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GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

KARL A. RACINE
ATTORNEY GENERAL

Public Advocacy Division
Public Integrity Section

E-Docketed

September 5, 2019

Ms. Brinda Westbrook-Sedgwick, Secretary
Public Service Commission
of the District of Columbia
1325 G Street, NW, Suite 800
Washington, DC 20005

Re: Formal Case No. 1148 – In the Matter of the Investigation into the Establishment and Implementation of Energy Efficiency and Energy Conservation Programs Targeted Towards Both Affordable Multifamily Units and Master Metered Multifamily Buildings which Include Low and Limited Income Residents in the District of Columbia

Dear Ms. Westbrook-Sedgwick:

On behalf of the District of Columbia Government, enclosed for filing are comments on the Energy Efficiency and Energy Conservation Working Group Report. If you have any questions regarding this filing, please contact the undersigned.

Sincerely,

KARL A. RACINE
Attorney General

By: */s/ Brian Caldwell*
BRIAN CALDWELL
Assistant Attorney General
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Brian.caldwell@dc.gov

cc: Service List

BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE INVESTIGATION INTO THE ESTABLISHMENT AND IMPLEMENTATION OF ENERGY EFFICIENCY AND ENERGY CONSERVATION PROGRAMS TARGETED TOWARDS BOTH AFFORDABLE MULTIFAMILY UNITS AND MASTER METERED MULTIFAMILY BUILDINGS WHICH INCLUDE LOW AND LIMITED INCOME RESIDENTS IN THE DISTRICT OF COLUMBIA	)	**Formal Case No. 1148**

COMMENTS OF THE DISTRICT OF COLUMBIA GOVERNMENT ON THE ENERGY EFFICIENCY AND ENERGY CONSERVATION WORKING GROUP REPORT

Pursuant to the Public Service Commission of the District of Columbia's (Commission) Public Notice published on August 16, 2019, the District of Columbia Government (the District), through its Office of the Attorney General (OAG), respectfully submits the following comments on the Energy Efficiency and Energy Conservation (EEEC) Working Group Report, filed on June 26, 2019 (Report).

The District echoes the comments and concerns raised by the National Consumer Law Center (NCLC), the National Housing Trust (NHT) and the Office of the People's Counsel for the District of Columbia (OPC) in their Joint Comments filed with the Commission yesterday regarding the need to establish a process to efficiently and expeditiously deploy the $11.25 million in funds set aside from the Exelon-Pepco Holdings, Inc., merger to:

> support innovative energy conservation or energy efficiency programs targeted primarily towards both affordable multifamily units and master metered multifamily buildings which include low and limited income residents that are sponsored or operated by the District or by qualified non-profit entities that support and enable targeted energy-efficiency programs.[1]

[1] Formal Case No. 1119, Order No. 18148, Attachment B, ¶ 7 (*rel.* March 23, 2016).

As NCLC/NHT/OPC note in their Joint Comments, the Clean Energy DC Omnibus Amendment Act of 2018 (Clean Energy Act) imposes Building Energy Performance Standards, set by the Department of Energy and Environment (DOEE), on large multifamily buildings that require these building owners to meet certain minimum energy performance metrics, or else be required to implement energy efficiency upgrades that will reduce energy usage by at least 20 percent, or face a penalty.[2] These Performance Standards are set to take effect as early as Jan. 1, 2021.[3] Therefore, time is of the essence to implement this program so that funds can get out the door.

The Report recommends retaining a Retrofit Program Implementer to serve as a single point of contact to work with building owners to identify financing options, including government and ratepayer-subsidized programs, and to establish program performance metrics. The District agrees with this recommendation. The Report also recommends the Commission create a formal structure to facilitate stakeholder involvement "to allow for stakeholder buy-in and responsibility sharing for the Retrofit Program outcomes."[4] Accordingly, the Report proposes two options. The first option would direct Pepco to create a non-profit corporation with a Board consisting of stakeholders "such as OPC, DOEE, NCLC/NHT and Pepco."[5] The second option proposed would be to establish an EEEC Task Force, comprised of the same stakeholders, but it would not be a formal entity. As the Report suggests, the first proposal to create a nonprofit corporation with a Board comprised of stakeholders may require a legal opinion from OAG as to whether such an arrangement would run afoul of the D.C. Home Rule Act.[6]

[2] NCLC/NHT/OPC Joint Comments, at 3.
[3] Clean Energy Act, Section 301
[4] Report, ¶ 9.
[5] Report, ¶ 10.
[6] Report, ¶ 11.

OAG did, in fact, conduct a legal analysis of the above-presented options in the Report.[7] As set forth in greater detail in the attached OAG legal analysis, requiring District agency employees to sit on the Board of a private nonprofit corporation would be legally problematic for at least two reasons. First, devoting government agency resources / personnel to serve a private enterprise is problematic unless the purpose of the nonprofit corporation falls within the agency's statutory function. While DOEE's statutory function broadly encompasses administering programs and advancing policies to promote energy efficiency, including the above-referenced Building Energy Performance Standards, how it conducts this function is specified by statute.[8]

Second, even if the purpose of the nonprofit corporation upon whose Board a DOEE employee serves could be squared with the statutory function of DOEE, there is a more fundamental problem which results from the nature of corporate law. Board members have a fiduciary duty / statutory duty of loyalty to serve in the best interests of the corporation, while District government employees have duties to serve the government agency under which they are employed, and whose salary is paid for by District taxpayers. These duties are independent of each other and could conflict on issues as fundamental as how much time to devote in service of which entity.

On the other hand, the OAG analysis uncovered no legal concerns with government agency employees serving on a Task Force, as set forth in the second option above. Such an arrangement would have the further benefit of avoiding the time-intensive processes associated with following the corporate formalities mentioned in the NCLC/NHT/OPC Joint Comments.[9]

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[7] See "Legal Analysis: Whole-Building, Deep Energy Retrofit Program Proposals (AL-19-400)" from Brian K. Flowers, Deputy Attorney General, Legal Counsel Division, to Brian Caldwell, Assistant Attorney General, dated July 10, 2019, attached hereto as "Exhibit A."
[8] See, *e.g.* Section 301, Clean Energy Act.
[9] NCLC/NHT/OPC Joint Comments, at 3.

Therefore, the District concurs with NCLC, NHT and OPC that an EEEC Task Force is the appropriate vehicle to facilitate stakeholder assistance in developing the RFP, selecting the Implementer, and securing buy-in on the EEEC program outcomes.

Respectfully Submitted,

KARL A. RACINE
Attorney General for the District of Columbia

KATHLEEN KONOPKA
Deputy Attorney General
Public Advocacy Division

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Chief, Public Integrity Section

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September 5, 2019

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

MEMORANDUM

TO: **Brian Caldwell**
Assistant Attorney General
Public Integrity Section

FROM: **Brian K. Flowers**
Deputy Attorney General
Legal Counsel Division

DATE: **July 10, 2019**

SUBJECT: **Legal Analysis: Whole-Building, Deep Energy Retrofit Program Proposals (AL-19-400)**

The Public Service Commission ("Commission") is considering two proposals related to its Whole-Building, Deep Energy Retrofit Program ("Program"), including one proposal that involves the creation of a nonprofit entity. It is likely that the Commission will solicit comments on these proposals, and our understanding is that it is especially interested in any comments this Office may wish to offer. You therefore asked our office to advise on any limits that District law may impose on either of the two proposals.

This memorandum responds to your request. If the Program operates as a government program, both proposals raise significant concerns. If the Program operates as a private program, only the nonprofit-entity proposal would raise concerns; the other proposal (to create an advisory Task Force instead of a nonprofit) would be permissible.

I. Background

We start by summarizing the Program and the two proposals. The Program stems from the Pepco-Exelon merger settlement, which "required Exelon to place over $32 million into an escrow account, to be disbursed at the Commission's direction, to fund projects supporting

energy efficiency, energy conservation, and modernization of the energy-delivery system."[1] Our understanding is that this Program would be one of those projects. The Program would be a Pepco initiative that would assist in retrofitting "affordable multifamily units and master-metered multifamily buildings in the District, which include low and limited income residents."[2] The Commission tasked a working group with recommending how this Program should be designed,[3] and in a document you forwarded to us, the working group recommended that the Commission hire a Retrofit Program Implementer to run the Program.[4] The group also recommended that the Program incorporate stakeholder input,[5] and set forth two alternative ways – the two proposals – to accomplish this.

The first proposal involves a privately created nonprofit entity. The Commission would "direct Pepco to create a non-profit board," with both government and non-government members, that would issue a Request for Proposals ("RFP"), interview Implementer candidates and recommend a candidate to the Commission, and provide continuing feedback during the life of the Program.[6] The nonprofit's role appears to be principally advisory, although some of the language in the proposal suggests that the nonprofit may also be involved in supervising the program's operation.[7] Moreover, the proposal cautions that "launching a non profit may require a legal opinion from the Office of Attorney General regarding any Home Rule Act implications as well as certain administrative delays inherent in establishing a new organization."[8]

The second proposal, designed to avoid potential concerns, involves a Commission-created Task Force.[9] The Task Force's members would be chosen by the Commission and, like the nonprofit, the Task Force would be continually responsible for offering stakeholder feedback on the Program's operation. The Task Force would work with the Implementer to recommend Program details to the Commission, and once the Program is operational, "the Task Force would serve as a sounding board for the [I]mplementer and provide guidance on any day-to-day issues."[10]

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[1] *Office of the People's Counsel v. Pub. Serv. Comm'n*, 163 A.3d 735, 743 (D.C. 2017).

[2] Order in Formal Case No. 1148, Aug. 9, 2018, at 1, *available at* https://edocket.dcpsc.org/apis/api/filing/download?attachId=80378&guidFileName=a3ec1f80-18ab-456c-aaa4-7dc1695a1c90.pdf (last visited July 9, 2019).

[3] *Id.*

[4] Energy Efficiency and Energy Conversation ("EEEC") Working Group Report ("Report"), June 26, 2019, ¶ 7 (on file).

[5] *See id.* ¶ 9.

[6] *Id.* ¶ 10.

[7] *See id.* (stating that the nonprofit would "supervise" the Implementer).

[8] *Id.* ¶ 11.

[9] *Id.*

[10] *Id.* One difference is that the Task Force, unlike the nonprofit, would not issue an RFP for an Implementer. That would fall to either the Commission or Pepco. *Id.*

II. Legal Analysis

Our understanding is that the Commission intends for the Program to operate as a private program that, in keeping with the merger settlement, would be overseen by the Commission. Under the working group's proposal, however, the Program would appear to operate as a District government program because the District government – specifically, the Commission – would select the Implementer who would run the Program. This would raise serious concerns under either the Task Force proposal or the nonprofit proposal. Under either proposal, for example, the Program would be funded with money (the escrow account) that has not been legislatively appropriated. This would violate the federal and local Antideficiency Acts if the Program were a District government program because, absent express authorization from Congress, a government program cannot be paid for with money that has not been legislatively appropriated.[11]

If the Implementer were selected by someone other than the Commission (Pepco, for example), and the Program were otherwise run as a private program supervised by the Commission rather than a government program run by the Commission, that would significantly lessen our concerns. The Task Force proposal would not raise serious legal concerns because the Task Force would be a quintessential advisory group designed to offer stakeholder input to a District agency. The nonprofit proposal would likewise be generally consistent with the Home Rule Act because, rather than involving the creation of a nonprofit by the District government[12] or a nonprofit entity's operation or supervision of a government program,[13] it would involve a private entity (Pepco) creating a nonprofit to advise on (and potentially supervise) the operation of a private program.

Even so, however, there could be significant legal questions about whether, and to what extent, District agency representatives could serve on the nonprofit's board of directors. An agency representative would not be able to serve on the board unless doing so fell within his or her agency's statutory functions. There could be questions about whether those functions include serving on a private body that advises on the administration of, and may play a role in administering, a private program. For example, the Department of Energy and Environment has broad authority to administer environmental laws and District government environmental programs,[14] but there is a serious question as to whether that authority empowers it to be directly involved in a private entity's program that is overseen by a different District agency. Moreover, even if District government entities could participate in administering the Program, the

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[11] *See, e.g.,* 31 U.S.C. § 1341(a)(1)(A) and (B) (federal); D.C. Official Code § 47-355.02 (local). One example of a congressionally-granted exception is that District programs may be funded through lawful donations to the District. *See* D.C. Official Code § 1-329.01.

[12] *See* Op. of the Corp. Counsel, *The Nat. Capital Revitalization Corp. ("NCRC") and its Subsidiaries*, Dec. 8, 2006, at 4, *available at* https://oag.dc.gov/sites/default/files/2018-02/Opinion-July-2014-National-Capital-Revitalization.pdf (last visited July 9, 2019) (noting that the District may only create entities "of the District government").

[13] Such operation would be contrary to the principle that the power vested in the District government cannot be exercised by private parties. *See Carter v. Carter Coal Co.*, 306 U.S. 1, 16 (1936); *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095, 1143-144 (D.C. Cir. 1984); 63A Am. Jur. 2d, Public Officers, § 97 (2d ed. 1984).

[14] *See* D.C. Official Code § 8-151.03

participation of their officials in a new nonprofit entity could, depending on how the entity is constituted, raise ethical concerns. For example, if the nonprofit was established as a limited liability company, or LLC, those managing the LLC would owe statutory duties of loyalty to the LLC that would be independent from any duties to the District.[15] Any nonprofit would need to be established and operated in a way that avoided any actual or perceived conflict between duties to the nonprofit entity and government officials' duties to the District government.[16]

If you have any questions, please contact Assistant Attorney General Joshua Turner at 442-9834, or me at 724-5524.

BKF/jat

[15] *See id.* § 29-804.09.

[16] *See, e.g.,* 5 C.F.R. § 2640.203 (in the context of federal conflict-of-interest provisions, permitting service on nonprofit boards); 6-B DCMR § 1807.1 (District employees generally must not "[e]ngag[e] in any outside employment, private business activity, or other interest that is reasonably likely to interfere with the employee's ability to perform his or her job, or which may impair the efficient operation of the District government ").

EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2019, I caused true and correct copies of the foregoing District of Columbia Government's Comments on the Energy Efficiency and Energy Conservation Working Group Report, to be electronically delivered to the following parties:

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