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INDEPENDENT REGULATORY REVIEW COMMISSION

January 8, 2008

Secretary James J. McNulty
Public Utilities Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Late Filing Request
Comments on Proposed Rulemaking Regarding Implementation of Public Utility Confidential Security Information Disclosure Act; L-00070185, M-00072014

Dear Secretary McNulty,

Please accept for filing the comments of the Pennsylvania Newspaper Association (PNA). The comments are one day beyond the deadline for filing. PNA believes that no party will be prejudiced and no harm will result from accepting the comments as requested.

Thank you and please feel free to contact me if you have any questions or concerns. My direct line is (717) 703-3048.

Sincerely,

Melissa Bevan Melewsky, Esq.
Media Law Counsel
PNA

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JAN - 8 2008

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

January 7, 2008

Secretary James J. McNulty
Public Utilities Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Comments on Proposed Rulemaking Regarding Implementation of Public Utility Confidential Security Information Disclosure Act; L-00070185, M-00072014

Dear Secretary McNulty,

I am writing on behalf of the Pennsylvania Newspaper Association (PNA), the statewide trade organization for Pennsylvania newspapers. We have a number of significant concerns regarding the Proposed Rulemaking Regarding Implementation of Public Utility Confidential Security Information Disclosure Act and urge you to consider additional changes. As a fundamental matter, we are concerned that the regulatory scheme grants unfettered discretion to public utilities in designating documents as containing "confidential security information," with no meaningful ability for the public to challenge the designation.

Similar federal regulations designed to keep critical infrastructure information confidential pursuant to the Critical Infrastructure Information Act of 2002 contain clear standards as well as a validation process undertaken by federal authorities. 6 C.F.R. Part 29. No similar system exists in the proposed regulations; instead, a public utility has absolute power to designate which records are confidential with no oversight or validation by the Commission.

At a minimum, the regulations must make it clear that public utilities bear the burden of establishing that designated records actually contain "confidential proprietary information." They must also provide a public summary of documents so designated, to permit an interested citizen a meaningful opportunity to challenge a particular designation.

Our specific concerns include the following:

Section 102.2 – Definitions

"Member of the Public" is defined to include "any citizen of the Commonwealth of Pennsylvania" tracking the definitional language of the Right to Know law, 65 P.S. 66.1, et seq. However, the 3rd Circuit Court of Appeals has ruled that a residency requirement nearly identical to the one contained in the Right to Know law was unconstitutional, in violation of the Privileges

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and Immunities Clause. See Lee v. Minner, 458 F.3d 194 (3rd Cir. 2006). Moreover, corporations, such as newspaper companies, must be able to make requests in the name of the companies. We believe that this definition should be stricken in its entirety.

Section 102.3 – Filing Procedures

Section (a) requires public utilities to maintain all records containing confidential security information, as designated in the sole discretion of the utility, onsite, subject to Commission review. To the extent that these documents relate to government activities, and particularly where the utilities themselves are government agencies, this is unacceptable. The public will have no information about any government-related documents that are maintained on-site, and will have no means to challenge their designation. Utilities that are themselves government agencies cannot shield these documents from public view for all time and without any means to challenge. At a minimum, the regulation must make it clear that public utilities that are public agencies are still be subject to challenge under both this Act and the Right to Know Law. (Section 102.4(a) currently states that records maintained onsite by the public utility are not subject to challenge or request to review. This cannot be the case for utilities that are themselves public agencies, and must be corrected.)

The process outlined in subsections (b) and (c) requires the public utility to determine and designate which records are subject to protection. This scheme presents significant issues.

First, the designation of a document as containing "confidential security information" is at the sole discretion of the public utility. The burden of proving that such a record is public, however, is on the requestor, who has no information regarding the content of the record. The burden must be on the public utility to establish that the designation is correct (when challenged).

The regulation requires public agencies to include a transmittal letter with its submission of "confidential security information." This transmittal letter – or a similar document - must be a public record, available to a person seeking to challenge a designation. In their current form, the regulations provide no information to a person seeking to challenge a utility designation. If a challenger has no information regarding the content of a document, any challenge is futile. As a result, the proposed regulations would have the effect of encouraging utilities to over-classify documents as "confidential security information," with no negative repercussions and no meaningful public oversight.

Subsection (b)(2) requires utilities to separate any filed information into at least two categories: 1) records that are public in nature and subject to the Right to Know Law; and 2) records that contain confidential security information and not public under the Right to Know law. As a preliminary matter, the Right to Know law is complex and should be applied and analyzed by those familiar with the law. Private industry does not make Right to Know determinations; that responsibility properly lies with the government agency holding records or the Pennsylvania Courts. Unfamiliarity with the Right to Know law coupled with the fact that confidential designation is critical to protection could lead to over-zealous confidential designation by private industry and a huge barrier to access to records that should be available under the Right to Know law.

Subsection (e) allows the Commission to evaluate requests for unmarked records that may contain confidential security information by referring them to the Law Bureau. However,

the proposal contains no standards for evaluation or time limits in which the Law Bureau must make its determination. PNA believes the time limits imposed by the Right to Know law should apply and be clearly stated in the regulations. PNA also recommends that in addition to notifying the public utility of its decision, the Law Bureau or Commission must also be responsible to provide timely notice of its decision and appeal process to the requester.

For the reasons stated above, the proposed regulations can lead to improper use and over-designation of confidential security information. Surely the Legislature's intent was to protect only that information that genuinely needs protection. As explained by the Federal Energy Regulatory Commission, in its Critical Energy Infrastructure Information Filing Guidelines (http://www.ferc.gov/help/filing-guide/file-ceii/ceii-guidelines.asp):

> The Critical Energy Infrastructure Information (CEII) process is not intended as a mechanism for companies to withhold from public access information that does not pose a risk of attack on the energy infrastructure. Therefore, in an effort to achieve proper designation while avoiding misuse of the CEII designation, the Commission requires submitters to segregate public information from CEII and to file as CEII only information that truly warrants being kept from ready public access. To this end, the Commission emphasizes that 18 CFR § 388.112(b)(1) requires that submitters provide justifications for CEII treatment. The way to properly justify CEII treatment is by describing the information for which CEII treatment is requested and explaining the legal justification for such treatment.
>
> The Commission has continuing concern for CEII filing abuses and will take action against applicants or parties who knowingly misfile information as CEII, including rejection of applications in which information is mislabeled as CEII.

Similarly, the Pennsylvania Public Utility Commission must expressly warn against improper use of the "confidential security information" designation in the proposed regulations.

Section 102.4 – Challenge procedures to confidentiality designation

Subsection (a)(3) allows the Commission up to 60 days to render a final decision on a challenge to confidential designation or request to view confidential records. This time limit is well beyond the time limits imposed for accessing government records under the Right to Know law. The Right to Know Law allows a commonwealth agency 10 business days in which to initially respond to a request for records with the agency permitted to take an additional 30 days for legal review. Even counting the additional time allotted under the Right to Know Law, the proposed regulations go far beyond the time limits applied to requests for other government records. PNA recommends applying the same time limits to the Commission as those imposed by the Right to Know law.

Even more significantly, 102.4(a)(3) requires a challenger or requester to provide his or her social security number when seeking access to records. This is inappropriate, unnecessary and must be stricken. In fact, the Federal Energy Regulatory Commission has abandoned this practice related to Critical Energy Infrastructure designation. At http://www.ferc.gov/legal//maj-ord-reg/land-docs/ceii-rule.asp. There is no reason to demand or collect social security numbers from citizens seeking access to government records. This is an intimidating and unnecessary obstacle.

Subsection (a)(3)(iii) also requires a requester to provide a detailed statement explaining his or her "particular need for and intended use of the information and a statement as to the requester's willingness to adhere to limitations on the use and disclosure of the information requested." Again, these requirements are inappropriate and unnecessary. It is well-settled under the Right to Know Law that an agency cannot require a requester to explain why he or she wants to review a public record or how he or she intends to use it. Under this Act, the inquiry at the time of the request is whether a record contains "confidential security information" or not. To the extent that an otherwise public record does not contain "confidential security information," it must be released. It does not matter why the requester seeks access or how he or she intends to use it. This regulation presumes that the agency will be producing "confidential" information (which apparently must be protected from further dissemination). If, however, the agency finds that the information requested is not confidential security information, there is no reason to further limit its use or disclosure. (See also 102.4(b)(1)(2) and (3), which relate to the requester's willingness to sign a non-disclosure agreement, be subjected to a criminal background check, and agreement to additional conditions. These factors should not be relevant where a public utility has mis-labeled an otherwise public document as "confidential.")

Subsection (b) sets forth the balancing test that the Commission will use to determine the release of the requested information. Again, to the extent that the Commission determines that otherwise public information is not "confidential security information," the information should be released. To the extent that there is some question about whether the information rises to the level of "confidential security information," then a balancing test may be appropriate. The stated balancing test balances the potential harm resulting from release against the requester's need for the information. This must be changed to expressly consider any **public interest** in disclosure. Again, the burden of establishing the "confidential" designation must be on the public utility, which has all of the relevant information concerning the document at issue.

Thank you for your time and consideration of these comments. We urge you to consider the public interest in accessing government records in crafting your final form regulations. Please contact me at (717) 703-3048 if you have any questions or need any additional information.

Sincerely,

Melissa Bevan Melewsky

Melissa Bevan Melewsky, Esq.
Media Law Counsel
Pennsylvania Newspaper Association