information ... as their attorneys’ work product created with respect to their use and access to Confidential Information in the matter.” Id.

The UIEC point out that the provision allowing use in subsequent proceedings apparently conflicts with the restriction that confidential information may be used “solely for the purpose of the proceeding in which it was obtained.” We recommend, therefore, the following revision to section (A)(3):

Notwithstanding any requirement in this rule that Confidential Information may be used solely for the purpose of the proceeding in which it was obtained, a party who is allowed to retain Confidential Information under this section, and Any party that who intends to use or disclose Confidential Information obtained pursuant to this rule or Protective Order in any subsequent Commission dockets or proceedings, shall do so in accordance with the terms of this rule or any applicable protective orders issued in such other subsequent Commission dockets or proceedings and only after providing notice of such intent to the providing person along with an identification of the original source of the Confidential Information.-

This proposed revision would clarify the exceptions to the prohibition against using confidential information in other proceedings.

DATED this 15th day of September, 2009.

/s/ William J. Evans

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2009, I caused to be e-mailed, a true and correct copy of the foregoing **COMMENTS OF THE UTAH INDUSTRIAL ENERGY**

CONSUMERS TO PROPOSED NEW RULE R746-100-16 to:

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