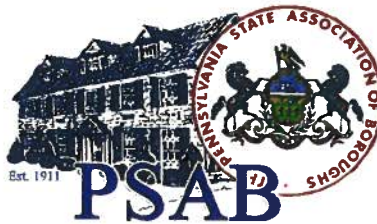


**SENATE BILL 168- MUNICIPAL ELECTRIC PROCUREMENT &
THE BOROUGH CODE**

PA HOUSE CONSUMER AFFAIRS COMMITTEE



EDWARD TROXELL
DIRECTOR OF GOVERNMENT AFFAIRS
PENNSYLVANIA STATE ASSOCIATION OF BOROUGHS

August 11, 2010

SENATE BILL 168 (pn1376)
MUNICIPAL ELECTRIC PROCUREMENT &
THE BOROUGH CODE

Good morning, Mr Chairman and members of the House Consumer Affairs Committee, my name is Ed Troxell and I serve as the Director of Government Affairs for the PA State Association of Boroughs. As the Director for Government Affairs at PSAB, my job asks me to examine pending legislation that may have an impact on Pennsylvania's 958 boroughs and to work for changes to the Borough Code or any related law that may benefit the more than 3.6 million residents who live in these communities.

As 2011 will mark PSAB's century mark of service to the Commonwealth's borough communities, I would like to remark that within its history a very well organized process has been used by the association membership in establishing which public policy positions it will adopt. That process is a deliberative approach measuring the quantitative impact of any issue and submitting the concept to the entire membership for its guidance.

This morning's issue is no different and under PSAB resolution 2010-18 our members have endorsed the concepts of Senate Bill 168 concerning changes to The Borough Code in regards to contracts for the purchase of electricity.

Most of the discussion on SB168 has been on enabling a limited amount of borough communities seeking to participate in electric power generation projects. True, this participation provides savings in electricity costs that are passed on to municipal consumers; however PSAB would like to focus on its primary reason for support of these amendments to The Borough Code.

Plainly, Senate Bill 168 will enable ALL boroughs to enjoy all the benefits of electric deregulation without the cumbersome administrative procedures currently outlined in The Borough Code¹. The existing article of The Borough Code that will be amended by SB168 was crafted prior to the era of electric deregulation. That language served its purpose during that regulatory period – today, it hinders boroughs seeking to save on the energy costs associated with street & traffic control lighting, municipal buildings & facilities (i.e.; pools, public works garages, lock-ups & sewage treatment) to name a few.

Currently under Section 1402 (d)(4) of The Borough Code, a borough must bid electric contracts unless the company is under tariff with the Public Utilities Commission. We have had numerous boroughs complain about this hamstringing them when they wish to join a consortium who can offer them a cheaper price for their municipal electric needs. This hindrance was removed from The Second Class Township Code under Act 70 of 2000² and townships today enjoy the flexibility that deregulation provides them.

Yet the most effective way to illustrate this problem is to provide the committee with evidences directly from our members. I have attached several documents that will be helpful to the committee, included are a letter from Macungie borough describing their problems with the current law, an analysis of the issue provided by Macungie's solicitor and lastly highlighted excerpts from both municipal codes. Overall, the passage of Senate Bill 168 will not just benefit a narrow sample of borough communities, but it will also modernize portions of The Borough Code that will reduce costs for all boroughs throughout the Commonwealth who seek to lower their energy costs ultimately reducing the costs of borough operations. Thank you for considering the concerns for our communities and I am available for your questions.

¹ The Borough Code, Article XIV, Section 1402 (a) Regulations of Contracts

² House Bill 1863 (pn3958)

The Second Class Township Code, Article XXXI, Section 3102(h)(3)

(h) The contracts or purchases made by the board of supervisors involving payments in excess of the required advertising amount, which do not require advertising, bidding or price quotations are as follows:

(3) Those involving any policies of insurance or surety company bonds, those made for public utility service, those made for electricity, natural gas or telecommunications service either directly or with an association authorized under Article XIV in which the township is a member and those made with another municipal corporation, county, school district or municipality authority or Federal or State Government, including the sale, leasing or loan of any supplies or materials by the Federal or State Government or their agencies.

((3) amended October 11, 2000, P.L.535, No.70)

The Borough Code, Article XIV, Section 1402(d)(4-5)

(d) The contracts or purchases made by council, which shall not require advertising, bidding or price quotations as hereinbefore provided, are as follows: (Intro. par. amended Dec. 18, 1996, P.L.1141, No.171)

(4) Those involving any policies of insurance or surety company bonds; those made for public utility service under tariffs on file with the Pennsylvania Public Utility Commission;

those made with another political subdivision, or a county, the Commonwealth of Pennsylvania, the Federal Government, any agency of the Commonwealth or the Federal Government, or any municipal authority, including the sale, leasing or loan of any supplies or materials by the Commonwealth or the Federal Government or their agencies. The price thereof shall not be in excess of that fixed by the Commonwealth, the Federal Government, or their agencies;

(5) Those involving personal or professional services.

BOROUGH OF MACUNGIE
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Guy Ramsey
Council President

Rickie Hoffman
Mayor

Chris L. Boehm
Borough Manager

May 13, 2010

Ms. Shelley Houk
PA State Association of Borough
2941 North Front Street
Harrisburg, PA 17110

Dear Shelley:

With the deregulation of electric utilities in Pennsylvania, the Borough of Macungie has been evaluating several electric providers to determine which provider would best fit our needs and provide the most cost savings benefit.

You would think this is a good opportunity. Unfortunately this is not the case. Borough Council's hands are tied by the Borough Code which requires municipalities to bid all contracts in excess of \$10,000. There is an exception, however, that public utility services under tariffs on file with the Pennsylvania Public Utility Commission shall not require advertising and bidding. So, what's the problem? This exception only allows the Borough to purchase electric from the following public utilities without bidding: Allegheny Power, Citizens Electric of Lewisburg, Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Power Company, PECO Energy Company, Pike County Light and Power Company, PPL Electric Utilities, Inc., Schuylkill Haven Borough, UGI Utilities, Inc., Wellsboro Electric Company.

With deregulation there are many electric generation suppliers to choose from now. But, we can't purchase from them without bidding, which in itself is a very complicated process because of the constantly changing pricing. Electricity is a very volatile commodity.

After attending many seminars and presentations on electric deregulation and researching suppliers, I have found one supplier, Richard's Energy Group (REG), a purchasing consortium, that is in the position to negotiate the best rates for the purchase of electricity for the Borough. With over 240 members who collectively consume over a billion KWH of electric annually, the Borough would not be limited to purchasing electric at a flat rate and would benefit from the larger consumers in the consortium.

However, since REG is not a public utility as defined in the Pennsylvania Utility Code, rather an electric generation supplier, the Borough is unable to take advantage of this cost saving opportunity provided by the co-op. I have enclosed a copy of our Solicitor's opinion on this matter for your review.

Ms. Shelley Houk
May 13, 2010
Page 2

That said, my reason for writing this letter is to request your assistance in amending the Borough Code to exempt the purchase of utilities, specifically electricity, from the bidding requirements. What else do we bid that has such a volatile market with pricing that changes from hour to hour? We need to update the Borough Code to keep up with the changing times.

The Borough is clearly in a situation where bidding is not in our best interest. Yes, we will save money. But, the most savings would be obtained from joining the co-op and the law prohibits us from reaping those benefits.

I would appreciate the Association's assistance in getting the Borough Code amended to allow municipalities the opportunity to purchase utilities without bidding. If you wish to discuss this matter further, please feel free to contact me at 610-966-2503, Monday through Friday, 8:00 a.m. to 4:30 p.m. Any assistance you can provide in this matter will be greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris L. Boehm". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Chris L. Boehm
Borough Manager

MEMORANDUM

TO: Timothy J. Siegfried, Esq.
FROM: Stephanie A. Kobal, Esq.
RE: MACUN/GENE – Contract with Electric Co-op
DATE: January 4, 2010

I. Statement of Facts

Given the recent deregulation of electric utilities in the Commonwealth of Pennsylvania, the Borough of Macungie (the “Borough”) is evaluating several electric providers to determine the provider that would best fit the Borough’s needs. Currently, it appears as though an electric co-op will provide the services that best fit the Borough’s needs.

II. Issue Presented

1. Whether the Borough must advertise and bid a contract related to the supply of electric? (Suggested Answer: Yes).

III. Analysis

The Borough Code requires that a borough bid all contracts in excess of Ten Thousand Dollars (\$10,000.00). 53 P.S. § 46402(a). The Borough Code, however, provides several exceptions to this general rule. Specifically, contracts made for public utility services under tariffs on file with the Pennsylvania Public Utility Commission shall not require advertising and bidding. *Id.* § 46402(d)(4).

The Pennsylvania Utility Code, codified at 66 Pa. C.S.A. § 101 *et seq.* (the “PUC Code”), defines a public utility as “any person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for: (i) producing, generating, transmitting, distributing or furnishing . . . electricity . . .”. *Id.* § 102. The statute, however, specifically excludes electric generation supplier companies from the definition of public utility.¹ *Id.* An electric generation supplier is a “person or corporation . . . that sells to end-use customers electricity or related services utilizing the jurisdictional transmission or distribution facilities of an electric distribution company or that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an electric distribution company . . .”. 66 Pa. C.S.A. § 2803.

¹ It should be noted that two sections of the PUC Code apply to electric generation suppliers, Sections 2809-10. Neither of these sections mentions the applicability of tariffs to electric generation suppliers. Section 2809 does require electric generation suppliers to be registered with the Public Utility Commission and Section 2810 pertains to taxation by and of electric generation suppliers.

Pennsylvania Courts have maintained this distinction between a public utility and an electric generation supplier. The Pennsylvania Supreme Court stated "the General Assembly did not intend for [electric generation suppliers] to be characterized as public utilities for most purposes." Delmarva Power & Light Co. v. Commonwealth, 870 A.2d 901, 910 (Pa. 2005). In addition, Pennsylvania Courts have also held that electric generation suppliers are not regulated by tariffs, where as electric distribution companies are regulated by tariffs. Green Mtn. Energy Co. v. Commonwealth, 812 A.2d 740 (Pa. Commw. Ct. 2002).

So long as the co-op that the Borough intends to purchase electric from does not provide the actual facilities for the transmission and distribution of electricity (i.e. the lines or cables), the co-op falls within the PUC Codes' definition of an electric generation supplier. As stated above, an electric generation supplier is not a public utility or subject to tariffs. Because the co-op is an electric generation supplier not subject to tariffs, the contract with the co-op does not fall within the advertising and bidding exception found in the Borough Code. Therefore, the Borough must advertise and bid a contract for the supply of electric when the supplier is an electric generation supplier.

Should you have any additional questions, please feel free to ask.