

Nuclear Chaos: The Exelon-PHI Merger and What it Means For Nuclear Power in the United States and the EPA's Carbon Emission Rules

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ABSTRACT

As exemplified by the recent proposed mergers of Exelon Corporation (“Exelon”) with Pepco Holdings, Inc. (“PHI”) and NextEra Energy with Hawaiian Electric Industries, nuclear-heavy utility companies are increasingly seeking to offset the losses they are experiencing by acquiring profitable, regulated utilities that do not generate nuclear power. But these mergers have been met with skepticism by the public and in some cases utility regulators. This Note focuses on the utility commissions’ consideration of the Exelon-PHI merger to establish that, despite press coverage that indicated that the District of Columbia (“DC”) Public Service Commission’s (“DC PSC”) initial rejection of the merger might have been influenced by concerns that Exelon’s nuclear losses would be passed on to DC ratepayers, that was not the case. DC PSC’s ultimate acceptance of the proposed merger was also not influenced by Exelon’s nuclear generation activities. This Note places DC PSC’s consideration of the Exelon-PHI merger in the context of the U.S. Environmental Protection Agency’s (“EPA”) Clean Power Plan (“CPP”) to regulate carbon emissions from the utility sector in order to meet the challenge of climate change. Nuclear power is critical to meeting the CPP’s carbon emission reduction goals because twenty percent of the country’s electricity is generated from nuclear power. Although nuclear power ultimately did not influence DC PSC’s consideration of the merger, its and the other utility commissions’ consideration of the merger illustrates that the nuclear industry faces a chaotic regulatory environment in attempting to acquire profitable utilities to offset their losses. This Note attempts to develop lessons from the Exelon-PHI regulatory process that nuclear-heavy utilities might seek to apply in acquiring non-nuclear, regulated utilities to offset their losses in the unprofitable, deregulated nuclear generation industry and meet the carbon reduction ambitions of the CPP. Lastly, this Note offers policy recommendations that the federal

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government could pursue to put the nuclear industry on firmer financial ground in order to ensure that the CPP's carbon emission goals are met.

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INTRODUCTION

Nuclear power generating companies can take lessons from the recent merger between Exelon-Corporation (“Exelon”) and Pepco Holdings, Inc. (“PHI”) to more successfully navigate the regulatory process for mergers in the future. Different jurisdictions maintain different approval processes and standards for public utility mergers, and combining companies must be prepared to surmount the most difficult of them. The difficulties Exelon and PHI encountered in the approval process in the District of Columbia (“DC” or “the District” or “the City”) are a notable example of this phenomenon. Though Exelon’s aging nuclear fleet was ultimately not a factor in the initial rejection of the merger by the DC Public Service Commission (“DC PSC”), these regulatory obstacles remain especially relevant to nuclear power companies as they aim to financially restructure by acquiring non-nuclear utility companies. This restructuring is necessary to support the finances of the flagging industry. This challenge is important because nuclear power is critical to the United States’ success in meeting its carbon emissions reduction goals of the Clean Power Plan.

For nearly two years through the winter of 2015–2016, DC PSC and DC politicians, community activists, and renewable energy organizations fiercely debated the proposed merger between utility companies Exelon and PHI.¹ The

1. Associated Press, *DC Mayor Announces Settlement in Exelon, Pepco Merger*, WTOP (Oct. 6, 2015, 4:21 PM), <http://wtop.com/dc/2015/10/dc-mayor-announcing-settlement-in-exelon-pepco-merger/>; Aaron C. Davis, *D.C. Mayor Rejects Pepco-Exelon Plan; \$6.8-Billion Merger Appears Dead*, WASH. POST (Mar. 1, 2016),

merger had been approved by state utility commissions in Virginia, New Jersey, Delaware, and Maryland and the Federal Energy Regulatory Commission (“FERC”),² but still needed DC PSC’s approval. On August 25, 2015, DC PSC rejected the proposed merger³ in a move that attracted significant media attention. The coverage concerned Exelon’s aging nuclear fleet and what the merger might mean for DC ratepayers.⁴ The initial rejection of the deal was interpreted as having significant implications for nuclear power in the United States⁵ given the financial struggles of the industry.⁶ It also attracted attention because other nuclear utilities, including NextEra Energy, are looking to acquire non-nuclear utilities to offset their nuclear-induced losses.⁷

https://www.washingtonpost.com/local/dc-politics/pepco-exelon-merger-may-be-unsalvagable/2016/03/01/d9283908-dfc3-11e5-846c-10191d1fc4ec_story.html; Thomas Heath & Aaron C. Davis, *D.C. Regulators Green-Light Pepco-Exelon Merger, Creating Largest Utility in the Nation*, WASH. POST (Mar. 23, 2016), https://www.washingtonpost.com/local/dc-politics/in-a-surprise-move-dc-regulators-give-green-light-to-pepco-exelon-merger/2016/03/23/4ace2bc0-f10e-11e5-89c3-a647fcce95e0_story.html; Ryan Koronowski, *After 4 States Approved A Big Utility Merger, DC Shocked Everyone by Denying It Over Clean Energy*, THINKPROGRESS (Aug. 26, 2015), <http://thinkprogress.org/climate/2015/08/26/3695037/exelon-pepco-merger/>.

2. Koronowski, *supra* note 1; *FERC Approves Merger of Exelon and PHI Holdings Inc.*, EXELON CORP. (Nov. 21, 2014), http://www.exeloncorp.com/newsroom/Pages/pr_20141121_EXC_PHIFERCapproval.aspx.

3. 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 for Authorization and Approval of Proposed Merger Transaction, D.C. Pub. Exelon Corp., D.C. Pub. Serv. Comm’n, Order No. 17947, ¶ 1 (2015) Serv. Comm’n, Order No. 17947, ¶ 1 (2015) [hereinafter *PHI I*].

4. TOM SANZILLO & CATHY KUNKEL, EXELON’S PROPOSED ACQUISITION OF PEPCO: CORPORATE STRATEGY AT RATEPAYER EXPENSE, INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS 1 (2015), <http://ieefa.org/wp-content/uploads/2015/01/Exelons-Proposed-Acquisition-of-Pepco-IEEFA-Jan-20-2015.pdf> (“A merger with Exelon would also subject ratepayers to risks associated with Exelon’s aging nuclear fleet.”); Will Sommer, *Nuclear Fallout: Is the Pepco-Exelon Merger Really Dead?*, WASH. CITY PAPER (Sept. 17, 2015), <http://www.washingtoncitypaper.com/blogs/looselips/2015/09/17/nuclear-fallout-is-the-pepco-exelon-merger-really-dead/>; David Roberts, *Grassroots Pressure Has Put a Stop to the Proposed Exelon-Pepco Merger in DC*, VOX (Aug. 26, 2015, 8:40 AM), <http://www.vox.com/2015/8/26/9209227/exelon-pepco-merger-opposition> (“Sounds great for Exelon. And for Pepco shareholders. But not so great for Pepco ratepayers.”); *More Woes for Exelon as DC PSC Rejects its Takeover of Pepco*, GREENWORLD (Aug. 25, 2015), <http://safeenergy.org/2015/08/25/more-woes-for-exelon/>; Nick Cunningham, *Nuclear Utility Suffers Setback as DC Pursues Clean Energy*, OILPRICE (Aug. 25, 2015, 4:41 PM), <http://oilprice.com/Alternative-Energy/Nuclear-Power/Nuclear-Utility-Suffers-Setback-As-DC-Pursues-Clean-Energy.html>.

5. See Roberts, *supra* note 4 (“So this ruling has been hotly anticipated and will reverberate far beyond DC.”); Mark Chediak & Jim Polson, *Exelon Denial Signals Battles Over \$40 Billion in Utility Deals*, BLOOMBERG BUS. (Aug. 25, 2015, 3:57 PM), <http://www.bloomberg.com/news/articles/2015-08-25/exelon-rejection-foretells-battles-for-40-billion-in-utility> (“The District of Columbia’s move to block the merger . . . throws in doubt Exelon’s goal of creating the largest U.S. utility in terms of customers. Power giants NextEra Energy Inc. and Iberdola SA are also facing opposition in proposed takeovers in Hawaii and Connecticut.”) NextEra Energy is one of the largest commercial operators of nuclear power in the United States. *Fact Sheet*, NEXTERA ENERGY, <http://www.nexteraenergy.com/company/factsheet.shtml> (last visited Jan. 5, 2016).

6. Hannah Northey, *Utilities: Nuclear Giants Urge Market Changes to Thwart Closures*, E&E NEWS (Feb. 6, 2014), <http://www.eenews.net/stories/1059994177>.

7. See Dennis Hollier, *Which NextEra Will Hawaii Get?*, HAW. BUS. (Feb. 2015), <http://www.hawaiibusiness.com/which-nextera-will-hawaii-get/> (discussing NextEra Energy’s, a nuclear generating utility, bid to acquire Hawaii Electric Industries, a non-nuclear utility).

This Note will establish that Exelon's nuclear holdings were not a determinative factor in the chaotic and unpredictable process that lead DC PSC to initially reject the proposed merger, reject it again in February 2016,⁸ and ultimately approve the merger a month later.⁹ This Note will also examine the approval of the merger by other state utility commissions to show that Exelon's nuclear generation was not a significant issue in their analysis of the proposed merger. Lastly, this Note will establish that regulatory review of the merger has implications for the financial health of the nuclear energy industry in the United States and the carbon emission reduction goals of the Clean Power Plan ("CPP"), but that there are steps the nuclear industry can take to respond to this challenge. The CPP is the U.S. Environmental Protection Agency's ("EPA") rule to reduce carbon emissions from utility companies.¹⁰

Part I of this Note will discuss the CPP and the role of nuclear power in it, while Part II will discuss the state of the nuclear industry in the United States. Part III will examine the terms of the original proposed merger and provide background information on Exelon and PHI. Part IV will analyze the decisions by the utility commissions in Virginia, New Jersey, Maryland, and Delaware in the chronological order that the commissions ruled on the merger. Part V will discuss the course of the three decisions by DC PSC, and Part VI will discuss how DC PSC's consideration of the merger could pose problems for the nuclear industry and the CPP and will offer suggestions for how the nuclear industry itself or the federal government could take steps to put the nuclear industry on secure financial ground and meet the carbon emission goals of the CPP. Lastly, this Note will offer a conclusion to the topics discussed in the Note.

I. THE CPP AND NUCLEAR POWER

The CPP is EPA's rule that regulates carbon emissions from power plants.¹¹ Section I.A of this part will discuss EPA's legal responsibility to regulate carbon emissions from power plants. Section I.B will discuss the three building blocks that constitute the CPP. Section I.C will discuss the role of nuclear power in the CPP.

8. 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 for Authorization and Approval of Proposed Merger Transaction, D.C. Pub. Serv. Comm'n, Order No. 18109, ¶ 1 (2016) [hereinafter *PHI II*].

9. Exelon Corp., D.C. Pub. Serv. Comm'n, Order No. 18138, ¶ 1 (2016) [hereinafter *PHI III*].

10. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter Clean Power Plan].

11. *Id.*

A. EPA'S LEGAL RESPONSIBILITY TO REGULATE CARBON EMISSIONS
FROM POWER PLANTS

In 2007, in *Massachusetts v. Environmental Protection Agency*, the Supreme Court confirmed that the EPA has a legal responsibility to regulate greenhouse gases, an air pollutant under the Clean Air Act (“CAA”), if it determines that greenhouse gases endanger public health and welfare.¹² In 2009, EPA determined that greenhouse gases are the primary drivers of climate change and may reasonably be anticipated to endanger both public health and welfare.¹³ EPA must regulate carbon pollution from existing power plants under § 111(d) of the CAA because it is statutorily commanded to do so when, as is the case here, new power plants are regulated for carbon emissions under § 111(b) and carbon pollution is not regulated as a criteria pollutant or through the hazardous air pollution program.¹⁴ On October 23, 2015, EPA fulfilled its obligation to regulate carbon pollution from existing power plants under § 111(d) of the CAA by publishing the final rule for “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” or the CPP.¹⁵

B. THE THREE BUILDING BLOCKS OF THE CPP

The CPP requires states, excluding DC,¹⁶ to adopt plans to reduce carbon emissions from power plants.¹⁷ The EPA expects the state plans will reduce

12. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) (“On the merits, the first question is whether . . . the Clean Air Act authorizes EPA to regulate greenhouse gas emissions . . . in the event that it forms a ‘judgment’ that such emissions contribute to climate change. We have little trouble concluding that it does.”).

13. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (“The Administrator finds that greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare. . . . The Administrator reached her determination by considering both observed and projected effects of greenhouse gases in the atmosphere, their effect on climate, and the public health and welfare risks associated with such climate change.”).

14. Lissa Lynch et al., *Proposal Summary: Key Issues for States in EPA’s Clean Power Plan Proposed Rule*, GEO. CLIMATE CTR. 3 (June 2014), http://www.georgetownclimate.org/files/report/GCC_111dProposal_Key_IssuesforStates_June2014.pdf.

15. *Clean Power Plan*, 80 Fed. Reg. at 64,662. The CPP has already been challenged in the D.C. Circuit, *See State of West Virginia et al. v. EPA et al.*, No. 15-1363 (D.C. Cir. filed Oct 23, 2015), which has exclusive jurisdiction for challenges to final standards of performance with national impact under § 111, 42 U.S.C. § 7607(b)(1) (2015) (“A petition for review of action of the Administrator in promulgating any . . . standard of performance or requirement under section 7411 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. . . . [A]ny action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect . . .”). Additionally, the CPP has been stayed by the Supreme Court. Lisa Heinzerling, *The Supreme Court’s Clean-Power Power Grab*, 28 GEO. ENVTL. L. REV. 425 (2016). This note acknowledges that the lawfulness of the CPP is being challenged, but assumes, for the sake of discussing the impacts of the Exelon-PHI merger on the CPP, that it will be upheld.

16. *Clean Power Plan*, 80 Fed. Reg. at 64,664 (“Because . . . the District of Columbia do[es] not have affected EGUs, they will not be required to submit a state plan.”).

17. *Id.* at 64,663.

carbon emissions from power plants thirty-two percent below 2005 levels by 2030.¹⁸ The state plans must establish standards of performance that reflect the degree of emissions reductions achievable through an adequately demonstrated Best System of Emission Reduction (“BSER”) that considers the cost of such reductions, non-air quality health, environmental impacts, and energy requirements.¹⁹ The BSER is based on three “building blocks,” which already enjoy widespread use by utilities and states.²⁰ The first building block is reducing carbon intensity at power plants through heat rate improvements.²¹ The second is substituting generation at carbon-intensive affected power plants for generation from less carbon-intensive affected power plants.²² The third building block is substituting increased generation from new zero-emission sources of renewable energy for generation from fossil fuel-fired power plants.²³

C. NUCLEAR POWER IS NOT IN THE CPP, BUT IS STILL CRITICAL TO
ACHIEVING ITS GOALS

Nuclear power was included in one of the building blocks in the proposed version of the CPP, but the final CPP excluded nuclear power from the building blocks.²⁴ Even though nuclear power is not included in the building blocks, nuclear power is critical to reaching the CPP’s carbon emission goals because it provides twenty percent of the electricity in the United States and more than sixty-five percent of the country’s emissions-free electricity.²⁵ Further, if nuclear power is not part of the electrical generation mix, fossil fuel use will increase—and increase carbon emissions—as most new renewable sources are intermittent and are not suitable for generating baseload power.²⁶ Despite this, the CPP does not credit states for reducing their carbon emissions by increasing nuclear energy generation.²⁷

18. *Id.* at 64,665.

19. *Id.* at 64,707.

20. *Id.* at 64,664, 64,667.

21. *Id.* at 64,667.

22. *Id.*

23. *Id.*

24. *Id.* at 64,674.

25. Samuel Brinton & Josh Freed, *When Nuclear Ends: How Nuclear Retirements Might Undermine Clean Power Plan Progress*, THIRDWAY (Aug. 19, 2015), <http://www.thirdway.org/report/when-nuclear-ends-how-nuclear-retirements-might-undermine-clean-power-plan-progress>.

26. Doug Vine & Timothy Juliani, *Climate Solutions: The Role of Nuclear Power*, CTR. FOR CLIMATE & ENERGY SOLS. (Apr. 27, 2014), <http://www.c2es.org/publications/climate-solutions-role-nuclear-power>. Baseload power runs twenty-four hours a day to meet the continuous, minimum levels of energy demand. *Id.* Renewable energy sources are variable, changing as the weather changes. *Id.* They cannot provide the consistent source of energy needed to support baseload demands; however, fossil fuels are not variable and can provide a consistent source of energy. *Id.* Consequently, fossil fuels would replace nuclear energy in the mix of energy forms that constitute the baseload power, if nuclear power was to go offline. *See id.*

27. Brad Plummer, *One Potential Loser in Obama’s Climate Plan? Existing Nuclear Plants.*, VOX (Aug. 19, 2015), <http://www.vox.com/2015/8/19/9171845/obama-climate-plan-nuclear>.

II. THE STATE OF THE NUCLEAR INDUSTRY

Nuclear power is important to achieving the CPP's carbon emissions reductions goals, but the industry itself is at a critical crossroads as it faces financial challenges and the decommissioning of nuclear power plants.²⁸ Lower natural gas prices and greater quantities of low-cost renewable sources of energy over the last few years have lowered energy prices in competitive energy markets.²⁹ This has lowered the market price that all energy generators, including nuclear generators, receive for the energy they produce.³⁰ Five nuclear power plants out of the country's 105 have been decommissioned since 2013 due to the combination of lower market energy prices and the costly maintenance associated with operating aging nuclear power plants.³¹ More nuclear power plants may close in the coming years because of economic concerns.³²

New nuclear power plants are not likely to replace or exceed the nuclear power capacity lost from decommissioned power plants. Construction of new nuclear power plants has slowed because of public safety concerns following the Three Mile Island nuclear reactor meltdown, increased costly regulation of nuclear power plants, the high cost of insurance for nuclear operators, and the long time-frame for planning and constructing new plants.³³ The result has been a near moratorium³⁴ on new nuclear power plants; in the spring of 2016 the first new nuclear reactor came online in twenty years.³⁵ Only four new nuclear reactors are expected to come online within the next three years and the Department of Energy's Energy Information Administration does not expect any additional nuclear reactors beyond those units before 2030.³⁶

Still, operators of existing nuclear power plants can take steps to avoid further reductions in the level of nuclear power generated in this country. Operators can

28. *Id.* ("Nuclear power has been facing serious headwinds over the past few years."); Northey, *supra* note 6.

29. Vine & Juliani, *supra* note 26.

30. *Id.*

31. Jess Bidgood, *Vermont Yankee Nuclear Plant Begins Slow Process of Closing*, N.Y. TIMES (Jan. 4, 2015), <http://www.nytimes.com/2015/01/05/us/vermont-yankee-nuclear-plant-begins-slow-process-of-closing.html>; Brad Plummer, *Nuclear Plants in the US Keep Closing—That's Bad News for Climate Change*, VOX (May 2, 2014), <http://www.vox.com/2014/5/2/5671394/nuclear-power-retirements-climate-change>; Plummer, *supra* note 27.

32. Jeff McMahon, *Final Clean Power Plan Drops Support for Existing Nuclear Plants*, FORBES (Aug. 3, 2015), <http://www.forbes.com/sites/jeffmcmahon/2015/08/03/final-clean-power-plan-drops-support-for-existing-nuclear-plants/2/> (identifying nine nuclear power plants that may close).

33. William D. O'Connell, *Causation's Nuclear Future: Applying Proportional Liability to the Price-Anderson Act*, 64 DUKE L.J. 333, 334 (2014); Plummer, *supra* note 31.

34. O'Connell, *supra* note 33, at 334 ("For the past several decades, an effective moratorium on building new nuclear-power plants has silenced the nuclear industry.").

35. Chris Mooney, *It's the First New U.S. Nuclear Reactor in Decades. And Climate Change has Made that a Very Big Deal*, WASH. POST (June 17, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/06/17/the-u-s-is-powering-up-its-first-new-nuclear-reactor-in-decades/>; Vine & Juliani, *supra* note 26.

36. Vine & Juliani, *supra* note 26.

upgrade the capacity at nuclear power plants to increase output.³⁷ Another step is to apply for a twenty-year extension of the operating license for the nuclear reactor so that the plants can continue to operate.³⁸ Seventy reactors have already received extensions from the Nuclear Regulatory Commission (“NRC”) with twelve reactors applying for such an extension and all the remaining reactors at least considering extensions.³⁹ These measures, however, appear as stopgaps against the broader industry trends of decommissioning and more competitive energy markets.

III. THE PROPOSED EXELON-PHI MERGER

A. TERMS OF THE PROPOSED MERGER

On April 30, 2014, Exelon announced its acquisition of PHI for \$6.8 billion where PHI would operate as a subsidiary of Exelon’s holding company.⁴⁰ Under the terms of the proposed merger, PHI would no longer be a publicly traded company and would no longer perform some corporate functions associated with its public status.⁴¹ However, PHI would continue to maintain headquarters in DC and its operating structure would remain the same.⁴² Significant concessions and commitments that Exelon and PHI made will be integrated into the discussion of the utility commissions’ analysis of the proposed merger, *infra*.

B. EXELON

Exelon is involved in every stage of the energy business—electricity generation, energy sales, transmission, and delivery.⁴³ Exelon is headquartered in Chicago,⁴⁴ and its three utilities deliver electricity and natural gas to more than 7.8 million customers in Maryland, Illinois, and Pennsylvania.⁴⁵

Exelon is the largest U.S. nuclear power plant operator⁴⁶—with eleven nuclear plants⁴⁷—and nuclear power comprises over eighty percent of its energy genera-

37. *See Plans for New Reactors Worldwide*, WORLD NUCLEAR ASSOC. (Oct. 2015), <http://www.world-nuclear.org/info/current-and-future-generation/plans-for-new-reactors-worldwide/>.

38. *See* Brinton & Freed, *supra* note 25.

39. *Id.*

40. *PHI I*, *supra* note 3, ¶¶ 18–20.

41. *Id.* ¶ 23.

42. *Id.*

43. *About Exelon*, EXELON, <http://www.exeloncorp.com/company/about-exelon> (last visited Dec. 14, 2015).

44. *Id.*

45. *Id.*

46. Scott Disavino, *New Power Rules May Preserve Exelon Nuclear Plants in Illinois*, REUTERS (July 30, 2015), <http://www.reuters.com/article/2015/07/30/us-usa-nuclear-idUSKCN0Q42IV20150730#OAIAXGya7pVxzdoA.97>.

47. Jeffrey Tomich, *Illinois Resolution Would Help Exelon Nuclear Plants*, MIDWEST ENERGY NEWS (May 28, 2014), <http://midwestenergynews.com/2014/05/28/illinois-resolution-would-help-exelon-nuclear-plants/>.

tion.⁴⁸ Its nuclear generation business is deregulated, which means that it does not receive a guaranteed price for the electricity it generates and instead receives the market price for electricity.⁴⁹ The falling market price for electricity has meant falling profit margins for Exelon.⁵⁰

Exelon's nuclear fleet is aging—three of its nuclear stations failed to clear the regional power grid's capacity auction in August 2015 because they were not a reliable source of electricity.⁵¹ Failing to clear the capacity auction means that the plants will not receive capacity payments—a sort of bonus for promising to be on standby during emergencies.⁵² Exelon has lost nearly \$1 billion over the past five years because of its nuclear operations and expects those losses to continue due to the loss of capacity payments and the lower market price for electricity.⁵³ It has announced that it intends to retire one of its nuclear reactors by the end of 2019.⁵⁴

C. PHI

PHI is a utility company that distributes power to DC and parts of Virginia, Maryland, Delaware, and New Jersey.⁵⁵ It serves two million customers in the mid-Atlantic region⁵⁶ and does not provide electricity from nuclear power.⁵⁷ PHI does not provide electric service to retail customers in Virginia, but it does own transmission facilities there.⁵⁸ It is a rate-regulated business, which means that the price it receives for the electricity it provides is set to recover the cost of providing that electricity and thus is not subject to fluctuations in the market price of electricity.⁵⁹ PHI does business as Potomac Electric Power Company (“Pepco”)

48. Kari Lydersen, *Why the Nuclear Industry Targets Renewables Instead of Gas*, MIDWEST ENERGY NEWS (Feb. 6, 2015), <http://midwestenergynews.com/2015/02/06/why-the-nuclear-industry-targets-renewables-instead-of-gas/>.

49. See Joe Cahill, *Exelon Loves Free Markets—Until it Doesn't*, CRAIN'S CHI. BUS. (Mar. 5, 2014), <http://www.chicagobusiness.com/article/20140305/BLOGS10/140309928/exelon-loves-free-markets-until-it-doesnt>.

50. *Id.*

51. Andrew Maykuth, *Exelon: Three of Its Nuclear Plants Failed to Clear Power Grid's Auction*, PHILA. INQUIRER (Aug. 26, 2015), http://articles.philly.com/2015-08-26/business/65851999_1_power-grid-auction-three-mile-island-unit.

52. *Id.*

53. Disavino, *supra* note 46.

54. Maykuth, *supra* note 51.

55. Koronowski, *supra* note 1.

56. *Our Companies*, PEPCO HOLDINGS, <http://www.pepcoholdings.com/about-us/our-companies/> (last visited Dec. 14, 2015).

57. See *Distribution*, PEPCO, <http://www.pepco.com/distribution.aspx> (last visited Dec. 15, 2015) (“Coal, natural gas and oil are the principal fossil fuels used to generate electricity.”); *Distribution*, DELMARVA POWER, <http://www.delmarva.com/my-business/choices-and-rates/maryland/distribution/> (last visited Jan. 17, 2016).

58. Order Granting Approval, Joint Petition of Pepco Holdings, Inc., Delmarva Power & Light Company, Potomac Electric Power Company, Conectiv LLC, Exelon Corporation, and Exelon Energy Delivery Company LLC, Va. State Corp. Comm'n, Case No. Pue-2014-00048, 2 (2014) [hereinafter Va. State Corp. Comm'n].

59. See REGULATORY ASSISTANCE PROJECT, ELECTRICITY REGULATION IN THE US: A GUIDE 5 (2011), <http://www.raponline.org/wp-content/uploads/2016/05/rap-lazar-electricityregulationintheus-guide-2011-03.pdf>; Jeffrey To-

in DC and Maryland,⁶⁰ Atlantic City Electric (“ACE”) in New Jersey,⁶¹ and Delmarva Power (“Delmarva”) in Delaware and Maryland.⁶²

IV. STATE MERGER APPROVAL DECISIONS

A. VIRGINIA STATE CORPORATION COMMISSION DECISION

This section of the Note will explore the approval of the merger by the Virginia State Corporation Commission (“VSCC”). The Virginia Utility Transfers Act provides the VSCC with the authority to approve mergers of utility companies. Virginia Code § 56-88.1 states that “[n]o person . . . shall . . . acquire control of . . . [a] public utility . . . without the prior approval of the Commission.”⁶³ In a short, six-page order on October 7, 2014, VSCC approved the merger.⁶⁴ The order stated that VSCC staff had recommended approving the proposed merger because it would not impair Virginia customers’ access to just and reasonable rates as Pepco does not have retail customers in Virginia and only owns transmission facilities in Virginia.⁶⁵ On the basis of the staff’s recommendation, VSCC approved the merger but conditioned the approval on the merged entity timely responding to VSCC staff inquiries regarding Virginia regulatory matters.⁶⁶ Exelon’s nuclear capacity was not mentioned in VSCC’s order.⁶⁷

B. NEW JERSEY BOARD OF PUBLIC UTILITIES DECISION

This section of the Note will assess the decision by the New Jersey Board of Public Utilities (“NJ BPU”) to approve the Exelon-PHI merger and establish that concerns about Exelon’s nuclear power plants were not a significant issue in analyzing the merger. Section IV.B.1 will review NJ BPU’s authority to assess the proposed merger and the standard of review for the proposed merger. Section IV.B.2 will discuss and analyze NJ BPU’s approval of the merger.

mich & Rod Kuckro, *Utilities: Exelon Doubles Down on Regulated Assets with Pepco Buy*, E&E NEWS (May 1, 2014), <http://www.eenews.net/stories/1059998806>.

60. *About Us*, PEPCO, <http://www.pepco.com/library/templates/interior.aspx?pageid=742> (last visited Jan. 3, 2016).

61. *About Us*, ATL. CITY ELEC., <http://www.atlanticcityelectric.com/connect-with-us/about-us/> (last visited Jan. 3, 2016).

62. *About Us*, DELMARVA POWER, <http://www.delmarva.com/connect-with-us/about-us/> (last visited Jan. 3, 2016).

63. VA. CODE ANN. § 56-88.1 (2016).

64. Va. State Corp. Comm’n, *supra* note 58, at 4 (“The Petitioners are granted approval to transfer control of Delmarva and Pepco to Exelon . . .”).

65. *Id.* at 3.

66. *Id.* at 4.

67. *Id.* at 1–6.

1. NJ BPU's Authority and Standard of Review

New Jersey law provides NJ BPU the authority to approve mergers involving utility companies⁶⁸ and establishes the standard of review for the proposed mergers. NJ BPU is not to approve a merger “unless it is satisfied that positive benefits will flow to customers and the State of New Jersey and, at a minimum, that there are no adverse impacts” on any of the four criteria laid out in NJ BPU’s organic statute.⁶⁹ The four factors are: “the impact of the acquisition on competition, on the rates of ratepayers affected by the acquisition of control, on the employees of the affected public utility or utilities, and on the provision of safe and adequate utility service at just and reasonable rates.”⁷⁰ The Joint Petitioners “have the burden of proving to the Board . . . that the requirements . . . are met.”⁷¹

2. NJ BPU's Approval of the Merger

On March 6, 2015, NJ BPU approved the merger, including a settlement agreement that had been negotiated between Exelon and PHI and NJ BPU staff.⁷² This section of the Note will discuss the four factors NJ BPU is statutorily mandated to consider in assessing the merger and the other factors it assessed.

NJ BPU found that the merger would have no adverse consequences on competition in New Jersey.⁷³ Exelon’s and PHI’s (“Joint Petitioners”) commitment to cooperate with and provide information to the regional transmission organization and independent consulting firms ensured that the Joint Petitioners would not stifle competition in transmitting electricity.⁷⁴ Further, the Joint Petitioners agreed to comply with the competition-related provisions of NJ BPU’s order approving the ACE-Pepco merger in June 2002, which would protect competition.⁷⁵

NJ BPU found that the merger would have no adverse consequences on rates of ACE’s customers, and would provide positive benefits to ACE customers and New Jersey.⁷⁶ NJ BPU was “satisfied” that the \$114 credit for each ratepayer

68. N.J. STAT. ANN. § 48:2-51.1 (2015) (“No person shall acquire . . . control of a public utility . . . without requesting and receiving the written approval of the Board of Public Utilities.”).

69. N.J. ADMIN. CODE § 14:1-5.14 (2016).

70. N.J. STAT. ANN. § 48:2-51.1.

71. N.J. ADMIN. CODE § 14:1-5.14.

72. In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc., N.J. Bd. of Pub. Utils., Docket No. EM14060581, 1, 43 (Feb. 11, 2015) [hereinafter N.J. Bd. of Pub. Utils.].

73. *Id.* at 37.

74. *Id.* at 38.

75. *Id.*

76. *Id.* at 34 (“The Board hereby finds that the Settlement sufficiently demonstrates that there will be no adverse consequences to the rates of ACE’s ratepayers as a result of the merger between PHI and Exelon. The Board further finds as evident in several provisions of the Settlement that the Merger will provide positive benefits to ACE customers and the State of New Jersey.”) (emphasis omitted).

through the \$62 million Customer Investment Fund (“CIF”) would result in positive benefits to ratepayers.⁷⁷ The merger was also projected to provide \$15 million in savings to customers through energy efficiency programs.⁷⁸ Further, costs associated with completing the merger would not be passed on to consumers.⁷⁹

NJ BPU’s analysis of the effect of the merger on employees determined that there would be no adverse consequences to ACE employees as a result of the merger and that there was “evidence that the [m]erger will provide positive benefits to ACE employees.”⁸⁰ The Joint Petitioners agreed to maintain ACE’s local operational headquarters in New Jersey, honor all existing collective bargaining agreements, and avoid any net reductions in employment levels for two years after the completion of the merger.⁸¹ ACE also committed to hire sixty union employees and meet obligations to ACE employees and retirees with respect to pension and retiree health benefits.⁸²

NJ BPU stated that the merger “provides positive benefits with respect to ACE’s ability to provide safe, adequate, proper and reliable customer service.”⁸³ NJ BPU was satisfied with the Joint Petitioners’ reliability commitments, including enhanced penalties for failing to meet service level guarantees and continuing the Reliability Improvement Program (“RIP”) beyond 2016 to 2021.⁸⁴ RIP requires ACE to report annually on reliability performance and to regularly meet with NJ BPU staff.⁸⁵

NJ BPU included in its order approving the merger a discussion of factors beyond those that it was statutorily mandated to consider.⁸⁶ NJ BPU noted that the Joint Petitioners’ commitment to ensure any benefits—financial or non-financial—that non-New Jersey jurisdictions receive through the merger process are also provided to New Jersey meant that the positive benefits of the merger were not “illusory” as some opponents of the merger claimed.⁸⁷ It also found that the merger’s ring-fencing provision—a commitment that ACE would remain a stand-alone financial entity and would be protected from any financial harm

77. *Id.*

78. *Id.*

79. *Id.* (“Consistent with past Board policy set forth in other merger proceedings, ACE will not seek recovery in rates of: (a.) the acquisition premium or goodwill associated with the Merger; or (b.) the Transaction Costs . . .”).

80. *Id.* at 36.

81. *Id.*

82. *Id.*

83. *Id.* at 37.

84. *Id.*

85. *Id.*

86. *Id.* at 39–42 (other factors discussed included “Most Favored Nation Provision,” “Provisions Supporting Other Requested Approvals,” “Ring Fencing and Corporate Structure,” “PHI Money Pool Participation,” and “Relocation of Books & Records.”).

87. *Id.* at 39 (“Most Favored Nation Provision” factor).

suffered by Exelon—may provide benefits that will “ensure the proper separation of books, financial insulation of PHI and its affiliates including ACE from business transactions of Exelon.”⁸⁸

Exelon’s nuclear holdings were not discussed in the analysis of the four statutorily mandated factors or any of the non-statutorily mandated factors.⁸⁹

C. MARYLAND PUBLIC SERVICE COMMISSION DECISION

This section of the Note will assess the decision by the Maryland Public Service Commission (“MPSC”) to approve the Exelon-PHI merger and establish that concerns about Exelon’s nuclear power plants were not a significant issue in its analysis of the merger. Section IV.C.1 will review MPSC’s authority to review the proposed merger and the standard of review for the proposed merger. Section IV.C.2 will discuss the statutory factors of review of the merger. Section IV.C.3 will examine MPSC’s approval of the merger.

1. MPSC’s Authority to Review the Proposed Merger

Maryland law provides MPSC the authority to review mergers involving utility companies and establishes the standard of review for the merger. Maryland Code § 6-105(e)(1) states that “[w]ithout prior authorization from the Commission, a person may not acquire . . . an electric company, gas and electric company, or gas company.”⁹⁰ Section 6-105(g)(3)(i) provides that MPSC shall grant the application if it finds that the acquisition is: (1) consistent with the public interest, convenience, and necessity; (2) provides benefits to ratepayers; and (3) will not harm ratepayers.⁹¹ The first factor focuses on society at large.⁹² The applicant bears the burden of showing that the merger is consistent with the above three factors.⁹³ MPSC may condition a proposed merger on the applicants “satisfactory performance or adherence to specific requirements.”⁹⁴

2. Statutory Factors for Reviewing the Merger

In determining whether the merger is in the public interest, provides benefits to ratepayers, and will not harm ratepayers, Maryland law establishes twelve factors

88. *Id.* at 41.

89. *Id.* at 34–42.

90. MD. CODE ANN., PUB. UTIL. § 6-105(e)(1) (2015).

91. MD. CODE ANN., PUB. UTIL. § 6-105(g)(3)(i) (2015) (“If the Commission finds that the acquisition is consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers, the Commission shall issue an order granting the application.”).

92. The Merger of Exelon Corporation and Pepco Holdings, Inc., Pub. Serv. Comm’n of Md., Order No. 86900, 321 P.U.R. 4th 6, 31 (2015) [hereinafter Pub. Serv. Comm’n of Md.].

93. MD. CODE ANN., PUB. UTIL. § 6-105(g)(5)(West 2016).

94. MD. CODE ANN., PUB. UTIL. § 6-105(g)(3)(ii) (West 2016).

MPSC must consider.⁹⁵ The twelve factors are:

(i) the potential impact of the acquisition on rates and charges paid by customers and on the services and conditions of operation of the public service company; (ii) the potential impact of the acquisition on continuing investment needs for the maintenance of utility services, plant, and related infrastructure; (iii) the proposed capital structure that will result from the acquisition, including allocation of earnings from the public service company; (iv) the potential effects on employment by the public service company; (v) the projected allocation of any savings that are expected to the public service company between stockholders and rate payers; (vi) issues of reliability, quality of service, and quality of customer service; (vii) the potential impact of the acquisition on community investment; (viii) affiliate and cross-subsidization issues; (ix) the use or pledge of utility assets for the benefit of an affiliate; (x) jurisdictional and choice-of-law issues; (xi) whether it is necessary to revise the Commission's ring fencing and code of conduct regulations in light of the acquisition; and (xii) any other issues the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience, and necessity.⁹⁶

As the above list of factors MPSC considers is “non-exclusive”⁹⁷ and MPSC did not systematically and thoroughly assess each of the twelve factors, as other utility commissions did,⁹⁸ this section of the Note will only include a discussion of MPSC's analysis of the factors that are most relevant to the topic of this Note.

3. MPSC's Approval of the Merger

MPSC determined that under the eleventh factor—whether it is necessary to revise MPSC's ring-fencing and code of conduct regulations in light of the acquisition—that the merger's ring-fencing measures would protect Pepco and Delmarva from financial turmoil.⁹⁹ MPSC acknowledged that opponents of the merger had raised concerns that Exelon's non-regulated, nuclear business could harm Pepco's and Delmarva's captive ratepayers, as Exelon may rely on the regulated utility business to cover losses from its non-regulated businesses.¹⁰⁰ It said that the evidence demonstrated that one of Exelon's motives for the merger

95. MD. CODE ANN., PUB. UTIL. § 6-105(g)(2) (West 2016) (“The Commission shall consider the following factors in considering an acquisition under this section . . .”).

96. *Id.*

97. Pub. Serv. Comm'n of Md., *supra* note 92, at 29 (“Section 6-105(g)(2) contains the non-exclusive list of factors we must consider in reaching these conclusions . . .”).

98. The utility commissions in DC and New Jersey considered each statutorily mandated factor in a separate section of their orders assessing the proposed merger. *See generally* *PHI I*, *supra* note 3; N.J. Bd. of Pub. Utils., *supra* note 72. But MPSC did not consider each statutorily mandated factor in a separate section of its order. Pub. Serv. Comm'n of Md., *supra* note 92, at i. (The “Commission Decision” included ten sections that focused on non-statutorily-mandated factors, including “Exelon Influence in Maryland” and “Energy Efficiency.”)

99. Pub. Serv. Comm'n of Md., *supra* note 92, at 44.

100. *See id.* at 43.

was to diversify its financial reliance on its unregulated nuclear business.¹⁰¹ However, the record did not demonstrate that Exelon would seek to “loot the earnings from Delmarva and Pepco to the financial detriment of those utilities.”¹⁰² Instead, the ring-fencing measures on which MPSC conditioned the approval of the merger would prohibit Exelon from raiding Pepco and Delmarva to pay for the losses associated with its nuclear generating assets.¹⁰³ The discussion of the merger’s ring-fencing provisions was the only discussion of Exelon’s nuclear generating assets in the majority opinion’s analysis of the statutorily mandated factors.¹⁰⁴

MPSC found that the first factor—the potential impact of the acquisition on rates and charges paid by customers and on the services and conditions of operating the public service company—would provide benefits for Pepco and Delmarva customers.¹⁰⁵ MPSC conditioned its approval upon Exelon-PHI providing a \$100 rate credit to each of Delmarva’s and Pepco’s residential customers.¹⁰⁶ MPSC accepted seventy-five percent of the proffered CIF, so as to provide direct long-term benefits to ratepayers through energy efficiency programs, including initiatives targeted towards limited-income customers.¹⁰⁷

MPSC determined that the sixth factor—issues of reliability, quality of service, and quality of customer service—would mean that the merger would produce benefits to Pepco and Delmarva customers.¹⁰⁸ MPSC found that the merger was in the public interest because Exelon’s track record in improving reliability would expand the expertise and resources of Delmarva and Pepco to do the same, while staying within specified annual reliability budgets.¹⁰⁹ Additionally, Exelon committed to conducting an analysis of Pepco’s low customer satisfaction scores and developing an action plan to improve them.¹¹⁰ This last provision meant the merger was consistent with the public interest.¹¹¹

MPSC found that the fourth factor—the potential effects on employment by the public service company—was consistent with the public interest.¹¹² MPSC acknowledged that expected synergy savings from the merger would possibly

101. *Id.*

102. *Id.*

103. *See id.* at 43–45.

104. *Id.* at 1–86.

105. *Id.* at 49–53.

106. *Id.* at 50.

107. *Id.* at 51–52 (“[W]e conclude that 75% of the proffered CIF is sufficient to comply with the statute and provide direct long-term benefit to ratepayers. . . . The funds will be distributed in the following manner: Exelon will provide \$31.5 million in funding for energy efficiency program support, including approximately 20% for limited-income customers . . .”).

108. *Id.* at 57–64.

109. *Id.* at 58–60.

110. *Id.* at 63.

111. *Id.* at 63–64.

112. *Id.* at 82.

have negative employment effects.¹¹³ However, MPSC conditioned approval of the merger on the acceptance of terms designed to mitigate this potential harm.¹¹⁴ These conditions included honoring all existing collective bargaining agreements, prohibiting a net reduction in employment for two years after the merger, and Exelon's good faith effort to hire 110 union workers in Maryland within two years of the close of the merger.¹¹⁵ But these mitigation conditions did not mean that the merger provided a public benefit under the fourth factor; instead it merely meant that it did not harm the public.¹¹⁶

D. DELAWARE PUBLIC SERVICE COMMISSION DECISION

This section of the Note explores the Delaware Public Service Commission's ("DPSC") acceptance of the merger's terms. The Delaware Code provides DPSC the authority to approve the merger of public utilities. 26 Delaware Code § 215 states that "[n]o public utility without having first obtained the approval of the Commission, shall: directly or indirectly merge . . . with any other person or company."¹¹⁷ Delaware law also provides DPSC the authority to approve the merger "with such modifications and upon such . . . conditions . . . it deems necessary or appropriate."¹¹⁸ In a short, seven-page order on June 2, 2015, DPSC approved the merger, but conditioned its approval upon modifications contained in the Amended Settlement Agreement ("ASA") that proponents and opponents of the merger had negotiated.¹¹⁹ In approving the merger, Delaware regulators invited proposed changes from the relevant parties¹²⁰ and stated that they would in a subsequent order specify the grounds for the Commission's approval,¹²¹ which they have not yet done.¹²²

113. *Id.* at 80–81 (“[W]e acknowledge that the realization of operational synergies in particular may result in negative employment impacts.”).

114. *Id.* at 81.

115. *Id.*

116. *Id.* at 81–82 (“In the aggregate, we find that the potential risk of incremental harm due to employment impacts directly attributable to this merger is sufficiently mitigated through the application of these conditions, and satisfies the no harm requirement . . .”).

117. DEL. CODE ANN. tit. 26 § 215(a) (2015).

118. DEL. CODE ANN. tit. 26 § 215(d) (2015).

119. See Application of Delmarva Power & Light Company, Exelon Corporation, Pepco Holdings, Inc., Purple Acquisition Corporation, Exelon Energy Delivery Company, LLC and New Special Purpose Entity for Approvals under the Provision of 26 Del. C. §§ 215 and 1016, Pub. Serv. Comm'n of Del., Order No. 8746, ¶¶ 9, 14 (2015) [hereinafter Pub. Serv. Comm'n of Del.].

120. *Id.* ¶ 15 (“The Settling Parties . . . are directed to . . . propose such changes to the provisions of the Amended Settlement Agreement as may be necessary”).

121. *Id.* ¶ 16 (“The specific grounds for the Commission's approval of the Merger, as amended by the Amended Settlement Agreement, shall be further detailed in a subsequent order . . .”).

122. A search of the DPSC website does not reveal any subsequent relevant orders for the corresponding docket number, Docket No. 14-193. *Advanced Search*, STATE OF DEL., <https://delafile.delaware.gov/AdvancedSearch/AdvancedSearchDocket.aspx> (last visited January 5, 2017) (enter “14-193” in “Docket #” field; click “Search;” then click “14-193” link).

The ASA is worth analyzing because it “represents the full scope of the agreement among the Settling Parties.”¹²³ In the ASA, Exelon and PHI (“Joint Applicants”) agreed to honor all existing collective bargaining agreements, avoid net reductions in employment levels for the first two years following the merger, and hire union employees.¹²⁴ The Joint Applicants also agreed to maintain their local operational headquarters near Newark, Delaware for ten years after the completion of the merger.¹²⁵ Delmarva Power will continue to maintain and promote energy efficiency programs.¹²⁶ The Joint Applicants also committed to implementing ring-fencing measures to ensure that Delmarva Power would be protected from any financial harm suffered by Exelon.¹²⁷ Exelon also agreed to not pass on any of the costs associated with acquiring PHI to Delaware ratepayers¹²⁸ and to establish a \$40 million CIF as a credit on ratepayers’ bills.¹²⁹ The Joint Applicants will continue to make charitable contributions in Delaware and provide assistance to low-income customers.¹³⁰ The Joint Applicants also committed to improving service reliability.¹³¹ The ASA did not include any provisions that dealt with Exelon’s nuclear generating activities.¹³²

V. DC PSC DECISION PROCESS

A. DC PSC DECISION I

In August 2015, DC PSC made its initial decision to reject the Exelon-PHI merger. In doing so, DC PSC applied a seven-factor analysis under which it was the Joint Applicants’ burden to prove that the merger was in the public interest. The following analysis will establish that concerns about Exelon’s nuclear power plants were not a determinative factor in rejecting the merger. Section V.A.1 discusses DC PSC’s authority for reviewing the merger and section V.A.2 states the standard of review. Section V.A.3 examines the seven factors DC PSC assessed the merger on and discusses DC PSC’s analysis of those seven factors.

123. Application of Delmarva Power & Light Company, Exelon Corporation, Pepco Holdings, Inc., Purple Acquisition Corporation, Exelon Energy Delivery Company, LLC and New Special Purpose Entity for Approvals under the Provisions of 26 Del. C. §§ 215 and 1016, Amended Settlement Agreement, PSC Docket No. 14-193, ¶ 111 [hereinafter Amended Settlement Agreement].

124. *Id.* ¶¶ 3–4.

125. *Id.* ¶ 10.

126. *Id.* ¶ 17.

127. *Id.* ¶¶ 31–35, 49.

128. *Id.* ¶ 73.

129. *Id.* ¶ 85.

130. *Id.* ¶¶ 74, 78 (“Delmarva Power will maintain, enhance and promote programs that provide assistance to low-income customers.”).

131. *Id.* ¶¶ 79–83.

132. *Id.* ¶¶ 1–113.

1. DC PSC's Authority to Review the Merger

The DC Code provides DC PSC the authority to review the merger. DC Code § 34-504 provides that no public utility “shall purchase the property of any other public utility for the purpose of effecting a consolidation” until DC PSC has determined that such consolidation is in the “public interest.”¹³³ DC Code § 34-1001 provides: “no franchise nor any right . . . to own or operate any public utility . . . shall be assigned [or] transferred . . . unless the assignment, transfer . . . contract, or agreement shall have been approved by the Commission in writing.”¹³⁴ Exelon and PHI (“Joint Applicants”) needed to secure a written authorization that the proposed merger was in the “public interest.”¹³⁵

2. Standard of Review

The Joint Applicants bore the burden of persuading DC PSC that on balance, the proposed merger was in the public interest.¹³⁶ The review was guided by DC PSC’s prior orders on proposed mergers, though DC PSC noted “‘each merger is a unique combination of companies at a distinct time in the development of the electricity market,’ and each merger is assessed on its own facts as they relate to the companies involved and the development of the electricity market.”¹³⁷

To determine if the proposed merger was in the public interest, DC PSC first looked at the effect of the proposed merger on seven public interest factors, identifying the benefits and burdens of the transaction.¹³⁸ But DC PSC noted that not every factor would be relevant or equally weighted in each merger.¹³⁹ Then DC PSC used the findings on the seven individual factors to assess the transaction as a whole to determine if the merger left the “public benefited and not just unharmed.”¹⁴⁰ In making the ultimate public interest determination, DC PSC took into account “(1) whether the transaction balances the interests of shareholders and investors with ratepayers and the community; (2) whether the benefits to the shareholders do or do not come at the expense of the ratepayers; and (3) whether the proposed merger produces a direct and tangible benefit to ratepayers.”¹⁴¹

133. D.C. Code § 34-504 (2012).

134. D.C. Code § 34-1001 (2012).

135. See D.C. Code §§ 34-504, 34-1001.

136. *PHI I*, *supra* note 3, ¶¶ 8–9 (“We must find that the Proposed Merger benefits the public . . . [a]s the proponent of the proposed transaction and the approval order that is being sought, the Joint Applicants bear the burden of persuasion.”).

137. *Id.* ¶ 40.

138. *Id.* ¶ 56.

139. *Id.* (“We note, however, that because the circumstances of each merger are unique, every public interest factor may not be relevant or equally weighted from one merger to another.”).

140. *Id.* ¶ 343.

141. *Id.* ¶ 54.

3. The Seven Factors that Constitute the Public Interest

On August 22, 2014, DC PSC amended the public interest factors used to evaluate whether a proposed merger is in the public interest for the purposes of D.C. Code § 34-504 by amending four of the existing public interest factors and adding a new seventh factor.¹⁴² The seven factors were the effect of the transaction on:

(1) ratepayers, shareholders, the financial health of the utilities standing alone and as merged, and the economy of the District; (2) utility management and administrative operations; (3) public safety and the safety and reliability of services; (4) risks associated with all the Joint Applicants' affiliated non-jurisdictional business operations, including nuclear operations; (5) the Commission's ability to regulate the new utility effectively; (6) competition in the local retail, and wholesale markets that impact the District and District ratepayers; and (7) conservation of natural resources and preservation of environmental quality.¹⁴³

DC PSC's analysis of the first factor—the effect of the transaction on ratepayers, shareholders, the financial health of the utilities standing alone and as merged, and the economy of the District—determined that it would have a mixed impact on the public interest.¹⁴⁴ On the positive side was the \$1.6 billion premium for the current PHI stockholders, the \$33.75 million CIF to benefit ratepayers, the creation of jobs, and an annual average of \$1.6 million in charitable contributions to DC-serving nonprofits.¹⁴⁵ However, on the negative side, DC ratepayers would have to pay transition costs associated with the merger.¹⁴⁶ DC PSC also found that any synergy savings due to the merger were speculative and that Pepco would be exposed to additional financial risks from the proposed merger due to Exelon's unregulated businesses.¹⁴⁷

DC PSC concluded that the second factor—the effect of the transaction on utility management and administrative operations—was not in the public interest. DC PSC faulted the proposed merger for placing Pepco in a second-tier position

142. *Id.* ¶ 55.

143. *Id.* ¶ 7. The new seventh factor was “conservation of natural resources and preservation of environmental quality.” Compare *id.* ¶ 7 (listing the above seven factors), with *id.* ¶ 44 (listing the six factors DC PSC had used to assess a previously proposed merger as “(1) ratepayers, shareholders, the financial health of the utilities standing alone and as merged, and the local economy; (2) utility management and administrative operations; (3) the safety and reliability of services; (4) risks associated with nuclear operations; (5) the Commission's ability to regulate the new utility effectively; and (6) competition in the local utility market.”).

144. See *id.* ¶¶ 345–346.

145. See *id.* ¶ 345.

146. See *id.* ¶ 346. DC PSC did not place a dollar figure on the cost of transition costs, but did find that the Joint Applicants estimated the transition cost to be \$9 million. See *id.* ¶¶ 101, 354 AA (subtracting the \$2 million regulatory cost of approving the merger from the \$11 million joint cost of the transition and regulatory support costs).

147. See *id.* ¶¶ 142, 346.

within Exelon's decision making management structure, adding at least two additional levels of approval for major budgetary decisions for Pepco, and failing to ensure that the Pepco Board would have a board member from DC.¹⁴⁸ DC PSC was not persuaded that DC ratepayers would benefit from these changes in the management structure, as they would place Pepco on an unequal footing with other Exelon-operated utilities.¹⁴⁹ "[T]he proposed management structure will potentially harm Pepco and the ratepayers that it serves by diminishing Pepco's role and its ability to make decisions that are responsive to the needs of its ratepayers and the policy directives of the District."¹⁵⁰

DC PSC determined the third factor—the effect of the transaction on public safety and the safety and reliability of utility services—was mostly not in the public interest. DC PSC stated that the proposed merger would “not provid[e] any additional benefit for reliability performance that Pepco is not already providing on a stand-alone basis.”¹⁵¹ This was because the commitment Exelon made to improve reliability between 2018 and 2020 was calculated on the basis of the average of three years instead of a five-year average, and there was no indication that the reliability improvements Pepco was already making would not continue without the merger.¹⁵² DC PSC was also concerned that Exelon's reliability budget did not take into account the fact that Pepco had been able to improve its reliability while spending less than what was budgeted.¹⁵³ Thus, DC PSC was worried that the proposed reliability budget might have been over inflated and would have a “harmful effect on ratepayers which would result in higher than necessary rates for District ratepayers.”¹⁵⁴ DC PSC also found that the Joint Applicants failed to support their assertions about improved reliability and safety. Exelon had failed to identify any best practices that would improve service reliability in DC, despite promising that best practices would do so.¹⁵⁵ DC PSC stated “[t]he record is devoid of any details explaining or supporting” Joint Applicants' claim that public and workplace safety will continue to be a core value for Pepco.¹⁵⁶

DC PSC did note a single positive aspect of the merger under the third factor—the merger would provide more resources to respond to storm emergen-

148. *Id.* ¶ 197.

149. *Id.*

150. *Id.*

151. *Id.* ¶ 224.

152. *See id.* ¶¶ 217, 220–221.

153. *Id.* ¶¶ 221–222 (“The record evidence confirms that Pepco's [System Average Interruption Duration Index] and [System Average Interruption Frequency Index] improved from 2011 and 2014. . . . The record confirms that Pepco met its 2014 [Electricity Quality of Service Standards] requirements without spending the full amount of its capital spending/reliability budget.”).

154. *Id.* ¶ 225.

155. *Id.* ¶ 231.

156. *Id.* ¶ 233.

cies in DC.¹⁵⁷ Pepco would be able to access Exelon's utility resources in order to restore service following storms, when it could not rely on other utilities in the region to provide resources to restore service because they may also be struggling to restore service to their own network.¹⁵⁸

The fourth factor assesses the effect of the transaction on the risks associated with all the Joint Applicants' affiliated non-jurisdictional business operations, including nuclear operations.¹⁵⁹ DC PSC found, despite public concerns about Exelon's nuclear fleet, that under the fourth factor the proposed merger would not harm the public interest, although it would not benefit it either. DC PSC noted:

[S]ome residents expressed concern that the [merger] will result in increased rates for ratepayers to support Exelon's aging nuclear plants. Other commenters feared that District ratepayers would be forced to subsidize the losses incurred by Exelon if it had to close or repair its aging nuclear plants and losses being experienced as customers move to lower cost renewable energy sources and away from uncompetitive merchant nuclear plants.¹⁶⁰

It also said that:

Exelon itself acknowledges there are economic difficulties presently associated with some of its nuclear assets. . . . Exelon only has partial nuclear insurance and is required to self-insure if losses exceed the insured amount as well as pay any portions of claims that fall within insurance policy deductible amounts.¹⁶¹

Despite the public acknowledgement of Exelon's economic difficulties with its nuclear operations and community concerns that Exelon's financial problems with its nuclear operations could be passed on to DC ratepayers, DC PSC was untroubled by the public interest impacts of the fourth factor. First, it dismissed claims by community members that Pepco ratepayers would pay for the costs associated with Exelon's aging nuclear fleet as the fleet is owned by a structurally and legally separate Exelon subsidiary.¹⁶² It praised the merger's ring-fencing measures—as “represent[ing] the leading edge in utility ring-fencing” and “shield[ing] Pepco and protect[ing] District ratepayers.”¹⁶³ DC PSC further concluded “that there is no way that losses incurred by Exelon's aging nuclear fleet would be included in the rate base of Pepco as a local distribution

157. *Id.* ¶ 232.

158. *Id.*

159. *Id.* ¶ 7.

160. *Id.* ¶ 256.

161. *Id.* ¶ 257.

162. *Id.* (“We begin by addressing and dispensing with a concern that was frequently raised by community commenters, *i.e.*, that Pepco, at the direction of Exelon will attempt to recover in the rates of District ratepayers the costs associated with its aging nuclear fleet. . . . In any event, Exelon's nuclear generating assets are owned by . . . an Exelon subsidiary that is structurally and legally separate from Exelon and its other subsidiaries.”).

163. *Id.* ¶¶ 263–264.

company.”¹⁶⁴ Lastly, DC PSC concluded the “Joint Applicants’ multiple commitments to implement numerous ring-fencing provisions would insulate Pepco . . . from most . . . of the business risks associated with Exelon’s non-regulated businesses and would provide a level of protection to District ratepayers in the event that Exelon’s finances are placed in jeopardy by events that impact” its nuclear business.¹⁶⁵ However, DC PSC did note that the proposed merger offered no “added benefit[s]” for DC ratepayers from Exelon’s other businesses.¹⁶⁶

DC PSC concluded that the merger under the fifth factor—the effect of the transaction on DC PSC’s ability to regulate the new utility effectively—would not be in the public interest. DC PSC evaluated this factor with “elevated scrutiny” because the merger involves a change of control over Pepco, the public utility it regulates.¹⁶⁷ The Joint Applicants’ commitment to provide DC PSC access to Pepco’s books and records within twenty work days after such a request would delay DC PSC’s access to Pepco’s books and records, negatively impacting DC PSC’s ability to execute its oversight role.¹⁶⁸ DC PSC’s regulatory work would also be complicated by having to learn how to work with the merged utility’s two distinct sets of service company charges under different service agreements.¹⁶⁹ DC PSC concluded the merger “would make regulatory tasks more complex, more time-consuming and more costly.”¹⁷⁰

DC PSC determined that the sixth factor—the effect of the transaction on competition in the local retail, and wholesale markets that impact DC and DC ratepayers—was slightly not in the public interest. The merger would provide no additional benefits with respect to wholesale competition or with respect to retail

164. *Id.* ¶ 265.

165. *Id.*

166. *Id.* (“[W]e see no added benefit that inures to District ratepayers or the District from Exelon’s other businesses.”)

167. *Id.* ¶ 277.

168. *Id.* ¶ 279. DC PSC appeared to believe that the commitment to provide the books within twenty work days would delay access to the books because D.C. Code § 34-1112 possibly requires public utilities to produce the books in a period of time shorter than twenty days. DC PSC’s findings read:

Joint Applicants’ Commitment 29 states that the Joint Applicants will provide the Commission . . . access to Pepco’s books ‘within twenty working days after such a request.’ . . . However, D.C. Code § 34-1112 requires each public utility to keep its books in an office within the District, ‘except as prescribed by the Commission’ and ‘produce before the Commission such books . . . from time to time *as the Commission may order.*’ . . . However, the Joint Applicant’s commitment that seeks to delay access to the books and records of Pepco is not beneficial because delayed access to necessary books and records will negatively impact the Commission’s ability to effectively carry out its oversight role.

Id.

169. *Id.* ¶ 280 (“It is beyond dispute . . . that the Commission . . . in a rate case where service costs are at issue will face an additional regulatory burden if they have to learn and work with two systems of service charges that are being imposed on Pepco and district ratepayers.”)

170. *Id.* ¶ 284.

competition.¹⁷¹ Rules governing the procurement procedure in the wholesale market could be modified to ensure that Exelon could not thwart competition in the wholesale market to benefit itself, but doing so would not produce any noticeable public benefits.¹⁷² DC PSC did not expect any retail energy competition issues or that the merger would produce retail side benefits.¹⁷³ But DC PSC did note that there was a potential harm in the potential conflict of interest in the merged utility controlling the local distribution company, as it may seek to delay changes necessary to encourage additional use of distributed generation, including solar energy.¹⁷⁴

DS PSC found that the seventh factor—the effect of the transaction on the conservation of natural resources and preservation of environmental quality in accordance with DC’s Clean and Affordable Energy Act (“CAEA”)—was neutral. In discussing the seventh factor, DC PSC rejected calls to approve the deal because Exelon generates more than eighty percent of its power from nuclear energy, and the positive effects nuclear power has on climate change and carbon emissions, as DC is not subject to EPA’s CPP.¹⁷⁵ DC PSC stated that DC would be left unharmed by the merger even though opponents of the merger had noted that Exelon’s nuclear holdings had led it to oppose efforts to invest in renewable energy.¹⁷⁶ DC PSC also found that the merger would not benefit DC, which meant the proposed merger would have a neutral public interest effect under the seventh factor.¹⁷⁷

In the final analysis, DC PSC concluded that the factors as a whole did not leave the public benefited and thus rejected the proposed merger. DC PSC did acknowledge that there were many positive effects of the deal under the first factor—the \$1.6 billion premium to PHI stockholders, the \$33.75 million CIF, and the creation of local jobs.¹⁷⁸ But in assessing the remaining six factors, DC PSC had a mostly pessimistic view of the impacts of the deal: ratepayer rates would increase due to transition costs; Pepco would be subject to additional levels of managerial review; DC PSC would have to develop new regulatory procedures to monitor charges from two service companies; and conflicts of interest might inhibit the city from embracing a clean energy future.¹⁷⁹ DC PSC also noted that it was important to take into account the wishes of the public in

171. *Id.* ¶ 301.

172. *Id.* ¶ 298.

173. *Id.* ¶ 299.

174. *Id.* ¶ 301.

175. *Id.* ¶¶ 335–336.

176. *Id.* ¶¶ 339, 342. Exelon opposed investments in renewable energy because the price of renewable energy is lower than the price of nuclear energy as it is cheaper to produce and thus displaces nuclear energy in the wholesale power market. *See* Vine & Juliani, *supra* note 26.

177. *Id.* ¶ 342.

178. *See id.* ¶ 345.

179. *Id.* ¶ 346.

reaching a conclusion as to whether the merger is in the public interest and stated that the majority of the public and Advisory Neighborhood Commissions (“ANCs”) that had been involved in the process were opposed to the proposed merger.¹⁸⁰ Under these circumstances, DC PSC said the merger “when taken as a whole, is not in the public interest because it does not benefit District ratepayers and the District rather than merely leave them unharmed.”¹⁸¹ DC PSC also rejected calls by interested parties and Commissioner Willie Phillips to condition approval of the deal on the Joint Applicants accepting conditions as it was not their obligation to find that every proposed merger was in the public interest by adding conditions to make it so.¹⁸² Nuclear power was not mentioned at all in the final assessment.

B. EXELON AND PHI PUSH TO RENEW THE MERGER AFTER REJECTION

Following the rejection of the proposed merger, Exelon and PHI worked to secure approval of the deal. On October 6, 2015, Exelon and PHI announced that DC Mayor Muriel Bowser, who had previously opposed the merger, now approved the merger.¹⁸³ On October 28, 2015, DC PSC granted the motion of Exelon and PHI to reopen the record on the proposed merger to consider the new proposed terms of the merger.¹⁸⁴ Exelon and PHI were able to ultimately win support from the Office of People’s Counsel, the District of Columbia Water and Sewer Authority, the National Consumer Law Center, the Apartment and Office Building Association of Metropolitan Washington (“Settling Parties”),¹⁸⁵ and a majority of the DC City Council for the reconfigured merger.¹⁸⁶

The Settling Parties’ Non-unanimous Full Settlement Agreement and Stipulation (“NSA”) laid out over 140 commitments on behalf of the Joint Applicants in an attempt to cure the defects DC PSC highlighted in its August 2015 rejection of

180. *Id.* ¶ 347 (“It is difficult to make a final decision about whether the Proposed Merger is in the public interest without taking into account . . . the wishes of the public. . . . A majority of the local ANCs adopted resolutions . . . against the Proposed Merger . . .”).

181. *Id.* ¶ 348.

182. *Id.* ¶¶ 350–353; *id.* Attach. A., ¶ 11 (“[M]y preference would have been to not only set forth the proposed merger’s defects, but to also offer, when appropriate, how the defect can be cured either by proposing conditions or providing guidance for future transactions.”).

183. Julia Pyper, *DC Regulators Advance a Settlement Deal on the Exelon-Pepco Merger*, GREENTECH MEDIA (Oct. 7, 2015), <http://www.greentechmedia.com/articles/read/dc-regulators-advance-a-settlement-deal-on-the-exelon-pepco-merger>.

184. Joint Application of Exelon Corporation, PEPCO Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC, and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, D.C. Pub. Serv. Comm’n, Order No. 18011, ¶ 1 (2015) (“By this Order, the Public Service Commission of the District of Columbia . . . grants the Motion of the . . . Joint Applicants . . . to reopen the Record in *Formal Case No. 1119* to Allow for Consideration of Non-Unanimous Settlement Agreement Stipulation.”).

185. Non-unanimous Settlement Agreement, ¶ 1 [hereinafter *NSA*].

186. *PHI II*, *supra* note 8, ¶ 192.

the merger and to win approval of DC politicians and stakeholders.¹⁸⁷ This section will discuss the noteworthy commitments the Joint Applicants made under each of DC PSC's seven-factor rubric for assessing the merger.

The Joint Applicants addressed perceived flaws of the proposed merger under the first factor by strengthening CIF funding and taking other steps to strengthen the City economy. The Joint Applicants scaled up funding for the CIF from \$33.75 million to \$72.8 million.¹⁸⁸ The Settling Parties agreed that \$25.6 million in CIF funding would be used as a credit to offset residential rate increases approved by DC PSC in any base rate case filed after closure of the merger.¹⁸⁹ Fourteen million dollars were devoted to a one-time direct bill credit to PHI residential customers,¹⁹⁰ \$3.5 million were earmarked for the Renewable Energy Development Fund¹⁹¹ and another \$3.5 million for energy efficiency programs,¹⁹² and \$10 million for a green building fund.¹⁹³ Nine million dollars were for customers eligible for the Low-Income Home Energy Program ("LIHEAP").¹⁹⁴ Pepco also agreed to track and account for merger-related savings and the cost to achieve those savings, flowing all synergy savings allocable to DC to customers.¹⁹⁵

Under the second factor, the Joint Applicants took several steps to address concerns that the merger would place PHI on unequal footing with other Exelon operated utilities. First they agreed to place the PHI CEO on the Exelon Executive Committee and provide the CEO "direct and frequent access to the Exelon CEO and other members of Exelon's senior management team."¹⁹⁶ Second, the PHI CEO would have the authority to make rate case decisions and DC PSC and DC stakeholders would enjoy the same access to PHI after the merger as before.¹⁹⁷

Again, Exelon and PHI adopted a multi-prong approach in attempt to cure the ills of the proposed merger under DC PSC's third factor. First, they committed to improving "system reliability beyond current DC statutory requirements."¹⁹⁸ Second, they also agreed to make non-compliance payments to the Sustainable Energy Trust Fund, if reliability performance measures were not met in 2018

187. *See generally* NSA, *supra* note 185.

188. *Id.* ¶ 3.

189. *Id.* ¶ 4.

190. *Id.* ¶ 5.

191. *Id.* ¶ 6.

192. *Id.* ¶ 7.

193. *Id.* ¶ 8.

194. *Id.* ¶ 9(b).

195. *Id.* ¶ 28 ("Pepco shall track and account for Merger-related savings, and the cost to achieve those savings, in each of its base rate cases filed within in a three-year period following Merger close. Pepco will flow all synergy savings allocable to the District to customers through the normal ratemaking process.").

196. *Id.* ¶ 51.

197. *Id.* ¶¶ 52, 54.

198. *Id.* ¶ 56.

through 2020.¹⁹⁹ The Joint Applicants sought to address concerns that reliability costs would unnecessarily be passed on to customers by committing to meet the reliability standards without exceeding the line item for reliability in its budget.²⁰⁰ Additionally, they acknowledged that any reliability-related costs would have to go through the regular ratemaking process before they could be recovered in customers' rates.²⁰¹

The Joint Applicants made over forty different commitments in the NSA related to DC PSC's fourth factor for assessing the proposed merger. The commitments mostly focused on ensuring that there was strong ring-fencing of Exelon and PHI's finances, so that any financial difficulties Exelon might experience would not harm PHI's finances or DC ratepayers.²⁰² Most significantly, the Joint Applicants committed to establishing a procedure that would allow DC PSC to order that Exelon divest its interest in PHI in order to protect PHI customers and the public if Exelon's finances posed a risk.²⁰³ DC PSC would have to first investigate and hold a hearing, but if it found that an Exelon nuclear accident, a disruption at an Exelon nuclear facility, or a downgrading of Exelon's credit rating caused PHI to fail to meet its obligations as a public utility, DC PSC could order the divestiture.²⁰⁴

Exelon and PHI made only minimal commitments to address DC PSC's concerns under the fifth factor. They agreed to provide access to their books in the "ordinary course of business in accordance" with DC law and to notify DC PSC about any "material changes" to its books within ten days of such a change.²⁰⁵ Exelon and PHI also agreed to file "reports comparing the performance and status of utilities within the Exelon family" with DC PSC.²⁰⁶

Under the sixth factor, the Joint Applicants made several small commitments. On the competition side, they agreed to remain part of the regional energy market.²⁰⁷ Additionally, Exelon agreed to make a one-time contribution of \$350,000 to fund a consumer advocate in the regional energy market and that this contribution would not be recovered in PHI utility rates.²⁰⁸

199. *Id.* ("In addition, if either of the SAIFI or SAIDI reliability-performance levels set out above as Merger Commitments are not met in any of the years 2018, 2019 or 2020, then Pepco will automatically make a non-compliance payment by April 1 of the following year to the DC Sustainable Energy Trust Fund . . .").

200. *Id.*

201. *Id.* ¶ 57.

202. *Id.* ¶¶ 63–94.

203. *Id.* ¶ 107.

204. *Id.*

205. *Id.* ¶ 109.

206. *Id.* ¶ 110.

207. *Id.* ¶ 116(d) ("Exelon commits that Pepco and Pepco Maryland, ACE, Delmarva Power, PECO, and BGE shall remain members of PJM until January 1, 2025 . . ." PJM is the regional transmission organization that coordinates wholesale electricity in thirteen states and DC. *About PJM*, PJM, <http://www.pjm.com/about-pjm.aspx> (last visited May 15, 2016)).

208. NSA, *supra* note 185, ¶ 117.

Under the seventh factor, Exelon and PHI made several commitments to conserve natural resources and ensure environmental quality. Most significantly, Exelon agreed to develop or assist in the development of ten megawatts (“MW”) of solar generation in DC by the end of December 2018.²⁰⁹ It also agreed to enter “good-faith negotiations of a commercially acceptable arrangement for 5 MW of such generation to be constructed” at the DC Water treatment plant (“DCWater”) by that date.²¹⁰ If such an agreement could not be reached with DC Water, the ten MW City-wide commitment would be reduced to seven MW; the development costs of the solar generation would not be rate-recoverable.²¹¹ Exelon also committed to providing \$5 million of capital to “government entities at market rates for the development of renewable energy projects” in DC.²¹² The Joint Applicants also agreed to take steps to ensure that renewable energy could be integrated into the local electricity grid.²¹³ PHI also committed to coordinating with the DC government to develop at least four microgrids to encourage on-site generation and enhance the reliability of the electric grid.²¹⁴

C. DC PSC DECISION II

The three Commissioners wrote a highly fractured opinion in February 2016, in which the merger was rejected.²¹⁵ Here, section V.C.1 will discuss the majority holding; section V.C.2 will discuss Chairman Kane’s concurrence; section V.C.3 will discuss Commissioner Fort’s concurrence; and section V.C.4 will discuss Commissioner Phillips’ dissent.

1. The Majority’s Holding

DC PSC began its analysis of the NSA by noting its rules provided that if the NSA was rejected it could propose alternative terms to the parties and allow the parties time within which to accept or reject the terms.²¹⁶ DC PSC voted to proceed under this option.²¹⁷ Reviewing the NSA, the majority opinion held that the NSA as a whole was not in the public interest.²¹⁸ But, while acknowledging that DC PSC had earlier assessed the merger under seven public interest factors

209. *Id.* ¶ 118.

210. *Id.*

211. *Id.*

212. *Id.* ¶ 119.

213. *Id.* ¶ 122.

214. *Id.* ¶ 128.

215. *PHI II, supra* note 8.

216. *Id.* ¶ 17 (“Commission Rule 130.17 further provides that if the settlement is rejected, the Commission may take various steps, including the following: . . . (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 . . .”).

217. *Id.* (“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.”).

218. *Id.* ¶ 25.

and that the Joint Applicants had submitted the NSA to address those factors,²¹⁹ it rejected the merger for four reasons that it did not frame as in any way connected to the seven public interest factors.²²⁰

First, the non-residential ratepayers would not benefit from the \$25.6 million allocation in the CIF to residential customers.²²¹ The Settling Parties could not answer questions or provide documents in response to the Commissioners' worries that the NSA would require commercial ratepayers to subsidize residential customers.²²² Second, Exelon and PHI would have roles in the electricity market that would undermine competition and grid neutrality.²²³ DC PSC was particularly disturbed by the provision in the NSA that gave the Joint Applicants the exclusive right to develop five MW of solar power at DC Water and believed that the role that PHI should play in the development of the four microgrids should be resolved in another ongoing DC PSC case.²²⁴ Third, the proposed use of the CIF for sustainability projects and LIHEAP would not improve Pepco's distribution system.²²⁵ Fourth, the proposed method of distributing CIF funds to DC government agencies would deprive DC PSC of the ability to enforce the terms of the NSA and to "ensure that all of the funds are being used" to benefit DC ratepayers.²²⁶ DC PSC was concerned that several of the agencies which would receive CIF funds for renewable energy projects had not previously been able to use funds earmarked for their use because DC officials often raided their budgets and were likely do the same again.²²⁷ Exelon's nuclear holdings were not discussed.

2. Chairman Kane's Concurrence

Chairman Betty Ann Kane's concurring opinion held that the NSA was not in the public interest and denied the NSA, even with proposed terms to cure the

219. *Id.* ¶ 15.

220. *Id.* ¶ 25.

221. *Id.*

222. *Id.* ¶¶ 36–37 ("During the Public Interest Hearing, the Settling Parties were questioned on the mechanics of the Customer Base Rate Credit. Chairman Kane asked OPC witness Dr. Dismukes The Commission then turned its attention to work papers submitted by the parties. Those work papers provided further evidence of discord among the Settling Parties regarding how negative rates of return will be addressed in future rate cases.").

223. *Id.* ¶¶ 25.

224. *Id.* ¶¶ 42, 45 ("Specifically, the role that Pepco should play in the development of private and public microgrids in the District is a subject currently being considered by the Commission in Formal Case No. 1130. The NSA prematurely attempts to resolve the issues being considered in Formal Case No. 1130 by assigning roles to Pepco in the development of microgrids that the Commission has yet to determine are reasonable or appropriate in the context of modernizing the District's energy system.").

225. *Id.* ¶ 25.

226. *Id.*

227. *Id.* ¶ 52.

NSA.²²⁸ Even with the dissent's proposed, but "welcome" modifications to the NSA, Chairman Kane found that the NSA remained not in the public interest.²²⁹ Kane noted that she accepted the reasons for why the majority found that the NSA was not in the public interest, but also highlighted what she described as "other" reasons for rejecting the NSA.²³⁰ These included that the NSA was too beneficial to residential customers, which are already highly subsidized by non-residential customers.²³¹ Kane also expressed concern that there was not sufficient accountability over the proffered funds in the NSA for various environmentally friendly programs to ensure that the funds will be used as directed in the NSA.²³²

Lastly, Kane rejected the NSA because she believed that Exelon's electricity generation holdings conflicted with PHI's statutory responsibility to only distribute electricity.²³³ In particular, she was concerned that Exelon's generation activities would stifle competition in the distribution market and that the placement of PHI's CEO on Exelon's Executive Committee and the merged entity's exclusive right to develop solar energy at the DC Water plant would only further throttle competition.²³⁴ Though Kane acknowledged that some of these competition-related concerns would be addressed by Commissioner Joanne Doddy Fort's proposed amendments to the NSA, she did not think they fully addressed her concerns and would require DC PSC to be ever vigilant that the merged entity would not undermine competition.²³⁵ Thus she rejected the merger, even with the proposed amendments to the NSA.²³⁶

3. Commissioner Fort's Concurrence

Commissioner Fort, in her concurrence, stated that she found the NSA was not in the public interest for the reasons outlined in the majority opinion,²³⁷ but offered proposed alternative terms that could cure the NSA. Fort faulted the Settling Parties for not knowing details about how the \$25.6 million CIF

228. *Id.* ¶¶ 54, 80. For a discussion of the proposed alternative NSA, see *infra* Section V.C.3.

229. *Id.* ¶ 55 ("In addition to the reasons cited in the Order that the NSA is not in the public interest, I strongly believe there are *other* 'benefits' in the NSA that are not in the public interest.") (emphasis added).

230. *Id.* ¶ 57.

231. *Id.* ¶ 57.

232. *Id.* ¶ 59.

233. *Id.* ¶¶ 68–69 ("The role of the [PHI] in the District is prescribed by D.C. Code § 34-1506 - Duties of the electric company. . . . This paragraph is the sole statutory basis for the traditionally regulated activities of Pepco within the District. This paragraph clearly prescribes that Pepco's role in the District is as an electric distribution utility and only a distribution utility").

234. *Id.* ¶¶ 72–74.

235. *Id.* ¶¶ 76–80.

236. *Id.* ¶ 80 ("Thus, I dissent from the conclusion that if the Settling Parties accept the alternative NSA commitments proposed under Commission Rule 130.17(b) the merger will be in the public interest and should be deemed approved.")

237. *Id.* ¶ 85.

dedication to residential customers would affect the relationship between residential and commercial ratepayers.²³⁸ She also expressed concern that the merged entity's exclusive right to develop a solar project at the DC Water plant would threaten electricity generation competition.²³⁹ Additionally, she believed that the issues relating to the NSA's proposed four microgrids were best resolved in the ongoing *Formal Case No. 1130* and that DC PSC could not ensure that funds in the NSA earmarked for renewable energy and environmental programs would actually be used for those purposes.²⁴⁰ Exelon's nuclear holdings were not mentioned in Commissioner Fort's rejection of the NSA.

Fort next engaged in a prolonged discussion of the outstanding issues from the seven factors that DC PSC had originally used to assess the proposed merger.²⁴¹ But because this analysis ultimately was not influential in DC PSC's decision to reject the NSA or its ultimate decision to approve the merger in March 2016, this Note will not discuss this portion of Fort's concurrence. Fort then pivoted to offering amended terms of the NSA that she said could cure the four flaws that led DC PSC to reject the NSA.²⁴² These amendments included deferring a decision on what to do with the \$25.6 million CIF allocation until the next rate case.²⁴³ Exelon's exclusive right to develop a solar project at the DC Water plant was removed from the NSA.²⁴⁴ Additionally, the amendments to the NSA included a series of provisions intended to ensure that funds in the NSA devoted to renewable energy and environmental efforts remained under the control of DC PSC and would not be redistributed in the face of the City budgetary constraints.²⁴⁵ Lastly, the amendments deleted the provision that committed Exelon and PHI to developing four microgrids before the conclusion of *Formal Case No. 1130*.²⁴⁶ If these terms were timely accepted by the parties, DC PSC would approve the merger with no further action.²⁴⁷

238. *Id.* ¶ 87 (“During the evidentiary hearing, the Chair and I posed a number of questions to the Settling Parties to better understand the operational mechanics of the proposal that is described in NSA Paragraph 4 and how it would impact rate design decisions when it is combined with NSA Paragraph 48. . . . The responses to these questions, along with the pre-filed testimony, persuade me of six things. First, there is not a complete understanding about the details of the proposals.”).

239. *Id.* ¶¶ 91–92.

240. *Id.* ¶¶ 93–94.

241. *Id.* ¶¶ 102–137.

242. *Id.* ¶ 138 (“Moreover, I do not believe that the NSA is fatally flawed because each of the four concerns addressed in the Majority Opinion can be corrected in a revised NSA with alternative terms. For that reason, and as explained in more detail below, I have crafted alternative terms for the NSA and asked my fellow commissioners to approve sharing them with the Settling Parties for their consideration under Commission Rule 130.17(b).”).

243. *Id.* ¶ 141.

244. *Id.* ¶ 144.

245. *Id.* ¶ 149.

246. *Id.* ¶ 160.

247. *Id.* ¶ 170 (“Further, if the Revised NSA is timely accepted by the Settling Parties, the Revised NSA and the underlying Merger Application is approved with no further action by the Commission.”).

4. Commissioner Phillips' Dissent

Commissioner Phillips' dissent mostly focused on his frustration with the DC PSC process that twice rejected the merger and its effects. He began his dissent by noting that he believed that the NSA was in the public interest and that Commissioner Fort's proposed revisions to the NSA were unnecessary to make the merger in the public interest, but that he would approve the amended NSA.²⁴⁸ He then noted that the Joint Applicants had worked to address the deficiencies that had originally led DC PSC to reject the proposed merger under the seven-factor public interest test and had secured the support of most of the parties for the NSA, but then criticized his fellow commissioners for "effectively mov[ing] the goal posts in order to reject the settlement."²⁴⁹ Once Exelon and PHI had corrected the deficiencies in the proposed merger, he said, then the NSA should have been accepted as in the public interest.²⁵⁰ He further faulted his colleagues for earlier, in considering the proposed merger, declining to condition approval on the acceptance of specific provisions and for the "unprecedented," unsupported by case law, decision to propose conditional approval not during the initial merger proceeding, but during consideration of the NSA.²⁵¹ He warned that this would discourage parties from entering into settlement negotiations because the terms of the agreement could be "negated" and "rewrit[ten]" by DC PSC.²⁵² Commissioner Phillips did not mention Exelon's nuclear generation activities in his dissent.

D. DC PSC DECISION III

In the wake of the second rejection of the merger, Exelon ultimately decided to accept the terms of the amended NSA. Below, the Note discusses the parties' reaction and DC PSC's March 2016 acceptance of the conditional approval it proffered.

1. The Parties React to the Rejection of the NSA

Exelon was initially unsure, following the rejection of the NSA, if it would accept the terms of the conditional approval.²⁵³ Exelon wanted to study the

248. *Id.* ¶ 171 ("I applaud the parties for their time and effort in negotiating a settlement agreement ("NSA") that I believe is in the public interest. Because I believe the NSA is in the public interest, and alternative terms are unnecessary, I must respectfully dissent from the majority's decision to reject the NSA . . . I do not object to Commissioner Fort circulating alternative terms to the Settling Parties").

249. *Id.* ¶ 172.

250. *Id.*

251. *Id.* ¶¶ 197–199.

252. *Id.* ¶ 200.

253. Mark Chediak & Brian Wingfield, *Exelon, Pepco Weighing New Takeover Terms After DC Rejection*, BLOOMBERG (Feb. 26, 2016, 10:48 AM), [http://www.bloomberg.com/news/articles/2016-02-26/exelon-pepco-](http://www.bloomberg.com/news/articles/2016-02-26/exelon-pepco)

proposed terms of the amended NSA and discuss those terms with the parties that had supported the NSA.²⁵⁴ In the interim, political support for DC PSC's proposed amendments to the merger cratered with the Mayor and the Office of People's Counsel pulling their support because they argued it would not benefit ratepayers.²⁵⁵ Despite the loss of public support for the deal, Exelon decided to continue to pursue approval of the merger by filing a request on March 7, 2016 for DC PSC to accept the terms of the NSA; or accept the revised NSA; or accept the Joint Applicants' own amendments to the revised NSA.²⁵⁶ This third option involved accepting all of the terms of the amended NSA except deferring a decision on what to do with the \$25.6 million in CIF funds for residential ratepayers.²⁵⁷ Instead, in an effort to keep its fragile political coalition alive by devoting those funds to residential ratepayer reductions, the Joint Applicants proposed devoting another \$20 million in CIF funding to reducing commercial customers' bills.²⁵⁸

2. DC PSC Approves the Merger with the Conditions it Offered

At the outset of its March 23, 2016 decision on the Exelon-PHI merger, DC PSC stated "that in the interests of justice" and because it had thoroughly considered the matter on a well-developed record, it would consider the Joint Applicants' March 7, 2016 request.²⁵⁹ DC PSC did not accept the Joint Applicants' first option to accept the NSA because the Joint Applicants had not identified "any error of law or fact that warrant[ed] changing" their determination on the NSA.²⁶⁰ DC PSC also rejected the third option of accepting the Joint Applicants' amendments to the NSA, finding it unpersuasive that this option would garner public support and expressing concern that the redistribution of CIF funds to commercial ratepayers would come at the expense of projects designed to improve the grid.²⁶¹ Lastly, DC PSC accepted the terms of the revised NSA under Joint Applicants' second option as in the public interest.²⁶² Exelon's

merger-settlement-rejected-dc-mulls-alternative ("Exelon Corp. is weighing new terms for its \$6.8 billion takeover of [PHI] after Washington regulators rejected its latest proposal for the deal.")

254. *Id.* (quoting an Exelon spokesman as saying: "Once we have had a chance to study the order and confer with the settling parties, we will have more to say about what it means and our next steps.")

255. Davis, *supra* note 1.

256. Joint Applicants' Request for Other Relief Pursuant to 15 DCMR § 1307.17(B) and Order No. 18019, at 3 (D.C. Pub. Serv. Comm'n filed Mar. 7, 2016).

257. *See id.* at 6.

258. *Id.*

259. *PHI III*, *supra* note 9, ¶ 38.

260. *Id.* ¶ 40.

261. *Id.* ¶ 41.

262. *Id.* ¶¶ 45–46 ("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 pursuant to D.C. Code §§ 34-504 and 34-1001. . . . Based on these findings, and the specific facts and circumstances presented, the Commission concludes that the Proposed Merger . . . when taken as a

nuclear generation activities were not mentioned in the March 23, 2016 order except to note in the findings of fact that the merged entities' ring-fencing provisions would ensure Exelon's nuclear holdings would not be included in PHI's rates.²⁶³ Chairman Kane remained opposed to the amended NSA,²⁶⁴ but the merger was completed on March 23, 2016 when DC PSC finally approved the terms of the merger.²⁶⁵

VI. ASSESSING THE IMPLICATIONS OF UTILITY COMMISSIONS' CONSIDERATION OF THE PROPOSED MERGER

This part of the Note will discuss the utility commissions' consideration of the merger and what it means for the nuclear industry and the CPP. Section VI.A will establish that neither DC PSC's nor the non-DC jurisdictions' consideration of the proposed merger focused on Exelon's nuclear holdings. Section VI.B will identify the aspects of the decision-making process that influenced or could have influenced the decisions reached in the various jurisdictions. Section VI.C will assess the impact of DC PSC's consideration of the merger in the context of other nuclear-heavy utilities looking to acquire regulated utilities as a way to offset losses from their nuclear holdings²⁶⁶ and what the aspects identified in subsection B mean in the same context. Section VI.D will discuss steps that the nuclear industry and the federal government can take to put the nuclear energy industry on firmer financial ground.

whole, is in the public interest pursuant to D.C. Code §§ 34-504 and 34-1001, and, therefore, the Joint Application for the Merger should be approved.”).

263. *Id.* at 29 (“A. Findings of Fact . . . DDD. There is no way that losses incurred by Exelon’s aging nuclear fleet would be included in the rate base of Pepco as a local distribution company. However, there is a possibility that Pepco’s cost of capital could be affected if there were no ring-fencing provisions to assure investors that the finances of Pepco and PHI were separate from the obligations of Exelon.”).

264. *See generally id.*, Attach. A.

265. *Exelon Corporation and Pepco Holdings, Inc. Are Now One Company*, PEPSCO HOLDINGS, <http://www.pepcoholdings.com/about-us/exelon-acquisition/> (last visited May 15, 2016) (“Exelon Corporation . . . and Pepco Holdings, Inc . . . announced on March 23 that the two companies have completed their merger transaction. The announcement follows the approval of the merger by the Public Service Commission of the District of Columbia. . . .”).

266. Roberts, *supra* note 4 (“In response,” to the declining economic fortunes of the nuclear industry “utility holding companies have been stampeding in the other direction, buying up more distribution utilities . . . [T]he revenue from distribution utilities tends to be smaller, but they are fully regulated . . . so their profits are guaranteed and extremely predictable.”); *see* Cathy Kunkel, *FERC Approval of Exelon-Pepco Merger Is a Step Back*, INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS (Nov. 25, 2014), <http://ieefa.org/exelon-pepco/> (“The proposal is the regional manifestation of a broader trend of utility-sector consolidation that has companies looking for growth through acquisitions. Owing Pepco’s regulated distribution utilities—which are guaranteed profits . . . as regulator-approved businesses—would provide a steady income stream to Exelon even as its unregulated competitive-generation business continues to be challenged by low wholesale power prices.”).

A. ASSESSMENT OF UTILITY COMMISSIONS' ANALYSIS

Section VI.A.1 will show that Exelon's nuclear holdings were not a determinative factor in DC PSC's decisions to reject the merger or its ultimate acceptance of the merger. Section VI.A.2 will establish that Exelon's nuclear business was also not a significant factor in the other utility commissions' consideration of the merger.

1. Exelon's Nuclear Holdings Did Not Sway DC PSC

Despite the public opposition to the merger because of Exelon's aging and unprofitable nuclear fleet, Exelon's nuclear generation did not factor highly in DC PSC's initial determination that the deal was not in the public interest. First, the only factor—the fourth factor—that explicitly instructed DC PSC to examine Exelon's nuclear operations was not rated as a threat to the public interest. Though, the fourth factor also was not rated as a benefit to the public interest. Moreover, DC PSC was satisfied that Exelon's and PHI's efforts to protect Pepco from financial risk from Exelon's nuclear operations would be effective. Second, in assessing the merger as a whole, DC PSC did not mention Exelon's nuclear operations at all. Instead, in determining that the proposed merger did not provide a public benefit, DC PSC focused on the harm that DC ratepayers, Pepco's management structure, DC PSC's regulatory program, and DC's environmental goals would suffer under the proposed merger.

Exelon's nuclear holdings were no more influential in DC PSC's second and third considerations of the proposed merger. In rejecting the NSA, DC PSC eschewed the seven-factor framework and its requirement that DC PSC consider the financial impact of Exelon's nuclear generation activities. Instead it rejected the merger for four reasons unrelated to Exelon's nuclear holdings. DC PSC proposed amendments to fix the NSA's flaws, which it ultimately accepted upon its third consideration of the Exelon-PHI merger. But the fixes did not address Exelon's nuclear holdings.

2. Exelon's Nuclear Holdings Were Not Thoroughly Considered By Other Utility Commissions

The utility commissions in Virginia, New Jersey, Delaware, and Maryland did not focus much of their attention on Exelon's nuclear businesses in approving the merger. VSCC and NJ BPU did not even mention Exelon's nuclear generation in their orders approving the merger and the ASA in Delaware did not mention Exelon's nuclear holdings either. MPSC devoted only three paragraphs in the eighty-five-page order approving the merger to discussing Exelon's nuclear

generation²⁶⁷ to determine that the merger's ring-fencing measures were sufficient to protect ratepayers from any risks associated with Exelon's nuclear businesses. Instead the non-DC jurisdictions mostly focused on the impact of the merger on ratepayers, employment levels, and service reliability in approving the proposed merger.

B. INFLUENTIAL ASPECTS OF THE DECISION-MAKING PROCESS

Exelon's nuclear generation was not a significant issue in any of the utility commissions' assessments of the merger. However, it is important to discuss differences in the decision-making process in DC as compared to the other jurisdictions because doing so highlights aspects of the utility commissions' decision-making processes that may influence the ability of other nuclear-heavy utilities to acquire profitable, regulated utilities. This section will discuss four influential aspects of the decision-making process.

1. The Standard of Review

The first such aspect is the standard of review for the proposed merger. In the DC PSC analysis it was: is the merger in the public interest? But more specifically it was: does it leave the "public benefited and not just unharmed?"²⁶⁸ Meanwhile MPSC, in approving the merger, sought to answer three questions: (1) is the transaction consistent with the public interest, convenience and necessity?; (2) will the transaction yield benefits to the utility's ratepayers?; and (3) is the transaction structured to not harm the utility's ratepayers?²⁶⁹ Thus it is theoretically possible that a factor unrelated to the impact the merger would have on ratepayers could have a neutral impact and suggest the merger should be rejected under the DC standard of review because it does not leave the public benefited.²⁷⁰ But a neutral impact for the same factor would not require that the merger be rejected under the Maryland standard of review because it does not require that the public as a whole be benefited.²⁷¹ The central question or

267. Pub. Serv. Comm'n of Md., *supra* note 92, at 43–44.

268. *PHI I*, *supra* note 3, at ¶ 343.

269. Pub. Serv. Comm'n of Md., *supra* note 92, at 30.

270. It is important to note that it only suggests that the merger should be rejected because DC PSC assesses the merger as a whole to determine if the merger leaves the "public benefited and not just unharmed," *PHI I*, *supra* note 3, at ¶ 343, and thus a single neutral factor would not require DC PSC to reject the merger.

271. The factors the utility commissions considered in assessing the merger under the various standards of review do not correspond with each other perfectly. For example, the employment aspects of the merger are part of the first factor in DC, but are a separate fourth factor in Maryland. *See supra* text accompanying notes 96, 145. So it is difficult to compare DC PSC's and MPSC's analysis of the factors one-on-one to find direct support for the above assertion about how the standard of review can influence the outcome of the review of the proposed merger. But that appears to be the implication of DC PSC's consideration of employment and its first factor as compared to MPSC's consideration of its fourth factor. DC PSC considered the first factor's impact to be mixed and ultimately rejected the merger. *See supra* text accompanying note 144. Meanwhile, MPSC noted

questions that the regulators seek to answer in reviewing the merger obviously influence how the regulators assess the merger and whether they will approve it.

2. The Source of Authority for the Factors Under the Standard of Review

The second aspect is the source of the authority for the factors the regulators consider under the standard of review. In Maryland, MPSC analyzed the three questions it sought to answer through twelve statutorily mandated factors. While MPSC did not consider all of the twelve factors, it did constrain itself to considering the proposed merger within those twelve factors.²⁷² But the experience in DC illustrates how a utility commission unconstrained by statutory factors gives regulators much more discretion to scrutinize and amend a proposed merger.²⁷³ DC PSC developed the seven factors it used to evaluate the public interest question upon its first consideration of the merger and it felt empowered to add an additional seventh factor. The addition of the seventh factor encouraged DC PSC to reject the merger when DC PSC found the seventh factor neutral because the DC standard of review required that the merger benefit the public, not merely leave it unharmed.²⁷⁴ Similarly, DC PSC's decision in considering the NSA to effectively ignore the seven factors it had earlier used to assess the merger gave it an avenue to reject the merger and then amend it, despite no earlier indication it had the authority to take such a step.

3. Conditional Approval

The third aspect that influences how the utility commissions assess a merger is whether the utility commissions are authorized to or are comfortable adding conditions to the proposed merger.²⁷⁵ In Maryland, MPSC exercised its authority

the steps Exelon took to mitigate the negative employment impacts associated with the merger's synergy savings made the fourth factor in the public interest without ever indicating it provided a benefit to the public. See *supra* Section IV.C.3. In essence the employment factor was neutral, but MPSC approved the merger. So in DC the first factor, which included employment impacts, was mixed or neutral and the merger was rejected, but in Maryland the employment factor was neutral and the merger was approved.

272. Although it did acknowledge that the list was not exclusive. See Pub. Serv. Comm'n of Md., *supra* note 92, at 29.

273. See Caroline Cecot & W. Kip Viscussi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 591 (2015) (noting that when there are statutory factors that an agency must consider, courts "primarily examine whether all statutory factors . . . were considered."). If the regulatory agencies are not concerned that their decision may be overturned for deviating from the statutory factors by a reviewing court, it provides the agencies greater latitude to assess the merger through the consideration of non-statutory factors that might be less favorable for approving mergers.

274. See *supra* note 177.

275. Maryland law provides MPSC the authority to condition the merger on Joint Applicants accepting certain conditions. MD. CODE ANN. § 6-105(g)(3)(ii). DC law neither provides DC PSC the authority to do so, nor prohibits DC PSC from doing so. D.C. Code § 34-504; D.C. Code § 34-1001. In this legislative vacuum, DC PSC felt uncomfortable conditioning approval of the merger on certain conditions. See *supra* text accompanying note 182.

to condition approval of the merger on the merged entity accepting certain conditions—ring-fencing provisions and a \$100 credit to ratepayers. VSCC conditioned its approval of the merger in Virginia on the merged company timely responding to staff inquiries regarding regulatory matters. But DC PSC initially rejected the merger in part because it declined to condition approval of the merger on certain conditions as it was concerned that doing so would change the analytical framework through which mergers are assessed, making it the obligation of DC PSC to identify the right mix of conditions necessary to make the proposed merger in the public interest. Then when DC PSC in considering the NSA determined that it had the authority to attach conditions to the NSA—and chose to do so—it ultimately led to approval of the merger. If the utility commissions evaluating a proposed merger can—and choose to do so—condition approval of the merger on certain conditions, it is more likely that the mergers will be approved as the condition-attaching process provides regulators the opportunity to improve the proposed merger to the point where they are comfortable supporting it.²⁷⁶ But this analysis also illustrates the regulatory review process with utility commissions that have the authority to condition approval of a proposed merger on the acceptance of certain conditions may be chaotic and unpredictable as the utility commission may be inconsistent in using such authority and may choose to attach a wide range of conditions to the proposal.

4. Aggressiveness of the Utility Commission in Assessing the Merger

The last factor is how aggressively the utility regulators assess the merger. DC PSC produced a nearly 200-page order²⁷⁷ and then an over 270-page order²⁷⁸ in rejecting the merger twice. But the Virginia²⁷⁹ and Delaware²⁸⁰ utility commissions approved the mergers in fewer than ten pages. A utility commission that is more committed to scrutinizing the proposed merger is more likely to find fault with the proposed merger and reject it²⁸¹ as DC PSC did in rejecting the merger

276. See generally *Report of the State Commission Practice & Regulation Committee*, 30 ENERGY L.J. 765 (2009) (recounting numerous applications of all kinds to state utility commissions that had been approved upon acceptance of conditions by applicants).

277. *PHI I*, *supra* note 3.

278. *PHI II*, *supra* note 8.

279. Va. State Corp. Comm'n, *supra* note 58 at 4.

280. Pub. Serv. Comm'n of Del., *supra* note 119, at ¶ 9.

281. Benjamin K. Sovacool & Christopher Cooper, *The Hidden Costs of State Renewable Portfolio Standards (RPS)*, 15 BUFF. ENVTL. L.J. 1, 33 (2007–2008) (citing increased scrutiny of proposed utility mergers by utility commissions as an explanation for the failure of proposed utility mergers to secure approval); see Felix Mormann, *Clean Energy Federalism*, 67 FLA. L. REV. 1621, 1637 (2015) (“the strict scrutiny of proposed mergers at the state level is cited as one of the major reasons for the relatively slow move toward consolidation” in the electric utility industry.).

the first two times before accepting it the third time in a much shorter decision.²⁸²

C. IMPLICATIONS OF THE CONSIDERATION OF THE MERGER

Exelon's aging and unprofitable nuclear fleet was not influential in DC PSC's consideration of the merger, nor was it a significant source of concern for the utility commissions in other jurisdictions. However, as other nuclear-heavy utilities are looking to acquire regulated utilities as a way to offset losses from their nuclear holdings,²⁸³ the consideration of the merger by the utility commissions contains lessons for the nuclear industry. Section VI.C.1 will examine two possible impacts of the rejection of the merger for the nuclear industry. Section VI.C.2 will discuss how the utility commissions' decision-making apparatus discussed in section VI.B, *supra*, could shape the nuclear industry going forward. Lastly, section VI.C.3 will discuss what the regulatory review process for the merger may mean for the long-term financial health of the nuclear industry and the carbon emission goals of the CPP.

1. Impacts of the Initial Rejection of the Merger

DC PSC's initial rejection of the merger could have two impacts for nuclear-heavy utilities seeking to acquire regulated utilities. First, communities and organizations in the service area of other proposed mergers may seize on the results in DC to oppose mergers involving nuclear-heavy utilities acquiring non-nuclear utilities as they did in opposing the proposed Exelon-PHI merger by citing New Jersey regulators' earlier rejection of a proposed Exelon-PSE&G merger.²⁸⁴ This could place utility commissions under greater political pressure to oppose such mergers and could result in more rejections of proposed mergers involving nuclear utilities. Second, DC PSC's initial rejection of the merger might encourage utility commissions to more thoroughly scrutinize merges involving nuclear-generating utilities.²⁸⁵ This too could make it harder to consummate mergers involving nuclear utilities acquiring non-nuclear utilities.

282. The March 23, 2016 DC PSC decision was only sixty-five pages long, including the dissent and findings of fact and law. *See PHI III*.

283. *See* Hollier, *supra* note 7.

284. *See* Laura Rechhie, *Help Stop Exelon from Taking over Washington*, COMMUNITY RENEWABLE ENERGY (Dec. 16, 2014), <http://communityrenewableenergynow.com/index.php/help-stop-exelon-from-taking-over-washington/>. Renewable energy activists opposed the Exelon-PHI merger because Exelon's nuclear holdings lead it to oppose investments in renewable energy programs. *See supra* note 176.

285. Chediak & Polson, *supra* note 5 (analyst Hugh Wynne said the rejection of the proposed Exelon-PHI merger "may embolden regulators in Hawaii" considering the proposed merger between nuclear-generating NextEra Energy Inc. and Hawaii Electric Utilities Industries Inc. NEXTEERA ENERGY, A LEADER IN CLEAN ENERGY 1 (2015), http://www.nexteraenergyresources.com/pdf_redesign/One_page_factsheet.pdf).

2. Utility Commissions' Decision-Making Apparatus May Shape the Future of the Nuclear Industry

The aspects of the utility commissions' decision-making processes that were identified in section VI.B, *supra*, may shape the long-term contours of the nuclear industry. In certain jurisdictions, utility commissions' different decision-making apparatuses could make it difficult to complete mergers involving nuclear-generating utilities, even if the nuclear-generating capacity of the acquiring utility is not the focus of the regulators in assessing the merger. For example, states that have an unfavorable standard of review for proposed mergers or do not have statutorily-mandated factors that utility regulators must consider in assessing a merger may give regulators a freer rein to reject utility mergers.²⁸⁶ Same too for states with utility commissions that are empowered to aggressively scrutinize proposed mergers²⁸⁷ and that are inconsistent in their application of their authority to seek conditional approval of the merger on the acceptance of certain conditions and what conditions to accept in doing so.²⁸⁸ Indeed, this was the case in DC where Exelon's nuclear holdings were not a determinative factor in the outcome there, but the above aspects of the decision-making process worked to initially sink the merger involving a nuclear-generating utility.²⁸⁹

3. What this Means for the Long-Term Financial Health of the Nuclear Industry and the Carbon Emission Goals of the CPP

DC PSC's two rejections of the merger and some utility commissions' decision-making apparatuses likely means it will be harder for nuclear utilities to acquire non-nuclear utilities in the future, regardless of whether utility commissions focus on those utilities' nuclear holdings.²⁹⁰ Consequently, nuclear-heavy utilities will likely struggle to acquire the regulated utilities needed to cover their losses from their nuclear businesses. That would then likely imperil the carbon emission goals of the CPP as the financial losses the nuclear industry is suffering

286. See discussion in *supra* section VI.B.1 and VI.B.2; *supra* text accompanying note 273.

287. See *supra* text accompanying note 281 regarding Mormann's article.

288. See *supra* text accompanying note 276.

289. See discussion in *supra* section VI.B.2.

290. See Chediak & Polson, *supra* note 5 (“There is a graveyard filled with corpses of failed utility mergers doomed by state regulators,” said Paul Patterson, a New York-based analyst for Glenrock Associates LLC. The rejection of Exelon's bid should ‘serve as a reminder that state regulatory approvals are not to be taken for granted.’”). However, it is important to note that most utility mergers have been approved by regulators. Brent Nyitray, *Why Mergers' Real Hurdle is State Public Utility Commissions*, YAHOO FINANCE (July 4, 2014), <http://finance.yahoo.com/news/why-mergers-real-hurdle-state-210007407.html> (“And then the deal—usually, but not always—gets approval.”); see also Tom Flaherty, *Utility Mergers and Acquisitions: The Changing Face*, ENERGYBIZ MAG. (Spring 2015), <http://www.energybiz.com/magazine/article/404353/utility-mergers-and-acquisitions> (“The past several years have highlighted the revival of utility industry consolidation[.]”).

could threaten to push much of nuclear power offline.²⁹¹ However, the utility commissions' review of the Exelon-PHI merger shows that while the regulatory review of nuclear-heavy utilities acquiring non-nuclear, regulated utilities can be a long, chaotic, and expensive process,²⁹² it still remains a viable option for strengthening the finances of the nuclear energy industry. That is if nuclear utilities alter their approach to winning the regulatory war surrounding the proposed mergers in the wake of the consideration of the Exelon-PHI merger. Additionally, the federal government might be able to take steps to shore up the financial fate of the nuclear industry.

D. PUTTING THE NUCLEAR INDUSTRY ON SECURE GROUND

This section will explore how the nuclear industry and the federal government can strengthen the long-term financial outlook for the nuclear industry, so that the carbon emission goals of the CPP can be achieved. Either the nuclear industry can put itself back on firmer financial terrain by mastering the regulatory process or the federal government can provide assistance to shore up the industry. However, winning the regulatory process is the only viable option for ensuring the long-term financial viability of the nuclear industry and the carbon emission goals of the CPP because the steps the government could take face daunting legal, political, and financial obstacles.

1. Win the Regulatory Process

Exelon and PHI's experience contains many lessons for how the nuclear-generating industry can better master the regulatory process to win approval for acquiring profitable, non-nuclear utilities in the future. First, DC PSC's initial rejection and other jurisdictions' approval of the merger shows that ring-fencing provisions can assuage regulators' concerns that an acquiring utility's nuclear-generating business will mean higher rates for local customers.

Second, Exelon and PHI's ultimately unnecessary and counterproductive—as it required the Joint Applicants to include provisions in NSA that drew the ire of DC PSC—pursuit of political and public support in DC is a useful reminder that the final decision on these mergers rests in a small number of regulators' hands. Nuclear utilities standing in the shoes of Exelon in the future would be well served by tailoring their proposed merger to ensure that any commitments they

291. Jesse Jenkins, *Nuclear Retirements Would Sabotage Clean Power Plan Carbon Reductions*, ENERGY COLLECTIVE (Sept. 1, 2015), <http://www.theenergycollective.com/jessejenkins/2266234/nuclear-retirements-would-sabotage-clean-power-plan-carbon-goal>.

292. Andy Medici, *Here's How Much Exelon Has Spent Pursuing its \$6.8 Billion Merger with Pepco*, WASH. BUS. J. (Feb. 11, 2016, 4:09 PM), <http://www.bizjournals.com/washington/news/2016/02/11/heres-how-much-exelon-has-spent-pursuing-its-6-8.html> (noting that Exelon had spent \$259 million, including an untold amount on lobbying activities, through the end of 2015 in its effort to acquire PHI).

make to win political support and build public momentum for the merger²⁹³ does not alienate the utility commissions. This might include deviating from the rather cookie-cutter nature of the modifications to the proposed merger Exelon and PHI offered the utility commissions—millions of dollars in CIF funding and ring-fencing measures to insulate the local utilities from financial turmoil at the parent utilities—to directly respond to the interests and concerns of the utility commissions.

Third, the acquiring nuclear utilities need to be better prepared for the regulatory review process. Throughout the process in DC, DC PSC faulted the Joint Applicants for failing to provide them documents and information to support the Joint Applicants' assertions about the benefits of the merger. Similarly, DC PSC was often frustrated that proponents of the NSA could not answer questions they had about the impact of the merger on DC commercial ratepayers. Acquiring nuclear utilities must work with their on-the-ground supporters to ensure that together they can support their assertions about the benefits of a proposed merger and answer questions about the mechanics and effects of the proposed merger or they risk losing credibility²⁹⁴ in the eyes of utility regulators and seeing the mergers fail.

Fourth, the nuclear industry might do well to try to acquire regulated utilities in jurisdictions that have a decision-making apparatus, as discussed in section VI.B, *supra*, more friendly towards mergers.²⁹⁵ This would mean targeting utilities for acquisition in jurisdictions in which the standard of review is favorable or in which utility commissions are predictable in their application and use of their right to condition approval of the merger on the applicants accepting certain conditions. It also means avoiding targeting utilities in jurisdictions that do not assess the proposed merger on the basis of statutorily mandated factors and avoiding utility commissions inclined to aggressively scrutinize mergers.

2. Steps the Federal Government Can Take

The federal government can also put the industry on firmer ground. The federal government can do so by working to keep currently operating nuclear power plants online and by bringing new nuclear plants online.

293. Building political support for the proposed mergers often helps create an environment that encourages regulators to approve the merger. For example, the Amended Settlement Agreement between proponents and opponents of the merger, which regulators approved in Delaware, helped win approval for the merger there. Pub. Serv. Comm'n of Del., *supra* note 119, at ¶ 9.

294. See generally Mark S. Brown, *Cardinal Rules of Advocacy: Understanding and Mastering Fundamental Principles of Persuasion*, 75 WIS. LAW. 29 (2002) (book review); Morley R. Gorsky, *Presentation Skills: A Quick Reference Guide for Advocates*, 54 DISP. RESOL. J. 49 (1999).

295. Sovacol & Cooper, *supra* note 281, at 33 (the rejection of proposed utility mergers “risk engendering a type of forum shopping where utility holding companies flock to states more likely to allow their consolidation.”).

The federal government can take two steps to keep currently operating nuclear plants from closing. First, NRC can extend the operating licenses of all the nuclear reactors for an additional twenty years to keep that power online.²⁹⁶ Second, and building on the first step, EPA could issue a new rule through its § 111(d) CAA authority to recalculate how nuclear power is calculated under the CPP, so that states could get credit for the increased nuclear generation from extending the licenses for nuclear power plants.²⁹⁷ This would provide an incentive for states to keep nuclear power online. However, this approach is risky because it would likely expose the CPP to still more legal challenges²⁹⁸ and consequently it is unlikely that EPA would take such a step.

The federal government can also bring new sources of nuclear power online. The French model of centralized management of nuclear operations may be the best way to do so. Seventy-five percent of France's electricity is provided through low-cost nuclear power.²⁹⁹ The French nuclear reactor fleet is standardized—the plants have standard designs—which helps keep construction and operating costs low and ensures the safety of the program.³⁰⁰ But the French nuclear industry has been besieged by its own financial problems recently,³⁰¹ so centralized management of nuclear operations may not be sufficiently financially secure to put the nuclear industry on stable ground in the United States. Additionally, it is unlikely that such an approach would win the Congressional support needed to reorganize the nuclear industry as Republicans are hostile to central planning³⁰² and Democrats have consistently expressed concern about the safety of the nuclear industry.³⁰³

CONCLUSION

Exelon's nuclear holdings were not a major factor in DC PSC's and the other utility commissions' review of the Exelon-PHI merger. DC PSC did not initially

296. Brinton & Freed, *supra* note 25.

297. See Plummer, *supra* note 27.

298. See Keith Goldberg, *DC Circ. Consolidates Clean Power Plan Challenges*, LAW360 (Oct. 25, 2015), <http://www.law360.com/articles/719082/dc-circ-consolidates-clean-power-plan-challenges> (noting that nineteen challenges were filed against the final rule on the day it was published in the Federal Registrar).

299. *Nuclear Power in France*, WORLD NUCLEAR ASSOC. (Jul. 2016), <http://www.world-nuclear.org/info/Country-Profiles/Countries-A-F/France/>.

300. *Nuclear Energy in France*, EMBASSY OF FRANCE IN WASHINGTON, D.C. (Dec. 2, 2007), <http://ambafrance-us.org/spip.php?article637>.

301. David Jolly & Stanley Reed, *French Nuclear Model Falters*, N.Y. TIMES (May 7, 2015), <http://www.nytimes.com/2015/05/08/business/energy-environment/france-nuclear-energy-areva.html>.

302. *America's Natural Resources*, REPUBLICAN NAT'L COMM., <https://www.gop.com/platform/americas-natural-resources/> (last visited Dec. 15, 2015) (The Republican platform states: "That is why a site- and situation-specific approach to an environmental problem is more likely to solve it, instead of a national rule based on the ideological concerns of politicized central planning.").

303. Timothy Cama, *GOP Gains Put Nuclear Power Back on the Table*, THE HILL (Dec. 6, 2014), <http://thehill.com/policy/energy-environment/226209-gop-gains-put-nuclear-power-back-on-the-table> (noting that Senate Democrats held ten hearings on nuclear safety following the Fukushima nuclear reactor meltdown).

reject the proposed merger because of concerns about Exelon's aging and unprofitable nuclear fleet. Instead, DC PSC found the proposed merger was not in the public interest because the merger would have many negative impacts: higher energy costs for ratepayers; regulatory complications; and potential obstacles to adopting renewable energy sources. It was confident that the proposed ring-fencing measures would protect PHI from any financial instability at Exelon. Upon subsequent review of the NSA and the amended NSA, DC PSC once again focused on other provisions—CIF funding—and impacts—competition in the electricity distribution market—of the merger in ultimately approving the merger. Similarly, the utility commissions in Virginia, New Jersey, Delaware, and Maryland did not scrutinize Exelon's nuclear holdings in approving the proposed merger. Instead they focused on the benefits of the merger: rate reductions; employment benefits; and improved reliability and quality of service.

The initial rejection of the merger by DC PSC could create challenges for the nuclear industry and by extension the carbon emission reduction goals of the CPP. This is most likely to happen if the organizations in and communities to be served by nuclear-heavy utilities acquiring non-nuclear heavy utilities more aggressively challenge such mergers or if utility regulators more thoroughly examine these proposed mergers in the wake of the initial rejection of the deal. It will then be harder for nuclear-heavy utilities to keep nuclear power online and continue to provide a carbon-free source of electricity by acquiring the profitable, non-nuclear utilities they need to offset their nuclear-induced losses.

Additionally, the comparison of the regulatory review process in DC to that in other jurisdictions illustrates that mergers involving nuclear utilities could also face obstacles to completion in jurisdictions in which the regulatory apparatus is unfavorable to consummating mergers, even when the utilities' nuclear holdings do not attract the attention of regulators. It would then also be harder for nuclear-dependent utilities to acquire the regulated utilities they need to remain solvent. This would potentially threaten the long-term financial health of the industry and force nuclear power offline, putting the carbon emission goals of the CPP in jeopardy.

The consideration of the Exelon-PHI merger illustrates that the best path forward for the industry in response to both of these possible challenges is to master the regulatory process to win approval for these mergers. Working the regulatory process to win approval of these mergers is more likely to be successful than relying on the federal government to step in to keep and put nuclear power online because doing so faces likely insurmountable legal, political, and financial obstacles. Ultimately, if the nuclear industry cannot sufficiently master the regulatory process so that it can avoid shutting down nuclear power plants, then the long-term viability of the nuclear industry and the CPP, which relies on nuclear energy to meet its carbon emissions goals, will be endangered.