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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

February 6, 2008

Honorable Wendell Holland, Chairman
Pennsylvania Public Utility Commission
Keystone Building, 3rd Floor
400 North Street
Harrisburg, PA 17105

Re: Regulation #57-256 (IRRC #2651)
Pennsylvania Public Utility Commission
Implementation of the Public Utility Confidential Security Information Disclosure
Protection Act

Dear Chairman Holland:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable Robert M. Tomlinson, Chairman, Senate Consumer Protection and Professional
Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and
Professional Licensure Committee
Honorable Joseph Preston, Jr., Majority Chairman, House Consumer Affairs Committee
Honorable Robert W. Godshall, Minority Chairman, House Consumer Affairs Committee

Comments of the Independent Regulatory Review Commission

on

Pennsylvania Public Utility Commission Regulation #57-256 (IRRC #2651)

Implementation of the Public Utility Confidential Security Information Disclosure Protection Act

February 6, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the December 8, 2007 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a (a)) directs the Pennsylvania Public Utility Commission (PUC) to respond to all comments received from us or any other source.

1. General - Consistency with statute; Clarity.

The proposed regulation includes certain parts, verbatim, from the Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. §§ 2141.1-2141.6) (CSI Act), while other provisions are not included. For example, various definitions are duplicated, while the exception for disclosure of confidential information contained in Section 2141.5 (b) of the CSI Act is not mentioned or referenced in the regulation. Another example is the term “violent offense,” which is defined in the CSI Act, but not included in the proposed regulation. However, this term is used in the definition of “terrorist act” which is defined in the CSI Act and is included in the proposed regulation. The PUC should consider using references to the CSI Act for all the statutory definitions and substantive statutory provisions rather than including some but not others. If the final-form regulation continues to include only parts of the CSI Act, then the PUC needs to carefully explain why some statutory definitions and provisions are included and others are not.

2. Section 102.2. Definitions. - Fiscal impact; Reasonableness; Implementation procedure; Clarity.

Confidential security information

This definition defines “confidential security information” as: “Information contained within a record maintained by the Commission [PUC] **in any form...**” (Emphasis added.) Does “any form” include “electronic filings”? If so, this provision is inconsistent with Section 102.3(f), which states that electronic filings are not confidential. To improve clarity, the final-form regulation should reference the statutory definition. If the PUC opts to retain this definition verbatim in the final-form regulation, the PUC should consider changing the final-form rulemaking to state: “**in any form, except electronic filings.**” (Emphasis added.)

Subsection (v) of this definition states that: “[n]othing in this definition may be construed to prevent the disclosure of monetary amounts.” This sentence is vague and the final-form rulemaking should clarify who would make such disclosures and for what purpose.

Member of the public

Is the definition of “member of the public” limited to citizens of the Commonwealth? In light of the recent holding of the 3rd Circuit Court of Appeals in *Lee v. Minner*, which prohibits denying access to records based on the residency of the requester, the PUC should clarify the intent of this provision and consider the fiscal impact of implementing a regulation that seems to conflict with current federal case law. See 458 F.3d 194 (3rd Cir. 2006).

3. Section 102.3. Filing procedures. - Consistency with statute; Reasonableness of implementation procedures; Fiscal impact; Clarity.

(a) Maintenance of records onsite.

Subsection (a) provides proper procedures for utilities to maintain confidential security information onsite. We identified four issues.

First, subsection (a)(2) requires a utility to certify that the record is present and up-to-date, and references Chapter 101. Would this certification process involve information added to the Self Certification Form (Form) described in Chapter 101? If so, how does this procedure address the concern raised by a commentator concerning confidential security information that may be transmitted with this Form?

Second, how will PUC staff monitor “onsite maintenance” to verify that utilities are correctly classifying information as “confidential”?

Third, for how long is a utility required to maintain confidential records?

Finally, is the utility required to follow the same filing requirements that the CSI Act sets forth for agencies? See 35 P.S. § 2141.3(d). For example, does the regulation establish a “document tracking system” for utilities to trace confidential information to a single person, as required by Section § 2141.3(d)(5) of the CSI Act? The final-form regulation should clarify how the PUC intends to implement these statutory requirements.

(b) Filing requirements.

The term “affected page,” as used in Subsection (b)(3), is vague. The PUC should clarify if this term applies to every page that actually contains confidential security information, or whether it could be read to include pages that are broadly “affected” by confidential security information contained in another document or page.

In addition, Subsection (b)(3) appears to permit utilities to designate entire pages as confidential, no matter how minimal the amount of actual confidential material they contain. The PUC should explain the basis for protecting entire pages that may contain confidential as well as non-confidential information. Has the PUC considered using redaction to eliminate confidential

information from a page and allow access to the rest of the page? If not, how does this broad designation relate to the Right-to-Know Law, which allows agencies to redact only that information that is contained in a public record and is not "subject to access"? See 65 P.S. § 66.3-2.

(c) Public utility's responsibility.

This subsection declares that the public utility has the responsibility to identify records that contain confidential security information. The second and third sentences in the subsection read:

When the public utility fails to designate a record as containing confidential security information, it does not obtain the protections offered in this chapter and in Act 156 [CSI Act]. Any record that is not identified, stamped and separated as set forth in subsection (b), will be made available to the public under the Right-to-Know Law.

The third sentence is overly broad because not every record may be accessible under the Right-to-Know Law. The word "will" should be replaced with "may" in the final-form regulation.

(d) Status of previously-filed unmarked records.

Subsection (d) indicates that confidential documents filed with the PUC before May 29, 2007, are not covered by the protections in this chapter and in the CSI Act, and must be resubmitted to the PUC under the new filing procedures in order to ensure confidentiality. If a public utility follows this procedure, what guarantee will the PUC provide that the old files are now secure or have been destroyed? The PUC should review and develop cost estimates for the fiscal impact of this requirement on the regulated community. This information should be provided with the submittal of the final-form regulation.

(e) Commission's responsibility with unmarked records.

This subsection asserts that: "The Commission [PUC] 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.'" This subsection contains non-regulatory language. Regulations establish binding norms of general applicability and future effect. They cannot establish limitations of liability for an agency. In addition, the first sentence of this subsection is redundant and the requirement that utilities are to re-file records is already established in Subsection (d). Hence, the first sentence is unnecessary and its narrative should be moved to the Preamble of the final-form regulation.

The second part of Subsection (e) establishes what appear to be internal procedures for the PUC. It is also not necessary to include this segment in a regulation since it is not establishing rules or standards that apply to any regulated party. Therefore, the PUC should either provide this information in the Preamble of the final-form regulation or in a secretarial letter to the utilities, or both.

(f) Electronic submissions.

This subsection is framed as an announcement or policy statement and contains non-regulatory language. These provisions need to be rewritten to set clear compliance standards. Subsection (f) should explicitly prohibit the submission of confidential security information in an electronic form. When the PUC is ready and able to accept electronic submissions and maintain their confidentiality and security, it will need to amend the regulation to allow utilities to use electronic filings.

4. Section 102.4. Challenge procedures to confidentiality designation. - Consistency with the statute; Implementation procedures; Reasonableness; Need; Clarity.

(a) General rule for challenges or requests to review.

Subsection (a) mentions that a person who is not a statutory advocate must provide certain information, including his/her Social Security number, to the PUC in order to review confidential information. The PUC should clarify its intent for requiring such information, and further explain how it will protect such information, which should be considered confidential.

This subsection also includes these two sentences:

Only records filed with the Commission [PUC] as confidential security information are subject to a challenge or written request to review under this subsection and Act 156 [CSI Act]. Records maintained onsite by the public utility are not subject to challenge or request to review.

These statements are overly broad and do not acknowledge that confidential security files may be accessed during litigation. If the intent is to state that onsite CSI cannot be challenged or reviewed via the process prescribed by this proposed regulation and the CSI Act, then this is what should be specifically stated. However, if the PUC is gaining access to onsite files and using them in its deliberations, why are others denied access? The PUC should explain this prohibition and describe other ways by which the statutory advocate or the public can obtain access to the utility's information. Based on a commentator's suggestion, has the PUC considered adding language similar to existing Section 5.423 (52 Pa. Code § 5.423), which provides procedures to establish orders to limit availability of proprietary information?

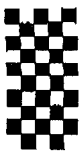
Subsections (a)(3)(iv) and (v) mention a 15-day time limit for various filings. How did the PUC determine that this was a reasonable time limit?

(b) Relevant factors to be considered.

This subsection describes a balancing test for the PUC to use in determining access to confidential security information. What is the PUC's basis for this balancing test? Section 2141.3(c)(4) of the CSI Act uses different language to describe an agency's decision process, including the term "reasonable grounds." Why isn't the statutory language used or referenced in the regulation? The PUC should review this language and provide a test that is consistent with the CSI Act.

(d) Appeal of Commission decision.

Subsection (d) is essentially the same as Section 2141.3 (c)(6) of the CSI Act. Is this subsection necessary? Has the PUC considered referencing the CSI Act rather than paraphrasing it?



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To: Sherri A. DelBiondo
Regulatory Review Coordinator
Law Bureau
Agency: Pennsylvania Public Utility Commission
Phone: 2-4597
Fax: 3-3458
Date: February 6, 2008
Pages: 7

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Pennsylvania Public Utility Commission's regulation #57-256 (IRRC #2651). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through Interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Sh DelBiondo Date: 2-6-08