

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

IN THE MATTER OF THE APPLICATION OF )  
DELMARVA POWER & LIGHT COMPANY, INC., )  
EXELON CORPORATION, PEPSCO HOLDINGS, INC., )  
PURPLE ACQUISITION CORPORATION, EXELON ) PSC DOCKET NO. 14-193  
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) )

**DELAWARE PUBLIC SERVICE COMMISSION STAFF’S RESPONSE  
TO JEREMY FIRESTONE’S MOTION FOR A CEASE & DESIST ORDER**

The Delaware Public Service Commission Staff (“Staff”), by and through its undersigned counsel, hereby respond to the cease and desist motion filed by Jeremy Firestone (“Dr. Firestone”) and request that the Delaware Public Service Commission (the “Commission”) dismiss such motion with prejudice. In support of this response, Staff states the following:

**Background**

1. On December 11, 2015, intervenor Dr. Firestone filed a motion for a “Cease and Desist Order Restraining the Delaware Division of Public Advocate from Taking Actions Antagonistic to the Amended Settlement Agreement” (the “Motion”). The Motion alleges that the actions of the Division of the Public Advocate (the “DPA”) before another state agency violated the Settlement Agreement entered into between Staff, the DPA, the Department of Natural Resources and Environmental Control (“DNREC”), the Sustainable Energy Utility (“SEU”), Clean Air Council (“CAC”), the Mid-Atlantic Renewable Energy Coalition (“MAREC”), Exelon Corporation (“Exelon”), and Pepco Holdings, Inc. (“PHI”).<sup>1</sup>

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<sup>1</sup> On February 13, 2015, a Settlement Agreement between the parties referenced above was filed with the Commission. Subsequently, it was amended, and an Amended Settlement Agreement was filed on April 7, 2015, with the Commission. Dr. Firestone was not a party to either iteration of the Settlement Agreement (referenced herein as the “Settlement Agreement.”) Exelon and PHI will be referred to as the “Joint Applicants.”

2. The Motion also alleges that on or about October 2, 2015, the DPA, without notice to the parties to this docket or to DNREC, attempted to collaterally attack DNREC's ongoing rulemaking in violation of the specific terms of the Settlement Agreement.<sup>2</sup> Specifically, Dr. Firestone contends that certain comments filed by the DPA on November 13, 2015, with DNREC in its rulemaking procedure suggested that DNREC does not have the authority to promulgate certain rules under Section 354 and Section 362(b) of Title 26 of the Delaware Code and that these comments violate certain provisions of the Settlement Agreement.<sup>3</sup>

3. Dr. Firestone seeks to have this Commission enter a restraining order against the DPA to prevent it from taking any further action before DNREC because he contends such action would violate certain terms of the Settlement Agreement.<sup>4</sup>

4. In response, Staff argues that Dr. Firestone's Motion fails to meet the requirements for the grant of a cease and desist order by this Commission because: (i) the Settlement Agreement has not yet been finalized; (ii) Dr. Firestone is not a party to the settlement and therefore has no standing; (iii) Dr. Firestone's arguments are not ripe for determination; and (iv) the Commission does not have the power to order a non-public utility or entity to take action or refrain from taking action in another forum.

### **Argument**

#### **A. The Settlement Agreement has not yet been finalized by the Commission.**

5. On May 19, 2015, the Commission met to deliberate on the Settlement Agreement. Four days before (on May 15th), the Maryland Commission issued an order approving the merger with certain conditions. The Joint Applicants advised the Commission that

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<sup>2</sup> See PSC Order No. 8807 (Dec. 3, 2015).

<sup>3</sup> See Motion at 3.

<sup>4</sup> *Id.* at 8.

they would accept the conditions imposed by the Maryland Commission for approval of the merger.

6. The Commission advised the parties that it would issue a minute order reflecting its deliberations on June 2, 2015, and a further order would be issued after the parties had analyzed and reviewed the additional customer financial benefits and other benefits as provided under the “Most Favored Nation” clause of the Settlement Agreement.<sup>5</sup> The June 2<sup>nd</sup> order approved the merger subject to the Most Favored Nation’s clause.

7. Specifically, the Commission directed the settling parties as follows:

If any Settling Party finds that the amount or form of the compensation offered by Exelon pursuant to the Most Favored Nation provisions to be insufficient, then the Settling Party may petition the Commission to require that Exelon provide increased benefits in Delaware.<sup>6</sup>

8. On August 27, 2015, the District of Columbia Public Service Commission (“DC Commission”) issued an order that rejected the merger.<sup>7</sup> The Joint Applicants filed a motion for reconsideration of that order on September 28, 2015. Thereafter, on October 6, 2015, a “Nonunanimous Full Settlement Agreement and Stipulation, or for Other Alternative Relief” was filed with the DC Commission which significantly altered the prior terms and conditions that the DC Commission had previously considered and rejected. The DC Commission is currently reviewing the new agreed-upon terms and conditions for approval of the merger. It is expected there will be a decision by the DC Commission by the end of March 2016.

9. The events in the District of Columbia make it clear that if the merger is to go forward, the Settlement Agreement filed in Delaware, and approved by this Commission, will have to be substantially modified. Until the DC Commission renders its decision, it is premature

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<sup>5</sup> PSC No Order 8746 at p. 5 (June 2, 2015).

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *See* Order No 17947, Case No. 119 (Aug. 27, 2015).

to speculate on what additional modifications will have to be made to the existing Settlement Agreement filed in Delaware.

10. As the Hearing Examiner pointed out in his order considering the Motion, the evidentiary record in this matter is far from being closed.<sup>8</sup> If approved in the District of Columbia, the merger would be approved in all jurisdictions, but with different terms that would require a process to compare the customer fund and customer benefits approved in Delaware with those ordered in other jurisdictions.<sup>9</sup> These customer benefits include renewable energy, the subject of the Motion. According to the Hearing Examiner, this analysis may render the Motion moot.<sup>10</sup>

11. Under the circumstances there is no immediate need to resolve the Motion at this time. In fact, to try and resolve it now may lead to confusion and the need for further clarification if and when the process to comport the various regulatory jurisdictions decisions under the Most Favored Nation clauses is completed. Thus, the Motion should not be considered at this time.

**B. Dr. Firestone is not a party to the Settlement Agreement and therefore lacks the required standing to make arguments regarding its terms.**

12. Dr. Firestone admits in paragraph 25 of the Motion that he is not a party to the Settlement Agreement, which means he has no legal authority to bring this motion before this Commission.<sup>11</sup> The concept of “standing” refers to the right of a party to invoke the jurisdiction of a court (or in this case, a state agency) to enforce a claim or redress a grievance.<sup>12</sup> Standing is a “threshold” issue: If a party does not have standing, an appeal would be improper and the

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<sup>8</sup> See Order No. 8844 at 2 ( Jan 7, 2016).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* It also may be moot if the DC Commission does not approve the merger.

<sup>11</sup> In paragraph 25 of the Motion, he stated the following: “Although I am not presently a party to the ASA....”

<sup>12</sup> *Schoon v. Smith*, 953 A.2d 196, 200 (Del. 2008).

merits of the matter cannot be considered by the reviewing body.<sup>13</sup> Standing is concerned only with the question of who is entitled to mount a legal challenge.<sup>14</sup> To achieve standing, a party's interest in the controversy must be distinguishable from the interest shared by other members of a class or the public in general.<sup>15</sup> State courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are “mere intermeddlers.”<sup>16</sup>

13. Here, the Settlement Agreement has been signed by all of the parties in this proceeding **except** Dr. Firestone. The Settlement Agreement is a binding contract, and the Commission has approved its terms per its decision in PSC Order No. 8746.<sup>17</sup> Although Dr. Firestone intervened in this docket and is therefore considered a party in this proceeding, he is not one of the parties who signed the Settlement Agreement (i.e., the contract). He is therefore considered a “non-contracting party.” At issue is whether Dr. Firestone, as an intervenor and non-contracting party, may argue that a contracting party is acting contrary to the terms of the contract by filing documents with another state agency and making arguments allegedly contrary to the terms of the contract.

14. Under Delaware law, a non-contracting third party generally has no rights relating to a contract unless he or she is a third-party beneficiary to the contract.<sup>18</sup> In order to qualify as a

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<sup>13</sup> *Office of the Comm'r, Del. ABC v. Appeals Comm'r, Del. ABC*, 116 A.3d 1221, 1226 (Del. 2015).

<sup>14</sup> *Schoon*, 953 A.2d at 200.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) (citations omitted); *see also Dover Hist. Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003) (“Standing is a threshold question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a ‘case or controversy’ that is appropriate for the exercise of the court’s judicial powers.”).

<sup>17</sup> As stated above, because one of the terms of the Settlement Agreement contains a “Most Favorable Nation” clause, the terms of this signed agreement may be revised to match with those in any settlement agreement approved by the DC Commission.

<sup>18</sup> *JPMorgan Chase Bank v. Smith*, 2014 WL 7466729, at \*4 (Del. Super. Dec. 15, 2014); *CitiMortgage, Inc. v. Bishop*, 2013 WL 114367, at \*5 (Del. Super. March 4, 2013); *MetCap Securities, LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at \*7 (Del. Ch. May 16, 2007); *Browne v. Robb*, 583 A.2d 949, 954 (Del. 1990).

third-party beneficiary, a party must be an intended third-party beneficiary.<sup>19</sup> Thus, even though a third-party may benefit indirectly from the performance of a contract, such non-contracting third party has no rights under the contract.<sup>20</sup>

15. Delaware law also holds that an intended third-party beneficiary may enforce a contractual promise in his own right and name only if the contract has been made for his benefit.<sup>21</sup> However, an intended third-party beneficiary's right to enforce such a contract essentially rests on the intention of the contracting parties -- they must view that intended third-party beneficiary as either a donee or creditor beneficiary.<sup>22</sup> By definition, a donee beneficiary has someone else's performance donated to him as a gift that is secured by the promisee's consideration.<sup>23</sup> A creditor beneficiary results when a promisee owes a duty or liability to the beneficiary, and the promisee secures a contract with another party whose performance satisfies the obligation to the beneficiary.<sup>24</sup>

16. Here, Dr. Firestone lacks standing because he is a non-contracting third party who fails to qualify as an intended third-party beneficiary. None of the contracting parties made any gifts to Dr. Firestone via the Settlement Agreement. In addition, none of the parties here owe any duty or liability to Dr. Firestone, and none of them entered into the Settlement Agreement to satisfy such obligation to him. Hence, Dr. Firestone does not qualify as an intended third-party beneficiary who could enforce the terms of the Settlement Agreement. As such, he has no standing to contest whether the actions of the DPA in another docket pending before a different

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<sup>19</sup> *MetCap*, 2007 WL 1498989, at \*7.

<sup>20</sup> *Id.*; see, e.g., *CitiMortgage, Inc. v. Bishop*, 2013 WL 1143670, at \*4 (Del. Super. March 4, 2013).

<sup>21</sup> *Wilmington Housing Authority v. Fidelity & Deposit Co. of Maryland*, 47 A.2d 524 (Del. 1946).

<sup>22</sup> *Browne v. Robb*, 583 A.2d 949, 954 (Del. 1990); see 4 A. CORBIN, CORBIN ON CONTRACTS §774, at 6 (1951).

<sup>23</sup> Corbin, §774, at 6.

<sup>24</sup> *Id.* at 6–7.

state agency actually conflict with the terms of the Settlement Agreement pending before the Commission in this docket.<sup>25</sup>

**C. Dr. Firestone's arguments regarding (i) the terms of the Settlement Agreement and (ii) the DPA's actions taken in another docket pending before another state agency are not yet ripe for the Commission's determination.**

17. Dr. Firestone's arguments are not ripe for review because he has not alleged an immediate, or about to be immediate, controversy between himself and the parties in this docket. Because his arguments fail to qualify as "ripe" at this time, it would be inadvisable for this Commission to take any action based on his motion for a cease and desist order. "Ripeness" refers to whether the interests of a party seeking immediate relief outweigh postponing review of the matter until the question arises in a more concrete and final form.<sup>26</sup> Generally, a dispute will be deemed ripe if "litigation sooner or later appears to be unavoidable and where the material facts are static."<sup>27</sup> Conversely, a dispute will not be deemed ripe where the claim is based on "uncertain and contingent events" that may not occur<sup>28</sup> or where "future events may obviate the need" for judicial (or, in this case, Commission) intervention."<sup>29</sup>

18. The facts in Dr. Firestone's Motion fail to show any need for the Commission to act immediately in order to resolve a dispute. In other words, Dr. Firestone's claims are not yet ripe. For example, Dr. Firestone alleges in paragraph 5 of his motion that DNREC "is in the process of promulgating rules" regarding RECs that Delmarva Power & Light Company may hold. In paragraph 7 he also stated as follows: "DPA's assertion and its actions in DNREC's

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<sup>25</sup> See, e.g., *JPMorgan Chase Bank v. Smith*, 2014 WL 7466729 (Del. Super. Dec. 15, 2014) (explaining that numerous courts have held a non-party mortgage-debtor lacked standing to challenge the validity of a mortgage assignment).

<sup>26</sup> *XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014); *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989).

<sup>27</sup> *Julian v. Julian*, 2009 WL 2937121, at \*3 (Del. Ch. Sept. 9, 2009) (quoting *Stroud*, 552 A.2d at 481) (internal quotation marks omitted).

<sup>28</sup> *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006).

<sup>29</sup> *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 631-32 (Del. Ch. 2005), *aff'd in relevant part, rev'd in part*, 901 A.2d 106 (Del. 2006).

rulemaking docket and more generally before this Commission are antagonistic and adverse to, and attack, rather than defend, the ASA [Settlement Agreement]." These facts do not support a present (or likely) harm to Dr. Firestone or the need for an immediate resolution of his claims.

19. Dr. Firestone's only interest in having his dispute litigated now is apparently to receive Commission guidance on whether the level of RECs would have to be frozen if the DPA's interpretation is correct regarding the recently-finalized DNREC rule.<sup>30</sup> Dr. Firestone seeks this guidance not as an actual party who must purchase RECs, but rather as a potential litigant against DNREC, the DPA, or Delmarva Power & Light Company. His desire to receive advice is not a cognizable interest that would justify this Commission exercising its jurisdiction to decide this dispute. Delaware courts decline to exercise jurisdiction over a case unless the underlying controversy is ripe, i.e., has "matured to a point where judicial action is appropriate."<sup>31</sup> Delaware courts decline to do so because they do not render advisory or hypothetical opinions.<sup>32</sup> Thus, avoiding unripe cases supports the judicial goal of conserving limited resources and avoiding the issuance of a legally binding decision that could result in premature and possibly unsound lawmaking.<sup>33</sup> Similarly, this Commission should not waste its limited time and administrative resources on Dr. Firestone's unripe arguments.

**D. Because the Commission's authority is limited to only regulated public utilities, it cannot grant Dr. Firestone's Motion cease and desist order against the DPA.**

20. The Legislature limited the Commission's authority to the "exclusive original supervision and regulation *of all public utilities...*"<sup>34</sup> (emphasis added). This authority includes

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<sup>30</sup> DNREC issued Secretary's Order No. 2015-EC-0047 on December 15, 2015, and finalized the cost cap regulations effective January 11, 2016. This order and the new regulations can be found here: <http://regulations.delaware.gov/register/january2016/final/19%20DE%20Reg%20643%2001-01-16.htm>.

<sup>31</sup> *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989) (citing *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987)).

<sup>32</sup> *Id.* (citing *State v. Mancari*, 223 A.2d 81, 82–83 (Del. 1966)).

<sup>33</sup> *Id.*

<sup>34</sup> See 26 *Del. C.* §201(a).

the power to compel by mandamus or injunction in appropriate cases “the duties imposed by law upon such public utility.”<sup>35</sup> However, this authority does not extend to individuals or to another state agency, i.e., the DPA, in this situation. Rather, this statutory authority includes power over only regulated public utilities. By definition, the DPA does not qualify as a “public utility”<sup>36</sup> because that state agency does not operate any utility services for public use. Hence, the Commission cannot enter a lawful order to restrain the DPA or to cease and desist it from taking actions in any forum allegedly contrary to the Settlement Agreement.

**WHEREFORE**, for the reasons set forth above, Staff urges the Commission to deny Dr. Firestone’s motion for a cease and desist order with prejudice.

Dated: February 11, 2016

Respectfully submitted:

/s/ James McC. Geddes

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<sup>35</sup> See 26 Del. C. §217 which provides, in pertinent part, that “[o]bservance of the orders of the Commission may be compelled by mandamus or injunction in appropriate cases, or by an action to compel the specific performance of the orders so made or of the duties imposed by law upon such public utility.”

<sup>36</sup> 26 Del. C. §102(2) defines a “public utility” to include “every individual, partnership, association, corporation, joint stock company, agency or department of the State ... that now operates or hereafter may operate for public use within this state ... any natural gas, electric ... , water, wastewater ..., telecommunications ... service, system, plant or equipment.”

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**CERTIFICATE OF SERVICE**

I, James McC. Geddes, Esquire, hereby certify that on February 11, 2016, I caused a copy of the attached **DELAWARE PUBLIC SERVICE COMMISSION STAFF'S RESPONSE TO JEREMY FIRESTONE'S MOTION FOR A CEASE & DESIST ORDER** to be served upon all parties in this docket via the Commission's DelaFile system pursuant to 26 *Del. Admin. C.* §1001-1.6.4.

*/s/ James McC. Geddes* \_\_\_\_\_

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Dated: February 11, 2016