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Council President Roger Berliner  
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100 Maryland Avenue  
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Council President Berliner,

First, I wish to thank you for meeting with me yesterday regarding public power. It was an enlightening conversation and I appreciate your support of public power and understand your reservations regarding the county attorney's public power memo.

As you asked, I am putting down my thoughts regarding the memo, including the additional information we discussed regarding the Pepco franchise. My concerns lie with what is not addressed in the memo that, from a policy and administrative perspective, should be discussed. These missing points lead me to question the work's overall quality and to believe its reasoning may well be faulty.

#### **No mention of existing public power utilities in Maryland**

If assigned to examine the creation of a public power utility in Maryland, the first task should be to see if it has been done before and if such utilities currently exist in the state. Today, there are five such utilities in Maryland: Berlin, Easton, Hagerstown, Thurmont and Williamsport. Nowhere in the memo is there a mention of existing municipal utilities: it treats the subject as if such utilities are aliens to our planet, and not functioning government departments in our state.

The entire subject would be illuminated by even a brief description of these utilities. If you re-read the memo with this missing data in mind, you can see the questions that arise. Why does the memo insist that Montgomery County must form a non-profit corporation to run a utility when no other Maryland municipal electric utility has one? How did these public power utilities receive a franchise and approval from the PSC to operate and can we do the same? Did these municipalities condemn lines, or build their own systems? The memo would move from the merely speculative to a more concrete and meaningful analysis of the topic, if these existing utilities were discussed.

#### **No historic review of the Pepco franchise in Montgomery County**

The memo glosses over many important points about the history of the state-granted franchise in Montgomery County and the role of the PSC in its current operation. It is this franchise the memo uses as the basis to say that the county would need consent from the General Assembly to condemn the lines.

The *Pepco Work Group Final Report* from April 2011, *Appendix E* (attached) details the history of the franchise with supporting documentation. Below is a brief summary.

The memo makes a footnoted reference to the state-granted franchise to operate in Montgomery County through Pepco's purchase of the assets of the Great Falls Power Company. Granted first in 1894

and revised in 1900, state legislation gave Great Falls a non-exclusive and perpetual electric franchise for our county. In 1947, Great Falls Power Company transferred its assets to Washington Railway and Electric Company, which then transferred all of its assets, including the Great Falls franchise, to Pepco.

*It is important to note that Pepco operated in Montgomery County from 1927 until 1953 under a franchise agreement with the county.* On June 11, 1952, Pepco filed an application with the Montgomery County Council for a non-exclusive, twenty five year franchise (commencing August 9, 1952), in renewal of the existing franchise granted by the county August 9, 1927 . However, after the county approved the new franchise agreement September 16, 1952, Pepco, on its own initiative, filed a petition with the Maryland Public Service Commission on October 14, 1952 to use the Great Falls franchise and be authorized to operate in Montgomery County. The PSC agreed and its May 15, 1953 order authorizes Pepco to operate to this day.

My concern is with the assumptions behind the memo's discussion of Pepco's right to exercise a franchise. From a policy perspective, operating a utility is a two-step process—a franchise and the authorization from the PSC to exercise the franchise. As Maryland code states “A public service company may not exercise a franchise granted by law except to the extent authorized by the Commission.” The memo treats the Pepco franchise as if it was received on stone tablets from a mountaintop, complete and insoluble. The history is much more complicated and the memo should have a more detailed examination of what was actually granted by the state in 1900, if a right to exercise a franchise was given by the General Assembly if it requires PSC authority to actually exercise the franchise, and what would happen if the PSC withdrew Pepco's authority to exercise its franchise. A more complete understanding of the franchise, past and present, may well set aside the odious notion of appealing to the General Assembly for condemnation authority.

### **The memo paints an incomplete picture**

These are some concerns based on a policy, administrative and historic perspective, regarding missing details key to understanding the situation we are in. And these are not obscure points, but easily researched, basic questions. How can we know the extent of our public power options without examining such utilities operating in our state today? How can we understand a franchise to operate a utility in Montgomery County without a better examination of how Pepco's came to be? To reiterate an earlier point, if you re-read the memo with these questions in mind, its flaws come to light.

My sense is that the topic has outstripped the expertise available within the county attorney's office. I urge the county council to seek outside council with experience in utility municipalization to better frame the legal issues surrounding the creation of public power.

Thank you for your time and attention to this letter. I am available at your convenience either by mobile phone at 202-262-9152 or by email at [ericjhensal@murrayhillweb.com](mailto:ericjhensal@murrayhillweb.com) for any questions.

Regards,



Eric Hensal