STATE OF MARYLAND

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of the	**)**	
Merger of Exelon Corporation and	**)**	**Case No. 9361**
Pepco Holdings, Inc.	**)**	

BRIEF OF

THE SIERRA CLUB

AND

CHESAPEAKE CLIMATE ACTION NETWORK

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MARCH 3, 2015

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Pursuant to the procedural schedule adopted by the Maryland Public Service Commission ("Commission") on September 22, 2014 in this case, as modified on February 13, 2015, Sierra Club and the Chesapeake Climate Action Network ("Environmental Intervenors") file this initial brief.

I. INTRODUCTION

Exelon Corporation ("Exelon" or "Company"), Pepco Holdings, Inc. ("PHI"), Potomac Electric Power Company ("Pepco") and Delmarva Power & Light Company ("Delmarva Power" or "DPL") (collectively "Applicants") filed an application with the Commission on August 19, 2014 requesting approval for Exelon to exercise "substantial influence over the policies and actions of Pepco and Delmarva Power."[1] If the acquisition is approved, Exelon will control electric delivery service to approximately 1.97 million Maryland ratepayers.[2]

In reviewing the application, the Commission must determine whether Exelon's acquisition of PHI is in Maryland's public interest, whether the acquisition will create benefits for Pepco and Delmarva Power's (collectively, "PHI Utilities") ratepayers, and whether the acquisition will create no harm to PHI Utilities' ratepayers.[3] The Applicants tout their proposal to provide $40 million in total to PHI Utilities' ratepayers through a customer investment fund, ("CIF"),[4] their charitable support, and their employment retention plans during the merger integration as evidence that the acquisition should be approved. However, these commitments are insufficient.

[1] Applicants Exhibit No. 3, Joint Application with Appendices at 1.
[2] Applicants Exhibit No. 3, Joint Application at 18 and 20.
[3] Md. Code Ann., Pub. Utils. § 6-105(g)(3)(i). All statutory citations are to the Public Utility Companies Article unless otherwise noted.
[4] Applicants Exhibit No. 3, Joint Application at 5.

The proposed acquisition fails to meet even one of the standards imposed by Maryland's public utilities law. The evidence in this proceeding conclusively establishes that the acquisition (i) is not in the public interest, (ii) offers no tangible benefits to customers, and (iii) will be harmful to consumers. The General Assembly and this Commission clearly consider renewable energy and energy efficiency to be an important aspect of the public interest. In contrast to this support of clean energy, the evidence concerning Exelon's position on a variety of renewable energy and energy efficiency issues conclusively establishes the difficulties Maryland will face if Exelon is authorized to acquire PHI. As a result, and for the reasons detailed below, this Commission should deny Exelon's request to acquire PHI. However, if the Commission decides to approve the acquisition, the Environmental Intervenors request that, at a minimum, the Commission adopt the conditions set forth in this filing to limit, as much as possible, the harms to the public interest that will result from Exelon's acquisition of PHI.

II. THE STATUTORY STANDARD

Pursuant to § 6-105(e)(1), "[w]ithout prior authorization from the Commission, a person may not acquire, directly or indirectly, the power to exercise any substantial influence over the policies and actions of an electric company…".[5] The statutory standard requires the Commission to make three distinct findings: (1) that the transaction is "consistent with the public interest, convenience and necessity"; (2) that the transaction yields "certain and direct benefits" to the PHI utilities' ratepayers in their capacity as customers rather than as members of the general public; and (3) that the transaction will cause no harm to the PHI utilities' customers.[6] In deciding whether to approve the application, subsection (g)(2) directs the Commission to

[5] § 6-105(e)(1).
[6] *In the Matter of the Merger of FirstEnergy Corp. and Allegheny Energy Inc.*, Case No. 9233, Order No. 83788 at 1-2 (Jan. 18, 2011) ("FirstEnergy Order").

consider a number of factors including, *inter alia*, the potential impact of the acquisition on rates and charges paid by customers and on the services and conditions of operation of the public service company; the potential impact of the acquisition on continuing investment needs for the maintenance of utility services, plant, and related infrastructure; the potential effects on employment by the public service company; the projected allocation of any savings that are expected to the public service company between stockholders and ratepayers; issues of reliability, quality of service, and quality of customer service; the potential impact of the acquisition on community investment; whether it is necessary to revise the Commission's ring fencing and code of conduct regulations in light of the acquisition; and any other issues the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience and necessity.[7] The Commission has noted that, while the General Assembly has enumerated factors the Commission must consider in evaluating a transaction's consistency with the public interest, "the [statutory] list is not exhaustive."[8]

Section 6-105(g)(5) places the burden on the Applicants to show that the application meets this standard. If the Commission finds that the application does not meet this standard, the Commission must deny the application.[9] Even if the Commission finds that the "acquisition is consistent with the public interest, convenience and necessity, including benefits and no harm to consumers," the Commission may "condition an order authorizing the acquisition on the applicant's satisfactory performance or adherence to specific requirements."[10]

With regard to the "benefits" standard, the Commission has found that ratepayers "must receive benefits *directly*, in their capacity as [utility] customers, not just their share of the

[7] § 6-105(g)(2).
[8] EDF Order at 25-26.
[9] § 6-105(g)(4).
[10] § 6-105(g)(3).

Transaction's impact on the public at large."[11] The Commission also ascribes no value to the benefits if the promised benefits are contingent, that is, it is uncertain whether those benefits will actually accrue.[12] Moreover, benefits provided by a merged company must add something to those benefits that pre-exist the merger.[13] Additionally, the benefits must also be "tangible."[14] According to the Commission, the General Assembly meant for ratepayers to receive something "more than a possibility…" of benefits from the proposed acquisition.[15] Specifically, with regard to rate credits, the Commission found that to meet the benefit standard the credits may not be subject to the company's subsequent "claw back."[16]

With regard to potential harm to ratepayers, the Commission recognized that harm need not be immediate, but rather may involve merely the "risk" of harm. In the context of a utility becoming part of a larger organization, the Commission found that increased "physical, corporate, and administrative distance" is a specific harm to ratepayers that requires before-the-fact protections.[17] The Commission has also determined that the ability of the new corporate entity to "influence" utility operations and/or services to ratepayer detriment is a cognizable merger-related harm to ratepayers.[18] Once the risk of harm is identified, a utility must offset all increases in risk to consumers resulting from the proposed merger.[19]

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[11] *See, In the Matter of the Current and Future Financial Condition of Baltimore Gas & Electric Company,* Case No. 9173, Order No. 82986 at 2, 33 (Oct. 30, 2009) ("EDF Order") (emphasis added).
[12] EDF Order at 2, 38.
[13] FirstEnergy Order at 38-39.
[14] EDF Order at 38.
[15] EDF Order at 38.
[16] FirstEnergy Order at 48-49.
[17] FirstEnergy Order at 53-55.
[18] EDF Order at 41-44.
[19] FirstEnergy Order at 35, 53-54.

III. ARGUMENT

The Commission should reject an application where, as here, the application falls short on its face and the proposed transaction does not come close to "satisfy[ing] all of the statutory elements."[20] As discussed below, Applicants have failed to show that the proposed merger would be "consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers."[21] In the absence of such a showing, the Commission must deny the application.[22]

A. The Proposed Merger is Not in the Public Interest.

As noted above, § 6-105(g)(2) provides a list of factors the Commission shall consider when examining the acquisition application. The General Assembly expressly granted the Commission authority to consider "**any other issues** the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience, and necessity."[23] Thus, the only limitation placed upon the Commission with regard to what issues it may consider is relevancy. Moreover, the Commission has noted that, while the General Assembly has enumerated factors the Commission must consider in evaluating a transaction's consistency with the public interest, "the [statutory] list is not exhaustive."[24]

In order to resolve the question of whether Exelon's acquisition of PHI meets the public interest standard, the Commission should determine if the acquisition will enable the State to

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[20] EDF Order at 25-27.
[21] § 6-105(g)(5).
[22] *See* § 6-105(g)(4) (providing that "[i]f the Commission does not find that the acquisition is consistent with the public interest…the Commission shall issue an order denying the application."). *See, also,* EDF Order at 32-33.
[23] § 6-105(g)(2)(xii) (emphasis added).
[24] EDF Order at 25-26.

better meet its energy policy objectives. If the State is more likely to achieve its energy policy objectives in the absence of the merger, the merger is not in the public interest and the Applicants' request must be denied. As discussed below, the evidence in this proceeding clearly establishes that Exelon's acquisition of PHI will make it more difficult for the State to meet its policy objectives.

The General Assembly clearly considers renewable energy and energy efficiency to be in the public interest. Over the last ten years, the General Assembly has adopted a series of laws designed to promote renewable energy and energy efficiency, including Maryland's Renewable Portfolio Standard ("RPS"),[25] the EmPower Maryland Energy Efficiency Act of 2008,[26] and the Greenhouse Gas Emissions Reduction Act of 2009.[27] The General Assembly also provided that, as a part of the competitive process for standard offer service, the Commission shall require or allow the procurement of cost-effective energy efficiency and conservation measures and services to offset anticipated demand to be served by standard offer service, and the imposition of other cost-effective demand-side management programs.[28]

The significance of Maryland's commitment to building a renewable market in the state for economic and environmental purposes is reflected in the legislative intent and findings of the RPS law. The General Assembly expressly stated that its intent was to:

> (1) recognize the economic, environmental, fuel diversity, and security benefits of renewable energy resources;
> (2) establish a market for electricity from these resources in Maryland; and
> (3) lower the cost to consumers of electricity produced from these resources.[29]

The General Assembly also found that:

[25] § 7-701 *et seq*.
[26] § 7-211.
[27] Md. Ann. Code, Environment Art., § 2-1201 *et seq.*
[28] § 7-510(c)(4)(ii)(2)(C).
[29] § 7-702(a).

> (1) the benefits of electricity from renewable energy resources, including long-term decreased emissions, a healthier environment, increased energy security, and decreased reliance on and vulnerability from imported energy sources, accrue to the public at large; and
> (2) electricity suppliers and consumers share an obligation to develop a minimum level of these resources in the electricity supply portfolio of the State.[30]

Moreover, this Commission also has deemed renewable energy and energy efficiency to be in the public interest. Since 2007, the Commission has investigated two energy company acquisitions: FirstEnergy Corp.'s merger with Allegheny Energy Inc.,[31] and Exelon's acquisition of Constellation Energy Group ("Constellation").[32] In the FirstEnergy proceeding, the Commission found that the merger was in the public interest only if FirstEnergy committed "to develop, or provide substantial assistance in the development of, one or more Tier 1 renewable energy projects in Maryland."[33] The Commission stated that it will hold FirstEnergy to its commitment to develop at least 13,000 MWh of Tier 1 renewable energy product and ordered the parties to report on its progress.[34] In the case of Exelon's acquisition of Constellation, Exelon was required to divest three of its generating stations, develop or assist in the development of 285 to 300 MW of new generation, including 125 MW from renewable resources and 30 MW from solar generation.[35]

Applicants ignore this precedent and argue for an inappropriately narrow view of the public interest, one that this Commission has never adopted before. Essentially, the Applicants contend that the only public interest issues the Commission should consider are those issues the

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[30] § 7-702(b).
[31] *In the Matter of the Merger of FirstEnergy Corp. and Allegheny Energy, Inc.,* Case No. 9233.
[32] *In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Inc.*, Case No. 9271.
[33] FirstEnergy Order at 36.
[34] *Id.* at 37.
[35] *In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Inc.*, Case No. 9271, Order No. 84698 at 104-105, 108 (Feb. 17, 2012) ("Constellation Order").

Applicants raised themselves through their commitments.[36] For example, while conceding that renewable energy development is a policy goal in Maryland, Applicants' witness Dr. Tierney asserted that the Commission's consideration of clean energy public policy goals was only appropriate in the other merger proceedings because the applicant brought that public policy issue forward "voluntarily" as part of a specific merger proposal.[37] According to the Applicants, it is not appropriate for the Commission to consider issues related to broad public policy matters that are currently being considered by the Commission in "generic" proceedings.

The Applicants' position inappropriately conflates the public interest inquiry with the determination regarding whether the transaction provides benefits to consumers. The flaw in this formulation of the public interest standard is demonstrated by the Applicants' filing. Applicants' filing contains several commitments, including a commitment to improve reliability in the PHI Utilities' service territories. The Commission also has an ongoing reliability docket, RM43,[38] and much of the testimony addressed how the Applicants' commitment compares to the Commission's reliability requirements.[39] Under the Applicants' interpretation of the public interest test, the Commission could not examine the acquisition's effect on reliability in the absence of a specific reliability commitment because reliability is at issue in the generic proceeding. This interpretation of the public interest standard gives virtually absolute authority over the parameters of the public interest to an applicant. The General Assembly could not have intended to cede such authority to an acquiring company.

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[36] *See, e.g.*, Tr. at 93-95 (Tierney).
[37] Tr. at 169-170 (Tierney).
[38] Revisions to COMAR 20.50 - Service Supplied by Electric Companies - Proposed Reliability and Service Quality Standards, Admin. Docket RM43.
[39] See, *e.g.*, Direct Testimony of Mark F. Alden, Applicants Ex. No. 26; Direct Testimony of Charles R. Dickerson, Applicants Ex. No. 19; Direct Testimony of Kevin J. Mara, MEA Ex. 28; and Direct Testimony of Peter J. Lanzalotta, OPC Ex. 49.

Consistent with past precedent, this acquisition should be approved only if it aligns with Maryland's energy policy goals. In particular, the merger should be examined in light of the following:

- Maryland's Renewable Portfolio Standard ("RPS"), which requires 20 percent of retail electric power to be generated from renewable energy sources by 2022. Within the overall RPS targets, Maryland requires that 2 percent of retail power sold in 2022 come from solar energy, with slight increases in requirements starting at 0.005 percent in 2008 and growing each year thereafter.

- The GHG Emissions Reduction Act of 2009, which requires Maryland to reduce greenhouse gas ("GHG") emissions by 25 percent by 2020 (compared to 2006 levels). Maryland is one of nine states participating in the multi-state cap-and-trade program called "Regional Greenhouse Gas Initiative" ("RGGI"). RGGI's goal is to reduce carbon dioxide emissions from electricity generating plants by 2.5 percent each year from 2015 to 2020.

- The EmPower Maryland Energy Efficiency Act of 2008, which sets targets to reduce both per-capita energy consumption and per-capita peak demand by 15 percent by the end of 2015 (based on a 2007 baseline).

- U.S. Environmental Protection Agency's ("EPA") proposed Clean Power Plan, which requires that Maryland reduce carbon emissions from power plants by 34% averaged over 2020-2029 and 42% by 2030.

The Commission must ensure that these important policy objectives are furthered by Exelon's acquisition of PHI. However, as explained below, Exelon's acquisition of PHI will actually harm Maryland's ability to achieve its renewable energy and energy efficiency objectives. Therefore, the Commission must find that Exelon's acquisition of PHI is not in the public interest.

1. Exelon is Openly Hostile To Renewable Generation.

At the outset, the Commission should note that Exelon's attitude toward renewable energy and energy efficiency has changed since its acquisition of Constellation. This change in

attitude is reflected in the differences between Exelon's initial application in the Constellation proceeding and the application this Commission is currently evaluating. In the current Application, Applicants fail to increase their commitment to renewable generation and energy efficiency in the State.[40] Instead of committing to solar initiatives, increased amounts of generation from other renewable sources, or new or expanded energy efficiency programs, Exelon has only pledged merely to "maintain and promote [Pepco's and Delmarva Power's] existing energy efficiency and demand response programs."[41] Although the Applicants tout Exelon's achievements in acquiring renewable resources elsewhere,[42] the Application lacks any plan to bring that same level of commitment to renewables in Maryland.

In contrast, in its application to acquire Constellation, Exelon stated that it "embraces Maryland's existing energy policy objectives both for the growth of cost-effective green energy resources and for more efficient use of energy."[43] "Consistent with the goals for renewable energy development and greenhouse gas reductions,"[44] Exelon included the commitment to develop at least 25 megawatts of new Tier 1 renewable energy projects in Maryland,[45] stating "[t]his project not only assists the State in meeting its defined policy objectives and goals, but also reflects Exelon's own clean energy operational objectives and benefits the public by adding

[40] *See* Crane Rebuttal Testimony, Applicants Ex. No. 9, Exhibit CMC-2.
[41] *Id.* Exhibit CMC-2 at 3.
[42] Joint Application at 8.
[43] *In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Inc.*, Case No. 9271, Application of Exelon Corporation, Constellation Energy Group, Inc., and Baltimore Gas and Electric Company, Docket Entry No. 7, at 3. ("Constellation Application").
[44] Constellation Application at 3.
[45] Interestingly, in the Exelon/PHI proceeding Mr. Crane described the 30 MW Exelon was ultimately required to provide as part of the Exelon/Constellation merger as "very small" and stated that this requirement would not "disincent" nuclear generation. Deposition of Christopher M. Crane, MEA Ex. 1 at 261-262.

new, clean, renewable generation."[46] Similarly, to encourage Baltimore Gas & Electric Company's ("BGE") implementation of EmPower Maryland programs, Exelon committed $4 million to offset costs already incurred under these programs, stating that "[t]his contribution will support State objectives, shared by Exelon, to improve energy efficiency and reduce energy consumption."[47]

This sharp change in philosophy in the few short years since the approval of Exelon's acquisition of Constellation was apparently engendered by a significant contraction of the wholesale power market. Market forces have rendered Exelon's business plan, which primarily focuses on the wholesale sale of nuclear generated energy, unprofitable.[48] Exelon engages in market-based electric sales and is significantly exposed to commodity price risk. Exelon is in a high-stress period economically due to low commodity prices resulting from stagnant demand and low natural gas prices. While pursuing higher generation profits is not unlawful, such objectives are at odds with Maryland energy policy, which seeks to lower energy costs and give citizens greater access to clean, renewable energy, distributed generation, energy efficiency, and demand side management initiatives. Exelon is heavily dependent on its merchant generation and concerned with the welfare of that generation fleet, often in opposition to the interest of its captive ratepayers.

[46] *In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Inc.*, Case No. 9271, Direct Testimony Of Christopher M. Crane, Docket Entry No. 7, at 22.
[47] *Id.* at 21.
[48] Exelon announced its fourth quarter earnings after the evidentiary hearings were completed in this proceeding. Exelon's generation segment loss $91 million from a year earlier profit of $269 million. Overall, the Company posted a profit of $18 million, or 2 cents a share, down from $495 million, or 58 cents a share, a year earlier. Chelsey Dulaney, "Exelon Profit Dampened by Weather, Expenses–Update" Wall Street Journal, Feb. 19, 2015. Appendix A.

While Exelon attempts to paint itself as a leader in the renewable energy market,[49] the evidence demonstrates a much different reality. Exelon's assertion that it is a national leader in renewable energy is simply factually incorrect.[50] While Mr. Crane and Mr. Gould mention several renewable projects, these projects were either started by Constellation before it was acquired by Exelon[51] or were instituted to meet various renewable portfolio standards.[52] While RPS is a critical tool to advance clean energy, compliance with the RPS laws constitutes the minimum threshold a state expects a utility to achieve. Compliance alone is not evidence of superior performance.[53]

Recently, Ceres issued its Benchmarking Utility Clean Energy Deployment Report in which it ranks thirty two of the largest investor-owned electric utilities on renewable energy.[54] While Exelon ranked **second** out of the thirty two companies in total retail electricity sales,[55] Exelon ranked **twenty-second** in renewable electricity sales as a percent of retail electric sales.[56]

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[49] For example, Dr. Tierney testified that Exelon has an "impressive track record" on renewable energy. Rebuttal Testimony of Dr. Susan F. Tierney, Applicants Ex. 5, at 53. However, on cross, Dr. Tierney admitted that Exelon's track record is only impressive if you consider nuclear power a renewable resource. Tr. at 115 (Tierney).

[50] Of the 359 MW of solar generation that Exelon owns, 230 MW are in California, where Exelon owns no nuclear generation. Tr. at 2225 (Gould). Moreover, solar generation is actually only .3 percent of Exelon's generation output. Ironically, oil/gas hybrid generation is also .3 percent of Exelon's generation output. Only 2 percent of Exelon's generation output is from wind. Rebuttal Testimony of Christopher D. Gould, Applicants Ex. 33, at 8. This is certainly not a ringing endorsement of Exelon's renewable program.

[51] *See, e.g.*, Tr. 2227 (Gould).

[52] Deposition of Christopher M. Crane, MEA Ex. 1, at 264.

[53] *See* Surrebuttal Testimony of Paul Chernick, Sierra Club/CCAN Ex. 2, at 25.

[54] "Benchmarking Utility Clean Energy Deployment 2014: Ranking 32 of the Largest U.S. Investor-Owned Electric Utilities on Renewable Energy and Energy Efficiency," Ceres, Inc. in partnership with Clean Edge, Inc. ("Benchmarking Report"). The Benchmarking Report was relied upon by Mr. Bradford in his Direct Testimony at 25-26.

[55] Benchmarking Report at 13.

[56] *Id.* at 17 (emphasis added). In the Report, renewable energy sales are the total amount of renewable electricity sold to retail customers or the total amount of Renewable Energy Credits

Not only is Exelon not a leader in renewable energy, the company actually is performing under average when compared to its peers.

Moreover, Exelon's positions on legislation nationwide reflect a distinct lack of support for renewable energy. For example, the Exelon opposed the Northern Pass Project which is designed to bring sufficient renewable electricity into New England to power 1 million homes, **[BEGIN CONFIDENTIAL]** [redacted] [redacted][57] **[END CONFIDENTIAL]** While Mr. Gould claimed that Exelon's objections to the Northern Pass Project were because of the impact on customers,[58] as Commissioner Hoskins noted, Exelon doesn't have any utility customers in New York.[59]

Similarly, Exelon opposed Governor Chaffee of Rhode Island's legislation to buy 150 MW of renewable power and Governor LePage of Maine's attempt to expand Maine's definition of renewable energy in Maine's RPS, and successfully killed measures to expand longterm contracting authority to benefit renewable energy developers in Maine.[60] Mr. Gould once again asserted that Exelon's actions were taken because of adverse customer impacts, despite the fact that Exelon has no utility customers in either Rhode Island or Maine.[61] While Exelon doesn't have utility customers in New England, it does have generation resources.[62]

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acquired or retired by the utility. *Id.* Renewable energy sales benchmarked in the Report include wind, solar PV (both utility-scale and distributed), solar thermal, geothermal and biomass. *Id.*

[57] Crane Deposition Ex. 16, "Northern Pass Transmission Project, Exelon Executive Committee", MEA Ex. 27 , at 2.

[58] Tr. at 2120 (Gould).

[59] Tr. at 2277-2278 (Gould).

[60] Tr. at 2118 (Gould).

[61] Tr. at 2117-2118 (Gould).

[62] Tr. at 2280 (Gould).

Exelon also actively opposed the extension of the wind production tax credit.[63] As Mr. Crane stated:

> We have vocally in editorials, letters to the editor, in conversation with elected and regulatory officials, stakeholders,… communicated the unintended consequences and why we think [the wind production tax credit] should be allowed to expire.[64]

Exelon's position led to its expulsion from the American Wind Energy Association for "leading an organized campaign against the industry's No. 1 priority." [65] Exelon's support for the expiration of the wind production tax credit risks harm to Maryland customers by reducing development of wind farms that generate renewable energy credits necessary for compliance with Maryland's Renewable Portfolio Standard, and thereby increasing costs to ratepayers.[66] With regard to wind energy in Maryland, Mr. Crane stated that "[i]n Maryland, I think we're just about at the point that we've exhausted our capabilities of wind development."[67] This statement is disconcerting not only because of the attitude it reflects toward wind generation in Maryland, but also because Exelon still owes Maryland approximately 22.5 MW of wind pursuant to order approving Exelon's acquisition of Constellation.[68]

Exelon has demonstrated the same attitude toward progressive renewable legislation in Maryland. For example, Exelon recently opposed legislation that would have increased both the

[63] Tr. at 789 (Crane). Exelon also is hostile to tax incentives for solar energy development, supporting the phase-down of the solar investment tax credit, despite acknowledging that this change in tax policy will increase the cost of solar generation in Maryland. Deposition of Christopher M. Crane, MEA Ex. 1, at 254.
[64] Direct Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 1, at 30:21-24 and Exhibit PLC-S-1 at 250:1-5.
[65] Direct Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 1, at 31:22-32:1 (citation omitted).
[66] Direct Testimony of Bruce Burcat, MAREC Ex. 5, 5:3-7.
[67] Deposition of Christopher M. Crane, MEA Ex. 1, at 253.
[68] Tr. at 2229 (Gould).

renewable portfolio standard for Tier I resources and the required solar portion of the renewable portfolio.[69] Exelon's point of contention was that

> Maryland has a significant amount of clean, efficient, baseload power [Exelon's Calvert Cliffs nuclear plant] within the state that contributes to reduced greenhouse gas emissions. Increasing the RPS places additional stress on those assets that are serving to reduce greenhouse gas emissions, yet not able to avail themselves of the revenue stream created by the RPS.[70]

In other words, Exelon apparently opposes an increased RPS simply because renewable generation reduces the prices and profits of Exelon's nuclear resources.

Similarly, Exelon recently opposed community solar legislation when it was being considered by the General Assembly. Nationwide, community solar is viewed as a key to expanding the market for distributed energy, including the many apartment and condominium residents and other customers unable to install solar arrays on roofs or properties. Community solar provides residential and small business customers, who have limited land, capital and/or resources, access to distributed solar generation.

Exelon asserted that community solar projects should be paid only the wholesale market price of generation.[71] This position stands in contrast to Exelon's interest in receiving payments above the wholesale market price for its nuclear generation.[72] More importantly, Exelon's

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[69] This legislation is available online at legiscan.com/MD/bill/HB1149/2014.
[70] Exelon comments on House Bill 1149, Direct Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 1, Exhibit PLC-4.
[71] Comments of Exelon, Exhibit PLC-5, Direct Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 1, Exhibit PLC-5.
[72] For example, in AD13-7-000, a FERC proceeding, Exelon complained that the capacity market in MISO, which has a very large capacity surplus, is not producing capacity prices high enough to keep its Clinton nuclear plant in Illinois economic. Exelon also has requested a contract for approximately $80 million a year greater than the market cost of electricity in order to maintain the profitability of its Ginna nuclear facility in New York. "Exelon eyes new power contract to revive N.Y. reactor" Reprinted from ClimateWire with permission from Environment & Energy Publishing, LLC. www.eenews.net. 202-628-6500. Appendix B.

opposition to community solar stands in sharp contrast to Pepco's support of similar legislation in DC.[73]

Exelon's support of RPS and distributed generation also is belied by Mr. Crane's statements. First, Mr. Crane asserts that **[BEGIN CONFIDENTIAL]** [redacted] [74] **[END CONFIDENTIAL]**

According to Mr. Crane,

> **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Apparently, RPS and distributed generation were reasonable policies as long as there is enough growth in electricity usage such that Exelon's nuclear profits were not affected.[76] However, now that Exelon's profit margins are getting squeezed, the Company is arguing that RPS and distributed generation programs have out-lived their usefulness.

Mr. Crane also testified that **[BEGIN CONFIDENTIAL]** [redacted]

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[73] July 2, 2013 report of the Committee on Government Operations to the Council of the District of Columbia, at unnumbered pages 90-94 and 96-102. http://www.dcsun.org/wpcontent/uploads/2013/10/committee-report.pdfhttp://dcclims1.dccouncil.us/images/00001/20130726113102.pdf.

[74] Deposition of Christopher M. Crane, MEA Ex. 1A, at 71-72.

[75] *Id.* at 72-73.

[76] Mr. Rigby admitted that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Deposition of Joseph M. Rigby, MEA Ex. 2A, at 155.

[redacted][77] **[END CONFIDENTIAL]** Mr. Crane expressly stated that "[w]hat we've opposed is subsidies that go beyond the tariffs that are purposely set to suppress prices."[78]

In the Maryland RPS statute, the General Assembly expressly stated that its intent was to "lower the cost to consumers of electricity produced from these resources."[79] It defies logic to consider Exelon a supporter of Maryland's RPS program when the company objects to the very premise underlying that program.

Of course, Exelon fully supports subsidies that go beyond tariffs or market prices when it is the beneficiary of those subsidies. For example, the Illinois legislature is expected to consider a "low-carbon energy standard" aimed at propping up Exelon's fleet of nuclear plants in Illinois.[80] Exelon asserts that this is a "market-based" solution. Exelon ignores that the purpose behind RPS statutes is to incentivize the construction of renewable generation, not improve the profitability of existing older generation. If this legislation passes, Illinois residents will be paying to support Exelon's Illinois-based fleet for years to come. Moreover, if Exelon is successful in Illinois, the Commission should expect that the Company will seek the same type of subsidy in other states.

Exelon's view of the "problem" is succinctly stated in its Form 10-K. In describing Exelon's market and financial risks and the problem of depressed prices in the wholesale and retail power markets, Exelon states that "[T]he continued addition of supply from new alternative generation resources, such as wind and solar, whether mandated through RPS or otherwise

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[77] Deposition of Christopher M. Crane, MEA Ex. 1, at 124. (emphasis added).
[78] Tr. at 1005-1006 (Crane).
[79] § 7-702(a)(3).
[80] Jeffery Tomich, "Exelon seeks low-carbon standard to aid its Ill[inois] reactors," Energywire (Feb. 25, 2015). Reprinted from ClimateWire with permission from Environment & Energy Publishing, LLC. www.eenews.net. 202-628-6500. Appendix C.

subsidized or encouraged through climate legislation or regulation, may displace a higher marginal cost plant, further reducing power prices"[81] and "[T]he risk of increased supply in excess of demand is heightened by continued or increased RPS mandates or other subsidies, including ITCs and PTCs."[82]

In contrast to Exelon's position, a distribution utility, like the PHI Utilities, has no incentive to favor the interests of generators over those of consumers. As a result, the PHI Utilities have frequently sided with consumer interests on such subjects as renewable energy. For example, Pepco supported the District of Columbia's enactment of a community solar program and is viewed as an important partner in that program's implementation.[83]

In short, Exelon recognizes that the profitability of its nuclear fleet is threatened by renewable energy generation.[84] Exelon is seeking to stifle the construction of renewable projects because these projects represent future competitors to its nuclear generation. Exelon's stance with regard to these programs will result, and has already resulted, in Exelon seeking to undermine Maryland's energy policy objectives. The ability to achieve Maryland's energy policy objectives is a vital aspect of the public interest. Exelon's acquisition of PHI will inhibit the development of renewable power generation in Maryland. Given Maryland's strong policy preference for renewable energy, approval of the acquisition is not in the public interest.

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[81] Direct Testimony of Michael L. Arndt, OPC Ex. 51, Exhibit MLA-12, at 3-4.
[82] Direct Testimony of Michael L. Arndt, OPC Ex. 51, Exhibit MLA-12, at 4. Interestingly, while Exelon notes that "the use of new technologies to recover natural gas from shale deposits has increased natural gas supply and reserves, placing downward pressure on natural gas prices and, therefore, on power prices," Direct Testimony of Michael L. Arndt, OPC Ex. 51, Exhibit MLA 12, at 9. Exelon has never publicly objected to fracking.
[83] Direct Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 1, at 34.
[84] Mr. Crane cites renewable generation as part of the reason for the company's decrease in earnings in a 2013 report. Direct Testimony of Nathan Phelps, SEIA Ex. 1, at 15.

2. Exelon's Practices Undermine Energy Efficiency Programs.

Exelon's recent track record with regard to energy efficiency is equally troubling. As noted earlier, Applicants fail to increase their commitment to energy efficiency in the PHI Utilities' service territories. Instead of committing to new or expanded energy efficiency programs, Exelon has pledged merely to "maintain and promote Pepco's and Delmarva Power's already existing energy efficiency and demand response programs offered under the EmPower Maryland initiative."[85] This Commission has previously found that to fulfill the public interest requirement, any commitments offered by the Applicants as part of the merger proposal must be additive to any preexisting commitments or requirements to which Applicants are already subject.[86] Thus, on its face the Application fails to meet the public interest standard.

Moreover, Exelon retains the same intransigent view regarding energy efficiency as it does toward renewable generation. For example, when confronted with Exelon's written statement that **[BEGIN CONFIDENTIAL]** [redacted] [88] **[END CONFIDENTIAL]** Mr. Crane also opined that **[BEGIN CONFIDENTIAL]** [redacted]

[85] Applicants Exhibit No. 3, Joint Application at 8.
[86] FirstEnergy at 39-40.
[87] Deposition of Christopher M. Crane, MEA Ex. 1A, at 127-128.
[88] *Id.* at 128-129 (emphasis added).

[redacted][89] **[END CONFIDENTIAL]**

Once again, Exelon's Form 10-K illustrates that growth in energy efficiency and demand response programs is a risk to Exelon's business model. Exelon states that "[t]he continued tepid economic environment and growing energy efficiency and demand response initiatives have limited the demand for electricity in Generation's markets."[90]

This Commission should note that BGE's energy efficiency efforts have lessened following the Exelon/Constellation merger. Prior to its merger into Exelon, BGE actually surpassed the performance of the other Maryland utilities. BGE's efforts started higher than the other utilities, as measured by spending per MWh of sales, and those efforts grew rapidly until 2012 (about 29% annually). Following the merger in 2012, the growth in BGE's energy-efficiency efforts slowed considerably, to just 2% annually from 2012 through 2017.[91]

Similarly, in terms of the savings as a percentage of retail sales, BGE's results started above those of the other utilities, rose until the merger in 2012, stalled in 2013, and fell thereafter. BGE's performance fell below those of the PHI Utilities in 2013. Even with the dramatic 10 contraction of their plans for 2015–2017, the PHI Utilities stay above BGE.[92] BGE's spending on its energy efficiency program suddenly stopped growing under Exelon ownership, and its annual energy savings have fallen, with projections for 2015–2017 lower than 2012 savings.[93]

[89] *Id.* at 74.
[90] Direct Testimony of Michael L. Arndt, OPC Ex. 51, Exhibit MLA-12 at 4.
[91] Direct Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 1, at 23-24.
[92] *Id.* at 24.
[93] Surrebuttal Testimony of Paul L. Chernick, Sierra Club/CCAN Ex.2, at 2.

Recently, BGE has taken positions designed to limit energy efficiency programs or participation in those programs. For example, in the current round of energy efficiency plans for 2015-2017, BGE chose to omit non-energy benefits ("NEBs") in its application of the total resource cost ("TRC") test, on the grounds that it did not have time to incorporate them, and because "BGE continues to have concerns about the appropriateness of NEBs, especially in the TRC."[94] In contrast, the PHI Utilities included the following benefits in their screening: avoided air emissions, increased comfort due to the Home Performance program, and reduced O&M costs for various non-residential programs.[95]

In addition, BGE has proposed to restrict participation in its Home Performance with Energy Star program by raising the Savings-Investment Ratio ("SIR")[96] requirement from 0.5 in 2014 to 1.25 in 2015 and 1.75 in 2016 and 2017.[97] The relationship between customer savings and avoided costs varies widely, and this apparently arbitrary rule would almost certainly reject cost-effective installations.[98]

Tellingly, following the announcement of the merger, the PHI Utilities have proposed large reductions in their energy-efficiency spending and savings for 2015-2017. PHI's post-merger programs are smaller than their existing programs and propose using a more restrictive TRC test.

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[94] Case No. 9154, Docket Entry No. 526, Baltimore Gas and Electric's 2015–2017 EmPower Maryland Program Filing, August 28 2014, at 3.
[95] See, *e.g.*, Case No. 9154, Docket Entry No. 607, Pepco Energy Efficiency and Conservation Portfolio, EmPower Maryland 2015–2017, September 2, 2014.
[96] The SIR is the ratio of (A) the first-year reduction in participant bills from an installation times the expected life of the measures, divided by (B) the customer's share of the efficiency investment.
[97] BGE 2015-2017 EmPower Maryland Program Filing at 55.
[98] Direct Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 1, at 26.

Thus, in terms of energy efficiency policy, Exelon has generally argued for limiting the scope of benefits counted in the TRC test, compared to current Maryland practice. In some instances, Exelon has specifically argued that customer benefits should be excluded from the cost-benefit test to protect merchant generators, which would include Exelon. Exelon's takeover of BGE coincided with a decline in BGE's level of effort, and this proposed merger is associated with a proposed steep decline in the energy-efficiency plans of the PHI companies. Exelon's efforts illustrate that concentration of responsibility for energy efficiency implementation into the hands of a generation-dominated holding company increases the risk of impairing energy efficiency programs that would be beneficial to consumers, the economy, and the environment.

3. Maryland Will Lose the Independent Perspective of a Distribution Utility.

The above discussion regarding renewable generation and energy efficiency illustrates a more fundamental problem with the proposed acquisition of PHI by Exelon. Maryland will be losing a potentially strong partner in its efforts to increase renewables and energy efficiency in the State. While electric distribution companies are aligned with ratepayers, or at least agnostic, when it comes to promoting renewables or energy efficiency, this alliance of interests breaks down when the distribution company is an affiliate of a generation company. This affiliation requires the distribution company to consider every program through the prism of that program's effect on the generation company.

Mr. Crane has admitted that after Exelon acquires PHI, the companies will be expected to speak with one voice.

> So we don't want to be in Annapolis saying things should be one way for one for one company and another way for the other company… It would only be logical to gain a

> consistent view that's built around the correct and balanced fundamentals of running a business.[99]

Mr. Crane also described himself as the ultimate decision-maker.[100]

This transaction will result in a reduction in the importance of a single utility and the policies of the state it serves to the overall interests of the holding company. Thus, PHI and its customers face the risk that policy decisions made by Exelon will conflict with the interests of PHI Utilities' customers in Maryland or with Maryland policy. As Commissioner Hoskins noted, if the interests of the citizens of Maryland and the company are not aligned "we might be buying ourselves some trouble, right, because now we've got an adversary that is very good."[101] An excellent example of how this can directly impact customers is the stark contrast between the approach taken by Exelon regarding community solar programs and PHI's support of these programs.

If this acquisition is approved, Maryland will not just lose "one voice." The State will lose an entity with a demonstrated record of support for community solar and other forms of distributed generation. In contrast to Exelon, the PHI Utilities' business model enables the those companies to be supportive of distributed generation, renewables and energy efficiency without adversely impacting those companies' business strategies.

4. Exelon's Over-Reliance on Nuclear Generation is Financially Risky.

Finally, this Commission should consider whether it should authorize a potentially financially troubled company to acquire two well-funded Maryland utilities. Exelon owns and operates the largest nuclear fleet in the nation and derived 85 percent of its generation from

[99] Deposition of Christopher M. Crane, MEA Ex. 1, at 323.
[100] *Id.* at 63.
[101] Tr. at 1050 (Crane).

nuclear power in 2013.[102] Prior to the agreement between Exelon and PHI to merge, Mr. Rigby stated that **[BEGIN CONFIDENTIAL]** [redacted] [103] **[END CONFIDENTIAL]** Mr. Rigby also noted that **[BEGIN CONFIDENTIAL]** [redacted] [104] **[END CONFIDENTIAL]** Mr. Crane also stated that he agreed with Standard & Poor's assessment that "with nuclear generation accounting for nearly 82 percent of the company's total generation, Exelon is the most exposed of its peers to a decline in natural gas prices."[105] Moreover, after the hearings ended in this proceeding, Exelon announced its fourth quarter earnings. Most notably, Exelon's generation business lost $91 million from a year earlier profit of $269 million. Overall, Exelon posted a profit of $18 million, or 2 cents a share, down from $495 million, or 58 cents a share, a year earlier.[106]

Essentially, Exelon's financial health is questionable. The Company is simply too heavily reliant on nuclear generation. The Applicants offer no compelling justification to this Commission for approval of the merger.

For the foregoing reasons, this Commission should find that Exelon's acquisition of PHI is not in the public interest. Exelon has the incentive to resist policy initiatives that might undermine nuclear generation, even if those initiatives would benefit the broader public interest. Essentially, Exelon is willing to protect its nuclear interests by opposing renewable development and energy efficiency programs. Not only do these programs represent important policy

[102] Direct Testimony of Nathan Phelps, SEIA Ex. 1, at 12. (citation omitted).
[103] Deposition of Joseph M. Rigby, MEA Ex. 2A, at 65.
[104] *Id.* at 77.
[105] Deposition of Christopher M. Crane, MEA Ex. 1, at 48.
[106] Chelsey Dulaney, "Exelon Profit Dampened by Weather, Expenses – Update" Wall Street Journal, Feb. 19, 2015. Appendix A.

objectives for Maryland, but these programs will take on added importance in the future as Maryland attempts to successfully implement its RGGI Plan and the EPA's Clean Power Plan. Applicants' commitments not only lack any additional measures to increase renewable generation or energy efficiency initiatives in Maryland, but Exelon is openly hostile to these initiatives. Thus, this merger is not in the public interest, convenience, or necessity of Maryland and the Application must be denied.

B. The "Benefits" Proffered by the Applicants in Support of the Merger are Illusory.

For the phrase "benefits…to consumers" to have any meaning, PHI ratepayers "must receive benefits *directly*, in their capacity as [utility] customers, not just their share of the Transaction's impact on the public at large."[107] Even with conditions in place to shield ratepayers from the risk of harm, the Commission must still reject a transaction if it fails to provide "benefits" to, in this case, the PHI Utilities ratepayers.[108] In the FirstEnergy Order, the Commission held that benefits provided by a merged company must add something to those benefits that pre-exist the merger.[109]

For the purpose of determining whether a proposed acquisition provides benefits to consumers, the Commission ascribes no value if the benefits promised by the Applicants are contingent, that is, it is uncertain whether those benefits will actually accrue.[110] Additionally, the benefits that inure to customers also must be "tangible."[111] For a benefit to qualify under the statute, it must be "direct" and "certain" as opposed to "contingent" or "intangible."[112] The goal

[107] EDF Order at 2, 33.
[108] Constellation Order at 87.
[109] FirstEnergy Order at 38-39.
[110] EDF Order at 2, 38.
[111] EDF Order at 38.
[112] EDF Order at 38.

is to create a meaningful and lasting impact on the PHI Utilities' customer base and the community at large.[113]

As discussed in more detail below, Exelon's "commitments" are largely smoke and mirrors. The "benefits" proffered by Exelon are too speculative and uncertain.[114]

1. Commitment 1 – Customer Investment Fund

> Exelon will establish a $40 million Exelon-funded CIF to be used across Pepco's and Delmarva Power's Maryland service territories. According to Exelon, this fund represents a benefit of more than $50 per distribution customer of Pepco and Delmarva Power.

Several parties have argued that the amount of funding provided in the CIF is simply too small. However, there is a more fundamental problem with this commitment. With regard to rate credits, to meet the customer benefit test the credits that are provided may not be subject to the company's subsequent "claw back."[115] Any rate increase shortly after the merger would be a claw back of the rate credit. In this instance, Exelon has refused to commit to not filing a rate increase for a period of time after the merger. Thus, as soon as the merger is completed, Exelon could file for a rate increase that wipes out the $50.00 "savings." Because Exelon could "claw back" the $40 million at any time after the merger is consummated, the CIF cannot be viewed as a benefit to PHI Utilities' customers.

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[113] Constellation Order at 93.
[114] While all the commitments proffered by the Applicants are problematic at best, the Environmental Intervenors do not intend to discuss every proposed commitment, but will focus on those commitments which raise the most concern.
[115] FirstEnergy Order at 48-49.

2. Commitment 2 – Reliability

> Exelon commits to Pepco and Delmarva Power achieving certain reliability performance levels by 2020, based on a three-year historical average calculated over the 2018-2020 period. In the event that these increased performance levels are not achieved, the return on equity ("ROE") to which Pepco or Delmarva Power would otherwise be entitled in its next electric distribution base rate case filed after January 1, 2021 will be reduced by 25 basis points.

This commitment raises three issues. First, whether the reliability performance levels committed to by Exelon exceed those that the PHI Utilities could achieve. Second, whether Exelon is committing to achieving those results within the PHI Utilities existing budgets. Finally, whether the basis point penalty is a substantial commitment.

With regard to the reliability performance level commitment, Dr. Tierney admitted that both Exelon and PHI, through pre-filed testimony, discovery and depositions, had stated that they reasonably believed that the PHI Utilities will achieve the SAIFI and SAIDI targets absent the merger.[116] Mr. Rigby admitted that the Commission could require Pepco and Delmarva Power to exceed the SAIFI or SAIDI standards set forth in Commitment 2.[117]
As Chairman Hughes asked:

> Given that we don't know what the RM 43 standards are going to be, why should the Commission not conclude that there is too much uncertainty with regard to the base RM 43 standards to count this commitment as a benefit?[118]

The second problem with this commitment is Exelon's "promise" to achieve these performance levels with Pepco and Delmarva Power's existing budgets. This commitment suggests that Exelon won't request more money from ratepayers to reach the proposed levels.

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[116] Tr. at 34 (Tierney).
[117] Deposition of Joseph M. Rigby, MEA Ex. 2, at 213.
[118] Tr.at 274-275(Tierney).

However, Mr. Crane stated that if Exelon exceeded the budget, the Company would seek more rate funding from the Commission and the parties could argue that the request should be denied. Specifically, Mr. Crane stated that if the companies did go over the committed to budget, "it's up to the Commission after that commitment if we get recovery on that or not."[119] Mr. Crane also stated that "[T]he intervenors in a future rate case can test its [the budget commitment] viability and the Commission has the ultimate authority to say if it is prudent or not."[120]

Not one Exelon witness could adequately explain how Mr. Crane's description of the "commitment" differs from a standard rate case. Essentially, Exelon intends to place the burden on intervenors, three to five years from now, to establish that Exelon is not entitled to the funding. The budgetary commitment should not be viewed by this Commission as a commitment at all.

Finally, the basis point penalty is also problematic.[121] This commitment is not tangible. First, it should be noted that Exelon can simply propose a much higher ROE in its next rate case so that the penalty reduction will not actually impact what the Company expected to earn. Moreover, the penalty wouldn't be applied until a rate case is filed after January 1, 2021. Thus, Exelon can avoid application of the penalty simply by filing a rate case prior to that date.

The Environmental Intervenors agree with Chairman Hughes that there is too much uncertainty surrounding this commitment to warrant counting the commitment as a benefit.

3. Commitment 4 and 4(a) – Hiring

> For at least the first two years following consummation of the Merger, Exelon will not permit a **net** reduction, due to involuntary attrition as a result of the

[119] Tr. at 871, 886 (Crane).
[120] Tr. at 889 (Crane).
[121] The value of the basis point reduction is estimated to be $5 million for both companies combined.

> Merger integration process, in the employment levels at Pepco and Delmarva Power. [emphasis added.]
>
> Exelon commits to make a good faith effort to hire within two years of the Merger closing date at least 110 union workers in Maryland.

Once again, this commitment is not what it seems. Exelon Concedes that the acquisition will result in some reductions in force.[122] Not permitting a "net" reduction means that the PHI Utilities employees can be fired as long as the overall number of employees at the utility does not decrease. Moreover, this commitment does not apply to PHI employees.

With regard to the 110 union workers, these new workers would be hired and trained to replace retiring field techs. For example, if Exelon has 500 field techs and hires 110 new workers and over the same time period 70 workers retire, the net increase in workers would only be 40. Given the age of the utilities' workforce,[123] it is entirely possible that after the hiring and training is complete the utilities will have the same number of field workers as they did before the merger.

As Mr. Crane expressly stated, "it is a replenishment of the work force is the commitment."[124] Mr. Crane agreed that it is possible two years from now that there would still be just 500 field workers at the two companies.[125]

4. Commitment 6 – Low Income Assistance and Commitment 8 – Energy Efficiency

> Pepco and DPL will **maintain** and promote programs that provide assistance to low-income customers. (emphasis added).

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[122] Direct Testimony Of Christopher M. Crane, Applicants' Ex. 8, at 19.
[123] Tr. 965-966 (Crane).
[124] Tr. at 678 (Crane).
[125] *Id.* at 678-679.

> Pepco and Delmarva Power will **maintain** and promote **existing** energy efficiency and demand response programs. (emphasis added)

The Applicants have not committed to expanding any low income programs or energy efficiency programs. Essentially, this is only a commitment to continue doing what they have been doing and are required by law or Commission order to do. Dr. Tierney argues that this is the "benefit of clarifying" that the programs are being maintained.[126] This is only a benefit if the Commission assumes that the PHI Utilities will be reducing their own commitments or cancelling programs. Importantly, with regard to energy efficiency, this commitment only applies to existing programs, not new programs which may be created by either the legislature or the Commission after the merger.

This Commission should find that maintaining an activity as opposed to improving upon it does not count as a benefit.

In sum, the Applicants have failed to meet the standard set forth in § 6-105. This provision requires an applicant to offer benefits that are direct and certain as opposed to benefits that are contingent. Applicants' purported benefits amount to little more than an offer to maintain the status quo or an "offer" to provide money or jobs that can easily be negated by the Applicants' subsequent actions. The Commission should find that the Applicants have offered no benefits to the PHI Utilities' ratepayers and deny Exelon's request to acquire PHI.

C. The Proposed Merger Threatens Harm to PHI Utilities Ratepayers.

The "no harm" element of § 6-105(g) requires the Applicants to demonstrate that the transaction "does not create new harms or risks or add to those [the Utilities'] ratepayers already face." The Commission must consider "potential harms" to PHI Utilities ratepayers, not just

[126] See, *e.g.*, Tr. at 100 (Tierney).

harms that are certain to occur. The statutory standard does not permit the Commission to weigh potential new risks caused by the transaction against the benefits to be achieved.

1. ***Exelon's control over interconnection threatens distributed generation.***

Exelon's post-merger control over interconnection also poses a threat to distributed generation in the PHI Utilities service territories. Distributed generation, including distributed renewable energy generation, "empower[s] individual ratepayers to assert control over the source of the electricity they use."[127] The ability to interconnect is essential to distributed generation. Exelon already has a track record of opposing legislation in Maryland that would encourage distributed generation.[128] Exelon could use the interconnection process to impede distributed solar generation,[129] and could be used to bottleneck or restrict the development of unaffiliated generation assets.[130] With control over the PHI Utilities' distribution networks, Exelon will have the incentive to actively support new rules for interconnection that will hamper development of distributed energy resources.[131]

2. ***The Proposed Merger Risks Harm to Energy Efficiency Programs.***

As noted above, under the EmPower Maryland Energy Efficiency Act, the General Assembly has found that "energy efficiency is among the least expensive ways to meet the growing electricity demands of the State" and has set energy efficiency, conservation, and demand

[127] Surrebuttal Testimony of Nathan Phelps, SEIA Ex. 2, at 2.
[128] Direct Testimony of Nathan Phelps, SEIA Ex. 1 at 14.
[129] Direct Testimony of Nathan Phelps, SEIA Ex. 1 at 8.
[130] Direct Testimony of Steven Gabel, TASC Ex. 1, at 4.
[131] Direct Testimony of Dr. Richard Tabors, MEA Ex. 31, at 40.

response targets.[132] However, the merger proposed in this proceeding would harm energy efficiency and these legislative goals.[133]

While the Environmental Intervenors continue to believe that Exelon's acquisition of PHI is not in the public interest because of Exelon's antipathy toward energy efficiency, this Commission should also find that Exelon's history of opposing energy efficiency will directly harm PHI Utilities' ratepayers because they are the immediate recipients of the benefits of PHI Utilities' energy efficiency programs and therefore have the most to lose in the event that Exelon is successful in its attacks on those programs.

Exelon does not have a history of supporting energy efficiency. Exelon has only done the minimum required by state regulation, and has no plans for new energy efficiency programs.[134] According to Staff, Exelon believes that energy efficiency programs are harmful to its bottom line.[135] Exelon's antipathy to energy efficiency is apparent through the actions of its subsidiaries. BGE's energy efficiency efforts have flagged since its acquisition by Exelon, and PHI has reduced its plans for energy efficiency after the merger.[136]

These actions show possible harm that the proposed merger is unlikely to mitigate, as "[i]ncreased concentration of responsibility for energy-efficiency implementation in the hands of a generation-dominated holding company increases the risk of impairing energy-efficiency

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[132] § 7-211(b)(1, 2).
[133]According to Mr. Crane, the new proposal regarding energy efficiency contained in his rejoinder testimony is intended for settlement discussions, not to alter the commitments before the Commission. Tr. at 623,798-799.
[134] Surrebuttal Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 2, at 9 and Exhibit PLC-S-1 at 266, 270.
[135] Direct Testimony of Chrissy Godfrey, Staff Ex. 21, at 8.
[136] Surrebuttal Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 2, at 9 and Exhibit PLC-S-1 at 266, 270.

programs that would be beneficial to consumers, the economy, and the environment."[137] As the "central and dominant player in the Maryland distribution utility market," the merged entity may seek to keep competitors out of energy efficiency markets to Exelon's own advantages.[138] Thus, Exelon's proposed acquisition of Pepco poses a risk of harm to energy efficiency, to consumers seeking to benefit from efficiency, and to policies established by the General Assembly.

3. ***No More "Across-the-Fence" Competition.***

With the disappearance of an independent Pepco following the merger, customers and the Commission will lose the ability to compare rates between distribution companies. "By eliminating 'across-the-fence' rivalry between Pepco and BGE, this transaction removes from the Commission's drawer its sharpest blade: the tool of continuous comparisons between the two companies, each motivated to show up the other."[139] Such competition can spur neighboring utilities to greater cost effectiveness,[140] and is critical for comparing technical, economic, and regulatory alternatives before the Commission.[141]

4. ***Exelon May Seek Benefits for its Generation Assets to the Detriment of Consumers.***

Testimony before the Commission shows that Exelon will have a strong incentive to exploit its new customers, while safeguarding its generating assets:

> Considering both the scale and the vulnerability of Exelon's generation investments, it is essentially inevitable that Exelon management will pursue the interests of shareholders in maximizing generation revenues over the interests of its [electric distribution company]

[137] *Id*. at 27.
[138] Direct Testimony of Dr. Richard Tabors, MEA Ex. 31, at 44.
[139] Direct Testimony of Scott Hempling, OPC Ex. 45 at 7.
[140] *Id*. at 60.
[141] Direct Testimony of Dr. Richard Tabors, MEA Ex. 31, at 7, 9, and 35.

> customers in low and more stable bills, as well as the interests of Maryland in meeting environmental targets.[142]

That is, Exelon appears to have "a significant motivation to maximize its return on unregulated generating assets.[143]" Exelon has already proven elsewhere that it will put its own interests in its nuclear fleet ahead of the interests of consumers and the development of renewable energy.[144] Exelon might also face incentives to oppose innovative technologies to the detriment of Maryland electricity consumers and the benefit of its central grid generation.[145] Under the circumstances here, including mixing relatively high-risk generation businesses with relatively low risk distribution businesses and offering inadequate safeguards, "it is necessary to presume, that customers will incur costs.[146]" These costs are harms to consumers, and support denial of the proposed merger.

5. ***The Merger Would Destroy Local Autonomy.***

If the proposed merger is consummated, control of Pepco and Delmarva Power will pass to Exelon. Pepco and Delmarva Power will lose control of their budgeting and planning.[147] The presidents of Pepco and Delmarva Power will not sit on the Management Executive Board.[148] "[T]he distribution utilities will be expected, if not required, to follow whatever overall strategic direction is adopted by Exelon."[149] Once in control of Pepco and Delmarva Power post-merger, "Exelon will have both the legal and practical power to impose its will with regard to the

[142] Direct Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 1, at 14.
[143] Direct Testimony of Dr. Richard Tabors, MEA Ex. 31, at 5.
[144] *Id.* at 14:11-15:12.
[145]Direct Testimony of Dr. Richard Tabors, MEA Ex. 31, at 28.
[146] Direct Testimony of Scott Hempling, OPC Ex. 45 at 71.
[147] Surrebuttal Testimony of Nancy Brockway, Ex. 42, at 3.
[148] *Id.* at 4.
[149] Direct Testimony of Dr. Richard Tabors, MEA Ex. 31, at 10.

operation of its utility subsidiaries."[150] Loss of local control poses an added risk that Exelon will be indifferent to the needs of Maryland customers, an outcome that exacerbates the other harms detailed above.

IV. IF THE COMMISSION ELECTS TO APPROVE EXELON'S ACQUISITION OF PHI, THE FOLLOWING CONDITIONS ARE ESSENTIAL TO MITIGATE THE HARM TO THE PUBLIC INTEREST

At the outset, it should be noted that the Commission's authority to attach conditions to the merger is discretionary, not mandatory.[151] In this instance, the first question is whether the Commission should "fix" the overwhelming deficiencies in the Applicants' filing. The Environmental Intervenors and others have demonstrated that the proposed merger offers no benefits, harms the PHI Utilities' ratepayers and is not in the public interest. The only entity who benefits from this merger is Exelon. Given this fact, the Commission should decline to "improve" the Applicants' filing, particularly in light of the Applicants repeated refusal to supplement their commitments.

Maryland has established that renewable energy, energy efficiency, and greenhouse-gas reduction are important to the public interest by enacting the renewable portfolio standard, establishing the EmPower Maryland goals, joining the Regional Greenhouse Gas Initiative, and enacting the Greenhouse Gas Emissions Reduction Act. As explained above, the Commission should reject the Application because it fails to meet the requirements of § 6-105. However, if the Commission approves Exelon's acquisition of PHI, it should only do so subject to the

[150] *Id.* at 7.
[151] *See* § 6-105(g)(3)(ii) (providing that "[t]he Commission **may condition** an order authorizing the acquisition on the applicant's satisfactory performance or adherence to specific requirements." (emphasis added)).

following conditions necessary to mitigate, to some extent, the harm to both PHI Utilities' ratepayers and the public interest that will occur as a result of this acquisition:

1. The Commission should direct Exelon's Maryland utilities to achieve the greater of *either* 1.) annual incremental 2.0 % energy efficiency targets for electric savings based on a 2012 retail sales baseline through 2020; or 2.) future annual energy efficiency targets set by the Commission through separate proceedings. The Commission should only allow Exelon to recoup the costs associated with energy efficiency targets set through separate proceedings not involved in this merger from its ratepayers;
2. The Commission should direct Exelon to increase its company-wide portfolio of Tier 1 renewable energy, as defined in § 7-701, to 25% of the Company's Maryland retail sales (inclusive of SOS sales and any of Exelon's competitive 3rd party sales) by 2020, including 2.5% from solar energy. The Commission should direct Exelon to increase its Company-wide portfolio of Tier 1 renewable energy to 40% of the company's Maryland retail sales by 2025, including 4% from solar energy. The Commission should prohibit Exelon from passing on the cost difference between Exelon's Tier 1 renewable energy goals that are directed by the Commission through this merger and the State's own Tier 1 Renewable Portfolio Standard goals to ratepayers;
3. The Commission should direct Exelon to competitively procure through long-term contracts a quantity of carbon-free Tier 1 renewable energy, as defined in § 7-701, and the attendant RECs from new generation that is sourced from within the PJM footprint or deliverable to PJM. These long-term contracts must be of at least twenty-year duration for energy equivalent to at least 1% of each of Exelon's Maryland utility's deliveries in

2016, rising at least 1% annually to 10% in 2025. The acquired energy and RECs may be used to meet standard offer service (SOS) requirements or sold into short-term markets;

4. The Commission should direct Exelon to develop or competitively procure at least 50 MW of community solar or other solar virtual net metering by 2018. At least half of the required solar capacity should be developed to provide energy to low-income retail electric customers and multi-family households. This commitment should be implemented outside any other community solar or virtual net metering requirements that may be set by the General Assembly. The Commission should prohibit Exelon from passing on the costs of this commitment to ratepayers;
5. The Commission should direct Exelon to establish a $50 million renewable energy fund that is separate from a Customer Investment Fund. At least half of the money in this fund should be used to provide financial assistance for the development of new carbon free Maryland-based Tier 1 resources. This financial assistance should be used to directly support companies that want to develop renewable energy in Maryland. The balance of the fund should be used to provide financial assistance for:
    a) post-secondary training and apprenticeship programs to increase the pool of applicable renewable energy labor skills in Maryland;
    b) development of the renewable-energy supply chain in Maryland;
    c) public institution or institutions of higher learning within Maryland to support research and development in wind energy applications; or
    d) other worthwhile purposes deemed appropriate by the Commission.

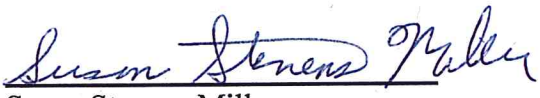
The full $50 million fund should be fully expended within 10 years of any final merger decision. Exelon should not be allowed to pass on the costs of this commitment to ratepayers.

6. The Commission should direct Exelon to regularly publish the capacity of each circuit (or circuit segment) to accommodate distributed generation, for solar, baseload, and other load-generation patterns of proposed distributed-generation technologies;
7. The Commission should direct Exelon to respond to queries regarding interconnection to distribution voltage within 30 days of request and to resolve issues related to distribution protective systems within 60 days of interconnection requests;
8. The Commission should impose financial penalties for each violation of the distributed generation commitments, at a rate of $10 per kilowatt-month of affected generation; and
9. The Commission should transfer responsibility for energy efficiency program planning and implementation for the PHI Utilities to an independent third party.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Environmental Intervenors respectfully request that the Commission deny the Applicants' request that Exelon be authorized to acquire PHI. In the alternative, should the Commission elect to approve Exelon's acquisition of PHI, the Commission should, at a minimum, adopt the nine conditions listed above in order to mitigate the harm to both PHI Utilities' ratepayers and the public interest that will occur as a result of this acquisition.

Respectfully submitted,



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Dated: March 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2015, I electronically filed a copy of the foregoing response in PSC Case No. 9361 with the Maryland Public Service Commission. I have also caused, on this date, the original and seventeen (17) copies to be sent via overnight delivery service to:

David J. Collins
Executive Secretary
Maryland Public Service Commission
William Donald Schaefer Tower
16th Floor
6 St. Paul Street
Baltimore, MD 21202

Copies were also electronically served this date on all parties on the official service list.

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Counsel for Sierra Club and
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APPENDIX A

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Exelon Profit Dampened by Weather, Expenses -- Update

2-13-15 9:00 AM EST

By Chelsey Dulaney

Exelon Corp. posted sharply lower earnings in its fourth-quarter amid unfavorable weather and a surge in expenses, though revenue topped Wall Street expectations.

The Chicago-based power company has been makings acquisitions lately, most notably a $6.8 billion deal to buy Pepco Holdings Inc. as it seeks to expand its reach and customer base. The deal is expected to close later this year.

Profit at the company's PECO segment, which does electricity and retail natural gas transmission in southeastern Pennsylvania, fell to $98 million from $102 million a year earlier.

Profit at the ComEd segment, which consists of electricity transmission and distribution operations in Northern Illinois, fell 33% to $73 million.

Its generation segment swung to a loss of $91 million from a year-earlier profit of $269 million.

Overall, the company posted a profit of $18 million, or 2 cents a share, down from $495 million, or 58 cents a share, a year earlier.

Excluding the impact of hedging activities and other items, per-share earnings were 48 cents.

Operating revenue grew 17.5% to $7.26 billion. Adjusted revenue grew to $6.94 billion from $6.25 billion a year earlier.

Analysts polled by Thomson Reuters had forecast earnings of 50 cents a share and revenue of $5.83 billion.

Expenses grew 32.6% to $7.02 billion in the quarter.

For 2015, Exelon forecast operating earnings, excluding items, of $2.25 to $2.55 a share, in line with analysts' expectations for $2.48 a share in earnings, according to Thomson Reuters.

Write to Chelsey Dulaney at Chelsey.Dulaney@wsj.com

APPENDIX B

THE TRANSFORMATION OF THE ENERGY SECTOR

9. NUCLEAR:

Exelon eyes new power contract to revive N.Y. reactor

Published: Wednesday, January 7, 2015

Exelon Corp.'s Ginna power station could serve as an example of how far regulators are willing to go to sustain an uneconomical nuclear plant.

To offset more than $100 million in losses between 2011 and 2013, Exelon will need to charge 83 percent more than wholesale prices to earn a profit at Ginna, company cost estimates indicate. New York regulators have set a Jan. 15 deadline for a new power contract that would keep the plant in operation.

Ginna is one of 10 nuclear facilities that cannot compete in the current market, according to Moody's Investors Service. But retiring those reactors, which provide about 10 percent of U.S. nuclear power, could set back the push for renewable energy.

"Ginna nuclear power plant is an important asset in the state's generation fleet," Patricia Acampora, a commissioner for New York's Public Service Commission, said at a Nov. 23 meeting. "It's important, reliable, carbon-free energy."

When Constellation Energy Group Inc., which was acquired by Exelon in 2012, bought Ginna from Rochester Gas & Electric in 2004, Constellation agreed to sell power back to Ginna's former owner at $44 per megawatt-hour for 10 years. Over the past five years, Rochester's average wholesale power price was $38.83 per megawatt-hour, according to data compiled by Bloomberg.

A single-unit reactor like Ginna needs about $71 per megawatt-hour to realize an 11 percent return and between $56 and $64 to break even, according to Exelon's 2016 projections.

The average Rochester Gas customer is willing to pay up to $18 more each month to boost Ginna, Exelon estimated in its state filing.

"Ginna will likely request a contract approximately $80 million a year greater than the market cost of electricity," said Jessica Azulay, program director for the Alliance for a Green Economy. "This is an extraordinary amount of money to be demanded of ratepayers to prop up a private company that has become uncompetitive in the market."

While the market could improve enough to ensure continued operations, facilities like Ginna "may not survive long enough to see the higher price," Donald Moul, a vice president for commodity operations at FirstEnergy Corp., said in Aug. 4 testimony.

Exelon has said a new power contract would be an interim measure to protect jobs as the utility seeks longer-term, market-based solutions for its reactors.

Nuclear critics have said a better course of action might be to replace Ginna and other struggling plants with alternative power sources.

"For what Exelon is asking to keep Ginna running, we could replace this plant with lower-cost sustainable energy, like efficiency, like wind and like solar," said Tim Judson, executive director of the Nuclear Information and Resource Institute.

Daniel Hucko, spokesman for Rochester Gas owner Iberdrola SA, said the utility is reviewing alternatives but declined to share specific details.

"It's about reliability," he wrote in an email. "We will work in the best interests of our customers with considerations of cost at the forefront while recognizing the importance of continued network reliability and reaching reasonable terms for all parties" (Malik/Polson, **Bloomberg**, Jan. 5). **-- PK**

APPENDIX C

THE TRANSFORMATION OF THE ENERGY SECTOR

1. NUCLEAR:

Exelon seeks low-carbon standard to aid its Ill. reactors

Jeffrey Tomich, E&E reporter
Published: Wednesday, February 25, 2015

Illinois legislators within days are expected to propose a low-carbon energy standard aimed at helping prop up Exelon Corp.'s fleet of six nuclear plants, three of which have struggled to remain profitable in recent years.

The bill could be filed before the end of the week and would require 70 percent of electricity used in territories served by the state's two large investor-owned utilities to come from low-carbon sources of generation, according to a summary of the legislation circulated at the state Capitol yesterday.

The two-page fact sheet notes that a low-carbon portfolio standard was one of five policy options cited in a January report from state agencies examining the impact of the premature closure of one or more of the Exelon nuclear plants. The report was a fact-finding effort and made no recommendations (***EnergyWire***, Jan. 8).

The measure would represent the second major energy proposal put before the General Assembly so far this year and sets the stage for interesting debates and negotiations concerning how the state cuts greenhouse gas emissions.

Last week, a group of legislators filed a measure pushed by environmental and clean energy advocates that would expand the state's renewable energy and energy efficiency standards and establish a carbon market to help the state comply with U.S. EPA's proposed Clean Power Plan (***EnergyWire***, Feb. 20).

Exelon has signaled for more than a year that it would seek some type of legislation to aid its Illinois nuclear fleet. The company has warned that it may close as many as three of its six plants unless it sees a "path to sustainable profits." The plants in jeopardy -- Byron, Clinton and Quad Cities -- have faced financial headwinds because of weak wholesale power prices brought on by competition from natural gas and wind.

Company officials have lobbied throughout the state and in Washington that closing plants prematurely would make it more difficult for the state to meet its carbon reduction goals under the Clean Power Plan.

As recently as last week, Exelon Senior Vice President Kathleen Barrón testified before the Federal Energy Regulatory Commission about flaws the company sees in EPA's Clean Power Plan.

"The [low-carbon portfolio standard] in Illinois would act, at a minimum, as a bridge solution that would facilitate further policy actions that may be required for compliance with the EPA," the Illinois legislative summary said.

Paul Elsberg, an Exelon spokesman, wouldn't confirm the details or timing of the company's legislative proposal. "We expect that legislation will be introduced in coming weeks, and we will have more to say when that occurs," he said in an emailed statement.

It is also not yet known which Illinois legislators would sponsor the bill. William Von Hoene Jr., Exelon's chief strategy officer, told analysts and investors earlier this month that the measure would have broad bipartisan support (***EnergyWire***, Feb. 17).

Von Hoene and other officials at Chicago-based Exelon have repeatedly insisted that they are not seeking a "bailout" of the Illinois nuclear fleet and want only a "market-based" solution that recognizes existing nuclear plants as a reliable, low-carbon generation source and a major employer in the state.

Those who had viewed the brief summary of the Exelon bill said they are withholding judgment until more specifics are available.

"The devil is most certainly going to be in the details," said Nick Magrisso, a policy advocate for the Natural Resources Defense Council, a member of the recently formed Clean Jobs Coalition (***EnergyWire***, Feb. 6).

How it would work

The Exelon proposal would work similarly to how the state's existing renewable energy standard is supposed to work.

The state's two large investor-owned utilities, Commonwealth Edison and Ameren Corp., would be required to buy a percentage of their energy from a low-carbon source and collect a charge through retail distribution bills to pay for the low-carbon energy credits.

Similar to Illinois' renewable portfolio standard, electric cooperatives and municipal utilities wouldn't be subject to the requirement.

The Illinois Power Agency, a state office formed to procure electricity for ComEd and Ameren in the state's restructured retail electric market, would conduct a competitive procurement for low-carbon energy credits each year in the same way it purchases renewable energy resources. Like a renewable energy credit, a low-carbon credit would be a traceable credit that represents the environmental attributes of 1 megawatt of energy from a low-carbon source.

The legislative summary said low-carbon energy sources such as nuclear, renewables and coal-fueled plants that capture and sequester greenhouse gas emissions would "compete against each other on a best price basis to supply the low carbon energy credits."

Beside the 2 percent rate cap, the legislation would have a rebate provision that would provide a bill credit to consumers in the event that wholesale prices exceeded a specified level.

The measure will also include a sunset provision effective Dec. 31, 2021, or the effective date of a market-based plan to cut carbon emissions under the Clean Power Plan.

NRDC's Magrisso said the energy legislation introduced last week, by contrast, would set in motion a long-term transformation of the state's electricity market and provide a statewide economic stimulus.

"The bill that we're introducing is a comprehensive long-term solution that's going to offer thousands of clean energy jobs across the state," he said.

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