

OFFICE OF THE CITY ATTORNEY
MEMORANDUM

DATE: August 16, 2011

TO: Public Utility Board

FROM: Terry L. Adkins – Rochester City Attorney

SUBJECT: Closed Meeting to Discuss Litigation Strategy in Threatened or Anticipated Litigation involving the US Environmental Protection Agency

The City of Rochester/Rochester Public Utilities has received a request for information from the U.S. Environmental Protection Agency regarding the four units at the Silver Lake Power Plant. These are known in the business as "Section 114 Requests." Over the past years, the EPA has issued hundreds of such requests to investor-owned utilities. These requests have been followed by EPA allegations of Clean Air Act violations by the power plants in question, which, in turn, have resulted in litigation or administrative settlements resolving those allegations. The EPA is now turning its attention to municipally-owned utilities and that is why RPU received this Section 114 Request.

During a recent telephone conversation with EPA staff persons who issued the Section 114 Request to RPU, it was made clear by the EPA staff that this Request would result either in a settlement or in litigation between Rochester and the EPA. EPA staff persons indicated that Rochester's failure to enter into negotiations with the EPA over the anticipated Clean Air Act violations would result in a formal Notice of Violation and referral of the matter to the U.S. Department of Justice for the filing of litigation in federal court.

As legal counsel for the City, I have a legal duty and obligation to meet with the Public Utility Board to discuss the following litigation strategy issues concerning this threatened or anticipated litigation:

1. The allegation that the operation of the Silver Lake Power Plant results in a violation of the Clean Air Act, the facts supporting those allegations, the strengths/weaknesses of those allegations and the likely outcome of the litigation.
2. The legal basis for any lawsuit or administrative action brought by the EPA/Department of Justice against the City.
3. Legal strategies involving the prosecution of this lawsuit.

4. The City's possible legal defenses.
5. Possible settlement scenarios

I cannot have an open, candid and confidential meeting with you to discuss the above legal strategies in an open meeting format. You and I cannot ask questions, answer questions, share our thoughts about this case, determine the possible settlement scenarios and discuss our litigation strategies when all of our discussions and information are disclosed to the public as it occurs. In an open and public meeting of our litigation discussions, you would not be comfortable in asking whether a particular legal strategy should be followed or whether the contemplated lawsuit case is a strong or weak one. Similarly, I would feel constrained and would not be able to discharge my duties as City Attorney to provide straightforward and candid legal advice as to what might happen if we selected one particular litigation strategy over another.

Obviously, the public's best interests would be harmed by conducting this legal discussion in an open and public forum. In my mind, your access to confidential, timely and appropriate legal advice before you decide whether to file this lawsuit is in the public's best interest in this matter.

Under Minnesota law, a public body may close its meeting if closure is required by the attorney-client privilege. The Minnesota Supreme Court has ruled that a public body otherwise required to hold public meetings may hold a closed meeting pursuant to the attorney-client privilege when that privilege's need for absolute confidentiality prevails against the interests served by the Open Meeting Law.

Based upon the facts outlined in this memo, I believe the need for absolute confidentiality in this case involving the anticipated litigation to be brought against the City by the EPA/Department of Justice outweighs the interests served by the Open Meeting Law. Without a closed meeting to discuss this issue, the City of Rochester elected officials and its attorney will not be able to candidly, openly and fully discuss the case's merits and strategy without fear the communications will be divulged to the opposing side.

Accordingly, I recommend to you that, at the Board's August 30, 2011, meeting, the Board approve a closed meeting based upon the information provided in this memorandum and the need for confidential communications with the City Attorney to discuss litigation strategies involving the threatened or anticipated litigation initiated by the EPA/Department of Justice against the City. No pending application, other topic or other public business item, beyond the issues discussed in this memo, will be addressed in the closed meeting. And, no formal vote will occur during the closed session.