ORDER NO. 90084

IN THE MATTER OF THE MERGER OF EXELON CORPORATION AND CONSTELLATION ENERGY GROUP, INC.	* * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 9271

Issue Date: February 22, 2022

ORDER APPROVING 2021 SETTLEMENT AGREEMENT AND DENYING REQUEST TO REQUIRE EXELON TO REMAIN IN PJM

1. On December 30, 2021, Exelon Generating Company, LLC ("ExGen") submitted on behalf of itself and the Independent Market Monitor ("Market Monitor") for PJM Interconnection, L.L.C. ("PJM"), a settlement agreement ("the 2021 Settlement Agreement")[1] that, together with certain revisions to ExGen's fuel cost policies, purports to resolve all but one of the proposals contained in the Market Monitor's March 11, 2021 Report[2] to the Commission. The 2021 Settlement Agreement does not address the proposal of the Market Monitor and the Office of People's Counsel ("OPC") that Exelon Corporation ("Exelon") be required to remain in PJM for the duration of the 2021 Settlement Agreement. For the reasons discussed below, the Commission reaffirms in writing its acceptance of the 2021 Settlement Agreement, which was accepted orally by the Commission at the February 1, 2022 hearing in this matter, and declines the proposal to require that Exelon Corporation remain in PJM.

[1] Maillog No. 238398.
[2] Maillog No. 234143.

BACKGROUND AND PROCEDURAL HISTORY

2. On February 17, 2012, the Commission issued Order No. 84698, which approved the merger between Exelon and Constellation Energy Group, subject to a 10-year settlement agreement between Exelon and the Market Monitor ("The 2011 Settlement Agreement") that contains various market power mitigation provisions. Order No. 84698 found that Exelon's continued membership in PJM was an implied commitment in the 2011 Settlement Agreement and therefore a condition of merger approval, because without this implied commitment, Exelon could leave PJM and potentially escape its obligations under the Settlement.[3]

3. The 2011 Settlement Agreement provides that it will expire on March 12, 2022. Condition 9 of Order No. 84698 directs that the Market Monitor may provide a report to the Commission within the ninth year of the 2011 Settlement Agreement evaluating the effectiveness of the remedies still in place, and the impact of the expiration of the 2011 Settlement Agreement on the ability of Exelon to exercise market power in markets related to the Settlement.[4] Condition 9 also provides that the terms of the 2011 Settlement Agreement may be extended if certain conditions are met, including a determination by the Commission that expiration of the 2011 Settlement Agreement will, through Exelon's increased ability to exercise market power, pose a significant risk of harm to Maryland ratepayers.

4. On March 11, 2021, the Market Monitor filed a confidential report with the Commission describing Exelon's compliance with the 2011 Settlement Agreement and providing data related to the structural market power held by Exelon in the BGE Zone and in PJM as a whole.[5] The

[3] Order No. 84698 at 63; Condition 8 at 104.
[4] Order No. 84698 at 64, Condition 9 at 105.
[5] Maillog No. 234143. On April 7, 2021, the Market Monitor filed a public version of this report. Maillog No. 234669.

report found that Exelon "continues to have structural market power in the PJM markets" and recommended that the 2011 Settlement Agreement be extended for an additional 10 years.[6] The report further recommended that certain modifications to Exelon's behavioral commitments be made, to ensure adequate market power mitigation in light of changes in PJM market design since the 2011 Settlement Agreement was executed.[7]

5. On March 30, 2021, Exelon filed with the Commission a notice that it intends to transfer 100% ownership of its generation subsidiary, ExGen, to a newly-created subsidiary that will then be spun off to become ExGen's new parent company.[8] As a result of that transaction, ExGen and its generation plants, wholesale energy marketing operations, and competitive retail sales business will no longer be owned by Exelon. Exelon will remain a transmission and distribution utility company and the parent company of Baltimore Gas & Electric Company ("BGE"), Potomac Electric Power Company ("Pepco"), and Delmarva Power & Light Company ("Delmarva").

6. Exelon filed a reply in opposition to the Market Monitor's recommendations on May 21, 2021. Exelon argued that it controls significantly less generation capacity in PJM currently than it did immediately following the 2012 merger, that enhanced PJM market rules adequately protect wholesale and retail customers from market power, and that FERC rather than the Maryland Commission is the appropriate venue for the Market Monitor to propose new wholesale market power mitigation rules.[9]

7. On June 15, 2021, the Market Monitor filed a response to Exelon, reiterating its conclusion that extension of the 2011 Settlement Agreement is necessary in order to prevent the

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[6] Market Monitor Report at 12.

[7] *Id*. at 14-15.

[8] Maillog No. 234424, March 30, 2021 Notification Regarding the Transfer of Exelon Generation Company, LLC.

[9] Maillog No. 235369, Exelon May 21, 2021 Reply Memorandum at 3.

exercise by Exelon of market power.[10] On July 26, 2021, Exelon filed a second memorandum in opposition.[11]

8. OPC filed comments in support of the Market Monitor's recommendations on August 6, 2021.[12] OPC asked that the Commission schedule an evidentiary hearing to address market conditions in PJM, and argued that the Commission has authority to extend the 2011 Settlement Agreement's market power mitigation measures.

9. On August 9, 2021, Commission Staff requested that the Commission set an evidentiary hearing to consider the expiration of the 2011 Settlement Agreement.[13] The Commission granted that request on August 26, 2021, stating that it would conduct a virtual evidentiary hearing on October 7, 2021 to consider evidence and allow for legal argument on jurisdiction, current market conditions, and whether the expiration of the behavioral remedies in the 2011 Settlement Agreement would, through Exelon's increased ability to exercise market power, pose a significant risk of harm to Maryland ratepayers.[14]

10. OPC submitted to the Commission the pre-filed direct testimony of Douglas A. Smith on October 4, 2021, which provided Mr. Smith's opinion on the need for continued mitigation measures to protect Maryland ratepayers.[15]

11. On October 6, 2021, Exelon and the Market Monitor provided notice to the Commission that they had made substantial progress in reaching a settlement and requesting that the

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[10] Maillog No. 235776.
[11] Maillog No. 236268.
[12] Maillog No. 236484.
[13] Maillog No. 134675.
[14] Maillog No. 236818.
[15] Maillog No. 237283.

Commission postpone the October 7, 2021 hearing.[16] The Commission canceled the hearing that same day.

12. On December 30, 2021, Exelon filed the proposed 2021 Settlement Agreement, which extends the 2011 Settlement Agreement by 10 years for ExGen, but does not address the Market Monitor's request that Exelon be required to remain in PJM. The Market Monitor filed comments on January 3, 2022 in support of the 2021 Settlement Agreement. In those comments, the Market Monitor repeated its recommendation that the Commission require Exelon to remain in PJM, arguing that it would be impossible for the Commission to enforce the terms of the 2021 Settlement Agreement if Exelon were to leave PJM, since PJM rules governing generator behavior would no longer control.[17]

13. On January 21, 2022, OPC filed correspondence requesting that the Commission reschedule the evidentiary hearing in this matter, and stating that it intended to present testimony addressing the extension of behavioral measures to protect Maryland customers, the requirement for Exelon to remain in PJM, and whether the Commission should set a date for the expiration of any restrictions it imposes. On that same date, the Commission issued a Notice of Hearing and Comment Opportunity, which provided that the Commission would hold a virtual hearing to consider the 2021 Settlement Agreement on February 1, 2022, and that parties could file comments by January 27, 2022.[18]

14. Exelon filed comments on January 21, 2022, and the Market Monitor, Exelon, OPC, and Staff filed comments on January 27, 2022. The Commission held a legislative-style hearing on February 1, 2022 to address the proposed 2021 Settlement Agreement. During that hearing, no

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[16] Maillog No. 237337. Exelon and the Market Monitor made additional filings asking for further time to continue settlement negotiations on October 15 and 29, November 12, and December 2, 2021.
[17] Maillog No. 238408, Market Monitor January 3, 2022 Comments at 2.
[18] Maillog No. 238672.

party objected to the Commission's approval of the 2021 Settlement Agreement, and the Agreement was approved.[19]

PARTY POSITIONS

Exelon

15. In its January 21, 2022 comments, Exelon states that its continued commitment to remain in PJM is no longer required because of the separation of Exelon and ExGen that occurred on February 1, 2022, and which resulted in Exelon and its subsidiary public utilities no longer being affiliated with ExGen's generation business.[20] Exelon contends that as a wires-only company, it will own the transmission assets with which a number of ExGen's generation facilities are interconnected, as well as the distribution grid and related assets used to provide regulated retail services, but it "will have no ability to exercise any market power in the wholesale markets monitored by the [Market Monitor], nor any incentive to attempt to do so."[21] Exelon further asserts that in Order No. 84698, the Commission was primarily concerned with horizontal market power, including the significant concentration of generation the merged companies would own in certain areas of PJM, but that the order did not discuss market power concerns relating to Exelon's transmission or distribution assets.

16. Exelon asserts that FERC has expressly made participation in regional transmission organizations ("RTOs") like PJM voluntary, and that it would be contrary to FERC's policy to require Exelon to remain in PJM.[22] Exelon claims that the Market Monitor's proposal would be preempted by federal law, because it would impermissibly interfere with FERC's exclusive

[19] Feb. 1 Hr'g. Tr. at 7, 8, 10.
[20] Maillog No. 238681, Exelon January 21, 2022 Comments at 2, citing March 30, 2021 Notification Regarding the Transfer of Exelon Generation Company, LLC. During the February 1, 2022 hearing, counsel for Exelon stated that he represented both corporate entities, which separated the morning of the hearing. Feb. 1 Hr'g. Tr. at 4-6 (Curran).
[21] Exelon January 21, 2022 Comments at 2.
[22] *Id*. at 3.

authority over the regulation of the sale of electric energy at wholesale in interstate commerce, including the subject of RTO membership.[23] Exelon further contends that requiring PJM membership would violate the dormant Commerce Clause of the U.S. Constitution by imposing restrictions on Exelon utilities that operate outside of Maryland, such as Commonwealth Edison, Exelon's Illinois utility, or Delmarva Power & Light, which straddles the states of Maryland and Delaware. Similarly, Exelon argues that the Market Monitor's proposal would violate Maryland law, because the Commission lacks jurisdiction under the Public Utilities Article ("PUA") to mandate that out-of-state utilities remain in PJM.[24] Finally, Exelon claims that the Market Monitor's proposal is premature and grounded in speculation, given that Exelon has not stated that it intends to withdraw from PJM, and that any RTO seeking to withdraw from an RTO must first obtain FERC approval under Section 205 of the Federal Power Act.[25] In that event, Exelon acknowledges that it would bear the burden to show that the withdrawal was just and reasonable, and it would be required to obtain FERC approval for a replacement open-access transmission tariff, in a proceeding where the Market Monitor, the Commission, and any other party could participate.

Market Monitor

17. The Market Monitor filed comments requesting that the Commission accept the proposed 2021 Settlement Agreement and require that Exelon remain in PJM.[26] The Market Monitor states that Exelon agreed to remain in PJM as a condition of the 2011 Settlement Agreement, and argues that Exelon will not be able to meet its commitments under the 2021 Settlement

[23] Exelon January 21, 2022 Comments at 4-6.

[24] Exelon contends that authority for the requirement to remain in PJM for the 10-year duration of the 2011 Settlement Agreement stems from the voluntary commitment it made at that time to remain in the RTO.

[25] Exelon January 21, 2022 Comments at 7.

[26] Maillog No. 238783, Market Monitor January 27, 2022 Comments at 1-2.

Agreement if Exelon's transmission assets do not remain in PJM.[27] "[W]ithout this condition, Exelon would be unable to meet its commitments under the settlement as the generation assets, connected to the Exelon transmission system, would no longer be in PJM."[28] Accordingly, the Market Monitor argues that the Commission should extend the explicit requirement of merger approval that Exelon remain in PJM, as the Commission did in 2012.

18. The Market Monitor claims that Exelon's divestiture of its generation assets and formation of a new, unaffiliated company, GenEx, is immaterial and that the conditions mandated in Order No. 84698, including that Exelon remain in PJM, should continue to apply to both successor companies. Additionally, the Market Monitor argues that Exelon, even as a wires-only company, has the power and incentive to use its transmission assets to benefit itself at ratepayer expense. "The most significant exercise of market power available to Exelon Corporation is its ability, as a transmission owner, to leave PJM or to threaten to leave PJM. This potential threat provides Exelon Corporation with leverage to shape market policy to its benefit."[29]

19. The Market Monitor asserts that Exelon's dormant Commerce Clause and preemption arguments are misguided because the Commission did not attempt in Order No. 84698 to regulate behavior outside of its jurisdiction. Instead, the limits on Exelon's behavior exist because of its own voluntary commitments, which the Commission made a condition of merger approval, and which Exelon accepted.[30]

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[27] *Id*.
[28] *Id*. at 3.
[29] Market Monitor January 3, 2022 Comments at 2.
[30] Market Monitor January 27, 2022 Comments at 4.

Office of People's Counsel

20. OPC argues that Exelon retains the ability to exercise market power and that ability poses a significant risk of harm to Maryland ratepayers.[31] In order to protect Maryland ratepayers, OPC asserts that the behavioral measures that restrict Exelon's ability to exert market power—and which are contained in the 2021 Settlement Agreement—must be continued.[32]

21. Additionally, OPC argues that Exelon should be required to remain in PJM, claiming: "Just like in 2012, these provisions would only be meaningful if Exelon remains in PJM."[33] OPC notes, for example, that the 2021 Settlement Agreement refers to the PJM Tariff, PJM Market Rules, and the PJM Manual, which would lack meaning or applicability if Exelon were to leave PJM.

22. OPC argues that the separation of ExGen from Exelon is not a reason to end the protections for Maryland consumers because Exelon will still have the ability to exert influence within the PJM footprint to benefit its ownership interest in transmission. Additionally, if Exelon leaves PJM, OPC asserts that the generation physically located in those service territories will also leave PJM, making PJM's market power rules inapplicable, and leaving unclear what rules, if any, would replace them.[34]

23. OPC disputes Exelon's argument that requiring Exelon to remain in PJM would be unlawful. OPC states that the Commission found in 2012 that the Exelon-Constellation merger would not be in the public interest or consistent with the requirements of PUA § 6-105(g) (3) and (4) unless certain market power mitigation conditions were imposed, including that Exelon commit to remain in PJM. Exelon accepted those conditions in 2012, including the process set

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[31] Maillog No. 238684, OPC January 27, 2022 Comments at 2.
[32] *Id*. at 3, referencing pre-filed direct testimony of Douglas Smith at 5.
[33] OPC January 27, 2022 Comments at 4.
[34] *Id*. at 5-6.

forth in Order No. 84698 for potentially extending the provisions of the 2011 Settlement Agreement.[35] OPC concludes that the Commission retains the authority to continue those requirements today without violating federal law, arguing: "Nor does the Commission's authority wane because of the passage of time."[36]

Staff

24. Staff recommends that the Commission approve the 2021 Settlement Agreement between ExGen and the IMM. Staff asserts that the behavioral commitments contained in the 2021 Settlement Agreement, including ExGen's commitment regarding fuel cost policy, "provide[] a reasonable resolution" to the market power issues raised by the Market Monitor in its March 11 Report and subsequent filings with the Commission.[37]

25. Regarding the issue of PJM membership, Staff recommends against requiring that Exelon remain within the RTO without its consent, arguing that the Commission would lack the jurisdiction to enforce such a condition.[38] Staff claims that the Commission lacks authority over the out-of-State electric companies owned by Exelon, including Commonwealth Edison, PECO Energy Company, and Atlantic City Electric, and that the Commission would likely lack standing to bring an action to enforce such a directive. Nevertheless, Staff argues that under the supervisory and regulatory authority of PUA § 2-113, the Commission retains the jurisdiction to require Maryland electric companies to obtain prior approval of the Commission before leaving PJM.[39]

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[35] OPC January 27, 2022 Comments at 11, referencing Order No. 84698 at 64: "We will therefore require as a condition of Merger approval a possible extension of the behavioral commitments of the IMM Settlement."
[36] OPC January 27, 2022 Comments at 8-9.
[37] Maillog No. 238786, Staff January 27, 2022 Comments at 5.
[38] *Id*. at 1, 6-7.
[39] *Id*. at 9.

COMMISSION DECISION

26. On February 17, 2012, the Commission issued Order No. 84698, which approved the merger between Exelon and the Constellation Energy Group. The Order included several market power mitigation conditions, which were designed to prevent Exelon from exercising market power within the PJM wholesale markets. *See* Order No. 84698 at 62: "The IMM Settlement provides valuable behavioral and structural restrictions that significantly mitigate the ability of the Applicants to exercise market power." Condition 9 provides a method for extending the IMM Settlement, providing that the Commission "may extend the terms of the IMM Settlement if, after an evidentiary hearing addressing market conditions, the Commission determines that the expiration of the behavioral remedies in the IMM Settlement will, through the Applicants' increased ability to exercise market power, pose a significant risk of harm to Maryland ratepayers."[40]

27. The Commission finds in the record ample support for extending the behavioral commitments contained in Order No. 84698 by approving the 2021 Settlement Agreement between the Market Monitor and ExGen. The Market Monitor's report to the Commission found that Exelon continues to wield structural market power in the PJM markets, and that market power could pose a significant risk of harm to Maryland ratepayers.[41] The 2021 Settlement Agreement provides for the continuation for a term of 10 delivery years nearly all the behavioral commitments contained in the 2011 Settlement, which, through enforcement by the Market Monitor, have successfully protected Maryland ratepayers from market power for the duration of

[40] Order No. 84698 at 105, Condition 9.

[41] Market Monitor Report at 12. As discussed above, on February 1, 2022, Exelon's generation subsidiary, ExGen, separated from Exelon, and Exelon became a wires-only transmission and distribution utility company. Accordingly, the market power discussed by the Market Monitor in its March 11, 2021 report is properly attributed to ExGen on and after February 1, 2022.

that agreement.[42] The settling parties also made changes to the behavioral commitments in the 2021 Settlement Agreement to better align those commitments with current PJM Market Rules. Additionally, the 2021 Settlement provides that ExGen will file with PJM certain changes to its fuel cost policies that have been reviewed by the Market Monitor and PJM, and that ExGen will refrain from initiating changes inconsistent with these policies for 10 years. These behavioral restrictions will apply to offers for the sale of capacity, energy and ancillary services by ExGen, or its successor in interest, for delivery through May 31, 2032.

28. During the February 1, 2022 hearing in this matter, no party objected to the approval of the 2021 Settlement Agreement, and the Commission accepted the Settlement.[43] In this Order, the Commission reaffirms that the 2021 Settlement Agreement is in the public interest and meets the criteria delineated in Order No. 84698, and that the 2021 Settlement Agreement has been approved.

29. The Commission declines to require the extension of Exelon's commitment to remain in PJM, as requested by the Market Monitor and OPC. In Order No. 84698, the Commission focused on structural and behavioral remedies to mitigate Exelon's possession of ***horizontal*** market power. The Commission found that: "The combined assets of the merged company are substantial, and without the market power mitigation measures agreed to in the IMM and Joint Settlements, would have led to the increased presence and potential exercise of market power."[44] The Commission also stated that market power is inimical to competitive markets and discussed how generators with market power could withhold generating units or purposely bid high to

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[42] 2021 Settlement Agreement at 1.
[43] Feb. 1 Hr'g. Tr. at 7, 8, 10.
[44] Order No. 84698 at 61.

drive up market clearing prices.[45] Nevertheless, beginning on February 1, 2022—the date of ExGen's divestiture from Exelon—horizontal market power analysis is no longer relevant to Exelon because it has become exclusively a transmission and distribution utility company. ExGen can still exercise market power, and accordingly, the Commission has approved the 2021 Settlement Agreement to ensure that Maryland ratepayers are not harmed. However, Exelon is now separated from the generation assets it previously controlled and it has no clearly discernible financial incentive or practical ability to exercise horizontal market power. The Market Monitor argues that Exelon could use its transmission assets to benefit itself at ratepayer expense by threatening to leave PJM, providing it with leverage to shape market policy. However, that type of leverage was not the justification for the market power mitigation conditions imposed by Order No. 84698, and the Commission is disinclined to use it as a rationale for imposing a continued requirement of PJM membership now.[46]

30. The Market Monitor and OPC make compelling arguments that the 2021 Settlement Agreement could be rendered ineffectual if Exelon were to leave PJM. However, Exelon correctly observes that this argument is premature at this time, and the company confirmed during the February 1 hearing that it has no present plan to withdraw from the RTO.[47] If Exelon made a decision to withdraw from PJM, it would be required under federal law to make a Federal Power Act Section 205 filing with FERC to seek approval, and it would bear the burden of

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[45] Order No. 84698 at 61, n. 246. *See also* Order No. 88698 at 62, noting that "without adequate mitigation, horizontal merger analysis demonstrates significant screen failures in all of the geographic markets under study including the 5004/5005 submarket, where significant screen failures occur in all load/price conditions…" (Internal citations omitted).

[46] The Commission is also cognizant that FERC has expressed a clear policy position that RTO membership is voluntary. *See Regional Transmission Organizations*, 89 FERC ¶ 61,285, at 121 (1999) (Order No. 2000) ("[W]e continue to believe … we should pursue a voluntary approach to participation in RTOs."). In the present proceeding, Exelon has clearly stated that it does not want to extend its commitment to remain in PJM for the ten-year duration of the 2021 Settlement Agreement, and Exelon is not free to walk away from the merger today in the same way it was in 2011.

[47] Feb. 1 Hr'g Tr. at 46-47 (Lavinson).

demonstrating that withdrawal was just and reasonable.[48] Additionally, it would be required to obtain FERC approval for a replacement open-access transmission tariff. The Commission's expectation at such a proceeding would be that Exelon and/or ExGen,[49] as applicable, would agree to market mitigation provisions that are at least as stringent as the ones agreed to in the 2021 Settlement Agreement, and that FERC would not allow an entity to evade its previous commitments by using RTO withdrawal as a loophole. That expectation is consistent with Staff's citation of PUA § 2-113, which grants the Commission broad supervisory and regulatory authority over public service companies, including BGE, Pepco, and Delmarva (all Exelon subsidiaries).[50] In the event that Exelon decided to withdraw from PJM, the Commission expects that the company would timely appear before the Commission, and demonstrate why the removal of these public service companies from PJM would be in the best interest of Maryland ratepayers and otherwise be consistent with the public interest.

IT IS THEREFORE, this 22nd day of February, in the year Two Thousand and Twenty-Two by the Public Service Commission of Maryland,

[48] In *Duquesne Light Company*, 122 FERC ¶ 61,039, P 28 (2008), FERC articulated the three conditions that must be met for FERC approval of an RTO withdrawal request, stating: "First, the withdrawal proposal must satisfy the terms of the applicant's contractual obligations as they relate to RTO withdrawal. Second, the applicant's proposed replacement arrangements must comply with Order No. 888 (and now Order No. 890) and the standard of review under those orders for proposed tariff provisions that differ from the pro forma OATT, i.e., proposed deviations must be shown to be 'consistent with or superior to' the pro forma OATT. Third, the applicant's replacement arrangements must be just, reasonable and not unduly discriminatory."

[49] After February 1, 2022, ExGen became known as Constellation Energy Corp.

[50] The Commission notes that after the merger in Case No. 9271, Exelon committed in the Exelon-PHI merger that its distribution utilities, including BGE, Pepco, and Delmarva, would remain members of PJM until at least January 1, 2025. *See* Case No. 9361, *In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc*., Order No. 86990 at pages 41-42, and page A-30, Condition 25D.

ORDERED (1) That the 2021 Settlement Agreement between Exelon Generating Company, LLC and the Independent Market Monitor ("Market Monitor") for PJM Interconnection, L.L.C. ("PJM") is approved; and

(2) That the request of the Market Monitor and the Office of People's Counsel that Exelon Corporation be required to commit to remain in PJM as an explicit condition of the 2021 Settlement Agreement is denied.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Mindy L. Herman
Commissioners