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TO: Chairman Winslow  
Commissioner Conaway  
Commissioner Drexler  
Commissioner Gray  
Commissioner Karia

FROM: Brenda R. Mayrack, Esq., Deputy Attorney General

DATE: February 18, 2016

RE: PSC Docket No. 14-193: Legal Memorandum Concerning Firestone Petition for Interlocutory Review and Related Filings

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**Background:** As the Commission knows, Dr. Jeremy Firestone, an Intervenor in this docket concerning the merger of Exelon and Pepco Holdings, Inc., filed a Motion for a Cease and Desist Order Restraining the Delaware Division of the Public Advocate from Taking Actions Antagonistic to the Amended Settlement Agreement (“Firestone Cease & Desist Motion”) on December 11, 2015. This Motion sought to restrain the Division of the Public Advocate (“DPA”), pursuant to the Amended Settlement Agreement among the parties in this docket, from opposing renewable energy cost cap regulations being promulgated by the Delaware Department of Natural Resources and Environmental Control (“DNREC”) and pursuing an appeal of a Commission decision in Docket No. 15-1462 regarding the Commission’s versus DNREC’s authority to promulgate those same rules.

On January 7, 2016, in Order No. 8844, Hearing Examiner stayed consideration of and decision on the Firestone Cease & Desist Motion, noting the DPA’s pending litigation in Delaware Superior Court regarding its appeal of the Commission decision in Docket No. 15-1462 and that the ultimate outcome of the Exelon-PHI merger was pending before the D.C. Public Service Commission, and this could affect the terms and enforcement of any settlement agreement.

On January 11, 2016, Dr. Firestone filed a Motion to Quash, Vacate and Set Aside Unlawful Hearing Examiner Stay Order (“Firestone Motion to Quash”), asking the Commission to set aside the stay of and decide his Cease & Desist Motion.

On January 12, 2016, Dr. Firestone filed a Petition for an Interlocutory Review of the Hearing Examiner's Unlawful Actions ("Firestone Interlocutory Petition"), asking the Commission to vacate Order No. 8844 and decide his Cease & Desist Motion on the merits.

The Commission included the Firestone Interlocutory Petition on its February 4, 2016 meeting agenda. Dr. Firestone, who could not attend the meeting, requested that the Commission delay consideration until the February 23, 2016 meeting. The Commission granted that request and also decided that it would consider Dr. Firestone's Cease & Desist Motion, Motion to Quash, and Interlocutory Petition at the February 23, 2016 meeting. The Commission set deadlines for additional submissions in this docket of February 9, 2016 for any responses to the Firestone Interlocutory Petition; February 11, 2016 for any responses to the Firestone Cease & Desist Motion and Motion to Quash; and February 16, 2016 for any response of Dr. Firestone to the responses filed by the other parties.

No parties filed written responses to the Firestone Interlocutory Petition.

On February 11, 2016, the Joint Applicants, Commission Staff, and the DPA filed responses to the Firestone Cease & Desist Motion and Motion to Quash.

On February 16, 2016, Dr. Firestone filed his response to the filings of Staff, the DPA, and the Joint Applicants.

**A Framework for the Commission's Decision:** The only filing technically before the Commission is Dr. Firestone's Petition for Interlocutory Review. Commission Rules require that:

*26 Del. Admin. C. § 1001-2.16.5:* The Commission shall determine if the Petition and any answers thereto justify interlocutory review. If interlocutory review is granted, then it will be scheduled for oral argument before the Commission at its earliest convenience or a decision will be issued based on the written submissions. If no Commission action occurs within thirty days of the Petition filing, then it shall be deemed denied by operation of law.

When the Commission set a briefing schedule and scheduled oral argument on all filings at the February 4<sup>th</sup> meeting in response to Dr. Firestone's request to delay Commission consideration until February 23, 2016, the Commission – in effect – "granted" interlocutory review of the Petition. However, even though the Commission has functionally granted review of the Petition, the Commission may either grant or deny the substantive relief requested in the Petition and related filings.

Substantively, the Commission has three filings before it to consider:

- Firestone Cease & Desist Motion
- Firestone Motion to Quash Order No. 8844
- Firestone Interlocutory Petition

All essentially ask for the same relief, and are thus related. The Commission's ultimate decision on one or all of the filings should consider the relation among the filings for consistency. Possible Commission decisions for each filing are explored in more detail in the "Scenarios" below:

**Does the Commission have the authority to grant the relief requested?** The fundamental question before the Commission appears to be whether the Commission has the authority to grant the relief requested – that is, to restrain the conduct of the DPA in other dockets before the Commission, other agencies, and the courts.

According to 26 *Del. C.* § 201(a), the Commission's authority concerns "public utilities":

The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title. Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility, and, in so regulating, the Commission shall consider the interests of subscribers, if any, of the entity attaching to the public utility's facility, as well as the interests of the consumer of the public utility service.

"Public utility" is defined in 26 *Del. C.* § 102(2) as:

"Public utility" includes every individual, partnership, association, corporation, joint stock company, agency or department of the State or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a "cooperative"), their lessees, trustees or receivers appointed by any court whatsoever, that now operates or hereafter may operate for public use within this state, (however, electric cooperatives shall not be permitted directly or through an affiliate to engage in the production, sale or distribution of propane gas or heating oil), any natural gas, electric (excluding electric suppliers as defined in § 1001 of this title), water, wastewater (which shall include sanitary sewer charge), telecommunications (excluding telephone services provided by cellular technology or by domestic public land mobile radio service) service, system, plant or equipment.

The DPA, by statute, is established as an agency empowered to:

(1) To appear before the Public Service Commission on behalf of the interest of consumers in any matter or proceeding over which the Commission has jurisdiction and in which the Public Advocate deems the interest of consumers requires such participation.

(2) To advocate the lowest reasonable rates for consumers consistent with the maintenance of adequate utility service and consistent with an equitable distribution of rates among all classes of consumers; provided, however that the Public Advocate shall principally advocate on behalf of residential and small commercial consumers and shall not be required to advocate for any class of commercial or industrial consumers that the Public Advocate determines in his or her sole discretion on a case by case basis has the ability to advocate on its own behalf before the Public Service Commission.

(3) To appear on behalf of the interest of consumers in the courts of this State, the federal courts and federal administrative and regulatory agencies and commissions in matters involving rates, service and practices of public utilities.

(4) To hire, from time to time, as needed, in connection with proceedings before the Commission, experts in the utility regulation field, including, but not limited to, economists, cost of capital experts, rate design experts, accountants, engineers and other specialists. A budget for compensation and/or expenses of these experts shall be provided annually through the Delaware Public Utility Regulatory Revolving Fund. Nothing in this section shall be construed to preclude the Public Advocate from applying to the General Assembly for additional funds in specific instances, including emergencies, and from receiving such additional amounts as the General Assembly shall determine.

(5) To have the same access to and the same right to inspect any and all books, accounts, records, memoranda, property, plant facilities and equipment of the public utilities as is afforded by law or by rule of the Public Service Commission to any other party in interest.

(6) To have full access to the records of the Public Service Commission.

(7) To call upon the assistance of the staff and experts of the Public Service Commission in the performance of duties.

(8) To appoint, fix the compensations and terms of service and prescribe the duties and powers of such staff as may be necessary for the proper conduct of the work of the Division of the Public Advocate, within the conditions and limitations imposed by the merit system of personnel administration.

(9) Upon request of the Governor, the Secretary of the Department, or the General Assembly, the Public Advocate shall provide guidance on matters relating to energy policy and utility consumers, and shall consider such other matters as may be referred to the Public Advocate or the Division by the Governor, the Secretary of the Department, or the General Assembly. The Public Advocate may study, research, plan and make advisory recommendations to the Governor, the Secretary of the Department, or the General Assembly on matters it deems appropriate to advocate on behalf of public utility consumers.

29 Del. C. § 8716. If the Commission determines that it does not have the authority to restrain or direct the conduct of the DPA, the Commission may end its inquiry and issue the following decisions:

<b>Scenario 1: Commission determines that it has no authority to grant relief requested.</b>	
Filing at Issue	PSC Decision
Firestone Cease & Desist Motion	DENIED
Firestone Motion to Quash Order No. 8844	GRANTED
Firestone Interlocutory Petition	GRANTED
PARTY IN SUPPORT: STAFF; DPA (alternate)	

However, if the Commission determines that it does have the authority to grant the requested relief, the Commission must determine whether consideration is appropriate at this time.

**If the Commission has the authority to grant the requested relief, is consideration appropriate at this time?** The Parties have noted that consideration of the merger is pending before the D.C. Public Service Commission, which may result in substantial changes to the Amended Settlement Agreement. The Parties have also noted that litigation is pending in Superior Court regarding the Commission’s decision in Docket No. 15-1462 and DNREC’s final cost cap ruled. The Parties have also thoroughly briefed arguments concerning ripeness.

If the Commission determines that consideration of the Firestone Cease & Desist Motion is inappropriate at this time because of these or other factors, then the Commission could decide to allow the Hearing Examiner’s stay in Order No. 8844 to stand and remand consideration back to the Hearing Examiner:

<b>Scenario 2: Commission determines that it has the authority to grant relief requested, but declines to do so at this time and instead remands consideration of the Firestone Cease &amp; Desist Motion back to the Hearing Examiner, where consideration is stayed per Order No. 8844.</b>	
Filing at Issue	PSC Decision
Firestone Cease & Desist Motion	REMANDED TO HEARING EXAMINER
Firestone Motion to Quash Order No. 8844	DENIED; Order No. 8844 Stay remains in effect.
Firestone Interlocutory Petition	DENIED
PARTY IN SUPPORT: JOINT APPLICANTS (primary); STAFF; DPA (alternate)	

However, if the Commission determines that consideration of the Firestone Cease & Desist Motion is inappropriate at this time but also determines that the Hearing Examiner did not have

the authority to issue a stay as in Order. No. 8844, the Commission could issue its own stay and then reserve future consideration of the Firestone Cease & Desist Motion until later – before either the Commission or the Hearing Examiner:

<b>Scenario 3: Commission determines that it has the authority to grant relief requested, but declines to do so at this time, and determines that Hearing Examiner does not have the authority to issue a stay.</b>		
Filing at Issue	PSC Decision 3A	PSC Decision 3B
Firestone Cease & Desist Motion	STAYED – for future Commission consideration	STAYED & REMANDED TO Hearing Examiner
Firestone Motion to Quash Order No. 8844	GRANTED	GRANTED
Firestone Interlocutory Petition	GRANTED	GRANTED
PARTY IN SUPPORT: JOINT APPLICANTS (alternate); STAFF; DPA (alternate)		

Hearing Examiners have broad authority to manage their dockets, per 29 *Del. C.* § 10125:

- (a) The hearing may be conducted by the agency or by a subordinate designated for that purpose.
- (b) In connection with such hearings, the agency or its designated subordinate may be empowered to:
  - (1) Issue subpoenas for witnesses and other sources of evidence, either on the agency's initiative or at the request of any party;
  - (2) Administer oaths to witnesses;
  - (3) Exclude plainly irrelevant, immaterial, insubstantial, cumulative and privileged evidence;
  - (4) Limit unduly repetitive proof, rebuttal and cross-examination;
  - (5) Cause interrogatories to issue and depositions to be taken; or
  - (6) Hold prehearing conferences for the settlement or simplification of issues by consent, for the disposal of procedural requests or disputes and to regulate and expedite the course of the hearing.

In the context of a petition for interlocutory review, a Hearing Examiner may issue a stay of the proceeding pending Commission review. 26 *Del. Admin. C.* § 1001-2.16.4 (“The proceeding shall continue pending Commission review of the Petition for interlocutory review unless the Presiding Officer or Hearing Examiner stays the proceeding pending Commission review.”). No stay – outside of the one issued in Order No. 8844 – has been issued by the Hearing Examiner.

**If the Commission has the authority to grant the requested relief and consideration is appropriate at this time, is the requested relief warranted or desired?** If the Commission determines that it does have the authority to grant the requested relief and that consideration is appropriate at this time, then the Commission must determine whether granting such relief is warranted or desired:

<b>Scenario 4: Commission determines that it has the authority to grant relief requested and that consideration is appropriate at this time, and grants such relief.</b>	
<b>Filing at Issue</b>	<b>PSC Decision</b>
Firestone Cease & Desist Motion	GRANTED
Firestone Motion to Quash Order No. 8844	GRANTED
Firestone Interlocutory Petition	GRANTED
<b>PARTY IN SUPPORT: DR. FIRESTONE</b>	

<b>Scenario 5: Commission determines that it has the authority to grant relief requested and that consideration is appropriate at this time, and declines to grant such relief.</b>	
<b>Filing at Issue</b>	<b>PSC Decision</b>
Firestone Cease & Desist Motion	DENIED
Firestone Motion to Quash Order No. 8844	GRANTED
Firestone Interlocutory Petition	GRANTED
<b>PARTY IN SUPPORT: JOINT APPLICANTS (alternate); STAFF; DPA (primary/alternate)</b>	

The substantive issues have been thoroughly briefed by the Parties, but the questions for the Commission to consider in making this decision include:

- Does Dr. Firestone have standing to enforce the Amended Settlement Agreement, which he participated in negotiating but did not sign?
- Is the Amended Settlement Agreement enforceable, given the rejection of the merger and pending reconsideration by the D.C. Public Service Commission?
- If Dr. Firestone has standing to enforce and the Amended Settlement Agreement is enforceable, is the DPA’s conduct proscribed by the Amended Settlement Agreement?
- Even if Dr. Firestone has standing to enforce, the Amended Settlement Agreement is enforceable, and the DPA’s conduct is proscribed by the Amended Settlement Agreement, does the Commission, for political and public policy considerations, wish to restrain the conduct of the DPA?

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I am available to provide additional legal advice prior to the February 23<sup>rd</sup> meeting, if necessary.