BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION	**)**	
OF DELMARVA POWER & LIGHT	**)**	
COMPANY FOR APPROVAL OF A	**)**	**PSC DOCKET NO. 17-1094**
PROGRAM FOR PLUG IN VEHICLE	**)**	
CHARGING (FILED OCTOBER 19, 2017)	**)**	

THE DIVISION OF THE PUBLIC ADVOCATE'S AND THE PUBLIC SERVICE COMMISSION STAFF'S EXCEPTIONS TO THE HEARING EXAMINER'S PROPOSED FINDINGS AND RECOMMENDATIONS DATED JULY 11, 2018 AND AMENDMENT TO PROPOSED FINDINGS AND RECOMMENDATIONS DATED JULY 12, 2018

Regina A. Iorii
Deputy Attorney General
Delaware Division of Justice
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8159
regina.iorii@state.de.us

Counsel for the Division of the
Public Advocate

Robert W. Willard
Deputy Attorney General
Delaware Division of Justice
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8637
robert.willard@state.de.us

Counsel for the Public Service Commission
Staff

Dated: July 31, 2018

NATURE AND STAGE OF THE PROCEEDINGS/STATEMENT OF FACTS

On October 17, 2017, Delmarva filed an application with the Public Service Commission ("Commission") seeking approval of six electric vehicle ("EV") programs. It did not submit any prefiled direct testimony with that application. The Commission opened this docket to consider Delmarva's application and appointed R. Campbell Hay as Hearing Examiner.[1]

On January 2, 2018, Mr. Hay approved and filed a procedural schedule. Pursuant to that schedule, Delmarva's direct testimony was due on February 9, 2018; direct testimony from the Commission Staff ("Staff"), the Division of the Public Advocate ("DPA"), and other intervenors was due on May 18, 2018; Delmarva's rebuttal testimony was due on June 27, 2018; and evidentiary hearings would be held on July 11-12, 2018.

In accordance with the approved procedural schedule, Delmarva filed an amended application and the direct testimony of two witnesses, Peter R. Blazunas and Robert S. Stewart. The amended application proposed a seventh EV program. Nowhere in the amended application or in either witness' testimony did Delmarva mention that its parent, Exelon Corporation, had retained a consultant to investigate EVs and prepare a report regarding EVs. Nor did Delmarva disclose that information in any of its responses to data requests.

On May 18, 2018, Staff, the DPA, and others submitted direct testimony. Delmarva submitted data requests to Staff and the DPA, but none of those requests contained any hint that Exelon had commissioned an EV study.

On June 20, 2018, a week before Delmarva's rebuttal testimony was due, Delmarva's counsel told the DPA's counsel that Exelon had retained a consultant to investigate EVs, and that consultant was preparing a report that would not be available until after Delmarva's rebuttal

[1] Hearing Examiner Hay resigned his position to accept other employment. The docket was subsequently reassigned to Senior Hearing Examiner Mark Lawrence.

testimony was due and perhaps not before the evidentiary hearings. Counsel represented that the report would contain information that would be helpful for the PSC, and asked the DPA to agree to postpone the rebuttal testimony and evidentiary hearings to allow time for the report to be presented in the case. The DPA did not agree.

On June 22, 2018 – five calendar days before rebuttal testimony was due – Delmarva wrote to the Hearing Examiner, informing him about the forthcoming report and requesting postponement of rebuttal testimony deadline and the evidentiary hearings. On June 25, 2018, the DPA responded, opposing Delmarva's request. The Department of Natural Resources and Environmental Control ("DNREC") and the Sierra Club supported Delmarva's request; Staff and the Caesar Rodney Institute ("CRI") supported the DPA's opposition.

On July 3, 2018, the Hearing Examiner heard oral argument on Delmarva's request. He granted Delmarva's request and cancelled the evidentiary hearings. On July 11, 2018, he issued his Proposed Findings and Recommendations and Proposed Order. Characterizing the dispute as a discovery dispute, the Hearing Examiner cited Commission Rule 1001.2.6.4, which permits the designated Hearing Examiner to "vary discovery provisions in the interests of justice … ." (HEFR at ¶12). He stated that he had simply "varied the discovery of the case 'in the interest of justice.'" (*Id.* at ¶13). After reading the report, which was not provided to the parties or the Hearing Examiner until July 6, 2018, the Hearing Examiner found that the report "contains detailed analysis which will substantially aid the Commission in deciding this case." (*Id.* at ¶14). He stated that the report provides a "detailed analysis" regarding:

- The future of EVs in Delaware from 2019-35;
- The physical and economic impacts on Delaware and its infrastructure, anticipated grid and non-utility costs; and

- Delmarva's proposed performance on three net cost-benefits tests.

(*Id*. at ¶15). In his view, the report was "critical for the Commission to properly decide this case in a rapidly changing area of utility law." (*Id*). He concluded that no party would be prejudiced by filing this report and delaying the evidentiary hearings, because each party would "be afforded a sufficient amount of time to conduct any discovery into the Report" and would "clear the evidentiary hearing dates with their schedules." (*Id.*). Finally, he expressed his belief that the case could be completed by the end of 2018. (*Id.*). He claimed to "dislike a hearing delay as much as anyone," but preferred "a hearing delay over an *obvious incomplete* evidentiary record," which he concluded would occur if the DPA's, Staff's and CRI's objection was upheld. (*Id.* at ¶13, emphasis added). Last, the Hearing Examiner instructed the parties that any appeal of the Findings and Recommendations should be made pursuant to Commission Rule 1001.2.16. (*Id*. at ¶17). In his proposed order, the Hearing Examiner instructed the parties to confer with him to "work out an Amended Procedural Schedule suitable to all parties which affords each party a sufficient amount of time to conduct discovery as to the Report." (*Id.*, Proposed Order).

The DPA wrote to the Hearing Examiner on July 11, observing that he had styled his ruling as "proposed findings and recommendations" and a "proposed order." As such, the DPA contended, Section 10126 of the Administrative Procedures Act provided any party wishing to take issue with the proposed findings and recommendations 20 days to file exceptions, and the DPA intended to exercise its right to those 20 days. (July 11, 2018 Letter from Regina A. Iorii to Senior Hearing Examiner Mark Lawrence).

On July 12, 2018, the Hearing Examiner issued an "Amendment to Proposed Findings and Recommendations," in which he acknowledged the DPA's argument and established a deadline of July 31, 2018 for exceptions. He further claimed that for the last 20 years, "straight forward

discovery disputes like this … have been done exclusively through Interlocutory Appeals," and that such a process had worked well because it has "moved cases along" and "avoided protracted litigation by litigious parties." (Amendment to HEFR at ¶¶1-2).

This is the DPA's Exceptions to the Hearing Examiner's Proposed Findings and Recommendations.

ARGUMENT

A. The Commission Should Reject the Hearing Examiner's Proposed Findings and Recommendations.

1. Introduction.

Contrary to the Hearing Examiner's characterization of this dispute as a "straight forward discovery dispute," it is anything *but* that. Indeed, it is not a discovery dispute *at all*. What it *is* an applicant's attempt to sandbag other parties in rebuttal testimony only a few weeks before evidentiary hearings with the introduction of a report commissioned by the applicant's parent company that supposedly provides "critical information and analysis" about the issues involved in the case, and which results in scotching a long-established procedural schedule to which the applicant agreed. And the applicant requesting the postponement is the only party that had any knowledge that this report was being prepared (to the best of the DPA's and Staff's knowledge).

That which Staff and the DPA prophesied in Docket No. 17-0977, when Delmarva filed "supplemental" testimony that increased its requested rate increase by nearly $7 million, has come to pass. That case was in a different procedural posture (much earlier in the case), but Staff and the DPA both predicted that if the Commission allowed Delmarva to file this supplemental testimony rather than require it to refile its case, utilities would take advantage of the Commission's leniency. The Commission allowed Delmarva to introduce that testimony while requiring a change in the procedural schedule, rejecting Staff's and the DPA's argument that it

should have been treated as a new filing. Delmarva is attempting to take advantage of the Commission's leniency in this case, and at a time when evidentiary hearings were just three weeks away.

Obviously, the evidentiary hearings cannot now go forward on July 11-12, 2018. However, the DPA and Staff urge the Commission to reject the Hearing Examiner's proposed findings and recommendations, to establish a deadline for rebuttal testimony that does not include the report, and to schedule an evidentiary hearing as soon as possible pursuant to the Administrative Procedures Act's notice requirements.

2. The Hearing Examiner Improperly Based His Written Decision on an After the Fact Review of the Report.

The Hearing Examiner's findings and recommendations should be rejected because he based them on his review of the report (indeed, he attached the report to his findings and recommendations). But the report was not provided until July 6. He did not have the report at the time he made his decision on July 3. All he had was the representations of Delmarva's counsel in its June 22 letter and during oral argument. Unfortunately, there is no transcript of the oral argument, so the DPA and Staff cannot be sure what exactly Delmarva's counsel told the Hearing Examiner. It is clear, however, that the Hearing Examiner did not rely on what that letter said or the argument that Delmarva's counsel made, because he specifically referred to the report in his findings and recommendations.

It is improper to base a decision made earlier on information received after the decision was made. The Hearing Examiner should have based his decision on what was available to him at the time he made it. The Findings and Recommendations should be rejected on that basis alone.

3. Other Parties *Are* Prejudiced By the Hearing Examiner's Proposed Findings and Recommendations Because the Hearing Examiner Has Provided Them No Opportunity to Address the Report's Contents in Prefiled Testimony.

The Hearing Examiner says that no party is prejudiced by his findings and recommendations because he will give each party a sufficient amount of time to conduct discovery and each party will clear dates for the evidentiary hearing. But the Hearing Examiner misses the point. The point is that the DPA's and Staff's (and CRI's) time for filing testimony has passed, and they cannot address anything contained in the report in their prefiled testimony. The Hearing Examiner did not recommend giving the DPA and Staff (and CRI) an opportunity to present additional testimony addressing the report. And *that* is prejudicial.

As far as the DPA and Staff know, Delmarva was the only party in this case that knew that Exelon was conducting an EV study. Surely Exelon informed Delmarva about the study. (If it did not, that failure to communicate cannot be laid at the feet of any other party in this case). Delmarva's June 22 letter is cryptic about when Exelon commissioned the report (saying only that it was "earlier this year"), but this report was clearly in the works while this case was proceeding. It may already have been in the works when Delmarva filed its direct testimony. We don't know, however, because Delmarva hasn't told us and the Hearing Examiner never asked.

Delmarva (that is, Exelon) controlled when it filed this application, and Exelon controlled the knowledge of the study being conducted. Delmarva (that is, Exelon) could have waited to file the application until the report was finished, and included the report with its application so that other parties could address it in their direct testimony. Indeed, the report repeatedly references and addresses specifics of the proposed programs – which were known no later than February 9, 2018, and likely well before that date. There can be no doubt that the report was commissioned with the expectation that it would support Delmarva's application. Delmarva could have told the

intervenors about the study before direct testimony was due and asked them then to postpone the scheduled deadlines – including the deadline for intervenor direct testimony – until it filed the report and the intervenors had an opportunity to conduct discovery. It did neither of these things. Instead, it waited to see what the report would say. Only *then*, when it turned out (not surprisingly) that the report would support Delmarva's application, did it ask to postpone the schedule.

In every case, information will come to light after a party has submitted prefiled testimony, or right before a party's testimony is due, that may be useful to the Hearing Examiner and the Commission. Indeed, since the DPA filed its direct testimony, it has found additional support for its positions. But the DPA didn't dream of asking for a do-over to make this information part of the evidentiary record. No – the DPA is stuck with what it filed, even though it would very much like to provide this additional information.

Allowing Delmarva to postpone the long-scheduled hearings at this late stage to be able to submit a report that *its parent* commissioned sets a terrible precedent for future cases. What if another party had retained a consultant to perform a study that might provide helpful "critical information and analysis," but that report wasn't going to be ready for two months after the scheduled evidentiary hearing? Could that party ask to put a hold on the procedural schedule until that report was finished? What if another party learned that an EV guru was preparing a study that supported its position, but it would require him to file direct testimony that couldn't be filed until two weeks before the hearing? Could that party ask to postpone the evidentiary hearings? What if some other intervener found information that it believed would help the decisionmaker and wanted to amend its direct testimony to include it? If any other party did what Delmarva has done here, and what the Hearing Examiner has blessed, Delmarva would howl about the unfairness to it. Indeed, Delmarva bitterly protested Staff's alleged submission of new schedules in the electric rate

case – and there Staff was trying to accede to Delmarva's motion *in limine* by removing its FERC jurisdictional allocation issue from the case. Why does Delmarva get to play by different rules, especially when it is *its own conduct* that has necessitated the delay?

The Hearing Examiner failed to address the DPA's argument that this is essentially a new filing, so that if Delmarva wants to have the report in the case, it should be required to refile its application. The recommendation that the parties confer regarding an amended procedural schedule that affords a sufficient amount of time to conduct discovery on the report does not address the DPA's argument that it and other parties should be able to present testimony addressing the contents of the report, including additional witnesses if necessary. Requiring Delmarva to refile its application eliminates the prejudice to the DPA, Staff, and other parties because the case will restart and these parties will be able to address the report in their direct testimony. At the very least, if the Commission will not require Delmarva to refile its application and start the clock anew, it should include in its order a requirement that interveners be permitted to file additional testimony addressing the report.

4. Delmarva Failed to Comply with the Commission's Rules for Seeking Affirmative Relief.

This is a minor point, but we make it because Delmarva made an argument on July 10 in Docket No. 18-0935 that Staff and the DPA had not complied with the Commission's procedural rules in filing its petition to open a docket for distribution planning. Delmarva's letter was insufficient under Commission Rule 1001.2.7.1 to serve as a request for affirmative relief. 26 *Del. Admin. C.* §2.7.1 provides that a party may file and serve a motion at any time, and that the motion shall set forth, among other things, "a specific request for relief." Delmarva's June 22 letter made a specific request for relief: postponing the schedule until it can get its report finalized. It should have made its request by motion rather than by letter.

5. The Report Contains Nothing on Who Should Pay for EV Programs.

Finally, the report is simply a public service announcement for why EVs are great and why utilities should be involved. It provides no rebuttal on the key issue in this docket: who should pay for these programs. There are numerous non-ratepayer funding sources, and Delmarva's customers should not be forced to subsidize products and services that few customers – and wealthy customer at that – presently own or are likely to own in the future. But the report is silent on who should fund the utility's foray into this area.

CONCLUSION

The DPA and Staff respectfully request the Commission to reject the Hearing Examiner's proposed findings and recommendations. We respectfully submit that the Commission should exclude the report from evidence as part of rebuttal testimony, and that evidentiary hearings should be scheduled as soon as permissible under the Administrative Procedures Act. Alternatively, if the Commission should find that the report should be considered, the DPA and Staff respectfully request the Commission to require Delmarva to refile its application with the report, and that a new procedural schedule be approved that gives other parties the opportunity to conduct discovery on the report and present direct testimony addressing the report. If the Commission does not want to re-start the case, at the very least other parties should be afforded the right to conduct discovery on and provide sur-rebuttal testimony addressing the report.

Dated: July 31, 2018

/s/ *Regina A. Iorii*

Regina A. Iorii (DE Bar No. 2600)
Deputy Attorney General
Delaware Department of Justice
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8159
regina.iorii@state.de.us

Counsel for the Division
of the Public Advocate

/s/ *Robert W. Willard*

Robert W. Willard (De. Bar No. 338)
Deputy Attorney General
Delaware Division of Justice
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8637
robert.willard@state.de.us

Counsel for the Public Service Commission
Staff