



Office of the People's Counsel District of Columbia

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Elizabeth A. Noël
People's Counsel

March 23, 2009

Ms. Dorothy Wideman
Commission Secretary
Public Service Commission of the
District of Columbia
1333 H Street, NW, 2nd Floor, West Tower
Washington, D.C. 20005

Re: Formal Case No. 1009 (Code of Conduct)

Dear Ms. Wideman:

Enclosed for filing in the above-referenced proceeding are an original and fifteen (15) copies of the "Reply Comments of the Office of the People's Counsel on Chapter 39 Affiliate Transactions Code of Conduct."

Please contact the undersigned at (202) 727-3071, if you have questions or need additional information.

Sincerely yours,

Barbara L. Burton
Assistant People's Counsel

Enclosure

cc: All parties of record

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

In the Matter of)	
The Investigation into)	Formal Case No. 1009
Affiliated Activities, Promotional Practices)	
And Code of Conduct of Regulated Gas)	
And Electric Companies)	

**REPLY COMMENTS OF THE OFFICE OF THE PEOPLE’S COUNSEL ON
CHAPTER 39 AFFILIATE TRANSACTIONS CODE OF CONDUCT**

The Office of the People’s Counsel of the District of Columbia (“Office” or “OPC”), the statutory representative of utility customers and ratepayers in the District of Columbia (“District”),¹ submits the following Reply Comments in response to the Initial Comments of Potomac Electric Power Company (“PEPCO”), Washington Gas Light Company (“WGL”), Pepco Energy Services, Inc. (“PES”), and WGL Holdings, Inc. (“WGL Holdings”) to the proposed District of Columbia “Affiliate Transactions Code of Conduct,” Chapter 39 of Title 15.²

SUMMARY OF OPC’S POSITION

The Office of the People’s Counsel recommends the Commission adopt the proposed code of conduct, as modified by OPC’s recommendations.

¹ D.C. Code § 34-804 (2001).

² See Notice of Proposed Rulemaking D.C. Reg., Vol. 56, No. 6, pp. 001292-001300 (February 6, 2009) (“NOPR”).

I. INTRODUCTION AND SUMMARY

The Office commends the Commission's efforts to codify an affiliate code of conduct governing the relationship between regulated energy utilities and their non-regulated core service affiliates. The Commission has refined the code of conduct over the years and, with the few exceptions noted in the Office's Initial Comments, has authored a comprehensive code of conduct which, if diligently enforced, should protect District consumers from deceptive or abusive practices by, or unduly preferential arrangements among, such affiliates. The Office believes that the code of conduct, as modified by OPC's proposed revisions, should adequately protect District consumers if diligently enforced.

As noted in the Office's Initial Comments, the Commission has made repeated efforts to codify an affiliate code of conduct during the last eight years.³ The Office appreciates the Commission's diligent and thorough efforts over the years, but, the Office submits, the Commission must not delay any longer. District consumers need the protection that an effective affiliate code of conduct will provide them. The Office respectfully submits the Commission should adopt the code of conduct, as modified by OPC's recommendations herein and in OPC's Initial Comments, without further delay.

In comments on several of the previous iterations of the code of conduct, various commenters have questioned the Commission's authority to adopt a code of conduct. In response to the instant NOPR, however, most commenters acknowledge the Commission's authority. WGL, in fact, "supports the intent and in most instances the regulations themselves as protecting against any utility giving an affiliate unfair advantage...."⁴ However, PES still

³ OPC Comments at 2.

⁴ WGL Comments at 1.

questions the Commission's authority to adopt a code of conduct.⁵ PES' questions are misplaced. As discussed in detail below, the Commission has broad statutory authority to regulate affiliate relationships.

In addition to the foregoing, the following reply comments address individual comments and proposals to which the Office objects. The Office explains in each instance why the proposed change is inappropriate or otherwise unreasonable. The failure of the Office to address a given comment or proposal should not be construed as the Office's assent to such comment or proposal.

II. SCOPE OF AUTHORITY

PES objects to the promulgation of the code of conduct because it contends the Commission fails to provide any justification for the NOPR and fails to provide any statutory authority that empowers it to adopt the code of conduct.⁶ PES is wrong on both counts. PES erroneously views the instant NOPR in isolation. The instant NOPR is merely the Commission's most recent effort to adopt a code of conduct. The Commission has identified and explained its reasons for adopting a code of conduct on numerous occasions during the last eight years.⁷ Indeed, PES acknowledges the Commission explained the reason for the code of conduct in its January 2008 NOPR, to which PES filed initial and reply comments.⁸ PES cannot now claim that the Commission provides no explanation for the issuance of the NOPR.

⁵ PES Comments at 2.

⁶ PES Comments at 1-2.

⁷ See e.g., January 2008 NOPR at ¶ 2; Formal Case No. 945 et al., *Phase II, In the Matter of the Investigation into the Electric Service Market Competition and Regulatory Practices*, ¶ 4, rel. April 15, 2002, Order No. 12376 ("Order No. 12376").

⁸ PES Comments at 1-2. See also, Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Comments of Pepco Energy Services, Inc., February 19, 2008; Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Reply Comments of Pepco Energy Services, Inc., March 3, 2008.

PES also repeats its earlier claim that the Commission lacks the authority to adopt a code of conduct.⁹ PES' argument is based upon a complete disregard for the sources of Commission authority under the statute. As the Office has demonstrated in the past, the Commission does have the authority to implement code of conduct regulations.¹⁰ The Commission's authority to implement code of conduct regulations is found in D.C. Code §§ 34-1513, *et seq.*, and the sweeping statutory authority otherwise accorded the Commission by Title 34 of the District Code.

D.C. Code §§ 34-1513, *et seq.*, require that the Commission establish an affiliate code of conduct which includes certain minimum standards. Section 34-1513(c) **mandates** the establishment of a code of conduct, as it provides that "the Commission shall develop a Code of Conduct...." Section 34-1513(c) instructs the Commission to promulgate a code of conduct that includes specific prohibitions and requirements for affiliate transactions, but the section does not preclude the Commission from establishing additional requirements as necessary to protect District consumers.

The Commission shall develop a Code of Conduct between the electric company and its affiliate which establishes functional, operational, structural, and legal separation between the electric company and the affiliate, and which prevents the electric company from subsidizing the activities of the affiliate. The Code of Conduct required by this subsection shall include the following protections:

- (1) A prohibition on the release of proprietary customer information from the electric company to the affiliate;
- (2) A prohibition on the use by the affiliate of office space owned and used by the electric company;
- (3) A prohibition on the sharing of employees by the electric company and the affiliate;

⁹ PES Comments at 2; Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Comments of Pepco Energy Services, Inc., pp 2-3, February 19, 2008.

¹⁰ Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Initial Comments of the Office of the People's Counsel on Chapter 39 Affiliate Transactions Code of Conduct, pp 3-7, February 19, 2008.

- (4) A requirement that the electric company and the affiliate maintain separate books and records; and
- (5) A requirement that the electric company and the affiliate allocate and account for all shared corporate services.^[11]

The plain language of Section 34-1513(c) provides the Commission explicit authority to impose code of conduct requirements in addition to those set forth in subparts (c)(1)-(5), *i.e.* the Commission is authorized to impose requirements “which prevent[] the electric company from subsidizing the activities of the affiliate.” The Commission’s statutory authority, however, extends well beyond Section 34-1513(c).

In Order No. 12376, the order in which the Commission instituted Formal Case No. 1009 to address affiliate transactions, the Commission explained its broad statutory powers.¹² The Commission noted at paragraph 13:

In our view, clear and comprehensive standards of conduct governing affiliate transactions are necessary to prevent these types of market abuses and to ensure that the District’s energy markets are structured to provide for fair and open competition by service providers.

The Commission provided the following explanation of its authority:

It is well settled that the Commission has broad discretionary powers to regulate traditional utility functions in the District. *See* D.C. Code, 2001 Ed. § 34-1101 (Commission to ensure that public utilities doing business in the District of Columbia furnish reasonably safe and adequate service). *See also* D.C. Code, 2001 Ed. § 34-301(1) (This section defines the Commission’s authority over local gas corporations and electric companies furnishing or distributing gas or furnishing or transmitting electricity). In addition to these broad powers, the Electricity Act provides specific Commission authority to regulate electric utility affiliate interactions. *See, e.g.* D.C. Code, 2001 Ed. § 34-1513(c). The recent passage of the “Prevention of Unauthorized Switching of Customer Natural Gas Accounts Act of 2001” (“Gas Accounts Act”) provides further authority for the Commission’s efforts to address changes taking place in the gas industries and how these changes affect utility affiliate transactions. *See* Title XXXVI of the “Fiscal Year 2002 Budget Support Act of 2001,” D.C. Law 14-28. The Gas Accounts Act requires the Commission to adopt consumer protection orders or

¹¹ D.C. Code § 34-1513(c).

¹² Order No. 12376.

regulations that protect consumers from slamming and discriminatory, false, misleading, or deceptive marketing or advertising practices of market participants, including a natural gas supplier affiliate. *See* D.C. Law 14-28, § 3604(e)(1).^{13]}

Fundamentally, the Commission's authority to promulgate an affiliate code of conduct stems from its broad authority to ensure that all services provided by a public utility in the District are "in all respects just and reasonable" and all charges for such services are "reasonable, just, and nondiscriminatory."¹⁴ The Commission is authorized to regulate to prevent actions by a public utility or its affiliate(s) that would adversely affect the justness and reasonableness of public utility service and rates. The proposed code of conduct falls well within this authority.

III. DISCUSSION

To the extent PEPCO incorporates its February 19, 2008 Comments in response to the Commission's January 2008 NOPR, the Office incorporates its March 3, 2008 Reply Comments to address PEPCO's comments regarding sections 3901.6, 3902.1, 3903, 3904.3, 3904.4-3904.6, 3905.1, and 3908.1.¹⁵ A copy of OPC's March 3, 2008 Reply Comments are attached hereto as Exhibit A for the Commission's convenience.

Limitations on Joint Marketing, Space, and Sales for Service Affiliates

3902.3 An energy utility shall not provide sales leads to its core service affiliate(s).

Section 3902.3 properly prohibits the energy utility's provision of sales leads to its core service affiliate. WGL believes this provision should be eliminated because it is duplicative of

¹³ Order No. 12376 at ¶ 13 n. 41.

¹⁴ D.C. Code § 1-204.93 and § 34-1101(a).

¹⁵ PEPCO Comments at 2 n 1.

section 3901.5.¹⁶ Section 3901.5, however, is a general prohibition on energy utilities giving preferential treatment to an affiliate or customers of an affiliate in providing regulated services. It is not clear that providing sales leads would necessarily be considered part of the energy utility's regulated services.

Alternatively, WGL proposes the Commission modify the language in section 3902.3 similar to the language in section 3902.1 and allow an energy utility to provide "sales leads to its core service affiliate(s) if such leads are also provided to all competitors of the core service affiliate and under the same terms and conditions."¹⁷ OPC opposes WGL's modification because it appears impracticable and unenforceable. It is difficult to see how either the Commission or OPC could effectively monitor whether an energy utility actually provides sales leads to all competitors.

WGL also proposes moving section 3902.3 to section 3901 (Prohibition of Favorable Treatment for Affiliates).¹⁸ WGL provides no explanation as to why it believes section 3902.3 would be more appropriately located in section 3901. OPC objects to moving section 3902.3.

3902.4 Marketing/advertising material used by the service affiliate claiming an association with the energy utility shall include a disclaimer that:

- (a) The affiliate supplier is not the same company as the energy company, whose name or logo may be at least partially used;**
- (b) The prices and services of the affiliate supplier are not set by the Commission; and**
- (c) The customer is not required to buy energy or other products and services from the affiliate supplier in order to receive the same quality service from the energy utility.**

¹⁶ WGL Comments at 2-3.

¹⁷ WGL Comments at 2-3.

¹⁸ *Id.*

Section 3902.4 sets forth the disclaimer that is required for affiliate marketing/advertising materials claiming an association with the energy utility. The Commission has not proposed any changes to section 3902.4 since its January 2008 NOPR. PEPCO proposes to add the word “core” before “service affiliate” in the first line of section 3902.4 and the heading for section 3902.¹⁹ PEPCO’s sole explanation for such modification appears to be that “core service affiliate” is defined and used throughout the Code of Conduct whereas “service affiliate” is not.²⁰ OPC does not oppose PEPCO’s proposal.

PES objects to the disclaimer requirements of this section of the code of conduct on the same bases it objected to this section in the January 2008 NOPR. PES raises no new arguments. PES’ arguments were unavailing in 2008 and they are unavailing now. The Commission should again reject them.

As in 2008, PES: (1) alleges the code of conduct infringes its First Amendment rights;²¹ (2) offers its (self-serving) belief that there is no consumer confusion as to its identity versus that of its utility affiliate, PEPCO;²² (3) complains that it will be one of only a few companies required to recite such disclaimer;²³ (4) contends that the proposed disclaimer is overreaching.²⁴ PES’ constitutional and other claims are without merit. For the Commission’s convenience, the Office sets forth its previous response to PES’ arguments below.

¹⁹ PEPCO Comments at 2.

²⁰ *Id.*

²¹ PES Comments at 4-8. PES also alleges the advertising disclaimer amounts to a taking without fair compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, but provides no legal or factual discussion to support this allegation. Without such support, it is difficult even to discern what PES alleges is being “taken” without just compensation. OPC submits that the requirement that affiliates use an advertising disclaimer does not constitute a taking of any constitutionally protected interest without fair compensation and is not a violation of the Fifth or Fourteenth Amendments.

²² PES Comments at 5.

²³ PES Comments at 5-6.

²⁴ PES Comments at 6.

The applicable constitutional law is settled that the Commission need not have evidence that specific customers have been confused or injured by the failure of affiliates to mandate the kind of disclosure required by section 3902.4.²⁵ It is entirely sufficient that the Commission have a reasonable basis for believing that the required disclosure would reduce the likelihood of future consumer confusion or injury. The fact that **PES believes** there is no consumer confusion as to its identity versus that of its utility affiliate, PEPCO, is completely irrelevant. There is clearly the potential for such confusion, the Commission has properly concluded so, and it has exercised its authority to prevent such confusion.

The first part of the four-part test outlined in *Central Hudson* specified that, for commercial speech to be entitled to First Amendment protection, it must be lawful and not misleading. The withdrawal of protection from misleading speech has one very important corollary, explicitly recognized in the Supreme Court decisions both prior to and subsequent to *Central Hudson*: State-required disclosures of information in commercial speech are not to be judged by the same strict rules governing State prohibition of speech. The Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), explained the basis for this distinction:

Because the extension of the First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warnings or disclaimers might be appropriately required...in order to dissipate the possibility of consumer confusion or deception."

²⁵ *Central Hudson Gas & Electric Corp. v. PSC*, 447 U.S. 557 (1982).

While recognizing that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech, the Court held that an advertiser's rights are adequately protected "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."²⁶ The Court thus explicitly rejected the advertiser's contention there that disclosure requirements should be subject to a "least restrictive means" analysis.²⁷ The Supreme Court's explanation of the distinctly different role served by required disclosure in First Amendment analysis is entirely dispositive of PES' concerns.

Furthermore, the proposed disclaimer is not "overreaching" as PES suggests.²⁸ The disclaimer is a prophylactic measure intended to protect consumers from potential confusion and abuse by affiliates. It is irrelevant that PES will be in the minority of companies required to use the advertising disclaimer, as the purpose of the disclaimer is to prevent District consumers from confusing the energy utility's affiliate with the energy utility. Obviously, the potential for such confusion only exists if the energy utility and affiliate are both doing business in the District, hence there is no reason for other suppliers to provide such a disclaimer. The purpose of the disclaimer is not, in isolation, simply to inform the District consumers the company's prices are not set by the Commission or that they need not take energy, products, or services from the company. PES ignores the key clause in the disclaimer: the affiliate relationship statement.

PES proposes that Section 3902.4 be replaced by a provision modeled on the provision in the Maryland Code of Conduct which simply requires that the materials state that the affiliate is

²⁶ *Zauderer*, 471 U.S. at 651.

²⁷ 471 U.S. at 651 and n. 14.

²⁸ PES Comments at 6.

not the energy utility.²⁹ This proposal misses the mark. Section 3902.4 is intended for the circumstance where the affiliate claims an association with the utility, not identity. As such Section 3902.4 is precisely as it should be and the Office does not support PES' proposed revision.

As a secondary argument, PES claims that despite its efforts to persuade the Commission that section 3902.4 is unconstitutional and overreaching, PES would not be subject to the disclaimer requirements of this section.³⁰ While the Office obviously disagrees with PES' conclusions as to the applicability of section 3902.4 to PES, the applicability of this section to particular service affiliates is not at issue in this proceeding. Once the code of conduct is adopted PES may seek a Commission determination as to whether PES must adhere to this section.

Cost Allocation and Accounting

3904.1 Within four (4) months of the close of the energy utility's fiscal year, an energy utility must file annual a Cost Allocation Manual ("CAM") with the Commission explaining how it will allocated and account for shared services between the energy utility and any affiliate.

WGL proposes one modification to clarify that the annual CAM will be due four months after the close of the energy utility's fiscal year.³¹ OPC does not oppose WGL's proposal.

²⁹ PES Comments at 7-8.

3902.4 An energy utility shall not permit a core service affiliate to use its corporate name, trade name, trademark, or logo in an advertisement, other than image advertisement, to sell natural gas or electricity to District customers, unless the core service affiliate include the following disclaimer on its advertisement materials: "[affiliate name] is not the same company as [the energy utility], a regulated utility."

³⁰ PES Comments at 8.

³¹ WGL Comments at 3.

3904.1 Four (4) months after the close of then energy utility's fiscal year, an energy utility must file annually a Cost Allocation Manual ("CAM") with the Commission explaining how it has allocated and accounted for shared services between the energy utility and any affiliate.

3904.5 The energy utility and all affiliates to or from which assets included in rate base have been transferred by or to the energy utility and all affiliates that provide services to, or share costs with, the energy utility through any allocation method, must make available for inspection and review by the Commission books relating to the foregoing pursuant to PUHCA 2005 so that the Commission may determine compliance with the Code of Conduct. Books shall be maintained for inspection and review for at least five (5) calendar years.

WGL recommends the Commission change the five-year retention period to a two-year retention period.³² Alternatively, WGL recommends the Commission link the retention period to the biennial review required under section 3904.6.³³ WGL's proposal should be rejected. WGL has provided no explanation why books cannot and should not be maintained for five calendar years. WGL has made no claim that maintaining books for five calendar years would be unduly burdensome. In contrast to WGL's unexplained desire to destroy records after two years, there are compelling reasons to maintain the records for the five-year period proposed by the Commission. Among other things the records need to be maintained for a period of time long enough to permit a meaningful analysis of conduct and actions by the Commission and Office. There is no justification for a shorter retention period. The Commission should not change the retention period set forth in section 3904.5.

3904.6 Biennially, the energy utility shall conduct a compliance audit of its books and the books of any affiliate that has entered into a transaction with the energy utility within the period of the audit to ensure compliance with the District's Code of Conduct. The energy utility shall select an independent auditor and shall seek approval by the Commission of the selection at least sixty (60) days prior to the beginning of the audit.

³² WGL Comments at 4.

³³ WGL Comments at 4. WGL's proposed language is underlined.

3904.5 The energy utility and all affiliates to or from which assets included in rate base have been transferred by or to the energy utility and all affiliates that provide services to, or share costs with, the energy utility through any allocation method, must make available for inspection and review by the Commission books relating to the foregoing pursuant to PUHCA 2005 so that the Commission may determine compliance with the Code of Conduct. Books shall be maintained for inspection and review for at least ~~five (5)~~ one (1) calendar years after each biennial review is filed with the Commission.

WGL objects to the use of the term “audit” in this section and proposes to use the phrases “limited engagement report” and “limited engagement review” instead.³⁴ PEPCO proposes to replace the term “independent auditor” with “independent accountant.”³⁵ PEPCO also clarifies that the energy utility will not “conduct the compliance review” but will “cause a compliance review to be conducted by an independent accountant.”³⁶ OPC understands WGL and PEPCO to seek the following revisions to section 3904.6:

Biennially, the energy utility shall ~~conduct~~ cause a compliance audit ~~limited engagement report~~ to be prepared by an independent accountant of its books and the books of any affiliate that has entered into a transaction with the energy utility within the period of the ~~audit~~ limited engagement review to ensure compliance with the District’s Code of Conduct. The energy utility shall select an independent ~~auditor~~ accountant and shall seek approval by the Commission of the selection at least sixty (60) days prior to the beginning of the ~~audit~~ limited engagement review.

OPC would not oppose these modifications.

PEPCO also proposes the addition of a sentence that would allow the energy utility to “use any audit result supplied to another utility Commission or a joint audit to meet this filing requirement.”³⁷ PEPCO made this same proposal in response to the January 2008 NOPR; OPC opposed PEPCO’s proposal and the Commission rejected it. OPC continues to oppose PEPCO’s proposal for the same reason: an audit performed on behalf of another state Commission would not provide this Commission with reasonable assurance that the energy utility and its affiliates are in compliance with the District’s code of conduct.

³⁴ WGL Comments at 4-5.

³⁵ PEPCO Comments at 2.

³⁶ *Id.*

³⁷ *Id.*

WGL claims the Commission does not have the statutory authority to require WGL Holdings and its non-utility affiliates to conduct a limited engagement review.³⁸ However, section 3904.6 does not require the affiliate to conduct a limited engagement review; it requires the energy utility to conduct a limited engagement review to ensure compliance by the energy utility and its affiliates with the Commission’s code of conduct. WGL does not dispute the Commission has the statutory authority to direct the energy utility to conduct such reviews. Although OPC does not agree that the term “Compliance audit” is a cause for concern, OPC does not oppose replacing “Compliance audit” with “Limited Engagement Report” so long as “Limited Engagement Report” bears the same definition as the Commission’s proposed definition of “Compliance audit.”

PEPCO proposes to modify section 3904.6 by limiting the scope of the Compliance audit “to ensure compliance with this Section 3904 of the District’s Code of Conduct.”³⁹ As discussed more fully under the Definitions section below, the Office does not support PEPCO’s proposal to unduly limit the scope of the Compliance audit. The purpose of the Compliance audit should be to gauge the energy utility’s compliance with all provisions of the Code of Conduct, not an arbitrary subset of those provisions.

Transfer or Sale of Assets

3906.1 Transfers of assets from an energy utility to an affiliate must be recorded on the utility’s books at the greater of book cost or market value. Transfers of assets from an affiliate to the energy utility shall be at the lesser of book cost or market value. Such asymmetric pricing shall not apply to any transaction resulting from a competitive bidding process.

³⁸ WGL Comments at 5-6.

³⁹ PEPCO Comments at 4.

WGL proposes inserting the phrase “net” before “book cost” in the first and second sentences.⁴⁰ OPC does not object to the insertions.

Restrictions on Use of Employees and Equipment

3907.1 An energy utility is prohibited from sharing employees with an affiliate.

Despite WGL and WGL Holdings’ self-serving statements to the contrary, a strict prohibition against sharing of employees is necessary to protect District consumers and is well within the Commission’s statutory authority.⁴¹ As previously discussed, the Commission has broad statutory authority to ensure that all public utility rates and services provided in the District are reasonably safe, adequate, and in all respects just and reasonable.⁴² The Commission has the authority to adopt regulations to prevent actions by a public utility or its affiliate(s) that would adversely affect the justness and reasonableness of public utility service and rates. A prohibition from sharing employees falls within this general authority and also falls within the Commission’s specific authority to prohibit the sharing of employees.⁴³

WGL claims that the Commission’s proposed section 3907.1 is an unlawful attempt by the Commission to “dictate management decisions to utilities.”⁴⁴ The cases cited by WGL to support its claim are irrelevant.⁴⁵ Section 3907.1 does not impermissibly interfere with the management decisions of utilities.

⁴⁰ WGL Comments at 6.

⁴¹ WGL Comments at 6-9; WGL Holdings Comments at 2-3.

⁴² D.C. Code § 1-204.93 and § 34-1101(a).

⁴³ D.C. Code § 34-1513(c)(3).

⁴⁴ WGL Comments at 8-9.

⁴⁵ For example, *Southwestern Bell Tel. Co. v. Public Service Comm’n*, 262 U.S. 276, 289 (1923), concerned whether the Commission had the authority to disallow an actual expenditure from a company’s calculation of a fair rate of return. Similarly, *Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Comm’n*, 5 A.2d 133, 135 (Pa. 1939), concerned whether the Commission had the authority to deny the merger of two companies based on the companies’ physical separation from one another..

The Commission recognizes the inherent problems that may occur in the event that employees are shared between or among regulated utilities and their unregulated affiliates and proposes, as a solution including Section 3907.1, which prohibits employee sharing by the energy utility and its affiliates. WGL and WGL Holdings object to this prohibition and suggest that the proposed rule is significantly more restrictive than the Commission's previously proposed rule which allowed for the sharing of non-operational employees.⁴⁶ PEPCO proposes a revision that would prohibit sharing with "core service affiliates" or, in the alternative, allow sharing of operational employees between the energy utility and its regulated utility affiliates.⁴⁷ WGL, WGL Holdings and PEPCO all appear to support the concept proposed in the January 2008 NOPR, which allowed the energy utility to share non-operational employees with its core service affiliate.⁴⁸

OPC supports a complete prohibition from sharing employees, however, if the Commission is persuaded by the other commenters to change that position, OPC proposes the following modification to section 3907.1:

An energy utility is prohibited from sharing operational employees or officers with a core service affiliate.

These changes would resolve the objections of WGL, WGL Holdings and PEPCO. In addition, ratepayers would be protected by including the prohibition on sharing of officers between the energy utility and the core service affiliate.

3907.3 An energy utility shall not temporarily assign any employee of the energy utility to an affiliate.

⁴⁶ WGL Comments at 6-9; WGL Holdings Comments at 2-3.

⁴⁷ PEPCO Comments at 3.

⁴⁸ WGL Comments at 9; WGL Holdings Comments at 2; PEPCO Comments at 3.

WGL believes that energy utilities should be allowed to temporarily assign its employees to affiliates provided the energy utility charges and bills the costs of the activities to the affiliate.⁴⁹ OPC continues to support a complete ban on the sharing of all officers, other employees, and/or directors between an energy utility and its affiliate. OPC's position is consistent with D.C. Code Section 34-1513(c)(3) which mandates "a prohibition on the sharing of employees by the electric company and the affiliate." The Commission should reject WGL's proposal to allow temporary assignment of employees.

Ring-Fencing

3908.1 Any energy utility owned by a holding company that transfers more than 5 percent of the utility's earnings to a holding company parent, or declares a special or regular cash dividend to the holding company parent, shall notify the Commission in writing within 3 days following such action.

WGL and WGL Holdings propose the notification period be extended from 3 days to 5 days.⁵⁰ PEPCO proposes the notification period be extended from 3 days to 30 days.⁵¹ OPC does not oppose WGL and WGL Holdings' proposed modification.

3908.2 An energy utility shall issue debt securities and maintain credit and bond ratings for those securities apart from the holding company or any affiliate.

WGL argues that the Company cannot require bond ratings companies to issue bond ratings on its debt and suggests changing the wording from "maintain credit and bond ratings" to "seek credit and bond ratings."⁵² WGL Holdings also asserts that the credit and bond ratings agencies are independent and beyond the control of WGL and its affiliates.⁵³ WGL Holdings

⁴⁹ *Id.* at 10-11.

⁵⁰ WGL Comments at 11; WGL Holdings Comments at 4.

⁵¹ PEPCO Comments at 3.

⁵² WGL Comments at 11.

⁵³ WGL Holdings Comments at 4.

suggests that the wording be changed to “request in good faith that rating agencies maintain.”⁵⁴

OPC does not object to the change as proposed by WGL Holdings.

PEPCO proposes changes to Section 3908.2 to permit an energy utility to issue private debt without any rating and insert “if applicable” following “credit and bond ratings.”⁵⁵ WGL Holdings’ proposed change from “maintain” to “request in good faith that rating agencies maintain credit and bond ratings” would accomplish the same idea as adding “if applicable.”

OPC does not object to PEPCO’s addition of the wording regarding private debt.

Definitions

“**Annual Log**” means a log maintained by an energy utility to track information regarding a request for service from an energy supplier. The annual log shall include the following: (1) name of the supplier requesting service; (2) description of the type of service being requested; (3) date of request; (4) status of request[;] (5) date of completion of the requested service; (6) energy utility’s affiliation with the energy supplier; and (7) contact information for supplier requesting service.

PEPCO proposes the definition of Annual Log be deleted as well as the last sentence of section 3901.6.⁵⁶ PEPCO claims that maintaining an Annual Log would be unduly burdensome. The mere fact that “[t]he Company is already required to provide service to energy suppliers on the same basis as to its core service affiliate pursuant to D.C. Code § 34-1506”⁵⁷ does not guarantee that it will be done. The Annual Log provides an important tool for the Commission to determine whether the energy utility is processing requests for service by energy suppliers on the same basis as its core service affiliate. The Commission should reject PEPCO’s proposal.

“**Compliance audit**” means an independent accountant’s examination of books and records to determine compliance with all sections of this Code of Conduct.

⁵⁴ *Id.*

⁵⁵ PEPCO Comments at 3.

⁵⁶ PEPCO Comments at 3.

⁵⁷ *Id.*

As discussed under Section 3904.6, WGL recommends that the Commission replace the term “Compliance audit” with “Limited Engagement Report” in the definition section and maintain the definition provided therein:⁵⁸

~~“Compliance audit”~~ **“Limited Engagement Report”** means an independent accountant’s examination of books and records to determine compliance with all sections of this Code of Conduct.

OPC does not object to this change.

PEPCO proposes a substantial revision of the meaning of Compliance audit by limiting the compliance audit requirement to compliance with Section 3904 of the District’s code of conduct.⁵⁹ The compliance audit contemplated by the Commission’s proposal should not be limited to compliance with Section 3904 and the Commission should reject PEPCO’s proposal. Indeed, PEPCO offers no explanation for why the compliance audit should be so limited. The Commission and ratepayers need assurance that the energy utilities and their affiliates are in compliance with each provision of the code of conduct, not just the provisions in the “Cost Allocation and Accounting” section, section 3904. OPC opposes PEPCO’s proposal.

⁵⁸ WGL Comments at 11.

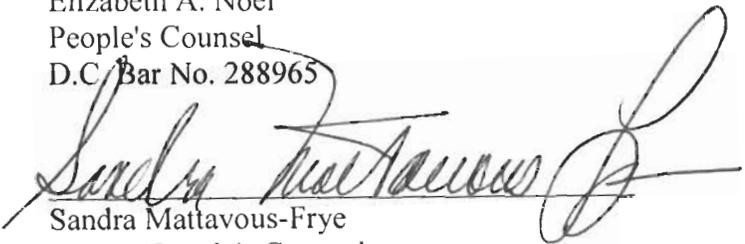
⁵⁹ PEPCO Comments at 4.

IV. CONCLUSION

For the foregoing reasons, the Office of the People's Counsel recommends the Commission adopt OPC's recommendations contained herein and in its Initial Comments.

Respectfully submitted,

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Dated: March 23, 2009



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Elizabeth A. Noël
People's Counsel

March 3, 2008

Ms. Dorothy Wideman
Commission Secretary
Public Service Commission of the
District of Columbia
1333 H Street, NW, 2nd Floor, West Tower
Washington, D.C. 20005

Re: Formal Case No. 1009 (Code of Conduct)

Dear Ms. Wideman:

Enclosed for filing in the above-referenced proceeding are an original and fifteen (15) copies of the "Reply Comments of the Office of the People's Counsel on Chapter 39 Affiliate Transactions Code of Conduct."

Please contact the undersigned at (202) 727-3071, if you have questions or need additional information.

Sincerely yours,

Barbara L. Burton
Assistant People's Counsel

Enclosure

cc: All parties of record

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

In the Matter of)	
The Investigation into)	Formal Case No. 1009
Affiliated Activities, Promotional Practices)	
And Code of Conduct of Regulated Gas)	
And Electric Companies)	

**REPLY COMMENTS OF THE OFFICE OF THE PEOPLE’S COUNSEL ON CHAPTER
39 AFFILIATE TRANSACTIONS CODE OF CONDUCT**

The Office of the People’s Counsel of the District of Columbia (“Office” or “OPC), the statutory representative of utility customers and ratepayers in the District of Columbia,¹ submits the following Reply Comments in response to the Initial Comments of Potomac Electric Power Company (“PEPCO”), Washington Gas Light Company (“WGL”), Pepco Energy Services, Inc. (“PES”), and WGL Holdings, Inc. (“WGL Holdings”) to the proposed District of Columbia “Affiliate Transactions Code of Conduct,” Chapter 39 of Title 15 (“Code of Conduct”).²

INTRODUCTION AND SUMMARY

A comprehensive and effective Code of Conduct governing the relationship between a regulated public utility -- an "energy utility" under the proposed regulations -- and its non-regulated affiliates is critical to the protection of District of Columbia consumers from deceptive or abusive practices by, or unduly preferential arrangements among, such affiliates. The Commission and the Office have sought for many years to implement such comprehensive and effective regulations. The other commenters in the current proceeding, however, have, in

¹ D.C. Code § 34-804 (2001).

² See Notice of Proposed Rulemaking D.C. Reg., Vol. 55, No. 3, pp. 000574-000582 (January 18, 2008) (“NOPR”).

substantial part, sought either to eliminate or to substantially curtail the Commission's regulation of their affiliate relationships. Their comments are predicated on the erroneous premise that the Commission's authority to implement Code of Conduct regulations is limited to that found in D.C. Code §§ 34-1513, *et seq.*

D.C. Code §§ 34-1513, *et seq.*, require that the Commission establish an affiliate Code of Conduct which includes certain minimal standards. But D.C. Code §§ 34-1513, *et seq.*, do not preclude the Commission from including other requirements in the Code of Conduct that the Commission deems necessary and appropriate to protect District consumers. Contrary to the assertions of the other commenters, D.C. Code §§ 34-1513, *et seq.*, are not the Commission's only source of statutory authority to regulate affiliate relationships. As discussed in detail below, the Commission has broad statutory authority to regulate affiliate relationships under its authority to ensure that all public utility rates and services provided in the District of Columbia are reasonably safe, adequate, and in all respects just and reasonable.³ Similarly, arguments by the other commenters that OPC should be denied access to the separate books and records that the Commission would require the energy utility and its affiliates to maintain fail to recognize the scope of the Commission's authority and the Office's independent investigative statutory authority.⁴

In addition to the foregoing, the following reply comments address individual comments and proposals to which the Office objects. The Office explains in each instance why the proposed change is inappropriate or otherwise unreasonable.

³ D.C. Code § 34-1101(a).

⁴ D.C. Code § 34-804(d)(4).

Preliminarily, the Office notes its objection to PEPCO's proposal that the Commission institute a working group to consider revisions to the NOPR.⁵ The Commission has entertained multiple comments with respect to code of conduct issues over the past almost 8 years. The Office fails to see any value in further delaying a definitive Commission decision and implementation of a Code of Conduct. In fact, working groups have been used in the past, without success, to develop such regulations. It seems highly unlikely that there is any proposal or subject of the proposed regulations that has not already been thoroughly addressed in these and prior comments. Moreover, on issues such as the Commission's statutory authority to impose certain requirements, or the Office's legal right to obtain access to certain books and records, there is nothing for the parties to negotiate. The Office submits that the Commission should decide on the substance of the Code of Conduct without further delay.

I. SCOPE OF AUTHORITY

PEPCO and PES object to the promulgation of the Code of Conduct because, they assert, the Code of Conduct exceeds the scope and authority of the District of Columbia Public Service Commission ("Commission").⁶ This argument is based upon an erroneous reading of, and misunderstanding with respect to, the sources of Commission authority under the statute.⁷

⁵ PEPCO Comments at 2.

⁶ PEPCO Comments at 2-3; PES Comments at 1-3.

⁷ PEPCO and PES also object to the "inference" each perceives in the NOPR that the Code of Conduct regulations are proposed because of alleged impropriety in the relationship between regulated utilities and non-regulated affiliates. OPC offers no view with respect to whether umbrage should be taken by either company, but notes that the entire premise of a Code of Conduct is to prevent improper relationships between regulated utilities and non-regulated affiliates. To that end, the Commission has been proposing, accepting comments, and considering rules relating to affiliate transactions for almost eight years, and the NOPR is simply the latest in the Commission's efforts to create standards of conduct tailored to District energy utilities and their affiliates. Moreover, as the District Council has mandated that the Commission establish a Code of Conduct to regulate the relationship between regulated utilities and non-regulated affiliates, PEPCO's and PES' objections to the "inference" each draws from the NOPR are entirely beside the point.

PES makes the remarkable claim that the Commission:

does not cite any authorizing law that empowers it to adopt the Code of Conduct. It is inappropriate and unfair to require commenters to guess where the Commission's authority originates. Nevertheless, PES will seek to anticipate a proper authority for promulgation of a Code of Conduct in order to demonstrate that the NOPR exceeds the Commission's authority.^[8]

In the very next sentence of its comments, however, PES notes that "Section 34-1513(c) of the D.C. Code . . . authorizes the Commission to develop a Code of Conduct to establish functional, operational, structural, and legal separation between an electric Company and its affiliates. . . ."

In point of fact, PES understates the proposition: Section 34-1513(c) **mandates** the establishment of a Code of Conduct, as it provides that "the Commission shall develop a Code of Conduct...." The Office submits that the source of the Commission's authority to establish the Code of Conduct is by no means mysterious; in fact, that authority could not be clearer.

PEPCO and PES "surmise" the Commission's authority to promulgate the Code of Conduct stems from D.C. Code § 34-1513(c).⁹

The Commission shall develop a Code of Conduct between the electric company and its affiliate which establishes functional, operational, structural, and legal separation between the electric company and the affiliate, and which prevents the electric company from subsidizing the activities of the affiliate. The Code of Conduct required by this subsection shall include the following protections:

- (1) A prohibition on the release of proprietary customer information from the electric company to the affiliate;
- (2) A prohibition on the use by the affiliate of office space owned and used by the electric company;
- (3) A prohibition on the sharing of employees by the electric company and the affiliate;
- (4) A requirement that the electric company and the affiliate maintain separate books and records; and

⁸ PES Comments at 1-2.

⁹ PEPCO Comments at 9, PES Comments at 3. PES cites D.C. Code §§ 34-1671.01 et seq., the Retail Natural Gas Supplier Licensing and Consumer Protection Act, for authority to promulgate the Code of Conduct with respect to a gas company.

(5) A requirement that the electric company and the affiliate allocate and account for all shared corporate services.^[10]

PEPCO and PES have correctly identified the Commission's obligations and authority under the Section 34-1513(c), but each erroneously asserts that the Commission's authority to regulate the relationship of a regulated utility with its non-regulated affiliates is limited to that found in Section 34-1513(c).¹¹ Section 34-1513(c) instructs the Commission to promulgate a Code of Conduct that includes specific prohibitions and requirements for affiliate transactions, but the section does not in any way preclude the Commission from establishing additional requirements as necessary to protect District consumers. The Commission plainly has the statutory authority to impose such additional requirements.

The Commission's authority to promulgate the Code of Conduct stems, in part, from D.C. Code § 34-1513(c), but the Commission's statutory authority to regulate, by the promulgation of rules, the relationships between a public utility and its affiliates is much broader than a single subsection of the Retail Electric Competition and Consumer Protection Act. In Order No. 12376, the order in which the Commission created Formal Case No. 1009 to address affiliate transactions, the Commission explained its broad statutory powers.¹² The Commission noted at paragraph 13:

In our view, clear and comprehensive standards of conduct governing affiliate transactions are necessary to prevent these types of market abuses and to ensure that the District's energy markets are structured to provide for fair and open competition by service providers.

The Commission provided the following explanation of its authority:

¹⁰ D.C. Code § 34-1513(c).

¹¹ Or D.C. Code §§ 34-1607.01 et seq., as applicable.

¹² Order No. 12376 issued in Formal Case No. 945, Formal Case No. 989, and initiating Formal Case No. 1009 (April 5, 2002).

It is well settled that the Commission has broad discretionary powers to regulate traditional utility functions in the District. *See* D.C. Code, 2001 Ed. § 34-1101 (Commission to ensure that public utilities doing business in the District of Columbia furnish reasonably safe and adequate service). *See also* D.C. Code, 2001 Ed. § 34-301(1) (This section defines the Commission's authority over local gas corporations and electric companies furnishing or distributing gas or furnishing or transmitting electricity). In addition to these broad powers, the Electricity Act provides specific Commission authority to regulate electric utility affiliate interactions. *See, e.g.* D.C. Code, 2001 Ed. § 34-1513(c). The recent passage of the "Prevention of Unauthorized Switching of Customer Natural Gas Accounts Act of 2001" ("Gas Accounts Act") provides further authority for the Commission's efforts to address changes taking place in the gas industries and how these changes affect utility affiliate transactions. *See* Title XXXVI of the "Fiscal Year 2002 Budget Support Act of 2001," D.C. Law 14-28. The Gas Accounts Act requires the Commission to adopt consumer protection orders or regulations that protect consumers from slamming and discriminatory, false, misleading, or deceptive marketing or advertising practices of market participants, including a natural gas supplier affiliate. *See* D.C. Law 14-28, § 3604(e)(1).¹³

Fundamentally, the Commission's authority to promulgate an affiliate Code of Conduct stems from its broad authority to ensure that all services provided by a public utility in the District are "in all respects just and reasonable" and all charges for such services are "reasonable, just, and nondiscriminatory."¹⁴ The Commission is authorized to regulate to prevent actions by a public utility or its affiliate(s) that would adversely affect the justness and reasonableness of public utility service and rates. The proposed Code of Conduct clearly falls within this authority.¹⁵

The breadth of the Commission's jurisdiction to ensure the justness and reasonableness of public utility rates is further evidenced by the sweep of the additional authority granted the Commission under the D.C. Code. D.C. Code § 34-903, for example, obligates the Commission

¹³ Order No. 12376 at ¶ 13 n. 41.

¹⁴ D.C. Code § 34-1101(a).

¹⁵ The Federal Energy Regulatory Commission ("FERC") reached a similar conclusion with respect to its statutory authority to regulate affiliate conduct. FERC issued Order No. 707 on February 21, 2008 to further ensure customer protection against affiliate abuse. *Cross-Subsidization Restrictions on Affiliate Transactions*, 122 FERC ¶ 61,155 (February 21, 2008) ("Order No. 707"). FERC noted its authority to regulate affiliate transactions falls under Sections 205 and 206 of the Federal Power Act. Order No. 707 at PP 3, 18, 22. Sections 205 and 206 govern FERC's ability to review and fix just and reasonable rates and charges. 16 U.S.C. §§ 824d, 824e.

to “keep itself informed as to the manner and method in which the business of all public utilities is conducted . . .” and mandates that the Commission “shall have the right to obtain from any public utility all necessary information to enable the Commission to perform its duties.” D.C. Code § 34-904 explicitly gives the Commission the right to inspect “the books, accounts, papers, records, and memoranda of any public utility...” upon demand. Similarly, D.C. Code § 34-907 requires every public utility to provide the Commission with “any or all maps, profiles, contracts, reports of engineers, and all documents, books, accounts, papers, and records...” whenever required by the Commission.

Not only does the Commission have broad authority to demand and gain access to the books and records of public utilities, but the Commission also has broad authority to initiate an investigation into any public utility subject to its jurisdiction. The Commission has the authority, upon its own initiative or upon reasonable complaint, to investigate any public utility it suspects of having unreasonable or unjustly discriminatory rates, tolls, charges, schedules, or services.¹⁶

While it is true that the Commission is obligated to promulgate a Code of Conduct pursuant to D.C. Code § 34-1513(c), the Commission’s authority to establish such a Code of Conduct and to impose conditions and requirements on the affiliate relations as part of such a Code of Conduct is not limited to that subsection.

II. DISCUSSION

Application

3900.1 This Chapter establishes the Public Service Commission’s (“Commission”) Code of Conduct between regulated energy utilities and unregulated affiliate service providers.

¹⁶ D.C. Code § 34-908.

PEPCO proposes to revise Section 3900.1 to refer to only “core service affiliates.”¹⁷ The proposed modification both implicates and rests upon PEPCO’s proposed modifications to a number of other Sections, including the Section 3999 definitions, all of which will be addressed here.

The provisions of the Commission’s proposed Code of Conduct understandably make numerous references to “affiliates” in discussing transactions between the energy utility and its affiliates. As PEPCO and PES note in their comments, the proposed provisions actually contain a number of noun phrases in which the word “affiliate” occurs: “unregulated affiliate service provider,” “affiliate,” “service affiliate,” “core service affiliate,” “non-core service affiliate,” “affiliate supplier,” “energy marketing affiliate,” “all affiliates,” and “any affiliate.” It is obviously desirable for the meaning of these terms to be clear and unambiguous and PEPCO and PES propose several modifications of the Section 3999 definitions ostensibly to clarify the references to affiliates.¹⁸ The Office, as explained below, agrees with certain of those proposals and objects to several other.

Section 3999 contains, *inter alia*, definitions of “affiliate,” “core service affiliate,” and “non-core service affiliate”:

“Affiliate” means a person who directly or indirectly, or through one or more intermediaries, controls, is controlled by, or is under common control with, or has directly or indirectly, any economic interest in another person.

“Core service affiliate” means an affiliate that provides energy services including the sale and delivery of electricity or natural gas to District customers.

¹⁷ PEPCO Comments at 4.

¹⁸ PEPCO Comments at 4 (3900.1, 3901.3, 3901.5) and at 10-12 (definitions for “core service,” “core service affiliate,” and “non-core service affiliate”); PES Comments at 5-6 (3901.5, 3901.6, 3901.7, 3901.8, 3901.9, 3903.3) and at 6 (definitions for “core service,” “core service affiliate,” and “non-core service affiliate”).

“Non-core service affiliate” means an affiliate that does not provide energy services including the selling and delivery of electricity or natural gas to customers in the District of Columbia.

There is a clear overall pattern in the provisions of the proposed Code of Conduct to the use of these three terms.¹⁹ There are two circumstances in which the provisions of the Code of Conduct use the restrictive terms “core service affiliate “ and “non-core service affiliate”: (1) where the provisions deal with transactions that can only occur between the energy utility and an energy services provider (*i.e.*, Sections 3901.6 through 3901.9) and (2) where the provisions deal with joint operations between the utility and its affiliate(s) that is (are) energy service providers (*i.e.*, Sections 3902 and 3907).

PEPCO and PES propose to revise the definitions, first, by inserting a definition of “core service.”²⁰

“Core service” means a retail gas or electric energy service provided to the public in the District of Columbia.

The Office supports this proposal so long as it is understood that “energy service” is not defined so narrowly as to connote only energy sales or supply services. The term should be understood to encompass such energy services as demand management services, efficiency services, and energy marketing services. The Commission’s definitions of “core service affiliate” and “non-core service affiliate” make clear that energy service is to be construed broadly, as they state that

¹⁹ As regards “affiliate” without qualification, Sections 3900 (Application), 3903 (Customer Information), 3904 (Cost Allocation), 3905 (Loans), 3906 (Sale of Assets), and 3908 (Ring-Fencing) all contain references to “affiliates.” There are no references to either “core service” or “non-core service” affiliates. Similarly, the provisions in Section 3901 (Favorable Treatment) that deal with representations and preferential treatment regarding regulated services (3901.1 through 3901.5) contain only references to “affiliate.” The one provision in Section 3902 (Joint Marketing) that deals with marketing representations by affiliates (3902.4) refers to “affiliate.” As regards the qualifiers “core service” and “non-core service,” the provisions in Section 3901 (Favorable Treatment) that deal with the utility’s treatment of energy service providers (3901.6 – 3901.9) contain references to “core service” affiliates. The provisions in Section 3902 (Joint Marketing) that deal with joint marketing, operation, and information (3902.1, 3902.2, 3902.3, 3902.5, and 3902.6) refer to “core service” affiliates. Section 3907 (Use of Employees) refers to “core service” and “non-core service” affiliates.

²⁰ PEPCO Comments at 10.

energy services “include[] the sale and delivery of electricity or natural gas.” This broad definition of energy service can easily be made explicit in the definition of “core service” by inserting the Commission’s phrase, “including the sale and delivery of electricity or natural gas,” after the phrase “energy service” in PEPCO’s proposed definition.

“Core service” means a retail gas or electric energy service, *including the sale and delivery of electricity or natural gas*, provided to the public in the District of Columbia.

If the Commission accepts the addition of this definition, the definition of “non-core service” should be revised to make it consistent with the definition of “core service.”

“**Non-core service**” means any service or activity performed by an affiliate that ~~does not duplicate or replace an essential service provided by the energy utility~~ *is not a retail gas or electric energy service, including the sale and delivery of electricity or natural gas, provided to the public in the District of Columbia.*

PEPCO and PES also propose to revise the definitions of “core service affiliate” and “non-core service affiliate” to define core service affiliate as an energy supplier affiliate.²¹

The Office opposes these revisions because they would inappropriately and improperly narrow the definition of “core service” to include only the sale of electricity or natural gas. With core service and non-core service defined as recommended by the Office, the definitions of core service affiliate and non-core service affiliate can be deleted and the Office recommends that the Commission do so.

In light of its proposed revisions to the definitions in Section 3999, PEPCO proposes to revise Section 3900.1 to refer to only core service affiliates.²² The Office opposes this revision

²¹ PEPCO Comments at 11.

“**Core service affiliate**” means an affiliate ~~that provides energy services including the sale and delivery of electricity or natural gas to District customers~~ *of an energy utility that is an energy supplier.*

“**Non-core service affiliate**” means an affiliate that does not provide energy services including the selling and delivery of electricity or natural gas to customers in the District of Columbia *of an energy utility that is not an energy supplier.*

which greatly narrows the scope of the Code of Conduct. It is inconsistent with Sections 3903, 3904, 3905 and 3906, all of which deal with interactions and transactions between an energy utility and all its affiliates without distinction between core service affiliates and non-core service affiliates.

Prohibition of Favorable Treatment for Affiliates

3901.1 Neither an energy utility nor its service affiliate(s) shall represent that any advantage accrues to a customer or others in the use of the energy utility's services as a result of that customer or others dealing with the service affiliates.

3901.2 Neither an energy utility nor its service affiliate(s) shall represent that the affiliation allows the service affiliate(s) to provide a service superior to that available from other licensed energy suppliers.

PES alleges the Commission has no authority over affiliates and Sections 3901.1, 3901.2, 3902.4, 3904.4, 3904.5, 3904.6, and 3904.7 should be revised by removing the reference to "affiliate(s)."²³ PES is plainly incorrect. Before addressing the Commission's legal authority to impose such requirements on affiliates, it is important to recognize what PES is saying. Removing "affiliate" from Section 3901.1 would necessarily allow an affiliate of an energy utility to represent that an advantage accrues to a customer in the use of the energy utility's services as a result of that customer dealing with the affiliate. Likewise, removing "affiliate" from Section 3901.2 would allow an affiliate to represent that the affiliation allows the affiliate to provide a superior service to that available from other, non-affiliated licensed energy suppliers. In other words, the removal of "affiliate" from these and the other sections proposed

²² PEPCO Comments at 4.

3900.1 This Chapter establishes the Public Service Commission's ("Commission") Code of Conduct between regulated energy utilities and ~~unregulated affiliate service providers~~ *core service affiliate*.

²³ PES Comments at 4-5. PES alleges references to "affiliate(s)" should be removed from Sections 3901.1, 3901.2, 3902.4, 3904.4, 3904.5, 3904.6, and 3904.7. The Commission should reject PES' proposed deletion of "affiliate(s)" from each of the Sections for the reasons articulated in OPC's Comments on Sections 3900.1, 3901.1, and 3901.2.

by PES would permit an energy utility's affiliate to misrepresent and deceive consumers. This would be an absurd result. The Commission should reject PES' proposed circumvention of these provisions.

As previously discussed, the Commission has broad authority to ensure that all services provided by a public utility in the District are "in all respects just and reasonable" and all charges for such services are "reasonable, just and nondiscriminatory."²⁴ The Commission is authorized to regulate to prevent actions by public utilities or their affiliates that may adversely affect the justness and reasonableness of public utilities' services and rates. In addition, the Commission has explicit authority to regulate the activities of affiliates of electric companies in the District.

If there is any question as to the Commission's jurisdiction in this regard, the Commission may rely on its authority under D.C. Code § 1513(b). That section requires that an affiliate of an electric company obtain a license from the Commission in order to conduct business as an electricity supplier in the District. The Commission may condition any such license on any requirements the Commission deems to be in the public interest.²⁵ In other words, the Commission may condition the grant of a license to an affiliate on any lawful requirements or restrictions. The Commission's Code of Conduct, including the prohibition set forth in the Sections to which PES objects, is one such lawful set of requirements and restrictions. PES may refuse to accept such conditions and decline to accept a license.

3901.3 No energy utility shall promote the services of a service affiliate or disparage the services of a competitor of a service affiliate.

²⁴ D.C. Code § 34-1101(a).

²⁵ D.C. Code § 34-1505(c)(3).

PEPCO proposes to revise Section 3901.3 to apply only to core service affiliates.²⁶ The Office opposes this revision, as it would inappropriately narrow the scope of the provisions. The purpose of the Code of Conduct is, *inter alia*, to ensure that the regulated utility does not injure the market in the District of Columbia by providing an unfair advantage to any of its unregulated affiliates operating in the District. There is no legitimate public purpose to be served by restricting this provision to only a subset of the regulated utility's affiliates.

3901.5 An energy utility shall not give preferential treatment to its affiliate(s) or customers of its own affiliate(s) in providing regulated services. With respect to regulated utility services, the energy utility shall treat all similarly situated providers and their customers in the same manner as the energy utility treats the affiliate or the affiliate's customers.

PEPCO also proposes to revise Section 3901.5 to apply only to core service affiliates.²⁷ The Office opposes this revision, as it would inappropriately narrow the scope of the provisions. There is no legitimate public purpose to be served by restricting this provision to only a subset of the regulated utility's affiliates.

PES complains, without offering proposed solutions, that the phrases "service affiliate," "any provider" and "similarly situated provider" in Section 3901.5, and Sections 3901.6 and 3901.8 as well, are undefined.²⁸ With "core service affiliate" and "non-core service affiliate" properly defined in Section 3999, as discussed above, "service affiliate" is properly defined and,

²⁶ PEPCO Comments at 4.

3901.3 No energy utility shall promote the services of a *core* service affiliate or disparage the services of a competitor of a service affiliate.

²⁷ PEPCO Comments at 4.

3901.5 An energy utility shall not give preferential treatment to its affiliate(s) or customers of its own affiliate(s) in providing regulated services. With respect to regulated utility services, the energy utility shall treat all similarly situated providers and their customers in the same manner ~~as the energy utility treats the affiliate or the affiliate's customers~~ *without regard to whether the supplier is a core service affiliate.*

²⁸ PES Comments at 5-6.

therefore, the interpretation of both “similarly situated providers” and “any provider” is straightforward and clear.

3901.6 An energy utility shall process all requests for service by any provider in the same manner and within the same period of time as it processes requests for service from its core service affiliate(s). An energy utility shall keep an annual log of the length of time it takes the energy utility to process each request for service.

Section 3901.6 requires that the utility keep a log of the length of time to process service requests. PEPCO objects that that this requirement is burdensome and misinterprets it as applying to the company making the service request.²⁹ The provision clearly states that it is the energy utility that is to keep the log, not the energy company requesting service. The log is clearly a reasonable means by which to exercise the Commission’s oversight to ensure that the discrimination prohibited by D.C. Code §§ 34-1506(a) and (b) does not occur. Moreover, PEPCO currently maintains a log of service requests from its customers and the 3901.6 requirement should not significantly add to that effort, since PEPCO has already developed and put in place the mechanisms required for keeping such a log.

WGL’s requests that the contents of the log be defined.³⁰ This is clearly a reasonable expectation and the Office urges the Commission to provide the definition either in Section 3901.6 or as a definition in Section 3999.

3901.7 An energy utility shall provide the same information about its distribution and transmission services contemporaneously to all licensed energy providers in a manner that does not favor its core service affiliates.

PEPCO proposes to delete Section 3901.7 because the requirement imposed by this Section is covered in D.C. Code § 34-1506.³¹ OPC opposes this proposal for the reasons set

²⁹ PEPCO Comments at 4-5.

³⁰ WGL Comments at 2.

³¹ PEPCO Comments at 6.

forth in its comments on Section 3903.1, below. In short, the regulations should be comprehensive and self-contained – the reader should not have to have statute books available when reading the regulations to understand what is and is not permitted by the regulations. The Commission should reject PEPCO’s proposed deletion.

3901.8 An energy utility shall apply all the terms and conditions of its tariff related to delivery of energy services to similarly situated providers in the same manner, without regard to whether the supplier is a core service affiliate.

PES complaint about the phrase “similarly situated providers” is undefined and imprecise³² is incorrect. See OPC comment on Section 3901.5, above.

Limitations on Joint Marketing, Space, and Sales for Service Affiliates

3902.1 Joint promotions, marketing, and advertising between an energy utility and its core service affiliate(s) are prohibited. Joint marketing shall include the sharing of billing materials. As such, an energy utility may not allow a core service affiliate access to space on its billing envelope or the ability to include marketing information inside the billing envelope.

Section 3902.1 properly prohibits joint marketing between the energy utility and core service affiliate. PEPCO claims this prohibition is restrictive and unnecessary and proposes that the section be revised to allow joint marketing if all similarly situated service providers are provided an opportunity to participate.³³ The 3902.1 prohibition is certainly restrictive and

³² PES Comments at 5.

³³ PEPCO Comments at 6.

3902.1 Joint promotions, marketing, and advertising between and energy utility and its core service affiliate(s) are prohibited. Joint marketing shall include the sharing of billing materials. As such, and energy utility may not allow a core service affiliate access to space on its billing envelope or the ability to include marketing information inside the billing envelope. *A utility may engage in joint promotions, marketing, and advertising with a core service affiliate if: (1) It affords all similarly situated non-affiliated licensed competitive suppliers the opportunity to participate in the promotion; and (2) The offer to participate is made in a manner designed to allow an equal opportunity to utilize the promotion.*

properly so, consistent with the strict restriction in D.C. Code § 34-1513(c) which mandates that the Commission, via the Code of Conduct, “establish functional, operational, structural, and legal separation between the electric company and the [core service] affiliate.” The prohibition is thus clearly necessary for the Commission to carry out the statutory mandate and the Office does not support the proposed revision.

WGL points out that Section 3902.1 would prohibit the energy utility’s core service affiliate from participating in programs promoting supplier choice generally and proposes that the provision be modified to allow joint marketing when the opportunity to jointly market is made available to all competitors.³⁴ The Office does not view such supplier choice promotions as joint marketing and suggests the following revision of the provision rather than the blanket revision proposed by WGL.

3902.1 Joint promotions, marketing, and advertising between and energy utility and its core service affiliate(s) are prohibited. Joint marketing shall include the sharing of billing materials. ~~As such, an~~ *The* energy utility may ~~not~~ allow a core service affiliate access to space on its billing envelope or the ability to include marketing information inside the billing envelope *only under the circumstance of a general promotion of supplier choice where space is made available to all competitors of the core affiliate under the same terms and conditions.*

3902.3 An energy utility shall not provide sales leads to its core service affiliate(s).

Section 3902.3 properly prohibits the energy utility’s provision of sales leads to its core service affiliate. WGL’s and WGL Holding’s references to the “merchant function” suggests

³⁴ WGL Comments at 2-3.

3902.1 Joint promotions, marketing, and advertising between and energy utility and its core service affiliate(s) are prohibited *unless space is made available to all competitors of the core affiliate under the same terms and conditions.* Joint marketing shall include the sharing of billing materials. As such, an energy utility may not allow a core service affiliate access to space on its billing envelope or the ability to include marketing information inside the billing envelope *unless space is made available to all competitors of the core affiliate under the same terms and conditions.*

they believe that the premise of this prohibition is the circumstance where the energy utility is providing the same service as its core service affiliate, *e.g.*, where the energy utility is the standard offer service (“SOS”) provider, and proposes that that prohibition be revised to allow sales leads with Commission approval.³⁵ The proposed solution is over broad and predicated on a misunderstanding of the purpose for the prohibition. The premise of the prohibition is that the energy utility, by providing sales leads to its core service affiliate, would damage the market by providing an unfair advantage to its core service affiliate, regardless of whether the energy utility is a provider of the same service as the core service affiliate. The Office does not support the proposed revision.

3902.4 Marketing/advertising material used by the service affiliate claiming an association with the energy utility shall include a disclaimer that:

- (a) **The affiliate supplier is not the same company as the energy company, whose name or logo may be at least partially used;**
- (b) **The prices and services of the affiliate supplier are not set by the Commission; and**
- (c) **The customer is not required to buy energy or other products and services from the affiliate supplier in order to receive the same quality service from the energy utility.**

Section 3902.4 sets forth the disclaimer that is required for affiliate marketing/advertising materials claiming an association with the energy utility. PES levels a broadside of objections great and small to the disclaimer requirements of this section of the Code of Conduct. PES: (1) alleges the Code of Conduct infringes its First Amendment rights;³⁶ (2) offers its (self-serving)

³⁵ WGL Comments at 3-4; WGLH Comments at 2.

3902.3 *Unless otherwise approved by the Commission in advance, an* energy utility shall not provide sales leads to its core service affiliate(s).

³⁶ PES Comments at 7-11. PES also alleges the advertising disclaimer amounts to a taking without fair compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, but provides no legal or factual discussion to support this allegation. Without such support, it is difficult even to discern what PES alleges is being “taken” without just compensation. OPC submits that the requirement that affiliates use an

belief that there is no consumer confusion as to its identity versus that of its utility affiliate, PEPCO;³⁷ (3) complains that it will be one of only a few companies required to recite such disclaimer;³⁸ and (4) contends that the proposed disclaimer is overreaching.³⁹ PES' constitutional and other claims are without merit.

The applicable constitutional law is settled that the Commission need not have evidence that specific customers have been confused or injured by the failure of affiliates to mandate the kind of disclosure required by section 3902.4.⁴⁰ It is entirely sufficient that the Commission have a reasonable basis for believing that the required disclosure would reduce the likelihood of future consumer confusion or injury. The fact that **PES believes** there is no consumer confusion as to its identity versus that of its utility affiliate, PEPCO, is completely irrelevant. There is clearly the potential for such confusion, the Commission has properly concluded so, and it has exercised its authority to prevent such confusion.

The first part of the four-part test outlined in *Central Hudson* specified that, for commercial speech to be entitled to First Amendment protection, it must be lawful and not misleading. The withdrawal of protection from misleading speech has one very important corollary, explicitly recognized in the Supreme Court decisions both prior to and subsequent to *Central Hudson*: State-required disclosures of information in commercial speech are not to be judged by the same strict rules governing State prohibition of speech. The Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), explained the basis for this distinction:

advertising disclaimer does not constitute a taking of any constitutionally protected interest without fair compensation and is not a violation of the Fifth or Fourteenth Amendments.

³⁷ PES Comments at 7.

³⁸ PES Comments at 8.

³⁹ PES Comments at 9.

⁴⁰ *Central Hudson Gas & Electric Corp. v. PSC*, 447 U.S. 557 (1982).

Because the extension of the First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, *see Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warnings or disclaimers might be appropriately required...in order to dissipate the possibility of consumer confusion or deception."

While recognizing that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech, the Court held that an advertiser's rights are adequately protected "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."⁴¹ The Court thus explicitly rejected the advertiser's contention there that disclosure requirements should be subject to a "least restrictive means" analysis.⁴² The Supreme Court's explanation of the distinctly different role served by required disclosure in First Amendment analysis is entirely dispositive of PES' concerns.

Furthermore, the proposed disclaimer is not "overreaching" as PES suggests.⁴³ The disclaimer is a prophylactic measure intended to protect consumers from potential confusion and abuse by affiliates. It is irrelevant that PES will be in the minority of companies required to use the advertising disclaimer, as the purpose of the disclaimer is to prevent District consumers from confusing the energy utility's affiliate with the energy utility. Obviously, the potential for such confusion only exists if the energy utility and affiliate are both doing business in the District, hence there is no reason for other suppliers to provide such a disclaimer. The purpose of the disclaimer is not, in isolation, simply to inform the District consumers the company's prices are

⁴¹ *Zauderer*, 471 U.S. at 651.

⁴² 471 U.S. at 651 and n. 14.

⁴³ PES Comments at 9.

not set by the Commission or that they need not take energy, products, or services from the company. PES ignores the key clause in the disclaimer: the affiliate relationship statement.

PEPCO and PES propose that Section 3902.4 be replaced by a provision modeled on the provision in the Maryland Code of Conduct which simply requires that the materials state that the affiliate is not the energy utility.⁴⁴ This proposal misses the mark. Section 3902.4 is intended for the circumstance where the affiliate claims an association with the utility, not identity. As such Section 3902.4 is precisely as it should be and the Office does not support the proposed revision.

Disclosure of Information

3903.1 An energy utility shall not disclose any customer-specific information obtained in connection with the provision of regulated utility services except upon informed, written consent of the utility customer.

Section 3903.1 prohibits disclosure of customer specific information except on informed, written consent. WGL complains that it does not know what “informed” means in the context of the provision and proposes, apparently, that the word “informed” be deleted from the provision.⁴⁵ PES makes similar complaints and also asserts that the rule is unnecessary because the prohibition is found in the Consumer Bill of Rights and proposes deletion of Section 3903.1.⁴⁶ PEPCO asserts that the entire Section 3903 should be deleted, because customer information disclosure is covered in the Consumer Bill of Rights and because direction on disclosure is

⁴⁴ PEPCO Comments at 6-7; PES Comments at 10.

3902.4 When an energy utility authorizes a core service affiliate to use its corporate name, trade name, trademark, or logo in an advertisement, other than image advertisement, to sell natural gas or electricity to District customers, the energy utility shall require the affiliate to include the following disclaimer: “(affiliate name) is not the same company as (utility name), a regulated utility.”

⁴⁵ WGL Comments at 4.

⁴⁶ PES Comments at 11.

provided in D.C. Code § 34-1507.⁴⁷ These proposed deletions are without merit and should be rejected.

The prohibition as articulated in the Consumer Bill of Rights is clearly in the context of consumer complaints, whereas the provisions in Section 3903 articulate the details of a general prohibition against disclosure of customer information by the energy utility, so, contrary to PES' argument, Section 3903 is necessary. Furthermore, the provisions in Section 3903 represent the practical elucidation of the statutory intent of D.C. Code § 34-1507, and as such cannot be replaced by simple reference to statutory language. The regulations should be comprehensive and self-contained – the reader should not have to have statute books available when reading the regulations to understand what is and is not permitted by the regulations. The Office, therefore, does not support deletion of either Section 3903.1 or the entirety of Section 3903.

As for the complaint that “informed” is undefined in Section 3903.1, that is easily remedied and the Office proposes the following revision to Section 3903.1.

3903.1 An energy utility shall not disclose any customer-specific information obtained in connection with the provision of regulated utility services except upon ~~informed~~ written consent of the utility customer. *The consent form signed by the utility customer shall state the purpose of the disclosure.*

The Office urges the Commission to make this revision to Section 3903.1.

3903.3 Any information provided by an energy utility to its energy marketing affiliate(s) with respect to its electric or gas system, the marketing or sale of energy to customers or potential customers, or the delivery of energy to or on its system, shall be contemporaneously disclosed to all non-affiliated suppliers or potential non-affiliated suppliers on its system. Disclosure of such information must be published on the energy utility’s electronic bulletin board or equivalent mechanism used to communicate with licensed energy providers.

⁴⁷ PEPCO Comments at 7-8.

PEPCO asserts that the entire Section 3903 should be deleted.⁴⁸ See OPC's comment on Section 3903.1. The Commission should reject PEPCO's proposed deletions. PES again complains, without offering proposed solutions, that the phrases "energy marketing affiliate(s)" and "all non-affiliated suppliers or potential non-affiliated suppliers on its system" are undefined.⁴⁹ See OPC's comment on Section 3901.5, above.

- 3903.4 Notwithstanding the limitations in 3903.3 above, an energy utility may disclose the following information without making the disclosure publicly available.**
- (a) Information that is subject to the administration of a contract to supply Standard Offer Service or to carry out an interconnection agreement**
 - (b) Information disclosed to a supplier, whether affiliated or non-affiliated, as necessary for the supplier to bill or provide services to its customer; and**
 - (c) Information with its affiliates to the extent necessary to comply with federal and state laws and regulations, including those relating to financial reporting and corporate governance.**

PEPCO asserts that the entire Section 3903 should be deleted.⁵⁰ See OPC's comment on Section 3903.1. The Commission should reject PEPCO's proposed deletions.

Cost Allocation and Accounting

- 3904.3 When changes occur to the CAM prior to the next annual filing period, the energy utility must file amendment(s) to the CAM as necessary.**

PEPCO proposes the word "substantive" be placed before the word "changes"⁵¹ In effect, this addition would give the energy utility the right, in its sole discretion, to determine

⁴⁸ PEPCO Comments at 7-8.

⁴⁹ PES Comments at 6.

⁵⁰ PEPCO Comments at 7-8.

which changes are material and, thus, allow the utility to decide what changes in the CAM information should be brought to the attention of the Commission and OPC. The Commission has appropriately chosen to exclude from this NOPR the insertion of ambiguous terms such as “material” or “substantive” that would allow companies to make unilateral decisions regarding whether or not the Commission should be notified of changes to the CAM. The Commission should modify Section 3904.3 as OPC proposed in its Initial Comments in this proceeding.

3904.4 An affiliate and an energy utility must maintain separate books and records that shall be subject to review pursuant to the Public Utility Holding Company Act of 2005 (“PUHCA 2005”) by the Commission.

PEPCO proposes to delete Sections 3904.4, 3904.5, and 3904.6 in their entirety⁵² and PES proposes to revise Sections 3901.1, 3901.2, 3902.4, 3904.4, 3904.5, 3904.6, and 3904.7 in order to remove references to “affiliate.”⁵³ Each of these proposals should be rejected. The Commission should modify Section 3904.4 as OPC proposed in its Initial Comments in this proceeding.

Section 3904.4 as proposed makes the obligations of the energy utility and its affiliates to maintain books and records derivative of the Commission’s rights and obligations under PUHCA 2005. PUHCA 2005 provides the Commission unequivocal authority to define the universe of separate books and records that must be maintained by the affiliates and ability to obtain access to those books and records upon request.⁵⁴ PUHCA 2005 Section 1265 requires the Commission to identify in reasonable detail the books and records it wants maintained in a proceeding before the State Commission. Title 34 of the D.C. Code provides the Commission

⁵¹ PEPCO Comments at 8.

⁵² PEPCO Comments at 8-9.

⁵³ PES Comments at 5.

⁵⁴ PUHCA 2005 Section 1265(a) explicitly requires an affiliate to “produce for inspection books, accounts, memoranda, and other records...”

with unequivocal authority to obtain access to all books and records maintained by the public utility.⁵⁵ Taken together, PUHCA 2005 and Title 34 provide the Commission the authority to determine the books and records to be separately maintained by the public utility and its affiliates and to obtain access to those books and records at its request.

As discussed below with respect to proposed Section 3904.5, the objections to OPC access to these books and records are entirely misplaced. The Commission has proposed rules that would afford OPC access to the books and record that the energy utility and affiliates are obligated to maintain. There is absolutely no limitation under the statute on the Commission's discretion to afford such access to OPC as the statutory representative of District consumers. Moreover, there is no question that OPC may obtain access to the books and records of public utilities under its independent authority to investigate the rates and services of public utilities.⁵⁶

3904.5 Commission Staff and the Office of the People's Counsel ("OPC") shall be provided full access pursuant to PUHCA 2005 to the books and records of any affiliate and energy utility that relate to the sharing of costs with the energy utility through direct assignment or an allocation methodology.

PEPCO states that PUHCA 2005 does not grant OPC access to the books and records of an energy utility.⁵⁷ OPC agrees that PUHCA 2005 does not explicitly provide access to such books and records by consumer advocates and independent agencies such as OPC. But neither PUHCA nor Title 34 of the D.C. Code limits the Commission's discretion to afford OPC access to those books and records. It is entirely appropriate that the Commission afford such access to OPC as the statutory representative of District consumers. OPC also has access to such books and records maintained by a public utility under the D.C. Code, which gives OPC the broad

⁵⁵ See *e.g.*, D.C. Code §§ 34-904, 34-905, 34-907.

⁵⁶ D.C. Code § 34-804(d)(4).

⁵⁷ PEPCO Comments at 9.

authority to “investigate independently...the services given by, the rates charged by, and the valuation of the properties of the public utilities under the jurisdiction of the Commission...”⁵⁸

The Commission should modify Section 3904.5 as OPC proposed in its Initial Comments in this proceeding.

PES objects to Section 3904.5 on the grounds that neither the Commission nor OPC have jurisdiction over the books of an affiliate.⁵⁹ As previously noted, PUHCA 2005 gives State Commissions the right to require affiliates of public utilities to maintain books and records and PUHCA 2005 Section 1265(a) explicitly requires an affiliate of a public utility to “produce for inspection books, accounts, memoranda, and other records...” upon written request of a State Commission having jurisdiction over the public utility. There is no rule or regulation to prohibit the Commission from granting OPC access to those affiliate books and records.

3904.6 The energy utility and all affiliates to or from which assets included in rate base have been transferred by or to the energy utility and all affiliates that provide services to, or share costs with, the energy utility through any allocation method must make available for inspection and review by the Commission books relating to the foregoing pursuant to PUHCA 2005 so that the Commission may determine compliance with the Code of Conduct. Books shall be maintained for inspection and review for at least five (5) calendar years. The initiation of an investigation by the Commission shall not shift the energy utility’s burden of proving compliance with these rules.

OPC agrees that references to PUHCA 2005 should be eliminated. As discussed in Sections 3904.4 and 3904.5 above, the authority relating to the maintenance of books and records is two-fold with respect to the public utility and its affiliates. First, the Commission has the authority to direct a public utility to maintain and produce books and records under its

⁵⁸ D.C. Code § 34-804(c)(4).

⁵⁹ PES Comments at 5. Additionally, PEPCO states in its Comments at 9 that PUHCA 2005 does not afford the Commission access to the books and records of an affiliate.

statutory directives.⁶⁰ Second, the Commission has the authority to direct a public utility's affiliates to maintain and produce books and records under PUHCA 2005. The Commission should modify Section 3904.6 as OPC proposed in its Initial Comments in this proceeding.

3904.7 Biennially, the energy utility shall conduct, at shareholder expense, an audit of its books and the books of any affiliate to ensure compliance with the District's Code of Conduct. The energy utility shall choose an independent auditor (approved by the Commission), and shall notify the Commission of that choice at least sixty (60) days prior to the beginning of the audit.

Contrary to WGL and WGL Holding's assertions otherwise, the audit required by Section 3904.7 is **not** a financial audit.⁶¹ The audit, as clearly stated, is an audit "to ensure compliance with the District's Code of Conduct." WGL and WGL Holdings have cited no statute or other legal impediment to WGL choosing an independent auditor to audit Code of Conduct compliance.

PEPCO, WGL and WGL Holdings each oppose the requirement that shareholders pay the costs for the audits required under this section.⁶² PEPCO argues that the Commission has no authority to require the shareholders to bear the cost of the audit.⁶³ WGL argues that this cost is no different than any regulatory compliance cost and, under normal ratemaking practices, this expense would be recoverable as a recurring expense.⁶⁴ PEPCO and WGL are wrong. For ratemaking purposes the Commission does have the authority to allow or disallow costs incurred by the companies. In this instance these audit costs should be paid by shareholders because it is the unregulated affiliate's transactions with the utility that are the reason these costs are being incurred. Without transactions between the regulated utility and the unregulated affiliate, the

⁶⁰ See e.g., D.C. Code §§ 34-904, 34-905, 34-907.

⁶¹ WGL Comments at 6; WGL Holdings Comments at 4-5.

⁶² PEPCO Comments at 9; WGL Comments at 7; WGL Holdings Comments at 3.

⁶³ PEPCO Comments at 9.

⁶⁴ WGL Comments at 7.

Code of Conduct would not be necessary and assurance of compliance with the Code of Conduct would also not be necessary.

PEPCO also proposes the addition of a sentence that would allow the energy utility to “use any audit result supplied to another utility Commission or a joint audit to meet this filing requirement.”⁶⁵ An audit performed on behalf of another state Commission would not provide this Commission with reasonable assurance that the energy utility and its affiliates are in compliance with the District’s Code of Conduct.

Loans and Loan Guarantees

3905.1 Energy utilities shall not provide loans or loan guarantees to their affiliates or to their holding company without prior written approval of the Commission. The general prohibition includes use of utility rate base asset as collateral for any affiliate activity.

PEPCO argues that this provision is beyond the scope of the Commission’s authority and should be stricken.⁶⁶ Notably, WGL does not believe Section 3905.1 to be beyond the scope of the Commission’s authority. As repeatedly recounted herein, the Commission has broad authority to ensure that all public utility rates and services provide in the District are reasonably safe, adequate, and in all respects just and reasonable.⁶⁷ In addition, the Commission has specific statutory authority to supervise, regulate, restrict, and control liens on corporate property⁶⁸ and to issue certificates permitting a utility to issue stocks, stock certificates, bonds, mortgages, or other evidences of indebtedness.⁶⁹ Both loans and loan guarantees have the potential to affect the financial stability and credit rating of an energy utility issuing such loans

⁶⁵ PEPCO Comments at 9-10.

⁶⁶ PEPCO Comments at 10.

⁶⁷ D.C. Code § 34-1101(a).

⁶⁸ D.C. Code § 34-501.

⁶⁹ D.C. Code § 34-502.

or guarantees. The Commission's authority clearly extends to the regulation and approval of loans and loan guarantees.

WGL argues that the provision gives unfair advantage to the other competitive energy suppliers over the WGL energy supplier since the others would "be free to receive unrestricted loans or loan guarantees from their affiliated companies outside the District of Columbia."⁷⁰ The Commission does not have jurisdiction over the loans or loan guarantees of utilities outside the District. The commissions in those jurisdictions are responsible for their ratepayers. The fact that those commissions may not exercise sufficient regulation of their utilities' affiliated transactions is not for this Commission to remedy and should not influence the Code of Conduct in the District. Loan guarantees by the utility for an unregulated affiliate would put the assets of the utility at risk and increase the cost of capital that ratepayers would be required to pay.

Transfer or Sale of Assets

3906.1 Transfers of assets from an energy utility to an affiliate must be recorded at the greater of book cost or market value. Transfers of assets from an affiliate to the energy utility should be at the lesser of book cost or market value. Such asymmetric pricing shall not apply to any transaction resulting from a competitive bidding process.

WGL proposes inserting the phrase "on the utility's books" between the words "recorded" and "at" in the first sentence and between the words "be" and "at" in the second sentence. OPC does not object to the insertions.

3906.2 The Commission maintains its authority to restrict and mandate use and terms of sale of utility assets of \$50,000 or more.

WGL takes the position that the Commission does not have the authority to prohibit WGL or any of its affiliates from selling or purchasing an asset or service, regardless of the value

⁷⁰ WGL Comments at 7-8.

of the asset.⁷¹ WGL is incorrect. The Commission does have the authority to supervise, regulate, restrict, and control a utility's management of its money.⁷² For example, D.C. Code § 34-501 states:

The power to create liens on corporate property by public utilities in the District of Columbia is hereby declared to be a special privilege, the right of supervision, regulation, restrictions, and control of which is hereby vested in the Public Service Commission of the District of Columbia, and such power shall be exercised according to the provisions of this subtitle.

As previously discussed, the Commission has broad authority to regulate utility functions in the District of Columbia. The Commission's authority to supervise and regulate the sale of utility assets should be no exception.

Restrictions on Use of Employees and Equipment

3907.3 An energy utility shall not temporarily assign any employee of the energy utility to a core service affiliate. However, energy utility employees may be temporarily assigned to a non-core service affiliate, provided those energy utility employees are not subsequently transferred to a core service affiliate.

WGL proposes adding the word "operational" before the word "employee" in the first sentence.⁷³ OPC opposes this proposed change and would support a complete ban on the sharing of all officers, other employees, and/or directors between an energy utility and its affiliate as the only approach that is consistent with D.C. Code Section 34-1513(c)(3) which mandates "a prohibition on the sharing of employees by the electric company and the affiliate." The Commission should reject WGL's proposed change.

3907.4 For the purposes of this section, a temporary assignment is for a term less than one year.

⁷¹ WGL at p 9.

⁷² See e.g., D.C. Code § 34-501 et seq.

⁷³ WGL Comments at 9.

WGL proposes allowing the utilities to determine the length of temporary assignments.⁷⁴

See OPC comment on Section 3907.3, above. The Commission should reject WGL's proposed changes.

Ring-Fencing

3908.1 Any energy utility owned by a holding company that transfers more than 5 percent of the utility's earnings to a holding company parent, or declares a Special or regular cash dividend to the holding company parent, shall notify the Commission in writing no less than 30 days before such action.

WGL and WGL Holdings present significantly different concerns about this provision than PEPCO. WGL and WGL Holdings assert that the provision cannot legally be complied with (a concern PEPCO does not share) and that it is otherwise inappropriate.⁷⁵ PEPCO does not contest the legality of the provision, but rather prefers that it be modified. Each of these comments is without merit and should be rejected and Section 3908.1 should be implemented as the Commission proposed.

The Commission has a legitimate interest in knowing beforehand that an energy utility is going to make large transfers of cash from the utility to the holding company. Such transfers may have a significant effect on the equity ratio of the utility and thus on the utility's ability to raise capital and maintain its credit rating. The Commission has asked for nothing more than information in a timely manner.

The WGL and WGL Holdings concerns with insider trading appear entirely without merit. First, the proposed regulation simply requires notification of the Commission. It is unclear why this would in any way contravene any statute, and WGL and WGL Holdings have

⁷⁴ WGL Comments at 9-10.

⁷⁵ WGL at p 10; WGL Holdings at p 5.

identified none. Second, WGL is a wholly owned subsidiary. As such, the only entity that could take advantage of the knowledge of the declaration of a dividend – WGL Holdings – already knows about the impending dividend. Third, OPC fails to see how the transfers of more than 5 percent of the utility’s earnings to a holding company parent could conceivably implicate insider trading. Such a transfer is merely an intra-corporate transfer of funds that has little if any impact on investment decisions.

Such a significant transfer of funds from the regulated utility to the parent, however, could be of great significance to the Commission, which is concerned with the financial health of the energy utility and its ability to provide safe and adequate utility facilities and services in the District.

PEPCO proposes the reporting threshold be applicable if “the dividend (special or regular) is greater than 5% of retained earnings and equity capitalization falls below a 30% threshold.”⁷⁶ This is a less-than-subtle way of ensuring that energy utilities will almost never have to make the reports called for by this section and should be rejected.

PEPCO is proposing two significant and objectionable changes. PEPCO would change the threshold from 5% of earnings (a current income statement amount) to 5% of retained earnings (a balance sheet accumulation of earnings over time). This alone significantly raises the threshold before the energy utility would be required to report to the Commission. But, PEPCO would raise the bar even higher. The energy utility would not be obligated to make any report unless **both** the 5% of retained earnings threshold were met **and** the energy utility’s equity ratio fell below 30%.⁷⁷ This proposal greatly reduces the likelihood that energy utilities would be

⁷⁶ PEPCO Comments at 10.

⁷⁷ Setting the trigger at a 30% equity ratio is dangerously low. A company with a 30% equity ratio is highly leveraged. Moreover, PEPCO would actually raise the bar even higher, as the equity capitalization ratios used to

required to notify the Commission of planned large dividends or significant cash transfers to the parent company, which in turn materially decreases the Commission's oversight and the protections to be afforded by "ring-fencing."

PEPCO's has provided no justification for its proposed changes and they should be rejected.

Definitions

"Asset" means Tangible and Intangible property of an energy utility or other right, entitlement, business opportunity, or other things of value to which an energy utility holds claim that is recorded or should be recorded as a capital expenditure in the energy utility's financial statements. All energy utility tangible or intangible property, rights, entitlements, business opportunities, and things of value should be considered an asset, a service, or supply.

PEPCO has proposed a dramatic narrowing of the definition of "asset," by suggesting that the definition be limited to "property of a type included in the rate base of a utility."⁷⁸ There is absolutely no justification for eliminating a detailed definition that legitimately encompasses a broad range of property and other rights and interests in favor of PEPCO's proposal. PEPCO asserts that the current definition is "confusing and overbroad," but a simple review of the proposed definition demonstrates that it is quite precise. The only example offered by PEPCO of the over-breadth of the definition is that PEPCO contends it would include PEPCO's "brand", which the Company says is not an asset. Even if that were correct, that does not justify the exclusion of all "intangible" and other property simply because it is not included in rate base.

The Commission should reject PEPCO's proposal.

determine whether the equity ratio falls below 30% would be adjusted upward in these calculations by excluding securitization debt issues from total capitalization and giving hybrid securities and preferred or preference stock 50% equity credit in the equity capitalization calculation.

⁷⁸ PEPCO Comments at 11.

III. CONCLUSION

For the foregoing reasons, the Office of the People's Counsel recommends the Commission adopt OPC's recommendations contained herein and in its Initial Comments.

Respectfully submitted,

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Dated: March 3, 2008

CERTIFICATE OF SERVICE

Formal Case No. 1009 (Code of Conduct)

I hereby certify that on this 3rd day of March, 2008, copies of the "Reply Comments of the Office of the People's Counsel on Chapter 39 Affiliate Transactions Code of Conduct" were served on the following parties of record by hand delivery, electronic mail, facsimile, or first-class mail, postage prepaid:

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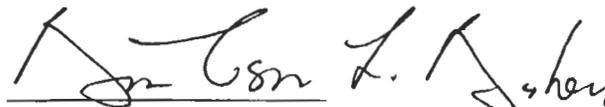
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I hereby certify that on this 23rd day of March, 2009, copies of the "Reply Comments of the Office of the People's Counsel on Chapter 39 Affiliate Transactions Code of Conduct" were served on the following parties of record by hand delivery, electronic mail, facsimile, or first-class mail, postage prepaid:

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