

DOCUMENT BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Pennsylvania Public Utility Commission :
v. :
Philadelphia Gas Works :
Petition of Philadelphia Gas Works to Establish :
a Cash Receipts Reconciliation Clause :

R-00049157

P-00042090

DOCKETED

JUN 30 2004

PROTECTIVE ORDER

On June 1, 2004, a "Joint Petition for Settlement of Philadelphia Gas Works' 2004-2005 GCR1 Proceeding" (Settlement Petition) was filed. Signatories to the Settlement Petition include Philadelphia Gas Works (PGW) Office of Trial Staff, Office of Consumer Advocate, and Action Alliance, et al.2 Also filed on June 1, 2004, was a motion by PGW for the issuance of a protective order in regard to Appendix "B" to the Settlement Petition. Appendix "B" provides the terms of a Gas Purchasing Program that PGW has agreed to follow for the 2004-2005 and 2005-2006 GCR periods. In support of its motion for a protective order, PGW argues that it considers the information contained in Appendix "B" proprietary "in that it includes commercially sensitive information pertaining to PGW's gas purchasing practices and strategies." Motion at 2, ¶4. PGW also provided the following argument:

Section 5.423 of the Commission's regulations states that a protective order should be issued when the potential harm to the participant outweighs the interest in maintaining public information. Among the factors to be considered is whether disclosure of the information would cause unfair economic or

1 Gas Cost Rate.

2 Action Alliance, et al. includes Action Alliance of Senior Citizens of Greater Philadelphia, Association of Community Organizations for Reform Now, the Tenants' Action Group, and the Consumer Education and Protective Association.

competitive damage and whether its value to PGW's competitors is high. The Gas Purchasing Program must be considered proprietary and subject to a protective order because the information in the document which obligates the Company to enter the market at the specified times and purchase the committed volumes could artificially inflate the market and cause unfair economic damage if subject to unprotected dissemination. Public release of this information could be also seen as a pricing signal, which would drive the market against PGW's interests. Therefore, this information is extremely commercially sensitive, has a high value to PGW's competitors and disclosure would cause both unfair economic and competitive damage.

Motion at 2-3, ¶5.

Participants in the proceeding had 10 days from the date of service of PGW's motion to answer or object to the motion. See, 52 Pa. Code §5.103(c). No timely answers or objections were filed in regard to PGW's motion.

The Commission's regulation at 52 Pa. Code §5.423 governs orders limiting the availability of proprietary information. Pursuant to that regulation, I must balance the potential harm to the party providing the information against the public interest in free and open access to the administrative hearing process. The harm to PGW if the information is provided to the general public must be substantial. The regulation also provides that, in considering whether a protective order to limit the availability of proprietary information should issue, I consider 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 participant and to the participant'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.

PGW focuses on subsections (1) and (3) of 52 Pa. Code §5.423 in support of its Motion. PGW argues that public disclosure of the Gas Purchasing Program at Appendix “B” to the Settlement Petition would cause unfair economic or competitive damage because public knowledge of the amount of gas PGW is required to purchase at specified times, could result in the market being artificially inflated. PGW also asserts that public disclosure of the information could be seen as a pricing signal, which would drive the market against PGW’s interest. PGW therefore indicates that the information contained in Appendix “B” is highly valuable to both it and its competitors.

I believe that PGW has met its burden of demonstrating that the potential harm of providing the information contained in Appendix “B” is substantial and that the harm in providing the information without restriction outweighs the public’s interest in free and open access to the administrative proceeding. I will therefore grant PGW’s motion for a protective order.

Having determined that a protective order is necessary, I must next determine the scope of the protective order. The regulation at 52 Pa. Code §5.423 states that I must apply the least restrictive means of limitation that will provide the necessary protection from disclosure. In the “proposed Protective Order” attached to its Motion at Exhibit “A”, PGW agrees to make Appendix “B” available to the Commission and its staff and counsel for parties of record in this proceeding, “for use in this proceeding, and/or a proceeding to enforce the settlement as well as compliance review.” Proposed Protective Order at 7 ¶s3, 4. PGW also proposes that a party’s counsel may make the information contained in Appendix “B” available to its experts and witnesses under certain conditions. Proposed Protective Order at 7-8 ¶s4, 5. PGW’s proposed Protective Order is consistent with the Commission’s regulation governing the release of proprietary information to parties. See, 52 Pa. Code §5.423(b) and (c). I will therefore issue a protective order consistent with PGW’s proposal.

ORDER

THEREFORE,

IT IS ORDERED:

1. That Philadelphia Gas Works' Motion for Issuance of a Protective Order is granted.
2. That the Proprietary Information subject to this Protective Order is Appendix "B" (Philadelphia Gas Works' Gas Purchasing Program for the 2004-2005 and 2005-2005 GCR periods) to the Joint Petition for Settlement of Philadelphia Gas Works' 2004-2005 GCR Proceeding.
3. Proprietary Information shall be made available to the Commission and its staff for use in this proceeding, and/or a proceeding to enforce the Settlement as well as compliance review. For purposes of filing, to the extent that Proprietary Information is placed in the Commission's report folders, such information shall be handled in accordance with routine Commission procedures inasmuch as the report folders are not subject to public disclosure. To the extent that Proprietary Information is placed in the Commission's testimony or document folders, such information shall be separately bound, conspicuously marked, and accompanied by a copy of this Order. Public inspection of the Proprietary Information shall be permitted only in accordance with this Protective Order.
4. Proprietary Information shall be made available to counsel for parties of record in this proceeding. Such counsel shall use or disclose the Proprietary Information only for use in this proceeding, in a proceeding to enforce the Settlement or for compliance review. A party's counsel may afford access to Proprietary Information to that party's expert(s) and witnesses. However, said expert(s) and witnesses may not be: (a) an officer, director, partner, owners other than stock, or employee who is primarily involved in the pricing, development, and/or marketing of products, goods or services at issue in this proceeding which are offered in

competition with those of the producing party; or (b) an officer, director, partner, owner other than stock, or employee of any affiliate of a competitor of the producing party; provided that any expert shall not be disqualified on account of being a partner, or owner other than stock unless his/her interest in the business constitutes a significant potential for violation of the limitations of permissible use of the Proprietary Information. For purposes of this Order, partnership, or ownership interest other than stock valued at more than \$100,000 and/or constituting more than 2% interest in the business establishes a significant potential for violation. If a party's independent expert, another member of the independent expert's firm or the independent expert's firm generally also serves as an expert for, or as a consultant or advisor to a competitor or any affiliate of a competitor or the producing party, said independent expert must: (1) advise the producing party of the competitor's or affiliate name(s); (2) make reasonable attempts to segregate those personnel assisting the independent's expert's participation in this proceeding from those personnel working on behalf of a competitor or any affiliate of a competitor of the producing party; and (3) if segregation of such personnel is impractical, the independent expert shall give to the producing party written assurances that the lack of segregation will in no way jeopardize the interests of the producing party. The producing party retains the rights to challenge the adequacy of the written assurances that its interests will not be jeopardized. No other persons may have access to the Proprietary Information except as authorized by Order of the Commission or the presiding Administrative Law Judge.

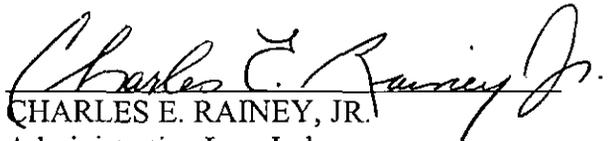
5. Prior to making Proprietary Information available to an expert, as provided in Paragraph 4, above, counsel for a party of record shall deliver a copy of this Protective Order to such expert and shall receive written acknowledgment from the expert in the form attached to this Protective Order as Appendix "A". The party furnishing the Proprietary Information shall be notified promptly of the identity of all persons provided access to such Proprietary Information pursuant to this Paragraph and Paragraph 4, above.

6. Any state agency which has access to and/or receives copies of the Proprietary Information will consider and treat the Proprietary Information as within the exemptions from disclosure found in the Pennsylvania Right to Know Act, 65 P.S. §66.1(2), until such time as the information is found to be non-proprietary.

7. Any public reference to Proprietary Information by the Commission or counsel or persons afforded access thereto shall be to the appendix or title reference in sufficient detail to permit persons with access to the Proprietary Information to fully understand the reference and not more. The Proprietary Information shall remain a part of the record, to the extent admitted, for all purposes of administrative or judicial review.

8. Part of any record in this proceeding containing Proprietary Information, including but not limited to all exhibits, responses to discovery, and settlements and including reference thereto as mentioned in Paragraph 7 above, shall be sealed for all purposes, including administrative and judicial review, unless such Proprietary Information is released from the restrictions of this Protective Order, either through the agreement of the parties, or pursuant to an Order of the Administrative Law Judge or the Commission.

9. The Commission, including its staff or delegated agents, and the parties affected by the terms of this Protective Order shall retain the right to question or challenge the confidential or proprietary nature of Proprietary Information; to question or challenge the admissibility of Proprietary Information; to refuse or object to the production of Proprietary Information on any proper ground, including but not limited to irrelevance, immateriality or undue burden; and to seek additional measures of protection of Proprietary Information beyond those provided in this Protective Order. If a challenge is made to the designation of a document or information as proprietary, the party claiming that the information is proprietary retains the burden of demonstrating that the designation is necessary and appropriate.


CHARLES E. RAINEY, JR.
Administrative Law Judge

Date: June 15, 2004

Appendix "A"

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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To Whom It May Concern:

The undersigned is the independent expert of _____ (the retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, director, stockholder, partner, owner or employee of any competitor of Philadelphia Gas Works; or (2) an officer, director, stockholder, partner, owner or employee of any affiliate of a competitor of the producing party. [Alternatively, the undersigned should explain in detail why he/she qualifies for access to Proprietary Information under the proviso to Paragraph 4 of the Protective Order.] The undersigned has read and understands the Protective Order in this proceeding, which Order deals with the treatment of Proprietary Information. The undersigned agrees to be bound by, and comply with, the terms and conditions of said Order.

_____(NAME)

_____(ADDRESS)

_____(EMPLOYER)

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