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PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1325 G STREET, N.W., SUITE 800
WASHINGTON, D.C. 20005

ORDER

October 30, 2015

FORMAL CASE NO. 1119, IN THE MATTER OF THE JOINT APPLICATION OF EXELON CORPORATION, PEPCO HOLDINGS, INC., POTOMAC ELECTRIC POWER COMPANY, EXELON ENERGY DELIVERY COMPANY, LLC AND NEW SPECIAL PURPOSE ENTITY, LLC FOR AUTHORIZATION AND APPROVAL OF PROPOSED MERGER TRANSACTION, Order No. 18018

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia ("Commission") denies the Petition to Intervene Out of Time of WGL Energy Systems, Inc. and WGL Energy Services, Inc. (together "WGL Energy")[1] and denies DC Public Power's ("DCPP") Motion to Request Late Intervenor Status.[2] The Commission also rejects DCPP's Response to Joint Applicants' Response in Opposition to DCPP's Motion for Late Intervention.[3] Finally, the Commission, *sua sponte*, grants WGL Energy limited participation in this proceeding.[4]

II. BACKGROUND

2. On April 30, 2014, Exelon Corporation ("Exelon") announced Exelon's purchase of Pepco Holdings, Inc. ("PHI"). On June 18, 2014, the Joint Applicants filed the Joint Application for approval by the Commission, pursuant to D.C. Code §§ 34-504 and 34-1001, for

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[1] *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction* ("*Formal Case No. 1119*"), Petition to Intervene Out of Time of WGL Energy Systems, Inc. and WGL Energy Services, Inc., filed October 16, 2015 ("WGL Energy's Petition to Intervene").

[2] *Formal Case No. 1119*, DC Public Power Motion to Request Late Intervenor Status, filed October 16, 2015 ("DCPP's Motion to Intervene").

[3] *Formal Case No. 1119*, DC Public Power's Response to Joint Applicants' Response in Opposition to DC Public Power's Motion for Late Intervenor Status and Joint Applicants' Request that the Commission Deny DC Public Power's Motion and Disregard DC Public Power's Opposition to Joint Applicants' Motion to Reopen the Record, and DC Public Power's Further Response to Joint Applicant's Application for Reconsideration, filed October 27, 2015 ("DCPP's Response").

[4] Commissioner Joanne Doddy Fort did not participate in the vote on the matters decided in this Order.

a change of control of Pepco to be effected by the Proposed Merger of PHI with Purple Acquisition Corp. ("Merger Sub"), a wholly owned subsidiary of Exelon ("Joint Application").[5]

3. On June 27, 2014, the Commission directed that any interested person desiring to formally intervene in this proceeding shall file a petition to intervene with the Commission no later than July 11, 2014.[6] The Office of the Peoples' Counsel ("OPC") is the statutory party of right to any Commission investigation,[7] and it participated as a party in this case. In addition, the Commission granted petitions to intervene of 11 other entities to participate as parties in this proceeding.[8] Neither DCPP nor WGL Energy filed any timely petition to intervene.

4. The Commission convened four (4) community hearings seeking input from the public on the Joint Application. The hearings were held between December 17, 2014, and January 20, 2015, at various times and locations throughout the District of Columbia. Eleven days of evidentiary hearings were held on March 30–April 8, 2015 and April 20–22, 2015. On May 27, 2015, the record closed.

5. On August 27, 2015, the Commission issued Order No. 17947, which denied the Joint Application and found that the proposed merger as filed was not in the public interest.[9] On September 28, 2015, the Joint Applicants filed an Application for Reconsideration of Order No. 17947.[10] Commission Rule 140.3 prescribes that responses to applications for reconsideration shall be filed within five (5) business days after receipt of the application.[11]

6. On September 30, 2015, the District Government and Joint Applicants filed a Joint Motion for a Stay or, in the Alternative, for an Extension of Time to Respond to the

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5 *See Formal Case No. 1119*, Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, p. 1, filed June 18, 2014 ("Joint Application").

6 *Formal Case No. 1119*, Order No. 17530, ¶¶ 30, 36, rel. June 27, 2014.

7 D.C. Code § 34-804 (a) (2015).

8 *Formal Case No. 1119*, Order No. 17597, rel. August 22, 2014 ("Order No. 17597"). The other parties are: Apartment and Office Building Association of Metropolitan Washington ("AOBA"); the District of Columbia Government ("District Government"); D.C. Solar United Neighborhood ("DC SUN"); District of Columbia Water and Sewer Authority ("DC Water"); General Services Administration ("GSA"); GRID2.0 Working Group ("GRID2.0"), Maryland DC Virginia Solar Energy Industries Association ("MDV-SEIA"), Mid-Atlantic Renewable Energy Coalition ("MAREC"); Monitoring Analytics, LLC as the Market Monitor for PJM ("Market Monitor"); National Consumer Law Center, National Housing Trust, National Housing Trust Enterprise Preservation Corporation ("NCLC/NHT"); and NRG Energy, Inc. ("NRG").

9 *Formal Case No. 1119*, Order No. 17947, rel. August 27, 2015.

10 *Formal Case No. 1119*, Application of the Joint Applicants for Reconsideration of Order No. 17947, filed September 28, 2015 ("Reconsideration Application").

11 *See* 15 DCMR § 140.3 (1981). "Responses to applications for reconsideration or modification shall be considered by the Commission only if filed with the Commission within five (5) business days after receipt of the application."

Application for Reconsideration.[12] On October 2, 2015, the Commission issued Order No. 17993, which pursuant to Commission Rule 146.1, waived the ten (10) day period for filing responses to the Joint Motion and directed parties to file their responses to the Joint Motion by close of business on October 6, 2015.[13] Additionally, the Commission stated "in no event will the responses [to the Application for Reconsideration] be due earlier than October 9, 2015."[14]

7. On October 6, 2015, the Joint Applicants filed a Motion to Reopen the Record in *Formal Case No. 1119* to Allow for Consideration of a Nonunanimous Full Settlement Agreement and Stipulation.[15] The Joint Applicants reported:

> that extraordinary efforts have now yielded a Nonunanimous Full Settlement Agreement and Stipulation ("Settlement Agreement") joined by a broad cross-section of the parties to this case – specifically, the Joint Applicants, Office of 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").[16]

Among other things, the Joint Applicants "request that the Commission toll consideration of the Application for Reconsideration . . . for such period of time as the Commission requires to fully consider the merits of the Settlement Agreement" and "toll the time for responses to the Application for Reconsideration."[17] The Joint Applicants state that "this request supersedes the Joint Motion of [the District Government] and Joint Applicants to stay the time for responses to the Application for Reconsideration that the Commission has scheduled for decision on October 7, 2015."[18]

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12 *Formal Case No. 1119*, Joint Motion of the District of Columbia Government and Joint Applicants for a Stay or, in the Alternative, for an Extension of Time to Respond to the Application for Reconsideration of Order No. 17947, filed September 30, 2015 ("Joint Motion").

13 *Formal Case No. 1119*, Order No. 17993, ¶ 11, rel. October 2, 2015. (Citations Omitted).

14 *Formal Case No. 1119*, Order No. 17993, ¶¶ 1, 12, rel. October 2, 2015.

15 *Formal Case No. 1119*, Motion of the Joint Applicants to Reopen the Record in Formal Case No. 1119 to Allow for Consideration of Nonunanimous Full Settlement Agreement and Stipulation, or for Other Alternative Relief, filed October 6, 2015 ("Motion to Reopen").

16 *Formal Case No. 1119*, Motion to Reopen at 1-2.

17 *Formal Case No. 1119*, Motion to Reopen at 11, 13.

18 *Formal Case No. 1119*, Motion to Reopen at 13.

8. In response to the Motion to Reopen, on October 8, 2015, the Commission issued Order No. 18000, which determined that the Joint Motion filed on September 30, 2015 and all responses filed to that Joint Motion are now moot.[19] Additionally, the Commission clarified that the stay of the filing of response to the Application for Reconsideration imposed in Order No. 17993 shall remain in effect until the Commission renders a decision on the Motion to Reopen.[20]

9. On October 16, 2015, the Settling Parties – the Joint Applicants, OPC; AOBA; District Government; and NCLC/NHT filed Responses to Order No. 18000. On October 16, 2015, DC SUN, GRID2.0, MAREC, and MDV-SEIA (collectively "Nonsettling Parties"); and the U.S. General Services Administration ("GSA") filed Oppositions to the Motion to Reopen and Responses to Order No. 18000.[21] On the same date, DCPP filed an Opposition to the Motion to Reopen the Record and Notification of Intent to Acquire PHI's DC-Based Assets, as well as a Motion to Request Late Intervenor Status.[22] Also on October 16, 2015, WGL Energy filed its Petition to Intervene Out of Time, and the Ward 3 Democratic Committee ("Ward 3 Democrats") filed Comments on the Proposed Procedural Schedule.[23]

10. On October 20, 2015, the District Government filed an Amended Response to Order No. 18000, and on that same date, the Joint Applicants filed a Response in Opposition to DCPP's Motion to Request Late Intervenor Status.[24] On October 27, 2015, DCPP filed its Response to Joint Applicants' Response in Opposition.

11. In an Order issued October 28, 2015, the Commission granted the Motion to Reopen the Record in *Formal Case No. 1119* to Allow for Consideration of Non-Unanimous Settlement Agreement Stipulation and rejected DCPP's Opposition to Joint Applicants' Motion to Reopen the Record and Notification of Intent to Acquire PHI's DC-Based Assets as well as the Ward 3 Democratic Committee's Comments. [25] Resolution of the remaining pending issues,

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19 *Formal Case No. 1119*, Order No. 18000, ¶¶ 1, 11, 14, rel. October 8, 2015.

20 *Formal Case No. 1119*, Order No. 18000, ¶¶ 3, 12, 15, rel. October 8, 2015.

21 *Formal Case No. 1119*, Nonsettling Parties' Opposition to Joint Applicants' Motion to Reopen the Record, filed October 16, 2015 ("Nonsettling Parties' Opposition"); *Formal Case No. 1119*, U.S. General Services Administration's Opposition to Joint Applicants' Motion to Reopen the Record, filed October 16, 2015 ("GSA's Opposition").

22 *Formal Case No. 1119*, DC Public Power Opposition to Joint Applicants' Motion to Reopen the Record and Notification of Intent to Acquire PHI's DC-Based Assets, filed October 16, 2015 ("DCPP's Opposition"); and DC Public Power Motion to Request Late Intervenor Status, filed October 16, 2015 ("DCPP's Motion to Intervene").

23 *Formal Case No. 1119*, Ward 3 Democratic Committee's Comments on Joint Applicants' Proposed Procedural Schedule, filed October 16, 2015 ("Ward 3 Democrats Comments").

24 *Formal Case No. 1119*, District of Columbia Government's Amended Response to Order No. 18000, filed October 20, 2015 ("DC Government's Amended Response"); and *Formal Case No. 1119*, Joint Applicants' Response in Opposition to DCPP's Motion to Request Late Intervenor Status, filed October 20, 2015 ("Joint Applicants' Response to DCPP's Motion").

25 *Formal Case No. 1119*, Order No. 18011, rel. October 28, 2015 ("Order No. 18011").

DCPP's and WGL Energy's requests for late intervention, were held over for decision in this Order.

III. WGL ENERGY'S PETITION TO INTERVENE OUT OF TIME

12. WGL Energy Systems, Inc., a provider of design build, energy savings, solar, fuel cell and combined heat and electric plant services operating in 25 states and the District of Columbia, and WGL Energy Services, Inc., a retail gas and electric marketer licensed and actively serving customers in the District of Columbia, Delaware, Maryland, Virginia and Pennsylvania, together referred to as "WGL Energy," petitions the Commission for leave to intervene out of time.[26] WGL Energy "seeks to be made a party to seek clarification that the Settlement Agreement, and the merger, if approved, will not adversely affect the working of competitive energy markets in the District to the detriment of the economy of the District and energy users in the District."[27] WGL Energy "accepts the existing procedural status of the case" and states as grounds for granting its request for party status that:

> The Settlement Agreement presents a number of competitive energy market service commitments that were not included in the original Joint Application and appears to address deficiencies by the Commission in Order No. 17947 with regard to Public Interest Factor No. 7 by committing the Joint Applicants to offer solar projects (10 Megawatts) in the District, to purchase wind power from PJM markets (100 Megawatts) for resale in the District and to locate, develop and propose for Commission approval at least four ratepayer funded public purpose microgrid projects with generation to serve District customers.[28]

13. WGL Energy asserts that, based on these new commitments, it is concerned that the Settlement Agreement contemplates "that the regulated electric utility would once again own generation in the District by enabling Pepco to locate and develop ratepayer funded solar facilities and microgrid projects with generation assets."[29] WGL Energy further states that it does not oppose the Settlement Agreement, but it does want clarification that this is not what the Settlement Agreement contemplates.

14. WGL Energy argues that it "may be directly affected by the outcome of the Commission's ruling on the Settlement Agreement and has an interest in the Settlement Agreement as filed that cannot be adequately represented by any other party."[30] WGL Energy adds that it "believes it can provide relevant and useful information with regard to issues that

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[26] *Formal Case No. 1119,* WGL Energy's Petition to Intervene at 1.

[27] *Formal Case No. 1119,* WGL Energy's Petition to Intervene at 2.

[28] *Formal Case No. 1119,* WGL Energy's Petition to Intervene at 3-4.

[29] *Formal Case No. 1119,* WGL Energy's Petition to Intervene at 4.

[30] *Formal Case No. 1119,* WGL Energy's Petition to Intervene at 5.

may be raised in connection with how the Settlement Agreement meets Public Interest Factor No. 7."[31] Recognizing that its request is filed out-of-time, WGL Energy explains that it "did not seek to intervene in this proceeding before the Settlement Agreement was filed as the prospect of generation being owned by the regulated utility was not implicated by the original Joint Application," however, now the Settlement Agreement "spotlights that prospect and WGL Energy would like to seek clarification that such prospect is not intended by the Settlement Agreement."[32] Additionally, WGL Energy states that it "would like to seek clarification that the competitive markets that presently exist in the District of Columbia for solar power and distributed energy including combined heat and power will continue to exist if the settlement is accepted."[33] For these reasons WGL Energy argues that good cause exists to grant its Petition, adding that granting its request will "not delay the proceeding or prejudice the interests of any other party."[34] No objection or opposition to WGL Energy's Petition were filed.

IV. DCPP'S MOTION TO REQUEST LATE INTERVENOR STATUS

15. DCPP alleges in its Motion to Request Late Intervenor Status that it has a significant interest in the "Divestiture element" of the Settlement Agreement and that it "was not in existence at the time potential Intervenors were requested to identify themselves nor at the time Intervenor status was granted" and that it "has a significant interest in the outcome of FC 1119."[35] DCPP states that it "is a Washington, DC not-for-profit organization created on April 30, 2015, for the purpose of advocating for the interests of the District's electricity ratepayers, citizens and businesses, and for the creation of a public power utility (municipal, not-for-profit, public utility district) in the District of Columbia, as well as to own, operate, manage District's local electrical grid in a manner consistent with its stated purpose and to optimize the public interest."[36]

16. DCPP asserts that its "Principals have unique skills, knowledge and insight into utility management and operations, regulatory matters, wholesale and retail markets, demand and emissions modeling, technology alternatives, real-time power management, and distributed generation" among other things.[37] As such, DCPP asserts that it "can bring a constellation of skills and industry-specific knowledge to this proceeding that are not provided or duplicated by other Intervenors to the benefit of the Commission and the public interest in establishing a full,

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31 *Formal Case No. 1119*, WGL Energy's Petition to Intervene at 5.

32 *Formal Case No. 1119*, WGL Energy's Petition to Intervene at 5.

33 *Formal Case No. 1119*, WGL Energy's Petition to Intervene at 5.

34 *Formal Case No. 1119*, WGL Energy's Petition to Intervene at 6.

35 *Formal Case No. 1119*, DCPP's Motion to Intervene at 24, 25.

36 *Formal Case No. 1119*, DCPP's Motion to Intervene at 24.

37 *Formal Case No. 1119*, DCPP's Motion to Intervene at 24.

complete and accurate record."[38] DCPP adds that granting it late intervenor status "would not harm or delay the Commission's deliberations going forward."[39]

V. JOINT APPLICANTS' RESPONSE TO DCPP'S MOTION TO INTERVENE

17. The Joint Applicants filed a Response to DCPP's Motion to Intervene on October 20, 2015, opposing the Motion. The Joint Applicants assert three main reasons for opposing DCPP's Motion. First, because the motion is untimely. The Joint Applicants argue that "DCPP may be new, but its organizers certainly could have come forward on a timely basis if they believed that the Merger implicated interests they wished to assert" and that granting DCPP intervention would result in prejudice to the parties and undue delay of the proceedings.

18. Second, the Joint Applicants assert that "DCPP has not met the threshold requirement for intervention." Specifically, the Joint Applicants assert that DCPP failed to demonstrate that it has a substantial interest in the proceeding "that 'is related to issues within the authority of this Commission within the District.'"[40] The Joint Applicants assert that it is unclear from DCPP's Motion what interest DCPP has in the proceeding, DCPP's desire to advocate against the Settlement Agreement is insufficient basis to grant intervention, and DCPP's opposition is already adequately represented by DC SUN and the other nonsettling parties – "as evident from DCPP's wholesale adoption of DC SUN's arguments."[41]

19. Third, the Joint Applicants argue that granting DCPP "intervention is inappropriate because it impermissibly raises issues outside the scope of this proceeding, contrary to the Commission's rule that granting intervention 'shall not have the effect of changing or broadening the issues in the proceeding.'"[42] The Joint Applicants contend that "[b]eyond the opposition to the Motion to Consider Settlement, DCPP wishes to raise issues concerning Pepco's acquisition by a 'not-for-profit DC-based public power utility' in an ill-defined and entirely hypothetical transaction."[43] The Joint Applicants assert that that concern is "far outside the scope of this proceeding, where the inquiry under District law is" whether the Merger is in the public interest.[44] The Joint Applicants assert that the Commission, like other regulators, should reject attempts to inject alternative transactions into this proceeding.[45] Indeed, the Joint Applicants assert, "the Commission does not have the *power* to grant the relief DCPP

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38 *Formal Case No. 1119*, DCPP's Motion to Intervene at 25.

39 *Formal Case No. 1119*, DCPP's Motion to Intervene at 25.

40 *Formal Case No. 1119*, Joint Applicants' Response to DCPP's Motion at 2.

41 *Formal Case No. 1119*, Joint Applicants' Response to DCPP's Motion at 3.

42 *Formal Case No. 1119*, Joint Applicants' Response to DCPP's Motion at 4.

43 *Formal Case No. 1119*, Joint Applicants' Response to DCPP's Motion at 4.

44 *Formal Case No. 1119*, Joint Applicants' Response to DCPP's Motion at 4.

45 *Formal Case No. 1119*, Joint Applicants' Response to DCPP's Motion at 4.

appears to desire – ordering the divestiture of Pepco into a not-for-profit;" therefore, there is no reason to grant DCPP's Motion to Intervene.[46]

VI. DISCUSSION

A. Standards for Intervention

20. We note at the outset that the procedural posture of this case, *i.e.*, reopening the record to consider a settlement proposal submitted after the final decision in the case has been rendered, is atypical of this Commission's proceedings. We could have denied the Motion to Reopen and determined that this matter instead be litigated in a new proceeding. However, in the interest of administrative efficiency, we chose to reopen the record in this case to consider the Settlement Agreement. Having said that, we want to ensure that no one will be disadvantaged by our decision to consider the Settlement Agreement in the existing case vis à vis a new case. Therefore, we consider the requests for intervention before us in that context.

21. As a general matter our rules governing settlement proceedings in 15 DCMR §§ 130.1–130.17 make no provision for participation in settlement proceedings by non-parties to the case, and neither DCPP nor WGL Energy offered any authority allowing their participation in the settlement proceedings other than the Commission's standard intervention rules. Section 106.1 of the Commission's regulations, 15 DCMR § 106.1, governs intervention in Commission proceedings. The provision reads:

> Any person as defined by this chapter, not named as a party in the pleadings initiating a proceeding but having a substantial interest therein, may petition the Commission for leave to intervene.[47]
>
> A petition for leave to intervene shall be in writing and shall be filed by the prospective intervenor in compliance with the direction set forth in the public notice of the filing or application, or as may be otherwise ordered by the Commission.[48]
>
> A person whose petition for leave to intervene has been granted by the Commission shall be permitted to appear and participate as a party in the proceeding.[49]

Intervention is not a matter of right. Instead, pursuant to Section 106.5, intervention is entirely within the discretion of the Commission. In determining whether intervention is appropriate in a particular case, we are guided by the same practical and equitable concerns as courts and will permit intervention if the petitioner demonstrates that intervention is necessary to protect a substantial

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[46] *Formal Case No. 1119*, Joint Applicants' Response to DCPP's Motion at 4-5.

[47] *See* 15 DCMR § 106.1 (1981).

[48] 15 DCMR § 106.3.

[49] 15 DCMR § 106.6.

interest. In Order No. 17597, the Commission explained that "In the context of this merger proceeding, which involves companies that operate across a wide geographical area along with our local distribution company, we have concluded that an interested person seeking intervenor status must demonstrate that its substantial interest is related to issues within the authority of this Commission within the District of Columbia."[50] Further, in reviewing motions to file out of time the Commission looks to see if the proponent of the motion provided good cause[51] and if granting the motion would be reasonable,[52] or would not prejudice any party to the proceeding.[53]

22. We especially note that granting party status to persons to participate in settlement proceedings who could have timely intervened in the proceeding would be unfair to the settling parties, contrary to our rules, and contrary to the concept of administrative efficiency and timely litigation and closure of cases. A potential intervenor cannot sit idly by throughout the course of a proceeding and then decide to ask for party status after a settlement has been reached expecting to participate at that point in the determination of the settlement, whether the intent is to support it or "sink" it. That is why we must carefully scrutinize late-filed requests for intervention and look to factors such as those referenced above in determining whether to grant such requests.

23. As an alternative to intervention, our rules (Section 107.1 and 107.2) allow us discretion to grant a limited appearance to persons in certain circumstances. Our rules provide:

> At the discretion of the Commission, any person may make a limited appearance in any proceeding by presenting a statement orally or in writing at any time prior to the close of the record.[54]
>
> A person entering a limited appearance shall not be a party to the proceeding and shall not have the right to present testimony or cross-examine witnesses.[55]

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50 *Formal Case No. 962*, Order No. 17597, ¶ 11, rel. August 22, 2014.

51 *See, e.g., Formal Case No. 962, In the Matter of the Implementation of the District of Columbia Telecommunications Competition Act of 1996 and Implementation of the Telecommunications Act of 1996,* Order No. 12428, ¶ 13, rel. July 2, 2002.

52 *See, e.g., Formal Case No. 712, In the Matter of the Investigation into the Public Service Commission's Rules of Practice and Procedure,* Order No. 15353 , ¶ 2, rel. August 10, 2009.

53 *See, e.g., TAC 19, Petition of Verizon Washington, DC Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, Order No. 13873,* ¶ 3, rel. February 7, 2006; *Formal Case No. 712, In the Matter of the Investigation into the Public Service Commission's Rules of Practice and Procedure,* Order No. 15353, ¶ 2, rel. August 10, 2009; *Formal Case No. 962, In the Matter of the Implementation of the District of Columbia Telecommunications Competition Act of 1996 and Implementation of the Telecommunications Act of 1996,* Order No. 12428, ¶ 13, rel. July 2, 2002.

54 15 DCMR § 107.1.

55 15 DCMR § 107.2.

24. In general, we believe a limited appearance is appropriate in certain circumstances. In the context of this proceeding, limited appearance should be restricted to the particular subject that the requestor is asking to address as long as the subject is relevant, falls within the four corners of the Settlement Agreement, and is of assistance to the Commission in making its determination whether the Agreement is in the public interest. We note that just asserting matters that can be made by others that are already parties to the proceeding, or asserting matters not relevant to the subject matter of what is being determined, is not a sufficient basis for granting a request for intervention or limited appearance.

B. WGL Energy's Petition to Intervene Out of Time

25. As stated above, WGL Energy requests "to be made a party to seek clarification that the Settlement Agreement, and the merger, if approved, will not adversely affect the working of competitive energy markets in the District to the detriment of the economy of the District and energy users in the District."[56] Referring to new commitments in the Settlement Agreement that were not included in the original Joint Application, such as the Joint Applicants offering solar projects in the District and the purchase of wind power from PJM markets for resale in the District, "WGL Energy is concerned that the Settlement Agreement appears to contemplate that the regulated electric utility would once again own generation in the District by enabling Pepco to locate and develop ratepayer funded solar facilities and microgrid projects with generation assets."[57] WGL Energy would like clarification that the Settlement Agreement "will not adversely affect the working of competitive energy markets in the District."[58]

26. In support of its Petition, WGL Energy states that it finances and provides design build, energy savings, solar, fuel cell and combined heat and electric plant services operating in 25 states and the District of Columbia, and operates as a retail supplier of gas and electric in the District of Columbia, Delaware, Maryland, Virginia and Pennsylvania. As such, WGL Energy claims that it "may be directly affected by the outcome of the Commission's ruling on the Settlement Agreement."[59] WGL Energy believes it can provide relevant and useful information with regard to issues that may be raised in connection with how the Settlement Agreement meets Public Interest Factor No. 7.[60]

27. WGL Energy further maintains that it "did not seek to intervene in this proceeding before the Settlement Agreement was filed as the prospect of generation being owned by the regulated electric company was not implicated by the original Joint Application filed on

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56 *Formal Case No. 1119*, WGL Energy Petition to Intervene at 2.

57 *Formal Case No. 1119*, WGL Energy Petition to Intervene at 4.

58 *Formal Case No. 1119*, WGL Energy Petition to Intervene at 2-4.

59 *Formal Case No. 1119*, WGL Energy's Petition to Intervene at 5.

60 *Formal Case No. 1119*, WGL Energy's Petition to Intervene at 5. Public Interest Factor No. 7 was a factor considered in the case on the merits in determining whether the merger was in the public interest. Factor No. 7 provided that the Commission consider the effects of the transaction on conservation of natural resources and preservation of environmental quality. *See Formal Case No. 1119*, Order No. 17947, ¶¶ 302-342.

June 18, 2014."[61] It claims that the "Settlement Agreement now spotlights that prospect and WGL Energy would like to seek clarification that such prospect is not intended by the Settlement Agreement."[62]

28. Contrary to WGL Energy's assertions, one of the issues that was present at the outset in this case was Exelon's ownership of generation assets and the effect of those assets on the merger transaction. Not only did it arise in connection with the merged companies' future decision-making with regard to Pepco's distribution services, but also with regard to the future of solar, wind, and other renewables in the District as argued by several party opponents of the merger. There was always the likelihood that competitive markets would be impacted by the merger, as that was also a factor announced at the beginning of the case to be considered by the Commission.[63] The generation issues were conspicuous from June 18, 2014, and WGL Energy had the opportunity to file a timely intervention request early-on in the case to raise any concerns about any interests it had concerning this matter. It failed to do so, and we must, therefore, decline to grant its untimely Petition to Intervene as being prejudicial to the parties, contrary to our rules, and contrary to the concept of administrative efficiency and timely litigation and closure of cases.

29. However, as we have done in recent cases,[64] although we deny the intervention request of WGL Energy, we will, *sua sponte,* grant WGL Energy permission to make a limited appearance in this proceeding in accordance with the above-quoted limited appearance rules in Commission Rule 107. In this case, granting a limited appearance for WGL Energy is warranted because it has a substantial interest in a limited, discrete issue which is relevant to the subject matter contained within the four corners of the Settlement Agreement, and it will be of assistance to the Commission in making its determination whether the Agreement is in the public interest, such assistance on these matters seemingly not available from the other parties to the proceeding. WGL Energy has demonstrated that the Settlement Agreement presents a number of competitive energy market service commitments that were not included in the original merger application, such as "committing the Joint Applicants to offer solar projects (10 Megawatts) in the District, to purchase wind power from PJM markets (100 Megawatts) for resale in the District and to locate, develop and propose for Commission approval at least four ratepayer funded public purpose microgrid projects with generation to serve District customers."[65] WGL Energy may be directly affected by the outcome of the Commission's ruling on the Settlement Agreement concerning these commitments as a result of its current business in the District and surrounding states.[66]

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61 *Formal Case No. 1119*, WGL Energy's Petition to Intervene at 5.

62 *Formal Case No. 1119*, WGL Energy's Petition to Intervene at 5.

63 Factor No. 6 considered by the Commission was the effect of the transaction on competition in the local retail, and wholesale markets that impacts the District and District ratepayers. *See Formal Case No. 1119*, Order No. 17947, ¶¶ 285-301.

64 *See Formal Case No. 1116, In the Matter of the Application for Approval of Triennial Underground Infrastructure Improvement Projects Plan*, Order No. 17625, ¶ 7, 11, rel. September 9, 2014.

65 *Formal Case No. 1119*, WGL Energy Petition at 4.

66 *Formal Case No. 1119*, WGL Energy Petition at 5.

WGL submits, and we concur, that it can provide relevant and useful information with regard to these issues.[67] Thus, we are of the opinion that WGL Energy has demonstrated good cause for participation, albeit limited, in this proceeding at this time.

30. Under the limited appearance we grant to WGL Energy, we permit it to make either an oral statement at the public interest hearing or file written testimony at the time the written testimony of the Nonsettling parties is due, November 17, 2015 on the limited issue presented in its Petition, and nothing more. WGL Energy will also be permitted to cross-examine witnesses at the public interest hearing solely on matters relevant to the competitive energy market commitments raised for the first time in the Settlement Agreement. Because testimony and cross-examination are not intended to constitute legal arguments, we also grant WGL Energy permission to file briefs on its discrete issue on the dates briefs are due in this case, December 11, 2015 for initial briefs and December 18, 2015 for reply briefs. To implement our ruling here, we, therefore, find it necessary to waive Commission Rule 107.2, which prohibits a limited participant from filing testimony and cross-examining witnesses, for the reasons set forth herein. We caution that this action is not to be construed as setting a precedent for the future. This action is taken by us solely due to the unique circumstances in this proceeding concerning the discrete issue raised by WGL Energy.

C. DCPP's Motion to Request Late Intervenor Status

31. As a preliminary matter, the Commission rejects DCPP's October 27, 2015 response to the Joint Applicants' Opposition which is a reply to a response. Under Commission Rule 105.9, "No rejoinders or replies to responses shall be accepted without leave of the Commission."[68] The underlying motion before the Commission is a procedural motion for which reply comments are rarely necessary; consequently our Rules state that such comments shall not be accepted without leave of the Commission. In the instant case, DCPP made no such request for leave from the Commission and fails to articulate any rational basis for the Commission to deviate from our general practice. Having a desire to say more on a topic or to clarify a position are not sufficient reasons to require a deviation from our general practice. Having reviewed all of the pleadings, we conclude that additional commentary on the Joint Applicants' Opposition is neither necessary nor warranted for the Commission to reach a decision on DCPP's Request.

32. DCPP avers in a conclusory fashion in its Motion to Intervene that it has a significant interest in the outcome of this proceeding.[69] To the extent that DCPP articulates a substantial interest, DCPP appears to be advocating for "the creation of a public utility (municipal, not-for-profit, public utility district) in the District of Columbia."[70] DCPP sees the Commission's review of the Settlement Agreement as linked to the creation of a public utility

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67 *Formal Case No. 1119*, WGL Energy Petition at 5.

68 *See* 15 DCMR § 105.9 (1981).

69 *Formal Case No. 1119*, DCPP's Motion to Intervene at 24.

70 *Formal Case No. 1119*, DCPP's Motion to Intervene at 24.

through the divestiture discussion in Paragraph 107 of the Settlement Agreement, which is part of the Agreement's ring-fencing provisions.[71] The expansion of the Commission's review of the Settlement Agreement, as proposed by DCPP is contrary to Commission Rule 106.7, which requires express Commission approval for an intervention to "chang[e] or broaden[ ] the issues in the proceeding."[72] As the Commission states in Order No. 18011, "[we] will reopen the record in *Formal Case No. 1119* solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest."[73] Therefore, given that DCPP's interests concern matters that are outside the scope of this proceeding, and due to the limited nature for which this record has been reopened, the Commission denies DCPP's Motion to Intervene. Furthermore, for the same reasons, the Commission also declines to grant DCPP a limited appearance in this proceeding.

THEREFORE IT IS ORDERED THAT:

33. The Petition to Intervene Out of Time of WGL Energy Systems, Inc. and WGL Energy Services, Inc. is **DENIED**;

34. DC Public Power's Motion to Request Late Intervenor Status is **DENIED**;

35. DCPP's Response to Joint Applicants' Response in Opposition to DCPP's Motion for Late Intervention is **REJECTED**; and

36. The Commission, *sua sponte*, **GRANTS** WGL Energy limited participation in this proceeding as set forth in Paragraphs 29 and 30 of this Order.

A TRUE COPY: **BY DIRECTION OF THE COMMISSION:**

CHIEF CLERK: **BRINDA WESTBROOK-SEDGWICK**
COMMISSION SECRETARY

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71 *Formal Case No. 1119*, DCPP's Motion to Intervene at 24.

72 *See* 15 DCMR § 106.7 (1981). "The granting of a petition to intervene shall not have the effect of changing or broadening the issues in the proceeding, except where that change or broadening is expressly requested by the intervenor and is expressly granted by the Commission after opportunity for the filing of objection to that request has been afforded to all parties."

73 *Formal Case No. 1119*, Order No. 18011, ¶ 58, rel. October 28, 2015.