Woodruff, Morris

From: Roberts, Dale

Sent: Friday, April 04, 2003 8:12 AM

To: Dippell, Nancy*; Hopkins, Bill*; Jones, Kennard; Mills, Lewis; Pridgin, Ron; Roberts, Dale; Ruth, Vicky; Thompson, Kevin; Woodruff, Morris

Subject: FW: Protective Order Rule

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-----Original Message-----
From: Joyce, Dan
Sent: Thursday, April 03, 2003 5:45 PM
To: Roberts, Dale
Cc: GCO-Deputies - PSC
Subject: Protective Order Rule

Here are comments compiled into one common document. The "I" used within may be anyone in GCO, including me, but this document is not just comprised of my comments.

Remember your discussion at DD meeting about putting something in this rule respecting the problem with misfiled HC and P documents.

Good luck!

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1. Would like to see the first page of an 'HC' or 'P' document also stamped (I think Staff already does this). Worthy of consideration is having a default, if no one objects to the designation, to be that the information is proprietary. It currently reads: "If no party replies, the commission will assume that there is no disagreement with the designation of the testimony and will permit the testimony to remain as designated."

2. A blank non-disclosure agreement is attached to the current protective order. The three drafts say that a form is available from the Commission. For convenience of the parties, the non-disclosure agreement form should be attached to the protective order, whichever draft is used.

3. I support a one tier system. Such a system is more convenient and the company which owns the information is equally protected by a non-disclosure agreement signed by another company's employee as it is by a non-disclosure agreement signed by an outside consultant. (A company may argue that the employee of its competitor is under more pressure or will have more opportunities to let the protected information slip out.)

4. Paragraph 3 of the one tier draft says that the disclosing party must serve confidential information on the attorney for the requesting party. Although this paragraph does not apply to the Staff, it seems counter to the technical person-to- technical person approach of data requests. (There is a similar requirement in the present standard protective order for proprietary information but apparently not for the more protected highly confidential information.)

5. Paragraph 6 of the one tier draft says that if the disclosing party has confidential information from a third party, the disclosing party must check back with the third party to see if the third party wants it designated as confidential. I don't understand the reason for asking a third party if it wants to classify its confidential information as confidential. This is different from the requirement of the first sentence that the disclosing party must notify the third party of its intent to disclose; that notification could lead to the third party challenging "any" disclosure of its confidential information.

6. Paragraph 7 of the one tier draft says that before using, in testimony, information from a third party, the party must ascertain from the source whether that information is confidential. There should be some indication that the source may consider the information to be confidential before imposing upon the testifying party the duty to check on its confidentiality.

7. Paragraph 3 of the "modified" two tier draft says that the party disclosing highly confidential information may file a motion with the commission asking that the highly confidential information be made available only at its premises. Since we have not seen a lot of motions challenging the disclosing party's exercise of its option under the present standard protective order to limit review of highly confidential information to its premises, I don't see the reason for now requiring a motion to limit review to premises.

8. Paragraph 3 of the "more restrictive" two tier draft says that before information may be designated highly confidential, the party seeking the designation must file a motion. Although I have not done a scientific survey, I am fairly confident that fewer than one of 100 highly confidential designations under the present standard protective order are challenged by a motion to reclassify. So I don't see the reason for now requiring a motion before classifying information as highly confidential.

9. All three proposals require a party seeking HC designation to inform the other party in writing and give the reasons for the HC designation. I suggest that a sentence be added stating that failure to give the reasons for the designation is equivalent to not designating the material HC. In one of my cases, SWBT simply stamped everything HC without giving an explanation.

10. All three proposals also state that material designated HC in an earlier case must be treated HC if used in a subsequent case. These sections don't address a situation where the HC material was later treated as public. Each proposal requires a 5-day explanation of the HC designation after testimony is filed, but they also allow a party to protest the designation which could result in the Commission treating the material as public. However, under all three proposals, the initial designation

appears to control treatment in later cases regardless of whether the Commission treated the material as public.

11. All three proposals require the Staff to submit a list of Staff members that will review HC information. I'm not sure what this provision intends to accomplish, but I think it is an unnecessary burden on the Staff. If a particular Staff member is not included on the list sent to the Company, will that Staff member be asked to leave the hearing room if the HC info is discussed? I know this provision appears in the current protective order, but I have not seen it followed.

12. It would have been more helpful if these drafts with underlines and strike throughs so changes would be clear. This is not meant to be an endorsement for any of the drafts as written or even with these few changes. Once an approach is selected, that draft should be reviewed for clean up: grammar, review of whether current practices that were not proposed for change by these drafts should be changed, etc.