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December 2, 2020

VIA E-FILING
Ms. Brinda Westbrook-Sedgwick
Commission Secretary
Public Service Commission
of the District of Columbia
1325 G Street N.W., Suite 800
Washington, DC 20005

Re: Formal Case No. 1156 – In the Matter of the Application of Potomac Electric Power Company for Authority to Implement a Multiyear Rate Plan for Electric Distribution Service in the District of Columbia.

Dear Ms. Westbrook-Sedgwick:

On behalf of the Baltimore Washington Construction and Public Employees Laborers' District Council ("BWLDC"), I enclose for filing BWLDC's Motion for Leave to File a Reply Brief in Support of Its Motion for Sanctions against Applicant Pepco ("Applicant").

Respectfully submitted,
/s/Brian J. Petruska

Attachments

cc: Counsel of record

**Before the
District of Columbia Public Service Commission**

Application of Potomac Electric Power)	
Company for Authority to Implement a)	Formal Case No. 1156
Multiyear Rate Plan for Electric)	
Distribution Service in the District of Columbia)	

**BALTIMORE-WASHINGTON CONSTRUCTION AND PUBLIC EMPLOYERS
LABORERS' DISTRICT COUNCIL'S
MOTION FOR LEAVE TO FILE ITS REPLY IN SUPPORT OF ITS
MOTION FOR SANCTIONS AGAINST PEPCO**

Pursuant to 15 DCMR 105.8, the Baltimore-Washington Construction and Public Employers Laborers' District Council ("BWLDC") moves this Commission for leave to file the attached Reply Brief in support of its Motion for Sanctions Against Applicant Potomac Electric Power Company ("Pepco") for its willful failure to seasonably supplement its response to BWLDC's DR 1-3, served on September 24, 2019.

BWLDC's reply brief should be allowed to make the following points:

- 1.) Pepco's response fails to offer any denial or other explanation but that its failure to supplement its responses to BWLDC DR 1-3 was deliberate and intentional, thereby strengthening BWLDC's case for sanctioning Pepco;
- 2.) Pepco's argument that BWLDC's DR 1-3 is irrelevant was waived when it failed to object to BWLDC's DR 1-3 on October 2, 2019, and the DR 1-3 plainly is relevant in any event;
- 3.) Pepco's response that it should not be sanctioned because its audit reports are privileged is legally insufficient under Commission precedent holding that

a party claiming privilege must serve a privilege log so that its claims of privilege can be fairly evaluated. A claim of privilege cannot be upheld in the absence of such a log.

The above points demonstrate that Pepco's opposition to BWLDC's Motion for Sanctions are legally insufficient and lack legal merit. According, permitting the Reply brief will provide a complete record demonstrating BWLDC's entitlement to have its proposed sanction assessed against Pepco. A copy of BWLDC's Reply is attached hereto as Exhibit "A."

CONCLUSION

Wherefore, based upon the foregoing, BWLDC requests that the Commission grant its motion for leave to file the attached Reply in Support of BWLDC's Motion for Sanction Against Pepco.

Dated: December 2, 2020

Respectfully submitted,

/s/Brian J. Petruska

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CERTIFICATE OF SERVICE
Formal Case No. 1156

I hereby certify on this 2nd day of December, 2020, that the attached Motion for Leave to File a Reply in Support of Its Motion for Sanctions Against Pepco was filed electronically on behalf of the Baltimore-Washington Construction and Public Employees Laborers' District Council ("BWLDC"), an affiliate of the Laborers International Union of North America ("LIUNA"), in Formal Case No. 1156 and copies were electronically transmitted or sent via USPS mail to the service list below:

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/s/ Brian Petruska
Brian Petruska

Exhibit “A”

**Before the
District of Columbia Public Service Commission**

Application of Potomac Electric Power)	
Company for Authority to Implement a)	Formal Case No. 1156
Multiyear Rate Plan for Electric)	
Distribution Service in the District of Columbia)	

**BALTIMORE-WASHINGTON CONSTRUCTION AND PUBLIC EMPLOYERS
LABORERS' DISTRICT COUNCIL'S
REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS AGAINST PEPCO**

Pursuant to 15 DCMR 105.8, the Baltimore-Washington Construction and Public Employers Laborers' District Council ("BWLDC") submits the within Reply Brief in support of its Motion for Sanctions Against Applicant Potomac Electric Power Company ("Pepco") for its willful failure to seasonably supplement its response to BWLDC's DR 1-3, served on September 24, 2019.

Pepco's opposition to BWLDC's motion for sanction fails to offer a legally sufficient or meritorious reason for denying BWLDC's motion that it should be sanctioned for failing to supplement its response to BWLDC's DR 1-3. First, Pepco's response fails to offer any denial or other explanation but that its failure to supplement its responses to BWLDC DR 1-3 was deliberate and intentional, thereby strengthening BWLDC's case for sanctioning Pepco. Pepco's response that BWLDC's DR 1-3 is irrelevant was waived when it failed to object to BWLDC's DR 1-3 on October 2, 2019, and, in any event, that argument is clearly incorrect. Lastly, Pepco's response that it should not be sanctioned because its audit reports are privileged is legally insufficient under Commission precedent holding that a party claiming privilege must serve a privilege log so that its claims of privilege can be fairly evaluated. Because a claim of privilege

cannot be upheld in the absence of such a log, Pepco's effort to shield itself by virtue of an improper assertion of privilege should be rejected.

ARGUMENT

I. PEPCO'S OPPOSITION REMOVES ALL DOUBT THAT ITS FAILURE TO SUPPLEMENT ITS RESPONSE TO BWLDC DR 1-3 WAS DELIBERATE.

In its motion for sanctions, BWLDC argued that Pepco's failure to supplement its response to BWLDC's DR 1-3 was knowing and deliberate. In its response, Pepco fails to offer any denial that this true. Thus, the record on this motion is un rebutted that Pepco's failure to supplement its response to BWLDC DR 1-3 was knowing and deliberate.

This conclusion is significant because it weights in favor of sanctioning Pepco. "Where proffered evidence demonstrates that documents were concealed or destroyed in bad faith—either *deliberately* or with reckless disregard for their relevance—a trial court may well abuse its discretion by refusing to allow factual inferences adverse to the culpable party to be suggested to the jury through an instruction or argument of counsel. *Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759, 766 (D.C. 1990) (emphasis added). Here, because Pepco does not deny that its concealment was deliberate and therefore culpable, sanctions are warranted.¹

¹ To the extent that Pepco argues that the Commission lacks power to sanction it for a failing to seasonably supplement its responses to data requests, this argument lacks merit. The Commission's authority to sanction parties for failing to comply with the Commission's discovery rules is inherent in the Commission's power to issue those Rules and Regulations in the first place. *See* DC Code § 34–902. Moreover, the sanction request here – an adverse inference – is inherent in the Commissions fact-finding powers. Moreover, sanctions are a standard remedy for addressing failures by a party to supplement its discovery responses. *Weiner v. Kneller*, 557 A.2d 1306, 1309 (D.C. 1989) ("[T]he trial court may enforce the duty of supplementation, like other discovery rules, through such sanctions as default judgment, dismissal, exclusion of evidence, continuance, or any other action it deems appropriate."); *Williams v. Washington Hosp. Ctr.*, 601 A.2d 28, 34 (D.C. 1991) "The court may, in its discretion, impose sanctions when this rule [to supplement discovery responses] is violated, including exclusion of the evidence, continuance, default judgment, dismissal or other action as the court deems appropriate.").

II. PEPKO WAIVED ITS OBJECTION TO THE RELEVANCE OF ITS WAGE COMPLIANCE AUDITS BY FAILING TO OBJECT ON OCTOBER 2, 2019, AND THE RELEVANCE OF THESE DOCUMENTS ARE BEYOND DISPUTE.

Pepco bases its opposition, in part, on the argument that DR 1-3 does not seek information relevant to this rate case. Pepco, however, waived this argument by failing to raise this objection on October 2, 2019, when it asserted its objections to BWLDC's other data requests. Indeed, Pepco made no objection to DR 1-3 until its letter of November 2, 2020, over a year following service of the data request. Pepco, therefore, has waived this argument.

That said, Pepco cannot seriously maintain that it is irrelevant to the Commission whether, in delivering service to rate payers, its contractors comply with the law, as well as with Pepco's own Master Service Agreements with those contractors. A Pepco contractor's compliance with the law and Pepco's own Master Service Agreements are manifestly relevant to whether Pepco expenditures are prudent, as well as to the safety and reliability of Pepco's service, and also to the economic impact of Pepco's activities in the District, particularly the impact on workers' wages.

III. PEPKO CANNOT SHIELD ITSELF FROM SANCTIONS BASED UPON ATTORNEY-CLIENT PRIVILEGE OR THE ATTORNEY WORK-PRODUCT PROTECTION WHEN IT HAS FAILED TO PROVIDE A PRIVILEGE LOG SO THAT ITS CLAIMS OF PRIVILEGE CAN BE FAIRLY EVALUATED.

Pepco cannot rely on attorney-client privilege or attorney work-product protection to shield itself from sanctions because it has failed to comply with the Commission's requirements for asserting privilege. The Commission's precedent holds that "[t]o properly demonstrate that a privilege exists, [the utility] must submit an explanation or privilege log that should contain (among other things) a brief description of the contents of the document that is specific enough to permit the Commission and opposing parties to determine whether the privilege asserted

applies to that document. Otherwise, the privilege log is of no value.” *In Re Washington Gas Light Co.*, FC 1054, Order 14385, 2007 WL 2694388 (DC PCS, July 23, 2007). Under the Commission’s precedent, because Pepco did not produce a privilege log, its assertion of privilege has not been properly raised. *Id.*² Accordingly, Pepco cannot rely upon those improper claims of privilege to justify its failure to supplement its response to DR 1-3 or to avoid now being sanctioned for that failure.

For the same reason, Pepco’s argument that BWLDC was not harmed by its failure to supplement because privilege shields the documents that are subject of the supplement must be rejected because this argument contradicts the Commission’s requirement to provide a privilege log. BWLDC’s injury here was being deprived of notice of Pepco’s wage compliance audits before the hearing as well as being deprived of a privilege log with which to evaluate Pepco’s claims of privilege. Due to Pepco’s failure to supplement, Pepco’s claims of privilege were sprung on BWLDC at the hearing with no warning and no fair opportunity to evaluate the validity of those claims. To say, as Pepco does, that the privilege log is meaningless is to reject the Commission’s reason for requiring a privilege log in the first place.

CONCLUSION

Wherefore, BWLDC respectfully requests that the Commission adopt, as a sanction for Pepco’s knowing failure to supplement its response to BWLDC’s DR 1-3, an adverse inference to the effect that Pepco’s contractors have engaged in persistent pattern of violating the DC

² Federal courts are in accord that the failure to produce a privilege log will result in a waiver of attorney-client privilege and work-product protection. *Bregman v. District of Columbia*, 182 F.R.D. 352, 363 (D.D.C.1998) (“[P]laintiff’s failure to comply with Fed.R.Civ.P. 26(b)(5), requiring him to file a privilege log, bars in itself any claim of privilege, whatever its basis.”); *Avery Dennison Corp. v. Four Pillars*, 190 F.R.D. 1, 2 (D.D.C. 1999) (“Failure to produce a privilege log may be deemed a waiver of the privilege.”); *First American Corp. v. Al-Nahyan*, 2 F.Supp.2d at 63 n. 5 (magistrate judge could permissibly base determination that privilege had been waived on failure to submit privilege log).

minimum wage and that, after being put on notice of the problem as of October 23, 2017, Pepco has done nothing to address that problem until its audits of this year.

Dated: December 2, 2020

Respectfully submitted,

/s/Brian J. Petruska

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