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September 16, 2019

Mr. Christopher G. Lipscombe
General Counsel
Public Service Commission of the District of Columbia
1325 G Street, NW, Suite 800
Washington D.C. 20005

Re: Formal Case No. 1156, Opposition to OPC Motion to Compel

Dear General Counsel Lipscombe:

On September 9, 2019, Potomac Electric Power Company (Pepco or the Company) filed objections to the Office of the People's Counsel ("OPC") Data Request Nos. 32-1, 32-2, 32-3, 32-10 and 32-11. On September 12, 2019, OPC filed a Motion to Compel Pepco to file responses to those requests ("Motion"). This is Pepco's opposition to OPC's Motion. OPC's attempted overreach in this instance is not unusual.¹ The Commission, however, has previously held that discovery is limited to that which is actually at issue in the proceeding before it.² Rank speculation on what might have been or could have been filed is not only irrelevant but has been correctly viewed as an inappropriate fishing expedition.³ The Commission has soundly rejected such efforts multiple times in the past few years,⁴ and it should do so again here.

1. *The Commission has consistently held that the scope of discovery requests is limited to that information that specifically relates to issues being litigated in a given proceeding. Details about cases not filed, decisions not reached, or proposals not made to the Commission are irrelevant to the multiyear rate plan ("MRP") that was actually filed by Pepco.*

In this case the Commission is considering Pepco's proposed MRP, not that of any other company.⁵ The Commission is reviewing the specific, detailed and comprehensive

¹ See, OPC2017-01, Order No. 18739 (Mar. 29, 2017).

² Formal Case No. 1119, Order No. 17619 (Sept. 4, 2014).

³ Order No. 17619 at ¶23 (Commission will not allow open-ended discovery unrelated to the issues before it).

⁴ *WGL v. PSC*, 450 A.2d 1187, 1196 n. 8 (D.C. 1982) (Commission can rely on principles established in prior cases).

⁵ OPC admits that it is seeking information not only on Pepco, but on Exelon, ComEd, Philadelphia Electric Company, Baltimore Gas & Electric, Atlantic City Electric and Delmarva Power. See, Motion at note 7.

MRP filed by Pepco. It is not considering whatever alternative approach “might” have been proposed but that was not filed and is not being pursued.⁶

OPC makes no pretense about its intentions to probe matters beyond the permissible scope of discovery in Commission proceedings. As it states in the Motion, OPC’s “requests go to ... *data concerning ARMs in place at or under consideration by other Exelon distribution utilities that Pepco and Exelon considered – or could have considered – in crafting the proposal that is before the Commission.*” Motion at 2.

This argument is almost identical to one OPC made when it unsuccessfully sought information on what *other* mergers WGL and AltaGas *might* have contemplated. There, as here, OPC was not seeking information on aspects of the case actually under consideration but on what alternative cases the companies may or may not have contemplated before filing the matter actually before the Commission.⁷ The Commission rejected OPC’s efforts in that case and should again here.

Moreover, since the Commission in Formal Case No. 1139 specified what forms of alternative regulatory plans Pepco could propose,⁸ analyses of what other Exelon distribution utilities “could have considered” is doubly irrelevant. Pepco filed an MRP within the confines of what the Commission permitted. OPC’s Motion should be denied.

2. *This proceeding is limited to evaluation and deliberation of the services, rates and performance of Pepco’s District of Columbia operations and not those of any affiliated companies outside of this jurisdiction. OPC makes no showing that the information it seeks regarding Exelon or other Exelon affiliates is reasonably calculated to lead to the discovery of admissible evidence.*

The material sought by the discovery requests at issue is not related to Pepco’s rates, services or performance of Pepco’s operations within the District of Columbia. Although OPC claims that its data requests seek information in Pepco’s possession, the scope of the data requests at issue is far broader and seeks information from Exelon and Exelon distribution utility affiliates other than Pepco that do not provide public utility services in the District of Columbia, are not regulated by this Commission, and over which Pepco does not exercise control.

⁶ Order No. 18739, at ¶15 (details of mergers that did not occur unlikely to elicit discovery of admissible evidence or relevant information).

⁷ See, *In the Matter of the Implementation of the Triennial Review Order in the District of Columbia*, Formal Case No. 1024, Order No. 13049 at ¶32 (Jan. 26, 2004) (opposing party had no right to know what alternatives Verizon considered or might be considering that differed from what was actually filed and under review at the commission because it intruded upon privileged communications). What Exelon may or may not have considered, contemplated, deliberated upon but did not pursue in this case is not only irrelevant, but also may invade the privileged and confidential protected sphere of Exelon’s legal analyses and planning.

⁸ See Formal Case No. 1139, Order No. 18846 at ¶594 (July 25, 2017) (“The Commission is not averse to allowing Pepco to include in its next rate case a request for a fully forecasted test year and or a multi-year rate proposal”).

To the extent that OPC is seeking information regarding alternative plans in other jurisdictions, those cases are public records available to OPC and its consultants. OPC can do the necessary research, gather the relevant information and bring to the Commission's attention whatever they deem to have merit from those other jurisdictions. However, what a specific Exelon distribution utility affiliate other than Pepco may have proposed or not proposed or how a specific affiliate has been regulated or not regulated outside the District of Columbia under a wide array of possible alternative regulation plans is simply not relevant to what Pepco has proposed in Formal Case No. 1156.

As the Commission noted in rejecting OPC's attempts to probe other potential mergers in OPC2017-01, each merger is unique and the analysis of it is also unique.⁹ Similarly, each alternative regulatory plan is uniquely controlled by the statutes, regulatory environment, performance history and other issues in a given jurisdiction. There are innumerable variations on such plans. The point of discovery is supposed to be to probe the details of Pepco's *actual proposal* in this case, based on the District's laws and regulations as well as this Commission's past precedents. Seeking to probe what was expressly *not proposed* by Pepco before this Commission is not reasonably calculated to lead to admissible evidence. The Motion should be denied.

3. *OPC offers no specific bases for its assertions of relevance and instead relies on generalities and assumptions with no factual support.*

The Commission has previously ruled that it will not permit "fishing expeditions" under the guise of discovery.¹⁰ The explanations proffered in OPC's Motion reveal that this is just such a fishing expedition. For example, OPC states that its "requests include materials prepared by or for 'Pepco, or for any other Exelon distribution company affiliate, or for Exelon's distribution affiliates generally.'" Motion at 2. OPC does not even make a pretense of seeking material that is limited to a reasonable scope. For example, OPC states, "In designing its MRP, Pepco had (and continues to have) access via Exelon management, Exelon Utilities, and *perhaps other corporate channels, to information about ARMs generally and the relevant experiences of other utility members of the Exelon corporate family.*" Motion at 3. This entire line of inquiry is both speculative and irrelevant.¹¹

OPC can assess the effectiveness of alternative regulatory plans based on public information, public proceedings, research and writing by experts that is in the public domain

⁹ Order No. 18816 at ¶19 (Information on other mergers that might have been pursued "facially irrelevant" to the merger under review).

¹⁰ Formal Case No. 1119, Order No. 17619 at ¶23 (Commission follows courts' principles that it will not endorse "fishing expeditions, discovery abuse and inordinate expense involved in overbroad and far-ranging discovery requests.")

¹¹ Another example of rank speculation is this comment: "*It is reasonable to conclude that Pepco was privy to whatever materials concerning ARMs were in the possession of Exelon Executive Committee, Exelon Board or Exelon Utilities – regardless of whether they were prepared for Pepco or another Exelon distribution utility. And it is implausible that those materials were not considered in crafting Exelon's proposal here.*" Motion at 3 (emphasis added).

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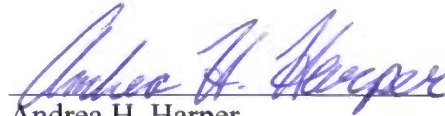
or available through the outside consultants it has engaged. Additionally, nowhere does OPC state how such information is useful in or relevant to this proceeding. The Commission is addressing the specific, detailed and extensive record Pepco has filed in support of the Company's proposed MRP. OPC's data requests are irrelevant to this endeavor and are an abuse of the discovery process.

OPC also attempts to justify its discovery demands by asserting that "Pepco's access to documents involving 'any other Exelon distribution company affiliate' is an intended consequence of Exelon's chosen corporate structure." Motion at 3. Any alternative rate plan of separate corporate entities that Pepco may or may not have considered regarding other distribution utilities in other jurisdictions has no relevance here. The Motion should be denied.

Conclusion

None of the information OPC requests is related to a cost Pepco is seeking to recover. None of it is related to Pepco's operations in the District of Columbia. Moreover, none of it is relevant to the specific plan for which Pepco is seeking approval from this Commission. This is a fishing expedition that should be quashed. OPC's Motion should be denied, and Pepco's objections to the data requests at issue should be sustained.

Respectfully submitted,
Potomac Electric Power Company



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Potomac Electric Power Company's Opposition to the Office of the People's Counsel's Motion to Compel has been served this September 16, 2019 on:

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