

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

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

Surrebuttal Testimony of Scott Hempling

On Behalf of

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

May 20, 2020

1 **Q. Are you the same Scott Hempling who presented Direct Testimony in this**
2 **proceeding?**

3 **A. Yes.**

4 **Q. Introduce your Surrebuttal Testimony.**

5 **A. Pepco's construction contractors receive hundreds of millions of dollars, ultimately from**
6 **Pepco’s customers. My Direct Testimony addressed two questions central to this**
7 **Commission's jurisdiction over those dollars. First, do these Pepco-hired contractors treat**
8 **their workers in a way that ensures their safe, cost-effective performance for the**
9 **customers? Second, does Pepco choose and oversee its contractors consistently with how**
10 **a prudent utility—one concerned about how worker performance affects customer**
11 **service—would choose and oversee its contractors?**

1 Instead of responding on the merits, Pepco avoids the issues. If the Commission
2 needed any more evidence that its own actions must replace Pepco's passivity, that
3 evidence is Mr. Sullivan's rebuttal.

4 **Q. Mr. Sullivan insists there is no worker mistreatment problem because the**
5 **contractors obey the law. How do you respond?**

6 **A.** Starting July, the District's minimum wage will be \$15/hour. So by paying its
7 distributions engineers \$15/hour, Pepco will obey the law. How safe, how cost-effective,
8 how reliable, will our distribution system be? Pepco can pay its Chief Financial Officer
9 \$15/hour. How accurate will Pepco's financial statements be? Pepco can pay Mr. Sullivan
10 \$15 an hour. How productive will he be? How will Mr. Sullivan feed himself and his
11 family, pay for his housing, cover his health needs, save for retirement, sleep through the
12 night without worry—and still concentrate on his job?

13 The silliness of these examples is matched by the illogic of Pepco's position. Mr.
14 Sullivan employs the classic form of avoidance—the non sequitur. The question is “Are
15 Pepco's contractors paying workers commensurate with the risks they face and the value
16 they contribute?” The answer cannot be “The contractors obey the law.” Let Mr. Sullivan
17 be paid the merely legal wage; perhaps then he will understand the difference between
18 what is legal and what is necessary.

19 The purpose of labor and wage laws is to prevent abuses—like stealing pay,
20 paying poverty wages, maintaining unsafe situations. No wage or labor law requires that
21 pay be what someone needs to work productively and undistractedly. No wage or labor
22 law eliminates the tension between contractor earnings and worker needs—a tension that
23 flows inevitably from Pepco's practices: selecting contractors based primarily on price,
24 then paying them fixed project fees—two actions that induce contractors to pay the

1 lowest possible compensation and offer the least possible training. The issue here is not
2 merely failure to pay the legal wage and create minimally safe conditions (which is also a
3 problem—see Anchor below); the issue is failure to pay the right wage and failure to
4 provide appropriate work conditions.

5 **Q. Respond to Mr. Sullivan’s insistence that Pepco “engag[es] the services of**
6 **contractors that follow the applicable requirements.”¹**

7 **A.** How does he know? Has he forgotten that Pepco “does not track claims and damages cost
8 data by construction contractor at this time”?² Just because a hospital hires licensed
9 doctors doesn’t mean the hospital oversees those doctors properly. Just because Pepco
10 hires purportedly law-abiding contractors doesn’t mean that those contractors treat their
11 workers properly. As my Direct Testimony explained, Pepco has no clear policy on how
12 contractors should treat their workers, other than hoping that they obey laws that have
13 insufficient connection to what the workers need.

14 **Q. Mr. Sullivan objects to your verbatim descriptions of Anchor's safety violations.**
15 **How do you respond?**

16 **A.** Mr. Sullivan and I have very different ideas about what it means to, in his words,
17 “operat[e] in a safe manner.”³ Quoting Pepco's own documents, I showed that for eight
18 straight months Anchor averaged nearly 10 violations each month—each violation scarier
19 than the next. Here are some high points:⁴

- Crew too close to open excavation not maintaining 6' distance
- No respiratory [sic] protection while milling

¹ Sullivan Rebuttal at 3:4.

² Pepco Response to Laborers' DRs 1-46, 2-11 (attached to my Direct Testimony).

³ Sullivan Rebuttal at 3:13.

⁴ Quoted from Pepco’s files. For full list, see my Direct Testimony at 20:3.

- 1 • Crew standing near excavation with out harness
- 2 • Traffic control sign placed upside down.
- 3 • Fire extinguisher not on jobsite.
- 4 • Air tester not in excavation (multiple times)
- 5 • No Fall protection when working on roof of shed.
- 6 • Not enough cones to close off lane.
- 7 • Crew members not wearing safety glasses.
- 8 • Fire extinguisher expired
- 9 • No guardrail installed and crew with in 6' of excavation edge
- 10 • Toe board missing on guardrail (multiple times)
- 11 • Crew was using logging strap with edge frayed
- 12 • Fall protection was not placed during open trench
- 13 • Improper method for rigging.
- 14 • Not enough advance warning signs on road.
- 15 • Fuel cans missing Marks.

16 It can't be "mischaracterization"⁵ to copy Pepco's materials verbatim. And to say
17 Anchor got a "very good score"⁶ says more about Pepco's scoring than it does about
18 worker safety. "Crew too close to open excavation," "no respiratory [sic] protection while
19 milling," "crew standing near excavation with out [sic] harness": Any one of those
20 violations could lead to injury, productivity loss, lawsuits and equipment damage—all
21 increasing customer cost and decreasing service reliability.

22 Nowhere does Mr. Sullivan acknowledge that Anchor's violations are Pepco's
23 responsibility. Nowhere does he acknowledge that these violations might have a source in
24 Pepco's methods for selecting contractors and its failure to monitor them. Nowhere does
25 he acknowledge dangers and offer ideas for preventing them. Maybe he has no need to,
26 because like Pepco said, "[t]he data speaks for itself."⁷ Indeed it does.

⁵ Sullivan Rebuttal at 3:10.

⁶ Sullivan Rebuttal at 3:15.

⁷ Pepco Response to Laborers' DR 2-7 (attached to my Direct Testimony).

1 Presumably Pepco chose a rebuttal witness whose attitude reflects Pepco's. That
2 attitude—avoidance and indifference—is the proof this Commission needs to act.

3 **Q. You testified that by not having Pepco use Project Labor Agreements (PLAs),**
4 **Exelon has violated its merger commitment to bring to Pepco Exelon's "best**
5 **practices."⁸ Mr. Sullivan says that Exelon never promised PLAs, and that PLAs are**
6 **not "best practices."⁹ How do you respond?**

7 **A.** Instead of getting serious about labor safety and productivity, Mr. Sullivan is playing
8 word games. True, in the merger case Exelon never committed specifically to PLAs. But
9 Exelon never committed specifically to any of its "best practices"—yet it talked of best
10 practices repeatedly.¹⁰ Unless we treat Exelon's repetition as deceptive advertising—
11 mantras designed merely to induce merger approval without making merger
12 commitments¹¹—we need to take Exelon at its word: In return for Exelon getting control
13 of Pepco's monopoly franchise, and in return for PHI's shareholders getting a \$1.2 billion
14 gain, Exelon committed to bring to Pepco Exelon's best practices.

15 So then one must ask: Are PLAs one of Exelon's "best practices"? How could
16 they not be? I was not present at the ComEd-union negotiations that produced Exelon's
17 PLAs. But I doubt that the unions somehow clubbed a multi-billion-dollar utility into

⁸ Hempling Direct at 30:4 to 31:4.

⁹ Sullivan Rebuttal at 4:2 to 4:7.

¹⁰ *See. e.g.*, Formal Case 1119, Exelon's Application at 15 (filed June 18, 2014) (promising that "the Merger will...provide a clearinghouse of best practices which will lead to operational and infrastructural improvements . . ."); *id.* at 19 (promising that "the sharing of resources and best practices among the combined companies . . . will produce direct and traceable financial benefits to District of Columbia customers"); *id.* at 20 (promising that "the Merger will . . . allow Pepco to leverage best practices shared across the Exelon enterprise"); *id.* at 23 (promising that "the sharing of best practices will benefit utility operations and customer service at all levels").

¹¹ *See* <http://www.learnersdictionary.com/definition/mantra> (defining "mantra" as "a word or phrase that is repeated often or that expresses someone's basic beliefs").

1 submission so it would accept an imprudent arrangement. It is more realistic to assume
2 that a project-specific contract—one that establishes the terms and conditions by which
3 contractors and workers cooperate on pay, benefits, safety measures, training and
4 apprenticeships—is an unambiguously effective way to ensure productivity, safety and
5 cost-effectiveness, all to the benefit of the utility's customers. It sounds like a “best
6 practice” to me. Nowhere does Mr. Sullivan explain why it is not.

7 8 **Conclusion**

9 **Q. What are your concluding comments?**

10 **A.** Here's how Pepco could have responded to BWLDC:

11 Pepco and Laborers both want workers to perform safely and cost-
12 effectively for the customers. We share this premise: Worker productivity
13 and worker safety depend on proper worker treatment. And we share this
14 logic: Choosing contractors primarily based on price, while establishing
15 requirements that condition profit on performance, leads contractors to
16 undercompensate their workers. From these commonalities, Pepco and
17 Laborers—two entities critical to customer service—will join to solve the
18 problems without Commission intervention.

19 Instead, Mr. Sullivan failed to engage, completely. For each substantive point I made, he
20 provided no substantive response:¹² Consider:

21
¹² All citations are to Hempling Direct Testimony.

1
2

Contractor Treatment of Workers: Pepco’s Failure to Engage

Hempling Direct	Sullivan Rebuttal
<i>Treatment of Workers Affects Workers’ Performance</i>	
Contractors' labor practices—on worker pay, benefits, training, and working conditions—affect construction quality, productivity, safety and costs—all of which affect rates and service quality. (10:20)	No response
If compensation affects executives' performance, compensation must also affect workers' performance. (2:4)	No response
<i>Pre-selection, Pepco Pays Insufficient Attention to How Contractors Treat Workers</i>	
Bidding processes based primarily on price affect worker safety, product safety, product quality and project timeliness. (12:23)	No response
In choosing contractors, Pepco asks almost nothing about how their labor policies affect their workers—nothing about hours, compensation, health insurance, skill development, or retirement benefits. (13:7)	No response
By paying fixed project fees to contractors selected based primarily on price and by setting no minimum requirements, Pepco makes it profitable for contractors to underpay workers. (11:18-20, 15:18)	No response
<i>Pre-selection, Pepco Pays Insufficient Attention to How Contractors Treat Workers</i>	
As a general practice, Pepco does not directly monitor its suppliers’ pay practices. (19:7)	No response
Pepco does not track claims and damages cost data by construction contractor. (19:14)	No response
Pepco has established no clear consequences for contractors that mistreat workers. (12:1)	No response

1

2 **Q. Does this conclude your surrebuttal testimony?**

3 **A.** Yes.