VOLUME II

COUNCIL OF THE CITY OF PHILADELPHIA

PUBLIC MEETING

BEFORE THE COMMITTEE OF THE WHOLE

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Room 400, City Hall
Philadelphia, Pennsylvania
Thursday, October 30, 1997
9:45 a.m.

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RESOLUTION 970687- Resolution approving a Venture Agreement between the Philadelphia Facilities Management Corporation and QST Energy, Inc.

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PRESENT:

COUNCILMAN JOHN F. STREET, Chair
COUNCILWOMAN ANNA C. VERNA, Vice-Chair

COUNCILWOMAN HAPPY FERNANDEZ
COUNCILMAN JAMES F. KENNEY
COUNCILWOMAN AUGUSTA A. CLARK
COUNCILMAN FRANK RIZZO
COUNCILMAN ANGEL ORTIZ
COUNCILMAN FRANK DiCICCO
COUNCILMAN MICHAEL A. NUTTER
COUNCILWOMAN MARIAN B. TASCO

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I N D E X

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P R O C E E D I N G S

PRESIDENT STREET: Good morning, ladies and gentlemen.

This is a meeting of the Council Committee of the Whole, a meeting which was recessed from yesterday in which the Council has under consideration -- if I could have your attention -- Resolution No. 970687.

This resolution approves a Joint Venture Agreement between Philadelphia Facilities Management Corporation and QST Energy, Inc.

At this time the Chair recognizes the City Solicitor, who has made available to us a black-lined copy of proposed amendments to the agreement which is attached to the resolution.

What I would like for her to do is walk us only through the changes, with a brief explanation of those changes.

I would like for her to put all of the changes in the record, and then have any discussion that Council members believe is necessary to understand those changes.

And then I would like to have the Whole Committee act on the resolution and report it

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out to the Council session today, so that the resolution can be considered at the same time that we consider the bill which authorizes the company to go into this program.

Are there any questions from any members of Council?

We need to do this. I should explain that what we need in order to take action is a majority of a quorum. The quorum of the Council Committee of the Whole is nine people, and we need to have a majority of that quorum in order to do business.

I think we do have nine people in the room, establishing a quorum for this hearing.

And if there are no questions from any members of Council, the Chair recognizes the City Solicitor.

MS. STEPHANIE L. FRANKLIN-SUBER: Good morning, Council President Street, members of City Council.

Stephanie Franklin-Suber, City Solicitor for the City of Philadelphia.

I am pleased to appear before you today to provide further testimony on Resolution No.

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970687, which would approve a Venture Agreement between the Philadelphia Facilities Management Corporation, acting on behalf of the Philadelphia Gas Works, and QST Energy, Incorporated.

As I have testified previously, Bill No. 970647, as amended, would authorize amendments to the 1972 Management Agreement to enable PGW to engage in the acquisition, marketing, brokering, solicitation, aggregation, and supply of electric power within the City of Philadelphia in connection with the PECO Energy Electric Pilot Program.

The amendments to the bill also require that this Venture Agreement with QST --

PRESIDENT STREET: Excuse me. Now, I don't want to talk about the bill. I only want to talk about the Venture Agreement. And I only want to talk about the changes in the Venture Agreement that you are now proposing since we last met, please.

We don't need to go back over this. Everybody knows the bill is in front of us on the second and final reading passage calendar, contains certain limitations. Those limitations are all now incorporated in the agreement that's attached to the

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resolution.

Just tell us what it is that has changed from the proposed agreement that was in front of us yesterday and that which we will be asked to work on today.

I am telling you, if you go back over all of that, we are going to want to talk about it. We don't want to want to talk about it. We only want to pick up from where we left off.

COUNCILWOMAN CLARK: Council President.

PRESIDENT STREET: See, there we go again.

There is a proposed agreement in front of us. Is it Tab 2? It is the black-lined copy of the proposed agreement, Tab 2 in the new book.

MS. FRANKLIN-SUBER: Tab 3.

PRESIDENT STREET: Tab 3.

COUNCILMAN NUTTER: Mr. President.

MS. FRANKLIN-SUBER: Council President Street, I apologize. My point was only that the resolution required --

PRESIDENT STREET: I don't want to

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know. I really don't want to know.

MS. FRANKLIN-SUBER: I am happy to summarize the changes.

PRESIDENT STREET: I only want to summarize the changes.

The Chair recognizes Councilman Nutter.

COUNCILMAN NUTTER: I think your point is, Mr. President, that starting on Page 4 of the Solicitor's new testimony, is where there is the discussion of the changes that you are talking about.

PRESIDENT STREET: I only want the changes.

COUNCILWOMAN VERNA: It starts on Page 4.

PRESIDENT STREET: I don't know where it starts. I just want the changes.

MS. FRANKLIN-SUBER: Tab 3 of the green binder includes a black-lined copy of the Venture Agreement reflecting the changes from the version of the agreement distributed yesterday in the blue binder.

Tab 4 is a clean copy of the

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agreement.

Both PFMC and QST are prepared to execute the Venture Agreement in substantially the form before you, with a few minor changes.

Section 5(b), which relates to QST's activities, has been revised to provide that QST has to obtain the review and approval of the city, acting through the City Solicitor, the Council President, and the Chairwoman of the Gas Commission, before entering into any new proposed forms of customer service contracts.

Additionally, the section requires that QST use a new city-approved form of residential and small commercial service contract after November 14, which is the expiration of the initial pilot program enrollment period.

Section 9 has been revised -- this is the section dealing with the flow of funds -- to reflect several changes as a result of the final negotiations with QST and PGW.

First, QST will be permitted to pay electric supply expenses directly out of revenues without the prior approval of the Management Committee.

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But, of course, the Management Committee will review, and there will be an accounting provided.

All other expense disbursements have to have the approval of the Management Committee prior to disbursement by QST.

Second, QST and PGW will share 50/50 any positive margin. The distribution of the positive margin shares will occur at the end of the Venture Agreement, instead of on a monthly basis. QST continues to bear the entire loss of any negative margin.

Third, QST will provide monthly accounting, instead of weekly accounting.

And, finally, the margin calculation has been revised to allow the deduction of certain specified taxes associated with the supply of electricity in connection with the venture: The utility's Gross Receipts Tax, 6 percent sales tax on commercial customers' accounts, and income taxes as due.

QST will also share on a 50/50 basis all actual pilot program expenses incurred, obligated prior to October 23, 1997.

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Within 90 days of the effective date of the Venture Agreement, QST and PGW will reconcile accounts so that they share these expenses on a 50/50 basis.

New Exhibit D is an estimate of these expenses.

Section 16, the Covenant Not To Compete, has been revised to simply indicate and to clarify that if PGW is no longer involved in the electric business, QST may compete in the electric business, notwithstanding the covenant, but upon written confirmation by the city to QST that PGW is no longer involved in the electric business.

So, in other words, the city, in writing, must affirmatively state to QST that PGW is no longer engaged.

Section 24, the termination section, has been revised to incorporate clarifying changes that the city, in keeping with past practice, would consult with the Gas Commission in terms of certain customer notifications during the pilot program.

Section 26, the Miscellaneous section, the entire agreement clause in particular, in response to certain concerns and questions raised

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by Councilman Cohen in particular, has been revised to provide for the mutual input of the City Solicitor, the Chairwoman of the Gas Commission, and the Council President with respect to amendment of the Venture Agreement.

The section now provides more specifically for the approval/disapproval process based upon a determination of materiality.

The black-lined version of the document that you received in the binder includes a separability clause. That clause was added, but has been deleted as unnecessary.

In terms of revisions to the exhibits, Exhibit A is now divided into two exhibits to respond to certain questions and points raised by Councilwoman Clark yesterday.

Exhibit A-1 is the agreement, the terms and conditions of residential and small commercial contracts, entered into before the expiration of the enrollment period on November 14.

Exhibit A-2 will be provided subsequently. This is the new form of contract that we discussed yesterday.

There is a new Exhibit B. It has

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been expanded and clarified to include a list of costs to PGW, as well as assets, including personnel, being provided by PGW in support of the pilot program.

Exhibit C on the Management Committee has been revised. The PGW members of the Management Committee are to be determined.

Exhibit D, as I stated previously, is now provided, and that is the schedule of estimated costs to PGW and QST for the pilot program.

This completes my summary of the changes to the Venture Agreement.

PRESIDENT STREET: The Chair recognizes Councilman Nutter.

COUNCILMAN NUTTER: Thank you, Mr. President.

Madam Solicitor, in your testimony on Page 6, the proposed change to Section 16 on the Covenant Not To Compete, you began to give an example. I would like to use the same example that I raised yesterday.

In the case of, if the agreement between PGW and QST expires prior to December 31, 1998, the example yesterday was expiration on March

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31.

And I believe in yesterday's situation, or under the amendments prior to today, QST would have been able to engage in the electric competition business, literally, on April 1, the day after the expiration.

Is the testimony in the example now that, notwithstanding a set expiration date agreed to by the parties, or however they come to it, that QST would not be able to engage in the electric business on this proposed April 1 date unless the city specifically said, "PGW is not in the electric business"?

MS. FRANKLIN-SUBER: That's correct. In writing.

COUNCILMAN NUTTER: In writing. Okay.

On Page 7 of the testimony, the expanded Section 26. I certainly do agree with the opportunity for input by the Solicitor, the Gas Commission Chairwoman, and the Council President.

I do want to query you as to the provision that unless there is a response within three days, it is assumed -- I believe this is Page

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30 of the Venture Agreement, Item No. 3 -- that unless something is filed to indicate that the amendment is material, that with the passing of the 72-hour time period, the parties can move forward on the amendment.

I just wanted to seek your, I guess, view or opinion on the prospect of actually asking those three parties to affirmatively indicate on some form or in some fashion that they believe that the amendment is immaterial, so as to create some trail of documents or paper.

You are requiring that they file something to say that it is material. There seems to be nothing to file or to indicate that it is immaterial, other than the passing of time.

MS. FRANKLIN-SUBER: It does not require an affirmative statement by any of the three officials that it is immaterial, although the amendments are filed with the Clerk of Court. So all amendments would certainly be of record to the Venture Agreement.

There is nothing that precludes, and we could certainly do that as a matter of practice. The question is whether Council would feel strongly

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that that be a requirement.

But certainly in terms of any material amendments, there has to be a written determination affirmatively by any of the three officials that it is material.

COUNCILMAN NUTTER: Okay.

I think your statement, though, is that you might explore that, or you could look at that?

MS. FRANKLIN-SUBER: That's correct. That might be done as a matter of practice.

I also wanted to point out that in terms of additional small changes made, the 72-hour language has been modified to say, "three business days."

And where there is reference to "ten days" in this section, as well as in Section 5(b), it has been changed to "ten business days" in both instances.

COUNCILMAN NUTTER: And lastly, on that same point, the ten days within which there would be a requirement for Council action, should any of the three parties file the amendment to indicate that they believe it is material, is that

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understood to mean any ten-business-day period, regardless of whether the Council is actively in session or not?

MS. FRANKLIN-SUBER: That is correct.

COUNCILMAN NUTTER: Okay.

Lastly, without discussing the substance of the matter, given the testimony yesterday on the residency issue -- and I am not asking for an answer right now -- but I would ask if you could forward to the committee, through the Chair, the Solicitor's opinion on the issue of whether a residency or a domicile requirement can be inserted into the agreement between the city and PFMC, which is, as we know, amended by City Council ordinance.

Can that provision be a part of that agreement, so as to remove the matter from the type of discussion that we had yesterday, or even the apparently three-times-changed policy over time or under certain circumstances?

MS. FRANKLIN-SUBER: I can certainly do that.

COUNCILMAN NUTTER: Thank you.

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Thank you, Mr. President.

PRESIDENT STREET: You said, "I can certainly do that." You can certainly do what?

MS. FRANKLIN-SUBER: Councilman Nutter requested copies of the City Solicitor's opinion dealing with residency and domicile requirements, and he asked that copies be forwarded to the committee.

COUNCILMAN NUTTER: On the issue of whether it can be inserted in the PFMC agreement. And I asked that whatever is produced be forwarded to the committee through the Chair.

PRESIDENT STREET: That's right. It can be, but through a separate process.

As long as nobody thinks that, as a result of what we're doing here today, that happens. It doesn't happen.

COUNCILMAN NUTTER: That's right. It is just that we were dealing with the issue yesterday, the Solicitor is here, it is all in the same area, but totally separate.

PRESIDENT STREET: I appreciate that.

COUNCILMAN NUTTER: Thank you.

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PRESIDENT STREET: Any other questions?

Are there any questions from any member of the committee about the resolution, about the exhibit to the resolution, about this program generally?

Seeing none, thank you very much.

(Public Hearing adjourned.)

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COUNCIL OF THE CITY OF PHILADELPHIA

PUBLIC MEETING

of the

COMMITTEE OF THE WHOLE

- - -

Thursday, October 30 1997

- - -

Public Meeting conducted by the Committee of The Whole, held in Room 400, City Hall, Philadelphia, Pennsylvania, on the above date, to consider action on the following:

RESOLUTION 970687

- - -

PRESENT:

COUNCILMAN JOHN F. STREET, Chair
COUNCILWOMAN ANNA C. VERNA, Vice-Chair

COUNCILWOMAN HAPPY FERNANDEZ
COUNCILMAN JAMES F. KENNEY
COUNCILWOMAN AUGUSTA A. CLARK
COUNCILMAN FRANK RIZZO
COUNCILMAN ANGEL ORTIZ
COUNCILMAN FRANK DiCICCO
COUNCILMAN MICHAEL A. NUTTER
COUNCILWOMAN MARIAN B. TASCO

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PRESIDENT STREET: At this time the Chair recognizes Councilwoman Verna for a motion.

COUNCILWOMAN VERNA: Thank you, Mr. President.

I move that Resolution No. 970687 be reported out of this committee with a favorable recommendation.

PRESIDENT STREET: We have to move the adoption of the amendments as read into the record by the City Solicitor and contained in the black-lined copy, et cetera, et cetera.

COUNCILWOMAN VERNA: Mr. President, I move that the amendments as just read by the City Solicitor to the agreement be approved.

(Duly seconded.)

PRESIDENT STREET: All in favor let it be known by saying aye.

Those opposed say nay.

The amendments are adopted.

The Chair recognizes Councilwoman Verna on a motion on the resolution.

COUNCILWOMAN VERNA: Mr. President, I move that Resolution No. 970687 be reported out of Committee with a favorable recommendation.

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PRESIDENT STREET: As amended.

COUNCILWOMAN VERNA: As amended.

(Duly seconded.)

PRESIDENT STREET: All in favor let it be known by saying aye.

Those opposed say nay.

It is so ordered, Resolution No. 970687 and the attached exhibit will be reported to this Council with a favorable recommendation, a recommendation that the Rules of Council be suspended to permit consideration at today's session.

I thank you very much. This brings us to the end of our meeting of the Council Committee of the Whole.

(Public Meeting adjourned at 10:05 a.m.)

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C E R T I F I C A T I O N

I HEREBY CERTIFY that the foregoing proceedings of the Council of the City of Philadelphia of Thursday, October 30, 1997, were reported fully and accurately by me, and that this is a correct transcript of same.

RE: COMMITTEE OF THE WHOLE

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DEBRA A. WHITEHEAD, RPR