

ORDER NO. 91067

Potomac Electric Power Company	*	BEFORE THE
Streetlights	*	PUBLIC SERVICE COMMISSION
	*	OF MARYLAND
	*	_____
	*	CASE NO. 9703
_____	*	_____

Issue Date: March 21, 2024

PARTIES’ REQUEST FOR COMMISSION RESOLUTION

On January 10, 2024, Potomac Electric Power Company (“Pepco”), Chevy Chase Village, Chevy Chase Section 3, the City of Gaithersburg, the City of College Park, the Town of North Chevy Chase, and the Town of Washington Grove (“the Municipalities”), and the Public Service Commission Technical Staff (“Staff”) (collectively, “the Parties”) filed with the Commission a request for resolution¹ of two issues that remain in dispute. After reviewing the Parties’ Request for Resolution, as well as the complete record in this matter, the Commission directs specified third parties to file comments in this matter, directs Pepco to provide the Commission and the Municipalities with the data identified herein, and denies the Municipalities’ requests for the inclusion of additional indemnification language as part of any future attachment agreements between an electric company and a county or municipality.

¹ Maillog No. 307018

Background

On April 8, 2022, Pepco filed revised tariff pages for Schedules SSL-OH and SSL-OH-LED containing information on the impact of §§ 1-1309(c) and (d) of the Local Government Article of the *Annotated Code of Maryland*, which provide that, upon written request by a county or municipality, an electric company shall sell to the county or municipality for fair market value some or all of the electric company's existing street lighting equipment that is located in the county or municipality. While the proposed tariff revisions did not change any tariff rates or charges, the Parties disagreed on several issues stemming from Pepco's proposed tariff language.

The matter was addressed at the Commission's October 12, 2022 Administrative Hearing, at which the Commission rejected the tariff revisions and directed the Parties to continue discussing the remaining issues in dispute. At a January 25, 2023 Status Conference, the Commission established an April 7, 2023 deadline for additional filings related to this matter. On April 7, 2023, Pepco and the Municipalities filed a Joint Issues List and requested a Status Conference.² The Status Conference was held on May 3, 2023, and on May 15, 2023 a modified Joint Issues List was filed³, identifying several remaining issues in dispute related to the model streetlight attachment agreement and the model streetlight purchase agreement.

On May 16, 2023, the Commission initiated Case No. 9703 and issued a Hearing Notice⁴ that established deadlines for briefs and scheduled a hearing for oral presentations on July 13, 2023. At the conclusion of the July 13, 2023 hearing, the Commission took the

² Maillog No. 302306

³ Maillog No. 302960

⁴ Maillog No. 302984

matter under advisement and issued bench data requests to Pepco. Staff stated its intention to contact Verizon to ascertain its position regarding pole attachment by the Municipalities, and the Parties agreed to continue to discuss the remaining issues in dispute.

On July 31, 2023, Pepco filed its response to the Commission's data requests.⁵ In August, September, and October 2023, Pepco filed updates⁶ with the Commission regarding progress made by the Parties in discussing the outstanding issues in dispute. On January 10, 2024, Pepco filed on behalf of the Parties, a final update on the model purchase and attachment agreements and requested that the Commission resolve the remaining issues in dispute.⁷

The Parties' Request for Resolution

In the Request for Resolution, the Parties asked that the Commission resolve the remaining issues taken under advisement at the July 13, 2023 hearing; specifically, holding Verizon and other third-party pole owners to the terms reached by the Parties in the attachment agreement allowing a buyer to remain on the pole and maintain the equipment, and whether to apply the indemnity requirement mutually and indemnity provision only to negligent or willful acts or omissions.

A. Third-Party Involvement

Pepco owns many of the poles in its service territory to which streetlights are attached; however, several poles are owned by Verizon or other third-parties. When Pepco attached its Company-owned streetlights to poles owned by Verizon or other third-parties, Pepco entered into attachment agreements and/or easements with the pole owners;

⁵ Maillog No. 304349

⁶ Maillog Nos. 304638, 305118, and 305789

⁷ Maillog No. 307018

however, according to Pepco, these attachment agreements and easements cannot be transferred to a local government or municipality that purchases the Pepco streetlights attached to third-party-owned poles. The Municipalities express concern about possibly needing to reach agreements with Verizon on the same types of issues that have been involved in this matter. The question presently before the Commission for resolution is whether or not Verizon should be involved in this proceeding in order to avoid the Municipalities re-engaging in similar but separate proceedings as attachment needs might arise.

Pepco takes no position on whether or not Verizon should be involved in this proceeding, the Municipalities contend that Verizon should be made a party to this proceeding, and Staff's position is that Verizon should be involved in future discussions regarding possible attachment to its poles.

The Commission agrees that Verizon should be included in future discussions regarding pole attachments in the context of streetlight purchases, and therefore directs Verizon to file comments within 30 days of this Order as to its interpretation of, and responsibilities under, § 1-1309 of the Local Government Article, specifically subsection (f)(1).

The Commission further notes that, in several instances, filings in this matter refer to poles that are owned by third parties other than Verizon, yet none of these other third parties are identified by the Parties. Since these other third-party pole owners in Pepco's territory are implicated under §§ 1-1309(c) and (d) of the Local Government Article, failing to include the non-Verizon third-party pole owners would leave a resolution on this issue incomplete.

The Commission therefore directs Pepco to provide to the Commission and the Municipalities a list of all Pepco-owned streetlights, identifying the owner of the pole to which the streetlights are attached. This information will eventually be necessary to any local government or municipality contemplating the purchase of a streetlight under § 1-1309 of the Local Government Article and is necessary to ensure that pole owners are aware of the legislation and, like Verizon, are given the opportunity to comment on their interpretation of, and responsibilities under, § 1-1309 of the Local Government Article, specifically subsection (f)(1). Pepco is directed to provide the list of streetlights and corresponding pole owners within 30 days of this Order. Once the Commission has received the filing, a copy of this Order will be served on the identified third-party pole owners, after which they will have 30 days to file their comments as directed herein.

B. Additional Agreement Language

The Parties ask the Commission to resolve the issue of whether to apply an indemnity requirement to both Pepco and the Municipalities. Pepco opposes the application of mutual indemnity, stating that it should no longer be liable after the sale of a streetlight to a local government or municipality. In support of its position, Pepco notes that tariff language in other jurisdictions places indemnity on the customer rather than the seller. The Municipalities argue that there should be mutual indemnification provisions, and that they should be given a different status than the private vendors addressed in the tariff language pointed to by Pepco. Staff takes no position on the issue.

The Parties also ask the Commission to resolve the issue of whether to apply the Municipalities' indemnity provision only to negligent or willful acts or omissions. Pepco opposes the inclusion of the negligent and willful acts or omissions language, stating that

doing so would expand the scope of the statutory immunities already afforded to local governments and municipalities. The Municipalities are only willing to compensate for willful or negligent acts or omissions, stating that it ensures that they do not waive their sovereign immunity, and that they have used such language in other contracts and documents without objection. Staff takes no position on the issue.

Pepco's response⁸ to a data request from the July 13, 2023 hearing indicates that, in previous contracts between Pepco and other government entities, indemnity provisions are not mutual and instead run from the licensee to Pepco, the contracts do not add language beyond the condition that local law would control, and in all but one contract the indemnity provision requires compliance subject to local law.

In addition to the Municipalities' requests not being common contractual practice with Pepco, the Commission also does not find any evidence which proves that requiring mutual indemnity or the addition of negligent acts or omissions to a contract serves the public interest requirements that the Commission must consider as part of its general supervisory powers. Therefore, the Commission will not go beyond the statutorily provided immunities already afforded to local governments and municipalities and will not direct the inclusion of mutual indemnification provisions or the inclusion of language covering negligent or willful acts or omissions in contracts for the sale or attachment of streetlights.

⁸ Maillog No. 304349

IT IS THEREFORE, this 21st day of March, in the year Two Thousand Twenty-Four, by the Public Service Commission of Maryland, **ORDERED**:

A) that Verizon file comments as to its interpretation of, and responsibilities under, § 1-1309 of the Local Government Article, specifically subsection (f)(1), within 30 days of this Order;

(B) that Pepco file with the Commission and the Municipalities a list of all Pepco-owned streetlights, identifying the owner of the pole to which the streetlights are attached, within 30 days of this Order; and

(C) that requests regarding the inclusion in model agreements of mutual indemnification language and/or language applying indemnification only as to negligent or willful acts or omissions are hereby denied.

/s/ Frederick H. Hoover, Jr.

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Kumar P. Barve

/s/ Bonnie A. Suchman

Commissioners