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July 21, 2004

John R. McGinley, Jr., Esq.
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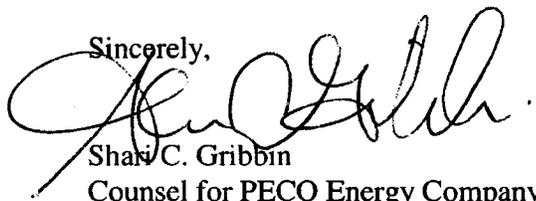
RE: Rulemaking Re Amending Electric Service
Reliability Regulations at 52 Pa. Code Chapter 57
Docket No. L-00030161

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JUL 22 11 11 AM '04
INDEPENDENT REGULATORY REVIEW COMMISSION

Dear Mr. McGinley:

Enclosed for filing are an original and nine (9) copies of the "**Comments of PECO Energy Company on the Final Proposed Rulemaking Order Setting Forth the Commission's Proposed Guidelines and Standards for Electric Service Performance Reliability**" in the above-captioned docket. This matter is currently set for IRRC review on Thursday, July 29, 2004.

Sincerely,


Shari C. Gribbin
Counsel for PECO Energy Company

SCG:mb
Enclosure

BEFORE THE
INDEPENDENT REGULATORY REVIEW COMMISSION

Rulemaking Re Amending : Docket No. L-00030161
Reliability Regulations at :
52 Pa. Code Chapter 57 :

**COMMENTS OF PECO ENERGY COMPANY ON THE FINAL
PROPOSED RULEMAKING ORDER SETTING FORTH THE
COMMISSION'S PROPOSED GUIDELINES AND STANDARDS FOR
ELECTRIC SERVICE PERFORMANCE RELIABILITY**

In accordance with Section 5.1(j) of the Pennsylvania Regulatory Review Act, PECO Energy Company ("PECO") hereby files these Comments with the Independent Regulatory Review Commission ("IRRC") in response to the Pennsylvania Public Utility Commission's ("Commission") Final Proposed Rulemaking Order¹ on Electric Reliability, entered on May 20, 2004 and published in the Pennsylvania Bulletin on May 22, 2004 ("Final Order").

I. INTRODUCTION

On June 27, 2003 the Commission issued the Proposed Rulemaking Order, adopting recommended revisions to the electric service reliability Regulations at 52 Pa. Code Chapter 57. As stated by the Commission, the purpose of the revisions to the Regulations is to "significantly improve the monitoring of reliability performance in the electric distribution industry." (Final Order at 1). There were a number of amendments to the regulations, including the addition of several new items to be reported by Electric Distribution Companies ("EDCs") on an annual basis and an entirely new section that requires EDCs also submit reports on a quarterly basis.

¹ Rulemaking Re: Amending Electric Service Reliability Regulations at 52 Pa. Code Chapter 57 Docket No. L-00030161.

Thereafter, comments were submitted by a number of parties, including PECO. Much of the quarterly reporting information is similar to that required in the annual reports and includes information such as staffing levels, call out rates, contract spend and contractor hours. Many of the comments filed by the EDCs included contentions that this information is confidential and proprietary and should not be available to the public.² On January 21, 2004, this Commission, IRRC, filed Comments on a few issues and specifically raised the issue of proprietary data, noting the EDC comments as to the confidential and proprietary nature of the requested information and the fact that the regulation as proposed does not address the treatment of such data. The IRRC then requested that the final form regulation should “specify the procedures for identifying and protecting the confidentiality of proprietary information.” (IRRC Comments at 2). On May 7, 2004, the Commission issued its Final Order on the Proposed Rulemaking, which was entered on May 20, 2004.

As stated in the filings before the Commission, PECO appreciates the extensive effort made by the Commission and supports many of the suggested revisions and the findings discussed in both the Tentative Order³ and the Proposed Rulemaking. Further, PECO largely supports the Commission as to the Final Orders in both proceedings. However, PECO does not believe the Commission sufficiently considered or addressed the issue of confidential treatment of proprietary information that must now be submitted as part of the new annual and quarterly reporting requirements, nor did it adequately

² Several EDCs commented on the importance of protecting such information including, Allegheny Power, PPL Electric Utilities, PECO Energy Company, UGI Utilities, Metropolitan Edison jointly with Pennsylvania Electric Company and Pennsylvania Power Company as well as the Energy Association of Pennsylvania.

³ Tentative Order and Request for Comments on the Proposed Guidelines and Policies regarding Standards for Electric Service Performance Reliability at Docket No. M-00991220.

respond to the legitimate concerns raised by the EDCs regarding the potential harm posed by the publication of such information.

Rather than making specific findings of fact on the issues raised, the Commission made broad statements as to their position on the treatment of such information and provided directives to the EDCs that were in direct contradiction to its own internal procedures as well as the Regulatory provisions governing protection of confidential information. It is PECO's position that the Commission should provide protection for the information within the published final Regulations and in support thereof, PECO hereby files these Comments.

II. COMMENTS

A. Much of the Information Required to be Reported Under the Proposed Revisions to Chapter 57 is Confidential and Proprietary in Nature and Protection Should Have been Provided Within the Revised Regulation

During the course of the comment period on the Proposed Rulemaking, several EDCs argued that the information requested by the proposed revisions to 52 Pa. Code §§57.195(b)(4-12); (c) and (e)(4-11) is confidential and proprietary in nature, that publication of such information is inappropriate and, as such, requested that this information not be made available to the public.

In making these arguments, many parties noted that publishing proprietary information, such as staffing levels, call out rates, contract spend and contractor hours would hamper their ability to effectively negotiate third-party contracts.⁴ As the Energy Association of Pennsylvania ("EAP") aptly stated in its Comments, "staffing levels and call-out rates are often items of negotiation in labor contracts" and "if contract-spend

⁴ See, e.g., comments of PPL at 8, filed Dec. 8, 2003; EAP at 10, filed Dec. 22, 2003; and MetEd/Penelec at 15, filed Dec. 8, 2003.

information is made available to the public, the result likely will be higher construction and maintenance costs because it will undermine the individual EDCs' effective bargaining." (EAP Comments at 10). Publicizing this information would give both competitors, as well as those bidding to provide the services, an undeniable edge in the negotiation process and impair the EDCs ability to effectively negotiate the best price for the best service.

Some parties also provided specific examples of other types of harm that could result from the publication of absolute numbers as they are reported under the new requirements. For example, PECO provided information about a recent Washington Post Article⁵ where the author utilized precisely this type of information to draw erroneous conclusions about the cause of outages in the service territory of a local utility. The article asserted that resource allocation by local utilities purportedly affected the total number of outages resulting from Hurricane Isabel and the restoration of those outages. The author based his assertion on reported budget, resource and maintenance allocation information. Yet, the conclusions drawn by the author and his quoted analysts were merely based on a simple comparison of absolute numbers for spending and numbers for staffing levels as reported by the utilities over as long as a ten-year period without appropriate consideration of the context in which such management resource decisions are always made.

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<http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A38385-2003Oct16¬Found=true>

PECO also provided another example of how absolute numbers do not give a complete picture and could be distorted or misused to the detriment of the utility. At page 9 of its Comments, PECO noted:

In the Commission's docket on Inspection and Maintenance Study of EDCs, Docket No. M-00021619⁶ the Commission attached its 2002 internal inspection and maintenance study. In that study, the Commission's staff found that transmission and distribution maintenance expenses, without tree trimming, decreased for two companies, PECO Energy and Duquesne, while increasing for all the other larger companies. The Commission's Appendices for the Tentative Order⁷ show, however, that PECO Energy and Duquesne had some of the better performance within the industry during the applicable time period. Thus, as the Commission's own data attests, the absolute numbers did not provide an accurate picture. (PECO Comments at 9).

Thus, not only is the information proprietary and therefore inappropriate for publication, as is demonstrated by these examples, publication of company-specific reported numbers is fraught with the potential for distortion, misinterpretation and unfair harm to the utility. In discussing the potential harm, EAP noted that:

Absolute numbers can never give a complete picture. The numbers alone do not tell the reader anything about the appropriateness of the business decisions behind those numbers. Publication of such information allows the public the opportunity to casually draw completely invalid inferences and conclusions from

⁶ Order Entered August 29, 2002

⁷ Tentative Order Docket M-00991220

the information about the EDC's business practices and the Commission's regulation of such. (EAP Comments at 11).

It is unreasonable to expose an EDC to the potential misuse of such information and in no way furthers the Commission's stated goal of improving its monitoring of reliability performance. Under all circumstances, the Commission will have access to the requested information to enable it to assess the reliability performance of an EDC. There is, however, no legitimate need for the public to have access to this information and it should be appropriately and adequately protected. As EAP noted, "The exposure of the EDC's business decisions, practices, staffing and finances to unwarranted scrutiny, evaluation and comments puts the EDC in the defensive position irrespective of good performance and is especially unfair to EDCs who consistently meet their reliability targets." (EAP Comments at 11-12).

Under these circumstances, and given the substantial potential harm posed to the EDCs by publication of the information, PECO urged the Commission to "add language to Section 57.195 providing that such information will not be available for public inspection or review and will not be made part of any report available to the public except to the extent that such information is reported in the aggregate as part of the Commission's annual report on the state of reliability."⁸ (PECO Comments at 2). The importance of protecting this information warrants that the designation as confidential and proprietary be a part of the regulation.

⁸ PECO also noted that the designation of such information as confidential would in no way undermine the Commission's annual statement of reliability report because the information could still be reported in the aggregate. (PECO Comments at 2-3).

B. In its Final Order on the Proposed Rulemaking, the Commission Did Not Sufficiently Consider the Arguments for Protection of the Confidential and Proprietary Information

Despite the extensive comments by various stakeholders that were submitted on the issue, and detailed discussion of the issues presented by publication of certain of the information, in its Final Order the Commission declined to offer protection to any of the newly required reported information. Nor did the Commission make any specific findings of fact as to what portions of the required reporting *might* be eligible for protection and what portions would not qualify. Although the EAP as well as some of the EDCs provided specific examples of proprietary information and the potential damage resulting from publication of such information, the PUC failed to assign protection to any types of information through the regulation itself. Rather, the Commission merely made a general statement about the issue of protection and stated that any utility wishing to obtain protection for certain of the reported information would need to file a petition requesting proprietary treatment *in advance* of the filing of the report. (Final Order at 34-35). The Commission also specifically stated that they did not “want” utilities to submit a proprietary and non-proprietary version at the time of filing and that information will not be protected simply because it has been stamped “proprietary” at the time of filing. (id.)

The Commission’s directions contradict their own procedures and are confusing and impractical. Both the requirements that an EDC file a request for a proprietary order prior to the time of the filing and that it not submit a public and non-public version, directly contradict the Commission’s own internal procedures and the regulation governing protective orders, 52 Pa. Code §5.423. According to Section 219 of the

Commission's Internal Operating Procedural Manual, whenever a party files with the Commission any document that it has claimed contains information of a proprietary nature, the Commission will honor that petition and not place the proprietary information in the public document folder. (Section 219(A)(1)). In order to obtain this treatment, the utility is to file with the information: (a) a transmittal letter indicating that the information is proprietary and including an explanation as to why it is claiming the information should be protected; and (b) at least one expurgated copy for the public folder and the requisite number of originals required for that type of filing. (Section 219(A)(2)).

Thereafter, the Commission's procedures provide that *upon request* by a member of the public, the Office of Consumer Advocate or Office of Small Business Advocate to view the information, the Commission will *then* issue a Secretarial Letter directing the utility to file a petition for protective order pursuant to 52 Pa.Code §5.423 within 14 days.

(Section 219(A)(3)). Finally, according to the Internal Procedures Manual and in accordance with 52 Pa. Code §5.423, the Commission is to honor the proprietary claim pending decision on the petition. (See, Section 219(B) and 52 Pa.Code §5.423(a) and (b)(4)).

Thus, pursuant to the Commission's own internal procedures, it would not be appropriate to file the petition for a protective order in advance of or even at the time the information is originally submitted to the Commission, but rather it is supposed to be filed *after* a request to review the information has been received. Additionally, according to the Commission's procedures, the party claiming that the information is proprietary is *required* to file both a proprietary and non-proprietary version at the time the information is originally submitted. Finally, the statement by the Commission in its

Final Order that it will not afford protection to information claimed to be “proprietary” pending a decision, also directly contradicts its procedures as well as §5.423 of the Regulations. As such, rather than appropriately addressing the issue of the confidential treatment of certain information in the reports as originally directed by IRRC in its January 21, 2004 Comments, the Commission, in its final Order, issued directions, (i.e., to file a petition *prior* to the submission of the quarterly and annual reports, and to not file redacted and unredacted versions) that do not comport with the Commission’s own internal procedures and the Regulatory requirements.

Furthermore, not only are the Commission’s directives inconsistent with current procedures and the Regulations, they create an overly burdensome and impractical requirement. Given that much of this information must be filed on a quarterly basis, requesting that a petition for protection be filed prior to each submission would mean that each EDC would have to file such a petition every three months. Moreover, because the Commission indicated the filing would need to be made in advance of the report and that the report would not automatically be protected even though marked as “proprietary”⁹, the implication is that the request would need to be made far enough in advance to obtain a decision prior to the actual filing. Such an approach likely may not even be possible, particularly with regard to the quarterly reporting.

Given the impractical nature of the Commission’s directives and the fact that they are inconsistent with current procedures and the Regulations, it is not unreasonable to request that the protection from publication be incorporated into the regulation. Notably, in other situations, the Commission has explicitly protected confidential information within the regulation itself. For example, within the recently published rulemaking

⁹ Final order at 34.

addressing security requirements¹⁰, the Commission specifically provided in Section 101.5 that the self-certification form will be considered confidential and will not be available to the public. (As proposed, 52 Pa. Code §101.5). Another example can be found in 52 Pa. Code §57.141 et. seq., which contains the Regulations related to the Annual Resource Planning Report (ARPR) filed by utilities. In §57.154, the Commission requires the utility to file a “summary” of the report, which is the portion of the information that will be available to the public. Under paragraph (b) of §57.141, as a condition precedent to receiving a copy of the report, the OCA and OSBA must agree to keep confidential the information within that report that the utility has marked as proprietary.

Thus, it is not uncommon for the Commission to consider, during the rulemaking phase, the confidential nature of information it has requested be reported and then assign protection to that information within the final regulation. Considering the sensitive nature of the budget, quarterly performance relative to those budgets, contractor and resource utilization, staffing level and call-out rate information that is required in the newly promulgated quarterly and annual reporting sections, the Commission should have accorded the same treatment to that information in the regulations.

III. Conclusion

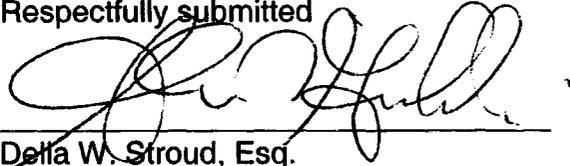
It is PECO’s position that the company-specific budget, quarterly performance relative to those budgets, contractor and resource utilization, staffing level and call-out rate information requested by the proposed revisions to 52 Pa. Code §§57.195(b)(4-12);

¹⁰ Rulemaking re: Public Utility Security Planning and Readiness at Docket No.: L-00040166. Published in the Pa. Bulletin on Saturday June 19, 2004. 34 Pa.B. 3138.

(c) and (e)(4-11) is all confidential and proprietary and should not be available to the public except in the aggregate for all EDCs and that the Commission should make specific findings regarding this information and protect such information within the published final Regulations.

Dated: July 21, 2004

Respectfully submitted



Delia W. Stroud, Esq.

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IRRC

From: shari.gribbin@exeloncorp.com
Sent: Wednesday, July 21, 2004 4:48 PM
To: IRRC
Cc: Wilmarth, Fiona E.
Subject: Comments being filed for the Thursday July 29th IRRC Meeting.

Original: 2363



Cover Letter - PECO Comments
PECO IRRC Comme.. for IRRC.PDF

For the attention of Chairman John R. McGinley, Jr.,
Esq.:

Below please find the cover letter and an electronic version of PECO Energy Company's Comments on the Public Utility Commission's Final Order re: Rulemaking Amending Electric Service Reliability Regulations, which are being filed via US Mail this afternoon.

If you have any questions, please do not hesitate to contact me directly.

Thank You
Shari Gribbin

<<Cover Letter - PECO IRRC Comments.PDF>> <<PECO Comments for IRRC.PDF>>

Shari C. Gribbin
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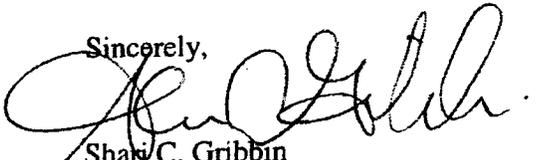
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I. INTRODUCTION

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II. **COMMENTS**

A. **Much of the Information Required to be Reported Under the Proposed Revisions to Chapter 57 is Confidential and Proprietary in Nature and Protection Should Have been Provided Within the Revised Regulation**

During the course of the comment period on the Proposed Rulemaking, several EDCs argued that the information requested by the proposed revisions to 52 Pa. Code §§57.195(b)(4-12); (c) and (e)(4-11) is confidential and proprietary in nature, that publication of such information is inappropriate and, as such, requested that this information not be made available to the public.

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B. In its Final Order on the Proposed Rulemaking, the Commission Did Not Sufficiently Consider the Arguments for Protection of the Confidential and Proprietary Information

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Thereafter, the Commission's procedures provide that *upon request* by a member of the public, the Office of Consumer Advocate or Office of Small Business Advocate to view the information, the Commission will *then* issue a Secretarial Letter directing the utility to file a petition for protective order pursuant to 52 Pa.Code §5.423 within 14 days.

(Section 219(A)(3)). Finally, according to the Internal Procedures Manual and in accordance with 52 Pa. Code §5.423, the Commission is to honor the proprietary claim pending decision on the petition. (See, Section 219(B) and 52 Pa.Code §5.423(a) and (b)(4)).

Thus, pursuant to the Commission's own internal procedures, it would not be appropriate to file the petition for a protective order in advance of or even at the time the information is originally submitted to the Commission, but rather it is supposed to be filed *after* a request to review the information has been received. Additionally, according to the Commission's procedures, the party claiming that the information is proprietary is *required* to file both a proprietary and non-proprietary version at the time the information is originally submitted. Finally, the statement by the Commission in its

Final Order that it will not afford protection to information claimed to be “proprietary” pending a decision, also directly contradicts its procedures as well as §5.423 of the Regulations. As such, rather than appropriately addressing the issue of the confidential treatment of certain information in the reports as originally directed by IRRC in its January 21, 2004 Comments, the Commission, in its final Order, issued directions, (i.e., to file a petition *prior* to the submission of the quarterly and annual reports, and to not file redacted and unredacted versions) that do not comport with the Commission’s own internal procedures and the Regulatory requirements.

Furthermore, not only are the Commission’s directives inconsistent with current procedures and the Regulations, they create an overly burdensome and impractical requirement. Given that much of this information must be filed on a quarterly basis, requesting that a petition for protection be filed prior to each submission would mean that each EDC would have to file such a petition every three months. Moreover, because the Commission indicated the filing would need to be made in advance of the report and that the report would not automatically be protected even though marked as “proprietary”⁹, the implication is that the request would need to be made far enough in advance to obtain a decision prior to the actual filing. Such an approach likely may not even be possible, particularly with regard to the quarterly reporting.

Given the impractical nature of the Commission’s directives and the fact that they are inconsistent with current procedures and the Regulations, it is not unreasonable to request that the protection from publication be incorporated into the regulation. Notably, in other situations, the Commission has explicitly protected confidential information within the regulation itself. For example, within the recently published rulemaking

⁹ Final order at 34.

addressing security requirements¹⁰, the Commission specifically provided in Section 101.5 that the self-certification form will be considered confidential and will not be available to the public. (As proposed, 52 Pa. Code §101.5). Another example can be found in 52 Pa. Code §57.141 et. seq., which contains the Regulations related to the Annual Resource Planning Report (ARPR) filed by utilities. In §57.154, the Commission requires the utility to file a “summary” of the report, which is the portion of the information that will be available to the public. Under paragraph (b) of §57.141, as a condition precedent to receiving a copy of the report, the OCA and OSBA must agree to keep confidential the information within that report that the utility has marked as proprietary.

Thus, it is not uncommon for the Commission to consider, during the rulemaking phase, the confidential nature of information it has requested be reported and then assign protection to that information within the final regulation. Considering the sensitive nature of the budget, quarterly performance relative to those budgets, contractor and resource utilization, staffing level and call-out rate information that is required in the newly promulgated quarterly and annual reporting sections, the Commission should have accorded the same treatment to that information in the regulations.

III. Conclusion

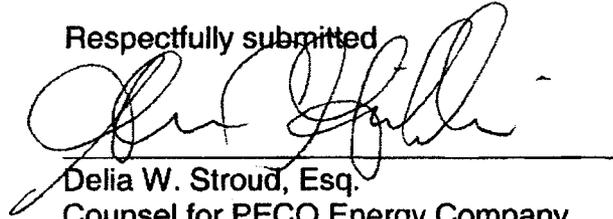
It is PECO's position that the company-specific budget, quarterly performance relative to those budgets, contractor and resource utilization, staffing level and call-out rate information requested by the proposed revisions to 52 Pa. Code §§57.195(b)(4-12);

¹⁰ Rulemaking re: Public Utility Security Planning and Readiness at Docket No.: L-00040166. Published in the Pa. Bulletin on Saturday June 19, 2004. 34 Pa.B. 3138.

(c) and (e)(4-11) is all confidential and proprietary and should not be available to the public except in the aggregate for all EDCs and that the Commission should make specific findings regarding this information and protect such information within the published final Regulations.

Dated: July 21, 2004

Respectfully submitted

A handwritten signature in black ink, appearing to read "Delia W. Stroud", is written over a horizontal line.

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July 26, 2004

Mr. Robert E. Nyce
Executive Director
Pennsylvania Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17101

VIA ELECTRONIC MAIL

Re: Regulation No. 57-228
(PUC Docket No. L-00030162)

Rulemaking Re Amending Reliability Regulations at 52 Pa. Code Chapter 57

Dear Mr. Nyce:

We, at the Energy Association of Pennsylvania, support the Comments filed by PECO regarding the need to disapprove the Public Utility Commission's Final Order Rulemaking on Reliability.

The IRRC needs to provide guidance to the Commission that the public dissemination of competitive, proprietary, security-related information, or trade secrets is contrary to the public interest.

The commentators filed extensive comments on the need for confidentiality and the need to curtail certain proprietary information from publicly being disclosed because of the potential for damage. The Commission's response to assertions was a process that does not conform to its own rules. Furthermore, EDCs have the right to rely on the stated PUC internal procedures where, as here, there is no notice that the Commission is proposing to alter those underlying rules.

The Commission has departed from its rules without notice in at least the following:

1. The Commission requires a request for a proprietary order prior to the time of filing and the EDCs are specifically instructed not to submit a public and non-public version of its data submission. Both aspects of this final Order's requirement are directly contrary to the Commission's own internal procedures and regulations governing Protective Orders, 52 Pa Code §5.423.
2. Section 219 (A)(1) of the Commission's Internal Operating Manual states that when an EDC or any party files with the Commission a document that it claims has information that is proprietary, the Commission will honor that request.
3. Section 219(A)(2) of the Commission Internal Operating Manual requires the EDC to file a letter of explanation as to why the information is to be protected and one expurgated copy for the public folder. However, here in this rulemaking at a time of heightened security, the Commission has abandoned its own rules without notice or explanation.

4. Section 219(A)(3) of the Commission's internal review established a procedure whereby upon a request for public dissemination the Commission will issue a secretarial letter directing the EDC to file a petition for a protective order. Again, this rulemaking fails to conform with the Commission's own procedures.
5. Section 219 (B) and 52 Pa Code §5.423 (a) and (b)(4) require that the Commission honor the proprietary claim pending decision on the EDC petition. Again, the Commission has provided no compelling reason to depart from its rules.

Therefore, pursuant to 71 P.S. §745.5(e)(3)(i)(ii) there is confusion, ambiguity and conflict with existing rules and regulations that require IRRC disapproval.

The Energy Association would also offer that the amount of information requested should have a security review before public dissemination, as some of this type of information is "protected" under the Critical Infrastructure Information Act of 2004.

PECO's comments illustrate that the Commission's proposed disclosure requirements are directly contrary to the Commission's rules and, as such, require disapproval.

Respectfully submitted,

J. Michael Love
President & CEO

Dan Regan
Vice President & General Counsel