

ORDER NO. 86990

**IN THE MATTER OF THE MERGER OF
EXELON CORPORATION AND PEPCO
HOLDINGS, INC.**

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**BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND**

CASE NO. 9361

Issue Date: May 15, 2015

Before: W. Kevin Hughes, Chairman
Harold D. Williams, Commissioner
Lawrence Brenner, Commissioner
Kelly Speakes-Backman, Commissioner
Anne E. Hoskins, Commissioner

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**DISSENTING OPINION OF COMMISSIONERS HAROLD D. WILLIAMS
AND ANNE E. HOSKINS**

I. INTRODUCTION¹

On August 19, 2014, Exelon Corporation ("Exelon"), Pepco Holdings, Inc. ("PHI"), Potomac Electric Power Company ("Pepco"), and Delmarva Power & Light Company ("Delmarva") (collectively, the "Joint Applicants" or "Applicants"), filed an application seeking authorization pursuant to Section 6-105 of the Public Utilities Article ("PUA") for Exelon to acquire the power to exercise substantial influence over the policies and actions of Delmarva and Pepco, electric distribution companies operating in Maryland. The proposed cash-for-stock transaction seeks approval from four states, the District of Columbia, and the Federal Energy Regulatory Commission ("FERC").

If the proposed merger between Exelon Corporation and Pepco Holdings, Inc. is approved by all jurisdictions,² Exelon will be the parent of Baltimore Gas and Electric Company ("BGE"), Pepco, and Delmarva, and through them will provide electricity to over 80% of Maryland's electric distribution customers. This fact has been cited by opposing parties as providing potential harm to Maryland utility customers; however, we find that this fact actually underlines important reasons to approve the merger.

Having the three contiguous Maryland electric distribution utilities share common support functions among themselves and with Exelon's other distribution utilities (PECO Energy Company ("PECO") in Pennsylvania and Commonwealth Edison Company ("ComEd") in Illinois) presents a rare opportunity for Delmarva and Pepco to leverage greater economies of scale, increase the potential for improved reliability performance with better cost control, and benefit customers with synergy savings. It also enables

¹ Commissioners Harold D. Williams and Anne E. Hoskins dissent from this Order.

² In addition to Maryland and FERC, the merger must be approved by the District of Columbia, Delaware, New Jersey and Virginia. FERC, Virginia, and New Jersey already have given approval.

easier pooling of resources to restore service to customers more quickly following major storms, leading to greater resilience for our Maryland utilities. The sharing of “best practices” among all six Exelon distribution companies³ will lead to day-to-day operational efficiencies and increased effectiveness, reducing operating expenses and ultimately rates for customers lower than they otherwise would have been.

Despite these advantages, opposing parties argue vigorously that the fact of serving 80% of Maryland distribution customers *may* give Exelon a significant advantage in influencing the future of the electric distribution industry in the State. Because Exelon already controls the largest distribution utility in Maryland, BGE, they argue that adding Delmarva and Pepco will make it the dominant voice when it comes to policy – a voice, the parties claim, that the Commission will be unable to regulate effectively. While we are cognizant of the impassioned concerns of the opposing parties and our dissenting colleagues, we find that these concerns are either not supported in the record or have been adequately mitigated by the conditions we set forth in this Order. We find that this proposed merger, as conditioned by this Order, is consistent with the broader public interest, will bring specific and measurable benefits and no harm to ratepayers, and therefore meets the requirements of PUA § 6-105.

In this Order we approve the merger of Exelon and Pepco Holdings, Inc. because, simply put, the evidence demonstrates that Delmarva and Pepco will be better utilities because of the merger, and that the statutory requirements are satisfied. Exelon has demonstrated that it knows how to run electric and gas distribution companies; indeed it is nationally recognized for its standards of excellence, and Maryland’s consumers will

³ Including Atlantic City Electric Co., which is a PHI electric company operating in New Jersey.

be better off for it. BGE, PECO, and ComEd are all first quartile in their reliability metrics.⁴ We find that this merger will enable Delmarva and Pepco in Maryland to improve their reliability performance more quickly than they would without the merger. We find that their day-to-day normal weather outages will be reduced, their distribution infrastructure will be improved more quickly and at lower cost, and their ability to recover from outages following major storms will be improved, all because of the merger. These are the results that Delmarva and Pepco customers have demanded and we find that approval of the merger will get them these results.

With regard to potential harms to Delmarva and Pepco customers, we previously have approved ring fencing measures to protect BGE customers from any possible consequences that might result from Exelon's wholesale energy business. In this merger Exelon has offered, and we include as a condition, even more robust ring fencing measures to ensure that Delmarva and Pepco customers are protected from any potential financial turmoil related to Exelon's deregulated business activities. Furthermore, the authority and power of the Public Service Commission to effectively regulate Delmarva and Pepco, as separate distribution companies operating under a larger corporate parent, will not be diminished by this merger. The Commission's ability to require and review across-the-fence comparisons of the operations and performance of BGE, Pepco, and Delmarva will continue and indeed be strengthened by the additional reporting requirements set forth as a condition of the merger.

Separate from the issue of potential harm and consistency with the public interest, we recognize the benefits to ratepayers from direct financial investment that Exelon has

⁴ Alden Direct at 6.

committed to Delmarva and Pepco customers. In this Order, we once again seek to create a balance between Exelon's short- and longer-term investments for its customers. For that reason, we conclude that a \$100 residential rate credit, coupled with longer-term investments in energy efficiency and renewable energy, with a significant focus on low-income customers, is necessary to satisfy the benefits requirement of PUA § 6-105(g)(4). Therefore, as a condition of this merger, we are requiring Exelon to provide to Delmarva and Pepco customers \$109.2 million in Customer Investment Fund benefits – approximately \$66 million for residential rate credits and \$43.2 million for energy efficiency programs. We are also requiring that Exelon provide \$14.4 million in Green Sustainability Funds for Prince George's and Montgomery Counties and \$4 million for sustainable energy workforce development programs. In addition, we require that Exelon provide for the construction of 20 megawatts of renewable energy generation, 10 megawatts each in the Delmarva and Pepco Maryland service territories. We believe the above customer benefits, as well as other benefits required in this Order, preserve the balance between short- and longer-term customer benefits and ensure that greater projected synergy savings from the merger are realized by customers up front.

We observe that Exelon and PHI began its Application with one set of commitments, largely modeled after those we finally approved in the Exelon – Constellation merger,⁵ and throughout the proceedings the Applicants have made an effort to accommodate the concerns raised by parties to the merger. In March 2015, the Applicants entered into two settlement agreements with multiple parties in the merger

⁵ While claiming to have “sized” the initial Commitments to the lower level of claimed synergy savings of this transaction, it also was clear that Exelon made the initial proposals knowing and intending they would have to be increased to get approval. Tr. at 632-649 (Crane).

case, including The Alliance for Solar Choice (“TASC”), Prince George’s County, Montgomery County, the National Consumer Law Center, the Maryland Affordable Housing Association, and the Mid-Atlantic Off-Road Enthusiasts (“MORE”). The settlements resulted in Exelon making numerous commitments related to funding for energy efficiency programs, a Green Sustainability Fund, renewable generation development, accelerated reliability improvements, the development of public-purpose microgrid projects, grid-of-the-future proceedings, sustainable energy workforce development, public recreational pilot projects, and improved interconnection policies for solar and other small scale renewable generation. We approve these settlement conditions with minor modifications to address issues raised in our proceedings. In addition, we reduce the long-term benefits allocation for energy efficiency programs to 75% of their proposed levels in order to increase the more immediate residential rate credit from \$50 to \$100. In doing so, we strike what we believe is the proper balance between short-term and longer-term benefits provided by the Applicants. We recognize that with these settlement agreements, there is strong public support for the merger, especially by Prince George’s and Montgomery County governments, where over 536,000 customers, or 73%, of the total PHI customers in Maryland reside.

Based upon the record in this case, and subject to the modified Conditions set forth in Appendix A, we find that the proposed merger meets the requirements of PUA § 6-105 and we therefore approve it. We direct the Applicants to inform the Commission no later than May 26, 2015 as to whether they will accept the modified Conditions, attached as Appendix A to this Order.

II. BACKGROUND

A. The Applicants⁶

Exelon is a utility services holding company that is incorporated in Pennsylvania, maintains its corporate headquarters in Chicago, Illinois, and operates through its principal subsidiaries, BGE,⁷ ComEd, PECO, and Exelon Generation Company, LLC. (“Exelon Generation”).⁸ Through its subsidiaries, Exelon generates electricity and delivers electricity and natural gas to its customers.⁹ Its utilities serve approximately 7.8 million customers in Maryland, Illinois, and Pennsylvania.¹⁰

BGE, ComEd, and PECO conduct Exelon’s energy delivery business.¹¹ BGE provides electric service to over 1.2 million electric customers and 655,000 gas customers within Maryland, including Baltimore City.¹² ComEd provides electric service to 3.8 million customers in Illinois, including the City of Chicago.¹³ PECO provides electric service to approximately 1.6 million customers in Pennsylvania, including the City of Philadelphia.¹⁴ It also provides natural gas service to more than 500,000 customers outside the City of Philadelphia.¹⁵

⁶ Exelon Energy Delivery Company (“EEDC”) and the special purpose entity that is to be created for ring fencing purposes, Special Purpose Entity, LLC (“SPE”), are joined as additional Applicants. Both will be corporate parents of Delmarva and Pepco, although neither will have any management role. August 19, 2014 Application (“Application”) at 1.

⁷ In 2012, Exelon merged with Constellation Energy Group, Inc. (“CEG”), which added BGE as an indirect subsidiary. Exelon indirectly holds 100 percent of the common stock of BGE through EEDC and EEDC’s subsidiary RF Holdco LLC. RF Holdco LLC is the SPE created to ring fence BGE. *Id.* at 18.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Application at 18.

¹³ *Id.* at 18-19.

¹⁴ *Id.* at 19.

¹⁵ *Id.*

Exelon Generation, a wholly owned subsidiary of Exelon Ventures Company, LLC, conducts Exelon’s generation business, which includes its generation fleet, wholesale energy marketing operations, and competitive retail sales business.¹⁶ Constellation is headquartered in Baltimore City and is Exelon’s competitive wholesale and retail energy supply business.¹⁷

PHI is a public utility holding company incorporated in Delaware and headquartered in Washington, D.C.¹⁸ PHI directly or indirectly owns three public utilities operating in three states and the District of Columbia: Delmarva (Delaware and Maryland); Atlantic City Electric Company (“ACE”) (New Jersey); and Pepco (Maryland and the District of Columbia).¹⁹ PHI also provides energy efficiency and other energy-related services through Pepco Energy Services, Inc. and its subsidiaries (collectively, “PES”).²⁰

Delmarva provides electric utility service to approximately 506,000 electric customers in Delaware and the Eastern Shore of Maryland.²¹ Delmarva also provides natural gas service to approximately 126,000 customers within New Castle County, Delaware.²² Pepco distributes electricity to approximately 264,000 customers in the District of Columbia and 537,000 customers in Montgomery and Prince George’s Counties in Maryland.²³ ACE distributes electricity to approximately 545,000 customers

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Application at 19.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 20.

²² *Id.*

²³ *Id.*

in New Jersey.²⁴

PES is an energy services company with a focus on energy savings performance contracting, underground transmission and distribution services, and integrated power and thermal projects.²⁵

B. The Merger Agreement and Commitments

Exelon proposes to acquire PHI in an all-cash transaction for approximately \$6.8 billion.²⁶ Upon closing of the merger, PHI will merge with Merger Sub²⁷ and become an indirect wholly-owned subsidiary of the bankruptcy-remote special purpose entity (“SPE”), a specially created entity intended to provide sufficient ring fencing to protect PHI from financial difficulties that may be incurred by its parent companies. SPE will be a subsidiary of EEDC, which is the holding company for all of Exelon’s regulated public utility companies.²⁸

Following the merger, PHI will become a limited liability company, with a seven-member board of directors, including three members from the Delmarva, Pepco, and ACE service areas, and four members who serve as officers or directors of Exelon and officers of Delmarva, Pepco, and ACE.²⁹ Post-merger, Delmarva and Pepco will each retain their own Boards of Directors, which will be selected by the new PHI Board.³⁰

The Applicants expect that, with the exception of certain corporate functions

²⁴ Application at 20.

²⁵ *Id.*

²⁶ *Id.* at 15. Specifically, each PHI shareholder will be entitled to receive \$27.25 for each outstanding share of PHI common stock, not held by PHI, Exelon, Purple Acquisition Corp. (“Merger Sub”), or any PHI or Exelon affiliate. *Id.*

²⁷ Merger Sub is an entity created solely to merge with PHI and will cease to exist after the merger closes. Application at App. C.

²⁸ *Id.* at 16. For a chart reflecting the proposed new organizational structure, *see Id.* at App. C.

²⁹ Application at 16-17; O’Brien Direct at 7.

³⁰ O’Brien Direct at 7.

related to operating as a publicly-traded company, PHI will continue to perform its current roles in the day-to-day operations of Delmarva and Pepco.³¹ Although Exelon will review Delmarva's and Pepco's capital and O&M budgets, they will be developed by Delmarva's and Pepco's management and approved by PHI's board of directors.³² Mr. Christopher Crane, the current CEO and President of Exelon, will serve as CEO and President of PHI following the merger.³³

Because PUA § 6-105(g)(3)(i) requires the Commission to determine whether the proposed merger “is consistent with the public interest, convenience and necessity, including benefits and no harm to consumers...”, the Applicants have offered many commitments that they claim satisfy this statutory standard.

In addition to the commitments contained in the original Application, the Applicants have added commitments through testimony, their initial and reply briefs, as well as the settlement agreements with certain parties entered into late in the proceedings. The last set of commitments reflected in certain aspects the merger conditions that we imposed in approving Exelon's acquisition of substantial control over BGE in Case No. 9271, as well as several concessions intended to address concerns and objections raised by other parties during the course of these lengthy proceedings.³⁴ We have modified these commitments in the set of merger conditions required by this Order, as discussed in the Order and attached as Appendix A. Some of the highlights of these commitments include:

³¹ Application at 17; Crane Direct at 20.

³² Application at 17; O'Brien Direct at 8.

³³ Application at 17.

³⁴ Applicant's Reply Brief, App. C (Errata Version).

1. *Reliability:* After iterations, the Applicants committed that Delmarva and Pepco will meet certain annual reliability metrics through 2020 and agreed to be subject to specified financial penalties if it fails to meet these targets.³⁵ Exelon further committed that Delmarva and Pepco will achieve these reliability metrics in the next five years without exceeding their proposed reliability-driven capital or operations and maintenance (“O&M”) budgets for each year (with certain exceptions to the capital budgets).³⁶

Should the Commission adopt reliability standards in RM 43 that are more stringent than the Applicants’ proposed targets, Delmarva and Pepco commit to meet those more stringent standards, subject to any necessary adjustments to the budget levels.³⁷

2. *Ring fencing:* The Applicants committed to several ring fencing measures that largely mirror those that we approved in Case No. 9271. For example, the Applicants committed to the following for a period of five years: (1) Delmarva and Pepco will maintain separate existences and separate franchises and privileges;³⁸ (2) Delmarva and Pepco will maintain separate books and records;³⁹ (3) the Commission will have access to inspect the books and records of Delmarva and Pepco;⁴⁰ (4) Delmarva and Pepco will maintain separate debt, their own separate debt credit rating as well as ratings

³⁵ *Id.* at 2; Multi-Party Settlement Agreement at ¶ 4. “SAIFI” refers to the System Average Interruption Frequency Index and “SAIDI” refers to the System Average Interruption Duration Index. In part, Exelon expects to meet these targets through synergy benefits as well as the geographic proximity to BGE and PECO, which will enhance mutual support capabilities during outages. Crane Direct at 16; Rigby Direct at 10.

³⁶ For the breakdown of the annual capital and O&M budgets for each utility for 2016-2020, *see* the chart at Applicants’ Reply Brief, App. C at 4.

³⁷ *Id.*, App. C at 26.

³⁸ Applicants’ Reply Brief, App. C at 10; Khouzami Direct at 9-11.

³⁹ Applicants’ Reply Brief, App. C at 10; Khouzami Direct at 9-11.

⁴⁰ Applicants’ Reply Brief, App. C at 10.

for long-term debt and preferred stock;⁴¹ and (5) Delmarva and Pepco will maintain an average equity ratio of 48%.⁴² Also as in Case No. 9271, the Applicants will establish an SPE as the Exelon subsidiary that will hold the equity interests in PHI.⁴³

3. *Customer Investment Fund and Rate Credit:* Exelon committed to fund a \$94.4 million Customer Investment Fund (“CIF”) for the benefit of Delmarva’s and Pepco’s customers.⁴⁴ This equated to a benefit of \$128 per distribution customer in each utility’s Maryland service territory.⁴⁵ Exelon committed not to attempt to recover this investment through rates.⁴⁶ Of these funds, \$57.6 million were proposed to be directed to various energy efficiency projects within Delmarva’s and Pepco’s Maryland service territories, and the recipients committed to endeavor to direct at least 20% of the energy efficiency funds to benefit low- and moderate-income residents.⁴⁷ The remaining amount of \$36.8 million was proposed to provide each customer account with a credit of approximately \$50 as part of the CIF.⁴⁸

4. *Green Sustainability Fund:* Exelon committed to establish a \$19.8 million fund to stimulate public and private investment in several enumerated green sustainability projects within Delmarva’s and Pepco’s Maryland service territories. Of this \$19.8 million, based upon the number of customers in each territory, the settlement parties proposed that \$8.4 million will be allocated to Montgomery County, \$6 million will be

⁴¹ Applicants’ Reply Brief, App. C at 10; Khouzami Direct at 9-11.

⁴² Applicants’ Reply Brief, App. C at 28; Khouzami Direct at 7-8.

⁴³ Applicants’ Reply Brief, App. C at 11.

⁴⁴ *Id.*, App. C at 1.

⁴⁵ *Id.*

⁴⁶ Applicants’ Reply Brief, App. C at 1; Crane Direct at 13.

⁴⁷ Multi-Party Settlement at 6.

⁴⁸ *Id.* at ¶ 3(a).

allocated to Prince George’s County, and \$5.4 million will be allocated to the Delmarva Maryland service territory.⁴⁹

5. *Various market power mitigation commitments:* The Applicants have also proposed commitments to address issues raised by the Independent Market Monitor (“IMM”) and other parties related to Exelon’s potential ownership of 80% of the distribution grid in Maryland. In brief, the Applicants committed to (a) identify, with PJM’s concurrence, at least three independent third-party engineering firms qualified to conduct facility studies for interconnections to the transmission grid;⁵⁰ (b) remain in PJM at least through January 1, 2025;⁵¹ (c) allow access for the IMM to review its demand response bids;⁵² (d) file annual across-the-fence reports;⁵³ (e) make a one-time contribution of \$350,000 to fund the PJM Consumer Advocates of PJM States., Inc. (“CAPS”), as well as support reasonable proposals to fund CAPS on an ongoing basis;⁵⁴ and (f) develop or assist in the development of 15 MW of solar in Montgomery County, Prince George’s County, and the Delmarva Maryland service territories.⁵⁵

C. Procedural History

On August 19, 2014, the Applicants submitted their Application along with the supporting testimony and exhibits of eight witnesses⁵⁶, as well as the information specifically required by PUA § 6-105(f). Because the Application would grant Exelon

⁴⁹ Applicants’ Reply Brief, App. C at 34-35.

⁵⁰ *Id.*, App. C at 24.

⁵¹ *Id.*, App. C at 25.

⁵² *Id.*

⁵³ *Id.*, App. C at 28.

⁵⁴ *Id.*

⁵⁵ *Id.*, App. C at 38-39.

⁵⁶ The eight witnesses whose testimony was submitted in support of the Application were Christopher Crane, Joseph Rigby, Denis O’Brien, Mark Alden, Charles Dickerson, Carim Khouzami, Susan Tierney and Calvin Butler.

the power to exercise substantial influence over Delmarva and Pepco, and because Exelon would become an affiliate of Delmarva and Pepco subsequent to the merger pursuant to PUA § 6-105(e), we initiated Case No. 9361 to evaluate whether the Application was “consistent with the public interest, convenience and necessity, including benefits and no harm to consumers...” as required by PUA § 6-105(g)(3)(i).

On September 19, 2014, the Commission conducted a pre-hearing conference to set a procedural schedule for this proceeding, address petitions to intervene, and any other preliminary matters that may arise.⁵⁷ Prior to this conference, in addition to the entry of appearances for counsel for Office of People’s Counsel (“OPC”) and Commission Technical Staff (“Staff”), 25 parties petitioned to intervene. We granted all unopposed petitions to intervene. However, we denied the petition filed by the International Brotherhood of Electrical Workers Local 614 (“IBEW”) and Harry Nurk. After reviewing the Applicants’ Opposition to IBEW’s and Mr. Nurk’s attempt to intervene, we concluded that the issues IBEW proposed to raise were immaterial and irrelevant to the issues before the Commission pursuant to PUA § 6-105, and that Mr. Nurk’s interests were adequately represented by OPC.⁵⁸

Following the September 19, 2014 pre-hearing conference, the Commission ordered that discovery would commence immediately, and we required all parties to submit Direct/Reply testimony by December 8, 2014; all Rebuttal testimony by January 7, 2015; and all Surrebuttal testimony by January 21, 2015.

Pursuant to our scheduling order, on December 8, 2014, the Coalition for Utility Reform; Apartment and Office Building Association of Metropolitan Washington

⁵⁷ Order No. 86555 (Aug. 19, 2014).

⁵⁸ Order No. 86646 (Oct. 2, 2014) at 6-7.

(“AOBA”); Montgomery County; Prince George’s County; the Sierra Club - Chesapeake Climate Action Network (“Sierra Club”); the National Consumer Law Center; the Clean Chesapeake Coalition; the Mid-Atlantic Renewable Energy Coalition (“MAREC”); MORE; TASC; The Maryland, District of Columbia and Virginia Solar Energy Industries Association (“MDV-SEIA”); Staff; OPC; Maryland Energy Administration (“MEA”); Monitoring Analytics, LLC (the Independent Market Monitor, or “IMM”); and Public Citizen, Inc. submitted written testimony.

On January 7, 2015, Staff, OPC, and Exelon submitted Rebuttal Testimony, and on January 21, 2015, Staff, AOBA, Montgomery County, the Sierra Club, TASC, MAREC, the Coalition for Utility Reform and the City of Gaithersburg, OPC, MEA, and MDV-SEIA submitted Surrebuttal testimony. The Commission also conducted five evening hearings⁵⁹ within Delmarva’s and Pepco’s Maryland service territories to solicit public comments from interested consumers.

The Commission scheduled a status conference for January 23, 2015, and initially set aside ten days for evidentiary hearings, although it became necessary to add two additional days for testimony, between January 26, 2015 and February 10, 2015. Although the Commission originally scheduled the submission of initial and reply briefs for February 27, 2015 and March 13, 2015 respectively, the parties agreed at the evidentiary hearing that initial and reply briefs would be due on or before March 3 and March 17, 2015 respectively, with our final order to be issued on or before April 8,

⁵⁹ Public hearings were held on: January 6, 2015 (Chestertown, Maryland); January 7, 2015 (Wye Mills, Maryland); January 8, 2015 (Salisbury, Maryland); January 13, 2015 (Rockville, Maryland); and January 14, 2015 (Largo, Maryland).

2015.⁶⁰

Throughout the proceeding, the Applicants proposed numerous “Commitments” which they contend enable the proposed merger to meet the statutory test in PUA § 6-105(g). Their initial Application proposed 11 Commitments,⁶¹ which were subsequently modified and increased to 21,⁶² and later further modified and increased to more than 40.⁶³ Some of these modified and new Commitments were made to reflect Settlement Agreements reached by Applicants and the Staff of the New Jersey Board of Public Utilities⁶⁴ and the Staff of the Public Service Commission of Delaware.⁶⁵

Prior to filing initial briefs, the Applicants and TASC submitted a proposed settlement agreement pursuant to which TASC offered its support for approval of the proposed merger (the “First Settlement”). On March 3, 2015, we received written briefs from the Applicants, Montgomery County, OPC, Coalition for Utility Reform, Staff, Sierra Club, AOBA, National Consumer Law Center, Prince George’s County, Clean Chesapeake Coalition, MORE, TASC, MAREC, MDV-SEIA, MEA, Public Citizen, Inc. and the IMM. On March 17, 2015, the Commission received written reply briefs from the parties,⁶⁶ as well as a second proposed settlement between the Applicants and

⁶⁰ Pursuant to PUA § 6-105(g)(6), the Commission previously extended the statutory 180-day period for issuing our final order by an additional 45 days. Order No. 86622 (Sept. 22, 2014) at 7. In agreeing to the extension of the briefing schedule, the Applicants agreed that the Commission would deem the Application to have been filed on August 26, 2014, thereby extending the date by which the Commission must issue its final order from April 1, 2015 to April 8, 2015.

⁶¹ Application, App. A.

⁶² Applicants’ Initial Brief, App. A.

⁶³ Applicants’ Reply Brief, App. A.

⁶⁴ Maillog No. 162720: Notice of Stipulation of Settlement with the State of New Jersey Board of Public Utilities in Docket No. EM14060581 regarding the proposed merger of Exelon and PHI (Jan. 14, 2015).

⁶⁵ Maillog No. 164191: Notice of Joint Applicants’ Motion to amend the Scheduling Order and Notice of Settlement with the Staff of the Delaware Public Service Commission, *et. al* (Feb. 18, 2015).

⁶⁶ Of the parties submitting Initial Briefs, the Coalition for Utility Reform, the National Consumer Law Center, MORE, MD-SEIA, the Alliance for Solar Choice and Public Citizen, Inc. chose not to submit Reply Briefs.

Montgomery County, Prince George's County, the National Consumer Law Center, the National Housing Trust, the Maryland Affordable Housing Coalition, the Housing Association of Nonprofit Developers and MORE (the "Multi-Party Settlement"), and Applicants' Request for Adoption of Settlements.

After exchanging various proposed revisions to the procedural schedule to allow time for the parties to submit testimony or comment on the two proposed settlements, we initiated immediate discovery and required parties to submit all testimony in support of the settlements by March 27, 2015 and all responsive testimony by April 6, 2015. Finally, in order to permit additional briefing and again by stipulation of the Applicants, we extended the date by which we would issue our order to May 15, 2015.

We received written testimony in support of the settlements as well as testimony from those parties opposed to the settlements and conducted an additional five days of hearings related to the two settlements between April 15 and April 21, 2015.

D. Positions of the Parties

1. *Commission Technical Staff*

Staff argued that the merger, as proposed, failed to satisfy the requirements of § 6-105 and should be denied.⁶⁷ Although the Applicants have increased the CIF commitment to \$94.4 million, Staff contended that this amount falls short of the amount that should be authorized as a benefit to ratepayers.⁶⁸ Instead, Staff recommended that the Applicants commit to an approximately \$100 per customer rate credit and an identical

⁶⁷ Staff Initial Brief at 5; Staff Reply Brief at 2; Staff Post Settlement Brief at 2 ("Staff continues to assert that the Joint Applicants have not met their burdens under Pub. Utils. § 6-105.").

⁶⁸ Staff Reply Brief at 6.

amount as an investment in the CIF (between \$147.5 and \$164.4 million in total).⁶⁹ Staff also asserted that the Applicants' proposed reliability commitments do not sufficiently improve upon those targets already proposed by Delmarva and Pepco in the Commission's RM43 proceedings.⁷⁰

Staff maintained its recommendation that the Commission deny the Application based on its view that the various commitments may satisfy individual parties to settlement negotiations, but as proposed, they fail to fully address the harms the merger will cause or sufficiently provide benefits to ratepayers.⁷¹ Staff concluded that, should the Commission approve this merger, the Commission should adopt the additional recommendations set forth by Staff witnesses, such as specific minimum spending commitments to meet reliability targets and additional investments in rate credits and the CIF.⁷² Staff additionally identified multiple provisions of the final commitments by the Applicants that fail to address Staff's initial concerns.⁷³

2. *Maryland Energy Administration*

Even with the enhanced settlement commitments, MEA does not believe the Applicants have satisfied, nor *can* they satisfy, the requirements of PUA § 6-105 for

⁶⁹ Lubow/Malko Direct at 9; Staff Reply Brief at 19-20; Staff Post-Settlement Brief at 5.

⁷⁰ DiPalma/Rafferty Direct at 7; Timmerman Post-Settlement Direct at 17 (“[T]he proposed reliability commitments are not clearly preferable to the Commission’s normal ratemaking and reliability processes.”).

⁷¹ Staff Post-Settlement Brief at 2; Timmerman Post-Settlement Direct at 4 (“Consequently, Staff cannot endorse these new settlement commitments as they do not adequately contribute to the satisfaction” of PUA § 6-105.)

⁷² *See also*, Godfrey Direct at 10 (“Exelon should provide within the near-term a distinct set of milestones as to how it will accelerate the pursuit of more aggressive energy efficiency goals as well as emerging technologies within the State for the Commission to review.”). Staff identified 19 separate conditions that the Commission should attach to any order approving the proposed merger, some of which the Applicants have subsequently addressed. Staff Reply Brief at 19-20.

⁷³ Staff Post-Settlement Brief at 8-11.

several reasons.⁷⁴ First, MEA asserted that the CIF commitment of \$94.4 million falls well short of what is required in light of “the enormous windfall” the merger provides to shareholders.⁷⁵ MEA also argued that the Applicants’ initial commitments regarding improved reliability were insufficient given the higher standards already proposed within RM 43.⁷⁶ Exelon’s later commitment to stricter standards in their brief, MEA contended, is insufficient because the record contains no evidence to explain how Exelon will meet these new targets.⁷⁷

MEA also rejected the Applicants’ assertion that merger-related synergy benefits constitute a “benefit” under PUA § 6-105.⁷⁸ MEA witness Estomin recommended that the Commission reject all of the proposed economic and employment benefits set forth by Dr. Tierney as based on an unsound valuation of benefits.⁷⁹ Based upon these and other concerns, MEA concluded that no additional commitments or benefits would suffice to bring the proposed merger within the public interest, or would mitigate the potential harms.⁸⁰

3. *Office of People’s Counsel*

The Office of People’s Counsel does not believe the merger is in the public interest and urges the Commission to deny the Application. OPC argued that Exelon’s Maryland CIF commitment is insignificant compared to the \$1.842 billion “windfall” that

⁷⁴ MEA Post-Settlement Brief at 15 (“The settlements notwithstanding, there is no mechanism that would mitigate the competitive harms that will accompany approval of the merger, including the loss of Pepco and Delmarva as across-the-fence competitors.”).

⁷⁵ MEA Reply Brief at 3; Tr. 1168-9 (Rigby).

⁷⁶ Mara Direct at 6.

⁷⁷ MEA Reply Brief at 4.

⁷⁸ *Id.* (relying upon the Commission’s prior order in Case No. 9271).

⁷⁹ Estomin Direct at 17-18.

⁸⁰ *See e.g.*, Tabors Direct at 50 (“I do not see any way to compensate for the loss of Pepco and Delmarva as across-the-fence competitors post-merger.”).

will accrue to PHI's shareholders.⁸¹ According to OPC, the proposed merger would "irrevocably change the landscape in Maryland"⁸² by allowing Exelon companies to own and operate at least 80% of the distribution grid in Maryland. OPC asserted that the Applicants' commitments regarding improved reliability add little, if anything, to the targets that Delmarva and Pepco have already proposed in the Commission's RM 43 proceeding.⁸³ Similarly, OPC does not believe that any alleged "synergy" savings resulting from the merger are sufficiently quantifiable to qualify as a benefit under PUA § 6-105.⁸⁴

Additionally, OPC noted that, unlike Exelon's acquisition of Constellation, which already owned unregulated generation assets before their merger was approved, the PHI utilities are not currently exposed to similar risks from the unregulated activities of their parent company. Nor must they concern themselves with whether their positions on matters before FERC, PJM, or in State policy matters conflict with the needs of their parent's unregulated affiliates.⁸⁵ OPC also pointed out that PHI customers will be required to pay to hire additional union workers, without evidence that they are necessary.⁸⁶

OPC discounted the ability of the Applicants' proposed ring fencing measures to fully protect the PHI utilities from potential financial problems of their new parent company, asserting that an Exelon bankruptcy would not prevent negative effects on

⁸¹ Arndt Direct at 58, 62; OPC Post-Settlement Brief at 19.

⁸² OPC Initial Brief at 1.

⁸³ Comings Direct at 11, 15; OPC Post-Settlement Brief at 3 ("[T]he evidence that the reliability performance of Pepco and Delmarva would improve as a result of the acquisition is entirely lacking.").

⁸⁴ OPC Reply Brief at 43-44.

⁸⁵ Brockway Direct at 36; OPC Post-Settlement Brief at 13.

⁸⁶ Arndt Surrebuttal at 9.

PHI's credit rating, access to equity, and cost of equity and debt.⁸⁷ Additionally, OPC anticipated that Exelon's reduced unregulated profits will create pressure for the PHI utilities to file more frequent rate cases in Maryland.⁸⁸ OPC also contended that harm to ratepayers will result from the loss of across-the-fence competition between BGE and Pepco, including the readily available benchmark comparisons that ratepayers can observe between two contiguous utilities that provide pressure for underperforming utilities to improve.⁸⁹

Due to the fact that the merger would result in Exelon controlling the distribution system for 80% of the Maryland electric customer base, OPC concluded that "[i]f the Commission approves the proposal, there are no conditions that can fully compensate for this erosion of regulatory control."⁹⁰ Consequently, OPC concluded that "[t]he proposed merger exposes Maryland ratepayers to significant risks which far exceed any consumer benefits offered . . . , and should be rejected."⁹¹

4. *AOBA*

AOBA contended that the CIF investment should be increased to at least \$100 per ratepayer.⁹² AOBA also discounted the Applicants' original reliability improvement promises in light of the reliability targets that Delmarva and Pepco have promised in RM

⁸⁷ OPC Initial Brief at 19.

⁸⁸ Arndt Direct at 67.

⁸⁹ Hempling Direct at 58-61; Tabors Direct at 7-10; Brockway Settlement Testimony at 2-3.

⁹⁰ Brockway Direct at 42.

⁹¹ Arndt Direct at 105. *See also*, Comings Direct at 28-29 ("As the analysis stands, the Joint Applicants have failed to adequately show that the merger will have a positive impact on Maryland's economy."); Hempling Direct at 6 ("A utility has an obligation to serve at reasonable cost. Seeking the highest possible purchase price is inconsistent with this obligation.").

⁹² Oliver Direct at 68-70; AOBA Initial Brief at 10.

43.⁹³ AOBA also contended that the synergy-related savings are too vague to quantify.⁹⁴ AOBA further noted that honoring collective bargaining agreements and submitting to the jurisdiction of the Commission are expected of any acquiring company and do not constitute meaningful concessions by the Applicants.⁹⁵ Additionally, AOBA concluded that the Applicants have failed to address AOBA's argument regarding the disproportionate treatment of non-residential customers.⁹⁶

After weighing all of the commitments by the Applicants, AOBA urged the Commission to reject the proposed merger.⁹⁷ However, if the Commission decides to approve the merger, AOBA offered several conditions that it believes the Commission should attach to any approval, including: (1) the establishment of separate pools of direct merger benefits for Delmarva and Pepco of \$68.8 million and \$25.7 million respectively; (2) termination of the Bill Stabilization Adjustment for Delmarva and Pepco; and (3) additional ring fencing measures contained in the New Jersey Settlement.⁹⁸

5. *Monitoring Analytics, LLC*

In its April 14, 2015 filing in the case, the IMM concluded that no market power issues would exist, subject to the imposition of the following conditions: (1) a commitment to remain in PJM indefinitely; (2) allowing verification that they have made the full capability of their combined networks available to the market; (3) an explicit commitment to treat non-affiliates like affiliates in every upstream or downstream market where they have control or influence over access; and (4) making property paid for by the

⁹³ Oliver Direct at 50-51; AOBA Initial Brief at 7.

⁹⁴ Oliver Direct at 44-45.

⁹⁵ *Id.* at 43, 47.

⁹⁶ AOBA Initial Brief at 54; AOBA Post-Settlement Brief at 7-8.

⁹⁷ AOBA Post-Settlement Brief at 1-2.

⁹⁸ AOBA Initial Brief at 56-59.

ratepayers available to competitive transmission developers at no additional cost.⁹⁹

6. *Montgomery County*

Montgomery County initially urged the Commission to require the Applicants to provide all Pepco ratepayers with a rate credit of \$110, in addition to their investment in the CIF.¹⁰⁰ They contended that the Commission should require the Applicants to commit that Pepco's SAIDI and SAIFI metrics would be in the top quartile nationwide within three years.¹⁰¹

Although Montgomery County initially urged the Commission to deny the proposed merger, as a result of the Multi-Party Settlement, Montgomery County now urges the Commission to approve the merger, subject to inclusion of the terms of their settlement providing, *inter alia*, for accelerated reliability improvement, a County-administered Green Bank, 5 MW of solar generation within the County, and a proposal for a pilot public-purpose microgrid project.¹⁰²

7. *Prince George's County*

Prince George's County also initially urged the Commission to deny the proposed merger. It initially contended that the Commission should increase the investment in the CIF and also grant a fair and equitable rate credit, although it left the particular amount of the credit and increased CIF investment to the Commission's discretion.¹⁰³ Prince George's County also asked that the Commission specifically direct at least \$30 million of the CIF investment into three existing energy efficiency programs that would be

⁹⁹ April 14, 2015 letter to Mr. David Collins at 2.

¹⁰⁰ Coffman Direct at 4.

¹⁰¹ *Id.* at 3.

¹⁰² Coffman Direct Settlement Testimony at 2-3; *see also* generally Montgomery County Post-Settlement Brief at 6-15.

¹⁰³ Bannerman Direct at 6.

administered by Prince George’s County: ENERGY STAR Certification and Green Leasing Program, Transforming Neighborhoods Initiative Comprehensive Energy Audit, and Retrofit and Clean Energy Program.¹⁰⁴

Finally, Prince George’s County contended that the Commission should require the Applicants to develop 40 MW of solar energy, establish an Exelon PowerLab, and expand Pepco’s Electric Vehicle Pilot Program.¹⁰⁵

As a result of the Multi-Party Settlement, Prince George’s County now urges the Commission to approve the proposed merger, subject to the terms of their settlement providing for the County, *inter alia*, \$17.6 million funding for its ENERGY STAR and Transforming Neighborhoods Initiative, a Green Sustainability Fund, 5 MW of solar generation, \$1.24 million for workforce development, and construction of one microgrid in the County.¹⁰⁶

8. *National Consumer Law Center (also on behalf of the Maryland Affordable Housing Coalition and the Housing Association of Nonprofit Developers)*

The National Consumer Law Center initially contended that the need for energy efficient housing required the Commission to compel the Applicants to increase their investment in the CIF to \$160 million to satisfy the “public interest.”¹⁰⁷

The National Consumer Law Center was also a party to the Multi-Party Settlement and now urges the Commission to approve the merger, subject to the commitments contained in that settlement. Their settlement includes funds for energy

¹⁰⁴ *Id.* at 7-8.

¹⁰⁵ *Id.* at 12-16.

¹⁰⁶ Bannerman Direct Settlement Testimony at 8-9; *see also* generally Prince George’s County Post-Settlement Brief at 2-8.

¹⁰⁷ Bodaken Direct at 22-23.

efficiency investments in affordable multifamily housing, energy efficiency programs to benefit low- and moderate-income residents of Montgomery and Prince George's Counties, development of an Arrearage Management Program, and the Green Sustainability Fund.¹⁰⁸

9. *The Mid-Atlantic Off-Road Enthusiasts*

MORE initially requested that the Commission increase the benefits associated with the merger by requiring Exelon's utilities to give "reasonable and prompt consideration," as well as various forms of assistance, to government requests for trails on its power-line rights of way.¹⁰⁹ MORE also requested that Pepco be required to invest \$5 million towards developing bike trails within its service territory.¹¹⁰

MORE was also a party to the Multi-Party Settlement and now urges the Commission to approve the merger, subject to the commitment to develop a pilot program for bike trails contained in that settlement.¹¹¹

10. *The Alliance for Solar Choice*

TASC initially expressed concern that Exelon's control of much of Maryland's distribution system could restrict the ability of renewable energy sources to interconnect.¹¹² It urged the Commission to adopt ten specific recommendations to ensure the unfettered ability of renewable energy sources to interconnect.¹¹³

TASC entered into the First Settlement with the Applicants and now supports Commission approval of the proposed merger, subject to the terms of the First Settlement

¹⁰⁸ See generally, National Consumer Law Center Post-Settlement Brief at 4-13.

¹⁰⁹ Magill Direct at 3-4 (unnumbered).

¹¹⁰ *Id.* at 4 (unnumbered).

¹¹¹ MORE Post-Settlement Brief at 3-5.

¹¹² Gabel Direct at 4-5.

¹¹³ *Id.* at 15-16.

that address improvements in the interconnection process for customer-sited solar projects.¹¹⁴

11. *The Sierra Club - Chesapeake Climate Action Network*

The Sierra Club expressed a number of concerns regarding Exelon's track record, primarily its bias towards its merchant generation fleet at the expense of ratepayers and its resistance to the development of renewable energy resources.¹¹⁵ However, they initially proposed several conditions for the Commission to adopt, should the Commission decide to approve the merger, including: requiring Exelon's Maryland utilities to meet certain energy efficiency targets,¹¹⁶ directing the PHI utilities to increase their Tier 1 renewable energy portfolio to 25% of Maryland retail sales by 2020,¹¹⁷ and requiring Exelon to competitively procure long-term contracts of a certain quantity of carbon-free Tier 1 renewable energy.¹¹⁸ In response to the settlements, the Sierra Club continues to recommend that the Commission deny the merger.¹¹⁹ They do so partially because the terms of the settlements: (1) exclude critical parties;¹²⁰ (2) continue to fail to provide credible evidence for improvements in reliability;¹²¹ and (3) provide for energy efficiency commitments that are "Redundant, Inefficient and Unnecessary."¹²²

12. *The Clean Chesapeake Coalition*

The Clean Chesapeake Coalition contends that Exelon's operation of the

¹¹⁴ First Settlement at 2; Gabel Settlement Testimony at 2; TASC Post-Settlement Brief at 3-4.

¹¹⁵ Chernick Direct at 5.

¹¹⁶ Sierra Club Initial Brief at 36.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 36-37. The Sierra Club initially contended that the Applicants should be required to split their generation and their utility businesses within two years of closing on the merger. Chernick Direct at 37-38.

¹¹⁹ Chernick Direct at 37; Sierra Club Post-Settlement Brief, at 1-3.

¹²⁰ Sierra Club Post-Settlement Brief at 4-6.

¹²¹ *Id.* at 10-12.

¹²² *Id.* at 14-15.

Conowingo Dam reflects a lack of interest in preventing sediment and nutrient pollution from harming the Chesapeake Bay.¹²³ It suggests that Exelon has demonstrated disregard for state and local concerns regarding the health of Maryland waters and the Chesapeake Bay ecosystem.¹²⁴ The Coalition urges the Commission to make any approval of the merger conditional upon Exelon dredging and properly maintaining Conowingo Pond.¹²⁵

In response, the Applicants have offered what we have attached as Condition 42, an agreement to fund \$3,500,000 for a multi-year “Sediment Study” in the Lower Susquehanna River Reservoir System. However, the Clean Chesapeake Coalition discounts this offer, contending that it was already required by the Maryland Department of the Environment and relies upon a draft of the Lower Susquehanna River Watershed Assessment report, which the Coalition believes has little scientific merit.¹²⁶

13. *The Mid-Atlantic Renewable Energy Coalition (MAREC)*

MAREC concludes that the proposed merger is not in the public interest. It believes that nuclear plant operators such as Exelon frequently block efforts to develop renewable energy resources in order to protect their nuclear investments.¹²⁷

Should the Commission approve the merger, MAREC contends that the Applicants should be required to enter into power purchase agreements for renewable energy sources, contribute funds towards the development of renewable energy resources, and construct a transmission upgrade that would allow renewable energy to flow further

¹²³ Fithian Direct at 22-24.

¹²⁴ *Id.* at 4.

¹²⁵ *Id.* at 7-8.

¹²⁶ Clean Chesapeake Coalition Post-Settlement Brief at 3.

¹²⁷ Bradford Direct at 7-9.

to the east.¹²⁸

In response to the additional commitments contained in the settlements, MAREC concludes that “the Settlement exacerbates the merger’s harms by expanding Exelon’s control to distributed generation sources within the region.”¹²⁹

14. *The Maryland, District of Columbia and Virginia Solar Energy Industries Association (MDV-SEIA)*

MDV-SEIA believes that Exelon has historically opposed distributed solar generation (“DSG”), and the merger will cause Pepco to oppose DSG more strongly than it has in the past.¹³⁰ Because there are no conditions that would mitigate the claimed harm to the public interest caused by Exelon’s “draconian” opposition to DSG, it urges the Commission to reject the proposed merger.¹³¹

Should the Commission approve the merger, MDV-SEIA urges the Commission to attach four conditions to the approval, relating to: (1) a reduction in interconnection delays; (2) maintaining current funding and performance levels for the PHI Green Power Connection Lead Consultant program; (3) updating interconnection standards; and (4) the installation of net meters.¹³²

15. *Public Citizen, Inc.*

Public Citizen, Inc. urges the Commission to reject the proposed merger based primarily upon three concerns: the merger will shift the risks associated with Exelon’s merchant generation fleet onto “captive” ratepayers; the merger will provide Exelon with

¹²⁸ Burcat Direct at 11.

¹²⁹ MAREC Post-Settlement Brief at 2.

¹³⁰ Phelps Direct at 2, 16.

¹³¹ *Id.* at 12, 18.

¹³² MDV-SEIA Initial Brief at 9; the additional commitments contained in the settlements did not change MDV-SEIA’s conclusions. MDV-SEIA’s Post-Settlement Brief at 4-6.

an even greater influence upon PJM, hence the recent targeting of utilities within PJM; and the merger will hinder Maryland's efforts to develop clean energy initiatives.¹³³

Should the Commission approve the merger, Public Citizen, Inc., among other conditions, urges the replacement of Mayo A. Shattuck III as the Chairman of Exelon's Board and an increase of the CIF contribution to \$365 million.¹³⁴

16. *POWERUPMONTCO*

POWERUPMONTCO did not offer any witness testimony in these proceedings. However, in its briefs, it concludes that the proposed merger failed to meet the standards of PUA § 6-105 for many reasons, including: (1) the proposed commitments do not include any commitments related to contact voltage;¹³⁵ (2) the CIF investment constitutes only a one-time payment and would be more than offset by the long-term harm caused by the merger;¹³⁶ (3) the synergy benefits are too amorphous to constitute a benefit;¹³⁷ and (4) even the heightened reliability standards Exelon now proposes for Pepco are less than Exelon expects of its other subsidiaries.¹³⁸

17. *Coalition for Utility Reform/City of Gaithersburg*

The Coalition for Utility Reform and the City of Gaithersburg contend that the current utility compensation model has failed the public interest, and they urge the Commission to adopt a performance-based compensation system as a condition to the merger.¹³⁹

¹³³ Slocum Direct at 2-3, 17.

¹³⁴ Public Citizen, Inc.'s Initial Brief at 2-3 (unnumbered).

¹³⁵ POWERUPMONTCO Reply Brief at 1-2.

¹³⁶ *Id.* at 2.

¹³⁷ *Id.* at 4.

¹³⁸ *Id.* at 3-4.

¹³⁹ Alvarez Direct at 23-29.

III. STANDARD OF REVIEW

As discussed in Case No. 9173, PUA § 6-105 provides us with “broad discretion within a narrow legal space.”¹⁴⁰ Our task here is to determine whether this merger is “consistent with the public interest, convenience and necessity, including benefits and no harm to ratepayers.”¹⁴¹ The Applicants bear this burden to prove that their transaction satisfies the requirements of § 6-105.¹⁴²

PUA § 6-105 allows for three possible outcomes. If we conclude that the transaction as proposed is “consistent with the public interest, convenience and necessity, including benefits and no harm to consumers,” we “shall issue an order granting the application.”¹⁴³ If the transaction fails to satisfy any of those three requirements, we “shall issue an order denying the application.”¹⁴⁴ Or, we may approve it with conditions that address the aspects of the transaction that prevented us from approving it on its face.¹⁴⁵ Section 6-105(g)(2) contains the non-exclusive list of factors we must consider in reaching these conclusions:

1. the potential impact of the acquisition on rates and charges paid by customers and on services and conditions of operation of the public service company;
2. the potential impact of the acquisition on continuing investment needs for the maintenance of utility services, plant, and related infrastructure;
3. the proposed capital structure that will result from the acquisition, including allocation of earnings from the public service company;

¹⁴⁰ *In the Matter of the Current and Future Financial Condition of Baltimore Gas and Electric Company*, 100 MD PSC 348, 361 (2009) (“CEG/EDF”).

¹⁴¹ PUA § 6-105(g)(3).

¹⁴² PUA § 6-105(g)(5).

¹⁴³ PUA § 6-105(g)(3)(i).

¹⁴⁴ PUA § 6-105(g)(4).

¹⁴⁵ PUA § 6-105(g)(3)(ii).

4. the potential effects on employment by the public service company;
5. the projected allocation of any savings that are expected to the public service company between shareholders and ratepayers;
6. issues of reliability, quality of service, and quality of customer service;
7. the potential impact of the acquisition on community investment;
8. affiliate and cross-subsidization issues;
9. the use or pledge of utility assets for the benefit of an affiliate;
10. jurisdictional and choice of law issues;¹⁴⁶
11. whether it is necessary to revise the Commission's ring fencing and code of conduct regulations in light of the acquisition; and
12. any other issues the Commission considers relevant to the assessment of the acquisition in relation to the public interest, convenience, and necessity.¹⁴⁷

The Commission has considered the present statutory standard of PUA § 6-105(g)(3) in three previous cases,¹⁴⁸ analyzing three distinct questions:

- a. Is the transaction consistent with the public interest, convenience and necessity?
- b. Will the transaction yield benefits to the utility's ratepayers?
- c. Is the transaction structured not to harm the utility's ratepayers?¹⁴⁹

¹⁴⁶ There is no dispute that the Commission will retain the same regulatory and oversight authority over BGE. Additionally, the Applicants agree that the Commission will possess jurisdiction to enforce the terms of this Order, including each of the conditions contained herein. Tr. 3546 (Bradford).

¹⁴⁷ PUA § 6-105(g)(2).

¹⁴⁸ CEG/EDF; *In the Matter of the Application of the Merger of FirstEnergy Corp. and Allegheny Energy, Inc.*, 102 MD PSC 11(2011) (FE/Allegheny); *In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Inc.*, 103 MD PSC 22 (2012) (Exelon/CEG).

¹⁴⁹ CEF/EDF, 100 MD PSC at 363.

While the latter two inquiries (benefits and no harm) focus on the utility's ratepayers,¹⁵⁰ the first inquiry (public interest, convenience and necessity) focuses on the society at-large.¹⁵¹ If the transaction does not allow each of the three inquiries to be answered in the affirmative, PUA § 6-105(g)(4) requires the Commission to deny the application. "Public interest," "benefits . . . to consumers" and "no harm . . . to consumers" are separate concepts that require distinct findings.¹⁵² However, PUA § 6-105(g)(3)(ii) permits the Commission to "condition an order authorizing the acquisition on the applicant's satisfactory performance or adherence to certain requirements."¹⁵³

The Commission has previously held that "benefits" must be "certain, measurable and incremental benefits to ratepayers."¹⁵⁴ With regard to "no harm" the Commission has held, "[t]he statute requires us to ensure that ratepayers are protected against *any* increased risks of harm from this merger, it is our job to eliminate them, either by denying approval outright or through conditions, not to offset them with benefits."¹⁵⁵ "We are charged instead with the task of ascertaining the 'public interest, convenience and necessity' vis-à-vis the proposed transaction and then, within that broader public interest notion, whether the transaction will offer 'benefits and no harm to consumers.'"¹⁵⁶ When considering a settlement, whether contested or otherwise, the Commission must determine that the settlement is in the public interest and that it is

¹⁵⁰ *Id.*

¹⁵¹ FE/Allegheny, 102 MD PSC at 28.

¹⁵² CEG/EDF, 100 MD PSC at 361.

¹⁵³ *Id.* at 360.

¹⁵⁴ Exelon/CEG, 103 MD PSC at 45.

¹⁵⁵ *Id.* (emphasis in original.)

¹⁵⁶ CEG/EDF, 100 MD PSC at 361.

supported by substantial evidence.¹⁵⁷ Our obligation in this case is first to evaluate, based on the proposal, the testimony and comments of the parties, the commitments and all revisions, whether the proposal meets the requirements of §6-105. We have carefully applied this statutory standard and our prior precedents to the facts of this specific case, as every merger proposal is different. We have sorted through the potential for harm, and the protections proposed to eliminate them; the tangible risks of inconsistency to the public interest standard and the actions proposed to ensure consistency; and lastly, the measureable and certain offers to benefit the short- and long-term interests of the PHI customers in Maryland.

IV. COMMISSION DECISION

We begin our analysis of this merger transaction with an evaluation of what many intervenors deem, and we agree, as the threshold question of the three prongs: whether the transaction will cause *no harm* to Maryland ratepayers. As we recognized in *FirstEnergy*, no merger is without risks.¹⁵⁸ The mere fact that two separate and distinct corporate entities are combining to form a new corporate entity lends itself to a certain level of risk. But as clarified in the Exelon – Constellation merger, PUA § 6-105 requires us “to ensure that ratepayers are protected against *any* increased risks of harm from this merger; it is our job to eliminate them by denying approval outright or through conditions, not to offset them with benefits.”¹⁵⁹ In that case, we recognized that the true

¹⁵⁷ *In the Matter of the Proposed Merger of the Potomac Electric Power Company and Delmarva Power and Light Company*, 93 MD PSC 134, 137 (2002) (citing *Re Potomac Electric Power Company*, 80 MD PSC 61, 64 (1989)).

¹⁵⁸ FE/Allegheny, 102 MD PSC at 35.

¹⁵⁹ Exelon/CEG, 103 MD PSC at 45.

nature of any merger involves risks but “carefully evaluated the effects of the merger to ensure that BGE customers [did] not incur any new risks in the post-merger world.”¹⁶⁰

We have conducted the same analysis here.

In the Exelon – Constellation merger, we noted that “public interest” is a broader concept of greater good and the transaction need only be consistent with that notion in order to satisfy the statutory requirement of PUA § 6-105(g).¹⁶¹ We previously have ruled that these benefits must flow directly to Delmarva and Pepco ratepayers “in their capacity as ratepayers, not just their share of the Transaction’s impact on the public at large.”¹⁶² For a benefit to qualify under the statute, it must be “direct” and “certain” as opposed to “contingent” or “intangible”.¹⁶³ To that end, we conclude that several commitments offered by the Applicants, as modified by this Order, satisfy the requirements of PUA § 6-105(g)(4).

In considering whether Maryland ratepayers would be better off because of the transaction and not harmed, and whether the public interest standard is met, we analyzed the issues in this case through the lens of the factors contained in PUA § 6-105(g)(2) to reach our conclusions:

- a. Is the transaction consistent with the public interest, convenience and necessity?
- b. Will the transaction yield benefits to the utility’s ratepayers?
- c. Is the transaction structured not to harm the utility’s ratepayers?

¹⁶⁰ *Id.*

¹⁶¹ Exelon/CEG, 103 MD PSC at 67 - 68.

¹⁶² CEG/EDF, 100 MD PSC at 352.

¹⁶³ *Id.* at 365; Exelon/CEG, 103 MD PSC at 65.

With each of the three statutory questions in mind, we address the issues raised specifically in this case.

A. Exelon Influence in Maryland

Several parties asserted generally that the merger will eviscerate the regulatory authority of the Commission, the legislative powers of the Maryland General Assembly, and Maryland's influence in a regional context.¹⁶⁴ Opponents to the merger identified two main concerns connected with these potential harms. Staff, OPC, and MEA described these concerns as a loss of across-the-fence competition as well as the loss of a local Maryland voice regarding specific aspects of PHI's operations.¹⁶⁵

'Across-the-fence' competition is defined as "competition by utilities within a specific geographic area, in this case, Maryland, where utilities are cognizant of being compared to similarly-situated utilities for purposes of 'comparing the technical, economic and regulatory alternatives within the context of a specific regulatory issue or parallel set of Commission proceedings.' This comparison creates a friendly, but robust, competition between utilities, driving all utilities to higher and better standards of performance. It enables the Commission to compare utility performance and programs against one another, in order to judge the best proposal available, and determine whether a utility's selection of a plan is the best."¹⁶⁶ MEA asserts that across-the-fence competition is a "vital regulatory tool,"¹⁶⁷ and that post-merger the Commission will no longer have the benefit of across-the-fence competition and the information it yields.

¹⁶⁴ OPC Initial Brief at 20-23; MEA Initial Brief at 53-57.

¹⁶⁵ Staff Initial Brief at 37-39; OPC Initial Brief at 20-23; MEA Initial Brief at 53-57.

¹⁶⁶ Staff Initial Brief at 37 (quoting Tabors Direct at 70).

¹⁶⁷ MEA Initial Brief at 30 n.47 (citing Tabors Surrebuttal at 5).

The Joint Applicants responded that MEA mischaracterizes¹⁶⁸ across-the-fence competition as a vital regulatory tool and pointed out that “Dr. Tabors conceded at the hearing that he could not identify a single state utility commission since 1991 that even mentions across-the-fence competition. . . .”¹⁶⁹ Additionally, they noted that neither MEA nor OPC cited any more recent decision in their briefs than “the 1991 California Public Utility Commission’s (“CPUC”) decision (regarding the proposed San Diego Gas & Electric (“SDGE”)-Southern California Edison merger as precedent.”¹⁷⁰ The Joint Applicants pointed out that the Commission’s decision approving the Pepco and BGE merger, just six years after the CPUC decision, did so without ever mentioning across-the-fence concerns.¹⁷¹

We recognize the value of being able to make comparisons in the proposals and performance of contiguous utilities, but we find that the proposed merger will not impede our ability to make them. We presently are able to make comparisons between Delmarva and Pepco, for example, concerning their respective supplier diversity performance, reliability performance, and their EmPOWER program proposals, even though both are within the same holding company, PHI. Since BGE, Pepco, and Delmarva will continue to operate separately with distinct operating companies, and will be separately regulated by the Commission following the merger, we do not find that our ability to compare and contrast performance between the three operating utilities will be hampered, and therefore does not constitute a harm.¹⁷² The merger will not result in any loss of data

¹⁶⁸ Joint Applicants Reply Brief at 31.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 32.

¹⁷² *Id.* at 32-33.

available to the Commission. BGE, Pepco, and Delmarva each will retain its corporate existence and will continue to provide the Commission with the same data they provide today and any additional data that the Commission may require. This data will enable the Commission to continue to compare the performance of these utilities against each other, and more importantly, against performance over time, to assess each utility's performance and whether it is improving or declining.¹⁷³

We have modified the Applicants' commitment for annual comparison reporting of the utilities (including Pepco, Delmarva, and BGE) to specify that such reports shall be filed under separate cover only if such analysis is not duplicative of other required Commission reports. In all instances, the analysis shall address substantive areas as directed by the Commission to facilitate comparisons of utilities within the Exelon family (including Pepco, Delmarva, and BGE) against each other, and also against the performance and status of other utilities inside and outside of Maryland. In the future, we will continue to require Pepco, Delmarva, and BGE to make separate filings and presentations to the Commission when appropriate. We find that this Condition adequately mitigates any alleged harm from loss of across-the-fence comparisons.

Regarding the loss of voice, OPC witness Brockway, a former regulator, testified that the merger will adversely affect our ability to effectively regulate Maryland distribution utilities. Specifically, she argued that the result of the present merger, if approved, will mean that 80% of the electricity consumers in Maryland will be Exelon customers.¹⁷⁴ After the Exelon – Constellation merger, PHI utilities remained separate

¹⁷³ *Id.* at 34.

¹⁷⁴ Brockway Direct at 35.

and had an independent voice in Annapolis and before the Commission.¹⁷⁵ She claims that upon approval of the present merger transaction, “[p]otential harms to BGE customers will become more urgent and focused, as the Commission will have to deal with a virtual monopoly among investor-owned electric utilities. Exelon will be practically the sole utility voice in Maryland for discussions of potential regulations and regulatory policy.”¹⁷⁶ In a testimonial discussion with Chairman Hughes, however, she conceded that she could not provide a specific example over the past two years since the Exelon – Constellation merger where the Commission has experienced a loss of regulatory control over BGE.¹⁷⁷ However, she further distinguished between an overt loss of legal control – which she conceded had not occurred with BGE – and “what happens to a Commission when it no longer has the unit under its financial incentives.”¹⁷⁸

In response to OPC’s claim of diminished regulatory authority of the Commission post-merger, Mr. Crane stated that “[j]ust as the Exelon – Constellation merger did not impact the Commission’s authority over BGE or diminish BGE’s accountability to the Commission or its customers, the same will be true for Delmarva and Pepco post-merger.”¹⁷⁹ Delmarva’s and Pepco’s obligation to provide customers with safe and reliable electric service also will not change.¹⁸⁰ Further, Mr. Crane noted that “[t]he Commission will have the same supervisory powers over Pepco and Delmarva Power; the same access to the books and records of the Exelon Business Service Company that it has

¹⁷⁵ *Id.* at 35.

¹⁷⁶ *Id.* at 35.

¹⁷⁷ Tr. 2684:4-15 (Chairman Hughes/Brockway).

¹⁷⁸ Tr. 2707 (Commissioner Speakes-Backman/Brockway).

¹⁷⁹ Crane Rebuttal at 16.

¹⁸⁰ *Id.* at 16.

today.”¹⁸¹ Moreover, the Joint Applicants contend that “there is no persuasive evidence that either utility [Delmarva or Pepco] will become more ‘resistant’ to regulation as a result of the merger.”¹⁸² Witness Sue Tierney rightly stated “furthermore, nothing about this merger would change the inherent authority of policy making entities in Maryland – including the General Assembly, the Maryland Department of Environment, the Maryland Energy Administration, County Commissions, other local governments and so forth – to exercise their jurisdiction over the Joint Applicants’ companies in Maryland. Those entities either have authority to take actions over the Joint Applicants’ activities in Maryland or they don’t. A Commission approval of the merger will not change that fact.”¹⁸³

In the District of Columbia and nine other states, one investor-owned utility or its affiliates serve 100% of the customer base.¹⁸⁴ An additional 10 states have utilities (or their affiliates) that serve over 80% of the state’s customer base.¹⁸⁵ Yet there is no evidence in the record that either the D.C. Public Service Commission or the Commissions of those other states have been less able to effectively regulate the reliable provision of electricity within their jurisdictions. As in D.C. and the 19 other states with 80% or more of their customer base under the umbrella of one company, we find that the merger will not undermine our ability to exercise our full regulatory powers over BGE, Delmarva, and Pepco. The evidence shows the Commission, and its Staff, will be able to continue to ensure that Delmarva and Pepco will deliver safe and reliable service at just

¹⁸¹ *Id.*

¹⁸² Joint Applicants Reply Brief at 56.

¹⁸³ Tierney Rebuttal at 35 – 36.

¹⁸⁴ Tierney Post-Settlement Reply Testimony at 10-12. Those utilities include Pepco DC, Delmarva DE, Alabama Power, Georgia Power, PacifiCorp, Green Mtn Power, NV Energy/Berkshire/Hathaway, Kingsport Power Co (AEP), National Grid – RI (Narragansett). *Id.* at 12.

¹⁸⁵ *Id.*

and reasonable rates, just as we have with BGE since its acquisition by Exelon. We are confident that Pepco, Delmarva, and BGE will continue to comply with all Commission orders, just as they always have, and that they will continue to work cooperatively with our Staff. The evidence in this case fails to demonstrate that Exelon will direct them to be less compliant with Commission orders and regulations.¹⁸⁶ We find here, as we did in the Exelon – Constellation merger, that there is nothing in this merger that will otherwise reduce our statutory power to ensure Delmarva and Pepco comply with specific rulings and policies of the Commission and the State.¹⁸⁷ Furthermore, if there is a public policy area such as EmPOWER Maryland, distributed generation, or reliability and resiliency, where sufficient initiatives are not being proposed by BGE, Delmarva and Pepco, the Commission will be readily able to direct that such programs be proposed.¹⁸⁸

In addition, we find that the potential harm of a loss of voice attributable to the acquisition of PHI by a generation-owning parent company is greatly overstated. Opponents cite Exelon’s Strategic Plan as evidence of an alleged conflict related to distributed energy and other renewable resources, and contend that the loss of PHI as a wires-only company will give rise to a new harm.¹⁸⁹ Specifically, opponents contend that unlike Exelon, PHI lacks an imbedded economic incentive to protect a generation fleet

¹⁸⁶ We find the concerns that Exelon will discourage development of renewable or distributed generation in Maryland, that it will press the Maryland General Assembly for legislation favoring its generation interests, and that Exelon may encourage BGE, Delmarva and Pepco to be resistant to other new grid developments to be little more than speculation, and they do not rise to the level of “harms.”

¹⁸⁷ Exelon/CEG, 103 MD PSC at 60.

¹⁸⁸ We are and will be cognizant of programs in other jurisdictions through our membership, indeed often leadership, in multi-jurisdiction organizations of regulators, such as the Organization of PJM States, the Mid-Atlantic Conference of Regulatory Utility Commissioners, the National Conference of Regulatory Utility Commissioners, the Regional Greenhouse Gas Initiative, the Mid-Atlantic Distributed Resources Initiative, and the Eastern Interconnection States’ Planning Council. Moreover we have the benefit of active, sophisticated parties informing us of their views in proceedings to consider existing programs and new initiatives, a number of whom are parties in this case.

¹⁸⁹ See, e.g. Fuller Direct at 3; Ex. MEA-80 at 12, 31-40.

from policy and technological changes.¹⁹⁰ However, we note that distribution companies are also susceptible to such concerns, frequently discussing initiatives such as net metering and distributed generation in the context of “disruptive technologies” that they claim erode volumetric revenues derived from delivery of electricity. Already we have seen both Delmarva and Pepco seek increases to their fixed customer charges in recent rate cases,¹⁹¹ in part to account for concerns regarding customers paying their “fair share” of grid maintenance in the face of declining monthly usage.

In a more regional context, several parties¹⁹² expressed concerns about PHI’s loss of voice and Exelon’s excessive influence at the wholesale level, within PJM. PHI is almost exclusively a regulated transmission and distribution company with three regulated operations – Pepco, Delmarva, and Atlantic City Electric – which accounted for 96% of its revenues in 2013. Exelon, on the other hand, consists largely of unregulated generation companies, whose non-regulated holdings account for 62% of its revenues. OPC and other opposing parties assert that Exelon’s interest as a generation owner would be focused on maximizing profits on the generation side of the business, and may adversely affect Pepco customers, whose participation in the wholesale markets currently has an interest in low generation prices. Witnesses Tabors and Peterson cited specifically the potential harm due to a loss of PHI’s vote in the PJM process on issues that would affect wholesale prices negatively for customers.¹⁹³ The Applicants provided evidence to

¹⁹⁰ *Id.*

¹⁹¹ *In the Matter of the Application of Potomac Electric Power Company for Authority to Increase Its Rates and Charges for Electric Distribution Service*, 103 MD PSC 293 (2012); *In the Matter of the Application of Delmarva Power & Light Company for Authority to Increase Its Rates and Charges for Electric Distribution Service*, 103 MD PSC 377 (2012).

¹⁹² Tabors Direct at 10-13; Brockway Direct at 35; Slocum Direct at 9; Arndt Direct at 7; Chernick Direct at 7, 38.

¹⁹³ Tabors Direct at 16-18, Peterson Direct at 8.

the contrary, that on the occasions in the past when Exelon voted differently than PHI, there would have been minimal impact on the outcome of the ultimate vote by all stakeholders. “All else equal, the merger will result in one less voting member in PJM Senior Committees, which given current PJM membership, would mean that there would be 527 voting members, rather than 528 voting members.”¹⁹⁴ We are convinced, when presented with facts countering the speculation of harm, that the PJM process involves a much larger set of stakeholders than Exelon and PHI alone, and will not create a new harm to ratepayers due to the merger. Even so, Exelon has also committed to make a one-time non-recoverable contribution of \$350,000 to fund the expenses of the Consumer Advocates of PJM States Inc. (“CAPS”), the organization within the PJM process whose obligation it is to represent the interests of consumers.¹⁹⁵ We conclude that additional financial contribution for end-user advocacy at PJM constitutes a direct benefit to ratepayers as required by PUA § 6-105(g)(4).

Exelon also has committed to address in part¹⁹⁶ the concerns raised by the IMM with respect to the loss of PHI as an independent transmission company within PJM. Following closing of the merger, Exelon and its affiliated transmission companies (including BGE, Delmarva, and Pepco) are committed to remaining as members of PJM

¹⁹⁴ Tierney Rebuttal at 42.

¹⁹⁵ Exelon has also agreed to support any reasonable proposal to have PJM members fund CAPS. *See* Condition 26, App. A.

¹⁹⁶ The Joint Applicants, as do we, declined to adopt other conditions requested by the IMM in its April 14, 2015 correspondence with respect to vertical market power concerns. *See* Joint Applicants’ Reply Brief at 66 (“The exact same claims made by the IMM here about the Joint Applicants’ potential exercise of vertical market power were presented by the IMM to FERC, which has jurisdiction over transmission facilities and over the wholesale power markets that would be affected by the alleged increase in ability to exercise vertical market power. After considering these arguments, FERC unequivocally rejected each claim.”). *Id.*, citing *Exelon Corp.*, 149 FERC ¶61, 148 (2014).

until at least January 1, 2025.¹⁹⁷ Further, Exelon has committed that each of its affiliated transmission companies will select, with PJM’s concurrence, at least three independent third-party consulting firms so that any generation developer that desires to interconnect to an Exelon-affiliated transmission system may utilize an independent firm.¹⁹⁸ Exelon also has committed that the IMM may review its demand resource bids in the PJM energy, reserves, and capacity markets.¹⁹⁹ We find that taken together, these conditions of approval mitigate any potential competitive harms that may result from the loss of PHI as an independent transmission company within PJM.

B. Ring Fencing, Local Control, and Affiliate Protections

Through the ring fencing, local control, and affiliate protections on which we condition this merger, the ratepayers in Delmarva’s and Pepco’s Maryland service territories will realize the benefits of a locally-controlled utility managed by a results-driven parent company, while also enjoying the enforceable assurances that the incumbent utilities’ assets are legally protected.

1. Ring Fencing

As is our statutory obligation, we considered whether it is necessary to revise the Commission’s ring fencing and code of conduct regulations in light of this proposed acquisition.²⁰⁰ Absent the merger, the ring fencing measures outlined in Delmarva’s and Pepco’s annual reports filed with the Commission would continue to govern the utilities’

¹⁹⁷ See Condition 25, App. A.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ PUA § 6-105(g)(2)(xi).

conduct in relation to PHI, Inc.²⁰¹ Following the merger, however, we acknowledge that the existing ring fencing provisions must be expanded to ensure that no harm is realized by ratepayers through the acquisition of the PHI distribution utilities by a generation-owning parent entity. In short, we find that the ring fencing commitments proffered by the Joint Applicants, and as amended by us, do just that.

In the Exelon – Constellation merger, we observed that “[t]he operation of a nuclear fleet carries enormous financial risk, and Exelon’s nuclear fleet exceeds that of any utility in the United States.”²⁰² Certain parties contend that Exelon, through this transaction, will exercise its ability and incentive to favor its generation businesses at the expense of its distribution utilities. OPC, for example, argued that the risks associated with Exelon’s non-regulated business can harm captive ratepayers, since Exelon may rely on the regulated utility businesses to support the non-regulated businesses during hard times.²⁰³

The evidence *does* demonstrate that one of Exelon’s motives for the merger is to diversify its financial reliance on volatile power market revenues from its generation business with the steady income stream from increased ownership of regulated distribution companies.²⁰⁴ What the record does *not* demonstrate, however, is any evidence supporting the assertion that Exelon will seek to loot the earnings from Delmarva and Pepco to the financial detriment of those utilities. In fact, the transaction is

²⁰¹ COMAR 20.40.02.08 requires on or before May 15 of each calendar year a utility to file with the Commission a ring fencing report for the previous calendar year ending December 31. *See, e.g.* Maillog No. 154990: *Pepco’s Ring Fencing Report for year ended December 31, 2013* (May 13, 2014); Maillog No. 154991: *DPL’s Ring Fencing Report for year ended December 31, 2013* (May 13, 2014).

²⁰² Exelon/CEG, 103 MD PSC at 63.

²⁰³ Arndt Direct at 18.

²⁰⁴ Crane Direct at 10.

conditioned on Delmarva and Pepco maintaining a rolling²⁰⁵ 12-month average annual equity ratio of at least 48%.²⁰⁶ Furthermore, we note that neither MEA Witness Lucas nor Staff Witness Timmerman express any concerns related to the ring fencing measures offered in the Multi-Party Settlement.²⁰⁷

The remaining concern, therefore, is represented by OPC Witness Hempling, who maintains in his settlement testimony that “[e]ven with ring fencing ... consumers face more risk after the acquisition than before.”²⁰⁸ However, just as we took steps to protect customers in light of BGE’s position in Exelon’s corporate structure post-merger, we conclude that adoption of the same “platinum standard” ring fencing provisions here – as committed to by the Joint Applicants – mitigates any potential harm that could otherwise be experienced as a result of this transaction. Opponents to this transaction fail to articulate concrete examples of instances in which the “platinum standard”²⁰⁹ ring fencing provisions adopted in the Exelon – Constellation merger failed to protect BGE ratepayers from this substantively identical concern. Thus, we conclude that adoption of comparable conditions in this proceeding will similarly mitigate any potential harm to ratepayers.

Moreover, we note that the ring fencing provisions on which we condition this acquisition are even more robust than in the Exelon – Constellation order. In this

²⁰⁵ While we have amended the Joint Applicants’ commitment to include the term “rolling,” we note that Company Witness Khouzami affirmed that this concept is consistent with the Joint Applicants’ intent. *See* Tr. 4257 (Khouzami).

²⁰⁶ *See* Conditions 30 and 31, App. A, which prohibit dividends whenever the payment would bring the equity share of BGE’s capital structure below 48%. As part of our consideration of this condition, we also considered our statutory obligation to assess the proposed capital structure that will result from this acquisition. PUA § 6-105(g)(2)(iii).

²⁰⁷ *See* Timmerman Settlement Testimony; Lucas Settlement testimony.

²⁰⁸ Hempling Settlement Testimony at 17.

²⁰⁹ Exelon/CEG, 103 MD PSC at 63.

transaction, not only will Delmarva and Pepco ratepayers be protected through the creation and use of a bankruptcy-remote special purpose entity (“SPE”), but in addition Exelon has committed to implementing the following ring fencing arrangements for at least *five*²¹⁰ years following the completion of the merger, absent permission from the Commission to act otherwise:

- Delmarva and Pepco will maintain separate existences and separate franchises and privileges;
- Delmarva and Pepco will maintain separate books and records;
- Delmarva’s and Pepco’s books and records pertaining to their operations in Maryland will be available for inspection and examination by the Commission;
- Delmarva and Pepco will maintain separate debt so that they will not be responsible for the debts of affiliated companies, will maintain separate preferred stock, if any, and will maintain their own corporate and debt credit ratings, as well as ratings for long-term debt and preferred stock.²¹¹

The ring fencing protections are further enhanced by Exelon’s commitment to certain Staff recommendations that go beyond those adopted in the Exelon – Constellation merger, including a future analysis of Exelon’s operational and financial risk to determine the adequacy of existing ring fencing measures.²¹²

2. *Local Control*

For purposes of all matters related to the merger – as well as for all matters relating to affiliate transactions between Exelon, Delmarva, and Pepco – Exelon has submitted to the jurisdiction of the Maryland Public Service Commission.²¹³ But the Joint Applicants’ commitment to local *regulatory* control post-merger constitutes only

²¹⁰ We note that in the Exelon – Constellation merger, Exelon was prohibited for petitioning the Commission for a modification to its ring fencing conditions within *three* years of the merger closing. *See* Exelon/CEG, 103 MD PSC at 71.

²¹¹ Khouzami Direct at 9-10.

²¹² *See* Condition 32, App. A.

²¹³ *See* Condition 28, App. A.

one prong of this inquiry;²¹⁴ the Joint Applicants are committed to local *utility governance* as well, as evidenced by the proffered delegations of authority and proposed structure of the PHI board following the acquisition.

As articulated in Condition 30, the authority and responsibility delegated to local management will be clearly delineated in two formal, written documents consisting of a statement of Corporate Governance Principles and a Delegation of Authority (“DOA”). The DOA will demarcate, among other things, levels of expenditures and defined categories of decisions that can be authorized solely by the utility’s CEO or by the utility CEO with the utility Board of Directors’ approval. We find that this arrangement strikes the appropriate balance between continued day-to-day local governance by those most familiar with the existing distribution system and services, while simultaneously expanding the scope of available resources – including “direct and frequent access to [Exelon’s CEO] and other members of Exelon’s senior management team.”²¹⁵ At the most basic level, we are persuaded that the conditions on which we approve this merger encapsulate Exelon’s continued commitment to Maryland.²¹⁶

As described by Company Witness Khouzami, PHI will become a subsidiary of the SPE created to ring fence the PHI utilities; the SPE will in turn become a subsidiary of EEDC, and its sole purpose will be to hold 100% of the equity interests in PHI.²¹⁷ The Board of Directors of the SPE will have four directors, one of whom shall be independent. In addition, Exelon committed that the seven-member PHI Board of

²¹⁴ We note the importance of the Joint Applicants’ consent to Maryland jurisdiction for purposes of satisfying our statutory inquiry. PUA § 6-105(g)(2)(x).

²¹⁵ See Condition 30, App. A.

²¹⁶ As confirmed by Company Witness Khouzami, “[t]here’s considerable focus on Maryland. It matters to Exelon. It will be a point of focus at the Exelon level.” Tr. 4347-4348 (Khouzami).

²¹⁷ Khouzami Direct at 10.

Directors shall include one director from each of PHI's utility subsidiaries. To ensure that the governing body maintains a Maryland presence, we further condition the merger on the requirement that "at least one director of the seven-member Board of Directors shall reside in Maryland,"²¹⁸ finding that, with this addition and the other conditions described herein, the concern regarding local control post-merger is adequately mitigated.

3. Affiliate and Cross-Subsidization Protections

Consistent with our statutory obligation, we have considered whether this acquisition will give rise to affiliate or cross-subsidization issues that would result in harm to the Delmarva and Pepco Maryland ratepayers.²¹⁹ In addition to the aforementioned commitment that Delmarva and Pepco will maintain separate debt so that they will not be responsible for the debts of affiliated companies post-merger,²²⁰ we condition this transaction on the commitment by Exelon to cause Pepco, Delmarva, and other Exelon affiliates to comply with the Maryland statutes and regulations applicable to Delmarva and Pepco regarding affiliate transactions.²²¹ Through this condition, the Commission can examine the accounting records of Exelon's affiliates to assess the reasonableness of Exelon's cost allocation factors assigned to Delmarva and Pepco Maryland operations. Therefore, we find that to the extent any potential harm could arise as the result of this transaction, the conditions on which we base our approval adequately mitigate them.

²¹⁸ See Condition 30, App. A.

²¹⁹ PUA § 6-105(g)(2)(viii).

²²⁰ As captured in Condition 29, this satisfies our statutory obligation to consider whether harm will result from the use or pledge of utility assets for the benefit of an affiliate following the acquisition. PUA § 6-105(g)(2)(ix).

²²¹ See Condition 34, App. A.

4. *Tax Normalization*

OPC witness Arndt raised a concern that the merger, structured as a cash-for-stock transaction and not a stock for-stock transaction, could result in a taxable transaction that would result in significant harm to PHI customers. Witness Arndt explained that as “a taxable transaction, the IRS normalization requirements may result in the loss of ratepayer tax benefits associated with Accumulated Deferred Income Taxes and Accumulated Deferred Investment Tax Credits on Delmarva’s and Pepco’s books, resulting in adverse jurisdictional revenue requirement impacts of ADIT and ADITC for Delmarva and Pepco in Maryland alone in the amount of \$48.819 million per year.”²²² OPC cautioned that the Joint Applicants failed to seek IRS guidance on the merger transaction to ensure that it would not pose harm to ratepayers. To mitigate this potential harm, the Joint Applicants agreed to “ensure that the merger transaction structure will not affect accounting and ratemaking treatments of Delmarva’s and Pepco’s accumulated deferred income taxes, including excess deferred income taxes or investment tax credits.”²²³ The Joint Applicants further committed to indemnify ratepayers for any harms resulting from the loss of ratepayer tax benefits associated with ADIT and ADITC due to the tax normalization concerns raised by OPC. That commitment is now embodied in Condition 41.

We find that Condition 41 in which Exelon ensures that the merger will not affect the accounting and ratemaking treatments of Delmarva’s and Pepco’s ADIT is sufficient to mitigate the tax normalization risk of harm to ratepayers that was raised by OPC.

Taken together, we find that the enhanced ring fencing measures offered in the

²²² OPC Initial Brief at 25.

²²³ Khouzami Rebuttal at 24.

Multi-Party Settlement, enhanced by the measures we have added in the Ring Fencing Conditions, will continue to protect PHI's, Pepco's, and Delmarva's financial health post-merger and will fully mitigate the risk of financial harm expressed by many of the parties. In the highly improbable event that this proves untrue, notwithstanding any other powers that the Commission currently possesses under existing, applicable law, the Joint Applicants agree that the Commission may, after investigation and a hearing, order Exelon to divest its interest in Pepco and/or Delmarva.²²⁴

C. Investing in Short- and Long-Term Benefits to Ratepayers

1. Rate Credit

In their initial Application, the Applicants did not offer a separate and direct rate credit to ratepayers. Rather, they offered instead a contribution to a Customer Investment Fund, leaving discretion to the Commission as to whether the funds might be used for a direct credit, energy efficiency investments, or some combination thereof. Staff and AOBA have urged that Delmarva's and Pepco's ratepayers should receive a direct credit in addition to those benefits that will accrue as a result of investment in various energy efficiency and other programs.²²⁵ For example, Staff contends that ratepayers should receive a \$106.76 and \$108.64 one time rate credit for each Delmarva and Pepco customer respectively,²²⁶ in addition to an equivalent per-ratepayer investment into the CIF.²²⁷ In past decisions, we have looked to strike a balance between the short- and long-term benefits of consumers.

²²⁴ See Condition 33, App. A, for a complete description of this relationship severance provision.

²²⁵ Godfrey Direct at 4-5; Oliver Direct at 6, 9, 27-28.

²²⁶ Godfrey Direct at 4-5.

²²⁷ Lubow/Malko Direct Testimony at 9; Staff Reply Brief at 19-20.

The Multi-Party Settlement proposed an approximate \$36.8 million investment to provide a \$50 rate credit for all Delmarva and Pepco Maryland electric distribution customers, among other benefits. Staff witness Lubow disagrees that this is an appropriate amount of rate credit, based on past mergers and based on the premium that PHI's shareholders will realize as a result of this merger.²²⁸ When we look to our statutory obligation to consider the *allocation of any savings* expected from the merger between shareholders and ratepayers pursuant to PUA § 6-105(g)(2)(5), we conclude that a \$100 rate credit per residential customer, when combined with other benefits in this case, appropriately balances the allocation of short- and long-term benefits to ratepayers under PUA § 6-105. This is a similar conclusion to that in Case No. 9271, where we also sought to balance short- and long-term benefits by requiring a \$100 residential rate credit at a cost of \$112 million along with a Customer Investment Fund of approximately \$113 million.

We condition our approval upon the Applicants providing a \$100 rate credit for Delmarva's and Pepco's Maryland residential customers to be credited: (i) \$50 to customers of record within 60 days after closing of the merger, and (ii) the remaining \$50 to customers of record in the billing cycle 12 months after the first installment.²²⁹

These credits to Maryland residential customers will total approximately \$17.4 million for Delmarva and \$48.6 million for Pepco, and shall not be recoverable in rates. As amended and combined with other certain and direct benefits in this Order, we conclude that this satisfies the benefits requirement of § 6-105.

²²⁸ Lubow/Malko Reply Testimony at 87-89.

²²⁹ A customer of record who receives a \$50 rate credit within 60 days after closing of the merger but who is no longer an active customer 12 months after the first installment is not eligible for the second \$50 rate credit (and visa-versa).

2. *Customer Investment Fund (“CIF”)*

In Case No. 9271, we recognized that “the long-term benefits of energy efficiency, if perhaps not always immediately felt by consumers, can have a more meaningful impact over the long-term.”²³⁰ In its final iteration, the Applicants have offered to create a fund in the amount of \$94.4 million, with \$57.6 million to be directed toward various energy-efficiency programs for all rate classes within Delmarva and Pepco’s service territory.²³¹

We have closely reviewed the details of the Multi-Party Settlement, which apportioned the proposed funds for a Customer Investment Fund among Prince George’s and Montgomery Counties and the Delmarva Maryland service territory, and we make several amendments here to comply with the statute. In balancing the revised rate credit of \$100 per residential customer with the long-term benefits derived from energy efficiency, the Green Sustainability Fund, workforce development, renewable energy, and contributions to efforts for the modernization of our grid, we conclude that 75% of the proffered CIF is sufficient to comply with the statute and provide direct long-term benefits to ratepayers.²³²

We therefore amend this commitment by the Applicants as follows. Exelon will fund a Customer Investment Fund of \$43.2 million, 75% of that proffered, for the long-term benefit of Delmarva’s and Pepco’s Maryland customers. Delmarva and Pepco will

²³⁰ Exelon/CEG, 103 MD PSC at 65.

²³¹ Applicant’s Reply Brief, App. C at 1.

²³² The short-term benefits include the \$100 residential rate credit equaling approximately \$66 million and the forgiveness of residential customer arrearages over two years equaling approximately \$647,156. The long-term benefits include \$43.2 million for energy efficiency programs, \$14.4 million in Green Sustainability Funds, \$4 million in work force development funding, \$500,000 for Grid-of-the-Future proceedings, and additional funding for renewable energy projects.

not recover the cost of this investment through rates. These funds will be distributed in the following manner:

- a. Exelon will provide \$31.5 million in funding for energy efficiency program support, including approximately 20% for limited-income customers, in the Pepco service territory (derived from prorating on a per customer basis of \$13.2 million for Prince George's County and \$18.3 million for Montgomery County) for specific programs to be directed and administered by Montgomery County and Prince George's County as set forth in Condition 3 in Appendix A to this order.
- b. Exelon will provide Delmarva \$11.7 million in funding for incremental energy-efficiency program support in the Delmarva Maryland service territory. Delmarva should use this funding to implement new, innovative energy efficiency pilots incremental to existing EmPOWER Maryland programs. The program(s) design will be determined through a subsequent Commission hearing, and could involve an on-bill financing program for small businesses or initiatives to facilitate energy efficiency upgrades in multifamily dwellings.

While the Multi-Party Settlement did not specify an allocation of energy efficiency funds in the Delmarva Maryland service territory, we have determined these funds can be most effectively utilized through Delmarva's EmPOWER Maryland programs. Specifically, we have conditioned approval on the use of at least 20% of the Delmarva funds to support energy efficiency upgrades in multifamily dwellings – an effort that Delmarva could model after the master-metered multifamily quick home energy check-up program offered by BGE through its EmPOWER Maryland portfolio. Unlike the Pepco Maryland service territory which has only two counties, we consider it both impractical and unreasonably costly to establish individual energy efficiency programs in the ten counties in Delmarva's Maryland service territory.

With these changes in place, we believe this condition more fairly balances the short-term benefits of the rate credit with the long-term benefits of energy efficiency

investment for all ratepayers affected by this transaction and constitutes a direct and measurable benefit pursuant to PUA § 6-105(g)(4).

D. Energy Efficiency

In addition to its commitment to maintain and promote existing energy efficiency and demand response programs, the Applicants also committed to develop, in cooperation with Staff, a set of milestones as to how they might accelerate and enhance the EmPOWER Maryland plans for Delmarva and Pepco, including penalties for not meeting the Commission-approved goals. We accept this commitment as a condition to approval of the merger, and expand it to include BGE,²³³ but do not endorse any additional funding for such programs, until such time as a thorough evaluation can be made of the proposal.

As discussed above, we are requiring the Applicants to fund the Customer Investment Fund for energy efficiency programs, with the amount adjusted by us to \$43.2 million. Pursuant to the Multi-Party Settlement, the Applicants, Prince George’s County, and Montgomery County have agreed in broad terms how this investment shall be allocated within their jurisdictions.²³⁴ We approve the terms of that settlement with certain amendments. As amended, we agree with the Applicants and the parties to the Multi-Party Settlement that the allocation of these funds for energy efficiency constitutes

²³³ As described by witness Khouzami, not only does the sharing of best practices occur on the operational side, “but there’s also a sharing on the programmatic side.” Tr. 4265 (Khouzami). In a testimonial exchange with Commissioner Speakes-Backman regarding the expansion of a public interest commitment to BGE, Khouzami confirmed that “whatever program is developed here, would that be shared with BGE, does it make sense for BGE, I think that absolutely will be the case.” Tr. 4353 (Khouzami).

²³⁴ In addition to the specific enhanced energy efficiency programs discussed here, Delmarva and Pepco have generally committed to maintain and promote existing energy efficiency and demand response programs. *See* Condition 4, App. A.

a direct benefit to ratepayers as required by PUA § 6-105(g)(4).²³⁵

Exelon shall provide, in equal installments over 3 years, a total of \$13.2 million of the CIF funding to Prince George's County. Pepco shall cooperate with Prince George's County (or agencies designated by Prince George's County) on the development and implementation of energy-efficiency programs for Pepco customers within Prince George's County. These programs shall include the ENERGY STAR Certification & Green Leasing Program, and the Transforming Neighborhoods Initiative Comprehensive Energy Audit, Retrofit and Clean-Energy Program. We also clarify here that any energy efficiency programs implemented by Prince George's County do not require review or approval by the Commission.²³⁶ As stated previously, Pepco shall not seek to recover the CIF funds through rates, nor shall Pepco attribute any energy efficiency savings derived from the CIF-funded programs toward its Commission-established EmPOWER goal.

Exelon shall also provide, in equal installments over 3 years, a total of \$18.3 million of the CIF funding to Montgomery County to be administered by Montgomery County or an agency designated by Montgomery County. Pepco shall cooperate with Montgomery County on the development and implementation of energy efficiency programs for Pepco customers within Montgomery County. These programs will include the Montgomery County Green Bank, the Energy Coach Network, and the Expanded Weatherization Programs.

²³⁵ For the complete text of our conclusions regarding this condition, *see* Condition. 3, App. A.

²³⁶ We note that the recipients of this additional energy efficiency funding – Prince George's and Montgomery Counties – represent two jurisdictions that are experienced already in implementing similar energy efficiency programs. We are confident that the Counties will effectively and wisely expend these funds, which are earmarked already for specific energy efficiency programs as described in the Multi-Party Settlement and as included in Condition 3. Moreover, there is existing legislative-body oversight within the Counties to ensure appropriate distribution and deployment of funds. The energy efficiency programs identified by the Counties will *supplement* – not *supplant* – existing EmPOWER programs implemented by Pepco.

As with Prince George's County, the energy efficiency programs implemented by Montgomery County do not require Commission review or approval. Pepco will not seek to recover the CIF funds through rates, nor will Pepco attribute any energy efficiency savings derived from the CIF-funded energy efficiency programs in Montgomery County toward its Commission-established EmPOWER goal.

Exelon will provide Delmarva, in equal installments over 3 years a total of \$11.7 million of the CIF to fund additional energy efficiency programs to benefit customers in the Delmarva Maryland service territory. Delmarva should use these funds to implement new, innovative energy efficiency pilots incremental to existing EmPOWER Maryland programs, including programs benefitting limited-income customers. The specific program design will be determined through a subsequent Commission hearing.

Pursuant to the settlement agreement with NCLC, NHT and others, Delmarva shall endeavor to direct 20% of the funds into programs dedicated to energy efficiency investments in affordable multifamily housing. After consulting with Commission Staff and any other interested stakeholders, Delmarva is directed to file a proposal regarding energy efficiency programs targeted at multifamily affordable housing no later than March 1, 2016.

Finally, we accept Exelon's commitment that Pepco will continue to cooperate with Montgomery County to make available tools and processes to provide building owners accessible, useful and accurate energy-performance data in Montgomery and Prince George's Counties.

Taken together, we conclude that these investments in energy efficiency in Delmarva's and Pepco's Maryland service territories constitute a direct and certain benefit pursuant to PUA § 6-105(g)(4), and are consistent with the public interest.

1. *Green Sustainability Fund*

Exelon proposed to establish a \$50 million Green Sustainability Fund (the "Fund") to stimulate public and private investment within Pepco's, Delmarva's, and ACE's service territories. This Fund would provide resources to install solar, storage and other behind-the-meter and distributed generation, energy efficiency and whole home solutions, Utility 2.0, resiliency measures, microgrids, water conservation in buildings, clean transportation, community solar and similar developing energy projects.²³⁷ At no time during the course of our proceedings did a representative from Delmarva's Maryland service territory state an interest in participating in the Fund.²³⁸ In response to a question from Chairman Hughes, Exelon witness Khouzami stated that the Applicants did not reach out to any of the ten counties in the Delmarva Service territory and were not aware if there was any interest in such a loan fund.²³⁹ In light of this fact, we will not order the Applicants to invest any of the Green Sustainability Fund within Delmarva's territory. In the alternative, in order to maintain the balance of short and long term benefits for each distribution service territory, we require that Exelon agree to develop an additional 5 megawatts of solar or other Tier 1 renewable generation in the Delmarva service territory.²⁴⁰

²³⁷ For the details as to how the Fund will be implemented, *see* Condition 6, App. A.

²³⁸ Tr. 4268-4269 (Chairman Hughes/Khouzami); Tr. 4291-4292 (Commissioner Williams/Khouzami).

²³⁹ Tr. 4271-4272 (Chairman Hughes/Khouzami).

²⁴⁰ *See* Condition 7, App. A.

The Fund will allocate \$14.4 million to Pepco's Maryland service territory. As proposed, the Maryland Fund allocation will be managed directly by Prince George's and Montgomery Counties. Of the \$14.4 million allocated to Maryland, \$6.0 million will be allocated to Prince George's County and \$8.4 million will be allocated to Montgomery County.

The Fund will be available for twenty years to finance qualifying projects, and the Counties will provide periodic reports to the Maryland Energy Administration on the activity and performance of the Fund. These reports need not be submitted to the Commission as this Fund is not funded by ratepayer money, and the Counties have proposed specific programs that will be administered through local infrastructure.

This Green Sustainability Fund is in addition to the \$43.2 million to be invested in the CIF and the approximately \$66 million in residential rate credits that we discussed above. Pepco will not seek to recover any expense associated with the Green Sustainability Fund through rates. As with the Rate Credit, the CIF, and the other programs discussed above, we conclude the creation of the Green Sustainability Fund is a direct and certain benefit pursuant to PUA § 6-105(g)(4).

E. Reliability and Resilience

1. Reliability Performance and Financial Commitments

The parties' emphasis in this proceeding on issues of reliability, resilience, quality of service, and of customer service is appropriate – not only because these issues are a factor required for the Commission's consideration in any acquisition under PUA § 6-105,²⁴¹ but because the ratepayers rightfully demand it.

²⁴¹ PUA § 6-105(g)(2)(vi).

We are cognizant, however, of our existing statutory obligation to regulate public service companies in a manner that promotes adequate, economical, and efficient delivery of utility services in the State.²⁴² We have adopted comprehensive and objective reliability regulations for Maryland’s electric companies for which the electric companies are held accountable in the event that the utility fails to deliver reliable service according to those standards.²⁴³ Thus, while it is beneficial for Delmarva and Pepco ratepayers to receive reliable service, it is already the obligation of the incumbent utility to provide it.

Officials in the affected jurisdictions, as described by Prince George’s County Witness Erica Bannerman, assert that “[Pepco] has severely struggled with system reliability and has languished in the bottom half or quartile amongst its peers.”²⁴⁴ Delmarva similarly has struggled, failing to meet the system-wide SAIDI and SAIFI standards promulgated by the Commission for previous calendar years.²⁴⁵ While we retain our authority to enforce penalties and other corrective actions for these service reliability shortcomings irrespective of the merger,²⁴⁶ the conditions on which we base our approval of this transaction are inextricably linked to the proven results-oriented management capabilities of the Exelon companies. Put more simply, they have a track record of excellence, and we are conditioning assurances to help ensure they can get the job done.

Exelon has demonstrated its competency with respect to the management of electric and gas distribution companies, and it is in the public interest to capitalize on

²⁴² PUA § 2-113(a)(1)(i)(2).

²⁴³ PUA § 7-213(b).

²⁴⁴ Bannerman Direct at 7.

²⁴⁵ *In the Matter of the Review of Annual Performance Reports on Electric Service Reliability filed pursuant to COMAR 20.50.12.11*, Order No. 86578 (Aug. 27, 2014) at 4.

²⁴⁶ See PUA § 7-213(f); COMAR 20.50.12.02(E).

Exelon’s proven track record in order to accelerate²⁴⁷ and maximize grid reliability improvements, beyond what could be accomplished absent the merger. Through the conditions of this merger, Delmarva and Pepco commit to specific annual reliability performance metrics, in the context of a parent entity that has staked its management reputation – and monetary penalties, in this case - on the ability to achieve the reliability performance metrics within the specified annual reliability-related budgets²⁴⁸. As a result of this merger, Delmarva and Pepco will forgo recovery of any excess O&M spending, and will automatically remit penalties for the Commission’s consideration should reliability-related expenditures exceed the annual capital budgets.

Certainly reliability is a basic service that is purchased by ratepayers. Therefore, as this Commission found in the *FirstEnergy* order, we do not associate reliability-related commitments with a “benefit” of the transaction because customers “pay for and already should be able to count on a reliable system, so offering reliable services adds no new benefit.”²⁴⁹ However, seizing the opportunity afforded by this merger – to expand the expertise and resources at the disposal of Delmarva and Pepco – to improve performance with a reasonable boundary around the costs of doing so, is also certainly in the public interest and consistent with our aforementioned statutory obligation. As noted by PHI witness Charles Dickerson, “it’s more than best practices, it’s about how are things

²⁴⁷ Indeed, while many, if not all, of the reliability-related expenditures described in this section likely would have occurred absent the merger, the conditions on which we base our approval ensure that Delmarva and Pepco ratepayers will experience an acceleration of the commensurate reliability improvements.

²⁴⁸ To be clear, we are not pre-authorizing or otherwise issuing a determination on the prudence of expenditures described herein. We retain our authority to conduct a thorough prudence review of all expenditures, including reliability-related capital and O&M expenditures, as part of a future proceeding in which Delmarva or Pepco may seek recovery for investments discussed in this section.

²⁴⁹ FE/Alleghany 102 MD PSC at 35.

managed, what are the results, what different things can you do.”²⁵⁰ While there is a cost associated with reliability-related grid improvements, the conditions on which we approve this merger ensure that the public will realize the maximum value associated with such investments.

In addition to its commitments to maintain its vegetation management program and meet its RM 43 performance levels,²⁵¹ Exelon commits to “meet specific annual reliability performance metrics (as opposed to three-year averages), which are reinforced with automatic annual non-compliance cash payments (as opposed to the originally proposed ROE penalty).”²⁵² We appreciate the narrative described by the parties to the Multi-Party settlement agreement, and we look forward to their meeting the performance milestones. However, because of the variations in how quartiles are derived depending on the criteria and companies compared, rather than focus on Pepco’s proposed achievement of first quartile reliability and Delmarva’s proposed achievement of second quartile reliability in 2018, we will focus here instead on the actual performance values of SAIDI and SAIFI as commitments in our Conditions of approval for the merger. These reliability commitments to improve will be achieved within specified annual reliability related budgets, while forgoing recovery of spending in excess of O&M budgets, and with annual non-compliance cash payments for exceeding capital budgets. Related to the Commission’s RM43 standards, Exelon commits to Pepco achieving higher levels of performance for SAIFI and SAIDI. Approval of this condition does not affect the Commission’s authority to set more stringent reliability metrics in the upcoming RM43

²⁵⁰ Tr. at 4008.

²⁵¹ See Conditions 9 and 10, App. A.

²⁵² Joint Applicants’ Initial Brief at 31.

proceeding, as recognized in Condition 9.²⁵³ We have strengthened this commitment by restricting the reasons for non-compliance to their experiencing a major outage event as defined in COMAR 20.50.01.03(27)(a).

Table 1: Annual SAIDI and SAIFI Commitments (2016 – 2020)

Annual Commitment		2016	2017	2018	2019	2020
Pepco	SAIFI	1.05	0.99	0.95	0.92	0.90
	SAIDI	124	116	101	96	91
Delmarva	SAIFI	1.41	1.36	1.31	1.17	1.12
	SAIDI	151	145	139	105	97

The annual SAIDI and SAIFI commitments depicted in Table 1 and included in Condition 8 reflect incremental improvements compared to the Delmarva RM 43 proposal for SAIDI in years 2019 –2020 and for SAIFI in years 2018 – 2020.²⁵⁴ With respect to the RM 43 proposal filed by Pepco, the performance metrics specified in Table 1 represent on average a 16% incremental improvement to the RM 43 proposed SAIDI values in years 2016 – 2020, and on average a 10% incremental improvement to the RM 43 proposed SAIFI values in years 2016 – 2020.

If the utilities fail to achieve these commitments for the years of 2018, 2019, or 2020, the annual non-compliance payments, which will not be recoverable in rates, will be paid into the Electric Reliability Remediation Fund from which the funds can be

²⁵³ We note, however, that should the Commission adopt more stringent RM43 metrics, that any prudent expenditures in excess of the reliability-related capital budgets targeted at achieving the incrementally more stringent reliability standards would not trigger the compliance penalties on which this merger is conditioned. Put simply, the reliability-related capital and O&M budgets to which the companies commit as a result of this merger are linked to the SAIDI and SAIFI performance metrics specified in Condition 8 only.

²⁵⁴ Dickerson Rebuttal at 3-5; Dickerson Post Settlement Testimony at 3.

directed by the Commission to provide resources to improve electric service quality and reliability for the worst performing electric distribution feeders in the State.²⁵⁵ We have also doubled their penalty for non-compliance with either metric in each of the years, as depicted in Table 2 below.

Table 2: Compliance Payments (2018 – 2020)

		2016	2017	2018	2019	2020
Compliance Payment	Pepco \$11.0M	-	-	\$2.0M	\$3.0M	\$6.0M
	DPL \$4.5M	-	-	\$0.5M	\$1.0M	\$3.0M

The amount has been made more substantial to serve as a stronger incentive for the companies not to miss the reliability metric commitments on which this merger is conditioned. We also considered the relative value to the companies of the rate of return (“ROR”) they would earn on the capital expenditures projected for reliability work up to the budgeted amount.²⁵⁶

Since 2010, the Commission has been focused on putting measures in place that would improve reliability performance of Maryland distribution companies. As pointed out by OPC, “the result of the Commission’s intense focus on reliability ... has been the establishment of a regulatory regime that utilizes yearly reliability standards for the

²⁵⁵ PUA § 7-213(j). Civil penalties collected from an electric company may only be used for eligible reliability measures and projects in that service territory, and may not replace or substitute for money already budgeted for or spent on any project that the company is required to implement.

²⁵⁶ In a testimonial exchange, Commissioner Brenner and PHI witness Dickerson discussed that, assuming the ROR of 7.61% from Pepco’s last rate case, the utility could earn a return of approximately \$9.5 million on a projected reliability-related capital expenditure of \$126 million in calendar year 2018. Tr. 3887-3888 (Brenner/Dickerson). Using this same methodology, and using Delmarva’s ROR of 7.56% as a result of the most recent rate case, Delmarva could earn a return of approximately \$5.65 million on a projected reliability-related capital expenditure of \$74.7 million in calendar year 2018. Tr. 3908 (Brenner/Dickerson).

utilities and gathers information about the costs involved for each of the utilities in meeting different levels of reliability.”²⁵⁷ Maryland distribution utilities have improved since 2010, although the speed with which these improvements are taking place can be accelerated. Exelon has demonstrated its ability to achieve better results with the reliability improvements achieved by BGE within the two years since the closing of the Exelon – Constellation merger.²⁵⁸ Exelon’s commitment to reliability improvement “will result in shorter and fewer electric outages, and improved electric distribution system reliability for all Pepco and Delmarva customers.”²⁵⁹ We find that this commitment is in the public interest, and we include it as Condition 8 of the merger.

2. *Customer Satisfaction Scores*

We previously have found that there is a “significant and unsatisfactory disconnect between the public’s expectations of distribution system reliability” and our utilities’ performance.²⁶⁰ This disconnect still exists, and we find it an unsatisfactory situation, as do many of the parties in this proceeding. In accordance with the recommendations of Staff specifically, Exelon has committed to conducting a “root-cause analysis” of Pepco’s low customer satisfaction scores, and will develop an action plan to improve upon them. Exelon has committed to submit this analysis and action plan with the Commission no later than six months after the closing of the merger.²⁶¹ We conclude that this condition (and the resulting improvement in customer service) is consistent with

²⁵⁷ OPC Initial Brief at 37.

²⁵⁸ Butler Direct at 6; Alden Direct at 6; Reply Brief of the Joint Applicants at 20.

²⁵⁹ Joint Applicants’ Initial Brief at 16.

²⁶⁰ *In the Matter of the Electric Service Interruptions in the State of Maryland Due to the June 29, 2012 Derecho Storm*, 104 MD PSC 133, 138 (2013) (Derecho).

²⁶¹ Although the initial commitment did not specify that Exelon would conduct a “root cause analysis”, Mr. Dickerson did subsequently clarify – and we here confirm – that Exelon will conduct this form of an analysis. Tr. 3964-3965 (Dickerson).

the broader public interest, pursuant to PUA § 6-105(g)(4).²⁶²

3. *Resilience*

While much time and effort was spent during the course of this proceeding on reliability improvements, and rightly so, the reliability commitments do not necessarily address the issues of resilience and recovery of our electric distribution system during times of outages due to severe weather or other externalities. As noted in the recently-released Quadrennial Energy Review, severe weather is the leading cause of power disruptions, costing the U.S. economy from \$18 billion to \$33 billion a year.²⁶³

Maryland is not immune to this reality; in fact, it is our experience that the electric utility distribution infrastructure in Maryland, built up over the previous hundred years, is not resilient enough to withstand unscathed major storms such as the June 2012 Derecho. Furthermore, as revealed to us during our major outage event investigations, a public increasingly dependent on electricity to meet their daily needs is not satisfied with the vulnerability of the current infrastructure.²⁶⁴ It is for these reasons that we will accept Exelon's commitment to work on issues of resilience as well as reliability. We do not endorse any recommended funding or resource requirements at this time, but in recognition of the increasing need for the hardening of our electric systems in the face of increasing external forces, we accept Condition 12 as being consistent with the broader public interest.

²⁶² See Condition 11, App. A.

²⁶³ *Quadrennial Energy Review: Energy Transmission, Storage, and Distribution Infrastructure*, Department of Energy (April 2015), at S-10; available at: http://energy.gov/sites/prod/files/2015/04/f22/QUER%20Full%204.24.15_0.pdf.

²⁶⁴ Derecho, 104 MD PSC at 133.

Within six months after the closing of the transaction, Pepco has also committed to provide Montgomery and Prince George's Counties with an analysis of transmission- or distribution-system options, and associated costs, to enhance the reliability and resiliency of electric service to the Washington Suburban Sanitary Commission Potomac Water Treatment Plant.²⁶⁵ Although some parties contended, and we agree, that this commitment to support the resilience of a high priority facility should already be in the normal course of Pepco's business, we recognize its consistency with the public interest, and accept this condition which was negotiated by the Counties.

Pepco also has committed to continuing its strong working relationship with the Office of Emergency Management and Homeland Security as well as Montgomery and Prince George's Counties during storm-restoration events and will expand this relationship to include BGE.²⁶⁶ Again, we find that their continuance to do work lying squarely within the scope in of their existing obligation is not necessarily an incremental benefit, but we recognize its consistency with the public interest and accept this condition which was negotiated by the Counties.

F. Consumer Rate Impacts

In all aspects of our regulatory oversight, it is the statutory obligation of the Commission to ensure that public service companies provide adequate, economical, and efficient delivery of utility services in the State.²⁶⁷ Specific to this merger, we must also consider whether the proposed acquisition will potentially impact the rates and charges paid by customers, which we must weigh against the services, conditions of operation,

²⁶⁵ For the full text of this condition, *see* Condition 44, App. A.

²⁶⁶ For the full text of this condition, *see* Condition 45, App. A.

²⁶⁷ PUA § 2-113(a)(1)(i)(2).

and value provided by the public service company.²⁶⁸ The synergy savings made possible by this merger, coupled with the conditions on which we approve the transaction, provide a level of protection and enhanced value to the Delmarva and Pepco ratepayers that would not exist absent this transaction.

While some parties (such as AOBA) assert that the projected synergy savings are too vague to quantify,²⁶⁹ we find that by monetizing a portion of Exelon's expected synergies up front and investing these amounts as conditions of this merger – specifically, the rate credit, CIF, and Green Sustainability Fund, among others – this transaction can adequately and definitively capture a significant portion of the projected synergies for the tangible benefit of Delmarva and Pepco ratepayers. Furthermore, we note that Exelon has a proven track record in Maryland of realizing projected synergy savings – particularly operational savings, which will be incremental to the synergies monetized already through the merger conditions. Following the culmination of the Exelon – Constellation merger, BGE achieved synergy savings of \$15 million in 2012 and \$23 million in 2013; 113% and 104% of projections, respectively.²⁷⁰

It is the projected allocation of these same kinds of synergy savings, as expected by the public service company between shareholders and ratepayers, which serves as another prong of our statutory inquiry in this merger.²⁷¹ The Joint Applicants estimate that the total five-year net synergy savings allocable to PHI's Maryland utilities amount to \$37 million.²⁷² Given that we have conditioned approval of this transaction on an

²⁶⁸ PUA § 6-105(g)(2)(i).

²⁶⁹ Oliver Direct at 44-45.

²⁷⁰ Exelon Reply Brief at 24.

²⁷¹ PUA § 6-105(g)(2)(v)

²⁷² Khouzami Rebuttal at 12.

increased package of residential rate credits and customer investment funds amounting to \$109.2 million, this increases the ratio of direct rate credits/CIF funding versus allocated synergies to 2.95 – 13% higher than the ratio on which the Exelon – Constellation merger was conditioned.²⁷³ We have also conditioned approval of this transaction on a 0.07 ratio of credits/CIF to shareholder premium, which is in the range of ratios on which we have conditioned other mergers in this State.²⁷⁴ All mergers are different and justify different allocations of savings between ratepayers and shareholders; we find that the approximately 295%²⁷⁵ monetization of allocated synergies we have ordered here constitutes a direct and measurable benefit to the Delmarva and Pepco Maryland ratepayers. Furthermore, operational savings stemming from this merger will accrue in the next five years and beyond, thereby offsetting to some degree requested rate increases and constituting a *positive* ratepayer impact.

Exelon has committed that PHI, Pepco, and Delmarva will not incur any transaction-related costs associated with this merger, consistent with a condition required for the Exelon – Constellation merger, serving to mitigate any potential harm from increased costs to ratepayers due to the merger. To further mitigate the potential for rate increases due to the merger, Exelon has also offered for purposes of future rate cases to amortize any costs to achieve the synergy savings, in the event that such costs exceed the test year in question.²⁷⁶

²⁷³ See Joint Applicants’ Reply Brief at 44, App. D.

²⁷⁴ *Id.*

²⁷⁵ \$109.2 million / \$37 million = 295%.

²⁷⁶ See Condition 38, App. A. We note, however, that Company witness Khouzami testified “by year two the synergies are greater than the [costs-to-achieve]...This was to address if we were to file [a rate case] immediately after close.” Tr. 4358 (Khouzami).

The question we face throughout this statutory analysis is not whether rates will increase *at all* in the foreseeable future; but rather, whether rates will increase as a direct result of this transaction and whether the identified rate increase constitutes “harm.”²⁷⁷ During this proceeding, some parties alleged that the merger commitment to accelerate Delmarva’s and Pepco’s reliability metrics would cause customer bills to increase to unacceptable levels.²⁷⁸ We note, however, that both utilities had already filed projected reliability-related capital and O&M budgets for the years 2016 – 2020 in our RM 43 proceeding.²⁷⁹ Consequently, the reliance on these expenditures to justify a finding of harm *in this transaction* is misplaced, particularly since the conditions imposed by this merger limiting reliability-related expenditures greatly enhance the value realized by ratepayers.²⁸⁰

While we acknowledge that Pepco proposes to spend an incremental \$34 million on reliability-related infrastructure improvements beyond the RM43 filed budgets, the spending will be conditioned on our subsequent traditional prudence review, and also on

²⁷⁷ By statute, the Commission is directed to consider the potential impact of the *acquisition* on rates and charges paid by customers. PUA § 6-105(g)(2)(i).

²⁷⁸ OPC Initial Brief at 23-24; Surrebuttal of Arndt at 49; Response of OPC to the Joint Applicants’ Request for Adoption of the Settlements at 6; Brockway Partial Settlement Testimony at 13.

²⁷⁹ On this point, we find that the Dissent mischaracterizes the potential rate increases that may be attributable to this merger, as they assert incorrectly that the entire reliability-related spending projected to occur between 2016 and 2020 should be considered in this proceeding. Improvements to the utilities’ distribution system are a normal course of business, and would occur with or without the merger. The merger will not in fact result in a typical Delmarva customer paying *extra*, as the reliability-related spending discussed here was planned by Delmarva in advance of this transaction. Rather, the conditions on which this merger is approved will maximize the *value* that Delmarva customers receive from this investment by ensuring accelerated performance for the same budgeted amount. Similarly, Pepco customers will not be paying *extra* for their reliability service; while this merger envisions an incremental \$34 million reliability-related expenditure in the 2016 – 2020 timeframe, the investment is merely accelerated (and not unplanned) so that the commensurate reliability improvements are realized sooner. While we are cognizant that this acceleration will cost an estimated \$0.40 per month for which customers will obtain better electric service, we decline to consider this a “harm” as defined by PUA § 6-105(g) when balanced against the value of reduced outages for consumers it will bring. Section 6-105(g)(2)(i) carefully balances the “potential impact . . . on rates and charges” with the “services and conditions of operation of the public service company.”

²⁸⁰ See the section on *Issues of Reliability and Resilience* for further discussion of these conditions.

Pepco's ability to achieve the delineated system-wide reliability metrics. We do not find this incremental spending, recovered only upon a future finding of prudence, and upon evaluation of the improved performance of electricity services for the customers who demand it, as a "harm." Most, if not all, of these investments would have occurred over time absent the merger, to meet the increasing need for reliable power. This incremental spend is conditioned on the performance and budget compliance metrics described herein, which increases the value of the investment for its ratepayers, and reduces the potential risk of overspending, which is present with or without the merger.

Exelon has committed that PHI, Delmarva and Pepco will not incur any costs associated with this merger, including *goodwill*. "Exelon commits to the same rate impact protections adopted by the Commission in the Constellation Order: (1) Exelon will ensure the rate neutrality of merger accounting in Delmarva and Pepco rates, (2) Exelon will not seek recovery in rates of the acquisition premium, transaction costs, legal fees, or regulatory support fees associated with regulatory approval of the merger, (3) Exelon will indemnify Delmarva and Pepco for any income tax liabilities in excess of Delmarva's and Pepco's stand-alone liability, and (4) Exelon will ensure that the merger will not affect accounting and ratemaking treatments of Delmarva's and Pepco's accumulated deferred income taxes. Customer rates will also be protected by the commitment to stay within existing reliability budgets while achieving enhanced reliability performance standards."²⁸¹ With these protections in place we find that Delmarva's and Pepco's customers will not suffer any transaction-related harm as a result of this merger.

²⁸¹ Joint Applicants' Initial Brief at 16.

G. Impacts on Limited-Income Consumers

As a Commission, let there be no doubt that we are all keenly aware of the particular burdens that are borne by limited-income consumers, as pressures build for utilities to invest in reliability and grid resiliency initiatives, efficiency programs that help to control customers' bills, and the modernization of our aging infrastructure. Opponents of this merger contend that the transaction will harm ratepayers by unnecessarily leading to increased rates.²⁸² Certainly, as is consistent with Commission precedent and our obligation to ensure reliable, safe, and economic service to customers, if we concluded that this acquisition would result in increased rates to the detriment of consumers, then such a finding could not be offset by any collection of benefits and we would deny it.²⁸³ However, we find no increased risk of harm *attributable to this transaction* relating to consumer rates – including limited-income customers – which is the legal standard of review to which we are bound. The merger is not required to mitigate all (or any) future rate increases. Rather, the transaction is to consider, and mitigate if necessary, a rate increase found to be harmful because of this merger. This is especially true, given that such increases remain speculative until subjected to the Commission's traditional prudence review.

The Commission remains committed to improving the affordability of electric and natural gas service for Maryland ratepayers, especially those consumers of limited means. Improving the energy efficiency of limited-income households, which lowers usage and therefore the monthly energy bills, is a major component of the State's continuing energy efficiency and conservation goal. The conditions we require for approval of this merger

²⁸² OPC Initial Brief at 23-25.

²⁸³ Exelon/CEG, 103 MD PSC at 45.

include an explicit affirmation of this policy, consistent with the public interest. Of the \$31.5 million in energy efficiency spending committed to Prince George's and Montgomery Counties following closing of this merger, 20% of these funds shall be directed to programs benefiting low- to moderate-income residents.²⁸⁴ An additional 10% of energy efficiency funds in Montgomery County and at least 20% of energy efficiency funds deployed in the Delmarva service territory shall be deployed specifically to initiatives intended to increase the affordability of multifamily housing.²⁸⁵ Directing energy efficiency monies into weatherization and behavior-based programs will provide this particularly vulnerable segment of consumers with investments targeted at improving the long-term affordability of electric service to their homes. Prince George's County has identified communities with high concentrations of limited income customers that will receive targeted energy efficiency funding.²⁸⁶ Coupled with the short-term investment of a \$100 residential rate credit, limited-income customers will realize tangible direct benefits as a result of this transaction.

As directed by statute, we have considered the adequacy of the *current* funding of the Electric Universal Service Program ("EUSP") in providing assistance to eligible customers given that a rate credit shall be distributed to residential customers as a condition of this merger.²⁸⁷ In assessing the adequacy of current EUSP funding, we considered the most recent report filed by the Maryland state agency charged with administering limited-income energy assistance programs – the Department of Human Resources, Office of Home Energy Programs ("OHEP"). In its Fiscal Year 2014 Annual

²⁸⁴ See Condition 3, App. A.

²⁸⁵ *Id.*

²⁸⁶ Tr. 4663 (Bannerman).

²⁸⁷ PUA § 7-512.1(g)(1).

EUSP Report to the Commission, OHEP concluded that ratepayer funds collected for EUSP – combined with Strategic Energy Investment Fund and Regional Greenhouse Gas Initiative proceeds – have been sufficient to cover the EUSP annual budget to-date.²⁸⁸ In the context of this merger, given the adequacy of current EUSP funding as confirmed by OHEP, and because we condition already its approval on the distribution of a \$100 rate credit to residential customers (including limited-income customers), we find that it is more appropriate to direct additional funding to benefit limited-income single and multifamily customers into energy efficiency programs that will yield greater returns in the longer-term.

As an additional and immediate benefit derived from this transaction and available to assist limited-income customers in arrears, Delmarva and Pepco have offered to forgive all residential customer accounts receivable over three years old as of the closing date of the merger. While this commitment is offered to all residential customers, we find it will be of particularly acute relief to those customers who spend a higher percentage of their household income on energy costs. At a three year minimum arrearage, however, we find that this commitment is only a gesture, and not a tangible benefit. In an effort to reach more customers, and to meet the standard of a direct and tangible benefit, we instead condition the merger on debt forgiveness of all residential customer accounts receivable over two years old at merger closing.²⁸⁹ This condition is also expanded in recognition of the statutory directive that we give consideration to the adequacy of EUSP funding in the distribution of any credit stemming from a merger or

²⁸⁸ *In the Matter of the Electric Universal Service Program*, FY 2014 Electric Universal Service Program Annual Report to the Maryland Public Service Commission (Oct. 30, 2014) at 19.

²⁸⁹ The cost of this commitment is projected by PHI to be approximately \$647,156. Maillog No. 167505, Joint Applicants' Response to Commission's Data Request No. 19.

acquisition agreement.²⁹⁰ All Delmarva and Pepco residential customers would be eligible for this debt forgiveness, including those who purchased electricity from third-party suppliers.²⁹¹ The costs of this debt forgiveness, estimated at \$647,156, shall not be recoverable in rates, and will therefore benefit limited-income ratepayers by assisting in the reduction of their long-outstanding energy debt.

In addition, the Joint Applicants committed through this proceeding to pursue in good faith the development of a mutually agreeable Arrearage Management Plan (“AMP”) to further assist limited-income customers in arrears. As implemented by utilities in other jurisdictions, AMPs frequently combine energy efficiency offerings, budget billing, and arrearage forgiveness in an effort to increase the affordability of service for limited-income households. Given that Exelon repeatedly confirmed that best practices are shared across its regulated utilities,²⁹² the development of a Commission-approved, mutually agreeable AMP would result in the adoption of a policy in not only Delmarva and Pepco, but in the BGE service territory as well. We therefore condition approval of the merger on the good faith discussions of BGE, Delmarva, and Pepco with all interested stakeholders. We order that these discussions commence within 60 days of the closing of the merger and that any agreed-upon AMP will be submitted to the Commission for review and approval.²⁹³ We find that the development of a mutually agreeable AMP is consistent with the public interest.

²⁹⁰ PUA § 7-512.1(g).

²⁹¹ Tr. 4350 (Khouzami).

²⁹² Tr. 4352-4353 (Khouzami).

²⁹³ Because we have seen that such proposals can bear large residential ratepayer impacts – such as the estimated \$220 million annual price tag of the Affordable Energy Plan proposed to us in another context by Staff and OPC – we retain our discretion to review the AMP proposal that results from these good faith discussions. *See* Condition 18, App. A.

Also consistent with the public interest, and as an additional pillar of support to the limited-income communities affected by this transaction, the Joint Applicants committed to maintain the charitable contributions and traditional local community support in Delmarva's and Pepco's Maryland service territories post-merger. Under our statutory obligation to consider the potential impact of the acquisition on community investment,²⁹⁴ the pre-merger charitable contributions and community involvement represent voluntary company initiatives only. However, the level at which Exelon made this commitment on behalf of the PHI operating companies territories fell short of our finding it a direct and tangible benefit, as it was based on a three-year average which included the lowest contributions in at least five years. Accordingly, we require a condition that Exelon and its subsidiaries shall maintain at least an annual average of charitable contributions that exceeds a five-year 2010-2014 average level of \$656,000 for a period of ten years.²⁹⁵ Beginning within 90 days after merger close, Exelon and its subsidiaries shall make a good faith effort to obtain information from the charitable organizations to which they contribute to determine whether and how much of those contributions benefit each of Prince George's County, Montgomery County, and the District of Columbia.

In addition, PHI makes significant annual charitable contributions at its parent level to national organizations such as the United Way, and "the vast majority of those dollars stay in the service territory."²⁹⁶ PHI Witness Rigby described this annual charitable campaign as driven by its employees, for which PHI matches 50 cents for

²⁹⁴ PUA § 6-105(g)(2)(vii).

²⁹⁵ See Condition 19, App. A.

²⁹⁶ Tr. 1241 (Rigby).

every dollar of employee contributions.²⁹⁷ We commend PHI and its employees for this and similar programs of charitable giving, whether in money or through in-kind contributions. According to Mr. Rigby, such parent-level charitable contributions were “perhaps as much as over \$2 million”²⁹⁸ in calendar year 2013, in addition to the charitable donations disbursed directly by the utilities. We expect that Exelon will continue the charitable donations at the parent level by PHI and we direct that it note this in its annual reports of charitable giving.

The conditions on which we base its approval will provide direct and certain benefits to limited-income ratepayers, and are consistent with the public interest in pursuing a long-term solution.

H. Grid Modernization

In September, 2012, the Energy Future Coalition accepted the recommendation of the Governor’s Task Force on Grid Resiliency to design a Utility 2.0 pilot project intended to model the potential contours of the future electric utility service in Maryland.²⁹⁹ Of the six categories identified by the Energy Future Coalition as areas in which progress toward the utility of the future should occur,³⁰⁰ we are in the midst of aggressively pursuing many of the individual elements, particularly with respect to customer optionality, grid flexibility, distributed and renewable resources, and visibility enabled by wide-scale deployment of smart grid initiatives in the State.

²⁹⁷ Tr. 1243 (Rigby).

²⁹⁸ Tr. 1241 (Rigby).

²⁹⁹ *Utility 2.0: Piloting the Future for Maryland’s Electric Utilities and their Customers*, Energy Future Coalition (March 15, 2013), available at: <http://cleanenergytransmission.org/uploads/Utility%202010%20Pilot%20Project-reduced.pdf>.

³⁰⁰ *Id.* at 1.

Stemming from this merger, we find that the public interest will be further served by accepting the Joint Applicants' commitments to initiate a grid-of-the-future proceeding that acknowledges the elements already undertaken.³⁰¹ We have modified the timing of the proposed commitment in an effort to maximize its value. Given that certain grid modernization initiatives are already underway in the State, and because other specific initiatives (such as the Green Sustainability Fund investments, development of proposals for public-purpose microgrids, and enhanced interconnection standards for behind-the-meter small distributed generation resources) are contemplated by this merger, we direct Delmarva and Pepco to file with the Commission on or before July 1, 2016 a request to initiate a grid-of-the-future proceeding that builds upon the existing infrastructure and grid modernization initiatives in Maryland. At a minimum, the scope of this proceeding request shall examine opportunities to transform the electric distribution grid, including the incorporation of smart-grid technology, microgrids, renewable resources, and distributed generation. To support this effort, no later than July 1, 2016 Delmarva and Pepco shall fund up to \$500,000 for the Commission to retain a consultant to advise it regarding these issues – funding that Delmarva and Pepco shall not recover in rates.³⁰² We accept this commitment as being consistent with the public interest.

1. *Microgrid Development*³⁰³

Within 18 months after the closing of the merger, Pepco committed through the

³⁰¹ This Condition also provides additional assurances that following the acquisition, the Joint Applicants will evaluate the continuing investment needs for the maintenance of utility services, plant, and related infrastructure. *See* PUA § 6-105(g)(2)(ii).

³⁰² *See* Condition 14, App. A.

³⁰³ For the full text of this condition, *see* Condition 13, App. A.

Multi-Party Settlement to file with the Commission a proposal for pilot public-purpose microgrid projects to provide enhanced services to selected areas, including during emergency events. Also within their stated commitment, Pepco offered to develop one proposal for a microgrid project in Prince George's County and one proposal for a microgrid project in Montgomery County, and to coordinate with each county as well as MEA on the specific location of the projects. They further clarified that the county hosting the microgrid shall have final approval and consent of the location.

Subject to a prudency review by the Commission, Pepco offered to install the microgrids within five years after receiving approval by the Commission. At this time, although we recognize the potential to serve the community by providing, among other public purposes, electricity for citizens during periods of extended outages, we do not endorse the prudency of ratepayer-funded public-purpose microgrid projects at this time, nor do we endorse the concept that ratepayers alone should be solely responsible for funding such projects. These microgrids have the potential to serve communities as a whole, not solely as ratepayers. We recognize that this Condition was largely the result of settlement negotiations between several parties, and we conclude that this commitment to develop a proposal for pilot public-purpose microgrid projects in Pepco's Maryland service territory is consistent with the public interest as required by PUA § 6-105(g)(4).

The proposal for this public-purpose microgrid shall inform and be incorporated into the development of the request to initiate a grid-of-the-future proceeding, as appropriate. Since the timing of this proposal and of the request to initiate a proceeding is inexorably linked, we direct Pepco to file with us no later than July 1, 2016 an interim progress report on the legal, financial, and practical issues associated with the planning

and development of the microgrid project proposals. We expect that this progress report may dovetail into the grid-of-the-future proceeding as appropriate, and allow us to consider comprehensively such matters that will arise regarding potential future ownership and operational structures.

2. *Interconnection, Net Metering, and Distributed Generation*³⁰⁴

Augmenting the commitment by Exelon to maintain Delmarva's and Pepco's interconnection and net metering programs,³⁰⁵ the Joint Applicants entered into a settlement with TASC to enhance its interconnection process for behind-the-meter distributed renewable generation and storage energy projects in Maryland. However, parties such as MEA and Staff expressed concerns regarding various aspects of the Settlement, including information-sharing provisions limited to certain parties and a perceived discrimination in favor of certain types of generation.³⁰⁶ As such, we amend certain aspects of the commitment so that the enhancements contemplated by the parties are consistent with the public interest.

Specifically, we modify the commitment so that it is applicable to all small distributed generation resources; the existing Maryland Small Generator Interconnection Standards ("SGIS") do not discriminate in favor of certain types of generation, and we find such a limitation to be unwarranted here. Further, we expand the information-sharing provisions to include Commission Staff and other interested stakeholders, as all parties – including TASC – acknowledged that a perceived lack of transparency could be

³⁰⁴ For the full text of this condition, *see* Condition 16, App. A.

³⁰⁵ *See* Condition 15, App. A.

³⁰⁶ *See* Lucas Settlement Testimony at 9-20.

problematic.³⁰⁷ We also modify the commitment to remedy some of the perceived ambiguities associated with the proffered consideration of hourly load shape, hourly generation profiles, and minimum daytime load (“MDL”); we condition approval of the merger on Delmarva’s and Pepco’s adoption of the MDL supplemental review screen established in FERC Order 792.³⁰⁸ Lastly, we clarify that the categories of size restrictions depicted on the circuit maps will be made available for information purposes only, and will neither yield automatic cost allocation assumptions for resulting upgrades nor supplant the determination of the level of utility review afforded to the interconnection request as described in COMAR 20.50.09.08, unless directed by subsequent Commission order. Subject to these modifications, we find that the Joint Applicants’ commitment to enhanced interconnection processes for behind-the-meter small distributed generation resources is in the public interest as required by PUA § 6-105(g)(4).

3. *Renewable Generation Development*³⁰⁹

Exelon has committed to develop or assist in the development of 15 MW of solar generation in Maryland, with 5 MW to be developed in each of Prince George’s County, Montgomery County, and Delmarva’s Maryland service territory. Exelon will not recover the costs associated with this renewable generation through Delmarva’s or Pepco’s rates. Additionally, the Solar Renewable Energy Certificates (“SRECs”) created by these projects shall not be used for Maryland Renewable Portfolio Standard

³⁰⁷ Gable Settlement Testimony at 3.

³⁰⁸ Lucas Settlement Testimony at 16-17.

³⁰⁹ For the full text of this Commitment, *see* Condition 7, App. A.

compliance prior to 2020.³¹⁰ However, Exelon may apply to the Commission for a waiver from prohibition of SREC usage prior to 2020, which may be granted upon a finding of good cause.

Furthermore, in lieu of the proposed Green Sustainability Fund allocation to the Delmarva Maryland service territory, Exelon shall, by December 31, 2018, develop or assist in the development of an *additional* 5 MW of solar or other Tier One renewable resources in the Delmarva Maryland service territory.³¹¹ In light of the benefit that the generation of renewable resources provides to all Maryland citizens, we conclude that this condition is consistent with the public interest as required by PUA § 6-105(g)(4).

I. Employment and Workforce Development

In considering whether to approve this transaction, we are required by statute to review the potential effect of the merger on employment by Delmarva and Pepco.³¹² In considering this transaction as a whole, we observe that having the three contiguous Maryland distribution utilities share common support functions among themselves and with Exelon's other distribution utilities presents the opportunity to leverage greater economies of scale than could be achieved absent the merger, especially for some functions among the geographically-proximate Exelon utilities, thereby increasing the potential for improved reliability performance and synergy savings. On the other hand, as is the case with all mergers, synergy savings that may translate to savings for customers also may translate to a less beneficial result: in achieving some of the projected

³¹⁰ However, RECs created in prior years may be banked and may then be used in 2020 or thereafter as permitted by law.

³¹¹ If Exelon elects to develop solar as this incremental 5 MW of Tier 1 renewable resource, the same prohibition on SRECs generated by the project(s) applies through 2020, subject to the waiver provision described herein.

³¹² PUA § 6-105(g)(2)(iv).

synergy savings, we acknowledge that the realization of operational synergies in particular may result in negative employment impacts.

In the absence of the merger, both Delmarva and Pepco would be free to reduce or otherwise adjust employment levels without seeking prior Commission approval to do so – consistent of course with their obligations to provide safe and reliable service to customers. However, in this case, the transaction is the reason for the synergy savings as well as the potential reductions in employment. To the extent that this transaction will increase the risk of involuntary attrition at Delmarva or Pepco in an effort to realize projected synergy savings, we condition approval of this merger on the acceptance by the Joint Applicants of terms designed to mitigate the potential harm. To satisfy this requirement, we accept the Joint Applicants’ commitment to honor all existing collective bargaining agreements, pension and health retiree benefit obligations, and further, to not permit a net reduction in employment due to involuntary attrition for a period of two years after the merger.³¹³ Additionally, we condition approval on Exelon’s good faith effort to hire, within two years after the merger closing date, at least 110 union workers in Maryland.³¹⁴ In further support of this mitigation strategy, we direct Delmarva and Pepco to, on an annual basis and for the first three years following closing of the merger, report to the Commission regarding employment levels at the respective companies. The reports shall detail all job gains and losses, including whether the attrition was involuntary or voluntary, and delineated using an industry-accepted categorization method such as by SAIC code. In the aggregate, we find that the potential risk of incremental harm due to employment impacts directly attributable to this merger is

³¹³ See Condition 21, App. A.

³¹⁴ See Condition 22, App. A.

sufficiently mitigated through application of these conditions, and satisfies the no harm requirements of PUA § 6-105. Furthermore, these conditions will be tracked to ensure such mitigations are effective.

In addition, we note the proactive commitment by the Joint Applicants to develop a potential workforce of the future within the Delmarva and Pepco Maryland service territories. As a direct result of this transaction, Exelon will fund non-recoverable workforce development initiatives – incremental to any existing or planned Delmarva or Pepco initiatives³¹⁵ – in the amount of \$4 million (\$1.24 million to Prince George’s County; \$1.70 million to Montgomery County; and \$1.06 million for use by selected public institution(s) of higher learning in the Delmarva Maryland service territory).³¹⁶ We have concluded that rather than allocating \$1.06 million among ten counties in the Delmarva service territory over a four-year period, it would be much more cost effective for Delmarva to partner with one or more institutions of higher learning for the same purpose. The potential of these initiatives to yield a supply of Maryland-based skilled employees constitutes not only an investment in the community stemming from this transaction,³¹⁷ but also a likely invaluable contribution to the employment ranks of all Maryland electric companies given the universal issue of a graying workforce in the utility industry. As such, we find that the condition pertaining to the funding of workforce development issues is consistent with the public interest, convenience, and necessity.

³¹⁵ Tr. 4345 (Khouzami).

³¹⁶ See Condition 24, App. A.

³¹⁷ The potential impact of the acquisition on community investment must be considered by the Commission in evaluating a merger application. PUA § 6-105(g)(2)(vii).

As part of the employment and workforce development commitments proffered by the Joint Applicants, we accept the pledge of PHI, Pepco, and Delmarva to continue their commitment to both workforce and supplier diversity. Specifically, Exelon agrees to fully support the goals of the Supplier Diversity Memorandum of Understanding (“MOU”) signed by Delmarva and Pepco on February 6, 2009, including all of the terms and conditions thereof, and shall use its best efforts to assist Delmarva and Pepco with the implementation of and meeting the goals of the MOU.

In the context of our annual supplier diversity public conferences, the Commission and stakeholders alike have expressed concern regarding Delmarva’s and Pepco’s pace of improvement to meet the goals outlined in the MOU. Therefore, based on the voluntary commitment by Exelon to “fully support” the goals of the MOU, we condition approval of this merger upon specific actions aimed at improving Delmarva and Pepco’s pace of improvement. Delmarva and Pepco shall file a plan with the Commission within 180 days of the closing of this transaction detailing actionable steps and an associated timeline by which the companies will reach higher supplier diversity targets pursuant to the MOU.³¹⁸ Providing greater opportunity for minority-, women-, and disabled-service veteran-owned enterprises to contract with utilities is clearly consistent with the public interest. Ultimately, supplier diversity must be an integral part of the procurement process, and should foster sustainability and enhance accessibility for new products and services.

³¹⁸ See Condition 20, App. A.

J. General Public Interest Conditions

In addition to the various conditions discussed, the Joint Applicants have also committed to several other actions that we generally accept as in the public interest.

For example, they have committed to fund up to \$3.5 million for a multi-year “Sediment-Study” to quantify the amount of suspended sediment concentration, associated nutrients, suspended sediment load, and nutrient load present in the major points to the Lower Susquehanna River Reservoir System and the upper Chesapeake Bay.³¹⁹ Pepco also has committed to cooperate with state and local agencies, establishing a pilot program in its Maryland service territory by which Pepco will grant an appropriate public or private entity a limited non-exclusive license to assess specified portions of Pepco’s transmission line property for recreational and transportation use by the public.³²⁰ We do not endorse any recommended funding or resource requirement at this time, and further require as part of this condition that local contribution towards the pilot project be made so as to minimize ratepayer impact. As conditioned within this order, we accept this commitment as being consistent with the broader public interest.³²¹

Lastly, we condition approval of this merger on the inclusion of a “Most Favored Nations” clause identical in substance to that adopted by the Joint Applicants in the New Jersey and Delaware jurisdictions.³²² We find that, consistent with our statutory direction to consider the projected allocation of savings, as well as any other issues that the

³¹⁹ For the full text of this condition, *see* Condition 42, App. A.

³²⁰ For the full text of this condition, *see* Condition 43, App. A.

³²¹ On January 13, 2015, the Commission held Public Hearings in Rockville, Maryland, where 58 citizens signed up to provide public comments in this merger proceeding. On January 14, 2015, the Commission held Public Hearings in Largo, Maryland, where 28 citizens signed up to provide public comments in this merger proceeding. The Commission heard testimony from citizens at both Public Hearings in support of public use of designated portions of Pepco’s transmission line property for recreational purposes.

³²² *See* Condition 46, App. A.

Commission considers relevant to the assessment of the acquisition in relation to the public interest, convenience, and necessity,³²³ it is appropriate for us to impose this condition. Doing so will ensure that the synergies realized by this merger are properly and appropriately allocated across the affected service territories – consistent with the public interest – by requiring the Joint Applicants to increase the financial benefits, credits, or payments to Delmarva and Pepco Maryland customers if, on a per-distribution customer basis, the benefits provided to other jurisdictions are materially more beneficial in the aggregate than the terms of this Order.³²⁴ As captured by Condition 28, Exelon has consented to our jurisdiction for all matters related to the merger and the enforcement of the conditions set forth herein to the extent relevant to operations of Delmarva or Pepco in Maryland. We find that conditioning the merger on inclusion of a Most Favored Nations clause will enhance both our ability to enforce general principles of fairness relevant to the operations of Delmarva and Pepco in Maryland, as well as the overarching finding of public interest, convenience, and necessity on which approval of this merger is contingent.

V. CONCLUSION

For the reasons set forth above, we find that the merger satisfies the three-part test of PUA § 6-105(g)(3)(i), and therefore approve it, subject to the conditions set forth in

³²³ PUA § 6-105(g)(2)(xii).

³²⁴ Consistent with the application of the Most Favored Nations clause in the New Jersey and Delaware settlements, the following three elements shall not be considered in the determination of whether the benefits in other jurisdictions are materially more beneficial than the terms of this condition: (a) employment and hiring commitments; (b) the existing level of charitable contributions; and (c) reliability performance and investment. Furthermore, we note that Company Witness Khouzami testified that renewable energy commitments are similarly excluded from the Most Favored Nations provision. Tr. 4263 (Khouzami).

Appendix A to this Order, which we consider to be merger conditions pursuant to PUA § 6-105(g)(3)(iii) and therefore not subject to modification without Commission approval.

IT IS THEREFORE, this 15th day of May, in the year Two Thousand and Fifteen by the Public Service Commission of Maryland,

ORDERED: (1) That the Application for Approval of the merger submitted by Exelon, Delmarva, Pepco and PHI in this proceeding is hereby granted, subject to the conditions and requirements contained in this Order and Appendix A;

(2) That Exelon, Delmarva, Pepco and PHI shall notify the Commission in writing by May 26, 2015, whether they accept the modified conditions attached to this Order as Appendix A;

(3) That Exelon, Delmarva, Pepco and PHI remain subject to the Commission's jurisdiction for enforcement of the provisions of this Order; and

(4) That all other motions not granted herein are denied.

/s/ W. Kevin Hughes _____

/s/ Lawrence Brenner _____

/s/ Kelly Speakes-Backman _____

Commissioners

APPENDIX A

Case No. 9361

May 15, 2015

Condition 1: Residential Rate Credit

Exelon shall fund a one-time direct rate credit of \$100 per Pepco Maryland residential customer, \$50 of which shall be credited within 60 days after consummation of the merger and the remaining \$50 to be credited in the billing cycle occurring 12 months after the first installment. The Pepco Maryland residential direct rate credits will amount to approximately \$48.6 million and shall not be recoverable in rates. The first rate credit installment shall be provided for all Pepco Maryland residential customers of record with active accounts as of the billing cycle commencing 30 days after consummation of the merger. The second rate credit installment shall be provided for all Pepco Maryland residential customers of record with active accounts as of the billing cycle occurring 12 months after the first rate credit installment.

Exelon shall fund a one-time direct rate credit of \$100 per Delmarva Maryland residential customer in direct rate credits, \$50 of which shall be credited within 60 days after consummation of the merger and the remaining \$50 to be credited in the billing cycle occurring 12 months after the first installment. The Delmarva Maryland residential direct rate credits will amount to approximately \$17.4 million and shall not be recoverable in rates. The first rate credit installment shall be provided for all Delmarva Maryland residential customers of record with active accounts as of the billing cycle commencing 30 days after consummation of the merger. The second rate credit installment shall be provided for all Delmarva Maryland residential customers of record with active accounts as of the billing cycle occurring 12 months after the first rate credit installment.

Condition 2: Customer Investment Fund

Exelon shall provide funding for energy efficiency programs through a Customer Investment Fund (“CIF”) of \$43.2 million for the benefit of Delmarva and Pepco customers in each utility’s service territory in the State of Maryland. Delmarva and Pepco shall not seek recovery in rates for the CIF. The CIF shall be distributed in the following manner:

- i. Exelon shall provide \$31.5 million in funding for energy-efficiency program support, including approximately 20% for limited-income customers, in the Pepco Maryland service territory (derived from prorating on a per customer basis of \$13.2 million for Prince George’s County and \$18.3 million for Montgomery County) for programs to be directed and administered by Prince George’s County and Montgomery County as set forth in Condition 3 below.
- ii. Exelon shall provide Delmarva \$11.7 million in funding for incremental energy-efficiency program support in the Delmarva Maryland service territory. Delmarva shall use this funding to implement new, innovative energy efficiency programs – including programs benefitting limited-income customers – that are incremental to existing EmPOWER Maryland programs. The program(s) design will be determined through a subsequent Commission hearing, but may involve an on-bill financing program for small businesses and initiatives designed to facilitate energy efficiency upgrades in multifamily dwellings.

Condition 3: CIF-Funded Energy Efficiency Program Support

A. Pepco shall cooperate with Prince George’s County on the development and implementation of energy-efficiency programs for Pepco customers within Prince George’s County to be administered by Prince George’s County or agencies designated by Prince George’s County. Prince George’s County shall endeavor to direct at least 20% of the funds to benefit limited- and moderate-income residents. The programs will entail:

- i. **ENERGY STAR Certification & Green Leasing Program.** This program is designed to provide funding to make existing commercial buildings in Prince George’s County more energy efficient, enough so that the building itself can be certified by ENERGY STAR developed by the United States Environmental Protection Agency. Funds would be provided to assist commercial buildings in applying for the ENERGY STAR certification process itself. In addition, funds would be used towards various energy-efficiency, water efficiency, and retrofitting measures performed to achieve ENERGY STAR Certification. To receive funding from this program, commercial buildings must first apply to one of Pepco’s applicable EmPOWER Maryland programs. Funds from this program would be used to supplement the costs of those measures. In addition, the buildings would be required to adopt various best practices in Green Leasing to align the interests of landlords and tenants so that they are both financially motivated to engage in energy efficient tactics in buildings to achieve energy savings in both decreased energy usage and cost.

- ii. **Transforming Neighborhoods Initiative Comprehensive Energy Audit, Retrofit and Clean-Energy Program.** This program joins ongoing efforts and programs by Prince George’s County to uplift six of its neighborhoods that face significant economic, health, public safety and educational challenges. This program consists of providing assistance to residents in funding energy-efficiency and water efficiency measures, and installation of rooftop solar upon the successful implementation of those efficiency measures. In addition, this program provides residents of these communities with additional financial incentives, and education via an “Energy Coach” in order to combat some of the challenges facing the neighborhoods. To receive funding from this program, residents must first apply to one of Pepco’s applicable EmPOWER Maryland programs. Funds from this program would be used to supplement the costs of those measures.

Pursuant to Condition 2, Exelon shall provide, in equal installments over 3 years, a total of \$13.2 million in CIF funding directly to Prince George’s County for such programs. Energy efficiency programs implemented by Prince George’s County do not require review and approval by the Commission. Pepco shall not seek recovery in rates of the CIF funds, nor will Pepco attribute any energy efficiency savings derived from the

CIF-funded energy efficiency programs implemented by Prince George's County toward its Commission-established EmPOWER goal.

B. Pepco shall cooperate with Montgomery County on the development and implementation of energy-efficiency programs for Pepco customers within Montgomery County to be administered by Montgomery County Government, Montgomery County agencies, or organizations designated by the County. Montgomery County shall endeavor to direct at least 20% of the funds to benefit limited- and moderate-income residents in both single- and multifamily communities. Montgomery County shall work with low and affordable housing stakeholders (including NCLC and NHT and others) to develop multifamily specific programming. Montgomery County shall target a minimum of 10% of incentives and financing to benefit multifamily communities; if funding cannot be effectively used it may be allocated to other sectors. The programs will entail:

- i. Montgomery County Green Bank – In addition to the Green Sustainability Fund described in Condition 6 below, Montgomery County will administer and capitalize a Green Bank using CIF funds to implement a comprehensive package of programs to leverage investment in clean energy and energy-efficiency technologies (as described in the initial brief filed by Montgomery County). The Montgomery County Green Bank will be designed to complement the EmPOWER Maryland Programs and other state initiatives. The Montgomery County Green Bank will provide additional CIF funds at the local level to supplement the initiative described in Condition 6.
- ii. Energy Coach Network – Montgomery County will build an Energy Coach Network to ensure community awareness and access to energy efficiency programs. Montgomery County's Energy Coach Network will provide customized, community-level education on the benefits of energy efficiency, availability of programs, and opportunities for assistance. A central manager will ensure consistent messaging about the Network's mission. Coaches located at regional service centers, local green groups, or other areas

of community interaction will provide direct services at the neighborhood level. The network will raise overall community awareness of program offerings from state, local, and federal programs, including existing EmPOWER programs. Specialized staff will work within the network to facilitate limited-income consumer access to subsidies and assistance programs.

- iii. Expanded Weatherization Programs – Montgomery County will reduce the energy-related expenses of limited-income consumers through expanded weatherization programs. These programs augment existing EmPOWER and federal funding for limited-income customer retrofits to provide deeper, more extensive improvements to limited-income housing stock. This may include more comprehensive remediation of the building envelope, electrical system, and space-conditioning systems. Montgomery County anticipates this program to expand the scope of individual retrofits by remediating conditions that need to be resolved before a retrofit can proceed, and to serve additional limited-income residents.

Pursuant to Condition 2, Exelon shall provide, in equal installments over 3 years, a total of \$18.3 million in CIF funding directly to Montgomery County for such programs. Energy efficiency programs implemented by Montgomery County do not require review and approval by the Commission. Pepco shall not seek recovery in rates of the CIF funds, nor will Pepco attribute any energy efficiency savings derived from the CIF-funded energy efficiency programs implemented by Montgomery County toward its Commission-established EmPOWER goal.

C. Pursuant to Condition 2, Exelon shall provide Delmarva, in equal installments over 3 years, a total of \$11.7 million in CIF funding to fund additional energy efficiency programs to benefit customers in the Delmarva Maryland service territory. Delmarva shall use this funding to implement new, innovative energy

efficiency programs – including programs benefitting limited-income customers – that are incremental to existing EmPOWER Maryland programs. The program(s) design shall be determined through a subsequent Commission hearing. Per the settlement agreement with NCLC, NHT, and others, Delmarva shall direct at least 20% of the funds into programs dedicated to energy efficiency investments in affordable multifamily housing. Other program offerings may involve on-bill financing programs for small businesses. Delmarva, after consultation with Commission Staff and other interested stakeholders, is directed to file a proposal regarding energy efficiency program(s) targeted at multifamily affordable housing no later than March 1, 2016.

D. Energy-Performance Benchmarking: Montgomery County Bill 2-14 (Environmental Sustainability – Buildings – Benchmarking) requires building owners to benchmark building energy performance. To benchmark, building owners must have access to utility data including, where separately metered, that of tenants. Pepco actively participates in the County’s working groups established to implement and refine the benchmarking program. In addition, Pepco has developed tools and processes to facilitate access to energy data by building owners, particularly in situations where the building owner may not have access to tenant data. Pepco shall continue its collaboration to support Montgomery County’s energy-performance benchmarking efforts. Pepco shall also continue to make available tools and processes to provide building owners accessible, useful and accurate energy-performance data in Prince George’s County and Montgomery County.

In addition, throughout Delmarva's and Pepco's service territories, Delmarva and Pepco shall provide building owners and managers of multifamily buildings (defined as buildings with five or more residential units) in Delmarva's or Pepco's service territories with timely whole-building and unit type (if available) energy usage data (at no additional cost) that will allow owners to benchmark energy usage of their buildings and set utility allowances, upon request, in a format reasonably acceptable to the parties to preserve the privacy of individual customer consumption data. Representatives of Delmarva and Pepco with appropriate authority regarding the sharing of this data shall meet with representatives of the Maryland Affordable Housing Coalition ("MAHC"), Housing Association of Non-profit Developers ("HAND"), and other interested stakeholders, to work out the necessary data sharing protocols to support development of acceptable utility allowances, with the good faith goal of implementing agreed-upon protocols within one year of the closing of the merger.

Condition 4: Energy Efficiency

Delmarva and Pepco shall maintain and promote existing energy efficiency and demand response programs consistent with the direction and approval of the Commission.

Condition 5: Enhanced Energy Efficiency Plans

The Joint Applicants shall cooperate with Staff and other stakeholders to develop and file a distinct set of milestones as to how they will accelerate and enhance BGE's, Delmarva's, and Pepco's EmPOWER Maryland plans, including proposed penalties for

failure to meet Commission-approved goals. This proposal shall be filed with the Commission no later than March 1, 2016.

Condition 6: Green Sustainability Fund

Exelon shall establish a Green Sustainability Fund (the “Fund”) to stimulate public and private investment within Pepco’s Maryland service territory in: solar, storage and other behind-the-meter and distributed generation; energy-efficiency and whole home solutions; utility 2.0; resiliency measures; microgrids; water conservation in buildings; clean transportation; community solar; and similar developing energy technologies (“Qualifying Projects”).

A. Allocation of Fund – The Fund shall include a \$14.4 million allocation to the Pepco Maryland service territory. Maryland funds shall be allocated with \$8.4 million of the Fund to Montgomery County, and \$6.0 million to Prince George’s County, which is derived from prorating on a per customer basis. Exelon shall advance directly the allocated portions of the Fund to Montgomery County and Prince George’s County (the “Counties”) within 60 days of merger closing.

B. Qualified Borrowers – The Fund shall be used by the Counties to help finance Qualifying Projects installed by or on behalf of: county, municipal and other local government organizations; universities and community colleges; 501(c)(3) organizations and similar charitable groups; limited- and moderate-income residents, affordable multifamily building owners, and commercial businesses; and commercial businesses (“Qualified Borrowers”). Qualified Borrowers do not include established, credit-worthy

organizations that have access to conventional financing, excepting government organizations, universities and community colleges. Determinations of Qualified Borrowers shall be made by the Counties.

C. Co-Investors – In order to leverage the Fund for maximum effectiveness, the Counties shall seek to maximize use of the Fund in partnership with other public and private financing sources to arrange financing for Qualifying Projects that cannot be fully funded through conventional financing and equity sources. The Counties may seek to arrange co-investments with regional, community and minority banks and Treasury Certified Community Development Financial Institutions (“CDFIs”). Exelon shall put forth best efforts to encourage its community and minority banking relationships and other financing sources to co-invest with the Counties on financing for Qualified Projects.

D. Types of Financial Support – Financial assistance from the Fund shall be extended to Qualified Borrowers through the Counties in the form of low-interest loans, interest subsidies, purchases of participations in loans made by co-investors, subordinated loans, partial loan guarantees or similar credit enhancements, and loan-loss protection. The Counties shall endeavor to direct at least 20% of the Fund for interest-free loans for Qualifying Projects to 501(c)(3) organizations, similar charitable organizations, and affordable multifamily housing.

E. Terms of Financial Support – Interest rates and similar charges on loans provided by the Fund (other than interest-free loans as noted above) shall be determined

by the Counties. Interest and other charges on loans provided by the Fund shall be retained by the Counties to defray administrative costs or provide funding for other Qualifying Projects.

- i. The Fund will be available for 20 years after merger closing. Loans provided by the Fund will mature in 15 years or less. Other terms and conditions of financial support will be determined by the Counties and co-investors.
- ii. During the 20 years that the Fund is available, payments of principal and interest and other recoveries on loans made from the Fund may be redeployed by the Counties into new loans to Qualified Borrowers for Qualified Projects, provided that all loans must mature no later than 20 years following closing of the merger. After 20 years following closing of the merger, payments of principal (and other recoveries applied to principal on loans) made from the Fund, but not interest and other charges which will be retained by the Counties, will be returned to Exelon following receipt by the Counties on a quarterly basis but only to the extent actually received by the Counties.

F. Administration – The Counties and their co-investors shall be responsible for administration of the loans made from the Fund, including the application process, credit decisions, monthly statements, monitoring of collateral, if any, collection of interest and principal, reporting, and legal and regulatory compliance. The Counties shall provide Exelon with adequate financial information on the Fund status and performance, as defined by Exelon, as may be needed for financial reporting and other regulatory purposes. The Counties may use a portion of the Fund to pay reasonable costs of administration of the Fund and loans made from the Fund. Subject to applicable law, when using third parties for loan administration or in contracting with suppliers, the Counties shall use their best efforts to utilize qualified community and minority banks

and persons meeting the definition of a “Minority Business Enterprise” (“MBE”) under the Memorandum of Understanding between the Commission and Delmarva and Pepco. The Counties will provide periodic reports to the Maryland Energy Administration on the activity and performance of the Fund.

G. Design Flexibility – The program is intended to provide flexibility for the Counties to establish specific parameters for use and preservation of the Fund, determination of Qualifying Borrowers, review and approval of Qualifying Projects, selection of co-investors, and detailed terms and conditions of loans and other financial support from the Fund. At the end of the initial 20 year period following closing of the merger, Exelon shall determine whether and how to extend or expand the program and the Fund, based on loss experience, loan demand, and other measures of success of the program. Unless otherwise determined at that time, original principal of the Fund not committed to Qualified Projects within 20 years after closing of the merger shall revert to Exelon.

H. Ratepayer Protection – The Fund is in addition to the \$43.2 million CIF and the approximately \$66 million in residential rate credits. Pepco shall not seek recovery in utility rates for the establishment of the Fund or any expense or loss associated with the Fund.

Condition 7: Renewable Generation Development

Exelon and its subsidiaries shall provide the following to support development of renewable generation:

- i. Exelon shall, by December 31, 2018, develop or assist in the development of 15 MW of solar generation in Maryland – 5 MW of which will be located in Prince George’s County, 5 MW of which will be located in Montgomery County, and 5 MWs of which will be located in the Delmarva service territory. The construction shall be competitively bid, and Exelon shall sell the output of this solar generation under one of its standard commercial offerings in the market. Exelon shall not seek to recover the costs of this commercial solar development through Pepco’s or Delmarva’s retail rates. Exelon shall retain the solar renewable energy certificates (“SRECs”) and tax attributes for the solar projects; however, the SRECs created by such projects may not be used for Maryland Renewable Portfolio Standard compliance prior to 2020. SRECs created in years prior to 2020 may be banked and then used in 2020 or thereafter, to the extent permitted by law. Additionally, Exelon may apply for, and the Commission may grant, a waiver from prohibition of SREC usage prior to 2020, upon finding of good cause by the Commission.
- ii. In addition to the 5 MW of solar set forth above, Exelon shall, by December 31, 2018, develop or assist in the development of an incremental 5 MW of solar or other Tier 1 renewable resources in the Delmarva service territory. The construction shall be competitively bid, and Exelon shall sell the output of this Tier 1 generation under one of its standard commercial offerings in the market. Exelon shall not seek to recover the costs of this commercial Tier 1 resource development through Delmarva’s retail rates. Exelon shall retain the renewable energy certificates (“RECs”) and tax attributes for the Tier 1 resource; however, the RECs created by such projects may not be used for Maryland Renewable Portfolio Standard compliance prior to 2020. RECs created in years prior to 2020 may be banked and then be used in 2020 or thereafter to the extent permitted by law. Additionally, Exelon may apply for, and the Commission may grant, a waiver from prohibition of Tier 1 REC usage prior to 2020, upon finding of good cause by the Commission.
- iii. Exelon shall provide \$5 million of capital at market rates for the development of renewable-energy projects in Montgomery County (for the community or government buildings).
- iv. Pepco shall coordinate with Montgomery County and Prince George’s County to facilitate planning for and interconnection of renewable generation to be developed by the Counties for governmental buildings or public facilities.

Condition 8: Reliability and Quality of Service

Delmarva and Pepco commit to improve system reliability in their Maryland service territories and specifically to achieve the following minimum annual reliability performance levels as measured using the Commission’s current methodology for calculating SAIFI and SAIDI, with the exclusion of major outage events:

Table 1: Annual SAIDI and SAIFI Commitments (2016 – 2020)

Annual Commitment		2016	2017	2018	2019	2020
Pepco	SAIFI	1.05	0.99	0.95	0.92	0.90
	SAIDI	124	116	101	96	91
Delmarva	SAIFI	1.41	1.36	1.31	1.17	1.12
	SAIDI	151	145	139	105	97

These reliability performance levels shall supersede the currently-proposed RM 43 performance levels submitted by Delmarva and Pepco for years 2016-2020 that are under consideration by the Commission. In addition, failure to meet these reliability-performance levels shall result in the following compliance measures: If Delmarva or Pepco fails to meet the reliability-performance levels set out above in any of the years 2016-2020, then the Commission’s RM 43 mitigation and penalty provisions shall apply; in particular, if the performance level is not met the company shall file a corrective action plan including an explanation as to why the target was missed, and the Commission can assess penalties as provided under RM 43. In addition, if either of the SAIFI or SAIDI reliability-performance levels set out above is not met in any of the years 2018, 2019 or 2020, then Delmarva and/or Pepco shall automatically make a compliance payment to the

Electric Reliability Remediation Fund as set forth below, which payment shall not be recoverable in customer rates:

Table 2: Compliance Payments (2018 – 2020)

		2016	2017	2018	2019	2020
Compliance Payment	Pepco \$11.0M	-	-	\$2.0M	\$3.0M	\$6.0M
	DPL \$4.5M	-	-	\$0.5M	\$1.0M	\$3.0M

Exelon shall achieve the proposed reliability standards, described in Table 1 above, without exceeding the annual capital and O&M spending levels set forth below, absent a major outage event as defined in COMAR 20.50.01.03(27)(a) requiring increases in reliability-related spending to restore service and facilities. Delmarva and Pepco understand that potential rate recovery of the annual capital and O&M spending levels set forth below must go through the regular rate-making process of the Commission, and the use of such in this condition does not imply or otherwise constitute an endorsement by the Counties, the Commission, or any party that such spending is just and reasonable.

Table 3: Projected Reliability-Driven Expenditures (2016 – 2020)

Reliability Driven Capital Expenditure 2016-2020					
	2016	2017	2018	2019	2020
Pepco-MD	\$ 129,008,730	\$125,644,019	\$126,050,722	\$108,389,507	\$111,641,192
Pepco-MD Increased Reliability	\$ 9,000,000	\$ 25,000,000			
Total Pepco-MD	\$ 138,008,730	\$150,644,019	\$126,050,722	\$108,389,507	\$111,641,192
DPL-MD	\$ 55,049,615	\$ 53,278,113	\$ 55,072,784	\$ 47,848,252	\$ 49,283,700
DPL-MD Corrective Action Plan	\$ 18,540,000	\$ 19,096,200	\$ 19,669,086	\$ 20,259,159	\$ 20,866,933
Total DPL-MD	\$ 73,589,615	\$ 72,374,313	\$ 74,741,870	\$ 68,107,411	\$ 70,150,633
Pepco O&M Reliability 2016-2020 (DC and MD)					
	2016	2017	2018	2019	2020
System Scheduled Maint	\$20,271,059	\$20,879,190	\$21,505,566	\$22,150,733	\$22,815,255
Forestry (Tree Trimming)	\$23,811,463	\$24,525,807	\$25,261,582	\$26,019,429	\$26,800,012
Total	\$44,082,522	\$45,404,998	\$46,767,148	\$48,170,162	\$49,615,267
Forestry -- Maryland Only	\$21,569,463	\$22,216,547	\$22,883,044	\$23,569,535	\$24,276,621
DPL O&M Reliability 2016-2020 (MD and DE)					
	2016	2017	2018	2019	2020
Scheduled Maint	\$8,754,554	\$9,017,191	\$9,287,707	\$9,566,338	\$9,853,328
Forestry (Tree Trimming)	\$12,945,668	\$13,334,038	\$13,734,060	\$14,146,081	\$14,570,464
Total	\$21,700,223	\$22,351,229	\$23,021,766	\$23,712,419	\$24,423,792
Forestry -- Maryland Only	\$8,033,483	\$8,274,487	\$8,522,722	\$8,778,404	\$9,041,756

Consequences for failure to meet budget targets, for reasons other than due to a major outage event as defined in COMAR 20.50.01.03(27)(a) requiring increases in reliability-related spending to restore service and facilities, are set forth below:

- A. If Pepco exceeds the reliability-related capital budget levels set out above in any of the years, then Pepco shall automatically place into escrow a compliance payment in the amount of \$65,000 for every \$1 million spent in excess of the reliability-related capital budget target for the year. If Delmarva exceeds the reliability-related capital budget levels set out above in any of the years, then Delmarva shall automatically place into escrow a compliance payment in the amount of \$64,000 for every \$1

million spent in excess of the reliability-related capital budget target for the year.

- i. All compliance payments shall be placed into escrow no later than April 1 of the subsequent calendar year during which the capital budget level was exceeded.
- ii. By June 30, 2021, each company shall file with the Commission a comprehensive report on the reliability performance and prudence of actual spending levels for 2016-2020 to allow the Commission to determine whether the funds should be directed to the Electric Reliability Remediation Fund or returned to the company.
 - a. By December 1, 2015, and by December 1 of each subsequent calendar year through 2019, each company shall file with the Commission a forecast of planned reliability work for the immediately following calendar year, including at a minimum the general project descriptions, locations, and associated reliability-related capital and O&M spending. The project description should denote the intended improvements to outage duration, frequency, or some other reliability metric. The filed forecast shall serve as a baseline comparison for the June 30, 2021 company report on actual reliability-related expenditures, but shall not prompt Commission approval, denial, or other action in advance of the report. Receipt of the forecast shall not constitute an endorsement by the Commission of the prudence of the expenditures.
 - b. If the company asserts that a major outage event (as defined by COMAR 20.50.01.03(27)(a)) resulted in excess capital or O&M spending, the report should, at a minimum, provide cost details regarding any personnel, equipment, or replacement materials required to restore service for each major outage event.
 - c. If the company asserts that “unplanned” reliability-related work attributed to excess capital spending, then the report should include a narrative as to the prudence of the capital expenditures. Specifically, the report should describe any incremental SAIDI or SAIFI improvement attributable to the “unplanned” work, and an assessment of whether the completion of such work during the period resulted in any cost savings, compared to delay of such work to a later date.

- B. If Delmarva or Pepco fails to meet the reliability-related O&M budget levels set out above in any of the years, then the company shall automatically forgo seeking recovery in customer rates of any amounts spent in excess of the reliability-related O&M budget level for the year.

Condition 9: Reliability – RM 43 Targets

The reliability performance levels set forth in Condition 8 supersede the currently-proposed RM 43 performance levels submitted by Delmarva and Pepco for years 2016-2020 that are under consideration by the Commission. In the event that the Commission adopts performance levels that are more stringent than those approved as a merger condition, Delmarva and Pepco shall meet those Commission-adopted performance levels, subject to any necessary adjustments to the budget levels set forth in Condition 8.

Condition 10: Reliability – Vegetation Management Programs

Exelon shall maintain Delmarva's and Pepco's existing and planned vegetation management programs in compliance with the standards as established in RM 43.

Condition 11: Reliability – Customer Satisfaction Scores

Exelon shall conduct a root-cause analysis of, and develop an action plan to improve, Pepco's customer-satisfaction scores. Exelon shall file this analysis and action plan with the Commission no later than six months after merger closing.

Condition 12: Reliability – Resiliency Programs

Exelon shall cooperate with Staff and other stakeholders to determine the funding and other resources necessary to meet future resiliency targets that may be established by the Commission. The Commission does not endorse any recommended funding or

resource requirements until such time as the recommendations are fully considered and approved by the Commission.

Condition 13: Microgrid Development

Pepco shall, within 18 months following merger close, file with the Commission a proposal for pilot public-purpose microgrid projects to provide enhanced energy services to the selected areas, including during emergency events. The filing shall include a proposal for funding of Pepco's costs in connection with the projects through Pepco's regulated rates and a description of any federal, state, or local contribution to the development of the microgrid projects. The pilot projects shall be developed in the Pepco service territory, with one project in Prince George's County and one project in Montgomery County. Pepco shall coordinate with Montgomery County and Prince George's County and the Maryland Energy Administration on the selection of the pilot locations, the development of the proposal, and implementation of the projects. The county hosting the microgrid will have final approval and consent of the location. The proposal of the microgrid projects will include, but is not limited to: planning, design, and construction of physical facilities and control technologies, the development of on-site distributed-generation sources, such as combined heat and power, solar photovoltaic, and fuel cells, and operation and maintenance activities; the development and implementation of each microgrid shall be competitively-sourced. Subject to a prudence review by the Commission, Pepco shall install the microgrids within five years after receiving approval from the Commission.

Pepco shall, no later than July 1, 2016, file with the Commission an interim progress report on the legal, financial, and practical issues associated with the planning and development of the microgrid project proposals. The reports should address at a minimum different ownership and operational structures for a microgrid located in the State, including a legal assessment of the ability of an investor-owned utility to own either or both of the distribution and generation assets integrated into a microgrid project.

Condition 14: Grid-of-the-Future Proceeding

No later than July 1, 2016, Delmarva and Pepco shall make a filing with the Commission requesting that the Commission initiate a proceeding to examine opportunities to transform the electric distribution grid, including the incorporation of smart-grid technology, microgrids, renewable resources, and distributed generation. As part of this filing, the companies shall request formation of a collaborative stakeholder process to study relevant issues. Exelon shall fund up to \$500,000 for the Maryland Public Service Commission to retain a consultant to study relevant issues and/or facilitate the proceeding, and Delmarva and Pepco shall not seek recovery in utility rates of this funding.

Condition 15: Interconnection and Net Metering Programs

Exelon is committed to maintaining Delmarva's and Pepco's existing interconnection and net metering programs.

Condition 16: Enhancements to Interconnection Process for Behind-the-Meter Small Distributed Generation in Maryland

PHI shall provide a transparent, efficient, and clear process for review and approval of interconnection of proposed small distributed generation projects to the PHI distribution systems in Maryland including the following:

- A. Service territory maps of circuits, within ninety days of merger closing, will be uploaded to PHI's website, to be updated at least semi-annually that include the area where circuits are restricted due to PHI criteria violations and to what system size the restrictions apply. Three different maps will depict different restriction sizes. Each map will have the circuit areas on the particular map highlighted in red. One map will show circuits that are restricted for all sizes. One map will show circuits restricted to systems less than 50kW. One map will show circuits restricted to less than 250kW. The maps will also serve to identify areas that are approaching their operating limits and could become restricted to larger systems in future years. As of January 2015, there were no "restricted" Secondary Network circuits, but if they occur, a new map or method of depiction may be necessary. A Secondary Network circuit may become restricted if the active and pending generation would cause utility system operating violations. The categories of size restrictions depicted on the circuit maps will be made available for information purposes only, and will neither yield automatic cost allocation assumptions for resulting upgrades nor supplant the determination of the level of utility review afforded to the interconnection request as described in COMAR 20.50.09.08, unless directed by subsequent Commission order.
- B. When a utility receives an interconnection request for a behind-the-meter small distributed generation resource, there are several factors, or criteria limits, to consider when it determines if upgrades are required at a specific circuit. PHI shall:
 - i. Provide a report to Commission Staff, which may be shared with other interested stakeholders such as The Alliance for Solar Choice ("TASC"), within ninety days after merger closing that provides its criteria limits for distributed energy resources that apply for connection to its distribution system. This report shall include supporting studies and information that substantiate those limits. The report will describe and discuss how PHI considers the generation profile of renewable energy and other behind-the-meter small distributed generation resources relative to load, as well as discuss the

approaches utilized in other jurisdictions that have addressed the issue of the impact of on-site small distributed generation resources on the local grid and circuits. PHI shall make itself available for discussions with Commission Staff and other interested stakeholders on the report and demonstrate the modeling tools used by PHI to perform its analysis to accommodate additional distributed energy resources.

- ii. PHI is currently working with the United States Department of Energy in research designed to show how Voltage Regulation strategy, phase balancing, optimal capacitor placement, smart inverters and energy storage may impact Hosting Capacity. PHI shall share this research with Commission Staff and other interested stakeholders such as TASC upon completion of the project.
- iii. PHI has provided data to National Renewable Energy Laboratory (“NREL”) as part of their in-depth work to review utility-interconnection criteria. A report is expected to be issued by the end of 2015. PHI shall evaluate its criteria with the criteria outlined in the NREL report to identify any improvements that may be made including treatment of behind-the-meter storage equipment. PHI and interested stakeholders shall consult NREL during this evaluation to gain any input from NREL that it is willing to provide including research on the inverters under controlled conditions. PHI, Commission Staff, and other interested stakeholders such as TASC shall collaborate on the activities in this paragraph, including sharing information, discussing approaches, evaluating interconnection criteria, working with NREL, and providing an opportunity for Commission Staff and other interested stakeholders such as TASC to comment on PHI’s proposed recommendations on interconnection criteria prior to public release. PHI shall collaborate with interested stakeholders in good faith, but nothing in this agreement obligates PHI to accept or be bound by stakeholder recommendations. This collaborative effort shall be completed within one year following merger closing.
- iv. PHI shall consider the hourly load shape and the hourly generation of interconnected small generators as a factor to determine the hosting capacity for any given location of a circuit. PHI’s hosting capacity determinations shall adopt the minimum daytime load (“MDL”) supplemental review screen established in FERC Order 792 as well as findings from the collaborative research referenced above that allow for interconnection of distributed generation systems without additional need for study or upgrade investments (*e.g.*, “Fast Track Capacity”) as long as aggregate installed nameplate capacity on the circuit, including the proposed system, would not exceed 100% of

MDL on the circuit and the proposed system passes a voltage and power quality screen and a safety and reliability screen.

- C. PHI shall maintain, within ninety days after merger closing, an accepted equipment list for small generation projects where once an inverter is reviewed and found to be acceptable for use, it is deemed acceptable for future development. This list shall be easily accessible on the PHI website and updated quarterly. PHI shall review its policy for requiring the equipment list to be submitted for panels and switchgear with each application and post on its website any changes in its policy.

- D. PHI shall revise and implement within ninety days after merger closing its interconnection agreement to applicants seeking to interconnect behind-the-meter small distributed generation resources to include the following:
 - i. PHI shall schedule interconnection construction to be complete within the timeline established by the Commission (currently in Code of Maryland Regulations 20.50.09, but also as that timeline may be changed by the Commission in the future) for notification of acceptance of application and for approval to construct.

 - ii. PHI shall provide a procedure for email or other electronic submission of all applications (including payments if required).

 - iii. PHI shall provide permission to operate (“PTO”) to the interconnection customer, in the form of an email, within 20 business days after the applicant’s receipt of acceptable final documents (signed Interconnection Agreement, certificate of completion and the inspection certificate).

 - iv. PHI shall provide electronic data interface (“EDI”) access to historical electric usage through the Company’s Green Button capability to its customers and to customer representatives (distributed energy companies and others who a customer designates to receive such information).

 - v. PHI shall work with Commission Staff and other interested stakeholders such as TASC to review the existing application process (and timelines) and determine where an application should restart (if at all) if the application is revised (*e.g.*, for spelling, grammatical, or clerical error). PHI shall file a report with the Commission annually showing the number of interconnection requests and performance relative to the above timelines (see item e, below). For any metric

where 10% or more of the requests are greater than the suggested timeframe the annual report shall also include action to be taken to improve the process to meet the stated timeframes.

- E. PHI shall file with the Commission annual reports of timeliness of responses to interconnection requests. Consistent with COMAR 20.50.09.14, annual reports shall include the following:
 - i. The total number of and the nameplate capacity of the interconnection requests received and approved and denied under level 1, level 2, level 3 and level 4 reviews.
 - ii. The number of and an explanation of the interconnection requests that were not processed within the established timelines. Should delays impact more than 10% of the interconnection requests in a reporting year, PHI shall include its plans and associated costs to address and eliminate the delays. As part of any such plan to address and eliminate the delays, the company shall consult with Commission Staff and other interested stakeholders regarding a structure and the appropriateness of implementing financial penalties on a prospective basis for delays impacting more than 10% of interconnection requests in a future reporting year.

- F. In behind-the-meter applications where the battery never exports while in parallel with the grid and both the battery and the solar system share one inverter, no additional metering or monitoring equipment shall be required for a solar plus storage facility than would be required for a solar facility without storage technology. PHI in conjunction with other stakeholders, through a committee process, shall further study the issues regarding the coupling of solar and storage. As a result of such studies, the committee may recommend changes to this protocol to the Commission. PHI and Commission Staff, in consultation with interested stakeholders such as TASC, shall determine an appropriate target completion date for this review within one year of merger closing.

Condition 17: Limited-Income Assistance

Delmarva and Pepco shall maintain, enhance, and promote programs that provide assistance to limited-income customers.

Condition 18: Resolving Accounts Receivables

A. To help reduce the burden of long-outstanding energy debt for limited-income and other families, Delmarva and Pepco shall forgive all residential customer accounts receivable over two years old as of the date of the merger closing. The costs of such forgiveness shall not be recovered in Delmarva's or Pepco's rates.

B. Exelon shall ensure that appropriate representatives of BGE, Delmarva, and Pepco engage in discussions with NCLC and other interested stakeholders to consider in good faith the development of a mutually agreeable Arrearage Management Program ("AMP") for limited-income customers in arrears, which would include the provision of credits or matching payments for customers who make timely payments on their current bills, with such discussions to be initiated no later than 60 days after the closing of the merger, and with the understanding that any agreement regarding the adoption of an AMP would be submitted to the Commission for its review and approval.

Condition 19: Charitable Contributions and Community Initiatives

During the ten-year period following closing of the merger, Exelon and its subsidiaries shall provide at least an annual average of charitable contributions and traditional local community support in Delmarva's and Pepco's service territories in Maryland that exceeds the 2010 – 2014 average level of \$656,000 from PHI. This condition is separate from and in addition to the charitable contribution commitment in the merger between Exelon and Constellation Energy Group, Inc., MD PSC Case No. 9271 in Order No. 84698 (issued February 17, 2012), at p. 101. Additionally, beginning within 90 days after merger close, Exelon and its subsidiaries shall make a good faith

effort to obtain information from the charitable organizations to which they contribute to determine whether and how much of those contributions benefit each of Prince George's County, Montgomery County, and the District of Columbia. Pepco shall provide information regarding the contributions that benefit Prince George's and Montgomery County to each County and the Commission on an annual basis for a period of 10 years following merger close. These annual reports shall also separately delineate the annual charitable contributions made directly by PHI.

Condition 20: Support for Supplier Diversity

Exelon shall fully support the goals of the Memorandum of Understanding ("MOU") signed by Delmarva and Pepco on February 6, 2009 regarding supplier diversity, including all of the terms and conditions thereof, and shall use its best efforts to assist Delmarva and Pepco with the implementation of the MOU and meeting its obligations pursuant to the MOU. Within 180 days of the consummation of the merger, Delmarva and Pepco shall file a plan with the Commission detailing actionable steps and an associated timeline by which the companies will reach higher supplier diversity targets pursuant to the MOU.

Condition 21: Labor, Employment and Compensation

Delmarva and Pepco shall honor all existing collective bargaining agreements. Upon approval of the merger and for at least the first two years following consummation of the merger, Exelon: (1) shall not permit a net reduction, due to involuntary attrition as a result of the merger integration process, in the employment levels at Delmarva and Pepco, and (2) shall provide current and former Delmarva and 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 execution of the merger agreement. PHI, Delmarva, and Pepco shall also continue their commitments to workforce diversity. Delmarva and Pepco shall, on an annual basis and for the first three years following consummation of the merger, report to the Commission regarding employment levels at the respective companies. The reports shall detail all job losses – including whether the attrition was involuntary or voluntary – as well as any job gains, delineated using an industry-accepted categorization method such as by SAIC code.

Condition 22: Hiring by Delmarva and Pepco

Exelon commits to make a good faith effort to hire within two years after the merger closing date at least 110 union workers in Maryland, the status of which shall be referenced in the annual employment level reports filed by Delmarva and Pepco as described in Condition 21 above.

Condition 23: Pension and Retiree Health Benefits

Exelon shall assume PHI's obligations, or cause PHI to continue to meet its obligations, to Delmarva and Pepco employees and retirees with respect to pension and retiree health benefits.

Condition 24: Workforce Development

Exelon, Delmarva, and Pepco shall partner with Prince George's County, Montgomery County, and one or more public institutions of higher learning in the Delmarva Maryland service territory to support Workforce Development programs –

incremental to any existing or planned Delmarva or Pepco workforce development initiatives – as follows:

- A. Prince George’s County:
- i. Exelon and Pepco shall partner with Prince George’s County to promote a Sustainable Energy Workforce Development program in Prince George’s County. The Sustainable Energy Workforce Development Program will play a critical role in establishing an advanced energy industry in the County that will create quality jobs and build employment capacity in the energy sector. A sustainable energy job or career produces goods or services that benefit the environment, promote a low-carbon economy, and/or conserve natural resources by performing duties in the area of energy-efficiency and renewable energy. Examples of sustainable energy jobs or careers include but are not limited to: energy auditors, solar photovoltaic or solar water heating installers; wind energy technicians; weatherization technicians; and manufacturers and distributors of energy-efficient products and services.
 - ii. The Sustainable Energy Workforce Development program will be administered by a Prince George’s County institution of higher learning such as Prince George’s County Community College, Construction and Energy Institute with special emphasis on creating “Pathways out of Poverty” and retooling residents who lose their job. The course content will provide interdisciplinary and applied training in energy-efficiency, renewable energy, and other emerging energy techniques whereby successful completion of the curriculum leads to certification in national recognized standards such as Building Performance Institute (“BPI”) and North American Board of Certified Energy Practitioners (“NACEP”).
 - iii. Prince George’s County will also partner with Exelon and Pepco on the implementation of an energy-literacy program in Prince George’s County Public School System to prepare students for advanced careers in the energy sector.
 - iv. Exelon or Pepco shall participate in Prince George’s County Summer Youth Enrichment Program (“SYEP”) by hiring or sponsoring at least 20 County youth annually for the next four years.
 - v. Exelon shall provide funding of \$1,240,000 directly to Prince George’s County, derived from prorating on a per customer basis,

over four years in support of these programs, and Pepco shall not seek recovery of this amount in utility rates.

B. Montgomery County:

- i. Montgomery County may organize its workforce development programs under one entity, in order to create a comprehensive workforce development system that will unite many stakeholders under common objectives. Exelon and Pepco shall partner with Montgomery County and with whatever entity is selected by the County to promote workforce development in Montgomery County, with an emphasis on promotion of training and job creation in the areas of energy-efficiency, renewable energy and Science, Technology, Engineering and Math (“STEM”) fields.
- ii. Exelon shall provide \$1,700,000 directly to Montgomery County, derived from prorating on a per customer basis, over four years in support of these programs, and Pepco shall not seek recovery of this amount in utility rates.

C. Delmarva Maryland Service Territory:

- i. Exelon shall coordinate with one or more public institutions of higher learning in the Delmarva Maryland service territory to support workforce development programs. Within 180 days of consummation of the merger, Delmarva shall solicit proposals for workforce development programs from interested public institutions of higher learning located in the Delmarva Maryland service territory. Delmarva shall report to the Commission on its selection(s) no less than 30 days prior to the initial disbursement of funds.
- ii. Exelon shall provide funding of \$1,060,000 directly to the selected public institution of higher learning, derived from prorating on a per customer basis, over four years in support of these programs, and Delmarva shall not seek recovery of this amount in utility rates.

Condition 25: Competition Protections

Exelon agrees to the following competition protections. For purposes of this Condition, “Affiliated Transmission Companies” are Delmarva, Pepco, Atlantic City Electric (“ACE”), PECO Energy Company (“PECO”), Baltimore Gas and Electric

Company (“BGE”) and Commonwealth Edison Company (“ComEd”), and any transmission owning entity that is in the future affiliated with Exelon and is a member of PJM Interconnection, LLC (“PJM”). “Exelon” refers to Exelon and its affiliates and subsidiaries.

- A. Exelon commits that its Affiliated Transmission Companies shall each identify, with PJM’s concurrence, at least three independent third-party engineering consulting firms that are qualified to conduct Facilities Studies under the PJM generator interconnection process. Any generation interconnection applicant may propose other independent third-party engineering consulting firms to Exelon for its consideration with respect to adding them to this list of qualified firms. Exelon shall make a decision with respect to whether any proposed independent third-party engineering consulting firm can be included on such list within thirty days of a request to include any such proposed firm. Once approved, Exelon shall not be permitted to remove a third-party engineering consulting firm from such list unless and until it can demonstrate good cause as determined by the PJM Market Monitor or the FERC.
- B. Any generation developer that desires to interconnect to the transmission system of one of Exelon’s Affiliated Transmission Companies may, in the developer’s discretion and at the developer’s expense, direct PJM to utilize one of the identified firms to conduct the Facilities Study for its generation project for upgrades and interconnection facilities required on the Affiliated Transmission Company’s facilities.
- C. For all interconnection studies performed by a listed independent third-party engineering consulting firm, the Exelon Affiliated Transmission Company shall cooperate with and, as requested, provide information to PJM and the independent engineering consulting firm as needed to complete all work within the normal scope and timing of the PJM interconnection process. The Affiliated Transmission Company shall provide to PJM the cost estimate for any facilities for which it has construction responsibility assigned in the PJM Interconnection Services Agreement. If a dispute arises in connection with the Study performed by the independent engineering consulting firm or the Affiliated Transmission Company, then the generation developer or the Affiliated Transmission Company may pursue resolution of the dispute through the process laid out in the PJM Tariff. Affiliates of Exelon that are pursuing the development of generation within the service territories of one of the Affiliated Transmission Companies shall, at their own expense, direct

PJM to utilize one of the independent engineering consulting firms to conduct the Facilities Study for upgrades and interconnection facilities required on the Affiliated Transmission Company's facilities and the Feasibility Study and System Impact Study shall be performed by PJM. Nothing in this Paragraph precludes an applicant, as part of its project team, from contracting with other contractors to assist it in the PJM interconnection process at its sole discretion.

- D. Exelon commits that ACE, Delmarva, Pepco, PECO, and BGE shall remain as members of PJM until January 1, 2025; provided, however, that if there are significant changes to the structure of the industry or to PJM, including markets administered by PJM, during that period that have material impacts on ACE, Delmarva, Pepco, PECO or BGE, then any of those companies may file with FERC to withdraw from PJM.
- E. Exelon agrees that the PJM Market Monitor may review its Demand Resource bids in PJM energy, reserves, and capacity markets.

Condition 26: Consumer Public Advocacy

In order to facilitate consumer advocacy in PJM, Exelon shall make a one-time contribution of \$350,000 to fund the expenses of the Consumer Advocates of PJM States Inc. ("CAPS"). This contribution shall be a single contribution made with respect to all of the PHI utilities and service territories and shall not be specific to Delmarva, Pepco, or Maryland. The cost of the contribution shall not be recovered in Delmarva or Pepco rates. Exelon shall agree to support reasonable proposals to have PJM members fund CAPS.

Condition 27: Across-the-Fence Comparison Reporting

Exelon and PHI shall file annual across-the-fence reports comparing the performance and status of the utilities within the Exelon family (including BGE, Delmarva, and Pepco) to each other and against the performance and status of other utilities inside and outside the State of Maryland. The reports shall address substantive areas as directed by the Commission and may include subject areas such as reliability,

customer service, safety, rate and regulatory matters, interconnections, energy-efficiency and demand-response programs, and deployment of new technologies, including smart meters and smart grid, automated technologies, microgrids and utility-of-the future initiatives. The annual reports shall only be filed under separate cover in the event that the across-the-fence comparison is not duplicative of analysis provided in a separate report required by the Commission.

As part of a Commission proceeding or work group, BGE, Delmarva, and Pepco may offer consensus comments or program recommendations if appropriate; however, the Commission reserves the right to require each company to file separate reports and present separately before the Commission.

Condition 28: Exelon's Consent to Jurisdiction

Exelon submits to the jurisdiction of the Maryland Public Service Commission (the "Commission") for: (1) all matters related to the merger and the enforcement of the conditions set forth herein to the extent relevant to operations of Delmarva or Pepco in Maryland; and (2) matters relating to affiliate transactions between Delmarva, Pepco, and Exelon or its affiliates to the extent relevant to operations of Delmarva or Pepco in Maryland. Exelon shall also cause each of its affiliates that supplies goods or services to Delmarva and Pepco to submit to the jurisdiction of the Commission for matters relating to the provision or costs of such goods or services to Delmarva and Pepco.

Condition 29: Corporate Organization, Financial Integrity and Ring Fencing

A bankruptcy-remote special purpose entity shall be established as the Exelon subsidiary holding the equity interests in PHI as provided in Condition 30. In addition,

the following ring fencing arrangements set forth in Conditions. 29 and 30 may only be changed with permission of the Commission, and the Joint Applicants may not seek such permission during the first five years after completion of the merger to act otherwise. Exelon and PHI shall implement the following ring fencing arrangements: (1) Delmarva and Pepco shall maintain their separate existence and their separate franchises and privileges; (2) Delmarva and Pepco shall maintain separate books and records; (3) Delmarva's and Pepco's books and records pertaining to their operations in Maryland shall be available for inspection and examination by the Commission; and (4) Delmarva and Pepco shall maintain separate debt so that they will not be responsible for the debts of affiliate companies and preferred stock, if any, and Delmarva and Pepco shall maintain their own corporate and debt credit rating, as well as ratings for long-term debt and preferred stock.

Condition 30: Enhanced Ring Fencing Protections

As members of the Exelon Management Executive Committee, the PECO, ComEd, and BGE CEOs (and the CEO of PHI after the merger) shall continue to meet with Exelon's CEO, at least monthly and have direct and frequent access to him/her and other members of Exelon's senior management team.

The authority and responsibility delegated to local management shall be clearly delineated in two formal, written documents consisting of a statement of Corporate Governance Principles and a Delegation of Authority ("DOA"). The DOA shall demarcate, among other things, levels of expenditures and defined categories of decisions

that can be authorized solely by the utility's CEO or by the utility CEO with utility Board of Directors' approval.

Exelon shall form a bankruptcy-remote Special Purpose Entity ("SPE") as a direct subsidiary of Exelon Energy Delivery Company ("EEDC") for the purpose of owning 100% of the shares of PHI.

- i. The SPE shall have no employees and no operations other than owning the equity of PHI.
- ii. The SPE shall have four directors, one of whom shall be an independent director.
- iii. In addition, the SPE shall issue a non-economic interest in the SPE (a "Golden Share") to a company that is in the business of safeguarding SPEs.
- iv. A voluntary bankruptcy petition by the SPE shall require a unanimous vote by the SPE's board of directors, including the independent director, as well as the affirmative consent of the holder of the Golden Share.
- v. A unanimous vote by the SPE's board of directors and the affirmative consent of the holder of the Golden Share shall also be required to amend the SPE's organizational documents affecting the voting rights and the other aspects of ring fencing in the SPE governing documents.

Further SPE-related conditions – the SPE shall:

- i. Hold itself out as an entity separate from affiliates;
- ii. Conduct business in its own name;
- iii. Not use the name or service marks of Exelon, PHI or PHI's subsidiaries;
- iv. Maintain separate books and records, separate bank accounts and financial statements;
- v. Not commingle its funds or other assets with those of other entities;
- vi. Manage its liabilities separately;
- vii. Not guarantee or obligate itself for any debt of other entities or pledge its assets for the benefit of any other entity or make loans;
- viii. Deal with all affiliates on an arms-length basis.

Other ring fencing conditions related to the SPE and its parent EEDC:

- i. Exelon shall not alter EEDC's corporate character to become an operating entity providing common support services to any affiliates, unless approved by the relevant regulatory commissions.
- ii. Exelon shall not engage in any internal corporate reorganization related to EEDC, the SPE, PHI or any PHI utility for which Commission approval is not required without giving 90 days prior written notice to the Commission. Such notification shall include: (a) an opinion of reputable bankruptcy counsel that the reorganization does not materially impact the effectiveness of PHI's existing ring fencing; or (b) a letter from reputable bankruptcy counsel describing what changes to the ring fencing would be required to ensure PHI is at least as effectively ring fenced following the reorganization and a letter from Exelon committing to obtain a new non-consolidation opinion following the reorganization and to take any further steps necessary to obtain such an opinion. Exelon shall not object if the Commission elects to open an investigation into the matter if the Commission deems it appropriate but may complete the reorganization prior to the conclusion of the Commission investigation if Commission approval is not otherwise required.
- iii. SPE shall maintain adequate capital, provided however that EEDC and Exelon shall not be obligated to make any additional capital contributions.
- iv. Within 180 days following completion of the merger, Exelon shall obtain a legal opinion in customary form and substance and reasonably satisfactory to the Commission, to the effect that, as a result of the ring fencing measures it has implemented for PHI and its subsidiaries, a bankruptcy court would not consolidate the assets and liabilities of the SPE with those of Exelon or EEDC, in the event of an Exelon or EEDC bankruptcy, or the assets and liabilities of PHI or its subsidiaries with those of either the SPE, Exelon or EEDC, in the event of a bankruptcy of the SPE, Exelon or EEDC. In the event that such opinion cannot be obtained, Exelon shall promptly implement such measures as are required to obtain such opinion.

Ring fencing conditions related to PHI:

- i. PHI's seven-member Board of Directors shall include one director from each of PHI's three utility subsidiaries. At least three of the PHI directors shall be independent (as defined by NYSE rules). At least one director of the seven-member Board of Directors shall reside in Maryland. The PHI Board of Directors shall select the Boards of Directors of Delmarva and Pepco, and the Delmarva and Pepco Boards shall choose, respectively, Delmarva's and Pepco's officers.
- ii. PHI shall maintain arm's-length relationships with Exelon and its affiliates, including the SPE;

- iii. PHI's CEO and senior officers directly reporting to the CEO shall hold no official positions within Exelon or other Exelon group affiliates (other than PHI and PHI's subsidiaries);
- iv. PHI shall hold itself out as a separate entity from Exelon and SPE and conduct business in its own name, and shall not use the trademarks or service marks of Exelon (except that PHI and each of its utility subsidiaries may identify themselves as affiliates of Exelon on a basis consistent with other Exelon utility subsidiaries);
- v. PHI shall maintain separate books and records, shall hold all its property in its own name, shall not assume liability for the debts and shall not guarantee the debt or credit instruments of Exelon, the SPE, or any other affiliate of Exelon other than a subsidiary of PHI.
- vi. PHI and its subsidiaries shall use pricing protocols consistent with the rules of the Commission and FERC for transfer prices of any intercompany transfers of supplies and services;
- vii. PHI shall use reasonable efforts to maintain credit ratings for its publicly-traded securities and shall use reasonable efforts and prudence to preserve an investment grade credit rating for its senior unsecured debt.
- viii. The PHI Service Company ("PHISCO") shall remain a subsidiary of PHI to afford it the benefits and protections of the Joint Petitioners' robust ring fencing proposal. PHISCO shall continue to perform functions and to maintain related assets currently involved in providing services exclusively to the PHI utilities. Other functions that are currently provided by PHISCO, including those that are provided to the PHI utilities and to other current PHI subsidiaries, shall be transferred to Exelon Business Services Company ("EBSC") or another Exelon affiliate in a phased transition over a period of time following the merger closing.

Ring fencing conditions related to Delmarva and Pepco – Delmarva and Pepco shall:

- i. Maintain arm's-length relationships with Exelon and its affiliates and the SPE;
- ii. Hold themselves out as separate entities from Exelon and the SPE and conduct business in their own name (except that Delmarva and Pepco may identify themselves as affiliates of Exelon on a basis consistent with other Exelon utility subsidiaries);
- iii. Maintain separate books and records, accounts and financial statements;
- iv. Maintain their own separate debt and preferred stock, if any;
- v. Not assume liability for nor issue any guarantees of the debt of any other entities other than their respective subsidiaries;

- vi. Have appropriate controls to assure that they shall not bear costs associated with the businesses of Exelon or any other Exelon affiliates other than PHI subsidiaries and have its transfer pricing protocols comply with the rules of the Commission and FERC;
- vii. Not participate in a money pool with Exelon or any other entities other than with the PHI utilities, PHI and PHISCO, and shall not commingle funds with those of other utilities; and
- viii. Maintain their own debt securities and credit ratings on their debt securities.

Ring fencing provisions to protect the stand-alone financial conditions of Delmarva and Pepco:

- i. Delmarva and Pepco shall not include in their debt or credit agreements any cross-defaults nor any financial covenants or ratings triggers relating to the securities of Exelon or any other Exelon affiliate;
- ii. Delmarva and Pepco, respectively, shall not pay dividends to its parent company if, immediately after the dividend payment, its common equity level would fall below 48%, as equity levels are calculated under the ratemaking precedents of the Commission;
- iii. If Delmarva's or Pepco's board of directors declares a dividend, the utility, within 5 business days after the payment of the dividend, shall file with the Commission the calculation that the board considered in determining the equity capital level before and after the dividend payment and demonstrate that the dividend shall not cause the equity to fall below 48% common equity as equity levels are calculated under ratemaking precedents of the Commission;
- iv. Delmarva and Pepco, respectively, shall not make any upstream dividend or distribution if its senior unsecured debt rating is rated by any of the three major credit rating agencies below investment grade;
- v. Delmarva and Pepco shall each report to the Commission promptly if it is rated below investment grade by any of the three major credit rating agencies; Delmarva and Pepco shall use reasonable efforts and prudence to preserve an investment-grade rating; and
- vi. A voluntary petition for bankruptcy for any of PHI's subsidiaries shall require the unanimous vote of the PHI board of directors (including its independent directors) and the unanimous vote of the board of directors of the relevant PHI subsidiary.

Ring fencing provisions to maintain or enhance the Commission's regulatory supervision of Delmarva and Pepco and their dealings with affiliates:

- i. Delmarva and Pepco shall file with the Commission an annual compliance report regarding its ring fencing;
- ii. At the time of the SPE formation and annually thereafter, an Exelon officer shall file a certificate regarding its pledge to maintain the corporate separateness of Delmarva and Pepco; and Delmarva and Pepco shall make all books and records available to the Commission.

Condition 31: Ring Fencing – Equity Ratio

Delmarva and Pepco shall maintain a rolling 12-month average annual equity ratio of at least 48%.

Condition 32: Ring Fencing – Risk Analysis

Exelon shall conduct an analysis of its operational and financial risk to determine the adequacy of existing ring fencing measures. Exelon shall file this analysis with the Commission no later than the end of the third quarter in 2017.

Condition 33: Severance of Exelon - Delmarva/Pepco Relationship

Notwithstanding any other powers that the Commission currently possesses under existing applicable law, the Joint Applicants agree that the Commission may, after investigation and a hearing, order Exelon to divest its interest in Delmarva and/or Pepco on terms adequate to protect the interests of utility investors (including Exelon investors) and consumers and the public, if the Commission finds: (a) that one or more of the divestiture conditions described below has occurred, (b) that as a consequence Delmarva and/or Pepco has failed to meet its obligations as a public utility, and (c) that divestiture is necessary to allow Delmarva and/or Pepco to meet its obligations and to protect the interests of its customers in a financially healthy utility and in the continued receipt of reasonably adequate utility service at just and reasonable rates. Any divestiture order

made pursuant to this condition shall be applicable to Delmarva or Pepco, or both, only to the extent consistent with the application of the criteria in the preceding clauses (a) – (c) and shall be limited to the assets and operations of Delmarva and/or Pepco in Maryland. The divestiture conditions covered by this condition are: (i) a nuclear accident or incident at an Exelon nuclear power facility involving the release or threatened release of radioactive isotopes, resulting in (x) a material disruption of operations at such facility and material loss to Exelon that is not covered by insurance or indemnity or (y) the permanent closure of a material number of Exelon nuclear plants as a result of such accident or incident; (ii) a bankruptcy filing by Exelon or any of its subsidiaries constituting 10% or more of Exelon’s consolidated assets at the end of its most recent fiscal quarter, or 10% or more of Exelon’s consolidated net income for the 12 months ended at the close of its most recent fiscal quarter; (iii) the rating for Exelon’s senior unsecured long-term public debt securities, without third-party credit enhancement, are downgraded to a rating that indicates “substantial risks” (i.e., below B3 by Moody’s or B- by S&P or Fitch) by at least two of the three major credit rating agencies, and such condition continues for more than 6 months; or (iv) Exelon and/or PHI have committed a pattern of material violations of lawful Commission orders or regulations, or applicable provisions of the Public Utilities Article and, despite notice and opportunity to cure such violations, have continued to commit the violations.

Condition 34: Affiliate Transactions

Exelon shall comply and cause Delmarva and Pepco and other Exelon affiliates to comply with the statutes and regulations applicable to Delmarva and Pepco regarding

affiliate transactions. Exelon shall permit the Commission to examine the accounting records of Exelon's affiliates that are the basis for charges to Delmarva and Pepco for operations in Maryland to determine the reasonableness of allocation factors used by Exelon to assign those costs and amounts subject to allocation and direct charges.

Condition 35: PHI Asset Ownership

PHI subsidiaries, other than PHISCO and the PHI utilities, that are currently engaged in operations that are not regulated by a state or local utility regulatory authority shall be transferred to Exelon or an Exelon affiliate; provided that: (a) PHI may retain ownership of Conectiv LLC as a holding company for ACE and Delmarva; (b) Conectiv LLC may transfer its 50% ownership interest in Millennium Account Services LLC to ACE; and (c) Conectiv LLC or subsidiaries of Conectiv LLC may retain ownership of real estate and other assets that are used in whole or in part in the business of the PHI utilities. PHI may elect to hold the stock of Delmarva and ACE directly, and cease the use of Conectiv LLC as a holding company.

Condition 36: Merger Impact on Rates

Delmarva and Pepco shall not seek recovery in distribution or transmission rates of: (1) any acquisition premium or "goodwill" associated with the merger; or (2) any transaction costs incurred in connection with the merger by Exelon, Pepco Holdings, Inc. ("PHI"), or their subsidiaries. The categories of transaction costs incurred in connection with consummation of the merger that shall not be recovered from utility customers are: (1) consultant, investment banker, legal, and regulatory support fees, (2) change in control or retention payments, (3) costs associated with the shareholder meetings and a

proxy statement related to the merger approval by PHI shareholders, and (4) costs associated with the imposition of conditions or approval of settlement terms in other state jurisdictions. In addition, Delmarva and Pepco shall not incur or assume any debt, including the provision of guarantees or collateral support directly related to the merger.

Delmarva and Pepco shall each track and account for merger-related savings, and the cost to achieve those savings, in their next base rate case.

Condition 37: Cost Accounting

Exelon shall ensure that merger accounting is rate-neutral for Delmarva and Pepco customers. Exelon shall ensure that any accounting treatments associated with merger accounting do not affect rates charged to Delmarva's and Pepco's customers. Exelon shall not record any of the impacts of purchase accounting at the PHI utility companies (ACE, Delmarva, and Pepco), thereby maintaining historical cost accounting at each of the PHI utility companies. No goodwill or other fair value adjustments shall be recorded at the PHI utility companies upon consummation of the merger. If the SEC requires that goodwill be recorded on Delmarva's or Pepco's books then Exelon, Delmarva, and Pepco shall ensure that such goodwill does not impact rates charged to Delmarva's or Pepco's Maryland customers.

Condition 38: Ratemaking – Amortization of Costs to Achieve Synergy Savings

If the Commission desires, Delmarva and Pepco shall agree in future rate case proceedings to amortize the costs to achieve synergy savings (“CTA”) over a period of time in the event that CTA exceed achieved synergy savings during the test year in question.

Condition 39: Cost Allocation Comparisons For Five Years

The Joint Applicants shall provide a side-by-side comparison by function of pre- and post-merger shared-services cost allocations to Delmarva and Pepco for five pre- and post-merger years. The comparisons shall be filed on an annual basis as a separate letter, and the first letter shall be filed no later than the end of the second quarter in 2017. In the event that either company files a post-merger base rate case prior to receipt of the first side-by-side comparison in 2017, then the company shall include as part of its application a side-by-side comparison, by function, of pre- and post-merger shared-services cost allocations available through the test year, to the extent applicable.

Condition 40: Tax Indemnification

Exelon shall indemnify Delmarva and Pepco for any liability for federal or state income taxes (including interest and penalties related thereto, if any) in excess of Delmarva's and Pepco's standalone liability for federal or state income taxes (including interest and penalties related thereto, if any) for any period during which Delmarva and Pepco are included in a consolidated group with Exelon. Under applicable law, following the merger Delmarva and Pepco will have no liability for federal or state income taxes (including interest and penalties related thereto, if any) of Exelon or any other subsidiary of Exelon for any period during which Delmarva and Pepco was not included in a consolidated group with Exelon (*i.e.* any period before the merger). Exelon shall take no action to cause Delmarva and Pepco to have any liability for federal or state income taxes (including interest and penalties related thereto, if any) of Exelon or any other subsidiary of Exelon for any period during which Delmarva and Pepco was not

included in a consolidated group with Exelon for purposes of filing federal or state income tax returns. If Delmarva and Pepco is included in a consolidated group with Exelon for purposes of filing federal or state income tax returns and the rating for Exelon's senior unsecured long term public debt securities, without third-party credit enhancement, is downgraded to a rating that indicates "substantial risks" (below B3 by Moody's or B- by S&P or Fitch) by at least two of the three major credit rating agencies, the Commission may, after investigation and hearing, require Exelon to deliver to Delmarva and Pepco collateral of the type and amount determined by the Commission pursuant to the hearing to secure Exelon's tax indemnity to Delmarva and Pepco if the Commission finds that such collateral is necessary for the protection of Delmarva's or Pepco's interests under Exelon's tax indemnity. Delmarva and Pepco shall be required to surrender or release such collateral security to Exelon (1) promptly after the rating of Exelon's senior unsecured long term public debt, without third-party credit enhancement, is restored to a rating above "substantial risks" (at or above B3 by Moody's or B- by S&P or Fitch) by at least two of the three major credit rating agencies, or (2) if and when Delmarva and Pepco is determined by a body of competent jurisdiction no longer to be liable for federal or state income taxes as a member of a consolidated group with Exelon, other than Delmarva's or Pepco's standalone liability for federal or state income taxes (including interest and penalties related thereto, if any), or (3) upon a finding by the Commission, after investigation and hearing upon application of Exelon, that the conditions under which such collateral security was originally required no longer exist.

Condition 41: Accumulated Deferred Income Taxes

The Joint Applicants shall ensure that consummation of the merger will not affect accounting and ratemaking treatments of Delmarva's or Pepco's accumulated deferred income taxes, including excess deferred income taxes, accumulated deferred tax credits and net operating losses (including net operating loss carrybacks and net operating loss carryforwards.)

Condition 42: Sediment Study and Consultation

Exelon shall affirm its previous commitment to fund up to \$3,500,000 for a multi-year study ("Sediment Study") that will quantify, among other things, the amount of suspended sediment concentration, associated nutrients, suspended sediment load, and nutrient load present in the major entry points to the Lower Susquehanna River Reservoir System and the upper Chesapeake Bay. The Sediment Study was jointly prepared by the Maryland Department of the Environment, the Maryland Department of Natural Resources, the University of Maryland Center for Environmental Science, the U.S. Environmental Protection Agency Chesapeake Bay Program, the U.S. Geological Survey, the U.S. Army Corps of Engineers, and Exelon ("Study Partners"). The Study Partners anticipate that the information from the Sediment Study will supplement the Lower Susquehanna River Watershed Assessment, and enhance the suite of Chesapeake Bay Watershed and Water Quality models that will inform the 2017 Chesapeake Bay TMDL Midpoint Assessment. In recognition of the Clean Chesapeake Coalition's shared interest in restoring the health of the Chesapeake Bay, Exelon will consult with the Clean Chesapeake Coalition on an ongoing basis regarding Sediment Study field data collection

and analysis, data management and reporting, modeling, and study results. At the conclusion of the Sediment Study, Exelon will present the study report's findings to the members of the Clean Chesapeake Coalition. In addition, Exelon shall continue its discussions with the Maryland Department of the Environment, the Maryland Department of Natural Resources, and other stakeholders on other issues relating to the licensing of Conowingo Dam.

Condition 43: Pilot Project to Provide Public Recreational Use of Pepco Utility Corridors and to Enhance Utility Access to Facilities

Pepco shall coordinate with the Maryland Department of Natural Resources ("DNR"), Montgomery County, Prince George's County and the Maryland - National Capital Park and Planning Commission ("M-NCPPC") to establish a pilot project in its Maryland service territory by which Pepco will grant to an appropriate governmental or private entity in both Counties a limited, non-exclusive license to access specified portions of Pepco's transmission-line property for recreational and transportation use by the public. Paths will provide increased access by Pepco to its facilities along the transmission corridor; therefore, Pepco will have access along any path to serve its facilities. Permanent paths will provide for faster access for restoration of lines damaged during storms and less impact on wetlands and streams since pathways will be built to mitigate damage to sensitive areas. Pepco shall work cooperatively with DNR, Montgomery County, Prince George's County and M-NCPPC to define the license terms. The first pilot project will be a combined paved and natural surface trail system along the transmission corridor from Westlake Drive near Montgomery Mall to the Soccerplex in Germantown (the "Bethesda-Dickerson Corridor"). Within four months after merger

closing, Pepco shall solicit the input and work cooperatively with the DNR, Montgomery County, Prince George's County, M-NCPPC, and other interested parties on the design of an unpaved trail in the portion of the Bethesda-Dickerson Corridor between the Soccerplex and Quince Orchard Road (the "Unpaved Trail").

The terms of the licenses for the pilot projects shall include, but are not limited to, the following:

- i. Construction (e.g., access points and parking, standards, path material, bridges, signs);
- ii. Maintenance (including but not limited to responsibility for snow removal, grass cutting, debris removal);
- iii. Times of Use;
- iv. Acceptable non-motorized uses, including pedestrians, dog walkers, runners, cyclists, horseback riding;
- v. Monitoring acceptable use;
- vi. Responsibility for handling complaints from adjoining landowners, including intake and response;
- vii. Liability and safety requirements;
- viii. Assurance that Pepco's access and use of its property and facilities located therein are not limited in any way; and
- ix. Pepco shall retain final approval regarding the location of the pilot project(s) and the site of any future access, based upon factors such as safety, security, and Pepco's need to continue to provide safe and reliable electric service consistent with its obligations to customers. Pepco will not forfeit or abridge its property rights in any way.

Pepco shall work with the Counties, M-NCPPC, and DNR to gain approval of these trails and to construct them in a way that reasonably minimizes the portion deemed to be impervious surfaces in order to reduce the storm water retention requirements. Subject to the receipt of local contributions toward the pilot projects, Pepco may seek recovery in regulated transmission and distribution rates of the costs that it incurs in

connection with the project. Pepco shall pay reasonable costs associated with the pilot project if it is able to obtain such recovery in regulated rates. If Pepco is not able to obtain rate recovery of the requested amount of pilot project costs (minus the local contribution), it will work with the Counties, M-NCPPC and DNR to reevaluate and appropriately limit the scope of the pilot project, pay the costs of designing the Unpaved Trail, and cooperate to seek alternate sources of funding to complete the pilot project.

Pepco shall follow the implementation of the pilot project, collect lessons learned and identify criteria and conditions under which it would consider future projects to allow access to its property for non-motorized recreational and transportation use.

Condition 44: System Hardening to Support Washington Suburban Sanitary Commission (“WSSC”) Potomac Water Treatment Plant

Within six months after the merger closing, Pepco shall provide to Montgomery County and to Prince George’s County an analysis of transmission- or distribution-system options, and associated costs, to enhance the reliability and resiliency of electric service to the WSSC Potomac Water Treatment Plant, which serves both Montgomery and Prince George’s Counties.

Condition 45: Pepco and BGE Cooperation with the Office of Emergency Management and Homeland Security (“OEMHS”)

Pepco shall continue its strong working relationship, coordination and communication with OEMHS and Montgomery and Prince George’s Counties during storm-restoration events, including with respect to identification of priority facilities to be restored. Exelon shall commit that BGE shall continue a similar relationship in its service territory.

Condition 46: Most Favored Nation Provision

Exelon shall file with the Commission a copy of the final Orders and/or Settlement Stipulations from Delaware, New Jersey, and the District of Columbia, following approval in each of those jurisdictions, along with an analysis indicating the total dollar amount of any customer investment fund approved in each jurisdiction (including a calculation of that amount on a per distribution customer basis) and explaining the valuation of the customer benefits awarded in that jurisdiction as compared to the valuation of the customer benefits awarded in Maryland (calculated in each case on a per-distribution customer basis).

- A. If, on a per-distribution customer basis, the benefits provided to other jurisdictions are materially more beneficial in the aggregate than the terms of this Order with respect to financial benefits, credits, or payments to customers, including the amount of the rate credits and CIF specified in Conditions 1 and 2, then Exelon will increase the financial benefits, credits, or payments to the Delmarva and Pepco Maryland customers, including the CIF, to an equivalent amount calculated on a per-distribution customer basis. In no event will the operation of this methodology cause Maryland's approximately \$66 million in residential rate credits and \$43.2 million CIF to be reduced. In the event that financial benefits, credits, or payments to the CIF are to be increased pursuant to this condition, the Commission shall retain the authority to allocate any such additional

financial benefits, credits, or payments in any manner that is consistent with the public interest.

- B. If the benefits in any other jurisdiction that do not involve financial benefits, credits, or payments to customers are materially more beneficial in the aggregate than the terms of this Order that do not involve financial benefits, credits, or payments to customers, then Exelon shall increase the benefits provided under this condition by the amount of any difference between the value of those benefits in the other jurisdiction and the value of those benefits under this condition, based on the analysis showing the valuation of those benefits in the other jurisdiction compared to the valuation of those benefits in Maryland, all determined where appropriate on a pro rata or per-distribution customer basis. The following three elements shall not be considered in the determination of whether the benefits in other jurisdictions are materially more beneficial than the terms of this condition: (a) employment and hiring commitments; (b) the existing level of charitable contributions; and (c) reliability performance and investment, and, therefore, Exelon shall not be required to offer to compensate Maryland for any differences in the value of such elements.

**DISSENTING OPINION OF COMMISSIONERS
HAROLD D. WILLIAMS AND ANNE E. HOSKINS**

Case No. 9361

May 15, 2015

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I. EXECUTIVE SUMMARY

The proposed merger of Exelon and PHI raises profound questions about whether Maryland residents and businesses will be harmed from the transaction. After a lengthy and highly contentious evidentiary proceeding, we find the Joint Applicants' answers insufficient, and the mitigation offered wholly inadequate, to conclude that this merger is consistent with the public interest and imposes no harm, as mandated by the General Assembly. The merger Application should have been denied.

The Public Utilities Article and Commission precedent provide unequivocally that the Commission must deny a merger application that imposes harm – including even the risk of harm – on consumers. The proposed merger fails that standard by causing unmitigated harm in three principal areas: it will undermine competition; it will increase rates, challenging affordability for many consumers; and it will eviscerate economic protections due to a weakened and compromised corporate governance structure.¹

The merger undermines competition for both ideas and utility services at a transformative time in the electricity industry. Maryland will lose its wires-only electric utilities, Pepco and Delmarva, which will be purchased by an energy conglomerate concerned with protecting its vast fleet of electric power plants, from which it derives most of its revenue. Exelon's economic interests to shield that fleet from emerging distributed energy technologies and other competitive threats are inherently misaligned with the interests of the customers of Pepco and Delmarva, who are predominantly concerned with efficient, cost-effective and reliable electric service. The merger will also

¹ In this dissent, we focus on the major unmitigated harms created by the merger, as well as its inconsistency with the broader public interest. That focus should not be read as a concession that other harms do not exist or agreement with the Majority that this merger provides sufficient benefits to consumers, which in fact we find patently wanting.

silence PHI's unique voice, which currently provides an invaluable non-generation perspective to the Commission on how to address the myriad issues we confront in the energy industry, from advanced metering, to demand response and integration of renewable resources.² Even more troubling, the merger will extinguish the inter-utility competition that has existed between Baltimore Gas and Electric (BGE) and Pepco/Delmarva, which in turn will chill the incentives for the State's utilities to innovate. Exelon's proposal to submit three uniform reports detailing the unified corporate stance of its utility subsidiaries, which will now control 80 percent of the State's electric service accounts, wholly fails to mitigate this harm.

A second unmitigated merger harm is the substantial rate increases that will almost certainly follow this merger, and especially burden low-income residents. The rate increases are masked in the putative benefit of enhanced reliability. However, its promised (but unsubstantiated) reliability gain is not a gift from the Applicants. Rather, customers will receive a recurring bill for decades to come for the infrastructure investments of almost \$1 billion embraced by the Majority today. We are as committed as our colleagues to ensuring a safe and reliable electricity network in Maryland. However, we cannot rubber stamp Exelon's proposal without a highly focused review of the planned enhancements. The Majority's celebration of promised reliability gains essentially preauthorizes Exelon to increase its reliability budget at customer expense

² While Exelon will control service to the vast majority of our utility customers, Maryland's voice will not be heard as loudly within the company's management, being but one of 48 states (plus the District of Columbia and portions of Canada) in which Exelon has operations. That is in sharp contrast to PHI, where Maryland is one of just four states. See Exelon Corporation: About Us, www.exeloncorp.com/aboutus.aspx.

without appropriate review.³ The Majority erred in sanctioning Exelon's reliability commitment outside of the Commission's established reliability rulemaking or other processes, where the costs and benefits and alternative pathways could have been examined more carefully.⁴

The third principal harm is to corporate governance and local control. PHI currently possesses a majority-independent Board of Directors; it will now be governed by a Board led by Exelon's CEO and dominated by that company. PHI's strategic planning will necessarily conform to the vision of Exelon, which in turn will be driven by the economic demands of its generation fleet. The Commission's Staff and the State's consumer advocate testified that the Commission should require Exelon to have an independent Board of Directors to prevent inappropriate conflicts between Exelon's unregulated business interests and Maryland's regulated electric utilities, and we find the Majority's rejection of that safeguard to be a glaring omission in its Order approving the Application.

The merger also fails to serve the public interest in significant ways. First, a broad coalition of parties oppose this merger, including, most troubling, all of the parties who possess a statutory duty or regulatory mandate to protect the public in the energy arena under Maryland law (or PJM tariff). Those parties include the State's energy office, Maryland's consumer advocate, the Commission's Technical Staff, and PJM's Independent Market Monitor. We find inexplicable the Majority's decision to ignore

³ Although the Majority argues that the Commission retains authority to deny imprudent reliability expenditures, we can expect Pepco and Delmarva to argue in future base rate proceedings that it was prudent to make investments to achieve reliability targets extolled by the Majority as being consistent with the public interest.

⁴ See RM43, Revisions to COMAR 20.50 – Service Supplied by Electric Companies – Proposed Reliability and Service Quality Standards.

these voices in favor of the Applicants' limited settlements reached with a group of disparate parties who have articulated very narrow interests.

Second, the merger yields a substantial inequity between Exelon shareholders and ratepayers, with the shareholders receiving a disproportionate share of financial benefits. Third, despite the breadth of power this company possesses in Maryland, including control over most of the electric service accounts of the State, Exelon makes no actionable commitment to improve upon PHI's weak record of supplier diversity. As an essential service provider in Maryland, Exelon and its subsidiaries should commit to better reflect the citizenship of the State in its internal hiring practices and use of outside contractors.

Exelon missed a critical opportunity to mitigate harm from this transaction, by failing to propose an integrated "utility of the future" strategy to support its reliability commitments. The tectonic shift in Maryland's distribution system is happening at a time when opportunities abound for more efficient and clean electricity service. As pronounced in the 2015 Quadrennial Energy Review (QER), the electric system is at a "strategic inflection point" and "the grid of the future will be an essential element in achieving the broad goals of promoting affordable, reliable, clean electricity."⁵ Unfortunately, the Order issued today relegates affordability, sustainability and technological advancement goals as secondary to reliability, and defers consideration of necessary new regulatory approaches until mid-2016. The grid of the future "will require business models and regulatory approaches that sustain grid investment and continued

⁵ QER Report at 3-3, 3-4. The Quadrennial Energy Report was issued in April 2015 by a Presidentially-established Task Force co-chaired by the Director of the Office of Science and Technology Policy and the Director of the Domestic Policy Council. QER Report at iv.

modernization while at the same time allow for innovation in both technologies and market structures.”⁶ Today, rather than embrace the promise of the grid of the future, the Majority chose to reinforce the grid of the past.

Simply put, this merger is bad for Maryland, harms consumers and businesses, and is contrary to the public interest. The statute requires the Commission to deny the transaction under those circumstances. Because the record demonstrates that the Commission should have denied the merger, we respectfully dissent.

II. LEGAL STANDARD

The Maryland General Assembly has stated unequivocally that a proposed merger of electric utilities in this State shall not be approved by the Commission unless the transaction results in no harm to consumers. There is no acceptable level of harm; the application must be denied if harm exists and cannot be mitigated.⁷ In fact, this Commission has held that not only actual harm, but even the risk of harm, must be mitigated before a merger application may be approved. For example, in the Exelon-Constellation merger order, the Commission found it necessary “to satisfy ourselves first that the Merger would not cause immediate or an incremental risk of harm to ratepayers.”⁸

Moreover, the Commission has found consistently that it may not overlook harm

⁶ *Id.* at 3-5.

⁷ PUA § 6-105(g)(4) directs the Commission to deny a merger application that imposes harm that cannot be mitigated. “If the Commission does not find that the acquisition is consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers, the Commission shall issue an order denying the application.”

⁸ Order No. 84698 at 37. *See also* Order No. 82986 at 11 (noting that “the Transaction posed no risk of harm to consumers.”)

or the risk of harm based on the notion that it is outweighed by merger benefits. The existence of non-mitigatable harm ends the Commission’s inquiry and requires disapproval. The Commission reiterated this principle in the Exelon-Constellation merger proceeding, when it stated: “The statute requires us to ensure that ratepayers are protected against any increased risks of harm from this Merger; it is our job to eliminate them, either by denying approval outright or through conditions, not to offset them with benefits.”⁹

In evaluating proposed merger applications, the General Assembly has placed particular emphasis on rate impacts. For example, it provided the Commission with a list of mandatory issues to consider, including at the top of the list, “the potential impact of the acquisition on rates and charges paid by customers.”¹⁰ Additionally, in legislation added just after the time of the Exelon-Constellation transaction, the General Assembly directed the Commission in any merger proceeding involving a rate credit to consider the adequacy of current funding for low-income customers.¹¹

Finally, the Public Utilities Article places firmly on the Applicants the burden of demonstrating that the merger is consistent with the public interest, convenience, and necessity, and that it provides benefits to consumers and inflicts no harm.¹² The burden is not on the opponents to demonstrate harm, the lack of benefits or inconsistency with the public interest. While the General Assembly has empowered the Commission to attach conditions to the merger, which may be used to mitigate otherwise harmful

⁹ Order No. 84698 at 37-38.

¹⁰ PUA § 6-105(g)(2)(i).

¹¹ PUA § 7-512.1(g).

¹² PUA § 6-105(g)(5).

impacts, that does not mean the Commission should attempt to rewrite a clearly defective Application or settlement agreement. Nor does it relieve the Applicants of their statutory burden to prove their case.¹³ As MEA artfully stated, “it is not the responsibility of either the Commission or the parties to try to figure out how to rewrite the Joint Applicants’ inadequate application as now modified by the settlement commitments.”¹⁴

III. DO NO HARM

A. Competitive Harms

1. Loss of Maryland’s Wires-Only Electric Utilities

Pepco and Delmarva currently serve a unique and vital role in Maryland’s deregulated electric utility environment. Namely, these utilities, under the PHI parent corporation, represent the only Maryland investor-owned utilities that do not own generation assets. As such, the primary mission for PHI is to serve its electric distribution customers with low-cost and reliable electricity. Of course, PHI like Exelon has shareholders, but the primary revenue for PHI is derived from serving its distribution customers rather than from selling electricity in wholesale markets from a vast generation fleet.¹⁵

The makeup and economic incentives for Exelon stand in stark contrast to PHI. Exelon operates the nation’s largest fleet of nuclear power plants, which produce 17,263 MW in addition to the other substantial generation interests owned by the company.¹⁶

¹³ The Commission may condition an order authorizing the acquisition on the applicant's satisfactory performance or adherence to specific requirements. PUA § 6-105(g)(3)(ii).

¹⁴ State/MEA Post Settlement Brief at 5.

¹⁵ Arndt Direct at 101.

¹⁶ OPC Initial Brief at 11.

PHI, on the other hand, is a regulated transmission and distribution company whose three regulated electric utilities, Pepco, Delmarva, and Atlantic City Electric, account for approximately 96 percent of its revenues.¹⁷ PHI and Exelon therefore have very different economic incentives and form divergent perspectives on energy issues that come before this Commission as well as other agencies, such as FERC.¹⁸ That diversity of perspective has provided useful insight to the Commission regarding how to address the myriad energy issues we face.

Indeed, this merger has been proposed at a time of significant change in the electric industry, from advances in distributed energy resources, to advanced metering infrastructure, and increased integration of renewable resources and demand response programs.¹⁹ It is a time where dramatic technological changes should provide Maryland's electric distribution customers with improved electric service. It is not, however, a propitious time for a dominant company with significant generation interests to control 80 percent of the electric service accounts of the State. The new merged entity will have strong economic incentives to restrain emerging technologies that could present a risk to its generation assets.²⁰ For that reason, the Mid-Atlantic Renewable Energy Coalition ("MAREC") opposed the merger, warning of Exelon's adverse business incentives and lamenting that the proposed settlement "does nothing to mitigate the dominance that Exelon will have over both ownership of renewable energy in Maryland

¹⁷ *Id.*

¹⁸ Hempling Direct at 27 ("Exelon's interest, as a generation owner, in high generation prices might adversely affect Pepco, which as a non-generation owner has an interest in low generation prices.").

¹⁹ State/MEA Initial Brief at 22; Tr. 4939-4940 (Lucas).

²⁰ Hempling Direct at 51.

and energy policies within the state and region.”²¹

NRG echoed those concerns, testifying that the merger will harm competition in the solar, microgrids, and alternatives to grid-sourced power markets in Maryland. It stated: “By throttling competition in these vital markets, the Partial Settlement will inflict significant and long-lasting harm on Maryland consumers in terms of fewer competitive options, less competitive pressure on market prices, and less innovation in new energy-related technologies and products.”²² MEA also presented extensive testimony regarding the harm Exelon could impose on distributed energy resources. Mr. Lucas concluded that nothing in the Application or the settlement commitments mitigates the risk of harm inherent in this merger *i.e.*, “Exelon’s incentive to exercise its control over Pepco and Delmarva Power to slow down or prevent the interconnection of distributed energy resources in order to protect its merchant generation fleet.”²³

Exelon’s conflict relating to distributed energy resources and other threats to its generation assets is evident from the documents contained in its Strategic Plan. For example, in its Hybrid model, Exelon examined the potential impact of distributed energy resources, observing that the model “will seek to insulate our centralized generation from the increased threat of DG.”²⁴ The Company further stated although distributed energy and microgrid growth opportunities were promising, “cannibalization of our core business . . . present[s] risks and challenges to implementation.”²⁵ PHI, in contrast, has no imbedded economic incentive to protect a generation fleet from technological change

²¹ MAREC April 13, 2015 Comments at 1.

²² Fuller Settlement Testimony at 3.

²³ Lucas Settlement Testimony at 12.

²⁴ Revised Tabors Direct at 42 (quoting Ex. RDT-7 at 34).

²⁵ *Id.* at 43 (quoting Ex. RDT-12 at 47).

that could benefit customers.²⁶

Beyond the economic incentives that are misaligned with customer interests, the evidence in this proceeding demonstrates that Exelon will have the *opportunity* to exert substantial influence over PHI once the merger is consummated. For example, it can control the pace of development of distributed energy resources by exerting influence over its utilities' system planning, system infrastructure, operational parameters, access to customer information, tariff proposals, and dispatch function.²⁷ Additionally, Exelon could use its interconnection protocols to limit the amount of distributed energy resources that are developed in the Pepco and Delmarva service territories, either by preventing the installation of renewable generation, making it cost-prohibitive, or limiting its size.²⁸ The risk that Exelon will use its control over PHI to curtail new technology including distributed energy resources to protect its generation assets at the expense of its customers presents a significant harm for which no adequate mitigation has been proposed.

An additional harm presented by the merger is the foregone opportunity to have legitimate competition during the next transformative change in the energy industry, including the changes associated with distributed energy resources and microgrids. Pre-merger, both PHI and Exelon offer expertise and experience to Maryland's energy markets and provide useful competition and comparison. For example, each would be capable of bidding on and developing a microgrid project, should a future Commission

²⁶ The mitigation of this harm presents a substantial challenge. We note with disappointment, however, the lack of effort by the Applicants to even address it beyond denying that it constitutes a harm. Exelon Reply Brief at 36.

²⁷ Ex. MEA-31 at 23:4-7; 39:14-15; 40:7-41:5.

²⁸ Ex. MEA-80 at 12-14; Staff Ex. 34 at 9:12-15; Tr. 4934:10-15 (Lucas).

decide to create one in Maryland.²⁹ Post-merger, however, that potential competition evaporates, as PHI will exist only as another unit of the larger Exelon conglomerate.

In that regard, it is important to consider the impact a merged Exelon/PHI will have on the mid-Atlantic region. These companies represent the largest potential competition in the mid-Atlantic, with Exelon serving the urban markets of Philadelphia and Baltimore and associated suburbs, while PHI controls Washington and its suburbs along with portions of Delaware and Southern New Jersey. Third-party competition will be stifled in markets for distributed energy resources, microgrids, and other alternatives to grid-sourced power when all major urban areas in the region are controlled by the same utility.

A witness from NRG – a potential competitor on innovative technologies – made precisely this point in his testimony before the Commission.³⁰ Specifically, Mr. Fuller testified that the merger will create in Exelon “a dominant player in Maryland’s distribution system, with an opportunity and economic incentive to use its dominant position and access to regulated rate recovery from Maryland’s consumers to suppress the deployment by third parties of innovative alternatives to grid sourced power.”³¹ Mr. Fuller further argued that Exelon’s so-called “concessions” to develop distribution energy resources and a microgrid itself, at ratepayers’ expense, actually constituted a harm to

²⁹ Although Maryland’s current franchise laws do not allow for a third party to develop a microgrid in a utility’s service territory, that could change in the near future as technology develops. Indeed, Mr. Crane acknowledged as much when he pondered how microgrids will change Exelon’s strategic outlook. “If it is determined that a microgrid or some other future that we haven’t defined yet, design of the system should be made, should that generation be competitively bid; should our company or any other company be able to competitively bid for that generation, or should the utility, and/or should the utility be able to bid for it. It’s a process we’re going through.” Tr. at 704:17 – 705:2 (Crane).

³⁰ Fuller Settlement Testimony at 3.

³¹ *Id.*

competition, because the proposals ensured that the resources would be developed by the incumbent rather than a third-party competitor. He explained that “the microgrid pilot project commitments appear designed to bolster and extend Joint Applicants’ monopoly position by bypassing any competitive process and preventing competitors who might be willing and able to provide the proposed goods and services at a lower price or with better overall terms from any opportunity to participate in the process.”³²

Finally, the Independent Market Monitor for PJM (“IMM”) filed testimony related to competitive harms that would result from approval of the merger.³³ For example, the IMM asserted that the merger’s elimination of PHI as a significant independent transmission company from PJM provided Exelon with leverage to exact concessions from PJM based on the threat of withdrawal from the organization. Exelon responded with additional commitments that addressed some, but not all, of the IMM’s concerns.³⁴ On April 14, 2015, the IMM filed correspondence with the Commission that clarified that the enhanced merger commitments failed to fully address the competitive harms identified by the IMM and that the merger “should not be approved” without additional mitigating measures.³⁵ Specifically, the IMM concluded that the merger would impose competitive harm on PJM unless the Commission required that Exelon (i) commit to participate in PJM indefinitely; (ii) commit to allow verification that Exelon

³² *Id.* at 6.

³³ See Joseph E. Bowring and Dr. Howard J. Haas Direct. The IMM was created “to objectively monitor the competitiveness of PJM markets” and to identify “structural problems in the PJM Market that may inhibit a robust and competitive market.” IMM Motion to Intervene at 1. The IMM presented the expert testimony of Joseph E. Bowring and Dr. Howard J. Haas in support of its recommendation to reject the merger unless certain mitigation measures were included by the Commission.

³⁴ IMM Reply Brief at 1.

³⁵ IMM April 14, 2015 correspondence at 1.

has made the full capability of its combined networks available to the market;³⁶ (iii) commit to treat non-affiliates like affiliates in every upstream or downstream market where Exelon companies control or influence access; and (iv) commit to make property paid for by ratepayers available to competitive transmission developers at no additional cost.³⁷ The final Commission Order does not require these additional mitigating measures or explain how the harms identified by the IMM are otherwise addressed.

2. *Loss of PHI Voice*

The loss of PHI's perspective as a non-generation owning utility presents another harm to Maryland. Exelon postulated that the loss of PHI's unique voice is immaterial because Pepco and Delmarva's votes in certain FERC stakeholder processes in the past did not sway PJM's ultimate position. That view is misguided for several reasons. First, we cannot know what important votes will occur in the future where PHI's voice would have made a difference. Second, the direction of PJM stakeholder meetings is often determined at the lower levels through the informal exchange of dialogue, well before a vote is even taken.³⁸ PHI has been vocal in stakeholder proceedings, for example, in promoting demand response programs within PJM, even though those programs may be injurious to generation interests. Third, PHI has taken positions that differed from Exelon in numerous forums, including on regulatory matters pending before the

³⁶ The IMM explained that faulty line ratings can artificially raise prices by reducing transfer capacity in constrained areas.

³⁷ IMM April 14, 2015 correspondence at 2.

³⁸ Tr. 2640:11-18 (Peterson).

Commission as well as energy issues before the legislature in Annapolis,³⁹ in addition to proposals pending before PJM.⁴⁰ As Ms. Brockway stated, “[t]he concern is that there will be no Maryland utility like PHI, a substantial utility with demographic characteristics similar to the state’s other large [utilities], to develop and present their independent views, to raise objections or confirm agreement, to highlight certain facts of a debate that support their independent perspectives, or even to sit silently while other stakeholders present their positions to the Commission.”⁴¹

The potential harm, therefore, is not just that Exelon could use its influence over its utilities to protect its generation interests at the expense of Maryland ratepayers, it is that Pepco and Delmarva could have come up with alternative ideas regarding energy efficiency, demand response, integration of renewable resources and other pressing energy issues that will now not be heard. Exelon has made clear that it speaks with one voice and that it will implement one set of best practices.⁴² In the context of its position before the General Assembly, for example, the company stated “[W]e don’t want to be in Annapolis saying things should be one way for one company and another way for the other company.”⁴³ Rather, all utilities will function “the Exelon way.”⁴⁴ Although that

³⁹ MEA’s witness Lucas testified that the potential influence of Exelon in state legislatures is apparent in Illinois, where Exelon’s utility subsidiary ComEd introduced legislation that would (if enacted) produce significant adverse customer impacts, such as “less customer-sited energy efficiency, more revenue for ComEd and Constellation, lower risk for Exelon’s generating assets, greatly reduced incentives for customer-sited distributed generation, financial windfalls for ComEd shareholders, consolidation of influence and control to ComEd and away from the Illinois Power Agency, and a reduction of the oversight authority of the Illinois Commerce Commission.” Lucas Settlement Testimony at 36-37. OPC’s witness Brockway testified, “It is dangerously naïve, however, not to recognize that Exelon, after this merger, will similarly seek to dominate the policy debate in Maryland.” Brockway Settlement Testimony at 6.

⁴⁰ Revised Tabors Direct at 16-17.

⁴¹ Brockway Surrebuttal at 11-12.

⁴² “Exelon will speak with one voice in Maryland.” OPC Reply Brief at 6, citing Christopher Crane deposition at 322.

⁴³ MEA Ex. 1 at p. 323:2-10 (Crane Deposition).

⁴⁴ See OPC Initial Brief at 9-10.

approach has the semblance of efficiency, it deters innovation and extinguishes the inter-utility competition that existed between BGE and Pepco/Delmarva, which is a result that is harmful to Maryland's electric distribution customers.

3. *Loss of Across-the-Fence Competition and Comparisons*

The record reflects that the merger will reduce the ability of the Commission, and particularly Commission Staff, to accurately evaluate the performance of Maryland utilities because of the loss of an important tool, *i.e.* the capacity to make across-the-fence comparisons between separately-owned utilities in the State. To be clear, we are not concerned that companies will fail to provide statistics to the Commission. As the Majority points out, it is easy enough to require that Exelon file a report detailing the performance of its Maryland subsidiaries. Rather, comparing the different corporate strategies of similarity-situated but separately-owned utilities is a valuable instrument in the Commission's regulatory toolbox, because it informs the Commission how different organizations can prudently address similar challenges, such as deployment of advanced metering infrastructure or strategies for reducing storm outages cost-effectively.⁴⁵ For Exelon to provide the Commission multiple sets of uniform reports misses the point and does nothing to mitigate the harm the loss of this comparison creates. The across-the-fence comparison is particularly important for the Commission because utilities generally possess more information about their operations than the Commission, and competition among similarly-situated utilities assists the Commission in compensating for that asymmetry.⁴⁶ Losing that comparison is harmful to the Commission and ratepayers.

⁴⁵ Tabors Direct at 7-9.

⁴⁶ Hempling Direct at 30.

The most compelling testimony filed on this competitive harm is from Commission Staff. After all, Staff spends every day reviewing the copious filings of Maryland's utilities and has the best perspective on the regulatory harm caused by the loss of an independently-owned PHI. Staff witness Calvin Timmerman talked at length about the harm caused by this merger. He noted that when comparing results between utilities with different owners, "you're comparing a different implementation approach quite likely. You're comparing a different management approach. And of course you're seeing, it's manifested in whatever the results are."⁴⁷ He noted that the "fewer different examples you have, the harder it is to actually say that" a particular method is "a best practice. At some point, at least from a single state, it becomes perhaps the only practice."⁴⁸ When asked specifically about whether Maryland utilities commonly offer different strategies to address problems, he stated, "you would be surprised how often . . . you actually have different perspectives . . . more often than not Pepco and Delmarva do not, since they've merged. . . I will suggest that they often have a different opinion than BGE"⁴⁹ When asked directly if losing the across-the-fence perspective would be harmful, Mr. Timmerman responded, "Yes. . . . the fewer utilities we have that are genuinely individual operations, the more limited our perspective will be on different ways of solving the various many different things that distribution utilities are expected to do."⁵⁰

One concrete example of how this harm manifests is seen in the Commission's long-standing attempts to improve utilities' supplier diversity programs. Because of legal

⁴⁷ Tr. 5044:18-22 (Timmerman).

⁴⁸ Tr. 5055:12-16 (Timmerman)

⁴⁹ Tr. 5046:11 – 5047:2 (Timmerman).

⁵⁰ Tr. 5065:15 – 5066:3 (Timmerman).

restraints, the Commission relies upon the utilities' initiative and across-the-fence competition to obtain better results. Over the past five years, Pepco and Delmarva – both owned by the same corporate parent – have implemented identical corporate strategies⁵¹ that have not produced improvement.⁵² Meanwhile, BGE's performance was actually worse than both Pepco's and Delmarva's in 2010, but corporate management set consistently increasing goals, both before and after Exelon acquired it. Over the past five years, BGE has delivered steadily increasing performance, and BGE outperformed Pepco and Delmarva in 2014.

We can fairly criticize PHI's corporate strategy on supplier diversity because we know that BGE, a similarly-situated company following the same State guidelines, has demonstrated steady (though not spectacular) improvement over the same period. However, by approving the merger, the combined companies will implement only one corporate strategy on supplier diversity issues, and on all other issues before the Commission. Perhaps Exelon will implement a better corporate strategy and achieve improved results moving forward, or perhaps it will not. The Commission will have lost a point of reference to evaluate whether the combined corporate strategy is better or not. In effect, the Commission will be evaluating a single policy in a vacuum.

We recognize that the Commission has not faced this harm in previous proceedings under PUA § 6-105. The mergers of Constellation and Exelon in 2012 and First Energy and Allegheny Energy in 2011 both simply replaced one corporate parent

⁵¹ Pepco and Delmarva kept their goals at the same level for 2010, 2011 and 2012 (Pepco at 10%, Delmarva at 9.1%) set the exact same goals for 2013, 2014 and 2015 (both at 14.2%), even though Pepco did not reach its goal in any of the past three years while Delmarva achieved its goal in each of them.

⁵² Both utilities' overall performance in 2014 has remained about where it was in 2010. Delmarva achieved 14.2% in 2010 and 14.9% in 2014. Pepco achieved 12.1% in 2010 and 13.2% in 2014.

with another that was not already operating a Maryland utility. But this transaction, by virtue of significantly increasing Exelon's control over Maryland's utility service territories, is noticeably different. Moreover, in addition to the harm faced by Pepco and Delmarva customers, this harm also affects BGE customers. BGE customers will also lose the benefit of across-the-fence competition with Pepco and Delmarva, which imposes an additional harm on Maryland consumers.

Requirements to report data separately will not mitigate the harm arising from the loss of across-the-fence comparisons. Regarding supplier diversity, for example, Pepco and Delmarva have submitted the exact same report that discusses their common supplier diversity strategy and provides annual data.⁵³ Those joint reports have also included supporting information about PHI's common corporate strategy and the PHI Supplier Diversity Department. Notably, even in this year's separate reports, Pepco and Delmarva took a similar approach, provided the information in a similar format, and again pointed to PHI's Supplier Diversity Department as supporting their operations. Although the Majority states that the utilities may be compelled to report separately in the future, the value in reviewing separate reports is to compare results from *different* corporate approaches. That is, reviewing separate reports is not a sufficient replacement for reviewing distinct corporate strategies. Therefore, Exelon's proposal to provide three copies of its unified corporate programs provides virtually no value.

Similarly, Exelon's offer to provide an across-the-fence report does not mitigate this competitive harm.⁵⁴ Data from Exelon-owned utilities will reflect Exelon's corporate strategy only, and data from out-of-state non-Exelon utilities will provide a poor

⁵³ The most recent joint filing in the PC16 docket occurred in November 2014. PC 16, Dkt. 222.

⁵⁴ See Condition 27.

substitute because those utilities will not reflect Maryland’s unique regulatory and physical environments.⁵⁵ As Mr. Timmerman noted, the commitment is simply not a substitute for the experience of having two actually different utilities doing their tasks as those two different utilities might do them.”⁵⁶ He continued by rhetorically asking, “Would we be measuring actual differences in how people address questions, or would we simply be measuring how Exelon did or did not succeed in carrying out its approach to management.”⁵⁷ Also, as Exelon witness Charles Dickerson observed, different state standards can prevent an “apples to apples” comparison between utilities in different states.⁵⁸ In addition, an across-the-fence report would fail to produce the innovative ideas that would have arisen through inter-utility competition absent approval of the merger.

Exelon’s reliance on the Commission’s conditional approval of the (non-consummated) BGE-Pepco merger is misplaced because that proposed merger would not have resulted in the same degree of concentration of utilities under the same corporate parent and it was subject to a different legal standard.⁵⁹ That proposed merger did not include Delmarva, so even if the merger had been completed, Maryland would still have possessed three independent investor-owned utilities. Additionally, unlike in this merger, the proposed BGE-Pepco transaction did not include PECO, the closest major urban utility outside of BGE and Pepco’s territory. Also, the statute in effect at that time required only a finding that the merger was “consistent with the public interest,

⁵⁵ Tabors Sub-Rebuttal at 8-12.

⁵⁶ Tr. 5042:4-8 (Timmerman).

⁵⁷ *Id.* at 14-18.

⁵⁸ Tr. 3872:18 – 3873:12 (Dickerson).

⁵⁹ Ultimately, the applicants in the proposed BGE-Pepco merger withdrew their application for approval. Case No. 8725, Dkt. No. 232.

convenience and necessity.”⁶⁰ As discussed above, Maryland law now requires a specific finding of no harm. Because of the less stringent standard, the Commission at that time was permitted to weigh harms against benefits. Finally, the promised benefits in the BGE-Pepco proceeding were significant: creating a “strong, Maryland-based corporation,” providing \$1.3 billion in savings over 10 years, and “a three-year rate freeze . . . that provide[d] real protection for customers.”⁶¹

As the Majority emphasizes, Exelon has a strong reputation as a utility operator and we fully expect Exelon to provide safe and reliable service to all of the customers it has the responsibility to serve. But the pertinent statutory question is whether Maryland consumers are worse off – that is, are they harmed – by this loss of competition.⁶² Because the record reflects that the merger raises competitive harms that put Pepco and Delmarva customers in a worse position, and because those harms are not sufficiently mitigated, the law requires the Commission to reject the merger.

B. Rising Rates & Affordability

This Commission has long considered the distribution of electricity to consumers to be an essential service.⁶³ Large numbers of Maryland residents are challenged by the increasing cost of electric and gas service distribution with hundreds of thousands of

⁶⁰ Maryland Code, Article 78, Public Service Commission Law, § 24(c) (1993 Repl. Vol.).

⁶¹ Order No. 73405 at 19, 90.

⁶² “Competition is not only the basis of protection to the consumer, but is the incentive to progress.” President Herbert Hoover, State of the Union Address, December 2, 1930.

⁶³ See *Re Elec. Services, Market Competition and Regulatory Policies*, 85 Md.P.S.C. 130, 141 (1994), which stated: “The provision of electric service is one of those enterprises which produces an essential or critical good. Electric operations were found in *Munn vs. Illinois* 94 U.S. 113 (1877) to ‘affect the community at large’ and were said to be ‘clothed with a public interest.’”

Marylanders struggling to pay their electric bills.⁶⁴ Rising rates are certainly no surprise to Pepco and Delmarva customers. Pepco's distribution rates have risen \$6.36 per month – or over \$76 per year – since August 2010,⁶⁵ while Delmarva's rates have risen almost \$12.92 per month – or over \$155 per year – since December 2009.⁶⁶

We recognize that the merger cannot solve Maryland's challenges on affordability, and indeed the law does not require it to do so. But the law does require the Commission to consider the potential impact of the merger on customer rates.⁶⁷ Unfortunately, this merger will perpetuate and unnecessarily harm consumers by leading to significant rate increases, which are particularly harmful to low-income ratepayers. Exelon's reliability commitment lasts five years, but ratepayers will endure the rate impacts for decades. The merger does not contain adequate measures to mitigate this harm or otherwise address affordability concerns.

1. *The Merger's Reliability and Other Commitments*

The central problem with Exelon's misguided reliability commitment⁶⁸ is that it has the practical effect of preauthorizing massive proposed reliability budgets without appropriate review. Indeed, Exelon has asserted that Pepco and Delmarva can meet the SAIDI and SAIFI targets promised in the settlement – but only if it spends all of PHI's planned five-year capital and O&M reliability-related budgets⁶⁹ plus an additional \$34 million in reliability expenditures – a total of almost \$1 billion.

⁶⁴ See generally *Outcome or Status of Evaluation of Energy Assistance Programs*, Maryland Public Service Commission, December 8, 2014; Tr. 34:2-7; (Vanni), Public Hearing January 6, 2015; Tr. 90:7 – 95:8 (Vanni), Public Hearing January 14, 2015.

⁶⁵ See Case Nos. 9217, 9286, 9311, and 9336.

⁶⁶ See Case Nos. 9192, 9249, 9285, and 9317.

⁶⁷ PUA § 6-105(g)(2).

⁶⁸ See Condition 8.

⁶⁹ Dickerson Rebuttal at 5.

This significant reliability spending will lead to substantial rate increases. Accounting for reliability and other spending increases, Exelon estimates that a typical residential rate customer will receive distribution rate increases of approximately \$3.00 per month each year (for Pepco) and \$5.60 per month each year (for Delmarva Power) through 2019.⁷⁰ In 2019, a typical Pepco residential customer will pay an estimated *extra* \$180 per year and will have paid an additional \$540 from 2015 through 2019.⁷¹ It is even worse for Delmarva customers, who in 2019 will pay an estimated *extra* \$336 per year and who will have paid an extra \$1,008 from 2015 through 2019.

Exelon claims that Pepco and Delmarva would have asked for these large reliability spending increases – and subsequent rate increase requests – without the merger. However, the Commission has not determined that Pepco and Delmarva’s proposed reliability spending is necessary or prudent.⁷² In this proceeding, the Commission did not undertake an evaluation of the reasonableness of the proposed expenditures, but rather focused solely on trying to prevent Exelon from exceeding the proposed budgets through application of modest penalty provisions. If the underlying budget is excessive, limiting potential overruns of that budget will not protect the public from the harm of overpaying for maintaining the distribution system. Instead, the Majority has essentially accepted Pepco’s and Delmarva’s initial, untested budgets as a ceiling (with a \$34 million attic tacked on, along with an escape hatch to allow additional

⁷⁰ See Joint Applicants’ Ex. 49 (Hearing Request 8).

⁷¹ Exelon concedes that it did not perform separate bill-impact analyses for reliability-only forecasted spending, but rather submitted projections for total infrastructure expenditures. *Id.* These rate estimates do not include the rate impact of the additional \$34 million earmarked for accelerating the pace of reliability improvements, which Exelon estimates will cost an additional \$0.40 per month. Tr. 3876:21-23 (Dickerson). We note that the record does not explain how the \$0.40/month estimate was derived or the expected duration of this cost on ratepayers.

⁷² The Commission generally reviews reliability spending very carefully. In fact, Pepco received only 23% of its requested increase in its last rate case. See Case No. 9336, Order No. 86441.

expenses if justified). That result is potentially injurious to ratepayers. To ensure just and reasonable rates, Exelon and the Majority should have addressed reliability targets and costs in separate proceedings.

The Majority claims, and Condition 8 acknowledges, that the Commission retains the authority to deny imprudent reliability expenditures. Although technically correct, that authority will be significantly curtailed because of this merger. Exelon will certainly counterclaim that all spending within PHI's proposed (but unreviewed) budgets was prudent because it was spent to achieve reliability targets that the Majority praised as being consistent with the public interest. The Majority has thereby handcuffed the Commission in the future rate cases of Pepco and Delmarva and essentially sanctioned massive budgets without appropriate review.⁷³ That implicit preapproval is directly attributable to this merger and virtually guarantees harmful long-term rate increases for Pepco and Delmarva customers.

Moreover, in addition to the significant costs of reliability improvements, the merger includes other provisions that may increase ratepayers' burden, including conditions related to microgrid development,⁷⁴ recreational trails⁷⁵ and significant costs to achieve this transaction.⁷⁶ None of the rate impacts of these conditions were evaluated

⁷³ Given the incomplete record in this case, we believe that the Commission's ongoing rulemaking in RM-43 is the appropriate venue to address new reliability targets, and that proceeding or a subsequent rate case is the appropriate venue to determine whether Exelon's budgets and costs in meeting those targets are prudent.

⁷⁴ Lucas Settlement Testimony at 30.

⁷⁵ Tr. 4303:20 – 4304:3 (Khouzami) (noting that this commitment could cost ratepayers up to \$5 million).

⁷⁶ Exelon estimates over \$50 million in costs to achieve this merger, which we understand will be recovered in future rate proceedings. Khouzami Rebuttal, Ex. CVK-3 at 8-9.

to determine the “potential impact of the acquisition on rates and charges paid by customers.”⁷⁷

2. *Lack of Reliability Cost Reduction Commitments or Goals*

The reliability metrics approved by the Majority do not incentivize Pepco and Delmarva to find ways to deliver service at a lower cost. Utilities earn a rate of return on reliability capital spending, which encourages infrastructure spending, even if other strategies could be more cost effective. Exelon claims only that it will limit the amount of cost *increases* as compared to what PHI might have done. This approach contrasts starkly with Exelon’s approach in Delaware, where Exelon agreed to improve its reliability performance substantially while reducing Delmarva’s originally proposed reliability budget by over \$71 million – *a reduction of 24%*.⁷⁸

We welcome the Majority’s toughening of budget caps and penalties, but these provisions ensure only that ratepayers are not on the hook for *even more* increases. Large increases in rates will remain in place, even if both Pepco and Delmarva exceed *every single* budget cap.⁷⁹ Regarding the over-budget penalty for capital expenditures, Exelon puts only its *profit* into escrow – it does not offer to reduce customers’ responsibility to pay for all costs. This penalty system, in which Exelon’s worst case is cost recovery and the best case is an ample return, is an ultimate “no risk, all reward” scenario for Exelon at the expense of ratepayers.

⁷⁷ PUA § 6-105(g)(2)(i).

⁷⁸ See Delaware Amended Settlement Agreement, Dkt. No. 242, p. 17. We can compare Maryland’s approach to buying a new car with all the bells and whistles at sticker price, whereas the Delaware parties negotiated improved standards at a reasonable price.

⁷⁹ State/MEA Reply at 6.

3. *Synergy Savings*

The Commission has previously found that promises to achieve synergy savings and pass through those synergies to ratepayers are “inherently speculative” and cannot be relied upon under our statute to qualify as benefits.⁸⁰ Because that same principle applies here, the Majority’s reliance on synergy savings is misplaced.⁸¹

Moreover, we take issue with the Majority's synergy savings calculations that attempt to justify the unimpressive rate credit and CIF contribution. The Majority overstates the degree to which potential synergy savings are being shared with Pepco and Delmarva ratepayers. First, the estimated \$37 million in net synergy savings over the first five years is only a subset of the total expected five-year net synergy savings of \$225 million – of which \$71 million will be directed to Exelon's competitive companies.⁸² This imbalance raises concerns about whether Pepco and Delmarva customers are receiving a fair share of the merger cost savings that arise out of the elimination of PHI service company jobs and functions.

4. *Lack of Adequate Mitigation*

Rate increases are harmful to all ratepayers, but particularly to limited-income ratepayers who struggle to pay their bills each month. In 2014, the State received over 150,000 applications from Maryland customers seeking bill heating and electric assistance, a 3.6% increase from 2013.⁸³ The number of bill payment assistance

⁸⁰ Order No. 84698 at 90.

⁸¹ Hempling Direct at 30 (quoting the Department of Justice/Federal Trade Commission guidelines, which state that “[Merger] efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms.”)

⁸² Joint Applicants’ Ex. 35 at 8

⁸³ *Outcome or Status of Evaluation of Energy Assistance Programs* at 8.

applications received in 2014 increased 4.6% over the prior year.⁸⁴ In December 2014, over 25,000 Pepco and Delmarva customers received an energy assistance payment.⁸⁵ In addition, as recently as last winter, the State found it necessary to make a one-time additional allocation of \$20 million to supplement existing low-income assistance programs due to a spike in electricity prices that threatened the welfare of low-income residents.⁸⁶ Rising rates that will result from this transaction will exacerbate the squeeze faced by low-income ratepayers in trying to obtain electricity.⁸⁷ The settlement did not adequately mitigate the harm.

The rate credits in Condition 1 are wholly insufficient to mitigate future rate increases.⁸⁸ For example, the combined rate credits would not cover an average residential Pepco ratepayer's expected distribution rate *increase* in 2017 alone.⁸⁹ Additionally, the rate credits will not reach numerous households, particularly low-income renters. Twenty-six percent of renters live on master-meter accounts in which the renter is not directly billed for electricity and thus not a recipient of a rate credit.⁹⁰ As NCLC witness Todd Nedwick stated: "To the extent that the renter is not individually paying their utility . . . they would not directly receive the rate credit. So there's a gap there."⁹¹ In Pepco's service territory, about two-thirds of low-income households are

⁸⁴ *Id.*

⁸⁵ Joint Applicants' Ex. 49 (Hearing Request 5).

⁸⁶ *Outcome or Status of Evaluation of Energy Assistance Programs* at 6.

⁸⁷ "We can't forget that there are many people who are very cold tonight. People whose kids really would be better in school if they didn't have to worry about whether the lights were going to be on and whether they could cook breakfast in the morning. And so, though we don't want [the Commission] to stop all the poverty issues, if we focused just on energy, we would be doing a great service to the most vulnerable people in Maryland." Tr. 94-95 (Vanni), Public Hearing January 14, 2015.

⁸⁸ We recognize that under the statute, the Commission cannot weigh benefits against harms to see which is greater. Order 84698 at 37-38.

⁸⁹ We note that Condition 1 does not fund rate credits to nonresidential customers.

⁹⁰ Tr. 4689:13-15 (Nedwick).

⁹¹ Tr. 4692:22 – 4693:3 (Nedwick).

renters,⁹² meaning a substantial number of low-income residents will not receive any rate credits from this merger to offset utility costs.⁹³

Other Exelon commitments lack sufficient impact to offset rising rates. For example, the requirement of Condition 3 to increase energy efficiency for low-income ratepayers is too small and does not impact enough ratepayers to meaningfully impact the substantial rate increases discussed above. Prince George's County's witness Erica Bannerman estimated that if \$8 million were directed toward her County's low-income energy efficiency program, it would impact only 150-200 homes across six communities.⁹⁴ Moreover, by directing Exelon to provide funding directly to Montgomery and Prince George's Counties with no Commission oversight or coordination with the Commission's EmPOWER programs, it is not reasonable to conclude that those funds will provide a benefit to ratepayers.⁹⁵ Similarly, Condition 18 on arrearage forgiveness, even as revised, is estimated to reach less than a thousand customers.⁹⁶ Low-income ratepayers would be more effectively served by directing synergy savings to increase the Electric Universal Service Program (EUSP).⁹⁷ Finally, the caveats contained in the commitment regarding the arrearage management program are so broad as to render the commitment meaningless. The language provides that Pepco and DPL will "engage in discussions" in "good faith" to develop a "mutually agreeable" program. Ultimately, Staff witness Calvin Timmerman noted, "it's not

⁹² Tr. 4677:1-2 (Nedwick).

⁹³ Although renters on a master-meter system do not receive a utility bill, landlords typically account for utility costs in setting rental rates. Thus, renters will feel the impact of increased rates passed through in higher rents.

⁹⁴ Tr. 4664:5 – 4666:11 (Bannerman).

⁹⁵ We note that Condition 3 requires that the Counties "shall *endeavor* to direct at least 20% of the [energy efficiency program] funds to benefit limited- *and moderate*-income residents." (italics added).

⁹⁶ Staff Ex. 31, Applicants Response to MEA Data Request 7-62.

⁹⁷ Tr. 5040:1-22 (Timmerman).

entirely clear to me that there's very much here to contribute to bill affordability for low- and middle-income residents."⁹⁸

Since 2012, Maryland law has specifically required the Commission to consider the adequacy of current funding of the EUSP in providing assistance to qualifying customers.⁹⁹ By unanimously passing that requirement so soon after the Commission's approval of the Exelon-Constellation merger, the Maryland General Assembly intended that low-income issues be addressed during future mergers.¹⁰⁰

Nevertheless, there is significant doubt about whether the record contains the requisite facts needed to determine the adequacy of the EUSP fund.¹⁰¹ The Majority relies upon a report from the Department of Human Resources, which was not discussed in our hearings or even submitted in this record. We note that the report's findings were strongly contested by the Office of People's Counsel in Case Number 8903, and likely would have been in this proceeding had the Commission complied with this statutory requirement.¹⁰² Notably, OPC's analysis showed that the EUSP is underfunded and has failed to assist thousands of eligible low-income families.¹⁰³ We also note that the state's EUSP funds are supplemented currently by auction proceeds from the Regional Greenhouse Gas Initiative, but the record does not indicate whether current RGGI funds are sufficient to meet the needs of low-income Marylanders. The record also does not

⁹⁸ Tr. 5038: 12-15 (Timmerman).

⁹⁹ PUA, § 7-512.1(g).

¹⁰⁰ Maryland General Assembly, Ch. 679, 2012 Regular Session.

¹⁰¹ Sierra Club and Chesapeake Climate Action Network Post-Settlement Brief at 8-9.

¹⁰² See Case No. 8903, OPC Comments regarding OHEP's 2014 Annual Report on EUSP, Dec. 2, 2014.

¹⁰³ *Id.* at 2 (“[T]here are 360,751 households at or below the income eligibility threshold of 175% of the federal poverty level.[] Nevertheless, OHEP projects that a total of only 117,110 households will receive bill payment assistance in FY2015; meaning a mere one-third of the total number of households eligible for EUSP will be participating . . . increasing numbers of people will need to be turned away when the allocated funds have been exhausted.”).

consider the tenuous position that Maryland low-income families would be in if RGGI auction proceeds are lower in future years or if State government chooses not to supplement the fund as it did in 2014. We are doubtful that the Majority satisfied the legal requirement to “consider the adequacy of the current funding” of the EUSP fund.

Exelon initially recommended¹⁰⁴ – but did not include in the settlement¹⁰⁵ – that a portion of the CIF be dedicated to direct low-income customer support. Exelon could have included in the settlement direct contributions to the EUSP or other low-income assistance and energy education programs, in line with what the Commission ordered in Exelon’s acquisition of BGE.¹⁰⁶ As much as Exelon implored the Commission to believe that its management model shares best practices company-wide, it could have mirrored two successful programs in BGE’s territory – the matching credit program¹⁰⁷ and the Maryland Fuel Fund¹⁰⁸ – and implemented or provided funds to support similar programs in the service territories of Pepco and Delmarva. Similarly, Exelon could have also looked to other states in which it operates utilities, notably Illinois and Pennsylvania, to pilot – or at a minimum, commit to proposing – programs to assist low-income individuals to afford electricity.¹⁰⁹ Exelon also could have offered to support recommendations for a “percent of income” program previously offered by Commission

¹⁰⁴ Exelon Initial Brief at 1.

¹⁰⁵ Joint Applicants’ Enhanced Commitments, Appendix C (Errata Version).

¹⁰⁶ The Commission ordered that the Maryland Fuel Fund receive \$14,871,204 to address low-income bill assistance issues. Order No. 85187.

¹⁰⁷ BGE’s matching credit program for low-income families writes off one-third of unaffordable bills if the customer (or a supplemental funding source) pays two-thirds of the bill. Tr. 93:6-10 (Vanni), Public Hearing January 14, 2015; Tr. 34:19 – Tr. 35:3 (Vanni), Public Hearing January 6, 2015.

¹⁰⁸ See testimony of Maryland Fuel Fund director Many Ellen Vanni, who said that the Merger presented “an opportunity to look at [the Fuel Fund] as a statewide program.” Tr. 35:9-10 (Vanni), Public Hearing January 6, 2015.

¹⁰⁹ See Illinois: <https://www.comed.com/customer-service/assistance-programs/additional-resources/Pages/state-local-resources.aspx>; and Pennsylvania: <https://www.peco.com/CustomerService/AssistancePrograms/CAP/Pages/default.aspx>.

Staff.¹¹⁰ Unfortunately, the Majority’s revisions to Exelon’s minimal low-income assistance further eroded financial support for low-income ratepayers.¹¹¹

Exelon had many options to mitigate the harm of increased rates, particularly for low-income ratepayers, but failed to do so. And although the Commission cannot “blue pencil” a merger application or settlement agreement,¹¹² the Majority similarly failed to mitigate this harm. Ultimately, because the harmful rate impacts have not been mitigated, and low-income customers face even higher costs for this essential service post-merger, the merger does not meet the statutory standard and should have been rejected.

C. Corporate Governance and Local Control

The evidence in this proceeding demonstrates that post-merger, PHI’s corporate identity will fundamentally change in a manner that risks harm to consumers.¹¹³ PHI will no longer be a wires-only company, whose strategic focus will center on the transmission and distribution of electricity to its residential customers. Instead, it will become a subsidiary of Exelon, whose central objective will be the economic health of its substantial generation fleet. Moreover, Exelon has proposed (and the Majority has approved) corporate governance provisions that will effectively render PHI and its regulated electric utilities powerless against Exelon’s corporate will. Exelon will speak

¹¹⁰ Timmerman Settlement Testimony at 24 (citing Public Conference 27, Affordable Energy Proposal, Public Service Commission Staff, November 1, 2012).

¹¹¹ The amount allocated for low-income affordable multifamily housing energy efficiency assistance investments to Delmarva customers is now less than agreed to in the partial settlement. Compare Request for Adoption of Settlements, Appendix A at 8 with Condition 3(C).

¹¹² Order No. 82986 at 32.

¹¹³ In the context of a regulated utility becoming part of a larger corporate organization, the Commission has recognized that increased “physical, corporate and administrative distance” is a specific harm to ratepayers that requires before-the-fact protections. *In the Matter of the Application of the Merger of FirstEnergy Corp.*, Order No. 83788 at 53-55.

with “one voice,” such that when conflicts of interest arise between the interests of regulated utilities and their customers on the one hand, and Exelon’s generation assets on the other, the generation interests will prevail.¹¹⁴ The Majority failed to require an independent voice for PHI under those circumstances, which we believe is in error.¹¹⁵

The lack of an independent PHI Board of Directors post-merger is a glaring omission from the Application and partial settlements. After the merger, PHI will transition from having a majority-independent Board of Directors¹¹⁶ to having a Board that is not independent, but rather is dominated by Exelon.¹¹⁷ For example, the new Board will have seven members, all of whom will be appointed by Exelon. The most important member of the Board will be Exelon CEO and Chairman Christopher Crane, who will also fill the role of Chairman of the new PHI Board. Three additional members of the Board also will be Exelon employees, ensuring that Exelon’s interests will prevail over those of PHI on any matter in which the positions of the regulated and unregulated

¹¹⁴ Mr. Lubow acknowledged that the strategic focus of PHI as a wires-only company was “diametrically opposed” to Exelon. Tr. 3541:1-5 (Lubow).

¹¹⁵ Beyond the harms relating to the loss of an independent PHI Board of Directors, the merger will yield a loss of corporate focus on Maryland. Additionally, because the merger is a cash-for-stock transaction, it will reduce stock ownership in the State. See Tr. 4412:21-22 (Khouzami) (“If we close, all of those [PHI] executives and employees will get cash [in exchange for PHI stock].”). In that regard, the Broadened Ownership Act “encourages the broadening of the base of capital ownership among greater numbers of the residents of the State through, as one means, the use of employee stock ownership plans.” Maryland Code, Economic Development Article, §§ 14-101 *et seq.* The Act requires the Commission to summarize its efforts to promote the policies related to broadening the ownership of capital in its annual reports to the General Assembly. § 14-102. Currently, approximately 19% of PHI shareholders are Maryland residents. Commission 2014 Annual Report at 92. Unfortunately, this merger will reduce the ownership of stock in Maryland, which is contrary to the State’s public policy.

¹¹⁶ Mr. Rigby testified that currently, 90 percent of PHI’s Board of Directors is independent, conceding “I’m the only management.” Tr. 1232:4-5.

¹¹⁷ Although Pepco and Delmarva will retain their own Boards of Directors after the proposed merger, those boards will not have any independence from Exelon. According to Staff witness Lubow, “these utility boards will likely not have any ‘real’ power or authority in a post-merger structure.” Lubow Reply Panel Testimony at 61. That lack of authority is perhaps best exemplified by Mr. Crane’s answer to the question of the role of the individual PHI utility boards, when he stated “I’m not aware of individual boards below the PHI level.” November 10, 2014 Deposition of Christopher Crane at 190:17-18. See also Tr. 1233:9-10 (Rigby) (“there are no independent members. All of those boards are management employees.”).

diverge. Condition 30 requires that the Board include one director from each of PHI's three utility subsidiaries and that at least three directors shall be independent as defined by NYSE rules. Nevertheless, because four of the directors will not be independent, PHI's Board of Directors will not be majority independent.¹¹⁸

According to Staff, given the composition of PHI's Board of Directors, "it is clear that the PHI Board's objectives will effectively be to carry out Exelon's strategic vision rather than focus only on the PHI utility subsidiaries."¹¹⁹ MEA agrees, stating "post-merger strategic planning will not be conducted at a local, or even PHI, level."¹²⁰ Instead, PHI's strategic planning will necessarily conform to the vision of Exelon, which in turn will be influenced by the economic needs of its vast generation assets.¹²¹ As MEA stated, "Exelon will operate its regulated utilities through the filter of how their activities will impact Exelon's grid generation and power marketing business."¹²² That outcome is in stark contrast to how PHI currently operates. In 2010, Pepco made a strategic decision to divest its generation assets from Conectiv and to operate as a wires-only distribution and transmission utility, with its primary focus being efficient and reliable delivery of electric service. Exelon's purchase of PHI will significantly change

¹¹⁸ Aggravating the problem of the lack of independence of PHI's Board of Directors is Exelon's failure to commit to including any current PHI board members on the Exelon Board of Directors.

¹¹⁹ Lubow Reply Panel Testimony at 64.

¹²⁰ State/MEA Initial Post-Hearing Brief at 55. See also Howard Lubow, stating "the strategic direction and key decisions of the PHI utilities will be made at the Exelon level." Lubow Reply Panel Testimony at 66.

¹²¹ The lack of an independent PHI Board is exacerbated by Exelon's approach to management, which is a top-down management style epitomized by the phrase "the Exelon way." See, for example, BGE witness Mr. Kevin McGowan, who testified: "Please understand, Mr. Crane is the ultimate boss." Tr. 1962:5-6 (Butler). Although conversations between Exelon and BGE management can be collaborative, Mr. McGowan indicated that the executive committee is "not a formal voting body." Tr. 1962:17-21 (Butler).

¹²² State/MEA Initial Post-Hearing Brief at 56.

that focus and could put Maryland’s ratepayers on a collision course with Exelon’s larger financial goals.

In order to address this problem and maintain the separation and independence of PHI and its utility subsidiaries, Staff recommended that the Commission require that the PHI, Pepco and Delmarva Power Boards be comprised of a majority of independent directors with a fiduciary duty to PHI rather than Exelon.¹²³ Specifically, Staff advised the Commission to condition the merger on the commitment that “PHI and all PHI utilities should have a board of directors consisting of a majority of non-management, independent directors with no material connections with Exelon or Exelon’s affiliates.”¹²⁴ The purpose of the condition was to prevent Exelon’s economic interests from fully pervading the behavior of the regulated utilities. As Dr. Malko testified, “one function of ring-fencing is to create an atmosphere where that utility subsidiary is behaving as it would be if it were not part of that holding company. So I think it’s very prudent to pursue the separate board idea.”¹²⁵ OPC’s Scott Hempling suggested a variation of this solution, whereby “the holding company legally commits not to overrule or preclude particular types of decisions by local management.”¹²⁶ In other words, the Commission would determine certain types of decisions that would be inviolate and not susceptible to

¹²³ Lubow Reply Panel Testimony at 65.

¹²⁴ Staff/MEA Initial Brief at 33. Staff’s recommendation is also consistent with a recent corporate transaction discussed in this proceeding involving Oncor Electric Delivery Company, a regulated electric transmission and distribution service company in Texas. In a transaction in which Energy Future Holding Company acquired Oncor, the Texas Commission required a number of ring fencing provisions to protect ratepayers, including that Oncor retain a majority independent board. Tr. 3542:10-14. Maryland Staff witness Lubow recommended that a similar condition be required for PHI. Tr. 3542:19 – 3543:4. Dr. Malko echoed that opinion, stating “In my view, as the holding company gets more complex, that is, has more subsidiaries... it’s prudent to make sure that the ring-fencing conditions over the regulated utility are very clear and very strong. And that’s why I also very much support this separate board idea.” Tr. 3544:19 – 3545:3.

¹²⁵ Tr. 3545:7-11 (Malko)

¹²⁶ Tr. 4720:20-22 (Hempling).

being overruled by Exelon, in contrast to Exelon’s proposal, where “there is no type of decision in the holding company system that cannot be controlled by the Exelon Board.”¹²⁷

Unfortunately, the Majority rejected the corporate governance solutions of both Staff and OPC. Given the extensive record evidence regarding Exelon’s economic incentives to foster its generation fleet, potentially at the expense of Pepco, Delmarva and their ratepayers, and the relative ease of adopting one of the straightforward proposals offered into evidence, we believe that the Majority acted erroneously on this matter.

IV. CONSIDERATION OF THE PUBLIC INTEREST

A. The Partial Settlements

The Joint Applicants laud the limited settlements as representing a “broad and diverse group of stakeholders” and claim that the merger “is endorsed by a wide range of organizations.”¹²⁸ Contrary to those assertions, this merger does not enjoy broad support, and indeed is opposed by a substantial number of parties. More troubling still, all of the parties who possess a statutory duty to protect the public in the energy industry under Maryland law have voiced strong opposition to this merger. We believe that the Majority is wrong to place any weight on these limited settlement agreements that exclude all of

¹²⁷ Tr. 4721:3-6 (Hempling).

¹²⁸ Exelon Post Settlement Brief at 1-2. We note that Exelon did not repeat in its post-settlement brief its assertion that the settlements “resolve all contested issues in this proceeding.” Request for Adoption of Settlements at 1.

Maryland’s statutorily-authorized energy agencies.¹²⁹

A broad and vocal chorus of voices has spoken out against this merger. Those parties include MAREC (“the Settlement does not mitigate the merger harms ... such as the expansion of Exelon’s influence in the Mid-Atlantic region and its longstanding resistance to renewables”);¹³⁰ Public Citizen (“the merger will consolidate Exelon’s political control of the regional market, PJM, enhancing its already outsized ability to influence the operations of the wholesale market, directly impacting Maryland ratepayers”);¹³¹ the Sierra Club and Chesapeake Climate Action Network (“the acquisition harms the State’s ability to achieve its energy policy objectives [and] the benefits proffered by the Applicants are illusory”);¹³² POWERUPMONTCO (“the merger would harm Maryland consumers by limiting competition [and] making Maryland ratepayers bear the cost of Exelon’s aging nuclear infrastructure”); Clean Chesapeake Coalition (the Application should be denied because of the “Joint Applicants’ blatant disregard for the concerns of Maryland’s local government officials” regarding certain Exelon power plants);¹³³ Coalition for Utility Reform/City of Gaithersburg (the Joint Applicants fail to “bring about a global settlement that addresses the fundamental issues raised by the merger”);¹³⁴ the District of Columbia and Virginia Solar Energy Industries Association (the merger will allow Exelon to “exercise undue influence over Maryland’s

¹²⁹ In the Exelon-Constellation merger that preceded this case, a unanimous Commission placed less emphasis on the global settlements obtained by Exelon. There, the Commission stated: “Of course, the mere fact of a settlement would not resolve this case even if it were unanimous - we still must review any settlement independently for compliance with Public Utilities Article (“PUA”) § 6-105, and we have done so below.” Order No. 84698 at 2.

¹³⁰ MAREC Post Settlement Brief at 1.

¹³¹ Public Citizen Brief at 2-3.

¹³² Sierra Club and Chesapeake Climate Action Network Reply Brief at 1.

¹³³ Clean Chesapeake Coalition Post Hearing Brief at 4, 7.

¹³⁴ Coalition for Utility Reform, City of Gaithersburg Reply Comments, Remarks of Councilmember Roger Berliner at 1.

solar policies, and economic incentives to create interconnection impediments where possible”);¹³⁵ and AOBA (“the proposed settlements reached by the Joint Applicants with selected parties are limited in scope and fail to address critically important issues raised by nonsignatories to the Joint Applicants’ settlements.”).¹³⁶

Although these parties discuss specific weaknesses in the merger and settlements, the testimony, exhibits and argument presented by the parties statutorily authorized to represent residential ratepayers, coordinate the State’s energy policy, and act as the Commission’s technical experts – OPC, the State of Maryland and MEA, and Commission Staff, respectively – reveal more comprehensively why this merger and settlement is fundamentally flawed.

Each of those parties brings special expertise and statutorily-mandated responsibilities to the merger proceeding. OPC, for example, is statutorily required by PUA § 2-204(a) to “evaluate each matter pending before the Commission to determine if the interests of residential and noncommercial users are affected” and to “conduct investigations and request the Commission to initiate proceedings to protect the interests of residential and noncommercial users.” The General Assembly has broadly authorized OPC to “appear before any federal or State unit to protect the interests of residential and noncommercial users.”¹³⁷ As such, the OPC is a familiar and valued party at Commission proceedings. Similarly, as the State’s energy office, MEA appears and presents evidence in most large-scale Commission hearings. MEA is statutorily charged

¹³⁵ District of Columbia and Virginia Solar Energy Industries Association Post Settlement Brief at 1.

¹³⁶ AOBA Post Settlement Brief at 5. AOBA, whose membership operates commercial buildings primarily within the Pepco service territory, represented the primary voice for nonresidential ratepayer classes in this proceeding.

¹³⁷ PUA § 2-205(b).

to “evaluate and coordinate energy related policies and activities among all agencies of the Executive Branch of the State” as well as to promote the conservation and efficient use of energy.¹³⁸ MEA intervened in this proceeding not only on behalf of itself as the State energy office, but also on behalf of the State of Maryland as an energy consumer. It stated: “In addition to representing the interests of the State’s citizens, the State is also a customer of both Pepco and Delmarva... purchas[ing] millions of dollars of electric service from the utilities.”¹³⁹ Finally, the Commission’s Technical Staff participated in this merger, as it does in all Commission proceedings, contributing expert testimony and objective recommendations.¹⁴⁰

OPC, the State and MEA, and Staff presented a wealth of testimony on the merger including a comprehensive evaluation of merger impacts. They called expert witnesses to address the potential harms of the merger, including increased rates for electric service, the risk of reduced reliability and quality of service, and injury to competition, such as reduction of distributed energy resources and loss of across-the-fence comparisons. Each State entity also addressed potential benefits, including an evaluation of synergy savings and rate credits, as well as the public interest, including loss of local control and corporate utility identity. Staff additionally filed an extensive list of recommended conditions for the Commission to incorporate, in the event that it declined to adopt Staff’s principal recommendation to reject the merger Application. In all, OPC, the State and

¹³⁸ State Government Article § 9-2003.

¹³⁹ Motion to Intervene of MEA and the State of Maryland at 3.

¹⁴⁰ In order to provide objective advice to the Commission, the Technical Staff who present testimony in a given proceeding are walled off from the Commissioners and do not communicate *ex parte*. Additionally, Staff witnesses are represented by Staff attorneys who are “organized and operate independently of the office of General Counsel.” PUA § 2-108(d)(4).

MEA, and Staff presented 20 expert witnesses on the many issues presented in this proceeding.¹⁴¹

The result of each State entity's thorough analysis was the same – deny the merger. Joining them in that recommendation was PJM's Independent Market Monitor, an organization that has a responsibility created by FERC-approved tariffs to ensure the competitiveness of PJM's markets. The IMM found that the merger's "elimination of a significant independent transmission company from the PJM region" would create certain harms to competition, including the possibility that Exelon could use its threat to withdraw from PJM to exert leverage over the Regional Transmission Organization.¹⁴²

The united voices of these objective, expert entities should have been accorded significant weight by the Majority in its assessment of the public interest. Instead, the Majority appears to have given the testimony little to no weight and instead placed great emphasis on the very limited settlements Exelon cobbled together with parties who expressed much more circumscribed interests.

Indeed, the "benefits" obtained through the various settlements were modest and overly narrow in focus. For example, the Mid-Atlantic Off-Road Enthusiasts obtained from Exelon a commitment to develop a pilot program for recreational trails to be located on utility rights-of-way, and to be funded by ratepayers. The Alliance for Solar Choice received improvements in the interconnection process for customer-sided renewable

¹⁴¹ OPC presented the following witnesses: Nancy Brockway, Scott Hempling, J. Randall Woolridge, Michael L. Arndt, Tyler Comings, Peter J. Lanzaotta, and Paul R. Peterson. MEA presented the testimony of Dr. Richard Tabors, Kevin Mara, Dr. Steven Estomin and Kevin Lucas. Staff presented Howard E. Lubow, Dr. J. Robert Malko, Frank T. DiPalma, Michael F. Rafferty, Steven A. Ostrover, Ryan J. Pfaff, Robert F. Welchlin, Chadwick Epps, and Crissy Godfrey.

¹⁴² April 14, 2015 letter from IMM to Commission at 2.

projects.¹⁴³ The point of singling out these types of agreements is not to diminish the concerns of these parties, but to observe that the interests are limited and not representative of the public interest at large. As Staff articulated, “the settlements are the attempts by a few parties to address some of the issues that are important to those parties, from the perspective of those parties. Notably absent from those settlements are some of the main parties whose duties are to ensure the public interest for the State of Maryland as a whole.”¹⁴⁴ In fact, the witnesses presented in favor of the settlements with Exelon spoke almost exclusively to the benefits obtained, and could not (and did not) address the harms presented by the merger or the other thorny issues raised by this transaction.¹⁴⁵ As OPC succinctly stated, “these settlement commitments, which have no relationship to the merger, provide no further support for approval of the merger, in light of the harms, none of which are mitigated by them, and which reflect special interests, or at best, reflect a narrow slice of the public interest.”¹⁴⁶

Conspicuously absent in this case is a global settlement of the major issues involved, as occurred in the preceding merger between Exelon and Constellation. There, the IMM and Exelon reached agreement on the central issue raised by the case – market power – and the MEA and State of Maryland and Baltimore City signed a second settlement with additional market power conditions and significant contributions to all ratepayers through an enhanced customer investment fund. In its order approving that

¹⁴³ Gabel Direct at 2.

¹⁴⁴ Staff Brief on Settlements at 2-3. OPC was more pointed, arguing: “Unfortunately, the resulting settlements with these parties reflect the worst aspects of turning a merger proceeding into the shopping mall described by OPC witness Hempling.” OPC Supplemental Brief at 10, citing Hempling Supplemental at 2.

¹⁴⁵ Likewise, the fact that certain charitable organizations who receive contributions from the Applicants voiced support for the merger does not indicate that the settlements are in the public interest with regard to the larger issues at stake in this merger.

¹⁴⁶ OPC Supplemental Brief at 10.

merger, a unanimous Commission stated “the fact that most of the parties now agree on a new, and significantly enhanced, set of terms that largely comprise the final set of conditions demonstrates to us the importance and validity of our State’s process for reviewing transactions like this.”¹⁴⁷

In contrast, in this proceeding, Exelon appears to have made little to no effort to reach a global settlement, despite Staff’s vocal appeal. “Staff relayed to the Joint Applicants that global settlement discussions were preferable, and that Staff would only engage in such discussions. These global discussions did not occur.”¹⁴⁸ Instead, Exelon pursued limited settlement agreements on narrowly-focused issues that were largely unrelated to the central questions presented by the merger. Exelon ignored Staff’s protests to the contrary. “Staff tries to discourage single party settlements, since these settlements tend to address only the interests of the parties involved, to the expense of all other parties, and the general public good.”¹⁴⁹ Given the extremely limited scope of these settlements, the Majority should have given them little to no weight. Additionally, the Majority should have found that it was contrary to the public interest that every statutorily-authorized government agency on energy matters has vocally opposed this merger.

B. Exelon’s Reliability Commitments

Certain parties and the Majority argue that the merger should be approved because Pepco has been a poorly run utility and Exelon will operate it better. Indeed, Pepco has previously failed customers, particularly on matters of reliability and

¹⁴⁷ Order No. 84698 at 2.

¹⁴⁸ Staff Brief on Settlements at 3.

¹⁴⁹ *Id.*

resiliency.¹⁵⁰ However, the record indicates that, under strong oversight from the Commission, Pepco's reliability performance has improved and virtually kept pace with BGE's improvement over the past several years. From 2011 to 2014, BGE and Pepco achieved improvements in SAIFI between 36% and 38% and in SAIDI over 40%.¹⁵¹

The record also does not demonstrate how Exelon would actually improve Pepco's and Delmarva's reliability performance, particularly given PHI's recent improvements. Exelon's witnesses asserted that the "Exelon Management Model" would drive performance improvement,¹⁵² but they did not share details about how the management model would do so. None of the witnesses that have actually been "instructed in [and] accountable for"¹⁵³ the Exelon management model were made available to describe how Exelon would meet the annual reliability targets proposed in the settlement. Exelon's Mark Alden stated that although he could provide "initial best practices," it was not practical or possible to identify and analyze best practices that could be deployed at Pepco and Delmarva because "that requires delving deeply into business and operational processes. . . . That kind of detailed analysis cannot be done in any meaningful way until the two organizations are part of the same corporate family."¹⁵⁴

The record does not support the Majority relying on Exelon's quartile ranking system to demonstrate that Pepco and Delmarva will be better utilities under Exelon's management. Exelon admitted that its quartile system is an internal benchmark, not an

¹⁵⁰ See Case Nos. 9240, 9298.

¹⁵¹ See generally OPC Initial Brief at 37. During the same time period, Delmarva achieved improvements of 23% in SAIFI and 55% in SAIDI.

¹⁵² For example, BGE CEO Calvin Butler noted that the management model's focus, accountability and responsibility in driving up performance contributed to better results. Tr. 1994:11-12; 2031:14-19 (Butler).

¹⁵³ Tr. 3805:1 – 3806:22 (Dickerson).

¹⁵⁴ Rebuttal Testimony of Mark Alden at 10.

independent ranking.¹⁵⁵ Although several Exelon witnesses repeatedly asserted that Exelon operates “first quartile” utilities, Exelon did not provide sufficient details about the system to meet its burden of proof. In addition, Exelon’s quartile rankings can be fickle. For example, Exelon committed that Delmarva would reach second quartile in SAIFI by 2018 at a level of 1.31. That level represents just a one-hundredth point improvement over the RM43 standard (1.32) but that miniscule bump moved Delmarva from the third quartile to the second quartile.¹⁵⁶

Overwhelming evidence indicates that Exelon could not reasonably commit to the annual reliability targets listed in Condition 8. Exelon witnesses testified that Exelon could not commit to specific annual reliability targets without a comprehensive engineering analysis.¹⁵⁷ Specifically, two Exelon witnesses said that the company needed six months to complete a “circuit-by-circuit analysis” before providing credible targets.¹⁵⁸ Exelon witness Denis O’Brien stated bluntly, “If we could do it quicker, we would do it quicker.”¹⁵⁹ It is undisputed that Exelon did not complete a circuit-by-circuit analysis before providing annual reliability targets.¹⁶⁰

Without those witnesses revising their testimony and being available for cross-examination, we have a record of multiple Exelon-employed reliability experts testifying in this proceeding that it was not feasible for Exelon to set annual reliability targets. Only one reliability-focused settlement witness, PHI employee Charles Dickerson, said

¹⁵⁵ Tr. 1395:11 (O’Brien). Exelon witness Denis O’Brien compared the non-independent Exelon system with the nuclear industry’s independent national benchmarking, noting that the nuclear industry “has great transparency of the numbers and great consistency of them . . . I haven’t figured that out yet [for our industry].” Tr. 1395:18-22 (O’Brien).

¹⁵⁶ Tr. 3849:10 – 3850:10 (Dickerson)

¹⁵⁷ Tr. 1659:23 – 1660:6 (Alden).

¹⁵⁸ Tr. 1413:23 – 1414:1 (O’Brien); Tr. 1657:18 – 1658:18 (Alden).

¹⁵⁹ Tr. 1414:2 (O’Brien).

¹⁶⁰ Tr. 3975:3-17 (Dickerson).

that the higher settlement targets could be achieved. However, when asked what specific actions Exelon would take to improve PHI's performance, he stated that he "can't do a detailed analysis [and] can't give you specifics."¹⁶¹ Ultimately, the record does not support a finding that Exelon's annual reliability targets are feasible,¹⁶² and the Majority erred in relying on those targets in determining that this merger is consistent with the public interest.

More broadly, Exelon did not substantively address a large component of ratepayers' reliability concern – storm-related resiliency. The one condition that addresses resiliency, Condition 12, directs only that Exelon "will cooperate with Staff and other stakeholders to determine the funding and other resources necessary to meet future resiliency targets that may be established by the Commission."¹⁶³ Although Exelon now professes that it can provide reliability budgets in this merger proceeding, Exelon witness Mark Alden testified that it was more appropriate to address the funding of resiliency efforts in a separate ongoing Commission proceeding.¹⁶⁴ Ultimately, the commitment to simply work with stakeholders and follow the Commission's direction provides no benefit and demonstrates that Exelon did not address this issue meaningfully.

C. Inequity Between Shareholders and Ratepayers' Benefits

The record demonstrates a severe inequity between the benefits the merger delivers for PHI shareholders and Maryland ratepayers. PUA § 6-105 states that the

¹⁶¹ Tr. 3853:15-16 (Dickerson).

¹⁶² We also note that the proposed reliability targets forecast drastic improvements that strain plausibility. For example, Exelon projects that Delmarva's SAIDI will improve by 24 minutes in one year (2019), when no other annual Delmarva SAIDI improvement is higher than 8 minutes. Even with additional spending, that dramatic jump appears more an aspiration required to reach a particular level rather than an achievable or appropriate target.

¹⁶³ Joint Applicants' Reply, Appendix C (Errata) at 26.

¹⁶⁴ Alden Rebuttal at 16.

Commission must consider “the projected allocation of savings that are expected to the public service company between stockholders and rate payers” as well as “any other issues that the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience and necessity.”¹⁶⁵

Under those statutory provisions, it is appropriate for the Commission to consider and remedy the hugely disparate allocation of benefits between shareholders and ratepayers. Assuming the merger is consummated, shareholders will receive a \$1.2 billion premium.¹⁶⁶ In contrast, ratepayers will receive approximately \$66 million in rate credits and \$57 million in indirect energy efficiency programming funds directed toward county and utility programs. Even if we credit the alleged synergy savings – \$37 million for the first five years and \$17 million each following year – the ratepayer benefits are dwarfed by the shareholder premium. To put it another way, it would take ratepayers over sixty years of recouping \$17 million per year in synergies to match the value shareholders – mostly non-Marylanders – received from selling two Maryland utility franchises to the highest bidder.

It is not consistent with the public interest for the vast majority of benefits of the “franchise” – that is, the exclusive right granted by the State to provide utility services to Maryland customers – to flow to stockholders instead of ratepayers. The Majority should have addressed this disparity and either rejected the merger or lessened this inequity by providing additional benefits to ratepayers.¹⁶⁷

¹⁶⁵ PUA §§ 6-105(g)(2)(v), (xii).

¹⁶⁶ Hempling Direct at 31.

¹⁶⁷ See generally Hempling Direct at 29-36.

It is also grossly inequitable that PHI executives will receive more direct cash payments because of this merger than PHI's 737,000 ratepayers altogether. Exelon's CEO testified that the deal includes approximately \$73 million in equity and retention payments.¹⁶⁸ Meanwhile, Maryland's Pepco and Delmarva ratepayers will receive \$66 million in rate credits. PHI employees will receive \$90 million in severance payments, which Mr. Crane described as "the cost to right size the organization."¹⁶⁹

Although we recognize that Exelon offers benefits, some benefits are less than meet the eye. For example, Exelon promoted the idea that the merger includes a \$50 million Green Sustainability Fund. But Maryland's share is only \$19.8 million, and the Majority reduced that amount to \$14.4 million, which must be repaid in 20 years. Plus, the \$14.4 million is divided between Montgomery and Prince George's Counties – meaning that Delmarva ratepayers receive no benefit from the Fund.¹⁷⁰ Moreover, a portion of the Counties' funds will be spent on administrative costs at multiple organizations, reducing the customer benefit even further. It is unclear how much of the remaining funds will ultimately benefit consumers or be available for green technologies.

D. Supplier Diversity

Exelon's commitment on supplier diversity is not sufficient to qualify as consistent with the public interest. Maryland utilities have operated supplier diversity programs since the 1980s, and the lack of progress at Pepco and Delmarva is extremely

¹⁶⁸ Tr. 962:21 – 963:4 (Crane).

¹⁶⁹ Tr. 963:10-13 (Crane). In light of these huge payments, we find it disheartening to reread the testimony of Exelon executive Carim Khouzami, who stated that Exelon included "as many [conditions] as [it] possibly could and still have a viable transaction." Tr. 4075:5-7 (Khouzami).

¹⁷⁰ Delmarva ratepayers will struggle to see another benefit enjoyed by Montgomery and Prince George's County ratepayers – affordable multifamily energy efficiency assistance. CIF funds for that purpose are assigned not to Eastern Shore county governments but to Delmarva itself, even though Delmarva does not currently operate our EmPower multifamily energy efficiency program.

discouraging. In 2009, the utilities signed a Memorandum of Understanding (MOU) intended to improve results with a goal of twenty-five percent, but over the past five years, Pepco and Delmarva have advanced only minimally toward meeting their supplier diversity targets.¹⁷¹

This merger presented an opportunity for Exelon to commit its management model to achieve demonstrable success in an area that has long-troubled Maryland's utilities and is an area of Commission focus in the Public Conference 16 and Rulemaking 50 processes. But Exelon missed its chance. It could have committed to a strong and progressive corporate policy; instead, it promised only to follow the same MOU that has not driven meaningful progress at Pepco and Delmarva over the past five years.¹⁷² We appreciate the Majority's condition that Pepco and Delmarva report on their plan to reach higher numbers, but it does not compensate for Exelon's failure to take initiative on the critical public policy goal of increasing supplier diversity. Exelon will now serve 80% of Maryland's residents. It is imperative that Exelon commit to make substantial progress with supplier diversity and better reflect the communities in which it serves.

E. Charitable Contributions

The merger poses risks that Maryland nonprofit organizations will receive fewer charitable contributions from PHI in the future. Exelon's commitment to maintain current philanthropic levels in the State applies only to Pepco and Delmarva donations. Exelon offered to maintain charitable giving in Maryland at \$623,000 per year, which is

¹⁷¹ In 2010, Pepco reached a level of 12.1%, and in 2015 it reached 13.2%. In 2010, Delmarva reached a level of 14.2%, and in 2015 it reached 14.9%.

¹⁷² Staff Witnesses DiPalma and Rafferty noted, "We do not see evidence of a firm commitment on the part of Exelon to meet [Rulemaking 50] diversity requirements." DiPalma and Rafferty Direct at 32.

its lowest annual totals since 2010,¹⁷³ whereas Exelon promised Delaware that it would provide charitable contributions in that state of \$699,000/year – PHI’s *highest* total over the past five years.¹⁷⁴ We question whether it is consistent with Maryland’s public interest that Delaware will receive its highest recent total but Maryland receives one of its lowest. Although the Majority included a slightly higher amount, \$656,000 per year, it is still less than Delaware’s total allocation and less than half as much as per Maryland customer.¹⁷⁵ In addition, Exelon does not commit to allocate any PHI corporate contribution funds to Maryland.¹⁷⁶ The loss of interactions between high-level utility executives and local community leaders will also be a loss for Maryland.¹⁷⁷

F. Job Impacts

Exelon’s multiple employment-related commitments fail to address concerns that the merger could impact Marylanders negatively, particularly through job losses. In Condition 21, Exelon is restricted from making a net reduction of Pepco or Delmarva employees for the next two years, but the commitment does not cover PHI employees. Exelon witnesses acknowledge that PHI will lose 257 corporate jobs because of the merger.¹⁷⁸ Given that PHI headquarters is adjacent to Maryland and that many of the job losses will be from PHI headquarters, a substantial number of those job losses (and the economic impacts) will likely fall on Maryland residents. Those job reductions are not

¹⁷³ Tr. 4406:5 – 4407:2 (Khouzami).

¹⁷⁴ Amended Delaware Settlement Agreement, Dkt. No. 242 at 16.

¹⁷⁵ Pepco and Delmarva have approximately 737,500 Maryland customers; Delmarva has approximately 306,000 Delaware customers. Exelon Reply Brief, Appendix C at 1; Joint Applicants’ Application at 20.

¹⁷⁶ PHI’s total annual charitable contributions are about \$5 million. Tr. 1242:22 – 1243:4 (Rigby).

¹⁷⁷ Because PHI officers likely sit on the boards of local charitable organizations, Maryland-based organizations may lose the benefit of high level corporate engagement – and the typical charitable funds that come along with it – on their boards. We question how many high-level Exelon executives based in Chicago will sit on local boards in Maryland.

¹⁷⁸ Tr. 3714:4-8 (Tierney) (noting that PHI would lose about 200 current employees and 57 vacant positions); Tr. 4221:12-14 (Khouzami).

consistent with Maryland’s public interest and have not been offset by other employment-related benefits. Condition 21 also commits Exelon to a “good faith” effort to hire at least 110 union workers in Maryland, but the record is unclear whether these union jobs will incrementally increase Exelon’s union workforce or just replace other union employees, and to what degree this additional hiring will impact the merger synergies.

G. Utility of the Future

Exelon’s grid of the future commitment consists of petitioning the Commission to initiate a proceeding and providing \$500,000 to retain a consultant.¹⁷⁹ In accepting this commitment to initiate a proceeding in the *future*¹⁸⁰ – while validating Exelon’s proposed five-year reliability investment plan and budget *now* – the Commission is foregoing a powerful opportunity to mitigate harm from this transaction. As the QER Report explains, “[i]nvestments in energy efficiency, smart grid technologies, storage, and distributed generation can contribute to enhanced resiliency and reduced pollution, as well as provide operational flexibility for grid providers.”¹⁸¹

Rather than offer a reliability strategy that integrates new technologies and distributed resources as essential components, Exelon appended 15MW in solar investments, an agreement to consider developing two microgrids (at ratepayer expense) and an untargeted and insufficiently capitalized green bank¹⁸² to its settlement offer. Microgrids hold exciting potential to provide benefits to customers if incorporated in a

¹⁷⁹ Condition 14 (Grid-of-the-Future-Proceeding).

¹⁸⁰ The Majority provides no justification for delaying filing of the offered plan from six months after close until July 2016.

¹⁸¹ QER Report at 3-2.

¹⁸² Coffman Settlement Testimony, Ex. 3 at 16 (stating that the market indicated the need for \$1 billion in capital for New York State’s Green Bank).

reliability and resiliency strategy. Here, the microgrid proposal¹⁸³ is an afterthought – an add-on to win support of two Counties without any indication of how the required ratepayer expenditures would relate to, and hopefully supplant, some of the reliability expenditures.

Demand response is another missed mitigation opportunity. While Exelon states that it will “maintain and promote existing demand response programs,” it proposes no strategies for doing so.¹⁸⁴ As the QER Report notes, “Demand response improves flexibility by enabling consumers to participate in load control; it could also reduce the need for new infrastructure.”¹⁸⁵

Energy efficiency is also absent from Exelon’s reliability commitment, and instead is treated as an unrelated benefit offered to the settling Counties. While the Montgomery County and Prince George’s County energy efficiency programs will certainly benefit program recipients and reduce electricity demand to some degree, it is unlikely that the energy savings will be reflected in Exelon’s distribution planning or in the estimates of load demand used by PJM. The Majority undermines the potential usefulness of these energy efficiency expenditures further by disassociating the funding completely from the Commission’s EmPOWER Maryland framework and rules.¹⁸⁶

Exelon’s reluctance to embrace energy efficiency and other distributed energy as reliability resources is not unexpected.¹⁸⁷ As the QER Report notes, “[i]nvestor-owned

¹⁸³ Condition 13.

¹⁸⁴ Condition 4.

¹⁸⁵ QER Report at 3-10.

¹⁸⁶ Sierra Club and Chesapeake Climate Action Network Post-Settlement Hearing Brief at 14-15 (“Any additional energy efficiency funding should be considered in the context of [the EmPOWER Maryland] programs.” The Counties are “unprepared to utilize these funds.”).

¹⁸⁷ See Coalition for Utility Reform at 8 (Exelon’s “need for a steady revenue stream makes it a natural opponent of the ‘disruptive’ technologies and policies that threaten that revenue stream.”).

companies have fiduciary obligations to increase shareholder value. Regulated utilities that earn profit based upon a return on invested capital lack a strong incentive (absent explicit requirements and incentives) to invest in energy efficiency practices.”¹⁸⁸ Exelon offered (and the Majority has now ordered them) to “cooperate” with Staff and stakeholders to develop milestones on how they will accelerate and enhance their EmPOWER Maryland plans, including penalties for failure to meet Commission approved goals.¹⁸⁹ Cooperation should be expected of our utilities; what we need now is for Exelon to pursue this reform as aggressively as they are pursuing other regulatory reforms.¹⁹⁰

Some parties urged the Commission to initiate a proceeding more broadly to consider opportunities for using performance-based ratemaking (“PBR”) to improve the efficiency and performance of an evolving electricity sector.¹⁹¹ PBR holds the potential to align utility compensation more closely with performance on a variety of socially desirable metrics,¹⁹² and to use information to confront adverse selection and moral hazard issues more directly than traditional ratemaking. For example, performance metrics can be crafted to reinforce public interest objectives for cost control, customer service, adoption of smart grid technologies and support for alternative energy.¹⁹³ The Majority embraces performance-based penalties to prod Exelon to meet higher SAIDI and SAIFI standards, and puts a toe in the water by encouraging cooperation on energy

¹⁸⁸ QER Report at 3-21.

¹⁸⁹ Condition 5.

¹⁹⁰ State/MEA Post-Settlement Hearing Brief at 3.

¹⁹¹ Coalition for Utility Reform, Alvarez Direct at 23.

¹⁹² *Id.* at 23-30. See also Report on Performance Based Ratemaking Principles and Methods for Maryland Electricity Distribution Utilities at 5, Staff of the Maryland Public Service Commission, C. Shelley Norman and Calvin Timmerman. July 1, 2014.

¹⁹³ *Id.* (citing in part the Energy Future Coalition’s “Utility 2.0: Piloting the Future for Maryland’s Electric Utilities and their Customers,” March 15, 2013).

efficiency performance metrics, but fails to initiate a process to investigate incentive structures for critical affordability, distributed energy and customer service objectives.

The Majority essentially blessed the expenditure of almost a billion dollars to reinforce the existing grid before requiring submission of a grid of the future plan. With the approval of this transaction, time is of the essence for the Commission to initiate a grid of the future proceeding in Maryland and to consider PBR reforms to align Exelon's financial interests with the public interest in Maryland. Given Exelon's ability to significantly influence the speed at which this process will move forward,¹⁹⁴ the Commission should not and need not wait for Exelon to file a petition.¹⁹⁵

V. CONCLUSION

Given the importance of Maryland's electric utilities, which are public franchises that provide "essential services" to customers, the General Assembly has placed on the Applicants the burden of demonstrating that a change in corporate ownership is in the public interest with benefits and no harm to consumers. The proposed merger of Exelon and PHI fails that standard. The merger will impose substantial competitive harm to Maryland's electricity market, by eliminating across-the fence competition, silencing PHI's unique non-generation voice, and chilling innovation in new energy-related technologies and products. The merger will also lead to harmful rate increases as Exelon spends vast sums of ratepayer dollars to achieve promised reliability gains that have not been adequately assessed for prudence in a separate regulatory proceeding. The merger

¹⁹⁴ Tabors Direct at 23.

¹⁹⁵ Sierra Club and Chesapeake Climate Action Network Post-Settlement Reply Brief at 13 (noting that a petition has been on file at the Commission for two years, citing "Petition to Open Investigation into Utility 2.0—The Future of Maryland's Grid" (March 5, 2013)), Mail Log # 145759.

further harms customers by eliminating an independent PHI Board of Directors, which will leave Maryland's electric distribution companies, Pepco and Delmarva, powerless against Exelon's decisions, which will be strongly influenced by the economics of its generation fleet. Finally, the merger is inconsistent with the public interest, as evidenced by the chorus of voices that have opposed it, not just because it contains a severe inequity between shareholder and ratepayer benefits, but also because the transaction fails to embrace innovative utility of the future strategies. With today's decision, Maryland has lost a distribution company that could have played a critical role in the transformation of our electricity system to be more reliable, resilient, affordable and sustainable for Marylanders. For these reasons, we respectfully dissent.

/s/ Harold D. Williams _____

/s/ Anne E. Hoskins _____
Commissioners