

BWLDC (B)

**Before the
District of Columbia Public Service Commission**

**Application of Potomac Electric Power)
Company for Authority to Implement a) Formal Case No. 1156
Multiyear Rate Plan for Electric)
Distribution Service in the District of Columbia)**

**Direct Testimony and Exhibits of
Scott Hempling**

On Behalf of

**Baltimore Washington Construction and
Public Employees Laborers' District Council**

February 19, 2020

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Exhibit BWLDC (B)-1: Resume of Scott Hempling

Exhibit BWLDC (B)-2: Discovery Responses Cited in Hempling Testimony

1 **Introduction:**
2 **Pepco's policies on contracted labor are inconsistent with its**
3 **customer obligation and the District's values**
4
5

6 **Q. State your name, address, and the organization on whose behalf you are testifying.**

7
8 **A.** Scott Hempling, 417 St. Lawrence Dr., Silver Spring MD. I am testifying on behalf of the
9 Baltimore Washington Construction and Public Employees Laborers' District Council, an
10 affiliate of the Laborers' International Union of North America (both referred to here as
11 “Laborers”). Many members are employees of Pepco contractors, and also customers of
12 Pepco.

13 **Q. This is a rate case. Why are you submitting testimony about Pepco's treatment of**
14 **workers?**

15
16 **A.** Pepco seeks higher rates and higher earnings. It also seeks speedier ways to raise its rates
17 to receive those earnings. Driving Pepco’s Application is its plan to spend, by 2022,
18 nearly \$1.6 billion on distribution upgrades and improvements in the District.¹ Much of
19 this money—customers’ money—will go to outside contractors. The men and women
20 who work for these contractors—the men and women whose work will actually upgrade
21 and improve Pepco’s distribution system—are treated poorly in comparison with other
22 workers. That poor treatment leads inevitably to lapses in productivity and safety, to the

¹ See McGowan Direct at 9-10 (“the Company is projected to spend approximately \$608.7 million over the 2018-2019 period and \$957.2 million over the 2020-2022 period on upgrades and improvements to Pepco’s District of Columbia distribution system”) (citing Clark Direct at p. 14, Table 1). See also McGowan Direct at 19-20 (describing as among the “drivers” of Pepco’s Application the need to “make significant investments in the electric distribution system, continue to improve reliability and customer service, advance technologies to modernize the distribution system and provide tools to assist customers in managing their energy usage”).

1 detriment of Pepco’s customers. Because Pepco selects these contractors, Pepco is
2 responsible for the outcomes—including the effects on workers and customers.

3 Customers don't pay for costs; they pay for performance. Commissions routinely
4 make customers pay for utility executives' salaries, on the premise that high salaries
5 produce high performance. If that premise applies to executives who sit at their desks, it
6 applies to workers who stand in the cold and sweat in the heat. The safe, reliable,
7 reasonably priced service that Pepco owes its customers could not happen without
8 construction workers. So how Pepco treats those construction workers—their pay,
9 benefits, working conditions and training—is relevant to this rate case.

10 Because Pepco is the government-appointed electric utility, its policies also affect
11 how District residents perceive the District’s values. Three of those values are especially
12 relevant to this rate case.

- 13 1. Workers are the District's backbone and bedrock. This city of workers
14 cares about workers—especially about the reasonableness and fairness of
15 their compensation.
- 16 2. Accountability is everything. Citizens expect the District’s officials, and
17 its utilities, to be accountable for excellence. The District’s residents want
18 no buck-passing.
- 19 3. Both the District and its Public Service Commission want to make the
20 electric industry cleaner, greener, more innovative, more diverse, and
21 more customer-responsive.

22 These three values converge on this question: How well does Pepco treat
23 workers? Because the District cares about its workers, Pepco must treat them right.
24 Because the District cares about accountability, Pepco can't shrug off responsibility for
25 how its contractors treat their workers. And because the District cares about energy
26
27
28

1 diversity, because it seeks to move from the old world of centrally controlled, fossil-
2 fueled energy sources to a new world of diverse suppliers selling greener products, its
3 electric utility needs policies on pay, benefits, safety, training and education that attract,
4 develop and support the types of workers whose labor will achieve that diversity.

5 Commissions need to set construction workforce standards, compensate utilities
6 for the reasonable cost of meeting those standards, and establish serious consequences for
7 violating those standards. With those three pieces in place, there is no need for
8 complicated rate plans. All that is necessary is clarity, compliance, and enforcement.

9 **Q. How have you organized your testimony?**

10 **A.** Following a summary of my professional experience, my testimony has four Parts.

11 **Part I** explains that by allowing and incentivizing its contractors to profit from
12 underpaying workers, Pepco imprudently places its customers at risk.

13
14 **Part II** recommends solutions. To address Pepco's imprudence, the Commission
15 should (a) reduce Pepco's prospective earnings by the amounts Pepco and its
16 contractors earn from underpaying workers, (b) condition Pepco's prospective
17 recovery of contractor costs on its eliminating contractor mistreatment, and (c)
18 create an independent entity to monitor the contractors' labor policies.

19
20 **Part III** explains why the Commission should reject Pepco's pleas to ignore its
21 imprudence.

22
23 **Part IV** urges the Commission to end a two-year silence that leaves workers and
24 customers exposed to Pepco's imprudence.

25
26 Exhibit BWLDC (B)-1 is my resume. Exhibit BWLDC (B)-2 contains all discovery
27 material cited in my testimony.

1 **Q. How does your testimony relate to that of Laborers' Witness Steve Lanning?**

2
3 **A.** Mr. Lanning presents facts and concerns that I rely on to explain why Pepco's contracting
4 practices are imprudent. He describes the nature of the work performed by the
5 contractors' employees, the risks to cost and quality associated with that work, and the
6 connections between worker treatment and worker performance.

7 **Q. Describe your employment background, education and experience.**

8 **A.** I began my legal career in 1984 at a private law firm, where I represented municipal
9 power systems and others on transmission access, holding company structures, nuclear
10 power plant construction prudence, and producer-pipeline gas contracts, among other
11 matters. From 1987 to 1990, I was an attorney at a public interest organization, working
12 on electric utility issues. From 1990 to 2006, I had my own law practice, advising public
13 and private sector clients—primarily state regulatory commissions, and also municipal
14 systems, independent power producers, consumer advocates, public interest
15 organizations, and utilities—with an emphasis on electric utility regulation.

16 From October 2006 through August 2011, I was Executive Director of the
17 National Regulatory Research Institute (NRRI). Founded by the National Association of
18 Regulatory Utility Commissioners (NARUC), NRRI is a Section 501(c)(3) organization,
19 funded primarily by state utility regulatory commissions to provide research to regulatory
20 decision-makers. As Executive Director, I was responsible for working with
21 commissioners and commission staff at all 51 state-level regulatory agencies to develop
22 and carry out research priorities in electricity, gas, telecommunications and water. In
23 addition to overseeing the planning and publication of over 80 research papers by NRRI's
24 staff experts and outside consultants, I published my own research papers, advised

1 contract clients (including state commissions, regional transmission organizations, private
2 industry, and international institutions), and wrote monthly essays on effective regulation.

3 In September 2011, I returned to private practice. I have focused on writing books
4 and research papers, providing expert testimony, advising regulatory agencies and others,
5 and teaching courses and seminars on the law and policy of utility regulation. Beginning
6 in 2011 and continuing through the present, I teach public utility law (and for three years,
7 I also taught regulatory litigation) as an adjunct professor at Georgetown University Law
8 Center. I teach the same subject each spring as a webinar attended by a nationwide group
9 of regulatory professionals.

10 My book on public utility law, *Regulating Public Utility Performance: The Law*
11 *of Market Structure, Pricing and Jurisdiction*, was published by the American Bar
12 Association in 2013. My book of essays, *Preside or Lead? The Attributes and Actions of*
13 *Effective Regulators*, was published by NRRI in 2010. I published a second, expanded
14 edition in 2013. My book on mergers, *Regulating Mergers and Acquisitions of U.S.*
15 *Electric Utilities: Industry Concentration and Corporate Complication*, will be published
16 by Edward Elgar Publishing later this year. I have written several dozen articles on utility
17 regulation for publication in law journals, trade journals, and books.

18 I have taught utility law seminars to attendees from all fifty states and all industry
19 sectors. Internationally, I have taught seminars or presented at industry conferences in
20 Australia, Belgium, Canada, England, Germany, India, Italy, Jamaica, Mexico, New
21 Zealand, Nigeria, Norway, Peru, and Vanuatu. As a subcontractor to the U.S. Department
22 of State, I have advised the six nations of Central America on the regulatory

1 infrastructure necessary to accommodate and encourage cross-national electricity
2 transactions.

3 I received a B.A. *cum laude* from Yale University in 1978, where I majored in
4 Economics and Political Science and in Music. I received a J.D. *magna cum laude* from
5 Georgetown University Law Center in 1984. I am a member of the Bars of the District of
6 Columbia and Maryland. More information is available at www.scotthemplinglaw.com.

7 **Q. Before what fora have you presented testimony?**

8 **A.** I have presented testimony before the state commissions of California, Connecticut,
9 District of Columbia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maryland, Minnesota,
10 Mississippi, New Jersey, North Carolina, Oklahoma, Texas, Vermont and Wisconsin. I
11 have also submitted testimony to federal district courts in Florida, Minnesota, Montana,
12 and Wisconsin. These proceedings are listed on my resume.

13
14 **I. By allowing contractors to profit from underpaying workers,
15 Pepco imprudently places customers at risk**

16
17 **Q. Describe the purpose of this Part I.**

18 **A.** Part I establishes that Pepco's contracting practices are imprudent. First I provide facts
19 showing that Pepco outsources much of its labor needs to contractors. Then I describe the
20 traditional prudence standard, which among other things requires Pepco to manage its
21 workers and its contractors cost-effectively. Applying the prudence standard, I show how
22 Pepco's methods choosing, paying and monitoring (or not monitoring) its contractors
23 allows and incentivizes them to mistreat their workers, in ways that hurt Pepco's
24 customers.

1 A. *Pepco outsources much of its labor needs to contractors*

2
3 **Q. Provide background on the extent of Pepco's outsourcing.**

4 **A.** Pepco outsources both operations and construction. For the 12 months ending June 20,
5 2019, its District-allocated operations and maintenance expense for contractors was \$24.7
6 million. The figure for distribution capital expenditures was \$155 million.² For the
7 historic test year and years 2019-2022, Pepco says that for each of three types of
8 construction projects, its contractors' share of Pepco's expenditures will be these
9 percentages:

- 10 • Customer-driven: 47-49%
- 11 • Reliability-driven: 38%-53%
- 12 • Load-driven: 65%-70%³

13
14 In addition, Pepco contracts out all traffic control work.⁴

15 We can assume that Pepco's reliance on contractors will continue. Pepco says it
16 will be “mak[ing] significant investments in the electric distribution system.”⁵ Its current
17 rate request reflects an intent to spend, on D.C. distribution construction expenditures,
18 about \$1.6 billion over five years.⁶

² Pepco Response to Laborers' DR 1-8; Attachments A and B, respectively. Both numbers represent the D.C. share only; total Pepco was about twice those amounts.

³ Pepco Response to Laborers' DR 1-32.

⁴ Pepco Response to Laborers' DR 1-36 (“Pepco does not have any internal employees performing traffic control functions.”).

⁵ Application at 6.

⁶ Clark Direct Testimony at 14.

1 **B. *The prudence standard requires Pepco to manage its contractors cost-***
2 ***effectively***
3

4 **Q. **Explain the concept of prudence.****

5 **A.** A utility's rates must be just and reasonable. The costs underlying those rates will satisfy
6 that just-and-reasonable requirement only if the utility “operate[s] with all reasonable
7 economies”;⁷ incurs the “lowest feasible cost”;⁸ and uses “all available cost savings
8 opportunities.”⁹

9 To evaluate a utility's costs, regulators use prudence analysis. Prudence analysis
10 tests whether a utility has behaved reasonably, based on industry norms, using all
11 professional tools objectively and competently.¹⁰ Prudence requires “[c]arefulness,
12 precaution, attentiveness, and good judgment.”¹¹ It requires “sagacity or shrewdness in
13 management of affairs,” and “skill or good judgment in the use of resources.”¹² A

⁷ *El Paso Natural Gas Co. v. FPC*, 281 F.2d 567, 573 (5th Cir. 1960).

⁸ *Potomac Elec. Power Co. v. Pub. Serv. Comm'n of the D.C.*, 661 A.2d 131, 137 (D.C. 1995). *See also State of Oklahoma v. Oklahoma Gas & Electric*, 1975 OK 40, 536 P.2d 887, 891 (1975) (requiring Commission to set “lowest reasonable rates consistent with the interests of the public and the utilities”).

⁹ *Midwestern Gas Transmission Co. v. E. Tenn. Natural Gas Co.*, 36 FPC 61, 70 (1966), *aff'd sub nom. Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444 (7th Cir. 1968). The Federal Power Commission later rescinded its decision on unrelated grounds. *Knoxville Utils. Bd. v. E. Tenn. Natural Gas Co.*, 40 FPC 172 (1968).

¹⁰ *See, e.g., Appeal of Conservation Law Found., Inc.* 507 A.2d 652, 673 (N.H. 1986) (describing the prudence standard as “essentially apply[ing] an analogue of the common law negligence standard”).

¹¹ *Wisconsin Public Service Corp. v. Public Service Comm.*, 156 Wis. 2d 611, 617-18 (1990) (quoting Black's Law Dictionary).

¹² *Business & Professional People for the Pub. Interest v. Commerce Comm.*, 665 N.E.2d 553, 556, 558 (1996).

1 commission's judgment about whether a utility has acted reasonably, and about whether
2 its decision-making process was appropriate, must take into account the consequences of
3 error.¹³

4 **Q. How does a utility's prudence obligation relate to time horizons?**

5 **A.** In making decisions, a prudent utility considers both the short term and the long term.
6 The customer-utility relationship is a long-term relationship. People don't buy electricity
7 like they buy season's tickets for the Nationals, one year at a time. Whether residential,
8 commercial, or industrial, a customer moves into a utility's territory expecting to buy
9 from the utility for the long term. Conversely: A utility views each customer not as a one-
10 year visitor, but as a customer whose long-term needs require long-term attention. The
11 obligation to serve is not an obligation to serve for a year; it is an obligation to serve, and
12 to plan to serve, for as long as each customer stays in the service territory.

13 It therefore is necessary that when a utility manages contractors, and a
14 commission sets rates, each consider the long term. Thinking ahead protects the
15 customers. Waiting until after errors are made, or until the effects of errors appear, means
16 it is too late to protect customers from (a) the resulting costs, because of the prohibition
17 against retroactive ratemaking; and (b) the adverse effects on quality, because the hours
18 of lower-quality service will already have passed.

¹³ *Baltimore Gas & Elec. Co.*, Case No. 8520/8520A, 1989 Md. PSC LEXIS 85, at *6-7, *24 (Md. Pub. Serv. Comm. 1989) (stressing the “high standard of care” required for maintenance practices and procedures at baseload plants, given the “high cost consequences of outages”).

1 **Q. Does a finding of imprudence require actual harm to customers?**

2 **A.** No. To find imprudence, a commission need not and should not wait for actual harm—
3 actual quality declines or cost increases. A sufficient basis for finding imprudence is an
4 avoidable increase in the risk of harm. If someone speeds on the highway, they get a
5 ticket whether they cause an accident or not. Increasing the risk of harm is imprudent,
6 whether harm occurs or not.

7 **Q. How does the prudence standard apply to Pepco's actions and inactions relating to**
8 **its contractors' labor practices?**

9
10 **A.** Pepco's obligation to act prudently includes the obligation to use contractor procurement
11 procedures that achieve the cost-effective provision of safe, reliable service over the long
12 term. As Mr. Lanning explains, that construction work requires workers who are skilled,
13 well-rested and well-compensated. Open trench operations require experience and
14 alertness—to minimize the risk of damage to underground facilities, to prevent trenches
15 from caving in, to continuously identify sources of risk, and to communicate clearly and
16 rapidly to heavy equipment operators. Traffic control workers protect construction crews,
17 themselves and the public from danger. Along with the crews they face risks from
18 distracted or dangerous drivers, unmarked trenches, and run-ins with company vehicles
19 and heavy equipment. All these workers need skills, training, and management support.
20 Contractors' labor practices—on worker pay, benefits, training, and working
21 conditions—affect construction quality, productivity, safety and costs—all of which
22 affect rates and service quality. Pepco itself “recogniz[es] that equitable wages help to

1 ensure quality construction and improve the lives and skill levels of Pepco's contractors'
2 employees.”¹⁴

3 Subpar labor policies—including but not limited to underpayment—affect service
4 not only currently but in the future. Because Pepco is using contractors for major capital
5 expenditures, quality problems arising from worker mistreatment can affect customers for
6 decades. And penalties imposed for wage violations, substandard construction, or safety
7 incidents can weaken a contractor financially, making it less able to fulfill whatever role
8 Pepco has assigned to it.

9 We want utilities to keep costs down. But a utility's obligation to minimize its
10 customers' costs is always subject to other constraints, both legal and practical. Just as a
11 cost-minimizing utility may not use quill pens because they cost less than computers, it
12 may not tolerate its contractors underpaying their workers just because doing so saves
13 customers money.

14 *C. Pepco fails to choose, pay and monitor its contractors cost-effectively*

15
16 **Q. Introduce this subsection.**

17 **A.** Pepco's contracting practices conflict with its obligation to manage its workforce cost-
18 effectively, in four distinct ways. First, by basing contractor selections primarily on price,
19 and then paying fixed project fees, Pepco makes it profitable for contractors to underpay
20 workers. Second, Pepco sets no minimum requirements for pay and benefits, leaving
21 contractors free to compensate workers below their value. Third, Pepco fails to monitor

¹⁴ Letter of Peter Meier to Commission Secretary at 1, Formal Case No. 1139 (Oct. 23, 2017) (Meier Letter). Mr. Meier then was Pepco Vice President, Legal Services.

1 its contractors sufficiently. Fourth, Pepco has established no clear consequences for
2 contractors that mistreat workers.

3 *1. By basing contractor selections primarily on price, and then*
4 *paying fixed project fees, Pepco incentivizes contractors to*
5 *underpay workers*
6

7 **Q. Discuss whether Pepco's method for selecting and paying contractors is consistent**
8 **with cost-effective performance.**

9
10 **A.** If a utility were indifferent to what its contractors paid workers, the utility would choose
11 contractors based mostly on price, then award contracts having a fixed project cost. That
12 is exactly what Pepco does:

13 Pepco awards a significant percentage of its contracts for third-party labor
14 on a total-cost basis. With respect to this type of contracting, the bidder
15 promises to perform the scope of work for a set, flat price, and the bid is
16 awarded to the most reasonably priced, qualified bidder that meets the
17 contract requirements.¹⁵
18

19 Fixed project cost, with no compensation floor other than the legal minimum wage,
20 incentivizes contractors to minimize all costs, including the costs of worker
21 compensation, benefits and training.

22 Minimizing employee cost is short-sighted, because it produces the wrong
23 behavior. The California Commission found that reverse auctions (utility bidding
24 processes that emphasized price) affect “worker safety, product safety, product quality
25 and timeliness of project completion.” These auctions—which the Commission then
26 prohibited—can “motivate bidders to oversimplify the elements of a complex project and
27 to emphasize price at the expense of other project criteria, such as long term integrity,

¹⁵ Meier Letter.at 2.

1 safety or quality.”¹⁶ Asked what went through his mind as he readied for takeoff atop an
2 Apollo rocket, Astronaut Alan Shepard replied: “the fact that every part of this ship was
3 built by the low bidder.”¹⁷

4 Pepco’s lawyer said that the company’s pre-qualification requirements consider
5 “the contractor's record of prior service, ability to perform the work, diversity, price, and
6 alignment with Pepco's corporate values, including compliance with all employment
7 laws.”¹⁸ But Pepco's pre-qualification questionnaire says almost nothing about how the
8 contractor’s labor policies and employment practices affect its workers. The
9 questionnaire lists the following:¹⁹

- 10 • Confirm supplier's company is a legal entity with the IRS
- 11 • Financial health reviewed via D&B tool
- 12 • Legal claims against Exelon reviewed
- 13 • Legal claims against Contractor reviewed
- 14 • Supplier's capability and competency matches requestor need
- 15 • Supplier informed of scope of work and indicated their desire to perform it
- 16 • Diversity certifications verified
- 17 • Supplier's union affiliation has been confirmed, aligns with business's req'mts
- 18 • Experience Modification Rate (EMR) <= 1.00
- 19 • OSHA Recordable Incident Rate <= 3.50
- 20 • Supplier Provide References for review by business partners
- 21 • Safety and Quality Audit/Inspection program
- 22

¹⁶*Order Instituting Rulemaking on the Commission's Own Motion for the Purpose of Considering Policies and Rules Governing Util. Constr. Contracting Processes 16, Rulemaking 03-09-006 (Calif. Pub. Utils. Comm'n Dec. 16, 2004).*

¹⁷ Gene Krant, *Failure Is Not an Option* 201 (2001).

¹⁸ Meier Letter at 2.

¹⁹ Pepco Response to Laborers' DR 1-45.

1 This list has nothing about worker compensation: nothing about how the contractor’s
2 compensation policies compare to Pepco’s and other utilities’; nothing about how the
3 contractor deals with workers’ hours, health insurance, and retirement savings; nothing
4 about workers' skills development, including aligning those skills with District's future
5 needs.

6 The list does include two important safety indicators—the Experience
7 Modification Rate and the OSHA Recordable Incident Rate.²⁰ These two metrics reveal
8 outcomes but they say nothing about inputs—about what actions contractors take, or fail
9 to take, to lower safety risks and to prepare workers for those risks; about how well
10 contractors respond to incidents (including assessing causes so as to avoid recurrence);
11 about whether and how well contractors solicit workers' ideas on making their jobs safer
12 and their lives more livable; and about what efforts contractors make to care for injured

²⁰ The Experience Modification Rate (EMR) reflects a company's past experience and future risks, relating to frequency and severity of worker injuries. Insurance companies use a company's EMR to calculate its premium for worker's compensation insurance. A company with an EMR of 1.0 has an average risk for that type of company. To calculate a company's EMR—to determine how much a company's risk is above or below average—insurers take into account the number and severity of prior injuries suffered and workers' claims made. Companies have their EMR calculated by the National Council on Compensation Insurance, or by some other independent agency. See generally www.ncci.com/learningcenter.

The OSHA Recordable Incident Rate “can be used to show the relative level of injuries and illnesses among different industries, firms, or operations within a single firm. Because a common base and a specific period of time are involved, these rates can help determine both problem areas and progress in preventing work-related injuries and illnesses.” The rate is calculated as: (Number of injuries and illnesses X 200,000) / Employee hours worked. See <https://www.osha.gov/laws-regs/standardinterpretations/2016-08-23>.

1 workers. And the two indicators are lagging rather than leading indicators, so they fail to
2 address how to prevent adverse safety events.

3 Pepco's omissions have a deeper source. This billion-dollar utility, one of literally
4 hundreds of subsidiaries of a multi-billion-dollar holding company, has spent hundreds of
5 millions of dollars on outsourcing—but has never subjected that spending to a benefit-
6 cost analysis. Pepco has performed no “study regarding savings derived from the use of
7 contractors.”²¹ It has no idea how much it saves ratepayers annually by outsourcing
8 construction work.²² It has performed no “analysis or calculations regarding savings
9 derived from the use of contractors for the above-referenced functions”—referring to
10 “light maintenance, corrective maintenance, and traffic control.”²³ A company that fails
11 to inform itself about the value it gets from its contractors will not likely know much
12 about how those contractors treat their workers.

13 **2. *Contractors are free to compensate workers below their value***
14 ***because Pepco sets no minimum requirements for pay and***
15 ***benefits***
16

17 **Q. Does Pepco set any floor on contractors' compensation for workers?**

18 **A.** No, Pepco sets no minimum compensation for its contractors' workers. Contractors
19 therefore have complete discretion over pay and benefits, subject only to minimum wage
20 laws. Combined with fixed-price contracts, Pepco's failure to mandate a floor makes it

²¹ Pepco Response to Laborers' DR 1-7.

²² Pepco Response to Laborers' DR 1-56.

²³ Pepco Response to Laborers' DR 1-5.

1 profitable for contractors to pay low wages and offer no benefits other than those legally
2 mandated.

3 Adding to the contractors' incentive to minimize wages and benefits is the
4 workers' inability to negotiate. Many workers—especially workers who are unskilled or
5 semi-skilled—have few options. For multiple reasons—language barriers, child care
6 needs, transportation problems, educational disadvantages, or discrimination based on
7 race or ethnicity—construction workers don't have much bargaining power with
8 contractors. To support themselves and their families, these individuals need the work,
9 even when the contractor pays them below their value. This fact holds especially for
10 workers lacking a union—the situation for most of Pepco's contractor employees—
11 because each worker has to negotiate alone, unaware of what others are receiving. And
12 each one risks retaliation for speaking out. Advantaged by these circumstances,
13 contractors have economic interest and practical opportunity to underpay, and to limit
14 health and retirement benefits.

15 How does Pepco deal with this situation? It doesn't. Pepco assumes that legal
16 treatment is sufficient treatment; that a contractor need pay no more than what the law
17 requires.²⁴ But no wage law requires pay sufficient to match a worker's real value,
18 sufficient to allow that worker to focus on the work and not on the worries caused by
19 undercompensation. Pepco also said it has the right to audit its contractors for wage law

²⁴ See Meier Letter at 2 . Responding to Commission questions about worker treatment, Mr. Meier did no more than point to (1) contract terms requiring compliance with wage and benefit laws, and (2) regulatory agencies responsible for ensuring compliance with wage and labor laws.

1 compliance.²⁵ But we don't know whether, how often, or how competently these audits
2 occur. No Pepco audit saved Mr. Zerihune Gaines from suffering a year of below-
3 minimum-wage payment from a contractor chosen and paid by Pepco.²⁶

4 To confirm that we omitted nothing, we asked Pepco to “detail all actions Pepco
5 has taken to ensure that employees of construction contractors are paid wages equal to
6 what Pepco employees are paid for comparable work.” We also asked for “all documents
7 that describe Pepco's policies and practices on establishing wage and benefit standards
8 for its contractor workforce....”²⁷ Pepco's responses merely referred to the Meier Letter.
9 That letter had no information about any actions Pepco has taken to ensure that
10 construction contractors compensate workers comparably to how Pepco pays its
11 employees. And in a follow-up, Pepco said only that its “standard terms and conditions
12 provide the Company with mechanisms that address the compliance of its contractors
13 with the wage rates that are required by law.”²⁸ Based on these non-answers to clear
14 questions, the Commission must assume that (1) Pepco has taken no actions to ensure
15 that construction contractors pay workers comparably to what Pepco pays; (2) Pepco has
16 no other policies to ensure proper pay to contractor employees; and (3) Pepco's
17 procurement decisions do not evaluate contractors for how they compensate employees—
18 other than requiring compliance with minimum wage laws (with the exception of Mr.

²⁵ *Id.*

²⁶ As discussed below.

²⁷ Laborers' DRs 1-1, 1-2.

²⁸ Pepco Response to Laborers' DR 2-1.

1 Zerihune Gaines and others who shared his unfortunate fate). In fact when we gave Pepco
2 an opportunity to deny that interpretation, Pepco only repeated itself.²⁹ The Commission
3 should assume that if Pepco had positive information, it would have presented it in
4 discovery. And the Commission certainly must bar Pepco from presenting in rebuttal
5 testimony information it withheld in discovery.

6 That Pepco focuses solely on generic legal minimums rather than on the
7 necessities of specific projects and tasks is evidenced by its failure to consider the value
8 of paying workers appropriately. We asked, twice, whether there is “a value to Pepco's
9 customers of ensuring that workers on Pepco's construction projects, whether Pepco
10 employees or contractor employees, are compensated at levels commensurate with the
11 value of their labor.” Both times, Pepco avoided the question. It could not bring itself to
12 answer “yes” to a question for which the obvious answer—for a prudent utility,
13 anyway—is “yes.” We also asked for a “full explanation of how Pepco has calculated
14 that value (i) in the past, and (ii) for purpose of this rate case[.]” Pepco admitted that it
15 had never calculated the value.³⁰

16 **3. *Pepco fails to monitor its contractors sufficiently***

17 **Q. How well does Pepco monitor its contractors' treatment of workers?**

18 **A.** Pepco lacks the most basic information about its contractors' treatment of workers. Here
19 are three examples.
20

²⁹ *Id.*

³⁰ Pepco Responses to Laborers' DRs 1-53, 2-13.

1 *Number of workers:* “Pepco does not know the number of FTEs used by
2 contractors.” Nor does it know what “percentage of total forecasted FTEs are direct
3 employees of the Company compared to employees of outside construction
4 contractors.”³¹ And for distribution construction, Pepco has performed no “analysis that
5 forecasts contractor crew levels.”³²

6 *Compensation:* Pepco assumes that contractors will pay workers legally. But
7 Pepco's inaction fails to support its assumption. “As a general practice, the Company
8 does not directly monitor the pay practices of its suppliers.”³³ (How would one monitor
9 pay practices “indirectly”?) Asked what actions it has taken against wage-law violators,
10 Pepco confessed ignorance. “Pepco is not aware of any contractors that have violated any
11 wage laws.”³⁴ Lack of awareness is a direct result of not “directly monitoring.” And it
12 tells us nothing about compliance, because the absence of awareness does not mean the
13 presence of compliance.

14 *Safety measures:* Pepco “does not track claims and damages cost data by
15 construction contractor at this time.” Pepco says nothing about tracking at some other

³¹ Pepco Responses to Laborers' DRs 1-12, 1-13.

³² Pepco Responses to Laborers' DR 1-14.

³³ Pepco Response to Laborers' DR 2-15.

³⁴ Pepco Response to Laborers' DRs 1-59, 2-15.

1 time.³⁵ Why not track?—especially when Pepco’s own records show that in 2019, at least
2 one of its contractors, Anchor Construction Corp., has had a host of problems:³⁶

3 [January] (1) crew too close to open excavation not maintaining 6' distance (2)
4 Trench box too low in excavation. (3) Wheels not chocked (4) No respiratory
5 protection while milling (5) Crew standing near excavation with out harness (6)
6 Ladder is not 3' over excavation. (7) Missing toe board on guard rail.

7
8 [February] (1) Crew installed trench box incorrectly upside down. (2) Struck
9 unmarked Utility (3) No wheel chokes. (4) Traffic control sign placed upside
10 down. (5) Poor House Keeping (6) Fire extinguisher not on jobsite. (7) Air tester
11 not in excavation (8) Ladder not extended 3' above surface

12
13 [March] (1) Wheels not chocked. (2)Guard rail missing toe board. (3) Improper
14 method for rigging. (4) Crew Huddle not complete. (5) No stack pins on trench
15 shields. (6) Wrong Permit and not signed off. (7) Not enough advance warning
16 signs on road. (8) Fuel cans missing Marks. (9) Arrow Board showing incorrect
17 direction.

18
19 [April] (1) 4 leg chain on site with a unreadable tag. (2) Ladder was painted on to
20 know it belonged to crew. (3) Wheels not chocked. (4) No air tester in excavation.
21 (5) Two Employees not wearing eye protection. (6)Guardrail was missing toe
22 board. (7) 2 leg chain on site with bent sure hook. (8)Flagger directing traffic with
23 out proper PPE and no Paddle (9) no Fall protection when working on roof of
24 shed. (10) During excavation spoils was not 2ft from excavation. (11) Crew
25 member not wearing FRE. (12) Crew was installing screw jacks from the bottom
26 to the top.

27
28 [May] (1)Traffic sign not properly placed. (2) Using folded step ladder inside
29 manhole. (3) Not enough cones to close off lane. (4) No metal covers over boots
30 while using jumping jacks. (5) Missing Air Tester. (6) Missing sidewalk Closed
31 sign. (7) Job Briefing not completed. (8) Crew members not wearing safety
32 glasses. (9) Fire extinguisher expired. (10) Dump Truck broke taillight.

33
34 [June] (1) Two fire extinguishers with out tag. (2) Trench box installed too low
35 below concrete road base. (3) Employee was found inside trench with out ladder.
36 (4) No guardrail installed and crew within 6' of excavation edge. (5) Single
37 Plywood sheet used as shoring around utilities. (6) No air tester in hole.(7)

³⁵ Pepco Response to Laborers' DRs 1-46, 2-11.

³⁶ This indented material is reprinted verbatim from Pepco’s Response to Laborers’ DR 1-22, pdf p.67/187, typing errors unchanged.

1 Employee not wearing FRE Shirt. (8) Fire extinguisher more then 25' from
2 generator. (9) Traffic signs not properly placed.

3
4 [July] (1)Employee not wearing FR clothing.(2) Trench box installed to low
5 below concrete road base.(3) toe board missing on guardrail. (4) Not enough
6 cones on tape. (5) Crew was using logging strap with edge frayed. (6) missing
7 wheel chocks. (7) Crew using ladder as a cutting table.

8
9 [August] (1) Wheels not chocked. (2) Horn not Working on excavator (3) Fire
10 Extinguisher do not have tags. (4) Poor House Keeping (5) Flagger no Flagger
11 Pants (6) NO Gutter Buddy (7) Gutter Buddy Needs to be replaced. (8)
12 Watermain trench not properly restored by others, concrete base comes lose when
13 excavating. (9) Fall protection was not placed during open trench. (10) No pins on
14 tripod.

15
16 Anchor is the same company that, after its workers at the April 12, 2017 public
17 hearing in FC 1139 (Pepco’s 2017 rate case) spoke of mistreatment, wrote identical
18 letters to each of the Commissioners stating that “Anchor is very committed to its
19 employees.”³⁷ We asked Pepco whether (a) Anchor's many problems were typical for
20 contractors, (b) Pepco had imposed any financial penalties on Anchor, (c) Pepco would
21 hire Anchor again, and (d) Pepco has verified that Anchor actually audits its sites, weekly
22 and randomly. Pepco ignored every question, offering only this non sequitor: “BWLDC
23 is seeking to characterize the data Pepco provided in its response to BWLDC DR 1-22.
24 The data speaks for itself and Pepco declines to characterize the data.”³⁸ The data does
25 indeed speak for itself. It needed no characterizing because its detail is damning. Pepco's
26 failure to answer our simple questions requires the Commission to deem admitted the
27 adverse inference: that Pepco has imposed no financial penalties on Anchor, would hire
28 Anchor again, and has not verified that Anchor actually audits its sites, weekly and

³⁷ Letter of Wen Liang (Aug. 1, 2017).

³⁸ Pepco Response to Laborers’ DR 2-7.

1 randomly. Because Pepco has failed to answer or object to a relevant question in
2 discovery, the Commission cannot fairly allow it to provide the answer in Rebuttal
3 Testimony.

4 Pepco says it has tools to ensure compliance. But Pepco has defined compliance
5 as minimal compliance—compliance with minimum wage laws having nothing to do
6 with whether the contractors are compensating workers consistent with their value. And
7 in the crucial areas of compensation and safety, Pepco lacks the most elementary
8 information necessary to ensure compliance.

9 **4. *Pepco has established no clear consequences for contractors that***
10 ***mistreat workers***

11
12 **Q. Has Pepco established or imposed consequences on contractors for mistreating**
13 **workers?**

14
15 **A.** Not that Pepco has revealed. A prudent utility would have at hand at least these
16 consequences: contract termination, financial penalties, removal from the list of approved
17 contractors, and continuous independent oversight paid for by the contractor. Despite
18 multiple opportunities, Pepco has provided no evidence that worker-mistreating
19 contractors face any of these consequences. That absence of evidence should not surprise,
20 because as I have shown, Pepco has no clear, established procedure for discovering
21 underpayments and other types of worker mistreatment.

22 Of the possible consequences I listed, each has its problems. Financial penalties
23 could weaken the contractor financially, increasing its Pepco-provided incentive to cut
24 corners on compensation and safety. Contract termination and removal from the approved
25 list would hurt the very workers whose protection is the purpose, while disrupting
26 essential work unless a replacement company is readily available. These problems do not

1 mean there should be no consequences; they mean Pepco must design consequences
2 sufficiently severe, and impose them sufficiently predictably, so that no worker
3 mistreatment occurs.

4 **Q. What facts has Laborers gathered on how Pepco's contractors actually treat their**
5 **workers, with what effects on customers?**

6
7 **A.** Laborers' Witness Steve Lanning provides detail on how contractors have mistreated
8 their employees, and how those practices affect, and can affect, the cost and quality of
9 electric service.

10
11 **II. To address Pepco's imprudence, the Commission should (a)**
12 **reduce Pepco's earnings, prospectively, by the earnings Pepco and**
13 **its contractors receive from mistreating workers; (b) condition**
14 **Pepco's prospective recovery of its contracting costs on its**
15 **adopting proper contracting practices; and (c) appoint an**
16 **independent entity to monitor worker treatment by Pepco's**
17 **contractors**

18
19 **Q. Describe Part II's purpose.**

20
21 **A.** Like any utility's imprudence, Pepco's imprudence must have consequences.

22 Prospectively, Pepco's earnings should be reduced to the extent that it, and its contractors,
23 derive earnings from underpaying contractor workers. Earnings aside, the Commission
24 should condition Pepco's prospective recovery of its contracting costs on the utility's
25 correcting its contracting practices. If Pepco then backslides, it should face penalties.
26 Given Pepco's continuing failure to address this situation, the Commission should appoint
27 an independent entity to monitor worker treatment by Pepco's contractors, along with
28 Pepco's efforts to improve that treatment.

1 A. *Pepco's prospective earnings should be reduced to the extent Pepco and*
2 *its contractors receive earnings from mistreating workers*

3
4 **Q. Should Pepco's failure to ensure that contractors treat workers properly affect its**
5 **earnings?**

6
7 **A.** Yes. If a utility treats its workers poorly, or hires contractors that treat their workers
8 poorly, or signs contracts motivating or allowing contractors to increase their earnings by
9 treating their workers poorly, the utility violates its prudence obligation to act cost-
10 effectively. Whether the utility's actions result from intention, inattention, inadvertence or
11 indifference, there must be consequences: disgorgement of improper earnings, and
12 penalties to deter repetition.

13 As discussed next, worker mistreatment can produce improper earnings in two
14 places: at the utility, and at the contractors.

15 **Q. Describe how worker mistreatment can produce improper earnings at the utility,**
16 **and what the Commission should do about those improper earnings.**

17
18 **A.** Outsourcing should be used to increase efficiency, not earnings. Any ratemaking method
19 allowing a utility to recover proposed contractor payments exceeding actual payments
20 rewards the utility for choosing contractors based primarily on cost—a practice that
21 creates the conditions under which contractors underpay workers. The Commission
22 therefore should eliminate any excess of (a) amounts Pepco recovers from customers for
23 contracting, over (b) amounts Pepco actually pays to contractors. The common
24 solution—one that avoids the error of retroactive ratemaking—is an adjustment clause
25 that trues up proposed to actual costs, subject to a prudence review.

1 **Q. Describe how worker mistreatment can produce improper earnings at the**
2 **contractor level, and what the Commission should do about those improper**
3 **earnings.**

4
5 **A.** If Pepco allows contractors to charge more for labor costs than what they pay workers,
6 contractors will have an earnings incentive to underpay workers. The Commission has no
7 authority over the contractors' earnings; but it does have authority over Pepco's. The
8 Commission therefore should reduce Pepco's earnings by the amount of its contractors'
9 excess earnings derived from mistreating workers. Doing so will induce Pepco to prevent
10 those contractor over-earnings.

11 Pepco cannot avoid this result by pleading ignorance about, or powerlessness
12 over, its contractors' practices—or lack of knowledge about the contractors' actual
13 earnings. A utility is responsible for its acts of discretion. Selecting a contractor is an act
14 of discretion. Drafting and executing a contract is an act of discretion. As a monopoly
15 provider of distribution service, and as one of the District's largest local sources of
16 contract work, Pepco is in a position, through contracting and auditing, to control its
17 contractors' performance, including their workplace policies. The Commission therefore
18 should (a) deem Pepco knowledgeable about its contractors' employment practices, (b)
19 impute to Pepco utility its contractors' decisions, and then (c) hold Pepco responsible for
20 those decisions.

21 Imputation—holding a utility financially responsible for its contractors'
22 decisions—is not a new idea. Consider three examples:

- 23 • Philadelphia Electric Company (PECO) was a minority owner in a nuclear
24 plant for which the lead entity was Public Service Electric & Gas (PSE&G—a
25 New Jersey utility). PECO had 4000 workers at the construction site, and an
26 annual cost share of \$46 million. But it had no permanent on-site
27 representatives. From 1970 through 1977, PECO averaged only three site

1 visits per year. Cost overruns at the plant led to findings of PSE&G's
2 imprudence. Imputing PSE&G's imprudence to PECO, the Pennsylvania
3 Commission disallowed from rates a portion of PECO's costs. The reason:
4 PECO's "total abdication of responsibility for the management of the
5 construction of . . . the project."³⁹
6

- 7 • In 1988, Westinghouse sold steam generators to the utility owners of the
8 South Texas Nuclear Project. Four of the generators didn't work. So in 2000,
9 AEP (which had become, via corporate acquisitions, the indirect owner of the
10 Project) shut down the plant to buy and install new generators. During the
11 shutdown, AEP had to buy expensive replacement power. The Texas
12 Commission found that AEP was not imprudent, but Westinghouse was.
13 Imputed Westinghouse's imprudence to AEP, the Commission disallowed part
14 of the replacement power cost from the utility's rates.⁴⁰
15
- 16 • The Massachusetts Department of Public Utilities found that Boston Edison,
17 the main owner-operator of the Pilgrim Unit 1 nuclear plant, acted
18 imprudently in causing and managing a plant outage. Commonwealth Electric,
19 another Massachusetts utility, had previously purchased from Boston Edison
20 11% of the plant's capacity. The DPU imputed Boston Edison's imprudence to
21 Commonwealth Electric, disallowing from the latter's rates some of the
22 replacement power cost. Commonwealth Electric argued that it had had no
23 control over Boston Edison, but the reviewing court disagreed:
24 "[P]erformance may be delegated, . . . duty may not."⁴¹ To exclude from
25 regulatory review "performance responsibilities delegated [by the utility] to
26 subcontractors clearly would not further [the statutory] goal" of achieving
27 lowest possible costs.⁴² Indeed, "[i]mputation of imprudence encourages
28 vigilant oversight by those who have delegated their responsibilities."⁴³
29

³⁹ *Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, 1978 Pa. PUC LEXIS 1, 31 P.U.R.4th 15 (1978).

⁴⁰ *AEP Texas Central Company v. Public Utility Commission of Texas*, 286 S.W.3d 450, 467-70, 2008 Tex. App. LEXIS 9541 (Ct. App. Texas 2008) (holding that "costs incurred due to the imprudence of a third-party vendor are not reasonable and necessary").]

⁴¹ *Commonwealth Electric Co. v. Department of Public Utilities*, 397 Mass. 361, 369 n.4, 491 N.E.2d 1035 (1985).

⁴² *Id.* at 372 (referring, in this case, to the goal "achieving lowest possible costs").

⁴³ *Id.* at 369.

1 If Pepco gains excess earnings by underpaying or treating its workers poorly, the
2 Commission would have the power to require Pepco to disgorge those earnings. That the
3 mistreating entity is a contractor makes no difference. Once the Commission imputes to
4 Pepco the practices of its contractors, the Commission can require Pepco to give up the
5 excess earnings. Making this natural consequence clear will help induce Pepco to correct
6 its contractors' practices.

7 **Q. Does requiring Pepco to disgorge improper earnings violate the prohibition against**
8 **retroactive ratemaking?**

9
10 **A.** Not if this requirement applies only prospectively. Due to the prohibition against
11 retroactive ratemaking, earnings already received by Pepco are Pepco's to keep.
12 Prospective earnings are a different story. The Commission can and should notify Pepco
13 now—and no later than its decision in this proceeding—that for purposes of the new
14 rates, the Commission will reduce Pepco's earnings by the amount of earnings Pepco and
15 its contractors received from mistreating workers. (The prohibition against retroactivity
16 does not preclude refunds back to a prior date if the utility had notice—as I provide for
17 here.)⁴⁴ If and when the Commission identifies these improper earnings, the Commission
18 should require Pepco to place them in a special account, to be used in whatever manner
19 the Commission deems within its jurisdiction. (Possibilities include distributing the
20 earnings to the mistreated workers to the extent they have no other means of redressing
21 their harm, allocating the funds to programs that help workers advance through job

⁴⁴ For background on the prohibition against retractive ratemaking, *see generally* Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* at Chap. 10 (American Bar Assoc. 2013).

1 training, and refunding the monies to customers—but that last option has logic only if the
2 customers have suffered provable harm.)

3 ***B. The Commission should condition Pepco's prospective recovery of***
4 ***contracting costs on its adopting proper contracting practices***
5

6 **Q. In addition to addressing earnings associated with mistreating workers, how can the**
7 **Commission cause Pepco to establish appropriate labor standards for its contractors**
8 **so that customers receive cost-effective service?**
9

10 **A.** As I have explained, allowing a utility to keep the difference between projected cost and
11 actual cost rewards the utility for using contractors that take advantage of workers. And if
12 the utility-contractor contract allows the contractor to keep the difference between what it
13 pays its workers and what it charges Pepco for their work, the incentive to underpay and
14 mistreat is amplified.

15 The statutory just-and-reasonable standard requires removing not only the
16 rewards from the mistreatment but also the causes. Pepco needs to show that it has
17 corrected the situation. The Commission therefore should condition Pepco's right to
18 recover its prospective construction contractor expenditures on its satisfying the nine
19 conditions discussed next. To the extent these requirements overlap, Pepco can satisfy
20 some by referencing its satisfaction of others. The key is to leave no gaps.

21 *1. Sufficient compensation:* For each job-type, the compensation that contractors
22 pay must be sufficient to allow workers and their families to stay healthy, housed and fed,
23 so that they can work safely, alertly and productively. Otherwise Pepco's construction
24 needs are performed by workers distracted by their economic situations. Furthermore, it
25 is illogical to have multiple wage systems—one for Pepco's employees, one for Pepco's
26 contractors' employees, one for Washington Gas's employees, and one for DC PLUG

1 workers. Pepco must require all contractors to pay the equivalent of what Pepco's
2 comparable in-house employees receive, with wages reflecting the hourly value of all
3 Pepco employee benefits. With that standard in place, the incentive and opportunity to
4 under-compensate disappears.⁴⁵

5 *2. Pre-qualification standards:* Pepco must establish pre-qualification standards
6 requiring contractors to replicate Pepco's internal policies for compensation, health,
7 safety, and worker training and development.

8 *3. Best value contracting:* Pepco must establish clear standards for contractor
9 selection that embody “best value” contracting. The selection criteria should use a
10 scoring system in which price does not dominate. Pepco instead must balance price with
11 the essential elements of worker treatment—compensation, safety, and training and
12 development. Only with a disciplined, formalized, transparent process can Pepco, the
13 Commission, the workers, and the customers evaluate whether Pepco's contracting
14 practices are cost-effective.

15 *4. Monitoring and evaluation:* Pepco must establish methods by which it will
16 monitor and evaluate contractors for compliance with its new standards.

17 *5. Payroll certification:* To certify that contractors have complied with wage laws,
18 Pepco must obtain from contractors and submit to the Commission certified payrolls on a

⁴⁵ New Jersey law requires that “[a]ny employee employed by a construction contractor engaged in construction work on a public utility shall be paid the wage rate for their craft or trade as determined by the Commissioner of Labor and Workforce Development pursuant to the provisions of the ‘New Jersey Prevailing Wage Act’” N.J.S.A. 34:13B-2.1, <https://www.state.nj.us/labor/wagehour/content/MW-211.pdf>.

1 quarterly basis.⁴⁶ Exempt from this requirement would be contractors that are signatories
2 to a union contract, since a union contract would establish and enforce wage and benefit
3 levels through a collective bargaining agreement.

4 *6. Project labor agreements:* For all construction projects, Pepco should design
5 and implement project labor agreements that at least replicate Exelon's best practices at
6 Commonwealth Edison.⁴⁷ In the Exelon-PHI merger case, Exelon promised to bring its
7 “best practices” to Pepco.⁴⁸ As Mr. Lanning explains, Exelon’s Illinois utility,

⁴⁶ It is my understanding that certified payroll reports are already a requirement of construction contractors performing similar activities for District Department of Transportation (“DDOT”), D.C. Water, and DC PLUG. *See* § 2–219.03(e)(1A)(D), <https://code.dccouncil.us/dc/council/code/sections/2-219.03.html#>.

⁴⁷ A project labor agreement (also known as a community workforce agreement) is a project-specific contract negotiated between a project's developer and local unions. It establishes, pre-hiring, the employment terms and conditions that will apply to the developer, all contractors, and all project workers. The PLA can also plan for future projects, by creating a pipeline for the workers the utility will need. It can provide for safety measures, training, apprenticeships and connections with other job opportunities created by the main project.

The California Commission found that PLAs can reduce the likelihood of project delays, promote construction efficiency and reduce cost uncertainty. *Order Adopting Rules for Utility Construction Contracting*, *supra* note 15 at 20. PLAs or their ancestors have been used for decades. *See generally* Dave Belman, Michigan State University, *Project Labor Agreements* (2007) (describing how PLA-like arrangements were used by defense contractors), <<https://www.cpwr.com/sites/default/files/publications/NECA-PLA-Report.pdf>>; Fred Kotler, Cornell University ILR School, *Project Labor Agreements in New York State II: In the Public Interest and of Proven Value* (2011) (explaining why PLAs increase the likelihood of on-time and on-budget performance). PLAs were used for the Washington Nationals baseball stadium and the Dulles Airport Metrorail system.

⁴⁸ Formal Case 1119, Exelon’s Application at 15 (filed June 18, 2014) (promising that “the Merger will...provide a clearinghouse of best practices which will lead to operational and infrastructural improvements . . .”); *id.* at 19 (promising that “the sharing of resources and best practices among the combined companies . . . will produce direct and traceable financial benefits to District of Columbia customers”); *id.* at 20 (promising that “the Merger will . . . allow Pepco to leverage best practices shared across the Exelon

1 Commonwealth Edison, uses a PLA for all contracted-out construction, demolition,
2 rehabilitation, and renovation work to ensure it has the skilled labor required for those
3 projects. Exelon has failed to replicate the ComEd labor relationship here at Pepco. The
4 Commission should require Exelon to fix its broken merger promise or face appropriate
5 consequences.

6 *7. Project approvals:* If Pepco requests approval of a project—whether the
7 request arises in a certificate of public convenience and necessity case or in a rate case,
8 and whether the project will be carried out by Pepco or by a Pepco contractor—the
9 request must include enforceable commitments to provide workers appropriate
10 compensation and benefits, plus detailed plans for worker training and development.⁴⁹

11 *8. Contractor penalties:* Pepco should submit to the Commission for approval,
12 then include in all future contracts, penalties for contractors that violate the standards;
13 along with bonding requirements that prevent contractors from escaping penalties by
14 claiming financial incapacity.

enterprise”); *id.* at 23 (promising that “the sharing of best practices will benefit utility operations and customer service at all levels”). *See* <http://www.learnersdictionary.com/definition/mantra> (defining “mantra” as “a word or phrase that is repeated often or that expresses someone’s basic beliefs”).

⁴⁹ In Colorado, utilities planning new resources need to request from bidders “information relating to best value employment metrics,” including available training programs, long-term career opportunities, and compensation packages that reflect industry standards. 4 Colo. Code Regs. § 723-3, P 3616(c). The D.C. Commission’s Order approving the WGL-AltaGas merger included investments in workforce development to train and grow a pipeline of workers necessary to support the District’s infrastructure modernization activities.

1 9. *Workforce analysis*: Pepco should submit to the Commission annually an
2 analysis of the state of the work force. The analysis should identify all gaps between the
3 number and types of workers available and those that Pepco needs currently and for
4 future projects. The submission should include solutions like working with qualified
5 organizations to establish training, recruitment, and retention programs sufficient to fill
6 the gaps. These programs need to be ones for which Pepco is accountable, not merely
7 other, generic programs in which Pepco claims to participate.

8 **Q. Procedurally, how should the Commission condition Pepco's new rates on its**
9 **compliance with these nine conditions?**

10 **A.** The Commission's rate order in this proceeding should declare the approved rates to be
11 interim rates, subject to refund of the amounts associated with Pepco's contractor
12 expenditures. Within 60 days of the Commission's order setting new rates, Pepco should
13 submit its plan for complying with the nine conditions. The Commission then could hold
14 a hearing on whether the plan satisfies the conditions. If the Commission finds the plan
15 satisfactory, it would declare the rates permanent rates. Otherwise, the Commission
16 would (1) explain the deficiencies in Pepco's plan; (2) order Pepco to refund to customers
17 the portion associated with contractor expenditures, back to the effective date of the new
18 rates; (3) set new prospective rates reduced by those expenditures; and (4) order Pepco to
19 submit a revised plan. When the Commission determines that the revised plan satisfies
20 the conditions, the Commission would place into rates, prospectively, the amounts
21 associated with contractor expenditures. No other portion of Pepco's revenue requirement
22 would be subject to refund.
23

1 C. *If Pepco backslides, it should face penalties*

2
3 **Q. If the Commission requires disgorgement of prospective earnings derived from**
4 **worker mistreatment, and also conditions recovery of contractor costs on creating**
5 **conditions for proper worker treatment, is there still a need for penalties?**

6
7 **A.** Yes. The goal is to align Pepco's self-interest with its workers' needs. Requiring Pepco to
8 disgorge earnings that it, and the contractors, derived from worker mistreatment is
9 necessary but not sufficient, because it makes Pepco and its contractors merely
10 indifferent to whether mistreatment occurs. Less than indifferent, actually—because if the
11 likelihood of detection is less than 100 percent, and if detection means only
12 disgorgement, mistreatment still pays. The Commission therefore should establish a set
13 of penalties applicable to Pepco, and a set of penalties that Pepco must include in its
14 contracts, for any violation of the appropriate workforce standards.

15 Penalties should address both actions and inactions, including:

- 16 • missing worker safety performance targets;
17
18 • violating existing laws;
19
20 • using procurement procedures or criteria that create incentives to take
21 advantage of workers; and
22
23 • failing to continue to comply with any of the nine conditions discussed in Part
24 II.B above.

25 Also, the Commission should forbid Pepco from using contract language
26
27 requiring contractors to hold Pepco harmless for their errors. That language would
28 weaken Pepco's incentive to select and monitor its contractors—the very purpose of this
29 policy.

1 **D. *The Commission should appoint an independent entity to monitor***
2 ***contractors' labor policies and Pepco's efforts to improve them***
3

4 **Q. Should the Commission expect that adopting your recommendations will, by itself,**
5 **cause Pepco to fix the problems you have described?**
6

7 **A.** No. Given the persistence of Pepco's imprudence, we should not expect the current rate
8 case to produce a full solution. And given Pepco's history of indifference and
9 resistance—evidenced by the Mr. Meier's responsibility-avoiding letter and the
10 company's failure to take any visible action since the revelations at the 2017 public
11 hearings—the Commission cannot reasonably rely on Pepco alone to fix its behavior. I
12 therefore recommend that the Commission appoint an independent entity to carry out two
13 related responsibilities:

- 14 • *Design specific standards:* My testimony has recommended general
15 standards. To promote worker treatment consistent with customer needs,
16 Pepco and its contractors need guidance to create and adopt specific
17 standards. The independent entity would provide that guidance, then
18 submit specific standards and recommended actions to the Commission
19 for approval.
20
- 21 • *Monitoring compliance:* Once the Commission approves the specific
22 standards, the independent entity would monitor Pepco's decisions on
23 contractor selection and oversight, and report to the Commission on
24 Pepco's compliance.
25

26 On the first task, designing specific standards, I recommend that the independent
27 entity work with an advisory group. That group would comprise workers' representatives
28 (from Pepco and its contractors, union and non-union), Pepco management, contractor
29 management, Office of Peoples' Counsel, Office of the Attorney General and
30 Commission staff. Staff from the City Council and Mayor's Office could add their
31 principals' perspectives. This combination of independent entity and technical advisory
32 group would address these questions:

- 1 1. For each major job category, what is the appropriate range for total
2 compensation? What are appropriate allocations of that compensation
3 among current wages, health and vacation benefits, and pension?
4
- 5 2. For selecting contractors, what should be the specific pre-qualification
6 standards on compensation, benefits, safety training, and worker skill
7 development?
8
- 9 3. Prospectively, what are the most effective methods for monitoring,
10 evaluating and disciplining contractors?
11
- 12 4. What are the standard elements that belong in future project labor
13 agreements?
14
- 15 5. What are appropriate penalties for different types of violations of
16 employment law and of Commission standards?
17
- 18 6. What are appropriate bonding requirements for contractors, to ensure
19 payment of penalties?
20

21 The foregoing questions address the problem's the solutions. They don't address the
22 problem's causes. Here are questions that do.

- 23 7. Within Pepco, what factors, and which executives, have contributed to a
24 culture of indifference toward contractor treatment of workers? How high
25 in the Pepco and Exelon hierarchy does responsibility for this situation
26 go? What type of professionals should be making these decisions, and how
27 can the company recruit and support them?
28
- 29 8. For each current contractor, how well does it treat workers, in terms of all
30 key criteria—wages, benefits, safety, training? For the contractors that
31 rank poorly, what are the reasons and who is responsible? What economic
32 incentives are influencing these individuals? Who at Pepco chose these
33 contractors, how and why? Who at Pepco has failed to detect and correct
34 the shortcomings? What corrective measures are necessary?
35
- 36 9. For those contractors that treat workers well, what are the contributing
37 factors? How can Pepco cause other contractors to replicate their positive
38 culture?
39

1 The independent entity should be paid from Pepco's earnings because the
2 problems arise from Pepco's imprudence. Before selecting the entity, the Commission can
3 ask the parties for recommendations.

4 This Commission would not be the first to investigate how worker treatment
5 affects service cost and quality. The New York Commission found that “[i]nvestments in
6 workforce development are justified when the cost of inferior work quality attributable to
7 an unskilled workforce is greater than the workforce development investment needed to
8 remediate the associated skills gap.” The Commission authorized an Initiative that
9 expanded college training programs as well as technical training and apprenticeships. The
10 Initiative reported that when serviced by trained workers, air-conditioning and heat-pump
11 equipment improved performance by up to 35 percent.⁵⁰ And the Vermont Public Service
12 Board held that imposing an hours-tracking requirement on Central Vermont Public
13 Service salaried employees did not unlawfully enter management's territory, but rather
14 fell “well within [its] supervisory authority over CVPS's staffing levels and the attendant
15 costs imposed upon CVPS ratepayers.”⁵¹

⁵⁰ *Order Authorizing Workforce Development Initiatives* at 3, 5-6, *Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard*, Case No. 07-M-0548 (N.Y. Dep't of Pub. Serv. June 22, 2009).

⁵¹ *Investigation into Cent. Vt. Pub. Serv. Corp.'s Staffing Levels*, Docket No. 7496, slip op. at 3-9 (Vt. Pub. Serv. Bd. Aug. 20, 2009).

1 **III. The Commission should reject Pepco's pleas to ignore its**
2 **imprudence**

3
4 **Q. How do you respond to Pepco's arguments that the Commission should not address**
5 **worker mistreatment that affects the cost and quality of electric service?**

6
7 **A.** Pepco has made, or I expect Pepco to make, three arguments against Commission action:
8 that (a) worker treatment is not a rate case issue; (b) work mistreatment is not a problem
9 because it is prevented by contract language, law, and other regulatory agencies; and (c)
10 the Commission has no authority to tell Pepco how to manage its contractor relations. As
11 explained next, each argument fails.

12 **A. *This rate case is a necessary forum for addressing Pepco's contracting***
13 ***practices***

14
15 **Q. Is this rate case a necessary forum for addressing mistreatment of workers?**

16
17 **A.** Yes. A rate case is never about only costs. Customers don't pay for costs; they pay for
18 service. Service and rates are two sides of the same coin, because normal rates paid for
19 sub-normal service are excessive rates.⁵² Contractor employees who are
20 undercompensated, not properly briefed on safety, or not sufficiently trained, will be
21 under-productive. The result will be higher costs, today and tomorrow, due to higher
22 operating expenses, costly checks, repairs and replacements, and insurance premiums. As

⁵² See, e.g., *Application of Baltimore Gas and Elec. Co. for Adjustments to Its Elec. and Gas Base Rates*, Case No. 9326, Order No. 86060 at 10 (Md. Pub. Serv. Comm'n Dec. 13, 2013) (“Safety and reliability are foremost concerns when [the Commission] consider[s] rate requests by utilities.”); *Application of Madison Gas and Elec. Co. for Authority to Change Elec. and Nat. Gas Rates*, Docket No. 3270-UR-115, 2007 Wisc. PUC LEXIS 611, *5 (Dec. 14, 2007) (ordering MG&E to “report to the Commission identifying the extent of the challenges regarding workforce planning, the specific actions that [the utility] is taking to address the issue, and the progress [it] is making towards meeting those goals”).

1 I explained in Part II.A, rate cases address the utility’s imprudence in managing
2 contractors who spend the utility’s money building a power plant.⁵³ There is no logical
3 reason for rate cases not to address imprudence in managing contractors who spend the
4 utility’s money hiring and paying employees.

5 The very purpose of this proceeding is to improve performance by rethinking
6 compensation. Pepco has focused on compensation to shareholders. But arguing that
7 performance will improve if customers pay more to shareholders, while dismissing
8 arguments that performance will improve if contractors pay more to workers, descends
9 from irony to illogic. For in the daily grind of construction performance—excavating
10 public streets, digging trenches, laying cables, directing traffic—the work is performed
11 by workers, not by shareholders.

12 Nor can Pepco say—at least not without hypocrisy—that this issue belongs in
13 some other proceeding, because Pepco has proposed no other proceeding. Pepco’s
14 prudence in using ratepayer money is relevant in the rate case that seeks ratepayer
15 money.

⁵³ See the cases discussed in Part II.A above: *Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, 1978 Pa. PUC LEXIS 1, 31 P.U.R.4th 15 (1978); *AEP Texas Central Company v. Public Utility Commission of Texas*, 286 S.W.3d 450, 467-70, 2008 Tex. App. LEXIS 9541 (Ct. App. Texas 2008); and *Commonwealth Electric Co. v. Department of Public Utilities*, 397 Mass. 361, 369 n.4, 491 N.E.2d 1035 (1985).

1 **B.** *Relying on labor agencies is buck-passing, claiming compliance without*
2 *evidence is indifference: Pepco's excuses for inaction miss the point*
3

4 **Q.** **Has Pepco urged the Commission to take no action on worker mistreatment—and if**
5 **so, how do you respond?**
6

7 **A.** Asked by the Commission about worker treatment, Pepco, through Mr. Meier, offered
8 two excuses for inaction: “1) Pepco has contract terms and conditions in place that
9 require contractors to follow the applicable wage and benefit laws for workers they
10 employ and include enforcement provisions; and 2) local and federal agencies currently
11 regulate contractors' obligations to comply with wage and hour laws as well as labor
12 relations.”⁵⁴

13 A contractor's obligation to act legally does not guarantee it will act legally—a
14 fact known to anyone who has run a red light, texted while driving, or read news reports
15 of tax fraud. Detection depends on the quality of regulation. Pepco talks of agencies that
16 “currently regulate” but says nothing whether and how well they actually regulate.

17 But most importantly: merely complying with minimum legal requirements does
18 not guarantee worker policies and treatment sufficient to produce what the Commission
19 must ensure—reliable service at just-and-reasonable rates. Pepco’s argument thus misses
20 the point. All that the labor and wage laws do is proscribe illegal acts—stealing workers'
21 pay, paying below minimum wage, forcing workers into unsafe situations. No wage or
22 labor law requires that contractors pay workers enough for them to be productive and
23 safe, protect workers from getting sick in the cold, or provide the training that prepares
24 workers for careers of public contribution. No wage or labor law avoids the tension

⁵⁴ Meier Letter at 2.

1 between contractor earnings and worker needs—a tension that flows inevitably from
2 Pepco's selecting contractors primarily on price, then paying them fixed project fees—
3 two actions that reward contractors that spend the lowest legal amount on pay and offer
4 the least possible training. The issue here is not merely failing to pay the minimum wage
5 and create minimum work conditions; the issue is failure to pay the right wage and failure
6 to provide appropriate work conditions. Mr. Meier's letter—which two years later Pepco
7 has done nothing to amend—is nothing but space-consuming, substance-avoiding
8 mansplaining. Sadly, for two years it has worked.

9 **C. *The “management prerogative” cases do not disable the Commission***
10 ***from holding Pepco accountable for its contractors' labor practices***

11
12 **Q. Does the “management prerogative” concept prevent the Commission from**
13 **adopting your recommendations?**

14
15 **A.** No. Requiring Pepco to improve worker conditions does not violate any legitimate
16 management prerogative.⁵⁵ All regulation limits management discretion; regulation's very
17 premise is that in defined circumstances, unregulated discretion undermines the public
18 interest. So the issue is not whether the Commission is limiting management's discretion;
19 the issue is whether the specific limitation serves a public interest delegated to the
20 Commission by statute, and whether the limitation is supported by logic and evidence.
21 My testimony, along with that of Mr. Lanning, has explained that Pepco's actions and
22 inactions on worker treatment have had, and will have, adverse effects on the quality and

⁵⁵ For background on this subject, see Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*, Chap. 2.D.3.d (American Bar Association 2013).

1 cost of electric service. Pepco has no management prerogative to mistreat, or to allow its
2 contractors to mistreat, workers in ways that affect the quality of cost of electric service.

3 The Illinois Commission made this point succinctly. In a rate case order, it
4 directed North Shore Gas to perform an audit of staffing deficiencies, explaining:

5 Every act of a public utility is performed by someone, and in countless
6 instances that person is managed by another someone. While it is certain
7 that the Commission's power to regulate the relationship between and
8 conduct of those persons [is] not unlimited, it is equally certain that we
9 can exercise some degree of control over those relationships and conduct,
10 in order to fulfill our unambiguous mandate to require public utilities to
11 promote the health and safety of employees and customers.⁵⁶
12

13 North Shore had argued that the order exceeded the Commission's authority by
14 intervening in labor-management relations. To accept that argument, the Commission
15 said, “would be to end the regulation of public utilities.”⁵⁷

16
17 **IV. The Commission's continuing silence leaves workers and**
18 **customers exposed to Pepco's imprudence**

19
20 **Q. What are your concerns about the Commission's treatment of worker issues?**

21
22 **A.** The Commission has known of these problems for almost three years. At the April 27,
23 2017 public hearing in FC1139, Pepco's 2017 rate request, BWLDC Official Steve
24 Lanning stated:

25 Pepco does not have a procurement policy in place that ensures equitable
26 wage and benefits for workers employed by its outsourced contractors. . . .
27 [Of the workers that union organizers talked to,] the overwhelming

⁵⁶ *North Shore Gas Co. Proposed General Increase in Nat. Gas Rates* at 311, Case No. 07-0241 (Ill. Commerce Comm'n Feb. 5, 2008). The Commission relied on 220 Ill. Comp. Stat. 5/8-505, requiring a public utility to perform any act “which the health or safety of its employees, customers or the public may demand.”

⁵⁷ *Id.*

1 majority . . . expressed fear of reprisals and retaliation by their respective
2 employers. . . . “Pepco's procurement system has created a race to the
3 bottom approach to awarding contracts. . . .
4

5 Mr. Lanning concluded by recommending the “model that Exelon follows in Chicago
6 with ComEd In Chicago, a collectively bargained agreement is in place for all
7 contracted-out work. . . . This approach ensures a negotiated wage increase for
8 contracted-out workers, not just the workers employed directly by the utility.”⁵⁸

9 At the same hearing Mr. Zerihune Gaines, a worker for Pepco contractor B. Frank
10 Joy, stated:

11 I need to arrive by 6 am if I want to be dispatched to a job. I stay on the
12 job until the work is complete. It is a very long day for very little
13 pay....[M]y employer . . . was paying me below D.C's minimum wage.
14 They had to issue me backpay. This wasn't a simple mistake. The
15 company underpaid me for more than 1 year.
16

17 Other workers joined Mr. Lanning and Mr. Gaines in expressing concern about their
18 treatment by contractors.⁵⁹

19 In response to these revelations, the Commission ordered Pepco to “submit a
20 written report . . .advising the Commission on how this issue can best be addressed,
21 including fully explaining its position on establishing wage and benefit standards for its

⁵⁸ Formal Case 1139, Community Hearing Transcript, at 34-36 (April 12, 2017).
<https://edocket.dcpsec.org/apis/api/filing/download?attachId=48700&guidFileName=00b5e715-ac2f-4b25-8464-0b2de6116fed.pdf>.

⁵⁹ See *Application of The Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order 18846 at para. 23 (July 25, 2017) (noting that the “last day of Community Hearings included many comments from employees of Pepco's outside reliability contractors. They asked the Commission to require Pepco to set wage and benefit standards for its outside contractor workforce, or a procurement policy ensuring equitable wages and benefits for Pepco's outside reliability contractors.”).

1 outside contractor workforce or a procurement policy ensuring equitable wages.”⁶⁰ In
2 submitting only Mr. Meier’s letter, Pepco disobeyed the Order. Mr. Meier said nothing
3 about how the problem “can best be addressed”; nor did he say how Pepco's procurement
4 actions “ensur[e] equitable wages.” He said only that Pepco's contracts prohibit unlawful
5 worker treatment, and that other regulators handle wage matters. Neither statement is a
6 “position on establishing wage and benefit standards.” Boiled down, Pepco's response to
7 the Commission was “Back off.”

8 This Commission-Pepco back-and-forth occurred almost three years ago. I
9 personally raised the same issues in the October 17, 2019 panel hearing on multi-year
10 rate plans. I displayed pictures of contractor employees who risked their jobs to have
11 their concerns presented to the Commission. The ensuing silence, from both Pepco and
12 the Commission, is worrisome.

13 Adding concern is the Commission's apparent view that worker conditions are not
14 relevant to rates. In discovery, Laborers asked Pepco for information on:

- 15 • compensation levels for in-house construction-related jobs—so the
16 Commission could see whether the same work, when outsourced, paid less.
- 17
- 18 • test-year payments to contractors for reliability and load projects—so the
19 Commission could see the effect on rates and earnings of the work Pepco
20 outsources.
- 21
- 22 • comparisons between what Pepco pays and what contractors pay—so the
23 Commission could see the extent of the discrimination and the risks to safety,
24 quality and cost.
- 25
- 26 • The number of contractor workers—so the Commission could know the scale
27 of the problem.
- 28

⁶⁰ *Id.* at para. 29.

- 1 • copies of construction contractor agreements—so the Commission could
2 understand the economic incentives contractors have to underpay workers.
3
4 • documents Pepco uses to compare contractor bidders—so the Commission
5 could know how high, or low, a priority Pepco places on price, compared to
6 other values.
7
8 • any information that Pepco tracks on what construction contractors pay their
9 employees—so the Commission can assess the care with which Pepco
10 oversees its contractors.⁶¹
11

12 When Pepco objected, the Commission said that Laborers had not shown the
13 information's relevance to the reasonableness of rates and service.⁶² Respectfully, the
14 Commission erred. I say this not to relitigate a discovery order but to emphasize what
15 workers experience daily: that the treatment contractor employees receive, compared to
16 what Pepco employees receive, and the financial benefit to contractors from under-
17 compensating workers, all affect the quality and cost of electric service. The causal
18 relationship is direct, the relevance unquestionable—a fact that likely explains why
19 Pepco's Objections contained no substance, but only generic boilerplate unconnected to
20 any of Laborers' requests;⁶³ because to deny the causal relationship would require
21 Pepco's lawyers to write falsely.

22 Compared to the many complex issues the Commission confronts, this one is not
23 hard to solve. I recommend that the Commission (a) make clear that rates and service are

⁶¹ See Commission Order No. 20269 (Dec. 18, 2019) (summarizing BWLDC DR Nos. 1-4 (a) and (b), 1-11, 1-16, 1-17, 1-21, 1-25, 1-33, 1-34, 1-38, 1-52).

⁶² *Id.* at para. 22.

⁶³ See “Potomac Electric Power Company's Objections to the Baltimore Washington Construction and Public Employees Laborers' District Council's Data Requests,” filed October 2, 2019.

1 affected by contractors' treatment of workers, and that Pepco is responsible for that
2 treatment; and then (b) adopt the recommendations in this testimony. With those
3 holdings, the Commission will get Exelon's attention. Then the Chicago-based holding
4 company that cited "best practices" to win from this Commission the power to control
5 Pepco will finally use that control to institute best practices—starting with sitting down
6 with worker representatives to solve these problems. The Commission will have put the
7 parties on a path leading to a settlement that benefits all—workers, customers, Pepco, and
8 this Commission.

9 **Q. Does this conclude your Direct Testimony?**

10
11 **A.** Yes.

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Scott Hempling is an attorney, expert witness and teacher. As an attorney, he has assisted clients from all industry sectors—regulators, utilities, consumer organizations, independent competitors and environmental organizations. As an expert witness, he has testified numerous times before state commissions and before committees of the United States Congress and the legislatures of Arkansas, California, Maryland, Minnesota, Nevada, North Carolina, South Carolina, Vermont, and Virginia. As a teacher and seminar presenter, he has taught public utility law and policy to a generation of regulators and practitioners, appearing throughout the United States and in Australia, Belgium, Canada, Central America, England, Germany, India, Italy, Jamaica, Mexico, New Zealand, Nigeria, Norway, Peru and Vanuatu.

Hempling's legal treatise, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*, was published by the American Bar Association in 2013. It has been described as a "comprehensive regulatory treatise [that] warrants comparison with Kahn and Phillips." His book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* will be published by Edward Elgar in Fall 2020. His book of essays, *Preside or Lead? The Attributes and Actions of Effective Regulators*, has been described as "matchless" and "timeless"; a Spanish translation has circulated throughout Latin America, through the auspices of the Asociación Iberoamericana de Entidades Reguladoras de la Energía, REGULATEL (an association of telecommunications regulators from Europe and Latin America) and the World Energy Forum. The essays continue monthly at www.scotthemplinglaw.com.

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B.A. *cum laude*, Yale University (two majors: Economics and Political Science, Music), 1978. Recipient of a Continental Grain Fellowship and a Patterson Research grant.

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Professional Experience

President, Scott Hempling, Attorney at Law LLC (2011–present).

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Executive Director, National Regulatory Research Institute (2006–2011).

Founder and President, Law Offices of Scott Hempling, P.C. (1990–2006).

Attorney, Environmental Action Foundation (1987–1990).

Associate, Spiegel and McDiarmid (1984–1987).

Past Clients

Independent Power Producers and Marketers

California Wind Energy Association, Cannon Power Company, Electric Power Supply Association, EnerTran Technology Company, National Independent Power Producers, SmartEnergy.com, U.S. Wind Force.

Investor-Owned Utilities

Madison Gas & Electric, Oklahoma Gas & Electric.

Legislative Bodies and Executive Departments

South Carolina Department of Administration, South Carolina Senate, Vermont Legislature.

Municipalities and Counties

American Public Power Association; Connecticut Municipal Electric Energy Cooperative; Iowa Association of Municipal Utilities; City of Jacksonville, Florida; Montgomery County, Maryland; Texas Cities; City of Winter Park, Florida.

Public Interest Organizations

Alliance for Affordable Energy, American Association of Retired Persons, Consumer Federation of America, D.C. Consumer Utility Board, Energy Foundation, Environmental Action Foundation, Environmental Defense Fund, GRID2.0 (Washington, D.C.), Illinois Citizens Utility Board, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists.

Regulatory Commissions and Consumer Agencies

Arkansas Attorney General, Arkansas Public Service Commission, Arizona Corporation Commission, Australia Energy Regulator, British Columbia Office of the Auditor General, British Columbia Utility Commission, California Public Advocates Office, Connecticut Department of Public Utility Control, Connecticut Office of Consumer Counsel, Delaware Public Service Commission, Hawai'i Public Utilities Commission, Hawai'i Office of Planning, Indiana Utility Regulatory Commission, Kansas Corporation Commission, State of Maryland, Maryland Energy Administration, Maryland Attorney General, Maryland Office of People's Counsel, Massachusetts Attorney General, Massachusetts Department of Public Utilities, Mexico's Comisión Reguladora de Energía, Minnesota Public Utilities Commission, Mississippi Public Service Commission, Mississippi Public Utilities Staff, Missouri Public Service Commission, Montana Public Service Commission, National Association of Regulatory Utility Commissioners, Nevada Consumer Advocate, Nevada Public Service Commission, New Hampshire Public Utilities Commission, New Jersey Division of Ratepayer Advocate, North Carolina Utilities Commission, Ohio Public Utilities Commission, Oklahoma Corporation Commission, Pennsylvania Office of Consumer Advocate, Puerto Rico Energy Commission, South Carolina Department of Administration, South Carolina Public Service Commission, Texas Office of Public Utility Counsel, Vermont Department of Public Service, Virginia State Corporation Commission, Wisconsin Attorney General.

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"Cost-Effective Demand Response Requires Coordinated State-Federal Actions" (National Regulatory Research Institute 2011).

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Renewable Energy Prices in State-Level Feed-in Tariffs: Federal Law Constraints and Possible Solutions (lead author, with C. Elefant, K. Cory, and K. Porter), Technical Report NREL//TP-6A2-47408 (January 2010).

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The Renewables Portfolio Standard: A Practical Guide (National Association of Regulatory Utility Commissioners, Feb. 2001 (with N. Rader).

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Is Competition Here? An Evaluation of Defects in the Market for Generation (National Independent Energy Producers 1995) (co-author).

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"Confusing 'Competitors' With 'Competition.'" *Public Utilities Fortnightly* (March 15, 1991).

"The Retail Ratepayer's Stake in Wholesale Transmission Access," *Public Utilities Fortnightly* (July 19, 1990).

"Preserving Fair Competition: The Case for the Public Utility Holding Company Act," *The Electricity Journal* (Jan./Feb. 1990).

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"Corporate Restructuring and Consumer Risk: Is the SEC Enforcing the Public Utility Holding Company Act?" *The Electricity Journal* (July 1988).

"The Legal Standard of 'Prudent Utility Practices' in the Context of Joint Construction Projects," *NRECA/APPA Newsletter Legal Reporting Service* (Dec. 1984/Jan. 1985) (co-author).

Speaker and Lecturer

United States: American Antitrust Institute; American Association of Retired Persons; American Bar Association; American Power Conference; American Public Power Association; American Wind Energy Association; Chicago Bar Association (Energy Section); Columbia University Institute for Tele-Information; Electric Cooperatives of South Carolina; Electric Power Research Institute; *Electric Utility Week*; Electricity Consumers Resource Council; Energy Bureau; *Energy Daily*; Executive Enterprises; Exnet; Federal Energy Bar Association; Harvard Electricity Policy Group; Indiana State Bar Association; Infocast; King Abdullah Petroleum Studies and Research Center; Louisiana Energy Bar; Management Exchange; Maryland Resiliency Through Microgrids Task Force; MIT Energy Initiative; Michigan State University Public Utilities Institute; Mid-America Association of Regulatory Commissioners; MidAtlantic Demand Resources Initiative; Mid-Atlantic Conference of Regulatory Utility Commissioners; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Conference of Regulatory Attorneys; National Governors Association; National Independent Energy Producers; New England Conference of Public Utility Commissioners; New England Public Power Association; New Mexico State University Regulatory Studies Program; New York Bar Association (Energy Section); North Carolina Electric Membership Corporation; Pennsylvania Bar Institute; Puerto Rico Energy Center; Puerto Rico Institute of Public Policy; Regulatory Studies programs at Michigan State University, New Mexico State University and University of Idaho; Society of American Military Engineers; Society of Utility and Regulatory Financial Analysts; Southeastern Association of Regulatory Utility Commissioners; Universidad del Turabo (Puerto Rico); United Nations Association at Georgetown Law; U.S. Department of Energy Forum on Electricity Issues; U.S. Department of Energy Solar Energy Technology Office; U.S. Environmental Protection Agency; Western Interstate Energy Board; Wisconsin Public Utilities Institute; Wisconsin Bar-Public Utilities Section; Yale Alumni in Energy; Yale School of Forestry and Environmental Studies.

International: Australian Competition and Consumer Commission; Australian Energy Regulator; Bergen Center for Competition Law & Economics, University of Bergen (Norway); British Columbia Utilities Commission; Canadian Association of Members of Utility Tribunals; Canadian Energy Law Forum; Central Electric Regulatory Commission (India); Comisión Reguladora de Energía (Mexico); The Energy and Resources Institute (India); Government & Policy Think Tank, Sharif University Institute of Technology (Iran); Independent Power Producers Association of India; India Institute of Technology at Kanpur; Ludwig-Maximilians-Universität (Munich, Germany); Management Development Institute (Gurgaon, India); National Association of Water Utility Regulators (Rome, Italy); New Zealand Electricity Authority; New Zealand Commerce Commission; Nigeria Electric Regulatory Commission; Office of Utility Regulation of Jamaica; OSIPTEL (the Peruvian Telecom Regulator) Training Program on Regulation for University Students; Petroleum and Natural Gas Regulatory Board (India); Regulatel (an international forum of telecommunications regulators); Regulatory Policy Institute (Cambridge, England); Utilities Regulatory Authority of Vanuatu; World Regulatory Forum.

Community Activities

Member, PEPCO Work Group, appointed by County Executive of Montgomery County, Maryland (2010–2011).

Sunday School teacher, Temple Emanuel, Kensington, Maryland (2002–2006, 2008).

Board of Trustees, Temple Emanuel (2005–2006).

Musical performer (cello): Riderwood Village Retirement Community (2003-present); St. Paul Episcopal Church (Centreville, MD).

Exhibit BWLDC (B)-2

Discovery Items Cited in Hempling Direct Testimony

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 8

Please list all amounts Pepco is proposing to recover in this rate case related to expenditures paid to outside contractors by account or category.

RESPONSE:

For the traditional historical test year:

Please see FC 1156 BWLDC DR 1-8 Attachment A relating to O&M expense.

Please see FC 1156 BWLDC DR 1-8 Confidential Attachment B relating to construction expenditures. It is important to note that this data includes capital expenditures, whereas plant additions are included in rate base in 13-month average electric plant in service.

SPONSOR: Jay C. Ziminsky

O&M Expense - Contractor Costs
Pepco DC Distribution - Approximate

Subacct - ID	(Multiple Items)
Subacct - Descr	(Multiple Items)
Accounting Period	(Multiple Items)

Sum of Posted Total Amt		12 Months Ended			Approximate DC Amount
		June 2019			
Row Labels	FERC - Descr	Total Test Period	% Distribution	% DC	
580000	Oper supervision & engineering	553,726	100%	51%	282,160
581000	Load dispatching	330,662	100%	51%	167,934
582000	Station expenses	10,084	100%	51%	5,121
583000	Overhead line expenses	115,704	100%	52%	60,625
584000	Underground line expenses	4,684,274	100%	57%	2,651,257
585000	Street light & sign sys exp	(918,779)	100%	0%	-
586000	Meter expenses	1,467,678	100%	44%	647,333
587000	Cust installations exp	159,222	100%	44%	70,757
588000	Misc distribution expenses	2,394,037	100%	57%	1,356,873
590000	Main supervision & engineering	6,107	100%	41%	2,500
591000	Maintenance of structures	13,077	100%	54%	7,063
592000	Main of station equipment	2,421,335	100%	49%	1,198,212
593000	Maintenance of overhead lines	25,883,178	100%	18%	4,720,926
594000	Main of underground lines	9,213,214	100%	56%	5,182,122
595000	Main of line transformers	2,100,046	100%	52%	1,098,262
596000	Main of street light&sign sys	4,911,764	100%	0%	(10,979)
597000	Maintenance of meters	110,729	100%	44%	48,614
598000	Main of misc distrib plant	28,165	100%	47%	13,366
902000	Meter reading expenses	429,140	100%	39%	165,657
903000	Customer records & collect exp	8,866,273	100%	34%	3,051,083
908000	Customer assistance expenses	4,838,112	100%	27%	1,287,753
909000	Inform and Instruct advert exp	(1,811,057)	100%	29%	(531,420)
920000	Admin & general salaries	(0)	87.55%	43%	(0)
920990	E&S Allocation Only - Expense	517,079	87.55%	43%	196,127
923000	Outside services employed	4,232,100	87.55%	43%	1,605,232
928000	Regulatory commission exp	3,047,713	100%	43%	1,320,382
930100	General advertising expenses	396,163	100%	43%	171,632
930200	Misc general expenses	(160,302)	87.55%	43%	(60,802)
935000	Maint of general plant - Elec	(44,750)	87.55%	43%	(16,974)
					24,690,819

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 32

Refer to Company Witness Clark, Table 1, Page 14, with respect to the Company's customer driven construction projects:

- a. Please detail total expenditures paid to outside construction contractors by individual contractor in the traditional test year.
- b. Please detail the number of construction contractor FTEs employed on customer driven construction projects by individual contractor in the traditional test year.
- c. For the historic test year and years 2019-2022, please detail what percentage of expenditures will be for construction services procured from outside contractors.

RESPONSE:

a-b. The analyses have not been performed in the format requested.

c.

Contractor %	<u>2019</u>	<u>2020</u>	<u>2021</u>	<u>2022</u>
Customer Driven	47%	47%	48%	49%
Reliability Driven	38%	48%	53%	53%
Load Driven	65%	60%	65%	70%

SPONSOR: William (Bill) Sullivan, Bryan L. Clark, and Tyler W. Wolverton

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 45

Please refer to the Direct Testimony of Witness McGowan, Page 15. Please detail the process by which a vendor becomes a “Contractor of Choice” on the Pepco system. Please list all the requirements and metrics a company must satisfy to qualify as a “Contractor of Choice.” Please provide a list of all companies that qualify as a “Contractor of Choice.”

RESPONSE:

Please see FC 1156 BWLDC DR 1-45 Attachment, which outlines the steps for construction contractor Prequalification.

For competitive reasons, Pepco cannot provide a list of all companies that qualify as Contractors of Choice.

SPONSOR: William (Bill) Sullivan and Kevin M. McGowan

Addition of New Supplier Pre-Qualification Checklist – REV4
SA-AC-P021-2, Attachment 1 submitted to contractor prior to review

Supplier Name: _____
Task Scope / Project: _____
Justification: _____
Executive approval to pursue Pre-Qualification: _____

Commercial

Responsibility: Supply

- Confirm supplier's company is a legal entity with the IRS (EIN / W-9 form provided)
- Financial health reviewed via D&B tool
- Legal claims against Exelon reviewed
- Legal claims against Contractor reviewed
- Supplier's capability and competency matches requestor need
- Supplier informed of scope of work and indicated their desire to perform the work
- Diversity certifications verified
- Supplier's union affiliation has been confirmed and aligns with the business's req'mts
- Experience Modification Rate (EMR) <= 1.00
- OSHA Recordable Incident Rate <= 3.50
- Supplier Provide References for review by business partners (technical review)
- Safety and Quality Audit/Inspection program

Notes:

Management / Technical Evaluation – for Supplier to be included on bid

Responsibility: Business Unit Task Manager

- Project Description and discipline of work confirmed by Business Unit Task Manager (BU/TM)
- BU/TM confirms Supplier appears to have sufficient experience with similar work to be acceptable to bid on the project
- Location of resources is acceptable (local, travel from out of state, etc.)
- Confirm the Business Unit/Task Manager will onboard supplier if selected for contract award
- Check references and evaluate
- Quality Audit performed *(if applicable)*
 - Quality Audit performed on similar activity
 - Quality Inspection performed on similar activity
 - Attached reference/summary letter from QAD
 - Not Applicable

Notes:

Contractor Pre-Qualification Recommendation – Supply Category Manager - Lead

Approved as Prime Contractor:

Approved as Subcontractor:

NOT Approved:

Name _____ Date _____

**Contractor Pre-Qualification Recommendation – Contract Management – Lead
(COC & EOC only)**

Approved as Prime Contractor:

Approved as Subcontractor:

NOT Approved:

Name _____ Date _____

Contractor Pre-Qualification Recommendation – Business Unit Task Manager - Lead

Approved as Prime Contractor:

Approved as Subcontractor:

NOT Approved:

Name _____ Date _____

Follow-up Actions:

Supply Executives Informed of Pre-Qualification Results:

Name _____ Date _____

Business Unit Executives Informed of Pre-Qualification Results:

Name _____ Date _____

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 7

(a) Has Pepco ever done a cost-benefit analysis of its outsourcing activities, before or after carrying out those activities? (b) Please provide all documents detailing the cost benefit analysis of outsourcing these activities, or discussing whether and how to carry out such a cost-benefit analysis.

RESPONSE:

a-b. Pepco has not performed a study regarding savings derived from the use of contractors.

SPONSOR: William (Bill) Sullivan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 56

How much money does Pepco save ratepayers annually by outsourcing construction work?
Answer (a) for each of the last five years and (b) for the test year used in this case,

RESPONSE:

The Company uses a combination of Pepco employees as well as contractors to complete projects. Business need, including staffing levels, project size, weather delays, and system maintenance needs, influence the assignment of work.

Pepco has not performed this analysis.

SPONSOR: William (Bill) Sullivan, Kevin M. McGowan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 5

Please list all operations and management activities and construction-related functions Pepco currently outsources to outside contractors. For each function, provide the annual savings derived from outsourcing. Explain all calculations.

RESPONSE:

Operations and management activities, and construction-related functions, for which Pepco currently uses contractors, include: street light maintenance, corrective maintenance, and traffic control.

Regarding the annual savings, Pepco has not performed an analysis or calculations regarding savings derived from the use of contractors for the above-referenced functions.

SPONSOR: William (Bill) Sullivan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 1

Consistent with the Commission's concerns about wage complaints from employees of third-party Pepco contractors (Order No. 18846 in Formal Case No. 1139 at 29), please detail all actions Pepco has taken to ensure that employees of construction contractors are paid wages equal to what Pepco employees are paid for comparable work.

RESPONSE:

See FC 1156 BWLDC DR 1-1 Attachment.

SPONSOR: Kevin M. McGowan

Peter E. Meier
Vice President, Legal Services

Office 202.872.2953
Fax 202.331.6767
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peter.meier@pepcoholdings.com

EP9628
701 Ninth Street NW
Washington, DC 20068-0001

October 23, 2017

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

Re: Formal Case No. 1139

Dear Ms. Westbrook-Sedgwick:

In Order No. 18846 (P 29), the Public Service Commission of the District of Columbia (“Commission”) stated that it “will consider whether it would or would not be appropriate for our utility code of conduct to be amended to address the employee wage complaints of third-party Pepco contractors.” The Commission directed Potomac Electric Power Company (“Pepco” or the “Company”) to “submit a written report, within 90 days from the date of this Opinion and Order, advising the Commission on how this issue can best be addressed, including fully explaining its position on establishing wage and benefit standards for its outside contractor workforce or a procurement policy ensuring equitable wages.” The Commission’s directive was in response to comments regarding the wages and benefits that were provided by employees of contractors that may perform work for Pepco at the April 12, 2017 Commission Community Hearing in Formal Case No. 1139 (“Community Hearing”).¹ This report provides Pepco’s response to the Commission’s directive.

Pepco appreciates this opportunity to provide information regarding the Company’s policies and practices that impact contractor wage compensation. Pepco takes the issue of equitable wages seriously, recognizing that equitable wages help to ensure quality construction and improve the lives and skill levels of Pepco’s contractors’ employees. Pepco’s contractors play an important part in the Company’s capital investment projects, as they perform a significant amount of the construction. In addition, they serve as valuable partners in providing Pepco’s customers safe and reliable service.

However, Pepco respectfully submits that it is not appropriate to amend the utility code of conduct—the affiliate transactions code of conduct²—to address the employee wage

¹ Order No 18846 at n. 30.

² Chapter 39 of Title 15, District of Columbia Municipal Regulation.

Ms. Brinda Westbrook-Sedgwick
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October 23, 2017

complaints of third-party contractors because the code of conduct was not intended to apply to Pepco's third-party contractors. The affiliate transaction code of conduct specifically relates to utility transactions with affiliates.³ As such, amending the affiliate transactions code of conduct to cover wage complaints between unaffiliated contractors and their employees is not appropriate. Furthermore, it is unnecessary for the Commission to amend its affiliate transactions code of conduct to address the wage complaints of third-party contractors because: 1) Pepco has contract terms and conditions in place that require contractors to follow the applicable wage and benefit laws for workers they employ and include enforcement provisions; and 2) local and federal agencies currently regulate contractors' obligations to comply with wage and hour laws as well as labor relations. In addition, Pepco intends to engage with Laborers' International Union of North America ("LIUNA") and North America's Building Trades Unions ("NABTU") on this issue.⁴

A. Pepco's Procurement Practices Include Provisions that Address Wages and Benefits

Pepco's commitment to equitable wages has been strengthened through its merger with Exelon and is reflected in Pepco's procurement practices. When seeking contractor bids, Pepco seeks the best-qualified contractor to perform a particular job. Pepco's bidding qualification requirements take into account the contractor's record of prior service, ability to perform the work, diversity, price, and alignment with Pepco's corporate values, including compliance with all employment laws. Pepco awards a significant percentage of its contracts for third-party labor on a total-cost basis. With respect to this type of contracting, the bidder promises to perform the scope of work for a set, flat price, and the bid is awarded to the most reasonably priced, qualified bidder that meets the contract requirements.

In addition, since its merger with Exelon, Pepco has adopted Exelon's Master Terms and Conditions for the Purchase of Products and Services ("Exelon T&Cs") in the contracts with its third-party contractors.⁵ The Exelon T&Cs expressly require that the contractor and any subcontractors:

³ Formal Case No. 1009, Order No. 16189 at ¶ 2 (the affiliate transaction code of conduct establishes "a single set of rules addressing issues related to restructuring of the District of Columbia's retail electricity and natural gas markets by the universal application of a single set of rules addressing the relationship and conduct of regulated energy utilities and their unregulated affiliates.")

⁴ LIUNA is a union that represents employees working in the building and construction trades, including employees in job classifications related to underground utility work. NABTU is an umbrella labor federation comprised of 14 North American unions, including LIUNA, that all represent employees working in the building and construction trades.

⁵ All of Pepco's contracts will adopt the Exelon T&Cs no later than January 2018. For any contracts that are currently under the PHI Master Terms and Conditions, Section 30.1 has a general requirement to comply with applicable laws: "Contractor shall comply with all applicable international, federal, state and local laws, rules, and regulations including, without limitation and incorporated by reference herein, Section 202 of Executive Order 11246 (41 CFR Part 60), Section 503 of the Rehabilitation Act of 1973 (41 CFR Part 741), the Vietnam Era

Ms. Brinda Westbrook-Sedgwick

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October 23, 2017

[S]trictly adhere, and [] continue throughout the term of these Terms and Conditions to strictly adhere, to all applicable Laws in the jurisdictions in which the Work is performed and with respect to the operation of their production and manufacturing facilities and their other business and labor practices, including Laws governing the working conditions, wages, hours and minimum age of the workforce; (ii) the Work will not have been, and will not be, performed, in whole or in part, by child labor or by convict or forced labor; and (iii) the Materials will not have been transshipped for purposes of avoiding compliance with labor Laws.⁶

As defined in the Exelon T&Cs, the term “Laws” with which contractors must comply includes all “labor and employment laws.”⁷ Therefore, the contractors and subcontractors are required as a matter of contract to comply with all applicable District and Federal laws that relate to the benefits that their employees must receive.

The Exelon T&Cs give Pepco substantial tools to enforce contractors’ compliance with these obligations. For example, they require the contractor “promptly upon Pepco’s request to furnish such documentation as may be required by [Pepco] to evidence compliance with”⁸ the obligations set forth above. The Exelon T&Cs also give Pepco the right to “audit Contractor’s files and records regarding the utilization of Contractor Personnel hereunder, including, without limitation all . . . wage and hour records.”⁹

B. Local and Federal Agencies Regulate Wage and Labor Issues

Wage matters relating to third-party labor contractors are already regulated at the District and Federal level. District and Federal agencies enforce wage and other labor standards and give contractor employees the right to complain about wages and other labor issues and also give the employers the right to defend themselves against such complaints. Specifically, the Labor Standards Bureau of the District Department of Employment Services:

[A]dministers and enforces the District of Columbia labor laws. The office investigates wage complaints, evaluates employee and employer safety/health in the workplace and adjudicates compensation/medical care claims for private-

Veterans’ Readjustment Assistance Act of 1974 (41 CFR Part 60-250), Public Law 95-507 (15 USC 637(d)), and all immigration laws pertaining to employment. . . .”

⁶ Exelon T&Cs, Section 22.4.1.

⁷ Exelon T&Cs, Article I (Definitions), “Law” or “Laws” means all laws, statutes, codes, ordinances, rules, regulations, lawful orders, applicable guidance documents from regulatory agencies, judicial decrees and interpretations, standards, requirements, permits and licenses; including Cyber Security Laws, Environmental Laws, Health and Safety Laws, tax laws and applicable tax treaties, building, labor and employment laws; as amended from time to time, of all Governmental Authorities that are applicable to the Work and any of Contractor’s obligations under the Contract Documents.

⁸ Exelon T&Cs, Section 22.4.1.

⁹ Exelon T&Cs, Section 22.4.6.

Ms. Brinda Westbrook-Sedgwick

Page 4

October 23, 2017

sector employees injured in the course of employment. In addition, the office provides administrative and semi-judicial proceedings to assist in resolving disputes that may arise in connection with claims filed for workers' compensation benefits.¹⁰

At the Federal level, the Wage and Hour Division of the U.S. Department of Labor "enforces Federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the Fair Labor Standards Act," enforces the Family and Medical Leave Act, and enforces the prevailing wage requirements of the Davis Bacon Act and the Service Contract Act and other statutes applicable to Federal contracts for construction and for the provision of goods and services.¹¹ These agencies are focused specifically on enforcing wage and other labor laws and the complaints and disputes that arise between employees and employers under those laws. Moreover, the National Labor Relations Board is vested with the authority and has the specialized expertise to regulate labor relations and relationships between employers, such as Pepco and their contractors, and labor organizations.¹² Accordingly, these agencies currently have District and Federal jurisdiction (and the specialized knowledge) to address any potential wage and other employment disputes that may arise with respect to contractors and their employees.

C. Other Communications

Pepco is planning to meet with both LIUNA and NABTU regarding their employees' wage concerns raised during the Community Hearing. Pepco anticipates that these discussions with LIUNA and NABTU will be productive and address the concerns raised at the Community Hearing. Moreover, some contractors have taken the affirmative step of filing public comments with the Commission to reassure the Commission of their commitment to their employees. For example, on August 1, 2017, Anchor Construction Corporation ("Anchor Construction") filed with the Commission a public letter signed by the Vice President clarifying certain information regarding compensation and the company cultures and confirming their commitment to their employees.¹³ The letter from Anchor Construction states unequivocally that "all Anchor field workers are paid well above the D.C. minimum wage, regardless of the work they perform and regardless of the type of job on which they work."¹⁴ The letter further clarified that the field

¹⁰ <https://does.dc.gov/service/labor-standardsworker-protection>

¹¹ <https://www.dol.gov/whd/about/mission/whdmis.htm>.

¹² The United States Supreme Court has recognized the risk of conflict between state and local regulation of labor relations and the integrated scheme that Congress created as embodied in Sections 7 and 8 of the National Labor Relations Act. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) ("Garmon"). *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986). To limit this conflict, Congress chose to have a specialized body the National Labor Relations Board, regulate the labor relations of private companies such as Pepco and its contractors under the National Labor Relations Act. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-49 and n.26 (1985).

¹³ Formal Case No. 1139, Letter from Wen Liang, Vice President of Anchor Construction Corporation to The Honorable Betty Ann Kane (Aug. 1, 2017) ("Anchor Letter").

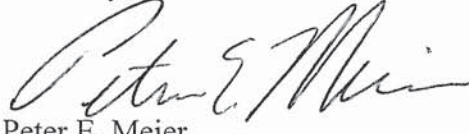
¹⁴ Anchor Letter at 1.

Ms. Brinda Westbrook-Sedgwick
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October 23, 2017

workers receive paid time off and two paid holidays as well as other benefits.¹⁵ On April 26, 2017, BF Joy's Chief Executive Officer also filed a letter with the Commission expressing its commitment to "fair and equitable treatment" of its employees.¹⁶ These affirmative statements reinforce Anchor Construction's and BF Joy's commitment to their employees.

For all the reasons stated above, Pepco submits that there is no need for the Commission to modify the affiliate transactions code of conduct to address contractor wage issues. This issue is best addressed through Pepco's existing contracting process that promotes compliance with wage and benefit standards by its contractors and by the ability of contractor employees to enforce applicable legal protections and to seek relief from the Federal and District agencies created expressly to administer employment laws. Please feel free to contact me if you have any questions regarding this matter.

Sincerely,



Peter E. Meier

Enclosure

cc: All Parties of Record

¹⁵ *Id.*

¹⁶ Formal Case No. 1139, Letter from Melissa Koehler, President & CEO of BF Joy to Brinda Westbrook-Sedgwick (Apr. 26, 2017).

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 2

Consistent with the Commission's concerns about wage complaints from employees of third-party Pepco contractors (Order No. 18846 in Formal Case No. 1139 at 29), please provide all documents that describe Pepco's policies and practices on establishing wage and benefit standards for its contractor workforce, including but not limited to documents addressing whether and how Pepco's procurement decisions account for contractor treatment of employees.

RESPONSE:

See Pepco's response to FC 1156 BWLDC DR 1-1.

SPONSOR: Kevin M. McGowan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 2

QUESTION NO. 1

Regarding 1-1, this question asked you to “detail all actions Pepco has taken to ensure that employees of construction contractors are paid wages equal to what Pepco employees are paid for comparable work.” Your response was your letter to the PSC dated Oct. 23, 2017. This letter contains no information about actions Pepco “has taken to ensure that employees of construction contractors are paid wages equal to what Pepco employees are paid for comparable work.” Provide all reasons why the following statement, based entirely on your response to 1-1, is not true: “Based on Pepco’s response to a direct question, the Commission must assume that Pepco has taken no actions to ensure that employees of construction contractors are paid wages equal to what Pepco employees are paid for comparable work.”

RESPONSE:

As the letter provided in response to BWLDC DR 1-1 stated, Pepco’s standard terms and conditions provide the Company with mechanisms that address the compliance of its contractors with the wage rates that are required by law.

SPONSOR: Kevin M. McGowan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 2

QUESTION NO. 13

Data request 1-53 asked: “Is there a value to Pepco’s customers of ensuring that workers on Pepco’s construction projects, whether Pepco employees or contractor employees, are compensated at levels commensurate with the value of their labor? Provide in detail a full explanation of how Pepco has calculated that value (i) in the past, and (ii) for purpose of this rate case?” You answered, “The requested analysis has not been performed.” The first half of this question is a yes or no. Answer it please with a yes or no. Too late to object.

RESPONSE:

As Pepco indicated in its response to FC 1156 BWLDC DR 1-53, a determination regarding value to customers would require a study which has not been performed. Under well-established Commission precedent, Pepco is not required to undertake a study to answer a data request. *See, e.g.,* Formal Case No. 840, Order No. 8433, 7 D.C.P.S.C. 199, 205-06 (1987).

SPONSOR: Kevin M. McGowan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 53

Is there a value to Pepco's customers of ensuring that workers on Pepco's construction projects, whether Pepco employees or contractor employees, are compensated at levels commensurate with the value of their labor? Provide in detail a full explanation of how Pepco has calculated that value (i) in the past, and (ii) for purpose of this rate case?

RESPONSE:

The requested analysis has not been performed.

SPONSOR: Kevin M. McGowan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 12

For the traditional test year used for this case, please detail the total number of full-time equivalent (FTE) personnel performing activities on Pepco's distribution construction projects in the District of Columbia. Please detail what percentage of total FTEs are direct employees of the Company compared to employees of outside construction contractors.

RESPONSE:

For Pepco FTEs, please refer to Pepco Exhibit (M)-2, page 3 of 3. Pepco does not know the number of FTEs used by contractors.

SPONSOR: William (Bill) Sullivan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 13

For the traditional test year and years 2019 through 2022, please detail the forecasted number of FTEs required to perform construction activities on distribution construction projects. For each of these years, please detail what percentage of total forecasted FTEs are direct employees of the Company compared to employees of outside construction contractors.

RESPONSE:

Please see Pepco's response to FC 1156 BWLDC DR 1-12.

SPONSOR: William (Bill) Sullivan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 14

Referring to Pepco's distribution construction report, please provide any workpapers or documents containing any analysis that forecasts contractor crew levels for forecasted construction activities.

RESPONSE:

The requested analysis has not been performed.

SPONSOR: William (Bill) Sullivan

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 2

QUESTION NO. 15

Regarding 1-59, we asked, “Q: What actions has Pepco take against contractors who have violated wage laws?” You answered, “A: Pepco is not aware of any contractors that have violated any wage laws. As a general practice, the Company does not directly monitor the pay practices of its suppliers. However, the standard terms and conditions (“T&Cs”) require that all suppliers must comply with all state and local requirements to perform work, including those related to wages, in each of the respective regions. In addition, as part of the Company’s evaluation process, all suppliers must acknowledge by acceptance of T&C’s that they will adhere to the state and local requirements for performing work in each of the respective regions.” (a) Again you did not answer the question asked. Is the answer that you have no idea whether your contractors violate wage laws because you don’t “directly monitor” their pay practices? (b) What do you mean by “directly monitor”? How do you indirectly monitor? (c) Is the answer that you rely on contractors to police themselves? (d) Given that a contractor can profit by underpaying workers, do you think it prudent utility practice to rely on contractor self-policing?

RESPONSE:

As Pepco indicated in its response to BWLDC DR 1-59, Pepco is not aware of any of its contractors that have been determined to have violated any wage laws in connection of any Pepco contract. Moreover, the determination of whether a wage law has been violated is made by the federal and District entities that were identified in Pepco’s response to BWLDC DR-1-1 and have jurisdiction to determine compliance with such laws in the first instance although ultimately these issues may be subject to judicial review in a court of competent jurisdiction. Please also see BWLDC DR 2-1.

SPONSOR: The Company

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 59

What actions has Pepco take against contractors who have violated wage laws?

RESPONSE:

Pepco is not aware of any contractors that have violated any wage laws. As a general practice, the Company does not directly monitor the pay practices of its suppliers. However, the standard terms and conditions (“T&Cs”) require that all suppliers must comply with all state and local requirements to perform work, including those related to wages, in each of the respective regions. In addition, as part of the Company’s evaluation process, all suppliers must acknowledge by acceptance of T&C’s that they will adhere to the state and local requirements for performing work in each of the respective regions.

SPONSOR: The Company

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 2

QUESTION NO. 15

Regarding 1-59, we asked, “Q: What actions has Pepco take against contractors who have violated wage laws?” You answered, “A: Pepco is not aware of any contractors that have violated any wage laws. As a general practice, the Company does not directly monitor the pay practices of its suppliers. However, the standard terms and conditions (“T&Cs”) require that all suppliers must comply with all state and local requirements to perform work, including those related to wages, in each of the respective regions. In addition, as part of the Company’s evaluation process, all suppliers must acknowledge by acceptance of T&C’s that they will adhere to the state and local requirements for performing work in each of the respective regions.” (a) Again you did not answer the question asked. Is the answer that you have no idea whether your contractors violate wage laws because you don’t “directly monitor” their pay practices? (b) What do you mean by “directly monitor”? How do you indirectly monitor? (c) Is the answer that you rely on contractors to police themselves? (d) Given that a contractor can profit by underpaying workers, do you think it prudent utility practice to rely on contractor self-policing?

RESPONSE:

As Pepco indicated in its response to BWLDC DR 1-59, Pepco is not aware of any of its contractors that have been determined to have violated any wage laws in connection of any Pepco contract. Moreover, the determination of whether a wage law has been violated is made by the federal and District entities that were identified in Pepco’s response to BWLDC DR-1-1 and have jurisdiction to determine compliance with such laws in the first instance although ultimately these issues may be subject to judicial review in a court of competent jurisdiction. Please also see BWLDC DR 2-1.

SPONSOR: The Company

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 1

QUESTION NO. 46

Please refer to the Direct Testimony of Witness Maxwell, Page 6. Quantify total costs related to claims and damages by construction contractors employed by Pepco in the last three years.

RESPONSE:

Pepco does not track claims and damages cost data by construction contractor at this time.

SPONSOR: Michael W. Maxwell

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 2

QUESTION NO. 11

Regarding 1-46, you state: “Pepco does not track claims and damages cost data by construction contractor at this time.” (a) Why did you include the phrase “at this time”? (b) Are you planning to track these items at “some other time”? (c) What executive is responsible for making that decision?

RESPONSE:

The phrase “at this time” was used as it is factually accurate. The construction contractor is responsible for all claims and damages that are brought against it by third parties.

SPONSOR: Michael W. Maxwell



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August 1, 2017

The Honorable Betty Ann Kane
Chairman
Public Service Commission of the District of Columbia
1325 G Street N.W., Suite 800
Washington, DC 20005

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DISTRICT OF COLUMBIA
PUBLIC SERVICE COMMISSION
ED

Dear Chairman:

On behalf of Anchor, I wanted to provide you with some information below about the pay and benefits Anchor provides to its employees. I believe that this information will help you to understand the true facts as they relate to the representations that were made by some of our employees at the PSC April 12th hearing.

First, all Anchor employees are paid well above the D.C. minimum wage, regardless of the work they perform and regardless of the type of job on which they work.

Second, all Anchor field workers receive PTO (Paid-Time-Off) and two paid holidays. Many employers in the construction industry do not provide such paid leave benefits to their field labor force.

Third, all Anchor employees are eligible to participate in our 401k plan, health insurance plan, and life insurance plan. On jobs subject to Davis Bacon or related wage scale requirements, the fringe benefit requirements are met by company contributions to these plans on behalf of our employees.

Fourth, Anchor believes strongly in performance-based compensation. Based on our company performance and individual performance, deserving employees also are awarded with pay increases and/or promotions. We have many management employees (from foremen to senior executives) who have risen through the ranks to high positions within the company based on their outstanding performance and contributions.

Anchor is very committed to its employees and we have large numbers of long-tenured employees whose continuing loyalty over many years is a testament to how we treat our employees. While we recognize the right of our employees to discuss and voice publicly their views about their terms and conditions of employment, we do not believe that the statements made at the Commission hearing accurately represent the facts. We hope that the information provided above will be useful to you in better understanding the value that Anchor places on its employees and the degree to which we strive to compensate and treat them fairly.

If you have questions or need any additional information, please feel free to contact me.

Very best,



Wen Liang
Vice President
Anchor Construction Corp.
2254 25th Place, NE. Washington, DC 20018

POTOMAC ELECTRIC POWER COMPANY
DISTRICT OF COLUMBIA FORMAL CASE NO. 1156
RESPONSE TO BWLDC DATA REQUEST NO. 2

QUESTION NO. 7

Regarding 1-22 pdf p.67/187, and the large number of problems at Anchor: (a) Is this large number of problems typical for contractors or atypical? Explain. (b) Did Pepco impose any financial penalties on Anchor due to these problems? (c) Would Pepco hire this contractor again, and if so why? (d) Has Pepco verified that this contractor is actually randomly auditing sites weekly as required? (e) Who are the individuals at Pepco responsible for choosing and overseeing this contractor?

RESPONSE:

a-d. BWLDC is seeking to characterize the data Pepco provided in its response to BWLDC DR 1-22. The data speaks for itself and Pepco declines to characterize the data.

e. Pepco does not provide individual employee names in discovery.

SPONSOR: William (Bill) Sullivan