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(Decision No. C89-1532)  
NOV 29 1989

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

EXECUTIVE DIRECTORS OFFICE  
DEPT. OF REGULATORY AGENCIES

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RULES REGULATING APPLICATIONS FILED	)	
IN ACCORDANCE WITH § 40-3-104.3,	)	DOCKET NO. 89R-598EG
C.R.S., CONCERNING THE AUTHORITY OF	)	
PUBLIC UTILITIES COMMISSION TO	)	COMMISSION DECISION
REFRAIN FROM REGULATING GAS,	)	PROPOSING RULES
ELECTRIC, OR STEAM UTILITIES.	)	AND GIVING NOTICE

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November 22, 1989  
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STATEMENT, FINDINGS, AND CONCLUSIONS

BY THE COMMISSION:

On July 1, 1989, House Bill 1104 (1989 Session of the General Assembly), now known as § 40-3-104.3, C.R.S., became law. Under that section, the Commission is directed to process applications to refrain from regulating certain utilities within 30-days from the date the application is filed. For good cause shown and upon specific findings, the Commission may extend the period to complete the application. The Commission believes that in the event it establishes rules which state the information required by the Commission in the application, the applications can then be processed within 30 days. Therefore, the Commission is proposing the rules attached in Appendix A to this Decision entitled the Rules Regulating the Filing of Applications in accordance with § 40-3-104.3, C.R.S., Concerning the Authority of the Public Utilities Commission to Refrain from Regulating Gas, Electric, or Steam Utilities.

This Decision and the Notice of these proposed rules should be filed with the Office of Regulatory Reform at least ten days prior to the publication of the Notice of these proposed rules in compliance with § 24-4-103.5, C.R.S. Notice of the proposed rules should be given by the Secretary of State as required by § 24-4-103, C.R.S. on December 10, 1989. The hearing on the proposed rules should be held on March 5 and 6 (if necessary), 1990 at 9:00 a.m. in the Commission Hearing Room.

Notice of this proceeding will be provided in accordance with § 24-4-103, C.R.S., rather than as required in Rule 63 of the Commission's Rules of Practice and Procedure. Rulemaking proceedings conducted by the Commission are now governed by entirely by the Administrative Procedure Act, and specifically § 24-4-103, C.R.S., in accordance with the recent amendment of § 40-2-108, C.R.S., in House Bill 1084, (1989 Session). Rule 63 was enacted prior to the amendment to

§ 40-2-108, C.R.S. Therefore, compliance with Rule 63 is unreasonable and unnecessary. In accordance with Rule 3, the Commission will comply with the statute, rather than Rule 63.

Finally, the Commission desires that written comments be filed by persons who may be affected by these proposed rules no later than February 15, 1990, for review prior to hearing.

THEREFORE THE COMMISSION ORDERS THAT:

1. The Executive Secretary shall file with the Secretary of State the necessary documents to allow for notice of the proposed rules entitled the Rules Regulating the Filing of Applications in accordance with § 40-3-104.3, C.R.S., Concerning the Authority of the Public Utilities Commission to Refrain from Regulating Gas, Electric, or Steam Utilities stated in Appendix A to this Decision.

2. The PUBLIC HEARING for these rulemaking proceedings, is set as follows:

DATE: March 5 and 6 (if necessary), 1990

TIME: 9:00 a.m.

PLACE: Commission Hearing Room  
1580 Logan Street, OL-2  
Denver, Colorado 80203

3. Persons shall have an opportunity to submit written data, views, or arguments and to present the same orally unless the Commission deems oral presentations unnecessary, at the public hearing and the Commission will consider what changes, if any should be made to these rules.

4. Persons who may be affected by these proposed rules are requested to file an original and ten copies of written comments with the Commission no later than February 15, 1990, for review by the Commission prior to hearing.

This Decision is effective immediately.

DONE IN OPEN MEETING November 22, 1989.

(S E A L)



ATTEST: A TRUE COPY

*James P. Spier*  
James P. Spier  
Executive Secretary

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

ARNOLD H. COOK

RONALD L. LEHR

GARY L. NAKARADO

Commissioners

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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RULES REGULATING APPLICATIONS FILED	)	
IN ACCORDANCE WITH § 40-3-104.3,	)	DOCKET NO. 89R-598EG
C.R.S., CONCERNING THE AUTHORITY OF	)	
PUBLIC UTILITIES COMMISSION TO	)	NOTICE OF PROPOSED
REFRAIN FROM REGULATING GAS,	)	RULES
ELECTRIC, OR STEAM UTILITIES.	)	

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November 22, 1989  
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NOTICE is given that the Public Utilities Commission for the State of Colorado is proposing Rules Regulating the Filing of Applications in accordance with § 40-3-104.3, C.R.S., Concerning the Authority of the Public Utilities Commission to Refrain from Regulating Gas, Electric, or Steam Utilities attached to this Notice as Appendix A in order to implement § 40-3-104.3, C.R.S., found in House Bill 1104 which became law on July 1, 1989, and in accordance with §§ 24-4-103 and 40-2-108, C.R.S.

The proposed rules establish the information required by the Commission in an application filed in accordance with § 40-3-104.3, C.R.S., so that a complete application can then be processed within 30 days. This Decision and the Notice of these proposed rules should be filed with the Office of Regulatory Reform at least ten days prior to the publication of the Notice of these proposed rules in compliance with § 24-4-103.5, C.R.S. Notice of the proposed rules should be given by the Secretary of State as required by § 24-4-103, C.R.S. on December 10, 1989.

Finally, persons who may be affected by these proposed rules are requested to file an original and ten copies of written comments with the Commission no later than February 15, 1990, for review by the Commission prior to hearing.

The PUBLIC HEARING for these rulemaking proceedings, is set as follows:

DATE: March 5 and 6 (if necessary), 1990  
TIME: 9:00 a.m.  
PLACE: Commission Hearing Room  
1580 Logan Street, OL-2  
Denver, Colorado 80203


*Rec'd S of S' office  
11/29/89  
ew*

Persons shall have an opportunity to submit written data, views, or arguments and to present the same orally unless the Commission deems oral presentations unnecessary, at the public hearing and the Commission will consider what changes, if any should be made to these rules.

( S E A L )



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

  
\_\_\_\_\_  
JAMES P. SPIERS  
Executive Secretary

Dated at Denver, Colorado, this 22nd  
day of November 1989.

1217n/td

RULES REGULATING APPLICATIONS FILED IN ACCORDANCE WITH  
§ 40-3-104.3, C.R.S., CONCERNING THE AUTHORITY OF  
PUBLIC UTILITIES COMMISSION TO REFRAIN FROM REGULATING  
GAS, ELECTRIC, OR STEAM UTILITIES

**BASIS, PURPOSE, AND STATUTORY AUTHORITY**

These rules are issued under the authority of § 40-2-108, C.R.S., and § 24-4-103, C.R.S. The rules establish the information required by the Commission in an application filed in accordance with § 40-3-104.3, C.R.S., so that a complete application can then be processed within 30 days.

**RULE 1 - APPLICABILITY**

These rules provide the exclusive means by which a person may seek an order from the Commission invoking its authority to refrain from regulating gas, electric, or steam utilities in accordance with § 40-3-104.3, C.R.S.

**RULE 2 - DEFINITIONS**

As used in these rules, unless the context otherwise requires:

- (a) "Application" means a pleading requesting an order from the Commission invoking its authority to refrain from regulating gas, electric, or steam utilities in accordance with § 40-3-104.3, C.R.S. but does not include, for example, the use of an advice letter or any other form of tariff filing as an initial request. Applications must be noticed to the public by the Commission so persons have an opportunity to intervene.
- (b) "Person" means the same as found in § 40-1-102(5), C.R.S.

**RULE 3 - APPLICATION PROCESS**

**Rule 3.1 - General Information in Application**

Any person ("the applicant") requesting an order from the Commission invoking its authority to refrain from regulating gas, electric, or steam utilities in accordance with § 40-3-104.3, C.R.S. shall file a verified application for such an order. The application shall contain the following information, unless the Commission grants a waiver to omit any specific piece of information in accordance with Rule 6 of these rules.

- (a) The name, address, and telephone number of the applicant;
- (b) The name under which the applicant will provide these services if different than in subparagraph (a);
- (c) If the applicant is a corporation:
  - (1) A statement of that fact, the state in which it is incorporated, and, if an out-of-state corporation, a copy of the authority qualifying it to do business in Colorado;
  - (2) Location of its principal office, if any, in this state; and
  - (3) A copy of its Articles of Incorporation (unless a current copy is already on file with the Commission);
- (d) If the applicant is a partnership, the name, title, and business address of each partner, both general and limited, and a copy of the partnership agreement establishing the partnership and later amendments, if any (unless a current copy is already on file with the Commission);
- (e) The name of the specific customer;
- (f) A specific description of the services upon which the applicant seeks the right to negotiate prices and terms with a specific customer;
- (g) A detailed statement of the means by which the applicant will provide the services if it is successful in obtaining a contract with a specific customer;
- (h) The facts upon which the applicant will rely to demonstrate that the specific customer will discontinue using the services of the applicant if the authorization is not granted. Such facts shall include information concerning the following:
  - A. The provision and cost of backup utility services, if services of the applicant are discontinued by the specific customer;
  - B. Description of site where specific customer proposes to obtain alternative services;

- C. A site specific feasibility study evaluating the method and equipment to be used in obtaining alternative services;
  - D. Total cost of the specific customer obtaining alternative services, broken down by capital cost, operating costs, and engineering costs;
  - E. Demonstration of the availability of fuel at the specific customer's site, and estimates of cost; and
  - F. Demonstration of the commitment of the customer's management to move forward on the project.
- (i) The facts upon which the applicant will rely to demonstrate that the specific customer will have competitive alternatives to the present service offered by the applicant to the customer under tariff or that will demonstrate that the customer has the ability to provide its own service. Such facts shall include information concerning the following:
- A. An economic study showing the costs and benefits of the specific customer's competitive alternatives, as compared to remaining a customer of the utility.
  - B. All assumptions used to perform the economic study should be clearly stated.
- (j) The facts upon which the applicant will rely to demonstrate that remaining customers of the applicant will not be adversely affected by granting the authorization as they would be if the alternative of losing the specific customer occurred. Such facts should include a study showing the annual costs to remaining ratepayers if the specific customer does continue purchasing services from the applicant. The study should extend for twenty years and should consider forecasted loads and resources for the applicant.
- (k) The facts upon which the applicant will rely to demonstrate that granting the authorization is in the public interest.
- (l) The name and address of the applicant's representative, if any, to whom all inquiries should be made.



Rule 3.2 - Prefiled Testimony and Exhibits

At the time the application is filed, the applicant shall file 10 copies of its direct testimony and 10 copies of exhibits to be offered at the hearing. If an exhibit is too large or cumbersome to prefile, the location of the exhibit shall be disclosed where parties may inspect it, and the applicant shall file 10 copies of the title of each exhibit and a summary of the information contained in the exhibit. Prefiled testimony or exhibits shall not be modified once filed except for typographical errors or mistakes. In the event a substantive change is made because of an error, the Commission may consider the effect of the substantive change as a basis for a motion to continue in order to allow the Staff of the Commission and any other party a reasonable opportunity to properly address the change.

Rule 3.3 - Incomplete Applications

Should an application be filed which the Commission determines is not complete, the Commission shall notify the applicant within 10 days from the date the application is filed of the need for additional information. The applicant may then supplement the application so that it is complete. Once complete, the application will then be processed as of the date the application is completed.

Rule 3.4 - Confidential Information

3.4.1 The applicant shall indicate any information which is claimed to be confidential and shall state the grounds with specificity and cite the legal authority for the claim of confidentiality in a motion for protective order. This motion shall be filed with the application or any claim of confidentiality for information filed in the application or as prefiled testimony and exhibits shall be deemed waived.

3.4.2 If an applicant contends any portion of the application, prefiled testimony, or exhibits is confidential, it shall file ten copies of the application, prefiled testimony, and exhibits without the asserted confidential information, together with the motion for protective order. This information will be available to the public immediately. The applicant shall also file ten copies of the complete application, prefiled testimony, and exhibits claimed to be confidential and the subject of a motion for protective order under seal.



3.4.3 The motion for protective order will be decided within ten calendar days from the date the application is filed. Response time to the motion shall be shortened to five calendar days. If the motion is granted, a protective order shall be issued as stated in Exhibit 1 to these rules unless otherwise ordered by the Commission.

**RULE 4 - GENERAL RULES CONCERNING APPLICATIONS FILED  
IN ACCORDANCE WITH § 40-3-104.3, C.R.S.**

**Rule 4.1 - Notice**

Upon the filing of an application in accordance with § 40-3-104.3, C.R.S., the applicant must provide a single notice of the application within 15 days to all existing customers in the "legal notice" section in a newspaper of general circulation in accordance with § 40-3-104(c)(1)(D), C.R.S., unless the Commission approves a different means to notify existing customers.

**Rule 4.2- Non-Action By The Commission**  
**Effect Of Failure To Comply With Procedural Requirements**

No application or request filed with the Commission shall be deemed granted by non-action of the Commission or by the Commission's failure to comply with any procedural requirement in these Rules except as specifically required by statute.

**RULE 5 - SEGREGATION OF INVESTMENTS, EXPENSES, AND REVENUES**

If a utility is successful in its negotiations and enters into a contract with a specific customer, the Commission may require the utility to file with the Commission an accounting plan that segregates assets, liabilities, revenues, and expenses for the services at issue from the assets, liabilities, revenues, and expenses associated with all other regulated services in order to ensure that the services which are the subject of the contract are not subsidized by the revenues from other utility operations in accordance with § 40-3-104.3(2)(a), C.R.S.

**RULE 6 - WAIVER OF RULES**

The Commission may permit variance from these rules, if not contrary to law, for good cause shown or if it finds compliance to be impossible, impracticable, or unreasonable.

PROTECTIVE PROVISIONS  
RELATING TO CONFIDENTIAL INFORMATION

1. Confidential Information: All documents, data, information, studies, computer programs, and other matters furnished in any form in response to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery that are claimed to be a trade secret or confidential in nature shall be furnished under the terms of this Order, and shall be treated by all persons accorded access pursuant to this Order as constituting trade secret, confidential, commercial, and financial information (here referred to as "confidential information"), and shall neither be used or disclosed except for the purpose of this proceeding, and solely in accordance with this Order.

To the extent there may be information which a party believes requires extraordinary protection beyond that provided for in this Order, the party shall file the information with the Commission, only, under seal together with a motion seeking such extraordinary protection. The motion shall state the grounds for seeking the relief and advise all other parties of the request and the subject matter of the material at issue.

2. Use of Confidential Information and Persons Entitled to Review. All confidential information made available pursuant to this Order shall be given solely to the Commission or counsel for the parties and shall not be used or disclosed except for purposes of this proceeding; provided, however, that access to any specific confidential information may be authorized by counsel, solely for the purpose of this proceeding, to those persons indicated by the parties as being their experts or advisors in this matter. With the exception of the Office of Consumer Counsel, no expert may be an officer, director, or employee concerned with marketing or strategic planning of directly competitive products and services of the party or of any subsidiary or affiliate of the party. Any member of the Staff of the Commission may have access to any confidential information made available under the terms of this Order.

3. Nondisclosure Agreement. No access to confidential information shall be authorized under the terms of paragraph 2 of this Order until the person authorized by counsel to have access signs a nondisclosure Agreement in the form that is attached and incorporated as Attachment 1. The Nondisclosure Agreement shall require the persons to whom disclosure is to be made to certify in writing that they have read this Order and agree to be bound by its terms. The agreement shall contain the signatory's full name, permanent address, and employer, and the name of the party with whom the signatory is associated. This agreement shall be delivered to counsel for the providing party and the Commission at the time of review of the documents, or as soon thereafter as practicable.

4. Delivery of Documentation. Where feasible, confidential information will be marked as such and delivered to counsel. In the alternative, the confidential information may be made available for inspection and then reviewed by counsel and experts, as defined in paragraph 2 of this Order, in a place and time mutually agreed on by the parties, or as directed by the Commission.

5. Challenge to Confidentiality. This Order establishes a procedure for the expeditious handling of information that a party claims is confidential; it shall not be considered as an agreement or ruling on the confidentiality of any document.

(a) A party seeking to challenge the confidentiality of any materials pursuant to this Order shall first contact counsel for the providing party and attempt to resolve any differences by stipulation.

(b) In the event that the parties cannot agree as to the character of the information challenged, any party challenging the confidentiality shall do so by advising all parties and the Commission, in writing, that it deems material nonproprietary and outside the scope of any Protective Order. This notice shall designate the material challenged in a manner that will specifically isolate the challenged material from other material claimed as confidential.

(c) The providing party shall, within ten days of the notice, file appropriate pleadings stating grounds upon which challenged data is deemed to be confidential. The challenging party shall have ten days to respond to the pleading. In the event the providing party fails to file appropriate pleadings within ten days, any challenged material shall be removed from the provisions of the Protective Order.

(d) When the Commission receives a pleading asserting confidentiality by the providing party regarding any items claimed as proprietary under the terms of this Order, the Commission will enter an order resolving the issue.

(e) In the event the Commission should rule in response to a pleading that any information should be removed from the protective requirements of this Order or from the protection of the sealed record, the parties, at the request of the providing party and to enable the providing party to seek a stay or other relief, shall not disclose the information or use it in the public record for five business days.

6. Receipt into Evidence. Provision is made here for receipt of evidence in this proceeding under seal. At least ten days prior to the use of or substantive reference to any confidential information as evidence at hearing, the party intending to use the information shall make that intention known to the providing party. This notice requirement may be met where the confidential information is cited or used in prefield testimony or in prefiled exhibits. If used in prefiled testimony or in a prefiled exhibit, that portion of the prefiled material which is confidential shall be filed under seal. The requesting party and the providing party shall make a good faith effort to reach an agreement so the confidential information can be used in a manner which will not reveal its trade secret, confidential, or proprietary nature. If these efforts fail, the providing party shall separately identify, within two business days, which portions, if any, of the documents or transcripts to be offered or referenced on the record containing confidential information shall be placed in the sealed Record. Ten copies of the document shall be filed under seal with the Commission. In the event any person reviews a copy of a document filed under seal, that person (including Counsel and Staff advisors to the Commission), shall first have signed a nondisclosure agreement. The ten copies filed under seal shall be numbered serially. Otherwise, parties shall make only general references to confidential information in these proceedings.

(a) Seal. While in the custody of the Commission, these materials shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. \_\_\_\_\_."

(b) Appeal. Sealed portions of the record in this proceeding may be forwarded to any court of competent jurisdiction on appeal in accordance with applicable rules and regulations, but under seal as designated here for the information and use of the Court.

(c) Data Requests. This procedure shall apply to data requests made during hearing and received thereafter. Resolution of disputes shall be by hearing thereafter, upon notice.

7. Use in Pleadings. Where reference to confidential information is required in pleadings, cross-examinations, briefs, arguments, or motions (except prefiled testimony and exhibits as noted in paragraph 6), it shall be by citation of title or exhibit number, or by some other description that will not disclose confidential information. Any further use of or substantive references to confidential information shall be placed in a separate section of the pleading or brief and submitted to the Commission under seal.

8. Segregation of Files. Those parts of any writing, depositions reduced to writing, written examinations, interrogatories and answers, or other written references to confidential information in the course of discovery, if filed with the Commission, will be sealed by the Executive Secretary of the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this Order, unless the confidential information is released from the restrictions of this Order either through agreement of the parties and the providing party or, after notice to the parties and providing party, and hearing, pursuant to the Order of the Commission or final order of a Court having jurisdiction.

9. Preservation of Confidentially. All persons who are afforded access to any confidential information by reason of this 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 this proceeding, and then solely as contemplated here, and shall take all reasonable precautions to keep the confidential information secure and in accordance with the purposes and intent of this Order. No party receiving confidential information pursuant to this Order may copy, microfilm, microfiche, or otherwise reproduce such confidential information without the written consent of the providing party.

10. Reservation of Rights. The parties and non-parties further retain the right to question, challenge, and object to the admissibility of any and all data, information, studies, and other matters furnished under the terms of the Protective Order on the grounds of relevancy or materiality.

11. Non-Waiver. This Order shall in no way constitute a waiver of the rights of any party or person to contest any assertion or finding of trade secret, confidentiality, or privilege, or to appeal any determination of the Commission or assertion by a party.

12. Scope. The provisions of this Order are specifically intended to apply to information supplied by any party to this proceeding, and any nonparty that supplies documents, testimony, or other information pursuant to process issued by this Commission.

13. Retention of Documents. Upon request of the entity providing confidential information, at the conclusion of these proceedings, all documents and information subject to this Order, including any copies or extracts or summaries, or documents containing information from them, shall be returned to the party or person producing them. No copy shall be retained, except the original shall be maintained in the Commission files. Copies of briefs and pleadings prepared by counsel for a party or by a pro se party may be retained.

14. Remedies. Any person or party to this Order retains all remedies existing at civil or criminal law for breach of this Protective Order, and no provision here shall be construed to be a waiver of those rights.

ATTACHMENT 1

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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APPLICATION OF \_\_\_\_\_ )  
IN ACCORDANCE WITH § 40-3-104.3, )  
C.R.S., SEEKING AN ORDER FROM THE )  
PUBLIC UTILITIES COMMISSION TO )  
REFRAIN FROM REGULATING GAS, )  
ELECTRIC, OR STEAM SERVICES. )

DOCKET NO. \_\_\_\_\_

NONDISCLOSURE AGREEMENT

I hereby agree that I have read the PROTECTIVE PROVISIONS  
RELATING TO CONFIDENTIAL INFORMATION entered in Docket No. \_\_\_\_\_ and  
agree to be bound by its terms.

\_\_\_\_\_  
(NAME)

\_\_\_\_\_  
Employer or Firm

\_\_\_\_\_  
Business Address

\_\_\_\_\_  
Party in Case

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature