

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
RCN TELECOM SERVICES OF)
PHILADELPHIA, INC.)
v.) PA No. 01-03
PECO ENERGY COMPANY)
and)
EXELON INFRASTRUCTURE SERVICES, INC.)

**RESPONSE TO PECO ENERGY COMPANY AND
EXELON INFRASTRUCTURE SERVICES, INC.
REQUEST FOR CONFIDENTIAL TREATMENT
AND NON-DISCLOSURE OF PROPRIETARY COMMERCIAL
AND FINANCIAL INFORMATION**

RCN Telecom Services of Philadelphia, Inc. ("RCN"), complainant in the above-captioned matter, by the undersigned counsel, herewith responds to the Request for Confidential Treatment and Non-Disclosure of Proprietary Commercial and Financial Information, filed by PECO Energy Co. ("PECO") and Exelon Infrastructure Services, Inc. ("EIS"), (collectively "Respondents"), on July 5, 2001 ("Request").¹ While RCN does not concede that the data are proprietary, or confidential, it does not in principle object to the relief sought by Respondents in their Request and responds only to the limited extent necessary to clarify the circumstances.

In its Amended Complaint RCN alleged that PECO and its affiliate(s) had engaged in unlawful pricing and pole attachment practices concerning work required to attach RCN's facilities to PECO's poles in suburban Philadelphia. RCN submitted to the Commission two versions of its

¹ Under the provisions of §§ 1.45 and 1.4 of the Commission's rules, RCN's response would normally have been due on July 16th, 2001. However, on August 22, 2001 RCN sought an extension of time to and including August 31st, 2001 to file its reply and such extension was approved orally on August 23, 2001.

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Amended Complaint: one, for public disclosure, with the prices used by Respondents redacted, and one with the information concerning the pricing included, for confidential treatment. The pricing data, it bears repetition, had come lawfully into RCN's hands through an apparent error of PECO. In filing these data in two formats, RCN noted that questions about the proprietary nature of the pricing data might be presented, and invited Respondents to seek confidential treatment for those data if they wished to do so.² The public, therefore, has not had access to the Respondents' data, and, as noted above, RCN has no objection to Respondents' request that the Commission withhold these numbers from public disclosure, provided only that doing so does not impair the grant of relief as sought by RCN. It is not the case, however, as Respondents allege, that RCN has done anything improper in proceeding as it has. Indeed, it was careful to structure its filing in a fashion which permitted it to put its case before the Commission without impairing any rights Respondents might have to protect the data from public disclosure.³

Respondents first allege that the Commission lacks jurisdiction to compel the disclosure of the data for which they now seek protected treatment. RCN does not agree, and in its Reply to Respondents' Responses has set forth the bases for the Commission's jurisdiction.⁴ In fact, the

² See RCN's Amended Complaint filed in two versions, one stamped "Public File Copy" and one "Confidential," and Letter to the Commission's secretary transmitting the two versions, all dated May 4, 2001.

³ In this context it is worth noting that, while RCN has provided the Commission with the general pricing tools or approach to make-ready pricing which it acquired through Respondents' error, and a hypothetical calculation using such pricing tools, it has not supplied the Commission (nor, *a fortiori*, any other party or public body) with the actual profit margin numbers. RCN has offered to provide those data to the Commission, and stands ready to do so if asked. See RCN Amended Complaint, at 10, n.16.


⁴ See Reply of RCN, at 4-14.

Commission's jurisdiction over make-ready work is pellucidly clear, as set forth in RCN's Response. Respondents' contention to the contrary simply disregards FCC precedent.

Respondents next contend that it was inappropriate for RCN to proceed as it has. However, other than some generalized quarreling, it has not suggested how else RCN could have or should have presented its case to the Commission. In this context, it is relevant that Respondents' assertion that make-ready work is a competitive marketplace is belied by the facts alleged by RCN in its Amended Complaint and Reply to Respondents' Response. The fact is that RCN had no practical alternative but to use PECO and its affiliate for make-ready work. In any case, no data in the public version of RCN's Amended Complaint could conceivably do competitive harm to PECO, even if the market were competitive.⁵

Respectfully submitted,

RCN Telecom Services of Philadelphia, Inc.

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⁵Although Respondents do not dwell long on the point, they note that RCN's receipt of the data has not been demonstrated on the record to have been by accident. RCN stands by its assertions in this respect and is prepared, if requested by the staff to do so, to provide details respecting its receipt of such data.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2001, copies of the foregoing Response to PECO Energy Company Request for Confidential Treatment and Non-disclosure of Proprietary Commercial and Financial Information were served on the following by hand delivery* and first-class U.S. mail, postage-paid:

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