

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) PSC DOCKET NO. 14-193
ACQUISITION CORPORATION, EXELON)
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’ ANSWER TO INTERVENOR
JEREMY FIRESTONE’S SECOND INTERLOCUTORY APPEAL**

The Joint Applicants respectfully oppose the interlocutory appeal filed by Intervenor Jeremy Firestone on October 6, 2014 (the “Appeal”), stating as follows:

BACKGROUND

1. This docket concerns an application for approval of a merger of Pepco Holdings, Inc. (“PHI”), and Exelon Corporation (“Exelon”), filed June 18, 2014 (the “Application”). On July 8, 2014, the Commission designated Senior Hearing Examiner Mark Lawrence to serve as the Hearing Examiner for this matter. Order No. 8581 ¶ 2. Order No. 8581 expressly empowers the Hearing Examiner to grant or deny petitions for intervention and to “monitor and resolve discovery disputes among the parties.” *Id.* On August 5, 2014, the Hearing Examiner granted Mr. Firestone’s petition for intervention and the intervention applications of eight other interested parties. Order No. 8603.

2. Upon being admitted to this proceeding as an intervenor, Mr. Firestone embarked on a campaign of serving the Joint Applicants with harassing discovery requests and following them up with unfounded motions to compel. The discovery requests proffered by Mr. Firestone were riddled with improper and objectionable inquiries and sought plainly irrelevant information, or were framed in a

manner to unduly burden the Joint Applicants. Although the Joint Applicants responded to many of Mr. Firestone's requests, they objected to certain requests. Mr. Firestone filed two separate motions to compel with the Hearing Examiner (as well as a motion for reconsideration of the denial of his first motion to compel). The Hearing Examiner substantially denied Mr. Firestone's motions, entering Order No. 8624 and Order No. 8637. In Order No. 8637, the Hearing Examiner recognized the vexatious nature of Mr. Firestone's discovery conduct, and accordingly limited Mr. Firestone's further discovery in the docket. Among other things, Order No. 8637 limited Mr. Firestone's further discovery of the Joint Applicants, but clarified that "Mr. Firestone may attend any depositions held in this docket." Order No. 8637 ¶ 11(d) (emphasis added). Mr. Firestone sought interlocutory review of Order No. 8637. The Commission denied Mr. Firestone's appeal at its hearing held September 30, 2014.

3. On October 2, 2014, the Hearing Examiner entered Order No. 8638 related to depositions. Recognizing the unique statutory powers of the Commission's Staff and the Division of the Public Advocate ("DPA"), the Hearing Examiner directed that Staff or DPA counsel serve as lead counsel for the depositions of the Joint Applicants' witnesses. Order No. 8638 ¶¶ 3-5. Further, in accordance with the agreement of counsel for Staff, the DPA and the Joint Applicants, the Hearing Examiner directed the parties to "attempt to complete" the depositions of three high level executives ((a) Exelon's President and Chief Executive Officer, (b) PHI's Chairman, President and Chief Executive Officer, and (c) Exelon Utilities' Chief Executive Officer) within four hours for each witness. Order No. 8638 ¶ 2. Finally, with respect to the intervenors, the Hearing Examiner stated that any intervenor could attend, but only Delaware counsel for an intervenor could ask questions. Deposition questioning would be limited to 15 minutes per intervenor. Order No. 8638 ¶¶ 8, 10.

4. On October 6, 2014, Mr. Firestone filed his second interlocutory appeal petition, requesting that the Commission vacate Order No. 8638. The pending Appeal should be denied in its

entirety, on the grounds that (a) Order No. 8638 does not even apply to Mr. Firestone in light of the prior Order No. 8637, and (b) even if it did, there is not, as Mr. Firestone asserts, a “due process” right to take or participate in pre-hearing depositions and the conduct of depositions (like all discovery) may properly be limited in the discretion of the Hearing Examiner.

ARGUMENT

5. As noted above, in Order No. 8637, the Hearing Examiner recognized Mr. Firestone’s abusive conduct of discovery, and limited the discovery that Mr. Firestone would take going forward. Notably, the Order indicated that Mr. Firestone “may attend any depositions held in this docket.” Order No. 8637 ¶ 11(d) (emphasis added). Mr. Firestone was not permitted to question witnesses; rather, as to the Joint Applicants, Mr. Firestone’s discovery is limited to submitting requests for admission that are directed at issues of disputable fact and that are reasonable in number. Order No. 8637 ¶ 11(b), (e). Insofar as Mr. Firestone brings the pending Appeal seeking the authority to question the Joint Applicants’ witnesses for an unlimited amount of time, Order No. 8637 already precludes such questioning, and the Commission has already declined to entertain an interlocutory appeal of that Order. Since Mr. Firestone is not permitted to do anything other than attend the depositions of the Joint Applicants’ witnesses, his planned question of the Joint Applicants’ deponents was barred before Order No. 8638 was entered. On that basis alone, his pending Appeal should be denied.

6. Mr. Firestone’s current Appeal proceeds from the unsupported claim that “due process” requires that there be depositions taken in this docket, and indeed, that the Hearing Examiner may not limit the time allowed for depositions or the scope of participation in depositions by the intervenors. Each of the premises for Mr. Firestone’s argument is false.

7. Simply put, there is no “due process” right for pre-hearing depositions in any administrative proceeding, including proceedings before this Commission. *See, e.g., Avalon Precision*

Castling Co. v. Indus. Comm. of Ohio, 2007 U.S. Dist. LEXIS 85362 at *23 (N.D. Ohio Nov. 15, 2006) (rejecting claim that there exists a due process right to take depositions in administrative cases); *Trust Ins. Co. v. Comm. of Insurance*, 724 N.E.2d 717, 722-723 (Mass. App. 2000) (upholding Insurance Commissioner's refusal to authorize pre-hearing discovery for administrative proceeding, despite constitutional due process claims); *LTV Steel Co. v. Indus. Comm. of Ohio*, 748 N.E.2d 1176, 1184 (Ohio App. 2000) (employer had no constitutional right to take pre-hearing depositions in advance of workers' compensation hearing, although rules permitted depositions); *Chelsea Community Hosp. v. Michigan Blue Cross Ass'n*, 436 F. Supp. 1050, 1059 (D. Mich. 1977) (due process did not require pre-hearing depositions for administrative proceedings under federal Medicare law); *National Labor Relations Bd. v. Valley Mold Co., Inc.*, 530 F.2d 693, 695 (6th Cir. 1976) (rejecting claim of due process entitlement to pre-hearing depositions).

8. That equal participation in depositions by all parties and intervenors is not constitutionally required is underscored by the fact that, prior to the pending case – to the Joint Applicants' knowledge – depositions have never been requested or taken in connection with any Commission proceeding. For instance, no depositions were sought or taken with respect to Delmarva Power's acquisition of Atlantic City Energy or with respect to PHI's acquisition of Delmarva Power and related companies.

9. The Commission's Rules of Practice and Procedure authorize depositions and other pre-hearing discovery. 26 Del. Admin. Code § 1001-2.6.1. However, under the Rules, the Hearing Examiner "...may vary discovery provisions, in the interests of justice..." 26 Del. Admin. Code § 1001-2.6.4. Further, the Commission's Rules authorize the Hearing Examiner to place reasonable terms and conditions of participation by intervenors. 26 Del. Admin. Code § 1001-2.9.4. *See also* Del. Super. Civ. R. 30(d)(2) (granting Court authority to limit time to conduct deposition). As applied here, it is

completely within the discretion of the Hearing Examiner to place appropriate limits on discovery by intervenors. It is appropriate that Staff and DPA be designated a lead status (in light of their special statutory functions), and that deposition participation by intervenors be limited as ordered by the Hearing Examiner, given that intervenors by definition have a more limited interest and more limited role in the proceedings. *See, e.g., In re Chesapeake Utilities Corp.*, Dkt. No. 07-186, 2007 Del. PSC LEXIS at *3 (Del. 4, 2007) (directing the Hearing Examiner to disallow discovery by intervenor that is “unrelated to its interest in the case or is otherwise unduly burdensome”).

CONCLUSION

For the reasons stated above, the Joint Applicants respectfully request that Mr. Firestone’s Second Interlocutory Appeal be denied in its entirety and dismissed.

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October 8, 2014

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CERTIFICATE OF SERVICE

I, hereby certify that on this 8th day of October, 2014, that the within document was filed with the Public Service Commission, via DelaFile and mailed to:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, DE 19904

I further certify, on this same date, I e-mailed a copy of the same to all of the recipients identified on the Service List. See <https://delafile.delaware.gov/Global/AdvanceSearch.aspx> (last visited October 8, 2014).

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