

**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))

**THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE’S OPPOSITION TO
COMMISSION STAFF’S MOTION TO REOPEN THE RECORD FOR THE PURPOSE
OF CONSIDERING STAFF’S MEMORANDUM ON PUBLIC INTEREST PROJECTS**

The Delaware Division of the Public Advocate (“DPA”) hereby opposes the Commission Staff’s motion to reopen the record for the limited purpose of considering Staff’s memorandum on public interest (the “Motion”), and in support thereof states as follows:

1. Pursuant to an amended scheduling order, the parties in the docket were instructed to submit proposals on August 12, 2016 and September 12, 2016 to allocate an additional \$27.1 million of funds coming into Delaware as a result of the “most favored nation” provision of the Amended Settlement Agreement that the Commission approved in this docket on June 2, 2016 (the “MFN Funds”). Staff, the Joint Applicants, DNREC, Dr. Jeremy Firestone and the DPA submitted written comments addressing their proposals for allocating the MFN Funds and opposing other parties’ allocation proposals.

2. Staff, the Joint Applicants, and the Department of Natural Resources and Environmental Control (“DNREC”) proposed to allocate \$4 million for “public interest projects.” Staff’s submission was silent on many aspects of how that allocation would work in practice. However, the Joint Applicants’ August 12, 2016 submission provided greater detail.

The Joint Applicants stated that “Exelon will deposit \$4.0 million into an endowment fund *for use as directed by the Commission* to fund public interest projects that would provide benefit to the State of Delaware and its citizens.” (Joint Applicants’ August 12, 2016 Comments at 7) (emphasis added). As the Joint Applicants understood the proposal: (1) Exelon would deposit funds in a restricted account that would be drawn on only with Commission approval for approved projects; (2) The Settling Parties would circulate an open notice of funding availability; (3) government entities and qualified non-profit organizations could submit applications for funds to be used exclusively for Delaware operations/public benefits; (4) Staff would contract with an independent evaluation firm to evaluate applications and make independent recommendations to the Commission. Funding would be limited to programs or projects that benefit Delaware citizens and are in the public interest; no more than \$2 million would be available for any one program or project; preference would be given to programs or projects that benefit a broad spectrum of Delaware citizens and that can be completed within three years of receiving the funds; and any of the \$4 million not allocated as of June 30, 2020 would be applied to other allocation items on a ratable basis. (*Id.*).

3. The DPA opposed this allocation, arguing that: (1) the Commission did not have the authority to conduct an RFP process and select winning applicants; (2) even if the Commission did have authority to conduct an RFP process and select public interest projects, the proposal was too vague to be approved; and (3) there were concerns about potential personal interests that might influence the selection of projects or recipients. (DPA September 12, 2016 Comments at 6-9).

4. On September 20, 2016, the Delaware Public Service Commission (the “Commission”) heard argument from the parties regarding the appropriate allocation of the MFN

Funds. The DPA opposed this allocation, raising the same arguments before the Commission as it had made in its comments. Staff argued in favor of the \$4 million “public interest project” allocation.

5. The Commission expressed concern about the vagueness of the proposal and asked Staff to provide it with greater detail about how the proposal would work.

6. On September 29, 2016 Staff filed with the Commission a “Memorandum to the Commission Proposed Public Interest Project MFN Allocation” (“Memorandum”). In the Memorandum, Staff claimed that its proposal “never assumed that this Commission would be the authority allocating dollars to individual agencies or organizations; only that this Commission could authorize Exelon, as a part of the merger final settlement, to conduct an RFP available to government and nonprofit agencies and to share the results with the Commission.” (Memorandum at 2). Staff further claims that it circulated a proposed RFP on August 9 (prior to the date that the Joint Applicants submitted their proposal) and that no one commented on it. (*Id.* at 1).

7. On September 30, 2016, Staff filed the Motion with the Commission. In the Motion, Staff asks the Commission to reopen the record to accept its Memorandum as evidence.

ARGUMENT

A. The Commission Should Deny the Motion.

8. The Commission should deny Staff’s Motion to reopen the record to accept its Memorandum as evidence.

1. No Other Party’s Comments Have Been Introduced Into the Record.

9. None of the comments filed by the other parties to this proceeding has been introduced into the record. Indeed, Staff objected to Dr. Firestone’s attempt to have his prefiled

testimony introduced into the record and considered as “evidence,” arguing that the issue before the Commission was a policy one, not an evidentiary one. Staff accordingly requested the Hearing Examiner (and the Commission) to consider Dr. Firestone’s prefiled testimony as comments, and not be specifically marked as an exhibit. (9/14/16 email from James McC. Geddes, Esq. to Hearing Examiner). Staff was successful in its attempt to preclude Dr. Firestone’s testimony from being considered as such and made part of the record.

10. Staff now seeks to have *its* Memorandum (which is not sworn testimony) introduced into the record and considered as evidence. This is nothing if not hypocritical. If Staff’s extremely belated Memorandum is to be considered, it should be considered in the same manner as all other parties’ comments (or prefiled testimony). It is no more entitled to be part of the “record” than any other comment submitted by any other party.

2. **Staff Had Ample Time to Present This Information to the Commission.**

11. Staff’s Memorandum discusses what it envisioned as its public interest project proposal and attaches a draft RFP that it circulated in early August about which it claims that no party commented. Staff *could* have presented this information in the comments due on August 12, 2016. It could have presented this information in the comments due on September 12, 2016. It did not present this information in either set of comments. It is too late in the game for Staff to present this information now.

12. Moreover, it is irrelevant that Staff circulated a draft RFP. Staff knew the DPA disagreed with this proposed allocation of the MFN Funds; why would the DPA waste time submitting comments on an RFP drafted to support a proposal with which it disagreed?

B. Staff's Proposal Is Not What the Joint Applicants Had In Mind.

13. Staff claims that its proposal “never assumed that this Commission would be the authority allocating dollars to individual agencies or organizations; only that this Commission could authorize Exelon, as a part of the merger final settlement, to conduct an RFP available to government and nonprofit agencies and to share the results with the Commission.” (Memorandum at 2). Apparently the Joint Applicants were not under the impression that *Exelon* was going to conduct any RFP process to allocate these funds; their August 12, 2016 comments – submitted after Staff circulated its draft RFP - clearly envisioned the *Commission* determining what governmental entities and/or nonprofit agencies would receive funds. Those comments stated that Exelon would deposit \$4 million into a fund “for use as directed by the Commission...” and that the funds “would be drawn on only with Commission approval for approved public interest projects.” (Joint Applicants’ August 12, 2016 Comments at 7). If the Joint Applicants had thought they were going to be making the decision, they would not have submitted those comments.

C. If the Commission Considers Staff's Memorandum, Other Parties Should Have the Opportunity to Respond to the Legal Assertions, Arguments and Opinions Expressed Therein.

14. Staff's Memorandum is not simply a description of the details of the public interest project allocation – which is *all* the Commission asked for. The Memorandum purports to set forth a non-lawyer's opinion on what Delaware law requires (page 1); contains argument that Staff already made before the Commission in what appears to be an attempt to convince the Commission to approve its proposal (pages 1-2, 6); and contains Staff's opinion on what is in the public interest (page 6). The Commission asked Staff only for details of how its proposal would operate. It did not ask for legal advice; it did not ask for additional argument; and it did not ask

for Staff's opinion (9/20/16 Transcript at 1054-60). If the Commission is going to consider Staff's additional argument and opinions, *all* parties should be permitted to address Staff's argument and opinions. In the event that the Commission considers Staff's additional argument and opinions, the DPA submits the following arguments.

D. Benefits to Ratepayers Benefit the Entire State.

15. Staff argues that the DPA's position that ratepayers created the value of the merger so they should get most of the benefit "does not consider the value contributed and retained by the merging utility for the State of Delaware," and therefore Staff's proposal that a "small percentage (less than 6%) be reserved to directly enhance Delaware's public interest" is reasonable. However, the General Assembly has decreed that costs paid by Delmarva ratepayers for various mandates benefit the entire State. For example, in the Energy Efficiency Resource Standards Act of 2009, the General Assembly found and declared that:

The benefits of a strong focus on cost effective energy efficiency accrue to the public at large, and all electric and natural gas suppliers and consumers in Delaware share an obligation to develop a minimum level of these resources in the energy supply portfolio of the State.

The benefits of cost effective energy efficiency include lowered consumer spending on energy, improved regional and local air quality, improved public health, increased electric supply diversity, increased protection against price volatility and supply disruption, improved transmission and distribution performance, and new economic development opportunities.

26 *Del. C.* §§1500(b)(4), (5). Those consumers are responsible for any other charges that the DNREC Secretary and the Delaware Energy Office incur in developing and implementing programs under the Act. *Id.* §1504(e). In the Act, the General Assembly created the Sustainable Energy Trust Fund, to which energy customers of affected electric and natural gas utilities contribute. *Id.* §§1505(d), (e). Thus, the DPA's position that the \$4 million should instead go to the Energy Efficiency Investment Fund creates value for and benefits the entire State.

E. The Proposal Is Still Too Vague.

16. Although Staff's Memorandum purports to answer the Commission's questions, it is still vague. For example, on page 4, Staff answers the question "What public interests will be eligible to submit a bid?" with "services, programs or projects that are in the public interest of the citizens of Delaware." With all due respect, that is circular: essentially this says that "the public interests that are eligible to submit a bid are...public interests."

17. With respect to how the bids will be evaluated, Staff says that its proposed RFP says that it will select and contract with an independent evaluation team. As an alternative, it suggests that Delmarva, the Commission, and perhaps the parties could select the independent evaluation team. (Motion, page 4). Staff's involvement in any part of the selection process is the biggest problem that the DPA has with this proposal. It is Staff that testified that in order for the merger to be consistent with the public interest, Exelon would have to donate \$1.5 million for a special needs' children's camp. (Ex. S-2). This is a very specific public interest project, and one in which the DPA has become aware that a senior Staff member has a very specific interest. If Staff is going to be coordinating with the supposedly independent evaluator, DPA questions how independent the selection process will actually be.

F. If Exelon/Delmarva Is the Decisionmaker, Why Is An RFP Even Necessary?

18. If Exelon or Delmarva is to make the ultimate decision of what entities will receive funds, why is an RFP even necessary? Both Exelon and Delmarva have donated hundreds of thousands of dollars to public interest projects in their service territories. It seems wasteful to require them to go through an RFP process when they already have the experience to determine the entities to which they wish to contribute. Moreover, the process seems unnecessarily cumbersome: for example, why is an independent evaluation team necessary

(unless, of course, the team was to make recommendations to the Commission *for its approval of projects*)?

G. The RFP is Inconsistent With Staff's Claim that Delmarva or Exelon Will Determine Grant Recipients.

19. If Exelon or Delmarva is to be the ultimate decisionmaker, then much of the RFP must be changed – because that RFP envisioned the Commission – not Delmarva or Exelon – making the final determination on the lucky recipients of grants.

20. For example, Section XII requires a successful applicant to enter into a Memorandum of Understanding with the Commission (not Exelon or Delmarva). But if (as Staff now claims) the Commission is only going to authorize Exelon or Delmarva to create the fund, and Exelon or Delmarva will make the decisions as to who should receive a grant, why is the Commission entering into a Memorandum of Understanding?

21. Section XIII provides that “[a] formal notice of award will be issued in writing to the successful applicants upon completion of the review of all submitted proposals, pending a recommendation by the Independent Evaluation Team *and the approval of the Commission.*” (Emphasis added). Further on in the section, applicants are instructed to include a tentative award paragraph at the end of their proposals that repeatedly refers to “selection” or “approval” *by the Commission.* But if (as Staff now claims) the Commission is only going to authorize Exelon or Delmarva to create the fund, and Exelon or Delmarva will make the decisions as to who should receive a grant, why is the Commission approving *any* recommendations?

22. Section XVII provides that a successful applicant agrees to “indemnify, defend and save harmless” the Commission against any losses arising out of a project that the Commission has “accepted” or “approved.” But if (as Staff now claims) the Commission is only going to authorize Exelon or Delmarva to create the fund, and Exelon or Delmarva will make the

decisions as to who should receive a grant, why does the Commission need to be indemnified, defended or held harmless?

23. Section XVIII gives the Commission the authority to audit. But if (as Staff now claims) the Commission is only going to authorize Exelon or Delmarva to create the fund, and Exelon or Delmarva will make the decisions as to who should receive a grant, then why does the Commission have the right to audit?

24. Section XX refers to the Commission's approval of "any award." But if (as Staff now claims) the Commission is only going to authorize Exelon or Delmarva to create the fund, and Exelon or Delmarva will make the decisions as to who should receive a grant, then why is the Commission approving *any* award?

25. Section XXI states that "The Public Service Commission reserve [sic] the right to accept or reject any proposals recommended by the Independent Evaluation Team" and "reserves the right to accept or reject any proposed memorandum of Understanding or to cancel or modify this RFP in whole or in part." But if (as Staff now claims) the Commission is only going to authorize Exelon or Delmarva to create the fund, and Exelon or Delmarva will make the decisions as to who should receive a grant, then why does the Commission have the right to accept or reject recommendations from the Independent Evaluation Team, accept or reject any proposed Memorandum of Understanding, or cancel or modify the RFP?

26. Sections XXII and XXIII, addressing terminations for cause and for convenience, give the Commission (not Exelon or Delmarva) the ability to terminate a grant. But if (as Staff now claims) the Commission is only going to authorize Exelon or Delmarva to create the fund, and Exelon or Delmarva will make the decisions as to who should receive a grant, then why does the Commission have the right to terminate grants for any reason?

27. Section XXIV provides that no parties (including the Commission) are “bound by the terms of a tentatively accepted proposal *unless and until the [] Commission has issued a formal notice of acceptance to Delmarva Power and executed a valid Memorandum of Understanding.*” (Emphasis added). But if (as Staff now claims) the Commission is only going to authorize Exelon or Delmarva to create the fund, and Exelon or Delmarva will make the decisions as to who should receive a grant, why is the Commission issuing any formal notices of acceptance and entering into a Memorandum of Understanding?

CONCLUSION

28. Staff has not established that its Memorandum should be made part of the record. Its current position is expressly contrary to what it argued about Dr. Firestone’s testimony, and the information contained in the Memorandum and the attachments could have been included in its comments due in August and September 2016. If the Commission is inclined to consider the Memorandum, then the DPA notes that Staff’s current proposal is inconsistent with what the Joint Applicants thought the proposal was; is unnecessarily cumbersome if the Commission is only going to approve the allocation of \$4 million for such projects; is still too vague; and is inconsistent with several provisions of the RFP that Staff claims represented its proposal. Staff’s Motion should be denied, and its “public interest project” proposal should be rejected.

Dated: October 10, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2016, I caused a copy of **THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE'S OPPOSITION TO COMMISSION STAFF'S MOTION TO REOPEN THE RECORD FOR THE PURPOSE OF CONSIDERING STAFF'S MEMORANDUM ON PUBLIC INTEREST PROJECTS** to be filed with the Public Service Commission using Delafile and to be served electronically on the following persons:

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