

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 DELIVERY COMPANY, LLC AND ) PSC Docket No. 14-193  
NEW SPECIAL PURPOSE ENTITY FOR )  
APPROVALS UNDER THE PROVISIONS OF )  
26 DEL. C. §§ 215 and 1016 )  
(Filed June 18, 2014) )

**ORDER NO. 8707**

**DENYING FIRESTONE'S MOTION IN *LIMINE* DATED FEBRUARY 2, 2015,  
WITHOUT PREJUDICE**

This 5<sup>th</sup> day of February, 2015, the Delaware Public Service Commission (the "Commission"), through its designated Hearing Examiner, issues the following Order denying Firestone's Motion in *Limine* dated February 2, 2015, without prejudice, and states as follows:

1. On February 2, 2015, Intervener Jeremy Firestone timely filed a Motion in *Limine*. ("the Motion")
2. The Motion seeks to exclude portions of the rebuttal testimony of Mr. Carim Khouzami, Exelon's Chief Integration Officer for the proposed merger of Exelon and PHI, and Dr. Susan F. Tierney, Ph.D, a Consultant for the Joint Applicants. (Motion, Exhibits 1, 3 & 5.) These rebuttal testimonies have been listed in the Pre-Hearing Exhibit List as the Joint Applicants' Exhibits 14 and 20, *respectively*.

3. On February 4, 2015, the Joint Applicants timely filed a Response to Mr. Firestone's Motion.

4. Mr. Carim Khouzami's Rebuttal Testimony. Mr. Firestone argues that, since the Joint Applicants filed Mr. Khouzami's direct testimony regarding synergy cost savings between the companies if the merger was approved, which relied upon analysis by the Boston Consulting Group ("BCG"), and the Joint Applicants subsequently produced both Mr. Khouzami and BCG Consultant David Gee for deposition, Mr. Khouzami's rebuttal testimony wherein he allegedly testified as to a "new theory" of synergy cost savings different than BCG's approach, should be excluded. Mr. Firestone argues that he has been prejudiced because Mr. Khouzami's allegedly new approach on rebuttal occurred after Mr. Firestone filed his own direct testimony. (Motion, PP. 1-4; JA Response, p.3.)

5. The Joint Applicants persuasively argue that they have not employed a new approach. Rather, the Joint Applicants' synergy cost savings analysis has evolved with more "refined" data since the BCG analysis was performed, noting that this major merger case was filed in June, 2015. (JA Response, pp. 3-4.) "For example, on the basis of the work of the integration team, Mr. Khouzami was able to provide estimates of employee attrition that may result from the merger integration process, and was able to develop detailed information concerning plans for the transition of information technology systems." (*Id.* at p.4.)

6. According to the Joint Applicants, "[i]nstead of relying on the statistical analysis that the parties were required to use before

the integration process was begun, it is more appropriate to focus on the work that has been developed in the integration planning process, and adjust the original [abstract] synergies analysis to reflect real world analysis." (*Id.*)

7. I agree with the Joint Applicants. This Commission has never distinguished as to which facts, arguments or analysis must be included in direct and rebuttal testimony. The Commission has never done this because it obviously wants to develop a complete evidentiary record in a constantly changing administrative case such as this where the Joint Applicants must establish at the evidentiary hearings that this proposed merger is in accordance with law, for a proper purpose, and that the proposed merger is in the public interest. (See 26 Del. C. §§215(d), 1016.)

8. Contrary to Mr. Firestone's argument, the Commission does not have a "case-in-chief requirement" requiring the Joint Applicants to, without recourse, "stick" with their direct or deposition testimony, and not file rebuttal testimony. This is an administrative agency, not a civil court where a cause of action must be proven or a litigant is subject to a Motion for a Directed Verdict, which must be raised prior to a defendant beginning to attempt to prove an affirmative defense. The method of presenting evidence in a civil court is much different than the method employed by the Commission. The potential of rebuttal testimony abuse is much higher and has more impact in civil court, when such abuse is virtually non-existent at the Commission due to how the Commission liberally permits evidence to be presented through the conclusion of the evidentiary hearings.

9. According to the Witness List, Mr. Khouzami will be testifying before the Commissioners at the evidentiary hearings and Mr. Firestone has requested twenty (20) minutes for cross-examining Mr. Khouzami. Also, Mr. Firestone listed himself as a witness at the hearings and will be testifying on direct for fifteen (15) minutes.

10. Delaware cases have uniformly held that, if a party is given the opportunity for cross-examination of a witness, a witness' evidence submitted in rebuttal will not be excluded. *E.g.*, Towerview LLC v. Cox Radio, Inc., 2013 Del. Ch. LEXIS 159 (Del. Ch. June 28, 2013) (*and cases cited by Joint Applicants*) The Commissioners will give Mr. Khouzami's testimony and Mr. Firestone's testimony the proper weight each deserves, based upon the credibility of each witness and the evidence presented.

11. Dr. Susan F. Tierney, Ph.d's Rebuttal Testimony. Mr. Firestone also seeks to exclude a portion of Consultant Tierney's Rebuttal Testimony. Mr. Firestone disagrees with Ms. Tierney's testimony regarding system reliability and the costs for achieving reliability standards. (Motion, pp. 5-9.)

12. Although Mr. Firestone's Motion questions the substance and accuracy of Ms. Tierney's rebuttal testimony, Mr. Firestone's questions do not affect the testimony's admissibility. These are matters for cross-examination at the evidentiary hearings.

13. For example, Mr. Firestone argues that Ms. Tierney's reference to Mssrs. Alden's and Gausman's testimonies in her rebuttal testimony is in error and he disagrees with it. (*Id.*) However, the Joint Applicants argue the reasons in their Response why Ms. Tierney

referred to those testimonies. (JA Response, pp. 6-7.) While this is a matter for cross-examination at the evidentiary hearings by Mr.

Firestone, arguing that Ms. Tierney erred or you do not agree with her testimony is not a valid reason for excluding Ms. Tierney's testimony.

14. Mr. Firestone has requested the following cross-examination time periods for these witnesses at the evidentiary hearings: Ms. Tierney-30 minutes, Mr. Alden-10 minutes, and Mr. Gausman-10 minutes. Again, as with Mr. Khouzami's and Mr. Firestone's testimony at the evidentiary hearings, the Commissioners will give these three (3) additional witnesses' testimony the proper weight it deserves, based upon the credibility of the witnesses and the evidence presented. (See Towerview LLC case, ¶10, *supra*.)

15. The Motion is Untimely. Finally, despite apparently learning on January 12, 2015 of the issues he is raising now, Mr. Firestone waited until February 2, 2015 to file this Motion, two (2) weeks before the evidentiary hearings begin and a day before Witness and Exhibit Disclosure was due, when Mr. Firestone could have earlier filed a Motion at any time. (Motion, ¶8; see 26 Del. Admin. Code §1001, ¶2.7.1.) Although the Motion in *Limine* deadline was February 3, 2015, considering the substance of Mr. Firestone's Motion, it was untimely.

16. As provided in Paragraph 11 of the Scheduling Order dated January 26, 2015, if he desires, Mr. Firestone may re-new his Motion with the Commissioners at the evidentiary hearing. Therefore, the Hearing Examiner issues this Order *without prejudice*.

/s/ Mark Lawrence  
Mark Lawrence  
Senior Hearing Examiner