BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

In the Matter of the Merger of	**)**	
Exelon Corporation, Pepco Holdings	**)**	
Inc., Potomac Electric Power Company,	**)**	**Formal Case No. 1119**
Exelon Energy Delivery Company, LLC,	**)**	
and New Special Purpose Entity, LLC	**)**	

INITIAL POST-HEARING BRIEF

OF THE

OFFICE OF THE PEOPLE'S COUNSEL

May 13, 2015

Table of Contents

I. INTRODUCTION.....1

II. EXECUTIVE SUMMARY 6

A. On Scale, Shareholders are the Principal Beneficiaries of the Measurable Benefits Associated with the Proposed Transaction.....7

B. Exelon's Acquisition of Pepco is Not in the Public Interest. 8

III. PROCEDURAL BACKGROUND AND MATTERS OF SUBSTANTIVE DUE PROCESS.....14

A. The Joint Applicants' June 18, 2014 Application and September 19, 2014 Supplemental Direct Testimony. 14

B. OPC's and Intervenors' November 3, 2014 Direct Testimony. 16

C. The Joint Applicants' December 17, 2014 Rebuttal Testimony. 19

D. The Joint Applicants' Eve-of-Hearing Attempt to Revise Their Original Proposal. 19

E. The Joint Applicants' February 17, 2015 Supplemental Direct Testimony.....21

F. OPC's and Intervenors' March 20, 2015 Supplemental Direct Testimony.....24

G. Revisions and Clarifications Provided During the March/April 2015 Evidentiary Hearing. 24

H. Rather than Affirmatively Meet Its Burden of Proof Through a Meritorious Proposal, Exelon has Attempted to Obtain Regulatory Approval By Presenting a Deficient Proposal and then Signaling to the Commission that It Will Accept Whatever Conditions the Commission Deems Necessary to Meet the Public Interest Standard. 26

IV. APPLICABLE LEGAL STANDARD AND BURDEN OF PROOF 28

A. The Public Interest Standard and the Commission's Seven Public Interest Factors. 28

B. The Commission Should Reject the Joint Applicants' Attempt to Re-Write the Applicable Standard.....29

C. The Joint Applicants Bear the Burden of Proving that the Proposed Transaction is in the Public Interest. 31

V. ARGUMENT.....32

A. Public Interest Factor #1: The Impact on Ratepayers, Shareholders, the Financial Health of the Utilities Standing Alone and as Merged, and the Economy of the District. 32

1. Exelon Needs PHI/Pepco, but PHI/Pepco Do Not Need Exelon. 32

2. The Proposed Transaction is About One Thing—Increasing Value for Shareholders.....34

a. Direct Benefits to Shareholders are Substantial and Immediate. 34

b. Direct Benefits to Ratepayers are Inadequate, Overstated, and Will Be Fully Realized (if at all) Only After Many Years. 35

3. Induced and Indirect Impacts that the Proposed Transaction is Purported to Have on the District's Economy are Overstated and Misleading. 40

4. The Joint Applicants' Employment Commitments Lack Substance and are Not Likely to Result in Any Net Benefit. 42

a. Exelon's Intention to Hire 102 New Employees is Not a Direct Benefit of the Transaction. 43

b. Exelon's Commitment to Transfer 50 Pepco Energy Services Employees to the District for an Unspecified Time Period does Not Constitute a Direct Benefit of the Transaction. 45

c. The Commitment on No Net Involuntary Attrition for a Period of Two Years is Inadequate. 46

d. The Commitment to Provide Pepco Employees with Compensation and Benefits at Least as Favorable as Current Compensation and Benefits is Inadequate.....47

5. The Joint Applicants' Synergy Analysis Fails to Establish a Direct and Traceable Benefit to Ratepayers—and the Joint Applicants Do Not Contend that it Does Establish Such a Benefit. 48

a. The Joint Applicants and Their Shareholders Would Recover Costs to Achieve in the Near-Term but Ratepayers Would Only Realize the Benefit of Any Synergy Savings Over a Period of Many Years. 49

b. The Joint Applicants Provide No Guarantee that Ratepayers Will Ever Enjoy the Projected Synergy Savings. 51

c. The Joint Applicants' Projected Costs to Achieve and Synergies Savings Are Moving Targets, and the Joint Applicants Have Not Committed to Any Specific Level of Synergy Savings. 52

d. The Joint Applicants Have Inappropriately Characterized Regulatory Support Costs as Costs to Achieve Instead of Transaction Costs, Burdening Ratepayers With Excessive Costs. 54

e. The Joint Applicants' Proposed Treatment of SERP Costs is Unsupported and Contrary to Commission Precedent, Thereby Burdening Ratepayers With Excessive Costs. 57

B. Public Interest Factor #2: The Impact on Utility Management and Administrative Operations. 58

1. Exelon's Takeover of Pepco is Likely to Result in Less Local Control Over Pepco's Budgets and Operations and Less of a PHI/Pepco Presence in the District. 58

a. The Joint Applicants Provide No Real Commitment to Maintain PHI's and Pepco's Headquarters in the District. 59

b. The Joint Applicants' So-Called Commitment to Maintain Senior Managers at Pepco's DC Headquarters Lacks Critical Details. 60

c. Exelon's Takeover of PHI and Pepco Would Result in Exelon-Appointed and Exelon-Dominated Boards of Directors for PHI and Pepco, and Less Independent Board Oversight of PHI and Pepco. 62

d. Exelon's Acquisition of Pepco Would Inject Multiple Layers of Exelon's Authority Over Pepco's Operations and Budget Processes. 64

e. Exelon Appears to Be Making Decisions Regarding Hiring at Pepco. 66

f. If the Commission Approves Exelon's Proposed Takeover of Pepco, Pepco's Strategic Planning Will Be Performed by Exelon. 67

C. Public Interest Factor #3: The Impact on Public Safety and the Safety and Reliability of Services. 68

1. The Joint Applicants' June 2014 Proposal Contained a Commitment to Achieve a *Worse* Reliability Performance Than That Mandated by the EQSS. 69

2. The Joint Applicants' Revised, Tripartite Reliability "Commitment" is Meaningless, Unenforceable, and Illusory. 71

a. The Reliability Commitment Improperly Excludes Non-Compliance for Weather-Related Reasons, Ignoring that the EQSS Already Exclude the Impact of Major Service Outages. 74

b. Contrary to Their Explicit Representations, the Joint Applicants' Modified Reliability Commitment Does *Not*: (1) Include a Cap on Spending; (2) Include a Pledge to Forego Rate Recovery of Reliability-Related Spending; or (3) Include Any Penalty for Exceeding Spending Levels. 75

c. The Joint Applicants' Proposed ROE Penalty Provides No Measure of Protection Because the Joint Applicants Could Avoid the Penalty at Will, to the Extent the Penalty Even Applied at All. 83

3. Exelon's Reliability Commitment Either Ignores or Improperly Takes Credit for Pepco's Substantial Improvement in Reliability Performance—Improvement that is Likely to Continue in the Absence of the Proposed Transaction. 86

4. Exelon Has No Plan for Actually Improving Pepco's Reliability Performance. 90

a. In Light of Testimony to the Contrary, the Commission Should Give No Weight to Mr. Alden's and Mr. Gausman's Claims Regarding Best Practices Driving the Revised Reliability Commitment. 90

b. There is No Substance to the Joint Applicants' Claims about Best Practices and Exelon's Management Model. 93

c. The Joint Applicants Have Not Identified Any Specific or Project that Exelon Would Modify in Order to Improve Reliability Performance. 95

5. The Joint Applicants' Reliability Commitment Understates the Reliability Improvements Expected from DC PLUG. 96

6. The Joint Applicants' Reliability Commitment Suffers from Other Major, Fatal Flaws.....99

a. The Joint Applicants' Reliability Commitment Rests Upon A Flawed Averaging Method Rather Than Annual Compliance with the EQSS. 99

b. The Joint Applicants' Reliability Commitment Provides No Spending-Related or Rate-Related Benefits to Pepco's Customers or to the District.....103

c. The Joint Applicants Reserve the Right to Seek a Weakening of the EQSS, Despite Basing Their Reliability Commitment Upon an Assumption of No Changes in Law or Regulations. 106

D. Public Interest Factor #4: The Risks Associated with all of the Joint Applicants' Affiliated Non-Jurisdictional Business Operations, Including Nuclear Operations. 107

1. OPC Submitted Substantial Evidence Detailing the Financial Risks Associated with the Proposed Transaction.....107

a. The Proposed Transaction Would Expose Pepco Customers to New Financial Risk that is Not Present in a No-Transaction Future. 108

b. PHI and Pepco Do Not Benefit from Exelon's "Strong" Balance Sheet.....108

c. Ringfencing Provisions are Risk-Mitigation Measures that Offer No Standalone Benefit. 109

2. The Joint Applicants Failed to Demonstrate that the Proposed Transaction Will Not Negatively Impact Ratepayers with Respect to the Use of PHI's NOLC. 110

E. Public Interest Factor #5: The Impact on the Commission's Ability to Regulate the New Utility Effectively. 113

1. Pepco's Participation in Exelon's General Services Agreement Will Have Negative Implications on the Commission's Ability to Effectively Review and Monitor the Costs Being Charged to Pepco Absent a Requirement that the Joint Applicants Provide Further Information. 114

2. Exelon's Conduct in this Proceeding Demonstrates that it Will Be More Difficult to Effectively Regulate an Exelon-Owned Pepco than it is to Regulate a PHI-Owned Pepco. 116

F. Public Interest Factor #6: The Impact on Competition in the Local Retail, and Wholesale Markets that Impacts the District and District Ratepayers. 118

G. Public Interest Factor #7: The Impact on Conservation of Natural Resources and Preservation of Environmental Quality. 121

1. The Joint Applicants Failed to Meet Their Burden and Prove that the Proposed Transaction Will Provide a Benefit to the District of Columbia in the Area of Renewables and the Environment. 122

2. Without Proposed Mitigation Measures, Exelon is Not the Right Electric Distribution Company for the District of Columbia. 125

3. Exelon's Opposition to Renewable Generation Will Likely Jeopardize the Future Success of the City's Efforts to Deploy More Renewable Generation. 126

VI. CONCLUSION 128

Table of Authorities

Administrative Decisions

Formal Case No. 1002, In the Matter of the Joint Application of Pepco and the New RC, Inc. for Authorization and Approval of Merger Transaction, Order No. 12395, rel. May 1, 2002 .....9, 28, 29, 69

Formal Case No. 951, In the Matter of the Joint Application of Baltimore Gas and Electric Company, Potomac Electric Power Company, and Constellation Energy Corporation for Authorization and Approval of Merger and for a Certificate Authorizing the Issuance of Securities, Order No. 11075, rel. Oct. 20, 1997 .....28, 29, 69, 107, 123

Formal Case No. 766, et al., In the Matter of the Commission's Fuel Adjustment Clause Audit and Review Program, et al., Order No. 16427, rel. July 7, 2011.....74, 97, 100, 101, 106

Formal Case No. 1103, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service, Order No. 17424, rel. Mar. 26, 2014.....49, 114, 115, 116

Formal Case No. 1103, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service, Order No. 17539, rel. July 10, 2014.....115

Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, Order No. 17530, rel. June 27, 2014 .....16, 29

Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, Order No. 17597, rel. Aug. 22, 2014.....16, 29, 30, 118, 124

Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, Order No. 17802, rel. February 11, 2015 21

Formal Case No. 1123, In the Matter of the Potomac Electric Power Company's Notice to Construct a 230 kV/138 kV/13 kV Substation and Four 230 kV/138 kV Underground Transmission Circuits on Buzzard Point, Order No. 17851, rel. Apr. 9, 2015 128

Statutes

D.C. Code § 2-509 (2010).....31, 42

D.C. Code § 34-504 (2010).....1, 5, 28, 29, 30, 31, 122, 129

D.C. Code § 34-804 (2010).....1

The Renewable Energy Portfolio Standard of 2004, D.C. Code § 34-1431.0 to 34-1431.10 (2012) 121

The Clean and Affordable Energy Act of 2008, D.C. Law 17-250 (codified in scattered sections of § 8 of the D.C. Code, among others).....121

The Distributed Generation Amendment Act of 2011, D.C. Code § 34-1432 to 34-1436 (2012) 121

The Sustainable DC Amendment Act of 2012, D.C. Law 19-262 (codified in scattered sections of § 8 of the D.C. Code, among others) 121

The Community Renewable Energy Amendment Act of 2013, D.C. Law 20-47 (codified in scattered sections of § 34 of the D.C. Code) 121

The Sustainable DC Omnibus Amendment Act of 2014, D.C. Law 20-142 (codified in scattered sections of § 8 of the D.C. Code, among others) 121

Regulations

15 D.C.M.R. § 122.4 (2010) 117

15 D.C.M.R. § 122.13 (2010) 117

15 D.C.M.R. § 137 (2010) 1

15 D.C.M.R. § 3603.11 (2010) 23, 70

BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

In the Matter of the Merger of	**)**	
Exelon Corporation, Pepco Holdings	**)**	
Inc., Potomac Electric Power Company,	**)**	**Formal Case No. 1119**
Exelon Energy Delivery Company, LLC,	**)**	
and New Special Purpose Entity, LLC	**)**	

THE INITIAL POST-HEARING BRIEF
OF THE
OFFICE OF THE PEOPLE'S COUNSEL

Pursuant to Rule 137 of the Public Service Commission of the District of Columbia's ("Commission" or "PSC") Rules of Practice and Procedure,[1] and the Commission's directive on April 22, 2015 at the evidentiary hearing,[2] the Office of the People's Counsel for the District of Columbia ("OPC" or "Office"), the statutory representative of District of Columbia ratepayers and consumers,[3] respectfully submits this Initial Post-Hearing Brief in opposition to Exelon Corporation's ("Exelon") proposal to acquire Pepco Holdings, Inc. ("PHI") and the Potomac Electric Power Company ("Pepco") pursuant to D.C. Code § 34-504 (2010). In support of its position, the Office states as follows:

I. INTRODUCTION

The case before the Commission is unprecedented in scope, magnitude and potential long term impact on the regulatory landscape of the District of Columbia. Its tentacles stretch long and far and unlike any other case in the history of utility regulation in the District, the end result of the Commission's decision will irrevocably reshape the District of Columbia's utility

[1] 15 D.C.M.R. § 137 (2010).

[2] Transcript of the Evidentiary Hearing ("Tr.") at 3596:4-8.

[3] D.C. Code § 34-804 (2010).

landscape for the foreseeable future. Hence, in exercising its statutory mandate to protect the public interest it is critical for the Commission to "get it right," because there will be no second chance. First and foremost, in order to approve the Joint Applicants' proposal for Exelon to acquire PHI/Pepco,[4] the Commission must determine, based on the evidentiary record, that the acquisition is in the public interest. To meet this high standard, the Commission cannot rely on vague and illusionary "commitments"; unsubstantiated promises; unverifiable savings or claims that the new company will maintain the status quo. The law requires that after all the dust settles, consumers must receive tangible and equitable benefits and avoid unnecessary risks. The benefits to consumers must be adequate to compensate ratepayers for the risks they will endure as a result of this transaction.

OPC undertook a thoughtful and analytical review of the Joint Applicants' proposal—the original proposal from June 18, 2014, as well as the various iterations of the proposal as it has evolved over time. Based on its review, OPC has reached the unavoidable conclusion that the Joint Applicants have failed to demonstrate that the proposed transaction will result in tangible, direct, and traceable financial benefits to ratepayers. Accordingly, OPC cannot support approval of the Joint Applicants' proposal to acquire PHI/Pepco.

In OPC's view, based upon the record evidence, the Joint Applicants have proposed nothing that warrants consideration as a benefit that would satisfy the Commission's public interest standard. Even the proposed Customer Investment Fund - a capped, one-time customer credit- which the Joint Applicants parade as the tangible ratepayer benefit, fails because it does not come close to compensating ratepayers for the risks inherent in the proposed merger.

---

[4] While the record contains references to a "merger" between Exelon and PHI, the instant proceeding involves Exelon's proposal to "acquire" PHI. Below, all references to the Exelon-PHI "merger," "acquisition," "transaction," etc. should be construed to mean Exelon's proposed acquisition of PHI.

The labyrinthine iterations of the proposal, including the numerous merger "commitments"[5] to which the Joint Applicants have agreed, and the promises about anticipated synergy savings that ratepayers are expected to enjoy, effectively shield the Joint Applicants from affirmatively agreeing to a single provision that would hold them accountable if net synergy savings do not materialize. This omission is particularly troubling given that any benefit from the Customer Investment Fund will evaporate as soon as Pepco files for a rate increase. If the Commission accepts the Joint Applicants' projected costs to achieve and synergy savings at face value, Pepco's rates will be higher in the first year following the transaction than they would be if the transaction is not approved. In other words, the Customer Investment Fund represents nothing more than taking with one hand what was given by the other. OPC urges the Commission to reject this shell game maneuver.

In addition, the proposed acquisition subjects Pepco's customers and the District of Columbia as a whole to substantial risk of irreparable harm on several fronts. First, Exelon's corporate policies regarding the appropriate role of distributed generation and customer-owned renewable generation is simply incompatible with the District's emerging role as a leader in the promotion and fostering of the District of Columbia as a green, healthy, and sustainable City. The Joint Applicants have continuously failed to present a proposal that meaningfully reconciles the disparity between their corporate policy and District policies designed to aggressively advance distributed generation in the City. To some extent, this failure may be unavoidable, as these types of problems may be so deeply embedded into the fabric of "what makes Exelon Exelon" that they cannot be fixed.

---

[5] The Joint Applicants' 91 "merger commitments" are contained in Exhibit Joint Applicants (4A)-2. As explained herein, it is misleading to assert that every Item identified on Exhibit (4A)-2 constitutes a firm commitment. Therefore, OPC refers to the 91 "commitments" as "Items." Further, Exhibit (4A)-2 is the current state of the "merger commitments" as of the date of this brief. The Joint Applicants have continually revised their proposal, which initially identified only 12 commitments.

Second, while some risks may be capable of mitigation, the threshold question must be answered: Are we fixing a problem that does not presently exist? Namely, is the District better off: (1) being exposed to risk from Exelon, but mitigating that exposure with a number of complex ring-fencing provisions, or (2) moving forward with PHI and Pepco on a standalone basis and avoiding those risks altogether? In addition, is the District better off with final authority residing in Chicago or here at home? OPC asserts that the answers to these questions are simple—it makes no sense for the District to accept these potential risks when they are completely avoidable in the first instance, particularly in the absence of any direct, traceable, financial benefits to ratepayers.

Third, in addition to the lack of tangible, direct, and traceable financial benefits to ratepayers and the myriad risks that the transaction would subject ratepayers to, it is difficult to see any compelling reason to accept other consequences of the proposed transaction. For example, PHI made a strategic decision to divest itself of its generation business and focus on becoming a regulated distribution utility. After finally accomplishing that restructuring, does it make sense now to join the "Exelon family of utilities," which holds ownership interests in substantial generation facilities? Does it make sense to replace a local leadership team that explained how improving reliability "dominated our focus"[6] with a leadership team from Chicago that initially proposed reliability targets that failed to meet the Electric Quality of Service Standards ("EQSS")? Does it make sense to replace a local leadership team that explained how they implemented plans that resulted in year-over-year reliability improvement from 2011 through 2014 with a leadership team from Chicago that downplayed Pepco's

[6] Tr. 582:18-22 (Rigby); *see also id*. 588:6-20 (Rigby)

significant improvement in reliability in 2014 as merely a "one-year data point[?]"[7] Any order approving the proposed transaction would have to explain why the answers to these questions are "yes." OPC has seen nothing in the pre-filed testimony or the evidence adduced during 11-day evidentiary hearing that would support such answers.

Fourth, as the ultimate question to be answered in this case is whether the proposed merger is in the public interest, the Commission needs to give careful consideration to the voice of the public. Indeed, OPC submits the public is more engaged in this case than any other in recent history. Most notably, the fact that more than half of the 40 Advisory Neighborhood Commissions in the City have passed resolutions in opposition to the proposed transaction, it is clear that a majority of the locally elected officials that represent the public interest do not want Exelon to takeover Pepco. Additionally, another clear signal that the public is paying attention to this case and wants the Commission to deny the proposed transaction is the hundreds of letters from individual consumers that have been filed with the Commission in opposition to the proposal. Therefore, in addition to the evidence presented by the expert witnesses in this proceeding, the Commission should give significant consideration to the voice of locally elected officials and the collective voices of individual consumers and deny Exelon's proposed takeover of Pepco.

Under the circumstances presented in this case, OPC has concluded that D.C. Code Section 34-504 simply does not permit the Commission to issue an order approving the proposed transaction that has been presented. While the Commission certainly has authority to do so, OPC

[7] Tr. 243:22 to 244:5 (Crane).

cautions the Commission against falling into the Joint Applicants' trap[8] and focusing on how various commitments could be modified to make the transaction marginally better or how additional conditions could make the transaction more palatable. First, the Joint Applicants bear the burden of proof in this proceeding. It is not the Commission's obligation to restructure the proposal based on the Joint Applicants' failure to meet the public interest standard. Second, enhancing certain commitments or adding additional conditions would not necessarily eliminate harms. Some harms—such as the fact that transaction transfers ultimate authority over Pepco from the District of Columbia to Chicago—may not be "fixable." Therefore, unless the Commission is inclined to undertake the burden of restructuring the proposed transaction to ensure that it is consistent with the public interest—a burden the Commission should not feel any compulsion to undertake—OPC respectfully submits that the Commission should issue an order rejecting the Joint Applicants' proposal.

II. EXECUTIVE SUMMARY

In this section, OPC identifies its primary substantive concerns with the proposed transaction, and identifies the section of this Initial Brief where OPC addresses those concerns in more detail. Sections III and IV discuss OPC's procedural and substantive concerns with the Joint Applicants' proposal in detail.

[8] On numerous occasions during his testimony during the evidentiary hearing, Exelon Chief Executive Officer Mr. Crane signaled to the Commission that Exelon was willing to do "whatever" the Commission required in order to gain regulatory approval. *See, e.g.*, Tr. 118:18-19 (where Mr. Crane discusses a reporting requirement regarding progress in meeting jobs projections and states "[w]hatever information the Commission desires, we would make that available"); id. 192:4-6 (where Mr. Crane is discussing the proposal to track synergy savings beyond the period identified in Exhibit Joint Applicants (4A)-2 and states that "[t]he Commission can ask and we would produce whatever they ask over whatever period of time").

A. On Scale, Shareholders are the Principal Beneficiaries of the Measurable Benefits Associated with the Proposed Transaction.

The Approximately $7 Billion Transaction Provides Numerous, Valuable Benefits to Shareholders. After struggling through a difficult 2012, Exelon began focusing on ways to increase profits and offset the substantial losses its unregulated generation business was incurring. The proposed transaction is designed primarily to serve that end, and that end alone. Specifically, by acquiring PHI's regulated utility operations, Exelon increases the portion of its total earnings generated by regulated utility operations, thereby helping to offset the poor performance of Exelon's unregulated generation business. If the transaction is approved, PHI's shareholders will get the immediate benefit of a $1.6 billion acquisition premium. *See* Sections V.A.1 and V.A.2 below.

The Purported Direct Benefits to Ratepayers are Inadequate. Contrary to any perception or suggestion that the proposed transaction will result in myriad benefits to ratepayers, the Joint Applicants contend that only *two* elements of the proposed transaction provide "direct,"[9] "tangible, quantifiable benefits to Pepco customers:"[10] (1) the Customer Investment Fund; and (2) "enhanced" reliability commitments.[11] The District's share of the Customer Investment Fund is facially deficient given that it was based on a flawed allocation methodology that over-allocates funds to other jurisdictions to the detriment of the District. That flawed allocation notwithstanding, the absolute value of the Customer Investment Fund in the

---

[9] *See* Exhibit Joint Applicants (G) at 11:7-11.

[10] *See* Exhibit Joint Applicants (G) at 8:16-19; *see also id*. at 6:2-4 (where Dr. Tierney characterizes "the District-specific Customer Investment Fund and the Enhanced Reliability Commitments" as the "two sets of tangible, quantifiable benefits to Pepco customers"); Tr. 2425:11-20 (where Dr. Tierney confirms that she did not attempt to quantify the potential benefit of any commitments other than the Customer Investment Fund and the reliability commitment).

[11] *See, e.g.*, Exhibit Joint Applicants (G) at 8:16-19; *see also* Exhibit Joint Applicants (3G) at 15:2-3 (where Dr. Tierney testifies that she "only quantified the two Regulatory Commitments – the [Customer Investment Fund] and the Reliability Improvements").

District is not sufficient enough to offset the qualitative and quantitative risks and costs of the proposed transaction. *See* Part IV.A.2.b below. The "enhanced" reliability commitments—which are neither "enhanced" nor "commitments"—are so plagued with flaws and caveats that they are unenforceable and meaningless. *See* Section V.C below.

The Purported Benefits to the District are Overstated and Misleading. In addition to the two elements of the proposed transaction that allegedly result in direct benefits to ratepayers, the Joint Applicants contend that the proposed transaction will result in positive induced and indirect impacts to the District. These induced and indirect impacts purportedly include 1,506 to 2,407 new jobs, $168.4 to $260.5 million in economic benefits, and $6.2 million to $10.8 million in incremental tax revenues.[12] Substantial record evidence demonstrates that these induced and indirect impacts are overstated, misleading, and unlikely to materialize. *See* Section V.A.3 below.

B. Exelon's Acquisition of Pepco is Not in the Public Interest.

There are No Commitments Ensuring Affordability of Service. Noticeably absent from the Joint Applicants' proposal is a commitment to reduce or freeze rates. On one level, this omission is not surprising (though it is unfortunate) given that, with or without the proposed transaction, Pepco's rates will continue to increase as it makes investments needed to improve reliability. On another level, the Joint Applicants' claim that "synergies" will, over the course of many years, result in rate increases that are smaller than the rate increases customers would experience in the absence of the proposed transaction. While this claim may seem alluring, it is not backed up by any accountability measure. Notably, this claim is based on *estimates* of synergies and costs to achieve those synergies that have changed over the course of this

[12] Exhibit Joint Applicants (G) at 7:2-12.

proceeding. It is reasonable to assume that the estimates will not materialize.[13] In fact, the Joint Applicants readily acknowledge that *none* of their projected benefits are assured.[14] It is telling that there are *no* guarantees that any synergies will be achieved. If the transaction results in rates that are higher than they otherwise would have been absent the transaction, the Joint Applicants will not have violated any firm commitment. Indeed, the only guarantee is that Pepco's rates will be going up. *See* Section V.A.5 below.

The Reliability Commitments are Unenforceable. Reliability is such an important element of this case that OPC submits the transaction as a whole cannot be found to be in the public interest unless there is a direct net benefit in terms of reliability performance. The Joint Applicants represent that there is such a benefit, as purportedly demonstrated by the proposal to improve Pepco's reliability performance, subject to caps on reliability capital and O&M spending, or face a substantial penalty in the form of a reduction to Pepco's authorized return on equity ("ROE"). According to the Joint Applicants, this reliability commitment will yield millions of dollars in economic value to the District. Evidence adduced at trial shows that these claims are false and that, indeed, there is no real reliability commitment at all.

Exelon revealed that it has no engineering plan supporting its ability to achieve the reliability targets. Given that Exelon has committed to spending whatever it takes to meet its reliability commitment, Exelon's budget "commitment" is nothing more than a promise to seek Commission approval to raise rates even further if Exelon needs more money than it originally thought. Thus, it is difficult to imagine a situation where the proposed return on equity ("ROE")

---

[13] As Chairman Kane aptly noted at the evidentiary hearing, the Commission has heard promises about projected benefits before. Tr. 872:8 to 874:7 (discussing the purported benefits of the 2002 merger that created PHI, read from *Formal Case No. 1002, In the Matter of the Joint Application of Pepco and the New RC, Inc. for Authorization and Approval of Merger Transaction*, Order No. 12395, rel. May 1, 2002 ("Order No. 12395")).

[14] OPC Cross Examination Exhibit #4 at 14 (cautioning individuals "not to place undue reliance" on the Joint Applicants' claims about future performance).

penalty would apply.[15] Even if the ROE penalty did apply, it would have no effect if Pepco is under-earning its ROE by 50 basis points or more—a situation in which Pepco has historically found itself. Finally, even if Exelon meets its reliability targets, the investments that drove such performance would be paid for by ratepayers. In short, Exelon expects customers, not shareholders, to bear all of the risks associated with improving reliability. *See* Section V.C below.

The Employment Commitments Lack Substance. A key component of synergy savings involves reducing employment levels. The Joint Applicants made certain commitments that are apparently designed to offset any losses in employment. The only guarantee is that PHI employees will lose their jobs as a result of Exelon's acquisition of PHI in order to achieve labor "synergies."

While Exelon promises to use good-faith efforts to hire 102 new union employees, that promise does not result in a net benefit. First, there is no guarantee that the 102 new employees will increase the size of the workforce. Rather, the 102 new employees are likely to fill positions that become vacant as employees retire. Second, the 102 new employees will be performing work necessary to meet the EQSS. Pepco will perform this work in the absence of the acquisition by Exelon, and has committed to meeting the EQSS. In any event, ratepayers, not shareholders, will bear the costs of these employees. *See* Part V.A.4.a below.

The commitment to transfer 50 Pepco Energy Service Company ("PES") employees to the District provides no benefit in light of the fact such employees could be terminated at any time. *See* Section V.A.4.b below.

---

[15] Exelon proposes to subject Pepco to a 50 basis point reduction to its authorized ROE in the first rate case after 2021 if Pepco fails to satisfy Item 7 of Exhibit Joint Applicants (4A)-2. *See* Exhibit Joint Applicants (4A)-2, Item 8.

Exelon's commitments to not allow a net reduction in employment due to involuntary attrition, and to maintain benefits and compensation levels for a period of two years is actually *worse* than the initial proposal in the Joint Application, which would have required Exelon to honor these commitments for a period of *at least* two years. *See* Sections V.A.4.c and V.A.4.d below.

The Omission of a Firm Proposal on Public Interest Factor #7 is Untenable. Unlike any other proposed change of control that the Commission has faced, Exelon's proposed takeover of PHI implicates issues relating to the manner in which technology, customer awareness, and distributed generation are transforming the way power is generated, delivered, and consumed. Recognizing this proposal's place at this pivotal moment for the industry and the District, the Commission had the foresight to establish Public Interest Factor #7 to address issues pertaining to conservation of natural resources and preservation of environmental quality. Like the issue of reliability, OPC submits that Public Interest Factor #7 is so important that finding net benefits with regard to this individual public interest factor is necessary for determining that the transaction as a whole is in the public interest.

Remarkably, Exelon elected not to present any firm proposal to provide benefits on the paramount issues raised by Public Interest Factor #7.[16] Specifically, when faced with the opportunity to present a proposal that demonstrates Exelon's fitness and willingness to serve as the utility for the 21st century, Exelon presented a 20th century application essentially designed to stall distributed generation development and advance its own generation policies. The omission of a firm commitment or proposal on Public Interest Factor #7 is unacceptable, especially in light

[16] At best, the Joint Applicants contend that a solar-financing provision from a pending (*i.e.*, not yet approved) settlement in Maryland may address Public Interest Factor #7, and that the Commission could elect to deploy the Customer Investment Fund in a manner that addresses Public Interest Factor #7. Tr. 2268:9-17 (Tierney).

of the substantial concerns that have been raised regarding Exelon's opposition to distributed generation and renewable energy resources. *See* Section V.G below.

"Commitments" are Not Necessarily "Benefits." Mr. Crane's February 17, 2015 Supplemental Direct Testimony contained Exhibit Joint Applicants (4A)-2, which presented the 91 Items that the Joint Applicants characterize as "merger commitments." Of the Joint Applicants' 91 Items, only one is arguably a direct, traceable, financial benefit to ratepayers—*i.e.*, the proposed $33.75 million customer investment fund.[17] As discussed herein, even the Customer Investment Fund is flawed. The remaining 90 Items are, at best, either: (1) commitments to "continue" or "maintain" Pepco's current plans programs or initiatives;[18] (2) risk-mitigation measures that simply offer ratepayers some degree of protection from potential harms that would not exist in the absence of the proposed transaction;[19] or (3) commitments that may have superficial appeal, but that are actually unenforceable or illusory.[20] If the Commission is looking for net, direct, traceable financial benefits to ratepayers, it will not find such benefits in Exhibit (4A)-2. *See* Sections V.A through V.G below.

Some Problems May Not Be "Fixable." OPC is not opposed to any merger or acquisition *per se*. To the contrary, OPC is supportive of any proposal that advances the public interest. Stated another way, OPC is opposed to any proposal—like Exelon's proposal here—that does not meet the public interest standard. As indicated above, OPC cautions the Commission against feeling compelled to revise various commitments or add conditions that

---

[17] Exhibit Joint Applicants (4A)-2, Item 6.

[18] Exhibit Joint Applicants (4A)-2, Items 9-14, 16, 19-24, 26, 28

[19] Exhibit Joint Applicants (4A)-2, Items 1-5, 15, 25, 29-91. With regard to ring-fencing in particular, Joint Applicants Witness Lapson confirmed that ring-fencing provisions are not a benefit. Tr. 2613:19-20 (where Ms. Lapson explains that "the whole purpose of ring-fencing is to avoid harm"); *see also id.* 2613:21 to 2614:3 (where Ms. Lapson testifies that ring-fencing provisions were "never there to create a benefit; [they were] there to avoid harm").

[20] Exhibit Joint Applicants (4A)-2, Items 7-8.

may make the transaction more palatable. The case may be that certain harms—such as the fact that Exelon's view on renewable resources and the role of distributed generation are incompatible with the District's policies on these issues—may not be "fixable."

Other problems may not be "fixable" simply by virtue of the fact that the proposal spans across four jurisdictions, and the resulting manner in which Exelon elected to craft its proposal. For example, in settlements in other jurisdictions, Exelon has agreed to Most Favored Nation provisions, which afford those jurisdictions the value and benefit of any concession Exelon may subsequently agree to that exceeds the value of the settlement in that particular jurisdiction. These provisions could prove problematic for Exelon. However, it is Exelon's problem and not the problem of the Commission, OPC, or any intervenor. Notably, Exelon chose to allocate the Customer Investment Fund on the basis of customer count. This arbitrary methodology over-allocates funds to other jurisdictions to the detriment of the District. The Commission could direct Exelon to increase the size of the Customer Investment Fund (which it should if it is inclined to approve the proposal to offset the numerous qualitative and quantitative harms the transaction presents) by requiring: (1) that the District receive not less than a certain percentage of the total fund; or (2) Exelon to increase the Customer Investment Fund in the District to an absolute amount. In those circumstances, Exelon may argue that the Most Favored Nation provisions would trigger increases in the other jurisdictions, rendering such a condition in the District financially burdensome for the Company to impose. Or, Exelon could increase the allocations in the other jurisdictions based on the proportionate increase in the District, which would give rise to the circular problem that the District is being under-allocated funds from the Customer Investment Fund. To the extent these types of situations are problematic, that should

be no concern of the Commission. Exelon chose to structure the proposal in the manner it did and it must live with the consequences of its decision.

III. PROCEDURAL BACKGROUND AND MATTERS OF SUBSTANTIVE DUE PROCESS

One of OPC's principal procedural concerns with the Joint Applicants' proposal has been the improvisational manner in which the proposal was presented.[21] OPC appreciates that the Joint Applicants recognized the need to improve their June 2014 proposal. However, the manner in which the Joint Applicants made the purported improvements seriously impaired OPC's ability to meaningfully participate in this important proceeding. Whether the evolving case was the result of strategic, procedural gamesmanship or a good-faith effort to respond to concerns about the original proposal, OPC was forced to address a moving target that prejudiced its ability to fully participate in the proceeding and strained its resources.

A. The Joint Applicants' June 18, 2014 Application and September 19, 2014 Supplemental Direct Testimony.

On June 18, 2014, the Joint Applicants submitted an Application seeking approval of the proposed transaction. The complete filing consisted of over 2,000 pages. However, on closer inspection, it became clear that the Application lacked substance. In fact, in a pleading submitted in the early phase of this proceeding, the Joint Applicants actually chastised OPC for exaggerating the magnitude of the Application:

> OPC resorts to hyperbole, stating that "the two-thousand-plus page application contains prepared written testimony and exhibits from eight witnesses." OPC Application for Reconsideration at 10. The Joint Application consisted of a thirty page application and eight volumes of testimony totaling 161 pages, which is less

[21] At the evidentiary hearing, Mr. Crane agreed that the commitments the Joint Applicants proposed have "evolved considerably during the course of this proceeding." Tr. 219:9-13.

> than a Pepco rate filing. In fact, *approximately 80% of the pages filed consists of copies of SEC Form 10-Ks*."[22]

Although the case would evolve to include the 91 items identified on Exhibit Joint Applicants (4A)-2, Exhibit 5 of the June 18, 2014 Application specified only 12 commitments. Those 12 commitments bear little resemblance to anything contained in Exhibit Joint Applicants (4A)-2. Consider Commitment 3 for example, the Joint Applicants' original reliability commitment. The proposed System Average Interruption Frequency Index ("SAIFI") target in Commitment 3 is *better* than the proposed SAIFI target that the Joint Applicants ultimately proposed in Item 7 of Exhibit Joint Applicants (4A)-2. In addition, Commitment 3 makes no mention of meeting the proposed reliability targets without increasing reliability capital and O&M budgets. In fact, such a concept would make no sense because the proposal described in Commitment 3 extended through 2020.[23] At the time the Application was filed, Pepco had developed capital budgets only through 2018 and O&M budgets only through 2015.

Similarly, the commitment to employment, which was originally articulated in Commitment 5 of Exhibit 5 to the Application, has changed over the course of this proceeding. Commitment 5 states that:

> for *at least the first two years following consummation of the Merger*, Exelon: (1) will not permit a net reduction, due to involuntary attrition as a result of the Merger integration process, in the employment levels at Pepco, and (2) will provide current and former Pepco employees compensation and benefits that are at least as favorable in the aggregate as the compensation and benefits provided to those employees immediately before April 29, 2014.[24]

---

22 Formal Case No. 1119, Joint Applicants' Opposition to OPC's Application for Reconsideration at 4, n.14 (September 18, 2014) (emphasis added).

23 OPC acknowledges that certain witnesses discussed the commitment to cap reliability capital and O&M spending in their Direct Testimonies. However, the Joint Applicants did not present reliability capital and O&M budget figures through 2020 until February 17, 2015. *See, e.g.*, Exhibit Joint Applicants (4A)-2, Item 7.

24 Application, Exhibit 5, Commitment 5 (Labor, Employment, and Compensation) (emphasis added).

As explained below, Exelon would subsequently erode the value of this commitment by capping it at two years, thus essentially changing it from "at least" two years to no more than two years.

In addition, Commitment 2 proposed a $14 million Customer Investment Fund for the District—an amount that was less than the total compensation that just one individual, Mr. Rigby, would receive if the transaction was approved.[25]

Following the Commission's issuance of Order Nos. 17530[26] and 17597,[27] which established the seven public interest factors the Commission would consider in this proceeding, the Joint Applicants filed Supplemental Direct Testimony. Remarkably, despite the fact that the Commission devoted an entire issue to conservation of natural resources and the preservation of environmental quality—*i.e.*, Public Interest Factor #7—the Joint Applicants' Supplemental Direct testimony did not present any affirmative proposal on this important issue.

B. OPC's and Intervenors' November 3, 2014 Direct Testimony.

On November 3, 2014, OPC and the intervenors submitted testimony responding to the Joint Applicants' June 18, 2014 proposal and September 19, 2014 Supplemental Direct Testimony. For its part, OPC submitted comprehensive testimony and exhibits from five expert witnesses. Dr. David E. Dismukes served as OPC's principal policy witness. Dr. Dismukes submitted comprehensive testimony that addressed: merger standards; the Customer Investment Fund; the transaction's economic impacts; the transaction's net employment impacts; charitable contributions and local community support issues; utility management and administrative

---

[25] Tr. 681:15 to 685:12.

[26] *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction*, Order No. 17530, rel. June 27, 2014, at ¶¶ 25-26 ("Order No. 17530").

[27] *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction*, Order No. 17597, rel. Aug. 22, 2014, at ¶ 124 ("Order No. 17597").

operations issues; policy issues associated with the Joint Applicants' proposed reliability performance; the Commission's regulatory oversight; and the transaction's potential impacts on competitive electric markets (Public Interest Factors 1, 3, 4, 5, and 6).[28] OPC Witness Kevin Mara, a consultant with GDS Associates with years of experience advising OPC with respect to reliability issues, presented testimony regarding the Joint Applicants' reliability commitment, the reasonableness of the proposed administrative operations structure, and the reasonableness of the Joint Applicants' heavy reliance on Exelon's "best practices" to support their assertions (Public Interest Factor 3).[29] OPC Witness Donna Ramas, an experienced consultant with Ramas Associates, addressed the distribution of transaction's impacts (Public Interest Factors 1, 2, and 5).[30] OPC Witness Dr. J. Randall Woolridge, a Goldman, Sachs, & Co. and Frank P. Smeal Endowed University Fellow and Professor of Finance at Pennsylvania State University, addressed financial aspects of the transaction and the risks associated with affiliate operation (Public Interest Factors 1, 4, and 5).[31] Finally, OPC Witness Richard (Rick) E. Morgan, a former Commissioner of the District of Columbia Public Service Commission who served from 2003 to 2011, presented testimony regarding natural resources and environmental quality (Public Interest Factor 7).[32]

As explained by OPC's witnesses, OPC's principal interests pertained to the four "Rs": (1) Rates—the proposed transaction must not increase rates;[33] (2) Reliability—the proposed

---

28 Exhibit OPC (A) and OPC (A)-1 through OPC (A)-45.

29 Exhibit OPC (B) and OPC (B)-1 through (B)-17.

30 Exhibit OPC (C) and OPC (C)-1 through OPC (C)-17.

31 Exhibit OPC (D) and OPC (D)-1 through (D)-6.

32 Exhibit OPC (E) and OPC (E)-1 through (E)-3.

33 *See, e.g.*, Exhibit OPC (A) at 9:8-10.

transaction must provide incremental improvements in reliability performance;[34] (3) Ring-fencing—the proposed transaction must not expose ratepayers to risk associated with Exelon's other affiliates, including its nuclear generation business;[35] and (4) Renewables—the proposed transaction must be consistent with the District's policies regarding distribution generation and renewable energy.[36]

The analyses that OPC's witnesses performed consisted of three principal, inter-related components. First, OPC attempted to validate the Joint Applicants' quantification of the level of the transaction's purported costs and benefits to ratepayers. Second, OPC focused on the important distinction between purported benefits to ratepayers that would occur absent Exelon's acquisition of PHI and any incremental benefits to ratepayers that result directly from the transaction. Third, OPC focused on "the equally important distinction between benefits to ratepayers and positive aspects of the merger that do not constitute direct and quantifiable ratepayer benefits (*e.g.*, charitable contributions or commitments to honor union agreements)."[37]

As a result of its analyses, OPC concluded that the Joint Applicants offer very little in terms of ratepayer benefits in this proposal. In fact, under some scenarios, the proposed transaction could result in a net negative economic impact to the District even before considering the wide range of additional costs and performance-related risks that will be shifted to ratepayers if the transaction is approved in its current form. With regard to reliability, for example, OPC was dismayed that the Joint Applicants committed to meeting reliability standards that are *worse* than the statutorily-mandated EQSS.[38] In consideration of its four principal interests (*i.e.*, the

---

34 *See, e.g.*, *id.*; *see generally* Exhibit OPC (B).

35 *See generally* Exhibit OPC (D).

36 *See generally* Exhibit OPC (E).

37 Exhibit OPC (A) at 8:5-12.

38 *See, e.g.*, Exhibit OPC (A) at 9:2-20.

four "Rs"), as well as after evaluating the transaction as a whole, OPC concluded that the Commission should reject the proposed transaction because it is not in the public interest and will likely result in an outcome where ratepayer costs outweigh the alleged ratepayer benefits.

C. The Joint Applicants' December 17, 2014 Rebuttal Testimony.

On December 17, 2014, the Joint Applicants submitted Rebuttal Testimony in response to the OPC and intervenor testimony that had been filed on November 3, 2014. While the Rebuttal Testimony made some clarifications and revisions to the June 18, 2014 proposal,[39] the Joint Applicants essentially "doubled down" with respect to the key components of their original proposal. Specifically, the Joint Applicants did not propose any increase to the $14 million Customer Investment Fund, did not propose any change to the original SAIFI and System Average Interruption Duration Index ("SAIDI") targets, and did not present any affirmative proposal regarding Public Interest Factor #7.

D. The Joint Applicants' Eve-of-Hearing Attempt to Revise Their Original Proposal.

Following receipt of the Joint Applicants' December 17, 2014 rebuttal filing, OPC pursued extensive discovery to attempt to understand Joint Applicants' positions as set forth in that Rebuttal Testimony and was otherwise preparing for the evidentiary hearing that was scheduled to commence on February 9, 2015. OPC's preparations were interrupted when, on February 4, 2015, the Joint Applicants attempted to make substantial revisions to their original proposal.[40] Unlike the Rebuttal Testimony, which admonished parties for presenting their "wish

---

[39] The original version of Mr. Crane's rebuttal exhibit, Exhibit Joint Applicants (3A)-1, replaced the 12 original commitments with a revised list of 40 commitments. *See* Joint Parties Hearing Exhibit #2 at 11-18 (reproducing the original version of Exhibit Joint Applicants (3A)-1); *see also* Tr. 218:15 to 219:8 (Crane).

[40] The Joint Applicants were well aware of the facts that, under the then-controlling procedural schedule, OPC's and the intervenors' one opportunity to file testimony had occurred three months earlier, in November 2014, and the window for submitting timely data requests had closed.

list[s]" of merger conditions,[41] the February 4, 2015 filing was purportedly intended to "respon[d] to concerns raised in the testimony and witnesses appearing on behalf of the Office of People's Counsel (OPC) and others…."[42]

As best as OPC can discern, the intent of the February 4, 2015 filing was to express the Joint Applicants' willingness: (1) to commit to a tax indemnification provision from a proceeding before the Maryland Public Service Commission ("PSC");[43] and (2) to "not object if the Commission were to apply the value and framework of the settlement package from New Jersey to a complete resolution of the issues raised in the District of Columbia, including expanding the customer benefits to a level comparable to that agreed upon in New Jersey as one element of the overall package."[44] In addition to the apparent willingness to make these two changes, the Joint Applicants also appeared to be attempting to make three revisions to their previously filed "merger commitments" (*i.e.*, the commitments as they stood on December 17, 2014): (1) a change in the Joint Applicants' proposed reliability commitment; (2) changes to reflect the Joint Applicants' commitment to track merger savings through Pepco's next rate case; and (3) changes to reflect the Joint Applicants' commitment not to use pushdown accounting.[45]

On February 6, 2015, the Commission issued a Notice indicating that it would convene an oral argument on February 9, 2015—the day the hearing was scheduled to commence—to discuss the process necessary to address the Joint Applicants' February 4, 2015 submission.

---

41 Exhibit Joint Applicants (3A) at 2:11-15.

42 Exhibit OPC (2A)-1 at 1. At best, OPC is confused by the Joint Applicants' change of heart between December 17, 2014 and February 4, 2015. At worst, the decision to strategically time the February 4, 2015 filing just days before the evidentiary hearing was to commence is another example of procedural gamesmanship given that rebuttal testimony was the appropriate avenue for responding to concerns raised in OPC and intervenor testimony.

43 Exhibit OPC (2A)-1 at 4.

44 Exhibit OPC (2A)-1 at 1.

45 Exhibit OPC (2A)-1 at 1-2, 4.

After convening the February 9, 2015 oral argument, the Commission rejected the Joint Applicants' February 4, 2015 filing. However, it determined that it would "consider the Joint Applicants' motion to be, in the alternative, a motion for leave to file the new testimony as Supplemental Direct Testimony that amends previously filed testimony by adding new commitments that the Joint Applicants are now prepared to make."[46] The Commission also extended the procedural schedule.[47]

E. The Joint Applicants' February 17, 2015 Supplemental Direct Testimony.

On February 17, 2015, the Joint Applicants submitted Supplemental Direct Testimony that, once again, substantially revised their original proposal. The Joint Applicants also submitted amended versions of their previously filed testimony and exhibits to conform to the revised proposals. However, the Joint Applicants did not make any revisions to their original Application, thereby confusing the record and calling into question the proposal now before the Commission. While Mr. Crane explained that there were no intended differences in the commitments the Joint Applicants intended to make on February 4 and those they actually made on February 17,[48] the two filings were, in fact, substantially different. In fact, several of the revisions seemingly have no relation at all to the February 4, 2015 filing.[49]

---

[46] *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction*, Order No. 17802, rel. Feb. 11, 2015, at ¶ 1.

[47] *Id.* at ¶ 30 (revised procedural schedule included as Attachment A).

[48] Tr. 73:12-16 (Crane). Mr. Crane's response cannot be reconciled with the Joint Applicants' Supplemental Response to OPC Data Request No. 21-2, which represents that the Joint Applicants did not decide to formally revise their "merger commitments" until after the February 9, 2015 oral argument. OPC Cross Examination Exhibit #1 at 2.

[49] To add to the confusion, Mr. Crane testified at the evidentiary hearing that he did not believe the Joint Applicants revised their reliability commitment on February 17, 2015. Tr. 94:18-20.

For example, Mr. O'Brien revised his discussion explaining the composition of the PHI board.[50] It is not clear why this revision was made, or how this revision related to the February 4, 2015 filing. Also, Dr. Tierney revised *her description* of *Dr. Dismukes' characterization* of the Customer Investment Fund despite the fact that Dr. Dismukes' characterization of the Customer Investment Fund never changed.[51] Interestingly, Dr. Tierney did *not* revise her analysis of the impact of the Joint Applicants' reliability commitment to reflect Pepco's substantial improvement in 2014—a revision that would have decreased the purported benefits. Dr. Tierney's explanation for not making this update was that she was being "very, very surgical in the things that [she] was changing."[52] In other words, in an attempt to make "minimal" changes,[53] an update to a key analysis (*i.e.*, the Joint Applicants' projected direct benefits stemming from the reliability proposal) did not make the cut as warranting revisions to incorporate Pepco's 2014 reliability performance. However, a change to a summary description of another witness' characterization of the Customer Investment Fund—a characterization that did not change—somehow did make the cut as warranting revision.

In any event, the principal effect of the Joint Applicants' February 17, 2015 filing was to expand the list of "merger commitments" from the original 12 to the 91 individual items identified in Exhibit Joint Applicants (4A)-2. The expanded list of items purportedly included "more detailed and granular ring-fencing and affiliate transaction provisions that are consistent with the ring-fencing and affiliate transactions that were included in the New Jersey

---

50 Joint Parties Hearing Exhibit #1 at 29.

51 Joint Parties Hearing Exhibit #1 at 46.

52 Tr. 2245:13-19.

53 Dr. Tierney explained that she understood her "assignment in the February 1th submission to be to update very, very minimally the changes in [her] testimony." Tr. 2246:5-8.

settlement,"[54] as well as the increased Customer Investment Fund (*i.e.*, $33.75 million for the District),[55] and a "revised reliability performance commitment."[56] While Mr. Crane described the revised reliability performance commitment as including a "commitment to meet the Commission's Electric Quality of Service Standard ('EQSS') for SAIDI and exceed the standard for SAIFI through 2020,"[57] that description is not accurate. Rather, the EQSS SAIFI and SAIDI requirements are annual performance metrics, whereas Item 7 on Exhibit Joint Applicants (4A)-2 proposes to measure compliance with the Joint Applicants' reliability commitment using a three-year average from 2018 to 2020.[58] Further, the Joint Applicants made no explicit commitment for reliability performance for 2015, 2016, or 2017.

Despite making these substantial revisions to the original proposal, Mr. Crane explained that the Joint Applicants made the strategic decision ***not*** to revise their Application because the Joint Applicants "did not want to restart the clock…."[59] Setting aside OPC's fundamental concerns with this type of procedural gamesmanship, the fact that the original Application—which has been verified by officers of PHI and Exelon as being true and correct—has never been revised creates further confusion as to what constitutes the actual proposal the Joint Applicants are asking the Commission to consider.[60]

---

54 Exhibit Joint Applicants (4A) at 3:18-20.

55 Exhibit Joint Applicants (4A) at 3:4-7.

56 Exhibit Joint Applicants (4A) at 2:2-10.

57 Exhibit (4A) at 4:2-4.

58 The EQSS's annual SAIFI and SAIDI requirements for 2013 through 2020 are set forth in 15 D.C.M.R. § 3603.11 (2010). At the evidentiary hearing, Mr. Rigby confirmed that the EQSS cannot be satisfied using Exelon's proposal to use average performance over a three-year period. Tr. 585:1-13.

59 Tr. 238:7-13 (Crane).

60 At best, OPC submits that it is not clear, as a matter of law, whether the Commission can approve a proposal that is made through testimony and not via formal application.

F. OPC's and Intervenors' March 20, 2015 Supplemental Direct Testimony.

Following a truncated discovery period on the Joint Applicants' substantially revised proposal, OPC and intervenors were provided an opportunity to submit Supplemental Direct Testimony in response to the Joint Applicants' February 17, 2015 filing. OPC Witnesses Dismukes, Mara, Ramas, and Morgan filed such testimony on March 20, 2015.

In its Supplemental Direct Testimony, OPC acknowledged that the Joint Applicants' February 17, 2015 Supplemental Direct Testimony contains some improvements in their proposed commitments relative to their woefully deficient original proposals. However, Dr. Dismukes identified OPC's procedural and substantive concerns with the Joint Applicants' revised commitments.[61] Mr. Mara demonstrated that key elements of the revised reliability commitments are deficient, likely rendering any benefit illusory.[62] Ms. Ramas testified that the revised commitments failed to address certain of her key concerns.[63] Finally, Mr. Morgan demonstrated that the Joint Applicants' failure to address Public Interest Factor #7 is a significant deficiency considering the importance of that issue.[64] On balance, OPC concluded that the Joint Applicants' revised proposal is not sufficient to outweigh all the potential harm associated with Exelon's proposed acquisition of PHI.

G. Revisions and Clarifications Provided During the March/April 2015 Evidentiary Hearing.

The moving target that is the Joint Applicants' proposal did not stop moving even once the evidentiary hearing commenced. Rather, while on the witness stand, the Joint Applicants' witnesses made, or appeared to make, a number of new clarifications or concessions. For

---

61 *See generally* Exhibit OPC (2A).

62 *See generally* Exhibit OPC (2B).

63 *See generally* Exhibit OPC (2C).

64 *See generally* Exhibit OPC (2E).

example, Mr. Crane seemed to explain that, despite the lack of an express commitment in Exhibit Joint Applicants (4A)-2 or in any of their witnesses' testimony, the Joint Applicants were committing to meet the Commission's annual EQSS targets.[65] Mr. Khouzami made a similar concession, testifying to the existence of an "*implicit* commitment to meet the annual EQSS requirements each year through 2020."[66] OPC is not sure what to make of this clarification given that the Joint Applicants' presented conflicting testimony on precisely what constitutes the firm proposal the Joint Applicants are asking the Commission to approve. At the end of two days of testimony, Mr. Crane was asked directly: "Is the formal presentation of merger commitments that the company is asking the Commission to consider the 91 paragraphs in Exhibit (4A)-2 or are there other firm commitments you're asking the Commission to consider that are not in Exhibit (4A)-2?" Mr. Crane responded by stating: "Exhibit (4A)-2 is the official filings [*sic*] *and the commitments that we're putting forth for the Commission to review*."[67]

In any event, Mr. Crane explained that, when Exelon entered into settlements in other jurisdictions, it did so with the understanding that it may need to apply certain provisions of those settlements in the District.[68] Mr. Crane also made numerous statements as to Exelon's willingness to do "whatever" the Commission wanted. These statements strongly suggest a perception by the Joint Applicants that they need to incorporate additional commitments in order to meet the public interest standard. Therefore, while the full extent of the Joint Applicants'

---

[65] Tr. 89:5-18 (where Mr. Crane testifies that the nature of the Joint Applicants' reliability commitment is to meet "whatever the EQSS standard requires"); *see also* Tr. 241:11-19 (where Mr. Crane clarifies that, in stating Exelon will agree to whatever the Commission requires, he was referring to the reliability standards).

[66] Tr. 1833:18-22 (Khouzami) (emphasis added).

[67] Tr. 549:20 to 550:6 (Crane) (emphasis added).

[68] Tr. 139:10-14 (Crane). For example, Mr. Crane states that, if a Most Favored Nations clause is a priority for the Commission, Exelon "would be willing to take that condition on." Tr. 70:13-20. With regard to the pending settlement in Maryland PSC Case No. 9361, Mr. Crane also testifies that Exelon is "willing to take…on" comparable provisions in the District "at the equivalent value." Tr. 138:8-20.

commitments is not known, it is clear that it goes beyond the items identified in Exhibit Joint Applicants (4A)-2. It is not the obligation of the Commission, OPC, or intervenors to "fill the gap" and identify the additional commitments to which the Joint Applicants may be willing to agree in order to meet their burden of proof.

With regard to Item 72 of Exhibit Joint Applicants (4A)-2—*i.e.*, the provision detailing when the proposed ring-fencing provisions can be reconsidered—Mr. Crane clarified that Pepco is not a "party" that could petition the Commission to seek reconsideration of the ring-fencing provisions within the first five years.[69] This clarification is not reflected in the text of Item 72 of Exhibit Joint Applicants (4A)-2 but has a substantive impact on the meaning of that text.

There is certainly nothing wrong with providing helpful clarifications. However, when a central procedural problem is the inability to identify the actual proposal that the Joint Applicants are asking the Commission to approve, these purported "clarifications" during the evidentiary hearing did nothing more than muddy the (already muddy) water.

H. Rather than Affirmatively Meet Its Burden of Proof Through a Meritorious Proposal, Exelon has Attempted to Obtain Regulatory Approval By Presenting a Deficient Proposal and then Signaling to the Commission that It Will Accept Whatever Conditions the Commission Deems Necessary to Meet the Public Interest Standard.

Several of Mr. Crane's comments at the evidentiary hearing seemed to provide critical insight into the Joint Applicants' conduct during, and strategy for, this proceeding. Notably, Mr. Crane stated, on numerous occasions, that the Joint Applicants would agree to "whatever" the Commission wanted.[70] In piecing the puzzle together—the bare bones June 18, 2014 Application, punting the decision on how to deploy to the Customer Investment Fund to the

---

[69] Tr. 124:6 to 125:22 (Crane); *see also* Tr. 250:3 to 251:18 (Crane).

[70] *See, e.g.*, Tr. 241:11-16 (where Chairman Kane makes note of Mr. Crane's references to do "what the Commission wants").

Commission, the piecemeal revisions over the course of the proceeding, etc.—it is clear that the Joint Applicants are attempting to sidestep their burden of proof. Instead of presenting a proposal that meets the public interest standard, the Joint Applicants presented a proposal intended to get their foot in the door. At that point, the Joint Applicants seem willing to roll the dice and accept whatever proposal the Commission is inclined to craft. OPC submits that acquiring PHI is so valuable to Exelon in light of Exelon's struggling generation business that the long-term benefits of acquiring PHI's regulated utility operations outweigh the risk that the Commission may impose conditions that appear costly in the short-term.

Exelon had ample opportunity to submit a proposal that satisfies the public interest but it failed to do so. From a policy perspective, subscribing to Exelon's strategy and remedying that failure by conditionally approving the proposal runs the risk of threatening the public's confidence in the fairness of this review process. In effect, it would allow the Joint Applicants in this case, and other applicants in the future, the ability (if not incentive) to present a flawed and deficient application for the Commission to fix and approve. Specifically, apart from the lack of substance of the Application and commitments, OPC is concerned that the manner in which the Joint Applicants provided their revised proposals, and Mr. Crane's willingness to accept "whatever" at the evidentiary hearing, will cast a shadow over this proceeding and the public trust. Consequently, while the Commission certainly has authority to impose conditions to ensure the proposal satisfies the public interest standard, OPC urges the Commission to thoughtfully consider, in this instance, whether it is in the public interest to do so, particularly given the extent to which the Joint Applicants' proposal is deficient. OPC acknowledges that this is not an easy task. It requires the Commission to ignore short-term palliatives and focus on the permanent, long-term consumer benefits. OPC, in discharging its statutory obligation, took

on the task of evaluating the totality of the Joint Applicants' proposal and ultimately reached the conclusion that the proposal did not meet the public interest standard established by the Commission.

IV. APPLICABLE LEGAL STANDARD AND BURDEN OF PROOF

A. The Public Interest Standard and the Commission's Seven Public Interest Factors.

For an acquisition to be approved, the D.C. Code imposes upon the proponents of the acquisition the burden of demonstrating that the transaction is in the "public interest."[71] The Commission has issued several decisions explaining what it means to be in the public interest within the meaning of D.C. Code § 34-504. In Order No. 12395 in Formal Case No. 1002, and Order No. 11075 in Formal Case No. 951, the Commission explained that a merger "must benefit the public rather than merely leave it unharmed."[72] In addition, the Commission explained that the merger "must produce a direct and traceable financial benefit to ratepayers."[73] While the direct, traceable, and financial benefit to ratepayers need not be "profound," the Commission has specified that benefits to shareholders and the merging companies "must not come at the expense of the ratepayers."[74] Moreover, the Commission has concluded that "any savings that result [from the transaction] must be shared with ratepayers, and be shared in such a proportion that ratepayers are compensated for the risks inherent in the companies' decision to merge."[75]

---

[71] D.C. Code § 34-504 (2010).

[72] *Formal Case No. 1002,* Order No. 12395 at ¶ 41 ("Order No. 12395") (quoting *Formal Case No. 951, In the Matter of the Joint Application of Baltimore Gas and Electric Company, Potomac Electric Power Company, and Constellation Energy Corporation for Authorization and Approval of Merger and for a Certificate Authorizing the Issuance of Securities*, Order No. 11075, rel. Oct. 20, 1997, at 17 ("Order No. 11075")). While Order No. 11075 discusses the public interest standard under DC Code Section 43-704, Order No. 12395 makes clear that DC Code Section 43-704 was recodified as DC Code Section 34-504. *Formal Case No. 1002*, Order No. 12395 at ¶ 41, n.107.

[73] *Formal Case No. 1002*, Order No. 12395 at ¶ 41 (quoting Order No. 11075 at 18).

[74] *Formal Case No. 951*, Order No. 11075 at 18.

[75] *Id*.

Consistent with the precedent from Order Nos. 11075 and 12395, the Commission expressed its intent in Order No. 17530 to use the analysis and evidence presented in this proceeding to answer whether: (1) the proposed transaction balances the interests of shareholders and investors with ratepayers and the community; (2) the benefits to the shareholders do or do not come at the expense of the ratepayers; and (3) the proposed transaction produces a direct and tangible benefit to ratepayers.[76] In Order No. 17530, as revised by Order No. 17597, the Commission established seven public interest factors it will use in evaluating the Joint Applicants' proposal in light of these three questions. These seven public interest factors consider the effects of the transaction on: (1) ratepayers, shareholders, the financial health of the utilities standing alone and as merged, and the economy of the District; (2) utility management and administrative operations; (3) public safety and the safety and reliability of services; (4) risks associated with all of the Joint Applicants' affiliated non-jurisdictional business operations, including nuclear operations; (5) the Commission's ability to regulate the new utility effectively; (6) competition in the local retail, and wholesale markets that impacts the District and District ratepayers; and (7) conservation of natural resources and preservation of environmental quality.[77]

B. The Commission Should Reject the Joint Applicants' Attempt to Re-Write the Applicable Standard.

As explained above, D.C. Code § 34-504 and the Commission's seven public interest factors set forth clear criteria for evaluating the merits of the Joint Applicants' proposal. The Commission should reject the Joint Applicants' attempt to simplify or re-write those criteria.

With regard to the operative terms "in the public interest" and "direct and traceable financial benefits," Exelon's CEO Mr. Crane does not have an opinion as to "the meaning of

---

[76] *Formal Case No. 1119*, Order No. 17530 at ¶ 26.

[77] *Formal Case No. 1119*, Order No. 17597 at ¶ 124.

those words."[78] Rather than apply the legal standard, Mr. Crane would have the Commission evaluate the proposed transaction using a simplified standard that considered "whether Pepco's customers will be better off with the Merger than without it…."[79] OPC submits that the proposed transaction does not meet even Mr. Crane's simplified standard. Nonetheless, OPC urges the Commission to apply the public interest standard as articulated in the D.C. Code and the seven factors established in this proceeding.

Despite the fact that the Commission's standard explicitly considers "direct" benefits to ratepayers, Dr. Tierney criticizes OPC Witness Dismukes for applying the plain-meaning of the word "direct." Specifically, Dr. Tierney "encourage[s] the Commission to find that Dr. Dismukes' definition of what impacts are 'direct' is too narrow."[80] Dr. Tierney would have the Commission interpret the word "direct" in a manner than encompasses the words "indirect" and "induced."[81] This is because, according to Dr. Tierney, who is not an economist, the terms "indirect" and "induced" are "arcane terms that economists use" to mean direct.[82] Dr. Tierney's strained analysis defies logic. First, "indirect" and "induced" are not arcane terms, just as "direct" is not an arcane term. The Commission's public interest inquiry explicitly refers to "direct" benefits and, prior to Dr. Tierney's cross examination, no party suggested that this term was arcane. Second, if Dr. Tierney meant for direct, indirect, and induced "to be all the same thing,"[83] there would be no basis for distinguishing those terms in her testimony as she did.

---

78 Exhibit Joint Applicants (3A) at 2:5-10.

79 Exhibit Joint Applicants (3A) at 2:11-13

80 Exhibit Joint Applicants (3G) at 21:10-14.

81 Tr. 2285:5-21 (where Dr. Tierney testifies that she "is asking the Commission to incorporate all of those [terms] as consistent with the merger standard").

82 Tr. 2283:17-18 (Tierney); *see generally* 2280:14 to 2283:20 (Tierney).

83 Tr. 2283:20 (Tierney).

Accordingly, in applying the public interest standard, the Commission should interpret "direct" to mean "direct."

Again, OPC urges the Commission to review the Joint Applicants' proposal based on the clear criteria set forth in D.C. Code § 34-504 and the Commission's seven public interest factors.

C. The Joint Applicants Bear the Burden of Proving that the Proposed Transaction is in the Public Interest.

Under the District of Columbia's Administrative Procedures Act, the Joint Applicants bear the burden of establishing by substantial evidence that the proposed transaction is in the public interest.[84] As explained herein, the Joint Applicants have not met that burden. Rather, they presented a deficient proposal in the June 18, 2014 Application. Subsequently, they revised the original proposal in piecemeal fashion, which simply made some deficient proposals marginally less deficient and raised a host of other questions and concerns. Finally, the Joint Applicants seem intent on relying on the Commission to craft the conditions necessary to ensure that the proposal meets the public interest standard. As detailed herein, the proposed "commitments" that are itemized in Exhibit Joint Applicants (4A)-2 lack substance, do not demonstrate that the transaction will result in net benefits, and ultimately fail to meet the public interest standard. In fact, OPC demonstrated that there are aspects of the proposal that are contrary to the public interest.

Moreover, OPC submits that the Joint Applicants' strategy for meeting the public interest standard—avoiding "over-committing" by putting forth a minimal proposal and then relying on the Commission to craft a proposal that fills the gaps— is, in itself, not in the public interest. The Commission should expect applicants to attempt to meet the applicable legal standard by

[84] D.C. Code § 2-509(b) (2010) (declaring that "the proponent of a rule or order shall have the burden of proof"); D.C. Code § 2-509(e) (2010) (requiring findings of fact and conclusions of law to be supported by "reliable, probative, and substantial evidence").

putting forward their best proposal and relying on the merits of that proposal. Here, however, the Joint Applicants essentially seek an "advisory" opinion from the Commission that details the conditions that, in addition to the Items on Exhibit Joint Applicants (4A)-2, are necessary to meet the public interest standard. OPC submits that the Commission should be reluctant to allow the Joint Applicants to meet their burden of proof in this manner.

V. ARGUMENT

A. Public Interest Factor #1: The Impact on Ratepayers, Shareholders, the Financial Health of the Utilities Standing Alone and as Merged, and the Economy of the District.

Public Interest Factor #1 is broad, and the issues encompassed within this factor go to the heart of the case. As the following discussion demonstrates, the Joint Applicants have failed to meet their burden of demonstrating that the proposed transaction is in the public interest with regard to the considerations under Public Interest Factor #1.

1. Exelon Needs PHI/Pepco, but PHI/Pepco Do Not Need Exelon.

From Exelon's standpoint, the impetus for the proposed transaction can be traced to 2012, which one media outlet characterized as an "annus horribilis" for Exelon, or a horrible year.[85] Exelon's substantial interests in nuclear generation were faring poorly in competitive markets based on low natural gas prices and the impact of renewable generation.[86] After seeing earnings per share of $4.16 in 2011, Exelon was expecting earnings per share of between $2.35 and $2.85 for 2013.[87] In an effort to turn things around, Exelon cut its dividend on February 7, 2013 by approximately 40%, which was projected to result in $700 million in savings on an

---

85 *See, e.g.*, OPC Cross Examination Exhibit #5 at 1.

86 *See, e.g.*, OPC Cross Examination Exhibit #5 at 1.

87 *See, e.g.*, OPC Cross Examination Exhibit #5 at 1.

annual basis.[88] The savings produced by Exelon's February 2013 dividend cut would provide Exelon "an opportunity to invest in growth."[89] However, Exelon did not seek to invest in growth by increasing capital expenditures. Indeed, Exelon cut capital expenditures in 2013.[90] Rather, Exelon sought the stability offered by the regulated earnings of a distribution utility.[91] In the fall of 2013, Exelon began considering PHI as a potential acquisition target.[92]

In stark contrast to the troubles Exelon experienced in 2012 and 2013, PHI and Pepco were beginning to realize the benefits of a "strategic repositioning" during that time frame. In PHI's 2013 Annual Report to Stockholders, PHI's CEO Joseph M. Rigby reported that "[a]fter a decade of evolution, PHI has become what it set out to be—a regulated utility company with a robust rate base growth plan focused on strengthening the reliability of our transmission and distribution infrastructure."[93] Mr. Rigby further reported that, in 2013, PHI increased power delivery earnings by 23%, grew rate base by 10%, and achieved one of its "best reliability performances ever."[94] Not surprisingly, Mr. Rigby commented that PHI's customer satisfaction was seeing an "upward trend."[95] Further, whereas Exelon cut capital expenditures in 2013, PHI increased capital expenditures from $1,216,000,000 in 2012 to $1,310,000,000 in 2013.[96] PHI's improved performance, and the value provided by the relatively stable earnings associated with

---

88 Tr. 127:6-16; *see also* OPC Cross Examination Exhibit #5 at 1.

89 OPC Cross Examination Exhibit #5 at 1 (quoting Mr. Crane).

90 OPC Cross Examination Exhibit #6 at 2; *see also* Tr. 131:15-133:5.

91 Tr. 128:7-10 (where Mr. Crane testifies that Exelon "undertook an analysis that…targeted what we wanted for a risk profile in maintaining a strong balance sheet").

92 Tr. 346:8-347:2 (Crane).

93 OPC Cross Examination Exhibit #9 at 2.

94 OPC Cross Examination Exhibit #9 at 2.

95 OPC Cross Examination Exhibit #9 at 2.

96 OPC Cross Examination Exhibit #9 at 2.

its regulated operations, rendered PHI an attractive acquisition target for an entity like Exelon that is struggling to deal with the negative economic aspects of its generation business.

2. The Proposed Transaction is About One Thing—Increasing Value for Shareholders.

a. Direct Benefits to Shareholders are Substantial and Immediate.

Coming into 2014, Exelon was clearly on one trajectory, and PHI/Pepco were on another. Unfortunately for ratepayers and the District as a whole, Exelon's and PHI's/Pepco's paths would converge as a result of Mr. Rigby's January 27, 2014 announcement of his plan to retire at the end of 2014.[97] One day after Mr. Rigby announced his retirement plans, Mr. Crane contacted Mr. Rigby and expressed Exelon's interest in acquiring PHI.[98] Consistent with the statements in the 2013 Annual Report to Shareholders, Mr. Rigby explained at the evidentiary hearing that PHI's "board had confidence in a stand-alone plan."[99] Thus, when Mr. Crane first approached Mr. Rigby about the proposed transaction, Mr. Rigby "didn't say anything other than to tell him that we weren't for sale and that the board had confidence in the plan."[100]

Despite PHI's successful repositioning as a regulated utility and the board's confidence in the standalone plan, Mr. Rigby explained that PHI's "board was not satisfied with the value that we were delivering to our shareholders."[101] Consequently, the prospects of increasing shareholder value through an acquisition premium quickly changed the board's view about whether PHI was for sale. On February 5, 2014, Exelon made a "directional" bid to acquire PHI

---

[97] Tr. 572:1-4; *see also* DCG Cross Examination Exhibit #1 at 1 (page 25 of PHI's August 12, 2014 Definitive Proxy Statement).

[98] DCG Cross Examination Exhibit #1 at 1 (page 25 of PHI's August 12, 2014 Definitive Proxy Statement).

[99] Tr. 868:1-2 (Rigby).

[100] Tr. 868:17-22 (Rigby).

[101] Tr. 868:2-3 (Rigby). In response to a question from the bench, Mr. Rigby testified: "I'm just being very straight with you, that the view of the board was that we were not delivering competitive shareholder value. That was just their view. *They believed in the plan, though*." Tr. 868:8-12 (emphasis added).

for $22 per share.[102] Over the next several weeks, a bidding war ensued and Exelon ultimately agreed to a purchase PHI for $27.25 per share.[103] The proposed transaction was announced on April 30, 2014—just 36 days after PHI published its 2013 Annual Report to Shareholders, declaring that PHI: (1) has finally "emerged better positioned to continue enhancing stockholder and customer value;" (2) has a "stronger balance sheet, a manageable financing plan and a solid business platform;" and (3) is "well prepared to further evolve…by leveraging exciting opportunities provided by new energy-related technologies and the decentralization of generation resources."[104]

The purchase price would provide PHI's shareholders the benefit of a $1.6 billion acquisition premium. For its part, Exelon was willing to pay the massive acquisition premium because of the benefit the transaction provided to Exelon's shareholders. By acquiring PHI, Exelon would increase the proportion of earnings from regulated operations to between 58% and 61%.[105]

b. Direct Benefits to Ratepayers are Inadequate, Overstated, and Will Be Fully Realized (if at all) Only After Many Years.

To gain public and regulatory approval of the proposed transaction, Exelon anticipated that it would need to show that the transaction provides benefits beyond the enormous benefits that shareholders would enjoy.[106] Despite the discussion of many purportedly positive impacts

---

[102] Tr. 351:20 to 352:1; *see also id*. at 352:1-3 (where Mr. Crane characterized the initial offer of $22 per share as "the first lob over the fence to start the conversation").

[103] DCG Cross Examination Exhibit #1 at 1-7 (pages 25 to 31 of PHI's August 12, 2014 Definitive Proxy Statement).

[104] OPC Cross Examination Exhibit #9 at 2.

[105] Exhibit Joint Applicants (A) at 9:18-20. Mr. Crane acknowledged that increasing the proportion of regulated earnings is a clear benefit to Exelon. Tr. 133:8-22.

[106] DCG Cross Examination Exhibit #1 at 4 (page 28 of PHI's August 12, 2014 Definitive Proxy Statement) (recounting an April 10, 2014 discussion regarding "the nature of the potential regulatory commitments that [Exelon] might be expected to make in order to secure the necessary regulatory approvals").

of the proposed transaction, it is imperative to appreciate that the Joint Applicants contend that only two elements of the proposed transaction provide "direct,"[107] "tangible, quantifiable benefits to Pepco customers:"[108] (1) the Customer Investment Fund; and (2) "enhanced" reliability commitments.[109] As explained below, these two elements are woefully inadequate.

As originally proposed, the Customer Investment Fund was a $100 million fund that the Joint Applicants alleged was tied to the net synergies that the Joint Applicants expected to realize as a result of the transaction.[110] The District would receive $14 million of the original $100 million Customer Investment Fund, which equated to $52.95 per metered customer.[111] To put the $14 million figure in context, one individual alone—Mr. Rigby—will receive in excess of $20 million if the transaction is approved.[112] Through a number of settlements and related proposals, the Joint Applicants increased the Customer Investment Fund from $100 million to

---

107 *See* Exhibit Joint Applicants (G) at 11:7-11.

108 *See* Exhibit Joint Applicants (G) at 8:16-19; *see also id*. at 6:2-4 (where Dr. Tierney characterizes "the District-specific Customer Investment Fund and the Enhanced Reliability Commitments" as the "two sets of tangible, quantifiable benefits to Pepco customers"); Tr. 2425:11-20 (where Dr. Tierney confirms that she did not attempt to quantify the potential benefit of any commitments other than the Customer Investment Fund and the reliability commitment).

109 *See, e.g.*, Exhibit Joint Applicants (G) at 8:16-19; *see also* Exhibit Joint Applicants (3G) at 15:2-3 (where Dr. Tierney testifies that she "only quantified the two Regulatory Commitments – the [Customer Investment Fund] and the Reliability Improvements….").

110 Joint Applicants Hearing Exhibit #2 at 2 (reproducing Exhibit Joint Applicants (A) at 12:17-21; *see also id*. at 108 (reproducing Exhibit Joint Applicants (3L) at 10:7-8.

111 *See, e.g.*, Joint Parties Cross Examination Exhibit #1 at 43 (discussing the original version of Exhibit Joint Applicants (G) at 17:19-20).

112 Tr. 681:15-685:12.

$238 million.[113] On February 17, 2015, the Joint Applicants explained that the District's portion of the increased Customer Investment Fund is $33.75 million.[114]

While $33.75 million may seem, at a superficial level, to constitute a substantial sum, appearances can be deceiving. First, the $33.75 million figure is only $3.6 million more than the "golden parachute" compensation for five senior executives of PHI.[115]

Second, any benefit from the Customer Investment Fund is "highly dependent" on how the Commission decides to allocate that fund.[116] By not proposing any specific deployment of the Customer Investment Fund, the Joint Applicants deprived the parties of the ability to know, *ex ante*, what the impact of the Customer Investment Fund is likely to be. It is simply impossible to know whether any benefits resulting from the Customer Investment Fund offset the qualitative and quantitative harms associated with the transaction.

Third, assuming that the Customer Investment Fund, either in total or in part, is provided to customers as a rate credit, any such benefit would quickly be eroded. Joint Applicants Witness McGowan testified that it is reasonable to assume that Pepco will file a rate case within 12 months of the proposed transaction being approved.[117] Accepting the Joint Applicants'

---

113 Tr. 1833:1-8 (Khouzami).

114 The Joint Applicants have offered conflicting views on the basis for the $33.75 million Customer Investment Fund. *Compare* Tr. 2900:19 to 2901:4 (where Mr. McGowan testifies that the increased Customer Investment Fund was driven by the desire to provide all jurisdictions the proportionate value of the increased Customer Investment Fund in New Jersey that resulted from a settlement in that jurisdiction) & Tr. 67:3-7 (where Mr. Crane explains that the revised Customer Investment Fund was determined by taking "the value of the New Jersey Settlement, the monetary value [and] revis[ing] the commitment in the District to the equivalent on a pro rata basis, customer basis"), *with* Tr. 2902:4-6 (where Mr. McGowan testifies that the revised Customer Investment Fund was based on the value of "paying out almost ten years of synergies…but [is] still based on the initial net five-year synergy savings") & Tr. 59:12-15 (where Mr. Crane testifies that the Customer Investment Fund "is approximately ten years [*sic*] worth of the synergies" expected to be generated by the transaction).

115 Tr. 639:6-10 (Rigby).

116 Tr. 2462:14 to 2463:1 (Tierney).

117 Tr. 2903:4-5.

projected costs to achieve and synergy savings at face value,[118] rates will be higher in the first year following the transaction than they would be if the transaction is not approved given that costs to achieve are higher than synergy savings during this period. Therefore, any benefit from the Customer Investment Fund would evaporate within 12 months of approval of the transaction. Worse yet, Mr. McGowan testified that it is reasonable to assume that Pepco may file as many as three rate cases before 2020.[119] Thus, any benefit provided by the Customer Investment Fund is likely to be more than offset by anticipated rate increases.

Fourth, many of the alleged benefits are not anticipated to materialize until several years into the future. Thus, a rate credit to current customers would not offset the harm that future customers may face if the projected benefits do not actually materialize.

Fifth, the original $14 million allocation to the District, and the revised $33.75 million allocation, constitute only about 14% of the total Customer Investment Fund based on Exelon's decision to distribute that fund among the four jurisdictions implicated by the transaction on a metered-customer basis. Using metered customers as the basis for allocating the Customer Investment Fund understates the allocation to the District to the direct benefit of the other jurisdictions involved in this proceeding. The Commission should afford no weight to Exelon's decision to use customer meters as an arbitrary basis for allocating the Customer Investment Fund. Given the Joint Applicants' failure to establish a rational link between customer count and

---

118 Exhibit Joint Applicants (3F) at 8 (Figure CVK-2).

119 Tr. 2903:6-14 (McGowan).

value, the Commission should consider other allocation methodologies that are, in fact, linked to each of the PHI distribution utilities' proportionate value.[120]

In short, the Customer Investment Fund: (1) is not the product of a fair allocation methodology among the various jurisdictions; and (2) fails to compensate ratepayers for the risks of the transaction. If the Commission is inclined to approve the transaction, one condition of any such approval must be a substantial increase to the District's Customer Investment Fund. Otherwise, there would be no substantial evidence upon which to base a decision that the public interest standard was satisfied.

After closer scrutiny, it is clear that the second purported direct and traceable benefit of the transaction—the reliability commitment—is even more objectionable than the Customer Investment Fund. Given this Commission's concentrated focus on improving Pepco's reliability performance, OPC was unpleasantly surprised when the Joint Applicants originally proposed to achieve "enhanced" reliability levels that were ***worse*** than reliability levels required by the Commission's EQSS—statutory, minimum standards that Pepco previously committed to achieve.[121] Perhaps in recognition of the fact that the original reliability commitment was a non-starter, the Joint Applicants revised their reliability commitment on February 17, 2015. As shown below in Part IV.C below, the revised commitment is riddled with loopholes, exceptions and disclaimers; ignores Pepco's recent dramatic improvements in reliability performance and Pepco's ongoing obligation to comply with the EQSS; and ultimately is fatally flawed.

---

[120] *See, e.g.*, Tr. 199:7 to 204:17 (where Mr. Crane discusses whether allocating the Customer Investment Fund on revenue/earnings is more reasonable than allocating on customer count); Tr. 205:22 to 206:8 (where Mr. Crane discusses whether allocating the Customer Investment Fund on rate base is more reasonable than allocating on customer count); Tr. 211:11 to 212:10 (where Mr. Crane discusses whether allocating the Customer Investment Fund on distribution plant investment per customer is more reasonable than allocating on customer count).

[121] Exhibit OPC (A)-14 at 2 (reproducing a transcript of the evidentiary hearing in Formal Case No. 1103, where Mr. Gausman testified that "we will *always* meet whatever standard the Commission establishes") (emphasis added); *see also* Tr. 586:15-16 (where Mr. Rigby testifies that "[w]e commit to meet the standards that we're held to").

Moreover, the Joint Applicants attempt to deny the fact that Pepco's reliability will continue to improve if the transaction is not consummated and, if approved, the transaction would provide no meaningful benefits to the public in terms of either reliability performance or lower rates paid by Pepco's customers in the District. Despite the Joint Applicants' denials, the record firmly establishes these facts.

3. Induced and Indirect Impacts that the Proposed Transaction is Purported to Have on the District's Economy are Overstated and Misleading.

On behalf of the Joint Applicants, Dr. Susan F. Tierney conducted an impact analysis in an attempt to quantify the indirect and induced effects on the District economy that the Joint Applicants anticipate will result from the Customer Investment Fund and "enhanced" reliability commitments.[122] Based on Dr. Tierney's analysis, the Joint Applicants contend that the proposed transaction will produce 1,506 to 2,407 new jobs, $168.4 to $260.5 million in economic benefits, and $6.2 million to $10.8 million in incremental tax revenues.[123] OPC Witness Dismukes demonstrates the fundamental flaws with Dr. Tierney's analysis.[124] Those flaws notwithstanding, the purported benefits to the District economy are either grossly overstated or are presented in a misleading manner. Two examples demonstrate this point.

First, Dr. Tierney's impact analysis compared the Joint Applicants' proposed reliability targets to Pepco's average actual performance over a three-year period. According to Mr. Crane, "[i]t is important to acknowledge the significant improvement in reliability that the PHI Utilities, including Pepco, have accomplished…."[125] On cross examination, Mr. Crane explained that

---

122 *See, e.g.*, Exhibit Joint Applicants (G) at 11:11-18; *see also* Tr. 2200:10-22 (Tierney).

123 Exhibit Joint Applicants (G) at 7:2-12.

124 *See generally* Exhibit OPC (A) at 49-75.

125 Exhibit Joint Applicants (A) at 14:1-3.

"significant improvement" included Pepco's reliability performance in 2014.[126] Thus, OPC would expect 2014 to be included in the three-year period underlying Dr. Tierney's analysis.[127] Remarkably, however, Dr. Tierney's economic analysis is based on the three-year average performance over the period from 2011 to 2013,[128] despite the fact that 2014 data was available *before* Dr. Tierney conducted her updated analysis.[129] By strategically ignoring Pepco's significantly improved reliability performance in 2014, Exelon compares its reliability commitment to a baseline that: (1) gives undue weight to the period before Pepco began taking measures to improve its reliability performance; and (2) assumes that Pepco's reliability performance will not improve beyond the 2011 to 2013 average even through substantial evidence suggests Pepco's reliability will improve.[130] The effect of Dr. Tierney's analysis is to overstate the positive impact of Exelon's reliability proposal. It is beyond dispute that an impact analysis that ignores Pepco's 2014 reliability performance results in overstated projections of new jobs, economic benefits, and incremental tax revenues.[131] Notwithstanding OPC's other

---

126 Tr. 122:9-11 (Crane).

127 Data showing Pepco's 2014 actual performance was available *before* Dr. Tierney updated her analysis on February 17, 2015.

128 At the evidentiary hearing, Dr. Tierney explained that she was not responsible for selecting the 2011 to 2013 period as the baseline for her analysis. Rather, she used the average from 2011 to 2013 as the baseline because Exelon "asked [her] to use it." Tr. 2239:1-6; *see also* OPC Cross Examination Exhibit #100 at 10.

129 When asked why her updated analysis did not reflect the 2014 data, Dr. Tierney claimed that she "was very, very surgical in the things that I was changing [in her February 17, 2015 update] and did not change that" baseline figure. Tr. 2245:17-19. The result of Dr. Tierney's "very, very surgical" update is to show changes that benefit the Joint Applicants and ignore changes that do not.

130 Even Mr. Crane recognizes that "there has been work done and the groundwork laid through a unique proposal of undergrounding *which we think will be supporting further improvement*." Tr. 81:11-14 (emphasis added).

131 Tr. 2254:19-2255:16 (Tierney); *see also* Tr. 122:12-16 (Crane).

criticisms of Dr. Tierney's economic analysis, as discussed in Exhibit OPC (A),[132] Dr. Tierney's economic analysis is unreliable given this one, fundamental flaw alone.[133]

Second, Dr. Tierney's projection of 1,506 to 2,407 new jobs is presented in "job years." OPC does not dispute that a job-years analysis is an acceptable approach for performing an economic analysis. However, a "job years" analysis does not tell the complete picture in this regulatory proceeding. Assuming that the transaction results in new jobs at the low end of Dr. Tierney's projected range, Dr. Tierney explained that the proposed transaction could actually result in 50 new jobs, not 1,500 new jobs.[134] However, the Joint Applicants did not explain that important nuance in making representations to the public.[135] Rather, they simply and resolutely represented to the public that "the merger commitments *will produce approximately 1,500 to 2,400 new jobs*."[136] This misrepresentation distorts the true impact of the transaction and overstates the induced and indirect impacts.

4. The Joint Applicants' Employment Commitments Lack Substance and are Not Likely to Result in Any Net Benefit.

Four components comprise Joint Applicants' commitments regarding employment: (1) Dr. Tierney's assessment of jobs that will purportedly be created as an indirect or induced impact of the proposed transaction; (2) a commitment to use good-faith efforts to hire 102 new union employees;[137] (3) a commitment to move at least 50 employees of Pepco Energy Services from

---

132 *See generally* Exhibit OPC (A) at 49-75.

133 As explained above, D.C. Code § 2-509(e) requires findings of fact and conclusions of law to be supported by "reliable" evidence.

134 Under a "jobs years" analysis, 50 jobs that lasted for 30 years would be presented as 1,500 jobs. Tr. 2465:4-8 (Tierney).

135 It is telling that Exelon's CEO did not even understand what "jobs years" meant in plain English, claiming that Dr. Tierney, an expert witness holding a Ph.D., would have to provide the explanation. Tr. 117:19 to 118:8 (Crane).

136 OPC Cross Examination Exhibit #4 at 9 (emphasis added).

137 Exhibit Joint Applicants (4A)-2, Item 17.

Arlington, Virginia to PHI's office at Edison Place in the District;[138] (4) a commitment that there will be no net involuntary attrition for a period of two years following approval of the transaction;[139] and (5) a commitment to provide Pepco employees with compensation and benefits that, in the aggregate, are at least as favorable as compensation and benefits that employees received immediately before the Application was filed.[140] Above, OPC discussed the Joint Applicants' flawed assessment of jobs that will purportedly be created as an indirect or induced impact of the proposed transaction. In the following sub-sections, OPC addresses the other four jobs commitments and shows that they lack substance.

a. Exelon's Intention to Hire 102 New Employees is Not a Direct Benefit of the Transaction.

In its December 2014 Rebuttal filing, Exelon provided greater detail regarding its commitment to employment, promising to use good-faith efforts to hire 102 new Pepco union employees.[141] Unfortunately, this promise lacks substance.

First, Exelon merely plans to fill positions that are likely to become vacant as older utility workers retire. While perhaps appropriate, the Joint Applicants have not shown that the commitment to use good-faith efforts to hire 102 new union workers will result in any *incremental* increase in the workforce. Indeed, the opposite is likely true. Given that there are approximately 450 employees covered by the Local 1900 union contract that are eligible to retire in the upcoming year, it is possible that Pepco could experience net *negative* employment even if

---

138 Exhibit Joint Applicants (4A)-2, Item 18.

139 Exhibit Joint Applicants (4A)-2, Item 15.

140 Exhibit Joint Applicants (4A)-2, Item 15.

141 Exhibit Joint Applicants (3G) at 12:15-17; *see also* Exhibit Joint Applicants (4A)-2, Item 17. These new union workers would be cable splicers, field workers, overhead line workers, substation workers, etc. Tr. 2866:8-18 (McGowan); *see also* Tr. 114:10-15 (Crane).

it hires the 102 new employees[142] At a minimum, Mr. McGowan confirmed under cross examination that hiring 102 new employees would not guarantee that the size of the workforce would be increased by 102.[143]

Second, Mr. Crane claims that the commitment to hire 102 new union employees is a benefit of the transaction because Pepco does not "have the resources" to hire these employees.[144] There is no basis for Mr. Crane's claim. Mr. Rigby confirmed that Pepco has never represented that it lacks the resources to hire new employees.[145] In any event, the issue is *not* whether the work that these 102 new employees would be performing—*i.e.*, the work necessary to meet the EQSS[146]—would not be performed in the absence of the transaction. Rather, the issue is simply whether this work would be performed by new employees,[147] contractors, or existing employees working overtime.[148] The Joint Applicants did not present any evidence demonstrating the costs and benefits of the various staffing options. Thus, there is nothing inherently or incrementally beneficial about Item 17 of Exhibit Joint Applicants (4A)-2.

Third, there are costs associated with these employees.[149] To the extent the 102 new employees reflect incremental additions to the workforce (*i.e.*, the new employees are not simply replacing employees that have retired), the Joint Applicants will seek to recover the costs of the

---

142 Tr. 2871:5-8 (McGowan). Local 1900 covers Pepco DC and Pepco Maryland. Tr. 2871:13-15 (McGowan).

143 Tr. 2870:12-17 (McGowan). In response to a data request, the Joint Applicants stated that the "net impact" that hiring 102 new employees "will have on total union work force numbers cannot be determined because other factors outside the control of the Joint Applicants (e.g. voluntary retirements, people leaving, etc.) are not known at this time." OPC Cross Examination Exhibit #91 at 2 (Joint Applicants' Response to OPC Data Request No. 18-89).

144 Tr. 115:16-20 (Crane).

145 Tr. 628:22 to 629:4 (Rigby).

146 Tr. 116:3-6 (Crane). Both Exelon and Pepco have committed to doing whatever it takes to meet the EQSS.

147 Mr. McGowan confirmed that Pepco may still hire some of the 102 employees Tr. 2870:7-11 (McGowan).

148 Tr. 2867:2 to 2868:17 (McGowan).

149 Tr. 2874:7-9 (McGowan).

new employees through rates.[150] If the 102 new employees are simply filling vacancies that are caused by retirements, the costs associated with the new employees are already reflected in Pepco's current budgets.[151] Thus, to the extent the commitment to hire 102 new employees is an incremental benefit of the transaction, it is a ratepayer-funded benefit for which Exelon is seeking to take credit.

b. Exelon's Commitment to Transfer 50 Pepco Energy Services Employees to the District for an Unspecified Time Period does Not Constitute a Direct Benefit of the Transaction.

Item 18 of Exhibit Joint Applicants (4A)-2 commits to relocate at least 50 employees of Pepco Energy Services Company ("PES") to the District of Columbia. The Joint Applicants have not quantified the alleged benefit of this proposal, nor have they established qualitatively what this alleged benefit is. Presumably, the Joint Applicants contend that Item 18 helps offset concerns about a loss of jobs and may provide ancillary benefits such as additional tax revenues, etc. Whatever the alleged benefits may be, they should be given no weight.

There is no time commitment associated with Item 18.[152] Thus, the 50 PES employees could be transferred to the District on one day and fired the next. Indeed, Joint Applicants Witness Khouzami confirmed that some PES employees will be among those PHI employees who are victims of involuntary attrition (*i.e.*, who are terminated).[153] However, the Joint Applicants suggest the investment of approximately $1.5 million to break the lease in Arlington and make renovations to the Edison Place office to house the PES employees demonstrates

---

150 Tr. 113:17-21 (Crane).

151 Tr. 2874:11-16 (McGowan).

152 The lack of a time commitment is important in two respects. One, there is no commitment on when the transfer will take place. Mr. McGowan clarified that the transfer is expected to occur within one-year, and more likely within two to three months of closing. Tr. 2875:19 to 2876:5. Two, there is no commitment to retain these employees in the District. The following discussion focuses on this second point.

153 Tr. 1847:16-18 (Khouzami).

Exelon's intent to maintain the employment of the PES employees.[154] This suggestion overlooks the fact that the office space at Edison Place could be renovated to accommodate employees of Constellation Energy Services ("Constellation") should the 50 PES employees be terminated upon a consolidation of Constellation and PES.[155]

In addition, OPC notes that only two of the 50 PES employees are District residents. Thus, Item 18 does not have a substantial impact on the important consideration of creating or maintaining jobs for District residents. To the extent these two District residents are terminated as part of the effort to achieve labor synergy savings, this aspect of the proposal could have a negative impact on the District.

c. The Commitment on No Net Involuntary Attrition for a Period of Two Years is Inadequate.

Item 15 of Exhibit Joint Applicants (4A)-2 purports to be a commitment to ensure there is no net reduction in employment levels at Pepco due to involuntary attrition for a period of two years following consummation of the transaction. As indicated above, the value of this commitment has eroded over time. The original commitment in Exhibit 5 of the June 18, 2014 Application was not capped at two years. Rather, it explicitly referenced a period of *at least* two years. Similarly, the revised commitment is contrary to, and worse than, the manner in which the Joint Applicants have represented this commitment to the public. Specifically, the Joint Applicants have represented to the public that the commitment is to avoid net involuntary attrition for a period of *at least* two years.[156] Dr. Tierney even sponsored testimony in this proceeding purporting to "know there is a *specific* Merger Commitment that, for *at least two years* following consummation of the Merger, there will not be a net reduction, due to

---

154 Tr. 2877:10-22 (McGowan); *see also id*. 1847:6-15 (Khouzami).

155 Tr. 2878:1-6 (McGowan).

156 OPC Cross Examination Exhibit #4 at 4.

involuntary attrition as a result of the Merger integration process, in the employment levels at Pepco."[157] Lest there be any doubt, Mr. Crane confirmed at the evidentiary hearing that the commitment is for two years.[158]

OPC questions why the value of this commitment was degraded from June 2014 to February 2015. If, as Mr. Crane suggests, "in our future view of Pepco or any of the PHI companies, there is no view that we believe there will be a requirement for involuntary reductions,"[159] OPC questions the Joint Applicants' motives in committing to a fairly short two-year period. Moreover, OPC questions why the Joint Applicants would agree to a longer-term commitment in New Jersey,[160] but deny the District that same commitment.

The Joint Applicants have not provided substantial evidence to support a finding that a two-year commitment is in the public interest. Rather, the basis for the two-year period is simply that Exelon used a two-year period in its acquisition of Constellation Energy and "that met the test."[161] Under this logic, there is no basis for not using the longer period that "met the test" in New Jersey.

d. The Commitment to Provide Pepco Employees with Compensation and Benefits at Least as Favorable as Current Compensation and Benefits is Inadequate.

The second part of Item 15 of Exhibit Joint Applicants (4A)-2 states that, for a period of two years after the transaction is consummated, Exelon will provide Pepco employees with compensation and benefits that, in the aggregate, are at least as favorable as compensation and benefits that employees received immediately before the Application was filed. The Joint

---

157 Exhibit Joint Applicants (3G) at 11:17-20 (emphasis added).

158 Tr. 109:7-9 (Crane).

159 Tr. 107:11-19 (Crane).

160 Exhibit Joint Applicants (4A)-1 at 13-14.

161 Tr. 76:19 to 77:4 (Crane).

Applicants do not provide any evidence supporting the adequacy of this two-year period. In fact, the only evidence that the Joint Applicants did supply demonstrates that a two-year period is inadequate. Specifically, the Joint Applicants provided the New Jersey Settlement, which ensures comparable compensation and benefits for a period of at least *five* years.[162]

5. The Joint Applicants' Synergy Analysis Fails to Establish a Direct and Traceable Benefit to Ratepayers—and the Joint Applicants Do Not Contend that it Does Establish Such a Benefit.

As noted above, the Joint Applicants' characterize only two components of their proposal as "direct,"[163] "tangible, quantifiable benefits to Pepco customers,"[164] *i.e.*, the Customer Investment Fund and the "enhanced" reliability commitments. However, in support of their proposal, the Joint Applicants generally allege that the transaction will provide ratepayers the benefit of millions of dollars of synergy savings. As demonstrated below, the Joint Applicants' synergy analysis suffers from several fatal flaws and fails to support a finding that the transaction produces a direct and traceable financial benefit to ratepayers. First, the Joint Applicants' analysis shows that the costs to achieve are front-loaded, whereas synergy savings that would flow to ratepayers are back-loaded. Because long-term estimates are more difficult to make than short-term estimates, and because it is more difficult to trace transaction-related synergies as the companies become further entwined, the Joint Applicants are unable to demonstrate any benefit to ratepayers, let alone a direct and traceable one. Further exacerbating this deficiency is the fact that the Joint Applicants have continually revised their costs to achieve and synergy estimates in

---

162 Exhibit Joint Applicants (4A)-1 at 14.

163 *See* Exhibit Joint Applicants (G) at 11:7-11.

164 *See* Exhibit Joint Applicants (G) at 8:16-19; *see also id*. at 6:2-4 (where Dr. Tierney characterizes "the District-specific Customer Investment Fund and the Enhanced Reliability Commitments" as the "two sets of tangible, quantifiable benefits to Pepco customers"); Tr. 2425:11-20 (where Dr. Tierney confirms that she did not attempt to quantify the potential benefit of any commitments other than the Customer Investment Fund and the reliability commitment).

this case. Assuming, *arguendo*, there is no inherent problem with the Joint Applicants' presentation of a moving target, the simple fact that the target is moving calls into question the reliability of the estimates. Second, the Joint Applicants have overstated the costs to achieve, thereby diminishing any synergy savings that ratepayers may realize. Notably, the Joint Applicants inappropriately characterize certain regulatory support costs as costs to achieve instead of transaction costs thus unnecessarily burdening ratepayers. Finally, the Joint Applicants' proposal to recover the non-accelerated portion of Supplemental Executive Retirement Plan ("SERP") costs is contrary to Commission precedent.[165] For all of these reasons, the Commission should find that the Joint Applicants have not provided the record with substantial evidence to demonstrate that the merger will produce a direct and traceable financial benefit to ratepayers.

a. The Joint Applicants and Their Shareholders Would Recover Costs to Achieve in the Near-Term but Ratepayers Would Only Realize the Benefit of Any Synergy Savings Over a Period of Many Years.

Under the Joint Applicants' proposal, Pepco's next base rate case will result in ratepayers paying rates that are higher than they otherwise would have been due to the fact that costs to achieve will be recovered through rates.[166] Specifically, on a Pepco DC basis, the Joint Applicants project that costs to achieve will outweigh synergies by $2 million in the pre-closing period.[167] In year one, the costs to achieve are $7 million, in comparison to projected synergies of $3 million. OPC understands that Pepco will seek to recover through rates the $2 million in

---

165 *See, e.g., Formal Case No. 1103, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order No. 17424, rel. Mar. 26, 2014, at ¶ 566(r) ("Order No. 17424") (noting the removal of SERP costs).

166 It is reasonable to assume that Pepco will file a base rate case within 12 months of consummation of the transaction. Tr. 2903:4-5 (McGowan).

167 Exhibit Joint Applicants (3F) at 8 (Figure CVK-2).

costs to achieve incurred in the pre-closing period. Thus, if the Joint Applicants' estimates of costs to achieve and synergy savings are accurate, Pepco's cost of service is likely to be $6 million higher than it would be in the absence of the transaction in the first rate case following the acquisition.[168]

It is only in year two that the projected synergy savings allegedly will turn positive—and that projected net benefit only amounts to $2 million. As noted above, these synergies estimates are nothing more than their name suggests—**estimates**—and the Joint Applicants have conceded that there is no guarantee that ratepayers will ever reap these benefits. Notably, as discussed below, the Joint Applicants would not be in violation of any of the 91 Items in Exhibit Joint Applicants (4A)-2 if the synergy estimates never materialize. However, the Joint Applicants would have recovered their costs to achieve by virtue of the fact that the costs to achieve are front-loaded (*i.e.*, are incurred within the first year of the merger according to page 8 of Exhibit Joint Applicants (3F)).[169]

Thus, instead of producing a benefit to ratepayers, the Joint Applicants' proposal essentially ensures that the Joint Applicants and their shareholders will be made whole while simultaneously putting the risk on ratepayers that: (1) synergies will actually be achieved; and (2) achieved synergies will more than offset the costs to achieve. This asymmetrical sharing of benefits and risks is unfair and contravenes Commission precedent. There is no basis for placing this undue risk on ratepayers. For this reason, the Commission should find that the Joint

---

[168] Tr. 1820:2-8 (Khouzami); *see also* OPC Cross Examination Exhibit #89 at 1. As explained by OPC Witness Donna Ramas: "If the merger is ultimately approved and were to close on June 30, 2015, then Year 1 post-merger would be the twelve months ended June 30, 2016. Under this timing scenario and the projections provided to date, if Pepco were to file a rate case application post-merger that incorporates a test period that falls prior to the net cost savings becoming positive . . . the costs to achieve incorporated in such a filing could potentially exceed the cost savings. If Pepco is permitted to incorporate costs to achieve in future rates that exceed the demonstrated cost savings, ratepayers in the District of Columbia would be harmed through higher rates." Exhibit OPC (C) at 16:11-20.

[169] Tr. 1816:11-15 (Khouzami).

Applicants have failed to demonstrate that the transaction will produce a net benefit to ratepayers. Such a finding supports the broader conclusion that the proposed transaction is not in the public interest.

b. The Joint Applicants Provide No Guarantee that Ratepayers Will Ever Enjoy the Projected Synergy Savings.

At the evidentiary hearing, Joint Applicants Witness Khouzami admitted that there is no guarantee that the Joint Applicants will actually achieve the projected synergies.[170] Mr. Khouzami also confirmed that it is easier to make projections for the short-term than the long-term.[171] Mr. Khouzami's testimony on these points is important because a major element of the Joint Applicants' case is the claim that long-term synergies will eventually come to fruition and will make ratepayers better off than they otherwise would be absent the transaction.

Further complicating matters is that the categorization of whether savings or costs are only transaction-related becomes more difficult to determine as the companies combine.[172] These realities set ratepayers up for a lose-lose scenario: given the likelihood that Pepco will file a rate case soon after the transaction is consummated, Pepco ratepayers will be burdened with higher rates than they could reasonably expect absent in the transaction because the costs to achieve in the test period will exceed the actual synergies in the test period. In subsequent rate cases, it will be more difficult to determine whether savings or costs are only transaction-related and whether Pepco ratepayers are in fact better off after Exelon's acquisition of PHI. Both situations impose upon ratepayers the significant risks associated with the lack of meaningful accountability.

---

170 Tr. 1814:18-20.

171 Tr. 1816:5-10; *see also* OPC Cross Examination Exhibit #90.

172 Exhibit Joint Applicants (3F) at 9:7-9; Tr. 1820:17-22 (Khouzami).

c. The Joint Applicants' Projected Costs to Achieve and Synergies Savings Are Moving Targets, and the Joint Applicants Have Not Committed to Any Specific Level of Synergy Savings.

In addition to the arguments above, it is important to note that the projected costs to achieve and synergy savings have been revised numerous times in this case. First, the Boston Consulting Group performed an analysis showing total net synergy savings for the PHI utilities to be $95 million from pre-closing through five years after consummation.[173] Then, the Joint Applicants' estimate of net synergy savings for the PHI utilities was increased from $95 million to $102 million.[174] That $102 million estimate was then further revised down to $92 million.[175] The decrease in net synergy savings from $102 million to $92 million was attributed to a determination that a move to common information technology ("IT") platforms was necessary.[176] Specifically, the Joint Applicants "determined that fully consolidating the Exelon and PHI enterprise systems and migrating PHI to Exelon's Oracle platform is the preferred alternative because doing so will be more cost-effective and because the hybrid model will not achieve the targeted IT synergies."[177]

OPC does not necessarily take issue with the reasons for these changes. Rather, OPC is concerned that, as the integration process continues to unfold, additional revisions to the projected costs to achieve and net synergies may be required. As demonstrated by OPC Witness Ramas, the cost savings and efficiencies were largely unknown at the time Ramas filed her direct

---

173 Tr. 1807:17-22 (Khouzami).

174 Tr. 1806:6-10 (Khouzami).

175 Tr. 1806:15-50 (Khouzami); Exhibit Joint Applicants (3F) at 7:17.

176 Tr. 1804:15-19 (Khouzami).

177 Exhibit Joint Applicants (3F) at 6:20 to 7:2.

testimony on November 3, 2014.[178] Unfortunately, little has changed since Ramas' criticism on November 3, 2014. As further uncovered during the course of this proceeding process, the integration process is far from complete and several critical issues have yet to be decided:

- The Joint Applicants are currently in the Design Phase of the integration process. This level of detail has not yet been developed, and as such, Joint Applicants have not made final determinations as to which specific positions will be eliminated, the locations of those positions, and the locations of remaining positions.[179]

- The Joint Applicants are in the process of identifying and evaluating: (1) the differences between Exelon's and PHI's financial accounting policies and procedures; (2) the differences between Exelon's and PHI's regulatory accounting policies and procedures; and (3) anticipated tax methods or tax elections for PHI and Pepco. As such, conclusions have not been finalized; however, no material changes have been identified as necessary at this stage of the process. Joint Applicants currently anticipate completing this review by the end of the first quarter of 2015.[180]

- Decisions about specific removal of positions, either filled or vacant (but budgeted), have not been made for the various jurisdictions to date.[181]

- Specific supply chain synergies have not been finalized to date.[182]

- Specific transmission-related synergies have not been finalized to date.[183]

Given that the Joint Applicants did not update these data responses, OPC assumes that such analyses still have yet to be completed, nearly a year after the Joint Applicants filed their Application. As admitted by Joint Applicants Witness Khouzami, "the integration process will

---

178 Exhibit OPC (C) at 13:2 to 15:5.

179 Tr. 2056:21 to 2057:14 (Khouzami).

180 OPC Cross Examination Exhibit #97 (Joint Applicants' Response to OPC Data Request 18-88).

181 OPC Cross Examination Exhibit #92 (Joint Applicants' Response to OPC Data Request 18-95).

182 OPC Cross Examination Exhibit #87 at part B (Joint Applicants' Response to OPC Follow-Up Data Request 3-3).

183 OPC Cross Examination Exhibit #87 at part C (Joint Applicants' Response to OPC Follow-Up Data Request 3-3).

continue for several years because the actual combination of business structures, systems and processes must 'ramp up' on a carefully staged basis over time."[184]

In light of the trend of changing estimates, and the continuing integration work, OPC simply cannot conclude that the synergy estimates are reasonable. In the absence of any commitment that would hold the Joint Applicants accountable for a specific level of net synergies, the Joint Applicants have deprived the parties of the ability to reasonably determine whether synergies will result in a benefit to ratepayers. As the proposal currently stands (at best as OPC can discern what the actual proposal is), the Joint Applicants' synergy analysis shows no such benefit.

d. The Joint Applicants Have Inappropriately Characterized Regulatory Support Costs as Costs to Achieve Instead of Transaction Costs, Burdening Ratepayers With Excessive Costs.

The Joint Applicants define the three types of costs in this proceeding—costs to achieve, transaction costs, and transaction-related costs—as follows:

- "Costs to achieve are actual expenditures that will be incurred as a result of the Merger, and include expenses in such areas as employee compensation, communications, technology migration, financing, accounting and many others... Costs to achieve are typically incurred in order to effectuate long-term sustainable savings or synergies."[185]

- "Transactions costs are those costs incurred in consummating a merger, such as consultant, investment banker and legal fees, change and control payments (*i.e.*, golden parachutes as referenced on page 79 of the Proxy Statement filed with the SEC on August 12, 2014), costs associated with the shareholder meetings and a proxy statement related to the Merger approval by PHI shareholders and costs associated with Exelon's financing for the Merger."[186]

---

184 Exhibit Joint Applicants (F) at 19:15-17.

185 OPC Cross Examination Exhibit #85 at 1; Tr. 1795:10-17 (Khouzami).

186 OPC Cross Examination Exhibit #85 at 1; Tr. 1796:10-19 (Khouzami).

- "Merger-related costs include transaction costs, acquisition premiums and costs to achieve."[187]

Costs to achieve include the following types of costs: IT, severance/other compensation, regulatory support, and transition costs. In contrast, transaction costs or fees include debt and equity issuances, banker fees, and equity to executives, among other types of costs.[188] As explained by Joint Applicants Witness Khouzami, the Joint Applicants "drew the line of transaction cost . . . effectively up and to the point of effectuating the merger agreement. And then the cost beyond that was deemed our [costs to achieve]."[189]

The Joint Applicants proposed treatment of regulatory support costs contradicts these definitions. Regulatory support costs include costs associated with the hearings in the four jurisdictions as well as the Federal Energy Regulatory Commission ("FERC").[190] As aptly observed by Commissioner Brenner of the Maryland Public Service Commission ("Maryland PSC"), without regulatory approval of these jurisdictions, there can be no consummation of the transaction.[191] Thus, Mr. Khouzami's definition that transaction costs include those costs "up and to the point of effectuating the merger agreement" should necessarily include regulatory support costs (*i.e.*, the costs associated with hearings in the four jurisdictions and before FERC). The Joint Applicants' own definitions of transaction costs and costs to achieve necessitate defining regulatory support costs as transaction costs.

If the transaction is approved, Pepco would recover costs to achieve from ratepayers because it proposes to flow net synergy savings through to ratepayers through rates. However,

---

187 OPC Cross Examination Exhibit #85 at 1; Tr. 1797:1-3 (Khouzami).

188 Exhibit Joint Applicants (3F)-1 at 8.

189 OPC Cross Examination Exhibit #86 at 3.

190 Tr. 1800:4-8 (Khouzami).

191 Tr. 1801:22 to 1802:3 (discussing Mr. Khouzami's testimony in Maryland PSC Case No. 9361)

Pepco does not propose to recover transaction costs from ratepayers.[192] Accordingly, the consequence of characterizing regulatory support costs as costs to achieve is that ratepayers are burdened with $15 million in excessive costs, a portion of which would be allocated to the District.[193] Thus, the Joint Applicants' proposal to characterize regulatory support costs as costs to achieve essentially eliminates shareholders' responsibility for these costs and burdens ratepayers with excessive costs.

In attempting to explain why the proposal to recover regulatory support costs from ratepayers would not be problematic, Mr. Khouzami claimed that a decision about whether these costs could actually be recovered would "be made at the appropriate time, which we believe is the rate case."[194] Deferring important issues to Pepco's rate case and not judging them in this proceeding would skirt the Commission's public interest review of the transaction. Accordingly, the Commission should reject the Joint Applicants' proposal to treat regulatory support costs as costs to achieve and simply punt this issue to Pepco's next rate case. These costs should be addressed now in determining whether the proposed transaction is in the public interest.

OPC notes that the Joint Applicants' treatment of regulatory support costs as costs to achieve in this proceeding is also inconsistent with the treatment of these same costs in the New Jersey settlement.[195] The Joint Applicants' undue discrimination among PHI's customers adversely impacts District ratepayers, and accordingly, the Commission should find that the Joint Applicants have inappropriately characterized regulatory support costs as costs to achieve in this proceeding.

---

192 Exhibit Joint Applicants (4A)-2, Item 1(a); Exhibit Joint Applicants (F) at 25:11-15.

193 Exhibit Joint Applicants (3F)-1 at 8. Though he was not sure of the exact figure, Mr. Khouzami believed the District's allocation of regulatory support costs would be below $2 million. Tr. 1803:12-16 (Khouzami).

194 Tr. 1802:19-21 (Khouzami).

195 Tr. 2071:14-18 (Khouzami); *see also* Exhibit Joint Applicants (4A)-1 at 6.

e. The Joint Applicants' Proposed Treatment of SERP Costs is Unsupported and Contrary to Commission Precedent, Thereby Burdening Ratepayers With Excessive Costs.

The Joint Applicants' proposed $90 million in "severance/other comp" includes $17 million in associated SERP costs.[196] Item 3 in Exhibit Joint Applicants (4A)-2 would preclude Pepco from recovering from ratepayers the *accelerated* portion of the SERP benefits that are paid to eligible executives.[197] However, the *non-accelerated* SERP benefits would be considered costs to achieve and therefore would be paid for by ratepayers.[198] The Joint Applicants provide no evidentiary support for this type of treatment—treatment that is contrary to Commission precedent.[199] The result is an overstatement of the costs to achieve and an understatement of the projected synergies that would flow to customers.

At the hearing, Mr. Khouzami acknowledged that this Commission does not allow for SERP to be included in rates.[200] Despite his understanding of Commission precedent, Mr. Khouzami explained that:

> The reason why the SERP is included here is this is SERP that has already been earned by the employees. In order to get the synergies, severances must occur. So the thought was this is effectively like comp that they would otherwise have earned or otherwise would have been paid. So in order to exit them from the organization, you must pay the SERP. That is the reason why we did not include the accelerated portion or the costs associated with accelerating because that is driven by the merger, the timing of the merger. So, again, that is our thought. [Seventeen] million is included in CTA, and that's PHI-wide, not just for Pepco D.C., but ultimately that will be the discussion, I believe, Pepco will have with the Commission and others during a rate case proceeding.[[201]]

---

196 Tr. 1822:5-9 (Khouzami); Exhibit Joint Applicants (3F)-1 at 8.

197 Tr. 1822:16-20 (Khouzami); Exhibit Joint Applicants (4A)-2, Item 3.

198 Tr. 1822:21 to 1823:5 (Khouzami).

199 Exhibit OPC (C) at 18:13-14.

200 Tr. 1823:13-14.

201 Tr. 1823:15 to 1824:10.

The Commission should reject Mr. Khouzami's repeated refrain—that these issues can be decided by the Commission during Pepco's next rate case. The Joint Applicants should not be allowed to cherry pick the points the Commission will consider when it determines whether the transaction, as a whole, is consistent with the public interest. Rather, OPC submits that the Commission has an obligation now to ensure that the transaction is in the public interest and that ratepayers will see a direct, traceable, financial, incremental benefit. Whether the Joint Applicants' proposal to recover non-accelerated SERP from ratepayers has a direct bearing on that analysis because it impacts the costs to achieve and net synergy savings at issue in this case.

Based on the foregoing arguments and supporting evidence, the Commission should find that Joint Applicants have failed to demonstrate that the proposed transaction meets Public Interest Factor #1.

B. Public Interest Factor #2: The Impact on Utility Management and Administrative Operations.

1. Exelon's Takeover of Pepco is Likely to Result in Less Local Control Over Pepco's Budgets and Operations and Less of a PHI/Pepco Presence in the District.

The Joint Applicants make several commitments that they claim will enable Pepco to maintain a local presence in the District.[202] OPC has serious concerns with the ambiguity and lack of specificity in those commitments. In addition, OPC is troubled by evasive and non-responsive answers Exelon witnesses gave at the evidentiary hearing regarding the degree to which Exelon senior management would be involved in reviewing and potentially modifying or rejecting Pepco's operational plans and budgets after the transaction closes. As discussed below, the Joint Applicants' commitments in this important area fall far short of what is needed to

[202] Exhibit Joint Applicants (4A)-2, Items 10-14.

provide meaningful assurance that local control would in fact be maintained should Exelon's acquisition of Pepco be approved.

a. The Joint Applicants Provide No Real Commitment to Maintain PHI's and Pepco's Headquarters in the District.

The Joint Applicants represent that "PHI and Pepco will continue to maintain headquarters in Washington, D.C. at Edison Place."[203] Even assuming that such language constitutes an enforceable commitment, it certainly provides no affirmative benefit to the District, as there is no evidence in the record that either PHI or Pepco, before the proposed transaction was announced, had planned or intended to move their headquarters outside the District, in either the short-term or long-term. In fact, the opposite is true, as Mr. Rigby confirmed there are no plans to move PHI's or Pepco's headquarters.[204]

In any event, Joint Applicants' representation above cannot be fairly characterized as a meaningful commitment to keep PHI's and Pepco's headquarters here in the District. First, it does not specify any minimum time period (*e.g.*, five years or ten years). For that reason, presumably Exelon would assert it would not violate that "commitment" if it directed PHI and/or Pepco to close their District headquarters within just a few months after the transaction closes. Second, the language of the commitment, that PHI and Pepco "will" maintain their headquarters in the District does not square with Mr. O'Brien's testimony that Exelon "intends" to maintain PHI's and Pepco's headquarters in the District.[205] It is reasonable to conclude that Mr. O'Brien's testimony explains why the so-called commitment is silent regarding any minimum time period, and that is precisely because the Joint Applicants offer nothing more concrete than an undefined intent to keep the companies' headquarters in DC. In fact, the only thing the record

---

203 Exhibit Joint Applicants (4A)-2, Item 10.

204 Tr. 594:12-17 (Rigby).

205 Exhibit Joint Applicants (C) at 12:22-23.

indicates is that PHI and Pepco may—or may not—maintain their headquarters in the District for some unspecified period of time if the transaction is approved. Such an opaque "commitment" cannot be deemed a benefit.

b. The Joint Applicants' So-Called Commitment to Maintain Senior Managers at Pepco's DC Headquarters Lacks Critical Details.

The Joint Applicants indicate that "PHI will have a President/CEO, Chief Financial Officer [CFO], Treasurer and a number of other officers."[206] The Joint Applicants also indicate that "Pepco will maintain appropriate levels of senior management at its District of Columbia headquarters."[207] Neither of those commitments is meaningful.

To begin with, just as with the language discussed above regarding maintaining Pepco's headquarters in the District, neither of these two commitments provides any affirmative benefit whatsoever to the District. There is no evidence in the record that either PHI or Pepco, before the proposed transaction was announced, had planned or intended to no longer have a President, CEO, CFO, Treasurer or any other senior managers, or that Pepco would cease to maintain appropriate levels of senior management in the District. At best, this commitment evidences an intent to maintain the *status quo* to the maximum extent possible.

In addition, while Item 11 above states that PHI will have a President/CEO, CFO, Treasurer "and a number of other officers,"[208] that commitment notably omits critical language from the testimony of Mr. O'Brien, who stated more fully as follows: "PHI will have a President/CEO, [CFO] . . ., Treasurer and a number of other officers, *although likely fewer than*

---

206 Exhibit Joint Applicants (4A)-2, Item 11.

207 Exhibit Joint Applicants (4A)-2, Item 12.

208 Exhibit Joint Applicants (4A)-2, Item 11.

there are now."[209] Why, one wonders, did Joint Applicants omit that highlighted phrase in Mr. O'Brien's testimony from their actual "merger commitments?" And how many fewer PHI officers will there be post-transaction? Under a light most favorable to the Joint Applicants, Mr. O'Brien's testimony identifies the obvious point that things will be different if the transaction is approved. The Joint Applicants have failed to present substantial evidence to justify accepting those differences.

Further, the commitment to "maintain appropriate levels of senior management" at Pepco's DC headquarters[210] is far too vague to be meaningful. The commitment does not indicate what the Joint Applicants believe to be the "appropriate" number of senior managers to be maintained at Pepco's headquarters in the District. Is it the same number as of today? Is it a smaller number? If yes, how much smaller? What is the basis for the difference? How do customers benefit from this change? At a minimum, how are customers not harmed by this change? In order for the proposal to be found to be in the public interest, questions like this must be answered. Unfortunately, the Joint Applicants have not provided any answers.

Moreover, the commitment is silent as to any minimum time period that the (unknown number of) senior managers would remain at Pepco's headquarters in the District. This again leaves open the distinct possibility that Joint Applicants will significantly reduce the number of senior managers at Pepco's DC headquarters right on the heels of the transaction's closing, or as scrutiny of the new company wanes over time. In those circumstances, the so-called commitment would provide no affirmative benefits and would not even result in preventing harm, as the District would be worse off due to having its electric distribution utility with less of a local presence than was the case before its acquisition by Exelon.

---

209 Exhibit Joint Applicants (3C) at 14:12-14 (emphasis added).

210 Exhibit Joint Applicants (4A)-2, Item 12.

c. Exelon's Takeover of PHI and Pepco Would Result in Exelon-Appointed and Exelon-Dominated Boards of Directors for PHI and Pepco, and Less Independent Board Oversight of PHI and Pepco.

The Joint Applicants state that "PHI will have a board of directors consisting of 7 or more people" and that "[a]t least three members of the PHI board must be 'independent' (as defined by New York Stock Exchange rules)."[211] In terms of maintaining independence and local control, this would represent significant back-sliding should the transaction be approved. PHI's board of directors currently has 13 members, nearly double the number being proposed by Joint Applicants.[212] Of those 13 current PHI board members, the majority of them (at least seven) are independent of PHI's senior management.[213] Thus, what Joint Applicants propose is not only a smaller PHI board (reduced from 13 to 7), but one that is decidedly less independent of corporate management (reduced from a majority of independent members to a minority of independent members). OPC believes such changes in PHI's board would be a step backwards for the District, since the less independent PHI's board is, the more likely that the board will simply act as a rubber stamp that routinely approves the decisions of Exelon's and PHI's senior management without vigorous analysis and debate. Such diminished independence of the PHI board would be compounded by the fact that PHI itself, post-transaction, would cease to be a publicly-traded company, instead becoming a private entity with but *one* shareholder—Exelon.[214]

---

[211] Exhibit Joint Applicants (4A)-2, Item 38.

[212] Exhibit OPC (A) at 94:17-18.

[213] OPC Cross Examination Exhibit #11 at 3 (excerpt of transcript of Mr. O'Brien's deposition in Delaware Public Service Commission Docket No. 14-193) (deposition transcript page 39).

[214] OPC Cross Examination Exhibit #11 at 2 ("Exelon will initially appoint the Board members for PHI company post close"). *Id*. at 6 (deposition transcript page 103) ("Exelon appoints ***all*** of the members [of the PHI board] initially") (emphasis added).

Equally, if not more, concerning is that not only would PHI's board be smaller and less independent, but that the Exelon board would appoint *all* members of the PHI board.[215] And not only would Exelon appoint all PHI board members, but a majority of that board (*i.e.*, 4 out of 7) would consist of a combination of Exelon officers and directors.[216] Moreover, Exelon CEO Crane would likely become chairman of both PHI's board and Pepco's board, while Exelon Senior Executive Vice President O'Brien would likely become vice-chairman of both PHI's and Pepco's boards.[217] The latter would be a significant change from the *status quo*, in light of the fact that Mr. Rigby is currently CEO *and* chairman of the PHI board, while Mr. Velazquez, who will succeed Mr. Rigby as CEO of PHI, would not be chair of the PHI board, since as noted above the PHI board chair would instead be Exelon CEO Mr. Crane.[218]

These proposed changes in the composition of the PHI board appear to contradict Joint Applicants' claim that Exelon's acquisition of PHI and Pepco would "maintain local control" of Pepco's operations in the District.[219] At a minimum, it seems indisputable that, unless Exelon intends for the PHI board to be a sham entity, the transaction would result in both PHI and Pepco having boards whose members are appointed, controlled and directed by Exelon, all of which would undeniably constitute major changes in the *status quo*. The Joint Applicants have failed to explain how such a result could possibly be consistent with their claim that the transaction would maintain local control.

---

[215] OPC Cross Examination Exhibit #11 at 2 (excerpt of transcript of Mr. O'Brien's deposition in Delaware Public Service Commission Docket No. 14-193) (deposition transcript page 36) ("Exelon will initially appoint the Board members for PHI company post close"). *Id*. at 6 (deposition transcript page 103) ("Exelon appoints ***all*** of the members [of the PHI board] initially") (emphasis added).

[216] OPC Cross Examination Exhibit #11 at 2 (Mr. O'Brien stating that "[f]our members [of PHI's board] . . . will consist of some combination of officers and directors of Exelon").

[217] OPC Cross Examination Exhibit #13 at 7 (excerpt of Mr. O'Brien's hearing testimony in Maryland PSC Case No. 9361); *accord* Tr. 904:18-905:8.

[218] Tr. 905:13-21.

[219] Joint Application at 19.

The record also reflects Exelon's resistance to OPC's recommendations that would strengthen the independence of the PHI and Pepco boards and ensure that those boards had stronger ties to the District. Specifically, the Joint Applicants outright rejected OPC's recommendations that: (1) at least one-third and no fewer than two Pepco board members be independent, (2) the majority of Pepco's Board members reside in DC, (3) the majority of PHI's Board be independent, and (4) the PHI and Pepco CEOs reside in Pepco's service territory.[220] The Joint Applicants rejected all of those OPC recommendations as "simply not tenable," because, as Mr. O'Brien stated, "Exelon, as a practical matter, must have the ability to exercise control over its subsidiaries," including Pepco.[221] Exelon's rejection of OPC's recommendations provided great insight into OPC's investigation of the extent of Pepco's local control. Any "commitment" to local control is illusory as Exelon will be in control. To the extent there is any local control, it would be through individuals who are beholden to Exelon. OPC fails to see any compelling basis to cede authority over the District's distribution utility to decision makers in Chicago.

d. Exelon's Acquisition of Pepco Would Inject Multiple Layers of Exelon's Authority Over Pepco's Operations and Budget Processes.

Another of the Joint Applicants' purported "commitments" is that "[w]hile Pepco's budgets will be *reviewed* by Exelon's CEO and Executive Committee, they will have to be *approved* by the PHI board of directors."[222] This so-called commitment is misleading, and ultimately meaningless for the District and Pepco's ratepayers, for two reasons. First, as discussed above, what the Joint Applicants propose is a post-transaction PHI board of directors

---

220 Exhibit OPC (A) at 136-37.

221 Exhibit Joint Applicants (3C) at 11:9-19.

222 Exhibit Joint Applicants (4A)-2, Item 24 (emphasis added).

that would be decidedly less independent than is currently the case. Thus, while PHI's board will approve Pepco's budgets, all the members of that board will be appointed by Exelon, its chairman and vice-chairman will be Exelon CEO Crane and Exelon Senior Executive Vice President O'Brien, respectively, and it will no longer have a majority of its members who are independent. Accordingly, for all intents and purposes, there would appear to be little practical difference between Pepco's budgets being reviewed and approved by the PHI board versus being reviewed and approved by Exelon. In other words, it would be a PHI board in name only.

Second, while the Joint Applicants have gone out of their way to emphasize that Pepco's budgets will simply be "reviewed" by Exelon's CEO and Executive Committee,[223] the record indicates such review power necessarily includes the ability to approve, disapprove and/or require changes to Pepco's budgets. Mr. O'Brien explained that the current arrangement is that the budgets of the Exelon operating utilities are reviewed and approved by the Exelon board in a rolled-up fashion, and that it would work the same way for Pepco's budgets.[224] Significantly, Mr. O'Brien left no doubt that, post-transaction, Exelon's board would have the ability to disapprove Pepco's budgets:

> Q And if the Exelon board were presented with a Pepco O&M budget or a Pepco business plan rolled up with other subsidiary business plans or budgets, would the Exelon board have the ability to disapprove the Pepco piece of what had been rolled up?
>
> A The Exelon board of directors would review the Exelon budget in aggregate and could approve or disapprove of that at any time.[225]

Later during his cross examination, Mr. O'Brien again conceded that Exelon senior management would have the ability to disapprove a Pepco business plan or budget.[226]

---

223 Exhibit Joint Applicants (4A)-2, Item 24.

224 Tr. 917:19 to 918:5.

225 Tr. 917:4-7.

OPC believes it is beyond reasonable dispute that Exelon's acquisition of PHI and Pepco, which would for the first time subject Pepco's proposed business plans and budgets to review and potential disapproval of Exelon senior management, would necessarily result in less local control over those proposed business plans and budgets. That diminished local control, in turn, would increase the possibility that Exelon could require changes to Pepco's proposed business plans or budgets for the primary purpose of conforming such documents to accomplishing an Exelon objective—an objective which of course may not be in the best interest of the District.

e. Exelon Appears to Be Making Decisions Regarding Hiring at Pepco.

OPC views utility staffing and employment decisions as being core operational, planning, and budgetary functions of the distribution utilities. Thus, with respect to whether additional employees would be needed to undertake the work necessary to meet the EQSS, OPC would expect those decisions to be made by Pepco and its local management. However, that is not the case.

As Mr. Crane explained at the evidentiary hearing, the commitment to hire 102 new union employees was a decision he made in consultation with Mr. Rigby.[227] Notably, Mr. Crane did not state that he consulted with Mr. Velasquez—the designated CEO of PHI if the transaction is approved—regarding this decision. This one example is insightful because it demonstrates, before the transaction has even been approved, Exelon's ability to control matters of local operations.

---

[226] Tr. 929:15-19. Notably, while Mr. O'Brien was the primary witness of Joint Applicants to present and discuss Exelon's delegation of authority with respect to approval of its utility subsidiaries' budgets, he had a difficult time explaining how such delegation works. Tr. 940-42. Referring to the Exelon "Delegations of Authority" document, which is one of his own exhibits, Exhibit Joint Applicants (3C)-5, Mr. O'Brien stumbled over his attempted explanation of how the document is applied, stating at one point that "I have someone on staff that interprets this thing for me." Tr. 940:3-4.

[227] Tr. 263:15-19 (Crane).

f. If the Commission Approves Exelon's Proposed Takeover of Pepco, Pepco's Strategic Planning Will Be Performed by Exelon.

Prior to the proposed transaction, PHI had been in the process of developing a "Utility 2.0" plan. On February 6, 2014—as Exelon and PHI were engaging in preliminary discussions about the proposed transaction—over 50 company leaders at PHI convened in an all-day Utility 2.0 retreat.[228] PHI was planning to have completed its Utility 2.0 "Vision" in time for its planned strategic retreat in September 2014.[229] By the time of that retreat, however, discussions between Exelon and PHI had progressed beyond preliminary talks. As a result, PHI's efforts on Utility 2.0 ceased. In Mr. Rigby's words, PHI "hit the pause button" on Utility 2.0.[230]

Mr. Rigby indicated that the matter would heretofore likely "fall under [Exelon's] strategic planning process."[231] Exelon, with its enormous investment in generation assets, is likely to address the prospect of competing generation sources, in contrast to a wires-only utility like PHI. The fact that decisions as important as Pepco's position on Utility 2.0 issues will be made by Exelon is disconcerting in light of the concerns OPC identifies below with respect to Public Interest Factor #7.[232]

Based on the foregoing arguments and supporting evidence, the Commission should find that Joint Applicants have failed to demonstrate that the proposed transaction meets Public Interest Factor #2.

---

228 Tr. 7972-14 (Rigby).

229 Exhibit OPC (2E)-3 at 6.

230 Tr. 803:14-18 (Rigby).

231 Exhibit OPC (2E)-3 at 4-5.

232 In the interest of administrative efficiency, OPC does not repeat this argument below with respect to Public Interest Factor #7. However, PHI's decision to hit the pause button in light of the acquisition by Exelon should be a major consideration for the Commission as it considers Public Interest Factor #7.

C. Public Interest Factor #3: The Impact on Public Safety and the Safety and Reliability of Services.

Based on the District's experience with reliability performance, the proposed transaction's impact on reliability is a central issue that the Commission must address in undertaking its public interest review. Indeed, the Joint Applicants characterized the reliability commitment as one of the most important, if not ***the*** most important, benefit of the proposed transaction.[233]

Notably, in 2011, Pepco's poor reliability performance resulted in Pepco being identified as the "Most Hated Company in America."[234] PHI's CEO, Mr. Rigby, asked the board to freeze his base salary due to poor reliability performance.[235] Since that time, the Commission, OPC, and Pepco have worked diligently to improve Pepco's reliability performance. For its part, the Commission established the EQSS, which require Pepco to meet annual SAIFI and SAIDI metrics or face financial penalties. According to Mr. Rigby, improving reliability performance was not simply an important goal, but it "dominated our focus."[236] Pepco developed a Reliability Enhancement Plan and an Emergency Restoration Improvement Plan, which included hundreds of millions of dollars in capital and O&M expenditures that were designed to improve Pepco's reliability performance.[237] By implementing its improvement plans, Pepco has met the

---

233 *See*, *e.g.*, Joint Application at 2, 20; Exhibit Joint Applicants (3E) at 4:1-5:22; *see also* OPC Cross Examination Exhibit #20 at 2 (excerpt of "PHI Tomorrow" webpage that discusses "increased reliability" under the "For Customers" tab); OPC Cross Examination Exhibit #21 at 2-3 (Exelon press release dated June 18, 2014, identifying "Enhanced Customer Service and Reliability Commitment" as one of four customer benefits of the merger). As OPC Witness Dismukes testified, "[b]ased on the Joint Applicants' testimony and responses to data requests, it appears as though they made commitments to enhance reliability as a key selling point of the merger, but the details on how to make good on those commitments were a mere afterthought." Exhibit OPC (A) at 101:6-9.

234 OPC Cross Examination Exhibit #3.

235 Tr. 582:1-3 (Rigby).

236 Tr. 582:18-22 (Rigby).

237 Tr. 583:1-13 (Rigby).

Commission's EQSS performance requirements each year.[238] In fact, excluding Major Service Outages, Pepco's SAIFI and SAIDI performance has improved year-over-year from 2011 through 2014.[239]

As noted above, the Commission has explained that, to meet the statutory "public interest" standard, a proposed acquisition or merger "must benefit the public rather than merely leave it unharmed."[240] Given the importance of reliability in the District, OPC submits that the Commission should find that the public interest requires the Joint Applicants to demonstrate that the proposed transaction will result in net benefits in terms of reliability performance. Comparing Exelon's reliability commitment against Pepco's standalone reliability performance in a no-transaction future demonstrates that the proposed transaction provides no meaningful benefits to ratepayers in terms of reliability performance.

1. The Joint Applicants' June 2014 Proposal Contained a Commitment to Achieve a *Worse* Reliability Performance Than That Mandated by the EQSS.

In the instant case, one of the linchpins of the Joint Applicants' claim that Exelon's acquisition of PHI and Pepco would produce such a benefit is their so-called "enhanced" reliability commitment.[241] The Joint Applicants repeatedly touted their reliability commitment as a transaction-related benefit that will assure Pepco's "enhanced" and "improved"

---

238 Tr. 586:6-9 (Rigby).

239 Tr. 588:6-10 (Rigby).

240 *Formal Case No. 1002*, Order No. 12395 at ¶ 41 (quoting Order No. 11075 at 17).

241 *See*, *e.g.*, Joint Application at 2 and 20; Rebuttal Testimony of Witness Gausman, Exhibit Joint Applicants (3E) at 4:1-5:22; *see also* OPC Cross Examination Exhibit #20 at 2, excerpt of "PHI Tomorrow" webpage, discussing "increased reliability" under the "For Customers" tab; OPC Cross Examination Exhibit 21 at 2 (Exelon press release dated June 18, 2014, identifying "Enhanced Customer Service and Reliability Commitment" as one of four customer benefits of the transaction). As OPC Witness Dismukes testified, "[b]ased on the Joint Applicants' testimony and responses to data requests, it appears as though they made commitments to enhance reliability as a key selling point of the transaction, but the details on how to make good on those commitments were a mere afterthought." Exhibit OPC (A) at 101:6-9.

reliability performance.[242] The Joint Applicants state the transaction would result in improvements to Pepco's reliability performance, as measured by average SAIDI and SAIFI performance over the three-year period 2018-2020, with performance results reported to the Commission by April 1, 2021.[243] However, until they filed revised testimony on February 17, 2015, the Joint Applicants "inexplicably commit[ted] to 2020 reliability levels which do not meet the standards already required of Pepco in the EQSS."[244]

In particular, the Joint Applicants "committed" Pepco to meeting a SAIDI of 107 minutes in 2020, calculated for the three-year period ending in 2020,[245] despite the fact that the currently-effective EQSS mandate that Pepco meet a SAIDI of 81 minutes in 2020.[246] Such a commitment *to do worse* may have been a reflection of Exelon's ignorance of the EQSS or possibly of its attempt to relax Pepco's ongoing responsibility to meet the Commission's reliability requirements. Whatever the reason, it was a clearly unacceptable offer of "a power delivery system that will be *less* reliable than what Pepco committed to achieving without the merger."[247]

Following criticism by OPC and other intervenors that a pledge to achieve *worse* reliability performance than would be achieved absent the transaction was obviously a non-

---

242 *See, e.g.*, Joint Application at 2; Exhibit Joint Applicants (A) at 5:15-17; Exhibit Joint Applicants (4E) at 1:15-16; Exhibit Joint Applicants (3D) at 2:4; Exhibit Joint Applicants (4A) at 2:8-11.

243 Exhibit Joint Applicants (D) at 8:10-23.

244 Exhibit OPC (B) at 15:2-3. At the same time Exelon was proposing reliability targets that were worse than the performance levels required by the EQSS, Mr. Crane was claiming that "Exelon intends not only to achieve compliance with the current regulatory performance requirements, *but also to make further improvements in reliability metrics*." Exhibit Joint Applicants (A) at 14:5-7 (emphasis added); *see also id*. at 18:3-6 (where Mr. Crane testified that the proposed transaction "will create a real partnership to achieve a level of utility service reliability *that not only meets the future requirements* that the PHI Utilities have today *but exceeds those requirements*") (emphasis added).

245 Joint Parties Hearing Exhibit #1 at 30, indicating that the original versions of Joint Applicants Witness Alden's Direct Testimony, Exhibit Joint Applicants (D) at 8:16-18, and Mr. Alden's Rebuttal Testimony, Exhibit Joint Applicants (3D) at 2:12 and 3:11-12, both set forth a SAIDI of 107 minutes for the three-year period ending in 2020.

246 Exhibit OPC (B) at 15:4-5 (citing 15 D.C.M.R. § 3603.11(h)).

247 *Id*. at 6:5-7 (emphasis in original).

starter, Joint Applicants revised their reliability commitment. The Joint Applicants decreased their proposed average SAIDI for the three-year period 2018-20 from 107 minutes to 90 minutes, but they inexplicably *increased* (*i.e.*, made worse) their proposed average SAIFI for that three-year period from 0.54 to 0.66.[248] As OPC Witness Mara stated, the Joint Applicants "offer no explanation" for that 22% worsening of the SAIFI value as compared to the original proposal.[249] As discussed below, the Joint Applicants' reliability commitment, as revised, remains unacceptable for numerous reasons, including that it would yield no benefits to ratepayers above and beyond the benefits ratepayers would enjoy in the absence of the proposed transaction.

2. The Joint Applicants' Revised, Tripartite Reliability "Commitment" is Meaningless, Unenforceable, and Illusory.

The Joint Applicants presented a modified reliability commitment as part of their February 17, 2015 filing in this proceeding. Joint Applicants Witness Alden was the chief sponsor of that modified commitment, which he described as follows:

> [T]he Joint Applicants commit to meet the following SAIFI and SAIDI averages calculated for the three-year 2018-2020 period *without exceeding the aggregate capital and operation and maintenance ("O&M") spending levels listed in Table 1 of Mr. Gausman's February 17, 2015 Supplemental Direct Testimony*, absent changes in law, regulations, or extreme weather events requiring increases in reliability-related spending to restore service and facilities or variations in the schedule of the District of Columbia Power Line Undergrounding ("DC PLUG") that are outside of Pepco's control . . . ."[250]

Mr. Alden then presented modified performance metrics for Pepco to achieve, on average, for the 2018 to 2020 time period, namely 0.66 interruptions for SAIFI and 90 minutes for SAIDI.[251]

---

248 *Compare* Joint Parties Hearing Exhibit #1 at 30 (indicating an average SAIFI of 0.54 and an average SAIDI of 107 minutes for the 2018-20 period in the original version of Witness Alden's Direct Testimony, Exhibit Joint Applicants (D) at 8:16-18) *with* Mr. Alden's Supplemental Direct Testimony, Exhibit Joint Applicants (4D) at 2:12-13 (setting forth an average SAIFI of 0.66 and an average SAIDI of 90 minutes for the same three-year period).

249 Exhibit OPC (2B) at 3:13-14.

250 Exhibit Joint Applicants (4D) at 2:1-9 (emphasis added).

251 Exhibit Joint Applicants (4D) at 2:12.

Similarly, Dr. Tierney testified that the characteristic that distinguishes the Joint Applicants' reliability commitment from a no-transaction future is the "tripartite" components of the Joint Applicants' commitment: (1) the expectation that Pepco will meet SAIFI and SAIDI performance targets over the three-year period from 2018 to 2020; (2) the ROE penalty that would be triggered if Pepco fails to meet the SAIFI and SAIDI performance targets over the three-year period; and (3) the commitment to meet the SAIFI and SAIDI performance targets over the three-year period without increasing spending above budgeted levels.[252]

The modified reliability commitment is set forth as Items 7 and 8 of Mr. Crane's Exhibit Joint Applicants (4A)-2. Items 7 and 8 of that exhibit fall under the heading "Reliability and Quality of Service." In Item 7 is Table 1, which sets forth the spending levels included in Mr. Gausman's Supplemental Direct Testimony.[253] Item 7 of Exhibit Joint Applicants (4A)-2 states, in part, that "Joint Applicants commit to meet the following SAIFI and SAIDI averages calculated for the three-year 2018-2020 period *without exceeding the aggregate capital and operations and maintenance ('O&M') spending levels listed in Table 1, below . . . .*"[254] Further, Item 8 of Exhibit Joint Applicants (4A)-2 provides, in part, that if the reliability metrics set forth in Item 7 are not achieved, "the return on equity [ROE] to which Pepco would otherwise be entitled in its next electric distribution rate case filed after January 1, 2021, will be reduced by fifty basis points."[255]

---

[252] Tr. 2233:4-11; *see also id*. 2390:5-9 (Tierney).

[253] Exhibit Joint Applicants (4A)-2, Item 7, Table 1 *with* Exhibit Joint Applicants (4E) at 2:6-7 and Table 1. (Note Joint Applicants mislabeled page 2 of Mr. Gausman's Supplemental Direct Testimony as page 3. The preceding citation to Exhibit Joint Applicants (4E) at 2:6-7 and Table 1 is to the table that is in fact on the second page of that testimony.)

[254] Exhibit Joint Applicants (4A)-2, Item 7 (emphasis added).

[255] Exhibit Joint Applicants (4A)-2, Item 8.

The Joint Applicants repeatedly emphasized that the central benefit to ratepayers of the reliability commitment is not just achieving three-year average SAIDI and SAIFI metrics by 2020, but doing so without increasing spending beyond specified levels. For example, Mr. Alden described the SAIDI and SAIFI metrics included in Joint Applicants' reliability commitment, and added, "[f]urthermore, the reliability improvements I have described will be achieved without increasing reliability-related…expenditures above the levels in Pepco's existing long-range plans…."[256] Mr. Crane likewise expressly characterized the reliability commitment as a commitment to meet reliability metrics "within Pepco's reliability capital and…[O&M] spending levels…."[257] Joint Applicants Witness Gausman was even more emphatic on this point, strongly disagreeing with OPC's witnesses that a proposal to improve reliability performance without increasing reliability-related capital and O&M budgets is not a benefit of the proposed transaction.[258] Mr. Gausman further stated as follows:

> The Merger commitment is guaranteeing reliability improvement ***while also guaranteeing that the reliability-related capital and O&M budgets would not increase***. The level of improvement ***guaranteed with no corresponding increase in spending*** is not something that would be available to District of Columbia residents absent the Merger and constitutes a direct and traceable benefit to customers.[259]

However, upon examination of these witnesses at the hearing, a very different—and utterly contradictory—story came to light. Specifically, cross examination unequivocally

---

[256] Exhibit Joint Applicants (D) at 9:5-7. Mr. Alden similarly stated, in his Rebuttal Testimony, that Joint Applicants' reliability commitment included "a commitment not to increase reliability-related capital and operation and maintenance . . . budgets." Exhibit Joint Applicants (3D) at 3:14-15.

[257] Exhibit Joint Applicants (4A) at 4:2-8.

[258] Exhibit Joint Applicants (3E) at 2:7-10. (Note Joint Applicants mislabeled page 2 of Mr. Gausman's Rebuttal Testimony as page 3. The preceding citation is to language that is in fact on the second page of that testimony.)

[259] Exhibit Joint Applicants (3E) at 3:3-8 (emphasis added). Note, the Joint Applicants mislabeled page 3 of Mr. Gausman's Rebuttal Testimony as page 4. The preceding citation is to language that is in fact on the third page of that testimony.

disclosed, for the first time, that the Joint Applicants' reliability commitment: (1) contains exceptions that essentially excuse Pepco from meeting the SAIFI and SAIDI targets; (2) does ***not*** include a commitment to hold spending at certain levels and does ***not*** include a commitment to forego seeking recovery, in Pepco's District customers' rates, of reliability spending in excess of the levels shown in Table 1 of Item 7 of Exhibit Joint Applicants (4A)-2, and (3) does ***not*** include subjecting Pepco to the ROE penalty if actual spending exceeds the levels shown in Table 1 of Item 7. As discussed below, these three revelations completely eviscerate the Joint Applicants' claim[260] that their reliability commitment provides a benefit to Pepco's ratepayers that they would not realize absent the proposed transaction.

a. The Reliability Commitment Improperly Excludes Non-Compliance for Weather-Related Reasons, Ignoring that the EQSS Already Exclude the Impact of Major Service Outages.

The Joint Applicants' reliability commitment provides an exception to achieving the SAIDI and SAIFI metrics due to "extreme weather events requiring increases in reliability-related spending to restore service and facilities . . . ."[261] However, Pepco already has available to it two separate bases for seeking relief from reliability-related requirements associated with weather events. First, the EQSS themselves "do not include Major Service Outages, which would likely exclude most serious weather events."[262] Second, "[i]f Pepco can show that its failure to meet a specific benchmark was truly a result of conditions beyond Pepco's control, then the Commission may relieve Pepco of the requirement."[263] Given these existing

---

260 Exhibit Joint Applicants (3E) at 3:3-8.

261 Exhibit Joint Applicants (4A)-2, Item 7.

262 *Formal Case No. 766, et al*., *In the Matter of the Commission's Fuel Adjustment Clause Audit and Review Program, et al.*, Order No. 16427, rel. July 7, 2011, at ¶ 38 ("Order No. 16427").

263 *Id*. The Commission defines a Major Service Outage as "occurring when 10,000 or more customers are without service and restoration takes longer than 24 hours." *Id*. at ¶ 39.

mechanisms for relief, the Joint Applicants' proposed new exception to its reliability commitment for weather-related events is entirely unnecessary.

b. Contrary to Their Explicit Representations, the Joint Applicants' Modified Reliability Commitment Does *Not*: (1) Include a Cap on Spending; (2) Include a Pledge to Forego Rate Recovery of Reliability-Related Spending; or (3) Include Any Penalty for Exceeding Spending Levels.

On the first day of the evidentiary hearing, counsel for OPC cross examined Exelon CEO Crane regarding the Joint Applicants' reliability commitment. Mr. Crane was questioned as to whether such commitment included a cap or limit on reliability-related capital and O&M budgets listed in Item 7 of Exhibit Joint Applicants (4A)-2. Specifically, Mr. Crane was asked to assume three things: first, the transaction is approved; second, after the transaction is consummated Exelon performs a circuit-by-circuit review of Pepco's system and determines more work is required than initially anticipated; and third, such extra work requires Exelon to exceed the capital and O&M budgets that it had committed not to exceed.[264] With that hypothetical situation in mind, the following exchange ensued:

> Q If that situation arose, would Exelon make the expenditures that exceed the budgeted levels?
>
> **A** ***We would make the expenditures that are required to drive the level of reliability. We're committed to that. And if those did exceed what this budget is, we would have to explain that to the Commission and we would be at their will to make that recovery***. But the number one priority is reliability and safety of the system, and our responsibility is to ***invest whatever money it needs to accomplish those*** – fix those conditions.
>
> Q Thank you. So your position is essentially that it would be an issue for the next rate case, and ***Exelon is not committing <u>not</u> to seek recovery of those increased amount[s]?***

[264] Tr. 95:4-22.

A ***We're not saying we would or we wouldn't.***[265]

When the same hypothetical was posed to Joint Applicants Witness Mr. Alden during his cross examination, he gave essentially the same answers as those of Mr. Crane above.[266] Specifically, when asked, "if that's the situation to arise, would Exelon make the expenditures that exceed the budgeted levels?" Mr. Alden responded, "[w]e would do what it took to meet the EQSS standards as required, and we would manage those costs as best we could not to exceed the limits."[267]

Likewise, just as Mr. Crane responded (as quoted above), Joint Applicants Witness Alden made clear that Joint Applicants are not ruling out seeking recovery in rates of reliability-related expenditures that exceed the amounts in Table 1 of the reliability commitment but were needed to meet Pepco's obligations under the EQSS: "We have an obligation to meet the EQSS standards and ***we'll do what it takes to do that. If that requires additional spend, then we're subject to the Commission's rules with respect to whether we're allowed to recover those dollars or not***."[268] He reiterated that point later in his cross examination, stating "[i]f we -- if we exceed the spending levels that we've committed to here to meet…, then those additional expenditures would be subject to approval through normal ratemaking process."[269]

Joint Applicants Witness Gausman also conceded, during cross examination, that the reliability commitment *does not* include either a limit on spending levels or a commitment not to

---

265 Tr. 96:5-22 (emphases added).

266 Tr. 1137:13-1138:15.

267 Tr. 1138:4-9; *see also* Tr. 1138:10-15 (asking Mr. Alden "is it correct to say that [J]oint [A]pplicants' reliability commitment is to make whatever expenditures are required to drive the level of reliability needed to meet the EQSS?," to which the witness responded, "We have an obligation to meet the EQSS standards and we'll do what it takes to do that.").

268 Tr. 1145:8-13 (emphasis added).

269 Tr. 1150:14-1151:3. *Accord* Tr. 1153:8-1154:5 and 1160:2-16

seek rate recovery of such excess spending.[270] Mr. Gausman added: "You know, having a requirement or having a limitation or a commitment to not exceed a budget is not going to stop us from doing what's right. ***We're going to spend the money to achieve the reliability performance that we are obligated to achieve***."[271] Referencing the spending levels in Table 1 of the reliability commitment, Mr. Gausman then stated as follows: "***If we spend more than what these values are, we absolutely are going to come back***.[272]

Mr. Gausman's confirmation that the Joint Applicants' reliability commitment excludes any commitment to limit reliability-related spending or forego rate recovery is all the more concerning in light of his concession that the Joint Applicants could not quantify the extent to which Pepco's O&M budget would need to increase in order to meet the Commission's reliability standards. As Mr. Gausman acknowledged, that analysis has not even been performed because Pepco does not prepare forward-looking O&M budgets.[273] Mr. Gausman further admitted that "Pepco has not conducted or commissioned any studies to assess what level of spending would be required beyond the existing budget to achieve the EQSS performance levels beyond 2017 as that is not the proposed commitment in this proceeding."[274]

---

[270] Tr. 1395:16-1396:9.

[271] Tr. 1396:22-1397:5 (emphasis added). Joint Applicants Witness Tierney also testified, falsely it turns out, that "the Joint Applicants now commit to Pepco achieving the following reliability performance metrics for SAIDI and SAIFI for the three-year 2018-2020 period *and to do so without exceeding the aggregate capital and O&M spending levels set forth in Mr. Gausman's February 17, 2015 Supplemental Direct Testimony . . . .*" Exhibit Joint Applicants (4G) at 3:1-5 (emphasis added).

[272] Tr. 1397:6-7 (emphasis added). Asked whether his statement that Pepco would "absolutely…come back" meant coming back for cost recovery of excess spends, Mr. Gausman replied, "[d]uring a rate case -- as well as all the expenditures. I mean, this is a budget. We don't get recovery of any of these dollars until we request recovery of those dollars in a future rate case." Tr. 1397:13-20.

[273] Notably, Exelon CEO Crane was not aware that Pepco does not develop O&M budgets for more than the next year ahead. Tr. 88:11-16.

[274] OPC Cross Examination Exhibit #65 (Joint Applicants' Response to DC Government Data Request No. 8-44).

Lastly, Joint Applicants Witness McGowan, during his cross examination, cemented the disturbing fact that the Joint Applicants' reliability commitment is not actually a "commitment" at all. Mr. McGowan conceded that even where the Joint Applicants seem to commit that they "will" achieve a specified goal or "will" provide a certain benefit for Pepco's customers, neither those customers nor the Commission should rely upon Joint Applicants' use of the word "will" as reflecting an actual, binding commitment. In particular, Mr. McGowan was asked about OPC Cross Examination Exhibit #4, a document about which he said, "I believe this was a presentation that was put together to help explain the benefits that the merger would bring to D.C."[275] The third page of that exhibit states, in part, "Pepco *will* meet or exceed the PSC's current reliability performance standards in the three-year period 2018-2020 without increasing forecasted reliability spending."[276]

Significantly, Mr. McGowan acknowledged that such statement is referring to the reliability commitment, Item 7, in Exhibit Joint Applicants (4A)-2.[277] OPC counsel then directed Mr. McGowan's attention to the last page of that exhibit, which has disclaimer language under the heading, "Cautionary Statements Regarding Forward-Looking Information." Mr. McGowan acknowledged that the disclaimer stated certain of the matters discussed in OPC Cross Examination Exhibit #4 constitute "forward-looking statements," specifically including the word "will."[278] Of critical importance, Mr. McGowan also conceded that the disclaimer on the last page of OPC Cross-Examination Exhibit No. 4 provides that forward-looking statements,

---

275 Tr. 2882:15-17.

276 OPC Cross-Examination Exhibit #4 at 3 (emphasis added).

277 Tr. 2890:16-2891:2.

278 Tr. 2893:1-14.

including the word "will," pertain to the purported benefits of the proposed transaction, and he further agreed[279] that the disclaimer provides as follows:

> There are a number of risks and uncertainties that could cause actual results to differ materially from the forward-looking statements included in this communication, as well as other unpredictable factors which could have material adverse effects on future results, performance or achievements of PHI, its subsidiaries or the combined company. . . . ***In light of these risks, uncertainties, assumptions and factors, the forward-looking events discussed in this communication may not occur. Readers are cautioned not to place undue reliance on these forward-looking statements***, which speak only as of the date of this communication.[280]

In other words, while the Joint Applicants affirmatively represent in this proceeding that Pepco "will" meet or exceed certain reliability performance standards based upon the average of the three-year period 2018-2020 without increasing forecasted reliability spending,[281] the truth of the matter is that the Joint Applicants' key witnesses all disavowed that exact representation. Indeed, Pepco's ratepayers and presumably the Commission "are cautioned not to place undue reliance on these forward-looking statements"[282] by the Joint Applicants. Thus, the Joint Applicants' reliability commitment in no way includes or constitutes any commitment to cap spending at the levels set forth in Item 7 of Exhibit Joint Applicants (4A)-2.

OPC is very troubled and disappointed that the Joint Applicants repeatedly and explicitly indicated in sworn testimony that their reliability commitment includes a firm "commitment" and "guarantee" not to increase reliability-related expenditures, and waited until they were forced to

---

279 Tr. 2893:15-2894:17.

280 OPC Cross Examination Exhibit #4 at 12 (emphasis added). The disclaimer further states that "it may not be possible to assess the impact of any such factor on Exelon's or PHI's respective businesses or the extent to which any factor, or combination of factors, may cause results to differ materially from those contained in any forward-looking statement." *Id*.

281 Exhibit Joint Applicants (4A)-2, at Item 7.

282 OPC Cross Examination Exhibit #4 at 12.

concede, during cross examination, that there actually is no accountability or enforceability underlying this alleged spending-related commitment.

Equally disturbing, it was not until cross examination that the Joint Applicants revealed that their reliability commitment does not include any waiver of their right to seek recovery, in Pepco's rates, of reliability-related spending above the amounts referenced in Item 7 of Exhibit Joint Applicants (4A)-2. Based upon the foregoing, OPC is concerned that the Joint Applicants' pre-filed testimony and Exhibit Joint Applicants (4A)-2 may reflect the Joint Applicants' calculated intent to misrepresent their reliability commitment as providing the benefit of "guaranteeing that the reliability-related capital and O&M budgets would not increase."[283]

As noted above, the non-commitment portion of Item 7 of Exhibit Joint Applicants (4A)-2 states, in part, that certain SAIDI and SAIFI three-year averages will be met "without exceeding the aggregate capital and . . . O&M spending levels listed in Table 1…."[284] In addition to the fact that the Joint Applicants are not actually committing to limit spending or to forego rate recovery of excess spending, OPC Witness Mara explained that Joint Applicants' attempt to link spending levels to an aggregate budget for capital and O&M "is fraught with complications in its application."[285]

First, while Item 7 references not exceeding "aggregate capital…spending," the referenced Table 1 in Item 7 displays only reliability spending. Thus, there is a disconnect between those two portions of Item 7.[286] Further complicating the matter, Mr. Alden's testimony suggests the reference to limiting spending applies only to reliability spending and not aggregate

---

283 Exhibit Joint Applicants (3E) at 3:4-5.

284 Exhibit Joint Applicants (4A)-2, Item 7.

285 Exhibit OPC (2B) at 13:12-13.

286 Exhibit OPC (2B) at 13:16-18.

capital spending.[287] If the Joint Applicants meant to limit only reliability spending, then it is uncertain as to how the Joint Applicants will determine which projects are "reliability" projects versus load-driven or customer-driven projects. As OPC Witness Mara testified, "[i]n the past, this distinction has been important, but difficult to ascertain. Thus, without detail, this commitment may be meaningless."[288]

Second, the ambiguous nature of the Joint Applicants' reliability proposal would enable a reliability project to be shifted into another category (*e.g.*, load- or customer-driven) to avoid exceeding a reliability budget. This shifting, in turn, would further hamper the efficacy of auditing the Joint Applicants' compliance with their reliability spending limits.[289]

Third, the Joint Applicants are reserving flexibility "to move capital dollars between projects and years and the ability to move O&M dollars between projects and years."[290] That retention of flexibility means the review of the budgetary cap would not occur until after the end of 2020, which, in Mr. Mara's opinion, "is not very workable in terms of assessing the prudency of reliability expenditures which may have occurred in 2015."[291] As explained above, assuming the Customer Investment Fund is deployed in a manner that provides up-front benefits to current ratepayers, future ratepayers would bear the risk of Pepco's inability to meet the aggregate spending cap. The Joint Applicants have failed to address this question of generational equity.

---

[287] *See, e.g.*, Exhibit Joint Applicants (4D) at 3:8, 4:9 and 4:18 (all referencing "reliability-related" capital and O&M spending, rather than "aggregate" spending.

[288] Exhibit OPC (2B) at 13:21-23.

[289] Exhibit OPC (2B) at 14:1-6.

[290] Exhibit OPC (2B)-7 at 1 (Joint Applicants' Response to OPC Data Request No. 20-7, subpart A).

[291] Exhibit OPC (2B) at 14:7-11. OPC Witness Mara discusses additional deficiencies in the budget-related aspects of Joint Applicants' reliability commitment, including the lack of a mechanism to preclude diverting either "surplus budget" from DC PLUG, or dollars budgeted for emergency repairs, to other reliability projects. *Id*. at 14-15.

Fourth, as OPC Witness Dismukes explained, the Joint Applicants have not committed to maintaining their reliability-related budgets without the use of, or future request for, special ratemaking mechanisms.[292] The unwillingness to forego seeking a surcharge or rider is problematic given that "[b]oth Pepco, and Exelon's affiliate, [Baltimore Gas & Electric Company ('BGE')], have long track records of requesting special rate recovery and ratemaking mechanisms," many of which have been rejected.[293] OPC is concerned that use of a tracker certainly has the potential to lower the bar to cost recovery, making it that much easier for Pepco, post-transaction, to recover expenditures that may be questionably related to true reliability projects. OPC's concern is well founded. At the time the Exelon-Constellation merger was pending before the Maryland PSC, the merger applicants did not suggest that BGE would need a special ratemaking mechanism to recover the costs of reliability-related investments being touted as merger benefits. But, soon after that merger was approved, BGE proposed (and later received approval of) a non-traditional ratemaking mechanism "to recover expenses associated with certain reliability improvements that it agreed to, at least conceptually, as a condition of the merger."[294] Dr. Dismukes urged this Commission to "be mindful of the fact that some of Joint Applicants' reliability-related commitments in this transaction could come with additional strings down the road, if not pre-emptively addressed in this proceeding."[295] Notably, the Joint Applicants did not respond to this concern that OPC raised.

Finally, OPC notes that the lack of a financial penalty for exceeding the budget "commitment" contained in Item 7 is disconcerting in light of the fact that the Joint Applicants

---

292 Exhibit OPC (A) at 113:4-9.

293 Exhibit OPC (A) at 113:9-12.

294 Exhibit OPC (A) at 115:14-20.

295 Exhibit OPC (A) at 115:20-22.

agreed to a financial penalty for violating a similar commitment in Maryland.[296] The Joint Applicants have not explained why Maryland ratepayers should get the benefit of a more favorable provision, while District ratepayers do not have any meaningful way to ensure accountability regarding the budget commitment.

c. The Joint Applicants' Proposed ROE Penalty Provides No Measure of Protection Because the Joint Applicants Could Avoid the Penalty at Will, to the Extent the Penalty Even Applied at All.

The Joint Applicants propose subjecting Pepco to an ROE penalty should it not achieve the three-year average SAIDI and SAIFI metrics discussed above. The Joint Applicants propose that if those metrics are not met, "the return on equity to which Pepco would otherwise be entitled in its next electric distribution rate case filed after January 1, 2021, will be reduced by fifty basis points."[297] As OPC demonstrates below, the ROE penalty "will provide little meaningful financial incentive to meet either the EQSS standards or Exelon's proposed standards" post-transaction.[298] Thus, this proposed safeguard provides no material measure of protection.

In addition to the absence of any commitment by the Joint Applicants to actually cap reliability-related spending or to forego seeking recovery in Pepco's DC customers' rates of excess reliability-related spending, it was not until the hearing that the Joint Applicants also disclosed that their proposed ROE penalty, Item 8 of Exhibit Joint Applicants (4A)-2, would *not* be triggered even if Pepco's post-transaction spending exceeded the levels set forth in Table 1 of

---

296 OPC Cross Examination Exhibit #7 at 23.

297 Exhibit Joint Applicants (4A)-2, Item 8.

298 Exhibit OPC (B) at 25:16-18.

Item 7 of that document.[299] Joint Applicants Witness Crane testified that the ROE penalty would not apply if Pepco met the reliability targets in the reliability commitment in Item 7 of Exhibit Joint Applicants (4A)-2 but exceeded the spending levels set forth in Item 7.[300] Likewise, Joint Applicants Witness Alden, when asked whether the ROE penalty in Item 8 would be triggered if the spending levels in Item 7 were exceeded, testified, "We haven't explicitly laid out a financial commitment or penalty associated with not meeting . . . the budget requirements, the budget commitments. That would be handled through – in our judgment, through the normal rate case process."[301] Joint Applicants Witness Gausman also indicated the ROE penalty applies to meeting reliability targets, and not to holding spending to certain levels.[302] Those late disclosures regarding the non-applicability of the ROE penalty to excess spending further show the Joint Applicants' reliability "commitment" excludes any cap or accountability on spending that differs in any way from what Pepco is already subject to, and would remain subject to, in the absence of the proposed transaction.[303]

In addition, the potential imposition of an ROE penalty is far too remote in time. The Joint Applicants are requesting the Commission to find, *at this time*, that the proposed transaction is in the public interest. The Joint Applicants are further requesting that the Commission determine, *at this time*, that the proposed transaction will provide reliability-related

---

299 Item 8 of Exhibit Joint Applicants (4A)-2 provides, in part, that "[i]f this level of reliability improvement is not achieved across either SAIFI or SAIDI, the return on equity to which Pepco would otherwise be entitled in its next electric distribution rate case filed after January 1, 2021, will be reduced by fifty basis points." Exhibit Joint Applicants (4A)-2, Item 8.

300 Tr. 97:21-98:22 (stating, "[i]f we made the reliability, the penalty would not be triggered. That's the way it is set up.").

301 Tr. 1140:2-8.

302 Tr. 1408:4-16. Instead, Mr. Gausman testified, " if we achieve the target reliability, the three-year average that you're talking about, and it's at a cost that is significantly different than this budget, we fully know that there's going to be a long discussion as to what that money was spent on." *Id*. at 1408:17-22.

303 As discussed further herein, there are other fundamental flaws in the Joint Applicants' proposed ROE penalty mechanism, beyond its non-applicability to excess spending.

benefits to ratepayers and the District. And yet, what the Joint Applicants offer is merely an intent to meet a reliability performance goal that is not only measured by a severely-flawed averaging methodology, but that is not even assessed until 2021 at the very earliest.

Moreover, the ROE penalty is not automatic or self-executing. Instead, assuming Pepco does not meet the three-year average, the penalty would not actually be imposed unless and until Pepco voluntarily decided to file its next rate case. Such a rate filing might not occur until late 2021, or in 2022, or even later. As OPC Witness Mara pointed out, this lengthy delay in potential imposition of a financial penalty represents greater risk to ratepayers than would a penalty imposed one or two years post-transaction.[304] That risk "is particularly problematic given that shareholders will have received their share of benefits in the early years following consummation of the transaction (assuming the transaction is approved)."[305]

OPC is also troubled by the lack of accountability given that the ROE penalty would not apply if Pepco is under-earning its authorized ROE by 50 basis points or more. Witness Crane agreed that, if Pepco is under-earning its authorized ROE by 50 basis points or more, the ROE penalty would have no financial impact.[306] Mr. Crane also agreed that, in fact, Pepco has under-earned its authorized ROE by 50 basis points or more the last five years.[307] Witness Rigby also conceded that "our [PHI] utilities are currently under-earning fairly significantly their allowed return."[308] The Joint Applicants presented no evidence that Pepco's historical trend of under-earning its ROE would change post-transaction. Thus, the Joint Applicants' characterization of

---

304 Exhibit OPC (2B) at 7:14-17.

305 Exhibit OPC (2B) at 7:17-19.

306 Tr. 104:18-105:7.

307 Tr. 105:8-11.

308 Tr. 756:1-2.

the ROE penalty as a true "penalty" is a misnomer given that it would have no impact if Pepco's trend of underearning continues.

Considering the foregoing facts, it is readily apparent that the proposed ROE penalty is illusory. Pepco already is subject to the EQSS and to a Commission-imposed penalty or other action should Pepco miss an EQSS target, and that would not change if Pepco continued on a stand-alone basis. The Joint Applicants' proposed ROE penalty would provide no meaningful, additional incentive for Pepco to improve its reliability performance.

In sum, the foregoing deficiencies and loopholes make clear that the Joint Applicants' so-called reliability commitment not only (i) excludes any limits on spending, (ii) provides no waiver of rate recovery of excess spending, and (iii) does not subject excess spending to the ROE penalty, but it also could easily be manipulated to make it appear that reliability-related spending did not exceed certain levels—without actually providing ratepayers with even that minimal protection.

3. Exelon's Reliability Commitment Either Ignores or Improperly Takes Credit for Pepco's Substantial Improvement in Reliability Performance—Improvement that is Likely to Continue in the Absence of the Proposed Transaction.

By claiming approval of the transaction will "enhance" reliability of the electric distribution system in the District, the Joint Applicants suggest that Exelon's expertise, resources, and other help are needed to improve Pepco's reliability performance.[309] What the Joint Applicants conveniently ignore is irrefutable evidence of Pepco's recent and on-going

[309] Mr. Gausman contends that Pepco is "tapped out" on what it can continue to do to continue to improve reliability. Tr. 1752:2 (Gausman). Mr. Gausman also goes so far as to suggest that Pepco's improvement reliability is a result of "pull[ing] every trick that [it] can think of…." Tr. 1752:3-4. Mr. Gausman's claims are contrary to substantial record evidence and should be rejected out of hand. *See, e.g.*, Tr. 81:11-14 (where Mr. Crane testifies that "there has been work done and the groundwork laid through a unique proposal of undergrounding *which we think will be supporting further improvement*") (emphasis added); *see also* Exhibit OPC (B) at 10:14 to 11:20 (where Mr. Mara projects reliability improvement that is expected in the absence of the proposed transaction).

impressive gains in reliability.[310] Of course, Pepco accomplished all such gains with no help from Exelon. Mr. Rigby, the Chairman of the Board, President and CEO of PHI, readily conceded each of the following essential points:

- Improving Pepco's reliability performance "dominated our focus" beginning around 2011;[311]
- Since the Commission established the EQSS in 2012, Pepco has met the SAIDI and SAIFI metrics each year;[312]
- Pepco is committed to meeting the EQSS metrics every year;[313]
- In 2013, the PHI utilities achieved one of their best reliability performances ever;[314]
- Pepco's reliability performance in 2014 was even better than its reliability performance in 2013;[315]
- Pepco's 2014 SAIFI performance would satisfy the EQSS SAIFI metric through 2020 and the 2014 SAIDI performance would satisfy the EQSS SAIDI metric through 2018;[316]
- It was Pepco's employees who "had everything to do with" Pepco's improvements in reliability performance from 2011 through 2014;[317] and

---

310 *See* OPC Cross Examination Exhibit #2 (Joint Applicants' Response to PSC Staff Data Request No. 6-1) (setting forth Pepco's 2014 SAIFI and SAIDI performance, which reflect significant improvement from 2013). Ironically, Mr. Crane testifies that Pepco's significant improvement in reliability must be acknowledged. Exhibit Joint Applicants (A) at 14:1-3.

311 Tr. 582:12-22.

312 Tr. 586:6-9.

313 Tr. 586:12-17.

314 Tr. 587:15-588:2.

315 Tr. 588:3-5.

316 Tr. 587:4-13 (agreeing "[s]ubject to check"); *see also* OPC Cross Examination Exhibit #2 (Mr. Gausman's response to Commission Staff Data Request No. 6-1) (providing Pepco DC's SAIFI and SAIDI performance results for calendar year 2014).

317 Tr. 588:11-17. In light of the Commission's affirmative efforts to spur improved reliability, and the data demonstrating a trend of improved performance, the Commission should reject Exelon's suggestion that Pepco simply got lucky in 2014 due to fair weather. *See, e.g.*, Tr. 243:22 to 244:5 (where Mr. Crane contends that Pepco's 2014 reliability performance is nothing more than a "one-year data point").

- During Mr. Rigby's tenure as CEO, the PHI utilities, including Pepco, "have been placed on a path of continuous improvement in reliability and customer satisfaction . . . [and] Pepco has an extensive set of multi-year programs designed to meet its reliability commitments and, as a result, has made significant progress in its reliability performance [and] Pepco is currently exceeding the District of Columbia's reliability requirements."[318]

Not surprisingly, Mr. Gausman agreed with Mr. Rigby that attempting to improve Pepco's reliability performance has dominated the company's focus the last several years and that such performance in fact has improved over that time period.[319] Mr. Gausman also agreed that Pepco achieved the EQSS SAIDI and SAIFI metrics in each of 2012, 2013 and 2014.[320] He further agreed that in 2013, the PHI utilities achieved one of their best reliability performances ever, that Pepco's reliability performance in 2014 was even better than its reliability performance in 2013, and that Exelon played no role in such improvements in performance.[321] Significantly, asked whether he was aware of any documentation that might show Pepco is more likely to achieve future EQSS requirements if the merger is consummated than if the merger is not consummated, Mr. Gausman responded that "[w]e didn't do that type of analysis."[322]

In light of Pepco's undisputed improvement in reliability performance over the last few years and through today, it is undeniable that Pepco can achieve, and in fact already has achieved, significant improvement in reliability, as well as full compliance with the applicable EQSS without Exelon's help.[323] Further, the Joint Applicants produced no evidence that Pepco's reliability improvements and continued compliance with the EQSS would cease if the transaction

---

318 Exhibit Joint Applicants (B) at 7:11-17.

319 Tr. 1416:13-21.

320 Tr. 1417:3-9.

321 Tr. 1417:20-1418:19.

322 Tr. 1424:12-16.

323 Witness Crane conceded that Exelon had nothing to do with Pepco's improved reliability performance from 2011-14, and that such improvement was due to Pepco's pre-existing programs. Tr. 82:11-15, 81:11-13.

is not approved and Pepco moved forward on a stand-alone basis. In fact, the only record evidence suggests the opposite is true. OPC Witness Mara noted that "Pepco's reliability has been steadily improving since 2010 and as demonstrated by these graphs [at page 160 of Pepco's 2014 Consolidated Report] Pepco expects such improvements to continue absent the proposed merger."[324] Mr. Mara added that "[i]f Pepco's current reliability improvement programs and increased focus on reliability improvement continue, reliability in the District will improve even absent the merger."[325] Mr. Crane acknowledged that that "there has been work done and the groundwork laid through a unique proposal of undergrounding which we think will be supporting further improvement."[326]

In sum, the Joint Applicants presented no credible evidence that Exelon's acquisition of PHI and Pepco would result in enhancing Pepco's reliability performance above and beyond what such performance would be for Pepco in the absence of the acquisition. To the contrary, the record reflects that actions taken by Pepco beginning several years ago, with no help from Exelon, have resulted in dramatic reliability improvements. The record further reflects that there is every reason to conclude Pepco's reliability performance will continue to improve and will continue to achieve the EQSS, again with no help from Exelon.

---

[324] Exhibit OPC (B) at 10:15-19.

[325] Exhibit OPC (B) at 6:3-5.

[326] Tr. 81:11-14 (Crane).

4. Exelon Has No Plan for Actually Improving Pepco's Reliability Performance.

a. In Light of Testimony to the Contrary, the Commission Should Give No Weight to Mr. Alden's and Mr. Gausman's Claims Regarding Best Practices Driving the Revised Reliability Commitment.

In their February 17, 2015 Supplemental Direct Testimony, the Joint Applicants claimed that they developed the revised SAIDI and SAIFI targets contained in Item 7 of Exhibit (4A)-2 based upon an assessment of what reliability could be achieved through implementation of Exelon's reliability best practices. As Mr. Alden testified, the Joint Applicants developed their reliability commitment "[d]uring technical discussions, which continued into January 2015, [in which] PHI, Pepco and Exelon discussed Pepco's current reliability plan in an effort to identify how Exelon's Management Model and the identification and implementation of best practices could be used to advance performance."[327] Witness Gausman echoed Mr. Alden's claim, contending that the "Joint Applicants were able to make the commitment to achieve the EQSS targets within the spending levels described in Table 1" of their reliability commitment "in part as a result of Exelon's ability to leverage its Management Model and best practices . . . ."[328] Mr. Gausman added that implementation of Exelon's best practices "will result in direct benefits to District of Columbia customers" by eliminating or reducing training and preparatory time, thereby "resulting in faster restoration and reduction in overall outage duration."[329]

The fatal flaw in these witnesses' testimony—and thus in the Joint Applicants' reliability commitment itself—is highlighted clearly by the testimony of Mr. O'Brien, Senior Executive Vice President of Exelon Corporation and CEO of Exelon Utilities. In his testimony, Mr.

---

[327] Exhibit Joint Applicants (4D) at 3:21-4:2.

[328] Exhibit Joint Applicants (4E) at 5:20-6:2.

[329] Exhibit Joint Applicants (3E) at 16:22-17:2.

O'Brien responded to the witnesses of OPC and other intervenors, who had argued that sharing of Exelon's best practices should be afforded little weight in assessing the benefits, if any, of the proposed transaction. These witnesses demonstrated that the Joint Applicants have not identified any best practices that might be deployed post-transaction, have not quantified the benefits of that deployment, and had not explained why Pepco could not implement best practices on its own. Mr. O'Brien asserted that intervenors' contentions are incorrect "because they are based on a fundamental misunderstanding of the process by which best practices are identified, analyzed and deployed— not just for this Merger, but for any merger of major corporations."[330] Ironically, considering the testimony of Messrs. Alden and Gausman quoted above, Mr. O'Brien explained (in his December 2014 Rebuttal Testimony) Exelon's position as follows:

> Q. ***Is it practical, or even possible, at this time*** to definitively identify and analyze best practices that can be deployed following completion of the Merger, as other parties assume?
>
> A. ***No, it is not, for several reasons, which include practical and legal impediments.*** As I previously explained, identifying best practices and determining how they can best be implemented to create value for a combined enterprise ***requires delving deeply*** into business and operational processes and procedures and conducting detailed research and analysis. ***<u>That kind of detailed analysis cannot be done in any meaningful way until the two organizations are part of the same corporate family and their employees are free to discuss their respective operations substantively and in detail</u>.*** Exelon has undertaken preliminary analyses to frame some areas where best practices development might be targeted. However, the deep, self-critical look into Pepco's business and operations necessary to identify specific best practices and determine how they can best be deployed to improve performance and reduce costs ***<u>cannot be undertaken in advance of the legal and operational combination of the Companies</u>***. While I am not a lawyer and do not intend to opine on legal matters, I understand that ***there are also legal limitations*** on the extent to which Exelon and PHI and their respective subsidiaries can coordinate their activities in advance of consummating the Merger.[[331]]

---

330 Exhibit Joint Applicants (3C) at 5:5-7.

331 Exhibit Joint Applicants (3C) at 5:7-6:4 (emphasis added). At the hearing, Mr. O'Brien maintained his position that identifying best practices and determining how they can be implemented to create value cannot be done in any meaningful way until after the transaction closes. Tr. 954:8-11.

Mr. O'Brien discussed areas where best practices "might" be targeted at Pepco following the transaction.[332] However, consistent with Mr. O'Brien's above-quoted testimony, and yet directly contrary to the testimony of Messrs. Alden and Gausman, the Joint Applicants left no doubt that they have not yet identified, and could not possibly identify, the specific best practices that would in fact be deployed at Pepco post-transaction, much less determined what the reliability and other impacts of that deployment might be.

Mr. O'Brien's responses to data requests also confirmed that Exelon has not yet identified any specific best practices that might be deployed at Pepco following consummation of the transaction, and has not performed any assessment of what benefits (reliability-related or otherwise) might result from implementation of such yet-to-be-identified best practices. For example, Mr. O'Brien stated:

> Exelon has not yet determined which best practices will be implemented at Pepco as no analysis has been completed at this time regarding which processes and procedures are most beneficial and best suited for implementation at Pepco.
>
> * * *
>
> Because no determinations have been made at this time regarding the sharing of best practices with Pepco post-Merger, potential cost savings achieved through the sharing of best practices between Pepco and PECO, ComEd and BGE have not been identified.[333]

---

332 Exhibit Joint Applicants (3C) at 6:5-8.

333 OPC Cross Examination Exhibit #13 (Joint Applicants' Response to OPC Data Request No. 5-39(C) and (D)). Mr. O'Brien answered multiple data requests asking which Exelon best practices would be deployed at Pepco, and the effect of such deployment, with essentially the same response that "no determination has been made at this time regarding which best practices will be implemented at Pepco following the merger." *See, e.g.*, Cross Examination Exhibit #14 (Joint Applicants' Response to OPC Data Request No. 5-41(A)); OPC Cross Examination Exhibit #15 (Joint Applicants' Response to OPC Data Request No. 5-42); Cross Examination Exhibit #16 (Joint Applicants' Response to OPC Data Request No. 18-17). Indeed, Mr. O'Brien included as an exhibit to his own rebuttal testimony his response to OPC data request 5-46(D), in which he stated "[no] comparison as between Exelon's utilities and Pepco in the areas where best practices have been shared between Exelon's utilities . . . has been conducted at this time." Exhibit Joint Applicants (3C)-2 at 2.

As Mr. O'Brien best illustrates, there is simply no basis for Mr. Alden's and Mr. Gausman's February 2015 claims about the best practices driving Exelon's ability to commit to revised reliability targets.

b. There is No Substance to the Joint Applicants' Claims about Best Practices and Exelon's Management Model.

According to Mr. O'Brien, "sharing of best practices is critical to realizing the benefits expected from the Merger . . . ."[334] The Joint Applicants contend that "[t]he sharing of resources and best practices among the combined companies, as well as their comparable business models, ***will produce*** direct and traceable financial benefits to District of Columbia customers . . . ."[335] They further contend that approval of the proposed transaction will enhance Pepco's reliability because "the Merger ***will*** . . . allow Pepco to leverage best practices shared across the Exelon enterprise."[336] The Joint Applicants' claims regarding best practices suffer from two crucial flaws. First, the Joint Applicants failed to provide any meaningful details regarding best practices. Second, the Joint Applicants were unable to articulate what the impacts would be if those best practices were deployed. Because of these two deficiencies, Joint Applicants are unable to demonstrate that the sharing of best practices *will produce* direct and traceable benefits to D.C. customers.

As to the first criticism, Witness O'Brien, attempting to explain Exelon's best practices, provided this vague description: "It is a culture and organizational belief that you get people to work together to share the best ideas, to develop the highest standards of performance, and you

---

334 Exhibit Joint Applicants (C) at 4:3-4 (emphasis added).

335 Joint Application at 19 (emphasis added).

336 Joint Application at 20 (emphasis added).

replicate that across all of the Exelon companies."[337] This lack of detail highlights that the Joint Applicants have failed to complete the first step in the process—identifying best practices.

As to the second criticism, beyond the amorphous nature of *identifying* best practices, the record reflects that actually *implementing* best practices is what produces the benefits, but that implementation process is even more complicated and difficult than the initial step of identifying the practices to be implemented. According to Mr. O'Brien, "identifying best practices is only part of the equation for driving improved performance. Best practices must be implemented if they are to create value, and ***the implementation process is in many respects a more complex and difficult task than identifying best practices***."[338] Even at BGE, where according to Mr. O'Brien, Exelon purportedly *did* identify and implement best practices following closing of the Exelon-Constellation merger,[339] Mr. O'Brien admitted that Exelon still has not analyzed what cost savings, if any, resulted from that implementation.[340] That admission completely undercuts the testimony of Messrs. Alden and Gausman, *i.e.*, that the "Joint Applicants were able to make the commitment to achieve the EQSS targets within the spending levels described in Table 1" of their reliability commitment "in part as a result of Exelon's ability to leverage its Management Model and best practices . . . ."[341]

The foregoing record evidence makes unequivocally clear that the Joint Applicants have not yet identified, and cannot yet identify, ***any*** specific best practices which are certain to be deployed at Pepco following consummation of the transaction. And that same evidence also

---

[337] Tr. 951:14-18 (O'Brien); *see also id*. 1006:15 (where Mr. O'Brien suggests that the magic behind the Management Model is the "execution") & 1101:8-9 (where Mr. O'Brien testifies that executing the Management Model is "all about people").

[338] Exhibit Joint Applicants (3C) at 7:15-18 (emphasis added).

[339] Exhibit Joint Applicants (C) at 14-16.

[340] OPC Cross Examination Exhibit #13 at 4 (excerpt of Mr. O'Brien's cross examination on January 30, 2015, during the Exelon-PHI proceeding before the Maryland PSC in Case No. 9361).

[341] Exhibit Joint Applicants (4E) at 5:20-6:2 (Gausman); Exhibit Joint Applicants (3D) at 3:3-15 (Alden).

makes clear that the Joint Applicants have not yet determined, and cannot yet determine, what will be the resulting impact once specific best practices are deployed at Pepco following consummation of the transaction. That evidence completely undermines the credibility of the Joint Applicants' reliability commitment, including the Joint Applicants' basis for, and confidence in their ability to meet, that commitment. The Joint Applicants claim they developed the SAIDI and SAIFI targets in that commitment based upon an assessment of what reliability could be achieved through implementation of Exelon's best practices, and yet the Joint Applicants' own witness, Mr. O'Brien, emphatically declared that such an assessment "***cannot be done in any meaningful way until the two organizations are part of the same corporate family*** and their employees are free to discuss their respective operations substantively and in detail."[342] In short, there is no basis to accept the Joint Applicants' contention that Exelon's acquisition of PHI/Pepco will produce reliability-related benefits for the District or for Pepco's ratepayers.

c. The Joint Applicants Have Not Identified Any Specific or Project that Exelon Would Modify in Order to Improve Reliability Performance.

In light of the amorphous description of best practices, OPC asked Exelon to identify any projects included in Pepco's current distribution construction plans that Exelon intends to either modify or not pursue or complete. In asking these questions, OPC aimed to achieve a better understanding of the technical basis for Exelon's reliability commitments. In response, Mr. Alden stated that the "Joint Applicants have made no determination at this time regarding this matter."[343] Mr. Alden gave the identical response when asked to identify: (1) any distribution

---

342 Exhibit Joint Applicants (3C) at 5:15-18 (emphasis added).

343 OPC Cross Examination Exhibit #22 (Joint Applicants' Response to OPC Data Request No. 2-1).

system inspection or maintenance programs that Exelon will change or terminate;[344] (2) any new inspection or maintenance programs that Exelon intends to initiate at Pepco;[345] or (3) any distribution system planning criteria employed by Pepco that Exelon intends to change or eliminate.[346] Additionally, when asked to explain and quantify all changes, including best practices, which will be made to Pepco's load growth and load management program as a result of the transaction with Exelon, Mr. Alden responded that "[s]pecific changes to Pepco's load growth and load management program have not been identified to date."[347] Lastly, asked whether Exelon believes Pepco's tree removal program needs to be more or less aggressive to meet reliability goals, Mr. Alden responded that "Exelon has not estimated to date whether Pepco's tree removal program needs to be more or less aggressive to meet reliability goals."[348] As the foregoing demonstrates, there is nothing of substance behind Exelon's reliability commitment. This lack of specificity demonstrates that the sharing of best practices has not been shown to be likely to produce any direct or traceable benefits to the District or Pepco ratepayers.

5. The Joint Applicants' Reliability Commitment Understates the Reliability Improvements Expected from DC PLUG.

The Joint Applicants' reliability commitment undervalues DC PLUG's likely contribution to Pepco's future reliability performance. As written, the commitment would be

---

344 OPC Cross Examination Exhibit #23 (Joint Applicants' Response to OPC Data Request No. 2-2).

345 OPC Cross Examination Exhibit #24 (Joint Applicants' Response to OPC Data Request No. 2-3).

346 OPC Cross Examination Exhibit #25 (Joint Applicants' Response to OPC Data Request No. 2-4).

347 OPC Cross Examination Exhibit #26 (Joint Applicants' Response to OPC Data Request No. 3-39); *see also* OPC Cross Examination Exhibit #62 (Joint Applicants' response to OPC data request 4-22(B) (asked to provide copies of studies and analyses which support Mr. Rigby's assertion that the close geographic fit of PHI's utilities, BGE and PECO will create a strong mutual support structure that will enhance performance and lower costs, witnesses Gausman and Alden responded that "[n]o such studies exist").

348 OPC Cross Examination Exhibit #28 (Joint Applicants' Response to OPC Data Request No. 17-3(A)).

contingent upon (*i.e.*, excused by) "variations in the schedule of . . . DC PLUG that are outside of Pepco's control."[349] There is a three-fold problem with that language.

First, the EQSS regulations *already* provide Pepco with an "escape clause" in the event something beyond Pepco's control adversely affects its reliability performance. As noted above, when it adopted the EQSS, the Commission stated that "[i]f Pepco can show that its failure to meet a specific benchmark was truly a result of conditions beyond Pepco's control, then the Commission may relieve Pepco of the requirement."[350] Providing Pepco with another "beyond control" exception would, at best, create confusion as to the meaning of that exception within the EQSS and its meaning within the reliability commitment. More likely, the extra layer of exception would pose the risk that, post-transaction, Pepco could identify new and unexpected factors that it claims excuses slippage in reliability performance.[351] At a minimum, such language raises questions as to the true contours and limits of the Joint Applicants' reliability commitment.

Second, the Joint Applicants' claim that the transaction would improve Pepco's reliability is "heavily dependent upon the positive effects of the proposed DC PLUG undergrounding initiative, which predates, and is entirely independent of, the proposed merger."[352] OPC Witness Mara explains that DC PLUG will underground approximately 21 feeders in the first three years, with more feeders in subsequent years.[353] Of critical importance, Pepco's 2013 projections for reliability, which as discussed above reflect continued improvements and compliance with the

---

349 Exhibit Joint Applicants (4A)-2, Item 7.

350 *Formal Case No. 766, et al.*, Order No. 16427 at ¶ 38.

351 As Mr. Mara explains, the escape clause in the reliability commitment (related to variations in the DC PLUG schedule outside Pepco's control) is concerning, since "for construction projects as large and complex as DC PLUG, it is difficult to clearly define when a project is fully complete." Exhibit OPC (2B) at 16:4-5.

352 Exhibit OPC (B) at 5:13-17.

353 Exhibit OPC (B) at 13:3-4.

EQSS through at least 2016, "do not include any improvements in reliability that may stem from DC PLUG."[354] The DC PLUG projects "will have a significant impact on improving reliability in the District in the future, above and beyond Pepco's existing reliability-related projects undertaken to meet the EQSS."[355] Thus, the Joint Applicants' reliability commitment "improperly include[s] the effect of the DC PLUG program."[356] As Mr. Mara summarized, "it is obvious that reliability improvements resulting from DC PLUG are in no way products of, or benefits from, the proposed merger and, therefore, should be excluded from Exelon's projections regarding merger-related reliability benefits."[357]

Third, the Joint Applicants, perhaps looking for a hedge, are understating DC PLUG's predicted contribution to Pepco's future reliability performance, particularly with respect to SAIDI. Mr. Mara performed an analysis indicating that the expected improvement due to DC PLUG would be 0.19 for SAIFI and 38 minutes for SAIDI.[358] Applying those results, Mr. Mara concluded that the anticipated SAIDI in 2020, once the feeders are undergrounded, should be 59 minutes (using Mr. Gausman's projections) or 75 minutes (using Mr. Alden's estimate).[359] In either case, Mr. Mara notes, both those values are significantly below the 81 minute SAIDI target in the EQSS.[360] Thus, the Joint Applicants "are understating the value of DC PLUG as a possible hedge against their guarantee for meeting their three-year average commitment."[361] Use of that hedge, in turn, increases the chance Pepco's ratepayers in the District "will see an

---

354 Exhibit OPC (B) at 13:4-6.

355 Exhibit OPC (B) at 13:10-12.

356 Exhibit OPC (B) at 13:13-14.

357 Exhibit OPC (B) at 14:5-8.

358 Exhibit OPC (2B) at 11:3-5.

359 Exhibit OPC (2B) at 12:4-8.

360 Exhibit OPC (2B) at 12:8-9.

361 Exhibit OPC (2B) at 12:10-11.

increase in rates for the undergrounding and potentially not see the improvement in reliability that was used to justify the expense."[362] In considering Pepco's reliability performance in a no-transaction future, as well as the impact of Exelon's proposed reliability targets, the Commission should reject the Joint Applicants' understatement of the impact of DC PLUG.

6. The Joint Applicants' Reliability Commitment Suffers from Other Major, Fatal Flaws.

a. The Joint Applicants' Reliability Commitment Rests Upon A Flawed Averaging Method Rather Than Annual Compliance with the EQSS.

The Joint Applicants' reliability commitment provides, in part, that "Pepco will achieve reliability performance for 2018-2020 at a level equal to or better than the corresponding levels set forth in the…EQSS averaged over the same three-year period."[363] There are multiple shortcomings in use of such an averaging mechanism.

First, the Joint Applicants present the commitment in a misleading manner. Item 7 of Exhibit Joint Applicants (4A)-2 includes a box setting forth various SAIFI and SAIDI metrics. Column 1 of both the second and fourth rows in that box are labeled "Exelon Commitment" and columns 2 through 4 of those rows display annual SAIFI and SAIDI metrics for 2018, 2019 and 2020. However, unlike their proposal in Maryland,[364] the Joint Applicants have not committed to meeting any particular SAIFI or SAIDI metrics on an annual basis for those three years, or, for that matter, for any specific year. Rather, the Joint Applicants' commitment is strictly limited to meeting only the average of those three years.[365] The commitment is the mathematical average

---

362 Exhibit OPC (2B) at 12:12-14.

363 Exhibit Joint Applicants (4A)-2, Item 7.

364 OPC Cross Examination Exhibit #7 at 21 (setting forth annual reliability targets for SAIFI and SAIDI). The Joint Applicants did not explain why Maryland customers should get the benefit of annual performance targets while District ratepayers would get the flawed, three-year average targets.

365 Exhibit Joint Applicants (4D) at 2:1-3.

of the annual figures in columns 2-4, and it is misleading to juxtapose the words "Exelon Commitment" with annual SAIFI and SAIDI metrics that are *not* part of the commitment.

Second, use of a three-year average to measure compliance with reliability performance is directly contrary to the EQSS. The Joint Applicants ignore the fact that, prior to the current EQSS, reliability for the District was based on a five-year average of Pepco's Outage Management System data, but the Commission then rejected continued use of an averaging method when it established the EQSS.[366] As the Commission noted, Pepco argued that "rigid year-to-year improvement requirements are inherently impractical because they do not reflect the reality of unpredictable weather conditions from one year to the next."[367] The Commission rejected that argument, and determined that annual compliance would be required.[368] The fact that the Joint Applicants' use of a three-year average to measure Pepco's reliability performance is contrary to Commission precedent should be given significant weight as the Commission considers the proposed reliability target.

Third, use of an averaging method will not create appropriate incentives for Pepco to continue improving its reliability. As OPC Witness Mara noted, such a method "provides cover of poor reliability performance in some years, by allowing such performance to be 'averaged away' by better performance in other years."[369] To illustrate this problem, consider the Joint Applicants' proposed three-year average SAIDI metric of 90 minutes, based on the EQSS requirements for SAIDI of 99, 89 and 81 minutes for 2018, 2019 and 2020, respectively.[370] Assume that Pepco's SAIDI performance is 93 minutes for 2018, 92 minutes for 2019, and 85

---

366 Exhibit OPC (B) at 15:13-16.

367 *Formal Case No. 766, et al*., Order No. 16427 at ¶ 25.

368 *Id*. at ¶ 45.

369 Exhibit OPC (B) at 16:1-3.

370 Exhibit Joint Applicants (4A)-2, Item 7.

minutes for 2020. In that scenario, Pepco's average annual performance for those three years would be 90 minutes ((93 + 92 + 85) ÷ 3 = 90). *Thus, Pepco would have violated the EQSS for SAIDI in 2019, and violated the EQSS SAIDI again in 2020, but Pepco would have met the three-year average of 90 minutes*. In that example, Pepco would not become subject to the Joint Applicants' proposed ROE penalty because Pepco's *average* annual performance over the 2018-2020 time period did not exceed the Joint Applicants' reliability commitment of 90 minutes for SAIDI. By the same token, Pepco could "achieve" the three-year average SAIFI of 0.66 interruptions, yet violate the EQSS for one of the three years, and it would not trigger the proposed ROE penalty.[371]

Fourth, the Joint Applicants inappropriately seek to use a three-year average to smooth out weather-related impacts on Pepco's reliability performance.[372] However, this is essentially the same argument Pepco made, and the Commission rejected, when the EQSS were promulgated.[373] As the Commission reasoned, the EQSS "benchmarks do not include Major Service Outages, which would likely exclude most serious weather events."[374] The Commission added that EQSS have yet another built-in potential for relief, beyond exclusion of Major Service Outages, namely that "[i]f Pepco can show that its failure to meet a specific benchmark was truly

---

371 For example, Pepco's SAIFI performance could be 0.97, 0.51 and 0.50 for 2018, 2019 and 2020, respectively. In this example, Pepco would be in violation of the EQSS of 0.95 for SAIFI in 2018, but would nonetheless meet the Joint Applicants' three-year average SAIFI of 0.66.

372 Exhibit Joint Applicants (D) at 10:9-12.

373 *Formal Case No. 766, et al*., Order No. 16427 at ¶¶ 25, 45 (referencing Pepco's argument that "rigid year-to-year improvement requirements are inherently impractical because they do not reflect the reality of unpredictable weather conditions from one year to the next").

374 *Id*. at ¶ 38.

the result of conditions beyond Pepco's control, then the Commission may relieve Pepco of the requirement."[375]

Allowing Pepco to wait until after 2020 to demonstrate progress towards the Joint Applicants' reliability goals, rather than requiring proof of annual compliance beginning immediately, means "Pepco's customers and other stakeholders will not know if system reliability goals are met until approximately five years after the merger is consummated . . . ."[376] Of course, five years would be "long after the time has run for challenging any order of this Commission approving the proposed merger."[377]

Given that the EQSS already exclude consideration of Pepco's reliability performance during Major Service Outages, and further given that the EQSS already provide Pepco with the ability to seek relief from the EQSS for poor performance caused by reasons beyond Pepco's control, the Joint Applicants' proposed use of a three-year averaging methodology "to account for any abnormal weather variability"[378] is wholly unnecessary and improper. Any evaluation of Pepco's reliability performance must be based upon compliance with reliability metrics each and every year, as the Commission requires for the EQSS SAIFI and SAIDI targets. The failure to include any commitment to such annual compliance, either in Exhibit Joint Applicants (4A)-2 or in any of their witnesses' pre-filed testimony, is yet another serious flaw in the Joint Applicants' reliability commitment.

---

375 *Id*. As explained in a prior footnote, the Commission defines a Major Service Outage as "occurring when 10,000 or more customers are without service and restoration takes longer than 24 hours." *Id*. at ¶ 39.

376 Exhibit OPC (B) at 24:2-3.

377 Exhibit OPC (B) at 24:4-5.

378 Exhibit Joint Applicants (D) at 10:9-10.

b. The Joint Applicants' Reliability Commitment Provides No Spending-Related or Rate-Related Benefits to Pepco's Customers or to the District.

As explained above, OPC has uncovered the true nature of the Joint Applicants' so-called reliability commitment—it does not include any commitment: (1) to limit spending to the levels set forth in Item 7 of Exhibit Joint Applicants (4A)-2; (2) to waive rate recovery of spending in excess of such levels; (3) to subject Pepco to an ROE penalty for spending in excess of those levels, (4) to employ clear definitions of key terms such as aggregate capital spending, reliability spending and reliability-related projects, or (5) to forego use of special cost recovery mechanisms for such spending. Accordingly, it is readily apparent that Exelon's acquisition of PHI/Pepco would provide no reliability-related benefits above and beyond those which Pepco's ratepayers in the District would enjoy in the absence of the acquisition. More specifically, the transaction would not provide any benefits to ratepayers in terms of capping or lowering reliability-related spending or with respect to avoiding rate increases to fund reliability improvements. After all, Pepco executives have repeatedly stated, on the record—both before and after the transaction was announced—that the company will do whatever it takes, and spend at the levels necessary, to meet the EQSS.

For example, Mr. Rigby testified that Pepco would "certainly" make the capital expenditures necessary to meet the EQSS on an annual basis.[379] Mr. Gausman similarly testified that "the Company recognizes that it has an obligation to meet any standard that is imposed by the Commission including the EQSS," and that "[i]n Formal Case No. 1103 . . . the point that I made was that the Company would do whatever was necessary to meet the Commission-imposed

[379] Tr. 600:3-9.

standards."[380] Mr. Gausman goes on to state that, in Formal Case No. 1103, "I did not opine on whether or not the Company definitively would be able to meet the EQSS reliability standards under existing budgets through 2020."[381] Crucially, however, the above-referenced cross examination testimony of Messrs. Gausman, Crane, Alden and McGowan in the instant case leave no doubt that ***the Joint Applicants are likewise making no commitment whatsoever that, post-transaction, Pepco definitively would be able to meet the EQSS reliability standards under existing budgets through 2020***. Thus, Mr. Gausman's testimony, that "[t]he Merger commitment is guaranteeing reliability improvement while also guaranteeing that the reliability-related capital and O&M budgets would not increase,"[382] is simply false and misleading.

At the same time, it was the purported cap on reliability-related expenditures that the Joint Applicants claim ***is*** the reliability-related benefit of the proposed transaction. According to Mr. Gausman, "[t]he level of improvement ***guaranteed with no corresponding increase in spending*** is not something that would be available to District of Columbia residents absent the

---

380 Exhibit Joint Applicants (3E) at 9:2-6. Other similar statements abound. *See, e.g.*, Tr. 586:15-17 (Rigby) ("We commit to meet the [EQSS] standards that we're held do. We do everything we can to do that"); OPC Cross Examination Exhibit #31 at 4 (excerpt of Mr. Gausman's testimony in Formal Case No. 1087) ("The Company has in place a reliability plan designed to allow it to provide continuous improvement and . . . to comply with Commission approved SAIFI and SAIDI targets"); OPC Cross Examination Exhibit #70 (response to OPC data request 18-28) ("[T]he Company will always do whatever is necessary in order to achieve Commission-imposed standards"); OPC Cross Examination Exhibit #83 at 4 (excerpt of Mr. Gausman's testimony in Formal Case No. 1087) ("[T]he Company . . . is committed to doing what is necessary to achieve specified reliability performance standards ultimately set by the Commission"); OPC Cross Examination Exhibit #84 at 5 (excerpt of Mr. Gausman's testimony in Formal Case No. 1103) ("The Company is committed to continue to provide the levels of reliability that are required by the EQSS."); Exhibit OPC (B)-7 at 1-2 (excerpt of Mr. Gausman's Cross Examination in Formal Case No. 1103) ("If we're talking about reliability . . . clearly one goal is that we will always meet whatever standard the Commission establishes . . . . We do not believe just meeting the standard is the [*sic*] appropriate, so we are making every effort to exceed the standards"). Despite this mountain of evidence, Exelon CEO Crane testified, inexplicably, that Pepco *has not* committed to meeting the EQSS through 2020 on a standalone basis. Tr. 89:19-21.

381 Exhibit Joint Applicants (3E) at 10:1-3.

382 Exhibit Joint Applicants (3E) at 4:3-5. Equally false and misleading are both Mr. Alden's testimony that the Joint Applicants' reliability commitment includes "a commitment not to increase reliability-related capital and . . . O&M budgets," Exhibit Joint Applicants (3D) at 3:14-15, and Mr. Gausman's testimony referencing "spending levels that Joint Applicants are committing to as part of their reliability commitment . . . ." Exhibit Joint Applicants (4E) at 2:4-5. As demonstrated herein, there can be no credible dispute that the Joint Applicants have actually offered no such commitment regarding spending.

Merger and constitutes a direct and traceable benefit to customers."[383] As detailed above, however, the purported spending cap has been disclosed as non-existent, or at best, no different from what Pepco already is subject to, and would continue to be subject to, in the absence of the transaction.

Moreover, for the very reason that the Joint Applicants do not commit to limit spending or to forego seeking rate recovery for such spending, there is no merit to the Joint Applicants' claim that a benefit of the transaction would be Pepco's ability to take advantage of Exelon's deep pockets. For instance, Mr. Rigby claims a benefit of Exelon's acquisition is providing Pepco with "significant additional resources to sustain and improve current levels of performance and customer satisfaction."[384] Mr. Rigby thus implies, while Mr. Gausman states outright,[385] that Exelon's acquisition of PHI/Pepco would enable Pepco to improve reliability performance while avoiding budget or rate increases to sustain such improvement. However, given that the Joint Applicants make no commitment either to limit reliability-related spending or to forego seeking rate recovery for such spending, Exelon's deep pockets and additional resources are irrelevant to this proceeding. The absence of such commitments means that, with or without the transaction, Pepco's ratepayers would be the ones funding the company's reliability improvements.

In sum, in terms of spending and distribution rates, the Joint Applicants' so-called reliability commitment would provide zero benefit to Pepco's ratepayers or the District.

---

383 Exhibit Joint Applicants (3E) at 3:3-8 (emphasis added).

384 Exhibit Joint Applicants (B) at 7:19-22.

385 Exhibit Joint Applicants (3E) at 4:3-12.

c. The Joint Applicants Reserve the Right to Seek a Weakening of the EQSS, Despite Basing Their Reliability Commitment Upon an Assumption of No Changes in Law or Regulations.

Another exception built into the Joint Applicants' reliability commitment is that unspecified "changes in law . . . [or] regulations" apparently would excuse Pepco's inability to meet the reliability targets therein.[386] Once again, the Joint Applicants unreasonably ignore that the Commission already enables Pepco to seek relief from the EQSS when "failure to meet a specific benchmark was truly a result of conditions beyond Pepco's control."[387]

Beyond that problem, the new exception the Joint Applicants seek here for changes in law or regulations is troubling because the Joint Applicants have steadfastly refused to waive Pepco's ability to petition the Commission for re-evaluation of the EQSS.[388] Repeatedly pressed as to whether the Joint Applicants would agree, as part of this proceeding, to waive Pepco's right to seek re-evaluation, the response has been that Pepco has not made a final determination about that yet.[389] In OPC's view, the credibility of the Joint Applicants' claim that they are committed to enhancing Pepco's reliability performance is undermined by the Joint Applicants' refusal to rule out future attempts by Pepco and/or Exelon to weaken the EQSS requirements in the District. Waiving this ability would be a clear, incremental benefit and OPC is troubled by the inherent contradiction in the Joint Applicants' claims about improving reliability performance and insistence on retaining the right to seek to weaken reliability performance measures.

---

386 Exhibit Joint Applicants (4A)-2, Item 7.

387 *Formal Case No. 766, et al.*, Order No. 16427 at ¶ 38.

388 As Mr. Gausman noted, the EQSS regulations provide that "[n]o earlier than June 30, 2015, the utility may request the Commission to reevaluate the reliability performance standards established…for the years 2016 through 2020 and thereafter." Exhibit Joint Applicants (3E) at 8:10-13.

389 OPC Cross Examination Exhibit #69 (Mr. Gausman's response to OPC Data Request No. 18-27); Tr. 1155:7-12 and 1426:1-8.

Based on the foregoing arguments and supporting evidence, the Commission should find that Joint Applicants have failed to demonstrate that the proposed transaction meets Public Interest Factor #3.

D. Public Interest Factor #4: The Risks Associated with all of the Joint Applicants' Affiliated Non-Jurisdictional Business Operations, Including Nuclear Operations.

Primarily through the testimonies of Dr. Woolridge and Ms. Ramas, OPC presented evidence addressing the risk to which the proposed transaction would subject Pepco ratepayers. These risks are discussed in more detail below.

1. OPC Submitted Substantial Evidence Detailing the Financial Risks Associated with the Proposed Transaction.

OPC Witness Woolridge[390] evaluated the proposed transaction with a focus on three distinct areas: (1) the capital markets' perceptions of Exelon's proposed acquisition of PHI; (2) the relative riskiness of Exelon and PHI, and how these risks are viewed in the combined Exelon-PHI entity; and (3) the ring-fencing measures and financial commitments proposed by the Joint Applicants in light of this relative riskiness. Dr. Wooldridge's analysis was driven and measured by the prevailing standard which must be satisfied in order for a transaction to be approved, *i.e.*, that the transaction "must produce a direct and traceable financial benefit to ratepayers" and, "any savings that result must be shared with ratepayers, and be shared in such a proportion that ratepayers are compensated for the risks inherent in the companies' decision to merge."[391] As demonstrated below, the Joint Applicants are unable to satisfy this standard, as the proposed transaction would expose ratepayers to more risk than would otherwise be present absent the transaction.

---

[390] A summary of OPC Witness Woolridge's educational background and business experience was admitted in this proceeding as Exhibit OPC (D)-1.

[391] *Formal Case No. 951*, Order No. 11075 at 18.

a. The Proposed Transaction Would Expose Pepco Customers to New Financial Risk that is Not Present in a No-Transaction Future.

From the outset of Dr. Woolridge's evaluation, it became readily apparent that the clear beneficiaries of Exelon's proposed acquisition of PHI are not ratepayers but Pepco's stockholders. Numerous investment analysts and market observers—citing different valuation metrics—all agreed that Exelon paid an exorbitant price for Pepco Holdings. Exelon paid a 24% premium for PHI, resulting in a $1.6 billion windfall for PHI shareholders at the announcement of the transaction.[392] Though this overpayment was cause for concern for Wall Street analysts, their focus was whether, and if so, how soon the acquisition would be accretive to Exelon's earnings.[393] It is this pressure to meet the earnings accretion expectations and synergies that OPC Witness Woolridge warns could lead to cost cutting and investment curtailments that may be detrimental to customers. Further, a key factor to earnings accretion is the high amount of debt that Exelon used to finance the transaction which, according to Standard and Poor's, will weaken credit metrics and could put pressure on Exelon's bond ratings. As OPC Witness Woolridge notes, this further exposes customers to risks of harm should this transaction be approved.[394]

b. PHI and Pepco Do Not Benefit from Exelon's "Strong" Balance Sheet.

In his Direct Testimony, Exelon's CEO Mr. Crane touted the financial strength of Exelon as a benefit to Pepco.[395] However, as OPC Witness Woolridge demonstrated, neither Joint Applicants Witness Crane, or Joint Applicants Witness Lapson, cite any "traceable" benefits to Pepco or its customers from the financial strength of Exelon. In fact, OPC Witness Woolridge notes a number

---

392 Exhibit OPC (D) at 7:3-7.

393 Exhibit OPC (D) at 8:10-15.

394 Exhibit OPC (D) at 10:9-13.

395 Exhibits Joint Applicants (A) at 7.

of factors that indicate Exelon is riskier than Pepco, including: (1) higher risk associated with its commercial generation business, 57% of which comes from nuclear; (2) lower S&P credit ratings; (3) significantly higher percent of unregulated revenues; (4) dividend cut in 2013; (5) very poor long-term stock performance; and (6) need to maintain a higher common equity ratio due to its risk.[396]

From the perspective of the markets, if any benefits are conferred by the proposed transaction, the benefits go to Exelon and not Pepco. As analysts' reviews indicate, the acquisition of PHI's relatively stable distribution business would be beneficial to Exelon and fit the current market theme of energy companies buying more regulated assets.[397] The tangible benefits that Exelon would derive from Pepco's stability are evidenced in S&P's decision to use Pepco's "medial volatility tables to assess the pro forma company's financial measures because of the meaningful increase in regulated cash flows."[398] In addition S&P noted that, post-transaction, Exelon's regulated base would be nearly 50% of cash flows and would provide 80%-90% of the parent company's external dividend. In sum, Mr. Crane's claims that the financial strength of Exelon is a benefit to PHI or Pepco should be disregarded as it is not supported by any evidence.

c. Ring-fencing Provisions are Risk-Mitigation Measures that Offer No Standalone Benefit.

Given the risks involved, OPC Witness Woolridge gauged the Joint Applicants' financial commitments and ring-fencing proposals to be inadequate. OPC Witness Woolridge noted that the Joint Applicants' commitments linking the payment of upstream dividends to Pepco's equity ratio

---

396 Exhibit OPC (D) at 13:5-22 & 14:1-17.

397 Exhibit OPC (D) at 15:7 to 19:17.

398 Standard & Poor's Ratings Services, Exelon Corp. And Pepco Holdings Ratings Are Affirmed On Acquisition Announcement, April 30, 2014, p.5. Document provided as Joint Applicants Confidential Response to OPC Data Request 11-5, Attachment A, pp. 295-305.

in the most recent rate case and the maintenance of investment grade bond ratings, are very important commitments for Exelon and proposed several additional financial commitments for the Joint Applicants. Dr. Woolridge proposed several additional financial commitments, including: (1) a three-year dividend holiday, such as that in Exelon's acquisition of Constellation/BGE; (2) a commitment that debt cost rates for Pepco do not increase due to a ratings downgrade associated with Exelon; and (3) provisions that in future rate cases, Exelon must demonstrate that Pepco's proposed capital structure and ROE are not affected in a negative way due to the proposed transaction.[399] The Joint Applicants provide no support for rejecting these recommendations.

While OPC Witness Woolridge has recommended additional measures to protect ratepayers from the adverse effects of the transaction, these measures are simply safeguards which, if accepted, do not confer any net benefit to Pepco customers. Despite assertions by the Joint Applicants, there are no 'traceable' benefits to Pepco customers due to the touted financial strength of Exelon.

2. The Joint Applicants Failed to Demonstrate that the Proposed Transaction Will Not Negatively Impact Ratepayers with Respect to the Use of PHI's NOLC.

In addition to the ring-fencing and financial issues discussed above, OPC Witness Ramas addressed another aspect of the proposed transaction that subjects ratepayers to risk. Based on the information presented to date, the Joint Applicants have not satisfactorily provided assurances that PHI's net operating loss carry-forwards ("NOLC") will not negatively impact Pepco's ratepayers in the District of Columbia. This uncertainty is contrary to a finding that, as it currently stands, the transaction is in the public interest. As explained by OPC Witness

[399] Exhibit OPC (D) at 23:5 to 24:4.

Ramas, the acquisition of PHI by Exelon triggers the Internal Revenue Code Section 382 limitation to tax carry forwards.[400] IRC Section 382 places limitations on the amount of NOLs that can be used annually.[401] However, the total amount of annual IRC Section 382 limitation on the use of the PHI's NOLC has not been finalized at this time. In response to OPC's question regarding the Joint Applicants' best estimate of the annual IRC Section 382 limitation on the use of PHI's NOLC, the Joint Applicants stated they "have made no such computation or estimate."[402] Based on the Joint Applicants' Response to Confidential Bench Data Request No. 5, it is clear that, as of April 17, 2015, the Joint Applicants have not, and cannot, provide a final IRC 382 limitation analysis.

OPC Witness Ramas explains the significance of this issue as well as a potential consequence of a NOLC position:

> [I]n Pepco's last rate case, "the fact that PHI and Pepco were in a NOLC position caused the ADIT offset to rate base to be lower than it would otherwise be absent the NOLC position. If the IRC Section 382 annual limitations on the use of the NOLCs causes the NOL deferred tax asset to reverse more slowly on Pepco's books than what would transpire absent the annual limitations on the use of the NOLS, a higher rate base could result. This is due, in part, to a potentially longer period for utilizing the NOLCs due to the annual limitations."[[403]]

At the hearing, Commissioner Fort asked Joint Applicants Witness Khouzami whether he was familiar with the Commission's order in Pepco's last rate case, Formal Case No. 1103, where there was an issue with respect to how the NOLC was being treated for our rate base purposes. Mr. Khouzami's response was far from reassuring. Although he did not know "the specifics of what was discussed" in the last rate case, he stated that if he "think[s]:" (1) Item 91 of Exhibit

---

400 Exhibit OPC (C) at 28:11-12.

401 Exhibit OPC (C) at 28:12-13.

402 Exhibit OPC (C)-16.

403 Exhibit OPC (C) at 29:10-17.

(4A)-2 "should alleviate some concerns about limitations of NOLs that could be used going forward due to the 382 limitation;"[404] and (2) "we'll be in the same position pre-merger versus post-merger."[405] This type of speculation does not come close to satisfying the Joint Applicants' burden of demonstrating that the transaction is in the public interest.

A compounding concern of the OPC is whether the NOLC issue will be exacerbated by the transaction. Commissioner Fort explored this issue at the hearing, asking whether, "[w]ith the new structure and with Exelon coming in, are we going to have some of the same issues that we faced in a prior case, but on a larger level because of how Exelon . . . treats their net operating loss and how they interact with their utilities in that regard?"[406] Mr. Khouzami dodged this straightforward question, contending that the Joint Applicants are "mindful of previous Commission orders."[407] As Commissioner Fort observed, that response does not "tell me whether or not there is actually an issue."[408]

In an apparent attempt to respond to Commissioner Fort's questions, the Joint Applicants provided Confidential Response to Bench Data Response No. 5. As explained at the hearing, this data response indicates that "Exelon **anticipates** being able to consume PHI's NOLC, net operating loss carry forward by 2017."[409] In addition, "PHI and Pepco **anticipate** they will not be able to use the NOLC carry-forward fully to 2019."[410] While the representations in this data response are a step forward, as OPC Witness Ramas noted, they do not "alleviate my recommendation that that information, once it's known, be reported to the Commission so it has

---

404 Tr. 2143:7-10.

405 Tr. 2143:4-5, 2145:2-3.

406 Tr. 2144:13-17

407 Tr. 2145: 7-8.

408 Tr. 2146:5-6.

409 Tr. 2755:11-13 (emphasis added).

410 Tr. 2755:20-22 (emphasis added).

it to evaluate in future proceedings."[411] In addition, while the Joint Applicants suggest that Item 91 on Exhibit (4A)-2 *might* address concerns about the NOLC, there is no specific language in Item 91 regarding this point.

An additional reporting requirement serves the important purpose of protecting Pepco's DC ratepayers from excessive costs. Put simply by Commissioner Fort at the hearing, "the concern, of course, that the Commission has is if it's not timely used, the rate base would be higher than it needs to be, and if it's a higher rate base, it is a higher cost to D.C. ratepayers."[412] If the Commission approves the transaction, this concern should be addressed through a mandatory, enforceable commitment requiring the Joint Applicants to file a report with the Commission describing, in detail, the amount of any IRC Section 382 limitations on the use of PHI's NOLC post-transaction as well as whether this position will be further impacted by how Exelon treats its NOL. Requiring a filing of a detailed description of the impact of any IRC Section 382 limitations will help ensure that the transaction is in the public interest.

Based on the foregoing arguments and supporting evidence, the Commission should find that Joint Applicants have failed to demonstrate that the proposed transaction meets Public Interest Factor #4.

E. Public Interest Factor #5: The Impact on the Commission's Ability to Regulate the New Utility Effectively.

Common sense dictates that it is more difficult to regulate a larger entity (an Exelon-owned Pepco) than a smaller one (a PHI-owned Pepco). Similarly, OPC submits that it will be more difficult for the Commission to regulate the District's electric provider if its CEO and home

---

411 Tr. 2756:5-8.

412 Tr. 2149:18-22.

office are based in Chicago rather than in the District.[413] Below, OPC discusses specific examples that add context to these practical concerns.

1. Pepco's Participation in Exelon's General Services Agreement Will Have Negative Implications on the Commission's Ability to Effectively Review and Monitor the Costs Being Charged to Pepco Absent a Requirement that the Joint Applicants Provide Further Information.

Joint Applicants Witness Khouzami states that, after consummation of the transaction, Pepco will enter into Exelon's existing General Services Agreement ("GSA").[414] The GSA is an agreement under which Exelon Business Service Company ("EBSC") provides a variety of services to Exelon utilities and other Exelon subsidiaries.[415] Upon consummation of the transaction, the Joint Applicants propose that Pepco will become a party to the GSA and be able to receive services from the EBSC. The GSA provides that services billed by EBSC to Pepco be billed at the EBSC's cost and directly charged where possible.[416]

Pepco will be receiving charges from both the PHI Service Company and the EBSC. The consequence of this is that "[g]iven the increase in the entities direct charging and allocating costs to Pepco post-transaction, the information and reporting concerns raised by OPC in prior rate cases, many of which have been shared by the Commission will be amplified."[417] These concerns are not hypothetical, but rather concrete. In Order No. 17424, the Commission stated that it "shares OPC's concerns that the amount of information about District of Columbia-

---

413 For purposes of administrative efficiency, OPC incorporates by reference the discussion in Public Interest Factor #2 regarding the loss of local control and will not repeat those arguments here.

414 Exhibit Joint Applicants (F) at 29-30.

415 Exhibit Joint Applicants (F) at 29:3-5.

416 Exhibit Joint Applicants (F) at 30:6-8.

417 Exhibit OPC (C) at 32:5-8.

specific PHI Service Company costs that are allocated to the District is inadequate."[418] The Commission thus directed the following requirements:

> In addition, we accept OPC's recommendation that Pepco should supply more information concerning the PHI Service Company costs that are direct-charged and allocated to Pepco-DC when it files a rate case. Accordingly, we direct Pepco to include along with its initial 21-day compliance filing in its next rate case, an updated Cost Allocation Manual ("CAM"), an updated service agreement between PHI and Pepco, and an exhibit that breaks out and separately states the PHI costs that are directly-assigned and allocated to Pepco-DC. This exhibit should include: (a) the total amount of direct-charged costs and the total amount of allocated costs to Pepco-DC during the test year and the prior four fiscal years; (b) the total amount of direct-charged and allocated costs to Pepco-DC included in Pepco-DC rate base during the test year and the prior four fiscal years; (c) the total amount included in Pepco-DC O&M expense during the test year and the prior four fiscal year[s]; (d) a detailed description of any changes or modifications to the service agreement between PHI and Pepco since the previous rate case; and (e) a detailed description of any changes to the CAM and methods of allocating costs from PHI Service Company to Pepco since the previous rate case.[419]

While the Joint Applicants did not make a similar, formal commitment in this case, Mr. McGowan indicated in a discovery response that Pepco will comply with the requirements of Order No. 17424.[420] To the extent the Commission approves the proposed transaction (or approves a restructured transaction that is consistent with the public interest), it should explicitly note Pepco's acknowledgement of the need to comply with Order No. 17424. Even with that commitment, additional complications could arise simply due to the fact that Pepco's rate cases would involve costs being allocated from two different entities using two different cost allocation manuals.[421] There is no dispute that the time associated with analyzing individual

---

418 *Formal Case No. 1103*, Order No. 17424 at ¶ 373.

419 *Id*. at ¶ 374. In the subsequent Order on Reconsideration, Order No. 17539, the Commission slightly modified the reporting requirements. *See Formal Case No. 1103, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order No. 17539, rel. July 10, 2014, at P 50.

420 OPC Cross Examination Exhibit #104 at 2 (Joint Applicants' Response to OPC Data Request No. 18-111).

421 *See* AOBA Cross Examination Exhibit #106 (Joint Applicants' Response to OPC Data Request No. 18-108) (explaining that PHI Service Company uses 70 unique cost allocation factors for Pepco and EBSC has approximately 60 different factors).

allocation ratios will increase as the number of ratios is expected to increase.[422] OPC fails to see any compelling reason to subject the District to these added complications.

In addition, at the hearing, Joint Applicants Witness Khouzami stated that the Joint Applicants "have not offered to provide detailed reports for all affiliates."[423] For example, Mr. Khouzami explained that "if BGE were to use some Pepco D.C. resources in a storm response, that would be an affiliate. I don't believe we've committed to providing reports that detail all those costs."[424] In response to a question as to why the Joint Applicants did not commit to providing a report breaking out and separately stating the costs that are directly assigned and allocated to Pepco total and to Pepco DC from Exelon, EBSC, and any other new affiliates charging costs to Pepco, Mr. Khouzami responded that "I don't think we thought [they] were applicable."[425] However, the breakdown of these costs is certainly applicable, as it provides an accountability measure that helps parties ensure that proposed costs are reasonable. Accordingly, if the Commission approves the proposed transaction (or approves a restructured the transaction that is consistent with the public interest), it should, as it did in Order No. 17424, require Joint Applicants to provide a report breaking out and separately stating the costs that are directly assigned and allocated to Pepco total and to Pepco DC from Exelon, EBSC, and any other new affiliates charging costs to Pepco.

2. Exelon's Conduct in this Proceeding Demonstrates that it Will Be More Difficult to Effectively Regulate an Exelon-Owned Pepco than it is to Regulate a PHI-Owned Pepco.

The Commission's ability to regulate the new utility effectively is not necessarily limited to concerns about additional layers of approval, etc. Rather, the distribution utility in the District

---

422 OPC Cross Examination Exhibit #108 at 2 (Joint Applicants' Response to OPC Data Request No. 18-107).

423 Tr. 1837:2-4.

424 Tr. 1837:4-7.

425 Tr. 1837:17-20.

is an important part of the community. Accordingly, both the public and the Commission should be comfortable with the new players the proposed transaction would introduce into the District. Moreover, the public must have confidence in administrative processes, and Exelon's approach to administrative processes is an important part of that consideration.

On cross examination, Mr. Crane admitted that the Joint Applicants made the strategic decision to revise their testimony and exhibits, but ***not*** to revise their Application, because the Joint Applicants "did not want to restart the clock…."[426] This tacit admission that Exelon, in its first formal proceeding before this Commission, played fast and loose with due process in order to gain a procedural advantage was as startling as it was disappointing. OPC has concerns about moving forward with a utility that engages in such questionable procedural gamesmanship. These concerns cannot be ignored in a proceeding where the Commission is charged with determining whether it is in the public interest to permit Exelon to be the monopoly electric distribution company in the District.

Moreover, until this proceeding involving Exelon, OPC is not aware of any previous proceeding in which Pepco disregarded the Commission's discovery rules. In particular, the Joint Applicants routinely ignored Rule 122.13, which requires that "all data responses shall identify the name and the title of the person sponsoring the response."[427] The Joint Applicants showed similar disregard[428] for Rule 122.4, which specifies that "[d]ata requests shall be considered continuing in nature" and requires that "[s]ubstantially revised information shall be provided *without specific additional requests*." Emphasis added. This blatant disregard for the

---

426 Tr. 238:7-13.

427 *See, e.g.*, OPC Cross Examination Exhibit #1 at 2 (Joint Applicants' Supplemental Response to OPC Data Request No. 21-2).

428 *See, e.g.*, OPC Cross Examination Exhibit #18 (Joint Applicants' Response to OPC Data Request No. 5-13).

Commission's regulations offered OPC the Hobson's Choice of expending resources to enforce regulations that should require no enforcement from OPC, or accept Exelon's non-compliance with Commission regulations and move forward with investigating the case to the best of OPC's ability. Again, OPC has serious concerns about moving forward with a utility that flaunts the Commission's procedural rules such as Exelon did in this proceeding.

Based on the foregoing arguments and supporting evidence, the Commission should find that Joint Applicants have failed to demonstrate that the proposed transaction meets Public Interest Factor #5.

F. Public Interest Factor #6: The Impact on Competition in the Local Retail, and Wholesale Markets that Impacts the District and District Ratepayers.

In Order No. 17597, the Commission made clear that it did not intend to review the proposed transaction's impact on the regional transmission organization, PJM, or on the PJM region as a whole.[429] Rather, the Commission explained that it would address wholesale market issues under its public interest review only to the extent they fall within the Commission's jurisdiction and affect the rates being paid by District customers.[430] OPC addresses Public Interest Factor #6 within the confines of the Commission's admonition from Order No. 17597.[431]

It is imperative that the Commission understand the magnitude of the proposed transaction on the District's energy future, both in the short- and long-term. Exelon is asking the Commission for substantial relief—the ability to serve as the exclusive electric distribution provider in the District of Columbia. If that request is granted, Exelon will be in a position to exercise a great degree of influence on policy discussions that shape of District's utility

---

429 *Formal Case No. 1119*, Order No. 17597 at ¶ 118 (concluding "[t]hat review is outside of the scope of our authority and is already being conducted at FERC").

430 *Id*.

431 Tr. 3573:10-16 (where Ms. Schoolman discusses the interrelationship between the retail and wholesale markets).

landscape for decades to come. In order for the proposed transaction to be in the public interest, the Commission should have a certain comfort level that Exelon will exercise that influence in a manner that benefits the District and is consistent with the vision underlying the District's policies. Unfortunately, the record in this case contains substantial evidence demonstrating that, if the Commission approves the transaction, Exelon will exercise its influence to the detriment of District and Pepco's ratepayers.

Concerning the transaction's impact on the District in terms of competition in local and wholesale markets, the record demonstrates that Exelon intends to control the pace of development of distributed energy resources within the footprint of its distribution utilities in order to protect its substantial merchant generation function.[432] If implemented, this intention would be harmful to consumers because would hamper the ability of distribution-level generation and storage technology systems to develop naturally through healthy competition and innovation. Further, acting on such intention would allow Exelon's desire to avoid existential threats to its central station merchant power plants to determine how the transformation to the utility of the future occurs. In addition, certain factors at the retail level can have an impact at the wholesale level. Notably, if demand response or energy efficiency programs can successfully reduce peak usage or shift usage from peak to off-peak periods, wholesale prices could be reduced.[433] In policy debates about demand response or energy efficiency, the Commission at present simply does not have to worry about PHI or Pepco taking actions that are based on the need to protect central station generation. This is because, by its own design, PHI is fundamentally a regulated distribution

---

[432] *See, e.g.*, Tr. 3559:19 to 3560:16 (where Ms. Schoolman discusses actions or positions Exelon has taken to "keep[] wholesale rates up to protect their nuclear fleet").

[433] Tr. 3572:4-8 (Schoolman).

utility company.[434] As such, PHI is largely agnostic to central station generation. This circumstance would change to the detriment of the District and Pepco ratepayers if the transaction is approved, as Exelon is hardly agnostic to central station generation. In fact, Exelon has already taken positions that are different from (at best) or not consistent with (at worst) the agnostic nature of a wires-only company.[435]

Exelon's enterprise-wide business strategy would need to change in order for this harm to dissipate. And yet, that is not likely to happen. Presumably, the Commission could find that the benefits of the transaction offset this harm. However, nothing in Exhibit (4A)-2 is so beneficial that it does, in fact, offset this harm. Thus, the Commission is faced with a difficult decision—is the prudent course conditional approval of the proposed transaction with mitigation measures that hopefully mitigate potential harm to the District and Pepco's ratepayers, or would the public interest be better served by avoiding these problems in the first instance?[436] Based on the record evidence, OPC does not see a compelling reason to move forward with Exelon, attempt to mitigate these concerns, and hope for the best.

Based on the foregoing arguments and supporting evidence, the Commission should find that Joint Applicants have failed to demonstrate that the proposed transaction meets Public Interest Factor #6.

---

434 OPC Cross Examination Exhibit #8 at 2-4; s*ee also* OPC Cross Examination Exhibit #9 at 2;

435 Tr. 3580:6-18 (discussing Exelon's support for legislation in Illinois that prevent third-parties from developing retail microgrids).

436 Based on the number of competing bids, it is not unforeseeable that, in the event the Exelon-PHI transaction is not consummated, another entity could seek to acquire PHI. It is simply unknown whether that would be the case, or whether any such potential acquirer may not pose the types of problems that Exelon poses due to its substantial generation in the PJM footprint. However, regardless of whether PHI continues as a standalone utility, or whether PHI is the subject of a future acquisition, the worst-case scenario in regard to the impact of competition seems to be presented by Exelon's proposal.

G. Public Interest Factor #7: The Impact on Conservation of Natural Resources and Preservation of Environmental Quality.

Public Interest Factor #7 is one of the most significant points of focus for the Commission in this proceeding. Inherent in determining the impact that Exelon's proposed acquisition of PHI/Pepco will have on the conservation of natural resources and the preservation of environmental quality is the obligation the City has to change the electric distribution network that has served us for over a century. Major environmental concerns, such as greenhouse gas emissions from conventional fossil fuel energy sources and climate change, have forced society to rethink the way we produce and consume energy. In response to these concerns, the District of Columbia has made significant progress in addressing these pressing issues through the collaborative effort of dedicated citizens, energy stakeholders and government officials who want to protect the environment and reshape the District's energy future.

Over the past decade, several pieces of legislation have been adopted and implemented that have positioned the District of Columbia at the forefront of national leadership in the area of sustainability, renewable energy generation and distributed generation.[437] Therefore, this transaction presents a pivotal moment for the Commission as the decision in this case will determine whether the collective success of citizens and elected officials will continue and how the District's electric infrastructure will evolve. Thus, the Commission should give careful consideration to this factor as the decision will impact District residents for generations to come.

---

[437] For example, the Renewable Energy Portfolio Standard of 2004, D.C. Code § 34-1431.0 to 34-1431.10 (2012); the Clean and Affordable Energy Act of 2008, D.C. Law 17-250 (codified in scattered sections of § 8 of the D.C. Code, among others); the Distributed Generation Amendment Act of 2011, D.C. Code § 34-1432 to 34-1436 (2012); the Sustainable DC Amendment Act of 2012, D.C. Law 19-262 (codified in scattered sections of § 8 of the D.C. Code, among others); the Community Renewable Energy Amendment Act of 2013, D.C. Law 20-47 (codified in scattered sections of § 34 of the D.C. Code); and the Sustainable DC Omnibus Amendment Act of 2014, D.C. Law 20-142 (codified in scattered sections of § 8 of the D.C. Code, among others).

After careful consideration of the Joint Applicants' Application and testimony concerning Public Interest Factor #7, as well as the evidence adduced at the evidentiary hearing, OPC has reached two conclusions. First, the issues covered by Public Interest Factor #7 are so important, the proposed transaction as a whole cannot be deemed to be in the public interest unless the Commission finds net benefits on this specific factor. Second, there is no substantial record evidence that would support a finding that the proposed transaction is in the public interest with respect to the conservation of natural resources and the preservation of environmental quality. Simply stated, the Joint Applicants' proposed transaction fails to meet the Commission's evidentiary standard based upon its interpretation of D.C. Code § 34-504 with respect to this key issue. Exelon's corporate philosophy regarding renewable energy generation and distributed generation is not consistent with the District's vision for locally-generated renewable energy and environmental quality.

1. The Joint Applicants Failed to Meet Their Burden and Prove that the Proposed Transaction Will Provide a Benefit to the District of Columbia in the Area of Renewables and the Environment.

As the proponent of the proposed transaction, the Joint Applicants are required to present evidence that the transaction will leave the District of Columbia and ratepayers better off than they would be absent the transaction (*i.e.*, the transaction must result in net, direct, traceable, financial benefits). In fact, the Joint Applicants allege not just that that approval of the transaction would not harm the District or ratepayers, but would *enhance* environmental quality in the District.[438] Contrary to that claim, substantial record evidence demonstrates that the proposed transaction would not leave the City and ratepayers better off and would not provide a benefit to the City's efforts to deploy renewable energy generation.

[438] Exhibit Joint Applicants (2I) at 3:1-4 (where Mr. Gould contends that the proposed transaction "will result in a sustained focus on conservation of natural resources and *enhancement* of environmental quality in the District") (emphasis added).

The evidence the Joint Applicants offered in this proceeding regarding Public Interest Factor #7 was the testimony and supporting exhibits of Christopher Gould. Mr. Gould speaks exhaustively about Exelon's achievements in the area of energy efficiency, but he offers little to nothing in the way of proof that the transaction will benefit the City's efforts in terms of renewable energy and distributed generation. Specifically, Mr. Gould's testimony did not present any ideas or proposals that would advance—or even merely comply with—the significant and hard-fought policies that City stakeholders have established to make renewable energy and distributed generation available and affordable throughout the District of Columbia. In fact, Joint Applicants Witness Tierney—the only witness who attempted to quantify the benefits of the proposed transaction on the Joint Applicants' behalf—explained that the extent of the Joint Applicants' proposal on Pubic Interest Factor #7 was a solar-financing provision from a pending (*i.e.*, not yet approved) settlement in Maryland and the potential for the Commission to deploy the Customer Investment Fund in a manner that addresses Public Interest Factor #7.[439] In this manner, the Joint Applicants have not adequately responded to Public Interest Factor #7, nor have they provided any evidence to support their claim that the transaction will enhance environmental quality in the District.

The impact of the Joint Applicants' failure to provide *any* proposals on this key issue is particularly troubling in light of two facts. One, this is the first time the Commission has evaluated environmental issues in a merger case. In 1997, when Pepco and BGE filed an application to merge, the Commission established six factors to determine if the proposed merger was in the public interest.[440] None of the factors in that case focused on renewables or

---

[439] Tr. 2268:9-17 (Tierney).

[440] *Formal Case No. 951*, Order No. 11075 at 20. The Commission established the following six public interest factors: (1) ratepayers, shareholders, the financial health of the utilities standing alone and as merged, and the economy of the District; (2) utility management and administrative operations; (3) public safety and the safety

distributed generation as there was very little activity in the City involving those newly emerging energy technologies. However, in the nearly twenty years since that case, significant progress has been made by the Council for the District of Columbia and community activists to address environmental issues and to ensure distributed generation resources are available to citizens regardless of income or home ownership. In this formal case, the Commission recognized the importance of this issue and the need for continued progress and added factor seven to "allow parties to address their concerns regarding renewable energy and the environment in the District."[441] Despite having a number of opportunities in this proceeding to provide evidence to prove how the proposed transaction would benefit the City from an environmental and sustainability standpoint, the Joint Applicants have repeatedly failed or neglected to do so.

The second troubling fact is that the Joint Applicants failed to provide any evidence of a benefit for Public Interest Factor #7 despite Exelon's resources and ability to do so. The District's efforts to advance renewables and distributed generation is well documented. Exelon, a multi-billion dollar corporation, has extensive resources and could have easily researched the City's renewable energy and distributed generation capacity, developed a comprehensive set of proposals to improve on existing renewable energy programs, and introduced new ideas to further advance the City's progress. Failure to do so is not attributed to a lack of ability to provide viable proposals, but rather a lack of will to do so. Issues pertaining to the conservation of natural resources and the preservation of environmental quality will have long-range implications for the District. Such blatant disregard of this important factor is telling and

---

and reliability of services; (4) risks associated with all of the Joint Applicants' affiliated non-jurisdictional business operations, including nuclear operations; (5) the Commission's ability to regulate the new utility effectively; (6) competition in the local retail, and wholesale markets that impacts the District and District ratepayers.

[441] *Formal Case No. 1119*, Order No. 17597 at ¶ 120.

provides a preview of how Exelon will consider the District's needs if the transaction is approved.

Like the important issues surrounding reliability, Public Interest Factor #7 is so significant that the Joint Applicants' failure to demonstrate benefits on this particular factor should compel a finding that the transaction as a whole is not in the public interest. OPC submits that the Commission should not feel compelled to fashion a set of conditions to fill the Joint Applicants' void for this factor nor should any weight be given to proposals the Joint Applicants are likely to introduce during the briefing stage of this proceeding. Instead, the Commission should note this deficiency along with the other shortcomings included in this brief as a basis for denying the proposed transaction.

2. Without Proposed Mitigation Measures, Exelon is Not the Right Electric Distribution Company for the District of Columbia.

In order for the District of Columbia's hard-fought success and advancements in sustainable energy policy and environmental stewardship to continue, the relationship between the electric company and the City must be solid and cooperative. Any inconsistency with vision or philosophy, as is present in Exelon's business strategy, will undoubtedly impede continued success.

With respect to a commitment to deploy more renewable energy resources, the current state of the relationship between Pepco and the City (elected officials and community stakeholders) is healthy. That has not always been the case. The testimony of DC Sun Witness Anya Schoolman and her testimony on cross examination show that, initially, Pepco was not willing to pursue renewables. However, after years of sharing ideas and engaging in productive discussions, Pepco and local advocates of solar generation began working cooperatively.[442] In

[442] Exhibit DCSUN (A) at 25-28.

fact, after the Community Renewable Energy Amendment Act of 2013 was passed, DC Solar United Neighborhoods ("DC SUN") presented Pepco with a "Community Hero Award" in recognition of the support Pepco provided in getting the legislation enacted. Going forward, as other policy discussions take place regarding how the electric infrastructure should evolve to address environmental concerns, it will be necessary for the electric utility to be committed to the types of policies enacted by the City up to this point. If the transaction is approved, Pepco's current voice in those discussions will be replaced by Exelon's corporate philosophy. An examination of Exelon's philosophy indicates that the relationship between the City and the new electric company will not be as cooperative.

3. Exelon's Opposition to Renewable Generation Will Likely Jeopardize the Future Success of the City's Efforts to Deploy More Renewable Generation.

In the recent past, Exelon has taken positions on renewable energy generation that the Commission should be concerned about. In late 2012, the American Wind Energy Association ("AWEA") voted to remove Exelon from the group's board of directors because of Exelon's staunch opposition to the federal production tax credit.[443] The production tax credit was a federal program that provided a financial incentive for the production of electric generation from renewable resources. In considering this issue, the critical point for the Commission to understand is the *basis* for Exelon's opposition to the production tax credit, not simply *that* Exelon opposed the production tax credit. Exelon's opposition was based on its view that the production tax credit was harmful to Exelon's substantial interests in nuclear generation. The Commission should view AWEA's decision as an indication that a national organization that

[443] Exhibit OPC (E) at 13:11-20.

values the progress of renewable energy generation deems Exelon's position on renewables unacceptable and an obstacle to clean energy integration.

Moreover, Ms. Schoolman articulated a second concern about Exelon's philosophy during cross examination. Ms. Schoolman provided testimony about Exelon's position on distributed generation in a proceeding in New York called "Reforming the Energy Vision" ("NY REV"). The purpose of the NY REV proceeding is to align electric utility practices and New York's regulatory framework with technological advances in renewable energy generation and distribution. Specifically, the NY REV proceeding has prioritized certain environmental and consumer choice policy objectives such as reduction of carbon emissions, fuel and resource diversity and enhanced consumer knowledge that will encourage better management of their energy bills. Ms. Schoolman noted that in the NY REV proceeding, Exelon raised concerns that distributed generation and efforts to reduce peak demand would create downward pressure on wholesale prices thus impacting Exelon's merchant business.[444] Ms. Schoolman's belief is that Exelon will take similar positions in the District of Columbia and that such positions are designed to protect Exelon's nuclear revenues at the expense of consumers who might have lower rates. OPC submits that Ms. Schoolman's belief is well-supported.

Pepco, unlike Exelon, does not have this inherent conflict because Pepco does not own generation plants and is therefore not focused on the impact the implementation of distributed generation will have on its revenues. This distinction is important to the District of Columbia as the Commission recently announced that it was going to establish a proceeding similar to the NY REV here in the District of Columbia "*to address in a more global way the future outlook for energy growth in the District of Columbia, the feasibility of deploying more energy storage*

[444] Tr. 3559:19 to 3560:16.

facilities and increased distribution generation, and the impact of these new technologies on Pepco's load forecasting and construction plans for the city."[445] The decisions that come out of that future proceeding will determine how the District's electric infrastructure will operate and will define a number of policies that will impact the manner in which consumers use and produce energy. If the Commission approves this transaction, there is substantial evidence to support a finding that Exelon's dominant corporate priority of revenue generation from nuclear energy will crowd out established District policies that benefit consumers, leaving the City and its electric future at a disadvantage. Therefore, OPC submits Exelon is not the right utility partner for the District of Columbia as many of the achieved sustainability gains stand to be compromised. In the absence of an affirmative proposal to offset these concerns, the proposed transaction cannot meet the public interest standard.

Based on the foregoing arguments and supporting evidence, the Commission should find that Joint Applicants have failed to demonstrate that the proposed transaction meets Public Interest Factor #7.

VI. CONCLUSION

While there are certainly substantial benefits associated with this approximately $7 billion transaction, the Joint Applicants have, unfortunately, presented a proposal that vests all of those benefits with shareholders to the detriment of Pepco's customers. After multiple rounds of comprehensive testimony, and an 11-day evidentiary hearing, the record simply reflects a proposal that is devoid of any meaningful, direct, tangible, quantifiable, financial benefits to ratepayers. Indeed, the Joint Applicants' proposal swings the other way and subjects the District and Pepco's ratepayers to harm.

---

[445] *Formal Case No. 1123, In the Matter of the Potomac Electric Power Company's Notice to Construct a 230 kV/138 kV/13 kV Substation and Four 230 kV/138 kV Underground Transmission Circuits on Buzzard Point,* Order No. 17851, rel. Apr. 9, 2015, at ¶ 78 (emphasis added).

As demonstrated herein, the Joint Applicants have had multiple opportunities to develop a proposal that, consistent with the public interest standard set forth in D.C. Code § 34-504 and encompassed by the seven public interest factors established by the Commission, responds meaningfully to issues, concerns, and opportunities facing the District of Columbia. However, substantial record evidence demonstrates that the Joint Applicants have failed to meet any of the seven public interest factors. Therefore, unless the Commission is inclined to undertake the burden of restructuring the proposed transaction to ensure that it is consistent with the public interest—a burden the Commission need not accept—OPC respectfully submits that the Commission should issue an order rejecting the Joint Applicants' proposal.

_____
Sandra Mattavous-Frye
People's Counsel

_____
Laurence Daniels
Director of Litigation

Dated: May 13, 2015