



May 20, 2019

Via Web Filing; Hand-Delivery

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

**RE: Tesla's Opposition to Pepco's Application for Reconsideration; Tesla's
Request to be Included in the Service Lists for Formal Case Nos. 1130 and
1155**

Dear Ms. Westbrook-Sedgwick:


Please find enclosed Tesla's Opposition to the Application for Reconsideration and Clarification filed by the Potomac Electric Power Company ("Pepco" or "Company") in the above captioned dockets.

Please also include me on the service lists for filings in both dockets:

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Please contact me if you have any questions. and thank you for your attention to these matters.

Sincerely,


Kevin Auerbacher

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

IN THE MATTER OF

**The Investigation into Modernizing the Energy
Delivery System for Increased Sustainability**

Formal Case No. 1130

And

**The Application of the Potomac Electric Power
Company for Approval of its Transportation
Electrification Program**

Formal Case No. 1155

**OPPOSITION OF TESLA, INC. TO
THE APPLICATION OF POTOMAC ELECTRIC POWER COMPANY
FOR RECONSIDERATION AND CLARIFICATION OF ORDER NO. 19898**

Introduction

Pursuant to 15 DCMR § 140.3, Tesla hereby submits its Opposition to the Application for Reconsideration and Clarification of Order No. 19898 (“Order”) filed by the Potomac Electric Power Company (“Pepco” or “Company”) in the above-captioned matter (“Application”). In particular, Tesla urges the District of Columbia Public Service Commission (the “Commission”) to deny Pepco’s request¹ that the Commission either alter its determination that Pepco cannot own and operate public Electric Vehicle Charging Stations (“EVCS”), or, if the Commission will not do so, that it limit the availability of the public EVCS for which Pepco provides make-ready infrastructure to EVs that charge using certain technologies.²

¹ Application, pp. 27 – 28.

² In the Order, p. 16, the Commission explains that Pepco would support EVCS deployment by paying for all or part of the costs of installing “make-ready” infrastructure. [citation omitted.]

Pepco's requested relief could result in the Commission's excluding Tesla and Tesla customers in the District -- which also include Maryland and Virginia residents who drive their vehicles to work in the District every day, and/or the out-of-state visitors -- from being able to avail themselves of the reduced cost charging that should be available as a result of Pepco's providing make-ready infrastructure.³ This is because, for the very first time in what has now been more than eight years of proceedings,⁴ Pepco is only now asking that the Commission "mandate[] some degree of interoperability" as a condition of certain EVs using Pepco's make-ready infrastructure, even as Pepco is conceding that not all manufacturers' charging technologies are designed to be interoperable.⁵ Further, Pepco is requesting that it be allowed to own and operate public EVCS if the competitive market fails to deploy the approved stations within nine months of the program's implementation.⁶ In short, Pepco is asking that if the Commission will deny Pepco the ability to own and operate EV Charging Stations, then the Commission should now substitute its choice for that of customers', and pick the winners and losers who can own and operate EVCS in Pepco's stead.

³ In the Order at n. 82, the Commission provides an illustrative definition of "Make-ready" as: "Service connection and supply infrastructure to support Electric Vehicle (EV) charging comprised of the electrical infrastructure from the distribution circuit to the stub of the Electric Vehicle Supply Equipment (EVSE). It can include equipment on the utility-side (e.g. transformer) and customer-side (e.g., electric panel, conduit, wiring) of the meter."

⁴ EV proceedings began with DC PSC FC 1087 in 2011, when the District Government proposed an EV rate as part of its plan to encourage the use of EVs within DC. Instead, the Commission elected to consider the development of an EV rate in a separate proceeding, which became FC 1096 (2012). Following passage of D.C. Act 19-562, the "Energy Innovation and Savings Amendment Act of 2012," the Commission closed FC 1087, calling for this docket (FC 1130) to address EVs and their impact on energy delivery. FC No. 1096, Order No. 18004, ¶ 5 (Oct. 16, 2015). Pepco thereafter proposed a Limited Demand Management Program for Plug-In Vehicle Charging ("EV Program"), which became Docket FC1143, but that was also closed and incorporated into FC 1130.

⁵ See *Application* at p. 27.

⁶ See *Application* at p. 18.

Pepco’s exceedingly late request not only flies in the face of the DC Council’s strongly expressed intent that the competitive market facilitate the deployment of EVCS in the District,⁷ it also clashes with District law, which defines publicly accessible EVCS as having a locational, or a physical, meaning, not a technological one. *See* D.C. Code § 50-921.01(a)(1A), which states:

“Electric vehicle charging station” means a publicly accessible facility or equipment that is located on public property, including any public space in the District, and is used to charge the battery or other energy storage device of an electric vehicle.

The Commission should deny Pepco’s Application because it raises a novel issue of policy, not an error of law or material fact that can be corrected; because it seeks an outcome that boasts virtually no record support and directly conflicts with current law and policy;⁸ and because the relief sought would discriminate⁹ against Tesla and Tesla customers.¹⁰

Most critically, Pepco’s requested relief would thwart the District’s ability to meet its ambitious greenhouse gas (“GHG”) emissions reduction¹¹ and Zero Emission Vehicle (“ZEV”) targets,¹² given that Pepco’s proposed technological limit would exclude the one manufacturer whose EVs comprised 80% of the DC fast charging-capable vehicle sales in 2018, and 60% since

⁷ *See Order* at ¶ 28, citing the Committee’s Report to EISA, at 8.

⁸ *See* 2017 D.C. PUC LEXIS 397, Order No. 19094, *In the Matter of Washington Gas Light Company’s Application for Authority to Withdraw the Watergate Tariff* (“Watergate”) (rejecting Watergate West’s motion on reconsideration on grounds that Watergate had not previously and did not in its motion identify any issues of material fact, but rather, raised only an issue of policy).

⁹ District law requires that rates (the tools for reimbursing Pepco for the costs of its program) be just, reasonable, and non-discriminatory. D.C. Code § 34-1101(a). *See Office of the People’s Counsel v. PSC of the Dist. Of Columbia*, 797 A.2d 719 (D.C. 2002) (Commission has a duty to require nondiscriminatory utility charges). *See also*

¹⁰ Tesla notes it is the only automobile manufacturer that has invested in the District by establishing a dealership herein.

¹¹ *See Order*, p. 2.

¹² *See Order*, p. 12; OPC Reply comments, p. 12.

2012,¹³ and are likely to comprise the bulk of such sales for the foreseeable future. *See* Tesla’s December 3, 2018 Letter opposing the Motion of the Apartment of Office Building Association of Metropolitan Washington (“AOBA”) to Suspend Review, where stated that based upon the hundreds of thousands of reservations it had received for its mass market electric vehicle, the Model 3, Tesla expected to see “. . . an enormous mass uptick in consumers looking to charge their electric vehicle in the District within the next twelve to eighteen months, including across all 8 of the District’s wards.” (emphasis in original.). Thus, deployment of charging stations usable by Tesla drivers is pivotal to the District’s achievement of its ZEV targets.¹⁴

If the Commission grants Pepco’s request, it will be hard-pressed to explain how Pepco’s proposed program would in fact constitute a prudent investment of ratepayer funds, as it is required by law to do,¹⁵ how the Commission is effectively fulfilling the CleanEnergy DC Act’s mandate that it consider the impact of global climate change and the District’s climate commitments in its decision to approve Pepco’s application,¹⁶ or how it would effectively be leveraging private sector partnership in EV charging station infrastructure.¹⁷

¹³ Data specifying vehicle models is available in AFDC data, specifically, at <https://afdc.energy.gov/data/10567> Also *See* InsideEV’s Monthly Plug In Sales Scorecard, available from <https://insideevs.com/monthly-plug-in-sales-scorecard/>.

¹⁴ *See* Pepco’s Application at n. 14, stating that the availability of charging stations is critical to EV adoption.

¹⁵ Order, p. 25.

¹⁶ *See* Order, p. 7:

In accordance with the CleanEnergy DC Act, the Commission may approve an application if it finds that it is: (1) in the public interest, (2) consistent with the District’s public climate change commitments as determined by the Mayor, and (3) consistent with the D.C. Code § 34-1101.

¹⁷ Order at ¶ 60.

Background

Tesla is a leading developer and manufacturer of electric vehicles, as well as other clean energy products and services. Tesla's mission is to accelerate the world's transition to sustainable energy and electric transportation.¹⁸ In order to serve its customers, Tesla funds, builds and operates its own network of charging stations and operates these as a service to its customers. The charging network is not intended to be a profit center for the company. Every Tesla customer is, at the time of vehicle purchase, effectively investing in both a car and in the charging station network.

In 2012, Tesla began developing its network of Superchargers to enable customers to confidently make road trips with quick charging sessions on highly traveled routes. Tesla's charging network and vehicles utilize a Tesla connector which is capable of charging vehicles with both alternating current (Level 1 and Level 2 charging at 110 volts or 240 volts up to 80 amps) and direct current (currently up to 250 kW). When Tesla began developing its charging station network in 2012, CHAdeMO connectors and DCFC networks were limited to a 50 kW charge rate, thus necessitating Tesla's development of a connector and network capable of higher charging rates and quicker charger sessions.¹⁹ The Tesla connector and first Supercharger stations predate the development of the Combined Charging System ("CCS"), which allows for use of European and North American plugs.

¹⁸ Tesla's September 10, 2018 letter of support for Pepco's Application for Approval of its Transportation Electrification Program ("TE Program Application"), p. 1.

¹⁹ A Tesla Supercharger (a DC fast charger or Level 3 charger) can charge a vehicle in 20 – 30 minutes for long distance travel (up to 170 miles in range). Tesla's December 12, 2018 Comments, pp. 1 – 2. More recently Tesla has released its V3 Supercharger capable of operating up to 250 kW and providing 75 miles of range in 5 minutes. The Wall connector (Level 2) is used for long dwell times in Tesla's destination or workplace charging programs, and also for residential settings. These charge a vehicle in 4 – 8 hours.

To date, Tesla has largely absorbed the costs of installing and operating an extensive network of charging stations in order to serve Tesla customers. As noted by the Commission, the steep costs of EVCS deployment has hindered EVCS installation, which has in turn hindered EV adoption.²⁰ Thus, Tesla generally supported Pepco's program because it sought to overcome several of the key barriers to increasing EV charging access in the District."²¹

However, Pepco is now seeking to exclude Tesla from eligibility for participating in its programs, thereby depriving the District of the many benefits increased numbers of Tesla charging stations would yield.²² Thus, Pepco is asking that the Commission issue a ruling that lacks any analysis in the record on the impact of excluding Tesla from the District's ability to achieve its ZEV and GHG reduction targets. *See* Application, p. 8, noting that the District will require 1,055 Level 2 chargers and 76 Direct Current Fast Chargers ("DCFC") to accommodate the anticipated level of PIVs registered in the District by 2030.²³

Tesla respectfully urges the Commission to deny Pepco's Application, and to refrain from discriminating against Tesla and undermining the District's ability to achieve its ZEV and GHG

²⁰ Order at ¶ 33.

²¹ *See, e.g.*, Tesla's September 5, 2018 Letter expressing general support for Pepco's TE Program, which stated:

Tesla believes that generally, Pepco's proposed Program should be helpful in removing barriers to transportation electrification adoption, such as a lack of customer awareness, high upfront costs of EV charging stations, and the lack of accessible charging stations for residents in multi-unit dwellings that rely on street parking.

See also, Order at ¶ 43 (same).

²² *See* Order, pp. 14 – 15, where the Commission noted the "... broad set of potential benefits to this [increased] level of EV adoption in three areas: "a) the impact PIV adoption has on electricity costs, as realized by rate payers through changes in their utility bill, b) the differences in operating cost between a IV and a traditional gasoline fueled vehicle, and c) the economic value of the reduced air emissions resulting from increased PIV use." [citation omitted.]. *See also* Tesla's April 3, 2018 letter supporting Pepco's workshops to discuss a revised EV program proposal, in which Tesla provided on bill savings benefits *to other ratepayers* resulting from electric vehicles.

²³ Application, p. 8.

reduction targets by denying Pepco's Motion, in particular with regard to pp. 27-28. The grounds for so ruling are described below.

Argument

Pepco's Application must fail, as it is legally defective in at least four regards.

First, the Commission recently held that:

. . . [T]he purpose for reconsideration: (a) is to identify errors of law or fact in the Commission's order so that they can be corrected; (b) is to "set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous [citing 15 DCMR § 140.2];" and (c) is not a vehicle for the losing party to rehash arguments previously considered and rejected, nor is it an opportunity to raise new issues and arguments that, with due diligence, could have been raised earlier in the proceeding. In addition, if there is substantial evidence in the record to support the decision of the Commission, that decision is not erroneous simply because there is substantial evidence that could support a contrary conclusion. Finally, the Commission enjoys wide discretion when making a decision on the issues that come before it, and may use this discretion when reviewing a petition for reconsideration or clarification to clarify certain findings and conclusions set forth in its initial decision.²⁴

Pepco's Application must be denied as it fails to meet the criteria for the Commission to grant either reconsideration or clarification. The Commission's recent *Watergate* decision made clear that the Commission will not, on reconsideration, resolve an issue of policy,²⁵ especially where a proponent "had ample opportunity [throughout the proceeding] to make any argument it chose to make."²⁶ At bottom, consistent with D.C. Code § 34-604(b), reconsideration is only warranted where an applicant "convince[s the Commission] that its "decision is erroneous as a matter of law or fact."²⁷

²⁴ *Watergate, Id., supra*, n. 2. (emphasis added).

²⁵ *Id.* at *11.

²⁶ *Id.* at *12.

²⁷ *Id.* at notes 32 and 39, in which the Commission cites several of its prior decisions construing said law.

Second, as is also noted above, the *Watergate* decision and many others by the Commission, have made clear that “if there is substantial evidence in the record to support the decision of the Commission, that decision is not erroneous simply because there is substantial evidence that could support a contrary conclusion.”²⁸ Here, Pepco’s Application cites zero record evidence (because there essentially isn’t any), and certainly, no new legal or factual grounds to compel the Commission to now issue a decision that would contravene District law (the definition of “publicly available”) and policy (in particular, the District’s long-standing policy of preserving “customer choice” in matters pertaining to electricity).²⁹ The record certainly lacks any analysis showing how much farther the District’s attaining its ZEV and GHG targets would be if it removed Tesla’s EVs from the equation. Thus, were the Commission to grant Pepco’s request and exclude Tesla from owning and operating EV charging stations supported by Pepco’s make-ready infrastructure, it would render the Commission’s decision highly vulnerable to challenge on

²⁸ *Id.*, citing FC 1053, Order No. 14832, p. 5, rel. June 13, 2008 (where the Commission denied the Office of the People’s Council’s petition for reconsideration where there was evidence in the record that purported to support a conclusion different from the one the Commission reached); *State of New York v. United States*, 880 F. Supp. 37 (D.D.C. 1995) (motion for reconsideration must address new evidence or errors of law or fact; only if the moving party presents new facts or a clear error of law which compel a change in the court’s ruling will the motion to reconsider be granted; purpose is not to now point to facts in the record that could lead to an inference; the evidence has to amount to more than a belief of error); and *Washington Gas Light Co. v. Pub. Serv. Comm’n of the District of Columbia*, 856 A.2d 1098, 1104 (D.C. 2004) (court’s review is limited to questions of law. Decision to deny WGL’s proposed closure of its Anacostia Service Center was not a policy decision.)

²⁹ See, e.g., Order No. 11796, FC 945, *In the Matter of the Investigation into Electric Service Market Competition and Regulatory Practices*, Sept. 18, 2000 at ¶ 81. See also Concurring Opinion of Commissioner Richard Beverly, p. 4, stating that the purpose of the “Retail Electric Competition and Consumer Protection Act of 1999” (“RECCPA”), was to, among other things, implement customer choice in the electricity supply market.

grounds it would be arbitrary and capricious³⁰ and not supported by any record evidence or analysis.³¹

Third, Pepco's requested relief would require that the Commission discriminate against Tesla, denying it from availing itself of the reduced costs of the EVCS infrastructure supported by Pepco with ratepayer money. Such decision would obviously contravene the requirement set forth in D.C. Code § 34-1101 and the CleanEnergy DC Act that any charges made by Pepco to recover the costs of its TE program be "reasonable, just, and nondiscriminatory."³² Clearly, excluding Tesla would be discriminatory, and contrary to long-standing District policy, as well as the purpose of Pepco's TE program, which is to increase the numbers of charging stations, and therefore EV adoption.³³

Finally, the Commission lacks the authority to grant the relief Pepco seeks. Pepco has asked the Commission to determine which EV manufacturers might host EVCS supported by

³⁰ See, *In the Matter of the Application for Approval of Triennial Underground Infrastructure Improvement Projects Plan*, FC 1116, Order No. 17769, 2015 D.C. PUC LEXIS 18, *95, denying an AOBA Application for Reconsideration as neither an abuse of discretion, nor arbitrary and capricious as AOBA alleged but failed to show. In such Order the Commission commented that:

Commission decisions on questions of law are subject to arbitrary and capricious standard of review which is the 'narrowest judicial review in the field of administrative law' and limited to determining whether the overall impact of the order is just and reasonable and 'whether the Commission 'respected procedural requirements, []made findings based on substantial evidence, and []applied correct legal standards.'" denying AOBA's Application for Reconsideration on grounds that doing so would be arbitrary and capricious, given AOBA's failure to show

Id. at *89.

³¹ See, *In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, FC 1103, Order No. 17539, July 10, 2014, D.C. PUC LEXIS 203, *18, pointing to the lack of timely-submitted evidence in the record (i.e., before the record closed, as is the case here) in support of its argument as grounds for denying Pepco's application for reconsideration.

³² Order, p. 13.

³³ See Concurring Opinion of Commissioner Beverly at p. 6, emphasizing the importance of Pepco's engaging in "neutral and unbiased engagement with EVCS developers/owners I obtaining ratepayer funded EV make-ready infrastructure to facilitate interconnection with the electronic distribution system.

Pepco's make-ready expenditures. Pepco has also asked that it be allowed to own all approved public EVCS if the competitive market fails to deploy the stations within nine months, thereby imposing a regulatory requirement on the competitive marketplace.³⁴ However, the Order makes clear that the Commission lacks jurisdiction over charging station owners and operators.³⁵

Thus, whether or not it would be a good idea for the Commission to select and ossify technological choices, which as we have argued above it should not do, and which would contravene the District's long-held policy preference that customers and the market make the decisions, the Commission simply lacks the authority to make such selection.

Conclusion

For the reasons stated herein, Tesla respectfully requests that the Commission deny Pepco's Application for Reconsideration and Clarification. At a minimum, Tesla requests that the Commission reject Pepco's binary request that the Commission either allow Pepco to own and operate ECVS, or that it essentially prevent Tesla from doing so, and impose unreasonable timelines on the competitive market to do so.

Additionally, consistent with its earlier comments, Tesla supports the Sierra Club's request that the Commission 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.

³⁴ It should also be noted that developing charging stations requires various approvals; thus, imposing artificial deadlines is problematic and unreasonable. Such approvals include arrangement with site hosts to use their property, local permitting, and new service connections from Pepco. Pepco's request is especially problematic since it has an unfair advantage in that it controls the new service request process and delays in the process could benefit the company by allowing it to own stations.

³⁵ Order, pp. 10 – 11.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Tesla, Inc.'s Opposition to Potomac Electric Power Company's Application for Reconsideration and Clarification of Order No. 19898 was served this May 20, 2019 on all parties of record in Formal Case Nos. 1130 and 1155 by electronic mail.