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May 27, 2015

VIA ELECTRONIC MAIL and ELECTRONIC DOCKET

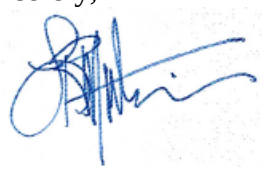
Ms. Brinda Westbrook,
Commission Secretary
Public Service Commission of the District of Columbia
1333 H Street, NW, 2nd Floor, West Tower
Washington, DC 20005

Re: Formal Case No. 1119 In the Matter of the Merger of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and new special Purpose Entity, LLC

Dear Ms. Westbrook:

Enclosed for filing please find the Post Hearing Reply Brief from the Grid 2.0 Working Group in in Formal Case No. 1119. If you have any questions regarding this filing, please contact me.

Sincerely,



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Enclosure

cc: Service List

BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE MERGER OF EXELON CORPORATION, PEPCO HOLDINGS, INC., POTOMAC ELECTRIC POWER COMPANY, EXELON ENERGY DELIVERY COMPANY, LLC AND NEW SPECIAL PURPOSE ENTITY LLC	**}**	**FORMAL CASE 1119**

GRID 2.0 WORKING GROUP
POST-HEARING REPLY BRIEF

GRID 2.0 Working Group (GRID2.0) hereby submits this post-hearing reply brief in accordance with the PSC's rule 15 DCMR §§ 137, 138 (2015) and the PSC's order Tr. 3596:4-15, of April 22, 2015.

I. INTRODUCTION

Exelon Corp. ("Exelon"), Pepco Holdings, Inc. ("PHI"), Potomac Electric Power Company ("Pepco"), Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC ("Joint Applicants") applied to the DC Public Service Commission (PSC) for approval of the acquisition of PHI by Exelon on June 18, 2014. GRID2.0 asks the PSC deny the Joint Applicants' application because:

1. The Joint Applicants have not demonstrated the acquisition is in the public interest;

2. The application does not provide any substantive, tangible benefit to ratepayers in the District of Columbia; and

3. The application does not demonstrate substantive, tangible protection of environmental quality, nor conservation of resources.

GRID2.0 represents the concerns over the effect that the merger will have on the planning of smartgrid improvements to the District's system, including but not limited to distributed generation, demand side management, and variable rates. GRID2.0 asserts that smartgrid improvements benefit ratepayers directly through improved reliability, enhanced efficiency leading to reduced energy consumption and consequent savings, increased clean energy source options, and the opportunity to participate in locally produced energy generation. GRID2.0 also contends that smartgrid improvements are equally important to advancing the identified environmental outcomes in public interest factor #7. GRID2.0 has argued that approval of the proposed merger will result in a dampening of planning for and investing in the smartgrid and distributed generation because the interests of Exelon do not align with objective goals of smartgrid outcomes – enhanced efficiency, distributed generation and demand-side management. The Joint Applicants have not substantively responded to these assertions, other than to deny or dismiss them; and have not articulated how their merger will advance enhanced efficiency leading to reduced energy consumption and consequent savings, increased clean energy source options, and the opportunity to participate in "home-grown" generation.

II. RESPONSE TO JOINT APPLICANTS INITIAL POST HEARING BRIEF

A. Competition is damaged by the merger

The Joint Applicants argue that because Pepco has exited the retail competition market, the merger causes no loss of retail competition between BGE and Pepco. But Mr. Hempling testified that absent the merger, Pepco might have re-entered; and that this threat of re-entry provides a discipline to the market that the merger eliminates. The Joint Applicants described Mr. Hempling's concerns as "speculation." But it is not "speculation" to say that the company with the largest name recognition, the most knowledge of the service territory's characteristics,

the best access to traditional sources of financing and the most experienced work force would find it profitable to enter a market that others find attractive and then enter the market. What is "speculation" is to say such an obvious move would never occur, and then treat this merger's elimination of that competitive possibility as irrelevant to the public interest.

Joint Applicants also assert that the level of retail competition is sufficient to discipline the market without Pepco anyway. But there is no persuasive evidence to support that assertion. Merely citing a large number of retail participants, while ignoring facts about market shares, entrant viability, and length of entrants' tenure, does not prove that entry is easy, let alone competition being "vibrant." Adjectives are not substitutes for facts.

Further, Applicants misunderstand the uniqueness of across-the-fence rivalry. The point is that customers make comparisons based on information they have. They are more likely to have information about adjacent companies than about distant companies. So two adjacent companies, if unaffiliated, will worry about those comparisons because one might lose customers to the other--or lose revenues at their commission because their commission is made aware of local customers' concerns based on those comparisons. In contrast, with two adjacent companies controlled by a common holding company, the holding company can control the performance of the two so that both are kept at a level where one is not "showing up" the other. That level is not necessarily the level that would be achieved if each was motivated to show up the other. By eliminating the separateness we lose the pressure each one feels to better the other.

B. Articulating a public interest vision is not changing the rules

The Joint Applicants accuse Mr. Hempling of changing the rules. But the "rule" is that the public interest comes first. Applicants talk of "fairness," but their definition of the term is

self-serving. Since the PSC has not made clear its own merger vision, they say, it is only "fair" that Applicants should be able to impose theirs--regardless of the effects on the public.[1]

What is truly "fair" is to place the public interest first. That the Commission would define the public interest at the end of the proceeding rather than at the beginning will disappoint shareholders who hoped that their vision would prevail. However, it is never "not fair" to make the public interest the priority. In any event, all that the shareholders would forego would be the acquisition premium that, as Mr. Hempling explained in his testimony, was a windfall anyway. So Applicants' understanding of "fair" is that PHI shareholders should receive an unearned premium while the public interest is harmed--and that this outcome is "fair" only because it is what the PHI shareholders bet their stock purchases on.

The Joint Applicants talk of "benefits" to shareholders. But as Mr. Hempling explained on the last afternoon of the hearing in response to a question from the Chair, in considering shareholder interest the PSC must consider only their legitimate, legal interest, not their *pecuniary* interest. Their legitimate, legal interest is in having a reasonable opportunity to earn a fair return on capital invested in utility service. The shareholder interest in receiving a premium for selling a utility is not one protected by regulatory law.

C. Joint Applicants are Dismissive of Public Interest Factor #7

The Joint Applicants mischaracterize Grid 2.0 witness Martin's testimony, stating he proposes "that the Merger should be rejected until the PSC establishes a new standard "to determine what protection of environmental quality and conservation of natural resources means

[1] The Public Service Commission's view as articulated by Commissioner Fort in her questions to Mr. Hempling at the hearing appears tantamount to making the tautological claim that "The Public Service Commission has no choice but to approve the merger because the Joint Applicants proposed it." This construction goes far beyond simply abnegating the PSCs discretion making a determination, or proposing that the Joint Applicants' proposal trumps the public interest, it seem to sweep away any notion whatsoever that the public interest plays a role in the PSC's determination of whether to approve or not to approve the proposed merger.

in the context of public interest."[2] What Mr. Martin asserts in his direct testimony, and is reasserted in the GRID2.0 Initial Post Hearing Brief, is that "there is no known precedent for explicitly including this criterion [public interest factor #7] into a utility commission formal case, [and] there is a need for the PSC to determine what protection of environmental quality and conservation of natural resources means in the context of public interest."[3] Mr. Martin and GRID2.0 then constructively recommend that the relevant concerns are two conditions primarily:
#3. Use of limited natural resources for energy production; and conversely, the conservation of those resources through energy conservation;
#4. Production of greenhouse gases from energy production; and conversely, the prevention of greenhouse gas pollution, and resulting global warming, through energy conservation use of renewable energy.

Mr. Martin asserts the widely held conviction that there is a need for both business practice and public policy to reflect the reality of and risks from global warming; and that "any business decisions, or regulatory actions that do not make this a central criterion and evaluative factor should be considered imprudent and fail the test of meeting the public interest – no matter the other compensating factors that may be presented." The environmental factor of public interest should be understood to be a necessary element, not subject to compensatory balancing or compromise with other elements. [4] Mr. Martin then identifies a reasonable approach for the PSC to then consider how to establish criteria for public interest factor #7.

"The conservation of natural resources and protection of the environment are reasonable well-articulated by District's statutes, regulations, and policies. As well as anything, the

[2] Joint Applicants Initial Post Hearing Brief at pg. 22.
[3] GRID2.0 Initial Post Hearing Brief at pg. 23
[4] GRID2.0 Ex. (C) 3:16-21; 4: 1-22

measurable goals and objectives of those statutes and policies give substance to public interest factor #7, as it applies to the conservation of natural resources and preservation of environmental quality. Thus, the PSC should consider these laws and policies when interpreting the intent of factor #7. Among the more significant are:

1. Renewable Portfolio Standard
2. Clean and Affordable Energy Act
3. Community Renewable Energy Act
4. Sustainable DC Goals"[5]

The Joint Applicants twist the preceding excerpt from the GRID2.0 Initial Post Hearing Brief, and instruct the PSC: "Mr. Martin's standard is not the standard that applies in the District of Columbia, by statute or PSC precedent, and should be rejected."[6] The actual intent of the testimony (and brief) excerpt was to offer a rationale for addressing a public interest factor that is being exercised for the first time in a DC PSC formal case. In effect, the Joint Applicants are dismissive of any proposed standard by which to evaluate the protection of environmental quality and conservation of natural resources (Public Interest Factor #7); arguing disingenuously that it "is not the standard that applies in the District…" Clearly, in the absence of precedent, the existing standard is no standard at all, which is insufficient to protect or conserve anything, and thus requires the vacuum to be filled with some rational strategy. A rational strategy is not perceived by the Joint Applicants to be in their interest. It is not in their interest because they have no substantive response to public interest factor #7, and thus they would prefer a vacuous statement without measurable criteria.

[5] GRID2.0 Initial Post Hearing Brief at pgs. 24-25
[6] Joint Applicants Initial Post Hearing Brief at pg. 22.

Factor #7 must be satisfied in a way that is responsive to the conservation of resources through energy conservation and reduced production of greenhouse gases from energy production, and through energy conservation and the use of renewable energy; and it should translate into the requirement that the merger serve to *advance* these objectives. Exelon has offered nothing that could provide *any* environmental benefits for District customers.[7]

The Joint Applicants' witnesses identified two commitments that relate to conservation of natural resources or preservation of environmental quality:[8]

> 1. Exelon will establish a Customer Investment Fund of $33.75 million to be used across Pepco's District of Columbia service territory for rate credits, or directed toward assistance for low income customers, energy efficiency initiatives, and/or other programs designed to benefit Pepco's District of Columbia customers in a manner determined by the PSC;[9]
>
> 2. PHI and Pepco will maintain and promote existing energy efficiency and demand response programs.[10]

Like the empty pledges made by Exelon in response to public interest factor #1, these commitment are also empty and cannot support a decision by the PSC that factor #7 has been affirmatively addressed. Commitment #1 should not be considered in any way sufficient because it does not assert any specific and positive outcome for public interest factor #7. These funds could just as easily be devoted to low income assistance, and result in no affirmative benefit to factor # 7. Commitment #2 only demonstrates the extent to which Exelon is unprepared to make any substantive commitment to advancing smartgrid strategies for DC. "[T]hey're really aren't any" Pepco-sponsored energy efficiency programs, "[s]o maintaining those programs is really

[7] Morgan, Tr. 2193:18-22; *infra* at 37-42.

[8] Crane, Tr. 442:4-14, 445:20-446:6.

[9] JA Ex. (4A)-2 at 1.

[10] JA Ex. (4A)-2 at 4.

not providing any benefit. . . ."[11] In reality, the full promise of demand-side management that exists on the rate-payers' side of the meter is in the province of the utility. Substantive energy efficiency opportunity exists with smart metering, in which the Joint Applicants are mute. Their inability to address public interest factor #7 intelligently demonstrates their inability to be responsive to the protection of environmental quality beyond sound-bites and rosy promises that are neither measurable nor accountable.

D. The Joint Applicants are antagonistic toward renewable power and efficiency

The Joint Applicants simply ignore the opportunities to transition from the early style of centralized generation, which characterizes the Exelon business model, to smartgrid strategies for distributed generation, automatic load redistribution, and a host of demand-side management strategies. GRID2.0 therefore asserts that they, by default, reject them. Consequently, the public's interest in a modern, efficient, reliable and versatile distribution grid is left unaddressed; and public interest factor #7 is unserved.

However, the Joint Applicants are not only ambivalent, but antagonistic toward the goals of a smartgrid. This is clearly demonstrated by comments made by its CEO, who perceives distributed generation as a "threat" that will "cannibalize" the parent's nuclear generation business.[12] Further evidence that cannot be disregarded exists in Exelon's corporate *Guiding Principles* that expressly oppose virtual net metering, community generation, any "subsidies" for supply resources, and any customer generation facilities that exceed on-site needs.[13] In effect,

[11] Rigby, Tr. 818:6-819:1; *see* Crane, Tr. 521:15-522:9 (admitting in response to the Chair's questions that he was aware that energy efficiency programs in the District were run by the Sustainable Energy Utility, not by the utility, but that he was not aware that energy efficiency programs are determined by the Sustainable Energy Utility, not the Commission); Shane, Tr. 3098:4-3099:7 (the Sustainable Energy Utility, not the utility, develops the District's energy efficiency programs); OPC Cross Ex. 37 at 1 ("Pepco does not offer energy efficiency programs.").

[12] Crane, Tr. 439:7-12, 440:2-11; DCG Cross Ex. 14 at 99, 106, and 107 of 178

[13] Crane, Tr. 455:5-9, 457:13-18; DC SUN Conf. Ex. (A)-4 at 2 of 15

articulating opposition to many dimensions of the smartgrid that would benefit environmental quality and serve ratepayer interests. Also noted, is another Exelon document, their September 2014 *Comprehensive Strategic Plan*, that acknowledges that Exelon's generation fleet of merchant nukes and fossil fuel power plants was being "squeezed" by "increasing renewables penetration and the increasing distributed generation," and "the increasing pace of game-changing leapfrog technologies."[14] Competition from renewable generation is identified as a "threat" to its merchant generation business. Exelon warned that mounting renewable penetration and distributed generation are "changing the supply stack, resulting in the conventional baseload squeeze." The Strategic Plan concluded "that cannibalization of our core business is the most obvious risk as distributed generation and microgrids both *reduce load growth* and provide energy that could be served by Exelon's centralized nuclear power generation fleet." What more evidence is necessary to demonstrate that Exelon is constrained by its corporate-wide business plan from fostering the very conditions that the District has sought to nurture through law and policy?

GRID2.0 asserts that the Exelon acquisition of Pepco would leave District ratepayers worse off in the protection of environmental quality and conservation of natural resources. This is a result of both conflicts of interest and motivations that are incompatible. The advance of smartgrid and the adoption of technology that will permit and promote demand side management and distributed generation of electricity in DC, leading to energy conservation and local generation of electricity will be poorly served by the acquisition. On these grounds GRID2.0 requests that the application, as submitted by the Joint Applicants be denied.

[14] Crane, Tr. 429:18-431:17, 431:20-432:14.

If the acquisition proceeds, all evidence points to Exelon's corporate guiding principles – shown to be antithetical to the District's energy policies, as directing a retreat from the progress DC has made in shaping a clean and efficient energy future. Numerous Advisory Neighborhood Commissions ("ANCs") adopted resolutions urging disapproval, and five Councilmembers have weighed in against this transaction, all citing environmental concerns.

Only if provisions can be incorporated into the proposal that establishes performance standards that ensure the new entity will meet DC goals for energy efficiency, use of renewable power, and design and investment into smartgrid technology, and stipulates that the DC utility will be separated from the parent corporation, and spun off into a separate entity should expressed conditions not be met within an established timeframe, can the application be modified to be in any way considered protective of the public interest.

Respectfully submitted,

Larry Martin, Secretary
GRID 2.0 Working Group