Nos. 16-AA-815, 16-AA-817 & 16-AA-825

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Office of the People's Counsel,
District of Columbia,
DC Solar United Neighborhoods, *et al*,
Petitioners

v.

D.C. Public Service Commission,
Respondent,

Exelon Corporation, *et al*,
Intervenors.

On Petitions for Review of Orders of the
Public Service Commission of the District of Columbia

OPENING BRIEF OF PETITIONERS DC SOLAR UNITED NEIGHBORHOODS AND PUBLIC CITIZEN

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Rule 26.1 Statement

Under D.C. App. R. 26.1 and 28 (a)(2)(B), Public Citizen, Inc. states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of Public Citizen, Inc.; and DC Solar United Neighborhoods (DC SUN), a project of the Community Power Network, states that DC SUN and the Community Power Network have no corporate parents and that there is no publicly held corporation that owns 10% or more of DC SUN or the Community Power Network.

Rule 28 (a)(2) Statement

The Petitioners are DC Solar United Neighborhoods (DC SUN), Public Citizen, Inc., the Office of People's Council (OPC), and the District of Columbia. The respondent is the Public Service Commission of the District of Columbia (PSC). The intervenors are Exelon Energy Delivery Company LLC, Exelon Corporation, Potomac Electric Power Company, and Pepco Holdings LLC.

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Statement of Jurisdiction

This court has jurisdiction under D.C. Code § 34-605 (a). This is a petition for review of a final order of the Public Service Commission of the District of Columbia ("PSC") that approved the acquisition of Pepco Holdings, Inc. by Exelon Corp., of which the petitioners timely sought reconsideration under D.C. Code § 34-604 (b), and of the PSC's final order denying reconsideration on June 17, 2016. The petition for review was timely filed on August 16, 2016.

Issues Presented

1. The PSC provided twelve and thirty-five days' notice, respectively, for two public hearings. Did it violate D.C. Code § 34-909 (a), which requires forty-five days' notice in every proceeding where the PSC has a public hearing?

2. The PSC proposed and adopted its own terms for the acquisition over the near-unanimous objection of the parties. Previously, it (a) held that it would not "shore up" a deficient application; (b) reopened the record "solely for the limited purpose" of considering a non-severable settlement proposal; and (c) proposed new terms and ordered that they would be approved if "all" settling parties accepted them. Did the PSC arbitrarily contradict prior decisions without explanation?

3. The PSC revised and approved the terms of a settlement over the objection of several settling parties. Did it violate PSC Rule 130.16, which requires it to accept or reject non-severable settlements in their entirety?

4. The PSC's reasoning in this case is scattered across as many as five mutually inconsistent opinions, issued up to six months apart. Did it fail to explain its decision clearly and show that it is based on substantial evidence?

5. The PSC deferred to several parties' views that a settlement they proposed was in the public interest, then relied on those views to support a finding that a different set of terms was in the public interest. Did the PSC misapply the legal standard, which requires it to make an independent finding that the acquisition, as a whole, is in the public interest?

Statement of the Case

This is a petition for review of the March 23, 2016, final order permitting Exelon to acquire Pepco, and the June 17, 2016, order denying DC Solar United Neighborhoods (DC SUN) and Public Citizen's application for reconsideration. Exelon and Pepco first applied for approval on June 18, 2014. JA 1. The PSC rejected the application on August 27, 2015. JA 257. On October 6, 2015, the utilities moved that the PSC reopen the record to consider a non-unanimous settlement proposal. JA 309. The PSC reopened the record on October 28, 2015, JA 409, and rejected the settlement on February 26, 2016, JA 1013. In that order, two commissioners offered new terms and ordered that they would be approved automatically if all of the settling parties agreed. JA 1001, 1013. Most rejected the new terms. JA 1408–17. On March 7, 2016, the utilities asked the PSC to approve the new

terms (or others) regardless. JA 1399. On March 23, 2016, the PSC granted the request with a further modification. JA 1429. DC SUN and Public Citizen sought reconsideration on April 22, 2016, and the PSC rejected their application on June 17, 2016. They petitioned this court for review on August 16, 2016.

Statement of Facts

After several years of poor performance and a 2013 dividend cut, JA 140, Exelon sought to acquire companies with reliable income, like Pepco, JA 121–22. Pepco was not for sale when Exelon approached it, but it entertained Exelon's bid and others. JA 133. Without considering whether ratepayers would benefit, JA 250, Pepco accepted Exelon's bid of $6.8 billion, which exceeded Pepco's market value by $1.6 billion. JA 133–34. Exelon and Pepco applied to the PSC to approve the acquisition on June 18, 2014. JA 87. They also sought approval in Delaware, Maryland, and New Jersey, the other jurisdictions where Pepco operates. JA 248.

To meet their burden of demonstrating that the acquisition is in the public interest, the companies' principal offer was a $14 million Customer Investment Fund (CIF). JA 107. This number supposedly represented the District's share of the companies' estimated "synergy savings" from the acquisition, based on the number of metered customers in each jurisdiction. JA 107, 109. Later, the companies boosted the CIF to $33.75 million to conform with a settlement they reached in New

Jersey, according to one of their witnesses, although they maintained to the PSC that the new number was still based on synergy savings. JA 125.

Several parties, including DC SUN, the District of Columbia, and the Office of People's Counsel (OPC), vigorously opposed the application. The parties conducted extensive discovery, and the PSC held four community hearings for the public, JA 95, and an eleven-day evidentiary hearing for the parties, JA 97.

On August 27, 2015, in its Order No. 17947, the PSC unanimously rejected the application, identifying numerous flaws. First, the CIF was inadequate, JA 130, 261, and the basis of the $33.75 million figure was unclear, JA 125. The PSC also could not assess the value of the CIF because the application did not allocate it for specific purposes, but left its use to the PSC's discretion. JA 130. The method of allocating the CIF among the jurisdictions, by metered customer count, discriminated against the District, where a greater proportion of the population lives in multi-unit housing. JA 125–26. In the PSC's view, the allocation should have been based on factors better reflecting the value of the jurisdictions to the utilities. JA 126. Claims that synergy savings would flow to ratepayers on a per-customer basis had nothing to do with the actual way those savings would flow to the individual Pepco utilities. JA 114, 126. These are only a few of the many flaws the PSC identified in its 171-page opinion; indeed the problems noted above involve only the first of seven factors the PSC considered under its public interest standard. JA 88.

The PSC declined to "shore up" the deal by offering conditions to salvage it. The PSC explained that the utilities had heard all the objections and chosen not to make changes, and that they appeared to have filed a weak proposal, "roll[ing] the dice" and "gambl[ing]" that other parties or the PSC would fix it. JA 246–47. The PSC emphasized that it would be bad policy to shore up proposals because proponents of a merger have the burden of persuasion. JA 248. In addition, doing so would risk "undermining the public's confidence in the fairness" of the review process and give future applicants the incentive to do what the utilities did here: "present a flawed and deficient application for the PSC to fix and approve." *Id*. Commissioner Phillips wrote separately, concurring in part because he agreed that the application was deficient, but dissenting in part because he believed the PSC should have evaluated potential conditions. JA 258.

On October 6, 2015, after weeks of lobbying by the utilities (opposed by members of the public),[1] and shortly after Pepco gave the District $25 million toward a new soccer stadium in exchange for the possibility of naming a street or park after the company,[2] Mayor Muriel Bowser announced that she had reversed her op-

[1] *See* Aaron C. Davis & Thomas Heath, *Opposing Sides Lobby D.C. Mayor on Exelon-Pepco Deal*, WASH. POST, Sept. 17, 2015.

[2] JA 947 n.55, 969; Michael Neibauer, *How Pepco Will Fund D.C. Capital Projects, D.C. United-Related Eminent Domain Costs*, WASH. BUS. J., Oct. 19, 2015.

position and struck a deal with Exelon and Pepco.[3] The same day, the utilities moved that the PSC reopen the record to consider a non-unanimous settlement agreement (NSA) with several parties, including the District and OPC. JA 309. Alternatively, they sought permission to file the NSA as a new application. JA 313. Among other changes, the NSA raised the CIF to $72.8 million, providing (1) $14 million in immediate bill credits for residential ratepayers, JA 950; (2) $26.5 million in credits to prevent increased residential rates through March 2019 (shortly after the next mayoral election), JA 971; and (3) $32.8 million for a range of purposes, which the PSC later found could be controlled by the Mayor or city council and diverted to other purposes, JA 957, 959, 960–61. The revised CIF also included $400,000 in forgiveness of two-year-old debts on low-income accounts. JA 998.

On October 28, the PSC held the NSA untimely because PSC Rule 130.11 bars consideration of settlements filed after final decisions. JA 404. Invoking Rule 146.1, which allows the PSC to "waive" a rule "after duly advising the parties of its intention to do so," JA 404–05, the PSC reopened the record anyway, "solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest," JA 406; *see also* JA 407. The PSC stated that the nonsettling parties and the public would not be prejudiced because it

[3] Aaron C. Davis & Thomas Heath, *D.C. Mayor Reverses Course and Backs Pepco-Exelon Merger*, WASH. POST, Oct. 6, 2015.

would "permit the public to express its view and opinions" and the nonsettling parties would have "a full and fair opportunity to participate." JA 406. At the same time, the order set a schedule for proceedings with a "public interest" evidentiary hearing beginning only thirty-five days later, on December 2. JA 410. Regarding the date of the "community hearing" for public participation, the schedule stated, "TBD." *Id*. As a result of this compressed schedule, DC SUN and the U.S. General Services Administration, both non-settling parties, notified that the PSC that they were unable to participate in the evidentiary hearing.[4]

On November 5, the PSC gave notice that the community hearing would be held in just twelve days, at 10:00 a.m. on a business day, November 17.[5] It published another notice at 5:30 p.m. on November 12, adding a second day because so many people had registered to speak, but warning in bold print that there might not be time to accommodate all of them.[6] The night before the hearing, the PSC posted a notice listing the order in which registrants would be called, but warned that it was "unlikely" everyone would be permitted to speak because "[o]ver two hundred persons" had registered and only ninety could speak each day.[7]

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[4] *See* DC SUN Notice Regarding Cross-Ex. at Pub. Int. Hr'g, Nov. 3, 2015; GSA Request to Be Excused, Dec. 1, 2015.

[5] Notice of Cmty. Hr'gs & Pub. Int. Hr'g, Nov. 5, 2015.

[6] Notice of Cmty. Hr'gs & Pub. Int. Hr'g, Nov. 12, 2015.

[7] Public Notice, Nov. 16, 2015.

At the hearing, Public Citizen raised its concern that the hearing notices were inadequate and violated D.C. Code § 34-909 (a), which requires forty-five days' notice.[8] On the day after the hearing, Public Citizen petitioned to intervene, stating that it was alarmed by the inadequacy of the hearing and the illegality of the notice, and it was concerned that the PSC might be rushing its consideration of the NSA and giving short shrift to the public interest.[9] The PSC denied the petition on November 25 but did not issue a written order providing its reasoning until December 17.[10]

On February 26, 2016, the PSC rejected the NSA in its Order No. 18109. JA 1013. Without determining whether the NSA fixed flaws in the original application, the PSC found that it introduced four new problems. JA 947. The first was that over half the CIF was allocated to residential ratepayers, with nothing for nonresidential ratepayers. JA 950. The PSC found that excluding nonresidential ratepayers was unjustified and conflicted with the PSC's goal to reduce commercial ratepayers' subsidization of residential ratepayers. JA 950–51, 953.

Second, the NSA specified that Exelon would negotiate with DC Water to develop five megawatts of solar generation at a water treatment plant. This arrangement may have been intended to remedy a finding in Order No. 17947 that the original application did not advance conservation of natural resources or pre-

[8] Arkush T'mony, Tr. 403:12–17, Nov. 18, 2015.
[9] Pet. for Leave to Intervene of Public Citizen, Nov. 19, 2015.
[10] Order No. 18058, Dec. 17, 2015.

serve environmental quality in the District, JA 256, but it exacerbated another concern, that the acquisition might undermine competition and grid neutrality because Exelon could use Pepco to promote Exelon's generation business. JA 955. Third, some CIF allocations, like those for low-income programs or the Green Building Fund, might fail to advance the goals underlying them because the specific use of the funds remained unclear. JA 958, 959–60. Relatedly, multiple CIF allocations, totaling $32.8 million, depended on the District government to carry them out and could be diverted to other purposes. JA 956–61. *See also* DC SUN Init. Post-Hr'g Br. 15–20, Dec. 16, 2015.

Despite these major flaws, Order No. 17947's decision not to "shore up" the application in this case, and the PSC's earlier decision to waive its rules and reopen the record "solely" to consider the NSA, JA 406, two of the three commissioners proposed revised terms to the formerly settling parties. Commissioner Fort, who concurred in the majority opinion rejecting the NSA, said she would approve the acquisition if the settling parties agreed to specific revisions that, in her view, answered the majority's concerns. *See, e.g.*, JA 969. Commissioner Phillips, who dissented from the disapproval of the NSA, indicated that he would also approve a new settlement with the terms proposed by Fort.

The most significant change proposed in Fort's terms, known as the "revised NSA" or "RNSA," was to reallocate all of the $72.8 million CIF except for the $14

million bill credit and the $400,000 in debt relief. The PSC would decide the allocation of the $25.6 million Customer Base Rate Credit in the next rate case. JA 993. Another $21.55 million would be put into an escrow account earmarked for grid-modernization pilot projects, JA 996, and $11.25 million would be put in an escrow account to fund energy efficiency and energy conservation programs focused on low-income ratepayers, JA 997. Because of the escrow accounts, none of the funds would be accessible to the Mayor or the city council.

Commissioner Phillips's dissent from the disapproval of the NSA took the view that the PSC should have approved the NSA because its only role was to assess the deal for basic fairness, adequacy, and non-collusion. JA 1002–03. He criticized the majority for "substitut[ing] [its] judgment for that of the Settling Parties." JA 1011–12. Regarding Fort's opinion, he believed that it was "unnecessary," JA 1001, not the "correct approach," *id.*, and "incongruent" with the PSC's standard for reviewing settlements to offer revised terms, JA 1011. He also believed Fort's approach was "inconsistent with the policy pronouncements in our prior decision in this case," *id.*, that it was "inappropriate . . . to shore up a proposed transaction," JA 1010. In his view, it was "rare or even unprecedented" for a PSC to "unilaterally redraft a settlement agreement." JA 1011.

Phillips nonetheless acceded to Fort's NSA revisions because he viewed that option as better than killing the acquisition outright. JA 1001. Like the majority

and Fort, Phillips did not comprehensively review whether the NSA resolved all of the PSC's concerns in Order No. 17947. He examined only whether the NSA met his own prior objections, which he identified as the "allocation of the CIF" and "local control and regulatory oversight of Pepco post-merger." JA 1003. He also noted other new commitments in the NSA but did not discuss whether or how they related to problems identified in Order No. 17947. JA 1004.

Phillips also did not analyze Fort's revised terms. He stated that he was acceding to them solely to save the deal:

> [I]f I adhere to what I believe is the correct approach . . . the NSA will be rejected outright for lack of a quorum. . . . For that reason, and that reason alone, I do not object to Commissioner Fort circulating alternative terms to the Settling Parties.

JA 1001. Underscoring his deference to the settling parties, he continued, "If the Settling Parties accept Commissioner Fort's alternative terms, then so will I." *Id.*

After these three opinions, the PSC ordered that:

> If all of the Settling Parties accept the Revised NSA . . . then the Joint Application . . . submitted on June 18, 2014, as amended by the Revised Nonunanimous Settlement Agreement, is deemed **APPROVED** as being in the public interest. . . .
>
> If the Settling Parties request other relief under Rule 130.17, then the Nonsettling Parties may file comments on the Settling Parties' filing or make a filing requesting other relief. . . .

JA 1013.

Aside from the Apartment & Office Building Association (AOBA) and the utilities, all of the settling parties rejected the RNSA. JA 1408–17.[11] Undeterred, Exelon and Pepco filed a "Request for Other Relief" asking the PSC to approve either the NSA, the RNSA, or the RNSA with further modifications. JA 1206. On March 23, with Chairman Kane dissenting on the grounds that the acquisition was not in the public interest, in large measure for reasons identified when the PSC rejected the original application and the NSA, JA 961–69, 1431–33, the PSC in Order No. 18148 approved the RNSA with one further modification, JA 1429–30.

Standard of Review

To approve this acquisition, the PSC was required to make an independent determination that the transaction, taken as whole, is in the public interest and will affirmatively benefit the public rather than merely leave it unharmed. JA 244, 945. This court reviews a PSC action to determine whether the agency respected procedural requirements and applied the proper legal standards, whether its decision was unreasonable, arbitrary, or capricious, and whether the agency provided a full and careful explanation of its decision. *OPC v. PSC*, 571 A.2d 206, 209 (D.C. 1990). The explanation must include the "methods by which, and the purposes for which" it acted, as well as an "assessment of the consequences . . . for the character and

[11] The other parties to the NSA were the District, OPC, 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. JA 383–84.

future development of the industry." *Wash. Gas Light Co. v. PSC*, 450 A.2d 1187, 1193 (D.C. 1982). If the PSC meets these requirements, then the court defers to its findings of fact and policy judgments. *OPC v. PSC*, 482 A.2d 404, 407 (D.C. 1984). The court's "authority — and responsibility — to find out why an agency acts as it does is considerable." *Wash. Gas Light*, 450 A.2d at 1194.

The utilities or the PSC may argue that DC SUN or Public Citizen waived the right to raise some of the issues in this brief. That argument is without merit. The doctrine of waiver is flexible and pragmatic and, in the administrative context, its primary purpose is to ensure that the agency had the opportunity to address issues and consider relevant evidence in time to correct its mistakes. *District of Columbia Housing Authority v. District of Columbia Office of Human Rights*, 881 A.2d 600, 611 (D.C. 2005) (citing *District of Columbia Gen. Hosp. v. District of Columbia Office of Employee Appeals*, 548 A.2d 70, 74 (D.C. 1988)). All of the issues in this brief were timely raised below and, to the extent the PSC believed any of them were not timely raised, it nonetheless responded to them on the merits. JA 1707. Where, as here, the agency had the opportunity to address the issues and did so, this court does not find waiver. *See, e.g.*, *Love v. District of Columbia Office of Employee Appeals*, 90 A.3d 412, 424 (D.C. 2015).

Summary of Argument

The PSC and several commenters have noted that this case presents "one of the most significant decisions that the PSC will ever make" and that the outcome "is forever." JA 87. The PSC met the challenges of this momentous proceeding admirably from the utilities' original filing on June 18, 2014, through the PSC's unanimous decision to reject the application on August 27, 2015. After that decision, the agency blundered repeatedly. It embarked on a pattern of procedural irregularity, under a highly compressed schedule, and ultimately produced a series of opinions that collectively approve the most significant transaction in the PSC's history without providing a coherent explanation of how the result serves the public interest, much less demonstrating an evidentiary basis to support that conclusion.

When the PSC waived its rule against considering a settlement proposed after a final decision, JA 404–05, it set a schedule for considering the NSA that was so hasty it violated the D.C. Code's notice requirements for public hearings and all but ensured that both advocates and the PSC would be unable to litigate and evaluate the settlement adequately. The PSC's order reopening the record emphasized repeatedly that it was proceeding only for the "very limited purpose" of considering whether the particular settlement proposed by the settling parties was in the public interest. JA 406, 407. But when the PSC rejected that settlement on February 26, 2016 in Order No. 18109, it did not close the case. Instead, it proposed al-

ternative terms to the parties. This move, which two of three Commissioners thought ill-advised, contradicted without explanation both the PSC's decision to limit future proceedings to the NSA and its decision that it would not "shore up" a deficient application.

The PSC's decision to approve the RNSA in Order No. 18148 also arbitrarily and without explanation contradicted its own decision that the RNSA would automatically be approved if "all of the Settling Parties accept[ed]" it. JA 1013. When nearly all the formerly settling parties rejected the RNSA, the PSC approved it anyway — ultimately granting Exelon and Pepco their near-unilateral desire in a proceeding that the PSC had "emphasize[d]" had "no other purpose" than to "consider[] whether *the Settlement Agreement filed by the Settling Parties* is in the public interest." JA 406 (emphasis added). The decision also violated the PSC's own rules, which require it to accept or reject a non-severable settlement in its entirety.

The PSC's irregular proceedings after August 2015 also failed to produce a clear, reasoned decision demonstrating that its conclusions are based on substantial evidence. Merely attempting to understand why the PSC believes Exelon's acquisition of Pepco is in the public interest requires reading five separate opinions written months apart, and those opinions contain critical contradictions and omissions in the PSC's reasoning and supporting evidence for its ultimate decision to approve the deal. Order No. 17947, which rejected the original application, considers the

transaction meticulously and identifies numerous reasons why it fails the public interest test. Order No. 18148 approves a similar deal, with modifications, but on many key points the opinions that accompany that result (which include the opinions concerning the intervening Order No. 18109), never explain how the PSC reached a different conclusion. The PSC does not explain whether changes in the terms addressed its concerns (and, if so, what changes and how they addressed the concerns), whether the PSC changed its mind (and, if so, why it did), or whether the PSC simply forgot to consider some of the reasons why it previously rejected the application. These contradictions appear to be attributable in large measure to the majority commissioners' misunderstanding of the public interest standard.

Rather than carefully explain what the PSC accepted and rejected from Order No. 17947, the commissioners who ultimately approved this acquisition in Order No. 18148 effectively lowered the bar to a public-interest finding because certain key parties, including the District and OPC, had previously endorsed their settlement with Exelon and Pepco (but *not* the RNSA) as being in the public interest. The two Commissioners who ultimately voted to approve the acquisition disagreed with one another on the proper standard when they stated their reasoning in Order No. 18109 — reasoning they did not revisit in Order No. 18148 — and both were mistaken. The public interest standard requires the PSC to make an independent, affirmative finding that the deal "as a whole" is in the public interest, JA 106, and

the burden of persuasion lies with the proponent of a transaction or settlement, *id*.; D.C. Code § 2-509 (b). Commissioner Fort expressly declined to consider the transaction "as a whole" and erroneously placed the burden of persuasion on the transaction's detractors.[12] Commissioner Phillips stated that he believed the PSC's role was only to assess the parties' agreement for basic fairness, adequacy, and non-collusion. JA 1002–03; JA 946 n.45. Rather than making an independent finding that the transaction 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." JA 1011–12. Phillips disagreed with Fort's decision to offer the settling parties alternative terms but nonetheless "consented" to offer them — and ultimately approved them — without evaluating whether they were in the public interest because he wanted to rescue the *original* settlement.

By the time of Order No. 18148, the settlement that the District and OPC endorsed had been rejected, and all but one of the formerly settling parties (aside from Exelon and Pepco) *opposed* the terms that the PSC adopted on the grounds that they were not in the public interest. The RNSA approved by the PSC was in no meaningful sense a settlement. Even if it were permissible to relax the public

[12] *See* JA 969 ("[N]o 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").

interest standard because certain parties claim that a non-unanimous settlement is in the public interest, the PSC could not rely on the formerly settling parties' consent to the NSA as a reason to approve a materially different RNSA that the same parties opposed.

Argument

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

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

> For every proceeding in which the PSC 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.

D.C. Code § 34-909 (a). In this case, the PSC held two hearings that violated this statute. On October 28, 2015, the PSC set a public interest hearing for December 2 and 3, thirty-five days away. JA 408. For the community hearing, the PSC gave a series of notices just twelve days, three business days, and one evening in advance, and repeatedly warned the public that some attendees might not be permitted to

speak.[13] By contrast, when considering the original application in this case, the agency gave four and one-half months' notice for the public interest hearing, JA 13, 82, then later rescheduled it so that parties had more than seven months' notice in total, JA 97. The community hearings on the original application were held on four separate days, each after business hours, and the PSC gave more than forty-five days' notice for all but the first.[14]

The notice requirement is not a mere technicality. The PSC's failure to provide proper notice undermined the public's and the parties' ability to participate and, as a result, hampered the PSC's own decision-making. The notices for the community hearing meant that members of the public who wanted to participate needed to set aside two full weekdays to do so, with little time to secure childcare or leave from work, without any guarantee that they would even be allowed to participate. Predictably, the community hearing was disorganized and difficult to participate in. Many, if not most, speakers were not present when called. JA 1504. If public input at a hearing is valuable and useful to the PSC, then it is difficult to conclude that the PSC did not handicap its consideration of the NSA.

The lack of adequate notice also undermined the parties' participation. DC SUN advocated a materially longer schedule, which it argued was essential for the

[13] Notice of Cmty. Hr'gs & Pub. Int. Hr'g, Nov. 5, 2015; Notice of Cmty. Hr'gs & Pub. Int. Hr'g, Nov. 12, 2015; Public Notice, Nov. 16, 2015.

[14] *See* Public Notice, Nov. 21, 2014.

to conduct reasonable discovery, produce responsive testimony, participate effectively in the public interest hearing, and prepare worthwhile briefs.[15] And in fact, after the PSC adopted its compressed schedule, DC SUN advised the agency that it could not participate fully in the hearing, stating that it could not conduct effective discovery, present testimony, or engage in cross-examination."[16]

The schedule also undermined the participation of GSA, an entity with significantly more expertise and resources. GSA had argued that a schedule like the one ultimately adopted would "deprive[] the nonsettling parties and the community at large" of a "meaningful opportunity to vet the Settlement Agreement" and pointed out that pre-hearing discovery and briefing would ordinarily take "no less than five months."[17] Ultimately, GSA advised the PSC on the eve of the hearing that it would not participate.[18] In response to a press inquiry, GSA explained that it had "work[ed] up to the last minute" but simply did not have enough time to prepare adequately.[19] Underscoring the consequences of the compressed schedule, the PSC later rejected one of GSA's positions on the ground that GSA "failed to proactively litigate this case" and "deprived all parties of the opportunity to vet" its position. JA 949. But that problem was of the PSC's making.

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[15] Nonsettling Parties Opp. to Joint Applicants' Mot. to Reopen, 9–13, Oct. 16, 2015.
[16] DC SUN Notice Regarding Cross-Ex. at Pub. Int. Hr'g 2, Nov. 3, 2015.
[17] GSA Opp. to Joint Applicants' Mot. to Reopen 6–7, Oct. 16, 2015.
[18] GSA Request to Comm'n for Permission to Be Excused, Dec. 1, 2015.
[19] *See* Aaron C. Davis, *GSA Drops out of Key Hearing on Pepco-Exelon Merger*, WASH. POST, Dec. 2, 2015.

DC SUN and GSA were not the only parties unable to prepare adequately for the public interest hearing. In multiple instances, Order No. 18109 notes that the settling parties' own witnesses could not answer questions adequately or disagreed on the meaning of NSA provisions. *See, e.g.*, JA 952–53, 971, 993.

The PSC stated in its denial of reconsideration that the notice requirement only applies to a "rate application or change in condition of service," pointing out that the first sentence in the relevant subsection uses those terms. JA 1708. But the PSC did not even attempt to explain why this case is not a "change in condition of service." It argued only that this is not a rate case. *Id.*

No less important, the sentence prescribing the forty-five-day notice pointedly does not use either term. It expressly applies to "*every proceeding*" — not just every rate case or change in condition of service — "in which the Commission has a public hearing." D.C. Code § 34-909 (a) (emphasis added). When the Code uses a different phrase in the same provision, the language has a different meaning.[20] Earlier sentences in the provision all refer to one type of notice, one that "the utility" must provide when it files a rate application or change in condition of service. The final sentence, by contrast, refers to notices applicable to a larger cat-

[20] *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("When the legislature "includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

egory of proceedings — "every proceeding in which the Commission has a public hearing." Other code provisions likewise give different notice periods for different types of procedures. For example, when an individual files a complaint against a utility, the PSC must give the utility notice of the complaint ten days before scheduling a hearing, then give the parties ten days' notice before the hearing. D.C. Code §§ 34-909 (b), 34-910. In those cases, the specific notice provision controls the general. *See, e.g.*, *Gozlon–Peretz v. United States*, 498 U.S. 395, 407 (1991). Here, in the absence of any provision for shorter notice, the general controls.

It would be nonsensical for the law to require forty-five-days' notice for a rate case but no notice for a matter like this one. The PSC itself has rightly called this case "one of the most significant decisions that [it] will ever make," JA 87, and specifically noted that it is far more significant than a rate case. Unlike a rate decision, which can be changed in the next rate case, "[t]his decision is forever." *Id*.

The PSC cites one case to support its argument that the statute does not mean what it says. But that case, if it has any relevance, supports the opposite conclusion. In *OPC v. PSC*, 889 A.2d 1003 (D.C. 2006), the PSC had issued an order permitting Pepco to use new meters based on notice-and-comment procedures without holding any hearing. OPC argued that the PSC was required to hold a hearing with forty-five days' notice because the action was a "change in condition of service." *Id*. at 1008. This court held that the PSC's procedures were spe-

cifically authorized by statute and the PSC was not required to hold a hearing at all to make the decision at issue. *Id*. at 1007–08. Therefore the court was not faced with deciding whether the forty-five-day requirement would apply if the PSC had held a hearing, and by no means did it hold or even suggest that the requirement is limited to hearings in "rate cases" or "changes in conditions of service."

Moreover, when evaluating whether the PSC's procedures were appropriate, the court identified the circumstances under which the PSC may use "streamlined procedures": when a "utility's proposal will have a minimal effect on its financial operation and is not of material significance from a regulatory standpoint," when faced with "a mere administrative detail," or when considering a matter "which only indirectly and to a minor degree affects the financial operation of the utility." *Id*. at 1006. It is beyond dispute, and the PSC has conceded, that this matter is not a "mere administrative detail."

The PSC also cites *Brown v. District of Columbia Pub. Employee Relations Bd*., 19 A.3d 351 (D.C. 2011), for the proposition that the forty-five-day notice requirement is "directory" rather than "mandatory." JA 1708–09. That case concerned whether an agency lost jurisdiction over a matter when it missed the statutory deadline to issue its decision. 19 A.3d at 355. The court was addressing time limits on agency action, not notice to parties or the public, and it concluded that a time limit on agency action is presumptively not mandatory if the statute does not

provide a sanction for missing the deadline. *Id*. at 355–56. The PSC's reading of the case would lead to the absurd result that agencies may ignore nearly all statutory notice requirements, as they rarely provide sanctions for agency violations.

The court would be justified in holding the PSC's notice for the public interest hearing unlawful even under the District of Columbia Administrative Procedure Act's more general requirements that an agency give "reasonable" notice to the parties to contested cases, D.C. Code § 2-509 (a), and respect every party's "right to present in person or by counsel . . . to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts," D.C. Code § 2-509 (b). The PSC's notice was not "reasonable" by any measure. The agency's compressed schedule denied DC SUN and GSA the participation rights that the statute specifies, and by the PSC's own account the evidentiary record suffered. *See, e.g.*, JA 949, 952–53, 971, 993. Because § 34-909 (a) applies, however, the court need not rely on the DCAPA's general protections.

II. The PSC contradicted prior positions without explanation.

It is a basic principle of administrative law that an agency must explain itself when it changes a stated policy or rule.[21] In this proceeding, the PSC contradicted

[21] *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he 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).

without explanation its decisions (1) to limit this proceeding to considering the NSA; (2) not to "shore up" deficient proposals; and (3) to approve the RNSA only if "all" of the parties to the NSA accepted it. These actions were not only arbitrary, but also deprived the parties and the public of adequate notice and the opportunity to participate fully in this proceeding.

1. From the time it reopened the record on October 28, 2015, until it rejected the NSA on February 26, 2016, the PSC repeatedly stated that it was proceeding exclusively to consider a particular settlement agreement, the NSA, among specific parties. In its October order, the PSC stated:

> [T]he Commission will reopen the record . . . *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*.

JA 406 (emphasis added). The PSC limited discovery accordingly:

> 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. . . . to the four corners of the Settlement Agreement itself and the testimony submitted in support of [it].

JA 407. The PSC later expressly relied on the limited scope of the proceeding to reject a petition to intervene in part because the petitioner sought to raise issues outside the scope of the NSA. *See* Order No. 18018 13.

In Order No. 17947, the PSC decided in a thoughtful analysis, over the dissent of one commissioner, that it would not propose terms to "shore up" a deficient

application in this case. JA 246–48. The PSC reasoned that doing so would undermine public confidence in the fairness of the review process and give future applicants the incentive to game the process by presenting flawed proposals for the PSC to fix. JA 248. At the close of its multi-page discussion, the PSC emphasized that it has "long" expected applicants to put forward their best proposals, and this "is a tradition and practice that is worth keeping." *Id.*

The PSC later reversed course on both the decision to limit the scope of its consideration and the decision not to "shore up" deficient proposals. When the agency rejected the NSA in Order No. 18109, it did not close the case. Rather, it proceeded, in the words of Commissioner Phillips, to "shore up" the NSA, JA 1010, 1011, by going beyond the NSA and offering new terms to the parties, JA 1013. The PSC's enlargement of the proceedings was far from trivial. Among other changes, it proposed to reallocate 80 percent of the $72.8 million CIF. That the PSC dramatically altered the NSA is evidenced by the fact that every former party to the NSA rejected the RNSA except for the utilities and AOBA.

The PSC never explained or justified these reversals. Rather, in his dissenting opinion in Order No. 18109, Phillips pointed out the contradiction regarding "shoring up" proposals, arguing that "[t]o require alternative terms and conditions" would be "inconsistent with the policy announcements in our prior decision in this case." JA 1011. Despite exposing this contradiction and disagreeing with the ef-

fort to shore up the NSA, Phillips voted with Commissioner Fort to propose revised terms to the settling parties — and later joined her in approving those terms over the objection of most parties. JA 1399.

2. When the PSC offered its revised NSA, it said it would approve the new terms if accepted by "all" of the parties to the original NSA. JA 1013. After nearly all of them *rejected* the RNSA, the PSC granted Exelon and Pepco's request to approve it anyway. JA 1429. The PSC gave no explanation for this reversal. To the contrary, the PSC conceded in Order No. 18148, approving the RNSA, that Order No. 18109 "require[d] the consent of all of the Settling Parties to make the Revised NSA self-executing" and that the PSC itself had "contemplated" that any "request for other relief" filed in response to Order No. 18109 would have been filed jointly by all of the settling parties. JA 1418. To justify its action, the PSC cited only the technicality that neither its rules nor the text of Order No. 18109 expressly barred Exelon and Pepco from filing, or the PSC from considering, a unilateral "request for other relief." *Id.* The PSC's statement that there is no specific rule forbidding its action is not an explanation of why that action is appropriate, or of why the PSC changed its view on whether to approve the RNSA absent the agreement of the settling parties. The PSC offered no such explanation.

3. These unexplained reversals were not just arbitrary, but also deprived the parties and the public of notice and the opportunity to participate fully. In a pro-

ceeding that had been limited to considering the NSA, the parties and the public did not have adequate opportunity to present evidence or weigh in on terms that went outside the scope of the NSA — in particular, the materially different terms proposed by Commissioner Fort's RNSA.

Because of the changed terms, the prior opportunity to address the NSA's provisions did not provide an adequate opportunity to address the RNSA. For example the RNSA dramatically changed the $26.5 million NSA's Residential Customer Base Rate Credit. In the NSA, this provision purported to shield residential customers from rate increases through March 2019. The RNSA retained a $26.5 million credit, shared it with *non*residential customers, and deferred decision on how the credit would be allocated until the next rate case. JA 993. Multiple parties had critiqued the relevant portions of the NSA, paragraphs 4 and 48; indeed, the PSC found that the paragraphs were unclear and the settling parties disagreed over and could not explain their meaning.[22] But no one had the opportunity to de-

[22] *See, e.g.*, JA 953 ("[T]he 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*. ("[T]he 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 . . . for residential ratepayers and the resulting subsidies . . . placed on non-residential customers."); JA 971 ("[T]here is not a complete understanding about the details of the proposals [paragraphs 4 and 48]."); JA 993 ("[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. . . ."). Even after Exelon and Pepco provided additional details on how Paragraph 4 would operate in its March 7 Request for Alternative Relief, the PSC still held that the "that

velop an evidentiary record on Fort's proposed solution, which she introduced in Order No. 18109 and the PSC adopted less than a month later in Order No. 18148.

Meanwhile, the PSC refused to consider another approach to resolving the same issues. GSA proposed a two-year rate freeze as a response to the problems with paragraphs 4 and 48. The PSC rejected this proposal because the parties had not had a full "opportunity to vet" it and, as a result, the PSC had no record evidence on which to assess its merits. JA 949. Instead, the PSC imposed its own proposal — which the parties also had no opportunity to "vet" and regarding which there was also no record evidence.

Likewise, the PSC deprived the parties and the public of notice and the opportunity to participate when it abandoned its position that the RNSA would be approved only if all of the parties to the NSA accepted the new terms. Shortly after the PSC issued Order No. 18109, the parties to the NSA began announcing their opposition to it. *See, e.g.*, JA 1513 n.63. As a result, both the parties and the public reasonably believed the case was over, and no one had the incentive to advocate fully and vigorously against the terms that the PSC had proposed. Moreover, Commissioner Phillips had explicitly said that the settling parties would be forced "back to the negotiating table" if a majority rejected the RNSA, not that the PSC

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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." JA 1420.

might approve it without their consent. JA 1012 n.320. When the PSC approved the RNSA without first giving notice that this outcome was even possible, it deprived the parties and the public of the opportunity to participate — and deprived itself of the benefit of a full and fair hearing on the terms it adopted.

The manner in which the formerly settling parties responded to Order No. 18109 and the utilities' March 7 request for the PSC 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. The District's response is instructive. Just two paragraphs long, the filing contains only one sentence on the RNSA, which simply provides "notice" that the District does not accept it. JA 1344. Similarly, OPC wrote just three sentences in direct response to Order No. 18109, primarily referring to OPC's March 1 press release announcing its opposition. JA 1336–37. OPC spent only two paragraphs restating its opposition to the RNSA in response to the utilities' request that the PSC approve it. JA 1338–39. OPC clearly — and reasonably — did not believe it needed to address the issue thoroughly. DC Water's entire response was also just two paragraphs. JA 1354. These filings all suggest that the formerly settling parties believed that once some of them informed the PSC of their opposition to the RNSA, the PSC would simply reject it. When the PSC surprised everyone by approving the RNSA, it deprived the parties, as well as the public, of adequate notice and opportunity to be heard on the RNSA's merits.

III. The PSC violated its rules when it granted Exelon and Pepco's request to approve the alternative terms.

The PSC also violated its rules without explanation when it granted Exelon and Pepco's request to approve the RNSA in Order No. 18148. That order either (a) violated Rule 130.16 by partially accepting and partially rejecting a non-severable settlement agreement, and violated Rule 140 by granting an application for reconsideration that failed to comply with that rule; or (b) approved a new application without observing any of the numerous procedural requirements that apply to that situation. In either case, the PSC failed to explain clearly what it was doing and failed to justify departing from its rules.

In Order No. 18109, two of the three commissioners said they would approve the settlement proposal if the parties revised it as Fort proposed. JA 1001, 1012. The PSC could not immediately approve the RNSA because, as Commissioner Phillips noted, PSC Rule 130.16 requires the agency to accept or reject a non-severable settlement proposal in its entirety.[23] As a result, the PSC observed Rule 130.16 by rejecting the settlement, and then invoked Rule 130.17 (b) to propose alternative terms for the settling parties to accept or reject — terms that, *if agreed to by the parties*, could be approved in their entirety by the PSC without

[23] *See* JA 1009–10 ("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); *see also* JA 941.

doing violence to Rule 130.16. JA 941–42. The PSC also said the settling parties could request other relief, as provided in Rule 130.17 (b). JA 1013.

When most settling parties rejected the RNSA, the conditions set forth in Order No. 18109 for approval of the RNSA were unsatisfied, but the PSC nonetheless approved it in Order No. 18148. This action amounted to a partial approval and partial rejection of an non-severable settlement agreement (the NSA) in violation of Rule 130.16, and a reconsideration of Order No. 18109, which refused to do just that, despite the absence of a reconsideration request that complied with Rule 140, which governs reconsideration. Alternatively, the order could be viewed as the granting of a new application by the utilities, as opposed to the approval of a settlement, but it followed none of the procedures required or customary to consider, much less approve, a new application. However it is viewed, the order deviates from the agency's rules and procedures unlawfully and without explanation.

IV. The PSC failed to state its reasoning clearly and demonstrate that its decision is based on substantial evidence.

The PSC also runs afoul of the basic requirement of administrative adjudication that an agency "explain its actions fully and clearly." *Wash. Pub. Interest Org. v. PSC*, 393 A.2d 71, 75 (D.C. 1978), *supplemented sub nom. Wash. Pub. Interest Org. v. PSC*, 404 A.2d 541 (D.C. 1979). This court has held that it has the "responsibility to hold the PSC accountable through as many remands as neces-

sary" until the agency meets this burden. *Id.*[24] This rule enables courts to perform their reviewing function and promotes sound decision-making by agencies.[25] The PSC's orders in this case fail the standard.

1. Rather than producing a single, coherent, clear explanation of its decision, the PSC has left its reasoning scattered across several opinions — majorities, concurrences, and dissents — in decisions dating from August 2015 to March 2016. Attempting to understand why the PSC believes Exelon's acquisition of Pepco is in the public interest requires reading, 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 Order No. 18109; and (5) the majority opinion in Order No. 17947, which Order No. 18148 purports to *both* incorporate, JA 1422 n.134, and supersede, JA 1430.

To be sure, the PSC issued sixty-nine findings of fact and five conclusions of law in its final decision, Order No. 18148. JA 1422–29. But on key issues, the findings contain only conclusory statements that are not supported by analysis in the body of the order. The legal conclusions in particular merely recite what the

[24] *See also OPC*, *supra*, 571 A.2d at 209 (quoting *Wash. Gas Light Co. v. PSC*, 452 A.2d 375, 379 (D.C.1982), *cert. denied*, 462 U.S. 1107 (1983)).

[25] *See, e.g.*, *District of Columbia v. PSC*, 802 A.2d 373, 376 (D.C. 2002) (quoting *Potomac Elec. Power Co. v. PSC*, 661 A.2d 131, 135 (D.C. 1995); *Wash. Pub. Interest Org.*, *supra*, 393 A.2d at 77; *Tel. Users Ass'n v. PSC*, 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. . . .").

PSC is required to find to approve the transaction without being grounded in the reasoning of the order.[26] Worse, they are at odds with reasoning in the other orders that the final order never disputes. Indeed, Order No. 18148 purports to incorporate by reference "all of the findings" of the two prior orders "to the extent that those findings are consistent with the findings, determinations, and conclusions made in this Order," JA 1422 n.134, even though the prior orders both *rejected* a transaction highly similar to the one that Order No. 18148 approves. The PSC leaves it to the reader to review these three orders and their attachments, totaling 499 pages, look for points of agreement and disagreement, determine which findings are "consistent" with the PSC's final action, and attempt to construct a coherent, unified account of the PSC's reasoning. The task is impossible. On key issues, the later orders never answer objections the first order raised. As a result, the opinions in this case are the opposite of a clear explanation for the PSC's action.

Although Order No. 18148 "incorporates . . . all of the findings" from Order No. 18109, JA 1422 n.134, Order No. 18109 contains no formal findings at all: It states that it contains no formal findings or conclusions except for those in its or-

[26] *See* JA 1429 ("The Proposed Merger, as modified by the revised terms . . . 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*. ("The Proposed Merger, as modified by the revised terms . . . will benefit District ratepayers and the District rather than merely leave them unharmed."); *id*. ("The Proposed Merger, as modified by the revised terms . . . when taken as a whole, is in the public interest under D.C. Code §§ 34-504 and 34-1001.").

dering paragraphs, JA 1013 n.321, and the ordering paragraphs contain none, JA 1013. Order No. 18109's ordering paragraphs contain nothing resembling a finding of fact, and the closest they come to stating a legal conclusion is in the directive that "[i]f 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." JA 1013. Even this sentence does not genuinely state a legal conclusion; it is an order. To the extent it implies a legal determination, it is that the RNSA is in the public interest *if all the Settling Parties accept it* — and that conclusion is flatly inconsistent with Order No. 18148, which approved the RNSA over many settling parties' objections.

For its part, Order No. 17947 contains 83 findings of fact and eight conclusions of law, JA 248–57, supported by a thorough analysis of the original application and the record, JA 106–248. But that order *rejected* the application — and rejected it for many reasons that apply equally to the RNSA that Order No. 18148 approves. Indeed, on multiple important issues addressed in the first order, neither of the later orders explains adequately, if at all, how or whether the RNSA resolves them.

On the inter-related issues of the CIF and synergy savings, for example, Order No. 17947 raised multiple concerns that they were inadequate, that it was unclear how they were derived and that, to the extent the PSC could discern how they

were derived, the method was inappropriate. First, the PSC stated that it did not know how the total CIF number — originally $14 million, later changed to $33.75 million — was derived. JA 125, 250. Exelon and Pepco purportedly based the $14 million figure on a five-year projection of synergy savings, JA 109, which they allocated to the jurisdictions based on metered customer counts, *id.* When the utilities changed the number to $33.75 million, they claimed the new figure was still based on projected synergy savings, JA 125, although their own witness testified that the number was derived to match a settlement in New Jersey, *id.*

Second, the PSC found that the method of apportionment discriminated against the District. A greater proportion of District residents live in multi-unit housing, which means that the District has fewer meters. JA 126. Relatedly, meter count is not a reasonable way of valuing the jurisdictions. A reasonable measure would be each jurisdiction's "contribution to earnings." *Id.* Third, to the extent that Exelon and Pepco were using meter counts, the PSC found that their count for the District was inaccurate. JA 126, 250. Fourth, the companies claimed that there would be additional synergy savings beyond those allocated through the CIF, JA 109–10, and they would pass these savings on to ratepayers, JA 127. The PSC found that this promise lacked any basis in the record. *Id.* Fifth, to the extent there might be additional synergy savings, the companies did not explain how those savings would be apportioned among the jurisdictions. *Id.*

Sixth, the allocation of the CIF was "not reflective of the major reason for the acquisition." *Id*. In other words, although the PSC did not fully understand the reason for this deal, or its value to Exelon, the agency knew that it lacked an acceptable account of that value and how the CIF reasonably related to it. If the CIF amount was based on a negotiated settlement in the New Jersey proceeding, then it was improper because that settlement has no bearing on what is reasonable or appropriate for the District.[27] If the CIF was based on projected synergy savings and allocated by meter counts, then it discriminated against the District and was based on an unreasonable measure. JA 126. Beyond these possibilities, the PSC could not evaluate the whether the CIF was reasonable or appropriate in relation to the value of the transaction to Exelon because it lacked adequate information about what the value would be. As the District's counsel put it at the first hearing,

> No business pays a $1.6 billion premium over market price of stock in a $6.8 billion stock purchase transaction for the privilege of generating 2.1 percent of the 1.6 billion in premium in [synergy] savings over ten years and then giving the claimed savings away.

JA 134. The PSC found that Exelon would benefit from the acquisition because the proportion of its earnings from regulated operations would increase from roughly 50 percent in 2013 to between 58 and 61 percent in 2015 and 2016.

[27] On this point, the PSC cites an AOBA witness's testimony, which states in relevant part that "a negotiated result in a New Jersey proceeding . . . should have no bearing on . . . the adequacy or appropriateness of direct Merger benefits for the District. . . ." JA 126 n.233.

JA 132, 137. But the PSC did not establish the *value* to Exelon of this development, JA 137, which must be greater than the combined $1.6 billion acquisition premium and the cost of financing the $6.8 billion purchase.

The purpose and value of the transaction to Exelon are important not only for evaluating the CIF, but for meeting the PSC's public interest standard generally. The standard requires balancing the interests of shareholders and ratepayers and ensuring that shareholders do not benefit at ratepayer expense. JA 9–10. If, as here, the PSC did not know the value of the deal to Exelon's shareholders, then it could not, as its standard requires, "balance[] the interest of shareholders and investors with ratepayers and the community." JA 9–10.[28] The PSC memorialized these issues in Order No. 17947 with the dry statement that the potential bases of the CIF in the record — a New Jersey settlement or synergy savings allocated by meter count — were not "reflective" of the "major reason for the acquisition." JA 126.

The later orders do not answer any of these major concerns that led to the initial denial of approval of the transaction. All of the concerns noted above apply equally to the NSA and the RNSA: How was the $72.8 million CIF derived? Was

[28] Moreover, although the PSC accepted Exelon's claim that it would not charge the $1.6 billion premium back to ratepayers and therefore they would not be harmed by the mere payment of the premium, JA 136, without a full understanding of the deal it could not evaluate whether Exelon shareholders might benefit at ratepayers' expense in some other way.

it based on synergy savings or some other factor? Whatever the basis, was it appropriate? On what basis were the funds apportioned among the jurisdictions? Was the allocation based on meter counts? If so, why is that method now reasonable and non-discriminatory, and are the meter counts accurate? How will additional synergy savings, if they exist, be apportioned among the jurisdictions? Why is it now permissible that the utilities still are not guaranteeing synergy savings for ratepayers? How does the CIF or synergy savings relate to, or balance against, the value of this transaction to Exelon and its shareholders? Order Nos. 18109 and 18148 do not even raise these questions, much less answer them, and this discussion involves just the first of seven factors that the PSC used to evaluate whether the acquisition was in the public interest. There are many more examples.[29]

The later orders likewise never address the PSC's earlier concerns about costs to achieve synergy savings from the merger. Order No. 17947 spends substantial time on the Joint Application's deficiencies on these issues and rejects the

[29] On reconsideration, DC SUN and Public Citizen additionally cited as examples the concerns that (1) the utilities failed to provide meaningful details of best practices that Exelon would purportedly share with Pepco to improve safety or reliability, JA 1520–21; (2) ratepayer benefit was not a factor in the bidding process for Pepco, JA 1521; and (3) Exelon would not be a helpful partner in reaching the District's renewable energy goals, JA 1521. Regarding the first and third of these issues, Exelon and Pepco responded only by cherry picking seemingly relevant language from an order and implying that it addressed the issue even though it did not. JA 1660–61. Regarding the second, the utilities simply tried to minimize the concern expressed in Order No. 17947 by pointing to that order's statement that the general impact of the proposed acquisition was "mixed." JA 1661 n.252. In none of these cases could it identify a passage in which the later orders actually answered one of these concerns. The PSC's only response was to cite Exelon and Pepco's arguments. JA 1728–29.

application in part for those reasons. JA 107–16, 121–22, 125, 127–30, 131, 245, 249–50. The NSA proposed some changes to the relevant provisions from the original application — for example, providing that costs-to-achieve can only be recovered up to the amount of synergy savings — but the PSC never explains whether or why these changes are sufficient to permit it to approve the acquisition. There is only a single mention of costs-to-achieve in Orders No. 18109 and 18148, and it is when Commissioner Fort states in the conclusion of her Order No. 18109 concurrence that if Pepco keeps its "promise" to track and file its synergy savings, the PSC will compare them to the costs to achieve this acquisition in the next rate case. JA 1000. This passing mention of the issue does not explain the changes from the prior application to the NSA; nor does it explain whether the new terms are positive, negative, or neutral, or how they factor into an ultimate finding favoring the public interest.[30]

Indeed, the PSC never adequately answered *most* of the extensive critiques in Order No. 17947. For this reason, many of the findings and conclusions in Order No. 17947 are not "consistent with the . . . determinations, and conclusions" made in Order No. 18148, which purports to either incorporate or abrogate them — whichever happens to be appropriate, JA 1422 n.134 — as if that task can be ac-

[30] Neither the utilities nor the PSC responded to this point in their responses to DC SUN and Public Citizen's application for reconsideration.

complished by magic rather than exposition. If the PSC wishes to dislodge its prior findings and conclusions in this case, it must explain the 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.

Beyond its failure to address concerns that led to the initial rejection of the transaction, the PSC's analysis in some instances reveals that there is no evidentiary basis on which to conclude that the RNSA's terms are in the public interest. For example, the majority in Order No. 18109 rejected the NSA in part because the $25.6 million Residential Customer Base Rate Credit was not shared with nonresidential ratepayers. Commissioner Fort sought to remedy that problem but, owing to the PSC's compressed schedule, there was no record developed on how the credit might be shared with nonresidential ratepayers. Thus, Fort's reasons for rejecting the credit in the NSA — namely, that "the record of the public interest hearing on the NSA" lacks "sufficient information to determine how this proposal . . . will operate and the rate design impact of its application," JA 993 — applies equally if not more to the RNSA's provision deferring the allocation decision en-

tirely. *Id*.[31] Fort's treatment of the $25.6 million credit also conflicts with the majority's decision in the same order, No. 18109, that the PSC could not find funding allocations in the public interest when the ultimate use of the money was unclear. JA 958–60. Indeed, without any detail regarding how the $25.6 million credit will be allocated, the PSC has no basis for deciding that even the mere dollar amount is in the public interest.[32] A decision that this revised term is in the public interest 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.

V. The PSC applied the wrong standard for the public interest, placed the burden of persuasion on the wrong parties, and failed to make an independent finding that the RNSA as a whole is in the public interest.

The PSC's disparate opinions reveal that the two commissioners who voted to approve this acquisition disagree over the public interest standard and the PSC's responsibilities in this case, and that both of them are mistaken. The result is a decision that applies the wrong legal standard, misplaces the burden of persuasion, and fails to satisfy the PSC's obligation to make an independent public interest finding. These mistakes regarding the legal standard explain why the PSC ap-

[31] *Cf. Potomac Elec. Power Co.*, *supra*, 661 A.2d at 141 (rejecting PSC's decision to deny 25 percent of cost recovery where it "specifically rejected the reasoning underlying the 25% figure" and "nonetheless adopted that amount . . . without providing any other rationale").

[32] *Cf. id*. at 141 (rejecting as arbitrary the PSC's decision to disallow 25 percent of Pepco's cost recovery where the PSC failed to provide a "full and clear explanation of why the Commission chose 25% as the appropriate percentage").

proved the RNSA without adequately addressing its own previously stated concerns with this acquisition. Rather than making an independent finding that the *RNSA*, as a whole, was in the public interest, the PSC largely deferred to the formerly settling parties' view that the *NSA* had been in the public interest. The NSA, moreover, was materially different from the RNSA that the PSC ultimately approved. Even if it were permissible to lower the public interest bar because certain parties endorse a non-unanimous settlement, the PSC cannot use settling parties' endorsement of one set of terms to support the finding that a materially different set of terms is in the public interest, over the same parties' opposition.

Commissioner Fort's concurrence in Order No. 18109 demonstrates two critical flaws regarding her view of the public interest standard and the PSC's obligations in this case. First, her opinion makes clear that she did not weigh the application (or even the NSA) "as a whole," as is required to find it in the public interest. JA 244, 945. She dismisses as "not properly before the Commission" arguments that (1) "do not challenge specific provisions of the NSA," (2) "reassert general arguments that were raised and considered by the PSC in Order No. 17947," (3) address "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. JA 969. But all of these arguments remained highly relevant to determining whether the application "as a whole" was

in the public interest. It would be nonsensical to consider only the NSA's new provisions, not the merits of the entire transaction, and assert that one has determined that the deal "as a whole" is in the public interest. And the PSC 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.

Further, Commissioner Fort's statement that she would evaluate only the specific portions of the NSA that nonsettling parties disputed, JA 969–70, and that "no specific comments were raised in response to the majority of the paragraphs," *id*., reveals that she did not consider her task to include evaluation of the transaction as a whole. Rather, she established a default position that the NSA was in the public interest until proven otherwise, placing the burden of persuasion on its opponents. Thus, her opinion 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." *Id*. This decision is plainly mistaken. The law places the burden on the proponent of a transaction or settlement, D.C. Code § 2-509 (b), and it requires the PSC to make an affirmative, independent finding that the deal as a whole is in the public interest. Commissioner Fort's view ultimately allowed her to vote for approval of the RNSA simply because it corrected specific flaws she saw in particu-

lar provisions of the NSA, without determining independently that the transaction as a whole was in the public interest.

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. Phillips posits that the PSC should defer to the settling parties and approve their agreement if it is fair, adequate, reasonable, and the product of arms-length negotiations. JA 1002–03. That is, Phillips would find that the PSC'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, *id*., and he criticizes the PSC for "substitut[ing]" its "judgment for that of the Settling Parties, which is counter to our standard of review and a plethora of case law." JA 1011–12.

Fort and Phillips both note that the Mayor and "a majority of the City Council" support the NSA. JA 1004 (Phillips); JA 991–92 (Fort). Phillips also quotes OPC's mandate, which says it must "consider the public safety, the economy of the District of Columbia, the conservation of natural resources, and the preservation of environmental quality," JA 1004, notes that "it is through this lens" that OPC "had to review the NSA," and says there is "nothing in the record" that "leads me to second-guess OPC's decision," *id*. n.279.

In accord with his view of the legal standard, Phillips appears never to have made an *independent* finding that the NSA or RNSA is in the public interest. In Order No. 18109, Phillips offers that he both "reserve[s] . . . judgment" on Fort's alternative terms, JA 1002, and, anomalously, "do[es] not believe" they "alter my determination that the settlement agreement is in the public interest," *id*. In the same order, he states that the PSC should not offer alternate terms because they are "unnecessary," and that is not the "correct approach." JA 1001. He consents to offer the RNSA to the settling parties not because he has made an independent finding that it is in the public interest, but because he believes the PSC should have deferred to the settling parties and approved the NSA; therefore he decides to give them the opportunity to rescue the deal by endorsing Fort's terms. To prevent the acquisition from "being rejected outright," *id*., and "for that reason, and that reason alone," *id*., he "do[es] not object" to Fort offering alternative terms, *id*. If the settling parties accept Fort's terms, he writes, "then so will I." *Id*.

Order No. 18148 also supports the conclusion that Phillips acceded to Fort's terms to reach an outcome. It states that Fort found the RSNA to be in the public interest and states that Phillips "accepted" the settling parties' "determination" that the *original* NSA was in the public interest. JA 1419. Regarding the RNSA, Order No. 18148 states that Commissioner Phillips had "agreed [in the prior order] 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.

JA 1420. A few paragraphs later, Order No. 18148 notes that Commissioner Fort "already concluded" that the RNSA is in the public interest, and now Commissioner Phillips "joins in that decision." JA 1421. Even if the latter statement can be taken as representing that Phillips made a public interest finding, it fails to reconcile that conclusion with his own reasoning. At most, it 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 his earlier acceptance, not that he applied the proper standard and found the RNSA, taken as a whole, to be in the public interest.

Worse than merely deferring to the settling parties' endorsement of the NSA, Order No. 18148 improperly — and incoherently — relies on that endorsement to approve a different set of terms, the RNSA. That order states, in relevant part:

> The final issue for the Commission to decide is whether [the RNSA] is in the public interest . . . . *We start with the fact that the Settling Parties already decided that the NSA . . . 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 . . . result in a Merger that is *still in the public interest*. Commis-

> sioner Fort already concluded that it does. Commissioner Phillips now joins in that decision.

JA 1421 (emphasis added). Similarly, the order notes elsewhere that the "task" of making a public interest determination "has been made easier because . . . the Settling Parties concluded that the NSA . . . was in the public interest." JA 1418–19. This reasoning makes no sense. Most of the formerly settling parties opposed the RNSA on the grounds that it was not in the public interest. JA 1408–17. The PSC was not permitted to lower the public interest bar for the NSA merely because key parties reached a settlement agreement. But even if that were permissible, the PSC may not use the lowered bar to approve terms that the same key parties *do not* accept. Indeed, if only one party had reached a deal with Exelon and Pepco in October 2015, more than a month after the PSC rejected the original application, the PSC undoubtedly would not have granted leave to file the untimely "settlement" or reopened the case to consider it, much less deferred to a claim by the settling parties that their deal was in the public interest.

* * *

Order No. 18148 contradicts without explanation the vast weight of the PSC's most careful reasoning and review of the record in this case, which appears in Order No. 17947, rejecting the acquisition. Given that Order No. 18148 approves a substantially similar transaction, the PSC was obligated to discuss most if not all material issues where Order No. 17947 found fault, draw a straight line

through the provisions relevant to each issue in the original application, the NSA, and the RNSA, and discuss whether the NSA's and RNSA's terms were better, worse, or no different than the terms the PSC conclusively rejected in Order No. 17947.[33] The PSC also should have engaged in an analysis of why, on the whole, the new balance of benefits and drawbacks in the RNSA was in the public interest. Nothing resembling either of these analyses can be found in Order Nos. 18109 or 18148. Instead, the two commissioners who voted to approve the acquisition not only lowered the bar to a public interest finding improperly, based on certain parties' endorsement of their own settlement, but used that lowered bar to approve a different set of terms. The result of this process is nearly the opposite of a reasoned decision based on substantial evidence. It is an unreasoned outcome that contradicts the PSC's most thoughtful review of the record.[34]

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[33] *Cf. Goodman v. PSC*, 162 U.S. App. D.C. 74, 79, 497 F.2d 661, 666 (1974) ("In any analysis of whether an end result . . . 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 order's] essential elements is supported by substantial evidence in the record.'"); *F.C.C.*, *supra*, 556 U.S. at 537 (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.").

[34] *Cf. Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. 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 & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *State Farm*, 463 U.S. at 46–51) ("Unexplained

Conclusion

For the foregoing reasons, the court should vacate Order Nos. 18148 (approving the acquisition) and 18243 (denying reconsideration).

Respectfully submitted,

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inconsistency" is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.").

Addendum

D.C. Code § 34-909

Public notice of rate applications or changes in conditions of service; opportunity for public response; notice to utility; setting time and place for hearing and investigation.

(a) Notice of every rate application or change in condition of service proposed and filed with the Public Service Commission shall be given by the utility to each residential or commercial rate payer affected by the proposed rate application or change. The notice shall be available for viewing at a utility's website, and either by electronic notice to those ratepayers who have registered for electronic billing with the utility or by written notice in the affected ratepayer's billing envelope. The notice shall be sent in not later than the next billing period following the filing; no filing may be approved by the Commission without adequate time for rate payer response. Each notice shall be sufficiently accurate and detailed for the rate payer to understand the filing, including the rate payer's specified affected interest. The notice shall provide the specific rate or service change affecting the rate payer, including the proposed percentage and dollar increase for the rate and rider category of the customer. 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.

(b) The Commission shall, prior to the formal hearing, notify the public utility complained of that a complaint has been made, and 10 days after the notice has been given the Commission may proceed to set a time and place for a hearing and an investigation as hereinafter provided.

PSC Rule 130

SETTLEMENT AND STIPULATION CONFERENCES

130.1 Unless otherwise ordered, counsel for the Staff shall not initiate arrangements for an initial settlement conference. Staff shall not schedule a conference prior to any deadlines which may exist for filing petitions to intervene in or to become a party to a proceeding.

130.2 Staff shall file a report on the outcome of the initial settlement conference within ten (10) days after the convening of the conference.

130.3 The initial settlement conference scheduled by the Staff under this section shall not preclude the parties from meeting at any other times as they deem necessary for the purpose of settlement and stipulation.

130.4 All parties shall be allowed to file proposed orders on matters of agreement.

130.5 All parties participating in settlement conferences shall do so either personally or through representatives empowered to act on behalf of the party and ultimately bind the party to any settlement.

130.6 Statements made and documents considered by parties during the course of settlement negotiations and conferences shall be confidential and non-discoverable, and shall not be admissible as evidence or raised in arguments by parties.

130.7 All filings contemplated under this section shall recite, in addition to the matters agreed upon at the conference, the date, time, and place of the conference, and the names of the parties in attendance.

130.8 A party may waive the confidentiality of its own disclosures. A party who has made public disclosures about matters that have also been considered in settlement negotiations and conferences may be deemed to have waived the confidentiality of its own disclosures, but not those of other parties.

130.9 In order to ensure the confidentiality of settlement proceedings, persons who are not parties may be excluded from settlement conferences and negotiations.

130.10 Settlements may be presented at any time prior to the issuance of a final decision. When a settlement is presented to the Commission, the settlement shall do the following:

(a) Be reduced to writing;

(b) Contain all of the terms and conditions agreed upon by the signatories;

(c) Be clearly and accurately labeled unanimous or nonunanimous;

(d) Be clearly and accurately labeled partial or full;

(e) Indicate whether any party who has not executed the settlement will oppose its adoption;

(f) Indicate whether the provisions of the agreement are severable; and

(g) Stipulate the admission into evidence of testimony and exhibits filed in the proceeding by the signing parties; Provided, that in the case of a partial settlement, only testimony and exhibits related to the settled matters shall be stipulated to for admission into evidence.

130.11 A full settlement presented in a base rate change application or other contested case, which would have an impact on a utility's customers, competitors, or the public, shall only be accepted after a hearing on whether the settlement is in the public interest.

130.12 At the hearing held pursuant to § 30.11, non-signatory parties shall be provided the opportunity to cross-examine the witness(es) tendered by the signatory parties on whether the settlement agreement is in the public interest.

130.13 A Commission decision to adopt a nonunanimous settlement as a resolution on the merits shall be based upon substantial evidence upon the record.

130.14 A party who does not sign settlement documents may not defeat or challenge a settlement simply by refusing to sign the document.

130.15 A settlement which fully or partially resolves a proceeding, before the Commission, shall have no precedential effect on future proceedings.

130.16 Given the negotiated nature of a settlement, the Commission shall either accept or reject a settlement in its entirety, unless the parties have specifically stated that the provisions of the settlement are severable.

130.17 If a settlement is rejected, the Commission may take various steps, including the following:

(a) Allow the parties time to renegotiate a settlement;

(b) Propose alternative terms to the parties and allow the parties a reasonable time within which to elect to accept such terms or request other relief; or

(c) Proceed with litigation of the case.

Certificate of Service

I certify that on February 6, 2017, I served this brief by electronic mail, with the consent of counsel, to:

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