

ATTACHMENT 2

ENERGY UTILITIES' SUGGESTED CHANGES TO PROPOSED RULE R746-100-16

R746 Public Service Commission Administration
R746-100 Practice and Procedures Governing Formal Hearings
Rule 746-100-16. Use of information claimed to be confidential in Commission proceedings.

This rule governs provision, use and treatment of information, documents, data, studies and other material provided in or relating to any Commission proceeding which is claimed to be confidential.

~~A. Information, documents and material submitted or requested in or relating to any Commission proceeding which is claimed to be confidential will be treated in as follows.~~ 1. a. Nature of Confidential Information. A person (Providing Party) ~~required or requested to provide~~ providing information, documents, data, ~~information,~~ studies, and other materials of a sensitive, proprietary or confidential nature (Confidential Information) to the Commission or to any ~~party participant~~ in connection with a Commission proceeding may ~~request protection of provide~~ such information in accordance with the terms of this rule. The Providing Party shall designate information as Confidential Information only to the extent a good faith reasonable basis exists for claiming that the information constitutes a trade secret or is otherwise of such a highly sensitive or proprietary nature that public disclosure would be inappropriate. Confidential treatment 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. Designation of Confidential Information shall be requested narrowly as limited to only that specific portion of the information provided for which protection is reasonably required.

~~b. 2. Identification of Confidential Information. All documents, data, information, studies and other materials filed in conjunction with a Commission proceeding, made available to proceeding participants, furnished, or whether made available pursuant to any interrogatories, or requests for information, subpoenas, depositions, or other modes of discovery or otherwise, that are claimed to be Confidential Information, shall be furnished pursuant to the terms of this rule or any superseding Protective Order, and shall be treated by all persons accorded access thereto pursuant to this rule or Protective Order, and shall neither be used nor disclosed by any recipient thereof except for the purpose of the proceeding in which it was obtained and solely in accordance with this rule or superseding Protective Order. All material claimed to be Confidential Information shall be so marked by the person producing it Confidential Information provided in the form of a document shall be marked by the Providing Party by stamping or noting the same with the a designation substantially as follows "CONFIDENTIAL — SUBJECT TO UTAH PUBLIC SERVICE COMMISSION RULE 746-100-16", or "CONFIDENTIAL — SUBJECT TO PROTECTIVE ORDER" or "CONFIDENTIAL — SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. XX-XXX-XX (reflecting the appropriate docket number 16)." All copies of documents so marked will be made on yellow paper. Parties A Providing Party should file both a confidential and non-confidential version of~~

any Confidential Information filed with the Commission, each clearly marked as such. The Providing Party shall ensure that line numbering in any redacted version of a document shall conform to and retain the general formatting and line numbering used in the unredacted version of the document. ~~Individuals providing electronic documents to the Commission should file both a confidential and non-confidential version each clearly marked as such. For purposes hereof, notes~~When providing Confidential Information orally during the course of discovery or hearing, the Providing Party shall designate the information as Confidential Information and any transcript or record of the oral disclosure of the Confidential Information shall be marked in accordance with the foregoing provisions and paragraph E.4 of this rule. Any notes, studies, analyses or other documents made pertaining to or as the result of a review of Confidential Information which contain Confidential Information shall be considered Confidential Information and shall be subject to the terms of this rule.

~~e.~~3. Use of Confidential Information ~~and~~. All information, documents, data, studies and other materials provided in conjunction with a Commission proceeding that is claimed to be Confidential Information shall be furnished pursuant to the terms of this rule, and shall be treated by all persons accorded access thereto (Receiving Party) pursuant to this rule. Confidential Information shall neither be used nor disclosed by any Receiving Party for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of the Commission proceeding in which the Confidential Information was disclosed, and then solely as contemplated in this rule. Any Receiving Party shall take reasonable precautions to keep the Confidential Information secure in accordance with the purposes and intent of this rule.

4. Persons Entitled to Review. ~~The Commission, Division of Public Utilities, and Office of Consumer Services shall be provided with Confidential Information and may use the Confidential Information as these agencies deem necessary to perform their statutory functions, provided they shall protect the confidentiality of the information as required by Utah law. Other than these state agencies, all~~ Confidential Information made available pursuant to this rule shall be given solely to legal counsel for the participants (which may include legal counsels' paralegals, administrative assistants and clerical staff to the extent reasonably necessary for performance of work on the matter), and shall not be used nor disclosed except for the purpose of the proceeding in which ~~they are~~it is provided and in accordance with this rule; provided, however, that access to any specific Confidential Information may be authorized by counsel, solely for the purpose of the proceeding, to those persons indicated by ~~the participants~~a participant as being ~~their~~its experts in the matter (including such experts' administrative assistants and clerical staff, and persons employed by the participants, to the extent reasonably necessary for performance of work on the matter). Persons designated as experts shall not include persons employed by the participants who could use the information in their normal job functions to the competitive disadvantage of the ~~person providing the Confidential Information. The Commission, 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. Further, nothing herein shall prevent disclosure as required by law pursuant to interrogatories, administrative requests for information or documents, subpoena, civil investigative demand or similar process, provided, however, that the person being required to disclose Confidential Information shall promptly give prior notice~~

~~by telephone and written notice of such requirement of disclosure by electronic mail facsimile and overnight mail to the person that provided such Confidential Information, addressed to the providing person and attorneys of record for such person, so that the person that provided the Confidential Information may seek appropriate restrictions on disclosure or an appropriate protective order. The disclosing person will not oppose action by, and will cooperate with the person that provided the Confidential Information to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Confidential Information~~Providing Party.

dB. Nondisclosure Agreement. Prior to giving ~~obtaining~~ access to Confidential Information, as contemplated in ~~1.b.paragraph A.4~~ above, counsel ~~or~~and any ~~experts~~expert shall agree in writing to comply with and be bound by this rule ~~and any Protective Order.~~ Confidential Information shall not be disclosed to any person who has not signed a Nondisclosure Agreement ~~in the form which is provided below or referenced in the Protective Order. The Nondisclosure Agreement shall require~~that requires 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~~rule. The agreement shall contain the signatory's full name, permanent address and employer, and the name of the ~~person~~participant with whom the signatory is associated. Such agreement shall be delivered to the ~~providing person and counsel for the providing person~~Providing Party prior to the expert gaining access to the Confidential Information. The Nondisclosure Agreement may 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 to comply with the terms and conditions of the rule and/or Protective Order.”~~ Thereafter there shall be lines upon which shall be placed the individual’s signature, the typed or printed name of the individual, ~~identification or~~the name of the individual’s employer ~~or firm employing the individual~~ (if any), the individual’s business address ~~for the individual, identification or,~~ name of the ~~party~~participant in the proceeding with which the individual is associated, and the date the nondisclosure agreement is executed by the individual.

eC. Additional ~~protective measures~~Protective Measures for Highly Sensitive Information. To the extent a Providing Party ~~reasonably~~ claims that additional protective measures, beyond those required under this rule, are warranted for certain highly proprietary, highly sensitive or highly confidential material (Highly Sensitive Information), the Providing Party shall promptly inform the ~~requester (Requesting~~Receiving Party) of the claimed highly sensitive nature of ~~identified material~~the Confidential Information and the additional protective measures requested by the ~~Requested~~Providing Party. If the Providing Party and ~~Requesting~~Receiving Party are unable to promptly reach agreement on the treatment of Highly Sensitive Information, the Providing Party shall petition the Commission for an order granting additional protective measures. The Providing Party shall set forth the particular basis for: the claim; that the information is Highly Sensitive Information; the need for the specific, additional protective measures; and the reasonableness of the requested, additional protection. ~~A~~ Requesting ~~A~~ Receiving Party and any other ~~party~~participant may respond to the petition and oppose or propose alternative additional protective measures to those requested by the Providing Party. Disputes between the parties shall be resolved by the Commission. In addition to

additional protective measures accorded Highly Sensitive Information, Highly Sensitive Information is Confidential Information and is subject to this rule.

~~2.D. a.1.~~ Challenge to Confidentiality or Proposed Additional Protective Measures. This rule establishes a procedure for the expeditious handling of Confidential Information; it shall not be construed as an agreement, or ruling on the confidentiality of any ~~document~~information.

~~b.2.~~ In the event that persons are unable to agree that certain ~~information,~~ documents, data, ~~information,~~ studies, or other ~~matters~~material constitute Confidential Information, are ~~highly sensitive documents and information referred to in A.1.e. above~~Highly Sensitive Information, or agree on the ~~appropriate treatment of~~additional protective measures applicable to Highly Sensitive Information, the person objecting to the classification as Confidential Information or the person claiming ~~highly sensitive documents and~~information ~~and~~is Highly Sensitive Information or the need for additional protective measures shall forthwith submit the disputes to the Commission for resolution.

~~e.3.~~ Any person at any time, upon at least ten (10) days prior notice, ~~when practicable to the Providing Party, or such shorter period as is determined to be reasonable in the circumstances by the Commission,~~ may seek by appropriate pleading, to have documents that have been designated as Confidential Information, or which were accepted into the sealed record in accordance with this rule ~~or a Protective Order,~~ removed from the protective requirements of this rule ~~or the Protective Order,~~ or from the sealed record and placed in the public record. If the confidential, or proprietary nature of this information is challenged, resolution of the issue shall be made by the Commission after proceedings *in camera* which shall be conducted under circumstances such that only those persons duly authorized to have access to such ~~confidential matter~~Confidential Information shall be present. The record of such *in camera* hearings shall be marked substantially as follows "CONFIDENTIAL-- SUBJECT TO PUBLIC SERVICE COMMISSION OF UTAH RULE 746-100-16 ~~OR PROTECTIVE ORDER IN CASE NO. XX-XXX-XX (reflecting the appropriate docket number)."~~" unless the Commission determines, and so provides by order, that such marking need not occur. It shall be transcribed only upon agreement by the parties, or order of the Commission, and in that event shall be separately bound, segregated, sealed, and withheld from inspection by any person not bound by the terms of this rule ~~or Protective Order,~~ unless and until released from the restrictions of this rule ~~or Protective Order,~~ either through agreement of the parties, or after notice to the parties and hearing, pursuant to an order of the Commission. In the event the Commission should rule in response to such a pleading that any information should be removed from the protective requirements of this rule ~~or Protective Order,~~ or from the protection of the sealed record, such order of the Commission shall not be effective for a period of ten (10) days after entry of the order.

~~3.E. a.1.~~ Receipt into Evidence. At least ten (10) days prior to the use of or substantive reference to any Confidential Information as evidence, ~~if practicable, the person or such shorter period as is determined to be reasonable in the circumstances by the Commission, the Receiving Party~~ intending to use such Confidential Information shall make that intention known to the ~~providing person~~Providing Party. The ~~requesting person~~Receiving Party and the ~~providing person~~Providing Party shall make a good faith effort to reach an agreement so that the Confidential Information can be used in a manner which will not reveal its trade secret, confidential or proprietary nature. If such efforts fail, the ~~providing person~~Providing Party shall separately identify, within five (5) business days, which portions, if any, of the documents to be offered or referenced on the record containing Confidential Information shall be placed in the

sealed record. Only one (1) copy of documents designated by the ~~providing person~~ Providing Party to be placed in a sealed record shall be made and only for that purpose. Otherwise, persons shall make only general references to Confidential Information in any proceedings.

b.2. Use in Proceedings. Where reference to Confidential Information is required in pleadings, briefs, other written arguments, or motions, it shall be by citation of title, or exhibit number, or by some other nonconfidential description. Any further use of, or substantive references to Confidential Information shall be placed in a separate section of the pleading, brief, or document and submitted under seal. This sealed section shall be served only on counsel of record (one copy each), who have signed a Nondisclosure Agreement. All the protections afforded in this rule apply to materials prepared and distributed under this paragraph.

3. Use in Decisions and Orders. The Commission will attempt to refer to Confidential Information in only a general or conclusionary form and will avoid reproduction in any decision of Confidential Information to the greatest possible extent. If it is necessary for a determination in a proceeding to discuss Confidential Information other than in a general or conclusionary form, it shall be placed in a separate section of an Order or Decision, under seal. This sealed section shall be served only on counsel of record (one copy each) who have signed a Nondisclosure Agreement. Counsel for other parties shall receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission once they have signed a Nondisclosure Agreement.

4. Seal. While in the custody of the Commission, Confidential Information provided pursuant to this rule ~~or a Protective Order~~ shall be marked substantially as follows: "CONFIDENTIAL -- SUBJECT TO PUBLIC SERVICE COMMISSION OF UTAH RULE 746-100-16 ~~OR PROTECTIVE ORDER IN CASE NO. XX XXX XX (reflecting the appropriate docket)~~".

5. Segregation of Files. Those parts of any writing, depositions reduced to writing, written examination, interrogatories and answers thereto, or other written references to Confidential Information, if filed with the Commission, will be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this rule, unless such Confidential Information is released from the restrictions of this rule, either through agreement of the parties, or after notice to the parties and hearing, pursuant to an order of the Commission and/or final order of a court having jurisdiction

e.6. In Camera Hearing. Any Confidential Information that must be orally disclosed to be placed in a sealed record of a proceeding shall be offered in an *in camera* hearing, attended only by persons authorized to have access to the Confidential Information under this rule ~~or Protective Order~~. Similarly, cross-examination on or substantive reference to Confidential Information, as well as that portion of the record containing references thereto, shall be similarly marked and treated.

d.7. Appeal. Sealed portions of the record in any proceeding may be forwarded to any court of competent jurisdiction on appeal in accordance with applicable rules and regulations, but under seal as designated herein, for the information and use of the court.

e. ReturnF. After Conclusion of Proceeding. Unless otherwise ordered, Confidential Information, including transcripts of any depositions or hearings to which a claim of confidentiality is made, shall remain under seal, and shall continue to be subject to the protective requirements of this rule ~~or Protective Order, and shall be returned to the providing person or counsel for the providing person.~~ A Receiving Party shall either: (i) return Confidential Information to the Providing Party within 30 days after final settlement; or conclusion of the

~~matters~~matter in which ~~they were used~~it was provided, including administrative or judicial review thereof. ~~Alternatively, a person receiving Confidential Information pursuant to the terms of this rule or Protective Order may, or (ii) certify, within 30 days after final settlement, or conclusion of the matter, including administrative or judicial review thereof, that the Confidential Information has been destroyed. Counsel who are provided access to Confidential Information pursuant to the terms of this rule or Protective Order may retain the Confidential Information, their notes, work papers or other documents as their attorneys' work product created with respect to their use and access to Confidential Information in the matter, to the extent the same are attorney work product. An expert witness, accorded access to Confidential Information pursuant to this rule or Protective Order, shall provide to counsel for the person Receiving Party on whose behalf the expert was retained or employed, the expert's notes, work papers or other documents pertaining or relating to any created with respect to their use and access to Confidential Information. Counsel shall, and counsel may retain these experts' documents with counsel's documents. In order to facilitate their ongoing responsibility, this provision shall not apply to the Commission, the Division of Public Utilities or the Office of Consumer Services, which may retain Confidential Information obtained under this rule or Protective Order subject to the other terms of this rule or Protective Order. Any party that intends to use or disclose Confidential Information obtained pursuant to this rule or a 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.~~work product documents or may destroy them.

~~4. Use in Proceedings. Where reference to Confidential Information is required in pleadings, cross-examinations, briefs, arguments, or motions, it shall be by citation of title, or exhibit number, or by some other nonconfidential description. Any further use of, or substantive references to Confidential Information shall be placed in a separate section of the pleading, brief, or document and submitted under seal. This sealed section shall be served only on counsel of record (one copy each), who have signed a Nondisclosure Agreement and counsel for the Division of Public Utilities and Office of Consumer Services. All the protections afforded in this rule apply to materials prepared and distributed under this paragraph.~~

~~5. Use in Decisions and Orders. The Commission will attempt to refer to Confidential Information in only a general, or conclusionary form and will avoid reproduction in any decision of Confidential Information to the greatest possible extent. If it is necessary for a determination in a proceeding to discuss Confidential Information other than in a general, or conclusionary form, it shall be placed in a separate section of an Order, or Decision, under seal. This sealed section shall be served only on counsel of record (one copy each) who have signed a Nondisclosure Agreement and counsel for the Division of Public Utilities and Office of Consumer Services. Counsel for other parties shall receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission once they have signed a Nondisclosure Agreement.~~

~~6. Segregation of Files. Those parts of any writing, depositions reduced to writing, written examination, interrogatories and answers thereto, or other written references to Confidential Information in the course of discovery, if filed with the Commission, will be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this rule or Protective Order, unless such Confidential~~

~~Information is released from the restrictions of this rule or Protective Order, either through agreement of the parties, or after notice to the parties and hearing, pursuant to an order of the Commission and/or final order of a court having jurisdiction.~~

~~7. Preservation of Confidentiality. All persons who may be entitled to receive, or who are afforded access to any Confidential Information by reason of this rule or Protective Order shall neither use, nor disclose the Confidential Information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of Commission proceedings, and then solely as contemplated herein, and shall take reasonable precautions to keep the Confidential Information secure in accordance with the purposes and intent of this rule or a Protective Order.~~

G. Exceptions for Commission, Division of Public Utilities and Office of Consumer Services. The Commission, Division of Public Utilities, and Office of Consumer Services (Agencies) shall be governed by this rule except that: (1) Confidential Information may be provided directly to employees of these Agencies without providing it to their legal counsel; (2) employees of these Agencies and legal counsel to these Agencies that are state employees are not required to sign and file a Nondisclosure Agreement prior to being given access to Confidential Information; and (3) the Commission and Division of Public Utilities are not required to destroy or return Confidential Information at the conclusion of the proceeding in which it was provided. Notwithstanding these exceptions: non-employee experts retained by the Commission or Division of Public Utilities may not retain Confidential Information after conclusion of the proceeding in which it was provided; the Commission and Division of Public Utilities may not disclose Confidential Information retained by them in a different proceeding for the same public utility without prior permission of the Providing Party or in a proceeding for any other public utility without prior permission of the public utility that is the subject of the proceeding; and former employees of the Commission and Division of Public Utilities who had access to Confidential Information during their employment with the Agency may not retain, have access to, use or disclose Confidential Information retained by them after their employment is terminated for any reason.

H. Relationship of Rule to Protective Orders. This rule shall govern the production and use of Confidential Information in Commission proceedings instituted after the effective date of this rule. If a protective order governing production and use of Confidential Information in a proceeding is issued in a proceeding that is subject to this rule, the provisions of the protective order shall govern to the extent inconsistent with the provisions of this rule. Otherwise, the provisions of this rule shall apply in addition to the provisions of the protective order.

~~8.~~I. Reservation of Rights.

1. Persons affected by the terms of this rule ~~or a Protective Order~~ retain the right to question, challenge, and object to the admissibility of any and all data, information, studies and other matters ~~furnished~~ provided under the terms of this rule ~~or a Protective Order in response to interrogatories, requests for information, other modes of discovery, or cross-examination~~ on the grounds of relevancy or materiality.

2. This rule ~~or a Protective Order~~ shall in no way constitute any waiver of the rights of any person to contest any assertion by another person or finding by the Commission that any information is a trade secret, confidential, or privileged, and to appeal any assertion or finding.

3. Nothing in this rule shall prevent disclosure of Confidential Information as required by law pursuant to interrogatories, administrative requests for information or documents, subpoena, civil investigative demand or similar process, provided, however, that the person

being required to disclose Confidential Information shall promptly give prior notice by telephone and written notice of such requirement of disclosure by electronic mail, facsimile and overnight mail to the Providing Party, addressed to the Providing Party and counsel for the Providing Party, so that the Providing Party may seek appropriate restrictions on disclosure or an appropriate protective order. The disclosing person will not oppose action by, and will cooperate with the Providing Party to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Confidential Information.

Key: utility, confidential information, protective order
54-1-1, 54-3-21, 54-1-3, 54-4-2, 54-4-1.5

[SaltLake-477006.6 0085000-01022](#)

Document comparison by Workshare Professional on Tuesday, September 15, 2009
5:30:43 PM

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Document 2 ID	interwovenSite://SLC-MTIER/SaltLake/477006/6
Description	#477006v6<SaltLake> - Energy Utilities' Suggested Changes to Proposed R746-100-16
Rendering set	Standard

Legend:	
Insertion	
Deletion	
Moved from	
Moved to	
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Format change	
Moved deletion	
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