

**STATE OF MARYLAND
BEFORE THE PUBLIC SERVICE COMMISSION**

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

**POST-SETTLEMENT HEARING BRIEF OF
THE SIERRA CLUB
AND
CHESAPEAKE CLIMATE ACTION NETWORK**

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MAY 1, 2015

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Sierra Club and the Chesapeake Climate Action Network (collectively, “Environmental Intervenors”) submit this Post-Settlement Hearing Brief in continued opposition to the proposed acquisition by Exelon Corporation (“Exelon”) of the power to exercise substantial influence over the policies and actions of Pepco Holdings, Inc. (“PHI”), including Potomac Electric Power Company and Delmarva Power & Light Company (collectively, “PHI Utilities”). As explained below, the Commission should find that Applicants proposed settlement agreement with certain parties¹ does not resolve the many deficiencies in Applicants’ original application. Thus, Exelon’s request to acquire PHI must be denied.

INTRODUCTION

The extensive record in this proceeding demonstrates that the proposed acquisition fails to satisfy the three statutory requirements for approval. The acquisition is not in the public interest because it harms the State’s ability to achieve its energy policy objectives; offers no tangible benefits for PHI Utilities customers; and threatens harm to these customers. The March 16 Settlement does not cure these deficiencies.² Specifically, the new commitments do not mitigate the harms identified by various parties to this proceeding. Moreover, the benefits proffered by the March 16 Settlement are largely illusory and thus Applicants have failed to meet the requirement that the acquisition provide tangible benefits to PHI Utilities customers.

¹ Applicants Appendix C to the Reply Brief (Errata Version), Applicants Ex. 96 (“March 16 Settlement”).

² Environmental Intervenors continue to advocate that the application must be rejected because the acquisition is not in the public interest and the harms caused by the acquisition cannot be mitigated. However, if the Commission approves the acquisition it should, at a minimum, adopt the conditions set forth in Environmental Intervenors Initial Brief at p. 36-38. The Commission could either impose an increased RPS percentage on the companies or require Exelon to develop or procure renewable generation equivalent to the increased percentages.

As discussed in detail in prior briefs,³ the proposed acquisition is not in the public interest because it would not further the State’s energy policy objectives. Furthermore, the alleged benefits of the acquisition are speculative and minor. Initially, Exelon claimed that “the PHI Utilities will join a larger enterprise and, in that way, gain access to a number of additional resources, including the financial strength of Exelon.”⁴ In light of the lack of a factual basis to support this benefit, Exelon quickly revised its position and now asserts that they had provided “compelling evidence that Pepco and Delmarva will not be increasing their relative ‘riskiness’ through the Merger...”⁵ The Commission should find that it is not in the public interest to authorize a potentially financially troubled company to acquire two well-funded Maryland utilities. Exelon derived 85 percent of its generation from nuclear power in 2013 and Exelon is the most exposed of its peers to a decline in natural gas prices.⁶ Exelon’s fourth quarter earnings show its generation business lost \$91 million from a profit a year earlier of \$269 million. Overall, Exelon posted a profit of \$18 million, down from \$495 million a year earlier.⁷ Essentially, Exelon’s financial health is questionable. The acquisition of a financially sound utility by a company with questionable finances should be viewed as a harm, not a benefit.

³ See, e.g., Initial Brief of Environmental Intervenors, Docket Entry No. 184 and Reply Brief of Environmental Intervenors, Docket Entry No. 205. The Environmental Intervenors extensively briefed the standard the Commission must apply in reviewing the acquisition, the harms caused by the acquisition, the lack of benefits resulting from the acquisition and a myriad of other issues. Environmental Intervenors incorporate those briefs by reference.

⁴ Direct Testimony of Christopher M. Crane, Applicants Ex. 8 at 5.

⁵ Applicants Initial Brief at 42-43.

⁶ See Deposition of Christopher M. Crane, MEA Ex. 1, at 48.

⁷ Chelsey Dulaney, “Exelon Profit Dampened by Weather, Expenses – Update” Wall Street Journal, Feb. 13, 2015. Environmental Intervenor Initial Brief, Appendix A.

Similarly, the claimed synergy savings are not only speculative,⁸ but these savings are meager at best. Exelon's own estimate is that, after the synergy savings are achieved, and including the trails and the additional \$34 million Exelon intends to spend on reliability, bills for Pepco customers would be about 80 cents lower a month for residential customers and for Delmarva residential customers about \$1.25 less a month.⁹ The Commission should find that the meager ratepayer savings allegedly achievable by this acquisition are not worth the harms associated with the acquisition.

While the alleged benefits of the acquisition are speculative and minor, the intervenors, OPC and Staff have established that the harms associated with the acquisition are substantial and impossible to mitigate. These harms include the loss of the wires-only prospective as the PHI Utilities will be required to implement Exelon's strategic objectives,¹⁰ conflicts of interest between a nuclear generation asset-centric business model and the State's need to encourage renewable generation, and loss of across-the-fence competition. For the reasons detailed below,

⁸ The Commission has found that the projection of benefits through synergies are "inherently speculative and, to the extent they materialize, will likely benefit ratepayers only as 'forgone requests for rate relief,' which we have previously held to be too intangible to qualify as a benefit" under § 6-105. *In the Matter of the Application of the Merger of Exelon Corporation and Constellation Energy Group*, Case No. 9271, Order No. 84698 ("*Constellation Order*") at 90, citing *In re the Merger of FirstEnergy Corp. & Allegheny Energy, Inc.*, Case No. 9233, Order No. 83788 ("*First Energy Order*") at 42-43.

⁹ Hearing Transcript ("TR") Vol. XV at 4373 (Khouzami). As noted by Commissioner Hoskins, this rate impact does not include the approximately \$600 million which will be expended on reliability whether the acquisition occurs or not. TR Vol. XV at 4393 (Commissioner Hoskins). Moreover, Dr. Tierney's estimate that the original reliability improvements bring over \$453 million of direct value to customers (Applicants Initial Brief at 59) was thoroughly discredited by MEA and others (*see, e.g.*, MEA Initial Brief at 16-19). Dr. Tierney subsequently revised her analysis which resulted in a significant decrease in the claimed direct value to customers. Dr. Tierney Rebuttal Testimony, Applicants Ex. 5 at 16-17. The flaws in Dr. Tierney's analysis were once again highlighted during the settlement hearings when it became clear that Dr. Tierney was unaware that the new reliability commitment included an additional \$34 million in ratepayer funded costs which she failed to include in her analysis. TR Vol. XIII at 3720.

¹⁰ These objectives include limiting the impact of distributed generation on Exelon's energy sales from its nuclear generation assets.

this Commission should find that the March 16 Settlement does not provide a basis for approving the acquisition.

ARGUMENT

I. Contrary to Applicants' Assertion, the March 16 Settlement Does Not Include "Critical Parties."

This Commission must decide if it will take the unprecedented step of approving an acquisition which is opposed by all three parties who have a statutory role in this proceeding. The State of Maryland and the Maryland Energy Administration (collectively, "MEA"), the Office of People's Counsel ("OPC") and Commission Staff ("Staff") have the statutory obligation to provide independent voices to the Commission from the perspective of ratepayers and the public interest.¹¹ All three advocate that the Commission reject this acquisition.¹² Moreover, the Coalition for Utility Reform ("Coalition") remains opposed to this merger.¹³

While Montgomery County Executive supports the March 16 Settlement, it is clear that the Montgomery County Council does not share that view.. The Montgomery County Council issued a resolution stating:

The Montgomery County Council urges the Maryland Public Service Commission to mitigate the serious risks to the public interest by insisting, at a minimum, on very strong, verifiable, and financially accountable commitments by Exelon (a) to holding down costs to ratepayers and (b) to national leadership in

¹¹ *See, e.g.*, TR Vol. XV at 4369-4370 (Commissioner Speakes-Bachman).

¹² When asked directly whether Staff supported the merger and settlement in its current form, Mr. Timmerman responded: "No. I guess I would say, as I say in my testimony at the end, we do not believe that the two settlements add enough to override Staff's final conclusion in our reply brief that as of the reply brief, the settlement did not meet the statutory requirements for approval." TR Vol. XVII at 5037 (Timmerman).

¹³ The Coalition includes the Cities of College Park, Greenbelt, Rockville, and Takoma Park, the Towns of Garret Park and Somerset, several Montgomery County councilmembers, the Mayor of Takoma Park and several Takoma Park councilmembers, and the Mayor of the Town of Somerset.

clean, renewable, distributed energy and energy efficiency, with a commitment to a renewable energy standard that is in line with top-performing states.¹⁴

The Prince George's County Council stated its support for the March 16 Settlement but also expressed reservations regarding the acquisition. In a recent resolution, the Prince George's County Council urged the Commission, as a part of its approval of the merger, to encourage Pepco to conduct a study to determine the feasibility and establish a reasonable cost estimate of undergrounding utility facilities in coordination with county road projects.¹⁵ The Prince George's County Council also urged the Commission to determine, as a condition of approving the March 16 Settlement and merger, "whether the commitments made by Exelon are strong and verifiable commitments (a) that Exelon will not impose risk from its nuclear operations on utility customers of Pepco and (b) for significant clean, renewable and distributed energy, including energy efficiency."¹⁶

Thus, only three parties fully support the Commission's approval of the acquisition. Notably, rather than address whether the March 16 Settlement rendered the acquisition in the public interest and resolved the issues regarding harm to PHI Utilities' customers, these parties, including Montgomery County and Prince George's County, only address the March 16 Settlement provisions that they deem beneficial to their particular interests. As this Commission's precedent demonstrates, the mere existence of a settlement does not warrant approval of the acquisition.¹⁷

¹⁴ See Montgomery County Resolution No. 18-85 (March 31, 2015) at 2, Docket Entry No. 229.

¹⁵ Prince George's County Resolution No. CR-13-2015 (March 24, 2015) at 4, Docket Entry 239.

¹⁶ *Id.*

¹⁷ *Constellation* Order at 36-37.

II. Exelon's Commitment to Develop 15 MW of Solar is Designed Solely to Meet Exelon's Statutory Obligations.

Pursuant to Commitment 37,¹⁸ within 5 years after the close of the merger, Exelon will develop or assist in the development of 5 MW of solar generation located in Prince George's County, 5 MW in Montgomery County and 5 MW located in the Delmarva service territory. When asked to explain why this solar development constituted a benefit, Mr. Khouzami stated "it helps start the progress to making more solar investments. Again, as people start to see these and experience the benefits of solar, more people will want this. That will spur investment in the state of Maryland..."¹⁹ Mr. Khouzami also stated that the intent of this commitment "was to spur the **beginning** of solar development here in the state of Maryland."²⁰

Mr. Khouzami's statements demonstrate how out of touch Exelon is with the solar generation market in Maryland. According to PJM, as of April 2015, there is over 259 MW of solar installed capacity in Maryland.²¹ Currently, 3,000 people work in the solar industry in Maryland.²² Exelon's addition of 15 MW, which would only increase installed solar capacity by 5 percent and is expected to take 15 years to complete, will have no effect on the development of the solar market in Maryland.

However, utility-scale solar development is consistent with Exelon's strategic plan. In its strategic plan Exelon stated, with regard to the monetization of renewable energy credits ("RECs"), that "these opportunities create a lucrative business model made evident by our current distributed solar business which is built, owned, operated, and maintained over 147 MW

¹⁸ Applicants Ex. 96 at 37-38.

¹⁹ TR Vol. XV at 4291 (Khouzami).

²⁰ TR Vol. XV at 4362 (Khouzami) (emphasis added).

²¹ PJM Environmental Information Service. <https://gats.pjm-eis.com/gats2/PublicReports/SolarWeightedAveragePrice/Filter>

²² Maryland Solar Jobs Census. <http://www.thesolarfoundation.org/wp-content/uploads/2015/02/Maryland-Solar-Jobs-Census-2014.pdf>.

of solar assets while earning a 13 percent average internal return over the past seven years.²³ As noted by Commissioner Speakes-Bachman, Exelon will retain the RECs from these projects and thus, this development of 15 MW is essentially a commitment to comply with the Renewable Portfolio Standard (“RPS”).²⁴ Complying with applicable law is the minimum that should be expected of any company. Thus, a commitment to construct solar generation, or any renewable generation, can only be deemed a benefit to PHI Utilities customers if the additional generation exceeds what the company needs to comply with the RPS.

Exelon’s contention that it will lose money building the 15MW of solar is simply not credible. The cost to construct a solar project can vary based on whether the structure is on the roof, on the ground, or in a parking facility.²⁵ Exelon's experience in Maryland is that ground-based facilities are considerably less costly to construct than parking-based facilities.²⁶ Despite the fact that Exelon has yet to determine what type of solar projects it will build, Dr. Tierney used the most expensive type of solar project—parking structures—to calculate her estimate of \$50 million for the project costs.²⁷

The current commitment to develop 15 MW of solar should be contrasted with the commitments in the Exelon/Constellation merger where Exelon was obligated to develop over 150 MW of new renewable generation, including 30 MW of solar generation.

²³ Exelon Strategic Plan, MEA Ex. 16, at 2.

²⁴ TR Vol. XV at 4361-4362 (Commissioner Speakes-Bachman).

²⁵ TR Vol. XIV at 4135 (Khouzami).

²⁶ TR Vol. XIV at 4136 (Khouzami).

²⁷ MEA Ex. 61, Applicants Response to Data Request 9-57. The Commission should note that while Dr. Tierney calculated that projects to build 20 MW of solar generation would cost \$50 million, Post-Settlement Testimony of Dr. Tierney at 11, n.14, in a separate data response Exelon claimed it would cost \$50 million to construct 15 MW of solar generation. MEA Ex. 59, Applicants Response to Data Request 9-24.

Unlike the Constellation settlement, the March 16 Settlement does not include any measures to ensure that the Applicants will in fact follow through on their commitments to develop new solar generation. The Constellation settlement provided for the payment by Applicants of substantial fees, payments and penalties in the event Applicants failed to develop or assist in the development of the promised renewable generation. Importantly, these significant payments were required to be made into the Strategic Energy Investment Fund which could only be used to support the creation of new Tier 1 renewable energy sources in Maryland.

The Commission should find that the development of 15MW of solar generation is not a sufficient benefit to PHI Utilities' customers, nor will it spur solar development in Maryland. The only entity that truly benefits from this development is Exelon.

Finally, separate from the March 16 Settlement, Exelon filed a "side agreement" with Prince George's County which provides that Exelon will construct an additional 5 MW of solar generation and provide the energy produced by these projects to Prince George's County at no cost to the County for 15 years. Exelon's own witness conceded that this agreement is not a benefit to PHI Utilities customers.²⁸ Since this side agreement is not a benefit to PHI Utilities ratepayers, the side agreement cannot be viewed as supporting approval of the acquisition.

III. Pursuant to § 7-512.1(g),²⁹ the Commission Cannot Accept the Settling Parties' Allocation of the Consumer Investment Fund ("CIF").

In the March 16 Settlement, the Applicants propose a \$94.4 million CIF.³⁰ The Applicants have ignored § 7-512.1(g), which provides:

²⁸ TR Vol. XIII at 3684 (Tierney).

²⁹ Md. Code Ann., Pub. Utils. § 7-512.1(g). All references will be to the Public Utilities Companies Article unless otherwise noted.

³⁰ Applicants Ex. 96 at 1-2.

(g)(1) If a party to a merger or acquisition of an electric company or an affiliate of an electric company is required to distribute a credit to the customers in the electric company's service territory under an agreement with the Commission in connection with the merger or acquisition, the Commission shall consider the adequacy of the current funding of the electric universal service program in providing assistance to customers who qualify under this section.

(2) Any funds deposited into the electric universal service program fund as a result of an agreement with the Commission in connection with a merger or acquisition of an electric company or an affiliate of an electric company are in addition to, and may not substitute for, funds collected under subsection (e) of this section.

Applicants have failed to provide any evidence addressing the adequacy of the current funding of the Electric Universal Service Program ("EUSP").³¹ Pursuant to § 3-111 (a), the Commission's decision must be based on the "official record." The Commission is barred from considering extra-record information. "Factual information or evidence not made part of the record may not be considered in the determination of a case."³² Because the Commission cannot make the determination required by § 7-512.1(g), the Commission cannot approve the distribution of CIF funds as set forth in the March 16 Settlement.

Moreover, Applicants' failure to present the evidence required by § 7-512.1(g) means that the application cannot be approved. This Commission has found that § 6-105 requires that ratepayers receive a portion of the acquisition benefits as immediately and certainly as the PHI shareholders.³³ This failure to present the required evidence results in the Commission lacking any basis to find that the PHI Utilities' customers will receive benefits as immediately as shareholders. Thus, the Commission should deny the application.

³¹ EUSP is a ratepayer funded electric bill assistance and arrearage program. The program provides assistance based on income and electric usage levels.

³² § 3-111(b)(2).

³³ *Constellation* Order, Order No. 84698 at 91, *citing* § 6-105(g)(d)(5).

IV. The New Proposed Annual Reliability Targets Are Contrary to the Testimony of Exelon's Own Witnesses.

Pursuant to the March 16 Settlement, Applicants are proposing new reliability targets for the years 2016 through 2020, rather than the three-year-average reliability targets the Applicants originally proposed.³⁴

The Commission has previously found that reliability commitments do not qualify as a benefit of the acquisition because ratepayers “pay for, and already should be able to count on, a reliable system, so offering reliable service now adds no new value from this [m]erger.”³⁵ Applicants have offered no rationale which would warrant the Commission abandoning this policy.

Applicants now assert that they can meet these new requirements less than a month after Applicants' witnesses testified under oath that the Company could not set annual reliability targets without conducting a circuit-by-circuit analysis of the PHI Utilities' systems. Specifically, Mr. O'Brien testified that Exelon could not commit to annual reliability targets because in order to develop those targets it would require a circuit-by-circuit analysis and this analysis would take 6 months.³⁶ Mr. O'Brien also testified that a team of Exelon employees met with PHI employees who spent weeks examining different ideas. Mr. O'Brien stated that he was “more than happy to commit to within six months a plan that looks at what we can do year by year.”³⁷ Mr. Alden also testified that Exelon was not in a position to commit to annual reliability performance standards without an engineering analysis.³⁸

³⁴ Applicants Ex. 96 at 2-5.

³⁵ *FirstEnergy* Order at 52-53.

³⁶ TR Vol. VI at 1657-1658 (O'Brien).

³⁷ TR Vol. VI at 1410-1413 (O'Brien).

³⁸ TR Vol. VI at 1660 (Alden).

The Commission, Staff and intervenors reasonably relied upon the sworn statements of Mr. O'Brien and Mr. Alden. For the Commission's consideration of the March 16 Settlement, Exelon elected not to have Mr. O'Brien or Mr. Alden testify. Instead, Mr. Dickerson testified regarding the new reliability commitments. Mr. Dickerson was specifically asked about Mr. O'Brien's and Mr. Alden's previous testimony:

Q: Is it your understanding that either Mr. Alden or Mr. O'Brien told this Commission previously that what constrained Exelon from providing, committing to annual SAIFI and SAIDI targets were budget constraints?

A: No. What Mr. Alden and Mr. O'Brien testified to is that they were not going to commit to yearly specific targets without a more detailed analysis of what we had. What I believe informed their answer was that they were operating under the assumption of the budgets that we had proposed at the time.³⁹

Mr. Dickerson is correct that Mr. Alden and Mr. O'Brien refused to commit to yearly specific targets. However, Mr. Dickerson's belief regarding what may have informed their answer is not evidence and is not relevant. The Applicants made the strategic decision not to have their previous witnesses proffer testimony in support of the March 16 Settlement. While it is the Applicants' prerogative regarding which witnesses to present in support of their case, the Commission cannot accept a self-serving reinterpretation of a witness's testimony when the Applicants have failed to call that witness. Mr. O'Brien and Mr. Alden swore under oath that Exelon could not commit to yearly specific targets without a more detailed analysis of the PHI Utilities' circuits. The Commission should find that the Applicants lack credibility on this issue.

Moreover, the Commission is now in the process of determining the new minimum reliability standards. The Commission will hold a hearing in May to consider the reliability

³⁹ TR Vol. XIII at 3797-3798 (Dickerson).

standards proposed by the utilities for 2016 to 2020.⁴⁰ In that proceeding, the Commission will explore the costs and benefits of setting reliability standards as proposed by the utilities or may set the reliability standards at some other level. At this juncture, the Commission cannot determine if the Applicants' reliability commitment actually is an incremental increase over the reliability standards that the PHI Utilities would be subject to in the absence of the acquisition.

Thus, the Commission should find that Applicants evidence regarding their ability to meet the revised reliability standards is not credible and that the revised reliability commitment provides no benefit to ratepayers.⁴¹

V. The Commission Can Institute a Utility of the Future Proceeding Without Applicants' Commitment.

Pursuant to Commitment 39,⁴² the PHI Utilities will make a filing with the Commission requesting that the Commission initiate a proceeding to examine opportunities to transform the electric distribution grid. The PHI Utilities also will request formation of a collaborative stakeholder process. Exelon will provide \$500,000 for the Commission to retain a consultant.

This commitment does not require the PHI Utilities to file a proposed plan or strawman proposal. The required petition could simply be a one-page letter. Moreover, the Commission

⁴⁰ "Notice of RuleMaking Session," *Revisions to COMAR 20.50 – Service Supplied by Electric Companies – Proposed Reliability and Service Quality Standards*, RM43 (March 3, 2015).

⁴¹ With or without this commitment, the Commission will review the PHI Utilities reliability related expenses and, to the extent the Commission finds these expense to be prudent, the PHI Utilities will recover those investments in their rates.

⁴² Applicants Ex. 96 at 39.

does not need the PHI Utilities to petition to open this type of proceeding. The Commission has the discretion to open a proceeding whenever it finds that such a proceeding is necessary.⁴³

Furthermore, the Commission currently has a petition before it requesting that the Commission open a “Utility 2.0” investigation. On March 5, 2013, Mr. Roger Berliner, Chair of the Montgomery County Council’s Transportation, Infrastructure, Energy & Environmental Committee filed a petition requesting that the Commission open a proceeding to examine the future of Maryland’s grid.⁴⁴

The Commission should find that this commitment provides meager benefits at best.

VI. The Arrearage Forgiveness Commitment Will Have Little Impact.

Pursuant to Commitment 19,⁴⁵ the PHI Utilities shall forgive all residential customer accounts receivable over three years old as of the date of the merger closing.

Information provided by Exelon establishes that this commitment will benefit very few customers. In Pepco’s service territory, only 206 customers have arrearages that are three years old or older. Similarly, in the Delmarva service territory, only 112 customers have arrearages three years or older.⁴⁶ Importantly, it is impossible to determine how many of these customers are low-income customers. According to Mr. Timmerman, this commitment will largely be meaningless for low-income customers because these customers receive arrearage forgiveness through EUSP.⁴⁷ Environmental Intervenors fully support programs which improve the affordability of electricity for low-income customers, including arrearage forgiveness programs.

⁴³ Moreover, with regard to the \$500,000 for a Commission consultant, Applicants failed to provide any evidence establishing the adequacy of this funding.

⁴⁴ Petition to Open Investigation into Utility 2.0—The Future of Maryland’s Grid (March 5, 2013), Mail Log # 145759.

⁴⁵ Applicants Ex. 96 at 20.

⁴⁶ Staff Ex. 31, Applicants Response to MEA Data Request 7-62.

⁴⁷ TR Vol. XVII at 5040 (Timmerman).

However, those programs must be designed to offer concrete aid to those customers. The Commission should find that this commitment provides little value to PHI Utilities' customers.

VII. The Energy Efficiency Commitments for Prince George's County and Montgomery County Create Redundant, Inefficient and Unnecessary Administrative Processes and Programs.

Exelon will provide approximately \$5 million per year for three years to Prince George's County to fund energy efficiency programs. The funding will be used for Prince George's County's energy star certification and green leasing program as well as and the transforming neighborhoods initiative comprehensive energy audit, retrofit and clean-energy program. For both of these programs, the participants must first apply to the applicable EmPower Maryland program. Prince George's County will submit the program plans to the Commission for approval and will also file annual reports with the Commission.

Similarly, Montgomery County will receive approximately \$6 million a year for three years to fund a green bank, an energy coach network and expanded weatherization programs. Montgomery County also will submit the programs for Commission approval and file annual reports with the Commission.

Essentially, the Counties will simply duplicate already existing EmPower Maryland programs, creating more review work for the Commission without any added benefit. Furthermore, this Commission does not have jurisdiction over the Counties. As such, if the Counties disagree with the Commission's directives regarding the energy efficiency programs, the counties can chose to implement the programs contrary to that directive.

Moreover, while Mr. Khouzami asserted that the Counties could administer these programs in a fast manner,⁴⁸ the evidence provided by the Counties demonstrates that they are unprepared to utilize these funds. For example, Mr. Coffman provided a list of Montgomery County's programs⁴⁹ but the vast majority of these programs would require at least 10 months to get up and running and many may take as long as 18 months.⁵⁰ In contrast, the EmPower Maryland programs currently are operational and the additional funding could be used immediately.

Empower Maryland is a statewide program that affects all utilities. Consideration of any issues affecting these programs should occur in the EmPower Maryland proceedings. Any additional energy efficiency funding should be considered in the context of those programs. By opening the process beyond the Counties, the Commission will get a variety of proposals. However, the Commission should require that any energy efficiency improvements exceed the current program targets and outweigh the harms that the acquisition will cause.

VIII. Several Commitments Demonstrate that Exelon's Acquisition of the PHI Utilities Is Not in the Public Interest.

Several of the commitments simply express Exelon's willingness to cooperate with other stakeholders in an attempt to resolve issues:

- Commitment 19 provides that Exelon will ensure that appropriate representatives from the PHI Utilities engage in discussions with NCLC to consider in good faith the development of a mutually agreeable Arrearage Management Program;⁵¹

⁴⁸ TR Vol. XIV at 4093 (Khouzami).

⁴⁹ Settlement Testimony of Eric Coffman at 9-10.

⁵⁰ TR Vol. XV at 4526-4532 (Coffman). It should be noted that Montgomery County does not use any cost effectiveness test. TR Vol. XV at 4532.

⁵¹ Applicants Ex. 96 at 20.

- Commitment 22 provides that the Applicants will cooperate with Staff and other stakeholders to develop and file a distinct set of milestones as to how they will accelerate and enhance PHI Utilities EmPower Maryland plans;⁵²
- Commitment 27 states that Exelon will cooperate with Staff and other stakeholders to determine the funding and other resources necessary to meet future resiliency targets that may be established by the Commission;⁵³
- Commitment 34 provides that Exelon will consult with the Clean Chesapeake Coalition on an ongoing basis regarding the Sediment Study and Exelon's will present the study's findings to the Clean Chesapeake Coalition. In addition, Exelon will continue its discussions with the Department of the Environment, the Department of Natural Resources and other stakeholders on issues relating to the licensing of Conowingo Dam;⁵⁴
- Commitment 39 requires the PHI Utilities to participate in the collaborative process associated with the grid-of-the-future proceeding;⁵⁵ and
- Commitment 44 provides Pepco will provide to Montgomery County and to Prince George's County an analysis of transmission or distribution-system options, and associated costs, to enhance the reliability and resiliency of electric service to the WSSC Potomac Water Treatment Plant.⁵⁶

When asked why these commitments should be viewed as benefits, Applicants' witnesses repeatedly stated that now the Commission can force the Company to take actions that they actually should be taking under the normal course of business. For example, in discussing Commitment 44 (WSSC) Mr. Dickerson was asked why this was not something the Company was doing during the normal course of business. Mr. Dickerson replied that "Now we shine the light on it and the Commission can say, hey, you said you were going to do this, where is this."⁵⁷ Similarly, with regard to Commitment 34 (Sediment Study), Mr. Khouzami stated that "So there's a firm commitment that Exelon will continue to reach out, work with the Clean

⁵² *Id.* at 25.

⁵³ *Id.* at 26.

⁵⁴ *Id.* at 28-29.

⁵⁵ *Id.* at 39. This is Mr. Khouzami interpretation of Commitment 39. TR Vol. XIV at 4117 (Khouzami).

⁵⁶ Applicants Ex. 96 at 41.

⁵⁷ TR Vol. XIV at 3966 (Dickerson).

Chesapeake Coalition. It's now a commitment subject to jurisdiction by the Commissioners. So if it's not happening, you have a body that you can petition that can take action if we're not adhering to this commitment."⁵⁸

In describing these commitments, Mr. Khouzami stated that "commitment 9 puts all of these commitments under the jurisdiction and consents jurisdiction to the Commission to enforce them. The way I read this is saying we have to participate in a collaborative process. If not, the Commission has the right to inquire why we're not and obviously take action if we're not."⁵⁹

The uncooperative attitude embodied in this list of commitments amply illustrates the concerns of intervenors regarding Exelon's expected actions if the Company controls 80 percent of the electric distribution in Maryland. Many of the actions expressed in these commitments are simply standard business practices for most regulated entities. Participation in the regulatory process is a minimum requirement for a utility, it is not a benefit to customers. A good corporate citizen would not need a bright spotlight or an enforceable commitment to perform the very basic actions that a company should willingly take.

Most disconcerting is Exelon's treatment of the Clean Chesapeake Coalition. This Coalition consists of 10 Maryland Counties.⁶⁰ These elected officials requested a meeting with Exelon on April 7, 2014. Exelon failed to meet with these officials until February 27, 2015, after the Coalition filed testimony objecting to the proposed acquisition.⁶¹ It certainly is not in the public interest to expand the reach of a company whose executives refuse to meet with elected officials unless there is some form of veiled threat from a regulatory body.

⁵⁸ TR Vol. XIV at 4172 (Khouzami).

⁵⁹ TR Vol. XIV at 4117 (Khouzami).

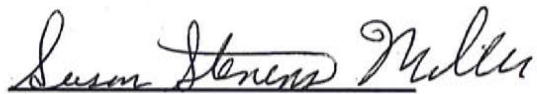
⁶⁰ Allegany, Caroline, Carroll, Cecil, Dorchester, Frederick, Harford, Kent, Queen Anne's and Wicomico.

⁶¹ TR Vol. XIV at 4172.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Environmental Intervenors respectfully request that the Commission reject the March 16 Settlement and the Applicants' request that Exelon be authorized to acquire PHI.

Respectfully submitted,



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Dated: May 1, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, I electronically filed a copy of the foregoing Post-Hearing Settlement 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
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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