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INDEPENDENT REGULATORY

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January 7, 2008

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Commonwealth Keystone Building
Harrisburg, Pennsylvania 17105-3265

**RE: *The Proposed Public Utility Confidential Security Information Disclosure
Protection Act Rulemaking***
Docket Nos. – L-00070185 and M-00072014

Dear Secretary McNulty:

Enclosed for filing are an original and fifteen (15) copies of the Comments of the Energy Association of Pennsylvania in regard to *The Proposed Public Utility Confidential Security Information Disclosure Protection Act Rulemaking*.

Cordially,

A handwritten signature in cursive script, appearing to read "Donna M. J. Clark".

Donna M. J. Clark
Vice President and General Counsel

CC: Chairman Wendell F. Holland
Vice Chairman James H. Cawley
Commissioner Tyrone Christy
Commissioner Kim Pizzingrilli
Carl S. Hisiro, Esquire

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Proposed Rulemaking Regarding :
Implementation of the Public Utility : Docket No. L-00070185
Confidential Security Information :
Disclosure Protection Act :

Implementation of the Public Utility :
Confidential Security Information : Docket No. M-00072014
Disclosure Protection Act :

COMMENTS of
THE ENERGY ASSOCIATION of PENNSYLVANIA

***To The Proposed Public Utility Confidential Security Information Disclosure
Protection Act Rulemaking***

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Date: January 7, 2008

COMMENTS OF THE ENERGY ASSOCIATION OF PENNSYLVANIA

1. Introduction

On November 29, 2006, Governor Edward Rendell signed into law the Public Utility Confidential Security Information Protection Act, 35 P.S. § 2141.1—2141.6 ("Act"). By Order entered on April 20, 2007, the Pennsylvania Public Utility Commission ("Commission" or "PUC") issued an Advance Notice of Proposed Rulemaking that 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 on September 4, 2007, the Commission issued its Proposed Rulemaking Order ("RO") to begin the process of establishing the protocols and procedures that 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.

The Energy Association of Pennsylvania ("EAPA") represents the interests of the majority of the PUC-regulated natural gas and electric distribution companies in the Commonwealth.¹ EAPA operates through its Gas Association Board and Electric

¹ Electric and Gas distribution company members include: Allegheny Power, Chartiers Natural Gas Co., Citizens' Electric Company, Columbia Gas of PA, Dominion Peoples, Duquesne Light Co., Equitable Gas Co., Metropolitan Edison Co., A *FirstEnergy Company*, National Fuel Gas Distribution Corp., PECO Energy Co., Pennsylvania Electric Co., A *FirstEnergy Company*, Pennsylvania Power Co., A *FirstEnergy Company*, Philadelphia Gas Works, Pike County Light & Power Co., PPL Electric Utilities Corp., PPL Gas Utilities Corp., UGI Penn Natural Gas, UGI Utilities, Inc, Valley Energy, Inc. and Wellsboro Electric Co.

Association Board and submits comments to the RO on behalf of both its natural gas and electric distribution company members.

The Act establishes a method of safeguarding CSI submitted by public utilities to state agencies, including, but not limited, to the Commission. Public utilities are responsible for determining whether a document or a portion thereof contains CSI upon submission to the agency. Members of the public, including the statutory advocates, may challenge a confidential designation or request access to documents deemed confidential. The Act is a conduct-controlling regulatory scheme that includes sanctions as a deterrent to reckless or purposeful non-compliance. The Act requires agencies, such as the Commission, to develop and implement procedures and protocols for public utilities to follow when submitting documents containing CSI, for challenges to a CSI designation initially made by a public utility and for requests made to examine documents containing CSI. In developing those procedures and protocols, the agency inevitably will have to consider the circumstances under which documents containing CSI previously have been submitted (i.e. routine filings or in the course of adversarial proceeding) and, in the case of the Commission, will need to account for the role of the statutory advocates.

EAPA believes that the proposed regulations drafted following a review of comments submitted in response to the Advanced Notice of Proposed Rulemaking address the circumstances under which public utilities generally submit documents containing CSI to the Commission. EAPA seeks a number of refinements and clarifications to the proposed regulations so as to further ensure that the disclosure of

documents containing CSI is restricted and, where necessary, safeguards are maintained to minimize the public safety risk.

2. **General Comments**

EAPA requests 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, EAPA asks that the Commission impose additional requirements on challengers and requesters. These changes are necessary because the Act, although placing an initial burden on utilities to identify CSI, clearly identifies its main goal as the prevention of the inappropriate release of CSI. Thus, for example, the proposed balancing test at Subsection 102.4(b), that 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 of protecting the CSI; and (ii) include an analysis of the potential harm to the public from disclosing the CSI. Further, the balancing test should include consideration of the definition of CSI. A proposed revision of Subsection 102.4(b) (excluding subsections (1), (2) and (3)) is set forth at Section I on Exhibit "A," attached hereto and incorporated herein by reference.

Further, a fair reading of the Act reveals that the Legislature did not intend that the Act 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, utilities provide Commission staff, upon reasonable request, with access on-site to CSI records and EAPA believes that this process has proven effective for public utilities, the Commission and the safety of the public. For this reason, EAPA 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, EAPA 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

EAPA requests that the definition of "Confidential security information" set forth in Section 102.2 of the RO be expanded. Due to the potential risk presented to the public by the release of certain types of utility information, the definition should be expanded to include areas that present potential terrorist sensitivity, such as: (i) location maps that 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 utility-related security risks.

B. Filing procedures - § 102.3

§ 102.3(a): EAPA supports the Commission's decision to incorporate the self-certification procedure currently codified at 52 Pa. C. Ch. 101 into the CSI procedure. EAPA maintains that utilizing this self-certification approach strikes the appropriate balance, of accomplishing the mandates of the Act, while simultaneously meeting the needs of the Commission. The proposed procedure will effectively protect CSI from adverse disclosure, while alleviating storage burdens for the Commission. As the Commission noted in the proposed rulemaking order, "[w]e also believe this recommended procedure [self-certification] will minimize the Commission's storage costs and Commission staff's exposure to possible sanctions that could result from mishandling confidential security information filed with the Commission."

Section 102.3(a) of the proposed rule states that "unless required by order or directive from the Commission, records containing CSI are to be maintained onsite by the utility and utilities are required to follow the self certification procedure established in 52 Pa. C. Ch. 101." The Commission should note, however, that the self-certification procedure may entail the submission of CSI. Under the present self-certification procedure, utilities are required to submit a self-certification form that currently is treated as confidential. During the implementation of the self-certification rules, the Commission stated "the adoption of the self certification process will aid the safeguarding of public utility assets, but at the same time, [we] recognize the sensitive

nature of the information that each utility must provide us in the Self Certification Form. Disclosure of a *Self Certification Form to the public could be used for criminal or terroristic purposes, jeopardize security or cause substantial harm* to the entity filing the Self Certification Form." 34 Pa.B. 3138. [*Emphasis added*]. Although it is expected that the forms themselves generally would not contain CSI, in cases where they do, it should be clear that the form must be marked as CSI and will be subject to all the CSI protections proscribed by the applicable rules.

§ 102.3(c): EAPA suggests that the proposed rule should be modified to clarify that a utility's failure to designate a record as CSI after May 29, 2007 does not constitute a waiver, and that a utility may correct any such failure. In the event of such a correction, the CSI designation should be deemed to have been made *nunc pro tunc* so that protection is afforded to such records as if they had been so designated when first submitted.

§ 102.3(d): EAPA 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, EAPA recommends that a request/challenge for any record filed by a utility before May 29, 2007, that was protected under a protective order or a request for confidential treatment, should be referred initially to the utility for review and an opportunity to determine if the record contains CSI. Because, under the Act, the utility has the responsibility for determining whether a record contains CSI, the Commission should accept the utility's determination. This also will serve to limit the

exposure of public employees to the risk of inadvertently disclosing CSI. In addition, to ensure that utilities have sufficient time, the 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 that have not been identified as CSI, EPA maintains 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 that contains in its title, or is marked with the words "confidential", "secure", "Supervisory Control and Data Acquisition", "sensitive", "emergency" or "infrastructure", and that 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 20-day

opportunity to determine if the record contains CSI. Because, 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 20 days to mark the record and return it to the Law Bureau. PGW suggests that subsection 102.3(e) be revised. The proposed revision is set forth at Section III on Exhibit "A." Again, this would reduce the risk of liability for agency employees.

C. Challenge procedures to confidentiality designation - § 102.4

Overall, this section should 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 that contain CSI, a request for review requires additional safeguards than those presented in the proposed regulation, as set forth further herein. EAPA 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): EAPA 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 the Commission to identify it. This requirement will ensure that the Commission examines, and possibly releases, only 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 Commission must carefully screen the requester. 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 also should require, as a pre-condition to performing the balancing test that the requester consent in writing to executing an appropriate non-disclosure agreement. The non-disclosure

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 acts of terrorism, EAPA requests that the Commission 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 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 in a letter from the Secretary's office.

§ 102.4(b): As further explained above, in order to protect the CSI that 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. EAPA 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 challenge² and a request to examine³ so that it is clear that a challenge contests the CSI designation, while a request for review only asks for a

² A challenge refers to "[c]hallenges to a public utility's [CSI] designation . . ." 35 P.S. § 2141.3(c).

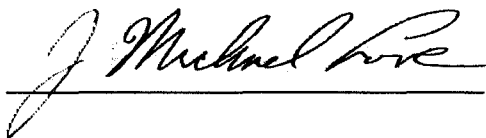
³ A request is a "request to examine records containing confidential security information . . ." 35 P.S. § 2141.3(c).

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.

EAPA appreciates the opportunity to provide comments on the proposed rulemaking. EAPA respectfully requests that the Commission incorporate its suggestions.

Respectfully Submitted,



J. Michael Love
President & CEO



Donna M. J. Clark
Vice President & General Counsel

Dated: 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 weight 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 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(e) *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 that contains in its title, or is marked with the words "confidential", "secure", "Supervisory Control and Data Acquisition", "sensitive", "emergency" or "infrastructure", and that 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 20 days from the date notice was provided to the

utility whether 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 that challenges a public utility record as constituting confidential security information."

Requester. "*Requester.* A Member of the Public that 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 that 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 shall be considered by the Commission when reviewing requests for CSI records. 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."

CERTIFICATE of SERVICE

I hereby certify that I have served a copy of the foregoing "***Comments of the Energy Association of Pennsylvania to the Proposed Public Utility Confidential Security Information Disclosure Protection Act Rulemaking*** relating to Docket Nos. L-00070185 and M-00072014 on the persons listed below, by means of hand-delivery or first-class mail, as indicated:

By Hand-Delivery:

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Harrisburg, PA 17105-3265

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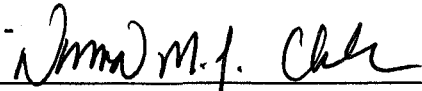
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Date: January 7, 2008



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Vice President and General Counsel