April 22, 2016

Ms. Brinda Westbrook-Sedgwick
Commission Secretary
Public Service Commission of the District of Columbia
1325 G Street, NW, Suite 800
Washington, DC 20005

Re: **DC SUN and Public Citizen's Application for Reconsideration** in **Formal Case No. 1119**, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC

Dear Ms. Westbrook-Sedgwick:

Enclosed please find an original and fifteen (15) copies of DC SUN and Public Citizen's Application for Reconsideration.

Please call me at (202) 454-5132 if you have any questions.

Sincerely,

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Washington, DC 20003
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cc: all parties of record

BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE JOINT APPLICATION OF EXELON CORPORATION, PEPCO HOLDINGS, INC., POTOMAC ELECTRIC POWER COMPANY, EXELON ENERGY DELIVERY COMPANY, LLC AND NEW SPECIAL PURPOSE ENTITY LLC

Formal Case No. 1119

DC SUN AND PUBLIC CITIZEN'S APPLICATION FOR RECONSIDERATION

DC Solar Neighborhoods United ("DC SUN") and Public Citizen, Inc., submit this application for reconsideration of Commission Order No. 18148 under 15 DCMR § 140.1.[1] By Commission rule, this application "act[s] as a stay upon the execution" of Order No. 18148 until the Commission takes final action on this application.[2]

[1] *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corp., Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of the Proposed Merger Transaction ("Formal Case No. 1119"),* Order No. 18148, rel. March 23, 2016 ("Order No. 18148" or the "March Order").

[2] *See* 15 DCMR § 140.7 (2014); *see also* D.C. Code § 34-604 (b) (2013 Repl.) (same, except also allowing the Commission to lift the automatic stay with the consent of the utility).

Introduction and Summary of Argument

The Commission and several commenters have noted that this case presents "one of the most significant decisions that the Commission will ever make" and that this decision "is forever."[3] For these reasons, it is critical that the Commission correct numerous errors in Order No. 18148 and the process that produced it. These errors are so central to that Order that their correction should preclude approval of the proposed transaction between Exelon and Pepco.

After the Commission rejected the Joint Application to approve Exelon's acquisition of Pepco on August 27, 2015,[4] it engaged in a pattern of procedural irregularity that produced a deeply flawed final order approving the merger based on the Commission's own modification of settlement terms not agreed to by the majority of the parties to the original settlement. When the

[3] *See, e.g.*, Order No. 17947 ¶ 5.
[4] Order No. 17947.

Commission waived its rule against filing settlement proposals after a final decision,[5] it acceded to the Joint Applicants' proposal to set a schedule for considering the non-unanimous settlement proposal ("NSA") that was so hasty it violated the D.C. Code's notice requirements for public hearings and all but ensured that the Commission, the parties, and the public would be unable to consider and weigh in on the settlement adequately. The Commission's decision to reopen the record emphasized repeatedly that it would hold additional proceedings only for the "very limited purpose" of considering whether the particular settlement proposed by the particular settling parties was in the public interest.[6] Thus, when the Commission rejected the NSA on February 26, 2016,[7] that decision should have ended the matter. Instead, the Commission proposed alternative terms to the parties,[8] a decision that, without explanation, contradicted its prior statements about the scope of this proceeding. The Commission then stated that the revised NSA ("RNSA") would be approved if all the Settling Parties agreed to it.[9] When nearly all the parties rejected the RNSA, the Commission approved it anyway—ultimately granting the Joint Applicants their near-unilateral desires in a proceeding that the Commission had "emphasize[d]" had "no other purpose" than to "consider[] whether the Settlement Agreement filed by the Settling Parties is in the public interest."[10]

[5] Order No. 18011 ¶ 58.

[6] *Id*. ("Consequently, the Commission will reopen the record in Formal Case No. 1119 solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest. The Commission emphasizes that the record will be reopened for no other purpose."); *id*. ¶ 60 ("Given the limited nature for which the record is being reopened, (i.e., to consider whether the Settlement Agreement filed by the Settling Parties is in the public interest), the Commission will similarly limit the scope of discovery.").

[7] Order No. 18109 ¶ 205 ("Order No. 18109" or the "February Order").

[8] Order No. 18109 ¶¶ 206–07.

[9] *Id*. The Settling Parties to the NSA were the District of Columbia Government ("District Government"), the Office of People's Counsel ("OPC"), the Apartment and Office Building Association ("AOBA"), the District of Columbia Water and Sewer Authority ("DC Water"), the National Housing Trust, the National Consumer Law Center, and the National Housing Trust-Enterprise Preservation Corporation. Of these parties, only AOBA continues to support the terms the Commission accepted in Order No. 18148. *See Formal Case No. 1119*, Notice and Response of the Apartment and Office Building Association of Metropolitan Washington to Commission Order No. 18109 and to the Joint Applicants' Request for Other Relief, Mar. 11, 2016.

[10] Order No. 18011 ¶ 58.

The Commission also failed to produce a clear, reasoned decision demonstrating that its conclusions are based on substantial evidence. Even attempting to understand why the Commission believes Exelon's acquisition of Pepco is in the public interest requires reading at least three and as many as five separate opinions. Further, those opinions contain critical internal contradictions and gaps in the Commission's reasoning and supporting evidence for its ultimate decision approving the deal. Order No. 17947, which rejected the Joint Application, considers it meticulously and identifies multiple reasons why the application does not satisfy the public interest test. Later, Orders No. 18109 and 18148 approve a similar deal, with modifications, but on many key points never explain how the Commission reached a different conclusion. The Commission does not explain whether changes in the Joint Application's terms addressed its concerns (and, if so, what changes and how they addressed the concerns), whether the Commission changed its mind (and, if so, why it did), or whether the Commission simply forgot to consider some of the reasons it previously gave for rejecting the application.

Rather than carefully explain what it accepts and rejects from Order No. 17947, Order No. 18148 relies heavily on the Settling Parties' consent to the NSA for its public interest finding. But by the time of Order No. 18148, the agreement had dissolved, and all but one of the formerly Settling Parties opposed the RNSA for failing to serve the public interest. The RNSA was, by that time, in no meaningful sense a settlement. Indeed, had only one of the many parties to this proceeding originally agreed to terms under which it would support Pepco and Exelon's merger, the Commission undoubtedly never would have granted leave for a late filing of such a "settlement." Even if it were permissible to relax the public interest standard merely because some parties claim that their settlement is in the public interest—and to be clear, it is not

permissible—the Commission still could not rely on the Settling Parties' consent to the NSA's terms as a reason to approve a materially different RNSA that the same parties opposed.

The Commission also misunderstood and misapplied the governing legal standard in Order No. 18148—the public interest standard. That standard requires the Commission to make an independent, affirmative finding that the deal "as a whole" is in the public interest.[11] Commission rules also place the burden of persuasion on the proponent of a transaction or settlement.[12] The two Commissioners in the majority disagreed with one another on the proper standard in Order No. 18109 (a discussion they did not revisit in Order No. 18148). Commissioner Fort expressly declined to consider the transaction "as a whole," and she erroneously placed the burden of persuasion on its detractors.[13] Commissioner Phillips stated that he believed the Commission's role was only to assess the NSA for basic fairness, adequacy, and non-collusion.[14] Rather than make an independent finding that the NSA was in the public interest, he deferred to the Settling Parties' view on that question and, in fact, criticized the majority in Order No. 18109 for "substitut[ing] [its] judgment for that of the Settling Parties."[15] Phillips disagreed with the Commission's decision to offer the Settling Parties alternative terms

[11] Formal Case No. 1119, Order No. 17947 ¶ 57.

[12] *Id*.

[13] Order No. 18109 ¶ 82 (Fort, concurring) ("No specific comments were raised in response to the majority of the paragraphs or the commitments contained in the NSA. In the absence of objections, there is no basis to find that they are not in the public interest").

[14] Order No. 18109 ¶ 174 (Phillips, concurring) ("Federal courts have recognized that a settlement should be approved if it is fair, adequate, reasonable, free of fraud or collusion. . . . In evaluating settlements, courts are mindful of the fact that compromise is the essence of settlement and are hesitant to substitute their judgment for that of the parties. Additionally, approval of a settlement is appropriate if the Commission is satisfied that it was reached pursuant to arm's length negotiation between the parties and is otherwise consistent with the law."). *See also* Order No. 18109 ¶ 23 n.45 ("Commissioner Phillips objects to the use of the standards cited from *Placid Oil Co*. and *Michigan Consolidated Gas Co*. as the standard of review for considering settlement agreements before this Commission. Instead, Commissioner Phillips believes that the appropriate standard of review that should be applied to the Commission's consideration of the NSA is the standard that is provided at Paragraph 174 of his dissenting opinion.").

[15] *Id*. ¶ 201.

but nonetheless "consented" to offer them—and ultimately approved them—without evaluating whether they were in the public interest.

When one considers the many errors, gaps, and contradictions across the Commission's orders, one finds that Order No. 18148 is supported by scant reasoning and has little basis in the record. In fact, it *contradicts* the Commission's most careful analysis of the evidence and the relevant legal standards, which appears in Order No. 17947, rejecting the application—a contradiction that appears to be attributable in large measure to the majority commissioners' misunderstanding of the public interest standard. In short, Order No. 18148 bears little resemblance to the reasoned decision-making required of an agency under the DC APA.

In light of these flaws, it is no surprise that many of the Commission's substantive decisions are not supported by substantial evidence in the record. The final section of this Application details several of these problems.

Standard of Review

By statute, any person affected by a final order or decision of the Commission may apply for reconsideration. One need not have been a party to the case; one need only be "affected by the order in question."[16] "[T]he purpose of an application for reconsideration is to identify errors of law or fact in the Commission's order so that they can be corrected," and to allow the

[16] *Goodman v. Pub. Serv. Comm'n*, 309 A.2d 97, 103 n.2 (D.C. 1973) ("[U]nder our statutes, one need not have been a party to the proceeding before the Commission to seek reconsideration; one need only be affected by the order in question."); D.C. Code § 34-604(b) ("Any public utility or any other person or corporation affected by any final order or decision of the Commission may . . . file with the Commission an application in writing requesting reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration."); *see also* 15 DCMR § 140.2 (2015). One of the applicants is a party to this case. The other applicant, Public Citizen, is an "affected person," as it pays for electricity in the District, has members in the district who are affected in the same way, and advocates for the public interest, the core focus of this proceeding. The Commission's order rejecting Public Citizen's petition to intervene recognized that Public Citizen has a substantial interest in this proceeding but denied the petition on the ground that it was untimely. *See* Order No. 18058 ¶ 35 ("[Public Citizen's] profile is sufficient to show a substantial interest in this proceeding which focuses on making an ultimate public interest determination. Based on these facts, Public Citizen would have been granted party status had it timely applied for intervention, *i.e.*, at the start of the case as outlined in our procedural order.").

Commission to clarify findings or conclusions in the order before the parties seek an appeal.[17] The application for reconsideration must include any argument the applicant wishes to preserve for judicial review, even if it has already been addressed by the Commission.[18]

Argument

I. The Commission violated D.C. Code § 34-909(a) by failing to provide adequate notice of the two hearings on the NSA.

The Commission failed to give adequate notice of two different public hearings on the NSA. Section 34-909(a) of the D.C. Code requires the Commission to give 45 days' notice to the public before holding a "public hearing" in "every proceeding in which the Commission has a public hearing":

> 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 [*sic*] 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.[19]

In this case, the Commission held two hearings that violated this statute. On October 28, 2015, the Commission set a schedule even more compressed than what the Joint Applicants had proposed,[20] which set the public interest hearing for 35 days later, on December 2 and 3.[21] The same order noted that the Commission would hold a community hearing for members of the public to present their views at "a date and time to be announced."[22] On November 5, the

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[17] *Formal Case No. 1126, In the Matter of the Office of the People's Counsel's Complaint Against Washington Gas Light Company Regarding the Unlawful Compensation of Competitive Service Providers in Violation of its Rate Schedule Number 5*, Order No. 18103 ("Formal Case No. 1126, Order No. 18103"), rel. February 3, 2016 at ¶ 22; *see also* D.C. Code § 34-604(b).

[18] D.C. Code § 34-604(b).

[19] D.C. Code § 34-909(a).

[20] *Compare Formal Case No. 1119*, Response of Joint Applicants to Commission Order No. 18000 Regarding the Schedule for This Proceeding and the Scope of Discovery, filed Oct. 16, 2015, at 3 (proposing that nonsettling parties' testimony be due on November 20, initial briefs on December 16 and reply briefs on December 23) *with* Order No. 18011 Att. A (ordering that nonsettling parties' testimony be due on November 17, initial briefs on December 11 and reply briefs on December 18).

[21] Order No. 18011 ¶ 62.

[22] *Id*. ¶ 64.

Commission announced that the community hearing would be held on November 17—just 12 days later.[23]

These notice requirements are not mere technicalities. The Commission's failure to provide adequate notice undermined the public's and the parties' ability to participate and, as a result, hampered the Commission's decision-making. The community hearing was exceedingly disorganized and difficult to participate in, largely because there was so little notice or advance planning. To begin, the Commission scheduled the hearing for 10:00 a.m. on a business day, and members of the public who wished to speak needed to commit to be present all day, for they had no way of knowing when they would have an opportunity to speak. Indeed, the Commission later issued a revised notice that warned members of the public, in boldface type, that even those who signed up in advance might not be given the opportunity to speak at all.[24] At 5:30 p.m. on November 12—just three business days before the hearing—the Commission added a second day to the hearing.[25] Many interested members of the public would have difficulty taking a day—or two—off work to attend all-day hearings, particularly with only 12 or two days' notice to their employers, and few would find it worthwhile after being warned that they might not be permitted to speak. Nonetheless, the Commission appeared to be surprised and overwhelmed by the number of speakers who signed up. At 5:30 p.m. on the night before the hearing, the Commission posted on its website a list of speakers in the order that they would be called.[26] The Commission was unable to follow that notice the next morning, as the majority of speakers were not in the right place at the right time.

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[23] Docket No. 1017, Notice of Community Hearings and Public Interest Hearing (Nov. 5, 2015).

[24] Docket No. 1045, Notice of Community Hearings and Public Interest Hearing (Nov. 12, 2015) ("*The Commission cannot guarantee there will be time for all pre-registered speakers and for all walk-in speakers even with the additional hearing day. Speakers will be called in the order that they pre-registered or signed in on the hearing day*.") (emphasis in original).

[25] *Id*.

[26] Docket No. 1095, Public Notice (Nov. 16, 2015).

The tight schedule also undermined the quality of the parties' public interest hearing. DC SUN advocated a materially longer schedule, which it argued was essential to permit the nonsettling parties to conduct reasonable discovery, to produce responsive testimony, to participate effectively in the public hearings, and to prepare worthwhile briefs.[27] When the Commission instead adopted a schedule that was even more accelerated than the one that the Joint Applicants proposed, DC SUN—a non-profit with pro bono counsel and limited resources—advised the Commission that "the procedural schedule will not permit it to conduct cross-examination at the Public Interest Hearing nor will it be able to conduct effective discovery or present testimony."[28] Because of the Commission-adopted schedule, DC SUN was limited to filing briefs and necessarily "rel[ied] on the Commission to thoroughly examine the proffered final resolution of this proceeding that will affect the District's electric utility customers 'forever.'"[29]

The Commission's schedule also undermined the participation of the United States General Services Administration ("GSA"), an opponent of the NSA that has substantial expertise and resources. GSA opposed the Joint Applicants' proposed schedule vigorously, arguing that it would "deprive[] the nonsettling parties and the community at large" of a "meaningful opportunity to vet the Settlement Agreement."[30] GSA also pointed out that the pre-hearing discovery and briefing process would ordinarily require "no less than five months."[31] After the Commission imposed the abbreviated 35-day schedule,[32] GSA notified the Commission shortly

[27] *Formal Case No. 1119*, Nonsettling Parties Opposition to Joint Applicants' Motion to Reopen the Record, filed October 16, 2015, at 9–13.
[28] *Formal Case No. 1119*, DC Solar United Neighborhoods' Notice Regarding Cross-Examination at the Public Interest Hearing, filed November 3, 2015, at 2.
[29] *Id.*
[30] Docket No. 0974, GSA Opp. to Joint Applicants' Mot. to Reopen the Record at 6 (Oct. 16, 2015).
[31] *Id*. at 6–7.
[32] Order No. 18011.

before the hearing that it would not participate.[33] In response to a press inquiry, GSA explained that it did not have enough time to prepare adequately.[34] Then, in Order No. 18109, the Commission rejected one of GSA's positions on the ground that it "failed to proactively litigate this case" and "deprived all parties of the opportunity to vet" its position.[35] This problem was of the Commission's making, not GSA's. The Commission has an obligation to craft proceedings adequate to ensure full and fair consideration of the issues before it.

The Joint Applicants do not dispute that the 45-day notice requirement would apply to the community hearing and the public interest hearing in the right type of case. They argue that the notice requirement does not apply here only because this is not a "rate case."[36] This argument directly contradicts the statutory text, which applies the notice requirement in "every proceeding in which the Commission has a public hearing."[37] The Joint Applicants also attempt to muster support from a single case, but that case demonstrates that § 34-909 (a) applies well beyond "rate cases." In *OPC v. PSC*, 889 A.2d 1003 (D.C. 2006), the PSC had issued an order based on notice-and-comment procedures without holding any hearing at all, and the court held that the Commission was not required to hold a hearing to make the decision at issue.[38] The court was not faced with deciding whether the 45-day requirement would apply if the Commission had held a hearing, and by no means held or even suggested that the requirement is limited to hearings in "rate cases."

[33] Docket No. 1238, GSA request to the Commission for permission to be excused from attending the Public Interest Hearing (Dec. 1, 2015).

[34] *See* Aaron C. Davis, *GSA Drops out of Key Hearing on Pepco-Exelon Merger*, WASH. POST, Dec. 2, 2015 (quoting GSA Deputy Administrator Adam Neufeld as saying, "[t]he short-circuited timeline meant that we were doing a lot of work up to the last minute—to make sure we had the most reasoned, articulate response" and "[w]e were unable to get a good enough document for this whole agency to stand behind").

[35] Order No. 18109 ¶ 30.

[36] *See* Joint Applicants' Response in Opposition to Grid 2.0 Working Group's Application for Reconsideration of PSC Order No. 18148, Mar. 30, 2016, at 3.

[37] D.C. Code § 34-909 (a).

[38] 889 A.2d at 1007–08.

II. The Commission contradicted prior positions without explanation, and those actions also deprived the parties and the public of notice and opportunity to participate in this proceeding.

It is a basic principle of administrative law that an agency must explain itself when it changes a stated policy or rule.[39] In this proceeding, the Commission acted arbitrarily by failing to explain actions that expanded the scope of proceedings that it said would be limited to the NSA, contradicted its policy against "shoring up" proposals before it, and contradicted its statements that it would approve the RNSA only if all Settling Parties consented. Moreover, each of these actions deprived the parties and the public of adequate notice and the opportunity to participate fully in this proceeding.

A. The Commission arbitrarily ignored or reversed its decision that this proceeding was limited to considering the NSA and its holding that the Commission would not "shore up" deficient proposals, and these actions deprived the parties of notice and the opportunity to participate in this proceeding.

1. In its February and March orders, the Commission took actions that were at odds with its prior positions against going beyond the four corners of the NSA and against proposing alternative terms to the parties. The Commission acted arbitrarily and capriciously in ignoring or reversing its prior positions on these matters without explanation, and its actions deprived the parties and the public of the opportunity to represent their interests fully and fairly in the proceeding.

From the time it reopened the record of this case on October 28, 2015, until its order rejecting the NSA on February 26, 2016, the Commission repeatedly indicated that it was proceeding exclusively to consider a particular settlement agreement—the NSA—by particular parties—the Settling Parties. In its October order, the Commission stated:

[39] *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books . . . . And of course the agency must show that there are good reasons for the new policy.") (citation omitted).

> Consequently, the Commission will reopen the record in Formal Case No. 1119 solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest. *The Commission emphasizes that the record will be reopened for no other purpose.*[40]

Turning to the question of discovery, it stated:

> Given the limited nature for which the record is being reopened, (i.e., to consider whether the Settlement Agreement filed by the Settling Parties is in the public interest), the Commission will similarly limit the scope of discovery . . . . Discovery in this proceeding is limited to the four corners of the Settlement Agreement itself and the testimony submitted in support of the Settlement Agreement.[41]

In a subsequent order, the Commission reaffirmed and relied on this position.[42]

The Commission also made clear in Order No. 17947 that it would not propose terms to "shore up" a deficient application in this case, in an extensive discussion that rejected a dissenting commissioner's contrary view.[43] The Commission noted that the Joint Applicants had "ample opportunity to submit a proposal that addresses the various weaknesses that were pointed out by the parties and members of the public."[44] Instead, the Joint Applicants "gambled" that either the parties "would be willing to work with them to craft a proposed Settlement" or the Commission would "shore up any weaknesses in the Joint Application by adding terms and conditions of its own making . . . ."[45] The Commission held that if it were to "take on the task" of fixing deficient proposals in every case, it would "risk undermining the public's confidence in the fairness of this review process[,]"[46] give parties "the ability (if not incentive) to present a

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[40] Order No. 18011 ¶ 58 (emphasis added).

[41] *Id*. ¶ 60.

[42] *See, e.g.*, Order No. 18018 ¶ 32 ("As the Commission states in Order No. 18011, '[we] will reopen the record in Formal Case No. 1119 solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest.' Therefore, given that DCPP's interests concern matters that are outside the scope of this proceeding, and due to the limited nature for which this record has been reopened, the Commission denies DCPP's Motion to Intervene.").

[43] Order No. 17947 ¶ 350, 353.

[44] *Id*. ¶ 350.

[45] *Id*.

[46] *Id*. ¶ 353. *See Formal Case No. 1119*, Initial Post-Hearing Brief Of DC Solar United Neighborhoods And Maryland District Virginia Solar Energy Industries Association Regarding A Proposed Non-Unanimous Settlement

flawed and deficient application for the Commission to fix and approve"[47] and "create a situation where every merger application would be approved because the Commission would be adding conditions that will make it so."[48] At the close of its multi-page discussion on this issue, the Commission emphasized that it has "long" expected applicants to put forward their best proposals, and this "is a tradition and practice that is worth keeping."[49]

In Order No. 18109, the Commission rejected the NSA but proposed alternative terms to the Settling Parties.[50] In doing so, the Commission directly contradicted its positions against going beyond the four corners of the NSA and against shoring up the parties' proposals. The Commission never explained or justified either reversal. To the contrary, Commissioner Phillips pointed out the contradiction on proposing terms to the parties in his dissent from Order No. 18109. He argued that "[t]o require alternative terms and conditions at this phase . . . *would also be inconsistent with the policy announcements in our prior decision in this case*."[51] Despite exposing this contradiction (and disagreeing with the action), Commissioner Phillips voted with Commissioner Fort to propose terms to the parties in Order No. 18109 and approve them in Order No. 18148. Neither he nor the Commission's majority opinion explained why he was incorrect about the contradiction or why the Commission's change in policy was justified.

2. These reversals also deprived the parties and the public of notice and the opportunity to participate fully. In a proceeding that was strictly "limited" to the NSA, with discovery restricted

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Agreement, December 16, 2015 ("DC SUN/MDV-SEIA Post-Hearing Settlement Brief"), at 62–63 (referencing the Commission's conclusion in Order No. 17947 that it is not the Commission's "obligation to craft conditions to make a proposed transaction that does not satisfy our public interest standard into one that meets that statutory test," and that this legal conclusion "continues to apply to the Commission's review of this Settlement Agreement, but with even more force now based on the terms that the Settling Parties chose to include in their agreement").

[47] *Id*. (quoting OPC Initial Post-Hearing Br. at 27.).

[48] *Id*.

[49] *Id*.

[50] Order No. 18109 ¶ 206–07.

[51] Order No. 18109 ¶ 199 (emphasis added).

accordingly,[52] the parties and the public did not have the opportunity to present evidence or weigh in on terms that went outside the scope of the NSA—like those the Commission adopted in the RNSA. One example is the RNSA's provision, first proposed by Commissioner Fort in Order No. 18109, that the allocation of the $25.6 million Residential Customer Base Rate Credit be deferred until the next base rate case and be shared with nonresidential customers.[53] Multiple parties critiqued the relevant portions of the NSA—paragraphs 4 and 48, regarding the Residential Customer Base Rate Credit and the Commission's policy of working to equalize subsidies between residential and nonresidential customers. As the Commission recognized, both paragraphs were unclear; even the Settling Parties did not agree on their meaning; and no one could explain how the two paragraphs would interact with one another.[54]

Although parties criticized these aspects of the NSA, they did not have the opportunity to develop an evidentiary record on Commissioner Fort's proposed solution, which she introduced in Order No. 18109 and the Commission adopted in Order No. 18148. Elsewhere, the Commission stated that similar circumstances barred the consideration of a non-vetted proposal: GSA proposed a two-year rate freeze as a response to the problems with paragraphs 4 and 48. The Commission rejected this proposal on the grounds that GSA had "failed to proactively litigate this case" and "deprived all parties of the opportunity to vet GSA's proposal for a two-

[52] Order No. 18011 ¶ 58; *id*. ¶ 60.
[53] Order No. 18109 ¶ 141–43.
[54] *See, e.g.*, Order No. 18109 ¶ 36 ("[T]he Commission finds that the Settling Parties have failed to clearly establish on the record how the Customer Base Rate Credit as applied to different revenue increase assumptions would work."); *id*. ¶ 37 ("[T]he Commission finds that the Settling Parties have failed to clearly establish on the record how the Customer Base Rate Credit would impact the Commission's ability to continue to implement its expressed policy of addressing the negative class rate of return that currently exists for residential ratepayers and the resulting subsidies that are placed on non-residential customers.").; *id*. ¶ 87, ("First, there is not a complete understanding about the details of the proposals [paragraphs 4 and 48]."); *id*. ¶ 142 ("[E]ven the Settling Parties are less than clear about how this proposal would work and what its impact would be on the Commission's stated policy to correct the historical inequity on class negative rates of return that was created in the aftermath of restructuring and the rate freezes associated with those proceedings."). Even after the Joint Applicants provided additional details on how Paragraph 4 would operate in their March 7 Request for Alternative Relief, the Commission still held that the "that information, in the absence of an actual rate application, is still insufficient to determine the rate implications of the base rate credits now being proposed." Order No. 18148 ¶ 41.

year rate freeze, which was first articulated on brief," and as a result there was "no record evidence that allows the Commission to assess the merits of GSA's proposal."[55] Then, incredibly, the Commission imposed *its own* proposal to resolve the problems in NSA paragraphs 4 and 48 by deferring the $25.6 million rate credit and potentially making it available to nonresidential ratepayers—a proposal that the parties did not have the opportunity to vet, which was first articulated in a final order of the Commission[56] and for which there was no record evidence on which to assess its merits. Within days nearly all parties rejected it.

B. The Commission arbitrarily contradicted its position requiring the agreement of all Settling Parties without explanation, and this action deprived the parties and the public of notice and the opportunity to participate in the proceeding at its most critical juncture.

1. Even while Order No. 18109 enlarged the scope of this proceeding beyond the question whether to approve the NSA and contradicted the Commission's policy against "shoring up" deficient proposals, the Commission maintained that it would approve its alternative terms only if all Settling Parties agreed to them.[57] Then, once nearly every party opposed the Joint Applicants' request for approval of the alternative terms,[58] the Commission approved them anyway.[59] The Commission arbitrarily and capriciously gave no explanation for its reversal of policy on the agreement of the Settling Parties. To the contrary, the Commission conceded in Order No. 18148 that Order No. 18109 "requires the consent of all of the Settling Parties to make the Revised NSA self-executing" and conceded that the Commission itself had "contemplated"

[55] Order No. 18109 ¶ 30.
[56] Order No. 18109 ¶ 207.
[57] *See* Order No. 18109 ¶ 17 ("The Commission votes to proceed under Rule 130.17(b) and approve a Revised NSA with alternative terms *if accepted by all of the Settling Parties*.") (emphasis added); *id.* ¶ 207 ("*If all the Settling Parties accept the Revised NSA* at Attachment A, then the Joint Application . . . as amended by the Revised Nonunanimous Settlement Agreement, is deemed **APPROVED** as being in the public interest . . . .") (emphasis added); *id*. ¶ 139 ("[I]f the NSA is revised to include the alternative terms as set out in Attachment A *and accepted by all of the Settling Parties*, it will result in a Merger Application which is, taken as a whole, in the public interest.") (emphasis added).
[58] Order No. 18148 ¶¶ 17–36.
[59] Order No. 18148 ¶ 51.

that any "request for other relief" filed in response to Order No. 18109 would have been filed jointly by all the Settling Parties.[60] But the Commission rested on the technicality that "neither the Commission's rules nor the language of Order No. 18109 state that unless 'all of the Settling Parties' join in the request for other relief, then any request for other relief filed separately could not be considered by the Commission."[61] This statement is the Commission's exclusive response to multiple parties' arguments that it could not approve a "Revised Nonunanimous Settlement Agreement" without the consent of all Settling Parties. But a statement that there is no rule forbidding the Commission from approving a "settlement" opposed by nearly all of the parties is not the same as an explanation for why the action was appropriate, especially in the face of previous statements (and the Commission's own expectation) that unanimity among the Settling Parties would be required.

Indeed, the Commission failed to engage in any way with its firm and repeated position, beginning in October 2015 with Order No. 18011, that it was proceeding "solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest."[62] The Commission has offered no explanation how granting a nearly unilateral request by the Joint Applicants to approve a deal—a move opposed by almost all of the Settling Parties—could be viewed as consistent with proceeding "solely" to consider the Settling Parties' agreement as reflected in the NSA. If the Commission intended to reverse that position and enlarge the scope of proceedings, then it offered no explanation why its action was permissible or advisable.

2. Independent of its arbitrariness, the Commission's reversal on requiring the Settling Parties' agreement deprived the parties and the public of notice and the opportunity to participate

[60] *Id*. ¶ 38.
[61] *Id*.
[62] Order No. 18011 ¶ 58.

in this proceeding. Parties talk to one another and read about each other's positions in the press. Shortly after the Commission issued Order No. 18109, Settling Parties began announcing their opposition to it.[63] Both the parties and the public could safely assume that the case was over at this point, and that opponents of the acquisition had defeated it a second time. As a result, interested parties opposed to the deal did not have the incentive to advocate fully and vigorously against the terms that the Commission proposed in Order No. 18109. By approving terms supported only by the Joint Applicants and one other party, with no prior indication that this outcome was even possible,[64] the Commission deprived everyone else of the full opportunity to participate and deprived itself of the benefit of a full and fair hearing on the alternative terms it had proposed.

The manner in which the Settling Parties responded to Order No. 18109 and the Joint Applicants' March 7 request for the Commission to approve the transaction is consistent with a belief that, once most of the Settling Parties voiced opposition to the RNSA, the case would end. All of the Settling Parties filed short responses well in advance of the Commission's March 17 deadline for responding to the Joint Applicants. All but one filed within four days of the Joint Applicants' request—on March 11, the date on which Order No. 18109 required them to respond to the Commission's proposed terms anyway.[65] The final Settling Party filed on the following

[63] *See, e.g.*, OPC, Press Release, People's Counsel Opposes the PSC's Revised Pepco-Exelon Merger Settlement Agreement, Mar. 1, 2016, at http://www.opc-dc.gov/index.php/consumer-topics-a-z/press-release/1236-people-s-counsel-opposes-the-psc-s-revised-pepco-exelon-merger-settlement-agreement.

[64] One Commissioner explicitly said that the Settling Parties would be forced to re-negotiate if a majority rejected the Commission's revised terms. *See* Order No. 18109 at 76 n. 320 ("A rejection [of the revised settlement terms] by the majority, at a minimum, will send the Settling Parties back to the negotiating table.").

[65] *See Formal Case No. 1119*, Notice of the District of Columbia Government Regarding Alternative Settlement Terms and Response to Joint Applicants' Request for Other Relief, Mar. 11, 2016; *Formal Case No. 1119*, Response of the Office of the People's Counsel for the District of Columbia to the Joint Applicants' March 7, 2016 Submission, Mar. 11, 2016; *Formal Case No. 1119*, Notice of the National Consumer Law Center, National Housing Trust and National Housing Trust-Enterprise Preservation Corporation Pursuant to Order No. 18109, 11 206 and Response to "Joint Applicants' Request for Other Relief Pursuant to 15 DCMR § 130.17(b) and Order No. 18019," Mar. 11, 2016; *Formal Case No. 1119*, Notice and Response of the Apartment and Office Building

business day, March 14.[66] Staff Attorney Richard Herskovitz had clarified to the Settling Parties by email at 3:24 p.m. on March 9 that the Commission would treat the Joint Applicants' request for other relief as an ordinary motion and therefore their responses were not due until March 17.[67] Yet none of the Settling Parties used that time to write a more thorough response. The District Government's response is instructive. Just two paragraphs long, the filing contains only one sentence on the RNSA, simply providing "notice" that the District Government does not accept it: "The District of Columbia Government (the District) hereby provides the Public Service Commission . . . with Notice that the District does not accept the alternative terms set forth in Attachment A to Order No. 18109."[68] Similarly, the OPC wrote just three sentences in direct response to Order No. 18109, primarily referring the Commission to the OPC's March 1 *press release* announcing its opposition to the RNSA.[69] The OPC also noted that other Settling Parties had "indicated opposition to the Revised NSA."[70] To be sure, the OPC later spent two paragraphs restating its opposition to the RNSA in response to the Joint Applicant's motion.[71] But it clearly—and reasonably—did not believe it needed to address the issue thoroughly. DC Water's entire response was also just two paragraphs.[72]

Association of Metropolitan Washington to Commission Order No. 18109 and to the Joint Applicants' Request for Other Relief, Mar. 11, 2016.

[66] *See Formal Case No. 1119*, Notice of the District of Columbia Water and Sewer Authority Concerning Order No. 18109 Alternative Settlement Terms and Response to Joint Applicants' Request for Other Relief, Mar. 14, 2016.

[67] *See Formal Case No. 1119*, Notice from Commission Staff to FC 1119 parties regarding Response Times to Requests for Other Relief, Mar. 9, 2016.

[68] *See Formal Case No. 1119*, Notice of the District of Columbia Government Regarding Alternative Settlement Terms and Response to Joint Applicants' Request for Other Relief, Mar. 11, 2016; *Formal Case No. 1119*, Response of the Office of the People's Counsel for the District of Columbia to the Joint Applicants' March 7, 2016 Submission, Mar. 11, 2016.

[69] *Formal Case No. 1119*, Response of the Office of the People's Counsel for the District of Columbia to the Joint Applicants' March 7, 2016 Submission, Mar. 11, 2016, at 2–3 ("For the reasons stated in its March 1, 2016 Press Release, OPC cannot and does not accept the Revised NSA.").

[70] *Id.*

[71] *Id.* at 4–5.

[72] *See Formal Case No. 1119*, Notice of the District of Columbia Water and Sewer Authority Concerning Order No. 18109 Alternative Settlement Terms and Response to Joint Applicants' Request for Other Relief, Mar. 14, 2016.

The Settling Parties' filings are consistent with the belief that, once some of the Settling Parties informed the Commission of their opposition to the RNSA, the Commission would reject it without their needing to provide much (if any) argument or analysis. The Commission's decision to contradict Order No. 18109 and approve the RNSA over the objection of nearly all the Settling Parties deprived them of notice and an opportunity to be heard on the RNSA's merits.

III. The Commission violated its rules in granting the Joint Applicants' request to approve the alternative terms.

The Commission also acted arbitrarily and capriciously by violating its rules without explanation when it granted the Joint Applicants' request to approve the alternative terms in Order No. 18148. This order either (a) violated Rule 130.16 by partially accepting and partially rejecting a non-severable settlement agreement, as well as granted an application for reconsideration that failed to comply with Rule 140; or (b) approved a new application without observing any of the numerous procedural requirements that apply to that situation. In either case, the Commission failed to explain clearly what it was doing and failed to justify departing from its rules.

To see these problems, it helps to begin with Order No. 18109. At the time of this order, two of three commissioners said they would approve the settlement proposal if it was revised with alternative terms that Commissioner Fort outlined.[73] Rather than approve the settlement with those revisions, the Commission proposed the revised terms to the parties. As the Commission recognized, Rule 130.16 requires the Commission to accept or reject a non-

[73] Order No. 18109 ¶ 170; *id.* ¶ 203.

severable settlement proposal in its entirety.[74] As a result, the Commission observed Rule 130.16, rejecting the settlement in its entirety, and then invoked Rule 130.17(b) to propose alternative terms for the Settling Parties to accept or reject.[75] The Commission also said the Settling Parties could request other relief.[76] A majority of the Settling Parties rejected the terms.[77]

The Joint Applicants pressed on and requested other relief unilaterally. They urged the Commission to (1) approve the original NSA even though the Commission had just rejected it in Order No. 18109; (2) approve the RNSA with Commissioner Fort's alternative terms even though nearly all of the Settling Parties opposed this approach; or (3) approve the RNSA with further modifications that the Joint Applicants suggested.[78] In Order No. 18148, the Commission approved the Joint Applicants' "Option 2" with one additional modification.[79]

There are two ways to conceptualize this decision. First, the Commission granted what was effectively an application for reconsideration of Order No. 18109, although the application failed to comply with Rule 140 because it did not identify any errors in Order No. 18109, and it accepted the NSA in part and rejected it in part, in violation of Rule 130.16. In effect, the Joint Applicants' Option 2 urged the Commission to reconsider its decision in Order No. 18109 and simply adopt its alternative terms rather than propose them to the parties. That is what the Commission did in Order No. 18148 when it acceded to the Joint Applicants' request. The Commission took that action despite recognizing in Order No. 18109 that it could not approve its own terms without violating Rule 130.16, and despite rejecting the Joint Applicants' Option 1 as

[74] *See* Order No. 18109 ¶ 16; *id*. ¶ 196 (Phillips, dissenting) ("Paragraphs 137 and 142 of the NSA provide that the provisions of the settlement are *not* severable. Therefore, the Commission must either reject or accept the NSA in its entirety.") (emphasis in original).
[75] *Id*. ¶ 16–17.
[76] *Id*. ¶ 206.
[77] Order No. 18148 ¶ 17–36.
[78] *Id*. ¶¶ 9–12.
[79] *Id*. ¶ 45.

"nothing more than a request for reconsideration of the NSA outside the confines of Commission Rule 140."[80] The Commission apparently did not notice that what was unlawful under Rule 130.16 in February remained unlawful in March; nor did it notice that the Joint Applicants' Option 2, like Option 1, asked the Commission to reconsider a position it had rejected in Order No. 18109.

The second view of Order No. 18148 is that it approved a new application by the Joint Applicants. The initial Joint Application was rejected in August 2015. The sole object of the proceedings since October 2015—the NSA—was rejected in February 2016. Further, the Commission's *revised* NSA was rejected by the parties. At this point, when the Joint Applicants unilaterally sought approval for acquisition terms, they were effectively filing a new application. In that case, the Commission's action was unlawful because it followed none of the procedures required to consider, much less approve, a new application.

The Commission failed to characterize its own action in Order No. 18148, but the two views outlined above appear to be the only serious possibilities. Both violate the Commission's rules. It was arbitrary and capricious for the Commission to approve terms in Order No. 18148 without identifying what it was doing procedurally, explaining how its action fit within its rules, or justifying its decision to depart from them.

IV. The Commission has not clearly stated its reasoning or shown that its decision is based on substantial evidence in the record.

Order No. 18148 runs afoul of the basic requirement that, in an administrative adjudication, the agency must clearly state its decision and show that its reasoning is based on

[80] *Id*. ¶ 40.

substantial record evidence.[81] This rule serves as much to enable courts to perform their reviewing function as it does to promote sound agency decision making.[82] The Commission's orders in this case fail to meet the standard for several reasons.

First, rather than produce a single, coherent, clear explanation of its decision, the Commission scattered its reasoning across several opinions— majorities, concurrences, and dissents—in decisions dating from August 2015 to March 2016. Just to attempt to understand why the Commission believes Exelon's acquisition of Pepco is in the public interest, one must read, at a minimum, five separate opinions: (1) the majority opinion in Order No. 18148; (2) the majority opinion in Order No. 18109; (3) the partial concurrence of Commissioner Fort in No. 18109; (4) the dissent of Commissioner Phillips in No. 18109;[83] and (5) the majority opinion in Order No. 17947, which Order No. 18148 curiously purports to both incorporate and supersede.[84] To be sure, the Commission issued 69 findings of fact and five conclusions of law in Order No. 18148.[85] But on key issues, both contain mere conclusory statements not supported by analysis in the body of the order. The legal conclusions in particular merely recite what the Commission is required to find to approve the transaction, without flowing from any reasoning

[81] *Washington Pub. Interest Org. v. Pub. Serv. Comm'n*, 393 A.2d 71, 75 (D.C. 1978), supplemented sub nom. *Washington Pub. Interest Org. v. Pub. Serv. Comm'n*, 404 A.2d 541 (D.C. 1979) ("[T]he court, when presented with a nonfrivolous petition for review, has a responsibility to hold the Commission accountable through as many remands as necessary for satisfying a burden all its own: to explain its actions fully and clearly."); *Office of People's Counsel of D.C. v. Pub. Serv. Comm'n of D.C.*, 571 A.2d 206, 209 (D.C. 1990) (quoting *Washington Gas Light Co. v. PSC*, 452 A.2d 375, 379 (D.C.1982), *cert. denied*, 462 U.S. 1107 (1983)) ("PSC must provide a 'full and careful explanation' of its ruling in order for this court to accord it 'great deference.'").

[82] *See, e.g., D.C. v. Pub. Serv. Comm'n of D.C.*, 802 A.2d 373, 376 (D.C. 2002) (quoting *Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 661 A.2d 131, 135 (D.C. 1995) ("'[T]o ensure that judicial review can be meaningful,' this court requires that the PSC 'explain its actions fully and clearly.'")); *Washington Pub. Interest Org.*, 393 A.2d at 77 ("Absent precise explanation of methodology as applied to the facts of the case, there is no way for a court to tell whether the Commission, however expert, has been arbitrary or unreasonable."); *Tel. Users Ass'n v. Pub. Serv. Comm'n of D.C.*, 304 A.2d 293, 300 (D.C. 1973) ("It is the responsibility of the Commission to present its decisions in a manner amenable to judicial review . . . .").

[83] Order No. 18109 ¶¶ 25–53, 81–170, 171–204 ("Order No. 18109" or the "February Order").

[84] Order No. 18148 ¶ 47 n.134 ("The Commission incorporates by reference all of the findings from Order Nos. 17947 and 18109 not specifically adopted below to the extent that those findings are consistent with the findings, determinations, and conclusions made in this Order."); *id.* ¶ 57 ("Order No. 17947 . . . is hereby SUPERSEDED by this Order.").

[85] Order No. 18148 ¶ 47(A–QQQ) (findings of fact); *id.* ¶ 48(A–E) (conclusions of law).

in the body of the order.[86] To the contrary, they contradict reasoning in other Commission orders that the Commission never disputes or even disavows. Indeed, Order No. 18148 purports to incorporate the factual findings of Order Nos. 17947 and 18109 "to the extent that those findings are consistent with . . . this Order."[87] The Commission leaves it to the reader to review these three separate opinions, find points of agreement and disagreement, determine which findings are "consistent" with the ultimate result, and attempt to assemble a unified account of the Commission's reasoning.

Given that Order No. 18148 incorporates Order No. 18109's findings, it is surprising to find that Order No. 18109 contains no factual findings or legal conclusions at all, even though it effectively reverses Order No. 17947's carefully reasoned decision and approves a revised NSA if all the Settling Parties agree to the new terms. Order No. 18109 expressly states that it contains no formal findings or conclusions except for those in its ordering paragraphs[88]—and the ordering paragraphs contain none.[89] The following language comes closest to resembling a legal conclusion: "If all the Settling Parties accept the Revised NSA . . . then the Joint Application . . . as amended by the Revised Nonunanimous Settlement Agreement, is deemed **APPROVED** as being in the public interest."[90] But on its face, this sentence does not state a legal conclusion; it is

[86] *See* Order No. 18148 ¶ 48(C) ("The Proposed Merger, as modified by the revised terms and conditions set forth in Attachment B to this Order, produces direct and tangible benefits to ratepayers and upon balance of the interests of Pepco's shareholders and investors with the interests of ratepayers and the community, the benefits to the shareholders do not come at the expense of the ratepayers."); *id*. ¶ 48(D) ("The Proposed Merger, as modified by the revised terms and conditions set forth in Attachment B to this Order, will benefit District ratepayers and the District rather than merely leave them unharmed."); *id*. ¶ 48(E) ("The Proposed Merger, as modified by the revised terms and conditions set forth in Attachment B to this Order, when taken as a whole, is in the public interest under D.C. Code §§ 34-504 and 34-1001.").

[87] Order No. 18148 ¶ 47 n.134.

[88] Order No. 18109 n.321 ("There are no findings of fact or conclusions of law separate from those included in the ordering paragraphs.").

[89] *See* Order No. 18109 ¶¶ 205–08.

[90] *Id*. ¶ 207.

an order.[91] To the extent a legal determination is implicit in it, it is that the RNSA is in the public interest *if* all the Settling Parties accept it—a conclusion that is by no means "consistent" with Order No. 18148. And the ordering paragraphs in Order No. 18109 contain nothing even resembling a finding of *fact*.[92]

For its part, Order No. 17947 contains 83 findings of fact and eight conclusions of law,[93] supported by a thorough analysis of the Joint Application and the record.[94] But that order *rejected* the Joint Application, for many reasons that are equally applicable to the substantially similar RNSA that Order No. 18148 approves. Those findings and conclusions may not be "inconsistent" with Order No. 18148, strictly speaking, because the latter order does not dispute or contradict them directly. But they certainly weigh strongly against the result in Order No. 18148. For instance,

- In August, the Commission found that the Joint Applicants provided no documentation or explanation of how the District's share of synergy savings would be determined.[95] The Commission drops this finding from Order No. 18148. However, the Commission does not explain why, or even whether, it has changed its mind on this point.
- In August, the Commission concluded that Joint Applicants provided no meaningful details regarding the best practices that Exelon would provide to Pepco, and no explanation of the effect of implementing these practices on public safety and

[91] Moreover, had the Settling Parties agreed to the RNSA, the order "deeming" it to be in the public interest would not have been lawful, because it did not actually *find* the RNSA to be in the public interest, as the Commission is would have to do to approve it.

[92] *See* Order No. 18109 ¶¶ 205–08.

[93] Order No. 17947 ¶¶ 354(A)–(EEEE), 355(A)–(H).

[94] *Id*. ¶¶ 56–348.

[95] Order No. 17947 ¶ 354 (U), (Z).

reliability of service.[96] In March, the Commission dropped this finding without explanation, concluding instead that Exelon had committed to sharing best practices with Pepco.[97] The terms the Commission approved provide zero elaboration on these questions, and the current record contains no more information about the best practices that Exelon will implement at Pepco than it did on August 27, 2015.

- In August, the Commission concluded that ratepayer benefit was not considered as an element of the competitive bidding process for the purchaser of Pepco Holdings Inc. ("PHI").[98] Order No. 18148 contains no further finding on this point, and the record contains nothing more about the competitive bidding process for PHI.
- In August, the Commission concluded that Exelon's generation business in general and its nuclear operations in particular "will have an impact on Pepco and could have a negative impact on District ratepayers, if the Proposed Merger is approved."[99] In March, the Commission dropped this finding without explanation.
- In August, the Commission concluded that the Joint Applicants "demonstrated a distinct lack of knowledge about important District energy policies," and it "[could] not find that the District and its ratepayers would be benefited by having the Joint Applicants as a partner as the District moves forward to embrace a cleaner and greener environment and pursues its goals of having 50% renewable energy by 2032."[100] Despite rejecting most of the Settling Parties' specific attempts to include terms addressing the conservation of natural resources and the preservation of

[96] Order No. 17947 ¶ 354 (LLL).
[97] Order No. 18148 ¶ 47 (YY).
[98] Order No. 17947 ¶ 354 (CC).
[99] Order No. 17947 ¶ 354 (OOO).
[100] Order No. 17947 ¶ 354 (BBBB–EEEE).

environmental quality as inconsistent with other District law or policy,[101] or with the Commission's oversight role,[102] the Commission nonetheless concluded in March that the Joint Applicants had remedied the earlier defects in their proposal.[103]

In these and other respects, the findings and conclusions in Order No. 17947 are, in substance, not "consistent with the . . . determinations, and conclusions" made in Order No. 18148.[104] But if the Commission wishes to dislodge its prior findings and conclusions in this case, it must explain its basis for doing so. It cannot simply announce a contrary outcome, state that it wishes to preserve whichever earlier statements are consistent with the new decision, and dismiss any (unacknowledged and unexplained) inconsistencies with a wave of the hand.

Indeed, when one compares Order No. 17947 and Order No. 18148, as the latter requires, it immediately becomes clear that the Commission never answered most of its own extensive critiques of the Joint Application in Order No. 17947. That is, Order No. 17947 reviewed the Joint Application meticulously and found numerous deficiencies on the way to rejecting it.[105] Order No. 18109, in turn, found that the NSA failed to cure those deficiencies and found additional problems. Then, Order No. 18148 approved the RNSA without explaining how the Commission changed its mind on key provisions of the deal. The Commission did not explain whether changes in the terms addressed its concerns or whether it simply changed its mind. One is left wondering whether the Commission simply forgot to consider many of the reasons it had rejected the acquisition.

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[101] Order No. 18109 ¶¶ 144–45 (rejecting proposal in ¶ 118 of the NSA to develop a 5 MW solar facility at DC Water's Blue Plains facility as inconsistent with the District's restructured competitive market).

[102] Order No. 18109 ¶¶ 148–51 (rejecting proposals in ¶¶ 6–7 of the NSA to transfer funds to the Sustainable Energy Trust Fund and the Renewable Energy Development Fund because it would prevent the Commission from overseeing how funds were spent).

[103] Order No. 18148 ¶ 47 (QQQ).

[104] *See* Order No. 18148 ¶ 47 n.134.

[105] *See* Order No. 17947 ¶¶ 59–348.

As one example, consider the problems around costs to achieve synergy savings from the merger and transition costs. Order No. 17947 spends substantial time on the Joint Application's deficiencies on these issues and rejects the application in part for those reasons.[106] The NSA proposed some changes to the relevant provisions from the Joint Application—for example, providing that costs-to-achieve can only be recovered up to the amount of synergy savings—but the Commission never explains whether or how these changes are sufficient to permit it to approve the acquisition in Order No. 18148. Indeed, Orders No. 18109 and 18148 do not even mention costs-to-achieve or transition costs when discussing the NSA or RNSA. (The only mention is when Commissioner Fort states that if Pepco keeps its "promise" to track and file its synergy savings, the Commission will compare them to the costs to achieve this acquisition in the next rate case.)[107] The Commission's treatment of other important issues is similar. It never states whether the NSA's (or RNSA's) terms on these issues are positive, negative, or neutral, or how they factor into an ultimate public interest finding.

Insofar as Order No. 18109 rejects the NSA and is therefore largely consistent with Order No. 17947, one might not expect the Commission to explain in the finest detail why a deal that was deficient in August remains deficient after some modification. But in the portions of Order No. 18109 that suggest the Commission will approve the NSA if three sets of terms are revised—and in Order No. 18148's final decision approving the revised NSA—the Commission is obligated to explain what has changed to justify approval. It never does. To the contrary, the Commission's only thorough analysis of the transaction appears in Order No. 17947, which rejects it. Later orders never respond to much of Order No. 17947's critique. Orders No. 18109

[106] *Id.* ¶¶ 61–78, 86–87, 94, 100–03, 107, 346, 354 (O)–(Z).
[107] Order No. 18109 ¶ 167.

and 18148 limit their analysis mainly to the Commission's proposed revisions on three issues, far short of the numerous faults that Order No. 17947 finds.

Regarding the revised terms, the Commission's analysis in some instances actually reveals that there is no evidentiary basis for concluding that they are in the public interest. Consider, for example, the $25.6 million Residential Customer Base Rate Credit. Commissioner Fort's concurrence in Order No. 18109 outlines a revision that would defer the allocation of the credit until the next base rate case and opens the possibility of sharing the credit with nonresidential ratepayers,[108] and the Commission adopts this revision in Order No. 18148. Commissioner Fort's reason for revising the credit is that "the record of the public interest hearing on the NSA does not provide us with sufficient information to determine how this proposal, as made, will operate and the rate design impact of its application."[109] But her suggested revision—deferring the allocation decision entirely and broadening the class of ratepayers to whom it might apply—makes even *less* clear how the rate credit "will operate" or factor into rate design.[110]

One might be tempted to respond that the Commission can be trusted eventually to do something with the $25.6 million rate credit that it finds in the public interest. But that response is inadequate. It does not answer the question whether the rate credit is in the public interest in the context of this Joint Application, and it does not help the Commission decide, as it must, whether the current application "taken as a whole" is in the public interest. Indeed, without any detail regarding how the $25.6 million credit will be allocated, the Commission has no basis for

[108] Order No. 18109 ¶ 141–42.
[109] *Id*. ¶ 142.
[110] *Cf. Potomac Elec. Power Co. v. Pub. Serv. Comm'n of D.C.*, 661 A.2d 131, 141 (D.C. 1995) (rejecting Commission's decision to deny 25 percent of cost recovery where the Commission "specifically rejected the reasoning underlying the 25% figure" but "nonetheless adopted that amount . . . without providing any other rationale for it.").

deciding that even the mere dollar amount is in the public interest.[111] The Commission's decision on this revised term amounts to a conclusion that giving some amount of money to some set of ratepayers will always contribute to a finding that a broader transaction, taken as a whole, is in the public interest. The proposition is self-refuting.

From a close reading of Order No. 18109, one can discern that two Commissioners were prepared to eschew the Commission's detailed analysis in Order No. 17947 simply because some important parties to the proceeding had reached a settlement agreement and now took the position that the deal was in the public interest. That decision reflects a misunderstanding of the public interest standard and of the Commission's obligations, as this Application for Reconsideration discusses in the next section. But even if it were permissible for the Commission to lower the bar for a public interest finding on the basis of an agreement among some of the parties, the Commission still must explain clearly that it is taking that step, not leave it to the parties, the public, or a reviewing court to decipher the Commission's moves. No less important, the agreement between the Settling Parties fell apart after Order No. 18109. Therefore it could not support the Commission's decision any longer. The Commission ignores this problem and purports to rely on the Settling Parties' consent to *the NSA* as support for the Commission's public interest finding regarding *the RNSA*. Order No. 18148 states, in relevant part:

> The final issue for the Commission to decide is whether the Proposed Merger and Joint Application, as modified by the revised terms and conditions described in Option 2, when taken as a whole, is in the public interest . . . . *We start with the fact that the Settling Parties already decided that the NSA as submitted (and as*

[111] *Cf. id*. at 138–39 (affirming the Commission's decision to reject one of Pepco's claims because the company's evidence "simply did not address the question that concerned the Commission: why it was necessary to spend money at those particular levels" and did not explain "what, if any, benefits would inure to ratepayers as a result of P[epco]'s levels of spending on [the underlying] programs."); *id.* at 141 (rejecting as arbitrary the Commission's decision to disallow 25 percent of Pepco's cost recovery where the Commission failed to provide a "full and clear explanation of why the Commission chose 25% as the appropriate percentage").

> *reflected in Option 1) met this threshold test*. Commissioner Phillips already concurred in that determination. What remains to be decided is whether the limited changes made to the NSA in Option 2 result in a Merger that is still in the public interest. Commissioner Fort already concluded that it does. Commissioner Phillips now joins in that decision.[112]

This reasoning makes no sense. Most of the Settling Parties opposed the Commission's revisions to the NSA on the ground that they are not in the public interest.[113] Having lowered the public interest bar because a critical mass of the parties reached a settlement agreement, the Commission may not use that lowered bar to approve terms that the same key parties do not accept. Moreover, some key Settling Parties objected to the Commission's revisions precisely because they *reversed* features of the NSA that those Settling Parties required. For example, the OPC long faulted the Joint Application for leaving to the Commission to decide how to allocate CIF funds.[114] OPC argued that it is impossible to know whether the benefits from the CIF outweigh the harms of the transaction without knowing the CIF allocation.[115] The OPC-backed NSA, accordingly, allocated the CIF funds, and one of the allocations was a $25.6 million Residential Customer Rate Credit.[116] The Commission's revision "deallocates" that rate credit, so to speak, and places it back within the Commission's discretion.[117] The Commission cannot rely on the OPC's consent to the NSA to support the RNSA when the RNSA cuts directly against some of the very NSA provisions that OPC viewed as critical. More generally, the Commission cannot rely on the Settling Parties' support for one set of terms, then approve another set of terms

[112] Order No. 18148 ¶ 45 (emphasis added); *see also id*. ¶ 39 (noting that the "task" of making a public interest determination "has been made easier because the terms of the NSA were set out using the seven public interest factor framework *and the Settling Parties concluded that the NSA (and therefore Option 1) was in the public interest*") (emphasis added).

[113] *Id*. ¶¶ 17–36 (reviewing the parties' positions).

[114] *See* Order No. 17947 ¶ 69 (discussing OPC Initial Post-Hearing Br. at 37).

[115] *See id*.

[116] *See 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, Oct. 6, 2015, Ex. A ¶ 4.

[117] *See* Order No. 18109 ¶ 141–43.

over their strong objection, to reach a conclusion that the RNSA, *as a whole*, is in the public interest.

The paragraph quoted above, coupled with one additional paragraph restating the Commission's support for three sets of revisions to the NSA,[118] summarizes the Commission's reasoning behind the finding that the RNSA is in the public interest. In short, Order No. 18148's public interest finding is at best incoherent and is almost wholly unsupported by reasoning or record evidence. To the contrary, the Order contradicts without explanation the vast weight of the Commission's most careful reasoning and review of the record in this case, which appears in Order No. 17947, rejecting the Joint Application. Given that Order No. 18148 approves a substantially similar application, one would expect to see a discussion from the Commission on most if not all material issues where Order No. 17947 found fault, drawing a straight line through the provisions relevant to each issue in the Joint Application, the NSA, and the RNSA and discussing whether the NSA's and RNSA's terms are better, worse, or no different than the terms the Commission conclusively rejected in Order No. 17947.[119] Then one would expect to see an analysis explaining why, on the whole, the new balance of benefits and drawbacks in the RNSA is in the public interest. Nothing resembling either of these analyses can be found in Order Nos. 18109 or 18148. The result is nearly the opposite of a reasoned decision based on substantial

[118] Order No. 18148 ¶ 46.

[119] *Cf. Goodman v. Pub. Serv. Comm'n of D.C.*, 497 F.2d 661, 666 (D.C. Cir. 1974) ("In any analysis of whether an end result (i.e. the new rate) is not arbitrary, we are aware that since the result is but the 'sum of a number of components,' each component must be analyzed . . . . We must ascertain, as appellee Pepco agrees, 'whether each of the Commission's Order's essential elements is supported by substantial evidence in the record.'"); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring) ("Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.").

evidence in the record—an unreasoned outcome that contradicts the Commission's most thoughtful review of the evidence.[120]

V. The Commission applied the wrong standard for determining the public interest, placed the burden of persuasion on the wrong parties, and failed to make an independent finding that the acquisition terms as a whole are in the public interest.

The Commission's disparate opinions also reveal that the two Commissioners who voted to approve the deal disagree on the public interest standard and the Commission's responsibilities in this case, and that both of them are mistaken about these matters. The result is a decision that applies the wrong legal standard, misplaces the burden of persuasion, and fails to satisfy the Commission's obligation to make an independent public interest finding.

Commissioner Fort's concurrence in Order No. 18109 demonstrates two critical flaws regarding the public interest standard and the Commission's obligations in this case. First, Commissioner Fort makes clear that she does not weigh the application (or even the NSA) "as a whole," as is required to find it in the public interest.[121] She dismisses as "not properly before the Commission" arguments that (1) "do not challenge specific provisions of the NSA or speak to whether the NSA is in the public interest," (2) "reassert general arguments that were raised and considered by the Commission in Order No. 17947," (3) assert "why the Commission's conclusion as set out in Order No. 17947 should not be changed," or (4) "address the underlying merits of the change of control application" separate from the NSA.[122] Of course, all of these

[120] *Cf. Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (rejecting as arbitrary and capricious an agency's decision that reversed course without addressing prior factual findings); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *State Farm*, 463 U.S. at 46-51) ("Unexplained inconsistency" is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.").

[121] *See, e.g.*, Order No. 18011 ¶ 61 ("To be in the public interest in the context of this proceeding, the Settling Parties must show that the Proposed Merger as set forth in the Settlement Agreement, *when taken as a whole*, is in the public interest under D.C. Code §§ 34-504 and 34-1001.") (emphasis added).

[122] Order No. 18109 ¶ 81.

arguments remained highly relevant to Commissioner Fort's task of determining whether the application "as a whole" is in the public interest. It is nonsensical to consider only the NSA, not the merits of the entire transaction, and simultaneously assert that one has determined that the deal "as a whole" is in the public interest. And the Commission was certainly obligated to address arguments that any relevant conclusions in Order No. 17947 "should not be changed" before announcing a decision that appeared to reverse most of that order.[123]

Further, Commissioner Fort does not even consider the whole *NSA.* She states that she will evaluate only the specific portions of the NSA that non-settling parties dispute.[124] Still worse, she states that "no specific comments were raised in response to the majority of the paragraphs."[125] In other words, she declines to evaluate *the majority of the NSA.* This decision results from a second error in Commissioner Fort's view of the legal standard: She sets a default position that the NSA is in the public interest until proven otherwise and places the burden of persuasion on its opponents. She states that "in the absence of objections" to particular provisions of the NSA, "there is no basis to find that they are not in the public interest."[126] This decision is plainly mistaken. The law places the burden on the proponent of a transaction or settlement,[127] and it requires the Commission to make an affirmative, independent finding that the deal is in the public interest. Indeed, the majority opinion in this and other orders

[123] The Joint Applicants have already attempted to respond to a similar argument that Grid 2.0 made in its application for reconsideration. Their response is wholly inadequate. They merely cite scattered, conclusory statements where the Commission states that it finds the transaction as a whole to be in the public interest. *See Formal Case No. 1119*, Joint Applicants' Response in Opposition to Grid 2.0 Working Group's Application for Reconsideration of PSC Order No. 18148, Mar. 30, 2016, at 9–12 & n.46. The Joint Applicants cannot wave away Commissioner Fort's unmistakable decision to follow the wrong legal standard by pointing to a few rote recitations of the correct standard elsewhere in the Commission's decisions.

[124] *Id*. ¶ 82.

[125] *Id*.

[126] Order No. 18109 ¶ 82.

[127] D.C. Code Ann. § 2-509(b) ("In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof."); *People's Counsel of D.C. v. Pub. Serv. Comm'n of D.C.*, 474 A.2d 835, 837 (D.C. 1984) ("We have interpreted the phrase 'burden of proof' in this statute [§ 2-509(b)] to mean burden of persuasion.").

acknowledges these legal principles.[128] Commissioner Fort's opinion makes clear that one of the votes for the result in Order No. 18109 rested on very different premises.

Commissioner Phillips's opinion in Order No. 18109 and his vote in Order No. 18148 reflect a different but equally erroneous view of the legal standard. Commissioner Phillips posits that the Commission should defer to the Settling Parties and approve their agreement if it is fair, adequate, reasonable, and the product of arms-length negotiations.[129] That is, Commissioner Phillips would find that the Commission's obligation to find the settlement in the public interest is satisfied simply by assessing whether the settlement is fair, adequate, and reasonable without independently exercising its own judgment. He cites multiple court decisions applying this standard in the very different setting of approval of class action settlements[130] and, later, he criticizes the Commission for "substitut[ing] the Commission's judgment for that of the Settling Parties, which is counter to our standard of review and a plethora of case law."[131]

Notably—but in accord with his view of the legal standard—Commissioner Phillips appears never to have made an *independent* finding that the NSA or RNSA is in the public interest. In Order No. 18109, Commissioner Phillips offers, anomalously, that he both "reserve[s] . . . judgment"[132] on Commissioner Fort's alternative terms and that he "do[es] not believe her terms alter my determination that the settlement agreement is in the public interest."[133] Elsewhere in the same order, Commissioner Phillips expresses the view that the

[128] Order 18109 ¶ 23. ("The Commission may adopt the terms of a contested settlement, however, if it undertakes an *independent inquiry* to determine the proposal's compliance with the public interest.") (emphasis added); Order No. 18011 ¶ 61 ("To be in the public interest in the context of this proceeding, *the Settling Parties must show* that the Proposed Merger as set forth in the Settlement Agreement, when taken as a whole, is in the public interest under D.C. Code §§ 34-504 and 34-1001.") (emphasis added).

[129] *See, e.g.*, Order No. 18109 ¶ 174.

[130] *Id.* ¶ 174.

[131] *Id.* ¶ 201.

[132] *Id.* ¶ 173.

[133] *Id.*

Commission should not offer alternate terms at all.[134] He consents to Commissioner Fort's offering them not because he has found them to be in the public interest, but exclusively to prevent the NSA from "being rejected outright for lack of a quorum to approve it."[135] He states that if the Settling Parties accept Commissioner's Fort's terms, "then so will I."[136]

Likewise, Order No. 18148 suggests that Commissioner Phillips acceded to Commissioner Fort's terms to reach an outcome. It states that Commissioner Fort found the RSNA to be in the public interest, while Commissioner Phillips "accepted" the Settling Parties' view that the *original* NSA was in the public interest.[137] Regarding the RNSA, Order No. 18148 states that Commissioner Phillips had "agreed [in Order No. 18109] to allow the Settling Parties an opportunity to accept" it:

> As explained in her concurring opinion in Order No. 18109, Commissioner Fort independently concluded that the terms of the Revised NSA would result in a Merger Application which is, taken as a whole, in the public interest. Commissioner Phillips found the NSA as filed to be in the public interest; and by voting to proceed under Commission Rule 130.17(b), he agreed to allow the Settling Parties an opportunity to accept the Revised NSA.[138]

A few paragraphs later, Order No. 18148 notes that Commissioner Fort "already concluded" that the revised NSA is in the public interest, and now Commissioner Phillips "joins in that decision."[139] If the latter statement can be taken as representing that Commissioner Phillips made a public interest finding, it fails to reconcile that conclusion with his own reasoning and, at most,

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[134] *See, e.g.*,Order No. 18109 ¶ 171.

[135] *Id.* ("Paradoxically, if I adhere to what I believe is the correct approach in this settlement proceeding, the NSA will be rejected outright for lack of a quorum to approve it. For that reason, and that reason alone, I do not object to Commissioner Fort circulating alternative terms to the Settling Parties.").

[136] *Id*.

[137] Order No. 18148 ¶ 39 ("[T]he Settling Parties concluded that the NSA (and therefore Option 1) was in the public interest. In paragraphs 171-173 of his opinion in Order No. 18109, Commissioner Phillips *accepted this determination* . . . .") (emphasis added).

[138] *Id*. ¶ 43.

[139] *Id*. ¶ 46 (emphasis added).

indicates that he viewed the changes to the NSA, which he had previously accepted based on the parties' judgment that it was in the public interest, as insufficient to alter that earlier acceptance.

In sum, Commissioners Fort's and Phillips's erroneous and mutually incompatible views of the proper application of the public interest standard produced an incoherent decision in Order No. 18148 that approves the Exelon-Pepco merger without a proper determination that the transaction is in the public interest.

VI. The Commission's decision to approve the transaction is not supported by substantial evidence.

Finally, the record lacks substantial evidence supporting the Commission's decision that the acquisition of PHI by Exelon is in the public interest. Because many of the merger conditions the Commission approved in March are slight variants on the settlement agreement it rejected in February, many of the reasons that the proposal was not in the public interest remain applicable to the approved conditions.

Synergy Benefits: The projected synergy savings are completely speculative and unlikely to materialize. The record contains insufficient evidence that the merger will produce any tangible synergy savings that could be reflected in rates.[140]

Job Commitments: Joint Applicants have committed to remain net jobs positive only through January 1, 2018, less than two years from now. Furthermore, since job reductions will be a primary driver of any synergy savings that Exelon might achieve through the acquisition, these synergy savings will come at the expense of District-based jobs, not in addition to them.[141]

Loss of Local Control: Nothing in Order No. 18148 or the record ostensibly supporting it changes the Commission's original assessment in August 2015 that loss of local control provides

[140] *See* DC SUN/MDV-SEIA Initial Post-Hearing Settlement Brief. at 20–21.
[141] *See id*. at 23–25.

no benefit to the District and its ratepayers.[142] The RNSA allows Exelon to override any local decision, to set corporate policies promoting its generation business at the expense of local distributed generation within the District, and to continue to put the fiduciary obligations of Exelon's executives ahead of the District's interests.[143]

Reliability Enhancements: There is nothing in the record that suggests that Pepco would be unable to meet the Electric Quality of Service Standards for System Average Interruption Duration Index (SAIDI) and System Average Interruption Frequency Index (SAIFI)[144] if the proposed merger were not approved.[145] Pepco has met and even exceeded the commitments in the RNSA through 2018 for both SAIFI and SAIDI, and has done so below the budget that Joint Applicants adopt as their baseline.[146] Reliability benefits thus provide no justification for approval of the RNSA.

Safety: Joint Applicants offer a bare commitment in the RNSA to "achieve and maintain first quartile performance in safety," and to provide information about PHI's progress toward this goal in annual reports, [147] but the record is silent on what practices Exelon hopes to import to Pepco to improve safety performance, and questions about how its commitment to safety will be balanced against other commitments to reliability or costs remain unaddressed.

Inherent Conflict of Interest: In August, the Commission recognized "a potential conflict of interest if the company that controls the local distribution company seeks to delay changes

[142] *Id*. at 27; Order No. 18148 ¶ 47 (NN) (finding that there is "minimal management and budget authority delegated to the Pepco CEO and other Pepco senior management).

[143] Order No. 18148 at Att. B, ¶ 49–50 (containing commitments relating to the management structure at Exelon); *see also id*. ¶ 47 (NN), (OO), (RR), & (SS).

[144] SAIFI and SAIDI are reliability indicators. The System Average Interruption Frequency Index ("SAIFI") is the average number of electrical service interruptions a customer will experience. The System Average Interruption Duration Index ("SAIDI") is the average duration of each service interruption. The Commission's Electricity Quality of Service Standards ("EQSS") set SAIFI and SAIDI standards within the District. *See* 15 DCMR §§ 3600-3600 (2015).

[145] DC SUN/MDV-SEIA Initial Post Hearing Settlement Brief at 30–31.

[146] *See id*. at 31–32 & n.129 (citing to JA Cross Ex. NSA-1 at 15).

[147] Order No. 18148 at Att. B, ¶ 60.

necessary to encourage additional distributed generation because of its ownership of alternative generation sources."[148] The record shows that Exelon has the ability, motivation, and intention to use its control over the District's distribution utility to limit the development of alternative generation sources.[149] Although the Commission removed these anticompetitive conditions from the RNSA. the Commission will have to continue, in the Chair's words, to play "whack-a-mole" to assure a level playing field for developers of local distributed generation.[150] That the RNSA does not contain these particularly objectionable conditions does not solve the underlying problem of conflict of interest.

Exelon's Interests Are Opposed to the District's Statutory Requirements: The District has established statutory benchmarks for increased penetration of renewable generation and local distributed solar generation. Nothing in the record suggests that Exelon has reversed its longstanding opposition to net metering, or has ceased to view distributed generation as a threat to its core business. Partnering with Exelon will be a step backward for the District.[151]

Conclusion

For the foregoing reasons, the Commission should grant this application for reconsideration and rescind its approval of the RNSA.

[148] Order No. 17947 ¶ 301; *see also id*. ¶ 354 (OOO).

[149] JA Cross Ex. NSA-1 at ¶¶ 118, 128.

[150] Order No. 18109, at 32 ¶ 76 (Kane, concurring) ("This action in the NSA can be mitigated in the specific, but the underlying philosophy will remain to be anti-competitive going forward, thereby, reducing the Commission to playing whack-a-mole to try and assure a level playing field for developers of microgrids and other distributed resources.").

[151] *See* DC SUN MDV-SEIA Initial Post-Hearing Settlement Brief at 49–51.

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Certificate of Service

I certify that on April 22, 2016 copies of this Application for Reconsideration were emailed to the service list in Formal Case 1119, and an original and fifteen copies will be delivered to Brinda Westbrook-Sedgwick, Commission Secretary, District of Columbia Public Service Commission, 1325 G Street NW, Suite 800, Washington, D.C. 20005.

David J. Arkush