

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE INVESTIGATION)
INTO DELMARVA POWER)
& LIGHT COMPANY’S RATE REQUEST) PSC Docket No. 13-152
FOR DISTRIBUTION INFRASTRUCTURE)
INVESTMENT)

**RESPONSE OF DELMARVA POWER & LIGHT COMPANY TO
Motion of Commission Staff Seeking Relief on Behalf
of Delmarva Power & Light Customers Regarding
Excessive Investment in Distribution Reliability Infrastructure**

Delmarva Power & Light Company (Delmarva or Delmarva Power), by and through its undersigned counsel, hereby responds to the *Motion of Commission Staff Seeking Relief on Behalf of Delmarva Power & Light Customers Regarding Excessive Investment in Distribution Reliability Infrastructure* (“Staff’s Motion”). Delmarva opposes Staff’s Motion on various grounds. In support of its response, Delmarva provides the following:

A. Staff’s Motion Seeks Authority To Conduct A Redundant “Investigation” Into Issues That Should Be Addressed In Delmarva’s Recently Filed Electric Rate Case Proceeding

1. Staff’s argument as to why it needs to open a docket to investigate the level of Delmarva’s investment in maintaining and enhancing the reliability of electric service is without merit. Staff’s Motion correctly states that Delmarva Power filed an electric base rate case (the “Electric Rate Case”) on March 22, 2013 (Staff Motion at ¶¶1 and 3). In its Motion, Staff alleges that the testimony of Delmarva’s witness on reliability projects in the Electric Rate Case filing provides an inadequate explanation regarding the need for what Staff asserts is an unreasonably high level of reliability spending (Staff Motion at ¶4). Staff makes this conclusory argument prior to conducting any investigation or discovery in the Electric Rate Case. Staff argues that the level of Delmarva’s investment to improve reliability performance is not in the

best interest of its customers. In support of that argument, Staff mischaracterizes the Commission's Docket 50 minimum reliability performance standards as a level of reliability that Delmarva should not exceed (Motion at ¶6-8). Staff argues, incorrectly, that no public forum is available for the public to comment regarding the level of Delmarva's reliability investments and that without a special investigation into the reliability spending set forth in Delmarva's Electric Rate Case, there will, somehow, be no opportunity for public comment on Delmarva's investments to provide reliable service (Motion at ¶10). Each of Staff's arguments is without merit.

2. Both the law of Delaware and the precedent of this Commission make clear that the Commission's duty does not entail reviewing the day to day operations and decisions made by Delmarva's management.¹ Delmarva is expected to use its discretion and expertise to make day-to-day decisions on how to appropriately plan and invest in its infrastructure in order to provide reliable and safe electric delivery service to its customers.

3. The appropriate forum for the Commission to review the costs of Delmarva's investment into the reliability of the electric distribution system is a base rate case. The Commission's ultimate authority to review Delmarva's decisions regarding the proper amount to invest in system reliability comes when Delmarva files rate cases to recover for its investment in its system.² If, after discovery, public comment sessions, evidentiary hearings and Commission consideration of all the evidence in the record, the Commission determines that Delmarva has not met the established legal standard for recovery of its reliability and other investments, the Commission can and will refuse to permit recovery of those investments through rates. What

¹ See, Delmarva Power & Light Co. v. Public Service Com'n, 508 A.2d 849, 859 (1986)("[A]public utility commission shall not dictate business practices to be followed by a utility."), citing Application of Wilmington Suburban Water Corp., Del.Super., 203 A.2d 817, 829 (1964).

² *Id.*

Staff has failed to address in its Motion is why the well-established rate case procedure is not fully sufficient for Staff, the Public Advocate, interveners and the public to fully investigate whether the amount that Delmarva has invested in the system is allegedly “excessive.”

4. The thorough discovery, public comment and evidentiary hearing process conducted in a base rate case proceeding is, itself, a comprehensive investigation into a utility’s rate request. Nevertheless, Staff is actually requesting the Commission to open an investigation into the ongoing Electric Rate Case investigation. The title of the proposed Docket itself, chosen by Staff, makes that clear: “In The Matter Of The *Investigation Into Delmarva Power & Light Company’s Rate Request.*” The Commission should not allow Staff to proceed with such a duplicative and wasteful proceeding.

5. Just like every prior electric, natural gas, water, sewer, cable television, telephone and other utility rate case brought before this Commission, in the pending Electric Rate Case Staff is fully entitled to hire consultants, propound discovery, file testimony, and cross examine witnesses regarding any position it wishes to assert. As with every prior utility rate case filed with this Commission, Staff can conduct all necessary discovery into whether Delmarva has engaged in inappropriate levels of investment in its efforts to provide reliable service to its customers. Staff, the Public Advocate and interveners can retain consultants in the Electric Rate Case to review Delmarva’s reliability investments. Public comment sessions *will* be conducted in each county where the public can express any concerns it may have regarding the amount that Delmarva has invested in its efforts to provide reliable service. Once discovery and public comment is complete, Staff, the Public Advocate, and any other party will be entitled to submit testimony and other evidence in support of an argument that Delmarva’s investments in providing reliable service to its customers are somehow “excessive.” Nothing in Staff’s motion

explains why the well-established and detailed discovery procedures of a base rate case would be insufficient here.

6. In short, the well-established rate case process for challenging a utility's level of spending on reliability, or any other obligation to its customers, is fully adequate for a thorough investigation into whether Delmarva has allegedly overspent in its efforts to provide its customers with reliable service. The Commission should not permit Staff to conduct a redundant and unnecessary investigation into a matter that will be fully investigated in the Electric Rate Case proceeding. To engage in a second, parallel proceeding to investigate the very issues that should be considered in the pending Electric Rate Case proceeding would merely create a duplicative, unnecessary and wasteful administrative proceeding that will needlessly consume the resources of the Commission, Staff, and Delmarva's customers.

B. Staff's Motion Erroneously Portrays This Commission's Docket 50 Reliability Performance Standards As The Maximum Level Of Reliability That Delmarva Should Provide Its Customers

7. Staff's Motion attempts to portray the Commission's Docket 50 reliability performance standards as the highest level of reliability that Delmarva should provide to its customers (Motion at ¶¶6-8). Throughout the development of the Docket 50 reliability standards, however, Staff repeatedly expressed its view (which Delmarva agrees with) that the SAIDI reliability performance addressed in Docket 50 serves as the minimum level of reliability that Delmarva's customers should be provided. In fact, the Docket 50 regulations themselves make that clear:

“1.13 Compliance with this regulation is a *minimum* standard. . . . Each [utility] needs to exercise their professional judgment based on their systems and service territories.”³

³ 26 Del Admin C §3007, 1.3 (*emphasis added*).

If Delmarva's reliability performance does not achieve the minimum SAIDI performance set forth in Docket 50, mandatory corrective action must be taken.⁴

8. If Staff now believes that Delmarva's reliability performance should not exceed the minimum floor established in Docket 50 and/or that Delmarva's successful efforts to provide its customers with better reliability than the minimum are wrongful or "excessive," then the appropriate forum for Staff to investigate and seek to prove that allegation is in Delmarva's currently pending Electric Rate Case. Of course, if the Commission determines that Delmarva's investments in reliability have been "excessive," then the appropriate course would be for the Commission to disallow recovery of those costs. A separate investigatory docket into Staff's allegations of "excessive" reliability spending would be both redundant and wasteful.

C. Staff's Assertion That Delmarva Has Failed To Fulfill Its
Obligation To Work With Staff On Issues Related To
Delmarva's Ongoing Investments In System Reliability Is
Inaccurate

9. In the Commission approved settlement agreement from Delmarva's last rate case (Docket No. 11-528) (the "Settlement Agreement"), Delmarva and Commission Staff "agreed to meet and discuss several issues outside the confines of this rate proceeding in the hopes of resolving each of them."⁵ The Settlement Agreement included the following language:

These issues include: (1) the establishment of metric(s) for the reporting and/or approval of reliability projects going forward so that customers are aware of how investment in Delmarva's plant in service benefits them in a quantifiable manner; (2) an agreement to meet and discuss alternative regulatory methodologies which would include, but not be limited to, multi-year rate plans.⁶

⁴ Docket 50 Regulation No. 10.6.

⁵ Settlement Agreement at ¶17, approved in Commission Order No. 825.

⁶ *Id.*

10. From the time that the Commission approved the Settlement Agreement, Delmarva began working to fulfill those settlement obligations with respect to reliability and a potential multi-year rate plan. Unlike a traditional base rate case, a multi-year rate plan is forward looking. While a traditional rate case focuses primarily on the appropriateness of *past* investments made during a test year, a multi-year rate plan focuses on the appropriate level of utility spending and rates during a *future* period. Development of a multi-year rate plan involves, among many other matters, an examination of a utility's *future* investments in reliability, service levels, and ongoing reporting to the Commission on spending and performance.

11. Staff's assertion that Delmarva has failed to move forward to address Staff's concerns related to Delmarva's ongoing investments in system reliability is unfortunate and incorrect. On February 22, 2013, Delmarva's counsel sent the following email to Staff's outside Rate Counsel:

"As part of the settlement [*of Delmarva's prior rate case - Docket No. 11-528*], one of the things Staff wanted to explore was ways that we could make customers "aware of how investment in Delmarva's plant in service benefits them in a quantifiable manner." Another issue we agreed to explore was a multi-year rate plan.

Discussions on the multi-year are moving forward. What are your thoughts about exploring how to show customers how Delmarva's investments in plant are beneficial? Maybe we could get together casually to start discussions after the next Commission meeting? Let us know your thoughts. Thanks."⁷

12. Delmarva has been actively working to fulfill its obligations contained in the Settlement Agreement, and as the attached email demonstrates, has initiated the ongoing work

⁷ See email dated February 22, 2013 (attached as "Exhibit 1" to this Response). Delmarva's counsel regrets having to attach informal email communications between counsel to this response. It was, however, Staff who made the flawed representation that Delmarva had not moved forward with its Settlement obligation on the reliability issue. Accordingly, Delmarva's counsel is duty bound to both his client and the Commission to make sure that the representation is concretely dispelled.

with Staff on this very issue. Delmarva has been meeting with Staff and the Public Advocate in an effort to explore the potential for a multi-year rate plan. These meetings have included, among other issues, the very reliability issues that Staff claims it needs to open an “investigatory docket” to examine. Contrary to Staff’s assertion, Delmarva reached out to Staff to make clear that the issue of reliability needed to be addressed as part of the Settlement Agreement. Delmarva intends to continue to work diligently with Staff and the Public Advocate on these issues. Delmarva is hopeful that Staff will continue what have been significant good faith efforts to explore current and future reliability spending and potential alternative rate methods.⁸

D. The Timing Of the Filing And Scheduling of Staff’s Motion
Is Procedurally Inappropriate and Serves To Deny Delmarva Due
Process

13. On the morning of April 17, 2013, Delmarva’s counsel learned, through a routine check of the Commission Agenda on the Commission’s website, that a motion by Staff to open an investigation against Delmarva for “excessive spending” had been filed and scheduled for Commission consideration. Delmarva was previously unaware of the existence of any such motion. Approximately an hour later, after Delmarva’s counsel called a Deputy Attorney General representing Staff to request a copy of Staff’s Motion, Staff’s outside Rate Counsel provided Delmarva’s counsel with a “*courtesy copy*” of the Motion.

14. Although the Commission’s Rules of Practice and Procedure do not specifically address the timing of motions before the Commission, it should be unnecessary to state that the most basic notions of fairness and procedural due process require that a party to a motion be provided with both timely service of a motion and an adequate time to respond. Staff’s deliberate timing deprived Delmarva of both of those due process rights.

⁸ Delmarva wishes to emphasize that while it is disappointed with Staff’s Motion and the representations made therein, Delmarva believes that Staff has been working in good faith on these issues with a focus on the best interests of customers.

15. Except in the most exigent of circumstances, where immediate relief is needed to protect a party from an imminent threat or irreparable harm, a party against whom a motion is filed should be provided with a timely service copy of a motion.⁹ The scheduling of a motion should afford the responding party with adequate time to consider the motion and respond to the motion in writing. Adequate time to respond to the motion must also include a fair opportunity for the Commission or court to adequately review and consider the written response to a motion. Staff provided Delmarva with none of those basic procedural rights and courtesies. Staff planned the Motion, drafted the Motion, scheduled the Commission's consideration of the Motion, added the Motion to the Agenda, and placed the Agenda on the Commission's public website – all prior to serving Delmarva with a copy of the Motion itself. Delmarva was eventually served with a “*courtesy* copy” of the Motion on April 17th. As a result of the deliberate timing of Staff's Motion and Staff's unilateral decision regarding scheduling, the Commissioner's packets containing the filings to be considered at the April 23rd meeting (which were sent by Staff to the Commissioners on April 18th) did not contain Delmarva's response to Staff's Motion.

16. Every party that appears before this Commission, as well as the Commission itself, deserves a higher standard of process and procedure. Such litigation tactics serve no purpose other than to: (a) prejudice the due process rights of parties appearing before the Commission; (b) impair the ability of the Commission to adequately consider matters before it; and, (c) needlessly increase the cost of the regulatory process to the detriment of the Commission, the parties and utility customers.

⁹ Clearly, no irreparable harm from alleged “excessive” spending on reliability exists here. As explained earlier in this response, if Delmarva ever seeks recovery for “excessive” spending of any kind, the Commission can and will deny recovery of any amounts found to be excessive.

CONCLUSION

17. Opening an investigatory docket at this time would be inappropriate and unnecessary. If Staff wishes to investigate whether Delmarva has “overspent” in its efforts to provide enhanced reliability to its customers, then Staff will have entirely adequate opportunity to investigate that issue in the Electric Rate Case – in fact, that is exactly what the discovery, public comment and evidentiary hearing process in all rate cases is designed to accomplish. In the future, except in the most exigent of circumstances, all parties in Commission proceedings should follow the well-established practice of providing opposing parties with adequate notice of, and a fair opportunity to respond to, motions and other filings. Delmarva intends to continue to move forward to work with Staff and the Public Advocate to fulfill the requirements of the Settlement Agreement from Docket 11-528, concerning reliability reporting and development of a potential multi-year rate plan. As Delmarva made clear in its Application to the Electric Rate Case, if those meetings result in any proposals, Delmarva will supplement its current Electric Rate Case filing to include any such proposals.¹⁰ Should a multi-year rate plan be developed for presentation to the Commission, it will be subject to full public evidentiary proceedings before the Commission in the current Electric Rate Case proceeding. However, to initiate a parallel, duplicative proceeding would not be in the best interests of customers who would ultimately bear the costs of a second proceeding which would accomplish nothing more than can be done in the currently pending Electric Rate Case. To grant Staff’s motion would only serve to waste the time and resources of the Commission and the parties and create administrative inefficiencies without adding any incremental value to the process.

¹⁰ Docket 13-115 Application testimony of Frederick J. Boyle at pages 9-10.

WEREFORE, for the reasons set forth herein, Delmarva respectfully requests that the

Commission rule as follows:

1. That Staff's Motion is DENIED.
2. That once the intervention period in the Electric Rate Case expires, Staff's consultants are approved, and the Hearing Examiner issues a procedural schedule, Staff and interveners may conduct reasonable and appropriate discovery for the purpose of investigating Staff's allegations concerning Delmarva's spending related to providing reliable service to its customers.
3. That Staff, Delmarva and the Public Advocate should continue to fulfill their obligations set forth in the Settlement Agreement, including but not limited to issues of reliability investments and a potential multi-year rate plan.

Respectfully submitted,



Todd L. Goodman
Counsel for Delmarva Power

Dated: April 22, 2013

Exhibit 1



Last Electric Base Rate Case

Todd Goodman to: jamesgeddes, janis.dillard

Cc: Heather Hall

02/22/2013 04:16 PM

Jim and Janis:

As part of the settlement, one of the things Staff wanted to explore was ways that we could make customers "aware of how investment in Delmarva's plant in service benefits them in a quantifiable manner." Another issue we agreed to explore was a multi-year rate plan.

Discussions on the multi-year are moving forward. What are your thoughts about exploring how to show customers how Delmarva's investments in plant are beneficial? Maybe we could get together casually to start discussions after the next Commission meeting? Let us know your thoughts. Thanks - Todd

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