

945 E- 664

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1333 H STREET, N.W., WASHINGTON, D.C. 20005

ORDER

FORMAL CASE NO. 945, PHASE II, IN THE MATTER OF THE
INVESTIGATION INTO ELECTRIC SERVICE MARKET COMPETITION AND
REGULATORY PRACTICES. Order No. 12071

July 31, 2001

Before the Commission:

Angel M. Cartagena, Jr., Chairman
Edward M. Meyers, Commissioner
Agnes A. Yates, Commissioner

APPEARANCES:

Mindy Herman and Paul H. Harrington for *Potomac Electric Power Company*; Elizabeth A. Noel, Sandra Mattavous-Frye, Barbara L. Burton, Phyllis G. Kimmel, John M. Adragna, James Byrd, and Lawrence Thurston for *Office of the People's Counsel*; Frann G. Francis for *Apartment & Office Building Association*; Herbert Harris for *District of Columbia Consumer Utility Board*; Leslie H. Nelson for *District of Columbia Government*; Robert I. White for *D.C. Water and Sewer Authority*; Brian Lederer for *International Brotherhood of Electric Workers*; Excetral K. Caldwell for *Washington Gas Light Company*; Joseph J. Zimmerman for *Washington Metropolitan Area Transit Authority*; Belva D. Newsome, *Moore Energy Resources, Incorporated*; Timothy R. Robinson, General Counsel, and Lawrence D. Crocker, Senior Attorney Advisor, for the *Public Service Commission*.

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia (the "Commission") adopts an interim market monitoring program, pursuant to and in compliance with Section 112 of the Retail Electric Competition and Consumer Protection Act of 1999 (the "Act").¹ The Commission also accepts for filing the "Reply of the Washington Metropolitan Area Transit Authority (WMATA) to the Office of the People's Counsel's Reply Comments respecting Market Monitoring Proposals," filed on December 13, 2000.

2. Upon review of the record in this proceeding, and after balancing the interests of all the parties to this case, the Commission finds that the interim market monitoring program established by this Order and attached hereto as Exhibit A (the "Interim Program") is fair, reasonable, and in the public interest. The Interim Program includes a combination of the various market monitoring proposals submitted by the parties. As detailed below, the primary monitoring mechanisms of the Interim Program, the Interim Retail Electric Choice Monthly Report Form (the "Interim Monthly Report Form") and the Interim Retail Electric Choice Yearly Report (the "Interim Yearly Report Form") (together, the "Interim Report Forms"), will be filed by PEPCO on a monthly and yearly basis, respectively, beginning with the August 2001 period. The Interim Monthly Report Form filed by PEPCO will include information for PEPCO and the licensed electricity suppliers in the District of Columbia (the "District"), including the number of customers and customers' demand and usage. The Interim Yearly Report Form will include revenue-billed information for PEPCO and the licensed electricity suppliers in the District. The Interim Report Forms will provide the Commission and OPC with all necessary information to comply with their respective market monitoring functions set forth in Section 112 of the Act. The Commission finds that the Interim Program and the Interim Report Forms avoid more complicated procedures that would be unnecessary, costly, and time consuming, given the nascent stage of competition in the District. For these and other reasons detailed more fully in this Order, the Commission adopts the Interim Program and Interim Report Forms discussed in this Order.

3. Further, the Commission emphasizes, as discussed below, the importance of the coordination of market monitoring activities at the regional level. The Commission finds that retail electricity consumers in the District may be served by suppliers that provide service throughout the region, not just in the District. The Commission also notes that the retail market is directly affected by the activities of the regional market for electricity and by the regional transmission system. As such, the Interim Program provides that the Commission will continue to coordinate and cooperate with federal authorities, the PJM, other regional organizations and other state commissions in order to ensure that the unjust exercise of market power at the regional level is investigated and effectively controlled by those entities with authority to do so. The parties are strongly encouraged to provide input to the Commission during this monitoring process.

¹ Retail Electric Competition and Consumer Protection Act of 1999, D.C. Law 13-107 ("the Act").

II. BACKGROUND

4. On September 18, 2000, the Commission issued Order No. 11796, which, among other things, required the Working Group established in connection with Case No. 945 (the "Working Group") to address the following issue within 60 days of the date of that Order: "What are viable procedures or mechanisms for effectively monitoring market power on an ongoing basis?"² The Commission further stated: "To the extent that the Parties fail to reach consensus, the individual Parties may submit non-consensus recommendations by that date."³

~~5. On November 17, 2000, the Commission received non-consensus market monitoring proposals and/or comments from: (1) the District of Columbia Government ("DCG") and the District of Columbia Water and Sewer Authority ("WASA"), filing jointly (the "DCG/WASA Proposal"); (2) Office of the People's Counsel of the District of Columbia ("OPC") (the "OPC Proposal") and (3) Potomac Electric Power Company ("PEPCO"), filing on behalf of itself, FirstEnergy Services Corp. ("FirstEnergy"), the International Brotherhood of Electrical Workers, Local 1900 ("IBEW"), NewEnergy, Inc. ("NewEnergy"), Washington Gas Light Company ("WGL"), and Washington Metropolitan Area Transit Authority ("WMATA") (the "PEPCO Proposal"). The PEPCO Proposal requested that the members of the Working Group be allowed to file reply comments by December 1, 2000 because no consensus had been reached among the parties of the Working Group.⁴~~

6. On December 1, 2000, PEPCO, on behalf of all members of the Working Group, asked the Commission to extend the deadline for reply comments to December 8, 2000. The Commission issued Order No. 11858 on December 7, 2000, granting the Working Group's request for the extension to December 8, 2000. On December 8, 2000, the Commission received reply comments from: (1) PEPCO ("PEPCO Rely"), (2) Enron and FirstEnergy, jointly ("Enron/FirstEnergy Reply"), (3) OPC ("OPC Reply"), (4) the DCG and WASA, jointly ("DCG/WASA Reply"), and (5) NewEnergy ("NewEnergy Reply"). On December 13, 2000, the Commission received the "Reply of the Washington Metropolitan Area Transit Authority (WMATA) to the Office of the People's Counsel's Reply Comments respecting Market Monitoring Proposals."

² Order No. 11796 at 26.

³ Id.

⁴ On November 22, 2000, the Commission received comments dated November 20, 2000 from the U.S. General Services Administration ("GSA") stating that it supports the PEPCO Proposal, and from Enron Energy Services ("Enron") indicating that it supports the PEPCO Proposal and that it had been inadvertently omitted as a filing party to the PEPCO Proposal.

III. THE PARTIES' MARKET MONITORING PROPOSALS AND POSITIONS

A. The PEPCO Proposal and Responses Thereto

7. PEPCO and its joint filers have proposed "market power monitoring requirements," as established by the Maryland Public Service Commission on September 13, 2000.⁵ More specifically, the Maryland model requires PEPCO and other investor-owned electric utilities to file two types of reports: (1) weekly reports, containing the total number of customers (separated into residential and commercial/industrial) enrolled in the retail electric choice programs, and (2) monthly reports, consisting of, for each customer class, (a) the number of accounts participating in the retail choice programs in relation to the total number of active distribution accounts; (b) the total megawatts of demand served by suppliers in the aggregate and in relation to PEPCO's total megawatts of demand of all of its active distribution accounts; and (c) the total number of suppliers servicing customers in each customer class.⁶

8. OPC questions the utility of the PEPCO Proposal and submitted a proposal of its own.⁷ OPC claims PEPCO's sole justification for its proposal is that Maryland uses it; however, OPC points out that there may be differences between Maryland's and the District's legislation, necessitating different Commission responses.⁸ OPC further argues that the PEPCO Proposal does not provide adequate information to address market power issues. For example, OPC asserts that the Maryland requirements submitted by PEPCO only provide a head count and do not facilitate the identification of market failures or anticompetitive conduct.⁹ According to OPC, the Maryland requirements would not detect market conditions such as vertical or horizontal market power or erection of barriers to entry.¹⁰ OPC also claims that the data elicited under the PEPCO Proposal would not detect the exercise of market power such as favorable treatment of affiliates, discriminatory treatment of non-affiliates, or conduct, which increases the costs of rival sellers. It further claims that the PEPCO Proposal also would not provide information regarding market share of participants, and that the information is inadequate to detect whether constraints or load pockets in the regional transmission system are adversely affecting competition in retail markets. Finally, OPC argues that the PEPCO Proposal will not gather the information needed to ascertain redlining.¹¹

⁵ PEPCO Proposal at 2.

⁶ See attachment to PEPCO Proposal.

⁷ OPC Proposal at 4-6.

⁸ OPC Reply Memorandum at 4-6.

⁹ Id. at 5.

¹⁰ Id. at 6.

¹¹ Id. at 7.

9. DCG and WASA believe that the PEPCO Proposal is a starting point for the Commission to monitor market power.¹² They suggest that the Commission must monitor retail prices charged by marketers and electricity suppliers, and to that end, PEPCO should also file revenue and kilowatt-hour data, so as to allow the calculation of cents per kwh for each supplier. This information according to DCG and WASA, could be used to indicate any possible anticompetitive practices. Moreover, they aver that reporting obligations should also apply to broad customer classes, and not to sub-classes of customers.¹³ DCG and WASA also assert that the Commission should review "the costs PEPCO recovers to maintain reliability on its distribution system to ensure these costs are reasonable and do not reflect anticompetitive conduct or conditions that result from transmission constraints or load pockets."

B. The OPC Proposal and Responses Thereto

10. OPC states that its proposal "is workable, affordable, and fully consistent with the Commission's and Office's shared statutory mandate."¹⁴ More specifically, OPC recommends the establishment of a new Market Monitoring Unit, which will track what is happening in the retail electricity market "at any given point in time" and will "afford consumers real protection from anticompetitive and other abuses." OPC's proposed market monitoring unit would be staffed with four full-time professionals who are not associated with "the Commission's enforcement and policy-making functions."¹⁵ OPC asserts that the information to be compiled by the Market Monitoring Unit would be comprehensive enough to shed light on all relevant questions during deregulation while avoiding duplication of functions at the wholesale level. The OPC Proposal emanates from its admittedly broad interpretation of Section 112 of the Act.¹⁶

11. OPC also claims that the information gathered under its plan would draw upon information market participants and PEPCO compile "in the normal course of their businesses so as to minimize the cost and burden of compliance."¹⁷ OPC alleges its proposal would not be a burden or costly for PEPCO or the sellers, because it does not require "the filing of reports to the monitor. Rather, PEPCO would transfer and routinely

¹² DCG/WASA Reply at 4.

¹³ Id. at 7, n. 6.

¹⁴ OPC Recommendation at 4.

¹⁵ Id. at 4.

¹⁶ OPC Proposal at 7.

¹⁷ Id. at 4.

update its customer database to the market monitor.”¹⁸ OPC asserts that EDI will also provide most of the needed data.¹⁹ Under the OPC Proposal, the sellers would provide the rates at which they are selling to customers, and all data would be maintained as confidential, with access highly restricted.²⁰

12. PEPCO has several criticisms of the OPC Proposal. First, PEPCO asserts that the OPC Proposal is broader than provided in Section 112, and it is inconsistent with the intent of the Council of the District of Columbia as manifest in the legislative history of Section 112.²¹ Second, PEPCO states that the OPC Proposal appears to be premised upon a fundamental distrust of competitive markets and an obvious preference for regulation.²² Third, PEPCO asserts that the OPC Proposal is unprecedented and inconsistent with the way the issues are being addressed in other states.²³ Fourth, PEPCO asserts that implementation of the OPC Proposal would be costly for PEPCO and would reduce the benefits of competition because its costs would become transition costs.²⁴ Fifth, PEPCO claims that the OPC Proposal may make it uneconomic for licensed electricity suppliers to participate in this market because of the additional costs imposed by the OPC Proposal.²⁵ Sixth, PEPCO argues that the OPC Proposal would require significant design, development and testing effort and that PEPCO does not have all of the information necessary to comply with the OPC Proposal.²⁶

13. Enron and FirstEnergy also take issue with the OPC Proposal. First, they argue the OPC Proposal is unprecedented and “will work against the establishment and maintenance of competitive retail electric supply markets in Washington, DC and will disadvantage District customers compared to those located in surrounding jurisdictions.”²⁷ Second, they claim that the OPC Proposal requires the submission of “incredibly sensitive and valuable information” to the market monitor who then can transmit it to the Commission. According to Enron and FirstEnergy, any errors could have dire consequences to suppliers, and through ripple effects, to other markets.²⁸ Third, Enron and FirstEnergy argue that the staffing of OPC’s proposed Market

¹⁸ Id. at 4.

¹⁹ Id. at 12.

²⁰ Id. at 4-5.

²¹ PEPCO Reply at 2 and 4.

²² Id. at 9.

²³ Id. at 2-3.

²⁴ Id. at 4.

²⁵ Id. at 10.

²⁶ Id. at 12-13.

²⁷ Enron/FirstEnergy Reply at 4.

²⁸ Id. at 4.

Monitoring Unit and associated costs are inconsistent with deregulation and will inhibit the likelihood that deregulation will lead to lower prices because suppliers will not be able to beat PEPCO's price.²⁹ Finally, Enron and FirstEnergy conclude that the OPC Proposal "will make the District of Columbia a less attractive place to do business."³⁰

14. NewEnergy also opposes the OPC Proposal on the grounds that it is "vague, potentially burdensome on suppliers, utilities and the Commission, and inconsistent with reporting requirements in adjacent states where electric choice has been implemented."³¹ NewEnergy claims that OPC's proposed Market Monitoring Unit is "inconsistent with the goals of deregulation, and, instead, imposes a new layer of re-regulation on the new market participants and utilities. . . . If the costs for this organization were imposed on utilities or suppliers, the benefits of deregulation would be further eroded."³² Finally, NewEnergy states the OPC Proposal is more complex and elaborate than what is required in other states, and provides information regarding market monitoring functions in New York, Pennsylvania, Delaware, and New Jersey.

15. In addition, the DCG and WASA oppose the OPC Proposal because it "overstep[s] the boundaries established by the clear language of the Act" by extending the responsibilities in Section 112 to issues contained in Section 107.³³ They claim that the OPC Proposal ignores the fact that Section 112 "does not confer upon the Commission the type of broad investigatory powers that would be required to implement OPC's desired review of Section 107(f) issues on an ongoing basis," and that authority rests with the DCG's Office of Corporation Counsel.³⁴ In addition, the DCG and WASA are concerned that the OPC Proposal does not adequately protect the confidentiality of consumer information.³⁵ This concern leads WASA to request that, if the Commission accepts a market monitoring program as suggested by OPC, that it permit individual customers to opt out of the program.³⁶

²⁹ Id. at 5.

³⁰ Id. at 6.

³¹ NewEnergy Reply at 1.

³² Id. at 2.

³³ DCG/WASA Reply at 4-5, 12-14.

³⁴ Id. at 5.

³⁵ Id. at 14-17.

³⁶ Id.

C. The DCG/WASA Proposal and Responses Thereto

16. The DCG and WASA propose the adoption of the market monitoring guidelines of the Federal Energy Regulatory Commission ("FERC"), as provided in its Order No. 2000.³⁷ Those guidelines cover such issues as identification of the markets to be monitored, examination of the market structure, compliance with market rules, behavior of individual market participants, market power and abuses, how information will be used and reported, conduct to which sanctions may be applied, and types and frequency of reports. They further state that "any information to be gathered should be the type collected in the ordinary course of business."³⁸

17. PEPCO asserts that the DCG and WASA did not file an actual market monitoring plan; rather, PEPCO claims that they merely identified the subject areas for a plan, as contained in FERC Order No. 2000.³⁹ As such, PEPCO does not offer an analysis of the filing of DCG and WASA. Enron and FirstEnergy have only one comment regarding the DCG/WASA Proposal. They note the lack of a specific program for adoption by the Commission.⁴⁰

IV. DISCUSSION

18. The Commission does not approve or adopt any one complete proposal submitted in this proceeding. Rather, the Commission adopts the Interim Program, attached hereto as Exhibit A, which blends the various proposals and comments submitted by the parties of the Working Group. By combining parts of the parties' recommendations, the Commission believes the Interim Program will protect consumers and interested parties from anticompetitive conditions and conduct as required under Section 112.

19. In adopting a program that blends the parties' proposals, the Commission finds that its market monitoring duties under the Act cannot be construed as unimportant, optional or secondary. Section 112(a) of the Act states that the Commission and OPC "shall monitor the District of Columbia retail markets for electricity supply and services declared by the Commission to be potentially competitive services to ensure that the

³⁷ DCG/WASA Proposal at 2-3.

³⁸ DCG/WASA Comments at 3.

³⁹ PEPCO Reply at 15.

⁴⁰ Enron/FirstEnergy Reply at 6.

markets are not being adversely affected by anticompetitive conduct and anticompetitive conditions.” (emphasis added)⁴¹ Further, the Commission determines that the exercise of market power can be a significant barrier to effective competition in the District, and as such, the Commission approaches its market monitoring obligations seriously.

20. In addition, Section 112(b) gives the Commission authority to take remedial action “to address the impact of the anticompetitive conduct or anticompetitive conditions” that result from transmission constraints or load pockets.⁴² Section 112(b) also provides for Commission coordination with the Office of the Corporation Counsel and federal agencies to address other anticompetitive conduct or conditions.⁴³ In recognition of the integration of the District’s retail markets with the regional system and markets, Section 112(d) authorizes the Commission to participate in meetings and organizations and to enter into agreements at the regional level to monitor and prevent the “acquisition or exercise of market power in the regional transmission system serving the District of Columbia.”⁴⁴

21. The primary retail monitoring mechanisms of the Interim Program and the Interim Reports, will be submitted by PEPCO to both the Commission and OPC on a monthly or yearly basis, as appropriate, beginning with the September 2001 period. The Commission finds that the Interim Reports will provide the Commission and OPC with the information necessary to comply with their respective market monitoring functions set forth in Section 112 of the Act. The Commission also finds that the Interim Program and the Interim Reports avoid more complicated procedures that would be unnecessary, costly and time consuming, given the nascent stage of competition in the District.⁴⁵

22. The Interim Report Forms require that PEPCO provide information about itself and all other licensed electricity suppliers in the District. The Commission finds that through EDI transactions and billing in the ordinary course of business, PEPCO is in a superior position to gather and provide all necessary information relating to itself and electricity suppliers. In addition, the Commission finds that monthly and yearly reports, rather than weekly reports, will adequately inform the Commission about market conditions.

⁴¹ Section 101(4) of the Act defines “anticompetitive condition” as “a condition which would allow a party to: (A) Exercise vertical or horizontal market power; (B) Use the ownership or control of a regulated facility to favor an unregulated affiliate or subsidiary or to discriminate against a non-affiliated entity; (C) Erect a barrier of entry; or (D) Compete unfairly or deny effective competition to consumers.” Section 101(5) of the Act defines “anticompetitive conduct” as “an activity which would: (A) Violate any applicable antitrust law; (B) Constitute favorable treatment of an affiliate; (C) Discriminate against a non-related entity; (D) Constitute a barrier of entry; or (E) Confer an unfair competitive advantage on an entity.”

⁴² Act at Section 112(b)(1).

⁴³ Act at Section 112(b)(2)(A) and 112(b)(2)(B).

⁴⁴ Act at Section 112(d)(1) and 112(d)(2).

⁴⁵ See WMATA Reply at 7.

23. The Interim Program and the Interim Report Forms further provide that most of the data contained in the Interim Reports shall be kept confidential by PEPCO, the Commission, OPC, and all other parties, with customary exceptions to comply with the Act, other laws, and court orders. Only non-supplier specific, non-customer class specific data provided in Part B of the Interim Monthly Report Forms will be available to the public through the Commission's web site. The Commission agrees in general with the concerns of some parties regarding the confidentiality of information in the Interim Report Forms.⁴⁶ As such, the Commission determines that these confidentiality provisions properly balance the need to protect the business data of PEPCO and the electricity suppliers and data regarding customer classes, which may be sensitive, while allowing the Commission to fulfill its statutory obligations.

24. The Commission finds that the Interim Program, rather than a permanent program, will facilitate Commission and OPC execution of their Section 112 duties currently, while recognizing the fact that the monitoring function may need to evolve as competition in the District matures. The Commission will re-evaluate and modify, as necessary, the Interim Program beginning on December 31, 2002. Re-evaluation will occur after 16 months of historical data have been collected. However, the Commission may reevaluate and modify, as necessary, the Interim Program at an earlier date, if the Commission determines that an earlier review is prudent.

25. The Commission agrees with OPC that market share information is an important component of the detection of the exercise of market power.⁴⁷ The Commission agrees also with OPC, DCG and WASA that monitoring pricing or revenue information is one basic tool that the Commission must use to fulfill its obligations under Section 112 to monitor markets and ensure that markets are not being adversely affected.⁴⁸ At the same time, however, the Commission finds that PEPCO and other parties have raised legitimate concerns regarding the OPC Proposal.

26. The Commission disagrees with OPC's contention that its proposal "would impose virtually no additional burden or costs" on PEPCO and the electricity suppliers.⁴⁹ PEPCO has responded to OPC's claim by outlining the specific costs that PEPCO asserts would be incurred under the OPC Proposal.⁵⁰ Without deciding the merits of each specific cost outlined by PEPCO, the Commission finds that the OPC Proposal would result in unacceptably high costs imposed on PEPCO, the licensed electricity suppliers, and ultimately the retail consumers.⁵¹

⁴⁶ See DCG/WASA at 14-17 and Enron/First Energy Reply at 3-4. The nature of the Interim Report Forms and confidentiality provisions adopted herein render moot DCG/WASA's suggestion to allow certain customers to "opt-out" of the Interim Program to protect any customer specific data that could be obtained from the Interim Report Forms. See DCG/WASA at 16-17.

⁴⁷ OPC Reply at 7.

⁴⁸ OPC Recommendation at 2 and DCG/WASA Reply at 3-4, 8.

⁴⁹ OPC Recommendation at 4.

⁵⁰ PEPCO Reply at 11-14.

⁵¹ See also Enron/First Energy Reply at 5.

27. Assuming, *arguendo*, that the costs imposed on PEPCO and the licensed electricity suppliers pursuant to the OPC Proposal are not excessive or unnecessary, the Commission still finds that the employment of full-time professionals under a separate office does not comport with the intent of the legislature as manifest in the legislative history of Section 112 of the Act. As PEPCO reiterates, Section 112 of the Act represents a significant departure from the more comprehensive and detailed nature of its originally proposed language.⁵² Therefore, Section 112 reflects the Council's intent to limit, and not expand, the scope of the Commission's and OPC's roles.

28. The Commission rejects OPC's contention that reports submitted under Section 112 should be used to gather information on discrimination, which in turn would be used to monitor compliance with the anti-discrimination provisions of Section 107 of the Act. While OPC is correct that Section 107 does not require that formal complaints be filed to initiate Commission action under Section 107, the Commission finds that Section 107 discrimination claims are not at issue in this proceeding, and as such, the Commission will not decide in this Order how to fulfill its Section 107 obligations.

29. OPC discusses the monitoring of discrimination under Section 107 in connection with the third stated objective of its proposal, namely, "to evaluate the operation of the retail electric markets in the District of Columbia, to detect design flaws in the Commission's orders and regulations on electric markets, and to detect structural problems in the retail electric markets in the District of Columbia that may need to be addressed by orders and regulations of the Commission."⁵³ The Commission agrees that the information gathered under the Interim Program pursuant to Section 112 may actually inform the Commission regarding flawed regulations dealing broadly with the electric industry. Nonetheless, the Commission concludes that the types of information gathered under the market monitoring authority of Section 112 should not be expanded beyond the types of information that are necessary for the detection of anticompetitive conditions and conduct that affect the retail markets because such additional information gathering does not comport with the scope of the statutory mandate of Section 112.

30. Additionally, the Commission finds that the OPC Proposal is insufficiently supported and overbroad. The OPC Proposal does not set forth in sufficient detail the specific tasks, functions, and duties of its proposed Market Monitoring Unit. The Commission determines that more detail is necessary in order to determine that the significant expense of establishing and operating a separate unit for market monitoring (rather than utilizing existing District and regional resources) is in the public interest. This is particularly true in this situation because these expenses would ultimately be borne by the ratepayers. In addition, the Commission agrees that the expenditures that

⁵² PEPCO Reply at 7-9.

⁵³ OPC Recommendation at 8, n. 5.

likely would be incurred by PEPCO, licensed suppliers, and the Commission to initially establish the information systems and electronic data protocol, and to monitor and conduct the reporting and analysis of the information discussed in the OPC Proposal would be excessive and discourage new suppliers from entering the District.⁵⁴

31. Moreover, the Commission finds that the broad monitoring goals that underlie the OPC Proposal will be fulfilled at the regional level by the Commission and other entities, such as the Federal Energy Regulatory Commission and a collaborative of state utility commissions.⁵⁵ In this regard, the Commission agrees with WMATA that the District's and regional markets cannot easily be defined, divided, and separated for purposes of monitoring the exercise of market power.⁵⁶ The Commission recognizes that the development and activities of the regional electricity market and the regional transmission system, including any exercise of market power, directly affect retail customers. In addition, suppliers that provide service regionally, not just in the District, may undertake anticompetitive activities throughout the region, which may require coordinated monitoring and remedial responses by agencies and entities throughout the region. Also, due to the nature of the District's position in the PJM region, looking solely to retail market monitoring functions is not adequate. The regional relationships apparent in the PJM make it vital that the Commission have access to, and understanding of regional markets, which impact inexorably on the local retail markets.

32. In recognition of the integrated nature of the District's retail market with the regional system, Section 112(d) of the Act specifically authorizes the Commission to undertake various actions related to the regional systems in order to monitor and prevent the regional exercise of market power. Thus, in addition to the Interim Report Forms established by this Order, the Commission will continue to collaborate with other governmental and industry entities' as they monitor the regional market in order to fulfill our duties under the Act. Accordingly, the Commission will remain informed of developments in the regional market through participation in the PJM State Liaison Committee and Staff Subcommittee meetings. In addition, the Commission will continue to work with the PJM Market Monitoring Unit to identify potential abuses of market power in the PJM market.⁵⁷ Finally, the Commission will continue to cooperate and coordinate, as necessary, with the PJM, FERC, other federal agencies and entities, and other state commissions in any investigations and/or prosecutions of the exercise of market power in the regional market.⁵⁸ Such cooperation may include, but shall not be

⁵⁴ See PEPCO Reply at 11-14; WMATA Reply at 5-6.

⁵⁵ See PEPCO Reply at 4-11; WMATA Reply at 2.

⁵⁶ WMATA Reply at 3-4. The fact, however, that electricity markets are not easily defined for purposes of monitoring market power does not and cannot vitiate the Commission's monitoring obligations under Section 112 of the Act.

⁵⁷ See PJM Interconnection, L.L.C., Order Approving Market Monitoring Plan As Modified, 86 FERC (CCH) ¶ 61,247 at 61,890-891 (March 10, 1999) (describing the coordination of the PJM Market Monitoring Unit with state commissions).

⁵⁸ DCG and WASA assert that the Commission, under Section 112(a) of the Act, should directly monitor PEPCO's wholesale costs relating to fulfilling reliability needs in order to identify anticompetitive conduct in the wholesale markets. See DCG/WASA Reply at 8-12. In response, as DCG and WASA themselves

limited to, participation in regional organizations and entering into agreements with other state commissions in order to share information and coordinate activities that will result in the effective monitoring and prevention of market power abuses in the regional system. For example, the Commission believes that a council of state commissions, working in partnership with the PJM in its market monitoring actions, would help to prevent market power abuses. The Commission determines that regional coordination and cooperation will create a broad information base and provide more effective consumer protection, particularly when combined with a reasonable level of retail market monitoring in the District.

33. The Commission also finds that the PEPCO Proposal falls short of fulfilling the requirements of Section 112 of the Act, even at this early stage of transition to retail electric competition. No market share, market concentration, or financial information is reported under the PEPCO Proposal. The Act, however, indicates that market share, market concentration, and financial information may be necessary to adequately monitor the market. Specifically, the extent of the Commission's and OPC's monitoring obligation is amplified by the definitions of "anticompetitive conduct" and "anticompetitive conditions" in the Act.⁵⁹ Significantly, the Commission notes that the definition of "anticompetitive conditions" includes, among other things, the "[e]xercise of vertical or horizontal market power."⁶⁰ Market share, market concentration, and revenue information are important tools in the detection of market power.⁶¹ The Commission, therefore, determines that anticompetitive conditions and conduct often can be manifest and detected in the retail market through analysis of retail market share, market concentration, and revenue billed. As such, the Commission finds that it cannot fulfill the responsibility assigned to it under Section 112 based on the minimal, non-financial data and non-market share data that would be reported under the PEPCO Proposal.

34. Regarding DCG's and WASA's reference to FERC Order No. 2000,⁶² the Commission finds that DCG and WASA have not submitted a plan, based on the guidelines of FERC Order No. 2000, that the Commission can evaluate. Thus, there is no proposal to evaluate. Nonetheless, the Commission finds that the Interim Program and Interim Report Forms adopted herein are not in conflict with FERC Order No. 2000.⁶³

mention (see DCG/WASA Reply at 10), the Commission notes that it may not have the requisite jurisdiction to require that PEPCO's wholesale costs relating to fulfilling reliability needs be reported directly to the Commission as part of the Interim Program. Nonetheless, as more fully set forth in this Order, the Commission will continue to participate in monitoring as conduct or conditions in the regional market to ensure that the District's retail markets for electricity supply or other competitive services are not adversely affected by anticompetitive conduct or conditions in the regional market.

⁵⁹ See note 38, *supra*, for these definitions.

⁶⁰ See Act, § 101(4).

⁶¹ OPC Reply Memorandum at 7. See also DCG/WASA at 3-4, 8.

⁶² Regional Transmission Organizations, FERC Order No. 2000, Issued December 20, 1999, 65 FR 809 (January 6, 2000), available at <<http://www.ferc.fed.us/news1/rules/pages/order2000.htm>>.

⁶³ In Order No. 2000, the FERC specifically states that: "We note, however, that the market monitoring function for the RTO does not limit the ability of each state within the RTO's region or other authorities to decide the nature and extent of its own market monitoring activities." Order at 465.

Further, the regional wholesale market monitoring activities established pursuant to the FERC Order issued on March 10, 1999⁶⁴ do not conflict with or otherwise limit the Commission's ability to adopt a retail market monitoring program for the District that is in the public interest of the District's retail electricity consumers. Moreover, as discussed previously, the Commission will continue to participate actively in monitoring the regional market in order to fulfill its duties under the Act.

35. On balance, therefore, the Commission finds that the market monitoring functions conducted by the Commission and OPC under Section 112 of the Act should be flexibly designed so as to fulfill current needs in monitoring potential anticompetitive conduct and conditions, while recognizing that modifications may be necessary in the future as the structure of relevant markets become more clearly defined. The Interim Program and the Interim Report Forms, attached hereto as Exhibit A, achieve this goal in accordance with Section 112 of the Act and the public interest.

THEREFORE, THE COMMISSION ORDERS THAT:

36. The Interim Program and Interim Report Forms, attached hereto as Attachment A and discussed herein, are **APPROVED**;

37. The "Reply of the Washington Metropolitan Area Transit Authority (WMATA) to the Office of the People's Counsel's Reply Comments respecting Market Monitoring Proposals," filed on December 13, 2000, is **ACCEPTED** for filing;

38. The market monitoring proposal submitted on November 17, 2000, by the Potomac Electric Power Company, on behalf of itself, FirstEnergy Services Corp., the International Brotherhood of Electrical Workers, Local 1900, NewEnergy, Inc., Washington Gas Light Company, and Washington Metropolitan Area Transit Authority is **GRANTED** in part, and **DENIED** in part;

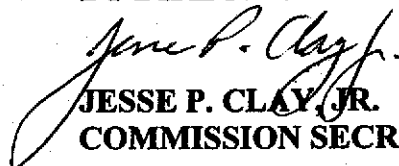
39. The market monitoring proposal submitted on November 17, 2000, by the Office of the People's Counsel of the District of Columbia is **GRANTED** in part, and **DENIED** in part; and

40. The market monitoring proposal jointly submitted on November 17, 2000, by the District of Columbia Government and the District of Columbia Water and Sewer Authority is **GRANTED** in part, and **DENIED** in part.

A TRUE COPY:

BY DIRECTION OF THE COMMISSION:

CHIEF CLERK


JESSE P. CLAY, JR.
COMMISSION SECRETARY

⁶⁴ PJM Interconnection, L.L.C., Order Approving Market Monitoring Plan As Modified, 86 FERC (CCH) ¶ 61,247 (March 10, 1999) (approving a market monitoring unit of the PJM and requiring that it coordinate and cooperate with state governmental authorities through reporting to and consultation with those state agencies).

**ATTACHMENT A:
INTERIM MARKET MONITORING PROGRAM**

I. Introduction

Pursuant to Section 112 of the Retail Electric Competition and Consumer Protection Act of 1999 (the "Act"), the Public Service Commission of the District of Columbia (the "Commission") sets forth herein the Interim Market Monitoring Program (the "Interim Program"). The Interim Program was adopted by the Commission in Order No. 12071, dated July 31, 2001.

II. Interim Report Forms

The information gathering mechanisms of the Interim Program are the Interim Retail Electric Choice Monthly Report Form (the "Interim Monthly Report Form") and the Interim Retail Electric Choice Yearly Report Form (the "Interim Yearly Report Form") (together, the "Interim Report Forms"), which are attached hereto. The Potomac Electric Power Company ("PEPCO") shall prepare and submit the Interim Report Forms to both the Commission and the Office of the People's Counsel ("OPC") on a monthly or yearly basis, as applicable, beginning with the September 2001 period. The Commission and OPC shall receive each calendar month's Interim Monthly Report on or before the fifteenth day of the following calendar month; however, if the fifteenth day should fall on a Saturday, Sunday or a Commission holiday, the Commission and OPC shall receive the Interim Monthly Report on or before the next business day. The Commission and OPC shall receive each Interim Yearly Report on or before September 15 of each year, beginning on September 15, 2002; however, if September 15 should fall on a Saturday, Sunday or a Commission holiday, the Commission and OPC shall receive the Interim Yearly Report Form on or before the next business day. PEPCO shall provide the Interim Reports separately to both the Commission and OPC in electronic format as a spreadsheet file that may be opened and properly viewed with Microsoft Excel software, or in such other electronic format as may be agreed upon by the Commission, OPC and PEPCO, and as a printed, paper copy.

The Interim Monthly Report shall contain data regarding customer accounts, demand, and energy for each of the licensed electricity suppliers in the District and PEPCO, as set forth in the attached Interim Monthly Report Form. The data contained in Part B of the Interim Monthly Report summarizes the information contained in Part A, such that Part B may be published by the Commission on its web site. The Interim Yearly Report Form shall contain revenue-billed data for each of the licensed electricity suppliers in the District and PEPCO, as set forth in the attached Form of Interim Yearly Report Form.

The Interim Reports submitted by PEPCO contain customer class columns relating to PEPCO's rate schedules. In addition, Part A of the Interim Monthly Report Forms and the Interim Yearly Reports submitted by PEPCO must list all of the licensed electricity suppliers in the District along row headings and by name. Data for all licensed electricity suppliers and PEPCO shall be provided to the Commission by PEPCO every month, even

if the reported figures are zeros or where no activity or service is currently being provided. Data for licensed electricity suppliers shall be provided by PEPCO to the Commission beginning with the calendar month in which such supplier's license was granted.

To the extent that PEPCO does not possess the data regarding any electricity supplier which is required to complete the Interim Report Forms, PEPCO shall request such data from the electricity supplier sufficiently in advance of the due date of the respective Interim Report such that the electricity supplier shall have a reasonable period of time to gather and remit the data to PEPCO. Any electricity supplier that receives such a data request from PEPCO shall provide the requested data to PEPCO within 7 business days upon receipt of the request.

All data contained in Part A of the Interim Monthly Report Form and in the Interim Yearly Report Form shall be kept confidential by PEPCO, the Commission, OPC, and all other parties, as more specifically provided in the forms of Interim Report Forms, attached hereto. The data contained in Part B of the Interim Monthly Report Form shall be published by the Commission on its web site.

III. Regional Coordination

The Commission shall also continue to involve itself in both existing and future monitoring of the regional market. The Commission will continue to participate in the PJM State Liaison Committee and Staff Subcommittee meetings. The Commission will work with the PJM Market Monitoring Unit to identify potential abuses of market power in the PJM market. We will cooperate and coordinate, as necessary, with the PJM, FERC, other federal agencies and entities, and other state commissions in any existing or future monitoring, investigations and/or prosecutions of the exercise of market power in the regional market. Such cooperation and coordination may include, but shall not be limited to, participation in regional organizations and entering into agreements with other state commissions in order to share information and coordinate activities that will result in the effective monitoring and prevention of market power abuses in the regional system.

INTERIM RETAIL ELECTRIC CHOICE MONTHLY REPORT FORM

PART A†

Customer Classes (PEPCO Rate Schedules)

	R	AE	Time of Use	RAD	Small Commercial*	Other Commercial	Total
I. Number of Customer Accounts							
A. Retail Electric Choice Service							
Supplier A**							
Supplier B							
Supplier C							
SUBTOTAL							
B. Standard Offer Service (SOS)							
C. TOTAL (A+B)							
II. Customer Demand (MW)							
A. Retail Electric Choice Service							
Supplier A**							
Supplier B							
Supplier C							
SUBTOTAL							
B. Standard Offer Service (SOS)							
C. TOTAL (A+B)							

INTERIM RETAIL ELECTRIC CHOICE MONTHLY REPORT FORM

PART A CONTINUED†

III. Customer Energy (MWH)							
A. Retail Electric							
Choice Service							
Supplier A**							
Supplier B							
Supplier C							
SUBTOTAL							
B. Standard Offer							
Service (SOS)							
C. TOTAL (A+B)							

† All data contained in PART A of this Interim Monthly Report Form, including supplier names, supplier specific data and customer class specific data, shall be kept confidential by PEPCO, the Public Service Commission of the District of Columbia (the "Commission), the Office of the People's Counsel of the District of Columbia ("OPC"), and all other persons. Further, any filings, complaints or other documents which are related to or refer to the data contained in PART A of this Interim Monthly Report Form and which are submitted by PEPCO, OPC or the Commission in connection with any proceeding before the Commission or any other governmental or adjudicatory body shall have the names of suppliers and PEPCO redacted from all publicly available versions of such filings, complaints or documents. Notwithstanding the above, the Commission or the OPC may only reveal proprietary data contained in this report to the public in order to comply with any order of a court of competent jurisdiction.

* For purposes of this report, Small Commercial customers are defined in Section 1-3 of the Interim Electric Consumer Protection Standards. See Order No. 11796, Attachment A.

** Each electricity supplier which is licensed as an Electricity Supplier by the Public Service Commission of the District of Columbia as of the date of this report must be listed in this report by name, rather than as "Supplier A" or "Supplier B".

INTERIM RETAIL ELECTRIC CHOICE MONTHLY REPORT FORM

PART B†

	Residential	Non-Residential	Total
I. Number of Customer Accounts			
A. Total of All Licensed Electricity Suppliers			
B. PEPCO Standard Offer Service (SOS)			
C. TOTAL (A+B)			
D. Percentage of Customers Enrolled with Licensed Electricity Suppliers			
II. Customer Demand (MW)			
A. Total of All Licensed Electricity Suppliers			
B. PEPCO Standard Offer Service (SOS)			
C. TOTAL (A+B)			
D. Percentage of Customer Demand served by Licensed Electricity Suppliers			

† All data contained in PART B of this Interim Monthly Report Form shall be published on the web site of the Public Service Commission of the District of Columbia.

INTERIM RETAIL ELECTRIC CHOICE YEARLY REPORT FORM

Customer Classes (PEPCO Rate Schedules)

	R	AE	Time of Use	RAD	Small Commercial*	Other Commercial	Total
I. Revenue Billed (\$)							
A. Retail Electric							
Choice Service							
Supplier A**							
Supplier B							
Supplier C							
PEPCO***							
SUBTOTAL							
B. Standard Offer							
Service (SOS)							
C. TOTAL (A+B)							

† All data contained in this Interim Yearly Report Form, including supplier names and supplier specific data, shall be kept confidential by PEPCO, the Public Service Commission of the District of Columbia (the "Commission"), the Office of the People's Counsel of the District of Columbia ("OPC"), and all other persons. Further, any filings, complaints or other documents which are related to or refer to the data contained in this Interim Yearly Report Form and which are submitted by PEPCO, OPC or the Commission in connection with any proceeding before the Commission or any other governmental or adjudicatory body shall have the names of suppliers and PEPCO redacted from all publicly available versions of such filings, complaints or documents. Notwithstanding the above, the Commission or OPC may only reveal proprietary data contained in this report to the public in order to comply with any order of a court of competent jurisdiction.

* For purposes of this report, Small Commercial customers are defined in Section 1-3 of the Interim Electric Consumer Protection Standards. See Order No. 11796, Attachment A.

** Each electricity supplier which is licensed as an Electricity Supplier by the Public Service Commission of the District of Columbia as of the date of this report must be listed in this report by name, rather than as "Supplier A" or "Supplier B".

***Reflects revenues billed by PEPCO for distribution services associated with electric power provided by an electricity supplier. The revenues for the electric power billed by electricity suppliers are included in the revenues for Supplier A, Supplier B, Supplier C, etc.