

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. 8651

On In-Camera Inspection of Hart-Scott-Rodino Documents

AND NOW, this 7th day of October, 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 Power"), Pepco Holdings, Inc. ("PHI"), Exelon Corporation ("Exelon"), Exelon Energy Delivery Company, LLC ("Exelon Energy"), 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.

4. On August 25, 2014, pursuant to the parties' agreement, by PSC Order No. 8621, I ordered that I would conduct an in-camera inspection of the documents which the Joint Applicants objected to producing.

5. Staff had requested the following documents from PHI and Exelon:

PSC-FN-58: "Corporate Governance-Please provide the Hart-Scott-Rodino filings of PHI and Exelon once available."

6. The Hart-Scott-Rodino Antitrust Improvement Act of 1976 is a federal statute which requires the parties to a large, proposed merger to file documents with the Federal Trade Commission ("FTC") which analyzes whether the proposed merger is legal, and a waiting period is imposed.

7. On September 23, 2014, PHI and Exelon each provided me with separate disks containing their respective documents and Privilege Logs.

8. On September 23, 2014, PHI and Exelon also informed me that "[t]he Joint Applicants produced to Staff the exact versions of these filings provided to the Department of Justice." ("DOJ") The DOJ and the FTC each enforce U.S. anti-trust laws, while sharing some authority and having some exclusive authority. In any event, the Joint Applicants provided Staff with the documents which the Joint Applicants provided to DOJ. (See 15 U.S.C. §§ 21, 25.)

9. In this case, the Delaware Public Service Commission is tasked with different responsibilities than the FTC's or the DOJ's

anti-trust enforcement. First, Delmarva Power, PHI's subsidiary, provides electric service to approximately 305,000 Delawareans, and natural gas service to approximately 126,000 Delawareans. (Applic., ¶ 10.)

10. The Commission must determine whether the proposed merger is in accordance with Delaware law. The Joint Applicants' Application correctly alleges as follows:

"Pursuant to 26 Del.C. § 215(b), no person or entity may acquire control of any public utility doing business in Delaware without first having obtained approval of the Commission. Pursuant to 26 Del.C. § 215(d), "[t]he Commission shall approve any such proposed merger, ...when it finds that the same is to be made in accordance with law, for a proper purpose, and is consistent with the public interest." In addition, 26 Del.C. § 1016(a) provides:

"The Commission's regulatory authority over [Delmarva Power] shall not be affected by a subsequent change in stock ownership...In approving any proposed merger..., the Commission shall, in addition to considering the factors set forth in § 215 of Title 26, take such steps or condition any transfer in such a manner as to insure that any successor will continue safe and reliable transmission and distribution services." (Applic., ¶ 20.)

I. DELAWARE LAW REGARDING JOINT APPLICANTS' OBJECTIONS

11. Exelon and PHI have objected to Staff's Request based upon: a) Attorney-Client Privilege; and in some cases, b) Attorney Work Product.

12. As to Attorney Client Privilege, 1) under Delaware law, only a communication predominantly concerning legal advice can qualify to be privileged according to D.R.E. 502(b) and Delaware case law; business advice is not protected; and 2) if legal advice and business advice are both involved, only the legal advice may be redacted. *E.g.*,

MPEG LA L.L.C. v. Dell Global B.V., 2013 WL 6628782 at *2 (Del. Ch. Dec. 9, 2013); Lee v. Engle, 1995 WL 761222 at *1 (Del. Ch. Dec 15, 1995.) I will discuss the Common Interest Doctrine later herein.

13. Some of the documents here involved either one or more transactional attorneys providing legal advice to high level managers. Additionally, most of the documents were labeled as protected by the creator or recipients as protected by the Attorney-Client Privilege, Common Interest Doctrine and/or Attorney Work Product. Later herein, I question whether some of Exelon's documents must be produced to Staff.

14. As to Attorney Work Product, Delaware law provides that:

"Despite the underlying similarities between the attorney-client privilege and the work product doctrine, the latter is distinct from and broader than the attorney-client privilege. Unlike the attorney-client privilege, which must be asserted by the client, the right to assert the work product barrier to disclosure belongs in large part to the attorney ... [and] afford[s] additional protection ... from unfair disclosure.

The privilege afforded by the work product doctrine is limited by "the requirement that the document be prepared "with an eye toward litigation." Thus, on the one hand, the doctrine does not encompass [r]outine business records and other materials gathered in the ordinary course of business and, accordingly, such documents are not protected from discovery by an opposing party. On the other hand, the doctrine affords nearly absolute protection to mental impressions, conclusions, opinions or legal theories of an attorney concerning litigation, and all documents prepared by or for an attorney in anticipation of litigation."
Rembrandt Technologies v. Harris Corp., 2009 WL 402332 (Del. Super. 2008) (*most citations omitted*)

II. PHI'S DOCUMENTS

15. The documents PHI produced to Staff were the same documents PHI produced to the Department of Justice, including redacted

portions. In this case, PHI objected based upon Attorney-Client Privilege for each document, and also Work Product for five (5) of the documents. I will now discuss each document in the order listed in PHI's Privilege Log. Due to the sensitive nature of PHI's and Exelon's Privilege Logs, I did not attach either to this Order.

16. Document No. 1. The redacted portion of this document is attorney-client privilege as it contains legal advice provided by Kevin Fitzgerald, PHI's General Counsel to PHI's Board of Directors regarding the Board's fiduciary duties concerning the sale of the company, including a merger. Attorney-Client Privilege.

17. Document No. 2. This presentation was made on June 26, 2014 by Donna Kinzel, PHI's Chief Integration Officer, Vice President and Treasurer. The redacted page contains legal advice from PHI's legal department regarding how PHI is required to conduct business during the pendency of the merger or the merger integration process. Attorney-Client Privilege.

18. Document No. 3. This presentation was authored by Arturo Agra, PHI's Vice President of Strategic Planning. Similar to Document Nos. 1 and 2 above, this redacted portion includes legal advice from PHI's legal department concerning the Board's Fiduciary duties, and duties in case of sale, including case law. Attorney-Client Privilege and Attorney Work Product.

19. Document No. 4. This initial presentation by Boston Consulting Group, called the "EXC/PHI Integration Core Team Kickoff," is dated June 18, 2014. The Agenda states that the "Legal Guidelines" section of the program was provided by the three (3) attorneys listed

in PHI's Privilege Log. Like document No. 2, the advice related to what is appropriate and permissible conduct for PHI during integration planning during the pendency of the merger. This analysis is more detailed than the legal advice provided in Document No. 2. Attorney-Client Privilege and Attorney Work Product.

20. Document No. 5. This second presentation by Boston Consulting Group, called the "Analyze Phase Integration Kickoff," is dated July 30, 2014. Very similar to Document No. 4, this advice relates to what is appropriate and permissible conduct for PHI during integration planning during the pendency of the merger. Attorney-Client Privilege and Attorney Work Product.

21. Document No. 6. Reflects legal advice from the law firm of Sullivan and Cromwell, a law firm retained by PHI, regarding the responsibilities of the Board of Directors regarding mergers in PHI's jurisdictions and the regulatory process. Attorney-Client Privilege and Attorney Work Product.

22. Document No. 7. This one (1) page document is an update to PHI's Board of Directors. According to PHI's Privilege Log, it was drafted by Kevin Fitzgerald, Esq., PHI's General Counsel, and Joseph Frumkin, Esq. of Sullivan and Cromwell, a law firm retained by PHI. This document details PHI's regulatory strategy. Attorney-Client Privilege and Attorney Work Product.

III. EXELON'S DOCUMENTS

A. Set 1

23. Document 1 (Page 1). Legal advice by Darryl Bradford, Exelon's General Counsel, contained in Company's "Project Olympus

Board Review Preparation," dated April 23, 2014, relating to regulatory requirements and strategy regarding PHI's jurisdictions. Attorney-Client Privilege.

24. Document 2. Speaker Notes dated April 23, 2004 from Shравan Chopra, Exelon's Vice President of Corporate Development, regarding "Project Olympus," including legal advice provided by Exelon's Legal Department. Redacted portion relates to various provisions Exelon was seeking to have included in its Merger Agreement with PHI. Attorney-Client Privilege.

25. Document 3. Project Olympus presentation provided to Exelon's Board of Directors on April 24, 2014. Redacted text section refers to regulatory strategy, including the opinions of Exelon's attorneys. Attorney-Client Privilege.

26. Document 4. Project Olympus Talking Points of Shравan Chopra, Exelon's Vice President of Corporate Development, dated April 10 and 11, 2014. The redacted portion relates to Regulatory Strategy advice provided by Exelon's attorneys. Attorney-Client Privilege.

27. Document 5. "Pepco Holdings, Inc. Discussion" conducted by Shравan Chopra, Exelon's Vice President of Corporate Development, dated January, 2014. The redacted portion is a text session of legal advice provided by Exelon's attorneys. It relates to Regulatory Strategy, including a Regulatory History section for PHI's jurisdictions. Attorney-Client Privilege.

28. Document 6. "Benefits of an Exelon/Pepco Combination" dated February, 2014. Presentation by Mr. Chopra (and his employees) with text section of legal advice from Exelon's attorneys. One page of

legal advice redacted addressing Regulatory Strategy and Regulatory History in PHI's jurisdictions. Attorney-Client Privilege.

29. Document 7. "EXC/PHI Integration Core Team Kickoff." Presentation by Boston Consulting Group dated June 18, 2014. Like Document No. 5 of PHI's documents, legal advice regarding appropriate and permissible conduct during integration planning. Detailed legal analysis. Attorney-Client Privilege.

30. Document 8. "Project Olympus Update." Presentation by Mr. Chopra (and his employees) dated April 18, 2014 with redacted Regulatory Strategy provided by Exelon's General Counsel (and assisting attorneys) regarding PHI's jurisdictions. Attorney-Client Privilege.

31. Document 9. "Project Olympus Request to Approve Final Bid." Presentation by Mr. Chopra (and his employees) dated April 23, 2004. Regulatory strategy and merger terms in text section drafted by Exelon's General Counsel (and assisting attorneys). Attorney-Client Privilege.

32. Document 10. "Project Olympus Request to Approve Indicative Bid." Presentation by Mr. Chopra (and his employees) dated April 24, 2014 with Legal advice in text session regarding Board's duties provided by Exelon's General Counsel (and assisting attorneys).

33. Document 11. "Analyze Phase Integration Kickoff." Presentation by Boston Consulting Group dated July 30, 2014. Legal advice in text section regarding appropriate and permissible conduct during integration planning. Detailed Legal Analysis. Attorney-Client Privilege.

B. Set 2

34. Document 1. The document is entitled "Analyze Phase Interim Read-Out; Non-Utility Operations" and is dated September 11, 2014. Exelon has withheld the entire document. The document is labeled "Privileged and Confidential - Attorney Work Product/Common Interest Material." Exelon's Privilege Log states that this document, and the following six (6) documents, are Attorney-Client Privileged, because of the same description:

"Draft integration planning presentation containing and incorporating legal advice in connection with merger approval, challenges to integration and related active/potential litigation submitted to counsel for legal review and advice."

35. Delaware courts are not in favor of a Privilege Log which reiterates the same blanket objection for every document. *E.g.*, Klig v. Deloitte LLP, 2010 WL 3489735 *5 (Del. Ch. Sept. 7, 2010). According to Exelon's Privilege Log, regarding each one of the seven (7) documents, exactly one attorney for Exelon and one attorney for PHI were involved with each of the seven (7) documents.

36. The Joint Applicants' shall brief me within five (5) business days of the date of this Order as to why Document No. 1 should not be produced to Staff. First, the document itself, which does not include any email(s), does not provide what specific role Exelon's attorney Veronica Gomez, or PHI's attorney Dennis Haines, played regarding this document. Do any emails exist explaining their respective roles? What legal advice did each provide? Was this document, which contains business advice, simply sent to these

attorneys "for legal review and advice" to later claim that it is privileged?

37. Please brief me as to what legal advice is contained in this document. According to D.R.E. 502(b) and Delaware case law, a communication must predominantly concern legal advice to qualify as privileged; additionally only legal advice can be redacted. *E.g.*, MPEG LA L.L.C. v. Dell Global B.V., 2013 WL 6628782 at *2 (Del. Ch. Dec. 9, 2013); Lee v. Engle, 1995 WL 761222 at *1 (Del. Ch. Dec 15, 1995.)

38. Moreover, in Rembrandt Technologies, L.P. v. Harris Corp., 2009 WL 402332 (Del. Super. 2009), the court held that "the common interest doctrine...extends only to communications relating to the prosecution and litigation of the patents, and not to those communications relating to the parties' rights among themselves in the patents." (See FN 73.) In other words, the common interest doctrine applies to a joint legal strategy, not a joint business strategy. (*Id.*)

39. Document No. 2. "PHI Merger Integration Enterprise-Wide Applications" dated September 17, 2014. Although the Log lists two (2) different attorneys than Document No. 1, for the same reasons described in my discussion regarding Document 1, the Joint Applicants shall brief me within five (5) business days of the date of this Order as to why Document No. 2 should not be produced to Staff.

40. Document No. 3. "Analyze Phase Interim Readout Human Resources" dated September 17-18, 2014. The Joint Applicants shall brief me within five (5) business days of the date of this Order as to why Document No. 3 should not be produced to Staff.

41. Document No. 4. "Analyze Phase Interim Readout Treasury" dated September 17-18, 2014. Except for the "Issues/Constraints" section on Page 3 and Page 16 addressing legal advice, both of which may be redacted, the Joint Applicants shall brief me within five (5) business days of the date of this Order as to why the remainder of Document No. 4 should not be produced to Staff.

42. Document No. 5. "Analyze Phase Interim Readout: Tax" dated September 17-18, 2014. Except for Page 12 addressing legal advice which may be redacted, the Joint Applicants shall brief me within five (5) business days of the date of this Order as to why the remainder of Document No. 5 should not be produced to Staff.

43. Document No. 6. "Analyze Phase Interim Readout Insurance" dated September 17-18, 2014. The Joint Applicants shall brief me within five (5) business days of the date of this Order as to why Document No. 6 should not be produced to Staff.

44. Document No. 7. Memo from both Donna Kinzel, PHI's Chief Integration, Vice President and Treasurer and Carim Khouzami, Exelon's Chief Integration Officer, to Kevin J. Waden, Vice President, Finance Integration, Exelon. "Subject: Discussion of labor adder rates for synergies." This is the only document in Exelon's Set 2 of documents for which both attorney-client privilege and work product have been claimed. Ms. Kinzel and Mr. Khouzami filed pre-filed testimony in this case. The Joint Applicants shall brief me within five (5) business days of the date of this Order as to why Document No. 7 should not be produced to Staff.

45. Document No. 12. This document entitled "Olympus Regulatory Strategy - Operational Benefits" dated April 14, 2014 is not listed in the Privilege Log, but was included on the disk provided to me. I need the Joint Applicants to advise me as to of the status of this document within five (5) business days of the date of this Order.

Done and Ordered this 7th day of October, 2014.

/s/ Mark Lawrence
Mark Lawrence
Senior Hearing Examiner