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Via E-Filing and Hand Delivery

September 28, 2015

Ms. Brinda Westbrook-Sedgwick
Commission Secretary
Public Service Commission of the District of Columbia
1325 G Street, N.W.
Suite 800
Washington, D.C. 20005

Re: Formal Case No. 1119

Dear Ms. Westbrook:

The Joint Applicants hereby submit this Application for Reconsideration of Order No. 17947 in Formal Case No. 1119. An original and fifteen copies will be hand-delivered to the Public Service Commission care of Ms. Brinda Westbrook-Sedgwick, Commission Secretary.

Please feel free to contact me if you have any questions regarding this matter.

Sincerely,

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Enclosures

cc: Office of the People's Counsel; all intervening parties

BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE MERGER OF EXELON CORPORATION, PEPCO HOLDINGS, INC., POTOMAC ELECTRIC POWER COMPANY, EXELON ENERGY DELIVERY COMPANY, LLC AND NEW SPECIAL PURPOSE ENTITY, LLC	)))))))	**Formal Case No. 1119**

APPLICATION OF THE JOINT APPLICANTS
FOR RECONSIDERATION OF ORDER NO. 17947

I. INTRODUCTION

Pursuant to Section 604(b) of Title 34 of the District of Columbia Code ("Code"), D.C. Code § 34-604(b), and Rule 140.1 of the Public Service Commission of the District of Columbia's ("Commission" or "PSC") Rules of Practice and Procedure, 15 D.C.M.R. § 140.1 (2010), Exelon Corporation ("Exelon"), Pepco Holdings, Inc. ("PHI"), Potomac Electric Power Company ("Pepco"), Exelon Energy Delivery Company, LLC ("EEDC") and New Special Purpose Entity, LLC ("SPE") (collectively, the "Joint Applicants") respectfully request that the Commission reconsider certain portions of Order No. 17947, issued August 27, 2015 in Formal Case No. 1119 ("Order"). In particular, the Joint Applicants seek reconsideration of the Commission's rulings that:

A. The merger of PHI and Purple Acquisition Corp., a wholly-owned subsidiary of Exelon, as proposed by the Joint Applicants (the "Proposed Merger" or "Merger"), is not in the public interest;[1] and

B. It would not be in the public interest for the Commission to identify the additional terms and conditions, which, if accepted by

[1] Order No. 17947 at P. 11; P. 348; Conclusion of Law H.

> the Joint Applicants, would make the Proposed Merger in the public interest.[2]

The Joint Applicants also seek reconsideration of specific legal and factual determinations, discussed in Section III and summarized in Appendix A, *infra*, that formed the basis for the foregoing Commission rulings.

The Joint Applicants believe that Order No. 17947 contains various errors of law and fact which, if corrected, would cause the Commission to conclude that approval of the Proposed Merger is unquestionably in the best interests of Pepco's customers and in the best interests of the District of Columbia and, therefore, is in the public interest. As explained herein, the errors of law include, among others: (1) the misapplication of the Commission's merger standard; (2) the failure to adequately explain the criteria utilized by the Commission in making its public interest determination; (3) the pronouncement that District policy "requires the electric company to be focused on distribution only";[3] (4) the consideration and apparent weight given to terms imposed or agreed to in other merger proceedings in other jurisdictions; (5) the failure to take into account merger benefits clearly presented on the record, but not included in a pre-filed written summary of commitments; (6) ignoring substantial record evidence of the Merger's many benefits; (7) the conclusion that the public interest did not require the Commission to take into account the additional conditions proposed by the Office of Public Counsel ("OPC"), District of Columbia Government ("DCG") and other intervening parties; and (8) the lack of a reasoned explanation for the Commission's departure from its established policy of considering such additional conditions. The Order's factual shortcomings, in turn, are attributable to misstatements, omissions and inconsistent findings, each of which is identified and explained below.

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[2] *Id*. at P. 353.
[3] *Id*. at P. 3.

II. LEGAL STANDARDS

Under Section 34-604(b) of the Code and Commission Rule 140.1, any public utility or any other person or corporation affected by any final order or decision of the Commission may, within 30 days after publication of the order or decision, file with the Commission an application in writing requesting reconsideration or modification of the matters addressed. As the Commission has noted on several occasions, the purpose of a petition for reconsideration is to identify errors of law or fact in the Commission's order so that they can be corrected.[4] Accordingly, applications for reconsideration or modification must set forth specifically the grounds on which the applicant considers the Commission's order to be unlawful or erroneous.[5] The Joint Applicants specify those grounds in detail in Section III and Appendix A, *infra*.

The District's Administrative Procedure Act ("APA"), in turn, requires, in contested cases, that the Commission's orders be accompanied by findings of fact and conclusions of law which are "supported by and in accordance with the reliable, probative and substantial evidence."[6] Notably, the appellate courts have made clear that "substantial evidence" is not defined solely in terms of the quantitative support for an administrative determination, but instead must include "a demonstration in the findings of a 'rational connection between facts found and the choice made'"[7] In other words, the Commission can only comply with the APA by "specifying its criteria for the order and clearly explaining, without material gaps, how its

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[4] *In the Matter of the Investigation into the Reliability of Verizon Washington, DC's Telecommunications Infrastructure*, Formal Case No. 1090, Order No. 17895 at P. 38 (June 1, 2015); *In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Formal Case No. 1103, Order No. 17539 at P. 4 (July 10, 2014).
[5] D.C. Code § 34-604(b); 15 D.C.M.R. § 140.2.
[6] D.C. Code § 2-509(e).
[7] *Washington Public Interest Org. v. Public Service Comm'n*, 393 A.2d 71, 77 (D.C. 1978), supplemental opinion and dissent, 404 A.2d 541 (D.C. 1979), cert. denied, sub nom *Potomac Electric Power Co. v. Pub. Serv. Comm'n*, 444 U.S. 926 (1979).

findings rationally support that determination."[8] For the reasons that follow, Order No. 17947 fails to satisfy these requirements.

In addition, the courts have held that "[t]he Commission may not depart from its own established policy without providing a reasoned explanation for doing so" and that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[9] As demonstrated below, the Commission has neither indicated "that prior policies and standards are being deliberately changed," nor provided "a reasoned explanation for doing so."

III. GROUNDS FOR RECONSIDERATION

As noted by the Commission in its introductory remarks,[10] this is an extremely important proceeding and, accordingly, one that has attracted substantial public interest. The Joint Applicants agree and, as they have throughout this case, believe that approval of the Proposed Merger will yield tremendous benefits by unlocking millions of dollars of synergy savings; facilitating the sharing of best practices; enhancing the reliability of service; ensuring the continuity of a skilled workforce; creating net positive job growth in the District of Columbia; guaranteeing Pepco's active participation in and support of the District of Columbia's many civic and charitable organizations; and providing Pepco and the District of Columbia with a partner uniquely well-suited to help the District of Columbia advance its sustainability goals quickly and effectively.

The Commission acknowledges that many of these benefits will be realized, but nonetheless concludes that the Proposed Merger will likely leave Pepco's customers and the

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[8] *Id*. at 78.
[9] *Watergate East, Inc. v. Public Serv. Comm'n*, 665 A.2d 943, 947 (1995).
[10] Order No. 17947 at PP. 4-5.

District at best "unharmed."[11] However, the Commission reaches that determination by departing from its established merger review standards and principles and by misconstruing or disregarding undisputed evidence of record. The Joint Applicants respectfully request that the Commission grant reconsideration to correct those errors of law and fact.

A. The Commission Erred In Concluding That Approval Of The Proposed Merger Was Not In The Public Interest

1. Order No. 17947 Contains Various Errors Of Law

a. The Commission Applied The Wrong Merger Approval Standard

In its past merger decisions, the Commission has stated unequivocally that while a merger must produce "direct and tangible" benefits to customers, such benefits need not be "profound."[12] Indeed, the Commission itself acknowledged in Order No. 17947 that this is its standard.[13] Yet, after so indicating, the Commission repeatedly disregards, or substantially discounts without explanation, undisputed evidence of "direct and tangible" benefits on the grounds that they could be even bigger, i.e., more "profound." For example, a $33.75 million Customer Investment Fund ("CIF"), representing a benefit of approximately $128 per customer, is criticized because it could have been larger if different allocation factors had been utilized.[14] Similarly, a commitment designed to provide at least two years of job security for Pepco employees is largely ignored because Exelon agreed to limit involuntary layoffs for five years in another jurisdiction.[15]

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[11] *Id.* at Conclusion of Law H.

[12] *In the Matter of the Joint Application of Baltimore Gas and Electric Co., Potomac Electric Power Co. and Constellation Energy Corp. for Authorization and Approval of Merger and for a Certificate Authorizing the Issuance of Securities*, Formal Case No. 951, Order No. 11075 at p. 18 (October 20, 1997); *In the Matter of the Joint Application of Pepco and New RC Inc. for Authorization and Approval of Merger Transaction*, Formal Case No. 1002, Order No. 12395 at P. 24 (May 1, 2002).

[13] Order No. 17947 at P. 43.

[14] *Id.* at PP. 96-97.

[15] *Id.* at P. 164.

The Commission also departs from past practice by allowing implausible speculation of potential harms to negate affirmative commitments to deliver direct and tangible benefits. Thus, even though the Joint Applicants submitted undisputed evidence establishing that Exelon's utility subsidiaries had facilitated the interconnection of thousands of customers with distributed generation,[16] the Commission concluded its discussion of Factor 6 as follows:

> [T]he Proposed Merger raises a *potential* harm in that there is a *potential* conflict of interest *if* the company that controls the local distribution company seeks to delay changes necessary to encourage additional distributed generation because of its ownership of alternative generation sources.[17]

As discussed, *infra*, there is absolutely no evidentiary basis for this finding and, in fact, the Commission's speculation that Exelon might impede the growth of distributed generation is directly contrary to its own statement in the immediately preceding paragraph[18] that it did **not** share the parties' concern that Exelon would seek to do so.

Another example of this asymmetrical approach to benefits and harms is found in the Commission's discussion at paragraph 165 of Order No. 17947 of the impact of the Proposed Merger on employment levels in the District. Here, the Commission acknowledges the Joint Applicants' commitments to hire an additional 102 union workers in the District and to transfer into the District employees of Pepco Energy Services ("PES") currently working in Arlington, Virginia. However, the Commission then turns this "direct and tangible" benefit into a potential harm by postulating that "the economic picture is almost certain to trend negative within two or

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[16] In fact, the Commission notes that BGE approved 4,237 interconnection requests (and over 40 megawatts of nameplate net metering capacity) in 2014 alone. *Id*. at P. 337.
[17] *Id*. at P. 301 (emphasis added).
[18] *Id*. at P. 300.

three years as the protections for job retention are lifted at PHI and Pepco."[19] Again, there is no evidentiary support for this conclusion.

b. The Commission Failed to Adequately Explain The Criteria It Utilized In Making Its Public Interest Determination

Critical to review of the Proposed Merger was the identification of the "public interest factors" that would guide the Commission in its evaluation. With that in mind, the Joint Applicants, in their June 18, 2014 filing, recommended that sixteen factors, drawn largely from a 2002 Pepco merger proceeding,[20] be considered. After reviewing the Application, the Commission, in Order No. 17530, issued June 27, 2014,[21] concluded instead that it would analyze the current transaction in the context of the six factors utilized in a 1997 Pepco merger proceeding.[22] Recognizing, however, that "each merger is a unique combination of companies at a distinct time in the development of the electricity market," the Commission, Order No. 17530, invited the parties to suggest additional factors that the Commission might wish to consider.[23] The Commission further noted: "[T]estimony that focuses on the effect of the proposed merger on at least these six factors, as modified by our review of comments from the parties, will provide a record sufficient for the Commission to determine if the proposed merger is in the 'public interest' as discussed above."[24]

Over the ensuing weeks, many parties to this matter took the Commission up on its invitation and submitted comments regarding the appropriate public interest factors to be utilized. In Order No. 17597, dated August 22, 2014, the Commission discussed the parties' recommendations in detail, accepting some and rejecting others. Specific revisions were made to

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[19] *Id*. at P. 163.
[20] Order No. 17530 at P. 27.
[21] *Id*. at PP. 26-27.
[22] *Id*. at n.12.
[23] *Id*. at P. 27.
[24] *Id*.

four factors (Factor Nos. 1, 3, 4 and 6) and a seventh factor was added. The Commission concluded by advising the parties that it would consider the seven public interest factors listed in Paragraph 124 of Order No. 17597 in evaluating the Proposed Merger.[25] Notwithstanding the foregoing, the Commission, in Order No. 17947, suddenly reversed course, stating:

> [T]he Commission will first look at the effect of the Proposed Merger transaction on each of the seven public interest factors identifying the benefits and the burdens of the transaction. We note, however, that because the circumstances of each merger are unique, every public interest factor may not be relevant or equally weighted from one merger to another.[26]

There are at least two problems with the Commission's abrupt change of position. First, by initially advising the parties that it would consider the seven specific factors identified in Order No. 17597 and then, twelve months later, declaring that one or more of such factors might be irrelevant, the Commission has denied the parties their rights to due process. It is also unclear what other unique circumstances may have received weight from the Commission outside of the listed factors that the Commission decreed would govern its decision. Second, because the Commission has not identified which factors, if any, it concluded were irrelevant or how it balanced those factors deemed relevant, there is no way of discerning the criteria applied by the Commission and/or whether there is a "rational connection between the facts found and the choice made."[27] The Commission's Order should be reconsidered for these reasons.

c. The Commission Erred In Declaring That District Policy Requires Electric Companies To Focus On Distribution Only

At the outset of Order No. 17947, the Commission declared: "The proposed change in ownership and control of Pepco must also be decided in the context of the public policy contained in District law that requires the electric company to be focused on distribution

[25] Order No. 17597 at P. 124.
[26] Order No. 17947 at P. 56.
[27] *Washington Pub. Interest Org. v. Public Serv. Comm'n*, *supra*, 393 A.2d at 77.

only…"[28] The record contains no support that the focus of Pepco as the distribution company would be on anything other than distribution. Moreover, no citation is provided for the "District law" referenced or for one that would apply this principle to affiliates of the distribution company. Nor does the Commission seek to reconcile its statement with various provisions of the D.C. Code which undermine the Commission's summary of prevailing "public policy." In fact, as discussed below, District law and policy specifically contemplate an electric company, such as Pepco, being affiliated with an entity that owns generation.

The record clearly established, and no party disputed, that Pepco does not own generation now and will not own generation if the Proposed Merger is approved. There is, therefore, no support for a conclusion that the focus of *Pepco* would be on generation that it does not and will not own. Rather, Pepco's "focus" will be exclusively on the distribution of electricity. If, as seems far more likely,[29] the Commission's statement was intended to frame its concern over *Exelon's* "focus," the Joint Applicants note that the Code clearly contemplates the ownership of generation by an electric company's affiliate. Code Section 34-1506(a)(1) provides: "The electric company shall not operate its distribution system in a manner that favors the electricity supply of the electric company's affiliates." Similarly, Code Sections 34-1513(c) and 34-1519(b)(2)(B) speak to the need for a Commission-issued code of conduct to govern the relations between an electric company and its generation-owning affiliates. To suggest that ownership of generation by a utility affiliate is not in the public interest is error where such a structure is clearly contemplated by the District of Columbia Code.

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[28] Order No. 17947 at P. 3.

[29] *See*, *e.g.*, *id.* at P. 298 (discussing potential conflict of interest in the procurement of SOS); P. 301 (discussing potential conflict of interest in facilitating the growth of distributed generation); and at P. 346 (discussing potential conflict of interest regarding the pursuit of a "cleaner and greener environment).

d. The Commission Improperly Considered And Gave Weight To Individual Terms Imposed Or Agreed To In Other Merger Proceedings

Throughout Order No. 17947, the Commission stresses the need to evaluate each transaction on its own merits. Thus, at paragraph 7, the Commission notes that it "informed [the] parties that . . . the circumstances of each merger are unique"; at paragraph 40, that each of Pepco's proposed mergers (1997, 2002 and 2015) "involved different corporate structures and different relationships"; and, at paragraphs 40 and 55, that "each merger is a unique combination of companies at a distinct time in the development of the electricity market . . . and is assessed on its own facts . . ." In addition, at paragraph 38, the Commission observes that it reviews merger applications pursuant to specific provisions of the D.C. Code.

If the Commission had adhered to these principles, there would be no issue. But, it did not. To the contrary, the Commission proceeded to discuss various commitments imposed or agreed to in prior Pepco merger cases, as well as in parallel merger proceedings in Delaware, Maryland and New Jersey involving the current transaction. For example, the Commission notes at paragraphs 101through 103 that Pepco, in Formal Case No. 1002, waived recovery of costs to achieve and agreed to cap its rates for several years. Similarly, at paragraph 99, the Commission criticizes Exelon for not offering an arrearage forgiveness program as it did in Delaware and Maryland.[30] Finally, the Commission claims at paragraph 351 that "the initial offer that was made in the merger application in *Formal Case No. 951* had a larger base of benefits for ratepayers."

Although not explicitly stated, the Commission appears to offer these examples in support of its conclusion that the commitments made by the Joint Applicants in this proceeding

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[30] And, as previously discussed, the Commission questioned why the Joint Applicants had not offered to retain Pepco employees beyond the initial two-year, post-Merger no net reduction period like it did in New Jersey. Order No. 17947 at P. 164.

are inadequate. If that indeed is their intended purpose, the Commission erred and its public interest findings should be reconsidered. Whether the Proposed Merger satisfies *the District's* public interest test, and satisfied the seven factors the Commission determined would govern, must be determined based on the overall package of benefits presented by the Joint Applicants *in this proceeding* and not by reference to individual commitments made elsewhere to satisfy another jurisdiction's merger approval standard.

e. The Commission Erred In Disregarding Benefits Not Memorialized In Exhibit (4A)-2 Or In Appendix B To the Joint Applicants' Initial Brief

In Order No. 17947, the Commission emphasizes that its decision must be based on the record before it and not on terms and conditions that might have been proposed but were not.[31] At paragraph 59, the Commission describes the scope of that record in the following terms:

> 59. The Joint Applicants have provided numerous updates and clarifications to their Joint Application. Since filing the Joint Application on June 18, 2014, the Joint Applicants have submitted an additional three rounds of testimony, on September 19, 2014, December 17, 2014, and February 18, 2015. Additionally, twelve witnesses presented live testimony for the Joint Applicants responding to OPC, Intervenor, and Commissioner questions regarding the Joint Application and adopting or accepting as evidence for the record numerous data request responses and cross examination exhibits. These documents form the evidentiary record upon which the Commission makes its decision. We note, as did several of the parties, that the Joint Applicants did not in some cases amend the Joint Application and its supporting documents to reflect changes that the Joint Applicants made in later filings. Where there is a discrepancy between the Joint Application and later record evidence, we will note that discrepancy and make a determination from the evidence before us as to what document is controlling.

At Paragraph 343, the Commission stated:

> We make our decision based on our review of the Application including the 91 Commitments filed by the Joint Applicant [sic] as

[31] Order No. 17947 PP. 6-7.

> part of their Supplemental Direct, the pre-filed testimony of all parties, the hearing record and the comments of interested persons and the effect of the Proposed Merger on the seven public interest factors.

The Joint Applicants concur with the Commission's summary of what constitutes the record in this proceeding. That said, certain key record evidence was either overlooked or disregarded in Order No. 17947. Perhaps the most important omission may be found in the Commission's treatment of the very substantial synergy savings that were quantified by Mr. Khouzami and were not seriously challenged. However, there are other examples that also require reconsideration and correction. *See* discussion, *infra*.

From the very beginning of this case, the Joint Applicants have been unequivocal in their position that all synergy savings generated by the Proposed Merger and allocated to the District should flow through to the benefit of customers in the form of reduced revenue requirement claimed in future rate proceedings. Indeed, Mr. Crane could not have been clearer on this point in his direct testimony:

> **20. Q. Is the Customer Investment Fund the only way in which Pepco customers will realize benefits from distribution-related Merger synergies?**
>
> A. No, it is not. District of Columbia customers will realize additional direct and traceable financial benefits as transmission-related and distribution-related Merger synergies are fully recognized in future rate proceedings in the form of costs that are lower than they would have been absent the Merger. The Merger integration process and the distribution-related savings it is expected to produce are addressed in greater detail by Mr. Khouzami.[32]

Mr. Khouzami echoed that understanding when he testified:

> Additionally, *Exelon and PHI are committing to flow through net Merger savings allocable to the PHI utilities in future rate*

[32] Exhibit Joint Applicants (A): Crane Direct at 13:1-19.

> *proceedings.* Consequently, if any PHI utility were to file a rate case utilizing a test year within that five-year post-Merger window, customers will benefit from receiving some portion of the net Merger savings twice – once through the Customer Investment Fund and a second time through lower post-Merger expenses reflected in the ratemaking process.
>
> Of course, annual Merger savings (estimated to be $43 million as shown above) will continue beyond five years following the completion of the Merger. As a result, customers will realize additional benefits, in future rate cases, from avoided expenses that continue to accrue during those future periods beyond the $100 million tangible benefit the companies propose to provide immediately following the Merger.[33]

The Joint Applicants never wavered from this commitment. Thus, in his Rebuttal Testimony, Mr. Crane reiterated the point: "Pepco's customers in the District of Columbia will realize the resulting cost savings, estimated to be approximately $7 million annually on a steady-state basis, through the normal ratemaking process."[34] Nor was there ever any confusion on the part of the other parties regarding the Joint Applicants' intentions.

Notwithstanding the foregoing, the Commission, in Order No. 17947, notes that the Joint Applicants' list of commitments, first presented as Exhibit (4A)-2 and later attached as Appendix B to their Initial Brief, is silent with regard to the treatment of future synergy savings. On this basis, the Commission concludes that "the record before us contains no commitment by the Joint Applicants to pass on 100% of allocable achieved synergy savings to Pepco - DC…."[35] This finding is in error and should be reversed for several reasons.

As the Commission states in its Order, the record in this proceeding comprises, among other things, the pre-filed written testimony submitted by the Joint Applicants. At each stage of this case, the Joint Applicants indicated, without qualification, that it was their intention to flow

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[33] Exhibit Joint Applicants (F): Khouzami Direct at 20:20-21:10.1 (emphasis supplied).
[34] Joint Applicants (3A): Crane Rebuttal at 5:17-20.
[35] Order No. 17947 at P. 100; Finding of Fact U.

100% of future synergy savings allocable to the District through to Pepco's customers. Moreover, and not mentioned by the Commission, all of such savings would flow through to Pepco's customers even in the absence of a formal commitment by the Joint Applicants to do so because future rates will be set on the basis of test year costs, which, by definition, will be lower than they otherwise would be as savings are realized. Stated simply, the fact that the Joint Applicants' commitment to flow through future savings was not memorialized in Exhibit (4A)-2 (or in Appendix B) does not diminish the fact that Pepco's customers will receive the benefits of very significant – and largely undisputed – synergies if the Proposed Merger is approved.

2. Order No. 17947 Is Not Supported By Substantial Record Evidence.

As noted *supra,* the Commission's findings of fact and conclusions of law must (1) be supported by "reliable, probative and substantial evidence" that (2) demonstrates a "rational connection between facts found and the choice made." In a number of critical respects, Order No. 17947 falls short of meeting that standard. The analysis which follows identifies, with respect to each of the seven public interest factors discussed in the Order, the principal errors and omissions that undermine the Commission's factual findings.

a. Factor 1: The Effect Of The Transaction On Ratepayers, Shareholders, The Financial Health Of The Utilities, Standing Alone And As Merged, And The Economy Of The District

The Commission's analysis of Factor 1 comprises 51 pages, or nearly one-third of Order No. 17947. Accordingly, it might be assumed that Factor 1 played a significant role in the Commission's conclusion that the Joint Applicants failed to demonstrate that the Proposed Merger was in the public interest. However, the Commission merely notes that its findings are "mixed" and one is left to speculate as to how benefits and harms were balanced and/or whether there is a "rational connection" between those findings and the Commission's ultimate determination.

Customers. The Commission discusses customer impacts in terms of four purported merger effects: (1) the CIF, (2) low income customer assistance, (3) synergy savings and (4) reliability. As to these, the Commission finds that the CIF is a "direct and tangible benefit";[36] that there will be no merger-related effect on low income customers; and that the Joint Applicants have overstated the benefits of reliability improvements. In other words, as to the items (1), (2) and (4), the Commission found some benefit and no harm.

With respect to item (3), the Commission seemingly concludes that it may ignore possible synergy savings because a specific commitment to flow them through to customers was not included in either Exhibit (4A)-2 or Appendix B to the Joint Applicants' Initial Brief. As previously explained, this finding is clear error and should be reversed. The Commission then points to two factors that purportedly could erode future synergy savings and result in customers paying higher rates than they otherwise would have: transition costs/costs to achieve and the possible misallocation of shared service costs.[37]

As to the first factor, the Commission correctly observes that the costs to achieve are projected to exceed synergy savings in the first year post-merger. The Commission then erroneously concludes that this could translate into a rate increase, i.e., that the risk of costs to achieve exceeding savings would be shifted to customers.[38] However, this concern was fully addressed by Mr. Khouzami, who explained that the Joint Applicants would be willing to amortize and recover such costs through rates over a multi-year period to avoid this from occurring.[39] Order No. 17947 does not discuss or seemingly recognize this testimony.[40]

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[36] Order No. 17947 at P. 106. The Commission also notes as a benefit Exelon's ability to use Pepco's Net Operating Loss Carry-Forward ("NOLC") at a faster rate than PHI.
[37] At paragraph 109, the Commission also mentions the costs of hiring and training the 102 union workers that the Joint Applicants have agreed to hire. This issue is addressed, *infra.*
[38] Order No. 17947 at P. 103.
[39] Tr. at 1797:11-14; 1820:1-12 (Khouzami Cross).

Concerning the potential misallocation of shared service costs discussed in Paragraph 107, the Joint Applicants note that the record is devoid of any evidence regarding "the Commission's experience with shared service arrangements for Pepco through the PHISCo."[41] However, even if it were shown that the Commission had reason to be concerned about Pepco's recording and tracking of PHISCo costs, that certainly would not justify rejecting the Proposed Merger. In fact, the Commission dismissed similar arguments in Formal Case No. 1002 observing: "[T]he Commission will have the ability to review, and reallocate if necessary, any costs allocated to District of Columbia ratepayers from other entities in the PEPCO Holdings Inc. family of companies."[42] More importantly, the concerns expressed by the Commission in Paragraph 107 of Order No. 17947 cannot be reconciled with its later statement in Paragraph 258:

> If the Proposed Merger were consummated, the Commission would direct the Joint Applicants to put in place protective measures to ensure that Exelon Generation or another Exelon subsidiary properly allocates all service costs from the EBSC so as to prevent District ratepayers from incurring unrelated service costs.[43]

In summary, the Joint Applicants demonstrated on the record that the Proposed Merger would have a very positive effect on customers in the form of a $33.75 million CIF, more timely use of Pepco's NOLC, substantial synergy savings that will serve to reduce future rate requests, and enhanced reliability. In addition, all potential harms identified by the Commission were or (as the Commission itself recognized elsewhere) can easily be addressed through normal rate

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[40] In Pepco's 1997 merger proceeding, the Commission directed that costs to achieve be amortized over a ten-year period. Formal Case No. 951, Order No. 11075 at p. 43.
[41] Order No. 17947 at P. 107.
[42] Formal Case No. 1002 at P. 113.
[43] Order No. 17947 at P. 258.

setting procedures. To the extent the Commission concluded otherwise, its findings are in error and should be reconsidered.

Shareholders. The Commission found that the Proposed Merger will provide "very real and substantial benefits to both the existing PHI shareholders whose stock is being acquired and to Exelon as the new shareholder of PHI."[44]

Financial Health Of Utilities. The Commission concludes that the Proposed Merger would enhance Exelon's financial health and would neither enhance nor diminish PHI's financial condition. As to Pepco, the Commission asserts that "the record evidence indicates that there would be no significant improvement in Pepco's credit ratings due to the Proposed Merger."[45] The Commission fails to identify the record evidence on which it based this finding and improperly disregards its own observation, at footnote 674 of Order No. 17947, that "[a]s recently as January and April 2015, the credit rating agencies concluded that joining the Exelon family is viewed positively for Pepco." In addition, the Commission apparently gave no weight to AOBA's contention that "a well-devised ring fencing arrangement [which the Joint Applicants have proposed] can also serve to lower a utility's cost of debt…."[46] The Commission also overlooked the testimony of Mr. Rigby that if the Merger does not close, it would have a negative financial impact on Pepco and Pepco will be in "a less robust financial condition."[47]

Economy Of the District. This is another area where the Commission concludes that the results are "mixed."[48] That determination, however, seems at odds with the Commission's subsidiary findings:

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[44] *Id.* at P. 119.
[45] *Id.* at P. 142.
[46] *Id.* at P. 262.
[47] Exhibit Joint Applicants (3B): Rigby Rebuttal at 9:10-13.
[48] Order No. 17947. at P. 160.

> [T]he District's economy could be strengthened by 102 new union jobs, 50 transferred jobs from PES, an annual average of $1.6 million in charitable contributions to non-profits serving the District, and the retention of the PHI headquarters in the District.[49]

In fact, the Commission finds that "the overall effect of the Proposed Merger on the economy of the District appears to be neutral or slightly positive for the immediate term…."[50] However, the Commission then recasts these very positive attributes into "mixed results" by asserting that "the economic picture is almost certain to trend negative within two or three years as the protections for job retention are lifted" at PHI and Pepco.[51]

There is absolutely no basis for the Commission's speculation that Exelon will begin to lay off PHI and/or Pepco employees after two years. To the contrary, what the record establishes – and what the Commission found – is that "Exelon is a company with many positive attributes and a recent track record of bringing operational success to BGE."[52] In short, Exelon has not built its reputation as a provider of safe and reliable electric delivery service by shrinking its workforce and there is no reason to believe it would do so here.

Lastly, the Commission appears to have ignored Dr. Tierney's extensive analysis of the Proposed Merger's likely economic impact on the District. As set forth in her Supplemental Direct Testimony, Dr. Tierney's analysis showed that the Proposed Merger would produce between 1,506 and 2,407 job years and would provide between $168.4 million and $260.5 million to the District in economic value added.[53] The only reason given by the Commission for disregarding these results was that Dr. Tierney presented the employment gains in job years

[49] *Id.* at P. 345.
[50] *Id.* at P. 165.
[51] *Id.*
[52] *Id.* at P. 348.
[53] Exhibit Joint Applicants (4G): Tierney February 17 2015 Supp. Direct at 4:1-6 (Table SFT-(G4)-1).

rather than full time job equivalents.[54] This is an insufficient basis for ignoring highly probative evidence of significant benefits to customers and the District and this error should be corrected.[55]

b. Factor 2: The Effects Of The Transaction On Utility Management And Administrative Operations

At paragraph 197 of Order No. 17947, the Commission concludes that the Proposed Merger "will *potentially* harm Pepco and the ratepayers it serves by diminishing Pepco's role and its ability to make decisions that are responsive to the needs of its ratepayers and the policy directives of the District" (emphasis supplied). This finding is not supported by substantial evidence and should be reconsidered.

The Commission correctly notes that the Proposed Merger would "change Pepco's relationship within its utility holding company's hierarchy."[56] However, that is a natural consequence of any corporate merger/change-of-control. Indeed, Pepco's proposed merger with Constellation in 1997 and its merger with Conectiv in 2002 both involved certain organizational changes and a new management structure. However, those factors did not prevent the Commission from ultimately approving those transactions.

Nor is there any basis for assuming, as the Commission does, that the anticipated changes in management structure would "fundamentally disadvantage Pepco."[57] Rather, and as the Commission itself notes in its Order, such changes may very well prove to be a good thing:

> We recognize that there may be beneficial or potentially beneficial effects for the local distribution company, and by extension District ratepayers, as a result of having access to greater financial resources from an experienced operator with a record of increasing the reliability of BGE post-merger by implementing certain best practices and a new Management Model.[58]

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[54] Order No. 17947 at P. 161.
[55] As Dr. Tierney explained, the macroeconomic modeling tool that she utilized – IMPLAN – reports employment impacts in terms of "job years." Exhibit Joint Applicants (3G): Tierney Rebuttal at 16:10-17:4.
[56] Order No. 17947 at P. 185.
[57] *Id*.
[58] *Id*. at P. 345.

Another apparent concern of the Commission was the Joint Applicants' purported "distinct lack of knowledge concerning important District energy policies and funding mechanisms that are distinct from other jurisdictions."[59] Here, the Commission focuses exclusively on the cross-examination of Mr. Crane. Yet, while Mr. Crane may not have been intimately familiar with all of the District's energy efficiency and renewable power policies and programs, the Exelon executive who would be involved in ensuring that Pepco complies with the District's policies and programs – Mr. Gould – clearly was.[60]

The Commission also improperly discounts the value that will accrue to Pepco customers as the result of sharing "best practices." Specifically, the Commission criticizes the Joint Applicants for failing to "provide examples on the record of the areas of operations at Pepco that would be changed by these best practices."[61] This is not correct. To the contrary, Mr. Alden, on rebuttal, testified as follows:

> **6. Q. Has Exelon undertaken preliminary analyses to identify areas where best practice development might be targeted?**
>
> A. Yes. At this time, we have identified the following initial list of best practices that we would expect to consider for use in Pepco's service territory following approval of Merger:
>
> - Moving to a spoke and hub supply chain model with centralized warehouses for equipment to improve line crew efficiency.
> - Common Mutual Assistance/Emergency Preparedness resources, to enable the efficient dispatch of utility crews during storm events.
> - Alignment of preventative maintenance programs/analytics (e.g., increased data

[59] *Id*. at P. 190; P. 338.
[60] Exhibit Joint Applicants (3I): Gould Rebuttal.
[61] Order No. 17947 at P. 194.

> validation of reliability metrics and standardization of dollars per avoided customer interruptions assumptions) to prioritize cost-effective reliability activities, improve system performance and improve efficiency.
>
> - Greater emphasis on recloser installation to sectionalize the grid and limit disruption during feeder outages.
> - Use of temporary cables for underground residential distribution service restoration.
> - Daily System Health focus to drive greater organizational focus on system configuration and conditions, outage restoration practices and contingency planning.[62]

Similarly, at paragraph 197 of its Order, the Commission characterizes Exelon's Management Model as utilizing "unspecified best practices." Yet, Mr. O'Brien attached to his Rebuttal Testimony a list of 24 specific best practices that Exelon successfully deployed at BGE.[63] The functional areas positively impacted by these practices included, among others, preventive and corrective maintenance, emergency preparedness, fleet management, and safety. Even though the Commission later compliments Exelon for "bringing operational success at BGE,"[64] the information regarding best practices submitted by Messrs. Alden and O'Brien appears to have been overlooked in the Commission's analysis of Factor 2.

c. Factor 3: The Effects Of The Transaction On Public Safety And Reliability Of Services

Order No. 17947's discussion of Factor 3 does not reveal whether, on balance, the Commission concluded that the Proposed Merger would benefit Pepco in the areas of reliability and safety or simply leave it unharmed. On the positive side, the Commission acknowledged that the Proposed Merger "will provide a bigger pool of affiliated crews that could streamline the

[62] Exhibit Joint Applicants (3D): Alden Rebuttal at 4:22-5:19.
[63] Exhibit Joint Applicants (3C)-2 at p. 3 of 3.
[64] Order No. 17947 at P. 348.

process of restoring electric service after major system damage occurs."[65] This, the Joint Applicants submit, is an important benefit that should have been given considerable weight, but may not have been.

On the other hand, the Commission criticizes that Joint Applicants for (1) not committing to comply with SAIFI and SAIDI metrics on an annual basis;[66] (2) not offering to achieve more stringent reliability targets than those already mandated by the Commission's EQSS[67]; and (3) failing to provide any details regarding Exelon's commitment to safety.[68] The Joint Applicants respectfully submit that each of the foregoing criticisms misconstrues the record evidence and should therefore be reconsidered.

With respect to the first issue, the Commission finds that the Joint Applicants' reliability commitment is limited to meeting average performance levels over the 2018-2020 period and that the use of such averages is "directly contrary to the current EQSS, which mandates compliance with annual SAIFI and SAIDI metrics."[69] The Commission correctly observes that the Joint Applicants' list of commitments speaks in terms of three year averages.[70] However, as Mr. Alden explained on cross-examination, that commitment was intended to supplement and not supersede Pepco's annual EQSS obligations:

> **Q. And is it your understanding that the EQSS standards specify maximum permissible SAIDI and SAIFI levels each year?**
>
> A. Yes.
>
> **Q. And the years covered by the current EQSS begin in 2013 and run through 2020; is that right?**
>
> A. That's correct.

[65] *Id*. at P. 232.
[66] *Id.* at P. 220.
[67] *Id.* at P. 227.
[68] *Id.* at P. 233.
[69] *Id.* at P. 220.
[70] Exhibit Joint Applicants (4A)-2 at p. 2 of 17 (Commitment 7).

Q. And is it your understanding that PEPCO must meet all reliability-related requirement of the Commission that apply to PEPCO?

A. That's my understanding, yes.

Q. And is it your understanding that the annual SAIDI and SAIFI levels of the EQSS are not goals or aspirations that PEPCO should strive to meet, but are legally-binding requirements that they must meet?

A. That's my understanding, yes.

Q. And is it part of the package of commitments that joint applicants are making in this proceeding that, if the merger is approved, then PEPCO would continue to have to meet SAIDI and SAIFI each and every year from 2013 to 2020?

A. Yes, I understand that is the expectation.

Q. And you certainly have extensive testimony about a three-year averaging commitment that would cover the years 2018 to 2020, a reliability commitment; is that right?

A. That's correct. That's separate from the EQSS standards.

Q. And as I understand it – let me ask it a different way. Do you have a statement in your testimony, any of your prefiled testimony, that makes that point, that entirely apart from the three-year averaging mechanism that the company has proposed in this case, PEPCO will be required to meet the SAIDI and SAIFI standards each and every year? Because I couldn't find it, and I was hoping you could help me find that in your testimony.

A. I think there's been some confusion about that. We probably could have been clearer with respect to that. But we do clearly understand that we have a requirement to meet the EQSS standards each and every year. That's an obligation the company would have regardless of additional commitments that we've made.[71]

Order No. 17947 also errs in finding that "the Joint Applicants' reliability commitments are no better than what the Commission's EQSS requires Pepco to achieve on a stand-alone

[71] Tr. at 1130:10-1131:17 and 1133:3-19 (Alden Cross).

basis."[72] As noted by Mr. Alden in his February 17, 2015 Supplemental Direct Testimony, the Joint Applicants have committed to an average SAIFI level of 0.66 interruptions per year for the 2018-2020 period.[73] This target is substantially better than the EQSS metric over that three-year period, which calls for no more than 0.95 interruptions in 2018 and declines to only 0.89 interruptions in 2020.[74]

Lastly, the Order asserts that "the record is practically silent with regard to the Joint Applicants' commitment to safety."[75] In fact, Mr. O'Brien submitted Supplemental Direct Testimony in which he described at length and in detail the numerous measures that Exelon has implemented to promote a culture of safety throughout its organization.[76] Moreover, as Mr. O'Brien explained, Exelon's commitment to safety extends beyond the workplace:

> We understand the importance of facilitating the safety of not only our employees, but of our customers and the communities in which they work and reside. Thus, each of our operating companies maintains an educational outreach and preparedness program that may include: (1) direct mailings to contractors; (2) educational programs at schools to teach children about energy safety; (3) presentations for contractors working in the vicinity of our facilities; (4) online safety information for the public; and (5) coordination with first responders.[77]

No mention is made in the Order of Mr. O'Brien's extensive Supplemental Direct Testimony.

d. Factor 4: The Effects Of The Transaction On Risks Associated With All Of The Joint Applicants' Affiliated Non-Jurisdictional Business Operations, Including Nuclear Operations

With respect to Factor 4, the Commission concludes: "District ratepayers and Pepco could be protected from any harmful effects of the Proposed Merger in the face of Exelon's

[72] Order No. 17947 at P. 227.
[73] Exhibit Joint Applicants (4D): Alden February 17, 2015 Supp. Direct at 2, Table 1.
[74] *See id.* at 2, Table 2.
[75] Order No. 17947 at P. 233.
[76] Joint Applicants (2C): O'Brien Supp. Direct at 3:4-6:21.
[77] *Id*. at 6:22-9:13.

unregulated business. At the same time, we see no added benefit that inures to District ratepayers or the District from Exelon's other businesses."[78] In other words, the Commission found that there are no potential harms that cannot be adequately addressed, but that no benefits will flow from Exelon's unregulated operations either.

e. Factor 5: The Effects Of The Transaction On The Commission's Ability To Regulate The New Utility Effectively

In Order No. 17947, the Commission asserts that "the Proposed Merger would make regulatory tasks more complex; more time-consuming and more costly."[79] This finding should be reconsidered because it is not supported by "reliable, probative and substantial evidence," but, rather, is based on speculation and/or a misinterpretation of the record in this proceeding.

The first potential complexity cited by the Commission relates to access to Pepco's books and records. Specifically, the Commission concludes that the Joint Applicants' commitment to provide access within twenty days of a request somehow "seeks to delay access" and "will negatively impact the Commission's ability to effectively carry out its oversight role."[80] This statement seriously misconstrues the purpose and effect of Commitment 29, which was designed to provide *more timely access* than otherwise required by the Commission's regulations and not to evade the provisions to D.C. Code § 34-1112. The Order also suggests, without support or further elaboration, that Commitment 29 "raises concern about the future intended location of Pepco's books and records."[81] Any such concern is entirely unwarranted because, as the Joint Applicants pointed out in their Reply Brief, District of Columbia law already requires that

[78] Order No. 17947 at P. 120.
[79] *Id*. at P. 351.
[80] *Id*. at P. 279.
[81] *Id*.

Pepco's books and records be kept in the District and there was neither a request nor a suggestion that they be moved elsewhere.[82]

The Commission next reiterates its concerns over the future allocation of service company costs. Although this issue was addressed, *supra*, in connection with the discussion of Factor 1, two additional comments are in order. First, as the Commission observes, PHISCo utilizes far more allocation factors than EBSC and, consequently, the Proposed Merger may actually simplify, rather than complicate, the cost allocation process.[83] Second, the Order states that the Joint Applicants provided "no quantitative evidence" to support their contention that the transfer of certain functions from PHISCo to EBSC would allow Pepco to realize economies of scale and scope.[84] Here, the Commission either overlooked or misunderstood the purpose of the comprehensive synergy study sponsored by Mr. Khouzami. Indeed, the bulk of the savings quantified by that study, the results of which were largely unchallenged, were attributable to the consolidation of service company functions.

The remaining issues raised by the Commission under Factor 5 relate to the need to: (1) become familiar with and conceivably audit "new documents" such as Exelon's General Service Agreement and Delegation of Authority; and (2) review and possibly strengthen rules and procedures regarding potential "conflicts of interest" involving the SOS process."[85] No showing has been made that either of these initiatives would impose additional costs or time constraints on the Commission and, in any event, they do not constitute the type of harms that could

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[82] Joint Applicants' Reply Br. at 83, *citing* D.C. Code § 34-1112.

[83] Moreover, as noted by Mr. Khouzami (Tr. at 2093:7-15 (Khouzami Cross)), PHISCo currently allocates approximately 70% of its costs while EBSC allocates only 30%.

[84] Order No. 17947 at P. 280.

[85] *Id*. at PP. 281-282.

possibly justify denying Pepco customers and the District the substantial benefits that approval of the Proposed Merger would bring.[86]

f. Factor 6: The Effects Of The Transaction On Competition In The Local Retail And Wholesale Markets That Impacts The District And District Ratepayers

The Commission concludes that the Proposed Merger will leave wholesale competition unharmed.[87] It also finds that retail competition will likely be unaffected as well: "We note that when Pepco affiliate Pepco Energy Services was active in the District there were no retail competition issues and we would not expect to see any if the Proposed Merger is consummated."[88]

The Commission next addresses the impact of the Proposed Merger on the growth of distributed generation. However, its discussion of this issue is internally inconsistent, as the following excerpts from paragraphs 300 and 301 reveal:

> 300. Concern has been expressed about the ability of an Exelon owned Pepco to fairly operate the distribution system in a manner that would not discourage distributed generation, especially for solar systems. We do not share that concern.
>
> * * *
>
> 301. Additionally, the Proposed Merger raises a potential harm in that there is a potential conflict of interest if the company that controls the local distribution company seeks to delay changes necessary to encourage additional distributed generation because of its ownership of alternative generation sources.

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[86] Furthermore, the SOS "conflict of interest" concerns expressed by the Commission in Paragraph 282 of the Order cannot be reconciled with the Commission's discussion of Factor 6 in P. 298:

> This would not be the first time that an affiliate of the SOS Administration has participated in the SOS procurement [footnote omitted]. Our affiliate transaction rules which are referenced in our procurement documents anticipate such transactions and set out the applicable guidelines.

[87] Order No. 17947 at P. 298.
[88] *Id*. at P. 299.

These statements cannot possibly be reconciled and the Order should therefore be reconsidered.

g. Factor 7: The Effects Of The Transaction On Conservation Of Natural Resources And Preservation Of Environmental Quality

Although the Commission states that it considers the effect of the Proposed Merger on Factor 7 to be "neutral,"[89] its words suggest otherwise:

> 341. While the Joint Applicants' Application does not contain any proposals that would be harmful to the District's efforts to protect the environment and promote sustainability, it does not contain any specific commitment(s) to enhance the District's existing programs for energy efficiency, sustainability and conservation which would be construed as a benefit. It should have been clear from the fact that the parties urged the Commission to add Factor No. 7 in response to a statutory mandate that these were issues of importance to the District, its ratepayers, and the Commission. The lack of any commitments by the Joint Applicants for the advancement of the statutory and policy agendas that have been set in the District for the incorporation of a growing amount of renewables and distributed generation within our local distribution system, combined with Exelon's documented history of opposing certain programs that promote renewables, leaves us uneasy concerning the District's smooth transition to clean and green fuel sources if this Proposed Merger is approved.[90]

This statement, coupled with the subsequent characterization of Exelon as being less than an "enthusiastic supporter and facilitator" of District policies,[91] strongly implies that the Commission expected – indeed, essentially demanded – that Factor 7 yield a positive benefit and penalized the Joint Applicants when they failed to advance a specific proposal to enhance Pepco's renewable energy, distributed energy or smart grid initiatives. If so, Order No. 17947 should be reconsidered because the parties were never put on notice that the Commission intended to treat Factor 7 in this fashion.

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[89] Order No. 17947 at P. 342.
[90] *Id*. at P. 341.
[91] *Id*. at P. 348.

Moreover, there is no reason, based on the record in this proceeding, for the Commission to be "uneasy" about Exelon's support of the District's policy objectives when it comes to the conservation of natural resources and preservation of environmental quality. To the contrary, the evidence submitted by the Joint Applicants convincingly demonstrates that Exelon not only has complied with all statutory and regulatory requirements wherever it does business, but has also established itself as an industry leader in terms of promoting the development of renewable energy resources.[92] As to Exelon's alleged "documented history" of opposing certain renewable programs, the Joint Applicants note that Exelon's views on renewal of the wind production tax credit – to which the Commission presumably is referring – were shared by witnesses for both the DCG and the OPC.[93]

B. The Commission Departed From Established Practice And Policy When It Declined To Consider Additional Conditions, Which, If Adopted, Would Make The Transaction In The Public Interest

In Order No. 17947, the Commission notes that it reviews merger applications pursuant to D.C. Code §§ 34-504 and 34-1001.[94] D.C. Code § 34-504 provides, in pertinent part, that:

> No public utility . . . shall purchase the property of any other public utility for the purpose of effecting a consolidation until the Commission shall have determined and set forth in writing that said consolidation will be in the public interest, *nor until the Commission shall have approved in writing the terms upon which said consolidation shall be made* (emphasis supplied).

Having determined that the Merger, as proposed by the Joint Applicants, was not in the public interest, it was incumbent on the Commission to spell out "the terms upon which [it believed] said consolidation shall be made." The Commission, however, disagreed, stating: "It is not our obligation to craft conditions to make a proposed transaction that does not satisfy our

[92] *See*, *e.g.*, Exhibit Joint Applicants (3I): Gould Rebuttal; Joint Applicants Initial Brief at pp. 111-123.
[93] Joint Applicants (3I)-2; Tr. at 2178:5-9 (Morgan Cross).
[94] Order No. 17947 at P. 38.

public interest standard into one that meets that statutory test."[95] For the reasons discussed below, as well as those advanced by Commissioner Phillips in his thoughtful concurring and dissenting opinion, the Joint Applicants respectfully request that the Commission reconsider that conclusion.

In Formal Case No. 951, the Commission reviewed the proposed merger of Pepco and BGE. That proceeding was particularly significant, not only because it generated substantial public interest, but because, as the Commission noted at the time: "[T]his is the first case in recent years that has presented the question of 'public interest' as applied to a consolidation of utility companies or as applied to the purchase by one utility company of the property of another."[96] Like this proceeding, various parties, including the DCG, OPC and AOBA, opposed the proposed transaction unless certain conditions were attached to its approval and, as here, the parties were unable to resolve their differences by settlement. The Commission, in Order No. 11075, concluded:

> In balancing the relative interests of all involved, we conclude that the merger *as proposed by PEPCO and BGE* exposes District of Columbia ratepayers to unacceptable risks and inequitably shares the savings likely to be realized. Nonetheless, we are mindful of the opportunity for savings and growth that the merger offers to the ratepayers as well as the shareholders of both companies. Furthermore, a financially stronger, more efficient electric company will better serve the needs of the ratepayers of this region, now and in the future. *However, the merger plan as proposed by the Applicants is not one that we will approve* (emphasis supplied).[97]

Notably, at this stage, the Commission did not reject the proposed transaction out of hand. Instead, the Commission concluded that "the public interest of the District of Columbia

[95] *Id*. at P. 349.
[96] Formal Case No. 951, Order No. 11075 at p. 16. The Commission ultimately called its decision one of the "most… important . . . in the history of electric utility regulation in the District of Columbia." *Id*. at p. 3.
[97] *Id*. at p. 3.

[would] best be served" if the merger was approved subject to certain additional terms and conditions being accepted by the merger applicants, including, most significantly: (1) a longer cap on base rates (four years rather than two and a half years); (2) a greater percentage of net merger savings (75% rather than 50%) being flowed through to customers; and (3) a sizeable bill credit.[98] The Commission summarized its actions as follows: "As *required* by the Commission's enabling statute, this Order sets forth our declaration that a merger of PEPCO and BGE is in the public interest *and determines* 'the terms upon which said consolidation shall be made.'"[99]

The foregoing clearly indicates that the Commission, when called upon to interpret and apply Section 34-504's public interest test in Formal Case No. 951, understood that its enabling statute "required" the two-step process described by Commissioner Phillips in his separate opinion.[100] Moreover, intervenors in both Formal Case No. 1002 (the 2002 merger of Pepco and Conectiv) and the current proceeding obviously shared that understanding when they set forth, in testimony, the specific conditions the Commission might impose if it concluded that the merger, as submitted, was not in the public interest.

In Order No. 17947, the majority seeks to distinguish Formal Case No. 951 on the grounds that the merger applicants in that case proposed a different management structure than here and that their "initial offer" had a "larger base of benefits for ratepayers."[101] But, earlier in its Order, the Commission stresses that "the circumstances of each merger are unique"[102] and involve "different corporate structures and different relationships."[103] Surely such differences do not warrant the application of a different merger review standard whenever the Commission is

[98] *Id*. at p.3-4.
[99] *Id*. at p. 13 (emphasis supplied) (footnote omitted).
[100] Opinion of Commissioner Willie L. Phillips, Concurring, in Part, and Dissenting, in Part, Formal Case No. 1119, Order No. 17947 at P. 2.
[101] Order No. 17947 at P. 351.
[102] *Id*. at P. 56.
[103] *Id*. at P. 40.

presented with a new merger proposal. Yet, that is what the Commission implies. Moreover, the Commission's observation regarding the applicants' "initial offer" in Formal Case No. 951 begs the issue of what the statute requires.

Even if the Commission were correct in concluding that D.C. Code § 34-504 did not require it to identify the terms and conditions that would make the Proposed Merger in the public interest, there is no doubt that the Commission had the authority to do so. In fact, the Commission explicitly recognizes as much in Conclusion of Law B of the Order, when it states: "The Commission has both express and implied statutory authority to review an application for authority to merge, and to set forth the terms and conditions upon which a merger may be approved or denied." Moreover, and as noted by Commissioner Phillips, having exercised that authority in Formal Case No. 951, the Commission was obliged to explain why it decided, in this case, that "there was no need to consider the conditions that were proposed by the parties" to which the Joint Applicants had objected.[104] As the District of Columbia Court of Appeals has held:

> [T]he Commission may not depart from its own established policy without providing a reasoned explanation for doing so.[105]
>
> * * *
>
> [A]n agency changing its course must supply a reasoned analysis indicating that 'prior policies and standards are being deliberately changed, not casually ignored.'[106]

The Joint Applicants respectfully submit that the Commission has failed to adequately explain its departure from past practice. As noted previously, its observations at Paragraph 351 of Order No. 17947 regarding factual differences between Formal Case No. 951 and this

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[104] *Id*. at P. 349.
[105] *Office of Peoples' Counsel v. Pub. Serv. Comm'n of D.C.*, 610 A.2d 240, 247 (D.C. 1992).
[106] *OPC v. PSC*, 455 A.2d 391, 396 (quoting *Greater Boston Tel. Corp. v. FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed 2d 701 (1971)).

proceeding do not justify the Commission's change of course. Nor do its comments at Paragraph 353 provide the requisite explanation. For example, the Commission stakes out, but never clarifies, the seemingly antithetical position that it would not be in the public interest for it to identify the conditions which, if accepted, would make a proposed transaction in the public interest. Similarly, the Commission insists that it has long expected applicants to put forward their "best proposal" and to then rely upon it, and that this is a "tradition and a practice that is worth keeping."[107] But, that is obviously not what happened in Formal Case No. 951, where the Commission felt compelled to substantially expand upon the merger applicants' "best proposal." As Commissioner Phillips concluded:

> With today's decision, it is not clear why the majority is taking an approach different from *Formal Case No. 951* and from the practice of considering conditions in the overwhelming number of mergers that are reviewed by commissions throughout the country on both the state and national level.[108]

In summary, the Joint Applicants believe that the Commission's decision not to consider the various conditions proposed by DCG, OPC, AOBA and others is wrong as a matter of law and policy. The Proposed Merger unquestionably has many positive attributes that promise to bring substantial benefits to Pepco's customers and the District of Columbia. At the same time, the deficiencies that the Commission found with the Proposed Merger can easily be cured.

[107] Order No. 17947 at P. 353.
[108] Opinion of Commissioner Willie L. Phillips at P. 11 (emphasis in original).

IV. CONCLUSION

For the reasons set forth above, the Joint Applicants respectfully request that the Commission grant reconsideration of Order No. 17947.

Respectfully submitted,

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APPENDIX A

SPECIFICATION OF ERRORS

Pursuant to Commission Rule 140.2, D.C.M.R. § 140.2 (2015), the Joint Applicants respectfully submit that Order No. 17947 contains the following unlawful or erroneous findings and conclusions, which should be reversed on reconsideration.

1. The Commission erred in concluding that the merger of PHI and Purple Acquisition Corp., a wholly-owned subsidiary of Exelon, as proposed by the Joint Applicants (the "Proposed Merger or "Merger"), is not in the public interest.

2. The Commission erred in concluding that it would not be in the public interest for the Commission to identify the additional terms and conditions, which, if accepted by the Joint Applicants, would make the Proposed Merger in the public interest.

3. The Commission erred in the misapplication of the Commission's merger standard.

4. The Commission erred in its failure to adequately explain the criteria utilized by the Commission in making its public interest determination.

5. The Commission erred in the pronouncement that District policy "requires the electric company to be focused on distribution only."

6. The Commission erred in the consideration and apparent weight given to terms imposed or agreed to in other merger proceedings in other jurisdictions.

7. The Commission erred in its failure to take into account merger benefits clearly presented on the record, but not included in a pre-filed written summary of commitments.

8. The Commission erred in ignoring substantial record evidence of the Merger's many benefits.

9. The Commission erred in concluding that that the public interest did not require the Commission to take into account the additional conditions proposed by the Office of Public Counsel ("OPC"), District of Columbia Government ("DCG") and other intervening parties.

10. The Commission erred in its lack of a reasoned explanation for the Commission's departure from its established policy of considering such additional conditions.

11. The Commission erred in departing from its own established policy that merger benefits need not be profound without indicating that it was adopting a new policy and without providing a reasoned explanation for so doing.

12. The Commission erred in departing from its own established policy by allowing implausible speculation of potential harms to negate affirmative commitments to deliver direct and tangible benefits without indicating that it was adopting a new policy and without providing a reasoned explanation for so doing.

13. The Commission erred by failing to adequately explain the criteria it utilized in making its public interest determination.

14. The Commission erred by initially concluding that it would consider the seven specific factors identified in Order No. 17530 and then, twelve months later, declaring that one or more of such factors might be irrelevant.

15. The Commission erred by failing to state what other unique circumstances received weight from the Commission outside of the listed factors that the Commission had decreed would govern its decision.

16. The Commission erred as there is no way of discerning the criteria applied by the Commission and/or whether there is a "rational connection between the facts found and the choice made."

17. The Commission erred in concluding that there is a public policy contained in District law that requires the electric company to be focused on distribution only.

18. The Commission erred in concluding that the focus of Pepco would be on generation.

19. The Commission erred in improperly considering individual terms imposed or agreed to in other merger proceedings.

20. The Commission erred in disregarding benefits not memorialized in Exhibit (4A)-2 or in Appendix B to Joint Applicants' Initial Brief.

21. The Commission erred in concluding that the record before us contains no commitment by the Joint Applicants to pass on 100% of allocable achieved synergy savings to Pepco – DC.

22. The Commission erred with respect to Factor 1 as it merely noted that its findings were "mixed" and did not specify how it balanced the benefits and harms, Thus there is not a "rational connection" between those findings and the Commission's conclusion.

23. The Commission erred in erroneously concluding that since costs to achieve are projected to exceed synergy savings in the first year post merger this could translate into a rate increase.

24. The Commission erred in concluding that the Commission's experience with shared service arrangements for Pepco through the PHISCo raise concerns about the proper recording, tracking and allocation of shared services costs.

25. The Commission erred in concluding that the record evidence indicates that there would be no significant improvement in Pepco's credit ratings due to the Proposed Merger.

26. The Commission erred in concluding that the economic picture is almost certain to trend negative within two or three years as the protections for job retention are lifted" at PHI and Pepco.

27. The Commission erred in its speculation that Exelon will begin to lay off PHI and/or Pepco employees after two years.

28. The Commission erred in ignoring Dr. Tierney's extensive analysis that the Merger would have a positive economic impact on the District.

29. The Commission erred in finding that the Merger will potentially harm Pepco and the ratepayers it serves by diminishing Pepco's role and its ability to make decisions that are responsive to the needs of its ratepayers and the policy directives of the District.

30. The Commission erred in concluding that the anticipated changes in management structure would "fundamentally disadvantage Pepco.

31. The Commission erred in concluding that Exelon had a distinct lack of knowledge concerning important District energy policies and funding mechanisms that are distinct from other jurisdictions.

32. The Commission erred in improperly discounting the value that will accrue to Pepco customers as the result of sharing "best practices."

33. The Commission erred in the characterizing Exelon's Management Model as utilizing "unspecified best practices," ignoring, *inter alia*, a list of 24 specific best practices that Exelon successfully deployed at BGE.

34. The Commission erred in ignoring the testimony on best practices of Messrs. Alden and O'Brien regarding Exelon's use of best practices.

35. The Commission erred in departing from past precedent that did not require an incremental improvement in reliability performance.

36. The Commission erred in concluding that the Joint Applicants did not commit to comply with SAIFI and SAIDI metrics on an annual basis.

37. The Commission erred in concluding that the Joint Applicants failed to commit to achieve more stringent reliability targets than those already mandated by the Commission's EQSS.

38. The Commission erred in concluding that the Joint Applicants failed to submit any details regarding Exelon's commitment to safety.

39. The Commission erred in concluding that the Joint Applicants' reliability commitment is limited to meeting average performance levels over the 2018-2020 period and that the use of such averages is "directly contrary to the current EQSS, which mandates compliance with annual SAIFI and SAIDI metrics."

40. The Commission erred in finding that "the Joint Applicants' reliability commitments are no better than what the Commission's EQSS requires Pepco to achieve on a stand-alone basis."

41. The Commission erred in finding no added benefit that inures to District ratepayers or the District from Exelon's other businesses.

42. The Commission erred in finding that the Proposed Merger would make regulatory tasks more complex, more time-consuming, and more costly.

43. The Commission erred in finding that the Joint Applicants' commitment to provide access within twenty days of a request, rather than the thirty days allowed by 15 D.C.M.R. §3904.3, somehow "seeks to delay access" and "will negatively impact the Commission's ability to effectively carry out its oversight role."

44. The Commission erred in finding that the Joint Applicants' proposal with respect to access to books and records raises concern about the future intended location of Pepco's books and records."

45. The Commission erred in concluding that the Joint Applicants provided "no quantitative evidence" to support their contention that the transfer of certain functions from PHISCo to EBSC would allow Pepco to realize economies of scale and scope.

46. The Commission erred in concluding that the need to become familiar with and conceivably audit "new documents" such as Exelon's General Service Agreement and Delegation of Authority; and that the review and possibly strengthening of rules and procedures regarding potential "conflicts of interest" involving the SOS process would impose additional costs or time constraints on the Commission.

47. The Commission erred in concluding that there is a potential conflict of interest if the company that acquired the local distribution company seeks to delay changes necessary to encourage additional distributed generation because of its ownership of alternative generation sources.

48. The Commission erred in finding that the lack of any commitments by the Joint Applicants for the advancement of the statutory and policy agendas that have been set in the District for the incorporation of a growing amount of renewables and distributed generation within our local distribution system.

49. The Commission erred in concluding that Exelon has a documented history of opposing certain programs that promote renewables, that would negatively impact the District's transition to clean and green fuel sources if this Proposed Merger is approved.

50. The Commission erred in characterizing Exelon as being less than an "enthusiastic supporter and facilitator" of District policies.

51. The Commission erred in demanding that Factor 7 yield a positive benefit and by penalizing the Joint Applicants for failure to advance a specific proposal to enhance Pepco's renewable energy, distributed energy and smart grid initiatives.

52. The Commission erred in departing from established practice and policy when it declined to consider additional conditions, which, if adopted, would make the transaction in the public interest, and without providing a reasoned explanation for so doing.

53. The Commission erred in attempting to distinguish Formal Case No. 951 on the grounds that the merger applicants in that case proposed a different management structure than here and that their "initial offer" had a "larger base of benefits for ratepayers.

54. The Commission erred by failing to consider the various conditions proposed by DCG, OPC, AOBA and others.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2015, a copy of Joint Applicants' Application for Reconsideration of Order No. 17947 was filed electronically on behalf of the Joint Applicants, and an original and fifteen copies of the above Application for Reconsideration was hand-delivered to the District of Columbia Public Service Commission care of Brinda Westbrook-Sedgwick, Commission Secretary, District of Columbia Public Service Commission, 1325 G Street NW, Suite 800, Washington, D.C. 20005, and was served on the following parties of record by electronic mail:

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