December 7, 2015

Betty Ann Kane, Chairperson
Joanne Doddy Fort, Commissioner
Willie L. Phillips, Commissioner
Public Service Commission of the District of Columbia
1333 H St. N.W., Suite 200, West Tower
Washington, D.C. 20005

Re: Proposed Settlement between Pepco-Exelon and Some Intervenors in FC1119

Dear Chairperson Kane and Commissioners Fort and Phillips:

We write to urge you to reject the recently proposed settlement in Formal Case No. 1119, the application for approval of Exelon Corporation’s acquisition of Pepco Holdings, Inc. (PHI). We have had a chance to review the settlement terms, and it is our belief that the acquisition as proposed remains contrary to the public interest. Many of the alleged benefits of the settlement are either Exelon complying with existing law, agreeing to standards below those already met by Pepco, or short-term benefits that in the long-term have detrimental costs to ratepayers and the District of Columbia.

As the PSC said in its final order rejecting the acquisition:

[T]his decision is one of the most significant decisions that the Commission will ever make. Unlike a rate case, this decision will affect a permanent change in the ownership and control of the District’s local electric distribution company. A rate case decision lasts only until the next rate case. This decision is forever.¹

Pepco has been the District’s energy distributor for over 100 years. If this deal goes through as proposed, Exelon will become the largest company of its kind in the nation, and will, in all likelihood, hold that powerful position over the District and the region for decades to come. We will trade our local distribution company for a massive corporation whose revenues are tied to volumetric electric sales from large generation assets—and the trade will, effectively, be permanent and irreversible. The terms of the proposed settlement may provide some benefits to the District government in next year’s budget and temporarily defer harm to residential ratepayers over the next 3 to 5 years, but they do not address the long-term harms and risks inherent in this permanent acquisition. For these reasons, we believe the PSC should stand by its earlier decision and not approve the proposed merger.

**Benefit for Exelon Equals Risk for District Ratepayers**

Exelon’s interest in acquiring Pepco is, at its very foundation, in conflict with the public interest of ratepayers. Exelon is struggling economically, and the bulk of its profits are tied to a risky business—nuclear energy generation.² It needs to diversify and needs to acquire healthy, reliable sources of revenue to balance its otherwise risky portfolio. That’s where Pepco comes in. Pepco is a highly regulated distribution company entitled by law to a reasonable rate of return on its operations and investments. This reasonable rate of return is currently a robust 7.65 percent, translating to over $100 million in profit annually in the District alone.³

Buying Pepco is certainly a good long-term deal for Exelon—worth paying significantly above market price and certainly worth comparatively smaller payments to the District government and local business groups to buy their agreement to the deal. To Exelon, these payments are short-term investments in a long-term asset that makes their company more stable. For the District ratepayers, the payments are short-term benefits exchanged for the long-term risk of having their electric utility become part of a company that needs stabilizing.

In addition to this basic concern about the financial health of our electric utility and the impact that could have on ratepayers, there are many other risks inherent in

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³ *Formal Case No. 1103*, Order No. 17424, ¶566ii, p. 224 (March 26, 2014).
this deal. As outlined below, Exelon has a poor reputation with its customers compared to other utility companies, and the company is an environmental dinosaur that supports and lobbies for policies that are directly contrary to the sustainable, environmentally forward-thinking initiatives of the District.

**PSC's Standard of Review**

District law requires that the PSC may approve this settlement only if it finds that the acquisition is in the public interest, and as the makers of this proposal, Pepco and Exelon bear the burden of proof. Exelon claims that to meet this burden, it need only show a “direct and tangible” benefit, and that its one-time payments and temporary job commitments satisfy this requirement. Exelon also claims that the PSC should not consider potential or unproven harms in making its determination. These assertions could not be more wrong. It is true that the PSC must find that there is a direct and tangible benefit to ratepayers, but a public interest determination also requires the PSC to evaluate and weigh potential long-term risks and benefits of the acquisition on ratepayers and the public. This is clear from the PSC's own findings regarding what it must consider in making the determination: financial health of the companies, reliability of service, risk associated with Exelon’s nuclear operations, ability to effectively regulate the new entity, effects on markets and competition, and effects on environmental quality. All of these are necessarily long-term considerations.

The proposed settlement does not adequately address the long-term risks inherent in this deal—the risks that the PSC identified in its rejection of Exelon's previously offered terms, particularly those risks from the "inherent conflict of interest" between Exelon's ownership of generation and the policies and goals of the District. It is incumbent upon the PSC to look closely and in detail at every feature

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4 D.C. Code § 34-504.
6 *Id.* at 6.
7 *Formal Case No. 1119*, Order No. 17597, p. 61, ¶124. The PSC considers the “effects of the transaction on: (1) ratepayers, shareholders, the financial health of the utilities standing alone and as merged, and the economy of the District; (2) utility management and administrative operations; (3) public safety and the safety and reliability of services; (4) risks associated with all of the Joint Applicants' affiliated non-jurisdictional business operations, including nuclear operations; (5) the Commission’s ability to regulate the new utility effectively; (6) competition in the local, retail, and wholesale markets that impacts the District and District ratepayers; and (7) conservation of natural resources and preservation of environmental quality.”
8 Order No. 17947 at 3-4, ¶10.
of this proposed settlement. One of Exelon's public relations strategies has been to present claims and generalities to make the settlement appealing by contrasting the settlement terms with the previously offered terms—in other words, pointing how much "better" this takeover offer is than the previous offer. But just because an offer is better, that doesn't make it good; a better offer doesn't address the actual question at stake—whether this acquisition is in the public interest of District residents. The PSC should not allow this public relations blitz or the short-term thinking of the settling parties to alter its correct decision that, as a whole, the acquisition is not in the long-term interest of the District and its ratepayers.

Short-Term Thinking in the Proposed Settlement Terms

A simple reading of the settlement terms illuminates the short-term thinking of the Mayor and the other settling parties. Generally, the new terms sprinkled throughout the settlement consist primarily of one-time payments to settling parties and some commitments to do things that are already happening, were poised to happen, or that benefit Exelon.

Payments to Ratepayers, Settling Parties, and Nonprofits

Acquiring the District's electric utility will give Exelon a permanent, long-term benefit in the form of regulated utility income of over $100 million per year. The settling parties agree to this in exchange for one-time payments of about $39.6 million for residential ratepayers and another $39 million in payments to the District government and other settling parties.\(^9\)

Exelon and the Mayor have made much of the so-called "rate freeze" in this deal. This is disingenuous and misleading. Exelon has not agreed to freeze rates for any amount of time. Rather, they've agreed only to offset the residential rate increases that they expect to receive in the next three years in an amount up to $25.6

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\(^9\) Exelon is buying Pepco at a $2.5 billion premium and receiving an annual rate base of $7 billion in return. For the District’s portion of this, $1.3 billion, at Pepco’s current guaranteed rate of return (7.65%), Exelon will bring in over $100 million per year as a result of this acquisition.

\(^10\) The settlement includes a provision directing $6.75 million through District energy efficiency programs to two of the settling parties—the National Consumer Law Center and the National Housing Trust. Formal Case No. 1119, Motion of Joint Applicants to Reopen the Record in Formal Case No. 1119 to Allow for Consideration of Nonunanimous Full Settlement Agreement and Stipulation, or for Other Alternative Relief, Exhibit A, p. 5, ¶¶9(c) (October 6, 2015) ("Nonunanimous Settlement Agreement").
million, plus a guaranteed payment of $14 million. After those funds dry up, District ratepayers will be on the hook for the increased rates. This is akin to signing a balloon mortgage, or having your rent permanently increase, but getting the first month at the old price.

Similarly, the Mayor touts an additional $39 million in payments to the District government as a public benefit. These payments ostensibly go to various funds intended for energy, environmental, or workforce development programs; but, increased amounts in those funds mean only that the Mayor can offset the funds she would have allocated for those purposes next year, freeing up money to pursue other priorities. Moreover, mayors frequently sweep or reprogram special purpose funds into the District’s General Fund when budget pressures arise. There is nothing in the agreement that requires the settlement funds to supplement rather than supplant the special purpose funds’ regularly allocated annual budgets. Therefore, it is most accurate to consider this money as a lump sum payment to the District government. This lump payment may give the Mayor more money to move around in the coming year, but adding $39 million to the District’s more than $7 billion budget is unlikely to result in any significant public benefit in the long-term.

Exelon makes much of its commitment to maintain Pepco’s levels of charitable giving for at least 10 years, and in a particularly cynical move, Pepco and Exelon created insecurity among local nonprofits by suggesting that Pepco’s charitable giving might discontinue if the acquisition is not approved, spurring groups that might not otherwise involve themselves in lobbying before the PSC to support the takeover. This maneuver is highly questionable not only in terms of ethics, but also veracity, as was pointed out by the Office of the People’s Counsel in its briefs. A commitment to continue making donations that Pepco is likely to continue making itself cannot be construed as a significant new public benefit.

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11 This equals about $154 per ratepayer, or only $26 more than the previous offer of $128 per ratepayer that the PSC rejected.
12 In this year’s fiscal year 2016 budget legislation, for example, the Mayor swept $5 million from the Sustainable Energy Trust Fund and $0.5 million from the Energy Assistance Trust Fund into the General Fund, two funds which could receive funds under the proposed settlement. See Letter from the Public Service Commission to Council Chairman Phil Mendelson re: Bill 21-158, “Fiscal Year 2016 Budget Support Act of 2015” (June 9, 2015).
13 See Madden, Patrick, WAMU 88.5, How Nonprofits are Getting Caught Up in Battle over the Pepco-Exelon Merger (October 16, 2015), available at http://wamu.org/programs/metro_connection/15/10/16/power_of_the_purse_charities_get_caught_up_in_battle_over_pepco.
14 In fact, Pepco testified in the merger proceedings that there was generally an “upward trend” to Pepco’s giving over the last few years, and that Pepco had no intention of cutting back. Formal Case No. 1119, Post-Hearing Reply Brief of the Office of the People’s Counsel, p. 31 (May 27, 2015).
Jobs

Exelon and the Mayor also point to commitments to increase or maintain District jobs for five years as a benefit of the deal. This, too, is misleading. The merger protects District jobs at Pepco for up to five years, but not District jobs at Exelon or Pepco Holdings, Inc. This sleight of hand means the merger could be net jobs negative for the District much sooner than Exelon implies. Indeed, Exelon has not made any long-term commitments regarding jobs in the District, even if five years could be considered “long-term.” When one reads the employment terms of the settlement, all of the commitments boil down to the settlement term in paragraph 20: “As a result of the commitments in Paragraphs 14-19 [all of the employment level commitments], Exelon, PHI, and Pepco commit that the Merger’s impact will be net jobs-positive for the District through at least January 1, 2018.”¹⁵ This is only a two-year commitment for job numbers to stay the same or higher—after that, job numbers can fall below current levels through reductions at Exelon or Pepco Holdings’ existing District offices. Further, there is no enforcement provision related to even this two-year commitment. In its final decision denying Exelon’s previously-offered terms, the PSC found that the economic effect of the acquisition “is almost certain to trend negative within two or three years as the protections for job retention are lifted at PHI and Pepco.”¹⁶ Surely, the paltry commitments in this settlement cannot alleviate the PSC’s concerns about employment effects.

Reliability

Exelon’s commitments regarding reliability in the settlement are not significant enough to change whether this acquisition is in the public interest. In its motion to reopen the record, Exelon notes that the settlement includes increased reliability commitments by Exelon beyond what Pepco is required to achieve per the PSC-imposed Electric Quality of Service Standards (EQSS)—made up of the System Average Interruption Frequency Index (SAIFI)¹⁷ and the System Average Interruption Duration Index (SAIDI).¹⁸ Commitments to increase reliability above the EQSS as well as penalties in the event that they weren’t met were already in Exelon’s previous offer that was evaluated and rejected by the PSC. Pepco’s reliability

¹⁵ Nonunanimous Settlement Agreement at 6, ¶20.
¹⁶ Order No. 17937 at 71, ¶165.
¹⁷ SAIFI is the average number of customer interruptions over the course of a year.
¹⁸ SAIDI is the average outage duration over the course of a year, usually expressed in minutes per customer served.
metrics have been improving year-over-year from 2011 to 2014, and they already exceed the EQSS—this is due to increased oversight and enforcement by the PSC in recent years, which could simply continue without any help from Exelon. There is no reason to think this situation would change, as the Office of the Peoples’ Counsel pointed out when evaluating these commitments.\footnote{See Formal Case No. 1119, Initial Post-Hearing Brief of the Office of the People’s Counsel, p. 88-89 (May 13, 2015).} Further, to the extent the settlement reliability commitments are above Exelon’s previous offer, they still start out significantly below what Pepco is already achieving. As of 2014 Pepco had already reduced its SAIFI to .69, and reduced its SAIDI to 96.6.\footnote{Public Service Commission 2014 Annual Report, p. 54-55, available at http://www.dcpsc.org/pdf_files/reports/AnnualReport2014.pdf.} The settlement commitments for 2016 are 0.91 for SAIFI and 118 for SAIDI—worse metrics than what Pepco achieved in 2014. A commitment to meet standards below those that are already being achieved, or close to those already likely to be achieved based on current investment and trends, cannot be considered a public benefit.

Additionally, Exelon has an extremely poor reputation with its customers. According to a May 2015 survey by the American Customer Satisfaction Index, Exelon has one of the worst customer satisfaction scores among energy companies.\footnote{Nonunanimous Settlement Agreement at 14, ¶56.} It would be a step backwards for the District to allow Pepco to be taken over by a company so disliked by its customers just as the PSC has begun to hold Pepco to higher standards.

\textit{Ring-fencing}

Ring-fencing provisions cannot add public benefit to the District, as the entire purpose of the provisions is to attempt to mitigate the risk of harms that could otherwise result from the deal—harm including loss of local control, anti-competitive market effects due to the same company being both the District’s purchaser of electricity and a generator selling electricity to the District, and risk to Pepco’s financial health and credit ratings that could ultimately mean higher electric rates for ratepayers. The very existence of the ring-fencing provisions is an acknowledgment that there is a significant risk of harm present in the deal. The settlement also makes no significant changes to the ring-fencing terms that were

previously offered. Further, as in its previously rejected offer, Exelon only promises not to petition the PSC to change the ring-fencing provisions for five years.

**Environmental Concerns**

Exelon argues that it addresses environmentalists’ concerns about the impact of the takeover in the settlement by adding some payments to District funds, committing to developing 7 to 10 MW of solar energy and four ratepayer-funded microgrids, and purchasing some wind power. One-time payments to existing environmental District program funds are, as discussed above, payments to the Mayor that will likely not significantly affect the District’s existing levels of program activity. The proposed wind purchase and solar and microgrid developments sound like environmental benefits on their face, but upon examination, these alleged public benefits are simply promises to do something Exelon is already required to do or development projects from which Exelon stands to turn a profit—and, in the case of the microgrids, ratepayer-funded profits, at that.

Exelon’s solar and microgrid development commitments also do not add significant value to this takeover proposal. Exelon commits only to becoming a player in markets that already exist in the District. It takes advantage of the settlement to secure support for development deals for itself. There is no added benefit to the public for Exelon agreeing to do something that the private sector could do. The District government, for example, recently signed an agreement with a local solar company and certified business enterprise to finance and install 11.4 MW of solar power on the roofs of various District buildings in the coming year. This was a competitive solicitation for which they received no less than 11 offers.23 Exelon’s proposal would actually take business away from the District’s local solar companies. The proposed microgrid development, similarly, would crowd out emerging local microgrid companies that might otherwise compete for the business. Not only is there no added public value to Exelon throwing its hat into the ring to compete with our many local solar developers and emerging microgrid market, but there are actually negative effects on local industry and markets due to the fact that Exelon will have an interconnection advantage that local companies don’t have. Further, the settlement provides that the microgrid developments will be funded by ratepayers, putting local companies who don’t have this source of funding at an even greater competitive

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disadvantage.\textsuperscript{24} For these reasons, the District’s environmental groups and the local solar industry oppose these settlement terms.\textsuperscript{25} These groups—the experts in this field—do not perceive these terms as a public benefit.

Exelon also promises to “solicit offers” to purchase some wind power in the settlement.\textsuperscript{26} But as an energy supplier, Exelon is required to either purchase a minimum amount of green energy or to pay a fee under the District’s renewable portfolio standard, as well as other states’ renewable portfolio standards. Essentially, this settlement term simply means that Exelon will obey laws it has to comply with anyway. Moreover, if Exelon doesn’t receive offers it likes, it reserves the right, in the settlement, to make no award and try again “at a future date.”\textsuperscript{27} Agreeing to possibly buy some wind energy in efforts to abide by current law cannot be considered a public benefit.

In the settlement, Exelon agrees to adhere to existing regulations regarding solar interconnection, and to shorten Pepco’s response time to interconnection operation applications. These terms are not a public benefit, because agreeing to abide by the law is not a public benefit, and interconnection response time is an issue that the PSC had recently begun to address, already, through Formal Case No. 1050. As recently as July, the Commission held a hearing in that case to discuss delays in Pepco’s processing of interconnection standards.\textsuperscript{28} An enforceable deadline to reply to interconnection operation applications could easily be imposed by a PSC rulemaking amending the existing solar interconnection regulations. Further, the settlement terms include no enforceability provisions related to these promises, so there is no penalty for Exelon if response times are not improved.

The settlement terms purporting to address concerns about the environmental effects of the deal do not create significant public benefit, but more importantly, any benefit they do provide doesn’t address or make up for the fact that Exelon is a committed opponent of policies that encourage distributed generation, which includes solar and most renewables. Exelon opposes distributed generation because its centralized generation business model is stuck in the past, and distributed generation

\textsuperscript{24} Nonunanimous Settlement Agreement at 31, ¶128.
\textsuperscript{25} Even Washington Gas, which hopes to compete in the District’s renewables market, is concerned about the anti-competitive market effects of these terms. See Formal Case No. 1119, Petition to Intervene Out of Time of WGL Energy Systems, Inc., and WGL Energy Services, Inc., p. 4-5, ¶5-7 (October 16, 2015).
\textsuperscript{26} Nonunanimous Settlement Agreement at 32, ¶130.
\textsuperscript{27} Nonunanimous Settlement Agreement at 32, ¶130(b).
\textsuperscript{28} See Formal Case No. 1050, Order No. 17910 (June 15, 2015).
is the future of energy. This is why Exelon has opposed net metering and policies favorable to renewable energy in Illinois, where its headquarters are,\textsuperscript{29} and why Exelon lobbied against the federal wind energy production tax credit,\textsuperscript{30} for which they got kicked out of the American Wind Energy Association (AWEA).\textsuperscript{31} Exelon testified in the merger proceedings that, in accordance with its corporate guidelines, it would lobby against progressive policies like community solar and net metering in the District.\textsuperscript{32} Exelon lobbies against any form of "subsidies" for distributed generation not because it opposes subsidies for any principled reason, but because distributed generation threatens its core business model. This is illustrated by the fact that Exelon lobbies for subsidies for its nuclear power plants.\textsuperscript{33}

\textit{Conclusion: The Proposed Settlement Is Not In the Public Interest}

The long-term risks of allowing Pepco to be taken over by Exelon are clearly outlined in many of the Intervenors' original briefs, including those of the District government. They include the loss of local control, harm to local markets, being subject to increased lobbying against renewable energy policies, and the risk to ratepayers of allowing their local distribution utility to become a small, financially stable subsidiary being used to offset Exelon's much larger, riskier investments in the increasingly unprofitable nuclear power generation business. The risks inherent in this takeover are the harms that PSC Chairman Kane acknowledged when presenting the PSC's final decision on the proposed acquisition: "[t]he public policy of the District is that the local electric company should focus solely on providing safe, reliable and affordable distribution service to District residences, businesses and


\textsuperscript{30} Exelon has been successful in this effort—the wind production tax credit was allowed to expire in 2012 before being reinstated in 2013, and expired again at the end of 2014. Wind installations dropped by 92% in 2013 due to the 2012 expiration. See Trabish, Herman, Utility Dive, 2015 \textit{Looks Grim for Wind Energy. How Will the Industry Adapt?} (December 18, 2014), available at http://www.utilitydive.com/news/2015-looks-grim-for-wind-energy-how-will-the-industry-adapt/345786/.


institutions. The evidence in the record is that the sale and change in control proposed in the merger would move us in the opposite direction.”34

Pepco and Exelon have spent many thousands, perhaps millions, of dollars on a public relations campaign to convince the public and the PSC that this settlement deal is good for the District. But saying it’s so, and repeating it loudly, doesn’t make it true. The PSC should not let the public campaign surrounding this settlement cause it to waver in its previous determination that, when long-term effects are considered, this takeover is not in the public interest. It is not enough that this deal is “better” than the previous offer. The temporary cost defrayment for ratepayers and one-time payments offered by Exelon to settling parties do not address the long-term concerns of the PSC, and neither do the short-term commitments regarding jobs and illusory benefits related to renewable energy. Aside from these alleged benefits, the settlement terms do not significantly change the terms of the original offer. The PSC’s determination that this acquisition is not in the public interest was correct, and remains correct.

Sincerely,

Mary M. Cheh
Councilmember, Ward 3

David Grosso
Councilmember, At-Large

Elissa Silverman
Councilmember, At-Large

Charles Allen
Councilmember, Ward 6