

213 Market Street, 9th Floor, P.O. Box 865, Harrisburg, PA 17108-0865

Tel: (717) 237-7160 ■ Fax: (717) 237-7161 ■ www.WolfBlock.com

RECEIVED

2008 JAN 11 PM 1:40

INDEPENDENT REGULATORY
REVIEW COMMISSION

COPY

RECEIVED

JAN - 7 2008

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Daniel Clearfield
Direct Dial: (717) 237-7173
Direct Fax: (717) 237-7161
E-mail: dclearfield@wolfblock.com

January 7, 2008

VIA HAND DELIVERY

James McNulty
Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
2nd Fl., 400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Implementation of the Public Utility Confidential Security
Information Disclosure Protection Act,
Docket Nos. L-00070185 and M-00072014

Dear Secretary McNulty:

On behalf of Philadelphia Gas Works, enclosed for filing please find an original and 15 copies of its Comments in the above docket.

Sincerely,



Daniel Clearfield

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

DC/lww
Enclosures

cc: Carl S. Hisiro, w/ enc. (via email)
Denise Admaucci, Esq., w/enc.

HAR:77776.1/PHI211-150040

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of the Public Utility	:	Docket Nos.	L-00070185
Confidential Security Information Disclosure	:		
Protection Act	:		M-00072014
	:		
	:		

RECEIVED
JAN - 7 2008
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**COMMENTS OF PHILADELPHIA GAS WORKS TO THE PROPOSED
PUBLIC UTILITY CONFIDENTIAL SECURITY INFORMATION
DISCLOSURE PROTECTION ACT RULEMAKING**

1. Introduction

On November 29, 2006, Governor Edward Rendell signed into law the Public Utility Confidential Security Information Protection Act, codified at 35 P.S. § 2141.1—2141.6 ("Act"). By Order entered April 20, 2007, the Pennsylvania Public Utility Commission ("Commission") issued an Advance Notice of Proposed Rulemaking which sought comments from interested parties regarding the nature and scope of what should be included in the filing and challenge procedures that must be followed under the newly enacted Act. By Order entered September 4, 2007, the Commission issued its Proposed Rulemaking Order ("RO") in order to begin the process of establishing the protocols and procedures which must be followed when: (i) public utilities file records containing confidential security information ("CSI") with the Commission; and (ii) there is a challenge to a CSI designation or a request to examine records containing CSI. The RO was published in the Pennsylvania Bulletin on December 8, 2007 and comments are due on January 7, 2008.

Philadelphia Gas Works ("PGW") supports the Commission's efforts to ensure that records and information which would create a public safety risk if released to third parties remain secure and confidential. PGW submits these comments on the RO as follows.

2. General Comments

PGW advocates that in preparing its final regulations the Commission more directly ensure that the public is protected from the security risks presented by the improper release of CSI. In support of this approach, some of the proposed regulations require more specificity. Further, PGW believes that the Commission should impose additional requirements on challengers and requesters. These changes are necessary because the Act, although it places a burden on utilities to identify CSI, appears to have as one of its main goals the prevention of the inappropriate release of CSI. Thus, for example, the proposed balancing test at subsection 102.4(b) which weighs the potential harm to a utility against the needs of the requester/challenger should (i) provide that if there is reasonable doubt regarding whether a record contains CSI or whether the requester's asserted need is substantial or valid, the balancing will weigh more heavily in favor protecting the CSI; and (ii) include an analysis of the potential harm to the public from disclosing the CSI. A proposed revision of subsection 102.4(b) (excluding subsections (1), (2) and (3)) is set forth at Section I on Exhibit "A." Exhibit "A" is attached hereto and incorporated herein by reference.

Moreover, a fair reading of the Act is that the Legislature did not intend the Act to expand an agency's authority to demand the production of confidential security information. Therefore, the regulations should not be utilized by the Commission or its staff to expand or increase directives to file CSI records with the Commission. Under current practices, PGW provides Commission staff, upon reasonable request, with access on-site to CSI records and PGW believes that this process has proved effective for PGW, the Commission and the safety of the public. For this reason, PGW recommends that the Commission add a sentence to the regulations at the end of section 102.1 limiting any potential expansion of the regulations. A proposed revision of section 102.1 is set forth at Section II on Exhibit "A."

Finally, PGW notes that, although the proposed regulations allow for Commission staff to decline designation as an authorized individual who receives CSI filings, the Act imposes penalties on those public employees who "acquire" a CSI record and then knowingly or recklessly release or disclose it. The regulation should state that declining designation as an authorized individual does not shield the employee from possible penalties under the Act if that employee nonetheless acquires CSI and then illegally discloses it.

3. Section Specific Comments

A. Definitions - § 102.2

PGW believes that the definition of "Confidential security information" set forth in section 102.2 of the RO should be expanded. Due to the potential risk presented to the public by the release of certain types of gas utility information, the definition should be expanded to include areas which present potential terrorist sensitivity, such as: (i) location maps which identify sensitive areas (such as LNG pipelines); and (ii) systematic/system wide maps and profiles of utility facilities. These two types of CSI, similar to the location of surface water intakes, present unique areas of gas-utility-related security risks.

B. Filing procedures - § 102.3

§ 102.3(d): PGW appreciates the extent of the undertaking that the Commission and utilities must undergo in order to protect previously filed CSI. In order to more easily facilitate this process, and to reduce the amount of paperwork required to mark previously unmarked files, PGW recommends that a request/challenge for any record filed by a gas utility before May 29, 2007 which was protected under a protective order should be referred to the utility for review and an opportunity to determine if the record contains CSI. Since, under the Act, the utility has the responsibility for determining whether a record contains CSI, the Commission should accept the utility's determination. In addition, to ensure that utilities have sufficient time, utilities

should be provided at least 45 business days from the effective date of the regulations to identify previously filed CSI records to the Commission.

With respect to the administration of this process, the Commission should address what will happen to previously filed records. If the Commission requires utilities to re-file CSI records, the regulations should provide that the Commission will destroy the original records filed, with a certification of destruction provided to the utility, or will return the records by a secure method to the utility. For example, physical pick-up of records by the utility, with the utility employee's identity confirmed, would be one secure method. As an alternative, this process could be greatly simplified by allowing the utility to identify in writing the previously filed records without resubmitting them. Then the Commission could mark the documents accordingly.

§ 102.3(e): With respect to the Commission's analysis of previously filed records which have not been identified as CSI, PGW believes that it would be a proactive protection of public safety, and helpful to Commission staff, to provide staff with regulatory guidelines regarding the evaluation of whether a record may contain CSI. For example, any requested record which contains in its title, or is marked with the words "confidential," "secure," "Supervisory Control and Data Acquisition," "sensitive," "emergency" or "infrastructure" and which may contain CSI should be referred to the Law Bureau for review. At the same time that the record is referred to the Law Bureau, the utility should be provided with written notice of the request and a 15 day opportunity to determine if the record contains CSI. Since, under the Act, the utility has the duty of determining whether a record contains CSI, the Law Bureau should accept the utility's determination, and the utility should be provided with 15 days to mark the record and return it to

the Law Bureau. To accommodate this modification, PGW suggests that subsection 102.3(e) be revised. The proposed revision is set forth at Section III on Exhibit "A."

C. Challenge procedures to confidentiality designation - § 102.4

Overall, this section would be enhanced by adding a definition of the terms "challenger" and "requester" and by adding a clarification that a successful challenge entirely invalidates a CSI designation, while a review of CSI will not invalidate the CSI label for any other purpose, request or challenge. Because a requester will view records which contain CSI, a request for review requires additional safeguards than those presented in the proposed regulation, as set forth further herein. PGW proposes that the Commission utilize the definitions of challenger and requester set forth at Section IV of Exhibit "A" hereto.

§ 102.4(a)(3)(i): PGW proposes that in order to simplify the administration of requests/challenges, and to verify the identity and asserted purposes of a requester/challenger, the requester/challenger should meet more stringent requirements than those set forth in the proposed regulation. For example, every request/challenge should be required to be made in writing; no oral requests/challenges should be allowed. This requirement will ensure that the Commission has an accurate record of the request/challenge. Similarly, in order to assist the Commission in correctly identifying the record sought, the requester/challenger should provide a clear identification of the record, with sufficient specificity to enable Commission to identify it. This requirement ensures that the Commission examines, and possibly releases, the correct record.

On a more administrative level, the requester/challenger should state whether he/she is a resident of Pennsylvania, and provide the address of residence. This requirement would enable the Commission to confirm that the requester/challenger fulfills the regulatory requirements.

Further, the regulation should require that the requester/challenger sign the request/challenge and identify an address to which a response should be sent so that the Commission is able to more easily meet its response deadline. Finally, the regulation should limit the method of delivery of a request/challenge (excluding facsimile or email delivery) in order to obtain an original signature.

§ 102.4(a)(3)(iii) and § 102.4(b): Because a requester will review CSI records, the requester must be carefully screened by the Commission. The Commission should require in subsection 102.4(3)(iii) that a requester state in writing at the time the request is made whether he/she will consent to, or refuse to consent to, a criminal background check. In performing the balancing test set forth in subsection 102.4(b), the Commission should take into consideration the results of the criminal background check, or the refusal to consent to a criminal background check. The Commission should also require, as a precondition to performing the balancing test that the requester consent in writing to executing an appropriate nondisclosure agreement. The nondisclosure agreement should be prepared by the Law Bureau, should be non-negotiable, should contain appropriate enforcement mechanisms, and should be executed prior to the release of any CSI.

Finally, in order to prevent terrorism, PGW believes that the Commission should coordinate with Pennsylvania's Office of Homeland Security to obtain confirmation that a requester is not listed on the United States Government's Consolidated Terrorist Watchlist, which is maintained by the Federal Bureau of Investigation's Terrorist Screening Center, or any other federal, or Commonwealth, terrorist watchlist.

§ 102.4(a)(3)(iv): In order to allow a utility with sufficient time to review a request/challenge, the utility's response deadline should run 15 days from the date the utility receives notice of the challenge or request.

§ 102.4(b): As further explained above, in order to protect the CSI which a requester may review, more specific factors should be set forth for the Law Bureau or presiding officer's consideration when evaluating whether to release the CSI. PGW proposes a rewrite of subsections 102.4(b)(1), (2) and (3) as set forth at Section V of Exhibit "A" hereto.

§ 102.4(c): A review of CSI should not invalidate the CSI designation. The Act distinguishes between a challenge¹ and a request to examine² so that it is clear that a challenge contests the CSI designation while a request for review only asks for a review of CSI. In order to clarify that a request will not invalidate the CSI designation for any other purpose, request or challenge, the sentence set forth at Section VI of Exhibit "A" hereto should be added at the end of subsection 102.4(c).

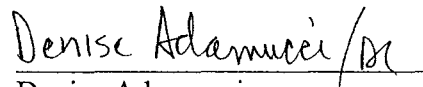
§ 102.4(g): Commission employees who elect designation as authorized individuals should agree to consent to a criminal background check prior to such designation and should not have been (i) convicted of or pled guilty to a felony in the past ten years; or (ii) convicted of or pled guilty to fraud, forgery, passing a bad check, theft by deception, or any other crime related to truthfulness or moral turpitude.

¹ A challenge is a "[c]hallenge[s] to a public utility's designation . . ." 35 P.S. § 2141.3(c).

² A request is a "request to examine records containing confidential security information." 35 P.S. § 2141.3(c).

Philadelphia Gas Works appreciates the opportunity to provide comments on the proposed rulemaking. PGW respectfully requests that the Commission incorporate its suggestions into the proposed regulations.

Respectfully submitted,



Denise Adamucci
Philadelphia Gas Works
800 West Montgomery Avenue, 4th Floor
Philadelphia, PA 19122
(215) 684-6745

Of Counsel:
Daniel Clearfield
Wolf, Block Schorr and Solis-Cohen LLP
213 Market Street, 9th Floor
P.O. Box 865
Harrisburg, PA 17108-0865
(717) 237-7160

Date: January 7, 2008

Exhibit "A"
Proposed Revised Regulations

I. § 102.4(b). "102.4(b) *Relevant factors to be considered*. The Commission will apply a balancing test that weighs the sensitivity of the designated confidential security information and the potential harm resulting from its disclosure against the challenger's or requester's need for the information. Applying this balancing test, a challenge to a public utility's designation of confidential security information or written request to review a record containing confidential security information will be granted only upon a determination by the Commission that the potential harm to the public utility and to the public of disclosing information relating to ~~its~~ the public utility's security is less than the challenger's or requester's need for the information. If there is reasonable doubt regarding whether a record contains confidential security information or whether a requester's asserted need is substantial or valid, the Commission will weigh the balancing test more heavily in favor of protecting the designation and preventing the review of the confidential security information. In determining whether to grant a written request to review a record containing confidential security information, the Commission, the presiding officer, or the Law Bureau will consider, along with other relevant factors, the following: . . ."

II. § 102.1. "102.1. *Purpose*. This chapter establishes procedures for public utilities to follow when filing records with the Commission containing confidential security information pursuant to the Public Utility Confidential Security Information Disclosure Protection Act, enacted on November 29, 2006, as Act 156, P.L. 1435, No. 156, 35 P.S. §§ 2141.1-2141.6 ("Act 156"), and procedures to address challenges by members of the public to a public utility's designation of confidential security information or requests to examine records containing

confidential security information in both adversarial and nonadversarial proceedings pending before the Commission. In no event shall this chapter be deemed to establish, expand or increase the Commission's authority to require the filing, or Commission review of, any utility records containing confidential security information."

III. § 102.3(e). "102.3(d) *Commission's responsibility with unmarked records*. The Commission and its staff are under no legal obligation to protect confidential security information already on file with the Commission that has not been marked "Confidential Security Information," following the procedures provided for in this subsection. When a request is made by a member of the public for an existing record that is not marked "Confidential Security Information" and Commission staff has reason to believe that it contains confidential security information, staff will refer the requested record to the Law Bureau for review. Staff shall refer to the Law Bureau any record which contains in its title, or is marked with the words "confidential", "secure", "Supervisory Control and Data Acquisition", "sensitive", "emergency" or "infrastructure" and which may contain confidential security information. Upon receipt of the requested record, the Law Bureau will provide the affected utility with written notice of the request. The affected utility will notify the Law Bureau within 15 days from the date notice was provided to the utility whether the record contains confidential security information. Failure by the utility to respond within 15 days shall be deemed an affirmative response that the record contains confidential security information. If the Law Bureau utility determines the record contains confidential security information, within 30 days from the date notice of the request was provided to the utility, the Law Bureau will advise the affected public utility and give it an

opportunity to shall resubmit and replace the record with a copy that is marked "Confidential Security Information" pursuant to subsection 102.3(d)."

IV. **Challenger.** Challenger: A Member of the Public which challenges a public utility record as constituting confidential security information.

Requester. Requester: A Member of the Public which requests to examine a public utility's confidential security information but which is not challenging such designation.

V. **§ 102.4(b)(1), (2) and (3).**

"(1) The requester's willingness to sign shall agree in writing to sign a non-negotiable non-disclosure agreement prepared by the Law Bureau which contains appropriate enforcement mechanisms and shall sign this non-disclosure agreement prior to any release of CSI.

(2) The requester's willingness consent to or refusal to consent to be subjected to a criminal background check, and whether the requester is listed on any United States or Commonwealth maintained terrorist watchlist. If the requester has consented to a criminal background check, the Commission, presiding officer, or the Law Bureau will weigh the results of the background check, such as whether the requester: (i) has been convicted of or pled guilty to a felony in the past ten years; or (ii) has been convicted of or pled guilty to fraud, forgery, passing a bad check, theft by deception, or any other crime related to truthfulness or moral turpitude, in making its determination.

(3) The conditions, if any, to place on release of the information, and the requester's willingness to consent in writing to comply with such conditions."

VI. **§ 102.4(c), end of subsection.** "When the Commission determines that a request for review shall be granted, this grant will not invalidate or remove the record's designation as containing confidential security information for any other purpose, request or challenge."