



CITY OF PHILADELPHIA

LAW DEPARTMENT  
One Parkway  
1515 Arch Street  
Philadelphia, PA 19102-1595

*Shelley R. Smith*  
*City Solicitor*

*(215) 683-5170 (phone)*  
*(215) 683-5175 (fax)*

June 7, 2010

Via Electronic Filing

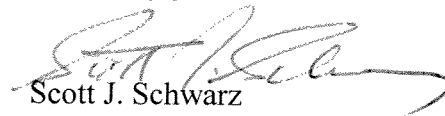
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Petition to Intervene of the City of Philadelphia  
Docket No. R-2010-2161575

Dear Secretary Chiavetta:

Enclosed for filing please find the Prehearing Memorandum of the City of Philadelphia in the above-referenced matter, along with a Certificate of Service showing that copies of the enclosed document have been served upon parties of record.

Very truly yours,

  
Scott J. Schwarz  
Senior Attorney

Enclosure

cc: All Parties on the Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission :  
v. : Docket No. R-2010-2161575  
PECO Energy Company – Electric Division :

**PREHEARING MEMORANDUM OF  
THE CITY OF PHILADELPHIA**

The City of Philadelphia (“City”) submits this pre-hearing memorandum in the above-captioned proceeding pursuant to 52 Pa. Code § 5.222 and the Prehearing Conference Order dated May 21, 2010.

**I. Presently Identified Issues**

The City intends to direct its involvement in this proceeding toward the issues raised by the requested changes to the municipal lighting tariffs. Under the tariff as proposed, PECO would bill the City’s traffic lights and small constant load electronic devices under Rate TLCL and the City’s streetlights under Rate SL-E. The City supports Rate TLCL as proposed, but it has concerns about whether the information and data filed by PECO in support of Rate SL-E are sufficient to establish that the SL-E Rate is just, reasonable, and nondiscriminatory, as required by Section 1301 and 1304 of the Public Utility Code, 66 Pa. C.S. §§ 1301 and 1304.

In addition, PECO’s proposed tariff includes Rate AL for Alley Lighting in the City of Philadelphia. The “Applicability” language of this Rate Schedule refers to “multiple, unmetered lighting service supplied by the City of Philadelphia to operate *incandescent* lamps and appurtenances installed, owned and maintained by the City” (emphasis added). As part of its energy efficiency efforts, the City does not currently use

any incandescent lamps in its alley lights. PECO and the City have met to discuss this issue, as well as to seek clarification of the portions of the Provisions for the Recovery of Energy Efficiency and Conservation Program Costs (EEPC) related to municipal lighting. PECO and the City are exploring the possibility of resolving these issues through a stipulation. The City reserves the right to address issues raised by other parties as they arise during the course of the proceeding.

## **II. Proposed Witnesses and Subject Matter of Testimony**

At present, the City plans to present from any or all of the following witnesses on the subject matters described below.

Alan Frank  
Chief Technology Officer  
Division of Technology for the City of Philadelphia  
1234 Market Street, Suite 1850  
Philadelphia PA 19107  
(215) 686-8103  
Subject Matter: The proposed TLCL Rate

Joseph M. Doyle, P.E.  
Chief, Street Lighting Program  
Municipal Services Building, Suite 900  
1401 John F. Kennedy Boulevard  
Philadelphia, PA 19102  
(215) 686-5515  
Subject Matter: the technical aspects of municipal lighting in the City, including the City's replacement of incandescent and mercury lamps with high-pressure sodium lamps and ballasts; how the rates will affect municipal lighting costs; the reasonableness of the fixed distribution charge for Rates AL and SL-E; the availability of the proposed AL Rate; the increase in costs to the City that would result from changing alley lighting from Rate AL to Rate SL-E.

Gregory A. DiGiovine  
Director, Energy Office  
Municipal Services Building, Suite 1430  
1401 John F. Kennedy Boulevard  
Philadelphia, PA 19102  
(215) 687-5469

Subject matter: How the rates will increase costs for the City in dollar amount and percentages for each rate and rate class; the reasonableness of the fixed distribution charge for Rates AL and SL-E; the availability of the proposed AL Rate; the increase in costs to the City that would result from changing alley lighting from Rate AL to Rate SL-E.

In addition, the City is exploring the retention of an outside expert, but has not finalized any agreement given the hope that this matter will be resolved amicably. The City reserves the right to call additional witnesses and/or delete witnesses listed above as may be necessary depending on the course of the proceeding.

### **III. Proposed Protective Order**

PECO has sought a protective order in this proceeding. The City does not object to the entry of a protective order but has concerns about the language in Paragraph 14 related to the Pennsylvania Right-to-Know Law (Law). As proposed, this paragraph states:

The Commission and all parties, including the statutory advocates and any other agency or department of state government will consider and treat the Proprietary Information as within the exemptions from disclosure provided in the Pennsylvania Right-to-Know Act (65 P.S. § 67.101 *et seq.*) until such time as the information is found to be non-proprietary.

The City has several concerns about this paragraph as drafted. First, the phrase “until the information is found to be non-proprietary” is subject to multiple interpretations, particularly given the mandatory procedures for responding to right-to-know requests under the Law. Section 502 of the Law requires an agency to designate an official or employee to act as the open-records officer and states that the open-records officer shall “issue interim and final responses” to requests received under the Law. 65 P.S. § 67.502. The term “agency” is defined to include a Commonwealth agency, local agency, a judicial agency, or a legislative agency. 65 P.S. § 67.101. Thus, one possible

interpretation of the proposed Protective Order is that an agency will consider and treat Proprietary Information as within the disclosure exemption until the agency's open-records officer makes a finding that the information is non-proprietary.

The Law also provides that if an agency denies a request, a requester may file an appeal with the Office of Open Records. The Office of Open Records then assigns an appeals officer to review the decision of the open record's officer and to make a final decision on the appeal. The requester or the agency may then seek judicial review of the appeals officer's decision in Commonwealth Court for decision of a Commonwealth agency or in the Court of Common Pleas for decisions of a local agency. Given this procedure, the Protective Order also could be read to mean that an agency must consider and treat Proprietary Information as within the disclosure exemptions until the Office of Open Records or a court finds the information to be non-proprietary.

Another concern is that the Protective Order may conflict with the process an agency must follow to determine how to respond to a right-to-know request under the Law. In addition, it refers to exemptions to disclosure without stating the specific exemption(s) that would apply. Section 901 requires agencies, among other things, to make a good faith effort to determine if a record is a public record. It provides in pertinent part:

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances at the of the request.

65 P.S. § 67.901. The Law defines "public record" as a record of a Commonwealth or

local agency that is not exempt from disclosure under Section 708 of the Law; is not exempt from disclosure under Federal or state law or regulation or judicial order or decree; or, is not protected by privilege. 65 P.S. § 67.101. Section 708 contains thirty categories of records that are exempt from access by a requester and provides that the burden of proving that a record of a Commonwealth or local agency is exempt from public access is on the Commonwealth agency or local agency. 65 P.S. § 67.701.

Records that constitute or reveal a trade secret or confidential proprietary information are one of the thirty categories of exempt records. 65 P.S. § 67.701(b)(11). Section 903 requires that if an agency denies access to a record, it must give “[t]he specific reasons for the denial, including a citation of supporting legal authority.” 65 P.S. § 67.903.

The Commonwealth Court recently noted that Section 901’s mandatory language makes it clear that agencies must go through the type of analysis specified in that section and make a good faith effort to determine if a requested document is a public record in response to an information request under the Law. *See Prison Legal News v. Office of Open Records*, 992 A.2d 942 (Pa. Commw. 2010); *see also Pennsylvania State Police v. Office of Open Records*, 2010 Pa. Commw. LEXIS 259 (2010)(stating that Section 901 requires an agency to make a good effort). Thus, the Law does not appear to allow a Commonwealth or local agency to delegate its responsibilities for determining if a document is exempt from disclosure or to agree to treat or consider a record as within the statutory exemptions from disclosure in advance of receiving a right-to-know request.

By stating that the Commission and all parties will consider all information designated proprietary by a party to this proceeding as within the exemptions from disclosure, the proposed Protective Order also presumes that such information is a

“record” as defined by the Law. In a recent decision, the Commonwealth Court initially considered whether the requested documents at issue were “records” as defined by the Law before evaluating whether a statutory exemption prohibited their disclosure.

*Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. 2010). The Law defines “record” as information “that documents a transaction or activity of an agency and that is created, received or retained pursuant to law in connection with a transaction, business or activity of an agency.” 65 P.S. § 67.701. Thus, information that does not document a transaction or activity of an agency is not a “record” as defined by the Law.

Section 707(b) of the Law establishes specific procedures an agency must follow upon receipt of a right-to-know request for a record provided by a third party and designated by the third party as containing a trade secret or confidential proprietary information. It provides:

**Requests for trade secrets.** – An agency shall notify a third party of a request for a record if the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information. Notification shall be provided within five business days of receipt of the request for the record. The third party shall have five business days from receipt of notification from the agency to provide input on the release of the record. The agency shall deny the request for the record or release the record within ten business days of the provisions of notice to the third party and shall notify the third party of the decision.

65 P.S. § 67.707(b).

The regulation that governs protective orders for proprietary information is 52 Pa. Code § 5.423. The pertinent portions are set forth below:

**5.423. Orders to limit availability of proprietary information.**

(a) *General rule for adversarial proceedings.* A petition for protective order to limit the disclosure of a trade secret or other confidential information on the public record will be granted only when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public's interest in free and open access to the administrative hearing process. **A protective order to protect trade secrets or other confidential information will apply the least restrictive means of limitation which will provide the necessary protections from disclosure.** In considering whether a protective order to limit the availability of proprietary information should issue, the Commission or the presiding officer should consider, along with other relevant factors, the following:

- (1) The extent to which the disclosure would cause unfair economic or competitive damage.
- (2) The extent to which the information is known by others and used in similar activities.
- (3) The worth or value of the information to the party and to the party's competitors.
- (4) The degree of difficulty and cost of developing the information.
- (5) Other statutes or regulations dealing specifically with disclosure of the information.**

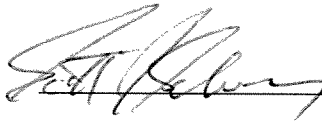
(Emphasis added.) Thus, the Law is a relevant factor to consider in drafting a protective order because it deals specifically with the disclosure of information.

For the reasons discussed above, the City recommends that the parties agree to revise this paragraph of the Protective Order to read:

The Commission and all parties that are agencies subject to the Pennsylvania Right-to-Know Law (65 P.S. §§ 67.101-67.3104), including the statutory advocates and any other agency or department of state government, will consider and treat any third party request for Proprietary Information in accordance with the procedures set forth in Section 707(b) of the Pennsylvania Right-to-Know

Law (65 P.S. § 67.707(b) (Production of certain records; requests for trade secrets or confidential proprietary information).

This suggested language is based on Section 707(b) of the Law, which specifically deals with the process an agency must go through when responding to a request for a record designated as containing a trade secret or confidential proprietary information. In addition, because the pertinent portions of the Law are limited in scope to agencies, the suggested language replaces the phrase “all parties” with “all parties that are agencies subject to the Right-to-Know Law.”

By: 

Scott J. Schwarz  
Senior Attorney  
City of Philadelphia Law Department  
1515 Arch Street, 16<sup>th</sup> Floor  
Philadelphia, PA 19102  
Phone: 215-683-5170  
Fax: 215-683-5175  
E-mail: [scott.schwarz@phila.gov](mailto:scott.schwarz@phila.gov)  
Attorney I.D. # 38224

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adecusatis@morganlewis.com  
cvasudevan@morganlewis.com

Johnnie E. Simms, Esquire  
Adelou A. Bakare, Esquire  
Office of Trial Staff  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
josimms@state.pa.us  
abakare@state.pa.us

Candis A. Tunilo, Esquire  
Tanya J. McClosky, Esquire  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101  
tmcclosky@paoca.org  
ctunilo@paoca.org

Charis Mincavage, Esquire  
Barry A. Naum, Esquire  
Carl J. Zwick  
McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
Harrisburg, PA 17108-1166  
dkleppinger@mwn.com  
cmincavage@mwn.com  
bnaum@mwn.com  
czwick@mwn.com

Sharon E. Webb, Esquire  
Assistant Small Business Advocate  
Office of Small Business Advocate  
Commerce Building, Suite 1102  
300 N. Second Street  
Harrisburg, PA 17101  
717-783-2525  
swebb@state.pa.us

Thu B. Tran, Esquire  
Philip Bertocci, Esquire  
Jonathan M. Stein, Esquire  
Geroage D. Gould, Esquire

Community Legal Services, Inc.  
1424 Chestnut Street  
Philadelphia, PA 19103  
pbertocci@clsphila.org  
ttran@clsphila.org

Harry S. Geller  
John G. Gerhard  
Pennsylvania Utilitiy Project  
118 Locust Street  
Harrisburg, PA 17101  
hgellerpulp@palegalaid.net  
jgerhardpulp@palegalaid.net

Thomas Tuffey, Esquire  
Charles McPhederan, Law Staff Chair  
PennFuture  
1518 Walnut Street, Sutie 1100  
Philadlephia, PA 19102  
ttuffey@pennfuture.org  
lane@pennfuture.org

Gary A. Jeffries, Esquire  
Assitant General Counsel  
Dominion Retail, Inc.  
501 Martindale Street, Sutie 400  
Pittisburgh, PA 15212-5817  
Gary.A.Jeffries@dom.com

Todd S. Steward, Esquie  
Hawke McKeon & Sniscak, LLP  
P.O. Box 1778  
100 N. Tenth Street  
Harrisburg, PA 17105-1778  
tstweard@hmslegal.com

C. Stanley Stubbe, Esquire  
Pennsylvanjia Section  
International Dark Scky Association  
1438 Shaner Drive  
Pottstown, PA 19465  
csstubbe@cs.com

Richard N. Lipow, Esquire  
629 Swedesford Road  
Malvern, PA 19355

richard@lipowlaw.com

Leo Smith  
Northeast Regional Director  
International Dark Sky Association  
1060 Mapleton Avenue  
Suffield, CT 06078  
leo@smtih.net

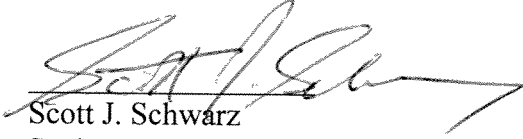
Charles T. Joyce, Esquire  
Spear Wilderman, P.C.  
230 South Broad Street, mSuite 1400  
Philadelphia, PA 19102  
ctjoyce@spearwilderman.com

David Zambitto, Esquire  
Christopher Wright, Esquire  
17 North Second Street, 12<sup>th</sup> Floor  
Harrisburg, PA 17101-1601  
dzambitto@postschell.com  
cwright@postschell.com

Ryan Miller  
9912 Medway Road  
Philadelphia PA 19115

Craig Vorwald  
600 Exmoor Dr.  
Collegeville, PA 19426

Cynthia Gallagher  
1130 Fanshawe Street  
Philadelphia, PA 19111

  
Scott J. Schwarz  
Senior Attorney  
City of Philadelphia, Law Department  
1515 Arch Street, 16<sup>th</sup> Floor  
Philadelphia, PA 19102  
E-mail: scott.schwarz@phila.gov  
Attorney I.D. # 38224  
Phone: 215-683-5170, Fax: 215-683-5175

Dated: June 7, 2010