BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

IN THE MATTER OF THE MERGER OF
EXELON CORPORATION AND PEPCO
HOLDINGS, INC.

) Case No. 9361
)

INITIAL POST-HEARING BRIEF OF
THE STATE OF MARYLAND AND THE
MARYLAND ENERGY ADMINISTRATION

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March 3, 2015
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The State of Maryland and the Maryland Energy Administration (collectively, State) submit this Initial Post-Hearing Brief in 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 (Pepco) and Delmarva Power & Light Company (Delmarva). The proposed acquisition introduces substantial potential harms to Pepco and Delmarva customers and to the State as a whole, which are not subject to meaningful mitigation. It likewise fails to offer adequate, tangible, incremental benefits to customers. The State urges the Commission to deny the application submitted by Exelon and PHI (collectively, Applicants).

INTRODUCTION

Exelon CEO Crane framed the issue at the heart of this proceeding: “the question the Commission should ask itself is whether Pepco and Delmarva Power customers and the State of Maryland will be better off with the Merger than without it.” Ex. JA-9 at 4:5-7. After twelve (12) days of hearings, the receipt of testimony from dozens of witness, and the development of a record that spans several thousand pages, the answer to this question is clear: Maryland and its ratepayers will not be “better off” if the merger is completed—unfortunately, the opposite is likely true. The merger enjoys no support from the State or numerous affected stakeholders. This is not surprising—other than a $54 per customer rate credit, there is nothing in this nearly $7 billion transaction that is of tangible benefit to customers or Maryland’s economy. Worse, the transaction poses significant potential harms, and Applicants’ commitments fail to mitigate them. Indeed, implementation of certain of the commitments could make things worse than would otherwise be the case.
We set forth the State’s primary concerns below, focusing on the issues raised by our witnesses, while recognizing that others have raised separate and substantial concerns:

**Reliability.** Applicants promise to improve reliability in the Pepco/Delmarva territories, subject to a spending cap—actions which will allegedly provide almost $500 million in economic value in the form of reduced outages. Evidence adduced at trial shows that these claims are false. Contrary to the assumption of its own expert witness, Exelon revealed that it has no “engineering plan” supporting its reliability targets, and will need at least six months in the field to ascertain what reliability improvements can be achieved, by when, and at what cost. Needed reliability projects may be delayed, and reliability may suffer as Exelon brings itself up to speed.

Worse, unlike pending proposals from Pepco and Delmarva, and contrary to Commission regulations, Exelon’s reliability commitment includes no targets for 2015, 2016, or 2017, and no annual targets for 2018, 2019, or 2020. In fact, Exelon’s proposal would not bind it to any reliability target until the end of 2020, roughly five years after consummation of the merger. A Pepco or Delmarva customer experiencing a power outage in the meantime is unlikely to care whether Exelon can meet a “three-year average” at the end of 2020. And, if Exelon fails to meet its commitment, then the Company—not the Commission—gets to determine when any penalty is imposed, based on when Exelon files a rate case.

Even if this regimen were acceptable, Exelon’s commitment is based on internal annual goals that are in some instances indisputably less stringent than the annual standards already proposed by Pepco and Delmarva, rendering the commitment a harm rather than a benefit. And whatever can be achieved will come with an unknown price tag. Exelon’s budget “commitment” is no more than a promise to seek Commission approval to raise rates even further if Exelon
needs more money than it thought—which is likely given that Exelon is yet to perform what it considers to be essential engineering studies. Rather than taking responsibility for these unknown risks, Exelon expects customers, not shareholders, to bear them.

*Competition and Innovation.* Post-merger, Exelon will control service to 80% of the State’s ratepayers. Internal documents show that Exelon plans to operate its distribution utilities to protect the Company’s massive, multi-billion dollar investment in unregulated generation (including its economically challenged nuclear plants) by seeking to control the pace of distributed energy resource (DER) penetration in retail service territories. The State’s testimony demonstrates that Exelon has both the incentive and, through its utilities, the ability to stifle the implementation of innovative, customer-driven DER, including resources that may improve service reliability. And the contrast could not be more stark: pre-merger, PHI was developing a “Utility 2.0” plan, but that effort is now on hold; Exelon-affiliate Baltimore Gas & Electric (BGE), on the other hand, possesses not a single piece of paper concerning this initiative. The stakes are high: the competitive issues raised by the merger involve the future of Maryland’s electric industry at a time of transformative change. That future is better served by Pepco and Delmarva offering proposals and insights uncompromised by the need to protect Exelon’s merchant generation. As the industry moves toward the distribution “utility of the future,” Maryland’s regulated utilities should be focused on embracing—not undermining—pro-consumer reforms. Applicants’ commitments ignore this issue entirely, and there is no meaningful way to mitigate the attendant harms.

*Employment.* Staff’s analysis shows that the merger would mean substantial job losses in Maryland. Exelon responded by promising to hire 110 new Pepco and Delmarva union field workers. Unfortunately, this promise lacks substance—Exelon merely plans to fill positions that
are likely to become vacant as older utility workers retire. While perhaps appropriate, there is no showing that this will result in an incremental increase in the workforce, or that Exelon will bear any additional cost.

**Affordability.** Applicants commit neither to cutting nor freezing rates, and the reality is that, with or without the merger, rate hikes will be sought to fund needed improvements. Applicants claim merger "synergies" will (eventually) lead to relatively smaller rate increases, but offer no guarantees, and the costs of whatever reliability improvements are pursued following approval are unknown. While acknowledging that BGE customers are suffering rate hike "fatigue," neither Applicants' commitments nor Exelon's internal documents promise changes. Exelon's focus is on increasing profits and offsetting the heavy losses being incurred by its unregulated generation.

**The public interest.** Applicants are asking for a lot—approval to acquire near-monopoly control of the provision of distribution service to Maryland retail's customers—but offer in return an inadequate package of benefits, and nothing that mitigates the significant harms the transaction poses. Certain of the "commitments" have been revealed to be hollow, and none of them would mitigate potential harms to competition and innovation.

**The bottom line.** As demonstrated by the considerable and sustained governmental and stakeholder opposition to the proposed merger, the public interest would not be served by approving this transaction, particularly at this critical juncture in the development of emerging energy policy and industry transformation. The proposed merger should be rejected.
ARGUMENT

I. THE PROPOSED MERGER CANNOT BE APPROVED UNLESS THE COMMISSION FINDS BENEFITS AND NO HARM TO UTILITY CONSUMERS, AND CONSISTENCY WITH THE PUBLIC INTEREST

Taken together, Sections 6-105(g)(3)(i) and 6-105(g)(4) of the Public Utilities Article of the Annotated Code of Maryland (PUA) require the Commission to deny approval of a proposed merger absent findings that the transaction: (1) is consistent with the public interest, convenience, and necessity; (2) will benefit utility consumers; and (3) will not harm consumers.\(^1\)

The merging companies bear the burden of meeting each of these statutory standards. PUA § 6-105(g)(5). “If the transaction fails any one of those tests, [the Commission] ‘shall issue an order denying the application.’” Exelon/CEG at 33 (quoting PUA § 6-105(g)(4)).

The Commission can approve a transaction through the imposition of conditions, PUA § 6-105(g)(3)(ii), but its conditioning authority is limited. “[T]he General Assembly is not vesting us with *carte blanche* ‘blue pencil’ authority to renegotiate deals to fit a specific defined vision.” CEG/EDF at 32 (citing Holloway *v.* Faw, Casson & Co., 78 Md. App. 205, 230-39, 552 A.2d 1311, 1324-28 (1989), *aff’d in part, rev’d in part*, 319 Md. 324, 572 A.2d 510 (1990)).

The “authority to condition an approval order is important and non-trivial, but requires [the Commission] to work within the framework of the Transaction before us.” *Id.*

*Showing of No Harm.* As Section 6-105 seeks to protect against acquisitions that “could result in harm to the customers of the public service company,” PUA § 6-105(b)(1)(ii), the determination that a proposed transaction will result in “no harm to consumers” is the threshold

inquiry. PUA §§ 6-105(g)(3)(i), 6-105(g)(4). The Commission must first ensure that the transaction is “structured not to harm [Pepco or Delmarva] ratepayers” before it may turn its attention to customer benefits and the broader statutory standard of the public interest. CEG/EDF at 33-34. To meet this fundamental standard, the Commission must “ensure that the Transaction does not create new harms or risks or add to those [Pepco or Delmarva] ratepayers already face.” CEG/EDF at 41. The statutory standard does not allow for the Commission to compare a transaction’s potential new risks with its claimed benefits. The Commission must instead either impose appropriate conditions to protect ratepayers from any increased risk, or where that cannot be done, deny the transaction. FE/Allegheny at 54.

**Showing of Benefits.** The transaction cannot proceed absent a separate finding that it provides “benefits ... to consumers.” PUA § 6-105(g)(4). Benefits must flow to Pepco and Delmarva ratepayers directly, “in their capacity as [utility] customers, not just their share of the Transaction’s impact on the public at large.” CEG/EDF at 2. There are no “mathematically rigid standards” for measuring benefits; instead the Commission considers “each transaction on its own terms, and in the context of the parties and circumstances at the time” of the transaction. FE/Allegheny at 46. Benefits cannot be contingent or intangible. Instead, the Commission “look[s] at whether the Merger will bring certain, measurable and incremental benefits to ratepayers.” Exelon/CEG at 37. Where no such benefits exist, the Commission must impose appropriate conditions. CEG/EDF at 38.

**Showing of Public Interest.** The Commission must make a separate finding that the transaction is consistent with the public interest. See CEG/EDF at 32. If the proposed merger “cannot be made consistent with the public interest ... through conditions, the statute instructs that [the Commission] ‘shall issue an order denying the application.’” Id. at 32-33. The statute
enumerates factors that the Commission must consider in evaluating a transaction’s consistency with the public interest, PUA § 6-105(g)(2), but this list is not exhaustive. Id. at 25-27. While “there is no one absolute form” that the merger “must take to pass public interest muster,” the Commission’s role in ensuring that the transaction is in line with “[the] broader concept of greater good” is “important and non-trivial.” Id. at 32. Therefore, where necessary within the scope of its conditioning authority, the Commission must condition the merger to meet the statute’s “public interest, convenience and necessity” standard. Where not possible, the merger must be denied. Exelon/CEG at 33; PUA § 6-105(g)(4).

II. THE MERGER CREATES UNDUE RISK OF HARDS NOT SUBJECT TO MITIGATION

A. The Merger Creates an Undue Risk of Reduced Reliability and Increased Cost

The Commission must consider the impacts of the proposed merger on “reliability [and] quality of service.” PUA § 6-105(g)(2)(vi). Consideration of this issue is central to the proposed merger. And the extensive record developed here shows beyond reasonable dispute that approval of the merger raises an undue risk of reduced reliability and increased cost for Delmarva and Pepco customers.

The Commission’s RM 43 regulations require Delmarva and Pepco to achieve annual System Average Interruption Frequency Index (SAIFI) and System Average Interruption Duration Index (SAIDI) targets, and the Commission has set these targets for 2015. Absent the merger, Delmarva and Pepco have proposed to achieve substantial, continued, annual improvements in SAIFI and SAIDI from 2016 to 2020 as set forth in their proposals in the RM 43 proceeding. Ex. OPC-11. PHI and Exelon reasonably believe that absent the merger Delmarva and Pepco will achieve these targets.
In their “Commitment 2,” Ex. JA-9, CMC-2, Applicants commit that Pepco and Delmarva will “continue to implement their current plans to improve system reliability and to improve upon each of their reliability targets.” Exelon also commits to achieve, by 2020, certain SAIFI and SAIDI targets for Pepco and Delmarva, “based on a three-year historical average calculated over the 2018-2020 period.” Exelon agrees to a financial penalty if it fails to reach these targets. In testimony, Exelon claims to have added an implicit commitment: to achieve this performance at a cost no greater than the current Pepco and Delmarva capital and operations and maintenance budgets for reliability.2

As will be demonstrated infra, this commitment is not an incremental improvement over the status quo, and is in some ways a step backwards. Specifically:

• Contrary to RM 43, Exelon refuses to commit to achieving any annual SAIFI or SAIDI target for either Pepco or Delmarva; Commitment 2 contains an inferior, three-year average ending in 2020. Tr. 1409:20-1410:11 (O’Brien). The commitment also contains no SAIFI or SAIDI targets—annual or otherwise—for the years 2015 to 2017. The status of the Pepco and Delmarva proposed SAIFI and SAIDI targets, were this commitment to be approved, is unclear.

• Mr. O’Brien (head of Exelon Utilities), and his subordinate, Mr. Alden, who will oversee the Delmarva and Pepco post-merger reliability efforts, Tr. 1740:8-11, testify that Exelon needs at least six months, post-merger, to conduct a circuit-by-circuit analysis to ascertain what annual SAIFI and SAIDI targets can be achieved and at what cost. Tr. 1412-1415 (O’Brien); Tr. 1657-59 (Alden). It is possible that during that time, planned capital projects will be put on hold, and reliability will suffer (or not improve as quickly as it otherwise would).

• The records shows that, post-merger, Delmarva’s SAIDI performance under Exelon will be significantly worse in the years 2016, 2017, and 2018 than Delmarva’s expected performance absent the merger.

• Exelon’s promise to reach targets within current budgets is riddled with exceptions, and amounts to a pledge to seek rate relief when and as needed.

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2 Tr. 880:20-881:17 (Crane).
The outcome of Exelon’s field analysis is unknown, but may result in Exelon proposing either (a) reliability performance inferior to what is to be achieved absent the merger; or (b) equal or better reliability performance, though at significantly greater cost.

These are complete and sufficient reasons for rejecting the merger.

1. Delmarva and Pepco Can Achieve Acceptable Reliability Performance Absent the Merger

In compliance with the Commission’s RM 43 regulations, both Pepco and Delmarva have proposed improved and improving SAIFI and SAIDI targets for each of the years 2016-2020, and are awaiting Commission action. Ex. OPC-11. These filings were made on March 4, 2014, nearly two months prior to Applicants’ April 30, 2014 announcement of the proposed merger. The filings included testimony from William M. Gausman, PHI Senior Vice President, Strategic Initiatives stating (in support of Pepco’s proposed targets for the years 2016-2020) that “[t]he Company created reliability targets [for Pepco] to achieve first quartile performance by 2020,” using the Commission’s methodology and based on the IEEE benchmarking process based on the five-year average, 2008 through 2012. Id. (Pepco filing at 3). The proposed Delmarva targets, which are intended to provide a meaningful improvement in reliability for the next five years, are aggressive but achievable with reasonable investment and “position the Company to continue its improvement trend towards first quartile performance.” Id. (Delmarva filing at 4).

The Delmarva and Pepco RM 43 SAIFI and SAIDI targets for 2016-2020 were not selected haphazardly: they are based on a “full engineering analysis,” Tr. 1538:19-1539:2 (Dickerson), informed by past performance and causal outage assessments, and vetted through multiple levels of the organization. Tr. 1537-1539 (Dickerson). Applicants’ commitment aside, Delmarva and Pepco continue to support their proposed targets, and have not sought to amend their RM 43 filings. Id. at 1542:18-20.
The record evidence is overwhelming that PHI and Exelon both reasonably believe that Delmarva and Pepco will achieve the RM 43 proposals, absent the merger:

- Mr. Gausman’s RM 43 testimony is that Pepco “will continue to meet the reliability standards through sustained investment in the distribution system,” Ex. OPC-11 (Pepco filing at 4), and that Delmarva’s proposed SAIFI and SAIDI standards for the years 2016-2020 “are aggressive but achievable.” Id. (Delmarva filing at 4).

- PHI witness Dickerson testified that it was “[a]bsolutely” his reasonable belief that Pepco and Delmarva would achieve their proposed RM 43 objectives for the 2016-2020 time period. Tr. 1514:1-6.

- PHI CEO Rigby testified that the utilities’ spending plan was developed with the expectation of exceeding the proposed reliability targets. Tr. 1101:22–1102:7.

- Exelon states that it has no reason to believe that Pepco and Delmarva would achieve different SAIFI and SAIDI standards than they have previously committed to absent the merger. Exs. MEA-22, 23.

- Witness Alden testified that it remained his understanding that Pepco and Delmarva would achieve their proposed RM 43 targets absent the merger. Tr. 1654:18–1655:3. Witness Crane confirmed the same point during his deposition. Ex. MEA-1 at 29:7-30:1.

Since the initiation of the RM 43 proceeding, Pepco and Delmarva have substantially improved their reliability performance and implemented reliability enhancement plans. See, e.g., Ex. MEA-28 at 9-13. A key component of Pepco’s prior reliability performance was its poor vegetation management practices. Pepco has implemented a four-year vegetation management practice that Staff witness Rafferty describes as an industry best practice, Tr. 3301:7-13, and which has resulted in a “dramatic decline” in outages. Tr. 3302:12. And while Delmarva did not meet the Commission’s reliability standards in 2013 or 2014, it has proposed a distribution-level corrective plan, and an additional $23 million in transmission system improvements that are also expected to provide reliability benefits. Ex. OPC-11 (Delmarva

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3 Pepco has outperformed the RM 43 Standards in every year since their adoption. Tr. 1133:14-17.
filing at 7). As with Pepco, PHI’s efforts at Delmarva are “working, indicated by the 57% reduction in feeders’ SAIFI and 63% reduction in SAIDI.” Id. (Delmarva filing at 10).4

Mr. Crane offered a contrary view, stating his “understanding” that Pepco and Delmarva are “not going to make the RM 43 numbers for SAIDI.” Tr. 995:1-4. This stray assertion cannot be squared with Mr. Crane’s contrary statements at his deposition, let alone the remainder of the record. Mr. Crane is plainly mistaken on this point.

2. Exelon Will Not Commit to Achieving Delmarva’s and Pepco’s Proposed RM 43 Annual Reliability Standards or Any Other Annual Targets

Applicants’ witnesses have refused to commit to achieving Delmarva’s and Pepco’s proposed RM 43 annual reliability standards. Tr. 1409:20–1410:11 (O’Brien). See also Tr. 1612:19-22 (Dickerson). Although witness Alden’s testimony seems to contain such a commitment, at the hearing he only “committed to working our plan to meet the three-year average commitment at the end of the period between 2018 and 2020.” Tr. 1717:17-19.5 Witness Alden had no good answer to Commission questions that acceptance of Commitment 2 would provide Pepco and Delmarva a pass on meeting RM 43 targets for the years 2015 through 2017, but that conclusion is inescapable. Exelon proposed no reliability commitment for those years, annual or otherwise, and refused to pledge to meet Pepco’s and Delmarva’s RM 43 proposals.

While witness Alden supported Exelon’s 2018-2020 average reliability commitment by presenting (in rebuttal testimony) internal annual goals for each of those years, he admitted that

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4 See also Tr. 1558:3–1560:9 (Dickerson); Tr. 1578:4-5 (witness Dickerson reports that “PHI has been doing real well and moving in a good direction”).

5 Mr. Dickerson confirmed this position. Tr. 1504:21-23 (“Post-merger, there’s not a commitment to meet a yearly reliability target”). And while Mr. Rigby testified that, post-merger, the likelihood of Pepco and Delmarva hitting their targets is “significantly improved,” Tr. 1223:7-9, the record is to the contrary.
these internal goals are not commitments. Tr. 1657:1-10. See also Ex. MEA-23. Nor are they based on a sound engineering analysis: Mr. Alden was not comfortable from an engineering perspective with the suggestion that Exelon agree to a Commission-imposed condition to meet the Exelon internal annual goals. Tr. 1668:6-15. His reluctance to do so is understandable. Mr. Alden was unaware of basic facts concerning the Delmarva system, Tr. 1669:18-1670:16, had never stepped foot in its system territory, Tr. 1670:17-20, and acknowledged that he was unable to compare the system architecture of BGE to Pepco Maryland. Tr. 1671:2-5. Witness O’Brien made clear his unwillingness to piggyback off the engineering work that Pepco and Delmarva had done to date. Tr. 1414:12-1415:20.

Whatever their value, Exelon’s internal goals are, in certain circumstances, less stringent than what Pepco and Delmarva have proposed themselves, absent the merger. In particular, Exelon’s internal 2018 goal for Delmarva SAIDI is significantly worse than Delmarva’s RM 43 proposal and represents a glide path that would not meet the utility’s proposed figures for 2016 and 2017. Tr. 993:16–996:20 (Crane); Tr. 1720:10-1722:10 (Alden). Mr. Crane’s response to these facts was only that he would “go back and look at that.” Tr. 995:17-18. The internal goals also show an unusually deep decline in Delmarva’s SAIDI from 2018 to 2019. Witness O’Brien could not explain this rapid improvement, Tr. 1422:1-13, while Mr. Alden termed meeting it “a

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6 Exelon presented no internal annual goals for the years 2015 through 2017, and apparently has none. As Mr. Alden explained, the “commitment is the last three years. I don’t want to keep debating that.” Tr. 1719:5-6. See also Tr. 1721:21-1722:10 (“provide us … six months post-close … that would offer us enough time to … figure out whether … we can get [Delmarva SAIDI] to your point within the glide point”).

7 There was evident confusion among Applicants’ witnesses as to whether an engineering plan had been prepared. Witness Tierney testified to her “understanding” that there is an “engineering plan” that provides the basis for the reliability numbers, but it was not given to her, nor did she ask for it. Tr. 373:8-16. While perhaps a sensible assumption, the fact is that no such plan exists.
challenge,” Tr. 1688:2, and could not identify anything specific that would be done to make this happen. Tr. 1687:20-23.  

Worse, even if Exelon convinces the Commission to abandon RM 43’s annual standards, and move to a three-year average commitment, and to allow the merged company to avoid setting—or meeting—annual targets between now and 2020, the payoff at the end of the road is underwhelming. According to witness Alden, if Pepco met Exelon’s 2020 metrics today, it would be “second quartile, if not the top of the third quartile.” Tr. 1713:17-18. Delmarva would be either third quartile or top of the fourth quartile. Tr. 1713:19-20. Implementation of Pepco’s own pending RM 43 proposals would purport to take the company to first quartile by 2020. Ex. OPC-11 (Pepco filing at 3). While the difference may be explainable by examining which companies are used to set their quartiles, it is not possible to conclude that reliability will be measurably improved if Exelon’s Commitment 2 is accepted.

In short, despite hundreds of pages of pre-filed and hearing testimony, Exelon’s witnesses could not explain why the Commission should approve the merger when the record evidence shows that, under Exelon’s ownership, Delmarva’s performance will be worse than it would otherwise be, and that the anticipated post-merger performance of both utilities for the years 2015-2017 is at best unknown. Indeed, a potential outcome may be a decline in performance while Exelon focuses on conducting its independent engineering assessment and developing its revised reliability plans and related budget for each of the utilities.

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8 “The problem ... we have is ... in Delmarva ... [we] need to get under the hood and really look at that business before we can plan or commit to anything that exceeds those goals on an annual basis.” Tr. 1720:3-9.

9 Mr. Alden testifies that there is no industry-wide data set that is common to all utilities and can be used for benchmarking, Tr. 1707:9-12, and that the list of utilities against which Exelon’s utilities are measured was developed internally by Exelon. Tr. 1754:6-12.
3. Exelon’s Three-Year Average Commitment Upends the RM 43 Regimen

By definition, and design, Exelon’s proposed three-year average reliability commitments for the time period 2018-2020 are inferior to Pepco’s and Delmarva’s proposed annual targets. The Commission requires annual SAIFI and SAIDI targets. Exelon’s less stringent three-year average targets would accord Pepco and Delmarva flexibility in meeting their commitments that goes beyond what is permissible under the prevailing regulatory regimen. As explained by State witness Mara:

The use of a three-year average to measure performance means that the average can be achieved even if performance in one year is poor, so long as it is compensated by improved performance in another year. The Commission has instead required Pepco and Delmarva to meet annual SAIFI and SAIDI standards. I do not see that a commitment to achieve a three-year average standard is beneficial to Pepco and Delmarva customers, when the Commission has already decided to hold them to more exacting annual standards.

Ex. MEA-28 at 6.

Because Exelon has made no reliability commitments for the years of 2015-2017, there is no demonstrated, post-merger glide path as to how Exelon intends to get from here to there, i.e., from the consummation of the merger to the 2018-2020 time period. Exelon’s internal annual supporting goals cannot properly be credited given: (a) the lack of underlying engineering analysis; and (b) Exelon’s refusal to commit to achieving these annual values. In any event, those annual goals represent both worse performance and seemingly unrealistic levels of anticipated annual improvement. Although Exelon attempts to compare its three-year average

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10 As explained by witness Dickerson, the “three-year average is to protect ourselves from operational volatility.” Tr. 1501:20-21.
commitment with Pepco's and Delmarva's annual RM 43 commitment, that comparison is a flawed-at-the-outset contrast between apples and oranges. Ex. MEA-28 at 6-7.  

4. The Budget "Commitment" Is an Illusion

One of the transaction's major selling points is Exelon's supposed commitment to meeting the three-year averages while sticking to a guaranteed budget cap. But the budget commitment is an illusion. It is absent from the commitment list, Tr. 914:4-10, showing up instead only in the Applicants' written testimony. Tr. 880:20-881:23 (Crane). But adding the cap to the list hardly solves the problem. The description of Exelon's pledge in testimony is significantly different than the characterization of the "commitment" on the witness stand, where the budget limitation more or less disappeared.

It became clear at hearing that, post-merger, Exelon understands itself as free to seek rate recovery for reliability expenditures in excess of the budgetary commitment. Tr. 884:13-888:15 (Crane). To call this a commitment to a dollars "cap" is to lapse into Orwellian doublespeak. No Applicant witness could explain how this differed in any meaningful way from the status quo ante going forward and the normal rate recovery process. Tr. 1737:13-1738:2 (Alden); Tr. 1615:1-1617:3 (Dickerson); Tr. 2549:17-2553:15 (Khouzami). According to witness Alden:

I think what we've committed to is that that's what we're committed to spend to hit those reliability targets. And if by some chance we were unable to do that, it would follow through the normal rate process where we would have that dialogue with the Commission and they would be free to decide whether or not those were recoverable costs or not.

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11 "Satisfaction of a multi-year average commitment is fundamentally different than satisfaction of a multi-year annual commitment, which erodes the comparability of the PHI baseline and the Joint Applicants' commitments." Ex. MEA-30 at 5:17-20.
Tr. 1701:16-23. Worse, the failure to meet this commitment—whatever it may be—has no consequences. Exelon incurs no financial penalty if it exceeds the reliability budget “cap” in order to meet its three-year averages. Tr. 1750:7-23 (Alden).

In addition, witness Dickerson explained that there are exceptions to the “commitment” for changes in law, regulation, or extreme weather, Tr. 1582:2–1583:4, which apparently includes any unforeseen event that caused Pepco and Delmarva to spend more than was anticipated (short of mismanagement or negligence). Tr. 1598:13-18. In other words, typhoons in the Pacific that cause an increase in cable prices constitute an exception to the “cap,” entitling the utilities to increased recovery beyond the budget. Tr. 1500:5-7 (“Any weather that could impact the cost of services beyond which would have informed our budgets when we made them.”).12 Beyond these substantial infirmities, it is unclear how the Commission could police compliance, given that the reliability budget is one part of an otherwise uncapped overall budget, Tr. 880:20-881:4 (Crane), affording the utilities the opportunity to increase their reliability expenditures under the guise of addressing other, uncapped budget items.

5. Exelon Witness Tierney’s Calculations of the Value of the Three-Year Average Reliability Commitment as Customer Benefits Are Contrary to Law and Otherwise Unreliable

Exelon witness Tierney testified that the fewer and shorter outages that will supposedly result from implementation of Exelon’s three-year average reliability commitment are worth roughly $453 million to Pepco and Delmarva customers. Tr. 30:2-10. In addition, she performed an alternative “sensitivity” analysis, under a different set of assumptions, showing

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12 The limitless nature of the exception was underscored by Mr. Dickerson: “I don't mean this to be facetious, a storm could happen somewhere on the planet and not a single customer in Delmarva or PEPCO Maryland's service territory could experience an outage but it could damage a manufacturing plant and ... drive the cost of those materials up 25 or 30 percent in this hypothetical.” Tr. 1532:15-23.
instead some $39 million in customer reliability benefits. Tr. 56:15-18.\textsuperscript{13} Witness Tierney’s analysis is flawed from the outset because its premise is not credible. As shown above, far from constituting a customer “benefit,” Exelon’s commitment is a source of potential harm; it’s implementation will likely result in worse reliability at an unknown and potentially greater cost to consumers than the status quo ante. Assuming arguendo that the Commission were to find otherwise, witness Tierney’s benefits valuation testimony still remains at odds with Commission precedent, and should be ignored.

The key flaw in witness Tierney’s valuation is that she sought to value as a merger “benefit” a commitment that, as a matter of law, cannot be so characterized. Witness Tierney assumed that Exelon’s reliability commitment was accompanied by a budget guarantee. Tr. 46:15-47:7; Tr. 276:5-7 (“they’re committed to doing that within the budgets and the time frames”); Tr. 372:10-373:7. As explained above, that assumption is wrong. As there is no budget guarantee, Exelon’s reliability commitment cannot constitute a customer benefit within the meaning of PUA § 6-105. The Commission found that FirstEnergy’s proposed merger reliability commitment did not constitute a customer benefit because “there may be a considerable cost to achieve that commitment, costs that presumably Potomac Edison would expect to recover from ratepayers, and that may or may not be worth it.” \textit{FE/Allegheny} at 52.

“[R]eliable electric service is a core function of an electric distribution company … customers pay for, and already should be able to count on, a reliable system, so offering reliable service now adds no new value from this Merger.” \textit{Id.} at 53. That is the case here: the Applicants have

\textsuperscript{13} Notwithstanding the 93% difference between her sensitivity analysis and her original calculation, witness Tierney continued to advocate her original calculation. Tr. 379:2-9. Both calculations are meritless and cannot serve as proxies for the value of other alleged benefits. \textit{Cf. id.}
made no showing that, post-merger, Pepco and Delmarva will provide better reliability at a lower cost than they would without the merger.

In any event, witness Tierney’s valuation methodology is fundamentally flawed. In her original valuation calculation she presumed that, absent the merger, Pepco’s and Delmarva’s SAIFI and SAIDI reliability performance for each of the years 2015 through 2020 would be no better than what it was on average during the years 2011 through 2013. That is an unrealistic assumption—not even Dr. Tierney believes it.\textsuperscript{14} Tr. 34:5-13; Tr. 37:21-38:5. Indeed, Dr. Tierney testified that she could not speculate as to how Pepco and Delmarva would perform post-merger, Tr. 38:4-5, a disabling consideration that should have precluded her from performing any reliability valuation calculation. \textit{Cf.} Tr. 24:4-17.

Dr. Tierney’s “with-the-merger” trend line is likewise in error. Because her valuation methodology calculates reliability gains or losses on an annual basis, Tr. 58:17-20, she had to translate Exelon’s proposed three-year average commitments into annual values. She did so by working backwards, developing a straight line average trend from 2020 to 2015 in her original case, and from 2020 to 2016 in her “sensitivity” analysis. Tr. 70:7-20; Tr. 308:21-23 (“Mathematically therefore I was starting at a different place in that original analysis, and I had more years to make the progress over.”). Her assumed linear trend lines are untenable and without factual underpinning. In the words of witness O’Brien, “if you say it’s straight lined ... there would be some flaws in it.” Tr. 1446:5-7. Dr. Tierney’s “with-the-merger” trend lines also differ one from another, Ex. MEA-5; Tr. 308:21-23, are not based upon any engineering analysis, and are inconsistent with Exelon’s internal annual supporting goals. Tr. 68:6-10; Tr.

\textsuperscript{14} As discussed above, the overwhelming record evidence is that PHI and Exelon believe that, independent of the merger, the two companies intend to achieve the SAIFI and SAIDI standards proposed in the RM 43 proceeding. Those targets and that anticipated performance exceed by vast measure the 2011 to 2013 historical average figures that Dr. Tierney used to construct her without-the-merger baseline.
70:14-16; Tr. 1608:4-5 ("No. It's not straight line.") (Dickerson). Because Exelon has supplied no annual figures for the years 2015 through 2017, and there is no engineering analysis showing Exelon’s intended post-merger glide path from 2015 to 2020, there is no reasonable way to construct such a trend line. Ex. MEA-30 at 6:1-12. "[A]ny step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible." In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994) (emphasis omitted). Under Exelon's proposal, several years of poor performance could be compensated for by one year of superior performance. Such performance cannot be considered a meaningful customer benefit and is contrary to the RM 43 construct. See Ex. MEA-30 at 5:14-20.

6. The Reliability Harms at Issue Are Not Cured by a Conditioning Directive to Comply With the RM 43 Regimen or the Utilities’ RM 43 Proposals

Exelon’s missteps cannot be fixed by requiring Pepco and Delmarva, post-merger, to comply with their RM 43 proposals, or by leaving the issue for resolution in the RM 43 proceeding. The record shows that there is no reason to believe that this directive will result in performance equivalent to or better than what will occur absent the merger. Exelon had opportunities—both before and during the hearing—to commit to achieving, at a minimum, the utilities’ proposed RM 43 SAIFI and SAIDI standards, but refused to do so.¹⁵

Exelon is likewise unwilling to piggyback off of the utilities’ existing reliability planning. Tr. 1414:12-1415:20 (O’Brien). Exelon either disputes the accuracy of Pepco’s and Delmarva’s projections, or, at a minimum, believes that SAIFI and SAIDI projections should be made on a different, weather-normalized basis. Tr. 1572:16-1573:20 (Dickerson). Mr. O’Brien explained that, post-merger, Exelon plans to perform a six month circuit-by-circuit systems analysis to

¹⁵ Tr. 1659:22-1660:6 (witness Alden agrees with witness O’Brien that Exelon cannot commit to annual reliability standards for Pepco/Delmarva absent an "engineering analysis"). Tr. 1668:6-15 (witness Alden confirms that he would be uncomfortable if Exelon’s three-year average were converted into annual targets).
ascertain “what technically is possible.” Tr. 1413:21-22. “I would love to close the deal, really get inside and figure out what is possible.” Tr. 1413:2-4.16 Following that analysis, he contemplated a “dialogue” with the Commission concerning Exelon’s plan. Tr. 1413:4-8.

Addressing the challenges of the Delmarva system, Mr. O’Brien stated:

I think it’s going to take, in real candor to you, some real thought as to how to do that. And I think we’re going to have to be able to figure out some new technologies, given the tree density, given the length of circuits.

Tr. 1389:17-22. See also Tr. 1720:3-9 (Alden). Exelon is presumably going to want to satisfy itself as to “what technically is possible” before embarking on major reliability projects. It is therefore reasonable to assume that during the pendency of this engineering study, dialogue, and subsequent implementation, Exelon would put on hold at least some previously planned Delmarva and Pepco reliability projects. The omission from Exelon’s commitments of annual reliability supporting goals for 2015 through 2017 is no accident: Exelon wants a pass for those years and reliability may well suffer while Exelon gets up to speed.

There is also good reason to believe that, post-merger, Exelon will seek to revisit the RM 43 regimen in an effort to move to three-year average standards, and/or revisit the Pepco and Delmarva glide path due to its weather normalization concerns. Staff witness Rafferty acknowledged that “the door would be open for the company to come back after the merger and say we need to adjust this.” Tr. 3323:20-22. Witness Dickerson made clear that Exelon wants to move to three-year averages rather than annual SAIFI and SAIDI targets:

[T]hat’s not what we’re asking for. RM 43 has requirements on an individual year that can have its own set of obligations imposed upon the joint applicants. We’re asking for the three-year average.

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16 Mr. Alden was in the same place, stating: “I agree that there’s much more work that has to be done in order to commit to anything that’s different than what’s in our proposal,” Tr. 1658:4-6, and noting that “[w]e’ve gone about as far as we can.” Tr. 1659:19.
While the Commission has the authority to do that, that's not what we would hope that it would do.

Tr. 1513:6-12. The Commission has spent years developing RM 43 and SAIFI/SAIDI performance trends for each utility. It is contrary to the interests of Pepco and Delmarva ratepayers to approve a merger through which Exelon unwinds that regimen and becomes subject to less restrictive standards.

There is no evidence that Exelon sought approval to conduct a circuit-by-circuit system engineering study prior to hearing. Each system presents its own challenges and Delmarva poses special problems. Notwithstanding Exelon's track record—which has come at the cost of substantial increases to BGE's ratepayers—17—the post-merger reliability scenario for the out years is unknown and fraught with risks. Reduced or delayed reliability improvements in the near term, coupled with an uncertain and potentially highly expensive reliability scenario in the "out years," is a complete and sufficient basis to deny the merger as harmful to ratepayers, and Maryland as a whole. The Commission should not approve a merger based on a leap of faith as to the likely impact on reliability and customer cost.

B. The Merger Must Be Rejected Because it Poses Risks of Anti-Competitive Harms that Have Neither Been Addressed Through Applicants' "Commitments," Nor Can Be Mitigated Through Commission-Imposed Conditions

PHI sold its unregulated generation assets in 2010, reinventing itself as "fundamentally a regulated utility company."18 By contrast, Exelon is a "hybrid" utility—a combination of substantial regulated and unregulated assets, including three distribution utilities and 35,000

17 In large part, Exelon benefitted from pre-merger budget increases at BGE. "BGE increased its O&M–related spending by more than $210 million in each of 2010 and 2011 over a base of $914.6 million in 2009, an increase of about 47% in two years. These increases were prior to the Exelon merger in 2012." Ex. OPC-49 at 26.
18 Ex. MEA-2 at 29:18; MEA-2, Rigby Dep. Ex. 3.
MWs of unregulated generation, much of it nuclear, and much of it in PJM. In recent years, Exelon’s generation has faced diminishing market prices. Exelon claims that some of its nuclear assets are uneconomic, and may have to be retired absent additional financial support.

Throwing the PHI utilities into Exelon’s mix of regulated and unregulated assets will likely create conflicts between the best interests of Pepco and Delmarva customers and Exelon’s interest in maximizing returns on its unregulated generation. Worse, the proposed merger occurs against the backdrop of what the Applicants themselves characterize as “fundamental” and “tectonic” changes in the nature of distribution utilities. These changes are driven by advances in distributed generation and information technologies; according to the Applicants, they are capable of “transform[ing] the electric utility industry as we know it,” and may necessitate modifications to the “regulatory compact.” As debates over those changes move forward, the merged entity faces an increasing likelihood of strategic and regulatory policy disagreements—among both its own regulated and unregulated subsidiaries, and with the Commission. Indeed, those conflicts are already present in pre-merger Exelon, which has described its situation as one in which the two sides of the Company are trying to resolve a

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19 Ex. MEA-1 at 10:14-17.
20 Id. at 48:8-17.
21 “Exelon owns about 23,000 MW of merchant capacity in PJM, about 70% of its total merchant fleet, including about 16,500 MW of nuclear capacity.” Ex. Sierra-I at 10:11-12.
23 Ex. MEA-8.
24 Tr. 3201:20-3201:4 (Witness Bradford observes: “Exelon is a company with a very large problem in terms of the profitability of at least some of its nuclear units. To solve that problem it seems to have to sell their output at above market prices one way or another. And as even some of the questions made clear, one of the ways to do that is to restrict the access of lower cost power to the same markets.”).
25 Tr. 1063:10-15 (Rigby).
26 Ex. MEA-31 at 38:19-20 (quoting RDT-19).
27 Ex. MEA-2 at 162:9-14.
28 Ex. MEA-31 at 24:14-17 (PHI), 38:20-21 (Exelon).
"deliberate tension" over the "optimal fit within its businesses for distributed generation and other new markets."29 This "tension," and the steps that will be taken to resolve it, will only become more important—and contentious—in the next few years, as technological changes offer retail customers, especially those seeking service reliability improvements, an increasing range of energy options that will compete with purchases from Exelon’s generation.30

Other parties share the State’s concerns. Staff witness Godfrey warns that witness Crane:

consistently alludes to energy efficiency, demand response, distributed generation, renewable energy and net-metering as being counterproductive to Exelon’s bottom line and that basically the Company needs to rethink its business model in order to survive in the new less-centralized, customer focused utility paradigm. Considering that Exelon believes these technologies are incongruous and disruptive to its business, it is my interpretation that encouraging the growth of such programs would be fraught with constant battles both with the implementation of EmPOWER Maryland, but also in maximizing the bidding of these resources into the capacity markets to offset costs to ratepayers. I imagine that distributed generation and renewables would meet the same fate.

Ex. Staff-21 at 8:6-16. OPC witness Brockway asserts that “the merged entity will be motivated to favor the other parts of the overall business, such as unregulated generation,” as opposed to DER. Ex. OPC-41 at 15:8-10. MAREC witness Bradford opines that post-merger:

you may be dealing with a combined company whose outlook on renewable energy has become part of Exelon’s ongoing territory-wide effort to solve its nuclear problem by one way or another getting ... customers to pay more for nuclear generation by restricting access to the renewables that are part of the public interest in Maryland.

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29 Tr. 702:21-703:10 (Crane); Tr. 1318:17-1320:20 (O’Brien).
30 While Mr. Crane testified at his deposition that these concepts are “so futuristic” and not an immediate concern, Ex. MEA-1 at 186:14-16, as Exelon’s witnesses indicated at the hearing, Exelon’s strategic planning documents address utility of the future issues at great length and detail its internal analysis of potential “models” for the new distribution utility, and evaluate the impact of the adoption of such models on Exelon’s central station generation. See, e.g., Tr. 726:7-742:13 (Crane).
Tr. 3203:6-13. SEIA witness Phelps testifies that “Exelon has demonstrated in the distribution sphere considerable protection of its generation assets, which is not in the best interest of ratepayers.” Ex. SEIA-1 at 12:22-13:1. Finally, Sierra Club witness Chernick observes that “[c]onsidering both the scale and vulnerability of Exelon’s generation investments ... management will pursue the interests of shareholders in maximizing generation revenues over the interests of its EDC customers in low and more stable bills, as well as the interests of Maryland in meeting environmental targets.” Ex. Sierra-1 at 14:5-9.

The Commission has found that the potential for—or the increased risk of—harm in connection with a proposed merger is a “harm” for purposes of PUA § 6-105 analysis.\(^3\) The proposed combination of Exelon’s unregulated assets and PHI’s distribution companies poses potential and increased risks of anticompetitive harm to ratepayers and, more generally, to the State’s economy. These competitive harms are two-fold:

- First, post-merger, Exelon will control a dominant share of Maryland’s retail electricity market, thereby reducing the ability of the Commission and customers to rely upon “across-the-fence” competition as a tool to ensure reliable service at reasonable rates. The current difference in the perspectives of Pepco/Delmarva, on the one hand, and BGE, on the other, is evident in the record. But—as is also clear—those differences will disappear following consummation of the merger.\(^3\)

- Second, Pepco and Delmarva, as Exelon-controlled entities, will have both the ability and the motivation to act in ways that limit the development of DER in Maryland.\(^3\) Such actions (or inactions) will delay, if not eliminate, the benefits associated with the ongoing transition to the distribution “utility of the future”—i.e., a structure in which (in PHI’s words) customer choices about behind-the-meter assets, rather than centralized utility planning, will drive grid architecture.

\(^{31}\) *Exelon/CEG* at 37; PUA § 6-105(g)(2) (repeated references to “potential” impacts).

\(^{32}\) *E.g.,* Tr. 283:2-5 (witness Tierney confirms that if the merger is approved, Exelon will vote for both PHI and BGE at PJM).

\(^{33}\) That ability, even if Exelon shows no inclination to exercise it, is sufficient to require rejection of the merger. *Exelon/CEG* at 37 (“We could not, and would not, approve this Merger if the resulting company would have the ability to manipulate electricity prices in the PJM markets, whether or not the post-Merger Exelon would be inclined to exercise its market power – the mere ability to exercise market power would, we find, constitute a harm both to BGE’s customers and the public interest that would be wholly incompatible with § 6-105.”).
Ex. MEA-31 at 24:18-20.\textsuperscript{34} The ability to inhibit, rather than foster, those choices, will have impacts on rates and reliability, especially in territories which, like Delmarva’s, pose singular reliability challenges.\textsuperscript{35}

These harms are real, significant, and well-supported by the evidentiary record. They are not mitigated by any of the Applicants’ commitments—instead, despite the obvious importance of these issues, they are ignored in the commitments,\textsuperscript{36} presumably on purpose.\textsuperscript{37}

Applicants respond that across-the-fence comparisons are either non-existent or, to the extent helpful, will be equally useful post-merger. Witness Kelly sees neither the loss of PHI’s independent perspective nor Exelon’s singular focus on ensuring sufficient returns for its generation as cause for concern, noting that the Commission can set whatever policies it chooses and Exelon’s distribution utilities will have no choice but to comply.\textsuperscript{38} While the Commission obviously can enact policies and issue directives regarding the distribution utilities, Exelon will undoubtedly be a very loud and important voice in any debate. After all, post-merger, Exelon distribution utilities will be in charge of the provision of service to a vast majority of Maryland

\textsuperscript{34} Dr. Tabors refers to the “transformative impact that [DER] are having on retail electric utilities,” and notes that “Exelon, PHI and others have referred to the anticipated outcome of this transformation as the ‘utility of the future.’” Ex. MEA-31 at 4:6-8.

\textsuperscript{35} E.g., Tr. 1550:4-15 (Dickerson).

\textsuperscript{36} Ex. MEA-31 at 49:21-50:2 (“none of the Applicants’ proposed commitments addresses how Exelon and PHI plan to adapt to the evolving role of distribution utilities. Ex. RDT-9 at Tr. 20:3-8.”); Tr. 3202:16-21 (witness Bradford: “[Exelon] can come into these territories with this fundamental cultural difference between us and the State of Maryland’s definition of the public interest as it is reflected with regard to renewable energy, we can do that without even talking about renewables.”); Tr. 2272:1-15 (witness Gould, Exelon’s “Chief Sustainability Officer,” testified that he did not know whether Exelon considered including commitments that concern renewable energy and, if not, why none were included.). Tr. 373:17-374:6 (witness Tierney addressed the absence of certain types of commitments, commenting [in response to a Commissioner question] that “[i]f I were sitting in your shoes, I might wonder what could there have been in terms of other parts of a package.”).

\textsuperscript{37} Applicants’ failure to propose commitments to address obvious and hot-button topics may reflect the concern that, by doing so, they would be giving the Commission authority to modify any such commitments. Tr. 374:6-12 (witness Tierney comments on the absence of certain commitments, noting that “[i]f I were sitting in your shoes, I might wonder what could there have been in terms of other parts of a package.”). Of course, to the extent this limitation applies, it simply means that a deficient merger application must be rejected, rather than attempting to fashion mitigating conditions involving subject areas avoided by the Applicants themselves.

\textsuperscript{38} Ex. JA-7 at 15:14-19:13.
retail customers, as well as every major metropolitan area in the mid-Atlantic.\textsuperscript{39} Whatever policies are adopted, Exelon will enjoy enormous influence in their development; whatever implementation is required will depend upon Exelon’s cooperation.\textsuperscript{40} Achieving success will be a tough road to hoe. As explained by MAREC witness Bradford, post-merger the Commission

won’t have less power. The question is whether it will face a much more difficult task in doing so, because ultimately commissions that try to regulate entirely through policing are setting themselves a much harder task than those who approach the problem more, to borrow a word from earlier today, holistically than simply reacting and going from proceeding to proceeding based entirely on a particular subject matter.

Tr. 3197:19-3198:4.

The concern that Exelon’s perspective will inevitably be at odds with important, customer-oriented policy objectives is exemplified by the Company’s assessment of the proposed Northern Pass Transmission Project,\textsuperscript{41} a line that would bring roughly 1200 MWs of Canadian hydropower into New England.\textsuperscript{42} Witness Gould’s trial testimony that Exelon’s lack of support for this project is due to a concern about its impact on “customers” does not withstand scrutiny; Exelon owns no distribution utilities in New England, and serves no retail customers in the region. Tr. 2279:19-2280:7. Exelon’s lack of support plainly stems from a concern that importing this new renewable resource will have an adverse impact on the revenues earned by

\textsuperscript{39} Ex. JA-3 at 3.

\textsuperscript{40} Tr. 2157:21-2158:15 (Gould). Dr. Tabors explained that the “merged utility, through its size and geographic expanse, will be the dominant player—the gorilla in the room—given its ability to communicate with most every retail consumer, knowledge of the behavior of those consumers, control of utility operations, and comparatively deep pockets for financing of development and implementation.” Ex. MEA-31 at 42:6-9. Witness Bradford observed that “there are just a hundred or a thousand small ways that a utility can make implementation of a public policy more difficult without ever breaking the law, without ever reaching the point where they have to be fined.” Tr. 3204:2-7.

\textsuperscript{41} Ex. MEA-31, RDT-15.

\textsuperscript{42} Ex. MEA-1 at 234:13-17. Mr. Crane confirmed his understanding the project would deliver sufficient renewable electricity to power one million homes. Ex. MEA-1 at 234:18-22.
Exelon’s unregulated New England generation assets.\textsuperscript{43} Exelon’s characterization (in the same presentation) of its success in having “killed” legislative proposals to expand long-term contracting authority in one New England state, and to purchase 150 MW of hydropower in another,\textsuperscript{44} portends nothing positive should Exelon become the owner of an even greater share of Maryland’s energy landscape. As noted by Commissioner Hoskins, it seems to me that if our interests are aligned, the interest of the citizens of Maryland and the company, then that is excellent, because now we’ve got this very experienced and effective policy group at Exelon working to advance those common objectives. But if they’re not aligned, we might be buying ourselves some trouble, right, because now we’ve got an adversary that is very good.

Tr. 1050:12-20. Exelon’s treatment of Northern Pass and the related legislative efforts indicates both that Exelon’s advocacy may be “very good,” but that Maryland’s and Exelon’s respective priorities may well not be “aligned.”

Given its corporate makeup, it is perhaps inevitable that Exelon must assess whatever regulatory or other initiatives are, or may be, underway through the prism of their potential impacts upon Exelon’s unregulated generation. But the Commission would ill-serve Maryland’s citizens by approving a merger that increases the likelihood of such conflicts and expands them to Pepco and Delmarva.

\textsuperscript{43} Tr. 2120:5-8 (bolded statement that the project “NPTP could negatively impact energy revenues by 4 to 5 million per year and capacity revenues by 25 to 30 million per year on the Exelon New England fleet.”). As an additional example, Dr. Tabors pointed out that a presentation of Exelon’s Transmission Committee shows that “in order to develop strategic transmission policy” the Transmission Committee evaluates the impact of proposed transmission projects on the revenues of Exelon’s nuclear units and thus “measure[s] [the] enterprise impacts of projects, policies and proposals.” Ex. MEA-31 at 30:18-20.

\textsuperscript{44} Tr. 2117:8-2118:20 (Gould).
1. The Merger Poses the Risk of Anti-Competitive Harm in That it Will Result in the Loss of Across-the-Fence Competition

MEA witness Tabors explains that the transfer to Exelon of the control of PHI’s two Maryland-serving distribution utilities would change the structure of the Maryland retail electric market in two important ways. First, the distribution segment of the retail market would become significantly more concentrated. Following approval, Exelon will control retail service to roughly 80% of Maryland’s retail customers. Second, the distribution segment of Maryland’s retail market would be dominated by Exelon, a company with a significant motivation to maximize its return on unregulated generating assets, perhaps at the expense of regulated distribution customer choice.

Dr. Tabors testified that while distribution utilities have different franchise territories, there is little doubt that they are “across-the-fence” competitors. He asserted that “[c]ustomers—and regulators—will compare one utility company against another neighboring company in terms of their rates, terms, and conditions of service,” Ex. MEA-31 at 7:4-6, and went on to explain why the “ability to compare and contrast is critical” given the “asymmetry of information between the Commission and the utilities.” Id. at 7:20-22. After observing that “[n]o one understands the utility better than it does,” Dr. Tabors opines:

when a utility presents a proposed action, or has taken an action, the Commission’s review is often constrained by the evidence the utility presents describing the options that are, or were, available to it as part of its justification for its decision. In such cases, it can be extremely difficult for the Commission to determine whether the utility has, or had, better options available to it that its management team either did not consider, or considered and rejected. However, with across the fence competition, the Commission often has the

45 Ex. MEA-31 at 6:10-14. Another roughly 10% of customers will be served by Potomac Edison, which is owned by FirstEnergy, another company with significant interests in unregulated generating assets. Commissioner Hoskins observed at trial that Exelon’s control over Maryland’s retail customers would be sufficiently substantial as to make the instant case “essentially ... almost a generic proceeding.” Tr. 369:11-12.
ability to determine if the utility has, or had, better options available to it. Comparing one utility against another helps the Commission to identify the full range of viable options and judge whether the option the utility selected or proposed was reasonable. Indeed, differences in position can help the Commission identify and understand the different approaches that are available.

Id. at 7:22-8:13. Dr. Tabors’s position is supported by the testimony of witness Rigby, who testified that the PHI distribution companies and BGE are compared on a variety of indicators, including “typical reliability measures around duration and frequency of outages,” “rates,” and “customer satisfaction indices.” Dr. Tabors went on to explain why this form of competition is “critical,” noting that:

each of the distribution utilities are always cognizant of there being a point of comparison. This comparison is not against national norms or standards set in a jurisdiction with different rules, different geography and different ratepayer profiles, but is against similarly-situated utilities. From the perspective of the Commission, “across the fence” competition is critical as a means of seeing and comparing the technical, economic and regulatory alternatives within the context of a specific regulatory issue or a single or parallel set of Commission proceedings.

Ex. MEA-31 at 7:9-16. See also Tr. 2501:14-22 (witness Khouzami notes that it makes sense to talk to and share best practices with utilities “in the same area”).

Applicants witnesses respond that the loss of an independent Pepco/Delmarva perspective and point of comparison is neither “material,” Ex. JA-7 at 6:4-6, nor “meaningful,” Ex. JA-15 at 6:9-12, and that Commission’s reliance on such comparisons is at best “anecdotal.” Ex. JA-15 at 6:1-2. Witness Tabors explained why these positions are off-base:

when I have only one utility that dominates the state, which would be the case in this instance, where that single utility … makes it very clear we’re going to have a common theme, we’re going to act commonly, [that] means that instead of having PHI, which is a

wires-only company and does its thing based on its best interest economically as a wires company, and BGE, which is part of a company that owns generation and does things optimally for a hybrid company, those are two different things. So the answer is I'm going to lose information and customers are going to lose information and the Commission is going to lose information.

* * *

There's a loss of knowledge, there's a loss of competitive capability. PHI might do it better, might have a different idea, might have a different experiment from what BGE has or what BGE does. That's the nature and the essence of the point that I'm making on that front.]

Ex. JA-56 at 66:13-67:15. Moreover, witness Tabors provided a list of examples of Commission decisions that rely (at least in part) on direct comparisons between and among regulated utilities. He notes that "[r]egardless of whether the Commission uses the specific phrase across the fence competition in its decisions, there would appear to be little doubt that in regulating the utilities subject to its jurisdiction, the Commission can—and regularly does—avail itself of such competition and comparison." Ex. MEA-32 at 7:4-7. Dr. Tabors went on to note that the California PUC went so far as to deny the proposed merger of San Diego Gas and Electric Company and Southern California Edison Company based in part upon the loss of essential across the fence competition that would occur.

While Pepco, Delmarva, and BGE lack the right to serve in each other's franchise territories, there is no question that they compete to continue to serve new customers, as well as

47Alternatively, witness O'Brien argues that losing an independent voice is a good thing, in that putting the companies together will "significantly enhance collaboration among [the] utilities." Ex. JA-18 at 2:7-17. But, as witness Tabors explains, that "is precisely the problem: the value of this vital regulatory tool will be reduced if the merger is consummated at this time of critical change in the distribution utility industry." Ex. MEA-32 at 5:16-18.
48Ex. MEA-32, RDT-22.
49SCECorp. S. Cal. Edison Co. & San Diego Gas & Elec. Co., No. 91-05-028, 1991 Cal. PUC LEXIS 253, at *236-237 (May 8, 1991). Ex. MEA-32 at 7:9-8:2. Dr. Willig's rejoinder, Ex. JA-16 at 6, that this is the only such case that Dr. Tabors was able to find on this point, does not make the decision any less relevant or well-reasoned.
existing customers (who can relocate). This competition plays itself out, among other ways, in the diversity of options and proposals that they present to this Commission. Dr. Tabors testified that the competition that exists among the PHI utilities and BGE is the premise of the instant case: "[f]undamentally, this case is about whether Pepco and Delmarva customers and Maryland as a whole are better off with Exelon holding the franchise to provide service to them." Ex. MEA-32 at 4:25-5:2. Consequently, the claim that the three utilities do not "compete" is not credible.  

Witness Willig responds that head-to-head comparisons have little value, and that benchmarking against a broader, national set of utilities is far more meaningful. Dr. Tabors responded that there are significant data collection issues with national surveys (including those cited by Dr. Willig himself, Ex. MEA-32 at 9:9-11:4), observing that even where data are comparable, "there are many areas of utility comparison that fall outside of numerical operating characteristics, such as programs, policies and service offerings." Id. at 11:6-7.

Alternatively, Applicants argue that, if such comparisons are made, they can continue after post-merger. Tr. 1331:16-22 (O’Brien). The record is to the contrary. To the extent Pepco/Delmarva and BGE would otherwise have taken different positions on an issue, there is no basis to conclude that both views will be presented to the Commission. While positional disagreements within the Exelon "family" may be the subject of discussion, there is no doubt about how any disputes are resolved: Mr. Crane, is the "ultimate boss," Tr. 1962:5-6 (Butler),

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50 Witness O’Brien seeks to instill an ethos of competition among Exelon’s distribution utilities. Tr. 1322:11-1324:17. The presence of restrictions on information sharing during the pendency of the merger, which is a subject that came up more than once during the hearing, is a further indication that the notion that the merging distribution companies do not “compete” is fallacious. E.g. Tr. 1821:22-1822:21 (Witness McGowan discusses witness Alden’s views about restrictions on information sharing among the PHI and Exelon companies). See 15 U.S.C. § 1; 15 U.S.C. § 18a; United States v. Computer Assocs. Int'l Inc., No. 1:01 CV 02062 (D.D.C. filed Sept. 28, 2001) (complaint alleging antitrust violations based on control over competitor’s pricing decisions during pendency of merger; resolved by settlement).
and he makes the decision. Ex. MEA-1 at 195:20-21; Tr. 1321:11-14 (O’Brien).51 And, Exelon makes decisions on a “holistic” basis, i.e. one which maximizes the corporation’s “enterprise-wide value,” which includes both its regulated and unregulated assets.52

Dr. Tabors testifies to instances in which BGE and the PHI distribution companies have taken different positions on energy policy issues, both within the state and at PJM, including those in which PHI has taken a more “customer-friendly” approach:

- **Recovery of Advanced Metering Infrastructure (AMI) Costs**: Pepco sought PSC approval to recover AMI costs through a traditional rate mechanism—the establishment of regulatory assets, and the deferral of rate recovery until its next base rate case. BGE, on the other hand, requested approval of a special AMI surcharge to recover such costs as they were incurred, subject to an annual true-up. Pepco’s proposal was approved. In rejecting BGE’s approach, the Commission cited Pepco’s willingness to proceed with a regulatory asset and recovery through future base rates.53

- **Development of Animal Waste to Energy Plant**: Maryland Senate Bill 521 introduced in 2014, sought to establish a program that would enable energy generation using poultry litter as a feedstock, through cooperative investment. Both Exelon (and BGE) strongly opposed the bill, arguing that it would subsidize a particular type of technology and provide the technology a competitive advantage. PHI did not comment on the Bill 521; its actions demonstrated, at a minimum, neutrality (if not tacit support).54 Dr. Tabors observed that the “objections of both Exelon and BGE indicate opposition to non-utility generation and other innovations which would enable customers to displace energy that would otherwise be delivered by their utility.”55

- **PJM Capacity Performance Proposal**: Witness Tabors noted that PJM is currently investigating potential changes to the PJM capacity market design, including enhanced fuel supply requirements, stricter limits on operational flexibility, and the elimination of certain types of demand response (DR) as a capacity product. If adopted, these changes would result in increased charges

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51 Exelon’s practice of adopting one, company-wide, position will presumably be true at the legislature. When pressed as to whether the Exelon utilities will be free to take different positions, Mr. O’Brien responded that “I don’t think we do the legislators any favors when we as a company come in with totally different positions and they’re trying to say, where are you guys.” Tr. 1399:17-20.

52 Ex. MEA-31 at 29:11-15.

53 Ex. MEA-31 at 11-12, citing sources.


55 Ex. MEA-31 at 13:9-11.
upon customers and increased revenue for generators, likely including much of Exelon’s nuclear generation fleet. While Exelon was generally supportive of the proposal, noting its “urgent” need, PHI expressed concerns about the abbreviated process for the proposal’s consideration and the large cost increases that implementation would impose on customers.\textsuperscript{56}

Given these examples (and other information),\textsuperscript{57} Dr. Tabors concludes that there is value to the Commission and, by extension, Maryland ratepayers, in BGE and Pepco/Delmarva “taking] different approaches to innovation and to being responsive to consumer needs.”\textsuperscript{58}

Post-merger, however:

Exelon—a generation-oriented hybrid utility—will (1) set the corporate agenda before the Commission for a much broader share of the Maryland customer base; (2) have little competitive challenge within the State; and (3) have an incentive ... to discourage innovation in technological advances such as distributed energy resources where that innovation will reduce sales of energy from Exelon’s central grid generation.

Ex. MEA-31 at 17:16-21.

2. The Loss of Across-the-Fence Comparisons Associated with Approval of the Merger Comes at a Time When Such Comparisons Would Be Especially Meaningful

Now is a critical time to be losing the independent voice of Pepco/Delmarva. As state utility commissions (and the electric utility industry) consider how best to ensure that customer-driven DER is integrated into the existing distribution utility structure, two points are clear: (1) there is value to the Commission in hearing the separate and independent perspectives

\textsuperscript{56} Ex. MEA-31 at 16:8-17:8.

\textsuperscript{57} An additional example is Pepco’s support for community solar generation as compared to BGE’s disinterest in such project development. Tr. 1396:21-1397:14 (O’Brien).

\textsuperscript{58} Ex. MEA-31 at 17:12-13.
of Pepco/Delmarva and BGE on these issues, as there is reason to believe that they would not be identical; and (b) there will be no such independent presentations following the merger.\textsuperscript{59}

3. The Merger Poses Risks of Harm in that Exelon Will Have the Incentive and Ability to Limit the Development of Distributed Energy Resources in Maryland

Dr. Tabors testified to three important changes currently underway in the distribution utility sector. He describes the first, the advent of distributed generation, as “disruptive,” in that the technology “allows retail customers to produce a portion of their electrical needs and, under specified circumstances, to sell back their excess energy to the distribution utility.” Ex. MEA-31 at 19:5-7.\textsuperscript{60} The second technological change is the “significant push for distributed storage.”

\textit{Id.} at 20:14. Dr. Tabors explains that, when combined with distributed generation, storage:

\begin{quote}

could make it possible for retail customers to require only limited energy from the distribution utility while counting on the distribution infrastructure for reliability, i.e., back-up should the generator and the battery fail.
\end{quote}

\textit{Id.} at 20:17-20. The third change he identifies is the revolution in Information & Communications Technology (ICT), which he refers to as “the enabler of change.” \textit{Id.} at 20:23-21:1. Dr. Tabors explains that ICT:

\begin{quote}
centers on providing the retail consumer the ability to intelligently schedule consumption for non-critical loads, to respond to price signals and move load from one time block to another; to participate in electric markets for energy and capacity; and under specific circumstances to provide ancillary services to the wholesale utility such as regulation or spinning reserves.
\end{quote}

\textsuperscript{59} While there will undoubtedly be other voices in any debate, Dr. Tabors explains that “as compared with utilities throughout the nation, across the fence comparisons between the utilities that the Commission regulates, and who are competitors, are essential sources of information in helping the Commission to carry out its regulatory mission.” Ex. MEA-32 at 11:14-17.

\textsuperscript{60} Exelon likewise refers to distributed generation as “disruptive.” Tr. 551:14-20 (Crane). Mr. Crane referred at his deposition to [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]
Dr. Tabors notes that ICT has become a highly competitive platform-based business. He notes that corporate entities such as Google or Apple (among many similar or smaller companies) are purveyors of information, are within nearly every retail customer’s vision and understanding and have the development capability and experience to be able to move quickly into new market niches. Electricity has seen initial forays by these companies in development of communication platforms and corporate purchases such as Google and NEST. The electric distribution sector represents new and untouched territory for experienced ICT players.

Ex. MEA-31 at 21:6-12.
Ex. MEA-31 at 25:8-12. Similarly, an internal PHI Board of Directors presentation states that the “electric utility space is undergoing a fundamental change that presents both challenges and opportunities,” and that the “delivered energy services industry is moving beyond the current utility model and the regulatory compact.” Ex. MEA-31 at 24:14-18.

The State submits that these trends, and the ways in which Exelon (as opposed to PHI) may react to them, are critical to the Commission’s assessment of the potential competitive harms that may result from approval of the proposed merger. As explained by Dr. Tabors, if the merger is completed:

the regulatory landscape in which these technological developments play out is one in which Exelon will be the dominant utility voice and utility actor in Maryland. Absent the merger, Pepco, as a large urban/suburban distribution utility, stands as an across-the-fence competitor to BGE. Pepco and Delmarva will be able to propose to the Commission and their customers (both existing and potential) their vision of how these utility of the future issues should be implemented. Pepco and Delmarva will serve as an independent voice to advocate what is technically and economically feasible and desirable. To the extent that the implementation is customer driven, at least in substantial part, ... then customers will be able to play Pepco off of BGE: BGE will be hard pressed to explain why it is not willing to provide utility of the future services that Pepco is willing to provide, and vice-versa.

Ex. MEA-31 at 26:22-27:11. Dr. Tabors analogized the extant circumstances to those in place in the period before the Federal Energy Regulatory Commission’s 1996 adoption of its landmark Order No. 888. He observed that there

is the same concern that the single entity that controls the utility will act to leverage that control to favor its affiliated generation. It

62 Along the same lines, Mr. Crane stated in a September 2014 letter to the Exelon Board of Directors (prior to an upcoming strategic retreat) that Exelon is facing “the most fundamental evolution in the technologies of our business we have ever seen.” Ex. MEA-31 at 24:12-13.

63 Mr. Rigby also expressed the view that one of the major changes going forward is that customer needs are driving grid architecture, a difference from the central utility planning model. Ex. MEA-31 at 24:18-20.
is in the financial interest of that owner to restrain and if possible to prevent a competitive supplier – even a seller of small scale generation systems – from having access to its infrastructure.

Ex. MEA-31 at 45:1-4.

Given these concerns, it seems clear that in deciding how best to address “utility of the future” issues, Maryland would be well-served by being able to hear the independent perspectives of PHI, on the one hand, and Exelon/BGE, on the other. Indeed, and as the record shows, the different approaches that each entity appears to be taking to these issues demonstrates cause for concern in the event that PHI’s independent perspective is lost.

a) Prior to its pursuit of the proposed merger, PHI was in the process of developing a “Utility 2.0” plan

In the months prior to the merger, PHI expended substantial resources in developing a Utility 2.0 plan for its utilities, which PHI intended would be completed by September 2014, and would thereafter be shared with regulators, legislators, and stakeholders. Tr. 1088:22-1089:18.

Mr. Rigby described Utility 2.0:

I think there’s a subset of our customers who have a growing interest in managing their energy usage who believe that there should be technology in place that allows them to manage their energy usage. There’s a growing integration of renewable power and more decentralized generation onto the grid. There’s a concept of net metering. I’m giving you kind of a range of things that I would perhaps posit that are under the umbrella of utility of the future.

Ex. MEA-2 at 97:12-22. The development of PHI’s “plan” would not be influenced by a need to protect the value of PHI’s central grid generation because PHI sold that generation in 2010. Indeed, PHI’s internal presentation on “Utility 2.0” issues raised a concern that third party and “proprietary” offerings be integrated “agnostically,” Tr. 1086:11-1088:21 (Rigby), an indication
that PHI may see the need to have its distribution system operate as a non-discriminatory and open platform.\textsuperscript{64}

Tellingly, PHI’s efforts on Utility 2.0 ceased once pursuit of the instant merger began. In Mr. Rigby’s words, PHI hit the “pause button” on this effort. Ex. MEA-2 at 135:15. He testified that, having been informed of PHI’s decision, neither Mr. Crane nor Mr. von Hoene, Exelon’s Chief Strategy Officer,\textsuperscript{65} suggested that PHI take its finger off that button. Tr. 1085:12-1086:2. Mr. Rigby’s “working premise” is that any continuation of Utility 2.0 planning will “fall under [Exelon’s] strategic planning process.” Tr. 1090:6-7.\textsuperscript{66}

PHI’s planning holiday remains in effect, and no intention to resume this effort was described at trial or addressed in the Applicants’ “commitments.” Absent a Commission directive, there is no reason to expect that circumstance to change. Remarkably, BGE admitted in discovery that there is not a single piece of paper in the entire company addressing Utility 2.0 issues.\textsuperscript{67} Thus, the notion that, post-merger, the State’s various distribution utilities will take the initiative to present competing Utility 2.0 “plans” is wishful thinking.\textsuperscript{68} Indeed, post-merger,

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\textsuperscript{64} By contrast, Mr. Crane testified that the impact on Exelon’s unregulated assets of changes to the distribution utility regulatory compact is a “question that has to be asked.” Tr. 737:7-738:15.

\textsuperscript{65} Ex. JA-3 at E6-E8.

\textsuperscript{66} Applicants may point to their intention that the PHI companies will be locally managed. But, as concerns policy initiatives, this claim is unsupported. Exelon expends enormous resources on centralized planning, and its distribution utilities are expected to follow the Company line. Ex. MEA-1 at 67:10-68:1. “I think Exelon has stated they take a single position on issues.” Tr. 1066:3-4 (Rigby).

\textsuperscript{67} Ex. MEA-25; Tr. 1948:1-10 (Witness Butler confirms that the response is correct, while stating, Tr. 1947:19-21, that BGE “look[s] forward to the opportunity to participate” in discussions about Utility 2.0 “because we do believe that it is important.”).

\textsuperscript{68} Exelon is testing microgrid technology in Illinois to inform its corporate-wide understanding of this technology. Mr. Crane explained that Exelon is “pushing the organization to be a thought leader,” including exploring the “potential for microgrids.” Tr. 1039:5-8. ComEd is currently implementing a “pilot microgrid ... in Chicago ... that’s kind of informing us on what potential there is.” Tr. 745:22-746:1. But there is no plan for Exelon to deploy this technology in Maryland. Commissioner Hoskins questioned whether the steps to achieve the reliability metrics would “include items like microgrids,” or would “really just [be] reinforcing a traditional system.” Tr. 372:18-19. Mr. Dickerson later testified that the reliability metrics in Commitment 2 are not based “at this time” on the construction of microgrids or distributed generation. Tr. 1643:17-1644:2. Applicants’ commitments say nothing about the issue. [BEGIN CONFIDENTIAL]
there is no reason to believe that a plan or plans will be offered any time soon by any Exelon distribution utility. And, if (or when) Exelon does propose a plan, the Company intends to advocate for a regulatory model that will afford its utilities the ability to control the pace of DER deployment in a manner that protects Exelon’s central grid generation.

b) Exelon’s strategy on the Utility of the Future is focused on managing impacts to its unregulated generation investments, not on maximizing benefits and opportunities for customers.

The record evidence concerning Exelon’s planning on “utility of the future” issues shows that its plans are moving in a direction opposite of those in which PHI would move on its own. Witness O’Brien testified to his understanding (based on discussions with lawyers) that PHI’s vision is that its utilities should be able to own distributed generation and “in effect be in competition with Exelon’s competitive generation affiliates.” Tr. 1315:21-1317:7. As became apparent at trial, however, that is not Exelon’s preferred course.

A draft of Exelon’s 2014 strategic plan reviews three “options” for Exelon’s “vision of the future.” Each option is evaluated using a “holistic approach,” i.e., one in which there is a combined assessment of the inter-relationships of the business models for our regulated and competitive companies. The regulated utilities must be adequately compensated for investments required to accommodate new distributed generation resources and incentivized to make efficient use of these same resources to improve system reliability, reduce losses, and defray unnecessary capital expenditures.* * * The competitive business must be protected from any threats of policy-induced market inefficiencies and compensated for its value attributes that support the existing electricity grid and industry[.]
Ex. MEA-31 at 14:22-15:7. The same document goes on to state that:

The first of the three options, known as the “Enhanced Status Quo” model, is described by Exelon as:

Exelon believes that this is not a good model. Tr. 728:6-12 (Crane).

The third option, known as the “Full Service Model,” is described by Exelon as one in which the utility owns and facilitates the distributed generation technology solutions. Tr. 738:20-23. Exelon goes on to explain:
Mr. Butler noted that Exelon would need to come to the Commission and seek authority "[because as I believe right now in the state of Maryland, utilities cannot own generation]." Tr. 1952:7-9.

Witness Butler explains that rate-basing of such investments "is the only way it could happen." Tr. 1951:3.\(^{70}\)

However, there is virtually no likelihood that Exelon would willingly pursue "Option III" (or the strategy described by Mr. Butler) because that option could harm Exelon’s unregulated assets, as it would be a "dire signal for competitive markets." Tr. 1957:3-7. The document goes on to state: [BEGIN CONFIDENTIAL]

\[^{70}\] Mr. Butler noted that Exelon would need to come to the Commission and seek authority "[b]ecause as I believe right now in the state of Maryland, utilities cannot own generation." Tr. 1952:7-9.
The strategy document refers to a "net benefit" analysis of the "value gained from participation compared with the loss due to cannibalization and DG penetration," Ex. MEA-31 at 42:20-21, but no witness was able to identify any such analysis as having been conducted. Tr. 741:9-743:7 (Crane).

Mr. Crane explained that the phrase "a dire signal for competitive markets" is a reference to the centralized energy and capacity markets in which Exelon's unregulated assets participate. Tr. 739:1-10. He observed that pursuit of Option III could dictate a move toward "reregulation":

But the third concept, if that's the desire within the jurisdiction that we have much more DG, we've got billions of dollars invested. So what would be fair and reasonable to almost go back into a reregulated type structure or something like that is the concept.

Tr. 740:7-12. Mr. Crane went on to explain that if the "market" is to "become much more of a distributed generation-based energy supply system" then:

there's a strong potential that you have collapsed the market prices. So units will shut down that are non-economic. To be able to drive and provide reliability you're going to have to have some kind of offtake agreement consistent with the capacity to be there when the clouds come in or a longer term period where you are not getting the energy, to provide the reliability.

Tr. 1006:19-1007:10.

While Option III is apparently preferred by both the Exelon and—according to Mr. O'Brien—the PHI distribution utilities, because of the reasons noted above, Exelon appears to be ultimately in favor of Option II, which is labeled as the "Network Service Provider/Integrator" and "Hybrid Competitive" model. Ex. MEA-31 at 30:6. This model is described in the strategy piece as one in which [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]

71 The strategy document refers to a "net benefit" analysis of the "[v]alue gained from participation compared with the loss due to cannibalization and DG penetration," Ex. MEA-31 at 42:20-21, but no witness was able to identify any such analysis as having been conducted. Tr. 741:9-743:7 (Crane).
The preferred utility model will utilize the utility's natural competencies as a grid owner and operator. Along these lines, Exelon prefers a form of network service provider integrator model. Tr. 1963:13-17 (Butler).

As shown in the has been made, the "final" version of Exelon's 2014 Strategic Plan (included as Ex. MEA-16) indicates that Option II is the preferred course. Tr. 1328:10-18 (O'Brien).72

The strategy document goes on to explain that one benefit of Option II is that Exelon's distribution utilities will be able to control the pace of DER penetration, and, therefore, to "insulate" Exelon's central station generation:

The "Hybrid" model for competitive market design will seek to insulate our centralized generation from the increased threat of DG as it is likely to have a faster penetration in our footprint if our utilities are the major catalysts. Overall, we need to assess if this model weakens the wholesale competitive markets and what the net benefit would be to Exelon i.e. Value gained from participation compared with the loss due to cannibalization and DG penetration[.]

Ex. MEA-31 at 42:16-21. While Mr. Crane testified that no decision on which model to pursue has been made, the "final" version of Exelon's 2014 Strategic Plan (included as Ex. MEA-16) indicates that Option II is the preferred course. Tr. 1328:10-18 (O'Brien).72

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72 "[T]he preferred utility model will utilize the utility's natural competencies as a grid owner and operator. Along these lines, Exelon prefers a form of network service provider integrator model." Tr. 1963:13-17 (Butler).
above quote, the basis for that choice is Exelon’s view that its implementation provides Exelon with assurance of its greatest net benefit during the evolution of these markets.

c) Exelon’s distribution utilities have the means to control the pace of DER penetration

There should be no question that, regardless of the “option” that is pursued or adopted, Exelon’s distribution utilities will have the ability—and, as shown above, the incentive—to control the pace of DER penetration on their systems. Dr. Tabors opined that not only will the merged entity “have the means to hamper the development of DER,” but also that “Maryland regulators would have limited ability to detect it.” Ex. MEA-31 at 39:14-15. Dr. Tabors noted that both Messrs. Crane and Rigby acknowledged the:

many ways in which a distribution utility can influence and control the development and deployment of distributed generation and storage resources. As CEO Crane stated, no distribution utility system in operation today was built to accommodate the kinds of two-way power flows that arise from behind the meter generation. Ex. RDT-9 at Tr. 176-77. Control over utility infrastructure and what does, or does not, get built will substantially affect the rate of distributed generation penetration and dictate where it can, and cannot, be built.

Ex. MEA-31 at 40:21-41:5. Dr. Tabors went on to highlight the “utility’s control over its planning process,” noting that:

Utilities will be able to set thermal line ratings and other technical operation standards that will afford them the ability to influence and control what distributed generation is built when and where. The utility’s ability to file proposed tariff changes is another means of potential control, including, for example, whether or not the utility will seek to adopt time of use rates. Distribution utilities may well find themselves providing a dispatch or balancing function, balancing customer resources with central grid resources in order to match overall resource needs with customer load.

73 The Commission has found that the ability to exercise market power, even if the utility is not inclined to use it, constitutes harm to customers and the public interest, and “would be wholly incompatible with § 6-105.” Exelon/CEG at 37.
Dispatch protocols and the like will afford the distribution utility yet another means of favoring incumbent generation.

Ex. MEA-31 at 40:7-16.

Dr. Tabors pointed out that distribution utilities will “have the ability to hamper by restraining or defining in anticompetitive ways the acceptance of—and thereby the revenues potentially attributable to—DER in return for the provision of system level services such as reserves, regulation, and VAR support.” Id. at 40:19-22. In addition, he noted Mr. Crane’s identification of “big data” as the technological advance that he believed would ultimately have the most impact on DER customers and the utility. Id. at 41:1-2. Dr. Tabors observed that “[h]ere, again, the distribution utility will control customer and system information, and have a very large say in the implementation of software and sensor and communication technology.” Ex. MEA-31 at 41:3-5. In short, the “list of opportunities for the distribution utility to drag its feet, including by defining the rules for reliability and safety, and to resist through regulatory proceedings the incorporation of distribution technologies into their systems, is nearly endless.” Id. at 23:4-7. Consistent with this observation, and following the close of the hearing, Hawaii

74 These possibilities are not foreign to the Applicants. In states with substantial amounts of solar such as Massachusetts, Hawaii, and California, the issue of interconnection delays is a substantial concern. Tr. 3170:1-9 (Phelps). SEIA witness Phelps stated that “for larger facilities [he] ha[d] seen delays in interconnection of years.” Tr. 3170:14-16. Provisions in the proposed Delaware settlement concerning the interconnection of behind-the-meter generation show some of the complexities of the issues such as whether the behind-the-meter application is one involving solar panels and batteries and whether “the battery never exports while in parallel with the grid and both the battery and the solar system share one inverter.” Delaware Settlement Agreement, at 26, Docket No. 14-193 (Del. Pub. Serv. Comm’n June 18, 2014). The Applicants filed the proposed settlement in the Delaware proceeding in this case and the Commission can take judicial notice of it.

Mr. Rigby acknowledged during his deposition that distribution system design and operation can influence behind the meter generation deployment, as can the distribution utility’s own deployment of such generation, and its rates, terms, and conditions of service. MEA-2 at 121:19-122:14. Mr. Crane likewise confirmed that all kinds of system considerations can come into play in determining how much DER can be added to a distribution system. Ex. MEA-1 at 180-184. Mr. Crane also made clear that the entity with most access to information about what can be deployed on the system is the distribution utility itself. Id. at 185:9-15.
Electric Light Company ("HECO") sent customers seeking interconnection for new DER a letter stating that:  

[HECO] filed a proposal with the Public Utilities Commission for revising the technical and economic components of the Net Energy Metering tariff ... Until the Public Utilities Commission makes a decision on our proposal, it is in the best interest of all customers and the utility to suspend approving additional interconnections.

Dr. Tabors explains that consumers lose if a distribution utility is able to slow down DER implementation, noting that, as a result, "the technologies that might be attractive to them have become more expensive in two ways":

The first is that delay costs time and, as is always the case, "time is money." The second is that delay slows the overall growth of innovative technologies; if technologies are prevented from developing rapidly their production and distribution and installation capabilities, then they cannot advance down the learning curve as quickly. The result is that the technologies cost more.

Ex. MEA-31 at 27:18-23. He notes that, in the "case of Exelon, the winner under these circumstances could well be its central grid generation, in that slowing down the process means Exelon will be able to sell more electricity for longer before it sees its market erode." Id. at 28:1-3. He concludes:

Because the merged entity will be the central and dominant player in the Maryland distribution utility market, it may well seek to close doors for competitors to enter the distributed resources or energy efficiency markets in order to advantage Exelon's substantial grid generation or its own distributed resources. Keeping those doors open is in the best interest of Maryland ratepayers.

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d) Record evidence shows that regulation may not be sufficiently effective to mitigate market and competition concerns.

As noted earlier, Applicants’ witness Kelly contends that the concerns raised here can be addressed through regulation. Dr. Tabors, however, argues that there “are few, if any, regulatory safeguards in place to address the market and competition concerns associated with these utility of the future issues.” Ex. MEA-31 at 46:6-8. Similarly, Exelon has expressed the view in its internal documents that “the speed of technological innovation, in particular at the distribution network level, has outpaced the existing and anticipatory response of the regulatory institutions.” Id. at 46:13-15.

That the policies and practices that will influence or direct this transition are still under development should be cold comfort. If the merger is consummated, Exelon-owned companies will serve all of the significant metropolitan centers in the mid-Atlantic region (Philadelphia, Wilmington, Baltimore, and Washington, D.C.). Tr. 2153:6-11 (Gould). Post-merger, whatever policies are agreed to will be influenced by Exelon’s views—as it will be by far the region’s largest player and loudest voice. Indeed, Mr. Crane has gone so far as to testify that the widespread use of new and evolving technology and development O&M needed for an interactive grid and the effective use of resources to reduce cost and improve reliability demand the kind of large geographically contiguous interconnected system the merger will produce. Ex. JA-8 at 10:12-16 (emphasis added). And, whatever policy choices are made, implementation will inevitably be the responsibility of an Exelon-owned company. The State can expect strong opposition whenever State guidelines or directives fail to mesh with Exelon’s strategic objectives.
At a minimum, it is reasonable to believe that, post-merger and for significant periods of time, Maryland’s distribution utilities will be operating in gray areas where the rules of the road are not clear. Exelon’s control over its utilities’ system planning and system infrastructure will enable it to control the pace of DER in each utility’s service territory.

4. There Is No Mechanism that Can Be Used to Mitigate the Harms Associated With the Merger

The State has been unable to identify a mechanism that would mitigate the harms we believe will accompany approval of the merger, and the loss of Pepco and Delmarva as across-the-fence competitors post-merger. Dr. Tabors explains that he does not see a good means to insulate Pepco and Delmarva ratepayers and other affected competitors post-merger from the potential of Exelon leveraging its control over the distribution utilities to favor its central grid generation. Moreover, absent the merger, Pepco and Delmarva as across-the-fence competitors will help serve as a check on Exelon exercising control over BGE to favor its central grid generation.

Ex. MEA-31 at 50:9-14.

III. THE PROPOSED CUSTOMER BENEFITS ARE INADEQUATE

The proposed merger should be rejected. The Applicants have failed to show that it will result in no harm to consumers, and the harms posed by the transaction cannot be mitigated. Should the Commission nonetheless chooses to address the remaining areas of inquiry under PUA § 6-105, the record shows that the proposed customer “benefits” are inadequate to justify approval, and that the merger is otherwise not in the public interest. Of the Applicants’ sixteen (16) proposed Commitments, only Commitments 1 and 2, the “Customer Investment Fund,” and “Reliability and Quality of Service” warrant consideration as potential sources of direct, certain,
Commitments 3 through 16 go to consideration of the "public interest" (addressed infra) or protecting against consumer harm. Other claimed benefits, such as synergy savings are insufficiently direct, certain, or incremental to constitute benefits within the meaning of § 6-105. See, e.g., FE/Allegheny at 43 ("proving the extent to which Merger integration savings translate into foregone requests for rate relief is like proving a negative, and future savings cannot, without more, satisfy PUA § 6-105"); Exelon/CEG at 90.

Commitment 1 is self-explanatory: “[a]fter consummation of the Merger, Exelon ... will establish a $40 million Exelon-funded Customer Investment Fund [CIF] to be used across [Pepco’s and Delmarva’s] service territories.” Ex. JA-9, CMC-2 at 1.

There are no “mathematically rigid standards” for measuring benefits; instead the Commission considers “each transaction on its own terms, and in the context of the parties and circumstances at the time” of the transaction. FE/Allegheny at 46. In the circumstances here, the proposed $40 million CIF is plainly inadequate. Exelon has agreed to establish a $62 million CIF in New Jersey and recommended that those funds be distributed as a rate credit to Atlantic City’s ratepayers, Ex. AOA-12 at 5, and further agreed to spend $7.5 million in support of energy efficiency programs for the benefit of Atlantic City’s ratepayers. Id. According to Mr. Khouzami:

In Maryland, the direct customer benefit portion of such a package would equate to an $84 million Customer Investment Fund (CIF) (equivalent to $114 per customer) plus an investment of approximately $10 million in energy efficiency initiatives paid for and implemented by Exelon over a five-year period following closing of the Merger.

76 Commitments 3 through 16 go to consideration of the “public interest” (addressed infra) or protecting against consumer harm. Other claimed benefits, such as synergy savings are insufficiently direct, certain, or incremental to constitute benefits within the meaning of § 6-105. See, e.g., FE/Allegheny at 43 (“proving the extent to which Merger integration savings translate into foregone requests for rate relief is like proving a negative, and future savings ... cannot, without more, satisfy PUA § 6-105”); Exelon/CEG at 90.

77 At a minimum, because the budget commitment is illusory, the reliability commitment is not a customer benefit and instead the provision of a core function which customers will pay for, as the Commission has held. FE/Allegheny at 53.
Ex. JA-36 at 2:10-14. This translates into “a total per-customer benefit of $128. The $128 per-customer benefit was then multiplied by 737,500 Pepco and Delmarva Power customers for a total customer benefit of $94.4 million (as measured in net present value.).” Id. at 5 n.8.

Nonetheless, Applicants continue to argue that a $40 million CIF is appropriate in this case, Tr. 623:5-14, noting that: (i) a larger payment is not economic given the projected five-year synergies of the transaction; (ii) the New Jersey ratepayer benefits are pursuant to a settlement; and (iii) the proposed CIF is reasonable in light of prior precedent. These assertions are without merit.

The State urges that the merger be rejected. However, should the Commission decide—over our objection and contrary to the record—to approve the merger, it should not do so absent a substantial increase in the level of direct customer ratepayer benefits. The level of those benefits should be well in excess of $94.4 million, which would result from the application of the applicable New Jersey settlement provisions to Maryland.78 In the event that the merger is approved, and for the reasons explained infra, the direct customer benefits should be at least at the level recommended by Commission Staff.

Synergies are not a cap on payments. Exelon’s behavior itself disproves the contention that requiring customer benefits in excess of Exelon’s projected five-year synergies would be uneconomic or unduly burdensome. Exelon’s projected total five-year synergies for the four jurisdictions is some $92 million. Tr. 634:14-19. Simply adding the New Jersey settlement ratepayer support ($69.5 million) together with the proposed CIF in Maryland ($40 million) already exceeds this total. Increasing the ratepayer funding to all four jurisdictions on a 

78 Indeed, CEO Crane has acknowledged that Exelon must provide for comparable treatment between and among the four jurisdictions (i.e., Delaware, the District of Columbia, Maryland and New Jersey). Ex. MEA-1 at 26:5-14 (“We believe that whatever we commit to in value based off of the proportional size of a jurisdiction, that we would have to make that commitment in another state. So favored nation is the term we would use.”).
achieve the proposed merger, which "exceed[] all of the savings for the first five years in total customer benefits based on the first five years of synergies because of the very high costs to  

In fact, there are good reasons to believe that even a New Jersey-style CIF and related customer benefits falls well short of being adequate. Staff recommends a CIF of $84.4 million, together with a separate rate credit of $80 million. Tr. 2868:8–2869:3 (correcting Ex. Staff-21 at 4-5; Godfrey). Staff witness Welchin explained that it makes no sense to assess the scope of customer benefits based on the first five years of synergies because of the very high costs to achieve the proposed merger, which "exceed[] all of the savings for the first five years in total
before you allocate it down to the utilities.” Tr. 3489:9-11. Based on its own revised synergy estimates, Staff looked at the synergy savings ten years out because “the 10-year value at least gives you five years after the cost to achieve has been recognized and offset against the savings.” Tr. 3490:23–3491:2. Staff also took issue with the Applicants’ synergy savings estimate because those figures contemplate utility staffing levels that exceed the “least effective performing Exelon utility that [Exelon] currently own[s].” Tr. 3465:23–3466:2. In addition, and relevant to the appropriate level of customer benefits, Staff witness Lubow observed that:

One way of looking at it, I suppose, is that the transfer of the franchise rights to the utilities is something that ratepayers should be compensated for. The value of the – of that transfer in the context of the statute requirement.

Tr. 3517:18-23.

The State believes the merger should be denied for numerous reasons as explained herein. However, if the Commission rejects the State’s position and decides, contrary to the evidence adduced at hearing, to approve the merger, then the Commission should at the very least accept the Staff’s recommendation as to the appropriate level of direct customer benefits.

IV. THE PROPOSED MERGER IS NOT CONSISTENT WITH THE PUBLIC INTEREST

A. There is Overwhelming Stakeholder Opposition to the Proposed Merger, Including Governmental Opposition

In reviewing the proposed transaction, the Commission enjoys discretion to consider “any … issue[] the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience, and necessity.” PUA §6-105 (g)(2)(xii). A factor particular to

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79 Witness Tierney testified that the “public interest” criterion refers to “broad state policy issues … and making sure that those are aligned.” Tr. 346:12-17.
the consideration of this transaction is the breadth and scope of stakeholder opposition, including from governmental bodies and regulatory entities. Specifically (and among others):

- The State and OPC seek denial of the merger.
- Staff has serious reservations whether the merger should be approved. Witness Lubow does not believe “that the transaction being proposed is necessary or leaves [customers] in a better position.” Ex. Staff-27 at 98:6-7. See also Tr. 3510:11-23 & 3523:1-6 (“I wasn’t … confident that simply adopting each and every recommendation of Staff would necessarily mitigate against all of the potential issues that have been raised”).
- The Clean Chesapeake Coalition, a coalition of ten Maryland counties, opposes the merger based upon concerns over Exelon’s lack of response to local concerns and poor stewardship regarding the Chesapeake Bay. Ex. CCC-2 at 22-23; Tr. 2176:13-19 (Gould). Delmarva provides service within Caroline, Cecil, Dorchester, Kent, Queen Anne’s, and Wicomico Counties, each of whom is a CCC member. Ex. CCC-2 at 1.
- The Sierra Club and Chesapeake Climate Action Network oppose the merger. Ex. Sierra-1 at 37:16-18.

In response to the Chairman’s question, CEO Crane acknowledged that state and local officials, elected by their constituents, represent, in part, the public interest. Tr. 961:14-19. Numerous governmental stakeholders here oppose the transaction, and for principled reasons ranging from competition concerns, environmental concerns, service quality and cost concerns, and a lack of corporate responsiveness to local officials. This governmental opposition, which reflects the public interest, should weigh heavily against any finding that the proposed merger is consistent with the public interest.

**B. The Merger Will Result in a Loss of Local Control and Corporate Utility Identity**

Witness O’Brien testifies “that local management and control are critical to the successful operation of its utility subsidiaries.” Ex. JA-18 at 16:4-5. He notes that, like BGE, Pepco and
Delmarva’s “operational decisions, strategic planning and capital and O&M budgets [will] all [be] made at the local utility level.” Id. at 18:9-10. The events in this case have already shown witness O’Brien’s assertions to be false.

Utility staffing is a core operational, planning, and budgetary decision. See Tr. 688:13-15 (Crane). Notwithstanding witness Khouzami’s understanding that Exelon and PHI should not operate as a single enterprise prior to merger approval, CEO Crane decided that Pepco and Delmarva should hire 110 additional union field workers in Maryland, and some 355 union field workers in total, Tr. 682:21-683:1, including added staffing for Atlantic City’s New Jersey operations, Delmarva’s Delaware operations, and Pepco’s operations in the District of Columbia. Mr. Crane explained: “It was my decision in consultation with Mr. Rigby that that was the right thing to do.” Tr. 690:7-9. Mr. Velasquez, currently PHI’s chief operations officer, and the designated CEO of PHI post-merger, apparently was not consulted on this matter. For its part, PHI insists that while it will have to address impending workforce retirements, PHI hedged on the question of whether it would hire the additional workers. Tr. 1801:17-22 (McGowan) (“What I’m saying is that there is a commitment to hire the 110 if the merger is completed. If the merger is not completed, there is no commitment. I’m not saying we’re not going to hire the 110. We may hire a portion of the 110.”).

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80 “[W]e are still two separate companies. We can’t operate as one.” Tr. 2568:6-7 (Khouzami).

81 Once explored at trial, it became clear that there was far less to Exelon’s hiring commitment than meets the eye. The additional employees will apparently be hired to fill positions that have become vacant due to retirement, and the extent to which the commitment will in fact result in an incremental increase in the workforce is not known. Tr. 917:10-23 (witness Crane states that “we don’t have the exact numbers” on how many additional workers in Maryland will result from the new hiring); witness Crane states:

I don’t think we’re saying we’re going to fill additional vacancies. We’re going to make a good faith effort to hire this amount in anticipation of attrition and make sure we are replenishing the workforce and providing adequate time for them to be trained to qualify as that next generation of utility worker.

Tr. 674:5-11; Tr. 1523:5-8 (Dickerson) (“as you correctly pointed out, 110 people, some of those 110 would be replacement positions that are currently filled by people. Some other number of that 110 are incremental”).
Remarkably, PHI has already begun to implement the process to hire these additional workers, even though PHI CEO Rigby testified that absent the merger it was undecided whether Pepco and Delmarva would do so. Tr. 1070:23-1073:2. Mr. Dickerson explained that Pepco and Delmarva have “planned and are in the process of hiring 110 people in Maryland ....” Tr. 1595:17-18. When challenged as to whether this was contrary to Mr. Rigby’s testimony that, absent merger approval, PHI had no plan to hire these workers, Mr. Dickerson stated that Mr. Rigby:

was correct in the fact that we had not had plans to hire them absent the merger. We are hoping the merger is going to go through. It takes time and we need to get them on board. We have to go out, we have to find people, we have to interview them. They have to go through tests. It’s a process to hire them. To the extent it takes longer and longer for the merger to get approved, some of those people could be on board.

Tr. 1596:11-20. Witness McGowan testified that these additional workers were being hired for Exelon to address utility needs post-merger. “What I said is when you look at PHI as a stand-alone company versus PHI as part of Exelon, we see the potential for needing different resources.” Tr. 1792:13-16.82 It seems clear that, local management considerations aside, hiring activities at Pepco and Delmarva are, at least as of now, being directed by Exelon.83

It is likewise beyond reasonable dispute that post-merger strategic planning will not be conducted at a local, or even PHI, level. Indeed, Applicants apparently plan to eliminate PHI’s strategic planning personnel. Tr. 3317:12-22 (DiPalma). And, the absence of a single piece of paper at BGE concerning “Utility 2.0” issues (Ex. MEA-25) speaks volumes about how and where utility strategic planning is done at Exelon. The same is true with respect to budgets,

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82 The “needs” to be addressed post-merger remain a mystery. Mr. McGowan was unaware of any document linking workforce demographics either to Commitment 2 or the table in Mr. Alden’s rebuttal testimony. Tr. 1799:14-18.
83 Mr. O’Brien testified that Exelon “run[s] more of a franchise model where” its distribution utilities “stand[] alone.” Tr. 1382:21-23. That is apparently not the case with respect to additional hiring.
which are presented to the PHI (or Pepco and Delmarva) boards for their approval after they have been fully developed through multiple levels of Exelon management. “The goals for performance would be derived at the Exelon level ... The actual detailed plans and budgets are built up in the businesses to be able to accomplish that.” Tr. 687:20-688:2 (Crane).

Applicants’ suggestion that, absent the merger, Exelon and PHI share an “alignment of vision,” Ex. JA-8 at 9:6, is off-base. Exelon is a hybrid company that operates its individual businesses, including its regulated utilities, based on a “holistic” assessment of any activity on its businesses as a whole. This means that Exelon will operate its regulated utilities through the filter of how their activities will impact Exelon’s grid generation and power marketing businesses. PHI is a wires company that made substantial efforts to divest its generation; there is no reason to believe that, absent the merger, PHI will seek to re-acquire substantial merchant generating assets. Tr. 1075:6-18. Post-merger, PHI’s corporate identity will change fundamentally and for the foreseeable future. Mr. Rigby testified that PHI’s sale of its generation repositioned the company as a regulated utility, but maintaining that status is no longer a PHI goal. Mr. Rigby explained that the change in PHI’s strategic direction “was driven from a call that I received from Chris Crane. That was the beginning of it.” Ex. MEA-2 at 31:13-15.

In an effort to mitigate the loss of local control and corporate identity that will follow the merger, Staff recommends that PHI, as a subsidiary of Exelon, have a majority independent board, akin to the current arrangement where Oncor Electric Delivery Company, a subsidiary of Energy Futures Holding Company, has a majority independent board. Tr. 3542:10-14.84

Witness Lubow explained that this recommendation is aimed at having “a material impact on trying to maintain separation and independence of PHI and its utility subs from the strategic planning and the commitments that go with it of Exelon.” Tr. 3541:7-12. See also Tr. 3545:4-11. While the State shares the concerns that support Staff’s recommendation, we question whether as a practical matter its implementation would in fact “create an atmosphere where that utility subsidiary is behaving as it would be if it were not part of that holding company.” Tr. 3545:7-10. Among other things, PHI and/or Pepco and Delmarva would still need resources, such as independent utility planning staff, that Exelon apparently intends to substantially reduce or eliminate. Tr. 3317:16-22 (DiPalma). Moreover, an independent board structure works against Exelon’s “holistic” business model.

C. The Merger’s Energy Efficiency Commitment is Non-Existent

Energy efficiency is a high priority in Maryland. The EmPOWER Maryland Energy Efficiency Act of 2008 (EmPOWER Maryland), which is the backbone of the state’s energy efficiency efforts, established as a statewide goal the achievement of a 15% reduction in per capita electricity consumption and peak demand by 2015.85 Meeting the EmPOWER Maryland goals is important to the State’s ability to comply with the Maryland Greenhouse Gas Emissions Reduction Act, which requires Maryland to reduce Greenhouse Gas emissions by 25% below 2006 levels by 2020.86 The failure to do so could, in turn, make it challenging to achieve Maryland’s obligations under the Regional Greenhouse Gas Initiative. Yet the Commission has

86 See Ex. Coalition-1 at 6:119-123; Ex. Sierra-1 at 5:22-6:2. Increased energy efficiency is also expected to be important to the State’s ability to meet the U.S. Environmental Protection Agency’s proposed Clean Power Plan. See id.
stated that “the currently approved [EmPOWER Maryland] programs may fall short of the energy reduction goals.” Achieving improved energy efficiency is thus paramount.

The proposed merger does little to promote energy efficiency. Applicants’ Commitment 8 is of uncertain scope. In response to a question about whether Exelon will continue to support the State’s energy efficiency efforts, witness O’Brien offered little more than “it depends,” Tr. 1435:3, and, as regards the upcoming EmPOWER Maryland cycle, that “hopefully . . . [Exelon is] supporting it.” Tr. 1436:4-6. Witness O’Brien refused to state whether Exelon would support or oppose efforts to “repeal,” “prohibit,” or “severely restrict” utility energy efficiency programs, Tr. 1401:1-12, stating instead: “Right now we support [energy efficiency]. I don’t see that position changing. I guess the world can change a lot on you.” Tr. 1401:7-9.

Exelon’s track record on energy efficiency is not encouraging. Its energy efficiency performance at PECO and ComEd was only that required by law. Ex. MEA-1 at 270:19-23. Exelon was not responsible for drafting the initial EmPOWER Maryland proposal that BGE has been operating under since prior to the merger with Exelon. Tr. 1973:8-16 (Butler). As for the new EmPOWER Maryland proposals that the utilities recently filed and which remain pending before the Commission, BGE’s proposal is arguably less supportive of energy efficiency than Pepco’s and Delmarva’s. See Tr. 1974:5-23. This trend is not surprising, in that Exelon’s economic interests as a competitive generator conflict directly with utility efficiency programs that reduce the purchase of electricity from central station power.

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88 Mr. Cran described at hearing a number of technological developments in areas including energy efficiency. Tr. 1035:1-1039:9. He could not explain why BGE had failed to propose to implement such solutions during any number of recent energy efficiency proceedings. Tr. 1038:19-1039:9.
D. Other Considerations Show the Merger Is Not in the Public Interest

The Applicants have made no commitments concerning affordability other than to maintain and promote Pepco’s and Delmarva’s existing low-income assistance program. Pepco’s and Delmarva’s ratepayers are likely to face substantial rate hikes associated with the proposed capital budgets and Exelon’s intent to realize higher actual returns on equity than the utilities are now achieving. Tr. 3519:20-3520:2 (Lubow); Tr. 1105:6-15 (Rigby). Subsequent to Exelon’s engineering studies, the proposed capital expenditures could increase substantially. In addition, Pepco and Delmarva post-merger may forego efficient reliability solutions to the extent they could adversely impact Exelon’s generating interests.\(^89\)

As regards employment, given workforce attrition rates it is possible that Exelon’s commitment to hire 110 “additional” field workers will result in no new full time jobs. Tr. 1803:15-1804:2; Tr. 1810:5-18; Tr. 1880:17-1882:9 (McGowan). Staff projects a net loss of jobs in Maryland because, among other things, many PHI Service employees work in Washington, D.C., but live in Maryland. Tr. 2852:11-2853:23 (Ostrover & Pfaff); Ex. Staff-19 at 20:20-24 (estimating a merger-related loss of up to 4,499 job years and associated economic losses to the State that may exceed $300 million).

CONCLUSION

This merger will harm Maryland customers, offers no tangible, incremental benefits of sufficiently meaningful value, and is not in the public interest. Nothing in the filed testimony, or the evidence adduced during lengthy and comprehensive hearings, changes these facts. The only significant benefits accrue to Exelon and PHI shareholders and corporate officers—not the State.

\(^89\) Mr. Crane acknowledged that there is a “fatigue element” associated with continual rate hikes, but commented that “[w]e have to get the recovery on the capital.” Tr. 1017:21-23. As customers seek to rely increasingly on DER, Exelon is considering the “concept” of moving to fixed or “network” charges as a way of maintaining distribution utility revenues. Tr. 735:2-17.
or Maryland customers. For the foregoing reasons, the State respectfully requests that the Commission deny the application for approval of the proposed merger.

Respectfully submitted,

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