BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE MERGER OF EXELON CORPORATION, POTOMAC ELECTRIC POWER COMPANY, EXELON POWER COMPANY, EXELON ENERGY DELIVERY COMPANY, LLC, AND NEW SPECIAL PURPOSE ENTITY, LLC	)	Formal Case No. 1119

PETITION FOR LEAVE TO INTERVENE
OF PUBLIC CITIZEN FOUNDATION

Public Citizen Foundation petitions the Commission for leave to intervene in this proceeding under Rule 106.

Introduction

Public Citizen seeks leave to intervene because no current party to this proceeding adequately represents affected consumers or the public interest. Public Citizen is a national nonprofit membership organization with over 400,000 members and supporters. We regularly work to promote good government and protect consumers and the public interest at the national, state, and local levels. Many of our members and employees reside in the District of Columbia, and two of our three offices are located here. We have a substantial interest in this proceeding because we represent District consumers and the public interest, and what is good for consumers and what is in the public interest are core issues in this proceeding.

The Commission has taken extraordinary actions in granting the settling parties' requests that it wave its rules and regular order to (1) permit a settlement to be presented after the issuance of a final order; (2) reopen the record; (3) decline to treat the settlement

as a new application triggering a new proceeding; and (4) set a schedule of proceedings so speedy that it makes adequate scrutiny of the proposed settlement exceedingly unlikely and contravenes express language of the D.C. Code requiring at least 45 days' notice before public hearings. In light of these actions in this historically significant proceeding, it is only appropriate that the Commission take the commensurate step of permitting parties to intervene to ensure adequate consumer and public interest representation. In short, if the Commission wishes to bends its rules—as its rules arguably permit[1]—then it should do so in an even-handed manner. It should accept requests not only from the settling parties but also public interest representatives and parties opposed to the settlement. The Commission will have difficulty justifying to a reviewing court a pattern of departing from its regular order selectively, in a manner that compromises its consideration of the core issue in this proceeding—the public interest.

The Commission should consider this petition on the merits rather than inquire whether late intervention is justified. But if the Commission deems the petition late, it meets the Commission's standard for intervention. Public Citizen has good cause to intervene and granting the petition would be reasonable for two reasons. First, the proposed settlement contains new and detailed provisions that have no analogue in the original application, and therefore the application failed to provide potentially interested parties with adequate notice of the settlement that the Commission is now weighing. It was reasonable for parties to believe that if the Commission ever came to pass on something as different as the proposed settlement, it would do so in a new proceeding or would otherwise permit a new round of interventions. Second, there is no longer any

[1] *See* 15 D.C.M.R. § 146.1 ("The Commission may, in its discretion, waive any of the provisions of Chapters 1 and 2 of this title in any proceeding after duly advising the parties of its intention to do so.").

party to the proceeding adequately representing consumers or the public interest, as the Office of the People's Counsel is no longer performing that role. Both the substance of this proceeding and the very nature of the parties have changed substantially since it began in June 2014. If the Commission does not allow consumer and public interest representatives to intervene, it will miss the opportunity for useful assistance in evaluating the proposed settlement, impair a full and fair evaluation of the proposal, and increase the risk of judicial reversal in the event that it approves the deal.

Finally, it is difficult to see how the parties could be prejudiced by intervention. The Commission is proceeding to evaluate the settlement, and intervention would do no more than permit an additional party with a valuable perspective to participate in the process. Indeed, it is Public Citizen and the general public who would be prejudiced if the Commission declines to permit intervention. They justifiably relied on it to follow its regular order, as it did through August 2015, when it rejected the utilities' application. Since then, the utilities have mounted an extraordinary campaign to have the Commission consider what is essentially a new merger application with little of the required process and minimal public scrutiny. To accede to the settling parties' requests without permitting adequate public input and participation by consumer and public interest representatives would severely prejudice those representatives, as well as the general public.

I. Differences between the settlement and the original application justify deeming this petition timely or, in the alternative, finding it reasonable and supported by good cause.

Although the Commission declined to treat the proposed settlement as a new application, it should consider petitions to intervene as if this is a new proceeding. The proposed settlement is vastly different from the original application. It contains nearly

three times as many words (roughly 15,500 rather than 5,800) and numerous new and detailed provisions.[2] This is no surprise, as the original application offers little more than empty rhetoric on significant issues. To give one example, consider the issues of cost, synergies, and rates. The original application discusses these matters in just 136 words, of which only the first 40 state anything of consequence. The remainder of the passage offers only conclusory assertions that stem from the utilities' unsupported *beliefs*, about which the utilities say they are "confident":

> The Merger will have no immediate effect on customer rates, rules, or terms of service. However, the Merger will confer immediate direct benefits of $14 million, or more than $50 for each Pepco distribution customer in the District of Columbia. The Joint Applicants are also confident that the Merger will generate synergies and result in overall aggregate cost saving opportunities for the combined company. The synergies that will accrue to Pepco over time should, at least in part, offset the increasing cost of providing regulated distribution and transmission utility service and, thereby, mitigate the need for or reduce the size of future rate increases that would have otherwise been requested absent the Merger. The Joint Applicants are confident that the merger will generate synergies and result in overall aggregate cost saving opportunities for the combined company.[3]

By contrast, the proposed settlement contains 2,710 words on these issues—a discussion roughly *twenty times* the length of the corresponding text in the original application. The settlement spends 734 words on the allocation of the Consumer Investment Fund,[4] another 1,911 on "Cost and Accounting Synergy Savings,"[5] and 65 on "Future Rate Design."[6] Needless to say, the settlement includes several highly detailed new provisions

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[2] We derived these word counts provided by deleting the non-substantive portions of the original application and the proposed settlement, contained in docket numbers 0001 and 00959, converting the documents to Microsoft Word format, and rounding the software's word count to the nearest hundred. They are meant to be illustrative, not precise, as there are different ways one could derive them.

[3] *Formal Case No. 1119*, Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC at 22 (June 18, 2014) ("Application").

[4] *Formal Case No. 1119*, Motion of Joint Applicants to Reopen the Record in Formal Case No. 1119 to Allow for Consideration of Nonunanimous Full Settlement Agreement and Stipulation, or for Other Alternative Relief, Ex. A at 3–5 (Oct. 6, 2015) ("Mot. to Reopen").

[5] *Id.* at 8–11.

[6] *Id.* at 11.

on these matters, which require public scrutiny and a thorough process before the Commission to evaluate adequately.

The language discussed above is just one of several substantial differences in the substance, length, or complexity of the settlement compared to the original application, all of which demonstrate that the application failed to give potentially interested parties notice that the Commission would ultimately consider a plan like the proposed settlement. It is our view that the settlement offers little if any real improvement over the application and still fails the public interest standard. But we urge the Commission to permit intervention to provide itself the benefit of a full, fair, and genuinely adversarial hearing on that question, with participation by representatives of the most important perspectives—consumers and the public interest.

II. The Commission should permit Public Citizen to intervene so that consumers and the public interest have a voice in this proceeding.

This petition is also reasonable and supported by good cause because consumers and the public interest currently lack adequate representation in this proceeding. The Office of the People's Counsel laudably highlighted the deficiencies in the proposed merger for roughly fifteen months, finding it inadequate in several respects—until the Commission rejected the merger and the Mayor reversed her opposition and launched an eleventh-hour campaign to rescue it.[7] Since then, the People's Counsel, which lacks independence from the Mayor, is no longer adequately representing the public interest.

On matters of procedure, the People's Counsel previously safeguarded the public's interest in having a voice in this proceeding. In September 2014, for example, it

[7] Aaron C. Davis & Thomas Heath, *D.C. Mayor Reverses Course and Backs Pepco-Exelon Merger*, WASH. POST Oct. 6, 2015, at https://www.washingtonpost.com/business/capitalbusiness/dc-mayor-reverses-course-and-backs-pepco-exelon-merger/2015/10/06/15bf2b60-6c5b-11e5-b31c-d80d62b53e28_story.html.

urged the Commission to provide at least 30 days' notice before any public hearing.[8] By contrast, the People's Counsel recently acceded to a schedule the Commission announced on October 28 which implied that a public hearing would be held between November 13 and November 17 but had not yet been scheduled.[9] In other words, the public would likely have less than two weeks' notice. In fact, the Commission announced a November 17 community hearing on November 9—just eight days in advance—and also scheduled it during the workday and failed to give participants advance notice of the times they could expect to speak. The scheduling and form of notice for this hearing contravene the protections in § 34-909(a) of the D.C. Code:

> For every proceeding in which the Commission has a public hearing, the public shall be given a timely opportunity to present its views, as evidence of record, with at least 45 days notice, with notice widely and publicly distributed in a form sufficiently detailed and complete to permit the public to realize its specific and affected interest.[10]

The People's Counsel's previous positions are consistent with the view that this manner of proceeding is wholly inadequate to ensure public participation, but the People's Counsel was silent on the issue this time.

The change in the People's Counsel's advocacy is also evident on matters of substance. Perhaps the most laudable aspect of its prior efforts was its sharp eye for aspects of the merger application that promised only to maintain the status quo rather than provide affirmative benefits sufficient to demonstrate a public interest in the transaction. That perspective is missing from its post-settlement testimony.

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[8] *Formal Case No. 1119*, Letter to Chairman Kane from Sandra Mattavous-Frye (Sept. 16, 2014) ("One of the recurring themes in the consumers' testimony was the importance of having adequate notice of public hearings . . . . I respectfully encourage the Commission to establish public hearing dates with at least 30 days of notice for the upcoming public hearings on the PHI-Exelon merger. In my view, the merger case is the most important public interest decision this Commission will make in the near future.").

[9] *See Formal Case No.* 1119, Order No. 18011 (Oct. 28, 2015), Attachment A.

[10] D.C. Code § 34-909.

One example is the People's Counsel's claim that customers will benefit from the rate provisions in the settlement.[11] The relevant settlement provisions require more scrutiny to evaluate fully, but we suspect the People's Counsel of June 2014 to August 2015 would have said something quite different—that the up-front payment of $14 million is too small to offset the potential costs of the merger, that we have no assurance that the remaining ratepayer protections amount to more than temporarily maintaining the status quo, and that any benefit they provide will be small, short-lived, and therefore insufficient.

The proposed settlement outlines a scheme to track merger-related savings and ensure that ratepayers do not pay merger costs in excess of those savings for three years.[12] But paying merger costs only up to the point of merger savings is a paradigmatic example of maintaining the status quo rather than providing a benefit. Worse yet, this inadequate guarantee will last only three years. The settlement also outlines a $25.6 million "Rate Stabilization Fund" but expressly contemplates that the fund might be completely exhausted by March 31, 2019. In November 2014, the People's Counsel faulted the original application in part by stating, "the $100 million CIF and the $14 million portion allocated to the District appear to be substantial sums . . . . [H]owever, these sums are not sufficient to compensate ratepayers for the risks inherent in the companies' decision to merge."[13] This assessment seemed unlikely to change if the utilities were to add $25.6 million to the original $14 million—or, for that matter, to offer a total of $72.8 million to various initiatives. Part of the People's Counsel's critique was

[11] *Formal Case No. 1119*, Office of the People's Counsel's Testimony in Support of the Proposed Settlement Agreement, Ex. OPC (A) at 6–11 (Oct. 30, 2015) ("OPC Settlement Testimony).
[12] Mot. to Reopen, Ex. A ¶¶ 28–29.
[13] *Formal Case No. 1119*, Direct Testimony and Exhibits of the Office of the People's Counsel (Public Version), Ex. OPC (A) at 10 (Nov. 3, 2014) ("OPC Orig. Testimony").

that the offered funds were a pittance compared to the $1.34 billion acquisition premium Exelon is offering and the $6.8 billion valuation of the deal.[14] These points remain true of the settlement. The People's Counsel also offered the following view on the application, which applies no less to the proposed settlement:

> Ratepayers have no assurances to any of the longer-term merger-related efficiency benefits asserted by the Joint Applicants. Even if these efficiency benefits were to arise (a conclusion that cannot be reached), they are likely to be small with very little upside of exceeding current Joint Applicant expectations.[15]

The People's Counsel now states that "the [settlement] Agreement envisions ratepayers getting a very substantial and large CIF benefit in addition to having the ability to share in any net synergy savings (net of cost-to-achieve) in the future."[16] It neglects to mention that the CIF remains small by its previous measures, and it neglects to fault the cost-sharing provisions for merely maintaining the status quo, for a mere three years.

A second example is the People's Counsel's criticism of the original application for "simply promising to maintain the *status quo*" on the issue of employment in the District.[17] The same is true of the proposed settlement, which differs only in that it makes explicit that the employment guarantee is extremely short-lived, running just through 2019, and it requires Exelon to move the headquarters of its utilities businesses to the District for ten years.[18] Summing up its view on these matters, the People's Counsel states that the proposed settlement includes an "expanded corporate presence" for at least ten years and "offers specific commitments *to not become net jobs-negative as a result of the merger* through at least the end of 2019."[19] It fails to argue, in accordance with its

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[14] *Id.*
[15] *Id.* at 26.
[16] OPC Settlement Testimony, Ex. OPC (A) at 6.
[17] OPC Orig. Testimony, Ex. OPC (A) at 76.
[18] Mot. to Reopen, Ex. A ¶ 10.
[19] OPC Testimony in Support of Settlement at16 (emphasis added).

prior advocacy for the public interest, that merely maintaining the status quo is inadequate to meet the public interest standard and that any affirmative benefits the settlement offers are small and short-lived.

In short, the People's Counsel is no longer adequately representing District consumers and the public interest, and it is no longer reliably assisting the Commission in assessing the public interest impact of the proposed merger. The Commission should grant this petition to help fill those voids.

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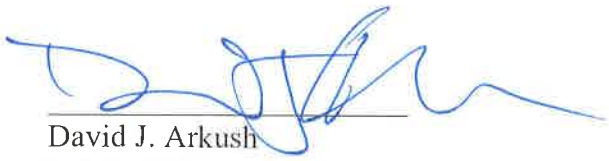
The Commission's decision to reopen the record and consider the proposed settlement without initiating a new proceeding invites gamesmanship and manipulation of its process. Its decision to proceed on an extraordinarily rapid schedule at the behest of the settling parties risks shutting out public scrutiny and important perspectives that will aid the Commission's decision making. It also contravenes the D.C. Code with respect to notice of public hearings. The Commission should remedy these problems by permitting intervention. It will invite unfavorable judicial scrutiny if it bends its rules to consider a settlement proposed out of time, reopens the record out of order, and proceeds on an unlawfully rapid time table while denying intervention by parties who represent critical perspectives and who lacked adequate notice eighteen months ago that they should have intervened in what is now a very different proceeding.

Conclusion

For the foregoing reasons, the Commission should grant this petition for leave to intervene.

Respectfully submitted,



David J. Arkush
Public Citizen
215 Pennsylvania Ave, SE
Washington, DC 20003
(202) 454-5100
darkush@citizen.org
D.C. Bar No. 490385

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