

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION OF )  
DELMARVA POWER & LIGHT COMPANY, INC. )  
EXELON CORPORATION, PEPCO HOLDINGS, )  
INC., PURPLE ACQUISITION CORPORATION, )  
EXELON ENERGY DELIVERY COMPANY, LLC ) PSC DOCKET NO. 14-193  
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) )

**ORDER NO. 8665**

**AND NOW**, this 13<sup>th</sup> day of November, 2014, the Delaware Public Service Commission ("Commission") determines and orders the following:

1. On June 18, 2014, Delmarva Power & Light Company ("Delmarva"), Exelon Corporation ("Exelon"), Pepco Holdings Inc. ("PHI"), Purple Acquisition Company, Exelon Energy Delivery Company, LLC, and Special Purpose Entity, LLC ("Merger-Sub") (collectively the "Joint Applicants") filed an application seeking approvals under 26 *Del. C.* §§215 and 1016 for a change of control of Delmarva to be effected by a merger of PHI with Merger-Sub, a wholly owned subsidiary of Exelon.

2. On July 8, 2014, the Commission approved Order No. 8581 which designated Senior Hearing Examiner Mark Lawrence as the Hearing Examiner for this docket with the authority to monitor and resolve any discovery disputes among the parties.

3. On October 2, 2014, the Hearing Examiner issued Order No. 8638 which set forth certain parameters and limitations regarding taking depositions in this docket. For example, paragraph 8 of the Order provides as follows:

"Each intervener which is represented by an attorney who is a member of the Delaware Bar shall be allotted fifteen (15) minutes to question each witness in a deposition, whether of limited duration or not. The Intervener's Counsel's questioning shall occur after Staff's Counsel and the Public Advocate's Counsel have completed their direct examinations."

4. Paragraph 10 of the Order also provides as follows:

"Intervenors not represented by an attorney who is a member of the Delaware Bar may attend the depositions, but are not permitted to ask the witnesses any questions."

5. On October 6, 2014, Intervenor Jeremy Firestone ("Firestone") timely filed a petition for an interlocutory appeal (the "Interlocutory Petition") pursuant to 26 *Del. Admin. C.* §1001-2.16. Firestone argues that this Commission must grant such Petition and reverse the Hearing Examiner's decision set forth in Order No. 8638 because the decision was arbitrary, capricious, and violated fundamental notions of due process.

6. The Joint Applicants timely filed an answer to the Interlocutory Petition on October 8, 2014, and then timely filed an amended answer on October 9, 2014.

7. On October 9, 2014, Intervenors Mid-Atlantic Renewable Energy Coalition ("MAREC"), Clean Air Council ("CAC"), and the State of Delaware, Department of Natural Resources and Environmental Control, Division of Energy and Climate ("DNREC") filed a "Motion for Reconsideration of the Hearing Examiner's Order and Directives." This Motion for Reconsideration appealed the same order which is at issue here—Order No. 8638—but was directed to the Hearing Examiner and was

not a petition directed to us. Hence, we have not considered such filing as a part of our reasoning and decision in this Order.

8. Having reviewed the record in this case, including the Interlocutory Petition and attached exhibits and the Joint Applicants' answer and amended answer to the Interlocutory Petition (including exhibits), and having heard oral argument from the participants and deliberated in public at our regularly-scheduled October 14, 2014 meeting;

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE  
VOTE OF NOT FEWER THAN THREE COMMISSIONERS:**

9. We have jurisdiction over this matter pursuant to 26 *Del. C.* §201 and 29 *Del. C.* §10128.

10. An interlocutory appeal from a ruling of a Hearing Examiner may be taken to the full Commission "where extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest." 26 *Del. Admin. C.* §1001-2.16.1. Based on the evidence presented to us, we find that the requirements of Section 1001-2.16.1 have been met here.

11. Firestone argues that Order No. 8638 is erroneous because it is arbitrary and capricious, violates his due process rights, and is detrimental to the public interest. Firestone also argues that fundamental notions of due process are at issue here because he (and other parties in this docket) were not given any notice and opportunity to be heard regarding the Hearing Examiner's decision to exclude him and another party (both of whom are not represented by counsel) from participating in any depositions of witnesses for this

proceeding and to limit the amount of time for taking witness depositions. Finally, Firestone argues that under 26 *Del. C.* §508,<sup>1</sup> he has a statutory right to take depositions of witness for this proceeding because he was granted intervention status and, as an intervenor, he is considered a party who may take depositions. Because this is a statutory right, Firestone argues that the Hearing Examiner has no discretionary ability to deny Firestone this right.

12. The Joint Applicants argue that a previous order issued by this Commission (Order No. 8367) already addresses the arguments raised by Firestone and that this Commission should deny the Interlocutory Petition. They also argue no constitutional or due process right exists which requires Firestone (i) to be able to take depositions of witnesses in this proceeding or (ii) to be allocated the same amount of time as, for example, the Public Advocate or the Commission Staff, has for taking depositions of witness.

13. The evidence presented to this Commission demonstrates that Order No. 8638 treats some of the parties in this proceeding (i.e., those not represented by Delaware counsel) differently and adversely than other parties in this proceeding (i.e., those represented by Delaware counsel). This differentiation and the limitations set forth in paragraphs 8 and 10 of Order No. 8638 are arbitrary in this situation and unfair to those parties who cannot equally participate in any depositions that may be taken by the other parties. Order No. 8638 provides no reasoning (legal or otherwise) as to why certain

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<sup>1</sup> 26 *Del. C.* §508 provides as follows: "The Commission, or any party to proceedings before the Commission, may cause the deposition of witnesses residing within or without this State to be taken in the same manner as prescribed by law or by rules of the Superior Court for taking depositions in civil actions."

intervenors (i.e., those not represented by legal counsel) are allowed to have only limited participation in the depositions to be scheduled in this docket while other parties are not limited. We find this result unacceptable and grant the Interlocutory Petition in this limited instance to prevent substantial injustice. Moreover, because the scheduled time-frame for taking any depositions begins before our next Commission meeting is scheduled, we also find extraordinary circumstances exist here that necessitate a prompt decision by us on this Petition. Therefore, we conclude that the Interlocutory Petition should be granted. (4-0).

14. We therefore remand this matter to the Hearing Examiner. Furthermore, upon written request by any party in this proceeding, we authorize the Hearing Examiner to reconsider the parameters of his Order regarding depositions, subject to the following conditions: (i) all intervenors should have some level of participation in any depositions that are scheduled for this proceeding and that (ii) the Hearing Examiner may not treat any intervenor differently than any other party in this docket based solely on whether or not such intervenor is represented by counsel. (4-0).

15. Our decision is strictly limited to Order No. 8638.

16. The Hearing Examiner's authority to handle the day-to-day decisions concerning the overview and process of this docket remain in his hands and also remain limited to the authority which we designated to him via Order No. 8581 (July 8, 2014).<sup>2</sup>

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<sup>2</sup> In Order No. 8581 (July 8, 2014), we designated Mark Lawrence as the Hearing Examiner for this docket with the authority to schedule and conduct public comment sessions in all three counties; monitor and resolve any discovery

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17. The Commission reserves the jurisdiction and authority to enter such further orders in this matter as may be deemed necessary or proper.

**BY ORDER OF THE COMMISSION:**

/s/ Dallas Winslow  
Chair

/s/ Joann T. Conaway  
Commissioner

/s/ Harold B. Gray  
Commissioner

/s/ Jeffrey J. Clark  
Commissioner

/s/ Jaymes B. Lester  
Commissioner

ATTEST:

/s/ Alisa Carrow Bentley  
Secretary

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disputes among the parties; grant and deny petitions to intervene in this docket; determine the appropriate time, form, and manner of any public notice for any further public comment sessions and for the public evidentiary hearing; conduct a pre-hearing conference on July 30, 2014; and preside over the evidentiary hearings to be held before the Commission.