

**PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1325 G STREET, N.W., SUITE 800
WASHINGTON, D.C. 20005**

ORDER

December 20, 2019

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, Order No. 20272

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia (“Commission”) denies the Office of the People’s Counsel’s (“OPC”) Motion to Compel the Potomac Electric Power Company (“Pepco” or “Company”) to Comply with OPC’s Data Request (“DR”) Nos. 32-1, 32-2, 32-3, 32-10, and 32-11.

II. BACKGROUND

2. On May 30, 2019, the Potomac Electric Power Company (“Pepco”) filed its Application for approval to increase rates through the implementation of a Multiyear Rate Plan (“MRP”) for its electric distribution service in the District of Columbia (“District”) for the years 2020 through 2022.¹ The Application includes a proposal for a MRP with performance incentive mechanisms (“PIMs”). On August 9, 2019, the Commission issued Order No. 20204 adopting an 18-month consolidated procedural schedule to consider Pepco’s traditional one year cost-of-service proposal alongside the Company’s MRP proposal and appropriate PIMs, including discovery beginning on June 28, 2019, and ending on May 22, 2020.² Additionally, the consolidated schedule set a technical conference for Parties and other participants to discuss the framework for evaluating Alternative Ratemaking proposals with the Commission issuing a policy order by December 11, 2019.³ Pursuant to the discovery process, OPC submitted to Pepco a number of Data Requests (“DRs”) on August 23, 2019, including the contested DR Nos. 32-1, 32-2, 32-3, 32-10, and 32-11.⁴ On September 9, 2019, Pepco filed an Objection to OPC to the foregoing DRs.⁵ On September 12, 2019, OPC filed a Motion to Compel Pepco to provide

¹ *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* (“*Formal Case No. 1156*”), filed May 30, 2019.

² *Formal Case No. 1156*, Order No. 20204, issued August 9, 2019.

³ *Formal Case No. 1156*, Order No. 20204 at Attachment A: Procedural Schedule.

⁴ *Formal Case No. 1156*, OPC Data Request No. 32, August 23, 2019.

⁵ *Formal Case No. 1156*, Objection of Potomac Electric Power Company to OPC’s Data Request Nos. 32-1, 32-2, 32-3, 32-10 and 32-11 (“*Objection*”), filed September 9, 2019.

responses to the DRs.⁶ On September 16, 2019, Pepco filed an Opposition to OPC's Motion to Compel.⁷

III. DISCUSSION

A. OPC's Data Requests and Pepco's Objections

3. OPC submitted DR Nos. 32-1, 32-2, 32-3, 32-10, and 32-11 to Pepco for response, each essentially requesting information and documents relating to Pepco Witness McGowan's written testimony in this proceeding. Witness McGowan's testimony was submitted to provide an overview of Pepco, the Company and the value to customers regarding the investments made by Pepco; to describe the rationale for the MRP; to discuss the Company's proposed Performance Incentive Mechanisms ("PIMs"); to discuss the traditional test period compliance filing required by the Commission; to describe the importance of maintaining a reasonable Return on Equity ("ROE"); to discuss select ratemaking adjustments; and lastly, to provide a brief introduction of the Company's witnesses. Of note to OPC, however, was Witness McGowan's testimony about various aspects of Pepco's MRP proposal, including the rationale for it and the benefits it may provide to ratepayers. Based on this testimony, OPC seeks materials from Pepco relating to discussions of various facets of the MRP proposal in the possession of Pepco and its affiliates. In response Pepco submitted the PowerPoint presentations it provided at stakeholders workshops the Company held including the Performance-Based Regulation Workshop held on September 19, 2018; Performance Based Regulation Stakeholder Workshops held on October 30, 2018, and January 29, 2019; and the Pepco DC 2019 Multi-year Rate Plan Proposal Stakeholder Workshop held on April 9, 2019.⁸ Finding Pepco's responses to be inadequate, OPC filed a Motion to Compel.

4. Pepco objected to the DRs, arguing generally that the requests seek information from or regarding any corporate entity other than Pepco and is outside the scope of this proceeding; and that they seek information regarding the Company's or its affiliates' electric distribution systems, operations, business practices, or customer interactions beyond the District. Pepco further asserts that the Commission's jurisdiction does not extend to such activities outside the boundaries of the District and thus such requests are not calculated to lead to the discovery of admissible evidence; that the requests require disclosure of information protected from discovery by the attorney-client privilege and/or the attorney work product doctrine; that the requests purport to impose upon Pepco a duty to disclose information or documents outside the Company's possession, custody or control or not maintained in the normal course of business; to the extent that they are cumulative or duplicative; that the requests are overbroad, unduly burdensome, and/or seek information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. In addition, Pepco argues that OPC seeks information that is

⁶ *Formal Case No. 1156*, OPC Motion to Compel ("Motion to Compel"), filed September 12, 2019.

⁷ *Formal Case No. 1156*, Pepco's Opposition to OPC Motion to Compel ("Opposition"), filed September 16, 2019.

⁸ *See Formal Case No. 1156*, Pepco Response to OPC Data Request No. 11, filed August 8, 2019.

available in the public domain.⁹ Pepco also provided specific objections to each of OPC's DRs, as discussed below.

5. **OPC DR No. 32-1 states:** With reference to Mr. McGowan's testimony, Pepco (B) at 21, beginning on line 3, please provide copies of any presentations and portions of presentations made to or prepared for the PHI Board of Directors (or any subcommittee of the Board of Directors) which address, concern, or relate to alternative ratemaking mechanisms (including MRPs or performance-based rates), whether specifically for Pepco, or for any other Exelon distribution company affiliate, or for Exelon's distribution company affiliates generally.

6. **OPC DR No. 32-2 states:** With reference to Mr. McGowan's testimony, Pepco (B) at 21, beginning on line 3, please provide copies of any presentations and portions of presentations made to or prepared for the Exelon Executive Committee (or any subcommittee of the Executive Committee) which address, concern, or relate to alternative ratemaking mechanisms (including MRPs or performance-based rates), whether specifically for Pepco, or for any other Exelon distribution company affiliate, or for Exelon's distribution company affiliates generally.

7. **OPC DR No. 32-3 states:** With reference to Mr. McGowan's testimony, Pepco (B) at 21, beginning on line 3, please provide copies of any presentations made to or prepared for the Exelon Board of Directors (or any subcommittee of the Board of Directors) which address, concern, or relate to alternative ratemaking mechanisms (including MRPs or performance-based rates), whether specifically for Pepco, or for any other Exelon distribution company affiliate, or for Exelon's distribution company affiliates generally.

8. **OPC DR No. 32-10 states:** With reference to Mr. McGowan's response to OPC DR 11-21, please provide all documents or presentations sent to or received from Exelon Utilities concerning alternative ratemaking mechanisms (including the proposed MRP, or performance-based rates), whether specifically for Pepco, or for any other Exelon distribution company affiliate, or for Exelon's distribution company affiliates generally.

9. **OPC DR No. 32-11 states:** With reference to Mr. McGowan's response to OPC DR OPC 11-21, please provide all documents prepared by or for Exelon Utilities concerning MRPs or performance-based rates, whether specifically for Pepco, or for any other Exelon distribution company affiliate, or for Exelon's distribution company affiliates generally.

10. **Pepco's Objection:** Pepco's objections to DRs 32-1 and 32-2, and 32-3 relating to Mr. McGowan's testimony, and Pepco's objections to DRs 32-10 and 32-11 relating to his responses to previous OPC DRs, are all substantially alike. Pepco objects that presentations made to or prepared for the Exelon Utilities regarding other Exelon distribution company affiliates in other jurisdictions are irrelevant to the current District proceeding and have no impact on the issues before the Commission. Pepco adds that materials regarding alternate ratemaking mechanisms that other Exelon distribution company affiliates may have considered in other jurisdictions are subject to different statutory requirements than those of the District's Public Utilities Act and have no bearing on whether the specific MRP proposal Pepco has submitted in this proceeding should be

⁹ Objection at 1-2.

adopted by the Commission pursuant to its authority under D.C. Code § 34-1504 (d). Pepco further contends that the information sought by OPC is not likely to elicit discovery of admissible evidence that would be material to this proceeding, and that this data request is even further attenuated from Pepco than *Formal Case No. 1156* OPC DR 32-1 as it seeks information regarding the Exelon Utilities. Pepco concludes that, to the extent that an Exelon distribution company affiliate proposed an alternative ratemaking mechanism in another jurisdiction, this information would be in the public record, as well as any Commission decision, and available to OPC.¹⁰

B. OPC's Motion to Compel

11. OPC contends that its statutory authorization “establishes a presumption in favor of disclosure to OPC of all materials that are relevant and material to a Commission investigation and that the burden of justifying any restriction on disclosure of relevant and material information rests with the utility.”¹¹

12. OPC argues that the disputed requests seek materials in Pepco's possession that: (1) were prepared by or for the Exelon Executive Committee, the Exelon Board of Directors, or Exelon Utilities; and (2) address alternative ratemaking mechanisms (“ARMs”), including the proposed MRP, or performance-based rates. The requests include materials prepared by or for “Pepco, or for any other Exelon distribution company affiliate, or for Exelon's distribution company affiliates generally.” OPC contends that, contrary to Pepco's objections, this information is both “relevant” and “reasonably calculated to lead to the discovery of admissible evidence.”¹² OPC maintains that its requests go to the analysis undertaken by Pepco in developing its own MRP, and the 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 before the Commission.¹³ As such, OPC maintains that the materials are discoverable because they bear on the reasons why Exelon and Pepco designed the proposed MRP in the manner in which they did.¹⁴

13. OPC asserts that David Velazquez, President and CEO of Pepco Holdings, “did not operate in a silo” and that Exelon's Executive Committee and Board of Directors were aware of

¹⁰ Objection at 6.

¹¹ Motion to Compel at 1-2, citing *Formal Case No. 1137, In the Matter of the Application of Washington Gas Light Company for Authority to Increase Existing Rates and Charges for Gas Service*, Order No. 18256, ¶¶ 11, 28, rel. June 27, 2016 (“Order No. 18256”) (citing *Office of the People's Counsel v. Pub. Serv. Comm'n of the District of Columbia*, 21 A.3d 985 (D.C. 2011) and explaining that “the Commission has broad discretion in resolving discovery issues, particularly on questions of relevancy.”); see also D.C. Code §§ 34-804 and 34-1118.

¹² Motion to Compel at 2, citing *Formal Case No. 1137, In the Matter of the Application of Washington Gas Light Company for Authority to Increase Existing Rates and Charges for Gas Service*, Order No. 18256, rel. June 27, 2016.

¹³ Motion to Compel at 2.

¹⁴ Motion to Compel at 2.

Pepco's intention to file its proposed MRP.¹⁵ OPC avers that Pepco acknowledges that Exelon Utilities played a role in developing the proposed MRP, as it "participated in the review and discussions of the MRP filing."¹⁶ OPC contends that it is reasonable to conclude that Pepco was privy to whatever materials concerning ARMs were in the possession of the Exelon Executive Committee, Exelon Board, or Exelon Utilities, without regard as to whether they were prepared for Pepco or another Exelon distribution utility. Thus, OPC contends that this information is relevant and requests that, consistent with the Commission's discovery policies and District law, the Commission issue an order compelling Pepco to respond fully to its DRs.¹⁷

C. Pepco's Opposition to OPC's Motion to Compel

14. Pepco contends OPC's Motion is irrelevant and tantamount to a fishing expedition, based on speculation on what might have been or could have been filed.¹⁸ Pepco asserts that the Commission is considering only Pepco's proposed MRP, not that of any other company, adding that 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.¹⁹ Pepco contends that a party seeking to probe what was expressly not proposed by Pepco before the Commission is not reasonably calculated to lead to admissible evidence.²⁰

15. According to Pepco, OPC is attempting to probe matters beyond the permissible scope of discovery, citing OPC's Motion as stating its "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."²¹ Pepco claims OPC's argument is almost identical to the one OPC made when it unsuccessfully sought information on what other mergers Washington Gas Light Company ("WGL") and AltaGas might have contemplated. Pepco argues that in the WGL case, as well as in the instant case, OPC was not seeking information on aspects of the case actually under consideration but on possible alternatives the companies may or may not have contemplated before filing the matter actually

¹⁵ Motion to Compel at 2.

¹⁶ Motion to Compel at 2-3.

¹⁷ Motion to Compel at 3.

¹⁸ Opposition at 1, citing *Formal Case No. 1119*, Order No. 17619, rel. September 4, 2014.

¹⁹ Opposition at 1-2, citing *Formal Case No. 1024, In the Matter of the Implementation of the Triennial Review Order in the District of Columbia*, Order No. 13049, ¶ 32, rel. January 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). Pepco contends that, "[w]hat 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." Opposition at 2, n.7.

²⁰ Opposition at 3.

²¹ Opposition at 2, quoting OPC's Motion to Compel at 2.

before the Commission.²² Pepco states that the Commission rejected OPC's similar requests in *Formal Case No. 1142* and should in this case as well.²³ Pepco adds that in *Formal Case No. 1139*, where the Commission specified what forms of alternative regulatory plans Pepco could propose, analyses of what other Exelon distribution utilities "could have considered" is "doubly irrelevant."²⁴ According to Pepco, OPC's assertion that, "[i]n 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" demonstrates the information OPC seeks is outside the scope of this proceeding.²⁵ Pepco claims that the "entire line of inquiry is both speculative and irrelevant."²⁶

16. Pepco maintains that OPC can assess the effectiveness of alternative regulatory plans based on public information, public proceedings, and research and writing by experts that is in the public domain or available through the outside consultants it has engaged.²⁷ Pepco concludes that none of the information OPC requests is related to a cost Pepco is seeking to recover, nor is it related to Pepco's operations in the District.²⁸ Pepco requests that OPC's Motion be denied, and that Pepco's objections to the DRs at issue be sustained.²⁹

D. Decision

17. The Court of Appeals makes clear in *Office of the People's Counsel v. Public Service Commission*, that D.C. Code § 34-1118(c) confers on OPC a statutory right to obtain information and documents reasonably relevant and material to a Commission investigation or proceeding.³⁰ The court further states that D.C. Code § 34-1118(c) establishes a presumption in favor of disclosure to OPC of all materials that are relevant and material to a Commission

²² Opposition at 2; See *OPC2017-01, In the Matter of the Office of the People's Counsel's Investigation into AltaGas, Ltd.'s Proposed Acquisition of Washington Gas Light Company*, Order No. 18739, rel. March 29, 2017.

²³ Opposition at 2.

²⁴ Opposition at 2, citing *Formal Case No. 1139*, Order No. 18846, ¶ 594, rel. 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.")

²⁵ Opposition at 3, citing Motion at 3.

²⁶ Opposition at 3. Pepco claims as another example of OPC's rank speculation in the following 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 (Pepco's emphasis).

²⁷ Opposition at 3-4.

²⁸ Opposition at 4.

²⁹ Opposition at 4.

³⁰ *Office of the People's Counsel v. Public Service Commission*, 21 A.3d 985, 992 (D.C. 2011). See D.C. Code § 34-1118 (c) (2010 Repl.).

investigation [in a proceeding such as this rate case] and that the burden of justifying any restriction on disclosure of relevant and material information rests with the utility.³¹ With respect to the issue of relevance, the Commission has held that, “[i]n resolving discovery disputes, the concept of relevancy is very broad. Discovery is appropriate so long as the information appears reasonably calculated to lead to the discovery of admissible evidence.”³² In addition, the Commission’s cases proceed in the context of specifically worded issues that have been identified to mark the outer boundaries of the case before the Commission.³³ In this context, “it has been the policy of the Commission to narrow the scope of discovery requests to that information which specifically relates to issues being litigated in a given proceeding.”³⁴ We will not allow open-ended discovery that is not relevant to the limited issue, but instead we may limit information requests to encompass only relevant documents specifically relating to the designated issues, or relied upon by witnesses, or created by the utility within some reasonable number of past years.³⁵ Furthermore, we follow the principle that “although Courts should read ‘relevance’ broadly, they should not endorse ‘fishing expeditions,’ discovery abuse and inordinate expense involved in overbroad and far-ranging discovery requests.”³⁶ Finally the Commission will not compel the production of information that is publicly available.³⁷

18. Following these principles, we conclude, as explained below, that OPC has failed to establish that the requested information appears reasonably relevant and material to Pepco’s proposed MRP and lead to the discovery of admissible evidence that would warrant the granting of the Motion to Compel. Here, the only alternative ratemaking proposal before us is the MRP proposed by Pepco. Since the Commission has not otherwise designated issues for this case, only issues related to Pepco’s rate case filing and the Company’s MRP proposal for the District are relevant in this matter. In the instant case, OPC seeks in DRs 32-1, 32-2, 32-3, information and documents relating to the various Exelon affiliates. However, Witness McGowan’s testimony

³¹ See *Office of the People’s Counsel v. Public Service Commission*, 21 A.3d 992 (D.C. 2011).

³² *Formal Case No. 850, In the Matter of the Investigation into the Reasonableness of the Authorized Return on Equity, Rate of Return, and Current Charges and Rates for Telecommunications Services Offered by the Chesapeake and Potomac Telephone Company*, Order No. 9699, at 5-6, rel. April 19, 1991. See also *Formal Case No. 1093, In the Matter of the Investigation into the Reasonableness of Washington Gas Light Company’s Existing Rates and Charges for Gas Services* (“*Formal Case No. 1093*”), Order No. 16836, ¶ 6, rel. July 13, 2012.

³³ Without this essential power to limit the issues, the Commission would have to “reinvent the wheel” in every case and its complex general rate cases would become “an intractable morass, without any corresponding benefit.” *Washington Gas Light Co. v. Public Service Commission*, 450 A.2d 1187, 1196, n.8 (D.C. 1982).

³⁴ *Formal Case No. 1102, In the Matter of the Investigation into the Continued Use of Verizon Washington DC, Inc.’s Copper Infrastructure to Provide Telecommunication Services*, Order No. 17294, ¶ 9, rel. November 8, 2013.

³⁵ *Formal Case No. 1093*, Order No. 16895, ¶ 4, rel. September 7, 2012.

³⁶ *United States v. Kellogg Brown & Root Services, Inc.*, 284 F.R.D. 22, 37 (D.D.C. 2012). See also, e.g., *Bastin v. Fannie Mae*, 323 U.S. App. D.C. 44, 48, 104 F.3d 1392, 1396 (D.C. Cir. 1997) (“The district court does not abuse its discretion when it denies a discovery request that would amount to nothing more than a fishing expedition.”); and *In re Hodges*, 756 A.2d 389, 397 (D.C. 2000) (“The Motion is moot, but lacks merit in any event because the request to take discovery is nothing more than a fishing expedition.”).

³⁷ *Formal Case No. 1103, In the Matter of the Application of Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order No. 17205, rel. July 30, 2013.

related specifically to the reasons for Pepco's MRP proposal in the District, not to any speculative plans and activities of Exelon and its affiliates. Witness McGowan explains in his testimony that the MRP provides many benefits to customers in the District, including improved transparency, improved regulatory efficiency, lower administration costs, and increased Company accountability for managing resources and administrative costs, all of which, according to his testimony, lower the cost to District customers. Secondly, Witness McGowan asserts the importance of aligning the investments the Company is making with the changing needs of Pepco's customers and the evolving energy goals of the District. He states that the way energy is produced, consumed, and distributed is dramatically changing. Thirdly, Witness McGowan maintains that given the annual level of required investments made by Pepco in the distribution system to improve reliability, resiliency, grid modernization, and customer service, the Company must file frequent annual rate cases to begin recovery of its past investments. He concludes in this portion of his testimony that it is critical for the Commission to balance the interests of customers, energy policy, and the utility.³⁸ Although OPC seeks to find some broad, unspecified connection between Pepco's ARM and MRP activities with Exelon and its affiliates, Witness McGowan's testimony from this passage is unrelated to any Exelon affiliates. At best, OPC DRs 32-1, 32-2 and 32-3 speculate on the existence of presentations made to or from the PHI Board of Directors, Exelon Executive Committee, and Exelon Board of Directors, but provides no explanation on how those presentations (assuming their existence) inform, or are relevant to, Witness McGowan's testimony about Pepco's MRP.

19. With regard OPC DRs 32-10 and 32-11, wherein the Office found Pepco's response to DR 11-21, to be inadequate, OPC requested all documents sent to or received from Exelon Utilities concerning the MRP proposed by Pepco. Here, Pepco submitted to OPC the PowerPoint presentations it provided to the Exelon Utilities and provided at stakeholders' workshops, including the Performance-Based Regulation Workshop held on September 19, 2018; Performance Based Regulation Stakeholder Workshops held on October 30, 2018, and January 29, 2019; and the Pepco DC 2019 Multi-year Rate Plan Proposal Stakeholder Workshop held on April 9, 2019.³⁹ Pepco believes this submission to OPC is responsive to the issue of Pepco-related ARM and MRP plans and activities in the District. Pepco asserts in its response to DR 11-21 that the materials submitted to OPC encompassed the totality of presentations in its possession: "Exelon Utilities were provided copies of **all** presentations [Pepco] prepared for the stakeholder workshops."⁴⁰ OPC, on the other hand, posits that, because the Exelon Utilities participated in the review and discussions of its role in developing Pepco's proposed MRP, Pepco was privy to whatever materials concerning ARMs were in the possession of the Exelon Executive Committee, Exelon Board, or Exelon Utilities, without regard as to whether they were prepared for Pepco or another Exelon distribution utility, and thus, are relevant because they relate to the analysis undertaken by Pepco in developing its own MRP.⁴¹

³⁸ *Formal Case No. 1156*, Application, Direct Testimony of Kevin M. McGowan, Pepco Attachment (B) at 21.

³⁹ *See Formal Case No. 1156*, OPC DR 11-21 Attachments A-D.

⁴⁰ *Formal Case No. 1156*, Pepco Response to OPC Data Request No. 11-21 (emphasis added).

⁴¹ Motion to Compel at 2.

20. For the following reasons, we find that the presentation and documents OPC requests to be both speculative⁴² and irrelevant. OPC maintains that its requests go to the analysis undertaken by Pepco in developing its own MRP, and the 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 before the Commission and thus bear on the reasons why Exelon and Pepco designed the proposed MRP in the manner in which they did. However, OPC has not adequately shown how presentations and documents by or from the PHI Board of Directors, Exelon affiliates, including the Exelon Executive Committee, the Exelon Board of Directors, and Exelon Utilities, that Pepco may or may not have in its possession, and reflect issues, alternatives, and strategies that may or may not have been raised and accepted, or raised and discarded, may or may not relate to Pepco's rate case filing and MRP. OPC makes no argument that Pepco's original response to OPC DR 11-21, Attachments A-D, i.e., the Brattle Group Presentations (discussed in paragraphs 3 and 19), was nonresponsive, but implies that Pepco was not fully responsive—that there are additional documents and materials in Pepco's possession—as evidenced by these contested DRs. However, a party's assumption as to the existence of other similar materials is not justification for additional discovery requests that is based on pure speculation.⁴³ In our view, OPC's request is not only overly broad but purely speculative.⁴⁴ As such, we will not allow OPC to conduct what we think constitutes an

⁴² While the scope of discovery is broad, the rule provision regarding limitations on frequency and extent is not a license to engage in an unwieldy, burdensome, and speculative fishing expedition. Fed. Rules Civ.Proc.Rule 26(b)(2), 28 U.S.C.A. See e.g., *Partridge v. American Hospital Management Company, LLC*, 289 F.Supp.3d 1 (2017): District courts should deny a request for delay in ruling on a motion for summary judgment in order to obtain discovery when the discovery sought appears irrelevant, or if discovery would be wholly speculative. See also, *Claude P. Bamberger Intern., Inc. v. Rohm and Haas Co.*, 40 Fed.R.Serv.3d 667 (1998), Wherein, Plaintiff Bamberger sought very broad discovery in an effort to prove its claims, including basically every business and financial record of Resin and Blyth, without regard to whether they were related to facts underlying Plaintiff's claims, and for periods well before the controversy began to brew. During hearings, the presiding judge explained that the requests were overbroad. He also stated that he would not order such broad discovery on Plaintiff's mere speculation, and asked Plaintiff for any facts to support its theories. When Plaintiff failed to do so, Judge Cavanaugh denied most of the discovery requests.

⁴³ See *Hubbard v. Potter*, 247 F.R.D. 27 (2008): Courts supervising discovery are often confronted by the claim that the production made is so paltry that there must be more that has not been produced[.] Speculation that there is more will not suffice; if the theoretical possibility that more documents exist sufficed to justify additional discovery, discovery would never end. *Accord Peskoff v. Faber*, 244 F.R.D. 54 (D.D.C. 2007) (holding that additional discovery of electronically stored communications was warranted where 1) plaintiff testified of his frequent use of e-mail as a means of communication, 2) there was in existence one such e-mail, and 3) the previous search produced curious results); *Ameriwood Indus., Inc., v. Liberman*, No. 06-CV-524, 2006 WL 3825291, at *3 (E.D. Mo. Dec. 27, 2006) (holding that plaintiff's production of a responsive e-mail justified the inference that other responsive e-mails existed).

⁴⁴ See *Amcast Indus. Corp. v. Detrex Corp.*, 138 F.R.D. 115, 121 (N.D. Ind. 1991) (denying as overbroad a discovery request seeking "all writings relating to ... any clean-ups, 'removal' actions ... 'remedial action' ... remedial investigation or feasibility study involving [Defendant], regardless of whether the circumstances surrounding such action would bear any similarity to the subject matter of this case."); *Zahorik v. Cornell Univ.*, 98 F.R.D. 27, 31 (N.D.N.Y. 1983) ("[Plaintiffs] may not, however, conduct a general 'fishing expedition' into areas unrelated to their claims ..."). Also, "discovery is not intended as a fishing expedition permitting the speculative pleading of a case first and then pursuing discovery to support it; the plaintiff must have some basis in fact for the action." *Zuk v. Eastern Pa. Psychiatric Inst. of Med. College of Pa.*, 103 F.3d 294, 299 (3d Cir. 1996); see also *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1326 (Fed. Cir. 1990)

impermissible fishing expedition into the world of Exelon's prior alternative ratemaking activities with its affiliates.

21. We note that in *Formal Case No. 1119*, the District Government sought information, including analyses, regarding proposed acquisitions of any gas or electric company by Exelon or Pepco Holdings, as well as documents relating to proposed acquisitions of Pepco Holdings. Even though the District Government presented several arguments regarding the relevance of such documents in *Formal Case No. 1119*, the Commission found that it was unlikely that details of mergers that did not occur would be likely to elicit discovery of admissible evidence or information that would be relevant to the Pepco/Exelon merger. Further, the Commission found that comparison of the Exelon/Pepco merger with any proposed mergers would be "speculative at best."⁴⁵ Thus, the Commission denied the District Government's data requests seeking information about potential mergers.

22. Similarly, in *Formal Case No. 1024*, the Commission found that the opposing party had no right to know the alternatives Verizon Washington, D.C. Inc. considered or might be considering that differed from what was actually filed and under review at the Commission because it intruded upon privileged communications. Pepco argues in the instant case that 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.⁴⁶ Here, OPC has not persuaded the Commission that we should not treat its DRs in the same fashion and we find that evaluation and/or comparisons of Pepco's proposed ARM with ARMs proposed by Exelon and its affiliates in other jurisdictions would be speculative as well and not elicit discovery of admissible evidence or information that would be relevant to this proceeding.⁴⁷ Although the inquiries may produce information about other jurisdictions' potential ARMs, that information would be unique to those jurisdictions based on their regulatory schemes, policies, and goals.⁴⁸ Consequently, we find that the requested discovery would result with little or no probative value.

⁴⁵ *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction*, Order No. 17619, ¶ 27, rel. September 4, 2014.

⁴⁶ See Opposition at 2. See also *Formal Case No. 1024, In the Matter of the Implementation of the Triennial Review Order in the District of Columbia*, Order No. 13049 at 32, rel. Jan. 26, 2004. In Order No. 13049, the Commission held that Verizon did not have to disclose to the opposing party alternatives it considered or might be considering that differed from what was filed, similar to what Pepco is arguing in this case.

⁴⁷ *Formal Case No. 1119*, Order No. 17619, ¶ 27 (evaluation and/or comparison of proposed merger with other "proposed" mergers would be speculative at best).

⁴⁸ In *Formal Case No. 1142*, The District Government filed a Motion to Compel seeking in a data request contracts between Greensmith Energy and AltaGas with respect to the Pomona Energy Storage Facility project. The Commission denied the Motion to compel production of the contracts on relevance grounds. The Commission stated that the District Government sought contracts between AltaGas and one of its contractors on the Pomona Facility apparently to contradict AltaGas' arguments regarding its role in developing the Pomona Facility. The Commission found that even if the contracts proved the District Government's assertion, it was unable to show how AltaGas' role (or lack thereof) in developing the Pomona Facility had any bearing on an issue in dispute. *Formal Case No. 1142, In the Matter of the Merger of AltaGas Ltd. and WGL Holdings, Inc.*, Order No. 19197, rel. December 1, 2017.

23. Moreover, we note that OPC has failed to rebut Pepco's general claims of privilege, specifically the attorney/client privilege⁴⁹ and attorney work product privilege,⁵⁰ in order to have the requested documents and materials produced. Plainly, we accept that in Pepco's response to DR 11-21, it has provided all the presentations in its possession with regard to the development of its ARM and MRP and, by the nature of its response, does not have in its possession ARMs and MRPs from the Exelon affiliates. Lastly, we add that much of the information OPC seeks regarding the alternative regulatory plans of Exelon and its affiliates are available in the public domain and are accessible by researching other jurisdictions' public proceedings. We note "Exelon Utilities Annual Across the Fence Report For Year 2018" which contains a table (5.2) which presents the adjustment mechanisms and alternative ratemaking mechanisms for Exelon utilities and a number of comparable electric utilities that have been authorized through rate cases or other regulatory proceedings.⁵¹ We are not persuaded that OPC's broadly stated requests for information from Pepco about Exelon, and its affiliates, on matters that may or may not have been

⁴⁹ A party asserting the attorney-client privilege bears the burden of showing: "(1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice." *United States v. Construction Prod. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (citations omitted); *see also In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036 (2d Cir. 1984). The privilege "exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable [the lawyer] to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Thus, a client's communication with an attorney is protected under the attorney-client privilege as long as the above-mentioned elements are met. *United States v. Louisville & Nashville Railroad Co.*, 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L. Ed. 598 (1915).

⁵⁰ The work-product privilege is, as the Supreme Court has recognized, more broad than the attorney-client privilege. *See, e.g., In re Grand Jury Proceedings*, 219 F.3d 175, 190 (2d Cir. 2000) (*citing Hickman*, 329 U.S. at 508, 67 S.Ct. 385, 91 L.Ed. 451, and *United States v. Nobles*, 422 U.S. 225, 238 n. 11, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)). This privilege exists to protect "attorneys' mental impressions, opinions or legal theories concerning specific litigation" from discovery. *Horn & Hardart Co. v. Pillsbury Co.*, 888 F.2d 8, 12 (2d Cir.1989). Federal Rule of Civil Procedure 26(b)(3), which codifies the principles articulated in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), grants limited protection against discovery to documents and materials prepared "in anticipation of litigation."

⁵¹ The Commission notes that a good starting point for research would be to review the filings pursuant to *Formal Case No. 1119*, Order No. 18148, ¶ 108, rel. March 23, 2016, where PHI and Exelon are required to file an annual "Across the Fence" Report ("Report") which compares the performance status of the utilities within the Exelon family. For example, Section 5 of the Report discusses the rate cases filed by Exelon Utilities with regulatory commissions in the District, Maryland, Delaware, New Jersey, Pennsylvania and Illinois, seeking changes to rates and other terms of their electric transmission, distribution and gas distribution (if applicable) service, in order to recover their costs and earn a fair return on their investments. The Report states that the outcomes of these regulatory proceedings impact the utilities' current and future results of operations, cash flows and financial position. The tables included in the Report provide a comparison of the jurisdictional requirements for rate cases in the operating areas of the Exelon Utilities (Table 5.1a) as well as the distribution rate case activity for the Exelon Utilities as of year-end 2018 (Table 5.1b). Table 5.2 referenced above, examines alternative regulation/incentive plans of numerous utilities including Exelon companies in categories such as, Formula-Based Rates, Performance Based Ratemaking, Future Test Year Allowed in Jurisdiction, Price Freeze/ Cap, Earnings Sharing, Formula Based ROE, Service Quality/ Performance, and Merger Savings. Table 5.3 discusses Rate Design for Pepco DC, Pepco Maryland, Delmarva Power Maryland, Delmarva Power Delaware, ACE, BGE, PECO, and ComEd. Section 8 of the Report discusses the deployment of new technologies, including smart meters (also known as automated metering infrastructure or AMI), distribution automation, microgrids, electric vehicles and energy storage among the Exelon affiliates. *See Formal Case No. 1119*, Exelon Utilities Annual Across the Fence Report (For Year 2018), filed July 1, 2019.

filed, proposals that may not have been made, and decisions made in other jurisdictions are relevant to Pepco's MRP proposal that is currently before this Commission. Therefore, the Motion to Compel is denied.

THEREFORE, IT IS ORDERED THAT:

24. The Office of the People's Counsel's Motion to Compel the Potomac Electric Power Company to provide responses to the Office of the People's Counsel Data Request Nos. 32-1, 32-2, 32-3, 32-10, and 32-11, is **DENIED**.

A TRUE COPY:

BY DIRECTION OF THE COMMISSION:

A handwritten signature in black ink, reading "Brinda Westbrook-Sedgwick". The signature is written in a cursive, flowing style.

CHIEF CLERK:

**BRINDA WESTBROOK-SEDGWICK
COMMISSION SECRETARY**