

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION )  
OF DELMARVA POWER & LIGHT )  
COMPANY, EXELON CORPORATION, )  
PEPCO HOLDINGS, INC., PURPLE )  
ACQUISITION CORPORATION, EXELON ) PSC DOCKET NO. 14-193  
ENERGY DELIVERY COMPANY, LLC AND )  
NEW SPECIAL PURPOSE ENTITY FOR )  
APPROVALS UNDER THE PROVISIONS OF )  
26 DEL. C. §§ 215 and 1016 (Filed June 18, )  
2014) )

**JOINT APPLICANTS' REPLY IN SUPPORT OF  
MOTION TO AMEND THE SCHEDULING ORDER**

The Joint Applicants, by and through undersigned counsel, submit this reply in further support of their Motion to Amend the Scheduling Order, filed February 13, 2015 (the "Motion").

In support of the Motion, the Joint Applicants state as follows:

1. During a status conference call with Senior Hearing Examiner Mark Lawrence conducted on February 12, 2015, counsel for the Joint Applicants advised that the Joint Applicants had negotiated an agreement in principle for the settlement of this matter with the Public Service Commission's Staff ("Staff"), the Division of the Public Advocate (the "Public Advocate"), and four intervenors, the Delaware Department of Natural Resources and Environmental Control ("DNREC"), the Delaware Sustainable Energy Utility (the "SEU"), Mid-Atlantic Renewable Energy Coalition ("MAREC"), and the Clean Air Council ("CAC").

2. On February 13, 2015, the Joint Applicants filed the Motion together with a Settlement Agreement (the "Settlement Agreement") among the Joint Applicants, Staff, the Public Advocate, DNREC, the SEU, MAREC and CAC (collectively the "Settling Parties"). In the Motion, the Joint Applicants propose to adjourn the evidentiary hearings that had been

scheduled for February 18 through February 20, 2015, and to schedule a hearing on the proposed settlement for April 21, 2015, a date that is already on the Commission's calendar for a meeting.

3. The Settlement Agreement is subject to approval by the Commission.

Accordingly, the Joint Applicants in the Motion proposed a new hearing date so that the parties could prepare a presentation that focuses on the Settlement Agreement and its terms, and so that parties opposing the approval of the Settlement Agreement are afforded an adequate time to review the proposed settlement and prepare for a Commission hearing.<sup>1</sup> As noted in the Motion, all of the Settling Parties agreed to the proposed adjournment of the hearing and the proposal for a new hearing to consider the Settlement Agreement entered into by the Settling Parties. Motion ¶ 8.

4. On February 16, 2015, intervenor Jeremy Firestone filed a response to the Motion (the "Response"). In his Response, Professor Firestone requests that the Motion be denied in part and that a hearing on the proposed settlement be set for June 16, 2015, or later. The basis for Professor Firestone's request to reschedule the hearing on the settlement in mid-June or later is that Professor Firestone has travel plans in March, April, May and the first part of June.<sup>2</sup> Professor Firestone implies that such travel commitments would prevent him from participating in person in a hearing on the settlement. Response ¶¶ 12-13. Professor Firestone argues that he would be prejudiced unless the hearing is postponed until June 16 or later.

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<sup>1</sup> There are four intervenor parties to this docket that have not yet taken a position on the proposed Settlement Agreement – (1) Monitoring Analytics, LLC, as the Independent Market Monitor for PJM; (2) NRG Energy Inc.; (3) Chesapeake Utilities Corporation; and (4) James Black, Executive Director for the Partnership for Sustainability in Delaware.

<sup>2</sup> The Joint Applicants were informed of Professor Firestone's scheduling issues for the first time when he filed his Response to the Motion on February 16, 2015. Although Professor Firestone participated in the status conference call with Hearing Examiner Lawrence on February 12, 2015, he made no mention of his scheduling issues during that call. Moreover, he raised no issue concerning his schedule even though counsel for the Joint Applicants specifically referenced the Commission's two previously planned April meeting dates (April 7 and April 21) as alternative dates for a hearing on the proposed settlement.

5. The Motion should be granted notwithstanding Professor Firestone's Response because: (a) Professor Firestone has not established that he is unable to participate in an April 21 hearing as proposed for the settlement in the Motion; and (b) even if it were true that Professor Firestone cannot participate in person on April 21, it would be consistent with due process to accept Professor Firestone's testimony and position in writing, or in the Commission's discretion, to allow him to participate in the hearing by telephone or other remote technology.

6. First, although Professor Firestone's pending travel plans would make his in person participation in a settlement hearing on April 21, 2015, more difficult, his Response does not explain why Professor Firestone cannot simply take several days away from his nine-week trip to China and return to Delaware if he strongly desires to participate in the hearing in person. The Joint Applicants concede this would be an inconvenience; however, it would not be an insurmountable inconvenience. Nor is it an inconvenience created in any way by the Joint Applicants or any of the other Settling Parties. In essence, Professor Firestone requests that this Commission sit on its hands for three months because of one intervenor's self-created scheduling limitations. Such a request should be rejected.

7. Further, to the extent that Professor Firestone's Response is read to suggest that some notion of "due process" requires that he participate in a live hearing on the proposed settlement, the Response is mistaken. Due process simply does not guarantee Professor Firestone an entitlement to appear live and in person before the Commission on the date of his choosing. Professor Firestone has the opportunity to submit testimony or argument in writing to the Commission. Due process principles are satisfied where a party is afforded the "opportunity to present, in person or in writing, why [a] proposed action should not be taken..." *In re The New Maurice J. Moyer Academy, Inc.*, C.A. No. 10398-CB, 2015 Del. Ch. LEXIS 7 at \* 57 (Del. Ch.

Jan. 9, 2015), citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1976) (emphasis added). There is not, as Professor Firestone supposes, some inviolate right to appear in person, present live testimony and cross-examine whatever witnesses one chooses. See *New Maurice J. Moyer Academy*, 2015 Del. Ch. LEXIS 7 at \*60-\*61 (rejecting contention by charter school sponsors that the Due Process Clause required that they be entitled to “formally introduce evidence, to examine witnesses, or to make argument in a trial-like proceeding”). The fact that Professor Firestone has the opportunity to submit his testimony and objections to the proposed settlement in writing is more than adequate to meet due process requirements.<sup>3</sup>

8. In addition, the Commission has the option to consider alternative means for Professor Firestone to participate in the proposed hearing, if travel back to Delaware to attend in person presents a hardship for him. For example, Professor Firestone could arrange to participate by telephone, videoconference or by Skype, as counsel for Staff apparently suggested. Response ¶ 7. Should the Commission elect to hear Professor Firestone by remote means, that would alleviate any arguable concerns about the scope and extent of Professor Firestone’s participation. Indeed, due process does not require in person participation in a proceeding when other means of participation are available. See *In re Termination of Parental Rights (Heller)*, 699 A.2d 25, 32 (Del. 1995) (Supreme Court rejects challenge by parent who claimed that her rights were violated because she was limited to participating in termination of parental rights hearing by telephone, due to the parent’s incarceration). Surely, Professor Firestone’s interest in

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<sup>3</sup> In advance of the evidentiary hearings, the Joint Applicants and other parties were prepared to stipulate to the admission of Professor Firestone’s pre-filed direct testimony. The Joint Applicants expect that the parties would similarly stipulate to the admission of Professor Firestone’s written testimony related to the Settlement Agreement if Professor Firestone decides not to attend in person. Therefore, his testimony will be a part of the record and can be fully considered by the Commission in determining whether the Settlement Agreement is in the public interest.

this proceeding can be expressed with written objections to the proposed settlement, together with telephonic testimony should the Commission elect to authorize it.

9. Finally, Professor Firestone's claim that he would be prejudiced must be balanced against the fact that the Settling Parties have submitted a proposed resolution of this docket, and Delaware law favors voluntary settlements. 26 *Del. C.* § 512. The narrow issue before the Commission is whether the settlement, taken as a whole, is in the public interest. 26 *Del. C.* § 512(c).<sup>4</sup> A hearing to consider the settlement necessarily is more limited and narrow than a fully litigated evidentiary hearing on the Joint Applicants' Application. *See Constellation New Energy, Inc. v. Public Serv. Comm'n*, 825 A.2d 872, 881-882 (Del. Super. 2003) (discussing policy favoring settlements). Therefore, any prejudice that Professor Firestone claims he suffers will be minimized by the fact that the proceedings now relate to a narrowly focused issue and Professor Firestone's position on the Settlement Agreement can be presented in writing to the Commission if he is unable to participate in the settlement hearing in person.

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<sup>4</sup> Significantly, the Settlement Agreement has the support of Staff and the Public Advocate (which is statutorily authorized to represent ratepayer interests), as well as the support of DNREC (the State agency entrusted with supervision of State policy with respect to environmental matters), the SEU (a public agency authorized to advance the State's interests in energy efficiency and related matters), MAREC (which advocates for wind energy development) and the CAC (an environmental advocacy group). The policy interests of DNREC, MAREC and the CAC closely align with the interests Professor Firestone identified to support his intervention in this docket, including concerns about the environment and climate change, and support for renewable energy. *See* Petition for Intervention of Jeremy Firestone (July 27, 2014) at ¶¶ 5-11, 17, 25-26, 31. Professor Firestone may be heard concerning his disagreement with the Settlement Agreement. However, his Response almost proceeds from an assumption that Professor Firestone's view of the public interest is the only one that matters. That of course is not the case. Professor Firestone can be heard; he is not entitled to the last word or only word on whether the proposed settlement is in the public interest.

## CONCLUSION

For the reasons stated above, and those stated in the Motion, the Joint Applicants respectfully request that the Commission adjourn the evidentiary hearings scheduled for February 18 through 20, 2015, and order a hearing on the proposed Settlement Agreement to take place at the Commission's previously scheduled meeting on April 21, 2015.

DRINKER BIDDLE & REATH LLP

/s/ Thomas P. McGonigle  
Thomas P. McGonigle (I.D. No. 3162)  
Joseph C. Schoell (I.D. No. 3133)  
222 Delaware Avenue, Suite 1410  
Wilmington, Delaware 19801  
Tel: (302) 467-4200  
Fax: (302) 467-4201  
Thomas.McGonigle@dbr.com  
Joseph.Schoell@dbr.com

*Counsel for the Joint Applicants*

February 17, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of February, 2015, the following document was e-mailed to the recipients identified on the Service List (see

<https://delafile.delaware.gov/Global/AdvanceSearch.aspx>, last visited February 17, 2015):

- *Joint Applicants' Reply in Support of Motion to Amend The Scheduling Order*

DRINKER BIDDLE & REATH LLP

/s/ Thomas P. McGonigle  
Thomas P. McGonigle (I.D. No. 3162)  
Joseph C. Schoell (I.D. No. 3133)  
222 Delaware Avenue, Suite 1410  
Wilmington, Delaware 19801  
Tel: (302) 467-4200  
Fax: (302) 467-4201  
[Thomas.McGonigle@dbr.com](mailto:Thomas.McGonigle@dbr.com)  
[Joseph.Schoell@dbr.com](mailto:Joseph.Schoell@dbr.com)

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