DOCKET NOS. 6477 and 6525

INQUIRY OF THE PUBLIC UTILITY COMMISSION OF TEXAS CONCERNING THE FIXED FUEL FACTOR OF GULF STATES UTILITIES COMPANY	§	PUBLIC UTILITY COMMISSION OF TEXAS
APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES	§	

ORDER NO. 25

ORDER REESTABLISHING EFFECTIVE DATE AND RESUSPENDING PROPOSED RATES, CONTINUING HEARING AND FINAL PREHEARING CONFERENCE, EXTENDING PROCEDURAL DEADLINES, RULING ON MOTIONS FOR SANCTIONS, AND DISCUSSING MOTION FOR CONTINUANCE

The seventh prehearing conference in this case was held on February 4, 1986. The following persons entered appearances: George Avery and Cecil Johnson for Gulf States Utilities Company (GSU); Rex VanMiddlesworth for Texas Industrial Energy Consumers (TIEC); Peter J.P. Brickfield for North Star Steel, Scott McCollough for the State Agencies, Steve Porter for the Cities; Walter Washington for the Office of Public Utility Counsel (OPC), and Alfred R. Herrera of the Commission General Counsel's Office for the public interest.

I. Continuance of Hearing and Final Prehearing Conference and Extension of Dates

During a recess, the parties present at the prehearing conference negotiated a three week continuance of the hearing and extension of various dates and deadlines. To accommodate the need for additional time, GSU agreed to a three week extension of the effective date on the condition that the parties not use this agreement in any application for interim relief. The parties not present at the prehearing conference have been given an opportunity to object, and have not done so. The schedules established in previous orders are hereby AMENDED only to the extent provided below.

A. Effective Date

At the prehearing conference, GSU orally agreed on the record to postpone the effective date of the proposed rate increase by 21 days, until January 10, 1986. Consequently, the examiner hereby RESUSPENDS the effective date of the proposed rate increase for the full 150 day statutory suspension period, until June 9, 1986.

B. Prefiling of Testimony and Objections

Testimony shall be physically separated into and labeled "Revenue Requirement" or "Rate Design," as appropriate. The following deadlines shall apply to the prefiling of testimony:

1. Intervenors' testimony and exhibits on Revenue Requirement SHALL be filed by no later than 4:00 p.m. on Monday, March 3, 1986. Intervenors' testimony and exhibits on Rate Design SHALL be filed by no later than 4:00 p.m. on Friday, March 7, 1986.

2. Staff testimony and exhibits on Revenue Requirement SHALL be filed by no later than 4:00 p.m. on Monday, March 3, 1986. Staff testimony and exhibits on Rate Design SHALL be filed by no later than 4:00 p.m. on Friday, March 14, 1986.

3. Rebuttal testimony and exhibits by GSU to all prefiled testimony of intervenors and staff SHALL be filed no later than 4:00 p.m. on Friday, April 4, 1986. Testimony and exhibits which constitute rebuttal by GSU to issues raised for the first time during the hearing SHALL be filed no later than 72 hours before such rebuttal testimony is to be introduced. Rebuttal by GSU to issues raised for the first time at the hearing during the 72 hour period before GSU's first rebuttal witness takes the stand may be presented live. Further issues relating to whether or not rebuttal testimony constitutes "true rebuttal" will be considered in connection with any objections or motions to strike such testimony.

4. All objections to prefiled direct evidence concerning Revenue Requirement and all requests to take any witnesses presenting evidence on voir dire SHALL be made in writing and filed and served upon the party whose testimony is sought to be stricken by 4:00 p.m. on Tuesday, March 11, 1986. Failure to meet this deadline will result in waiver of the objection or request.

C. Final Prehearing Conference

The final prehearing conference is hereby CONTINUED from 10:00 a.m. on Friday, February 21, 1986 until 10:00 a.m. on Friday, March 14, 1986. The prehearing conference will be held at the Commission offices at 7800 Shoal Creek Boulevard, Austin, Texas. The conference will be limited to procedural matters. The scope of procedural matters will include the consideration of pending motions, and, with respect to Revenue Requirement, objections to prefiled evidence, requests to take witnesses on voir dire, and the presentation of exhibits to be offered at the hearing to the court reporter for marking. The examiner intends to hear argument on these matters and to rule on them to the extent possible at that time. In the event that the examiner grants a request to take a witness on voir dire, the actual voir dire examination will be conducted at the time the witness takes the stand. This will eliminate the problem of witnesses having to travel twice to Austin or to stay longer than originally planned. With respect to Revenue Requirement, scheduling of witnesses, grouping of parties and establishing an order of proceeding and of cross-examination also will be completed. Parties whose Revenue Requirement witnesses may have scheduling problems SHALL file, by 9:00 a.m. on Friday, March 14, 1986, a list of such witnesses and the day(s) such witnesses will be available. Parties shall notify the examiner and the parties as soon as possible of additional scheduling problems that arise. Other procedural matters will be taken up as necessary.

With respect to Revenue Requirement rebuttal testimony and Rate Design, requirements like those described in the above paragraph will be taken up during the hearing on the merits.

D. Hearing Date

The hearing on the merits is hereby CONTINUED from 10:00 a.m. on Monday, February 24, 1986, until 10:00 a.m. on Monday, March 17, 1986. The hearing will be held at the Commission's offices at 7800 Shoal Creek Boulevard, Austin, Texas. The hearing on the merits will be bifurcated. The first part will be limited to revenue requirement issues. The second part will be limited to cost allocation and rate design issues. The cost allocation and rate design portion will commence on the first working day following conclusion of rebuttal testimony on the revenue requirement portion.

II. Motions for Sanctions

The parties agreed that all requests and motions to be taken up at that prehearing conference had been resolved or should be postponed except for those described in this order.

On January 24, 1986, the State Agencies filed a second motion for sanctions arising from GSU's Third Request for Information (RFI) to the intervenors and staff. This motion was similar to the State Agencies' first motion for sanctions arising from GSU's Second RFI to the intervenors and staff, which had been argued at the prehearing conference on January 24, 1986. In Order No. 23, the examiner deferred ruling on the first motion for sanctions so that both could be determined together. The second motion was orally argued on February 4, 1986. By that time GSU and the State Agencies had resolved all disputes concerning the actual questions in GSU's Second and Third RFIs, but the State Agencies had reserved their right to argue that sanctions still should be imposed.

In light of GSU's efforts and partial success at reaching a negotiated settlement with respect to its RFIs by reducing their scope significantly, and considering the events and arguments involving this issue, the examiner concludes that sanctions should not be imposed. The State Agencies' First and Second Motions for Sanctions are hereby DENIED.

III. Motion for Continuance and Extension

On January 31, 1986, the general counsel filed a motion for continuance and extension of prefiling deadlines. In light of the agreement concerning the extension and continuance, general counsel decided to withdraw the motion from consideration. Therefore, this motion will not be ruled on.

SIGNED AT AUSTIN, TEXAS, on this the 7th day of February 1986.

PUBLIC UTILITY COMMISSION OF TEXAS

Elizabeth Drews

ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE

bdb

DOCKET NOS. 6477 and 6525

INQUIRY OF THE PUBLIC UTILITY COMMISSION OF TEXAS CONCERNING THE FIXED FUEL FACTOR OF GULF STATES UTILITIES COMPANY

APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES

PUBLIC UTILITY COMMISSION OF TEXAS

ORDER NO. 24

NOTICE OF EIGHTH PREHEARING CONFERENCE AND ORDER ISSUING SUBPOENA AND GRANTING MOTION TO CONSOLIDATE

I. Notice of Eighth Prehearing Conference

On February 3, 1986, various requests for prehearing conference were filed. Pursuant to P.U.C. PROC. R. 21.83, an eighth prehearing conference will be conducted herein on Friday, February 14, 1986, beginning at 10:00 a.m. at the Commission's offices at 7800 Shoal Creek Boulevard, Austin, Texas. The following matters will be considered at the prehearing conference:

1. Any pending request or motion filed with the Commission and served upon the parties on or before noon on Wednesday, February 12, 1986; and

2. Any other matters which may aid in the simplification of the proceedings and the disposition of any issues in controversy including the stipulation of uncontested matters.

II. Issuance of Subpoenas and Subpoena Duces Tecum

On January 16, 1986, the Office of Public Utility Counsel (OPC) and the Commission's Office of General Counsel filed a joint motion requesting that the Commission issue a subpoena for J.D. Guy, Manager of Corporate Planning, Houston Lighting and Power Company (HL&P). They also filed a joint motion for a subpoena for Eugene Simmons, an HL&P employee, and for a subpoena duces tecum requiring that Mr. Simmons bring to the deposition the following items:

a. Correspondence between Southern Companies and HL&P related to the potential for participation by HL&P in the Southern Companies' coal capacity ("Southern purchase"). This includes, but is not limited to, offers and responses to offers by HL&P and the Southern Companies in the 1980 through 1982 time frame.

b. All studies, reports, analyses and memoranda which discuss the economic feasibility and viability of any proposed Southern purchase and/or alternative offers of purchase power for the period 1983-1992.

c. All studies, reports, analyses, and memoranda which discuss the appropriateness of the terms and conditions of any offers related to the Southern purchase.

d. All internally-generated documents which discuss the reason or reasons for any decision by HL&P to reject any potential Southern purchase.

e. All internal guidelines used by HL&P personnel for the evaluation of purchase power offers which were in force at the time of any potential Southern purchase offers.

The motions, which were orally argued at the prehearing conference on January 24, 1986, were not opposed by any party to this case. HL&P was then given an opportunity to object. On January 28, 1986, OPC filed a letter from counsel for HL&P confirming that the witnesses will be available for depositions on Friday, February 7, 1986 at 9:30 a.m. at 611 Walker, Houston, Texas.

The joint motions for subpoenas and for a subpoena duces tecum are hereby GRANTED. The deposition SHALL take place as described above.

III. Motion to Consolidate

On January 13, 1986, Gulf States Utilities Company (GSU) filed an appeal from the decision of the City of Huntsville, which had denied GSU's request for a rate increase. With the appeal was a motion to consolidate the appeal with the present case. No objections to GSU's motion to consolidate were filed. In accordance with the procedures set forth in Order No. 4, this motion to consolidate is hereby GRANTED.

SIGNED AT AUSTIN, TEXAS, on this the 4th day of February, 1986.

PUBLIC UTILITY COMMISSION OF TEXAS

Elizabeth Drews

ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE

bdb

DOCKET NOS. 6477 and 6525

INQUIRY OF THE PUBLIC UTILITY COMMISSION OF TEXAS CONCERNING THE FIXED FUEL FACTOR OF GULF STATES UTILITIES COMPANY

APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES

PUBLIC UTILITY COMMISSION

OF TEXAS

ORDER NO. 23

ORDER RULING ON MOTIONS FOR CONTINUANCE, EXTENSION OF TESTIMONY PREFILING DEADLINES, DISMISSAL AND SANCTIONS

The sixth prehearing conference in this case was held on Friday, January 24, 1986. Appearances were entered by the following persons: George Avery, Cecil Johnson and Don Clements for Gulf States Utilities Company (GSU); Rex VanMiddlesworth for Texas Industrial Energy Consumers (TIEC); Scott McCollough for the state agency customers of GSU (State Agencies); Jim Boyle and Walter Washington for the Office of Public Utility Counsel (OPC); Steve Porter for numerous cities (the Cities); Richard Ferguson for the Cities of Sour Lake, Nome and China; and Alfred R. Herrera of the Commission General Counsel's Office for the public interest.

I. OPC's Motion for Continuance

A. Request for Three Week Continuance and Extension

On January 21, 1986, OPC filed its motion for continuance. OPC requested a three week extension in testimony filing deadlines and a three week continuance of the hearing. OPC alleged two grounds for granting this relief. First, from January 8, 1986, until January 23, 1986, the intervenors and staff were denied access to documents classified as confidential due to dissolution of the first protective order entered in this case. Second, due to budgetary constraints, OPC was unable to retain outside consultants to evaluate the management of River Bend Generating Station (River Bend) until early January 1986, and one consultant has notified OPC that he will have great difficulty preparing testimony in time to file it by February 7, 1986. OPC stated that because the case is highly complex the hearing is likely to last a long time, affording the examiner and Commission an additional 50 to 70 days to decide the case.

The State Agencies and TIEC supported OPC's request for continuance. General counsel also supported OPC's motion, stating that the inability to have access to the fuel contracts during the two weeks after the first protective order was dissolved had hampered the staff's ability to develop certain recommendations.

In response, GSU argued that OPC's motion is based on factual statements, and that no supporting affidavit has been tendered as required in P.U.C. PROC. R. 21.66. GSU disputes the accuracy of some factual assertions of OPC. With respect to the protected materials, GSU said that the intervenors and staff had had access to the documents for three weeks before that access was terminated due to dissolution of the first protective order. With respect to OPC's statement that it had not been able to hire a consultant until January 1986, GSU stated that OPC has known for a year that the rate case would be filed due to its involvement in the River Bend Task Force beginning in May 1985. GSU also said that one OPC consultant, O'Brien - Kreitzberg and Associates, Inc. (OKA), appeared at GSU's offices in early November. GSU further commented that the state's fiscal year begins in September.

In rebuttal, OPC stated that the central reason for the continuance is the parties' lack of access to the protected materials for two weeks. It argued that the three weeks the intervenors and staff had access to the documents before the first protective order was dissolved included the Christmas and New Years Day holidays. OPC further argued that even if taking away the documents was beyond GSU's power, GSU still had overclassified documents as protected, thus creating the problem.

OPC's request for continuance is hereby DENIED, for the following reasons. First, as is the case concerning several motions discussed in this order, some of the factual assertions on which the motion is premised do not appear of record, and there is no supporting affidavit. The examiner cannot base her decision on which party's attorney presents the more credible unsworn statements. Second, the parties have known about the prefiling and hearing schedule ever since it was established at the first prehearing conference on October 21, 1985. The intervenors and staff did not object to their prefiling deadlines or the hearing date. Moreover, at that prehearing conference, GSU voluntarily extended its effective date by 45 days, every one of which was given to the intervenors and staff to give them as much time as possible to prepare their direct cases. The hearing is scheduled to begin on the 146th day, which, subtracting for the 45 days extension, means that it already will begin one day later than is typical for a major rate case. The intervenors and staff also were allowed to prefile the rate design testimony an additional one week later than ordinarily would have been the case. Acknowledging that the 185 day statutory deadline for issuance of a final order produces problems for all participants, it nonetheless is true that the intervenors and staff have had much more time to prepare for this case than they are accustomed to. Third, at this stage, the parties appear not to be particularly anxious about the fact that if the continuance is granted, it will place extreme stress on the parties' time for writing briefs and reply briefs, the examiner's time for writing recommendations, the parties' time for writing exceptions and replies to exceptions, and the Commissioners' time to evaluate the entire case. The

examiner must be concerned about this prospect. As pointed out by OPC, this case is likely to be very complex. This does not appear to the examiner to argue in favoring of shortening the deadlines for the later stages of the process. Fourth, in the examiner's opinion, it would be unwise to rely too much on predictions of how long a rate case hearing might last. It will not be known until the hearing is well underway how much, if any, the effective date will be suspended as a result of a prolonged hearing. It should also be noted that the "two-for-one" suspension of the effective date provided in PURA Section 43(d) is a lesser bargain than might initially appear to be the case. The effective date is extended only on working days, not calendar days, so that more than half of the suspension is taken up during the hearing and weekends occurring during the hearing. The added complexity of a case whose hearing lasts more than three weeks unquestionably will demand more detailed briefs, a longer examiner's report, a more extensive Commission review, etc. Adequate time must be allowed for each of these steps for adequate analysis to be performed. Fifth, OPC's first ground does not warrant a three-week continuance and extension. The documents alleged to be confidential were unavailable to the parties for two weeks, not three, and this was after they had been available to the parties for three weeks. The examiner is aware that events involving the confidentiality dispute created some logistical problems for the parties. However, she is puzzled by the fact that OPC first signed the stipulated protective order, then argued that perhaps it should be dissolved, and now argues for a continuance because it was dissolved. (As discussed in Part IV, the Cities, which appealed the first protective order, make the same argument.) Sixth, OPC's other ground does not warrant the requested continuance. According to OPC, it did not hire its consultant until approximately three-fourths of its review time had expired. Any party may have difficulty preparing its case during the allowed time because of budgetary constraints. The time allotments are a function of the statutory deadline, however, and each party must be prepared to meet them as best it can. In the examiner's judgment, neither problem described by OPC would outweigh the problems which a continuance without a further suspension of the effective date in this case would create.

B. Request for One Week Extension in OPC's Testimony Prefile Deadline

In the alternative to a three week continuance and extension, OPC moved for leave to file its testimony at the same time as the staff. OPC observed that on January 8, 1986, OPC and the staff entered into a Joint Working Agreement whereby they would combine their efforts to respond to the River Bend issues. A copy of the signed Agreement was attached to OPC's motion. It provides that OPC and the staff will work together to review the testimony of two consulting firms, OKA and Komanoff Energy Associates (KEA). According to the Agreement, it is intended that the staff and OPC each will make full use of such testimony. The Agreement further provides that OPC will employ OKA and KEA, and the Commission will pay for deposition-related expenses.

TIEC opposed OPC's alternative request for relief on grounds that all intervenors should be treated alike.

General counsel supported OPC's motion. Mr. Herrera indicated that OPC and the staff have not yet worked out the details of whether OPC or general counsel or both would put the consultants on the stand, but that it would unfairly prejudice the staff's case if the consultants have to have their testimony ready by the intervenor prefiling deadline.

GSU again argued that no affidavit supporting the factual assertions in the motion was submitted. GSU stated that the net effect of granting the requested relief would be to shorten GSU's time for rebuttal by one week.

The examiner concludes that OPC's alternative request should be granted. GSU has no particular right to have OPC prefile a week before the staff. The purpose of the one week lag is to allow the staff to review the intervenor testimony before filing its own. As noted by OPC and general counsel, this rationale does not appear to apply in this instance. To the examiner's knowledge, the question of when an intervenor should prefile when it is engaged in a formal joint effort with the staff on a major revenue issue has not arisen before. The examiner was not aware of this prospect when she established OPC's prefiling date. The deadline for intervenor prefiled testimony is not prescribed by statute or rule. However, P.U.C. PROC. R. 21.69(c) provides that except for good cause, the staff shall not be required to prefile earlier than a week before the hearing. Requiring that OPC prefile the consultants' testimony on the date currently set would require the staff's consultant effectively to lose a week of review time which would be contrary to at least the spirit of P.U.C. PROC. R. 21.69(c). The examiner concludes that OPC should be allowed to file the consultants' testimony at the same time as the staff. The examiner further believes OPC's assertion that the River Bend issue both is important and will be highly interrelated with the rest of OPC's revenue case. Accordingly, it would be confusing and tend to defeat the rationale for allowing OPC to file this part of its case with the staff if OPC had to decide ahead of time exactly what its prudence recommendation would be and how this would impact the rest of OPC's revenue case in order to file part of its revenue case with the other intervenors and part with the staff. OPC's request to file its revenue case at the same time as does the staff is hereby GRANTED. OPC did not request an extension in its deadline for prefiling rate design testimony, and the examiner believes that justification has not been shown for such an extension. OPC SHALL file its entire direct case by no later than 4:00 p.m. on Tuesday, February 18, 1986 (see Part VI of this order). OPC's testimony SHALL be physically separated and labeled "Revenue Deficiency" or "Rate Design," as appropriate.

II. OPC's Motion for Sanctions

OPC also moved for imposition of sanctions upon GSU pursuant to Texas Rules of Civil Procedure (TRCP) Rule 215(2)(b) and (c). OPC cited three grounds: (1) GSU's classification of numerous documents as confidential; (2) GSU's refusal to allow OKA to make copies of certain responses to RFIs; and (3) GSU's allegedly inadequate response to a number of OPC's RFIs. The Cities, State Agencies and general counsel supported this motion. GSU again argued that the motion is based on factual assertions which are neither in the record nor supported by affidavit. GSU further stated that it had not abused the discovery process.

OPC's motion for sanctions is hereby DENIED. The motion is premised upon a number of factual assertions which are not in the record or supported by affidavit. For sanctions to be imposed, TRCP Rule 215.b.3. requires that a party be abusing the discovery process or that its conduct in discovery be unreasonably frivolous, oppressive or harassing or that a response be made for the purpose of delay. Insufficient information has been provided to the examiner to enable her to evaluate the second and third grounds for sanctions alleged by OPC. With respect to the first ground, GSU did claim confidentiality of a most regrettably large number of documents. The examiner's decision concerning the confidentiality of such documents is presently on appeal to the Commission. While the examiner believes that GSU is wrong in its assertion that many of the documents were legally protected, based on the information available to the examiner, she does not conclude that GSU's actions concerning the confidentiality disputes should trigger the sanctions described in TRCP Rule 215.b.3.

III. State Agencies' Motion for Protective Order and for Sanctions

Like OPC, the State Agencies argued that sanctions should be imposed on GSU pursuant to TRCP Rule 215. However, the State Agencies alleged different grounds, specifically the questions contained in GSU's Second RFI to the intervenors and staff. The State Agencies argued that the RFI is improperly burdensome and that for the State Agencies' witnesses to respond to GSU's Second RFI would cost $8,500. The other intervenors and general counsel supported this motion.

GSU stated that it has a right to employ discovery, that most of its questions were based on RFIs asked of GSU, and that the RFIs GSU had asked and the State Agencies' estimated cost of responding to them were modest compared to what GSU faced in responding to the intervenor and staff RFIs.

The State Agencies responded that GSU can use discovery, but that it should not be allowed to abuse discovery.

The State Agencies' objections were not filed until January 20, 1986, and the parties have not had much opportunity to negotiate concerning them. In addition, on January 24, 1986, the State Agencies filed a very similar set of objections and motion for protective order and sanctions concerning GSU's Third RFI. GSU has not yet had an opportunity to respond to that motion. There is merit in the idea of considering both GSU's Second and Third RFIs before ruling on the requested relief. The examiner accordingly will reserve ruling on the State Agencies' motion at this time. She will however, make the following observations.

First, in the ordinary course of things, the examiner would expect that the number and nature of RFIs would impose a significantly greater burden upon GSU than upon the intervenors and staff. GSU is in possession of most of the information relevant to its own rate increase request. GSU has a right to seek through discovery, within certain limits, information which the intervenors and staff have that GSU does not. An example is the identity of the other parties' witnesses. However, the examiner will not be persuaded by an argument, if any, that RFIs asked of GSU were burdensome, so GSU should be able to return the favor. If GSU had a complaint concerning the other parties' good faith in conducting discovery, GSU should have presented that complaint to the examiner for resolution.

Second, the examiner will consider the requested relief recognizing that the referenced sanctions represent a harsh remedy which should not be lightly imposed. The examiner approached her review of GSU's RFIs to the other parties with the mindset that GSU has a right to discovery, within reasonable limits. Upon reviewing the actual questions posed by GSU, however, it is evident that a number are duplicative of other questions asked of the same parties by GSU, or are overbroad. While the examiner does not conclude that the requested relief should be granted at this time, the examiner does believe that the intervenors and staff have just cause for complaint concerning GSU's RFIs to them. The examiner strongly recommends to GSU that before beginning or continuing negotiations concerning the Second and Third RFIs, that GSU conduct its own review of its questions and modify or delete those which duplicate other questions it has asked, or which are overbroad, or otherwise objectionable. After making appropriate changes and deletions, GSU should negotiate with the other parties in an effort to reach an amicable settlement.

On January 29, 1986, GSU submitted a letter allegedly accepting an offer by the State Agencies in resolution of the disputes concerning GSU's Second and Third RFIs. On January 30, 1986, the examiner contacted Mr. McCollough by telephone in order to determine whether or not he was withdrawing his motion. Mr. McCollough indicated that he was not and that there apparently had been a miscommunication between GSU and the State Agencies.

The examiner encourages these efforts at reaching an agreement, and expects all parties to negotiate in good faith in an effort to resolve all disputes concerning GSU's Second and Third RFI, including the motions if possible.

IV. Cities' Motion to Compel or to Dismiss and Motion for Continuance

On January 20, 1986, the Cities filed a motion to compel or dismiss and a motion for continuance. In their motion, the Cities refer to their Third RFI, Question E-19, which requested that GSU make available in Beaumont, Texas, the work papers of the accounting firm of Coopers and Lybrand, which had performed the test year audit included in the rate filing and the 1984 audit of GSU's financial statements. The Cities alleged various difficulties encountered in an effort to obtain a satisfactory response to this question. The Cities argued that under P.U.C. PROC. R. 21.69, a utility's audited financial statements are required to be included in any application for rate relief. The Cities requested an order compelling GSU to make available the Coopers and Lybrand workpapers at a time and place designated by the Cities' consultants. The Cities also moved that the case be dismissed on grounds of failure to prosecute in the event that GSU refuses or is unable to provide the workpapers as requested.

The Cities also requested at least a three week continuance and extension of their prefiling date. The Cities cited three grounds for this requested relief. The first is the problem with the Coopers and Lybrand workpapers. The second is the parties' lack of access to documents involved in the confidentiality disputes. The third is that GSU allegedly filed late responses to a number of the Cities' RFIs.

The Cities' motion contains numerous factual statements which do not appear of record, and it is not supported by any affidavit. However, in response to the Cities' motion, GSU filed affidavits of five individuals. The examiner will not discuss the affidavits to the extent that they would lead the examiner to deny the requested relief. Where that is the case, in this order the examiner has simply not granted any relief based on that ground. However, in the following respects, the affidavits support the Cities' motion.

Mr. Willis's affidavit indicates that the workpapers were made available to the Cities' consultant, R. W. Beck, Inc., on January 8, 9 and 10, 1986. R. W. Beck's representatives arrived on the morning of January 8 and left the GSU office around noon on January 9, 1986. Mr. Willis was unaware of anyone at GSU who was told that R. W. Beck had not completed their review. Beginning on January 13, 1986, the workpapers will be unavailable for a minimum of three weeks while Coopers & Lybrand completes its work necessary for submission of certain forms required by law. The examiner notes that Mr. Willis' affidavit does not indicate whether or not GSU warned R. W. Beck that the workpapers would be unavailable.

Mr. Trevelise's affidavit indicates that the first time GSU learned that R. W. Beck had not completed their review of the workpapers was when Mr. Randy Allen of R. W. Beck so notified GSU on January 17, 1986. Mr. Trevelise informed Mr. Allen that the workpapers would not be available for approximately three weeks.

It appears from Mr. Jefferson's affidavit that, out of responses to questions which had not been objected to in the Cities' Second RFI, four were three days late and twenty-four were eight days late. Concerning the Cities' Fifth RFI, six responses were one day late, and one was four days late.

The examiner believes that dismissal is a more harsh remedy than is appropriate at this time. As noted previously, the Cities actually requested dismissal only in the event that GSU fails to comply with this order. The Cities' motion to dismiss, and for reasons described previously in this order, its motion for continuance, are hereby DENIED. The Cities' motion to compel is hereby GRANTED to the extent provided below. GSU SHALL make the workpapers available to R. W. Beck, in Beaumont, Texas unless otherwise agreed, by no later than 10:00 p.m. on Tuesday, February 4, 1986. Failure to do so will have the consequences described below. As soon as GSU knows when the workpapers will be available, GSU SHALL so notify Mr. Porter by telephone, to be promptly followed by written filing indicating the date and time. GSU and the Cities shall negotiate the necessary details. The Cities' request for extension in its deadline for prefiling testimony is hereby GRANTED to the following extent. The Cities' testimony and exhibits on Revenue Deficiency SHALL be filed by no later than 4:00 p.m. on Monday, February 24, 1986. Their testimony and exhibits on Rate Design SHALL be filed by no later than 4:00 p.m. on Monday, March 3, 1986. The purpose of this extension is to enable the Cities to include the fruits of their discovery in their direct case. The Cities are expected to resist the temptation to comment upon the intervenors' and staff's direct testimony which would not ordinarily have been filed before their own. All objections to the Cities' prefiled direct evidence concerning Revenue Deficiency and all requests to take any witnesses presenting such evidence on voir dire must be made in writing and filed and served upon the party whose testimony is sought to be stricken by 4:00 p.m. on Thursday, February 27, 1986. Failure to meet this deadline will result in waiver of the objection or request. All other deadlines in Order No. 4, except as amended elsewhere in this Order No. 23, SHALL remain unchanged.

In the event that GSU is unable to make the workpapers available by 10:00 a.m. on Tuesday, February 4, 1986, GSU SHALL so notify Mr. Porter or his law firm by telephone as soon as possible to be promptly followed by written filing containing the same information. GSU then SHALL indicate as soon as possible by written filing when the workpapers will be made available. The dates which are revised in the above paragraph will then automatically be extended one working day for each working day between February 4, 1986 and the first day on which the workpapers are available by at least 10:00 a.m. The workpapers will be considered made available for this purpose if R. W. Beck could look at them if they were in Beaumont, and if GSU has given Mr. Porter or his law firm at least 48 hours notice to this effect.

V. GSU's Counterproposal Concerning Continuance or Extension

On January 29, 1986, GSU filed a supplemental response to OPC's and the Cities' motions for continuance. GSU proposed a two week postponement of the deadlines for prefiling intervenor and staff testimony, a three week postponement of the hearing and a three week extension in GSU's deadline for prefiling rebuttal testimony. GSU characterized this proposed schedule as allowing the benefits of the proposed extensions to flow equally to all parties to the proceeding. The basis for the requested continuance is that the documents GSU had claimed to be confidential had been unavailable to the parties for two weeks following dissolution of the proposed protective order. GSU disavowed any responsibility for the scheduling problems and declined to extend its effective date.

GSU's request in the form of the above counterproposal is hereby DENIED for the same reasons as these discussed elsewhere in this order. Moreover, GSU has alleged no credible grounds for extending the hearing date or its deadline for filing rebuttal testimony by one week longer than the intervenor and staff prefiling dates.

VI. Examiner's Revisions to Order No. 4

It is evident from the intervenor's and staff's arguments that they are in some distress. Taking all of the motions and responses and the examiner's rulings into account, the examiner is of the opinion that a slight modification in the deadlines for prefiling intervenor and staff direct testimony and GSU rebuttal testimony should be granted. Pages 9 to 10 of Order No. 4, which presently sets out these and associated dates, is hereby AMENDED to provide as follows:

1. Except as indicated otherwise in Order No. 23, intervenors' testimony and exhibits on Revenue Deficiency shall be filed by no later than 4:00 p.m. on Tuesday, February 11, 1986. Except as indicated otherwise in Order No. 23, intervenor's testimony and exhibits on Rate Design shall be filed by no later than 4:00 p.m. on Tuesday, February 18, 1986.

2. Staff testimony and exhibits on Revenue Deficiency shall be filed by no later than 4:00 p.m. on Tuesday, February 18, 1986. Staff testimony and exhibits on Rate Design shall be filed by no later than 4:00 p.m. on Tuesday, February 25, 1986.

3. Rebuttal testimony and exhibits by GSU to prefiled testimony of intervenors and staff on Revenue Deficiency shall be filed by no

later than 4:00 p.m. on Friday, March 7, 1986. Testimony and exhibits which constitute rebuttal by GSU to prefiled testimony of intervenors and staff on Rate Design shall be filed by no later than 4:00 p.m. on Thursday, March 14, 1986. (The rest of paragraph 3 after the first two sentences remains unchanged.)

Except as indicated above, Order No. 4 remains unchanged. These changes are in addition to those indicated elsewhere in this order.

SIGNED AT AUSTIN, TEXAS on this the 30th day of January 1986.

PUBLIC UTILITY COMMISSION OF TEXAS

Elizabeth Drews
ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE

nsh

DOCKET NOS. 6477 and 6525

INQUIRY OF THE PUBLIC UTILITY COMMISSION OF TEXAS CONCERNING THE FIXED FUEL FACTOR OF GULF STATES UTILITIES COMPANY

APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES

ORDER NO. 22

ORDER RULING ON CONFIDENTIALITY OF DISCOVERY DOCUMENTS, ESTABLISHING A DEADLINE FOR RESPONDING TO MOTIONS FOR SUBPOENA, AND DISCUSSING MOTION TO INTERVENE, AND ORDER NUNC PRO TUNC

The sixth prehearing conference in this case was held on Friday, January 24, 1986. Appearances were entered by the following persons: George Avery, Cecil Johnson and Don Clements for Gulf States Utilities Company (GSU); Rex VanMiddlesworth for Texas Industrial Energy Consumers; Scott McCollough for the state agency customers of GSU (State Agencies); Jim Boyle and Walter Washington for the Office of Public Utility Counsel (OPC); Steve Porter for numerous cities (the Cities); Richard Ferguson for the Cities of Sour Lake, Nome and China; and Alfred R. Herrera of the Commission General Counsel's Office for the public interest. Tom Stevens appeared for General Electric (GE), which is not a party to the case.

Only GSU's second motion for protective order is ruled on in this order. All of GSU's pending objections to other parties' requests for information (RFI) were resolved by negotiation or deferred by agreement of the parties. Various motions also argued at the prehearing conference will be ruled on by subsequent order. However, a deadline for Houston Lighting and Power Company (HL&P) to respond to the motions for subpoena of certain HL&P employees is established herein.

I. Confidentiality Disputes

On January 24, 1986, GSU filed its second motion for protective order. By agreement of the parties, the procedures utilized at the January 13, 1986 prehearing conference at which the confidentiality of various documents was argued also governed consideration of the documents listed in GSU's second motion, which are ruled on in this order. The parties' arguments in connection with that prehearing conference were also applied to these documents. In addition, the examiner has considered oral arguments at the January 24, 1986 prehearing conference, the approximately six inches of documents she has reviewed in camera, and GSU's second motion for protective order and the five affidavits attached thereto. In the present order, the examiner has utilized the same standard as that set forth in Order No. 18. The procedures, standard and other matters are discussed in Order No. 18, which is incorporated by reference in the present order. GSU indicated that the documents ruled on herein have not been provided to the parties. Together with documents ruled on in Order No. 18, these documents constitute all materials requested in RFIs in this case which GSU claims to be confidential.

The examiner finds that all materials claimed by GSU or a third party to be legally protected from public disclosure are not so protected, and should be available for release to the public, except as expressly indicated otherwise below. The examiner finds that the following documents constitute a legally recognizable trade secret of a third party and should not be required to be available for disclosure to the public at this time:

1. Documents indicating the logic contained in the computer program used by TLG Engineering to perform its decommissioning study (Tab D).

As noted in Order No. 18, the legal standard is even more stringent with respect to protective measures governing documents on which the agency's decision is actually based. The examiner reserves the right to apply this different standard and to reconsider her rulings that the above documents are confidential in the event that they are placed in the record and she relies on them in making her substantive recommendations in this case.

At the prehearing conference Mr. Porter requested that a copy of the documents contained in Tab D, if found to be protected, be provided under protective order to the Cities' consultant, Mr. Powe of R.W. Beck. The reason is that Mr. Powe will need to spend many hours with them. On January 27, 1986, counsel for GSU notified the examiner by telephone that they would not object to this proposal. Mr. Porter's request is hereby GRANTED.

The examiner notes that GSU affiant Judith Moses requested that GSU be allowed to delete the customer names in the interruptible service contracts contained in Tab B. The Cities indicated that this would be acceptable, and no party expressed opposition to this proposal. GSU's request seems appropriate to the examiner, and is hereby GRANTED. The examiner notes that additional customer-specific information is also called for in the form contracts to which the same rationale for deletion appears to apply. It is therefore ORDERED that GSU may also delete the information filling in the second blank in Article II of each contract which indicates the location of the customer's premises, and any other reference to the customer's location or address, or to the name of an official or employee of the customer. GSU SHALL delete only the information described above.

It is hereby ORDERED that GSU SHALL make available to the parties as soon as possible all documents found to be legally protected in this Order, subject to the Protective Order contained in Order No. 18. It is further ORDERED that GSU SHALL make available to the parties as soon as possible all documents found not to be legally protected in this Order. Until and unless provided otherwise by order of the Commission, documents found not to be legally protected in this Order SHALL be subject to the Protective Order contained in Order No. 18 until noon on Friday, February 7, 1986, after which disclosure to the public SHALL be permitted.

II. Deadline for Responding to Motions for Subpoena

On January 16, 1986, OPC and the general counsel filed motions for the issuance of a subpoena for the taking of the deposition of J. D. Guy and Eugene Simmons, and for a subpoena duces tecum of certain documents in connection with Mr. Simmons' deposition. Copies of these motions are attached to HL&P's copy of this order. Mr. Guy and Mr. Simmons are HL&P officials. OPC indicated that HL&P was notified of these motions. HL&P did not appear at the January 24, 1986 prehearing conference. No party to this case expressed opposition to the motions. At the prehearing conference, OPC indicated that the time for both depositions had been set for Friday, February 7, 1986 at 9:30 a.m. It is hereby ORDERED that if HL&P objects to these motions, it shall indicate and explain its objections by written filing no later than noon on Monday, February 3, 1986. A copy of this order has been sent to:

Mr. George Schalles
Houston Lighting and Power Company
P.O. Box 1700
Houston, Texas 77001

III. Motion to Intervene

On January 24, 1986, Concerned Utility Rate Payers Association, Inc. filed a motion to intervene. A copy is attached. This motion will be ruled on in accordance with the procedures set forth in Order No. 4.

IV. Order Nunc Pro Tunc

The examiner signed one order in this case dated January 24, 1985 and another on January 27, 1985. Unfortunately, both orders were numbered "Order No. 20". The January 27, 1985 order respecting disposition of unclaimed fuel refunds is hereby RENUMBERED Order No. 21. The parties are urged to renumber their copies of this order and to refer to it in the future as Order No. 21. The examiner apologizes for the confusion.

SIGNED AT AUSTIN, TEXAS, on this the 28th day of January 1986.

PUBLIC UTILITY COMMISSION OF TEXAS

Elizabeth Drews
ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE

bdb

DOCKET NO. 6525

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1986 JAN 21 PM 1:13

APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES	§ § §	PUBLIC UTILITY COMMISSION OF TEXAS

PETITION FOR LEAVE TO INTERVENE

NOW COMES Concerned Utility Rate Payers Association, Inc., hereinafter "Petitioner", pursuant to the Public Utility Regulatory Act, TEX. REV. CIV. STAT. ANN. art. 1446c (Supp. 1984), and Sections 21.41, 21.42, 21.44, 21.62 and 21.64 of the Commisssion's Rules of Practice and Procedure, and files this its Petition to Intervene as a party in the above referenced docket and in support thereof would respectfully show the following:

1.

The name and address of Petitioner is as follows:

Concerned Utility Rate Payers Association, Inc.
P.O. Box 1577
Bridge City, Texas 77611

2.

The name, address and telephone number of the persons representing Petitioner are:

W. H. Reid, President of Concerned Utility Rate Payers Association, Inc.
3000 MacArthur Drive, Apt. 156
Orange, TX 77630
(409)883-5515

3.

The jurisdiction of the Commission over the parties and subject matter is pursuant to TEX. REV. CIV. STAT. ANN. art. 1446c.

4.

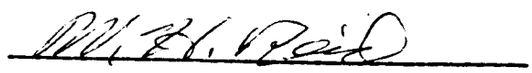
Gulf States Utilities has filed an application for an increase in rates concurrently before the Public Utility Commission and the various City regulatory authorities.

5.

Petitioner alleges that the members of its organization will be adversely affected by an increase in rates, and herein requests that the Applicant be required to meet its burden of proof as to each and every element of the proposed rates.

The Petitioner is an organization consisting of Gulf States Utilities' ratepayers within the state of Texas. As such they are vitally concerned with the rates in question in this Docket. Petitioner seeks intervention in order to insure that its interests are brought before the Commission and to enable it to participate in the setting of reasonable rates for Gulf States Utilities.

Respectfully submitted,



CERTIFICATE OF SERVICE

Petitioner hereby certifies that a copy of this Petition has been mailed to the Hearings Division of the Public Utility Commission, the General Counsel of the Public Utility Commission and to counsel for Applicant.

DOCKET NOS. 6477 AND 6525

INQUIRY OF THE PUBLIC UTILITY COMMISSION OF TEXAS CONCERNING THE FIXED FUEL FACTOR OF GULF STATES UTILITIES COMPANY

APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES

PUBLIC UTILITY COMMISSION OF TEXAS

1986 JAN 27 PM 2:09

ORDER NO. 21

ORDER RULING ON DISPOSITION OF UNCLAIMED FUEL COST OVERRECOVERY REFUNDS

I. Procedural Background

On October 16, 1985, Gulf States Utilities Company (GSU) filed a motion to refund to its customers past overrecoveries of fuel costs. The motion was resolved by stipulation as to all issues except one. The disputed issue is whether the Commission lawfully can order that unclaimed refunds must be distributed to GSU's Project Care, or whether that issue is controlled by the State laws regarding escheat.

The disputed issue was orally argued before the examiner on October 29, 1985. The following persons appeared: Donald M. Clements for GSU; Jonathan Day for Texas Industrial Energy Consumers; W. Scott McCollough of the Attorney General's office for the State Agencies; Jim Boyle for the Office of Public Utility Counsel; and Alfred R. Herrera of the Commission General Counsel's office for the public interest. Mr. McCollough argued that the state escheat laws are controlling. Mr. Clements and Mr. Boyle argued to the contrary. The parties agreed that under the stipulation, the issue need not be resolved for some time, that it should not delay adoption of the stipulation, and that briefing the issue would be appropriate.

GSU and the State Treasurer, which had intervened on this one issue, filed briefs on December 2, 1985, and reply briefs on December 9, 1985.

On December 16, 1985, GSU wrote a letter to Commission Executive Director Richard Galligan indicating that GSU intends to postpone transferring to Project Care the unclaimed refunds which arose from a previous case, Docket No. 6376. The examiner is not ruling as to Docket No. 6376, since the issue is not properly before her. No motion has been filed, and the examiner is without authority to review in this docket an unappealed final order of the Commission in a previous docket.

II. The Stipulation

The disputed issue concerns only customers other than large industrial service (LIS) and large power service (LPS). The following description applies only to consumers who are not LIS or LPS customers.

Under the stipulation, the refund was allocated to each rate class on a month-to-month basis according to each class's kilowatt-hour (kwh) usage during each month of the refund period, which is August 1, 1985 through September 30, 1985. The refund was made by a credit on the first bill issued in the first complete GSU billing cycle after approval of the stipulation. The credit was the class refund factor times the customer's individual kwh usage during the refund period at that customer's point of service on the date of such billing.

The disputed issue concerns unclaimed refunds of customers who were not LIS or LPS customers during the refund period and who, during the first billing cycle after approval of the stipulation, either were not served by GSU or were served at a different address. Under the stipulation, by a one-time bill insert and by three weeks newspaper publication, GSU gave notice that a refund may be due such customers if such customers promptly contacted GSU in the manner set forth in the notice. To be eligible for a refund, which would be by check, such customers were required to respond within sixty days after the mailing or publication of the notice by providing to GSU sufficient information to permit GSU to establish and verify their pertinent usage and location. Any refund amounts that might otherwise be due such customers who failed to respond timely to the notices were to be transferred by GSU to Project Care for GSU's Texas service area.

III. Examiner's Conclusions

The State Agencies argue that the disputed provision in the stipulation would violate the Texas escheat law, Tex. Prop. Code tit. 6 (Vernon Supp. 1986). With regret, the examiner agrees.

Tex. Prop. Code tit. 6 ch. 72 relates to abandonment of personal property. Tex. Prop. Code tit. 6 Sec. 72.001 (b) provides: "This chapter applies to tangible and intangible personal property held in this State and to tangible and intangible personal property held outside this State for a person whose last known address is in this State." The disputed issue raises two basic questions. First, does Tex. Prop. Code tit. 6 ch. 72 apply to personal property of others held by public utilities? Second, are the unclaimed refunds personal property within the meaning of this chapter?

A. Does Tex. Prop. Code tit. 6 ch. 72 apply to personal property of others held by public utilities?

The examiner concludes that Tex. Prop. Code tit. 6 ch. 72 does apply to the personal property of others held by a public utility, for several reasons.

First, several of the cases that have arisen under Ch. 72 have involved electric utilities holding others' unclaimed personal property such as dividends, funds for redemption of stocks or bonds, customer deposits and interest thereon, wages, and deductions from employees' salaries. (See, e.g., State v. El Paso Electric Company, 402 S.W.2d 807 (Tex. Civ. App. - El Paso 1966, writ ref'd n.r.e.); Central Power and Light Co. v. State, 410 S.W.2d 18 (Tex. Civ. App. - Corpus Christi 1966, writ ref'd n.r.e.) and State v. Texas Electric Service Company, 488 S.W.2d 878 (Tex. Civ. App. - Fort Worth 1972, no writ.)

Second, Sec. 72.001(f) provides:

> (f) In this chapter, a holder is a person, wherever organized or domiciled, who is:
>
> (1) in possession of property that belongs to another;
> (2) a trustee; or
> (3) indebted to another on an obligation.

Electric utilities appear to be within this definition.

The examiner notes that as amended in 1975, Sec. 72.001(d) provides: "This chapter applies to property held by life insurance companies with the exception of unclaimed funds, as defined by Section 3, Article 4.08, Insurance Code, held by those companies that are subject to Article 4.08, Insurance Code. One could argue that this language means that Ch.72 applies only to life insurance companies. The examiner does not so conclude. First, such an interpretation would be difficult to reconcile with Sec. 72.001(f), quoted above. Moreover, Ch. 72 also applies to unclaimed travelers checks and money orders, which are not ordinarily issued by life insurance companies. Second, in the past, Ch. 72 expressly did not apply to life insurance companies. It appears that Sec. 72.001(d) was simply intended to make Ch. 72 applicable to life insurance companies in addition to other entities.

B. Are the unclaimed fuel overrecovery refunds personal property under Tex. Prop. Code tit. 6 ch. 72?

The terms "property" and "personal property" are not expressly defined in tit. 6. By way of rough definition, the examiner has interpreted the terms to refer to property, other than real property, which is an identifiable item or amount, to which a particular person or entity has or had a present entitlement.

Most of the ch. 72 cases involve personal property which the owner acquired the right to by contract, indebtedness or statute. One unusual aspect of the present case is that each customer acquired ownership of the property, in the sense of present entitlement to a specific amount, only when the order approving that portion of the stipulation was entered. The examiner was unable to find a Texas case involving this type of property. However, there is a 1948 Texas Attorney General Opinion involving a situation where taxes were levied and collected to pay interest and to create a sinking fund to pay the bonds of a road district. The

The road district was abolished, and no bonds were issued. Judgment was rendered by a district court ordering officials and the depository to refund the tax money pro rata to persons who paid it. However, a certain sum was not claimed for a period of 27 years, and those who were entitled to receive it could not be ascertained by reasonable diligence. The Attorney General concluded that the sum was subject to escheat proceedings by the State. (Op. Atty. Gen. 1948, No. V-639.) Tex. Prop. Code tit. 6 ch. 72 is not by its terms limited to property to which the entitlement was created in some specific way, such as by contract. The examiner concludes that if a fuel cost overrecovery refund is an identifiable item or amount to which a particular customer acquired a present entitlement by order of the Commission, it can constitute personal property within the meaning of Tex. Prop. Code tit. 6 ch. 72.

GSU argued that the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1986) gives the Commission the power to determine the method of disposition of unclaimed fuel cost overrecoveries. PURA section 16(a) provides: "The Commission has the general power to regulate and supervise the business of every public utility within its jurisdiction and to do all things, whether specifically designated in this Act or implied herein, necessary and convenient to the exercise of this power and jurisdiction." The Commission has jurisdiction over GSU's rates. (PURA section 37.) It has the power to determine the manner in which and extent to which fuel costs will be recovered. (PURA section 43(g).) By implication it has the authority to order refunds and to determine the methodology and procedures to be used. By choosing a particular mechanism or procedure, the Commission effectively can determine whether a particular customer receives a refund or not and if so, in what amount. The question is, having already determined that an individual customer is entitled to a specific amount, can the Commission go further and specify who is to get the money if the customer does not claim it? If there were no escheat law, such power might be implied. However, the examiner must agree with the State Treasurer that the escheat law controls, because it mandates a specific and express mechanism, whereas the PURA provides only a broad grant of power from which the Commission's authority to order a different result than that provided by the escheat law would have to be implied.

GSU states that an individual customer has no independent legal right to a refund absent a Commission order, and argues that, this being the case, the Commission can make the refund dependent upon the terms of the order. If the order provides for a contingent distribution of funds such as transferring the amounts to Project Care, GSU contends, then the terms of the order control and there is no fund to escheat to the State.

The examiner need not decide the merit of GSU's argument in general, because in this particular case, the assumption does not apply. Pursuant to agreement of the parties, the examiner ordered the refunds in October, but did not rule on the issue of disposition of unclaimed refunds. While the examiner doubts that either she or the parties had thought through any possible implications of this timetable for the disputed issue, she cannot ignore the fact that in this case the entitlements have been established and the refunds made without the "condition" relating to unclaimed refunds being included.

The State Treasurer points out that its position is supported by two decisions from other jurisdictious. In Cory v. Public Utilities Commission, 658 P.2d 749 (Cal. 1983), the California Supreme Court overturned a decision by that State's utility regulatory agency which provided that unclaimed refunds payable by a telephone utility shall be distributed pro rata to its current customers. The court held that the refunds must be paid to the State under the California escheat law. The opinion states:

> The Commission is not authorized to forfeit the refunds of the unlocated customers, and the property should be held for the benefit of the unlocated customers and for the use of the state in accordance with the Unclaimed Property Law. There is no more reason to allocate the unclaimed rate refunds to current telephone customers than there would be for a bank to allocate unclaimed property to its current customers.

The Florida Supreme Court reached the same result in Lewis v. Public Service Commission, 463 So.2d 277 (Fla. 1985).

The examiner does not approve the second and fourth sentences of paragraph 5 of the stipulation. Unclaimed refunds shall be governed by the Texas escheat laws.

SIGNED AT AUSTIN, TEXAS on this the 27th day of January 1986.

PUBLIC UTILITY COMMISSION OF TEXAS

Elizabeth Drews
ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE

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DOCKET NOS. 6477 and 6525

1986 JAN 24 PM 1:33

PUBLIC UTILITY COMMISSION

OF TEXAS

INQUIRY OF THE PUBLIC UTILITY COMMISSION OF TEXAS CONCERNING THE FIXED FUEL FACTOR OF GULF STATES UTILITIES COMPANY

APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES

ORDER NO. 20

ORDER RULING ON DISCOVERY DISPUTES AND AMENDING ORDER NO. 18

I. Discovery Disputes

The fifth prehearing conference in this docket was held on January 13 and 14, 1986 for the purpose of considering pending discovery disputes and motions. Disputes concerning Gulf States Utilities Company's (GSU) First Request for Information (RFI) from Staff and Intervenors, argued on January 14, 1986, are resolved herein. At the prehearing conference on January 14, 1986, appearances were entered by George Avery for GSU, Peter Brickfield for North Star Steel Texas, Inc., Walter Washington for the Office of Public Utility Counsel (OPC), Steven A. Porter for numerous cities (the Cities), W. Scott McCollough of the Attorney General's Office for certain state agencies (the State Agencies), and Alfred R. Herrera of the Commission's General Counsel Office for the public interest.

Only the questions discussed below remained in dispute on January 14, 1986. To the extent that an objection is overruled, the response or supplemental response shall be submitted at the time of prefiling of the responding party's testimony. Where the party has offered some alternative in its objections or oral argument, such as making documents available instead of providing a copy, or answering a question in a particular way, an indication that an objection is sustained or sustained in part should be interpreted as requiring the objecting party to comply with that offer.

A. Cities' Objections to GSU's First RFI

Instruction 1(b). Objection sustained. Cities may interpret instruction to refer only to persons working on this rate case for or on behalf of the Cities.

Instruction 2. Objection sustained. This might be appropriate with reference to a specific question but as a general instruction for application to all questions is inappropriate.

Instruction 11. Objection overruled, unless otherwise indicated with reference to a specific question. (Texas Rules of Civil Procedure Rule 166b.2.b.). Where information appears to be only of marginal relevance or usefulness the examiner s limited some RFIs to "actual possession".

Instruction 12. Objection sustained. See instruction 2.

Instruction 18. Objection sustained.

Instruction 2(a). Objection sustained in part. The Cities shall indicate the general subject of the witness' testimony, if known (e.g., accounting, cost allocation).

Question 2(c). Objection sustained in part. In addition to the response the Cities have offered to make, they shall make available to GSU copies of all such testimony and transcripts in their or in their witness' actual possession.

Question 2(e). Objection sustained in part. The Cities shall indicate under what circumstances, if any, the Cities would be able to make their witnesses available for interview or discussion (as opposed to formal deposition) with GSU's representatives. The Cities need not explain their reasoning.

Question 3(a). Objection sustained.

Question 3(b), 3(c) and 3(d). Objection sustained in part. In addition to the response the Cities have offered to provide, if the witness is offering testimony in this proceeding about the subject matter of the question, the Cities shall indicate the identities requested, if any, and make available to GSU the requested copies, and, for 3(d), comparisons, if such copies and comparisons exist and are within their or their witness' actual possession.

Question 3(e), 3(f), 3(g) and 3(h). Objection sustained in part. If the witness is offering testimony in this proceeding about the subject matter of the question, the Cities shall make available to GSU the information requested if it presently exists and is within their or their witness' actual possession.

Question 3(i). Objection sustained.

Questions 4 through 7, 13, 14, and 16 through 21, 22, 23(b) and (c). Objection sustained.

Question 25. Objection sustained in part. It is unclear to the examiner what the Cities are offering to provide. The Cities shall make available the actual computer runs used by its witnesses in connection with their testimony in this proceeding.

Question 26 through 33. Objection sustained.

B. OPC's Objections to GSU's First RFI

Question 4 through 7, 14 and 28 through 33. Objection sustained.

C. General Counsel's Objections to GSU's First RFI

Question 2(b) and 2(c). Objection sustained.

Question 2(e) and 3(h). Objection sustained in part. See ruling on these questions for the Cities.

Question 3(i), 4 through 7, 13, 16, and 28 through 33. Objection sustained.

II. Amendment of Order No. 18

In Order No. 18, the examiner held certain Edison Electric Institute (EEI) Executive Compensation Surveys and updates thereto to be confidential. Upon further reflection, the examiner is of the opinion that this ruling was erroneous in light of the standard described in that order which she applied to the other documents. Order No. 18 is hereby AMENDED to delete item no. 5 from Part III of the order. The deadlines and procedures applicable to documents found not to be confidential and described in Order No. 18 SHALL also apply to the EEI studies. However, the parties' deadline for appealing this order under the Commission's rules shall be calculated from the date of the present order. If GSU wishes this amendment to be considered with its appeal of Order No. 18, it should simply supplement its appeal to so indicate.

SIGNED AT AUSTIN, TEXAS on this the 24th day of January 1986.

PUBLIC UTILITY COMMISSION OF TEXAS

Elizabeth Drews

ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE

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DOCKET NOS. 6477 and 6525

INQUIRY OF THE PUBLIC UTILITY COMMISSION OF TEXAS CONCERNING THE FIXED FUEL FACTOR OF GULF STATES UTILITIES COMPANY

APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES

PUBLIC UTILITY COMMISSION OF TEXAS

ORDER NO. 19

NOTICE OF SEVENTH PREHEARING CONFERENCE, AND ORDER ESTABLISHING PROCEDURES AND DEADLINES CONCERNING MOTIONS FOR PROTECTIVE ORDER AND RULING ON MOTIONS TO CONSOLIDATE CITY APPEALS

I. Notice of Seventh Prehearing Conference

Given the procedural history of this case, it seems likely that a seventh prehearing conference will be necessary. Pursuant to P.U.C. PROC. R. 21.83, a seventh prehearing conference will be conducted herein on Tuesday, February 4, 1986, beginning at 10:00 a.m. at the Commission's offices at 7800 Shoal Creek Boulevard, Austin, Texas. The following matters will be considered at the prehearing conference:

1. Any pending request or motion filed with the Commission and served upon the parties on or before noon on Friday, January 31, 1986; and

2. Any other matters which may aid in the simplification of the proceedings and the disposition of any issues in controversy including the stipulation of uncontested matters.

If no such motions or requests are filed by noon on January 31, 1986, the prehearing conference will be cancelled.

II. Procedures and Deadlines Concerning Motions for Protective Order

On January 20, 1986, Gulf States Utilities Company (GSU) filed a request for a prehearing conference to consider protection of certain documents which GSU alleges are confidential. It is hereby ORDERED that in the event that GSU wishes for the examiner to consider any additional written materials, other than the documents alleged to be confidential, or any statements by potential affiants or witnesses, GSU SHALL file such written materials, and SHALL reduce to writing and file such statements in sworn affidavit form, by no later than 9:00 a.m. on Friday, January 24, 1986. GSU SHALL also bring to the prehearing conference scheduled for January 24, 1986, the documents referenced in its request, for possible examination by the examiner.

The examiner notes that all requests for information (RFIs) were due on January 15, 1986. The examiner presumes that GSU's motions filed to date cover all information which was requested in RFIs from GSU which GSU claims to be confidential as opposed to privileged (see Order No. 18). In the event that this

is not the case, GSU SHALL file by no later than 9:00 a.m. on Friday, January 24, 1986, a request for a prehearing conference at which such claims might be considered, specifying the additional documents claimed to be confidential and the specific grounds for this claim. Procedures for dealing with such claims will be discussed at the January 24, 1986 prehearing conference.

The examiner's secretary contacted GSU concerning these deadlines by telephone on Tuesday, January 21, 1986.

III. Motions to Consolidate City Appeals

On January 3, 1986, GSU filed an appeal from the decision of the City of Woodlock, which had denied GSU's request for a rate increase. With the appeal was a motion to consolidate the appeal with the present case. No objections to GSU's motion to consolidate were filed. In accordance with the procedures set forth in Order No. 4, this motion to consolidate is hereby GRANTED.

SIGNED AT AUSTIN, TEXAS, on this the 22nd day of January 1986.

PUBLIC UTILITY COMMISSION OF TEXAS

Elizabeth Drews
ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE

bdb

DOCKET NOS. 6477 and 6525

INQUIRY OF THE PUBLIC UTILITY COMMISSION OF TEXAS CONCERNING THE FIXED FUEL FACTOR OF GULF STATES UTILITIES COMPANY

APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES

PUBLIC UTILITY COMMISSION OF TEXAS

ORDER NO. 18

ORDER RULING ON CONFIDENTIALITY OF DISCOVERY DOCUMENTS AND PROTECTIVE ORDER

Before issuing this order, the examiner reviewed and considered every authority cited by the parties and every document whose confidentiality is in dispute, as well as all written filings and oral arguments. The examiner has not attempted to describe all of the above in this order, because doing so would likely delay its issuance to an extent severely prejudicial to the cases of many of the parties. She has considered it important to discuss in some detail, however, the general procedures and standards utilized.

I. Procedural Discussion

On December 16, 1985, the examiner adopted a protective order, pursuant to which documents claimed by Gulf States Utilities Company (GSU) to be confidential but not privileged were made available to the parties. On January 3, 1986, the Office of Public Utility Counsel (OPC) filed an request for an order finding that the documents claimed by GSU to be confidential are not. At a January 8, 1986, open meeting, the Commission granted the Cities' appeal and dissolved the protective order. As discussed at the open meeting, GSU then began to recollect from the other parties the documents it had provided pursuant to the protective order. At the open meeting, the examiner stated that OPC's request to designate the documents non-confidential would be considered at the January 13, 1986, prehearing conference and that she would issue an order requiring GSU to file specific pleadings concerning its confidentiality claims. On Monday morning, January 13, 1986, GSU filed numerous documents, including its motion for protective order, memorandum in support thereof, and affidavits with attachments by twelve individuals. GSU asked to be allowed to present evidence by the twelve persons that afternoon.

At the prehearing conference, appearances were entered by the following: George Avery, Cecil Johnson, Donald Clements and Patrick Cowlishaw for GSU; Ralph Gonzalez for Texas Industrial Energy Consumers (TIEC); Peter Brickfield for North Star Steel Texas, Inc. (North Star Steel); Scott McCollough of the Attorney General's Office for the State Agencies; Jim Boyle, Walter Washington and Jeannine Lehman for OPC; Steve Porter for the Cities; and Alfred R. Herrera of the Commission General Counsel's Office for the public interest. In addition, appearances were entered by two non-parties: Thomas Anson and Ellen Cohn for Stone and Webster (S&W), and Stuart Richel for General Electric (GE). The

prehearing conference convened at 1:30 p.m. Approximately eight hours of argument were heard concerning the confidentiality issues. The prehearing conference was then recessed, and reconvened at 8:00 a.m. the following day in order to take up other pending discovery disputes. These discovery disputes are ruled on in other examiner's orders.

At the January 13, 1986 prehearing conference, the staff and the intervenors, except for the State Agencies, all opposed both GSU's request for the taking of evidence, and GSU's request that evidence be taken that day. Reasons cited include the following: (1) the prehearing conference was not noticed for the taking of evidence; (2) the caselaw does not require that evidence be taken; (3) the taking of evidence would be contrary to the scheme agreed to by most parties, including GSU, in the protective order; (4) at least one party had not exercised its right to review all of the documents under the protective order before it was dissolved and accordingly would have difficulty preparing for the taking of evidence concerning the confidentiality of such documents; (5) the parties had had insufficient time to prepare; and (6) the parties feared that the taking of evidence would delay issuance of an order enabling them to see the documents again. The State Agencies argued that the taking of evidence was recommended but not required, but that evidence should not be taken on that day. Mr. McCollough stated that the State Agencies would be willing to abide by an agreement among the parties not to disclose documents to the public while confidentiality of the documents is being considered, so that they could have access to the documents but still obtain a speedy resolution respecting disclosure.

GSU argued that evidence should be taken because the confidentiality issues are so serious, and that the taking of evidence in such situations is common practice in the courts. In response to a series of questions by the examiner, GSU indicated the following. First, the parties not present at the prehearing conference would not yet have received GSU's motion since it had just been mailed that day. Second, the fundamental facts GSU hoped to prove by presenting evidence were those contained in its affidavits. Third, the examiner should look to GSU's January 13, 1986 filing, rather than the attachments to the protective order, to ascertain what documents GSU is presently claiming are confidential, because GSU has pruned the list somewhat. Fourth, the documents GSU wants the examiner to review in camera total approximately eight feet in height. Fifth, GSU would not be willing to agree with individual parties that documents be provided confidentially, in the absence of a protective order. There followed a discussion among the parties concerning whether, if the examiner found that documents are not confidential, she should order immediate disclosure, disclosure after a period of time allowing GSU an opportunity to appeal to the Commission, or disclosure under a protective order allowing the parties to look at the documents during GSU's appeal.

The intervenors and staff were unenthusiastic about the examiner's suggestion that other pending discovery disputes be taken up on January 13, 1986, and that the prehearing conference then be recessed for a few days to allow the intervenors

and staff time to review and to prepare for consideration of GSU's filing respecting confidentiality. They did not favor this outcome unless the examiner decided that evidence should be taken. They were also generally unenthusiastic about submitting a written response to GSU's arguments and evidence, although for convenience the examiner established a deadline for anyone that wished to do so. Instead, the staff and all of the intervenors except the Cities agreed that the confidentiality disputes should be addressed using the following procedures. First, GSU's affidavits should be considered evidence of what GSU's witnesses would have testified to had they taken the stand. Second, the examiner should make her decision based on the written filings, oral argument and in camera inspection of the documents. Third, if the examiner issued a ruling that documents are not to be protected, the examiner should order that they be provided to the parties under a protective order during GSU's appeal time. The Cities agreed with (1) and (2), but opposed (3) on the grounds that it was precisely the scheme the Commission had disapproved in reversing the protective order. GSU initially wanted evidence to be taken unless the other parties stipulated to the facts contained in the affidavits, but later appeared reasonably satisfied if the intervenors and staff agreed, as they did, that the affidavits be considered as what GSU's witnesses would have testified to had they taken the stand.

The examiner then ruled that evidence would not be taken, that GSU's affidavits would be considered as what GSU's witnesses would have testified to had they taken the stand, and that her decision would be based on the written filings, oral argument, authorities cited, and in camera inspection of the documents.

On January 15, 1986, North Star Steel submitted copies of certain reports which GSU had filed with this Commission and with the Federal Energy Regulatory Commission. At the prehearing conference, all parties except GSU indicated that they had no objection to official notice being taken of these documents. GSU simply wished to assure itself that the copies were complete and accurate. On January 15, 1986, Mr. Avery notified the examiner by telephone that GSU has no objection to such official notice being taken. Official notice is hereby TAKEN of the documents submitted by North Star Steel. As contemplated at the prehearing conference, the examiner compared these documents to those claimed by GSU to be confidential in an effort to ascertain if any of the information alleged to be protected is in the public domain.

Legal memoranda were submitted by GE on January 15, 1986 and by S&W on January 16, 1986. On January 16, 1986, GSU filed a letter with attachments setting forth its position regarding a question raised by OPC, which concerns information claimed to be confidential submitted to Temple, Barker and Sloane, the firm which audited GSU for the Commission. On January 21, 1986, GSU submitted a list of documents claimed to be confidential which were since discovered to be in the public domain.

II. Legal Authorities

The participants' policy and legal arguments and citations to authorities respecting confidentiality in general are contained in GSU's, S&W's and GE's memoranda and in the transcript of the January 13, 1986 prehearing conference.

In general, GSU has used the term "privileged" to refer to documents which need not be disclosed to the parties or the public, and "confidential" to refer to documents which must be disclosed to the parties but not to the public. Although GSU, S&W and GE advanced some arguments which might be classified as referring to privileges, they have taken the position not that these documents should be withheld from the parties, but rather that they should be withheld from the public.

GSU asserts that all of the documents it claims to be confidential contain sensitive commercial information that, if disseminated without protection, would cause substantial harm to GSU in its future operations, or to third parties such as signatories to contracts with GSU, or entities which provided the requested information to GSU. For some documents, GSU seeks to protect only specific sections.

A. Texas Statutes and Rules

Section 14(a) of the Administrative Procedure and Texas Register Act (APTRA), Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1986), provides in part: "The rules of evidence as applied in nonjury civil cases in the district courts of this state shall be followed." Section 14a(a) provides that discovery is "subject to such limitations of the kind provided for discovery under the Rules of Civil Procedure".

The laws of privilege clearly apply to discovery in Commission proceedings. APTRA Section 14(a) states: "Agencies shall give effect to the rules of privilege recognized by law." (Accord APTRA Section 14a(a)(1), pertaining to discovery.) Rule 166b.3 of the Texas Rules of Civil Procedure (TRCP) provides in part: "The following matters are not discoverable:...(e) any matter protected from disclosure by privilege."

However, the privilege must be expressly authorized by law. (Rule 501 of the Texas Rules of Evidence (TRE).) The rule relating to the specific privilege claimed by GSU, S&W and GE is TRE Rule 507, which provides:

> A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interest of the holder of the privilege and of the parties and the furtherance of justice may require.

Of course even if a privilege exists, it may be waived by disclosure of any significant part of the privileged matter unless such disclosure itself is privileged. (TRE Rule 511.) Counsel for GSU, S&W and GE positively averred at the prehearing conference that they believed that all of the documents they claimed to be confidential met this standard.

It is evident from TRE Rule 507, quoted above, that the judge may order either that a trade secret not be disclosed, or that it be disclosed subject to "such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require." TRCP Rule 166b.4 states:

> Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:
>
> a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified;
>
> b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;
>
> c. ordering that results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted.

Courts (and by inference, agencies in the exercise of adjudicative functions) are given broad discretion regarding the protective measures to be imposed. (See McGregor v. Gordon, 442 S.W. 2d 751 (Tex. Rev. Civ. App. - Austin 1969, writ ref'd n.r.e.) Certainly the standard of what is required in the interests of justice is quite subjective. On the other hand, APTRA, TRCP and TRE make it obvious that the rules of privilege are mandatory.

B. Judicial and Administrative Decisions

When evidence has been shown to be relevant to the subject matter of the case, it is incumbent upon the party claiming that information should not be made public to show good cause. (See, e.g., Essex Wire Corp. v. Eastern Electric Sales Co., 48 F.R.D. 308 (E.D. Pa.1969).) "Whether particular information would customarily be disclosed to the public by the person from whom it was obtained is not the only relevant inquiry in determining whether the information is 'confidential'.... A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." (Nat'l Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).)

The particular claims of confidentiality made by GSU, S&W and GE raise three specific questions on which the cases shed some light. First, what type of information may constitute a trade secret? Second, who may claim the privilege? Third, what standards should be used in determining if protective measures are warranted?

1. What Type of Information May Constitute a Trade Secret?

In Luccous v. J.C. Kinley Co., 376 S.W. 2d 336 (Tex. 1964), the Texas Supreme Court used the following definition:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article.

In Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 529 F. Supp. 866 (E.D. Pa. 1981), aff'd in part, rev'd in part on other grounds, 723 F.2d 238 (3rd Cir. 1983), the court observed that in cases in which a protective order has been issued, the courts discuss categories of information such as customer, supplier, and price lists, financial records, and contract terms. "The terms of an agreement or a contract have often been the subject matter of a protective order designed to ensure that this type of confidential business information is not revealed to the public." (Essex Wire.)

2. Who Can Claim the Privilege?

The present case presents two issues concerning who can claim the trade secret privilege: first, can GSU claim the privilege, and second, can third parties such as S&W and GE claim the privilege?

a. Can GSU Claim the Privilege?

The purpose of the trade secret privilege is to protect competitively sensitive information from disclosure. The question thus arises, can a monopoly such as GSU claim the privilege? In National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), the court made the following comments concerning this question:

> Appellant argues that such a showing cannot be made in this case because the concessioners are monopolists, protected from competition during the term of their contracts and enjoying a statutory preference over other bidders at renewal time. In other words, appellant argues that disclosure cannot impair the concessioners' competitive position because they have no competition. While this argument is very compelling, we are reluctant to accept it without first providing appellee the opportunity to develop a fuller record in the district court. It might be shown, for example, that disclosure of information about concession activities will injure the concessioners' competitive position in a nonconcession enterprise.

Unlike the situation in National Parks, the current case does not present a situation where public disclosure of the information could harm the monopolist's activities in a competitive market. Certainly, neither GSU's pleadings and affidavits, nor the documents claimed to be privileged, suggest this possibility.

GSU argues that, although it is a monopoly, it must purchase goods and services in competitive markets. GSU asserts that disclosure of the documents could damage GSU's ability to obtain favorable prices for the goods and services it must purchase, and thereby increase rates as GSU passes these higher costs on to its customers. While the scenario GSU describes might be a cause for concern, it does not appear to be the type of concern which forms the basis for the trade secret or any other privilege. The Commission might have the discretion to order protective measures pursuant to TRCP Rule 166b.4, which does not refer to privileges or to competitive sensitivity. However, the examiner reads the Commission's comments at the January 8, 1986 open meeting to indicate their conviction that the importance of public disclosure of information concerning the components of public utility rates outweighs the risk, if any, that disclosure might drive up some prices. (See January 8, 1986 open meeting Tr. at 89, 91, 94-97, 117.) The Commission observed that privileges are strictly construed and that as a general rule, public disclosure is required.

The examiner concludes that GSU can not claim the privilege.

b. Can Third Parties Claim the Privilege?

As noted previously, two third parties, S&W and GE, appeared at the prehearing conference and later submitted legal memoranda. GSU's January 13, 1986 filing includes an affidavit by a representative of GE, January 1986 letters from representatives of Kerr-McGee Corporation, Exxon Gas System, Inc., Burlington Northern Railroad, and Cogen Power, Inc., and earlier letters from representatives of Cajun Electric Power Cooperative, Inc., GE, and the Department of Energy. Each of the above entities indicated that it did not wish for some of the documents GSU claims to be confidential to be disclosed to the public. When a reason was specified, it related to a trade-secret type interest of the third party. The question is thus presented: How should the Commission consider the rights of third parties requesting that documents be protected in deciding whether or not the documents should be disclosed to the public?

TRCP Rule 166b.4 refers to "the movant". However TRE Rule 507, respecting trade secrets, states that "A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him," and that the court should consider "the interests of the holder of the privilege and of the parties and the furtherance of justice". GSU and GE cited several trade secrets cases in which the court obviously considered the rights of third parties in determining whether or not materials should be disclosed to the public. Where a trade secret interest of a third party has been specifically alleged, the examiner has done the same.

3. What Standards Should Be Used in Determining if Protective Measures are Warranted?

In Automatic Drilling Machines, Inc. v. Miller, 515 S.W.2d 256 (Tex. 1974), the Texas Supreme Court held: "A public disclosure of trade secrets should not be required, however, except 'in such cases and to such extent as may appear to be indispensable for the ascertainment of truth.'"

In Lamons Metal Gasket Co. v. Traylor, 361 S.W.2d 211 (Tex. Civ. App.-Houston 1961, writ ref'd n.r.e.), a Texas Court of Appeals observed that when information "is generally known in the industry, there is no legally recognizable trade secret." The discussion in Zenith, attached as Examiner's Exhibit A, also contains useful insights.

It has been held that a less stringent standard should be utilized for imposing protective measures regarding documents sought to be produced during discovery than those sought to be introduced at the hearing, for two reasons. First, there is a stronger public interest attached to documents upon which the court or agency's substantive decision is actually to be based, than to those simply requested by a party at some point during discovery. Second, such protective measures may facilitate discovery, particularly where complex litigation is involved. (See Zenith; Professor Ernest Gellhorn, "Business Secrets in Administrative Agency Adjudication," paper presented before the Federal Trial Examiners' Seminar, 1985.)

S&W cited several federal cases for the proposition that unjustified disclosure of proprietary information by a government agency constitutes a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. In one such case, Wearly v. FTC, 462 F. Supp. 589 (D.N.J. 1978), vacated on other grounds, 616 F. 2d 662 (3rd. Cir. 1980), cert. denied, 449 U.S. 822 (1980), the court observed:

> There can be no real doubt that the trade secret privilege, as a rule of evidence, is grounded on the property nature of the trade secret and that it recognizes the fact that disclosure of the tenor and content destroys both the value and the property. In balancing the need for evidence against the property right, the well-recognized concept is that the privilege is a qualified one in the sense that disclosure will be required (so that the evidence may be available) but under the control of a protective order (to the end that the property not be "taken").

Both GSU and the State Agencies cite decisions construing the trade secrets exception to the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1986). Some of the more applicable decisions are summarized below.

In Open Records Decision (ORD) No. 217 (1978), the Texas Attorney General held that the audit program part of a proposal submitted by Touche Ross & Co. to the State Government falls within the trade secret exception. The Attorney General related the following facts:

> An audit program consists of the plan and procedure by which an auditor conducts his audit. An accounting firm will specially adapt a program as it approaches each audit, and programs often reflect a substantial investment of time and money. We are advised that superior audit programs can give accounting firms significant competitive advantages.
>
> These programs are carefully treated as confidential within the firm and the industry. Only those employees who are involved with that particular audit are allowed access to the program. Manuals that contain audit plan information are assigned to specific employees and are

> required to be returned if an employee leaves the firm. During the audit, the audit program and auditor's workpapers are kept under lock when not in use. Also, in the proposal to the Criminal Justice Division, Touche Ross & Co. singled out the audit program as the only part of the proposal that it requested be kept confidential.

The opinion describes the standard used as follows:

> Besides giving advantages to competitors, a trade secret must also be treated as confidential by the business.... In Open Records Decision Nos. 198 and 184 we decided that information did not qualify for the 3(a)(10) exception when the businesses did not indicate what efforts, if any, had been made to keep the information confidential and there were no court decisions holding similar information to be trade secrets.

In ORD No. 292 (1981), the Attorney General held that a contract between the Texland Electric Cooperative and the Shell Oil Company is within the trade secrets exception. A copy of that opinion is attached as Examiner's Exhibit B.

In ORD No. 296 (1981), the Attorney General held that information provided to the City of Dallas' environmental department by a corporation was within the trade secret exemption. The opinion states: "The information was largely technical in nature and...related to raw material usage, production methods, and production and emission central processes and associated equipment." The Attorney General considered the following criteria:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

A similar approach was used in ORD No. 426 (1985).

The examiner notes that in each of the above decisions, a detailed and persuasive showing was made with respect to each element of the applicable standard. (Cf ORD No. 203, in which taxicab financial and usage reports were held not to qualify for the trade secrets exemption in part because of a lack of evidence of a specific harm which would result from disclosure.)

C. Summary

In general, the examiner has applied the following principles in deciding whether or not particular documents qualify as legally protected trade secrets.

A trade secret privilege applies only where the holder thereof sells its goods or services in a competitive market and disclosure might harm the competitive enterprise. In this case, the privilege does not apply to GSU, but might to a third party which supplied the information to or contracted with GSU.

Privileges are strictly construed. The party asserting the privilege has the burden of meeting each of its elements. The party must show that: (1) the type of information sought to be protected is the type contemplated by the trade secret privilege; and (2) specific harm would result from disclosure. With respect to type of information, a trade secret is a process or device for continuous use in the operation of the business which gives the owner an advantage over competitors who may not know or use it. Trade secrets generally arise in connection with the production of goods. Classic examples are machines or formulas. However, they may include contracts, compilations of information or financial records. A trade secret must not be in the public domain or generally known in the industry. The court may consider the staleness of the information. Information more than three years old has been held not to qualify for the privilege. However, the court must use its common sense in deciding this. In determining if information constitutes a trade secret, the court should consider: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the owner and to his competitors; (5) the amount of effort or money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. With respect to showing of harm, the party must show that specific and serious harm would result from the disclosure. Conclusory statements to this effect are insufficient.

Where a trade secret has been shown, the judge shall take such protective measure as the interest of the holder of the privilege and of the parties and the furtherance of justice may require. The trade secret should not be publicly disclosed except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. The protection to be afforded ordinarily is within the discretion of the trial court, and will not be disturbed unless an abuse of discretion is shown.

III. Rulings on Confidentiality

Many dozens of documents were alleged to be confidential. The examiner finds that all materials claimed by GSU or a third party to be legally protected from public disclosure are not so protected, and should be available for release to the public, except as expressly indicated otherwise below. The examiner finds that the following documents constitute a legally recognizable trade secret of a third party and should not be required to be available for disclosure to the public at this time. The document's location within the five boxes of documents claimed to be confidential is indicated in parentheses after the document's title.

1. Cogeneration Contract between GSU and Cogen Power, Inc. Dated September 1, 1984. (Tab G.)

2. Hay Associates, 1984 Executive Compensation Comparison: Utility/Industrial Management. (Box III.)

3. Sibson & Co., Inc., Special Utility Industrial Survey: Participants' Report. (Box III.)

4. Towers, Perrin, Forster & Crosby, Electric Utility Compensation Survey, 1984. (Box III.)

5. Edison Electric Institute, Executive Compensation Surveys and EEI updates thereto. (GSU's updates of the EEI study are held not to be confidential.) (Box III.)

6. S&W, Engineering Assurance Manual, Quality Assurance Directives, Quality Standards Manuals. (Tab. I.)

7. S&W, Integrated Management System Manuals. (Tab J.)

8. GE, River Bend Station Unit 1 Nuclear Design Reports, December 1984. (Tab S.)

As noted in part II. of this order, the legal standard is even more stringent with respect to protective measures governing documents on which the agency's decision is actually based. The examiner reserves the right to apply this different standard and to reconsider her rulings that the above documents are confidential in the event that they are placed in the record and she relies on them in making her substantive recommendations in this case.

IV. Revised Protective Order

A. Explanation

Since the examiner has found some of the documents or parts of documents in question to be legally protected, another protective order is needed. The following protective order is generally based upon the protective order dissolved by the Commission on January 8, 1986. As the examiner understood the Commission's decision, the problem was not so much most of the language of the order as the fact that it permitted nondisclosure to the public before documents were held to be confidential. The language used appeared to be generally acceptable to, and in fact was agreed to by most of, the parties. The examiner has made a few revisions to account for her concerns and those expressed by some parties, as well as changes in circumstances since the first protective order was entered.

B. Protective Order

1. Unless changed by subsequent order, this Protective Order shall be applied to materials found to be legally protected in Part III of Order No. 18, or, if different, those found to be legally protected by subsequent order of the Commission.

a. Such materials shall be referred to as "protected materials".

b. Protected materials shall also include any other documents or information supplied by or obtained from GSU that by subsequent order in this proceeding is made subject to the terms of this Protective Order.

c. However, protected materials shall not include any information or document contained in the public files of the Public Utility Commission of Texas, the Federal Energy Regulatory Commission or any other federal or state agency. Protected materials also shall not include documents or information which at the time of, or prior to, disclosure in these proceedings, is or was, public knowledge, or which becomes public knowledge other than through disclosure in violation of this Protective Order.

2. A "party" is a party to Public Utility Commission of Texas Docket Nos. 6477 and 6525.

3. Except as otherwise provided in this paragraph, a party shall be permitted access to protected materials only through its "authorized representatives." Authorized representatives of a party include its counsel of record in this proceeding and associated attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by the party and directly engaged in these proceedings.

4. Each person, except counsel, who inspects the protected materials shall first agree in writing to the following certification:

> I certify my understanding that the protected materials are provided to me pursuant to the terms and restrictions of the Protective Order in Public Utility Commission of Texas Docket Nos. 6477 and 6525, and that I have been given a copy of it and have read the Protective Order and agree to be bound by it. I understand that the contents of the protected materials, and any notes, memoranda, or any other form of information regarding or derived from the protected materials, shall not be disclosed to any one other than in accordance with the Protective Order and shall be used only for the purpose of the proceeding in Docket Nos. 6477 and 6525. I acknowledge that the obligations imposed by this certification are pursuant to an order of the Public Utility Commission of Texas. Provided, however, if the information contained in the protected materials is obtained from independent sources, the understanding stated herein shall not apply.

A copy of each signed certification shall be provided to counsel for GSU. Any authorized representatives may disclose materials to any other person who is an authorized representative or is qualified to be an authorized representative provided that, if the person to whom disclosure is to be made has not executed and provided for delivery of a signed certification to GSU, that certification shall be executed prior to any disclosure. In the event that any person to whom such protected materials are disclosed ceases to be engaged in this proceeding, access to such materials by such person shall be terminated. Any person who has agreed to the foregoing certification shall continue to be bound by the provisions of this Protective Order for the duration thereof, even if no longer so engaged.

5. Except for protected materials which are voluminous, GSU shall provide a party one copy of the protected materials. A party may make further copies of reproduced materials for use in this proceeding pursuant to the Protective Order, but a record shall be maintained as to the documents reproduced and the number of copies made, and the party shall promptly provide GSU with a copy of that record. Parties may take handwritten notes or derive other information from the protected materials provided in response to this Paragraph 5.

6. a. Protected materials will be made available for inspection by parties at the offices of GSU in Beaumont, Texas, between the hours of 9:30 a.m. and 5:00 p.m., Monday through Friday (except holidays). Protected materials also will be made available at the office of Public Utility Counsel, 8140 Mopac, Westpark III, Suite 120, Austin, Texas. The protected materials may be reviewed only during the "reviewing period", which period shall commence upon issuance of the Protective Order, and continue until conclusion of these proceedings. As used in this paragraph, "conclusion of these proceedings" refers to the exhaustion of available appeals, or the running of the time for the making of such appeals, as provided by applicable law.

b. Parties may take handwritten notes regarding the information contained in protected materials made available for inspection pursuant to Paragraph 6(a), or they may make photographic or mechanical copies of the protected materials, provided, however, that before photographic or mechanical copies can be made, the party seeking photographic or mechanical copies must give written notice to counsel for GSU identifying each piece of protected material or portions thereof the party will need. Only one copy of the materials designated in the notice shall be reproduced. Parties shall make a diligent, good-faith effort to limit the amount of photographic or mechanical copying requested to only that which is essential for purposes of this proceeding. Notwithstanding the foregoing provisions of this Paragraph 6(b), a party may make further copies of reproduced materials for use in this proceeding pursuant to the Protective Order, but a record shall be maintained as to the documents reproduced and the number of copies made, and the party shall promptly provide GSU with a copy of that record. Only that information which is necessary to this proceeding may be extracted from these materials.

7. All protected materials shall be made available to the parties solely for the purpose of these proceedings. The protected materials, as well as the parties' notes, memoranda, or other information regarding, or derived from, the protected materials, are to be treated confidentially by the parties and shall not be disclosed or used by the party except as permitted and provided in this Protective Order. Information derived from or describing the protected materials shall not be placed in the public or general files of the parties except in accordance with provisions of this Protective Order. A party must take all reasonable precautions to ensure that protected materials, including handwritten notes and analyses made from protected materials, are not viewed or taken by any person other than an authorized representative of the party.

8. a. If a party tenders for filing any written testimony, exhibit, brief, or other submission that includes, incorporates, or refers to protected materials, all portions thereof referring to such materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIAL" and shall be filed under seal with the Presiding Examiner and served under seal only upon GSU and the parties. The Presiding Examiner may subsequently, on her own motion or on motion of a party, issue a ruling respecting whether or not the inclusion, incorporation or reference to protected materials is such that the written testimony, exhibit, brief or other submission should remain under seal.

b. If any party desires to include, utilize, or refer to any protected materials in testimony or exhibits during the hearing in such a manner that might require disclosure of such material, such party shall first notify both counsel for GSU and the Presiding Examiner of such desire, identifying with particularity each of the protected materials.

c. All protected materials filed with the Commission, the Presiding Examiner, any court, or any other judicial or administrative body in support of or as a part of a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers.

9. Each party shall have the right to seek changes in this Protective Order as appropriate from the Presiding Examiner, the Commission, or the courts.

10. In the event that the Presiding Examiner at any time in the course of this proceeding finds that all or part of the protected materials are not confidential, by finding, for example, that such materials have entered the public domain, those materials shall nevertheless be subject to the protection afforded by this Protective Order for one (1) full working day, unless otherwise ordered, from the date of issuance of the Presiding Examiner's decision or the date of issuance of a final and non-appealable Commission order denying an appeal filed within the one (1) full working day period from the Presiding Examiner's order. Neither GSU nor any reviewing party waives its right to seek additional administrative or judicial remedies after the Commission's denial of any appeal.

11. During the pendency of Docket Nos. 6477 and 6525 at the Public Utility Commission of Texas, in the event that a party wishes to disclose protected material to any person to whom disclosure is not authorized by this Protective Order, or wishes to have changed the designation of certain information or material as protected by alleging, for example, that such information or material has entered the public domain, such party shall first serve written notice of such proposed disclosure or request for change in designation upon counsel for GSU and the Presiding Examiner identifying with particularity each of such protected materials. In the event that GSU wishes to contest such proposed disclosure or request for change in designation, GSU shall file with the Commission its request for a prehearing conference within five working days after receiving such notice

of proposed disclosure or request for change in designation. Failure of GSU to file such a request within this period shall be deemed a waiver of objection to the proposed disclosure or request for change in designation. If GSU files such a request for a prehearing, the Presiding Examiner will determine whether the proposed disclosure or change in designation is appropriate. The burden is on GSU to show that such proposed disclosure or change in designation should not be made. If the Presiding Examiner determines that such proposed disclosure or change in designation should be made, such determination may not be effective earlier than one (1) full working day later, unless otherwise ordered. No party waives any right to seek additional administrative or judicial remedies concerning such Presiding Examiner's ruling.

12. Nothing in this Protective Order shall be construed as precluding GSU from objecting to the use of protected materials on grounds other than confidentiality, including the lack of required relevance. Nothing in this Protective Order shall be construed as an agreement by any party that the protected materials are entitled to confidential treatment.

13. All notices, applications, responses or other correspondence shall be made in a manner which protects the materials in issue from unauthorized disclosure.

14. Following the conclusion of these proceedings, as that term is defined in Paragraph 6(a), GSU will provide written notice to counsel for the parties advising each party that it must, no later than 30 days following conclusion of these proceedings, return to GSU all copies of the protected materials provided by GSU pursuant to this Protective Order and all copies reproduced by a party pursuant to Paragraphs 5 or 6(b), and that counsel for each party must provide to GSU a verified certification that, to the best of his or her knowledge, information, and belief, all copies of notes, memoranda, and other documents regarding or derived from the protected materials (including copies of protected material) have been destroyed, other than notes, memoranda, or other documents which contain information in a form which, if made public, would not cause disclosure of protected material. Nothing in this paragraph shall prohibit counsel for each party from retaining two copies of any filed testimony, brief, application for rehearing, or other pleading which refers to protected materials provided that any such materials retained by counsel shall remain subject to the provisions of this Protective Order.

15. Notwithstanding any provision contained herein to the contrary, this Protective Order shall expire at the earlier of two (2) years from the date of issuance of the final Order in these Docket Nos. 6477 and 6525 or three (3) years from the date of this Protective Order unless such expiration date is extended by stipulation of the parties or by the Commission upon motion.

16. This Protective Order is subject to the requirements of the Open Records Act, the Open Meetings Act, and any other applicable law, provided that parties subject to those acts will give GSU prior notice, if possible under those acts, prior to disclosure pursuant to those acts.

V. Date on Which Documents Are to Be Released to the Parties or the Public

It is hereby ORDERED that GSU SHALL make available to the parties as soon as possible all documents found to be legally protected in Part III of this Order, subject to the Protective Order contained in Part IV of this order.

The examiner has struggled with the question of when GSU should be required to turn over the documents found not to be legally protected. As discussed in Part I of this order, there are three alternatives. First, the examiner could order that such documents be turned over to the parties immediately, with no requirement of nondisclosure to the public during the period in which GSU seeks an appeal, if any, from this order. Unfortunately, this would leave GSU as the only party denied any effective right to seek such an appeal, which right is provided for in P.U.C. PROC. R. 21.106(a). It would also effectively transfer from the Commission to this examiner the right to make the ultimate decision with respect to these documents, which is a result the examiner has no desire to accomplish. Second, the examiner could order that such documents be turned over to the parties immediately, with a requirement of nondisclosure to the public for a brief period to allow GSU to pursue an appeal if it wishes. This alternative is attractive in that the examiner knows that the parties want and need access to the documents immediately, but is aware of no similarly expressed desire at this time on the part of any other member of the public. This alternative also was agreed to by the staff and by all intervenors present at the prehearing conference except the Cities. The Cities correctly point out that this alternative is contrary to the Commission's directives in reversing the original protective order. Third, the examiner could provide that her order that such documents be turned over to the parties without any requirement of nondisclosure is not effective until some future date which allows GSU a short period of time in which to pursue an appeal. Unfortunately, this would delay the parties' access to such materials as well as that of the public. It would also produce the incongruous result that the parties could immediately see the documents which the examiner has held to be confidential but could not see those which she has found not to be.

The examiner chooses the second alternative in the hope that her good intentions will be taken into account. It is hereby ORDERED that GSU SHALL make available to the parties as soon as possible all documents found not to be legally protected in Part III of this Order. Until and unless provided otherwise by order of the Commission, such documents SHALL be subject to the Protective Order only until noon on Thursday, January 30, 1986, after which disclosure to the public SHALL be permitted.

SIGNED AT AUSTIN, TEXAS, on this the 22nd day of January 1986.

PUBLIC UTILITY COMMISSION OF TEXAS

Elizabeth Drews
ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE

bdb

Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd., 529 F. Supp. 866 (E.D. Pa. 1981), aff'd in part, rev'd in part on other grounds, 723 F.2d 238 (3rd Cir. 1983).

matter category is broad enough to include a wide variety of business information, including the kinds of matters sought to be protected by defendants.[42]

[26c.212, 26c.352] Competitive disadvantage is a type of harm cognizable under Rule 26. Although the cases have not tried to identify competitive disadvantage as any one type of the three specific harms—annoyance, embarrassment or oppression—mentioned in Rule 26 which might subsume this harm, it is clear that a court may issue a protective order restricting disclosure of discovery materials to protect a party from being put at a competitive disadvantage. See, e.g., Parsons v. General Motors Corp., 85 FRD 724, 720 (ND Ga 1980); Vollert v. Summa Corp., 389 F Supp 1348 (D Hawaii 1975); Maritime Cinema Serv. Corp. v. Movies En Route, Inc., 60 FRD 587 (SD NY 1973); Borden Co. v. Sylk, 289 F Supp 847 (ED Pa 1968), appeal dismissed, 410 F2d 843 (3d Cir 1969).

The party seeking a protective order bears the burden of showing good cause for the order to issue. Reliance Ins. Co. v. Barron's, 428 F Supp 200 (SD NY 1977); Davis v. Romney, 55 FRD 337 (ED Pa 1972); Hunter v. International Sys. & Controls Corp., 51 FRD 251 (WD Mo 1970); Essex Wire Co. v. Eastern Elec. Sales Co., 48 FRD 308 (ED Pa 1969). In order to establish good cause, it must be shown that disclosure will work a clearly defined and serious injury, Essex Wire Co., supra; United States v. Lever Bros. Co., 193 F Supp 254 (SD NY 1961), cert denied, 371 US 932 (1962),[43] and that the party resisting disclosure "will indeed be harmed by disclosure." Johnson Foils, Inc. v. Huyck Corp., 61 FRD 405, 409 (ND NY 1973). Accord, Reliance Ins. Co., supra.

It has been held that in order to show good cause, the injury which allegedly will result from disclosure must be shown with specificity, and that conclusory statements to this effect are insufficient. United States v. Hooker Chem. &

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right. Because Rule 26(c)(7) reflected existing law under old Rule 30(b), we may look to cases decided under that Rule in considering the instant issues.

[42] See, e.g., Magnavox Co. v. Mattel, Inc., No. 80-4124 (ND Ill March 24, 1981) (agreements between patentee and licensee, patent sub-license agreements, and royalty reports); Chesa Int'l, Ltd. v. Fashion Assocs., Inc., 425 F Supp 234 (SD NY), aff'd mem, 578 F2d 1288 (2d Cir 1977) (customer list); Vollert v. Summa Corp., 389 F Supp 1348 (D Hawaii 1975) (financial records detailing capitalization, net worth, and annual income); Maritime Cinema Serv. Corp. v. Movies En Route, Inc., 60 FRD 587 (SD NY 1973) (license fees and oral contracts with customers); Spartanics, Ltd. v. Dynetics Eng'r Corp., 54 FRD 524 (ND Ill 1972) (information pertaining to market entry); Russ Stonier, Inc. v. Droz Wood Co., 52 FRD 232 (ED Pa 1971) (customer and supplier list); Corbett v. Free Press Assoc., 50 FRD 179 (D Vt 1970) (profit and gross income data); Essex Wire Corp. v. Eastern Elec. Sales Co., supra, (terms of contract); Hecht v. Pro-Football, Inc., 46 FRD 605 (D DC 1969) (financial statements); Borden Co. v. Sylk, 289 F Supp 847 (ED Pa 1968), appeal dismissed, 410 F2d 843 (3d Cir 1969) (prices charged and volume sold to customer); Turmenne v. White Consol. Indus., Inc., 266 F Supp 35 (D Mass 1967) (customer lists); American Oil Co. v. Pennsylvania Petrol. Prods. Co., 23 FRD 680 (DRI 1959) (lists of dissatisfied customers).

[43] "Very serious injury" was required in United States v. International Business Mach. Corp., 67 FRD 40 (SD NY 1975). Accord, Citicorp v. Interbank Card Ass'n, 478 F Supp 756 (SD NY 1979); Reliance Ins. Co., supra. We question the appropriateness of and necessity for this higher standard, under Rule 26(c)(7). We defer our consideration of what the First Amendment may require to Part IV, infra.

The "very serious injury" standard of United States v. IBM may be limited to the particular facts of that case. Judge Edelstein was confronted with a request that disclosure be limited in the face of the Publicity in Taking Evidence Act, 15 USC § 30 (1970), which mandated that depositions taken in a suit brought by the United States under the antitrust laws be open to the public. That statute is of no effect in the case before us.

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Plastics Corp., 90 FRD 421 (WD NY 1981); Rosenblatt v. Northwest Airlines, Inc., 54 FRD 21 (SD NY 1971); Hunter, supra; Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 18 FRD 318 (SD NY 1955). It has also been held that the specific instances where disclosure will inflict a competitive disadvantage should be set forth in more than the briefs or the hearsay allegations of counsel's affidavit, for a protective order should not issue on that basis alone. See Reliance Ins. Co. v. Barron's, supra; Rosenblatt v. Northwest Airlines, Inc., supra; Apco Oil Corp. v. Certified Transp., Inc., 46 FRD 428, 432 (D Mo 1969); Paul v. Sinnott, 217 F Supp 84 (WD Pa 1963). We think, however, that hard and fast rules in this area are inappropriate. Frequently the injury that would flow from disclosure is patent, either from consideration of the documents alone or against the court's understanding of the background facts. The court's common sense is a helpful guide.

An attempt to show that disclosure will indeed work a competitive disadvantage might be undermined if the information sought to be protected were stale. There is a paucity of case law in the area. In Vollert v. Summa Corp., supra, and Hecht v. Pro-Football, Inc., 46 FRD 605 (DDC 1969), information up to three years old was held entitled to confidentiality and a court's attendant protection. On the other hand, in United States v. International Business Mach. Corp., 67 FRD 40 (SD NY 1975), information three to fifteen years old was held not entitled to protection because, in the court's view, it revealed little, if anything, about the contemporary operations of the party resisting disclosure. For the same reason, United States v. Lever Bros. Co., supra, held that information three to eight years old should not be protected. Indeed, in Rosenblatt v. Northwest Airlines, Inc., supra, the need for a court's protection was held to be diminished because the information sought to be protected was one year old.

Notwithstanding the conclusions in these cases, it is terribly difficult to establish, on any principled basis, temporal boundaries governing the protection to be accorded information. While at first blush one might doubt that harm could be caused by the disclosure of stale information, there is sense in the argument, which defendants urge, that old business data may be extrapolated and interpreted to reveal a business' current strategy, strengths, and weaknesses.[44] It would appear that, in the hands of an able and shrewd competitor, old data could indeed be used for competitive purposes.

Finally, a protective order should always be narrowly drawn. Two considerations mandate this constraint. First, an overbroad protective order may constitute an abuse of discretion by exceeding the authority granted by Rule 26. Cf. Gulf Oil Co. v. Bernard, — US —, 101 S Ct 2193 (1981) (order that banned all communications, without prior approval of court, concerning class action between parties or their counsel and any actual or potential class member who was not a formal party, entered without findings of fact or explanatory opinion, exceeded bounds of discretion under Rule 23(d)). Even when a court acts within the bounds of discretion set by Rule 26(c), its actions should be informed by the second consideration mandating a narrowly drawn order, the

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[44] Compare Timken Co. v. United States Customs Serv., No. 79-2545 (D DC April 25, 1981) (Freedom of Information Act exemption case): four affidavits established a sufficient basis for the court to find that release of pre-1973 information in 1981 would cause substantial harm to the competitive position of the companies from which it was obtained.

"It would allow competition to discern the strengths and weaknesses of the marketing strategies of these companies and target their weak points for attack. Competitors also could imitate the successful policies of these companies. Further, customer relations likely would be disrupted by the breach of confidentiality and increased competition from competitors." Id., Slip Op at 2.

First Amendment overbreadth doctrine. This doctrine, along with the other First Amendment issues pressed upon us by plaintiffs, is considered in detail in Part IV, infra.

B. The Validity of Pretrial Order 35

[26c.352] We find that PTO 35 is valid under Rule 26(c)(7). We reach that conclusion because: (1) the material that it protects is confidential commercial information; (2) the harm that it seeks to prevent is cognizable under Rule 26(c); and, (3) both at the time it was entered and at the present time, defendants (as well as plaintiffs) have shown good cause for the protective order to issue. It is plain from a reading of both the NUE and Zenith complaints, which spanned the law of antitrust and focused on defendants' price behavior, that large quantities of sensitive commercial data would be sought in discovery. That prospect in fact materialized, as our description of some of the price data generated in discovery makes clear. Thus, the propriety of some form of umbrella protective order was never seriously in doubt.

The affidavits filed by defendants to support continued enforcement of PTO 35[45] do not detail the harm which would result from disclosure on a document-by-document basis. Rather, they describe the harm which would result from the disclosure of discrete categories of information. We find that the affidavits are consistent with our knowledge of the material at issue. We are also satisfied that by describing the harm which would result from the disclosure of categories of information defendants have shown good cause. In reviewing other cases in which a protective order has issued,[46] we find that those courts discussed categories of information such as customer, supplier, and price lists; financial records; and contract terms; the very categories present here. Only rarely were individual documents subjected to a Rule 26(c) analysis. This case is distinguished from the usual Rule 26(c) case only in that the categories involved here contain much, much larger numbers of documents. Grouping huge amounts of cumbersome data into manageable categories for the purpose of supporting a Rule 26(c) order is desirable from the standpoint of case management and is consistent with the instruction of Rule 1 that the Rules of Civil Procedure shall be construed to secure the "just, speedy, and inexpensive determination of every action."

We also conclude that PTO 35 comes well within the bounds of discretion established by Rule 26. By its terms, PTO 35 applies only to material protectible under Rule 26—materials which "relate to trade secrets, or other confidential research, development or commercial information, as such terms have been defined pursuant to Rule 26(c)(7) of the Federal Rules of Civil Procedure." PTO 35 does not shift the burden of proof, but requires that, upon objection, the party electing to classify information justify its action pursuant to the Federal Rules of Civil Procedure. Finally, PTO 35's appeals process insulates the order against the danger that its provisions may sweep too broadly. Any party objecting to a confidentiality classification may request a determination of a particular document's entitlement to protection under Rule 26(c).

The need for PTO 35 is not diminished by our disposition of defendants' summary judgment motion. We have defendants' counterclaim still before us for eventual trial. Moreover, our summary judgment order may not have undercut

[45] See notes 21 and 22 supra.
[46] See cases cited in note 41 supra.

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An Equal Opportunity/
Affirmative Action Employer

December 8, 1981

Honorable Elos Soderberg
General Manager
Lower Colorado River Authority
P. O. Box 220
Austin, Texas 78767

Open Records Decision No. 292

Re: Whether contract held by the LCRA under an agreement to maintain confidentiality is excepted from public disclosure under the Open Records Act

Dear Mr. Soderberg:

You have received a formal request under the Open Records Act, article 6252-17a, V.T.C.S., for a copy of a certain contract in your possession. This contract is between the Texland Electric Cooperative and the Shell Oil Company. You ask whether it must be released.

Because our answer turns upon the particular facts set out in various materials submitted to this office, we will recite those facts in some detail. Prior to obtaining a copy of the contract in question, the Lower Colorado River Authority (hereinafter "LCRA") engaged in extended negotiations with Texland concerning its proposed lignite-fired electric generating plant. In order to determine the viability of such a plant, LCRA sought, among other things, to examine its source of fuel. Upon ascertaining that Texland had entered into a contract with Shell Oil Company for the supply of lignite, LCRA requested a copy of that contract so that it could review the information contained therein. Initially, Shell objected to the release of this contract; after extensive negotiations, however, Shell and Texland agreed, subject to LCRA's express promise to maintain the confidentiality of the contract, to let LCRA review it to determine the economic feasibility of the Texland plant and to decide whether to join in the project. As of the date of your request letter, LCRA had not completed its evaluation and therefore had not entered into any contractual arrangement with either Texland or Shell. We understand that this state of facts has not since changed.

In a brief submitted to this office, counsel for Shell makes the following points:

1. The contract and its exhibits contain very sensitive information such as the price of

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