

ORDER NO. 87707

IN THE MATTER OF THE APPLICATION *
OF POTOMAC ELECTRIC POWER *
COMPANY FOR ADJUSTMENTS TO ITS *
RETAIL RATES FOR THE DISTRIBUTION *
OF ELECTRIC ENERGY *
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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9418

Issue Date: August 9, 2016

To: All Parties of Record

This order denies the Motion to Strike Portions of the Direct Testimony of Technical Staff’s (Staff”) witness Bion C. Ostrander (“Mr. Ostrander”) filed by Potomac Electric Power Company (“Pepco” or the “Company”) on July 22, 2016. However, we direct Mr. Ostrander to include with his Rebuttal Testimony to be submitted on August 15, 2016 his complete positions, views and opinions in this case, including on any issues where he has indicated in his Direct Testimony that he still evaluating or is awaiting more information.¹

On July 22, 2016, Pepco filed a Motion requesting that the Maryland Public Service Commission (“the Commission”) strike portions of Staff witness’ Bion C. Ostrander’s Direct Testimony and direct him not to submit amended or supplemental testimony in the future on issues that could have been explored in a more timely manner. In support of it’s Motion, Pepco asserts that “Mr. Ostrander engages in what has become an all-too-familiar tactic of his as a witness in Commission proceedings by stating

¹ In surrebuttal testimony, Mr. Ostrander may respond to any matters included in the parties rebuttal testimony.

amorphously that he is “still evaluating” certain issues because he is either personally dissatisfied with Pepco’s discovery responses... or is awaiting more information...”²

Pepco notes that on April 19, 2016, it filed its Application for adjustments to its electric retail rates and that “[t]he next day, the Commission initiated a proceeding to review the Application and ordered that ‘discovery commences immediately’ for Pepco, Staff, and the Office of People’s Counsel (“OPC”).”³ Pepco further explains that shortly thereafter the Commission established a familiar procedural schedule which involves a period of discovery followed by direct testimony (due July 6) and rebuttal testimony (due August 15) and surrebuttal testimony (due September 1).⁴ Pepco acknowledges that the Commission also established deadlines for responding to discovery requests and that during the three months between April and July the parties have collectively engaged in substantial discovery. Pepco notes that “[f]or its part, Pepco has responded to 2,069 individual requests including subparts, from all of the parties in total.”⁵ Therefore, Pepco argues that it has fully complied with its discovery obligations and any insinuation to the contrary is without merit.

To support its position, Pepco notes that no party has filed a motion to alter the procedural schedule after it was finalized, nor has it been suggested that Pepco’s data responses were untimely or inadequate. Pepco argues that Mr. Ostrander’s direct testimony wrongly implies that Pepco has not provided adequate information in discovery responses. Not only does Pepco rebut Mr. Ostrander’s claims but it also points

² Motion to Strike Portions of the Direct Testimony of Bion C. Ostrander and Request for Expedited Treatment (“Pepco Motion”) filed by Pepco on July 22, 2016 at 1.

³ Pepco Motion at 2-3.

⁴ Pepco Motion at 3.

⁵ *Id.*

out that Mr. Ostrander has a history of making similar unfounded claims in previous rate Cases Nos. 9285 and 9299.

In response to Pepco's Motion to Strike, Staff filed its Reply on August 3, 2016. In its Reply, Staff reiterates, that under § 3-112 of the Maryland Public Utilities Article, Pepco bears the burden of proof in a proceeding for the Commission to consider a rate change and to meet this obligation Pepco must "provide full and responsive information through the discovery process."⁶ Staff notes that Mr. Ostrander was not engaged as a consultant until June 3, 2016 and issued his first data request within the week he was hired.⁷ Staff asserts that Pepco's implication that Staff's failure to initiate a formal discovery dispute somehow means that Staff forfeits its right to express dissatisfaction with Pepco's data request responses is incorrect. Staff acknowledges that its resources are limited and that it generally prefers to address discovery failures by asking additional follow-up questions. If those responses prove insufficient then Staff believes that it "is entitled to say that a company has not provided (or cannot provide) sufficient information for Staff to verify or support the Company's claims."⁸ Further in its Reply, Staff acknowledges that "[i]n general, Pepco does appear to have made a good faith effort to comply with its discovery obligations. Nonetheless, even in a relatively cooperative discovery process, when the number of questions asked is in the thousands, there are bound to be occasions when the provided answers are unsatisfactory, such as when the Company cannot provide an adequate answer because the information requested does not exist, the Company's witness initially misunderstands the question, the Company finds a

⁶ Reply of the Staff of the Public Service Commission of Maryland to Pepco Motion to Strike ("Staff Reply") filed August 3, 2016 at 2.

⁷ *Id.*

⁸ Staff Reply at 3.

request too burdensome, or simply because the Company decides not to be fully responsive, for whatever reason it may have.”⁹ Staff asserts that all of these issues have arisen during this proceeding at times and sometimes these issues cannot be resolved at all or at least not before the filing deadline. Under these circumstances, Staff argues that it is necessary for a party to reserve the right to supplement testimony in later rounds.

Staff points out that Pepco requests that Commission strike six sections of Mr. Ostrander’s Direct Testimony that specify topics on which he considers submitting testimony in the future if discovery supported such testimony. Staff argues that if Pepco’s request is granted it “could violate the statutory directive that Staff present direct and redirect testimony that Staff ‘considers necessary to ensure that the Commission has a complete record on all relevant issues’.”¹⁰

While we continue to encourage parties to bring discovery disputes to our attention for resolution, we also recognize one way of attempting to resolve such matters is to issue additional data requests seeking the necessary additional information. So that Pepco and Staff are given a full and fair opportunity to present and support their case to the Commission with evidence gathered during the discovery period, we deny Pepco’s Motion to Strike except on lines 19 and 20 on Page 28 of Mr. Ostrander’s Direct Testimony.¹¹ However, in order to provide Pepco adequate notice of his opinions and a fair opportunity to respond to them, we direct Staff and witness Ostrander to file with his Rebuttal Testimony (due August 15) his complete positions, opinions and views in this case based on the information provided by the parties in response to data requests.

⁹ Staff Reply at 5.

¹⁰ Staff Reply at 6.

¹¹ Staff Reply consented to this being stricken at 18.

IT IS THEREFORE, this 9th day of August, in the year Two Thousand Sixteen by the Public Service Commission of Maryland,

ORDERED: 1) That Pepco's Motion to Strike is denied except on lines 19 and 20 on Page 28 of Mr. Ostrander's Direct Testimony; and

2) That Staff and witness Bion C. Ostrander file with his Rebuttal Testimony (due August 15) his complete positions, opinions and views in this case based on the information provided by the parties in response to data requests.

By Direction of the Commission,

/s/ David J. Collins

David J. Collins
Executive Secretary