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Via E-Filing and Federal Express

October 16, 2015

Ms. Brinda Westbrook-Sedgwick
Commission Secretary
Public Service Commission of the District of Columbia
1325 G Street, N.W.
Suite 800
Washington, D.C. 20005

Re: Formal Case No. 1119

Dear Ms. Westbrook-Sedgwick:

The Joint Applicants hereby submit their "Response of Joint Applicants to Commission Order No. 18000 Regarding the Schedule For This Proceeding and the Scope of Discovery" in the above-captioned matter. An original and fifteen copies of the Response will be sent to the Public Service Commission, care of Ms. Brinda Westbrook-Sedgwick, Commission Secretary, by Federal Express.

Please feel free to contact me if you have any questions regarding this matter.

Sincerely,

A handwritten signature in blue ink, appearing to be 'R. Lorenzo'.

Richard M. Lorenzo
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Enclosures

cc: Office of the People's Counsel; all intervening parties

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA**

IN THE MATTER OF THE MERGER OF	:	
EXELON CORPORATION, PEPCO	:	
HOLDINGS, INC., POTOMAC	:	
ELECTRIC POWER COMPANY,	:	Formal Case No. 1119
EXELON ENERGY DELIVERY	:	
COMPANY, LLC AND NEW SPECIAL	:	
PURPOSE ENTITY, LLC		

**RESPONSE OF JOINT APPLICANTS TO COMMISSION ORDER NO.
18000 REGARDING THE SCHEDULE FOR THIS PROCEEDING AND
THE SCOPE OF DISCOVERY**

This Response is being filed pursuant to Paragraphs 13 and 16 of Order No. 18000 (the “Order”) issued by the District of Columbia Public Service Commission (“PSC” or “Commission”) on October 8, 2015. The Order addresses and responds to the *Motion of Joint Applicants to Reopen the Record to Allow for Consideration of Non-Unanimous Full Settlement Agreement and Stipulation, or for Other Alternative Relief* (“Motion”) filed on October 6, 2015. With the Motion, the Joint Applicants also filed the Nonunanimous Full Settlement Agreement and Stipulation (“Settlement Agreement”) that has been achieved in this case.¹

Paragraphs 13 and 16 of the Order provide that responses to the Motion are due by October 16, 2015, and direct the parties (1) to comment on the procedural schedule proposed in the Motion and (2) to address “the scope of any discovery that would be included in the procedures and whether any discovery would be limited by Commission Rule 130.6 and other

¹ The Settlement Agreement was entered into by and among the Joint Applicants, the Office of the People’s Counsel (“OPC”), the District of Columbia Government (“DCG”), the District of Columbia Water and Sewer Authority (“DC Water”), the National Consumer Law Center (“NCLC”), National Housing Trust (“NHT”), the National Housing Trust-Enterprise Preservation Corporation (“NHT-E”), and the Apartment and Office Building Association of Metropolitan Washington (“AOBA”) (collectively, the “Settling Parties”).

rules pertaining to settlements (15 DCMR § 130).” Both of those directives are addressed in this Response.

I. REVISED SCHEDULE FOR CONSIDERATION OF THE SETTLEMENT AGREEMENT IN FORMAL CASE NO. 1119

The Joint Applicants now recognize that the schedule proposed in their Motion will have to be modified in light of the likely timing of the Commission’s Order on the Motion. Given a deadline of Friday, October 16, 2015 for parties to file responses to the Motion, it is unlikely that the Commission will rule by Monday, October 19, 2015, which is the date the proposed schedule would establish for Settling Parties to file testimony in support of the Settlement Agreement.² Accordingly, the Joint Applicants are proposing a revised schedule.³

The revised schedule set forth below provides for discovery by the non-settling parties, commencing immediately, and the submission of post-hearing briefs, but now also incorporates a period for filing of testimony by non-settling parties (with an expedited period for any related discovery and the opportunity for brief oral rebuttal by the Settling Parties).⁴ The proposed discovery and testimony by non-settling parties and full briefing exceed the requirements of the Commission’s Rules of Practice and Procedure pertaining to settlements, and will serve to provide a full record for review of the Settlement Agreement and ruling on the Merger.

² See Motion, p. 15.

³ In proposing a revised schedule, the Joint Applicants do not intend to prejudge the outcome of the Commission’s consideration of the Motion. Rather, as the Commission invited in Paragraph 16 of the Order, they are presenting a revised schedule that they believe is a fair and reasonable way to proceed.

⁴ The revised schedule also assures that the milestone dates for scheduling and for the issuance of a final order that are set forth in the Settlement Agreement can be achieved. Specifically, the Settlement Agreement provides that either Exelon or PHI, in its sole discretion, may terminate the Settlement Agreement upon certain events including if the Commission does not set a schedule within 45 days of the filing date of the Settlement Agreement (which was October 6) that allows for a Final Order to be issued within 150 days of the filing date of the Settlement Agreement (i.e., not later than March 4, 2016) or if the Commission fails to adopt a Final Order approving the Settlement Agreement within 150 days after it was filed. See, Settlement Agreement ¶ 136(a)-(c).

Revised Proposed Schedule

- Testimony in support of the Settlement Agreement by the Settling Parties to be filed and served by end of business day on October 30, 2015;
- Discovery with respect to the Settlement Agreement to commence immediately, and discovery on the Settling Parties' testimony to commence immediately upon filing of such testimony; all data requests directed to Settling Parties to be served no later than November 6, 2015; and all responses to such data requests are to be served within five (5) business days (but in no event later than November 13, 2015);
- Testimony of the non-settling parties to be filed and served by end of business day on November 20, 2015;
- Discovery on testimony of the non-settling parties to commence immediately upon filing of the non-settling party's testimony; all data requests directed to the non-settling parties to be served no later than November 24, 2015; and all responses to such data requests are to be served within five (5) business days (but in no event later than December 2, 2015).
- Evidentiary hearing on the merits of the Settlement Agreement to be held on December 3, 2015 (which may continue on December 4, 2015, if necessary); Settling Parties will be permitted to present brief oral rebuttal testimony at the hearing;
- Initial Briefs by all parties to be filed on December 16, 2015; and
- Reply Briefs by all parties to be filed on December 23, 2015 (with the record closing on December 23, 2015).

II. DISCOVERY SHOULD BE LIMITED TO FACTUAL INQUIRIES PERTAINING TO MATTERS WITHIN THE FOUR CORNERS OF THE SETTLEMENT AGREEMENT

Paragraph 13 of the Order directed the parties to address the “scope of discovery” and, specifically, “whether any discovery would be limited by Commission Rule 130.6 and the other rules pertaining to settlement (15 DCMR § 130).” As previously noted, the Rules of Practice and Procedure pertaining to settlements do not require any discovery.⁵ Nonetheless, the Joint Applicants, consistent with their desire that the process for considering and ruling upon the settlement be open and transparent, support a reasonable degree of discovery focused on the new and enhanced commitments set forth in the Settlement Agreement and the testimony of the Settling Parties and the non-settling parties filed in connection with the Settlement Agreement.

As the Commission is aware, Formal Case No. 1119 was fully litigated. In the course of that proceeding, all parties had the opportunity to undertake extensive discovery, and a wide array of issues pertaining to all of the seven public interest factors were explored in depth. An extensive record was developed, which is available to the Commission and all parties for consideration in connection with their review of the Settlement Agreement. As a consequence, the Commission should limit discovery at this stage to the new and enhanced commitments set forth within the four corners of the Settlement Agreement and the testimony of the Settling Parties and the non-settling parties filed in connection with the Settlement Agreement. The Commission should likewise prohibit discovery that is unlimited in scope or that seeks to get a “second bite at the apple” with respect to issues and matters that were explored previously.

Moreover, the Joint Applicants note the express prohibition set forth in 15 DCMR § 130.6 on discovery of “[s]tatements made and documents considered by parties during the course of settlement negotiations and conferences,” which, pursuant to that regulation, are “confidential

⁵ 15 D.C.M.R. §§ 130 *et seq.*

and non-discoverable” and which “shall not be admissible as evidence or raised in arguments by parties.” The regulations prohibit discovery of any such statements or documents, and the Joint Applicants oppose the admission into evidence of any such statements or documents irrespective of how they were obtained.⁶

III. CONCLUSION

For the reasons set forth above, if the Commission determines that the Settlement Agreement should be considered in Formal Case No. 1119, as the Joint Applicants requested, the Commission should:

- 1) adopt the schedule set forth herein;
- 2) affirm that discovery is limited to factual inquiries pertaining to matters within the four corners of the Settlement Agreement and the testimony of the Settling Parties and the non-settling parties filed in connection with the Settlement Agreement; and
- 3) affirm that discovery will not be permitted that contravenes the prohibition imposed by 15 DCMR 130.6.

Respectfully submitted,



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⁶ See, e.g., *Lively v. Flexible Packaging Association*, 930 A.2d 984, 994 (CD Ct. App. 2007) (explaining that purpose of precluding admission of statements and admissions during settlement negotiations is “to encourage unfettered dialogue in negotiations, so as to further the underlying policy favoring out-of-court settlement of disputes”) (citing *Wayne Insulation Co. v. Hex Corp.*, 534 A.2d 1279, 1281 (D.C.1987)).

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Counsel for Joint Applicants

Dated: October 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2015, a copy of the Response of Joint Applicants to Commission Order No. 18000 Regarding the Schedule For This Proceeding and the Scope of Discovery was filed electronically on behalf of the Joint Applicants, and an original and fifteen copies of the above Response was sent by Federal Express to the District of Columbia Public Service Commission care of Brinda Westbrook-Sedgwick, Commission Secretary, District of Columbia Public Service Commission, 1325 G Street NW, Suite 800, Washington, D.C. 20005, and was served on the following parties of record by electronic mail:

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Respectfully submitted,

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