City of Seattle

Ethics and Elections Commission

February 24, 2010

Re: Case No. 09-WBI-1208

*Dear *******:*

On December 8, 2009, the Ethics and Elections Commission ("SEEC") received a complaint under the Whistleblower Protection Code alleging that Ms. Kelly Enright, the Director of Seattle City Light ("SCL") Customer Care, acted in violation of SCL Department Policy and Procedure ("DPP") 500 P III-417 when she authorized the initiation of electrical service to a commercial development before the developer paid in full the $259,674 installation charge.

We have completed our investigation, and make no finding that Ms. Enright's conduct constitutes an improper governmental action under the Whistleblower Protection Code. We are, however, sending this report to the Superintendent with the recommendation that SCL establish clear standards for when, if ever, policy exceptions like this one will be granted so as to ensure equal treatment of all customers.

FACTS

Pacific Commercial Development ("the Company") is rehabilitating a commercial building located at 240 2nd Avenue South Extension ("the Property"). As part of this rehabilitation, the Company engaged SCL to engineer and install an in-building vault.

On January 16, 2009, Ms. Melissa Nelson, SCL Plans Coordinator, after reviewing the "permanent service plan" submitted for the Property, issued a letter with comments and requirements to the Company's representative, Mr. Dan Ramras. The Company agreed to the plan.

On January 29, 2009, Ms. Nelson sent a "Service Construction Letter," to Mr. Rob Brewster, the Company's general partner, informing Mr. Brewster that the installation project cost was estimated to be $259,674.00. The letter included a "Service Construction Acceptance

Form," to be signed by a Company representative and information regarding an SCL policy known as DPP 500 P III-417 and the DPP 500 P III-417 Schedule. According to the DPP:

> **Twenty percent (20%) of the estimated cost must be paid before SCL's design engineers and/or installation crews will begin work. The balance must be paid in full before the service can be approved for connection.**

SCL never received the $51,994 (20%) deposit or the signed Service Construction Acceptance Form.

SCL Electrical Services Engineering ("Engineering") personnel relied on the Company's representations that the deposit and agreement were forthcoming, and directed the SCL installation crew coordinator to schedule the electrical service upgrade work. Without further verification of payment or acceptance of the service agreement, SCL installation of the in-building vault began.

Soon after work began, Engineering noticed the Company's "service record" did not show the estimated installation charges. SCL personnel posted the estimated costs to the system. On August 7, 2009 the SCL Cost Accounting Unit issued its first invoice for $259,674. The invoice was mailed to Mr. Ramras. The invoice was re-billed on or about September 21, 2009, when Mr. Ramras contacted Mr. John Harvey of SCL Engineering and changed the address to Pacific Commercial Development c/o ConoverBond Development in Spokane.

No payment was received.

A month passed and another $259,974 invoice was mailed to ConoverBond in Spokane. In response to this invoice, Mr. Brewster had telephone conversations with SCL Engineering. SCL reiterated the SCL policy regarding payment and initiation of service. On November 24, 2009 Mr. Brewster sent an email stating in part:

> "There is no way we can foot the entire $250,000 bill until well into 2010 when we have tenants. We are also going for an additional tax credit to take care of the cost of this transformer and addition costs the project will see for TI [tenant improvements] allowance increases and rent concessions. We should have work on the tax credits by mid-January and ask that we make an initial 25% payment now and then that we make three more payments of equal amount every other month until paid in full."

SCL engineering responded that payment over a few months was acceptable but service would not be initiated until SCL received full payment.

Shortly thereafter, a ConoverBond representative, Mr. Scott Surdyke, called SCL Engineering asking when service would be initiated. Mr. Surdyke was also informed that, under SCL policy, the vault would be energized when the installation fee of $259,974 was paid in full.

Mr. Surdyke pressed for an exception which was denied. Mr. Surdyke asked that a supervisor reconsider the denial. A supervisor was consulted and the request was denied.

After learning of the denial, Mr. Surdyke contacted Ms. Kelly Enright, SCL Director of Customer Care.

Ms. Enright, instructed Ms. Margy Jones to negotiate an exception to the SCL policy. In conversation with SEEC staff, Ms. Enright said she viewed the exception as both providing customer service and preventing money from "slipping through the cracks."

Ms. Margy Jones negotiated a payment plan with Mr. Surdyke through e-mail correspondence on December 3, 2009. The resulting agreement was to initiate electrical service and allow the developer to pay installation charges over a four month period. Ms. Enright approved this arrangement.

A three-paragraph letter signed by Mr. Brewster, dated December 4, 2009, memorializes the terms of the agreement. Pacific Commercial Development agreed to pay the $259,974 final bill over a period of four months, in three equal installments of $64,994 and one final installment of $64,992. Payments were to begin on the day that power was supplied to the building. The letter was accompanied by a post dated check for the first payment and with a statement, "Owner acknowledges that failure to meet the payment agreement will result in the power supply being disconnected by Seattle City Light."

Electrical service was initiated and the first check was deposited on December 11, 2009.

To date, the second installment, due January 28, 2010, has not been received.

ANALYSIS

Improper governmental action is defined at SMC 4.20.850 to mean any act by "a City officer or employee that is undertaken in the performance of the officer's … official duties whether or not the action is within the scope of employment, and [inter alia] violates any state or federal law or rule or City ordinance" or "results in a gross waste of public funds."

SCL's provision of electrical service is governed by Title 21, chapter 49 of the Seattle Municipal Code. SMC 21.49.130.B reads as follows:

> B. Rule-making and Contract Authority.
>
> 1. The Department shall have authority to adopt and file as appropriate rules, regulations, policies, and procedures relating to it performance of the provisions of this chapter and to the operation of the Department's light and power system. The Department ***may*** require compliance with such rules, regulations, policies and procedures as a condition for the supply or continued supply of electric service. (Emphasis added.)

SCL adopted DPP 500 P III-417 and its schedule of charges under authority of SMC 21.49.130. The DPP is, like all City rules, filed with the City Clerk's Office.

Because the Municipal Code gives SCL the discretion to require compliance with its rules, however, we do not believe the Whistleblower Protection Code should be interpreted in a way that makes the exercise of that discretion an improper governmental action. Accordingly, we do not find that Ms. Enright's grant of an exception violated any City law or rule.

"Improper governmental action" is also defined to include acts which result in a gross waste of public funds. "Gross waste of public funds" is not defined in the City's Whistleblower Protection Code, and therefore we look to state law, which defines the term to mean "spend[ing] or us[ing] funds or allow[ing] funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation." RCW 42.40.020(5). While we share your concerns about authorizing electrical service for a customer with an outstanding balance of over $200,000, we do not believe that Ms. Enright's actions meet the definition of "gross waste of public funds."

CONCLUSION

For the foregoing reasons, we are closing our investigation of this matter. We do, though, make the following observations, with the hope that SCL will use this case to improve its processes.

DPP 500 III-417 is viewed by SCL employees as a rule and has been applied as such for decades, with, to our understanding, very few exceptions. If exceptions are to be granted, we recommend that SCL articulate what standards it will apply when considering requests for exceptions, and what procedures SCL will follow when making exceptions. In this case, it is our understanding that Pacific Commercial Development was not asked to provide financial verification of loan proceeds or tax credit availability, and there was no verification of financial solvency, no formal signed agreement and no consultation with the Law Department about securing the debt.

In a similar vein, we recommend that SCL establish organizational accountability policies regarding who in the organization can authorize exceptions. For instance, under SCL policy, Ms Enright does not have signature authority on consultant or procurement contracts over $250,001. In this case, however, she directed a subordinate to negotiate an agreement and then ratified the agreement valued at over $259,000.

Throughout our inquiry into this Whistleblower complaint we have found the SCL employees with whom we spoke to be a loyal, committed and concerned group of employees, whose main objective is to ensure the public's access to superior electrical service is maintained and that SCL policies are fairly applied. We hope that our inquiry has highlighted an issue of

importance to SCL management and will help to set in motion a process through which these issues can be addressed.

Thank you again for bringing this matter to our attention.

Very truly yours,

Wayne Barnett
Executive Director

cc: Seattle Ethics and Elections Commission *(name and address of complainant redacted)*
Superintendent Jorge Carrasco *(name and address of complainant redacted)*
Kelly Enright, SCL Customer Care Director *(name and address of complainant redacted)*