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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Rule-Making for Rule
Provisions Delineating “Complete”
Application Requirements for Rate Case and
Major Plant Addition Applications Pursuant to
Utah Code Sections 54-7-12 and 54-7-13.4

Docket No. 09-999-08

**JOINT COMMENTS OF ROCKY
MOUNTAIN POWER AND QUESTAR
GAS COMPANY ON PROPOSED RULE
R746-100-16**

Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power”), and Questar Gas Company (“Questar Gas”) (collectively the “Energy Utilities”) respectfully provide these joint comments and suggested amendments to proposed rule R746-100-16, Use of Information Claimed to Be Confidential in Commission Proceedings (“Rule”), published in the Utah State Bulletin on August 15, 2009. These comments and suggested amendments are

provided pursuant to Utah Code Ann. § 63G-3-301(11) and to the Notice of Proposed Rule, DAR File No. 32867, Utah State Bulletin, August 15, 2009, Vol. 2009, No. 16, page 36.

I. INTRODUCTION

The Rule was developed during the pre-rulemaking process for the proposed 7XX series rules also published on August 15, 2009. As a result, the Energy Utilities have had opportunity to provide comments and suggestions on some aspects of the proposed Rule during its development. The Energy Utilities appreciate the Commission's willingness to consider their positions during the pre-rulemaking process and particularly appreciate the Commission's adoption of some of those positions in the Rule. Nonetheless, the Rule includes a number of changes from the latest draft reviewed in the pre-rulemaking process, some of which have raised new issues. The Energy Utilities provide these comments to address new issues or to provide additional perspective on issues previously reviewed.

The Energy Utilities are providing a number of suggestions on the Rule. Most of the suggested changes are nonsubstantive; however, a few are substantive. The nonsubstantive suggestions are not intended to change the rights or obligations of any person under the Rule. The nonsubstantive changes involving renumbering and reorganization of the Rule are sufficiently extensive that a comparison of the Energy Utilities' suggested changes with the Rule may be confusing. Therefore, Attachment 1 to these comments is a clean version of the Rule with the Energy Utilities' suggested changes, both substantive and nonsubstantive, incorporated. A computer-generated redline comparing the Rule as published by the Commission with the Energy Utilities' suggested changes is Attachment 2 to these comments.

The Energy Utilities recognize that substantive amendments would require republication of the Rule in the Utah State Bulletin and a further comment period under Utah Code Ann. § 63G-3-303. There is no deadline for adoption of this Rule, so the Energy Utilities respectfully

encourage the Commission to make the suggested amendments and to republish the Rule for another round of comments. The Energy Utilities would also be willing to participate in a public meeting or hearing on the Rule to further explain and discuss their suggested changes.

II. COMMENTS

A. General

The Energy Utilities fully support the adoption of a rule that will largely take the place of the standard form protective order issued in most Commission proceedings. Even though entry of the standard protective order is relatively routine, the requirement of having it issued sometimes causes delays in providing confidential information to the Commission and interested parties. In addition, having the protective order issued in each case imposes an unnecessary burden on the Commission and the moving party, albeit a relatively small one.

On the other hand, converting the protective order to a rule reduces its flexibility. Accordingly, it is important to make the effort to “get it right the first time” to the extent possible. The increased scrutiny of the process for provision, protection and use of confidential information in connection with this rulemaking is appropriate and justified, but such increased scrutiny should not result in unnecessarily burdensome requirements. If a relatively simple process has worked satisfactorily in the past, there is no reason to make it more cumbersome. The Energy Utilities appreciate the fact that the Commission has generally not accepted suggestions of some interested parties during the pre-rulemaking process that would have made the process of dealing with confidential information unnecessarily burdensome. Nonetheless, the Energy Utilities have identified a few substantive problems with the Rule that are discussed below and respectfully request that the Commission make the substantive amendments to the Rule shown in Attachments 1 and 2.

In addition, in reviewing the Rule, the Energy Utilities believe it can be streamlined by eliminating duplicative references. The Energy Utilities also believe the Rule will be easier to understand if it is renumbered and reorganized. Accordingly, the Energy Utilities respectfully request that the Commission make the nonsubstantive amendments to the Rule discussed below and shown in Attachments 1 and 2.

B. Specific Substantive Comments on Rule Provisions

1. Presumption of Confidentiality and Nature of Confidential Information

In an apparent effort to address a concern that some parties may overuse designation of information as confidential in Commission proceedings, R746-100-16.A.1.a¹ of the Rule was changed from the pre-rulemaking draft to include statements discouraging confidential designation of material that may not be confidential. The Energy Utilities have no objection to a statement in the Rule that information should only be designated as confidential if a good faith basis exists for believing that it should not be disclosed publicly. However, this section of the Rule goes beyond such a statement and might be viewed as essentially nullifying the presumption that information designated as confidential is confidential unless and until it is demonstrated to the satisfaction of the providing party or the Commission that it is not confidential. The section also could be deemed to excuse a failure to treat information as confidential if a later determination is made that the information was not or is no longer confidential. For example, the section characterizes a designation of information as confidential as a request for confidential treatment of the information. Although later sections of the rule make it clear that information designated as confidential and produced under the terms of the

¹ References to the provisions of the Rule in these comments are to the provisions as numbered in the proposed Rule rather than the renumbering suggested by the Energy Utilities in Attachments 1 and 2 except where specifically noted.

Rule must be treated as confidential unless and until the parties agree or the Commission orders that the designation may be removed, *see, e.g.* R746-100-16.A.2.b-c (renumbered as R746-100-16.D.2-3 in Attachments 1 and 2), the statements in this first section of the rule create the opposite impression and may lead to confusion or misunderstanding.

In addition, the initial sentence of the section assumes that a party will only provide confidential information if required or requested to do so. Parties often *choose* to provide confidential information in testimony or to use confidential information in cross examination in support of their cases.

Finally, the Energy Utilities believe that the Rule should be clarified to indicate that information may be designated as confidential information if the information constitutes a trade secret or is otherwise of such a sensitive or proprietary nature that public disclosure would cause competitive disadvantage or financial harm to the providing party, that public disclosure is contrary to the providing party's agreement with a third party to maintain the confidentiality of the information, that public disclosure is contrary to the public interest in maintaining security of facilities or services, that the information is private information of the providing party, its employees or agents or its customers or suppliers, or that other good cause exists for preventing public disclosure of the information.

The Energy Utilities respectfully propose changes to R746-100-16.A.1.a (renumbered as R746-100-16.A.1 in Attachments 1 and 2) to address these issues.

2. Retention and Use of Confidential Information in Another Proceeding

The Energy Utilities disagree with the two aspects of R746-100-16.A.3.e. The first is that an attorney for a party may retain confidential information following conclusion of a proceeding. The justification offered for this exception to the requirement that confidential information be returned to the providing party or destroyed was that the attorney needed to retain

the confidential information as part of his or her work product or for professional responsibility reasons. While that may be correct with regard to non-verbatim notes or analyses made on the basis of the confidential information prepared by the attorney or expert for the receiving party, it is not correct with regard to the confidential information itself. There is no rule of professional responsibility that requires an attorney to retain confidential information provided by another party in a matter. To the contrary, it is common practice that confidential information produced under protective order must be returned at the conclusion of a proceeding whether held by a party or the party's attorney.² While this requirement may have been overlooked or excused at times in the past, the Rule should not eliminate the duty of an attorney to return or certify that he or she has destroyed confidential information received in the course of a proceeding unless the providing party agrees to waive that provision in a particular instance.

The second aspect of R746-100-16.A.3.e that the Energy Utilities disagree with is the last sentence that allows any party to use confidential information provided in one proceeding in a

² See, e.g. *Yesilada Kredi Ve Yatirim Ltd. v. Whitmore*, 8:05CV01, at *2 (D. Neb. Oct. 7, 2005) (Loislaw.com) (granting protective order requiring that “[u]pon final resolution of this case, Plaintiff shall return all copies of the ‘confidential information’ to Defendant and shall not keep any copy of same, nor shall any agent, attorney, or expert of Plaintiff”). See also *Allen v. Pennsylvania Society for Prevention of Cruelty to Animals*, 1:06-CV-0247, at *5 (M.D. Pa. Aug. 10, 2007) (Loislaw.com) (granting protective order pursuant to which “[a]ll ‘confidential’ discovery materials . . . including originals, copies, abstracts or summaries thereof, shall be returned at the conclusion of the lawsuit to the attorney for the party that produced the material, and no copies thereof shall be retained by any other person or entity”); *Lendingtree v. Lowermybills, Inc.*, 3:05CV153-C, at *15 (W.D.N.C. Oct. 3, 2005) (Loislaw.com) (approving protective order that required that, following final termination of the action, “each party shall assemble and return, or destroy and certify destruction of, all materials containing information designated confidential or highly confidential—attorneys’ eyes only, including all copies, extracts and summaries thereof”); *Dial-Thru International Corp. v. Q Comm International, Inc.*, 2:04CV00660 BSJ, at *7 (D. Utah July 12, 2005) (entering protective order pursuant to which, upon termination of the action, “counsel for the parties shall assemble and return to each other all documents, materials and deposition transcripts designated as confidential and all copies of same, or shall certify as to the destruction thereof”).

different proceeding subject only to the requirements that (1) the information still be treated as confidential and (2) the providing party be notified that the information will be used, identifying the original source of the information. This provision undermines premises on which confidential information is provided—that it will be used only for purposes of the proceeding in which it is provided and that it will be returned to the providing party or destroyed at the conclusion of the proceeding. If confidential information is returned or destroyed, it cannot be used in another proceeding.

The authorized retention of confidential information by the Commission and the Division of Public Utilities (“DPU”) puts them in a special category with respect to this issue. They legitimately have the information. Nonetheless, the first premise underlying the provision of confidential information is still violated by their use of the information in a different proceeding. The Energy Utilities do not object to the Commission or DPU requesting permission to use confidential information provided in one proceeding in a different proceeding of the same public utility, but they do object to it using the information in a different proceeding of the same public utility without obtaining permission from the providing party. In addition, they object to the DPU using confidential information obtained in a proceeding of one utility in a proceeding of a different utility without permission of the utility that is the subject of the proceeding.

The Energy Utilities note that experts retained by the Commission or DPU are not in a special category on this issue. They are not entitled to retain confidential information after conclusion of a proceeding in which it was provided and, therefore, should not have the information available for use in a different matter. Likewise, the right to retain and request permission to use confidential information in a different proceeding should be restricted to employees of the Commission and DPU. Once persons have left employment with the

Commission and DPU, they should no longer have access to confidential information retained by these agencies for any purpose.

The Energy Utilities do not agree that the Office of Consumer Services (“OCS”) should be entitled to retain confidential information after conclusion of a proceeding. Although the OCS is a state agency, it is not a regulatory agency. Rather, the OCS represents the interest of certain customers of public utilities in proceedings before the Commission. The Energy Utilities believe the OCS should be treated like other customer-parties with respect to this issue. Rocky Mountain Power also notes that although commission staffs are allowed to retain confidential information after conclusion of a proceeding in other states, consumer advocate agencies are not.

The Energy Utilities respectfully propose changes to R746-100-16.A.3.e (renumbered as R746-100-16.F and G in Attachments 1 and 2) to address these issues.

C. Nonsubstantive Suggestions

The Energy Utilities have proposed nonsubstantive suggestions to various provisions of the Rule in Attachment 1. These suggestions have five purposes: (1) elimination of unnecessary repetitive references to exceptions for the Commission, DPU and OCS and protective orders in the Rule, (2) consistent use of defined terms throughout the Rule, (3) reorganization of provisions to group provisions relative to the same issues together, (4) renumbering of provisions consistent with other rules, and (5) correction of grammatical or clerical errors. With the exception of the first purpose, these suggestions should generally be self-explanatory. None of these suggestions is intended to affect any substantive right or obligation under the Rule. The Energy Utilities respectfully believe their adoption will streamline the Rule and make it more clear.

1. Exceptions for Commission, DPU and OCS

Exceptions to the Rule for the Commission, DPU and OCS are repetitively provided at various places in sections R746-100-16.A.1.c, 2.e, 4 and 5. The Energy Utilities recognize that the Commission, DPU and OCS are in a somewhat different position than other parties because they are state agencies and have no objection to their being treated differently than other parties in some respects. This does not mean, however, that restrictions on their use of confidential information should be vague or need to be repeated.

The Energy Utilities understand that the exceptions afforded the Commission, DPU and OCS apply to three things: (1) confidential information may be provided directly to employees of these agencies without going through their attorneys, (2) employees of these agencies and their attorneys who are state employees are not required to sign and file nondisclosure agreements, and (3) the Commission and DPU, as regulators, are not required to destroy or return confidential information at the conclusion of the case in which it was provided.³ Except for these things, the Energy Utilities understand that all provisions of the Rule apply to these agencies as much as they apply to any private party. Accordingly, the Energy Utilities respectfully propose to delete the exceptions in sections R746-100-16.A.1.c, 2.e, 4 and 5 and replace them with a single paragraph (R746-100-16.G in Attachments 1 and 2) describing these exceptions.

³ As discussed above, the retention of confidential information by the Commission and DPU should not allow them to use the information in another proceeding of the same utility unless the providing party gives permission to use of the information. In addition, it should not allow them to use the confidential information in a proceeding of another public utility unless the public utility that is the subject of the other proceeding consents. Finally, retention of the information by the Commission and DPU should not allow former employees of these agencies to have access to or use confidential information retained by them for any purpose.

2. Protective Orders

The Rule contains numerous references to a superseding or other protective order. The Energy Utilities are hopeful that the Rule will largely replace the need for protective orders in proceedings before the Commission with the exception of occasional protective orders issued with respect to disputes regarding discovery or use of confidential information. Therefore, the Energy Utilities believe the constant references to protective orders in the Rule may be unnecessary. In lieu of those references, the Energy Utilities respectfully propose that the Commission add a provision to the Rule (R746-100-16.H in Attachments 1 and 2) that provides that if the terms of a protective order entered in a proceeding are inconsistent with the Rule, the provisions of the protective order govern. Otherwise, the rule and any protective order issued will both apply to the treatment of confidential information.

III. CONCLUSION

The Energy Utilities appreciate the efforts of the Commission in developing the Rule and particularly appreciate the Commission's acceptance of certain of their suggestions from the pre-rulemaking process. The Energy Utilities believe this is a useful exercise and welcome the adoption of the Rule to generally take the place of the standard protective order in Commission proceedings. Nonetheless, they respectfully propose that the Commission make the amendments to the Rule set forth in Attachments 1 and 2 and republish the Rule for a further comment period before making the Rule effective. The Energy Utilities are willing to participate in any public meeting or hearing scheduled by the Commission on the Rule to further explain and discuss their suggested changes.

DATED: September 15, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **JOINT COMMENTS OF ROCKY MOUNTAIN POWER AND QUESTAR GAS COMPANY ON PROPOSED RULE R746-100-16** to be served upon the following by electronic mail to the addresses shown below on September 15, 2009:

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