PAUL H. PROCTOR (#2657)
Assistant Attorney General
Utah Committee of Consumer Services
MARK L. SHURTLEFF (#4666)
Attorney General
160 East 300 South
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone (801) 366-0552

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Rule-Making for Use of Information Claimed to be Confidential in Public Service Commission Proceedings; R746-100-16	PSC Docket No. 09-999-08 DAR File No. 32867 UTAH OFFICE OF CONSUMER SERVICES' COMMENTS

The Utah Office of Consumer Services submits these comments upon Utah Administrative Code Rule 746-100-16, the Commission's proposed administrative rule that upon the filing of a case, implements a protective order. The Commission's stated purpose is 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." [1]

1 These comments do not address the rights and obligations of government agencies other than the Office, nor do the comments address discovery by and between non-government agencies.

GENERAL COMMENTS

The Utah Rules of Civil Procedure govern discovery in Commission proceedings. *Utah Admin. Code R 746-100-8 B.* The Commission may itself or at a party's request, establish the scope, necessity and terms of protective orders. *Utah Admin. Code R 746-100-8 C. 3.* The Commission's current procedures, which are not modified by the proposed rule, require that notice and an opportunity to be heard be afforded if a protective order is requested. *Utah Admin. Code R 746-100-4 D. 3.* At present, the Commission routinely issues its standard protective order if requested, often before the time for filing responsive pleadings has expired. The proposed rule uses the standard protective order now in use, substantially unchanged.

The Office experience corroborates that there are delays in the exchange of information, or outright denials of data requests, by parties taking advantage of the uncertain provisions and ambiguous procedures in the standard protective order now in use, which is incorporated into the proposed administrative rule. Most often, such difficulties are because the current standard order and therefore the proposed rule fails to provide any meaningful boundaries for classifying information as confidential.

The proposed rule eliminates any opportunity for the Commission or a party to question the need for and scope of a protective order. The proposed rule does not conform to standard practice in Utah courts that places the burden to show good cause upon the party who withholds or limits discovery. The proposed rule is contrary to the

Utah Government Records Access and Management Act in that it contains no meaningful limits upon classifying information and materials as confidential or protected. These defects are aggravated by the proposed rule's reliance upon unworkable definitions of what information may be protected and the ineffectual means to challenge the assertion of confidentiality.

As a result, the Commission's purpose can only be achieved by updating its protective order to conform to standard legal practices and procedures. The proposed rule automatically and immediately implements a protective order to govern the discovery process and impacts the manner in which government agencies may perform their role in the regulatory process. The proposed rule must therefore use generally accepted and understood terms to describe a party's duty to timely provide requested information and materials. The rights and obligations under the protective order must be definite and plainly stated. The Commission must be prepared without delay to consider and rule upon any dispute that does arise.

RECOMMENDATIONS

Recommendation for R746-100-16 A.1.a. Nature of Confidential Information.

This section should define what information and materials are protected materials subject to the protective order as commercial and financial information and materials that if unprotected presents a genuine risk of or can reasonably be expected to result in competitive disadvantage, competitive injury or financial harm. The Commission may

wish to add a provision for managing private, personal information similar to the Utah GRAMA in Utah Code Ann. §63G-2-302 (Supp. 2009).

Parties may classify as protected only information and materials that truly might compromise their ability to compete fairly or that otherwise might impose a competitive or financial risk if disseminated without the protections provided by the protective order.

The Commission should exclude as protected any information or materials that is in the public files of any federal or state agency or court, or information that is in the public domain.

For all purposes and in any dispute, the party claiming that information and materials are protected has the burden to establish that it is protected under the order.

The proposed rule states that a party may claim that documents and materials are confidential if they are sensitive, proprietary or confidential so long as the party has a good faith reasonable basis for claiming that the information is a trade secret, is highly-sensitive or proprietary such that public disclosure is inappropriate. Concisely restated, documents and materials are confidential if they are confidential, sensitive, highly sensitive, or proprietary. No statute, judicial or administrative rule, or appellate opinion reviewed by the Office defines confidential information is such a circular manner and sets disclosure that is inappropriate as the test for what may be protected.[2]

2 For this same reason, requiring that a claim for confidentiality have a good faith reasonable basis that the information is a trade secret, highly sensitive or proprietary is pointless.

For example, the Utah Uniform Trade Secrets Act, Utah Code Ann. §13-24-2(4) (2004), defines "trade secret" as: information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

> (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[3]

The information is protected as a trade secret because it has independent economic value from not being generally known to others who can extract that value and efforts have been made to maintain secrecy; NOT because disclosure would be "inappropriate".

The Utah Government Records Access and Management Act, Utah Code Ann. §63G-2-305(2) (Supp. 2009), defines commercial or financial information as protected information if:

> (a) disclosure of the information could reasonably be expected to result in unfair competitive injury to the person submitting the information

3 The burden of establishing the existence of a trade secret is upon the person who asserts the protection of the Utah Uniform Trade Secrets Act, who is afforded no favorable presumption. *Farm Bureau Life Ins. Co. v. American Nat. Ins. Co*., 505 F.Supp2d 1178, 1185 (2007).

or would impair the ability of the governmental entity to obtain necessary information in the future;

(b) the person submitting the information has a greater interest in prohibiting access than the public in obtaining access; and

(c) the person submitting the information has provided the governmental entity with the information specified in Section 63G-2-309.[4]

The inquiry is always upon the competitive character of the information, the possibility of conferring a competitive advantage upon a potential or actual competitor, and the injury reasonably expected to result from disclosure; NOT because disclosure would be "inappropriate". See *Utah Code Ann. §63G-2-305(4) (Supp. 2009).*

The Federal Energy Regulatory Commission's model protective order similarly defines materials that may be protected: "This Protective Order applies to the following two categories of materials: (A) A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and (B) A Participant shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 CFR§ 388.113(c)(1) ("Critical Energy

4 The burden of establishing such information as protected is upon the person asserting the protection of the Utah Government Records Access and Management Act by a written claim containing a concise statement of reasons supporting the claim. *Utah Code Ann. §63G-2-309 (Supp. 2009).*

Infrastructure Information")." True, FERC protects "sensitive" materials, but by defining them in terms of competitive misuse and injury, the model protective order is unambiguous and enforceable.

The proposed rule as written is flawed because it does not require that the party asserting the need for protection establish that the information to be exchanged is in fact confidential information under commonly used terms or statutory definitions. The approach in the proposed rule is contrary to the Utah Rules of Civil Procedure, which governs the Commission's discovery procedures, and to the Utah Government Records Access and Management Act, which defines the Office's rights and obligations with respect to information requested by and submitted to the Office.

Utah statutes or administrative rules addressing protective orders all require the party seeking the protective order to establish good cause for imposing limits on discovery, and often to confer in good faith with other affected parties to resolve discovery disputes before requesting an order. *Utah R. Civ. P. 26(c)*; *see Utah Code Ann. §63G-2-309 (Supp 2009); Utah Admin. Code R 602-7-3(c)VI* .C.; *Utah Admin. Code R 81-1-7(4)(c)(i).* At present, a party requesting a protective order has the burden of showing that good cause exists for the issuance of the order. Because the proposed rule eliminates the requirement that a party apply for a protective order, the protective order itself must ensure that for all purposes, the burden to establish that information and materials are properly classified is upon and remains with the party asserting the claim.

Recommendation for R746-100-16 A.1.b. Identification of Confidential Information.

The last phrase of the first sentence reads: ". . . , 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." This provision should be explicitly subject to the right given elsewhere in the order to the Commission, Utah Division of Public Utilities and the Office, to retain and use confidential information to perform their statutory functions.

The final sentence of this part states: "For the purpose hereof, notes made pertaining to or as the result of a review of Confidential Information shall be considered Confidential Information and subject to the terms of this rule." Such notes would therefore be returned to the party providing the confidential information; a violation of Utah law governing attorney's work product and privilege. The Commission should amend this sentence to state that notes derived from confidential information are confidential only to the extent that disclosure would reveal the original information. Derivative notes and other similar materials need not be disclosed to or returned to the party providing the source materials. The Commission should consolidate this part, and all other definitions, into section A.1.b.

Recommendation for R746-100-16 A. 1. c.

The first sentence should read: "The Commission, Division of Public Utilities, and Office of Consumer Services shall be provided with all protected information and

materials, including information and materials classified as highly sensitive under R746-100-16 A. 1. e., and may use and retain the information and materials as these agencies deem necessary to perform their statutory functions, provided they shall protect the confidentiality of the information as required by Utah law." The balance of this section should conform to this rule.

The last sentence of this section must be stricken as it exceeds the Commission's authority and may require the Office to violate the Utah GRAMA. This provision requires the Office to affirmatively intervene in legal proceedings other than before the Commission wherein access to protected materials is being sought, and to cooperate to obtain in that other forum, an appropriate protective order or other reliable assurance that the other forum will accord confidential treatment to the information. The Commission does not have the authority to require the Office to take such steps. The Office must protect the confidentiality of properly classified materials, unless and until otherwise ordered. However, the Office has no obligation beyond complying with the Utah GRAMA or a Commission order.

Recommendation for R746-100-16 A.1.e. Additional Protective Measures.

As to the Office, a government agency engaged in the regulation of public utilities, this provision should not apply.

In connection with what the Commission refers to as "Highly Sensitive Information", the proposed rule provides no meaningful guidelines for applying such a

classification, and no meaningful limits to the additional protective measures that a party may impose. This part of the proposed rule does not contain any definition of highly sensitive information; does not properly assign to the moving party, the burden of establishing the need for additional measures, either in the first instance or to the Commission; and applies restrictions and burdens upon government agencies that are not required or sanctioned by Utah law, i.e. the Utah GRAMA.

The Office found one Utah appellate court opinion referring to "highly-sensitive" information: R & R Energies v. Mother Earth Industries, 936 P.2d 1068, 1080 (Utah 1997). The trial court's protective order denied R & R any discovery into geothermal energy resources operated by its competitor, MEI. The Utah Supreme Court affirmed by applying a competitive fairness analysis, nothing more. Provided that the standards for classifying information and materials is properly stated as recommended, there is no indication that the protections afforded such information by the proposed rule are not adequate. A party who claims to the contrary must be required to file a petition with the Commission justifying the need for and type of additional restrictions on the exchange of information.

The Office experience is that utilities will unilaterally assert that information is highly sensitive and will allow only supervised inspection of materials, or require that the Office accept an oral summary, prohibiting copying, note taking, or any type of information summaries, analysis or extraction. This action is taken without benefit of a

motion to the Commission as is required by the standard protective order currently used.[5] The assertion is unsupported by an explanation of the additional harm that will result from classifying the information as provided in the protective order.

The proposed rule perpetuates this practice. Under the proposed rule, a party merely informs a requesting party that the information or materials is highly sensitive and the additional protective measures seen as necessary. Notice need not be in writing and need not explain why greater harm will result if the additional protections are not applied. Such an explanation is not required until a party applies for relief.

As to the Office, a government agency with a statutorily defined role in regulating public utilities, there is no justification to impose such restrictions and in fact, to permit a utility to apply them and compel the agency to resort to the Commission to get the information is unreasonable if not unlawful. Additional protective measures are never necessary or appropriate for a government agency that has no competitive interest and is independently, legally obligated to protect the confidentiality of information and materials.

5 "The provider of the requested information shall also petition the Commission for an order granting additional protective measures which the petitioner believes are warranted for the claimed highly sensitive documents and information that is to be produced in response to an information request. The provider shall set forth the particular basis for: the claim, the need for the specific, additional protective measures, and the reasonableness of the requested, additional protection."

Recommendation for R746-100-16 A.2.c.

The proposed rule as written imposes a minimum 20 days before a dispute over confidential or highly sensitive information and materials may be resolved. Ten days prior notice, when practicable, is required before a party may seek relief.[6] An order granting relief is not effective for 10 days. The Office recommends that the proposed rule be rewritten to adopt a discovery dispute resolution process that allows for prompt resolution of such disputes by a Commissioner, Administrative Law Judge, or other staff appointed for that purpose.

Recommendation for R746-100-16 A.3.a. Receipt into Evidence.

This part should be rewritten to allow notice that confidential information is used or referred to as evidence at the time that written testimony is filed with the Commission. As it now reads, the notice must be given 10 days before it is used in written testimony, effectively removing 10 days from the time given to prepare and file such testimony. Also, the proposed rule should specify the manner in which protected information and materials are to be used or referred to as evidence. This will eliminate the need for and resulting delay caused by the parties having to agree to the manner such information is used.

6 "When practicable" is, in the opinion of the Office, an invitation to claim it is not practicable sooner than 10 days.

Recommendation.

The proposed rule should use the same or consistent terms. For example, the protective order will apply to parties not persons or participants. The Office encourages the Commission to carefully review the proposed rule for consistency and conformity internally and with relevant statutes and administrative rules.

RESPECTFULLY SUBMITTED this 15th day of September 2009.

_____

Paul H. Proctor
Assistant Attorney General
Utah Office of Consumer Services

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Comments was served upon the following by electronic mail sent on September 15, 2009:

Sandy J. Mooy
Legal Counsel
Public Service Commission of Utah
400 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
smooy@utah.gov

Mark C. Moench
Yvonne R. Hogle
Rocky Mountain Power
201 South Main Street, Suite 2300
Salt Lake City, Utah 84111
mark.moench@pacificorp.com
yvonne.hogle@pacificorp.com

Gregory B. Monson (2294)
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
(801) 578-6946
(801) 578-6999 (fax)
gbmonson@stoel.com

Colleen Larkin Bell
Questar Gas Company
180 East First South
P.O. Box 45360
Salt Lake City, UT 84145-0360
colleen.bell@questar.com

Stephen F. Mecham
Callister, Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
sfm@cnmlaw.com

Gary A. Dodge
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
gdodge@hjdlaw.com

Michael Ginsberg
Patricia Schmidt
ASSISTANT ATTORNEYS GENERAL
500 Heber Wells Building
160 East 300 South
Salt Lake City, UT 84111
mginsberg@utah.gov
pschmid@utah.gov

F. Robert Reeder
William J. Evans
Vicki M. Baldwin
Parsons Behle & Latimer
One Utah Center
201 South Main Street suite 1800
P. O. Box 45898
Salt Lake City, UT 84145-0898
bobreeder@parsonsbehle.com
bevans@parsonsbehle.com
vbaldwin@parsonsbehle.com

_____