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STATE OF MARYLAND

BEFORE THE PUBLIC SERVICE COMMISSION

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

REPLY BRIEF OF THE SIERRA CLUB AND CHESAPEAKE CLIMATE ACTION NETWORK

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On March 3, 2015, the Sierra Club and the Chesapeake Climate Action Network ("Environmental Intervenors") submitted their Initial Brief in opposition to the proposed acquisition by Exelon Corporation ("Exelon") of Pepco Holdings, Inc. ("PHI"), including Potomac Electric Power Company ("Pepco") and Delmarva Power & Light Company ("Delmarva").[1] In the Initial Brief, the Environmental Intervenors set forth the applicable standard of review for the acquisition under Maryland law and demonstrated that the proposed acquisition is contrary to the public interest and fails to offer adequate, tangible benefits to Pepco and Delmarva (collectively, "PHI Utilities") customers. In this Reply Brief, the Environmental Intervenors respond to the arguments presented by the Applicants.

Despite Applicants' attempt to remedy the obvious deficiencies in their original application, the acquisition is not in the public interest because the acquisition harms the State's ability to achieve its energy policy objectives. Moreover, the benefits proffered by the Applicants are illusory and thus Applicants have failed to meet the requirement that the acquisition provide tangible benefits to PHI Utilities customers. 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 their initial brief to limit, as much as possible, the harms to the public interest that will result from Exelon's acquisition of PHI.

[1]The "Applicants" are: Exelon, PHI, Pepco, Delmarva, Exelon Energy Delivery Company, and Special Purpose Entity.

I. ARGUMENT

In their initial brief, the Applicants set forth new "commitments" and a proposed settlement designed to bolster their claim that the proposed acquisition is in the public interest and provides benefits to PHI Utilities' customers. However, these new commitments do not cure the numerous deficiencies of the original acquisition proposal as identified by Environmental Intervenors, and other parties. In fact, Applicants' attempt to add new conditions only underscores the inadequacy of their initial proposal that is pending before this Commission. As such, the Commission must find that the Applicants have not met their burden of demonstrating that the proposed acquisition is in the public interest, will provide benefits to PHI Utilities customers, and will not harm PHI Utilities customers.

A. The Applicants Misconstrue § 6-105(g)(2)(xii)

In an attempt to limit this Commission's authority to review the proposed merger, the Applicants misconstrue the governing statute. The Commission should reject the Applicants' attempt to re-write § 6-105.

In 2006, the General Assembly clarified and expanded the Commission's jurisdiction over transactions involving an acquisition of the power to exercise substantial influence over a public utility "in order to prevent unnecessary and unwarranted harm to [] customers." [2] The General Assembly expressly found that "an attempt by a person not engaged in the public utility business in the State to acquire the power to exercise any substantial influence" over a utility, "could result in harm to the customers of the [utility], including the degradation of utility

[2] *See* Md. Code Ann., Pub. Utils. § 6-105(b)(2).

services, higher rates, weakened financial structure, and diminution of utility assets."[3] As a result, the General Assembly directed the Commission to consider twelve factors when considering whether to approve the acquisition, including "any other issues the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience, and necessity."[4]

Applicants initially assert that the Commission must evaluate whether the proposed acquisition is consistent with the public interest, convenience and necessity, including benefits and no harms to consumers, based solely on the four potential harms listed in § 6-105(b)(1)(ii).[5] Applicants cite no support for this contention. Moreover, this contention contravenes basic rules of statutory construction. Having the Commission evaluate an application based only on potential harms would read both the public interest and the benefits standards out of the statute. The statute speaks separately of the "public interest, convenience, and necessity," "benefits," and "no harm." Under general rules of statutory interpretation, this means the considerations of the public interest, benefits, and harm are separate and independent categories. Statutes should be construed so as not to render any "word, clause, sentence or phrase" as "surplusage, superfluous, meaningless or nugatory."[6] Moreover, the statutory use of the word "and" means that all three

[3] Md. Code Ann., Pub. Utils. § 6-105(b)(1)(ii). All references will be to the Public Utilities Companies Article unless otherwise noted.
[4] § 6-105(g)(2)(xii).
[5] Applicants' Initial Brief at 7. In a footnote, Applicants argue that § 6-105 was adopted merely to extend the Commission's pre-existing statutory merger review authority to out-of-state holding companies. Applicants' Initial Brief at 7, n.15. This is a misinterpretation of the statute. If the General Assembly had wanted to merely extend the then-existing provisions of § 6-101 to include acquisitions by out-of-state entities, it would have done so by simply amending § 6-101. Instead, the General Assembly clearly broadened the intention and scope of the provisions.
[6] *Barbre v. Pope*, 402 Md. 157, 172 (2007).

conditions must be satisfied. "It is ordinarily presumed that the word 'and' should be interpreted according to its plain and ordinary meaning."[7]

Next, Applicants argue that the scope of the public interest standard is limited to whether the acquisition is "consistent" with the public interest.[8] The Commission should note that even under Applicants' improperly narrow construction of the standard, the acquisition fails to meet the standard. More importantly, the Applicants misstate the standard set forth in Maryland law. While most parties, including the Environmental Intervenors, use the short-hand "public interest" when discussing the standard, the actual standard is "public interest, convenience, and necessity." Indeed, the very case cited by the Applicants, *Pacific Power & Light Co. v. Fed. Power Comm'n*,[9] notes the distinction between "consistent with the public interest" and the applicable standard in this case, stating:

> The phrase 'consistent with the public interest' does not connote a public benefit to be derived or suggest the idea of a promotion of the public interest. The thought conveyed is merely one of compatibility. *Congress resorted to this language rather than to the use of the stock term 'public convenience or necessity'*, or to such phrases as 'in furtherance of' or 'will promote the public interest' used in its interstate commerce legislation (later considered); and the language employed ought to be construed to mean no more than it says.[10]

[7] *Comptroller of the Treasury v. Fairchild Indus., Inc.,* 303 Md. 280, 285-286 (1985), citing C. Sands, 1A Sutherland Statutory Construction § 21.14 (4th ed. 1972 and Cum. Supp. 1984); 73 Am. Jur. 2d Statutes § 241 (1974).
[8] Applicants' Initial Brief at 8.
[9] 111 F.2d 1014 (9th Cir. 1940).
[10] *Id.* at 1016 (emphasis added).

Thus, while the phrase "consistent with the public interest" may not suggest the promotion of the public interest, the phrase "public convenience or necessity" connotes broader purposes.[11]

The public interest, convenience, and necessity standard is a term of art in utility regulation and must stand for more than merely the public interest or the phrase "convenience and necessity" becomes superfluous. A basic canon of statutory construction is that a legislature knows the meaning of the words which it uses. In this regard, the Court of Appeals has held that "[c]ourts presume, in interpreting statutes that the law uses familiar legal expressions in their familiar legal sense, … [i]n the absence of a contrary indication."[12] The Supreme Court similarly found that "where [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey."[13]

The General Assembly is fully capable of distinguishing between the public interest standard and the public interest, convenience, and necessity standard. For example, § 7-603(b) provides that the "Commission shall adopt licensing requirements and procedures for gas suppliers that protect consumers, *the public interest,* and the collection of all State and local taxes." (emphasis added).

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[11] None of the other citations provided by the Applicants address the public interest, convenience, and necessity standard. *See* Applicants' Initial Brief at 8, n.18. Thus, all of Applicants' support for their position is inapposite.

[12] *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County*, 407 Md. 53, 92 (2008) (quoting *United States v. Dodson*, 291 F.3d 268, 271 (4th Cir. 2002), and *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991)) (internal quotation marks omitted).

[13] *Morissette v. U.S.*, 342 U.S. 246, 250 (1952).

The public interest, convenience, and necessity standard is to be construed so as to secure for the public the broad aims of the Public Utilities Companies Article.[14] Moreover, public convenience, and necessity are not synonymous and effect must be given to both. Convenience is much broader and more inclusive than necessity. Necessity means reasonably necessary but not absolutely imperative.[15] The word "necessity" has been defined to mean "a public need without which the public is inconvenienced to the extent of being handicapped."[16] In this instance, Exelon's acquisition of PHI does not meet the public interest, convenience, and necessity standard because, as explained more fully in Section B, the acquisition will have an adverse effect on the State's ability to achieve its energy policy objectives.

Applicants' reliance on the doctrine of *ejusdem generis* to limit this Commission's review authority is equally misplaced. Applicants argue that under this doctrine "the Commission's consideration under the catch-all is restricted to those factors within the same general class as the enumerated factors."[17] The doctrine of *ejusdem generis* applies when the following conditions exist:

> (1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.[18]

[14] *See, e.g., General Tel. Co. of S.W. v. U.S.*, 449 F.2d 846 (5th Cir. 1971).
[15] *See, e.g. Thomson v. Iowa State Commerce Comm'n*, 15 N.W. 2d 603, 606 (Iowa 1944). (citation omitted).
[16] *Central Kansas Power Co. v. State Corp. Comm'n*, 482 P.2d 1, 7 (Kan. 1971).
[17] Applicants' Initial Brief at 9.
[18] 2A *Sutherland Stat. Construction* § 47.18, at 200 (5th ed.1992)).

It is generally held that the rule of *ejusdem generis* is only applicable where legislative intent or language expressing that intent is unclear.[19] The courts recognize that *ejusdem generis* should not be invoked where it would "subvert [the statute's] obvious purpose."[20]

The doctrine is applied to statutes featuring lists of specific "things." For example, in *In re Wallace W.*, a statute prohibited the unauthorized use of "any horse, mare, colt, gelding, mule, ass, sheep, hog, ox or cow, or any carriage, wagon, buggy, cart, boat, craft, vessel, or any other vehicle including motor vehicle as defined in the laws of this State relating to such, or property whatsoever[.]"[21] A juvenile was adjudged delinquent for violating this statute by taking money from a classmate's purse. The Court of Appeals held that *ejusdem generis* applied because the list created two groups—livestock and vehicles that travel on land or water—and the "other property" mentioned in the statute should be understood to be other property "in the 'same class or general nature' as livestock and land or water vehicles."[22]

In contrast, the Maryland Court of Appeals has reviewed provisions similar to § 6-105(g)(2)(xii) and found that these provisions should be interpreted expansively. For example, in *Johns Hopkins Hospital, Inc. v. Insurance Commissioner*,[23] the Court of Appeals reviewed § 14-126 of the Insurance Article, which provided that in reviewing rates the agency should consider several factors including "all other relevant factors within and outside this State."[24] All the other factors listed were actuarial factors. The Insurance Commissioner approved a form of

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[19] *Id.* The doctrine of *ejusdem generis* is a tool of statutory construction more commonly used to interpret criminal statutes because they must be narrowly construed. *See In Re Wallace W.*, 333 Md. 186, 191 (1993).
[20] *Blake v. State*, 210 Md. 459, 462 (1956).
[21] In re Wallace W., 333 Md. at 190 (citation omitted).
[22] Id. at 191.
[23] 302 Md. 411 (1985).
[24] *Id.* at 461.

insurance contract submitted by Blue Cross of Maryland, Inc., that excluded from coverage "high cost" hospitals, as defined in the contract. A number of hospitals challenged this approval, claiming that it was the job of the Health Services Cost Review Commission ("HSCRC"), and not the Insurance Commissioner, to regulate the rates charged by hospitals. Rejecting this contention, the Court of Appeals broadly interpreted the "any other relevant factors" language of §14-126(b)(3):

> In today's complex society it is not possible, nor is it desirable, so to limit the area of concern of one administrative agency that it does not touch upon that of other agencies. It is not only appropriate but in many instances necessary, in pursuing state policy goals that two or more agencies of State government take action within the ambit of their express powers to accomplish the desired objective. **Certainly, if health care cost containment is State policy, such would be among the 'relevant factors' which the Commissioner is enjoined by [§14-126(b)(3)] to consider**....[25]

Applying the Court of Appeals interpretation of "any other factor" to the similarly worded § 6-105(g)(2)(xii) demonstrates that the "any other factor" language in this instance should be interpreted broadly, not narrowly as the Applicants contend. First, if the General Assembly had intended that "other relevant factors" included only "harm" factors, it could easily have so stated. Second, the eleven factors listed in subsection (g)(2) differ in character from the readily identifiable list of "things" or "persons" featured in many other instances when *ejusdem generis* has been applied.[26] The eleven listed factors are not "concrete" "persons, places, or things" but rather general types of information.

If the General Assembly did not intend to include within the ambit of the catch-all term other State energy matters likely to come before the Commission that did not fall within one of the enumerated areas, the catch-all provision would have no effect and therefore no purpose. To

[25] *Id.* at 419-20 (quoting trial court)(emphasis added and citations omitted).
[26] *Cf., e.g., In re Wallace W,* 333 Md. at 190-91 (specific nouns itemized different livestock and vehicles).

read out of a statutory provision a clause setting forth a specific condition such as one requiring grant of only those acquisitions that are consistent with the public interest, convenience, and necessity is an entirely unacceptable method of construing statutes.

Moreover, Applicants ignore the fact that § 6-105(g)(2) is part of a larger statutory scheme.[27] When a statute is part of a larger statutory scheme, "it is axiomatic that the language of a provision is not interpreted in isolation."[28] Thus, § 6-105 must be read within the context of the Commission's overall authority.[29]

Section 2-113(a)(2) expressly states that:

> In supervising and regulating public service companies, the Commission shall consider the public safety, the economy of the State, the conservation of natural resources, and **the preservation of environmental quality.**

The Commission must "supervise and regulate" public service companies to "ensure their operation in the interest of the public [] and [to] promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination."[30] Finally, § 2-112(c)

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[27] The other authorities relied upon by the Applicants also do not support their narrow interpretation of the Commission's review authority. See Applicants' Initial Brief at 10, n.24 and n.25. For example, in *West v. Sun Cab Co., Inc.*, 160 Md. 476 (1931), the Court of Appeals disagreed with the Commission's interpretation of the word "practice" under the Commission's authority to regulate the "practices… of any common carrier." The Court did not address the public convenience and necessity standard because that standard was not at issue in the case. Similarly, *Clifton Power Corp. v. FERC,* 88 F.3d 1258, 1265 (D.C. Cir. 1996), addressed the catch-all provision of a **regulation** and found that the regulation was limited by statute. Finally, *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers,* 606 F. Supp. 2d 121, 127 (D.D.C. 2009), is also inapposite. The trial court was addressing the effect of Congressional intent; there was no mention of statutory factors.

[28] *State Central Collection Unit v. Jordan,* 405 Md. 420, 426 (2008).

[29] Applicants essentially concede this statutory interpretation, stating that § 6-105 "directs the Commission to **consider matters it already has the power to regulate pursuant to other sections of the Code**." Applicants' Initial Brief at 10. (emphasis added)

[30] § 2-113(a)(1)(i)-(ii). The Commission has previously noted that § 2-113 allows the Commission to adopt specific ring-fencing measures regarding Baltimore Gas & Electric Company ("BGE") separate and apart from our statutory review under § 6-105. Case No. 9173, Order No. 82719 at 35.

states that the Commission's powers are to be "construed liberally." Thus, taken together, sections 2-112 and 2-113 grant the Commission broad authority, express and implied, to ensure the operation of utilities in the public interest.

In considering § 6-105 within the context of the Commission's broad authority, the phrase "any other factors" must be interpreted to include the issues of energy efficiency and renewable energy. As Applicants conceded,[31] the Commission has the authority under this provision to consider matters it already has the power to regulate. This Commission has the power to regulate energy efficiency through the EmPower Maryland statute and through § 7-211(f)(1)).[32] Similarly, the General Assembly authorized the Commission to implement Maryland's Renewable Energy Portfolio Standard ("RPS").[33] The Commission also regulates net metering pursuant to § 7-306.

Through their initial application and their recent filed settlement, Applicants have specifically conceded that energy efficiency and renewable energy are among the other factors that the Commission should consider in reviewing the acquisition. With regard to energy efficiency, in their original application the Applicants included a "commitment" to maintain energy efficiency.[34] While the Commission should find that Applicants' specific commitment with regard to energy efficiency is meaningless, Applicants' decision to include this issue in their initial application constitutes a recognition on their part that energy efficiency is within the

[31] Applicants' Initial Brief at 10.
[32] Commission has the statutory duty to require electric company to "establish any program or service that the Commission deems appropriate and cost effective to encourage and promote the efficient use and conservation of energy."
[33] §§ 7-701 through 7-713.
[34] Joint Application at 15, Appendix A at A-3. See also Applicants' Initial Brief at 6. ("PHI will maintain its dedication and commitment to … energy efficiency and demand response initiatives….").

province of the Commission to consider in the context of examining the proposed acquisition. Similarly, Applicants recently filed a proposed settlement with The Alliance for Solar Choice ("TASC"). As described by the Applicants, this settlement provides "processes for the interconnection of customer-owned renewable-energy projects" to the PHI Utilities distribution systems.[35] Again, this proposed settlement constitutes a recognition on the part of the Applicants that distributed generation is within the province of the Commission.

In sum, this Commission should reject Applicants' narrow, unsupported interpretation of the applicable public interest, convenience, and necessity standard. The standard of review proffered by the Environmental Intervenors is fully supported by the rules of statutory interpretation, case law, and this Commission's past practice. Thus, this Commission should find that in order to resolve the question of whether Exelon's acquisition of PHI meets the public interest standard, the Commission must determine if the acquisition will enable the State to better meet its energy policy objectives. If the State is more likely to achieve its energy policy objectives in the absence of the merger, which is the case here, the merger is not in the public interest and the Applicants' request must be denied.

B. The Application is Not in the Public Interest

Applicants have offered incremental changes to their application in an attempt to meet the § 6-105 standards. With regard to the public interest standard, Applicants' initial application failed to meet this standard and the altered application also must be found to not be in the public interest. As the Environmental Intervenors explained in their initial brief, in order to resolve the question of whether Exelon's acquisition of PHI meets the public interest standard, the

[35] Applicants' Initial Brief at 14.

Commission should determine whether the acquisition will better enable the State to 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 the Environmental Intervenors and others established through their extensive testimony, 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 Energy Portfolio Standard, the EmPower Maryland Energy Efficiency Act of 2008, and the Greenhouse Gas Emissions Reduction Act of 2009.

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., and Exelon's acquisition of Constellation Energy Group ("Constellation"). 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."[36] 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

[36] In the Matter of the Merger of FirstEnergy Corp. and Allegheny Energy Inc., Case No. 9233, Order No. 83788 at 36 (Jan. 18, 2011) ("FirstEnergy Order").

solar generation.[37] Consistent with past precedent, this acquisition should be approved only if it aligns with Maryland's energy policy goals.

Exelon recognizes that the profitability of its nuclear fleet is threatened by renewable energy generation. 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.

C. Applicants' Alleged Commitments Do Not Provide the Necessary Benefits to Consumers and Therefore Applicants Do Not Meet the Statutory Standard

Applicants assert that the "commitments" they proffer, and in a few instances enhanced, ensure that customers will receive certain, defined benefits. These alleged benefits include, among other things, synergy savings, an increase in the Customer Investment Fund ("CIF"), forgiveness of outstanding debt for low-income families, enhancements to the interconnection process, and job commitments. However, the Applicants' commitments are illusory and do not resolve the myriad of problems raised by the proposed acquisition.

[37] 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").

1. Prospective Synergy Savings Are Too Speculative to Be Considered a Benefit.

The Applicants tout the acquisition-related synergy savings as a customer benefit, contending that these savings will inure to the benefit of ratepayers in future rate cases. The Commission rejected a similar contention in the FirstEnergy Order, stating:

> But prospective synergy savings cannot qualify as "benefits to customers" on their own…the possibility and amount of post-merger savings are too contingent and uncertain…. [P]roving the extent to which Merger integration savings translate into foregone requests for rate relief is like proving a negative, and future savings (not firmly quantified now) cannot, without more, satisfy PUA § 6-105.[38]

The record in this case demonstrates fact that the alleged "prospective synergy savings" are contingent and uncertain. Applicants now estimate that the five-year net synergy savings amount to $37 million.[39] However, Applicants' own estimate of future synergy savings have decreased from $453 million to $37 million over the past few months. This drastic reduction in savings estimates in such a short period of time illustrates that these "savings" are too contingent and uncertain to be considered a benefit.

2. The Increase in the CIF Does Not Resolve the Fundamental Problem with that Fund.

The Applicants have proposed to increase the CIF in Maryland from $40 million to $94.4 million. The Applicants also state that they believe that at least 25% of the CIF should be dedicated to low-income consumer rate credits and programs. Finally, Applicants state that they

[38] FirstEnergy Order at 42-43.
[39] Applicants' Initial Brief at 4.

support a requirement that each CIF recipient using an outside vendor should "allocate at least 25% of its spend [*sic*] to Minority Business Enterprises (MBE)."[40]

This CIF increase suffers from the same fatal flaw as the original commitment. As the Environmental Intervenors explained in their Initial Brief, to meet the customer benefit test the credits that are provided may not be subject to the company's subsequent "claw back."[41] Any rate increase shortly after the merger would be a claw back of the rate credit. In this instance, Exelon continues to refuse to commit to not filing a rate increase for a period of time after the merger. Thus, as soon as the merger is consummated, Exelon could file for a rate increase that wipes out any customer "savings." Because Exelon could "claw back" the $94.4 million at any time after the merger is consummated, the CIF cannot be viewed as a benefit to PHI Utilities' customers.

Moreover, Applicants belief with regard to the allocation of the CIF and their support of MBE[42] cannot be viewed as a benefit since under the original commitment and under this new iteration, the Commission has the discretion to allocate the CIF in any manner its deems appropriate.

3. <u>The Applicants' Proposed Settlement with TASC Raises Competitive Concerns.</u>

One of the Applicants' new commitments is a set of interconnection processes which constitute a proposed settlement the Applicants reached with TASC. While some of the interconnection processes included in this commitment represent an incremental improvement, the application remains deficient.

[40] Applicants' Initial Brief at 2.
[41] FirstEnergy Order at 48-49.
[42] The statements regarding dedicating 25% to low-income customers and the MBE requirement are not included in the actual commitment.

More importantly, several aspects of the proposed settlement focus on TASC exclusively and raise concerns about non-TASC members' access to information and ability to compete. Commitment 20 states:

- PHI will provide a report to TASC that provides its criteria limits for distributed energy resources that apply for connection to its distribution system. PHI shall make itself available for discussions with TASC on the report and demonstrate the modeling tools used by PHI to perform its analysis;[43]

- PHI is currently working with the U.S. Department of Energy in research designed to show how certain factors impact hosting capacity. PHI will share this research with TASC upon completion of the project;[44]

- PHI has provided data to National Renewable Energy Laboratory ("NREL") as part of their in-depth work to review utility interconnection criteria. A report is expected to be issued by the end of 2015. PHI will evaluate its criteria with the criteria outlined in the NREL report to identify any improvements that may be made including treatment of behind-the-meter storage equipment. PHI and TASC will consult NREL during this evaluation to gain any input from NREL that it is willing to provide including research on the inverters under controlled conditions. PHI and TASC shall collaborate on the activities in this paragraph, including sharing information, discussing approaches, evaluating interconnection criteria, working with NREL, and providing an opportunity for TASC to comment on PHI's proposed recommendations on interconnection criteria prior to public release;[45]

- PHI will work with TASC to review the existing application process (and timelines) and determine where an application should restart (if at all) if it's revised (e.g., for spelling, grammatical, or clerical error);[46]

TASC is a trade association which represents rooftop solar companies. Through this settlement, only TASC members will gain access to commercially necessary information. Moreover, TASC members will be offered the opportunity to shape PHI policies, an opportunity

[43] Commitment 20 (b)(i). Applicants' Initial Brief, Appendix A at 17-18.
[44] Commitment 20 (b)(ii). Applicants' Initial Brief, Appendix A at 18.
[45] Commitment 20 (b)(iii). Applicants' Initial Brief, Appendix A at 18.
[46] Commitment 20 (d)(v). Applicants' Initial Brief, Appendix A at 19.

that does not appear to be available to non-members. Granting access to information and providing opportunities for stakeholder engagement to only one set of solar developers in the same marketplace raises competitive concerns. The Commission should amend this commitment to give broader access to the PHI information and PHI's processes.

4. The Job Commitment is Not a Sufficient Benefit.

The Applicants claim that the job commitment—under which Exelon will not, for two years, permit a net reduction in either Pepco's or Delmarva's employment due to involuntary attrition as a result of the Merger integration process—is a benefit to PHI Utilities' customers. In fact, this commitment is meaningless, and as a result, the likely loss of jobs at the PHI Utilities is a source of public harm under § 6-105(g)(2)(iv).

First, it should be noted that the only reason jobs are at risk at the PHI Utilities is because of the acquisition. Applicants presented no evidence that either Pepco or Delmarva are planning to reduce their workforce in the absence of the acquisition. Since there would be no reduction in workforce without the acquisition, the lack of a reduction in workforce with the acquisition cannot be viewed as a "benefit." At best, this "commitment" must be viewed as an avoidance of harm.

Significantly, Exelon only is asserting that there will be no **net** reduction in positions due to involuntary attrition. This commitment does not prevent individuals from losing their jobs so long as the total number of positions at the companies remain the same. Moreover, the commitment is limited to "involuntary attrition," and it is clear that this does not prevent Exelon from reducing PHI Utilities' employment numbers by failing to fill positions due to voluntary attrition, or offering early retirement or "buy-out" offers. Regardless of whether Exelon

encourages voluntary attrition, there is likely to be an increase in voluntary attrition after the merger. Obviously, the commitment does not prevent reducing PHI Utilities' employment by involuntary attrition after two years.

In light of the above, the PHI Utilities' job commitment provides no comfort that there will not be significant potential effects on employment by the public service company, a factor which the Commission must consider in evaluating whether the Merger is in the public interest.

The commitment to make a "good faith" effort to hire an additional 110 union employees also is not a benefit. If Exelon fails to hire 110 employees, how will this Commission determine that Exelon made a good faith effort? Furthermore, these new workers would be hired and trained to replace retiring field techs. Thus, 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.

5. Maintaining Energy Efficiency and Demand Response Initiatives is Not a Benefit.

Applicants added new language to the energy efficiency "commitment," stating "Pepco and Delmarva Power will maintain and promote existing energy efficiency and demand response programs **consistent with the direction and approval of the Commission.**"[47]

The Applicants still have not committed to expanding or adding any actual benefit with regard to 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. This is only a benefit if the Commission assumes that the PHI Utilities will be reducing their own commitments or cancelling programs. Essentially, the added language just provides that the PHI

[47] Applicants' Initial Brief, Appendix A at 6. New language in bold.

Utilities will follow the law. Compliance with the law is a minimum requirement for a utility, not a **benefit** to customers.

In a footnote, Applicants assert that they have demonstrated a strong commitment to energy efficiency and demand response.[48] Applicants, relying on the testimony of Mr. Butler, claim that since BGE became part of Exelon its energy efficiency and demand response programs have thrived.[49] These statements are simply factually incorrect. As explained by the Environmental Intervenors' witness Paul Chernick, in 2012 and 2013, following the Exelon merger, BGE fell 63% below its demand-reduction target. In the same period, the non-BGE utilities achieved an average of 194% of their demand targets. Moreover, the BGE demand savings were only about a quarter of what would have been expected from the energy savings and a typical 60% load factor, while the average of the other utilities' demand reductions were about three times the reductions that would be expected at typical load factors.[50] Mr. Chernick also noted that:

> 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.[51]

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[48] Applicants' Initial Brief at 46, n.176. The fact that Applicants have relegated their entire energy efficiency discussion to a footnote illustrates the Applicants' view of the importance of these programs.

[49] Applicants' Initial Brief at 46, n.176. Regrettably, Mr. Butler seemed to have very little understanding of Maryland's Energy Efficiency programs. For example, when asked about the inclusion of non-energy benefits in the total resource cost, Mr. Butler stated that BGE did not support the TRC test because "[a]s far as what our customers and suppliers were telling us"…"[w]e wanted to understand what they want from an energy efficiency perspective" Tr. at 1974-1975 (Butler).

[50] Direct Testimony of Paul L. Chernick, Sierra Club/CCAN Ex. 1, at 23.

[51] *Id.* at 23-24.

Mr. Chernick further found that 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 that of Pepco and Delmarva in 2013. According to Mr. Chernick, even with the dramatic contraction of their plans for 2015-2017, Pepco and Delmarva remain above BGE.[52]

Moreover, Mr. Butler conceded in his testimony that BGE's 2012-2014 energy efficiency program was approved by the Commission in 2011, well before BGE became a part of Exelon.[53] Thus, even if the Applicants' view of BGE's program is correct, Exelon's only role in that program thus far has been to follow the Commission's order.

This Commission has previously found that to fulfill the public interest requirement, any commitments offered by the applicants as part of a merger proposal must be additive to any preexisting commitments or requirements to which the applicants are already subject.[54] Thus, the Commission should find that maintaining energy efficiency and demand response programs as opposed to improving those programs does not count as a benefit.

D. The Applicants' Untimely Objection to Mr. Chernick's Testimony Should Be Rejected

Applicants object to several intervenors' testimony on a variety of bases. First, Applicants assert that the Commission should disregard testimony regarding the standard of

[52] *Id.* at 24. Mr. Chernick also noted that the PHI Utilities started with much smaller energy-efficiency programs than BGE, but those rose much more rapidly than BGE's programs from 2011 through 2014. Following the announcement of the merger, the PHI Utilities proposed large reductions in their energy-efficiency spending and savings for 2015-2017.
[53] Tr. at 1973 (Butler).
[54] FirstEnergy Order at 39-40.

review or the meaning of § 6-105.[55] Applicants also contend that witnesses testified on matters outside of their area of expertise.[56] With regard to Environmental Intervenors' witness Mr. Chernick, Applicants argue that the Commission should disregard Mr. Chernick's testimony to the extent he offered testimony "on the interpretation and application of § 6-105 and other legal matters, and lay opinion on competition and public policy."[57]

The Applicants failed to raise the objection to Mr. Chernick's testimony during the hearing. Mr. Chernick's testimony was received into evidence without objection.[58]

The Applicants cannot now move to strike portions of Mr. Chernick's testimony. Pursuant to Md. Rule 2-517(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." In *Perry v. State*,[59] Judge Wilner explained the purpose for insisting upon a contemporaneous objection:

> The requirement of a contemporaneous objection is a necessary and salutary one, designed to assure both fairness and efficiency in the conduct of trials. **A party cannot be permitted to sit back and allow the opposing party to establish its case, or any part of its case, through unchallenged evidence and then, when it may be too late for the opposing party to recover, to seek to strike the evidence**.[60]

Moreover, Mr. Chernick's statements are the proper subject for expert testimony. Experts may offer opinion testimony "on mixed questions of law and fact," as long as the expert

[55] Applicants' Initial Brief at 54.
[56] *Id.* at 55-56.
[57] *Id.* at 57.
[58] Tr. at 3403 (Chernick).
[59] 357 Md. 37, 77 (1999).
[60] *Id.* at 77 (emphasis added).

"remain[s] focused on helping the jury or judge understand particular facts in issue."[61] In a case requiring expert testimony, experts may testify not only to their understanding of the facts and circumstances, but they may also use their knowledge, training, and experience to draw inferences from those facts and circumstances.[62] Many of the parties in this proceeding, including the Applicants,[63] have offered expert testimony of this character, opining on whether the application meets the requirements of § 6-105. Essentially, the expert must present his or her testimony through this prism or the testimony will lack context.

Finally, Applicants' description of the testimony to be disregarded is too general to support their objection. "[I]t is well settled that a judge is not required to go through the testimony to pick out testimony piecemeal which would come within such a general description."[64] Essentially, Applicants ask this Commission to review all seventy-seven pages of Mr. Chernick's testimony and determine which statements fit within Applicants' overly broad objection. This unreasonable request should be rejected by the Commission.

II. CONCLUSION

WHEREFORE, for the reasons set forth in the Environmental Intervenors' Initial Brief and this Reply Brief, 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 conditions set forth in Environmental Intervenors' Initial Brief in order to

[61] *See, e.g., In Re Initial Public Offering Securities Litigation*, 174 F. Supp. 2d 61, 65 (S.D.N.Y. 2001).
[62] *Tucker v. University Specialty Hosp.,* 166 Md. App. 50 (2005).
[63] *See, e.g.,* Tr. at 93-95, 169-170 (Tierney).
[64] *State Roads Comm'n of Md. v. Bare*, 220 Md. 91, 94 (1959).

mitigate some of the harm to both PHI Utilities' ratepayers and the public interest that will occur as a result of this acquisition.

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Dated: March 17, 2015

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2015, I electronically filed a copy of the foregoing Reply Brief 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
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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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