

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

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

JEREMY FIRESTONE'S PETITION FOR INTERLOUCTARY REVIEW

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Intervenor Jeremy Firestone hereby Petitions the Commission for Interlocutory Review of Senior Hearing Examiner (HE) Mark Lawrence's Order 8637 regarding Motions to Compel.

Statement of Case

1. Former Delaware Public Service Commission Executive Director Bruce Burcat observed:

This merger docket could likely be the most transformational case affecting the energy landscape in Delaware, since ... 2002. In actuality, ...this merger will have ... far greater consequences to the electricity market ... given the breadth and size of the merger and the potential control.... (Ex. 1¹).

Despite this, the HE is proceeding with more concern for his workload and minimizing the costs the Joint Applicants (JAs) may incur than he is with the Commission having a complete record to establish whether or not the merger is for a proper purpose and consistent with the public interest. I have filed two discovery requests that primarily relate to Exelon's positions regarding renewable energy (and in particular development of new renewable energy capacity) and nuclear energy, and how Exelon's large nuclear fleet's economic performance influences how Exelon approaches these questions. The way in which Exelon approaches these questions has implications for Delaware policy addressing renewables and externalities. Exelon's CEO refers to an "overbuild" of wind, Ex. 15, p. 11, and Exelon considers RPS laws as a "market and financial risk," *id.* at pp. 8-9, 13, and

¹ Exhibits are provided in a separate file and indexed for the convenience of the Commissioners.

opposes the production tax credit (PTC) for wind (id. at 12, 15). Not only may Exelon's private interests affect whether public policies are extended, modified or repealed, but as well (a) the cost of renewables to ratepayers; (b) the cost of RECs and SRECs to ratepayers; and (c) whether the REC cost caps are exceeded. Should Exelon's actions result in REC prices increasing by only \$2/MWh, it will take less than 3 years to wipe out the proposed upfront payment. The task of establishing these facts is made difficult because the HE ignores law, endorses breaches of discovery agreements, engages in a tag-team with the JAs, protecting them from discovery, seeks to cripple me from engaging in further discovery, and threatens to banish me from the case. Extraordinary circumstances thus necessitate a prompt decision by the Commission to prevent substantial injustice and detriment to the public interest.

Summary of Jeremy Firestone's Position

2. The Commission should vacate Order 8637, grant my Motion for Reconsideration of Order 8624, and then vacate Order 8624. The JAs in turn should be ordered to comply with discovery. Finally, the Commission should remove HE Lawrence and appoint a new HE.

Grounds Supporting Interlocutory Appeal

3. In Order 8603 I was granted intervention without limitation. Ex. 2
4. On July 31, I timely filed my first discovery request on the JAs. Ex. 3.
5. Given the tight discovery schedule, the Scheduling Order (¶3a), attached to Commission Order 8616, Ex. 4., provides that any blanket objection had to be filed within 7 calendar days; other objections, where a party still intended to provide a substantive response, could be filed with answers on August 20. As a result, if a categorical objection was not filed to a given request (e.g., sub-interrogatory) by August 7, the JAs had no choice but to provide a substantive answer to that request.
6. On August 6, the JAs and I reached the following agreement: Some discovery requests would be withdrawn, others modified; in turn, the JAs agreed not to file any blanket objections to the remaining or modified requests, including all subparts. Ex. 5.
7. On August 20, the JAs filed their answer. The JAs however breached the agreement and

- violated the Scheduling Order. In numerous instances, the JAs failed to respond to a sub-interrogatory (correctly identified by the HE as a separate discovery request) or a sub-production of documents request; others were non-responsive. Ex. 6.
8. Rather than producing private documents, the JAs mostly directed me to the web.
 9. On August 27, 2014, the HE issued Order 8624 endorsing the JAs violations and breach, doing so based on two gross errors. Ex. 7. The HE ignored his own Scheduling Order (Ex. 4), and held the JAs had until August 20 rather than August 7 to make a blanket objection (§ 11-12). He also applied an objection specific to 3 discovery requests to all requests.
 10. Delafile did not provide notice when Order 8624 was issued. Rather, I learned of it during a scheduling conference on September 8. This should not have been a surprise to the HE as the day before, August 26, we received a Staff email (Ex. 8), attaching another Order (8621), and indicating that, “Mr. Lawrence did not realize that the Delafile system was not emailing the parties in this docket when he filed the Order.” Staff did not provide similar notice of Order 8624. It was only on August 29, that Delafile began to provide me with notice. Ex. 9. Given the HE’s gross errors, I filed a Motion for Reconsideration that same day. Ex. 10.
 11. Apparently embarrassed by his legal analysis in Order 8624, HE Lawrence lashed out, sending an email to some 60 persons, and in a stunningly inappropriate manner chastised the PSC staffer for having emailed the earlier order (speaking on his behalf) and expressed puzzlement at my “claimed confusion.” See Ex. 11. While the parties recognize the importance of the docket and the problems with Delafile, and provide courtesy email copies to one another, HE Lawrence trivializes the docket, telling parties to check Delafile multiple times each day to see if he has issued an order. The HE’s behavior here is not isolated, but finds expression in other forms, such as in his failure to appreciate the crucial role of the Public Advocate in the docket and his belittling treatment of its counsel on scheduling.
 12. On September 11, in opposition to reconsideration (Ex. 12), the JAs disingenuously argued that I should have known of Order 8624. In so doing, the JAs deliberately failed to inform the HE that they also did not have actual notice. Indeed, two days earlier Todd Goodman

- stated: “We were unaware of the order until yesterday when it was discussed during the conference call, Jeremy. We probably had the same look on our faces as you did.” Ex. 13.
13. HE Lawrence issued Order 8637 (Ex. 13) on September 17 (although given a further Delafle problem I did not receive electronic notice until after 10 pm that evening). In pertinent part, HE Lawrence adopted the JA’s disingenuous and deceptive notice argument as his own, thus allowing him to paper over the gross errors in his earlier order. Id at ¶13.
 14. On August 29, given the difficulties noted above, I tried a different approach with my 2nd discovery request, focusing on requests for admissions, but also including interrogatories and document requests (Ex. 14). On September 3, the JAs filed “blanket” objections. I then filed a timely 2nd Motion to Compel (Ex. 15) on September 5. Under the Scheduling Order the HE was to issue a decision on my Motion on September 10, but he failed to do so. Ex. 4.
 15. Rather than issue a timely decision on the Motion, the HE deferred to the JAs on briefing, inviting the JAs to advise him regarding briefing. The JAs informed the HE that they “intend to respond ... on September 15,” which was accepted by the HE without discussion. Ex. 16.
 16. On September 12, the JAs filed their responses to my 2nd discovery request, picking and choosing how and when to respond based on whether or not they believe obfuscation or clarity is in their interests. Compare e.g.: (a) Response to Admission (RFA) 2, where the JAs make an admission regarding “market-based” approaches to RFA 19, where they are unable to admit or deny because “market-based” is “vague and ambiguous”; (b) RFA 57, admitting the Nuclear PTC is a “non-market based” approach, while objecting to RFA 21 because that discovery request does not define the phrase “non-market transmission”; and (c) RFA 58 and 63, admitting the nuclear PTC and accelerated depreciation are subsidies and RFA 55, denying that Exelon supports subsidization of nuclear power to RFA 3, objecting to the term “subsidies” as “vague and ambiguous ... because that term is not defined.” Ex. 17.
 17. The JAs did not answer other requests, claiming, e.g., that “private commercial interests” (RFA, 10), “fiduciary obligations to shareholders,” (RFA, 12), “in the best interest of Exelon’s shareholders” (RFA 40), “environmental impacts” (RFA, 69), “wind power” (RFA

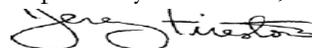
34), “fair market value” (RFA, 67), and even the words “advantage” (RFA 65) and “supports” (RFAs 74, 76 and 77) are “vague and ambiguous.” Ex. 17.

18. Further, in their September 15 opposition to the 2nd Motion to Compel, the JAs stoop to mocking (Ex. 17. ¶33), contenting that interrogatory 35 is “ridiculous” as “it is obvious to anyone (except perhaps Mr. Firestone)” that the JAs acknowledge Commission authority when, as the JAs know, I simply inquired about a statement made by JA’s expert witness, Dr. Tierney (direct testimony, p. 7) who claimed the ratepayers were advantaged by the same.
19. In Order 8637 (Ex. 13), despite the JAs inconsistencies in their responses, calculated ignorance, complete failure to provide some discovery responses and failure to provide privilege logs, HE Lawrence upheld “every one” of the JAs objections ((¶ 11 and 11c). The HE appears bothered by having a zealous advocate before him and is more concerned about his workload and costs that may be incurred by the JAs (¶ 11) to respond to 224 discovery requests combined, 1st and 2nd Firestone discovery requests (¶ 4) (while neglecting that Staff served 389 requests in its 1st request alone; Staff has been delayed by a couple of its own Motions to Compel), than he is with a fair evaluation of whether or not the merger is for a proper purpose and consistent with the public interest.
20. Not only has HE Lawrence engaged in a discovery tag-team with the JAs to date (and been overly concerned with their financial well-being), in retribution, he has sought to neuter me in the discovery process going forward and threatened me with expulsion. Order 8637, ¶ 11.

WHEREFORE, for the reasons set forth above, Jeremy Firestone requests the Commission to:

1. Vacate Orders 8624 and 8637;
2. Order the Joint Applicants to answer fully each discovery request, including produce the withheld documents and privilege logs; and
3. Remove the Senior Hearing Examiner Mark Lawrence and appoint a substitute.

Respectfully submitted,



Jeremy Firestone
September 22, 2014