

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA**

<i>In the Matter of the Investigation into</i>)	
<i>Modernizing the Energy Delivery System</i>)	Formal Case No. 1130
<i>for Increased Sustainability</i>)	

and

<i>In the Matter of the Application of the</i>)	
<i>Potomac Electric Power Company for</i>)	Formal Case No. 1155
<i>Approval of its Transportation Electrification</i>)	
<i>Program</i>)	

**SIERRA CLUB RESPONSE TO APPLICATION OF
POTOMAC ELECTRIC POWER COMPANY FOR RECONSIDERATION
AND CLARIFICATION OF ORDER NO. 19898**

Pursuant to Rule 140.3 of the Public Service Commission’s Rules of Practice and Procedure, the Sierra Club respectfully submits this Response to the Application of Potomac Electric Power Company for Reconsideration and Clarification (“Reconsideration Application”) of Order No. 19898 (the “Order”). As detailed below, based on Pepco’s Reconsideration Application, the Sierra Club urges the Commission to: (a) clarify that the provision of electric vehicle (“EV”) charging services is not the sale of electricity regardless of whether the site host is a non-utility third party or the distribution utility; and (b) retain the carve-out in Offerings 7 and 8 for siting a minimum percentage of EV charging stations in Wards 5, 7 and 8. The Sierra Club looks forward to the expeditious resolution of these issues and implementation of the Commission’s Order.

- I. The Commission Should Clarify that Provision of EV Charging Services is Not the Sale of Electricity and, Therefore, Not the Activity of an Electricity Supplier Regardless of the Entity Providing Those Charging Services.**

The Sierra Club appreciates the Commission’s efforts in its Order to provide greater clarity regarding the application of the Energy Innovation and Savings Amendment Act of 2012 (“EISA”) to charging station site hosts.¹ The Sierra Club fully agrees with the Commission that, under EISA, non-utility EV charging station site hosts do not become electricity suppliers within the meaning of D.C. Code Section 34-1501(17) by virtue of providing EV charging services, regardless of the form of the pricing to EV drivers at those stations.² This critical clarification will be beneficial in enabling the competitive charging market in the District.

The Sierra Club shares the concern raised by Pepco in its Reconsideration Application,³ however, that the discussion at paragraph 22 of the Order has the potential to cause confusion regarding the meaning of EISA and its application to Pepco and potentially other entities. According to Paragraph 22 of the Order, the sale of electricity from a charging station owned by Pepco to an EV driver “is within the definition of an electricity supplier,”⁴ and Pepco is precluded from engaging in the business of an electricity supplier except through an affiliate. This statement, however, is directly at odds with the Commission’s determination in Paragraph 19—and in the Committee Report accompanying EISA—that EV charging is a service and not the sale of electricity. And it is incompatible with the text and legislative history of EISA.

As described in detail in Sierra Club’s Initial Comments,⁵ EISA sought to clarify the regulatory status of non-utility site hosts providing EV charging services in the District. Specifically, EISA added two code provisions that clarified that ownership or operation of EV charging equipment alone does not subject an entity to regulation as an “electric company” or

¹ Order No. 19898 ¶ 19.

² *Id.*; *see also* Initial Comments of the Sierra Club Regarding Pepco’s Transportation Electrification Proposal (Nov. 5, 2018), at 6-10 (explaining the legislative history of EISA and the statute’s intent to clarify the non-regulated status of non-utility EV charging station site hosts).

³ Reconsideration Petition at 21-23.

⁴ Order No. 19898 ¶ 22.

⁵ Initial Comments of the Sierra Club Regarding Pepco’s Transportation Electrification Proposal (Nov. 5, 2018), at 6-10.

“public utility.”⁶ As the accompanying Committee Report explained, EV charging station site hosts are not utilities because “[e]lectric vehicle charging station operators provide fuel for transportation, not energy for distribution or transmission.”⁷ Indeed, the Committee Report’s reasoning—that vehicle charging is a service (provision of a fuel) and not the resale of electricity—is consistent with that of other states.⁸

The fact that provision of EV charging services is not the sale of electricity is not altered if the entity providing those charging services is Pepco rather than a non-utility third party. This does not mean that such a transaction is beyond the jurisdiction of the Commission to regulate. EISA did not purport to affect the Commission’s jurisdiction over Pepco’s activities.⁹ Indeed, the code provisions added by EISA clarifying the meaning of “electric company” and “public utility” purport only to exclude persons or entities that “do[] not sell or distribute electricity”¹⁰—viz., entities other than Pepco. Since Pepco is already in the business of selling and distributing electricity, its activities do not cease to fall within the jurisdiction of the Commission simply by virtue of it adding to those activities the provision of charging services. This conclusion—that third party EV charging station site hosts are not subject to utility commission regulation, but

⁶ D.C. Code §§ 34-207 (providing that the term “electric company” “excludes a person or entity that does not sell or distribute electricity and that owns or operates equipment used exclusively for the charging of electric vehicles”), 34-214 (“The term “public utility” excludes a person or entity that owns or operates electric vehicle supply equipment but does not sell or distribute electricity, an electric vehicle charging station service company, or an electric vehicle charging station service provider.”).

⁷ Committee on the Environment, Public Works, and Transportation Report regarding Bill 19-749, the “Energy Innovation and Savings Amendment Act of 2012,” at 8 (Oct. 24, 2012) (emphasis added) (hereinafter “Committee Report”). The Committee Report explains that “The fact that their product has an energy component doesn’t make them a utility anymore than perhaps a hotel, which sells electricity as a part of its product, would also be a utility.” *Id.*

⁸ See Sierra Club Initial Comments at 7 -8 (quoting and describing decisions by the Massachusetts Department of Public Utilities and the New York Public Service Commission distinguishing provision of EV charging services from sale of electricity).

⁹ See *id.* at 6, 8-9.

¹⁰ See D.C. Code §§ 3-207 (providing that the term “electric company” “excludes a person or entity that does not sell or distribute electricity and that owns or operates equipment used exclusively for the charging of electric vehicles”) (emphasis added), 34-215 (“The term ‘public utility’ excludes a person or entity that owns or operates electric vehicle supply equipment but does not sell or distribute electricity, an electric vehicle charging station service company, or an electric vehicle charging station service provider.”) (emphasis added).

that provision of charging services by public utilities is—is consistent with determinations in a number of other states including California, Maryland, Massachusetts, New York, Oregon, Utah, and Washington.¹¹

Clarifying that the provision of EV charging services is not the sale of electricity regardless of the nature of the entity providing those charging services does not automatically require the Commission to authorize ownership and operation of EV charging stations by Pepco. Indeed, as discussed in Sierra Club’s Reply Comments,¹² Section 502(c) of the CleanEnergy DC Omnibus Amendment Act of 2018 (“Clean Energy Omnibus”) establishes the conditions under which the Commission can consider and approve an application by Pepco to promote transportation electrification through utility infrastructure ownership and other programs and incentives. The Commission should hinge its determination regarding whether to allow Pepco to own and operation charging stations on the conditions set forth in Section 502(c) of the Clean Energy Omnibus rather than asserting that the provision of charging services by Pepco alone represents a sale of electricity and, therefore, falls uniquely within the purview of an electricity supplier.

II. The Commission Should Retain the Carve-Out in Offerings 7 and 8 for Siting Public Charging Stations in Wards 5, 7 and 8.

In its Initial Comments,¹³ the Sierra Club applauded the fact that Pepco’s revised transportation electrification proposal evidenced a greater focus on providing the benefits of electrified transportation to market segments that have, to date, been underserved by the competitive market. Sierra Club’s comments specifically highlighted the increased size of the

¹¹ See Sierra Club Initial Comments at 8-9.

¹² Reply Comments of the Sierra Club Regarding Pepco’s Transportation Electrification Proposal, FC1130 (Jan. 14, 2019), at 1-2.

¹³ Sierra Club Initial Comments at 12.

public charger offerings and the innovation fund, both of which contain carve-outs intended to bring electrified transportation opportunities to Wards 5, 7 and 8.

The Sierra Club shares the concern, raised in Pepco's Reconsideration Application,¹⁴ regarding the Commission's rejection of Pepco's proposal to allocate 20 percent of the public charger offerings (Offerings 7 and 8) to disadvantaged communities located in Wards 5, 7 and 8. Based on the data in Pepco's reconsideration petition, only 5 out of 120 (4 percent) of public EV charging stations are presently located in Wards 5, 7 or 8. At the same time, those wards are home to 36 percent of the District's population.¹⁵ Pepco's proposal to ensure that a minimum of 20 percent of the public EV charging stations supported by Offerings 7 and 8 be placed in these wards is both appropriate and equitable.

Establishing EV charging station deployment minimums for Wards 5, 7 and 8 does not compel the Commission to authorize utility ownership of these charging stations. Sierra Club has not taken a position on utility ownership, but notes that the case for utility ownership is certainly strongest where there are structural or other impediments to provision of charging stations by the competitive market, such as multi-unit dwellings and in disadvantaged communities. Ultimately, however, what is most important is ensuring that all residents of the District benefit from increased electrified transportation opportunities as a result of their support for Pepco's transportation electrification proposal. To this end, the Commission should establish a carve-out for siting EV charging stations in Wards 5, 7 and 8, as requested by Pepco, and approve a viable approach for ensuring that these stations are constructed, whether that is through utility

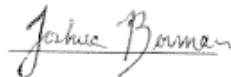
¹⁴ Reconsideration Petition at 18-21.

¹⁵ D.C. Office of Planning, Demographic and Housing Profiles 2010 by Ward, available at <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Demographic%2520and%2520Housing%2520Profiles%25202010%2520by%2520Ward.pdf>. Of the total population of the District (601,723), 12.3 percent (74,308) live in Ward 5, 11.8 percent (71,068) live in Ward 7, and 11.8 percent (70,712) live in Ward 8.

ownership, a make-ready model, and/or other rebates or incentives for deploying these charging stations.

Thank you for your consideration.

Respectfully submitted,

A handwritten signature in cursive script that reads "Joshua Berman".

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