

**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)
ACQUISITION CORPORATION, EXELON ENERGY) PSC Docket No. 14-193
DELIVERY COMPANY, LLC AND SPECIAL PURPOSE)
ENTITY, LLC FOR APPROVALS UNDER THE)
PROVISIONS OF 26 DEL. C. §§ 215 AND 1016)
(Filed JUNE 18, 2014))

ORDER NO. 8634

On In-Camera Inspection of Documents

AND NOW, this 5th day of September, 2014, the duly-appointed Hearing Examiner for this docket determines and orders the following:

1. Pursuant to ¶2 of Order No. 8581 (July 8, 2014), the Commission designated me as the Hearing Examiner for this docket and delegated the authority to me to resolve any discovery disputes among the parties.

2. On July 31, 2014, the Public Service Commission Staff ("Staff") timely served discovery on Delmarva Power & Light Company ("Delmarva"), Pepco Holdings, Inc. ("PHI"), Exelon Corporation ("Exelon"), Exelon Energy Delivery Company, LLC ("Exelon"), Purple Acquisition Corporation ("Merger Sub"), and Special Purpose Entity, LLC ("SPE") (collectively the "Joint Applicants").

3. On August 7, 2014, the Joint Applicants timely objected to a number of Staff's discovery requests and identified certain objected to documents in a Privilege Log.

4. On August 25, 2014, by PSC Order No. 8621, pursuant to the parties' agreement, I ordered that I would conduct an in-camera inspection of the documents which the Joint Applicants objected to producing. Due to the parties' agreement, I will not address Staff's original claim that the

Privilege Log is deficient because it did not have enough information for Staff to determine if the documents are truly privileged. By agreeing to me examining these documents, this claim is now moot.

5. On August 27, 2014, the Joint Applicants timely delivered the documents to me.

6. In its Motion to Compel dated August 15, 2014, the Commission Staff identified eleven (11) general categories that it claims that the Joint Applicants have improperly refused to produce.

7. The first category ("Category #1 Docs 1-12) consists of emails sent to, received by, or copied to, Darryl M. Bradford, Senior Vice President and General Counsel for Exelon Corporation, Paul Bonney, Exelon's Senior VP and Deputy General Counsel and/or Wendy E. Stark, Deputy General Counsel, Regulatory, for Pepco Holdings, Inc., along with a number of high level managers listed in the Privilege Log.

8. Based on my review of Category 1, these documents, which relate to the legal drafting of regulatory commitments, primarily customer benefit payments, which the Joint Applicants were discussing, are Attorney-Client privileged and subject to the Common Interest Doctrine.

9. As it relates to Attorney-Client Privilege and the Common Interest Doctrine, I agree with the legal authorities relied upon by the Joint Applicants in their response to Staff's Motion to Compel, and it is not necessary to repeat it here.

10. Regarding the Category 1 documents (and other categories herein), the most important issues are: 1) under Delaware law, a communication can qualify to be privileged even if no party to the communication is a lawyer according to D.R.E. 502(b) and 2) each of these documents involved usually two (2) transaction attorneys (but sometimes

one) communicating between themselves and/or with other high level managers. Each of the documents were labeled as protected by the creator or recipients as protected by the Attorney-Client Privilege and/or the Common Interest Doctrine.

11. As to the common interest doctrine, all documents are dated April 27, 2014 or after. The merger was signed and formally announced on April 29, 2014. (Applic., Appendix B.) I find that the documents qualify under the common interest doctrine. Based on my review of these documents, it is obvious to me that common interest existed between these parties at this time. The merger deal was done for all intents and purposes on April 27. The documents clearly reflect that the lawyers and the high level managers were already trying to finalize the legal language in their Applications, which I find that they had a right to do without others discovering their communications.

12. As to documents 14-15, the attachment to this email called "Revised Exelon Pepco Combination April 10, 2014" was provided, but is not accessible to me. I require the Joint Applicants to produce this document to me within forty eight (48) hours. I will then rule as to whether Documents 14 and 15 and/or the attachment must be produced to Staff.

13. As to the Category 2 documents, Document Nos. 16-31, these documents relate to the Joint Applicants developing the legal language in their final ring fencing approach to be included in the multiple applications, including the pre-filed testimony of Carim V. Khouzami, BSE's Senior Vice President, Chief Financial Officer and Treasurer, and Chief Integration Officer for the merger.¹

¹ According to the Delaware Application, "IX. OTHER REQUIRED APPROVALS, 35. In addition to approval by the Commission, several other regulatory approvals will be required before the Merger can be concluded. These include expiration of the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as well as

14. The Category No. 2 documents also involve many lawyers. Bruce Wilson, Exelon's Sr. VP and Deputy General Counsel, Thomas Gadsden, Esq., Anthony Gay, Esq., Paul Bonney, Esq., Kevin McGowan, Esq. and Wendy Stark, Esq. are all emailing in this group of documents. Each of the documents were labeled as protected by the creator or recipients as Attorney-Client privilege or the common interest doctrine. Although there are slight brushes almost reaching business advice apparently with only managers involved, these documents, which area all dated after the merger announcement, read in their proper context, are Attorney-Client privileged and subject and subject to the Common Interest Doctrine.

15. Category No. 3, Document Nos. 32-35, consist of: a) a June 5, 2014 email from Wendy Stark, Esq. to Darryl M. Bradford, Esq., Paul Bonney, Esq., Anthony Gay, Esq. and high level managers regarding the District of Columbia's Application requirements relating to Pepco Holdings, corporate operational structure; and b) the latest draft District of Columbia Inc.'s application sent by Ted Duer, Esq., Exelon's Senior Counsel. This draft application addresses the issue and some District issues; however it also addresses a number of issues which are also addressed in the Delaware Application, including customer benefits and renewable energy. I find that the documents are also protected by Attorney-Client Privilege and the Common Interest Doctrine.

16. Category No. 4, Document Nos. 36-38, consist of: post-merger announcement emails beginning June 4, 2014 between attorneys and high level

approvals from the Federal Energy Regulatory Commission ("FERC"), the Federal Communications Commission, the District of Columbia Public Service Commission, the Maryland Public Service Commission, the New Jersey Board of Public Utilities and the Virginia State Corporation Commission." (DE. Applic., pp. 23-24.)

managers and the draft Delaware Application prepared by DPL's Delaware attorney, Todd Goodman, Esq. The documents reflect the Joint Applicant's approach to a number of Delaware issues: Dynamic Pricing, Direct Load Control Programs, Reliability, Smart Meters, etc. I find that the documents are Attorney-Client Privileged and subject to the Common Interest Doctrine.

17. Category No. 5, Document Nos. 39-42, like Category No. 2 discussed previously, relate to the pre-filed testimony of Carim V. Khouzami, BSE's Senior Vice President, Chief Financial Officer and Treasurer, and Chief Integration Officer for the merger.

18. The two (2) emails here relate to the Money Pool. However, Mr. Khouzami's testimony reflects advice by lawyers and high level accounting managers requesting legal advice as to a number of issues involving the different jurisdictions, including corporate organization, merger accounting, reliability, etc. I find that the documents are clearly Attorney-Client privileged and subject to the Common Interest Doctrine. My comments in this section also apply to Document Nos. 47-48, Document Nos. 61-64, and Document Nos. 77-78.

19. As to Category No. 6, Document Nos. 43-46, these are emails and a draft "Ring Fencing and Governance Proposal," sent principally between lawyers but also other high level managers addresses ring fencing, corporate organization, the Money Pool, the companies' equity levels, etc. I find that the documents are Attorney-Client privileged and subject to the Common Interest Doctrine.

20. Category No. 7, Document Nos. 49-60, first consists of an email dated June 8, 2014 from Paul Bonney, Esq. sent primarily to lawyers but also high level managers attaching the draft pre-filed testimony of Denis

P. O'Brien, Exelon's Senior Exec. VP and CEO to be included in multiple Applications.

21. The second portion of Category 7 consists of an email dated June 4, 2014 from Anthony Gay, Esq., Exelon's Associate General Counsel enclosing draft pre-filed testimony of: a) Denis P. O'Brien, Exelon's Senior Vice President (VP) and CEO, Christopher Crane, Exelon's President and CEO; Charles Dickerson, who is or was VP of Customer Services for Pepco Holdings, Inc., Joseph Rigby, PHI's current President and CEO, Mark Alden, Exelon's VP of Utility Oversight & Integration, William Gausman, PHI's VP of Strategic Initiatives, Calvin Butler, Chief Exec. Officer of BGE, and Susan Tierney, PhD, Senior Advisor, Analysis Group.²

22. In addition to be labeled as "Attorney-Client Privilege and Common Interest Privileged," Attorney Anthony Gay's email specifically states that it is being sent only to: a) the legal team; b) the witnesses; c) a chief of staff; and d) lead contact for the witness. I find that the documents are Attorney-Client Privileged and subject to the Common Interest Doctrine.

23. Category No. 8, Document Nos. 65-69, also consist of emails and attachments relating to the Delaware Application and testimony, but this category primarily involves ring fencing issues and the Money Pool. Sent only to attorney, I find that the documents are clearly Attorney-Client Privileged and subject to the Common Interest Doctrine.

24. Staff raised an issue as to Category No. 9, Document Nos. 70-71, because credit ratings are involved. These documents are related to Category 8 above, discussing ring fencing issues and the Money Pool. There is a credit ratings chart which describes the credit ratings of all

² With the exception of Charles Dickerson, all these testimonies were subsequently filed in Delaware. (DE. App. 21-23.)

companies. However, I will not disturb the privileged nature of these communications, when this credit rating information is easily obtainable by Staff elsewhere.

25. Staff also raised an issue as to Category No. 10, Document Nos. 72-76, including the Liberty Report dated March 20, 2003. Category 10 is a continuation of the dialog in described in Category 8 except the dialog turned to New Jersey as opposed to Delaware. However, despite its date, the Liberty Report relates not only to the Joint Applicants' current New Jersey Application, but also the current Delaware Application. I find that the documents are Attorney-Client Privileged and subject to the Common Interest Doctrine.

26. Category No. 11 - Remaining Documents

- a. Document Nos. 79-80 - Emails dated June 13, 2014 primarily between lawyers describing status of pre-filed testimony if Christopher Cane, Carim Khouzami and Denis O'Brien. For the reason described earlier, I find that the documents are clearly Attorney-Client privileged and subject to the Common Interest Doctrine.
- b. Document No. 81 - Email from Witness Carim Khouzami to lawyers re: the language to be included in his testimony, and emails from lawyers attempting to provide a draft of his testimony which he could actually open after he had could not open it. I find that the documents are Attorney-Client privileged and subject to the Common Interest Doctrine.
- c. Document Nos. 82-89 - Emails and attachments dated June 5-10, 2014, primarily between lawyers but also Managers discussing Delaware's ring fencing and merger requirements, and enclosing drafts. For the reasons described earlier, I find that the documents are

Attorney-Client privileged and subject to the Common Interest
Doctrine.

It Is Ordered this 5th day of September, 2014.

Mark Lawrence
Senior Hearing Examiner