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

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

OFFICE OF THE PEOPLE'S COUNSEL;
DISTRICT OF COLUMBIA;
D.C. SOLAR UNITED NEIGHBORHOODS; PUBLIC CITIZEN, INC.,
PETITIONERS,

V.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA,
RESPONDENT,

EXELON CORPORATION, *et al.*,
INTERVENORS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA

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GLOSSARY

AOBA	Apartment and Office Building Association of Metropolitan Washington
CAEA	Clean and Affordable Energy Act of 2008
CIF	Consumer Investment Fund
Commission	Public Service Commission of the District of Columbia
DCAPA	District of Columbia Administrative Procedure Act
D.C. Public Utilities Act	The Act of March 14, 1913, Pub. L. No. 62-435, § 8, 37 Stat. 938, as amended
DC SUN	D.C. Solar United Neighborhoods
District	District of Columbia Government
DOEE	Department of Energy and Environment
Exelon	Exelon Corporation
FAA	Federal Aviation Authority
GAO	General Accountability Office
GAO Redbook	*Principles of Federal Appropriations Law* (3d ed. 2004)
GSA	General Services Administration
Joint Applicants	Exelon Corporation; Pepco Holdings, Inc.; Potomac Electric Power Company; Exelon Energy Delivery Company, LLC; New Special Purpose Entity, LLC
LIHEAP	Low-Income Home Energy Assistance Program

MEDSIS	Modernizing the Energy Delivery System for Increased Sustainability
MW	Megawatt
NSA	Nonunanimous Settlement Agreement
OPC	Office of the People's Counsel
Pepco	Potomac Electric Power Company
PHI	Pepco Holdings, Inc.
RECACPA	Retail Electric Competition and Consumer Protection Act
RNSA	Revised Nonunanimous Settlement Agreement
Settling Parties	District of Columbia; Office of the People's Counsel; D.C. Water and Sewer Authority; Apartment and Office Buildings Association; National Consumer Law Center; National Housing Trust; National Housing Trust-Enterprise Preservation Corporation
SEU	Sustainable Energy Utility

STATEMENT OF THE ISSUES

1. Whether the Public Service Commission of the District of Columbia ("Commission") acted unreasonably, arbitrarily, capriciously, or contrary to law, when, after it had rejected an initial proposal for merger of utilities under the seven-factor test it uses to determine whether a merger is in the public interest, it again rejected a settlement agreement for the merger, proposed by the utilities, the District of Columbia Government, the Office of People's Counsel, and other major parties, that responded to the deficiencies identified in the Commission's first order, and, instead, conditioned its approval of the merger on the inclusion of alternative terms the Commission believed made the agreement a better deal, where (1) the settlement agreement as proposed was in the public interest and (2) the Commission's alternative terms simply displaced terms that already satisfied the applicable public-interest factors and, moreover, in some instances affirmatively violated the law.

2. Whether the Commission at minimum failed to fully or clearly explain why the merger under the terms of the settlement agreement was not in the public interest, or why the merger under the alternative terms was in the public interest.

STATEMENT OF THE CASE

The Commission rejected the application for a merger of Exelon Corporation ("Exelon") and Pepco Holdings, Inc. ("PHI"), including PHI's subsidiary Potomac Electric Power Company ("Pepco"), (collectively, the "Joint Applicants") as not being

in the public interest. It did so after analyzing the application under a seven-factor test it established for determining whether a merger is in the public interest and explaining in detail the deficiencies of the merger under each factor of that test.

The Joint Applicants, the District of Columbia Government ("District"), the Office of People's Counsel ("OPC"), and other major parties then negotiated a Nonunanimous Settlement Agreement ("NSA"). Responding to the precise deficiencies identified by the Commission, they proposed a merger under the NSA. The Commission nevertheless again rejected the merger, by a two-to-one vote. The dissent charged the majority with "mov[ing] the goal post" and acting "on the grounds that the settlement terms could have been better," even though the "Commission's role in a settlement proceeding is simply to determine whether the NSA is in the public interest." One of the majority commissioners proposed several alternative terms to the NSA and stated that, if they were accepted by the settling parties, she would vote to approve the merger. The Joint Applicants then proposed that the Commission adopt the merger revised with the alternative terms (the "RNSA"). Most of the settling parties opposed that proposal. The Commission nevertheless adopted the RNSA as the basis of its approval of the merger and denied all applications for reconsideration.

The District of Columbia, OPC, D.C. Solar United Neighborhoods ("DC SUN"), and Public Citizen, Inc. have petitioned for review of the Commission's order approving the merger subject to the RNSA and other orders merged therewith.

PERTINENT STATUTORY PROVISIONS

1. D.C. Public Utilities Act.

The Commission was established by Congress by the Act of March 14, 1913, Pub. L. No. 62-435, § 8, 37 Stat. 938, 974 ("D.C. Public Utilities Act"). The Act was extensively revised in 1935. *See* Pub. L. No. 74-349, 49 Stat. 882. The Act, as amended, is codified in various sections in Title 34 of the D.C. Code.

The Commission is authorized to approve the merger of utility companies under D.C. Code § 34-504 (2012), which provides that:

> No public utility shall purchase the property of any other public utility for the purpose of effecting a consolidation until the Commission shall have determined and set forth in writing that said consolidation will be in the public interest, nor until the Commission shall have approved in writing the terms upon which said consolidation shall be made.

This provision is complemented by D.C. Code § 34-1001, which provides that "[i]t shall be unlawful for any . . . electric company . . . directly or indirectly, to acquire the stock or bonds of any other corporation incorporated for or engaged in the same or similar business as it is, unless authorized in writing to do so by the Commission."

2. Home Rule Act.

The Home Rule Act, D.C. Code § 1-201.01 *et seq.* (2012), enacted by Congress in 1973, provides in Section 493, D.C. Code § 1-204.93, that:

> There shall be a Public Service Commission whose function shall be to insure that every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. . . .

The Home Rule Act also provides that "the legislative power of the District shall extend to all rightful subjects of legislation within the District," with "the legislative power granted to the District . . . vested in and [to] be exercised by the Council [of the District of Columbia]." *Id.* §§ 302, 404(a), D.C. Code §§ 1-203.02, 1-204.04(a).

Section 450 of the Home Rule Act, D.C. Code § 1-204.50 (entitled "General and Special Funds"), which pertains to the District's budget and financial management applicable to all District agencies, provides:

> The General Fund of the District shall be composed of those District revenues which on January 2, 1975 are paid into the Treasury of the United States and credited either to the General Fund of the District or its miscellaneous receipts, but shall not include any revenues which are applied by law to any special fund existing on January 2, 1975. The Council may from time to time establish such additional special funds as may be necessary for the efficient operation of the government of the District. All money received by any agency, officer, or employee of the District in its or his official capacity shall belong to the District government and shall be paid promptly to the Mayor for deposit in the appropriate fund . . . .

3. Pertinent Acts Of The Council Creating Special Funds.

In 1999, the Council enacted the Retail Electric Competition and Consumer Protection Act of 1999, D.C. Law 13-107 [Act 13-256], 47 D.C. Reg. 109, , D.C. Code § 34-1501 *et seq.* (2001) ("RECACPA"). RECACPA established the Reliable Energy Trust Fund as a special fund, *see* D.C. Code § 34-1514 (2001), and provided that "[t]he Commission shall establish a program to promote the use of electricity from renewable energy sources," D.C. Code § 34-1514(b)(3) (2001).

In 2004, the Council enacted the Renewable Energy Portfolio Standards Act of 2004, D.C. Law 15-340 [Act 15-755], 52 D.C. Reg. 2285, D.C. Code § 34-1431 *et seq.* (2012). It established a Renewable Energy Development Fund as a special fund administered by the Department of Energy and the Environment ("DOEE"). D.C. Code § 34-1436 (2012).

In 2006, the Council enacted the Green Building Act of 2006, D.C. Law 16-234 [Act 16-590], 54 D.C. Reg. 377, D.C. Code § 6-1451.01 *et seq.* (2012). It established a Green Building Fund as a special fund administered by the Mayor. D.C. Code § 6-1451.07(b) (2012).

In 2008, the Council enacted the Clean and Affordable Energy Act of 2008, D.C. Law 17-250 [Act 17-497], 55 D.C. Reg. 9225 ("CAEA"). CAEA created two special funds administered by DOEE—the Sustainable Energy Trust Fund and the Energy Assistance Trust Fund. D.C. Code §§ 8-1774.10, 8-1774.11 (2012).

The Sustainable Energy Trust Fund was created to fund sustainable energy programs, through a contract by DOEE with a Sustainable Energy Utility ("SEU"), to "conduct sustainable energy programs on behalf of the District." D.C. Code §§ 8-1774.01(a), (c), 8-1704.10(c); *see also* D.C. Code § 8-1774.05 (giving DOEE responsibility for procuring and monitoring the SEU contract). The SEU contract is subject to requirements set forth in D.C. Code § 8-1774.02(c):

> The SEU contract shall be performance-based and shall provide financial incentives for the SEU to surpass the performance benchmarks set forth in the SEU contract. The SEU contract shall also provide financial penalties to be applied to the SEU if the SEU fails to meet the required performance benchmarks.

The Energy Assistance Trust Fund was created to fund existing low-income programs defined in D.C. Code § 8-1773.01(6).

CAEA made a major change to the administration of renewable energy programs. Section 212 of CAEA abolished the Reliable Energy Trust Fund established by RECACPA, which had been administered by the Commission, and transferred one-half its assets to the Sustainable Energy Trust Fund and one-half to the Energy Assistance Trust Fund, administered by DOEE. *See* 55 D.C. Reg. 9237-38.

In addition, Section 401 of CAEA added D.C. Code § 34-808.02 to the D.C. Public Utilities Act: "In supervising and regulating utility or energy companies, the Commission shall consider the public safety, the economy of the District, the conservation of natural resources, and the preservation of environmental quality."

STATEMENT OF THE FACTS

1. Commission's Order Rejecting Joint Applicants' Initial Merger Proposal.

On June 18, 2014, the Joint Applicants filed an application with the Commission for approval of the merger of Exelon and PHI, which includes Pepco and related entities. *See* Order 17597, Joint Appendix ("J.A.") 13. On August 22, 2014, the Commission advised the parties that, in evaluating whether the proposed merger

was in the "public interest" under D.C. Code § 34-504, it would apply its established seven-factor test—*i.e.*, to determine the merger's effect 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 of 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 impacts the District and District ratepayers; and (7) conservation of natural resources and preservation of environmental quality. J.A. 72-73 ¶ 124. The Commission observed that the first and third factors had been amended, and the seventh factor had been added, by CAEA. J.A. 69 ¶ 116; *see* D.C. Code § 34-808.02.

On August 27, 2015, the Commission rejected the proposed merger as not being in the public interest. Order 17947, J.A. 87 ¶ 1. The Commission made findings as to whether the effect of the merger under each of the seven factors would be positive, negative, mixed, or neutral:

As to Factor 1, which has several components, the merger would have a "mixed impact on ratepayers," J.A. 130 ¶ 106; "substantial benefits" to shareholders, J.A. 137 ¶ 119; a generally positive impact on the financial health of the utilities involved in

the merger, J.A. 143-46 ¶¶ 133-36, 141-42; and a "mixed" effect on the District's economy, J.A. 154 ¶ 160.

As to Factor 2, the merger would have a negative impact on utility management and administration by reducing Pepco's role within the larger holding company's structure. J.A. 168, 170-71, 173 ¶¶ 185, 192, 197.

As to Factor 3, although the merger would provide greater resources to respond to emergencies, "the record is practically silent with regard to the Joint Applicants' commitment to safety." J.A. 189-90 ¶¶ 232-33.

As to Factor 4, the merger would have a neutral effect on risks associated with non-jurisdictional business operations, and "no added benefit [would] inure[] to District ratepayers or the District from Exelon's other businesses." J.A. 106 ¶ 265.

As to Factor 5, the merger would have a negative impact on the Commission's ability to regulate the utility and, in particular, "would make regulatory tasks more complex, more time-consuming, and more costly." J.A. 214 ¶ 284.

As to Factor 6, the merger would "provide[] no additional benefits with respect to wholesale . . . or retail competition" and "raises a potential harm in that there is a potential conflict of interest if the company that controls the local distribution company seeks to delay changes necessary to encourage additional distributed generation because of its ownership of alternative generation sources." J.A. 222 ¶ 301.

And, as to Factor 7, the merger would have a "neutral" effect on conservation and the environment. J.A. 243 ¶ 342.

The Commission concluded that the "Joint Applicants have not persuaded the Commission that taken as a whole, the Proposed Merger will benefit District ratepayers and the District rather than merely leave them unharmed and, therefore, is in the public interest." J.A. 257 ¶ 355H.

2. Proposed Nonunanimous Settlement Agreement.

On October 6, 2015, after weeks of negotiation, the Joint Applicants, together with the District, OPC, the D.C. Water and Sewer Authority (now D.C. Water), the Apartment and Building Association of Metropolitan Washington ("AOBA"), the National Consumer Law Center, the National Housing Trust, and the National Housing Trust-Enterprise Preservation Corporation (collectively, the "Settling Parties"), executed a settlement agreement that addressed each of the deficiencies under the seven-factor test identified in the Commission's initial order. J.A. 1124-66. Through the NSA, which has 142 paragraphs and a non-severability provision, J.A. 1157 ¶ 137, the Settling Parties addressed the deficiencies identified in the Commission's initial order under each of the seven factors:

As to Factor 1 (the effect on ratepayers component), the NSA provides commitments by Exelon to provide $72.8 million in a Consumer Investment Fund ("CIF") for District residents. J.A. 1126 ¶ 3. This includes $25.6 million to offset any

increases to the distributional portions of residential customers' bills from the closing of the merger to April 2019, J.A. 1127 ¶ 4; a one-time credit of $14 million for residential customers, 1127 ¶ 5; $3.5 million for the Renewable Energy Development Fund, established by D.C. Code § 34-1436, J.A. 1127 ¶ 6; $3.5 million for the Sustainable Energy Trust Fund, established by D.C. Code § 8-1774.10, J.A. 1127 ¶ 7; $10.05 million for the Green Building Fund, established by D.C. Code § 6-1451.07, J.A. 1127-28 ¶ 8; and $16.15 million for low- and limited-income electric customers, including $9 million for the Low-Income Home Energy Assistance Program ("LIHEAP"), J.A. 1128 ¶ 9(b). Also as to Factor 1 (the effect on the District's economy component), the NSA provides commitments from Exelon to benefit the District's economy in several respects, including increasing its corporate presence in the District, providing workforce development programs, charitable contributions, and providing community support. J.A. 1128-35 ¶¶ 10-49.

As to Factor 2, the NSA includes provisions concerning Pepco's management structure and board of directors structure, including the employment and responsibility of specific officers. J.A. 1135-36 ¶¶ 51-55.

As to Factor 3, the NSA includes provisions concerning service reliability and quality, customer satisfaction, and safety. J.A. 1137-40 ¶¶ 56-62.

As to Factor 4, the NSA includes "ring-fencing" provisions to ensure that Pepco will not be adversely affected by Exelon's acquisitions or other financial activities or

by Pepco Holdings, Inc.'s non-utility operations, and to require that Exelon divest its interest in Pepco in the event that Exelon experiences a catastrophic financial event. J.A. 1140-48 ¶¶ 63-107.

As to Factor 5, the NSA includes provisions requiring Exelon's consent to the Commission's jurisdiction, prompt access to Pepco's records, and utility performance comparison reporting. J.A. 1148 ¶¶ 108-11.

As to Factor 6, the NSA includes provisions requiring Exelon's adherence to a code of conduct and provision of standard offer service, a separation of employees who would advocate before the Commission to prevent a conflict of interest between Exelon and Pepco, and competition protections. J.A. 1148-50 ¶¶ 112-17.

As to Factor 7, the NSA includes provisions promoting the development of solar generation, J.A. 1150-51 ¶¶ 118-20, including a commitment by Exelon to enter into negotiations in good faith to develop and construct 5 MW [megawatts] of solar generation at D.C. Water's Blue Plains Facility, J.A. 1151 ¶ 119; enhancing the interconnection process including support for customer owned generation, J.A. 1151-54 ¶¶ 121-27; and developing microgrid[1] facilities, J.A. 1154-56 ¶¶ 128-30, including

[1] A "microgrid" is "an integrated energy system consisting of interconnected loads and distributed energy resources (including generators and energy storage devices), which as an integrated system can operate in parallel with the utility grid or in an intentional islanding mode." 42 U.S.C. § 17231(b)(6).

a commitment by Pepco to coordinate with the District to interconnect and develop at least four microgrids, J.A. 1155 ¶ 129.

3. Commission's Rejection Of Nonunanimous Settlement Agreement By A Two-To-One Vote, With Suggested Revisions By One Commissioner.

On October 18, 2015, the Commission reopened the proceedings to consider the proposed merger subject to the terms of the NSA. Order 18011, J.A. 381 ¶ 1; *see* 15 DCMR § 130.10. Three days of evidentiary hearings were held from December 2 to 4, 2015. J.A. 940 ¶ 13. On February 26, 2016, the Commission, by a two-to-one vote, again rejected the proposed merger. Order 18109, J.A. 937 ¶ 1.

A. Majority opinion.

The majority, consisting of Commissioners Joanne Fort and Betty Anne Kane, who chairs the Commission, held that the proposed merger under the NSA was not in the public interest. Their criticisms focused primarily on aspects of Factor 1 of the seven-factor test, specifically the effect on ratepayers component.

The majority stated that (1) they were not convinced that the $25.6 million consumer base rate credit proposal was fair because it excluded nonresidential ratepayers, which already subsidize residential ratepayers, and might constrain the Commission's ability to address negative class rates of return in the future, J.A. 948-49, 951 ¶¶ 27-28, 33; (2) the NSA contained provisions that undermined competition and grid neutrality, J.A. 953-56 ¶¶ 38-45; (3) the proposed uses of the CIF for sustainability projects and LIHEAP do not improve Pepco's distribution system or

advance the Commission's objective to modernize the District's energy systems and distribution grid, J.A. 956-60 ¶¶ 46-50; and (4) the allocation of CIF funds to District agencies deprives the Commission of the ability to ensure that all of the funds are being used to further the objectives of enhancing the distribution system and benefiting District ratepayers, J.A. 960-61 ¶¶ 51-53.

Although the Commission rejected the NSA, it directed the Settling Parties to review the alternative terms proposed in Commissioner Fort's separate concurrence (discussed below) and file a notice accepting them or requesting other relief pursuant to 15 DCMR § 130.17(b). J.A. 1013 ¶ 206.

B. Concurring opinion of Commissioner Kane.

Commissioner Kane, in a separate concurring opinion, stated that the proposed merger was not in the public interest for two reasons. First, the merger would not create a local distribution company that distributes electricity more efficiently and reliably. J.A. 961 ¶ 55. Second, many of the benefits that were promised in the NSA could not be enforced by the Commission itself. She believed that the NSA's placement of funds offered by Exelon in "certain District special purpose funds and agencies . . . cannot be relied on to guarantee that the benefits will actually occur" and that "any funds proposed to support environmental, low income, microgrids, and other programs must be placed in a space that allows for oversight by and accountability to the Commission and absolutely protects them from diversion from other uses." J.A.

963 ¶ 59. In particular, she noted that the Executive Office of the Mayor in 2016 had proposed that the balances of several special purposes funds be swept into the General Fund, including the Green Building Fund, the Sustainable Energy Trust Fund, and the Renewable Energy Trust Fund. J.A. 964 ¶ 62.

C. Concurring opinion of Commissioner Fort.

Commissioner Fort, in a separate concurring opinion, proposed alternative terms addressing four of her concerns and stated that "if the NSA is revised to include the alternative terms as set out in Attachment A and accepted by all of the Settling Parties, it will result in a Merger Application which is, taken as a whole, in the public interest" and "[t]hen I can join" the dissenting commissioner, who believed the NSA was in the public interest without need for revision, "and approve the Revised NSA without further action by the Commission." J.A. 992 ¶ 139. She proposed the following specific revisions to provisions of the NSA, related to Factor 1 (the effect on ratepayers component) and Factor 7 (conservation and the environment):

(1) To "revise Paragraph 4 to reflect that a decision on the allocation of the $25.6 million Customer Base Rate Credit among Pepco's customers will be deferred until the next base rate case proceeding." J.A. 993 ¶ 141.

(2) To "revise NSA Paragraph 118 to remove the provision that calls for Exelon to develop 5 MWs of solar generation at DC Water's Blue Plains facility under 'commercially acceptable' terms; retain the commitment for Exelon to develop

7 MWs of solar generation in the District outside of Blue Plains by December 31, 2018[;] and add a commitment by Pepco to facilitate and expedite the interconnection of a solar project at DC Water's Blue Plains facility of up to 5 MWs with the developer of DC Water's choice." J.A. 994 ¶ 145.

(3) To revise paragraphs 6, 7, 8, 9, 56, and 58(c) of the NSA to "to ensure that the CIF and any penalty funds remain under the Commission's regulatory authority; is available for projects that support the mission of the Commission[;] and is not subject to being diminished or reallocated based on budgetary concerns within the District Government." J.A. 995 ¶ 149.

(4) To delete paragraph 128 of the NSA, under which Pepco had agreed to coordinate with the District to interconnect and develop least four microgrids, and to revise paragraph 129 to add a commitment to support and facilitate pilot projects approved by the Commission that emerge from a separate proceeding devoted to exploring ways to modernize the electricity distribution grid. J.A. 998 ¶ 159.[2]

D. Dissenting opinion of Commissioner Phillips.

Commissioner Willie Phillips dissented. He stated that the merger under the NSA was in the public interest, but that, to prevent it from being rejected, he did not

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[2] The RNSA is set forth as Attachment A to Order 18109, J.A. 1014; the NSA, as Attachment C, J.A. 1123; and a redlined copy showing the changes to the NSA by the RNSA as Attachment D, J.A. 1167.

object to Commissioner Fort's circulating alternative terms to the Settling Parties. J.A. 1001 ¶ 171. However, he criticized the majority's decision in several respects.

He noted that, in the Commission's decision rejecting the Joint Applicants' initial proposal, it laid out how the deficiencies could be corrected, but that, when the Joint Applicants worked to correct these deficiencies and got most of the other parties to agree, "the majority effectively moved the goal post in order to reject the settlement." J.A. 1002 ¶ 172. He stated that "once the Joint Applicants submitted a settlement that corrected the deficiencies identified by the Commission, then the settlement should have been deemed in the public interest, absent a substantial reason to reject it." J.A. 1002 ¶ 172. He criticized the majority for "reject[ing] the NSA on the grounds that the settlement terms could have been better" and stated that, per D.C. Code § 34-504, the "Commission's role in a settlement proceeding is simply to determine whether the NSA is in the public interest." J.A. 1003 ¶ 175.

He noted that the majority had four objections to the NSA—(1) $25.6 million for residential Customer Base Rate Credits, (2) development of renewable and distributed generation projects, (3) Exelon and Pepco roles in project development, and (4) administration of CIF funds by the District Government, J.A. 1005 ¶ 182—and that two of these "concern only public interest factor seven." J.A. 1005 ¶ 183. He found this strange because, in its order rejecting the Joint Applicants' initial proposal, the Commission found that the merger had a "neutral" effect as to Factor 7 and

declined to reject it on that ground; and, although in the NSA, the Settling Parties provided further specific commitments to address that factor, the majority penalized them for doing so. J.A. 1005 ¶ 183.

With respect to the majority's first objection to the NSA, he remarked that "[t]he majority does not claim, and cannot claim, that the $25.6 million residential customer rate credits will harm residential customers," but, instead, that "the proposed rate credits unfairly exclude non-residential customers and could potentially undermine Commission policy to address negative rate of return for residential customers." J.A. 1005 ¶ 184. However, he stated that the evidence did not support that conclusion, since it was based solely on the "last minute argument by GSA [the General Services Administration]," which did not appear at the hearing and did not present a case, J.A. 1105-06 ¶ 185, and, moreover, it "discounts the fact that the residential rate credits are supported by AOBA, which has served as a representative for commercial class customers in Commission proceedings," "[w]ith approximately 91 million square feet of commercial office space in the District." J.A. 1006-07 ¶ 187.

As to Commissioner Fort's proposed revisions relating to Factor 1 (effect on ratepayers component), Commissioner Phillips stated that courts have found "[t]here is no rule that settlements benefit all class members equally . . . as long as the settlement terms are rationally based on legitimate considerations." J.A. 1006 ¶ 186. He also remarked that he was "not convinced that the record supports reallocating the

proposed rate credit to benefit commercial customers, a condition that no commercial customer requested." J.A. 1007 ¶ 188. In addition, he "d[id] not agree with the majority's objection to the administration of CIF funds by the District Government because the majority dismisses critical evidence in the record"—specifically, that "[t]he District Government has pledged that the NSA is, 'a commitment to use these funds for the purposes set forth in the Settlement Agreement,' and that the District Government 'will actively oppose any effort by any entity to sweep or otherwise divert the funds from these purposes.'" J.A. 1009 ¶ 194.

As to the majority's objections relating to Factor 7, he stated that he was "not persuaded by the record that [the] Joint Applicants' commitment to develop solar and distributed generation], as asserted by the majority, will not improve Pepco's distribution system, and that Exelon/Pepco post-merger project development roles are anti-competitive," J.A. 1007 ¶ 189; and that "[t]here is no evidence that Formal Case No. 1130 (energy system modernization initiative), as asserted by the majority, is at odds with the NSA," J.A. 1008-09 ¶ 193.

As a general criticism of the majority's decision, he remarked:

> In my view, the majority has "stepped into the shoes" of the parties in a way that is simply unwarranted in order to justify their rejection of the NSA. Under our standard of review, the Commission is not tasked with fashioning the *best* or even a *better* settlement, which is what the proposed alternative terms aim to do.

J.A. 1009 ¶ 195 (emphasis in original). He concluded:

> Ultimately, the legal standard is not whether the Commission can make a good deal better. As stated, the standard is whether the NSA is in the public interest. A principle that is so important that it is embedded in our mission, which is to serve the public interest by ensuring that financially healthy utilities provide safe, reliable and quality services at reasonable rates. The Commission does not serve its mission by seeking to author a better settlement than what the parties have negotiated simply because we believe there are terms or conditions that could have been included.

J.A. 1011 ¶ 200.

4. Commission's Adoption Of Revised Nonunanimous Settlement Agreement.

The Joint Applicants filed a Request for Other Relief in which they asked the Commission to adopt one of three options—(1) the NSA, (2) the RNSA, or (3) a modified version of the RNSA preserving the benefits of the residential customer base rate credit. J.A. 1403 ¶ 8. Oppositions were filed by most other parties. J.A. 1401-02 ¶ 6. The District argued that only the NSA was acceptable, as it would "provide[] direct and tangible benefits to ratepayers, promote[] sustainability, and otherwise remain[] in the public interest." J.A. 1344.

On March 23, 2016, the Commission, again two-to-one, adopted Option 2 (the RNSA) as a resolution on the merits of the application for the merger, concluding that it is in the public interest. Order 18148, J.A. 1399, 1421 ¶¶ 1, 45. The Commission found that, under the RNSA, Exelon committed to the creation of an escrow fund that includes $21.55 million for the Modernizing the Energy Delivery System for Increased Sustainability ("MEDSIS") Pilot Project Fund Subaccount (for grid modernization) and $11.25 million for the Energy Efficiency and Energy

Conservation Initiatives Fund Subaccount "to support innovative energy efficiency and energy conservation initiatives with a primary focus on assisting low and limited income residents and to help reduce the burden of energy bills." J.A. 1423-24 ¶¶ S, T. Specifically, the RNSA, which is attached to the order, provides:

> 4. Within sixty (60) days after Merger close, Exelon shall provide Pepco with the funds and Pepco shall establish a Formal Case No. 1119 Escrow Fund with two subaccounts: the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount and The Energy Efficiency and Energy Conservation Initiatives Fund Subaccount. The escrowed funds shall be placed in an interest-bearing account or invested in instruments issued or guaranteed as to princip[al] and interest and
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> 5. Within sixty (60) days after Merger close, Exelon shall provide funding in the amount of $21.55 million to the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount within the Formal Case No. 1119 Escrow Fund. *The fund shall be held in escrow until the Commission approves a pilot project and directs that the funds be released.*
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> . . .
>
> 7. To support innovative energy efficiency and energy conservation initiatives with a primary focus on assisting low and limited income residents and to help reduce the burden of energy bills and long-standing energy debt on low and limited income residents in the District:
>
> (a) Within sixty (60) days after Merger close, Exelon shall provide funding in the amount of $11.25 million to the Energy Efficiency and Energy Conservation Initiatives Fund Subaccount within the Formal Case No. 1119 Escrow Fund to support innovative energy conservation or energy efficiency programs targeted primarily towards both affordable multifamily units and master metered multifamily buildings which include low and limited income residents that are sponsored or operated by the District or by qualified non-profit entities that support and enable targeted energy-efficiency programs. *The funds shall be held in escrow until the Commission directs that the funds be released.*

J.A. 1467-68 ¶¶ 4, 5, 7 (emphasis added).

5. Commission's Denial Of Applications For Reconsideration.

Applications for reconsideration of the Commission's order approving the merger under the RNSA were filed by the District, OPC, DC SUN, Public Citizen, GRID2.0 Working Group, and DC Public Power. J.A. 1693 ¶ 1. The District argued, *inter alia*, that the Commission failed to make an affirmative finding that the RNSA as a whole is in the public interest. J.A. 1607.

On June 17, 2016, the Commission denied the motions for reconsideration. Order 18243, J.A. 1693 ¶ 1. In response to the District's argument, the Commission stated:

> In order to come to the conclusion that Option 2, essentially the Revised NSA, when taken as a whole was in the public interest, instead of reiterating all of the detailed rationale expressed by the Commission in Order Nos. 17947 and 18109, including those sections referenced above, the Commission expressly incorporated those orders by reference "to the extent that those findings are consistent with the findings, determinations, and conclusions made in this Order."

J.A. 1732-33 ¶ 91 (quoting J.A. 1422 ¶ 47 n.134). The Commission further stated:

> [T]he Commission then provided 69 findings of fact that directly tracked the seven public interest factor analysis in Order No. 17947 and culminated in five conclusions of law which, among other things, found the: "Proposed Merger, as modified by the revised terms and conditions set forth in Attachment B to this Order, produces direct and tangible benefits to ratepayers and upon balance of the interests of Pepco's shareholders and investors with the interests of ratepayers and the community, the benefits to the shareholders do not come at the expense of ratepayers . . . will benefit District ratepayers and the District rather

than merely leave them unharmed . . . [and] when taken as a whole," is in the public interest under D.C. Code §§ 34-504 and 34-1001.1.

Id. The reference to the "69 findings of fact" is to Paragraph 47 of the order approving the RNSA, Order 18148, J.A. 1422-29.

6. Appeals.

Timely petitions for review were filed by OPC (No. 16-AA-815), the District (No. 16-AA-817), and DC SUN and Public Citizen, Inc. (No. 16-AA-825). The Court *sua sponte* consolidated the appeals. Order of September 8, 2016. Exelon; PHI; Exelon Energy Delivery Company, LLC; and Pepco intervened on the side of the respondent Commission.

STANDARD OF REVIEW

This Court's "review of a Commission order is 'limited to questions of law . . . ; and the findings of fact by the Commission shall be conclusive unless . . . such findings . . . are unreasonable, arbitrary, or capricious.'" *Wash. Gas Light Co. v. D.C. Pub. Serv. Comm'n*, 856 A.2d 1098, 1104 (D.C. 2004) (quoting D.C. Code § 34-606). The language of D.C. Code § 34-606 was added by Congress in its 1935 revision to the D.C. Public Utilities Act. The legislative history shows that, although the amendatory bill as reported out of committee provided an "arbitrary or capricious" standard of review, *see* H.R. Rep. No. 74-665, 74th Cong., 1st Sess. 3 (1935), the word "unreasonable" was added during its consideration on the floor. *See* 79 Cong. Rec. 13344 (Aug. 16, 1935); 79 Cong. Rec. 13812 (Aug. 20, 1935). The hearings on

the legislation show that the word "unreasonable" was added at the request of Pepco and that its purpose was to provide "the full opportunity for a court review such as is generally given by the States." *Procedural Changes Affecting the Public Utilities Commission: Hearing Before the Subcomm. of the Comm. on the District of Columbia*, 74th Cong. 4 (1935); *see Wash. Gas Light Co. v. Pub. Serv. Comm'n of D.C.*, 982 A.2d 691, 705 & n.43 (D.C. 2009) (citing hearings). The proponents of adding that word stated that "[o]ur position is that the word 'unreasonable' implies the exercise of detailed discretion and judgment," id. at 45, and that it "is necessary . . . to give these utilities a full and adequate judicial review." *Id.* at 52; *see* 3 *Koch & Murphy Admin. Law & Prac.* § 9.24 (2016) (comparing reasonableness review with arbitrariness review).

The Commission's findings also must be supported by substantial evidence, as required by the District of Columbia Administrative Procedure Act ("DCAPA"). *See* D.C. Code § 2-509(e) (2012); *Telephone Users Ass'n v. Pub. Serv. Comm'n of D.C.*, 304 A.2d 293, 301 (D.C. 1973). Moreover, "[t]here must be a demonstration in the findings of a rational connection between facts found and the choice made." *Wash. Pub. Interest Org. v. Pub. Serv. Comm'n of D.C.*, 393 A.2d 71, 77 (D.C. 1978); *see Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n of D.C.*, 514 A.2d 1159, 1171 (D.C. 1986).

In addition, "[i]n order to ensure that judicial review can be meaningful, [this Court has] imposed a separate and independent burden on the Commission to explain its actions fully and clearly." *Potomac Elec. Power Co. v. Pub. Serv. Comm'n of D.C.*, 661 A.2d 131, 135 (D.C. 1995). This Court "has a responsibility to hold the Commission accountable—through as many remands as necessary—for satisfying a burden all its own: to explain its actions fully and clearly." *Wash. Pub. Interest Org.*, 393 A.2d at 75. "Absent precise explanation of methodology as applied to the facts of the case, there is no way for a court to tell whether the Commission, however expert, has been arbitrary or unreasonable." *Id.* at 77.

SUMMARY OF ARGUMENT

1. The Commission's rejection of the merger under the terms of the NSA was based on findings that were unreasonable, arbitrary, and capricious, and also was contrary to law and did not rationally flow from its findings. As Commissioner Phillips recognized in dissent, the Commission overstepped its role by rewriting the settlement to force what it thought would be a better deal for the District. Its statutory mandate was simply to decide whether the NSA was in the public interest. Moreover, the Commission's alternative terms in fact affirmatively violated the law. The Commission should have approved the NSA.

A. The NSA was in the public interest. It responded to the deficiencies identified by the Commission in its order rejecting the Joint Applicants' initial

proposal under each of the seven factors to determine whether a merger is in the public interest, while strengthening the positive aspects. Yet the Commission required four changes to the NSA. Although the Commission apparently believed these alternative terms made the agreement a better deal, they were not necessary for the NSA to satisfy the public-interest factors, and in some respects made the deal worse.

The first change was to paragraph 4 of the NSA. As negotiated by the Settling Parties, that paragraph offset residential customer rate increase until 2019. The Commission ordered the paragraph replaced with a provision deferring the allocation of this contribution between residential and commercial customers to the Commission's next rate case. That plainly was to the detriment of residential ratepayers. Moreover, there was no basis in the evidence to say this change was needed to prevent unfairness to commercial customers, as evidenced by the fact that the NSA was supported by AOBA, which represented commercial customers.

The second change was to paragraph 118 of the NSA, which had required Exelon to help develop 10 MW of solar generation, including 5 MW at Blue Plains, unless that was not commercially feasible, in which case the total commitment would be reduced to 7 MW. The majority's assertion that it would undermine competition and grid neutrality is illogical as it is difficult to see how this perceived deficiency is remedied by reducing Exelon's commitment to develop solar generation from 10 MW to 7 MW outside of Blue Plains. Moreover, it is inconsistent with the Commission's

earlier order finding the initial proposal, which had no specific commitments to address environmental concerns, was "neutral" with respect to Factor 7 and, thus, would not be a basis for disapproval.

The third change was to paragraphs 6, 7, 8, 9, 56, and 58(c) of the NSA, which provided for contributions by Exelon to special funds created by the Council and administered by DOEE or the Mayor. The alternative terms, instead, established funds under the Commission's control for fund energy efficiency and energy conservation initiatives and grid modernization. The Commission's reason was to prevent the Council and Mayor from reallocating assets in special funds to the General Fund. However, this ignored the uncontroverted evidence that the District would actively oppose this, and in any event the Commission's apparent distrust of the political branches of the District's Government was not a legitimate reason for concluding that the NSA was not in the public interest.

The fourth change was to delete paragraph 128 of the NSA, which had provided a commitment from Pepco to coordinate with the District to interconnect and develop at least four microgrids, and to revise paragraph 129 to add a commitment to support and facilitate pilot projects approved by the Commission that emerge from a separate proceeding devoted to exploring ways to modernize the electricity distribution grid. This is inconsistent with the Commission's initial finding that the merger would have "neutral" effect on the factor dealing with conservation and the environment.

Moreover, the addition to paragraph 129 did little, as the paragraph already contained commitments by Exelon to identify technologies and policies to modernize the District's energy delivery system for increased sustainability and to make the energy delivery system more reliable, efficient, cost-effective and interactive.

B. The problems with the Commission's rejection of the NSA go deeper than the fact the rejection was unreasonable, arbitrary, and capricious and did not rationally flow from its findings. The Commission's alternative terms establishing funds under its control for energy efficiency and conservation and grid modernization were in fact affirmatively illegal, as they exceeded its statutory authority. The Commission's establishment of a fund for "energy efficiency and conservation initiatives" contravened legislation enacted by the Council that had transferred authority over such programs from the Commission to DOEE. Although the Council previously had given the Commission control over a program to promote energy efficiency, in 2008 the Council, in enacting CAEA, terminated the Commission's role over renewable energy programs because of its dissatisfaction—made express in the legislative history—with the Commission's handling of the programs. The Council instead created a Sustainable Energy Trust Fund and an Energy Assistance Fund as special funds to be administered by DOEE, not the Commission. The Commission's establishment of a fund under its own control for similar programs contravenes the

Council's express decision to terminate the Commission's role in this area and undercuts DOEE's administration of the programs.

The Commission's establishment and control over this escrow account also contravened Section 450 of the Home Rule Act, D.C. Code § 1-204.50, which requires District agencies to deposit all public moneys in the District's General Fund or a special fund created by the Council or Congress. Section 450 is substantively identical to the federal "Miscellaneous Receipts Statute," 31 U.S.C. § 3302, which requires that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable." The purpose of such statutes is to prevent a government agency from augmenting its appropriations without legislative authority. The Commission is an "agency . . . of the District" and has "received" money "in its official capacity" because it has effectively required its creation and has exercised control over it.

The Commission's stated purpose for giving itself control over these funds was to prevent the Council from transferring the assets in those funds to the General Fund by enacting legislation to that effect. However, this is not a legitimate purpose because it is contrary to the core principle of appropriations law reflected in Section 450 and, thus, violates that provision of the District's Charter.

For these reasons, the Commission should have adopted the NSA, which did not fall prey to these problems, rather than the RNSA. The Court should reverse and remand with instructions for the Commission to approve the NSA.

2. At minimum, remand is required because the Commission failed to present an adequate analysis of the NSA or the RNSA and failed to explain its actions fully or clearly. As shown, the reasons the Commission gave for rejecting the NSA and requiring alternative terms do not withstand scrutiny. Moreover, in its order approving the merger under the RNSA, the Commission did not undertake an independent analysis under the seven-factor test but relied on the fact that the Settling Parties agreed that a merger under the *NSA* was in the public interest. It was insufficient for the Commission simply by footnote to incorporate by reference a block of findings in its order rejecting the Joint Applicants' initial proposal or its order rejecting the merger under the NSA. The Commission was required to explain properly why the NSA was not in the public interest, and then why the RNSA was in the public interest. It failed to do either.

ARGUMENT

I. The Commission's Order Rejecting The Merger Under The NSA Should Be Reversed Because The NSA Was In The Public Interest And The Commission Not Only Overstepped Its Role In Requiring Alternative Terms To Make A Better Deal But Also Affirmatively Violated The Law.

Under D.C. Code § 34-606, this Court may reverse orders of the Commission if they are contrary to law or if they are based on findings of fact that are unreasonable,

arbitrary, or capricious. *See Potomac Elec. Power Co.*, 661 A.2d at 135. Moreover, this Court has held that the Commission, like any other District agency, is subject to the requirements of the DCAPA that its findings be supported by substantial evidence on the record and that its decision rationally flows from its findings. *See Wash. Pub. Interest Org.*, 393 A.2d at 77. Applying these standards, the Court should overturn the Commission's rejection of the proposed merger under the NSA as not being in the public interest and, relatedly, its conditioning of its approval of the merger on alternative terms to several provisions of the NSA. As Commissioner Phillips noted, while the Commission may have believed the alternative terms made the agreement a better deal, the proper role of the Commission was to determine whether the proposed merger under the NSA was in the public interest, not whether a better agreement could be achieved. Moreover, some of the alternative terms affirmatively violated the law.

A. The Commission's alternative terms displaced terms in the NSA that already satisfied the applicable public-interest factors, and the changes by the RNSA did not correct any substantial deficiencies.

In its order rejecting the Joint Applicants' initial application (No. 17947), the Commission thoroughly analyzed the effect of the proposal under each of the factors of the established the seven-factor test to determine whether a merger is in the public interest under D.C. Code § 34-504. As Commissioner Phillips pointed out, the Commission thereby laid out how the deficiencies could be corrected. J.A. 1001 ¶ 171. Responding to this order, the Settling Parties negotiated a settlement

agreement that corrected the deficiencies identified in the Commission's initial order under each of the seven factors. It also strengthened, or at least left intact, the aspects of the application that the Commission had found promoted the public interest. For instance, the agreement reflected considerable contributions and other commitments by Exelon, including $72.8 million benefiting District residents. J.A. 1126 ¶ 3.

However, instead of approving the merger under the NSA, the Commission conditioned its approval on the acceptance of alternative terms that modified several of the terms of the NSA but essentially displaced provisions that were already in the public interest. That was improper, as by statute the Commission was only to rule on whether the NSA as a whole was "in the public interest." D.C. Code § 34-504. In rejecting the NSA because it believed that the alternative terms achieved a better deal, the Commission asked the wrong question.

The RNSA amended 10 of the 142 paragraphs of the NSA by making changes in four discrete areas. J.A. 1170-72, 1181-83, 1198-99. The other 132 paragraphs were not changed, and, thus, the Commission found them acceptable. The 10 paragraphs of the NSA that the Commission altered, however, already satisfied the pertinent public-interest factors.[3]

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[3] The strike and score version misnumbers paragraphs 7 to 142 as paragraphs 8 to 143, respectively. In addition, it does not reflect the change to paragraph 56 (misnumbered as 57), which, at the bottom of J.A. 1180, deletes the reference to the

The first change was to paragraph 4 of the NSA, which had allocated $25.6 million to offset residential customer rate increase until 2019, replacing it with a provision deferring the allocation of this contribution between residential and commercial customers to the Commission's next rate case. J.A. 1017 ¶ 4. As Commissioner Phillips pointed out, the Commission understandably did not deny that the residential rate credit would benefit residential customers, and there was no evidence that it would be unfair to commercial customers. J.A. 1005 ¶ 184. Although GSA asserted it was unfair, GSA did not present any evidence to this effect, while AOBA, which represented commercial customers with 91 million square feet of office space, supported this provision. J.A. 1006-07 ¶ 187. The Commission's finding that this change was necessary to promote the public interest despite the position of commercial customers' principal representative and the lack of other supporting evidence did not rationally flow from the evidence.

The second change was to paragraph 118 of the NSA, which had required Exelon to help develop 10 MW of solar generation, including 5 MW at Blue Plains, unless that was not commercially feasible, in which case the total commitment would be reduced to 7 MW. J.A. 1150-51 ¶ 118. The RNSA lowered Exelon's commitment

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DC Sustainable Energy Trust Fund and substitutes a reference to the MEDSIS Pilot Project Fund Subaccount. *Compare* J.A. 1137 ¶ 56 (NSA) *with* J.A. 1027 ¶ 56 (RNSA).

to develop 7 MW of solar generation outside of Blue Plains, and removed Exelon's requirement to develop the 5 MW of solar generation at Blue Plains and placed it with D.C. Water, leaving Pepco only with the interconnection responsibility, J.A. 1151 ¶ 120, a responsibility that Pepco, as an Electric Distribution Company, already has as a matter of law. *See* 15 DCMR §§ 4001.2, 4099.

The majority asserts that "the NSA assigns roles to Exelon and Pepco that undermine competition and grid neutrality and are inconsistent with the District's restructured market." J.A. 947 ¶ 25. However, logically, it is difficult to see how this perceived deficiency is remedied by reducing Exelon's commitment to develop solar generation from 10 MW (including 5 in Blue Plains) to 7 MW outside of Blue Plains. Moreover, as Commissioner Phillips pointed out, the Commission's faulting of the NSA's terms promoting renewal energy is inconsistent with its order (No. 17947) rejecting the Joint Applicants' initial proposal, which found that the proposal, which had no specific commitments addressing environmental concerns, was "neutral" with respect to Factor 7 and, thus, would not be a basis for disapproval. J.A. 1005 ¶ 183. The Commission's changes do not rationally flow from the evidence and are arbitrary.

The third change was to paragraphs 6, 7, 8, 9, 56, and 58(c) of the NSA, which provided for contributions by Exelon to special funds created by the Council and administered by DOEE or the Mayor—*i.e.*, the Renewable Energy Development Fund ($3.5 million), Sustainable Energy Trust Fund ($3.5 million), Green Building Fund

($10.05 million), and Energy Assistance Trust Fund ($16.15 million) (for low- and limited-income customers)—a total of $33.2 million. J.A. 1127-28, 1137, 1139. The RNSA deleted these provisions and, instead, required Exelon to establish and fund an escrow account with $21.55 million for the MEDSIS Pilot Project Fund Subaccount (for grid modernization) and $11.25 million for the Energy Efficiency and Energy Conservation Initiatives Fund Subaccount ("to support innovative energy efficiency and energy conservation initiatives with a primary focus on assisting low and limited income residents and to help reduce the burden of energy bills"). J.A. 1423-24 ¶¶ S, T. These funds—a total of $32.8 million—would be disbursed at the Commission's direction. *See* J.A. 1435 ¶¶ 5, 7.

The reason that Commissioner Fort gave for requiring the alternative terms was "to ensure that the CIF and any penalty funds remain under the Commission's regulatory authority; is available for projects that support the mission of the Commission[;] and is not subject to being diminished or reallocated based on budgetary concerns within the District Government." J.A. 995 ¶ 149. However, as Commissioner Phillips pointed out, the Commission ignored the uncontroverted testimony of District officials that "that the District Government has pledged that the NSA is, 'a commitment to use these funds for the purposes set forth in the Settlement Agreement,' and that the District Government "will actively oppose any effort by any entity to sweep or otherwise divert the funds from these purposes." J.A. 1009 ¶ 195.

Moreover, the Commission did not explain how its distrust of the political branches of the District Government would be a legitimate reason to conclude that the NSA was not in the public interest. (Indeed, as discussed in the next section, the Commission actually violated the law by asserting control over these funds.) Again, the Commission's decision that these changes to the NSA were necessary to satisfy the applicable public-interest factor was unreasonable and arbitrary, and does not rationally flow from the evidence.

The fourth change was "[t]o delete paragraph 128 of the NSA, which had provided a commitment from Pepco to coordinate with the District to interconnect and develop least four microgrids, and to revise paragraph 129 to add a commitment to support and facilitate pilot projects approved by the Commission that emerge from a separate proceeding devoted to exploring ways to modernize the electricity distribution grid." J.A. 998 ¶ 159. Both of these provisions serve Factor 7 (conservation of natural resources and preservation of environmental quality).

As noted, the Commission concluded in its initial order that the merger would have a "neutral" effect with respect to this factor and, hence, would not be grounds for disapproving the merger. J.A. 243 ¶ 342. Hence, it is difficult to see how Exelon's commitment to develop microgrids in paragraph 128 would render the NSA deficient in this respect. Similarly, although the RNSA's addition of a sentence to paragraph 129 requiring support for certain pilot projects of the Commission may have made the

agreement a better deal in the Commission's view, paragraph 129 of the NSA without this sentence already required Exelon to "support, and cause Pepco to continue to support, the Commission's objectives in opening this proceeding to identify technologies and policies that can modernize the District of Columbia energy delivery system for increased sustainability and to make the District of Columbia energy delivery system more reliable, efficient, cost-effective and interactive." J.A. 1199 ¶ 130.[4] Yet again, the Commission's conclusion that these changes to the NSA were necessary to satisfy the pertinent public-interest factors was unreasonable and arbitrary, and does not rationally flow from the evidence.

Thus, the Commission's conclusion that these four changes to the NSA were necessary to satisfy the pertinent public-interest factors should be overturned. The Commission's insistence on specific alternative terms to the NSA, which it believed would make the settlement agreement a better deal, was unreasonable and arbitrary because it overstepped its role, which was to determine whether the merger under the NSA was in the public interest under the seven-factor test, not whether a better deal could be achieved.

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[4] The majority also indicated that the NSA did not "improve" Pepco's distribution system or "advance" the Commission's objective to modernize the District's energy systems and distribution grid. J.A. 947 ¶ 25 . This careful language too is consistent with a finding of a neutral rather than a negative effect.

B. The Commission's alternative terms establishing funds under its control for energy efficiency and conservation and grid modernization violated the law.

An additional reason that the rejection of the NSA and the requirement to accept the RNSA's alternative terms was unreasonable and arbitrary was that particular changes resulted in terms that affirmatively violated the law. The RNSA's revisions to paragraphs 6, 7, 8, 9, 56, and 58(c) of the NSA exceeded the Commission's authority in two respects, whereas the NSA suffered from neither defect. First, the revisions contravened an act of the Council, CAEA, which expressly transferred authority over energy efficiency and conservation programs from the Commission to DOEE. Second, they contravened a key provision of the Home Rule Act, embodied in Section 450, governing the deposit and control of public moneys.

The majority's express purpose for transferring control over these funds to itself was to prevent the Council from transferring the assets in those funds to the General Fund by enacting legislation to that effect. *See* J.A. 956-57 & n.101, 995 ¶¶ 46-47, 149. This purpose is also reflected in the concurring opinion of Commissioner Kane. *See* J.A. 963-64 ¶¶ 59-62. However, this is not a legitimate purpose. As this Court has held, the Council and Mayor have the power under the Home Rule Act to transfer funds from special funds and programs to the General Fund, which may be necessary to respond to a budget shortfall. *See Wash. D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299, 304-05 (D.C. 2012). The Commission is without authority to

negate this power. Actions of the Commission that, like these, exceed the Commission's statutory authority warrant reversal. *See Wash. Gas Light Co. v. Pub.*, 982 A.2d at 696 (reversing imposition of fine on utility because it was in excess of Commission's statutory authority).

1. The Commission contravened legislation enacted by the Council that had expressly transferred authority over energy efficiency and conservation programs from the Commission to DOEE.

The Commission's establishment by the RNSA of an escrow account that includes $11.25 million "to support innovative energy efficiency and energy conservation initiatives," J.A. 1423-24 ¶¶ S, T, effected a reassertion of authority over energy efficiency and conservation programs by the Commission contrary to the Council's express decision to terminate the Commission's authority over such programs and to transfer authority to DOEE because of the Council's dissatisfaction with the Commission's handling of the programs.

In 1999, the Council had enacted RECACPA, which established the Reliable Energy Trust Fund and provided that the Commission "shall establish a program to promote energy efficiency in the District of Columbia" and "shall establish a program to promote the use of electricity from renewable energy sources as defined in § 34-1517." D.C. Code § 34-1514(a), (c)(2)(A), (3) (2001). However, in 2008, the Council enacted CAEA, which terminated the Commission's authority over energy efficiency and conservation programs and transferred this authority to DOEE. CAEA

established the Sustainable Energy Trust Fund and required DOEE to contract with a SEU "to conduct sustainable energy programs on behalf of the District of Columbia." D.C. Code § 8-1774.01(a). CAEA also established an Energy Assistance Trust Fund to "be used solely to fund the existing low-income program," D.C. Code § 8-1774.11(a)(1), (c), which is defined as the LIHEAP [Low-Income Home Energy Assistance Program] program, D.C. Code § 8-1773.01(5). Critically, CAEA abolished the Commission-administered Reliable Energy Trust Fund, transferring one-half its funds to the Sustainable Energy Trust Fund and one-half to the Energy Assistance Fund, both to be administered by DOEE. *Id.* § 212(a), 55 D.C. Reg. 9237-38. These funds are "special funds" established by the Council under Section 450 of the Home Rule Act. *See* D.C. Code §§ 8-1774.10(a)(2), 8-1774.11(a)(2).[5]

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[5] Although the Commission is an independent agency under Section 493 of the Home Rule Act, D.C. Code § 1-204.93, and, thus, cannot be abolished by the Council, the Council has the power to determine the Commission's powers and duties in the exercise of the legislative power over "all rightful subjects of legislation within the District." Home Rule Act § 302, D.C. Code § 1-203.02 (2012); s*ee Woodroof v. Cunningham*, 147 A.3d 777, 782 (D.C. 2016); *Andrew v. Am. Imp. Ctr.*, 110 A.3d 626, 629 (D.C. 2015); *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010).

The legislative history of the Home Rule Act makes this clear. The question of the Council's legislative authority over the Commission came up several times during discussions of drafts of the Home Rule Act. For instance, in the Markup of the Subcommittee on Government Operations of the District of Columbia Committee on Discussion Draft No. 1 (May 21, 1973), the following exchange occurred between House Legislative Counsel Michael Senger and Representative Brock Adams:

The legislative history of CAEA shows that one of the Council's primary reasons for enacting the legislation was its dissatisfaction with the Commission's handling of the energy efficiency programs over which the Council had given the Commission administrative authority under RECACPA, funded by the Reliable Energy Trust Fund. The Council's committee report explains that as of 2004, the Commission had not approved or funded any programs, despite the fact that DOEE had submitted several proposals. D.C. Council, Report on Bill 17-492, the "Clean and Affordable Energy Act of 2008," at 8-9 (June 2, 2008) ("Committee Report"). The report noted that, "[i]n 2004, dissatisfied with the progress of the programs, the Council passed Law 15-342, the 'Omnibus Utility Amendment Act of 2004,'" which included various provisions to expedite the Commission's handling of these programs, but that they had no effect. Committee Report 8-9. The report concluded that:

> Although there were various recommendations from the Commission that resulted in resubmissions of program proposals and modification of previous submissions, the fact remains that the Commission, charged with establishing energy efficiency and renewable energy programs by both the Retail Electric Competition and Consumer Protection Act of

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> Mr. SENGER. Once more, so I am clear on this, the powers and duties of the Public Service Commission could be changed by the Council.
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> Mr. ADAMS. Correct.

Staff of the Senate Comm. on the District of Columbia, 93rd Cong., 1st Sess., Legislative History of the D.C. Self-Government and Governmental Reorganization Act (Comm. Print 1974) 304; *accord id.* 612, 1747.

> 1999 and the Omnibus Utility Amendment Act of 2004, failed to do so in a timely fashion.

Committee Report 9.

The Commission's establishment of the Energy Efficiency and Energy Conservation Initiatives Fund in an escrow account under the Commission's control directly contravenes CAEA, which vested DOEE with exclusive authority over sustainable energy programs and terminated the Commission's authority over such programs. The NSA did not have these problems.

The Commission's establishment of a regime in this area not only contravenes the Council's legislative decision, but also has an adverse practical impact because it creates a redundancy with programs established by CAEA to be administered under contract by DOEE by the SEU. As OPC argued in its application for reconsideration of the Commission's order:

> The Commission's unilateral decision to provide energy efficiency services to the exact same population that the SEU serves could cause the SEU to fail to meet its benchmarks, which could result in financial penalties. *See* D.C. Code § 8-1774.02(c) (2015) ("The SEU contract shall be performance-based and shall provide financial incentives for the SEU to surpass the performance benchmarks set forth in the SEU contract. The SEU contract shall also provide financial penalties to be applied to the SEU if the SEU fails to meet the required performance benchmarks.")

J.A. 1566 n.102. Thus, the Commission's action jeopardizes the success of the SEU and, hence, DOEE's administration of the program.

2. The Commission's assertion of control over the funds in this escrow account also violates the Home Rule Act requirement that District agencies deposit all public funds in the District's General Fund or a special fund created by the Council or Congress.

The Commission's establishment of funds under its control for energy efficiency and conservation and grid modernization programs exceed the Commission's statutory authority for the additional reason that they violate a key provision of the Home Rule Act governing the control and deposit of public monies. It is a fundamental principle of appropriations law that government agencies deposit public moneys in the government's general fund or a special fund created by legislation. In the case of the District, this principle is embodied primarily in Section 450 of the Home Rule Act, D.C. Code § 1-204.50, a provision of the District's Charter, which is "[c]omparable to a state constitution." *Zukerberg v. D.C. Bd. of Elections & Ethics*, 97 A.3d 1064, 1072 (D.C. 2014). Section 450 establishes the General Fund, allows the Council to establish "such additional special funds as may be necessary for the efficient operation of the government of the District," and, critically, directs that "[a]ll money received by any agency, officer, or employee of the District in its or his official capacity *shall belong to the District government and shall be paid promptly to the Mayor for deposit in the appropriate fund*." (Emphasis added). This Court has held that this provision authorizes the Council to transfer monies from special funds to the General Fund to respond to a budget shortfall. *See Wash. D.C. Ass'n of Realtors, Inc*, 44 A.3d at 303-04.

The escrow account established by the RNSA, providing $21.55 million to the MEDSIS Pilot Project Fund and $11.25 million to the Energy Efficiency and Energy Conservation Initiatives Fund, is not a special fund created by Congress or the Council. In contrast, the Sustainable Energy Trust Fund and Energy Assistance Trust Fund are special funds established by the Council under Section 450, as are the Renewable Energy Development Fund and Green Building Fund, from which $3.5 and $10.05 million, respectively, were transferred to the Commission's control. *Compare* J.A. 1127 ¶ 8 (NSA) *with* J.A. 1017 ¶¶ 7-8 (RNSA).

Section 450 of the Home Rule Act is substantively identical to the federal "Miscellaneous Receipts Statute," 31 U.S.C. § 3302, which requires that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable." One of the primary purposes of such statutes is to prevent a government agency from augmenting its appropriations without legislative authority. The policy is explained by the General Accountability Office ("GAO"):

> As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority. When Congress makes an appropriation, it also is establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is to prevent a

> government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.

Principles of Federal Appropriations Law 6-162 to 6-163 (3d ed. 2004) ("GAO Redbook"). As the D.C. Circuit has explained:

> The statute's requirement that a Government official "receiving money for the Government from any source" deposit the money in the Treasury, 31 U.S.C. § 3302(b), derives from and safeguards a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause, that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7.

Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense, 87 F.3d 1356, 1361 (D.C. Cir. 1996).

The Commission is an "agency . . . of the District" and has "received" money "in its official capacity" within the meaning of Section 450. Settled interpretations of the federal Miscellaneous Receipts Statute hold that an agency has constructively "received" a fund if it has effectively required its creation and has exercised control over it. *See* GAO Redbook 6-177 (noting that both the Comptroller General and the courts have applied the concept of "receiving money for the government" broadly, and have made it clear that an agency cannot avoid the miscellaneous receipts statute simply by changing the form of its transactions to avoid the receipt of money otherwise owed to it).

Thus, in *Scheduled Airlines Traffic Offices*, the D.C. Circuit held that the Department of Defense violated the Miscellaneous Receipts Statute by requiring private companies serving as on-site government travel agencies to contribute a portion of their revenues to a local "Morale, Welfare, and Recreation" Fund to provide recreational and other services to members of the military community. 87 F.3d at 1357. Similarly, in *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958 (4th Cir. 1984), the Fourth Circuit held that the Federal Aviation Administration ("FAA") violated the Miscellaneous Receipts Statute by contractually requiring air carriers to contribute to the Air Carriers Trust Fund, which the FAA created to purchase ground transport buses for Dulles International Airport. *Id.* at 965. In affirming injunctive relief against the practice, the court explained:

> [T]he trust arrangement both undermined the integrity of the congressional appropriation process and ignored substantive duties under the procurement statutes. Viewed realistically, the Trust was an attempt by the FAA to divert funds from their intended destination—the United States Treasury. Although the purpose for which the FAA sought the funds was laudable, its methods certainly cannot be praised. Were the contract between the Trust and Eagle left intact, the agency's end-run around normal appropriation channels would have been successful, enabling it effectively to supplement its budget by $3 million without congressional action.

Id. at 968.

By contrast, the NSA is consistent with Section 450. The NSA provides that Exelon contribute (1) $3.5 million to the Renewable Energy Development Fund established by D.C. Code § 34-1436, or to one or more Community Development

Financial Institutions, for the expansion of renewable generation in the District Support for Energy Efficiency Initiatives; (2) $3.5 million to the Sustainable Energy Trust Fund established under D.C. Code § 8-1774.10, to further the District's energy efficiency efforts; (3) $10.05 million to the District of Columbia Consumer and Regulatory Affairs Green Building Fund established by D.C. Code § 6-1451.07, to promote sustainability in the District; and (4) $16.15 million for LIHEAP administered by DOEE. J.A. 956-57 ¶ 46.[6] As noted, all these funds are "special funds" established by the Council pursuant to its authority under Section 450.

* * *

In sum, the NSA responded to each of the deficiencies identified in the Commission's initial order under the seven-factor test, and the Commission, while accepting the vast majority of the NSA's provisions as satisfying these factors, improperly conditioned its approval on revisions of several provisions of the NSA, where no revisions were necessary because the NSA already was in the public interest. The alternative terms simply displaced provisions of the NSA that satisfied the public-interest factors or, worse, were affirmatively illegal. The Commission's actions were, therefore, unreasonable, arbitrary, capricious, and contrary to law.

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[6] If the alternative in the NSA of giving $3.5 million to one or more Community Development Financial Institutions were followed, this would not violate Section 450 because it would place these funds irrevocably in private hands and, hence, would not constitute money received by the government. *See* GAO Redbook 6-177.

II. At Minimum, The Commission Failed To Explain Its Actions Fully And Clearly.

As discussed, the Commission rejected the NSA because it disagreed with certain terms for particular reasons. J.A. 947 ¶ 25. As explained, the District believes that the rejection was substantively improper, and should be reversed outright. *See supra* at 29-30. But at minimum, the Commission did not adequately explain why the NSA was not in the public interest in the form presented by the Joint Applicants and the Settling Parties. *See Wash. Pub. Interest Org.*, 393 A.2d at 73. That flaw, moreover, was not corrected in the Commission's order approving the merger. As noted, the seven-factor test is the established methodology for the Commission to determine whether a merger is in the "public interest" under D.C. Code § 34-504. Under this methodology, the Commission must first examine the effect of the merger under each factor, balance these factors, and determine whether the merger taking as a whole is in the public interest. *See* Order 17597, J.A. 72-73, 256 ¶¶ 124, 355C, D. Although the Commission analyzed the initial proposal under the seven-factor test, it failed to undertake similar analyses of the RNSA or the NSA.

As this Court has held, "[a]bsent precise explanation of methodology as applied to the facts of the case, there is no way for a court to tell whether the Commission, however expert, has been arbitrary or unreasonable." *Wash. Pub. Interest Org.*, 393 A.2d at 75; *see Potomac Elec. Power Co.*, 661 A.2d at 135. Moreover, as this Court has repeatedly held:

> In order to ensure meaningful judicial review, we have imposed an independent burden on the Commission to explain its actions fully and clearly, by (1) announcing the criteria governing its determination, and (2) explaining how the particular order reflects application of these criteria to the facts of the case.

Potomac Elec. Power Co. v. Pub. Serv. Comm'n of D.C., 457 A.2d 776, 783 (D.C. 1983) (citing *Wash. Pub. Interest Org.*, 393 A.2d at 76-77); *accord District of Columbia v. D.C. Pub. Serv. Comm'n*, 963 A.2d 1144, 1151 (2009).

The Commission did not undertake an independent analysis of whether the merger under the RNSA was in the public interest. Instead, the Commission relied on the fact that the *Settling Parties* agreed that the *NSA* was in the public interest:

> 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. We start with the fact that the Settling Parties already decided that the NSA as submitted (and as reflected in Option 1) met this threshold test. Commissioner Phillips already concurred in that determination. What remains to be decided is whether the limited changes made to the NSA in Option 2 result in a Merger that is still in the public interest. Commissioner Fort already concluded that it does. Commissioner Phillips now joins in that decision.

Order No. 18148, J.A. 1421 ¶ 45.

The Commission stated as a footnote that it "incorporates by reference all of the findings from Order Nos. 17947 and 18109 not specifically adopted below to the extent those findings are consistent with the findings, determinations, and conclusions made in this Order." J.A. 1422 n.134. Although the Commission made 69 findings of

fact, some of which address specific public interest factors, they do not assess the evidentiary support for each factor. Nor did the Commission balance the pros and cons under these factors to make a determination whether a merger under the terms of the RNSA, as a whole, is in the public interest.

Critically, the Commission failed to set forth a clear and comprehensive analysis of why its adoption of the terms of the RNSA made the merger in the public interest, or that the NSA did not, under the seven-factor test. The Commission did not satisfy this burden simply by incorporating these previous orders by reference with no guidance as to what parts of them were "consistent" and what parts were not.

Apparently, the Commission believed it could dispense with an independent and fresh analysis of whether the RNSA was in the public interest as it posed the question as "whether the *limited changes* made to the NSA in Option 2 [the RNSA] result in a Merger that is still in the public interest." J.A. 1421 ¶ 45 (emphasis added). Although the changes were "limited" in the sense that they affected very few of the provisions of the NSA, they had an adverse practical impact. They gutted key provisions that the District had negotiated, including providing $25.6 million to a CIF to offset residential ratepayers' increase in distribution charges until 2019, and a total of $32.2 million for various programs administered by DOEE, including funds for low-income energy assistance and renewable energy. Moreover, the Commission could not satisfy its obligation by incorporating its orders *rejecting* earlier proposals.

The Commission's orders approving the RNSA as being in the public interest, and rejecting the NSA as not being in the public interest, were based on the Commission's disagreement with specific provisions of the NSA and its preference for alternative provisions, some of which exceeded the Commission's statutory authority. In the absence in either order of a proper analysis and a full and clear explanation of the Commission's actions, this Court should remand for that analysis and explanation even if it does not simply order approval of the NSA.

CONCLUSION

This Court should reverse the Commission's order rejecting the proposed merger under the NSA and remand with instructions to enter that proposal as its final order, or otherwise remand for further proceedings.

Respectfully submitted,

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February 2017

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