149 FERC ¶ 61,148
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Exelon Corporation and
Pepco Holdings, Inc.

Docket No. EC14-96-000

# ORDER AUTHORIZING PROPOSED MERGER

(Issued November 20, 2014)

1. On May 30, 2014, Exelon Corporation (Exelon) and Pepco Holdings, Inc. (Pepco Holdings) (together, Applicants), together with their respective subsidiaries that are public utilities subject to the jurisdiction of the Commission, filed an application pursuant to sections 203(a)(1)[1] and 203(a)(2)[2] of the Federal Power Act (FPA) and Part 33 of the Commission's Regulations[3] requesting that the Commission approve a merger and disposition of assets by which Exelon would acquire Pepco Holdings (Proposed Merger).[4] As discussed below, we have reviewed the Proposed Merger under the Commission's Merger Policy Statement[5] and authorize the Proposed Merger under FPA section 203 as consistent with the public interest, subject to the clarifications discussed below.

## I. Background

### A. Description of Applicants

#### 1. Exelon

2. Applicants explain that Exelon is a public utility holding company that, through its utility subsidiaries, distributes electricity to approximately 6.6 million customers in Illinois, Pennsylvania, and Maryland, and also distributes natural gas to approximately

[1] 16 U.S.C. § 824b(a)(1) (2012).

[2] 16 U.S.C. § 824b(a)(2) (2012).

[3] 18 C.F.R. pt. 33 (2014).

[4] Joint Application for Authorization of Disposition of Jurisdictional Assets and Merger under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act, Docket No. EC14-96-000 (May 30, 2014) (Joint Application).

[5] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC¶ 61,157 (2008) (Supplemental Policy Statement). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

1.15 million customers in the Philadelphia and Baltimore areas. Applicants note that Exelon has a diverse portfolio of electric generation capacity; that it operates the largest nuclear fleet in the United States; and that its operations include power marketing, transmission, and distribution.[6]

3. Applicants state that Exelon operates through its principal subsidiaries, Exelon Energy Delivery Company (Exelon Delivery) and Exelon Generation Company, LLC (Exelon Generation). As described in further detail below, Exelon Delivery owns Exelon's three franchised public utilities: Commonwealth Edison Company (Commonwealth Edison), PECO Energy Company (PECO), and Baltimore Gas & Electric Company (Baltimore Gas & Electric). Exelon Generation owns Exelon's fleet of electric generation facilities.[7]

### a. Exelon Energy Delivery Company and Its Electric Utility Subsidiaries

4. Applicants explain that Exelon Delivery is a direct subsidiary of Exelon that was formed to own Exelon's franchised public utilities. All three of Exelon's franchised public utilities provide electric service, and two of them, PECO and Baltimore Gas & Electric, own natural gas distribution facilities and provide natural gas distribution service. Applicants state that all three of the franchised public utilities operate under retail competition and have no captive customers. Neither any of Exelon's franchised public utilities nor any other Exelon entity owns any interstate natural gas pipeline facilities.[8]

5. With respect to transmission service, Applicants state that Commonwealth Edison, PECO, and Baltimore Gas & Electric have each transferred operational control over their transmission systems to PJM Interconnection, L.L.C. (PJM). The three utilities each have formula rates under Attachment H of the PJM Open Access Transmission Tariff (PJM OATT), which PJM uses to invoice customers for transmission service.[9]

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[6] Joint Application at 3.

[7] *Id.*

[8] *Id.* at 4.

[9] *Id.* at 8.

### i. Commonwealth Edison

6. According to Applicants, Commonwealth Edison is engaged principally in the purchase, transmission, distribution, and sale of electricity to residential, commercial, industrial, and wholesale customers in northern Illinois. Commonwealth Edison does not own any generation, but obtains all of its energy requirements for retail customers from market sources pursuant to a procurement process approved by the Illinois Commerce Commission. Commonwealth Edison delivers electricity to retail customers in its service territory that is either purchased by its customers from retail energy suppliers, or that Commonwealth Edison, as the default supplier, purchases for them from wholesale energy suppliers.

### ii. PECO

7. Applicants state that PECO is engaged in the purchase, transmission, distribution, and sale of electricity and natural gas to residential, commercial, and industrial customers in southeastern Pennsylvania. With respect to the electric service provided by PECO, Applicants explain that under Pennsylvania law, PECO is required to provide generation services to customers who do not choose an alternative generation supplier, or who contract for electric energy that is not delivered by an alternative generation supplier. Like Commonwealth Edison, PECO does not own any generation, but purchases the power needed to satisfy its Default Service Plan obligations through a competitive procurement process approved by the Pennsylvania Public Utility Commission (Pennsylvania Commission).

8. With respect to the natural gas service provided by PECO, Applicants explain that PECO operates an intrastate natural gas distribution system, and that PECO's gas sales and gas transportation revenues are derived pursuant to rates regulated by the Pennsylvania Commission. PECO's facilities include a liquefied natural gas (LNG) facility and a propane-air plant, both of which are peak-shaving facilities associated with PECO's distribution activities and do not offer services to third parties. PECO's customers have the right to choose their gas suppliers or to purchase their gas supply from PECO at cost; approximately 44 percent of PECO's current total yearly throughput is supplied by third parties. Applicants state that gas transportation service is provided on an open-access basis and remains subject to regulation by the Pennsylvania Commission.

### iii. Baltimore Gas & Electric

9. Applicants state that Baltimore Gas & Electric transmits and distributes electricity in all or part of 10 counties in central Maryland and the City of Baltimore, Maryland. With respect to the electric service provided by Baltimore Gas & Electric, under Maryland's retail choice program, Baltimore Gas & Electric is required to provide market-based standard offer service to all of its electric customers who elect not to select a competitive energy supplier. Applicants explain that bidding to supply Baltimore Gas

& Electric's default service occurs through a competitive bidding process approved by the Maryland Public Service Commission (Maryland Commission).

10. With respect to the natural gas service provided by Baltimore Gas & Electric, Applicants state that Baltimore Gas & Electric operates natural gas distribution facilities in its service territory in Maryland. Under the existing gas choice program, retail customers can purchase natural gas from third party suppliers. Baltimore Gas & Electric also operates an LNG facility for the liquefaction and storage of natural gas on its distribution system, as well as a captive propane-air facility with a mined cavern; both facilities are associated with Baltimore Gas & Electric's distribution activities and do not offer services to third parties.

### b. Exelon Generation

11. Applicants state that Exelon's generation business is conducted by Exelon Generation, a wholly-owned subsidiary of Exelon Ventures Company, which, in turn, is wholly-owned by Exelon. Exelon Generation is an electric utility company and a holding company exempt from federal books and record requirements under section 1265 of the Public Utility Holding Company Act of 2005.[10] Applicants explain that Exelon Generation has been granted market-based rate authority, and that it serves as a supplier of energy to, among others, utilities and municipalities to meet their native load obligations. Exelon Generation is also a retail competitive energy provider. Finally, Applicants note that Constellation Energy (Constellation), Exelon Generation's wholesale power marketing unit, is responsible for the day-to-day market operations associated with, and the dispatch of, Exelon Generation's fleet, and for the provision of fuel and fuel-related services to Exelon Generation's non-nuclear units.[11]

### c. Purple Acquisition

12. Purple Acquisition Corp. (Merger Sub), a wholly-owned subsidiary of Exelon, was formed on April 28, 2014 for the purpose of effecting the Proposed Merger.[12] Merger Sub has not conducted any activities other than those incidental to its formation and the matters contemplated in the Merger Agreement.

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[10] 42 U.S.C. § 16453 (2012).

[11] Joint Application at 9.

[12] The Agreement and Plan of Merger as of April 29, 2014 (Merger Agreement) sets forth the terms and conditions of the Proposed Merger. Applicants included the Merger Agreement in Exhibit I to the Joint Application.

### 2. Pepco Holdings and Pepco Holdings Affiliates

#### a. Pepco Holdings

13. Applicants explain that Pepco Holdings is a holding company that, through its regulated public utility subsidiaries, is engaged primarily in the transmission, distribution and default supply of electricity, and, to a lesser extent, the distribution and supply of natural gas at retail. In addition to its regulated utility operations, Pepco Holdings, through Pepco Energy Services, Inc. and its subsidiaries, engages in certain non-utility activities.[13]

#### b. Regulated Public Utilities

14. Applicants explain that Pepco Holdings' three regulated public utilities, Potomac Electric Power Company (Pepco), Delmarva Power & Light Company (Delmarva), and Atlantic City Electric Company (Atlantic City Electric), have each divested their generation facilities. The three utilities do not purchase power except pursuant to requirements contracts to serve their default service load and under must-take contracts from Qualifying Facilities under the Public Utility Regulatory Policies Act of 1978,[14] and under contracts for wind power to satisfy renewable portfolio standard requirements in Delaware. Applicants state that each of the utilities also operates under a retail competition regime and has no captive customers.

15. With respect to transmission service, Applicants state that Pepco, Delmarva, and Atlantic City Electric are all members of PJM. Applicants state that Pepco, Delmarva, and Atlantic City Electric have formula rates under Attachment H of the PJM OATT for transmission on file with the Commission, which PJM uses to invoice customers for transmission service.[15]

##### i. Pepco

16. Applicants state that Pepco's electric distribution territory consists of the District of Columbia and major portions of Prince George's County and Montgomery County, Maryland. Applicants explain that both the District of Columbia Public Service Commission (D.C. Commission) and the Maryland Commission have designated Pepco as the default electricity supplier for these service territories. Pepco purchases the

[13] Joint Application at 9.

[14] 16 U.S.C. § 2601 *et seq.* (2012).

[15] *See* Joint Application at 12.

electricity to meet these obligations from wholesale suppliers primarily under contracts entered into in accordance with the competitive bid procedures approved by the D.C. Commission and the Maryland Commission.[16] With respect to commercial customers in the District of Columbia and large commercial customers in Maryland, Pepco is obligated to provide hourly priced service, for which it purchases the electricity in the day-ahead and other short-term PJM markets.

### ii. Delmarva

17. Applicants state that Delmarva is engaged in the transmission, distribution, and default supply of electricity in portions of Delaware and Maryland. Applicants explain that Delmarva purchases the electricity needed to meet its default supply obligations primarily under contracts entered into in accordance with competitive bid procedures approved and supervised by the Delaware Public Service Commission (Delaware Commission) and the Maryland Commission. With respect to its largest customers in Delaware and Maryland, Delmarva has an obligation to provide hourly priced service, for which it purchases the electricity in the day-ahead and other short-term PJM markets.

18. Applicants state that Delmarva also supplies and delivers natural gas to retail customers and provides transportation only services to retail customers that purchase natural gas from another supplier. Applicants explain that Delmarva's natural gas distribution service area consists of a large portion of New Castle County in northern Delaware. Large volume commercial, institutional, and industrial customers may purchase natural gas from Delmarva or receive "transportation-only" service from Delmarva through its distribution facilities after purchasing natural gas from a competitive supplier.[17]

### iii. Atlantic City Electric

19. Applicants state that Atlantic City Electric has a distribution service territory located in southern New Jersey and that it has been designated the default electricity supplier in that territory by the New Jersey Board of Public Utilities (New Jersey Board). Applicants explain that each distribution utility in New Jersey jointly obtains the electricity they need to meet their collective service obligations from competitive suppliers that are selected through auctions authorized by the New Jersey Board. Atlantic City Electric is paid tariff supply rates, on which it does not make a profit or incur any loss, established by the New Jersey Board to compensate it for the cost of the supply.

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[16] *Id.* at 10.

[17] *Id.*

### c. Pepco Energy Services

20. Applicants state that Pepco Energy Services is engaged in the following activities: (1) designing, constructing and operating energy efficiency projects and distributed generation equipment principally for federal, state, and local government customers; (2) providing underground transmission and distribution construction and maintenance services for electric utilities; and (3) providing steam and chilled water under long-term contracts primarily in Atlantic City, New Jersey.

## B. The Proposed Transaction

21. Applicants explain that Exelon will acquire Pepco Holdings in an all-cash transaction whereby Exelon will pay $27.25 per share for each outstanding share of common stock of Pepco Holdings. Under the terms of the Merger Agreement, subject to regulatory approvals and the satisfaction of certain obligations of the parties, Merger Sub will merge with and into Pepco Holdings. Pepco Holdings will continue as the surviving entity and become a wholly-owned subsidiary of Exelon. Pepco Holdings' regulated public utilities will be placed under Exelon Delivery along with Exelon's other regulated public utilities. Pepco Holdings' unregulated subsidiaries will be placed in separate branches of the Exelon holding company structure.

# II. Notice of Filings

22. Notice of the Joint Application was published in the *Federal Register*, 79 Fed. Reg. 32,933 (2014) with interventions and protests due on or before June 20, 2014. On June 12, 2014, the Delaware Commission and the Delaware Division of the Public Advocate (Delaware Public Advocate) filed a motion for extension of the comment date to July 21, 2014 and a motion for a shortened period to respond. The Office of the People's Counsel for the District of Columbia (D.C. People's Counsel) and the Maryland Office of People's Counsel (Maryland People's Counsel) submitted answers in support of the motion to extend the comment date. On June 18, 2014, the Commission extended the comment date to July 21, 2014.

23. The Delaware Commission, the Maryland Commission, and the New Jersey Board filed notices of intervention. The following parties filed motions to intervene: Chesapeake Utilities Corp.; the D.C. People's Counsel; Delaware Public Advocate; Delaware Municipal Electric Corp., Inc. (Delaware Municipal Electric); Easton Utilities Commission; FirstEnergy Service Co.; Maryland Energy Administration; the Maryland People's Counsel; Monitoring Analytics, LLC acting in its capacity as the Independent Market Monitor for PJM (Market Monitor); New Jersey Division of Rate Counsel; Public Service Electric and Gas Co., PSEG Power LLC, and PSEG Energy Resources & Trade LLC (collectively, PSE&G); Southern Maryland Electric Cooperative, Inc. (Southern Maryland); and United States General Services Administration. The Chesapeake Climate

Action Network; the Sustainable FERC Project and the Natural Resources Defense Council; and the Sierra Club filed out-of-time motions to intervene.

24. Public Citizen, Inc. (Public Citizen) filed a motion to intervene and protest. The Delaware Commission, Delaware Municipal Electric, and the Maryland People's Counsel filed protests. The D.C. People's Council; the Institute for Energy and Environmental Research and the Nuclear Information and Resource Service (collectively, Institute for Energy and Environmental Research); the Market Monitor; and Southern Maryland filed comments. The Allegany County Board of County Commissioners, the County Commissioners of Caroline County, the County Commissioners of Carroll County, the County Executive and County Council of Cecil County, the County Council of Dorchester County, the Frederick County Board of County Commissioners, the County Executive and County Council of Harford County, the County Commissioners of Kent County, and the County Executive and County Council of Wicomico County (collectively, Clean Chesapeake Coalition) filed a motion to intervene, protest, and request for evidentiary hearing. Clean Chesapeake Coalition filed a supplement to its motion on July 22, 2014, which contained an omitted attachment. The Illinois Attorney General filed an out-of-time motion to intervene and comments.

25. On July 30, 2014, Applicants filed an answer to the comments and protests filed in this proceeding (Applicants July 30 Answer). On September 5, 2014, the Market Monitor filed an answer to Applicants' answer (Market Monitor Answer). On September 11, 2014, Applicants filed an answer to the Illinois Attorney General (Applicants September 11 Answer). On September 19, 2014, Applicants filed an answer to the Market Monitor's answer (Applicants September 19 Answer), including a request that the Commission reject the Market Monitor Answer.

## III. Discussion

### A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant the late-filed motions to intervene, given the entities' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept all answers because they have

provided information that assisted us in our decision-making process. Accordingly, we deny Applicants' request to reject the Market Monitor Answer.

### B. Standard of Review under Section 203

29. FPA section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.[18] The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[19] FPA section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[20] The Commission's regulations establish verification and information requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.[21]

### C. Analysis of the Proposed Merger

#### 1. Effect on Horizontal Competition

##### a. Applicants' Analysis

30. Applicants note that Pepco Holdings owns or controls only 17 MW of landfill-gas-fired, net-metered, and behind-the-meter generation in PJM, all of which is located in the AP South submarket of PJM, and 15 MW of which is located in the 5004/5005 submarket.[22] Applicants state that the generation capacity represents approximately

[18] 16 U.S.C. § 824b(a)(4) (2012). Approval of the Proposed Merger is also required by other regulatory agencies pursuant to their respective statutory authority before the Proposed Merger may be consummated. See Joint Application Exhibit L. Our findings under FPA section 203 do not affect those agencies' evaluation pursuant to their respective statutory authority.

[19] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

[20] 16 U.S.C. § 824b(a)(4) (2012).

[21] 18 C.F.R. § 33.2(j) (2014).

[22] Joint Application at 16.

0.02 percent of the total installed capacity in each market. Applicants performed a simplified "2ab" Herfindahl-Hirschman Index[23] (HHI) calculation.[24] Applicants state that the change in HHI in each market was less than one HHI point.[25]

31. Applicants also analyzed certain Pepco Holdings power purchase contracts with generators that are Qualifying Facilities under the Public Utility Regulatory Policies Act of 1978, as well as with owners of wind generation projects. Applicants state that, in each case, Pepco Holdings does not control the output of the plant.[26] Further, Applicants state that all revenues received by Pepco Holdings from the sale of energy into the PJM

[23] The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails the relevant screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

[24] As noted by Applicants, under the "2ab" simplified method, the market share of installed capacity of company "a" and the market share of installed capacity of company "b" contribute $a^2 + b^2$ to the HHI calculation pre-transaction and $(a+b)^2$ post-transaction. Because $(a+b)^2 = a^2 + b^2 + 2ab$, subtracting the pre-transaction $a^2 + b^2$ yields the 2ab result of calculating the change in HHI. Joint Application n.19 (citing *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552, 41,558 n.18 (1992)).

[25] Joint Application at 16.

[26] These power purchase contracts are for a combined 590 MW summer rating.

energy markets are returned to its retail customers. Consequently, Applicants assert that the contracts are not attributable to Pepco Holdings for market power purposes.[27]

32. Applicants note that, in the PJM capacity market, Pepco Holdings bids demand response resources, pursuant to state mandated programs, into the PJM Reliability Pricing Model auctions. Applicants state that Pepco Holdings' 700 MW of demand resources offered into the 2017/2018 Base Residual Auction represented less than 0.5 percent of the PJM market. Applicants state that, when combined with Exelon's 26,000 MW of generation, demand response and energy efficiency resources in PJM, the merged company will control about 14.1 percent of the total market capacity.[28] Accordingly, Applicants conclude that that the Proposed Merger does not raise any concerns with respect to the PJM capacity markets.[29]

### b. Comments and Protests

33. The Market Monitor agrees that the Proposed Merger does not raise horizontal market power concerns with respect to power generation.[30] However, the Market Monitor states that, while both Exelon and Pepco Holdings have substantial portfolios of demand-side resources that participate in the PJM energy markets and capacity markets, and that the Proposed Merger would significantly increase the combined company's market share among demand-side resource providers, Applicants have not provided analysis showing the effects of combining the demand-side resource portfolios.[31]

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[27] Joint Application at 17 (citing *Market-Based Rates for Wholesale Sakes of Elec. Energy, Capacity and Ancillary Services by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,352, at P 176, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305, *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012); *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, at P 18, *order on reh'g*, 111 FERC ¶ 61,413 (2005)).

[28] *Id.* at 18.

[29] *Id.*

[30] Market Monitor Comments at 2.

[31] *Id.* at 2-3.

34. The Market Monitor further claims that the Proposed Merger raises horizontal market power issues in transmission. The Market Monitor notes that under Order No. 1000, the Commission has adopted a new policy of encouraging competition in development in transmission projects. Thus, the Commission should consider a merger's effect on competition in transmission as part of its horizontal competition analysis.[32] The Market Monitor also explains that a consolidation of transmission companies reduces the pool of companies that have the expertise to compete to build competitive transmission projects, as defined in Order No. 1000, which could result in higher costs for customers.[33]

**c. Answers**

35. Applicants state that "[i]t is unclear whether the Market Monitor believes that a separate evaluation of [demand-side resource] markets should be performed, or if it is asserting that [demand-side resources] should be included in the analysis that was performed by the Applicants."[34] Applicants note that, if the former, there is no separate demand-side market for PJM, and the Commission has never required separate analysis of demand-side markets. Applicants further note that the Market Monitor did not perform its own analysis and presented no evidence demonstrating that there is a competitive problem.[35] Applicants continue that, to the extent that the Market Monitor is simply asserting that demand-side resources should be included in Applicants' analysis of PJM capacity markets, such claim is misplaced, noting that the Market Monitor takes no issue with Applicants' analysis of PJM energy markets and that Applicants' analysis of PJM capacity markets reflects demand-side resources offers by Exelon and Pepco Holdings. Thus, Applicants argue, the Commission should not require additional analysis.[36]

36. Applicants also dispute the Market Monitor's comments on transmission construction. They state that the Market Monitor has presented no data evaluating the current state of competition for transmission construction and that the Commission

[32] *Id.* at 4-5 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at PP 225-344 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)).

[33] *Id.* at 8.

[34] Applicants July 30 Answer at 4.

[35] *Id.* at 5.

[36] *Id.*

should reject its claim as unsupported.[37] Applicants explain that the available data shows that there is adequate competition in transmission construction in PJM and that the merger of two transmission owners should not materially reduce the number of potential competitors because a large number of non-incumbents submitted proposals in recent solicitations.[38]

37. The Market Monitor responds that Applicants do not address its concerns related to demand-side resources in their screen analysis or otherwise. The Market Monitor asserts that Applicants cannot rely on an analytic screen that does not analyze the specific market power issues of the impact of the Applicants' combined demand-side capacity resources on the energy market. The Market Monitor asserts that the effect of combining the Applicants' capacity market-based demand response resources on the energy market should not be ignored because these resources are subject to higher offer caps than generation resources and are eligible to set prices in periods when all asset owners are pivotal. The Market Monitor asserts that the burden is on Applicants to show there is no adverse effect.[39]

38. The Market Monitor states that Applicants also fail to acknowledge significant developments in the Commission's policies for competitive transmission development. The Market Monitor asserts that the policy goal of increasing competition in the development of the grid articulated in Order No. 1000 provides justification for the Commission to refine its merger analysis and to enhance its review of market power.[40] Therefore, the Market Monitor states that the Commission's analysis should include stronger analytical requirements and the inclusion of conditions aimed at preserving competitive access and competitive opportunities for non-incumbent transmission developers. The Market Monitor asserts that the Proposed Merger will make what is now an independent transmission and distribution company part of a vertically integrated utility.[41] In this regard, the Market Monitor disputes the validity of Applicants' examples of independent company's proposals to build transmission projects to address transmission needs in PJM. The Market Monitor asserts that Applicants have not shown that any of these proposals were accepted over an incumbent's proposals and states that

[37] *Id.* at 8.

[38] *Id.* at 8-9.

[39] Market Monitor Answer at 2.

[40] *Id.* at 4.

[41] *Id.*

the examples raise concerns that there may not be actual competition in transmission development.[42]

39. Applicants state that the Market Monitor has not met its burden to make a case that the Proposed Merger results in competitive problems when the Commission's analytic framework shows no potential for competitive harm.[43] Applicants explain that Commission precedent requires the Market Monitor to provide data to support any new theoretical concerns that it raises and assert that the burden should not be on Applicants to disprove the Market Monitor's unsupported theories of potential competitive harm.[44]

40. Applicants further assert that the Market Monitor's concerns related to demand-side resources have no merit. Applicants reiterate that the competitive analysis prepared by Applicants includes all demand-side resources that were eligible for the PJM capacity market and showed that there was no competitive concern. With respect to the Market Monitor's assertion that there is a potential adverse effect on the PJM energy markets, Applicants state that the Proposed Merger will not have an adverse effect. Applicants explain that there are two ways that owners of demand-side resources that have received a capacity award could theoretically affect energy markets. First, Applicants state that the demand-side resources can be participants in the "Emergency Load Response Program" under which they will receive a strike price, subject to an offer cap, whenever PJM determines that there is a "Load Management Event."[45] These strike prices may be incorporated into the calculation of PJM's energy locational marginal price when PJM declares an event and can set the energy price when a demand-side resource is the marginal resource.[46] Second, Applicants state that there is a separate voluntary program that allows demand-side resources to be bid into the PJM energy markets, which is known as an "Economic Program." Applicants assert that PJM's treatment of demand-side resources incentivizes these resources to set a strike price at or near PJM's offer cap to take advantage of the maximum price when there is a Load Management Event and participate in the Economic Program at a lower price.[47]

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[42] *Id.* at 4.

[43] *See* Applicants September 19 Answer at 4.

[44] *Id.* at 5.

[45] *Id.* at 10.

[46] *Id.* at 11.

[47] *Id.*

41. Applicants assert that participation in the Economic Program is modest and that the amount of resources participating is very small when compared to the size of the PJM energy market.[48] Applicants state that, as a practical matter, the demand-side resources participating in the Emergency Load Response Program do not effectively participate in the PJM energy market because they bid at the maximum strike price, which is seldom exceeded by the locational marginal price. Therefore, Applicants assert that the Proposed Merger could have no effect on the PJM energy markets because the capacity does not participate in the market.[49] Furthermore, Applicants assert that if Exelon were to set strike prices for Pepco Holdings' demand-side resources below the maximum offer cap, the only possible effect would be to reduce the energy locational marginal price that would otherwise result, and potentially increase supply in the energy market, which would be pro-competitive.[50]

42. Applicants also explain that, for all practical purposes, Pepco Holdings' demand-side resources have not participated in the Emergency Load Response Program or the Economic Program. Instead, they explain that Pepco Holdings typically offers its demand-side resources into one or more of its state jurisdictions.[51] Therefore, Applicants assert that any change in bidding strategy after the Proposed Merger could only result in an increased supply of demand-side resources offered into the PJM energy markets, which could only be pro-competitive.[52]

43. Applicants state that they have shown that there are many entities responding to PJM's competitive solicitations for building competitive transmission projects. Therefore, Applicants assert that there is no reason for the Commission to conclude that the Proposed Merger could have any material effect on competition to construct new transmission facilities pursuant to Order No. 1000.[53] In this regard, Applicants assert that, while the question of whether incumbents have an advantage over independent companies in competing to construct new transmission lines may, or may not, have some relevance as to how Order No. 1000 is being implemented, it is irrelevant to the question of whether the Proposed Merger could affect competition to construct new transmission

[48] *Id.* at 11-12.

[49] *Id.* at 12.

[50] *Id.*

[51] *Id.* at 12-13.

[52] *Id.* at 13.

[53] *Id.* at 14.

projects. Applicants conclude that the Proposed Merger could have no effect on whether incumbents have advantages in such competitions, and that the Commission does not need to determine in this proceeding whether competitive transmission development in PJM is now a reality. Instead, Applicants assert, the question in this proceeding is whether the Proposed Merger could somehow materially lessen the existing level of competition for constructing new transmission projects.[54]

### d. Commission Determination

44. In analyzing whether a transaction will adversely affect competition, the Commission first examines its effects on concentration in generation markets or whether the transaction otherwise creates an incentive to engage in behavior harmful to competition, such as the withholding of generation.[55] Here, as Applicants explain, Pepco controls only 17 MW of landfill-gas-fired, net-metered, and behind-the-meter generation in PJM, all of which is located in the AP South submarket of PJM, and 15 MW of which is located in the 5004/5005 submarket, which represents approximately 0.02 percent of the total installed capacity in each market. Therefore, the Proposed Merger will not have an adverse effect on horizontal competition in the generation market.

45. With regard to the Market Monitor's contention that Applicants' substantial portfolio of demand response resources requires further analysis, we note that Applicants included a "2ab" analysis which included Pepco Holdings' demand response resources as a capacity product participating in the PJM Base Residual Auction. We find that the combination of the approximately 700 MW controlled by Pepco Holdings with the approximately 26,000 MW already controlled by Exelon constitutes only a small increase in market concentration for the capacity product and, therefore, will not have an adverse effect on competition in the PJM capacity market. Moreover, although the Market Monitor submits that no information has been provided regarding the effects of the combination of Applicants' capacity market-based demand response resources on the energy market, Applicants' September 19 Answer provided additional information regarding the limited ability of Pepco Holdings' demand response resources to participate in the PJM energy market. Applicants indicate that Pepco Holdings has been called upon only twice since 2010 to reduce demand under the Emergency Demand Response Program and has made offers in the Economic Program during a total of 31 hours since 2010.[56]

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[54] *Id.* at 15.

[55] *See ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 105 (2007).

[56] *See* Applicants September 19 Answer at 10-12, Giovannini Affidavit at P 3-5.

46. However, we note that the Market Monitor raises additional concerns related to the impact of Applicants' collective capacity market-based demand response resources on prices in the energy market following PJM dispatch. Specifically, the Market Monitor is concerned that the combination of Exelon's and Pepco Holdings' capacity market-based demand response resources could impact prices in the PJM energy market because these demand response resources are subject to significantly higher offer caps than generation resources and are eligible to set energy market prices in periods when all asset owners are pivotal. Indeed, Applicants state that PJM's treatment of demand response resources "creates an incentive for owners of [demand response resources] receiving capacity awards that participate in the Emergency Load Response Program to set their strike prices at or near the maximum offer cap in order to receive the maximum payment available when a Load Management Event is called by PJM."[57]

47. The Commission takes concerns about the structure of the PJM market seriously. In our May 2014 Order in Docket No. ER14-822,[58] we accepted several PJM OATT revisions to promote the operational flexibility and efficiency of capacity market-based demand response resources. Among other changes, PJM now has the ability to dispatch demand response resources not only during an emergency, but also prior to emergency conditions. In its filing, PJM explained that it will dispatch demand response resources subject to consideration of the resource's strike price. The Commission found that this will allow PJM to more efficiently and cost-effectively integrate capacity market-based demand response resources into its markets. PJM's proposal also enhanced variability in both the distribution of strike prices and notification times for capacity market-based demand response resources. In terms of strike prices, PJM implemented lower offer caps for capacity market-based demand response resources, which are now stratified based on notification period. The Commission found that these changes will enable PJM to promote more efficient and effective operations. We also required PJM, with the input of the Market Monitor, to submit a report on compliance in Docket No. ER14-822 to address issues related to the exercise of market power and the interruption of shortage pricing signals.

48. While we recognize that the combination of Exelon's and Pepco Holdings' capacity market-based demand response resources increases the market share owned by Applicants, we believe that the recent improvements to the dispatch and pricing of capacity market-based demand response resources will encourage competition among providers and lead to more efficient dispatch going forward. We encourage the Market Monitor to continue monitoring these issues and to provide further input in the report on compliance in Docket No. ER14-822. We also recognize the existence of other pending

[57] *Id.* at 11.

[58] *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,103 (2014) (May 2014 Order).

proceedings where these or similar issues have been raised. Accordingly, while we find that the Proposed Transaction will not have an adverse effect on competition, and therefore decline to resolve these issues here, we will continue to address the broader issues raised by the Market Monitor in ongoing proceedings.[59]

49. With respect to competition to construct new transmission facilities under PJM's Order No. 1000 regional transmission planning process, the Commission recognizes the importance of fostering competition among developers for regional transmission projects. The Commission also continues to monitor the implementation of Order No. 1000 in the PJM footprint. Here, however, we find that the combination of Exelon and Pepco Holdings does not materially lessen the pool of all developers, approved as pre-qualified Designated Entities that may participate in the Regional Transmission Enhancement Window as provided for in the PJM Amended and Restated Operating Agreement.[60] Subject to final Commission approval, PJM will administer the selection of developers in the Regional Transmission Enhancement Process according to the PJM OATT.[61]

### 2. Effect on Vertical Competition

#### a. Combining Generation and Natural Gas Facilities

##### i. Applicants' Analysis

50. Applicants state that neither Exelon nor Pepco Holdings own any interest in any interstate natural gas pipeline. However, PECO, Baltimore Gas & Electric, and Delmarva do operate intrastate natural gas distribution systems with state regulated open access distribution requirements that ensure service to new customers, including gas-fired generators seeking to interconnect with their respective distribution systems. Applicants further observe that new generation can be sited to connect directly to an interstate

[59] *See, e.g., BHE Holdings Inc.*, 133 FERC ¶ 61,231, at P 54 (2010) ("When necessary, the Commission will condition its authorization to address specific, merger-related harm; no such harm has been identified here.").

[60] PJM has prequalified 22 developers as Designated Entities, including both Pepco Holdings, Inc. and Exelon Corporation. *See* Pre-Qualification for Designated Entity Status. http://www.pjm.com/planning/rtep-development/expansion-plan-process/ferc-order-1000/pre-qualification.aspx (retrieved October 24, 2014).

[61] *See PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 (2013), *order on reh'g and compliance*, 147 FERC ¶ 61,128 (2014).

pipeline and thus bypass the PECO, Baltimore Gas & Electric and Delmarva gas distribution systems.[62]

51. Applicants explain that the PECO, Baltimore Gas & Electric, and Delmarva natural gas divisions each have firm transportation contracts on interstate natural gas pipelines as well as natural gas storage entitlements. Other Exelon affiliates have contracts in connection with their competitive retail activities or to transport natural gas to owned or controlled gas-fired generation. Applicants explain that Exelon and Pepco Holdings' firm transportation contracts represent approximately 6 percent of the deliverability capacity into the states within PJM and about 7-8 percent in the AP South and 5004/5005 submarkets of PJM.[63] Applicants state that their combined share of storage capacity in PJM is about 2.5 percent. Applicants conclude that the small market shares support a determination that there are no vertical market power concerns.[64]

52. Applicants indicate that they do not possess market power with respect to any other inputs to generation.[65]

### ii. Comments and Protests

53. The Market Monitor states that the incremental increase in the concentration of ownership in intrastate natural gas distribution systems that will result from the Proposed Merger raises concerns about vertical market power that require further investigation and that mitigation should be considered. Among other concerns, the Market Monitor notes that, while Applicants state that new generation can be sited to connect directly to an interstate natural gas pipeline and bypass the local distribution systems, Applicants do not discuss the rules for bypass in each state, including whether a distribution company can impose charges or conditions on a gas customer seeking to bypass the local gas distribution company.[66]

54. The Delaware Commission states that Applicants have not shown that the Proposed Merger will have no adverse impact on competition due to potential vertical market power issues. The Delaware Commission asks that the Commission require

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[62] Joint Application at 20.

[63] *Id.* at 20-21.

[64] *Id.* at 21.

[65] *Id.*

[66] Market Monitor Comments at 5.

Applicants to show the steps that have been taken, and will be taken, to ensure that affiliated local distribution companies do not favor their generation affiliates through capacity release and other actions on interstate natural gas pipelines, through their local distribution company operations.[67] The Delaware Commission notes PJM Real-Time Locational Marginal Prices reached as high as $1,800/MWh during the winter 2014 season, and points to issues regarding gas deliverability and gas-electric coordination.[68] Additionally, the Delaware Commission asks that the Commission require Applicants to identify the percentage of pipeline capacity on each interstate natural gas pipeline in PJM, and more specifically on the interstate natural gas pipelines serving gas-fired generation located in the AP South and 5004/5005 submarkets that is held by PECO, Baltimore Gas & Electric, and Delmarva. In addition, the Delaware Commission states that Applicants should provide information related to the correlation among throughput percentages, capacity entitlements, and the basis differential on those pipelines.[69]

### iii. Answers

55. Applicants state that their combined natural gas facilities raise no vertical market power concerns. First, they explain that Pepco Holdings owns only 17 MW of generation capacity and cannot use the local natural gas distribution systems to benefit its generation capacity.[70] Second, they state that the Proposed Merger has no effect on Exelon's ability or incentive to use PECO's and Baltimore Gas & Electric's local natural gas distribution facilities to benefit its generation because Exelon already owns those systems. Applicants continue that the only potential vertical market power concern raised by the Proposed Merger would be if Exelon could use Delmarva's limited gas distribution system to benefit Exelon's generation.[71] In that regard, however, Applicants explain that Delmarva does not serve any natural gas-fired generation from its facilities, and that Applicants' combined transportation contracts represent only a *de minimis* share of the deliverable capacity into PJM and the relevant submarkets.[72]

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[67] Delaware Commission Protest at 8.

[68] *Id.* at 9.

[69] *Id.* at 10.

[70] Applicants July 30 Answer at 9-10.

[71] *Id.* at 10.

[72] *Id.*

56. Applicants assert that the Market Monitor's concerns about state bypass rules for natural gas pipelines are unfounded. They state that the Market Monitor has not provided the Commission with any reason to conclude that state rules regarding bypass would enable Applicants to exercise vertical market power.[73] Furthermore, they state that the Commission presumes that ownership of intrastate natural gas distribution facilities does not create a barrier to entry that can be used to exercise market power, and that the Market Monitor has presented no evidence to rebut this presumption.[74] Applicants also assert that, even if the state bypass rules gave Applicants an absolute veto over the bypass of their distribution facilities, their combined gas distribution service territories, approximately 3,000 square miles, represents just over 1 percent of PJM's footprint, limiting any potential effect on new gas-fired generation entry into PJM.[75]

57. Applicants state that there is no basis for the Delaware Commission's assertion that additional information is needed to assure the Commission that Applicants will not be able to use their upstream gas pipeline capacity rights to exercise vertical market power. Among other things, Applicants note that the Delaware Commission cites to no regulation or Commission precedent that would require the additional information that it asserts is needed.[76] Applicants state that much of the information requested by the Delaware Commission is available in the Joint Application or is otherwise available.[77] Applicants further note that the Commission has recognized that, under its open access regulations, sellers are prevented from withholding interstate pipeline capacity in the manner posited by the Delaware Commission.[78] Finally, Applicants state that the evidence presented by the Delaware Commission was that the price spike in the PJM

[73] *Id.* at 11.

[74] *Id.* at 11-12 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,352, *clarified*, 121 FERC ¶ 61,260, *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285, *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305, *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910, *cert. denied*, 133 S. Ct. 26).

[75] *Id.* at 12.

[76] *Id.* at 13.

[77] *See id.* at 13, n.10.

[78] *Id.* at 14 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,352 at P 430).

energy market was caused by generators' natural gas procurement practices and not from problems with natural gas transportation.[79]

58. The Market Monitor reasserts that Applicants have not provided a reasonable demonstration that there is adequate access to their combined natural gas distribution assets. The Market Monitor explains that it does not dispute that generation facilities may directly connect to interstate natural gas pipelines but reiterates that the issue is whether Applicants can impose significant terms and conditions on such access under rules applicable to bypassing gas distribution facilities.[80] The Market Monitor states that Applicants have the burden of explaining the terms and conditions for access and demonstrating that these terms and conditions prevent Applicants from erecting barriers to entry.[81] The Market Monitor asserts that Applicants have not provided enough information to meet this burden.

59. Applicants restate that the Market Monitor's assertion that Applicants have not adequately shown that they cannot use their natural gas distribution facilities to prevent entry by competitors is unsupported and does not present evidence to overcome the rebuttable presumption that ownership of intrastate natural gas facilities does not create a barrier to entry that can be used to exercise vertical market power or rebut Applicants' showing that the Proposed Merger has a *de minimis* effect on Applicants' ability to prevent the citing of new natural gas-fired generation because of Delmarva's small size.[82] Applicants assert that the Market Monitor provides no new data to refute either of these points in its answer; instead, the Market Monitor merely restates its original argument.[83] Applicants assert that the Market Monitor's argument that Applicants can block the entry of new natural gas-fired competing generation in PJM is based on a false premise. Applicants state that they cannot impose any conditions on a new gas-fired generator that directly connects to an interstate natural gas pipeline because Applicants would not be providing any service to that generator.[84]

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[79] *Id.*

[80] Market Monitor Answer at 5.

[81] *Id.*

[82] Applicants September 19 Answer at 16.

[83] *Id.* at 16-17.

[84] *Id.* at 17.

### b. Combining Generation and Transmission

#### i. Applicants' Analysis

60. Applicants state that all of the transmission facilities owned by Applicants are under the control of PJM, and will continue to be under PJM's control after the consummation of the Proposed Merger. Applicants state that the Proposed Merger does not increase the ability of Applicants to use their ownership of transmission facilities to give themselves a competitive advantage in energy markets.[85]

#### ii. Comments and Protests

61. The Market Monitor states that the degree to which Applicants attribute control over their transmission facilities to PJM is overstated. Specifically, the Market Monitor states that PJM "control" over a transmission owner's facilities means that it can direct the operation of transmission facilities, prepare a Regional Transmission Expansion Plan, and obtain data and other information to comply with North American Electric Reliability Corporation (NERC) standards. The Market Monitor explains that, while this transfer of responsibility is significant, it is also limited and, therefore, further explanation of the vertical competitive effects is required.[86]

62. The Market Monitor further notes that participation in PJM is voluntary. The Market Monitor asserts that the greater the proportion of a Regional Transmission Operator's (RTO) assets represented by a transmission owner, the greater the threat of exit is to the RTO and therefore the greater the potential influence of the transmission owner over the RTO's processes and governance.[87] In this regard, the Market Monitor asserts that the combined Exelon and Pepco Holdings would account for 23.4 percent of transmission service credits collected from the PJM market, giving the combined company substantial and increased influence over decisions that directly relate to competition in PJM among developers of transmission projects.[88]

63. The Market Monitor states that, while the RTO has the responsibility for the interconnection process, transmission owners have responsibility for performing

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[85] Joint Application at 21.

[86] Market Monitor Comments at 6 (citing PJM Consolidated Transmission Owners Agreement § 4.1, Rights and Responsibilities Transferred to PJM, 1.0.0).

[87] *Id.*.

[88] *Id.* at 7.

interconnection studies for generation, which can create a conflict of interest if the transmission owner also owns competing generation. The Market Monitor suggests transmission owners may have the incentive and opportunity to exert vertical market power and influence the interconnection process of wholesale competitors by determining timeliness, technical requirements, and costs of the interconnection.[89] The Market Monitor further states that incorrect or incomplete information on line limits submitted by transmission owners for use in the RTO models may have significant market impacts.[90]

64. The Market Monitor suggests that "behavioral mitigation" could address the vertical market power concerns it has raised, including securing Applicants' agreement to: (i) commit to remain in PJM; (ii) to permit third party independent interconnection studies; and (iii) to commit to a thorough review of ratings of all elements of the combined transmission systems and provide supporting analysis to PJM and the Market Monitor for review and to establish an ongoing regular process for reviewing and updating transmission limits.[91]

65. The D.C. People's Counsel expresses concern that, following the Proposed Merger, the PJM stakeholder process would disproportionately reflect the views of one corporation. The D.C. People's Counsel explains that it is concerned that the natural tendency following the merger will be for the Exelon subsidiaries to vote in a way that benefits the overall company as opposed to the interests of the individual operating subsidiaries and their customers.[92]

66. The Delaware Commission echoes the concern that the Proposed Merger will have an adverse effect on the PJM stakeholder process. The Delaware Commission states that Pepco Holdings has typically been "pro-consumer" through its votes in the PJM stakeholder process, while Exelon has generally pursued policies and positions that would result in increased payments by customers to generators.[93]

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[89] *Id.*

[90] *Id.* at 8.

[91] *Id.*

[92] D.C. People's Counsel Comments at 4-5.

[93] Delaware Commission Protest at 11.

### iii. Answers

67. Applicants state that the Proposed Merger raises no vertical market power concerns, noting that the Commission has stated that membership in an RTO adequately mitigates vertical market power concerns arising from a merger and that they are members of PJM, which is an RTO.[94] Furthermore, Applicants state that, even if a utility is not a member of an RTO, the Commission has held that operation pursuant to an open access transmission tariff (OATT) provides adequate mitigation, noting that PJM provides transmission service under an OATT.[95] Applicants assert that their membership in PJM mitigates the Market Monitor's concerns about interconnection studies and line limits, which are functions that all transmission owners perform in RTOs.[96] Furthermore, Applicants assert that transmission owners that are not members of an RTO perform these functions, and others, themselves under an OATT without vertical market power concerns.[97]

68. Applicants state that the Delaware Commission's and the D.C. People's Council's concerns that the merged companies will have an undue influence over PJM stakeholder processes are not relevant to the Commission's review of mergers.[98] Applicants assert that the concerns are without merit in any event because the PJM stakeholder voting procedures will limit the combined entity's influence.[99] Additionally, Applicants assert

[94] *See* Applicants July 30 Answer at 5 (citing *Exelon Corp.*, 138 FERC ¶ 61,167, at P 113 (2012); *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 161 (2011); *PPL Corp.*, 133 FERC ¶ 61,083, at P 18 (2010); *Exelon Corp.*, 127 FERC ¶ 61,161, at PP 90, 93 (2009)).

[95] *Id.* at 5-7.

[96] *See id.* at 6.

[97] *Id.* at 7.

[98] *Id.* at 24 (citing *NSTAR*, 136 FERC ¶ 61,016, at P 79 (2011) ("[T]he concerns raised by National Grid concerning the possible impact of the Proposed Transaction on voting dynamics under existing agreements with [ISO New England, Inc.'s Participating Transmission Owners] are not relevant to the Commission's review of proposed mergers.")).

[99] Applicants assert that the combined company's influence will actually be reduced because it will have only one vote in the Transmission Owner sector, instead of one each for Pepco Holdings in the Distribution Sector and Exelon in the Transmission Owner sector. Furthermore, Applicants assert that the per capita and weighted voting procedures, including the 24.9 percent limit of total voting weight, of the Transmission

(continued…)

that any action taken by the PJM transmission owners that results in a tariff filing must be approved under the procedures established for PJM action and then approved by the Commission.[100]

69. The Market Monitor states that Applicants did not address the vertical market power concerns presented by the significant consolidation of upstream and downstream assets presented by the Proposed Merger in their analysis.[101] The Market Monitor states that the Applicants' entire vertical analysis hinges on membership in PJM, which the Market Monitor asserts will only alleviate vertical market power if Applicants remain in PJM and do not exert undue influence over PJM based on their ability to withdraw from the RTO.[102] Accordingly, the Market Monitor asserts that the Commission should condition approval of the Proposed Merger on Applicants' agreement to remain a member of PJM.

70. The Market Monitor asserts that the Proposed Merger will permanently affect PJM markets going forward because of its unusual size and scope and because it "returns a significant portion of the grid now operating under the independent network model back to the vertically integrated model."[103] It states that the Commission should not relax its review of vertical market power of the Proposed Merger simply because the Commission's required quantitative analysis is less easily applied to Applicants.[104] The Market Monitor states that because nothing prevents Applicants from building new generation anywhere in PJM, the Commission should consider more than the Proposed Merger's short term market effects. Therefore, the Market Monitor requests that the Commission consider how the Proposed Merger will affect the ultimate market structure

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Owners Agreement Administrative Committee will limit the combined entity's influence. *Id.* at 25-26.

[100] *Id.* at 25.

[101] Market Monitor Answer at 3.

[102] *Id.*

[103] *See id.* at 5 (quoting Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,902 ("[T]he Commission has demonstrated that it is concerned about cases that involve a vertical combination of generation and transmission assets even if there is little or no overlap between generation activities.")).

[104] *Id.* at 5-6.

of PJM in this case and consider the effects on the market structure of all regional markets in future FPA section 203 applications.[105]

71. For these reasons, the Market Monitor states that the assertions made by Applicants should not be accepted as sufficient to establish a prima case that there are no vertical market power concerns, and that Applicants should be required to provide more information about how RTO membership will alleviate these vertical market power concerns.[106] Alternatively, the Market Monitor suggests Applicants could provide measures to ensure competitive access to their combined system.

72. Applicants assert that the Commission requires that parties advancing theories of competitive harm resulting from a merger bear the burden of submitting data to support those theories if the analysis is not required to be addressed in an FPA section 203 application by the Commission's regulations.[107] Applicants assert that "intervenors must make a convincing case that the merger has anticompetitive effects" if the Commission's required framework shows no potential for competitive harm and intervenors allege that the merger results in competitive problems.[108] Therefore, Applicants state that the Commission should reject the Market Monitor's theoretical competition concerns as unsupported and not required to be analyzed in a FPA section 203 application, consistent with Commission precedent.[109]

73. Applicants assert that the Commission should not revise its merger policy in this proceeding to provide for new or enhanced vertical market power requirements as requested by the Market Monitor.[110] Applicants offer no opinion on whether the

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[105] *Id.* at 6.

[106] *Id.* at 5.

[107] Applicants September 19 Answer at 4 (quoting Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,119 ("Unsupported, general claims of harm are insufficient grounds to warrant further investigation of an otherwise comprehensive analysis developed by the applicants. Intervenors may also file competitive analysis, *accompanied by appropriate data*, to support their arguments.") (emphasis added)).

[108] *Id.* (quoting Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,897).

[109] *Id.* at 5-6 (citing *Florida Power & Light Co.*, 145 FERC ¶ 61,018, at PP 34, 47 (2013); *Duke Energy*, 136 FERC ¶ 61,245 at P 153; *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at PP 50-51 (2010)).

[110] *Id.* at 6-7.

Commission should revise its merger policy, but they assert that to the extent that revisions may be advisable, such changes should be made pursuant to new policy statements or revisions to the Commission's filing requirements.[111] Applicants state that it would not be appropriate for the Commission to establish new standards of review for this case and require Applicants to submit new analyses.[112] Applicants stress that they are not asserting that the Market Monitor may not raise vertical market concerns that go beyond the Commission's required analysis, but they state that the Commission should not impose new requirements on Applicants in the middle of this proceeding absent a demonstration by the Market Monitor that the concerns it raises are legitimate.

74. Furthermore, Applicants assert that many of the Market Monitor's concerns are the same as the general PJM market issues that the Market Monitor raised in its recent State of the Market reports.[113] Applicants state that the Commission should not allow the Market Monitor to use the Proposed Merger to bypass the PJM stakeholder process and Commission review in order to impose its general changes to the PJM markets, which are unrelated to the Proposed Merger, as conditions on individual merger applicants.[114]

75. Applicants also dispute that they can exercise influence over PJM by threatening to exit PJM and state that the Commission should not require that they commit to remain in PJM. Applicants assert that the Market Monitor does not explain how the Proposed Merger would exacerbate any existing ability of Applicants to exercise influence by threatening to exit or how such threats translate into the exercise of vertical market power.[115] Applicants assert that any threat to leave PJM could not be used to exercise vertical market power because PJM provides transmission service pursuant to a Commission-approved OATT, which adequately mitigates any vertical market power that Applicants could theoretically possess over PJM. Furthermore, Applicants assert that,

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[111] *Id.* at 7.

[112] *Id.*

[113] *Id.* at 8-9 (quoting Monitoring Analytics, *State of the Market Report for PJM 2013*, Vol. II at 197, 346, 358-59 (Mar. 13, 2014), *available at* http://www.monitoringanalytics.com/reports/pjm_state_of_the_market/2013.shtml (State of the Market Report for PJM 2013); Monitoring Analytics, *2014 Quarterly State of the Market Report for PJM: January-June 2014*, at 194 (Aug. 14, 2014), *available at* http://www.monitoringanalytics.com/reports/PJM_State_of_the _Market/2014q2-som-pjm.pdf).

[114] *Id.* at 9.

[115] *Id.* at 18.

even if they left PJM following the Proposed Merger, they would be required to operate under their own OATT by Commission regulations, which would adequately mitigate vertical market power.[116] Finally, Applicants note that, in any event, Exelon committed to the Maryland Commission that it would remain in PJM for a 10-year period following its merger with Constellation in 2012, which should adequately mitigate any concerns that Applicants will have the ability to exercise vertical market power through a threat to exit PJM.[117]

### c. Commission Determination

76. In mergers combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel), competition can be harmed if a merger increases the merged firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival firms access to inputs or by raising their input costs, a merged firm could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.

77. We find that the Proposed Merger will not have an adverse effect on vertical competition from the combination of generation and upstream natural gas inputs. We are satisfied that the Proposed Merger will not give Applicants the ability to withhold natural gas transportation to disadvantage rival generation as a result of the Proposed Merger. First, as Applicants note, the only additional natural gas distribution utility entering the Exelon corporate family is Delmarva. Since there are no generation facilities directly connected to the Delmarva system, we find that Applicants will not be able to use a newly affiliated local distribution company to withhold inputs to generation. We accept Applicants' representation that, even if they could prevent bypass of their distribution facilities, Applicants' control of natural gas distribution service territories represents less than one percent of the PJM footprint, which limits the possibility of restricting new natural gas generation entry into PJM.

78. Second, we find that Applicants' control of contracted interstate pipeline capacity is limited. Applicants' combined capacity in the PJM market is approximately 6 percent of the total pipeline capacity in the market and within the states that comprise the AP South and 5004/5005 submarkets in PJM, Exelon and Pepco Holdings' combined market share is 7-8 percent. We note that, contrary to the Delaware Commission's assertion, Applicants have provided adequate support regarding their limited natural gas

[116] *Id.* (citing *Silver Merger Sub, Inc.*, 145 FERC ¶ 61,261, at P 46 (2013); *Florida Power & Light*, 145 FERC ¶ 61,018 at P 50; *Duke Energy*, 136 FERC ¶ 61,245 at P 161).

[117] *Id.* at 18-19.

pipeline capacity. Further, in the PJM market, Applicants' combined share of storage capacity is about 2.5 percent. We conclude that Applicants' combined contracted pipeline and natural gas storage capacity is not large enough to adversely affect vertical competition.

79. We also find that the Proposed Merger will not have an adverse effect on vertical competition from the combination of generation and transmission. The Commission has previously relied upon RTO membership to conclude that merger applicants will not have the ability to use their expanded transmission system to harm competition in the wholesale electric markets.[118] In addition to RTO membership, the Commission has also found that the combination of electric generation and transmission facilities will not give merger applicants an ability to exercise vertical market power where the transmission facilities will continue to be subject to a Commission-approved OATT.[119] As the Commission has previously stated, both the ability and incentive to exercise vertical market power are necessary for a merger to harm competition.[120] Here, based on the evidence in this record, we find that Applicants' ownership of transmission facilities does not have an adverse effect on vertical competition. This is because Applicants have turned over operation of their transmission facilities to an independent entity, PJM, eliminating their ability to favor dispatch of Exelon's generation.

80. The Market Monitor argues that, while the RTO has the responsibility for the interconnection process, transmission owners have the responsibility for performing interconnection studies for generation, which can create a conflict of interest if the transmission owner also owns competing generation. However, the Market Monitor has not presented evidence to support that concern, particularly with respect to the Proposed Merger. In addition, the PJM OATT provides for oversight by PJM of the interconnection process through, among other things, assignment of an interconnection coordinator; predetermined responsibilities for each party; and predetermined timelines and milestones which are reported to PJM.[121] As a result of these provisions, following

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[118] *See Nat'l Grid plc*, 117 FERC ¶ 61,080, at P 45 (2006).

[119] *See, e.g.*, *Silver Merger Sub*, 145 FERC ¶ 61,261 at P 46.

[120] *See, e.g.*, *PPL*, 133 FERC ¶ 61,083 at P 18; *Nat'l Grid*, 117 FERC ¶ 61,080 at P 45; *American Electric Power Co.*, 90 FERC ¶ 61,242, at 61,788 (2000), *review denied sub nom. Wabash Valley Power Assn. v. FERC*, 268 F.3d 1105 (D.C. Cir. 2001). *See also* Order No. 642, FERC Stats. & Regs. ¶ 31,911.

[121] *See* PJM Manual 14a, Generation and Transmission Interconnection Process, Revision 15 at §§ 2, 4 (providing for Interconnection Study and Interconnection Service Agreements); PJM Manual 14c, Generation and Transmission Interconnection Construction, Revision 8 at §§ 3, 6 (providing for Construction Processes and Schedules).

the Proposed Merger, Applicants may not improperly delay a non-affiliated generator's interconnection without being detected and facing possible consequences.

81. We decline to condition the Proposed Merger on Applicants' agreement to remain in PJM, as requested by the Market Monitor, because the Commission has maintained a voluntary approach to RTO formation and membership.[122] Further, we note that Exelon committed to the Maryland Commission that it would remain in PJM for a 10-year period following its merger with Constellation in 2012. Were Exelon to abandon PJM in the year 2022 or later, the Commission has adequate tools and authority to address market power concerns at that time.

82. We also decline to condition the Proposed Merger on implementing a process to review all Facility Ratings and line limits, as requested by the Market Monitor, because this is not the proper venue to implement such a review. Section 4.11.4 of the PJM Transmission Owners Agreement – Rate Schedule 42, requires PJM to maintain a database of all Transmission Facility ratings, and PJM to review, and may modify or reject, any submitted change to such ratings or any submitted procedure for pre-established changes to such ratings. Any dispute between a party and PJM with respect to the Facility Ratings to be resolved according the PJM dispute resolution process.[123]

83. Finally, we find that, following the Proposed Merger, the PJM stakeholder process will continue to reflect the interests of the members and other participants in PJM according to the procedures explained in PJM Manual 34.[124] For example, Applicants will have a single vote as a Transmission Owner in PJM's senior committees and their influence on the Transmission Owners Agreement Administrative Committee will be limited by the terms of PJM's Consolidated Transmission Owners Agreement. While the Commission is aware that Exelon will be a member with more assets after the merger, there is nothing in the record of this proceeding to indicate Exelon will have excessive influence over the stakeholder process or the independence of PJM. Moreover, the Commission will continue to review any relevant revisions to the PJM OATT that arise from the PJM stakeholder process to determine whether the revisions are just and reasonable before they go into effect. Should there be evidence in the future that any

[122] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,033-34 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092, at 31,357 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

[123] *See* PJM Transmission Owners Agreement at § 4.11.4, 0.0.0.

[124] *See* PJM Manual 34, Stakeholder Process, Revision 05.

stakeholder has excessive influence over the stakeholder process, the Commission has the authority to take appropriate remedial action.

### 3. Effect on Rates

#### a. Applicants' Analysis

84. Applicants state that the Proposed Merger will have no adverse impact on rates. Applicants state that they do not have any captive wholesale requirements customers, and, as a consequence, the Proposed Merger will have no adverse impact on rates to such customers. Applicants further state that they are willing to make commitments to ensure that the Proposed Merger does not have an adverse effect on transmission customers. Specifically, Applicants commit for a period of five years to hold transmission customers harmless from the rate effects of the Proposed Merger. For that five-year period, Applicants commit that they will not include merger-related costs in their transmission revenue requirements, except to the extent they can demonstrate that merger-related savings are equal to or in excess of all of the transaction-related costs so included.[125] Applicants state that Exelon and Pepco Holdings and their respective subsidiaries will track merger-related costs, including costs incurred for the purpose of effectuating the Proposed Merger and costs incurred to integrate Pepco Holdings into Exelon. According to Applicants, these costs include, among others, external legal and banking costs as well as internal labor costs. Applicants state that this separate tracking mechanism will enable Applicants and their subsidiaries to exclude merger-related costs as appropriate from Commission jurisdictional rates, or to demonstrate that merger-related savings exceed such costs.[126]

#### b. Comments, Protests, and Answers

85. Intervenors raise three issues related to Applicants' analysis of the effect of the Proposed Merger on rates and the adequacy of Applicants' hold harmless commitment. First, intervenors argue that the Commission should clarify the procedures under which Applicants can recover merger-related costs and the Commission's standards regarding recovery. Second, intervenors argue that Applicants' hold harmless commitment should cover additional costs, including transition costs and acquisition premium. Third, intervenors raise issues regarding Applicants' formula rate protocols.

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[125] Joint Application at 21-22.

[126] *Id.* n.25.

### i. Procedures for Recovery of Merger Related Costs

#### (a) Comments and Protests

86. Southern Maryland states that, if the Commission does not prohibit the recovery of all transaction-related costs, the Commission should specify that Applicants must propose any recovery of acquisition premium or transaction-related costs via section 205 of the FPA.[127] It states that this requirement will provide certainty to all parties and will ensure that rates remain just and reasonable and not unduly discriminatory.[128] Southern Maryland asserts that this requirement will insure that these costs are not inappropriately recovered through a placeholder in a formula rate template without a demonstration that they are just and reasonable.[129]

87. The Delaware Commission states that Applicants do not explain how common costs and savings will be allocated among the various operating companies. The Delaware Commission explains that without this information, stakeholders in formula rate proceedings will not have the ability to scrutinize costs before they may be included in a formula rate.[130] The Delaware Commission states that the Commission should require Applicants to explain, with supporting data and calculations, how merger-related costs and savings will be allocated among the operating companies. The Delaware Commission also states that Applicants do not explain how they will identify and verify merger-related savings.[131] The Delaware Commission asks that the Commission require that, if and when an operating company seeks recovery of merger-related costs, all aspects of the formula rate must be subject to review under FPA section 205.[132]

88. The Delaware Commission further states that the hold harmless commitment provides no assurances that Exelon or Pepco Holdings will not accrue merger-related costs during the five-year commitment period and then seek recovery of such costs after the hold harmless commitment period expires. Therefore, the Delaware Commission asks that, if the Commission approves the Proposed Merger, it should require Exelon and

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[127] 16 U.S.C. § 824d (2012).

[128] Southern Maryland Protest at 6-7.

[129] *Id.* at 7.

[130] Delaware Commission Protest at 3.

[131] *Id.* at 4.

[132] *Id.* at 7.

Pepco Holdings to provide a written commitment not to defer recovery of merger-related costs that are incurred during the five-year hold harmless period.[133]

89. The Illinois Attorney General states that Applicants' hold harmless commitment does not specify that only realized merger-related savings may offset the recovery of merger-related costs as opposed to projected or long-term savings. The Illinois Attorney General asserts that, because transmission rates are determined annually, any offsetting benefits must also be determined on an annual basis and, therefore, the Commission should clarify that Applicants may not recover any merger-related costs unless they demonstrate that those costs are equal to or exceeded by realized merger-related savings in a specific rate year.[134]

**(b) Answers**

90. Applicants state that their hold harmless commitment is consistent with those previously accepted by the Commission. Applicants state that the five-year term of their hold harmless commitment is consistent with hold harmless commitments accepted by the Commission and satisfies the Commission's effect on rates standard.[135] Applicants also state that the Delaware Commission's concerns are rate issues that are not properly addressed in this proceeding. Applicants assert that the Delaware Commission will be able to address the costs included in rates if and when Applicants seek to recover these costs in rates.[136]

91. Applicants assert that intervenors' contentions that Applicants should be required to recover any merger-related costs in a new FPA section 205 filing is contrary to Commission precedent. They state that, under Commission precedent, while a new FPA section 205 filing to recover merger-related costs would be required for a new rate, they do not need to make such a filing to recover these costs in an existing formula rate.[137] If

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[133] *Id.* at 2-3.

[134] Illinois Attorney General Comments at 5-6.

[135] *See* Applicants July 30 Answer at 15.

[136] *Id.* at 21 (citing *Silver Merger Sub*, 145 FERC ¶ 61,261 at P 67 ("[T]his section 203 merger proceeding is not the appropriate forum for addressing the rates Applicants will charge for transmission service after the Proposed Transaction has been completed.")).

[137] *Id.* at 18 (citing *FirstEnergy*, 133 FERC ¶ 61,222 at P 63; *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 25 (2010); *PPL*, 133 FERC ¶ 61,083 at PP 26-27).

Applicants seek to recover merger-related costs, they commit to follow this precedent and submit a compliance filing in the instant docket and submit either a compliance filing in the applicable FPA section 205 docket for their formula rates or to make a FPA section 205 filing if no formula rates are involved.[138] Applicants assert that the Delaware Commission's suggestion that all aspects of Applicants' formula rates should be subject to review if they submit a compliance filing to recover merger-related costs is not supported by Commission precedent. Instead, Applicants argue that, under Commission precedent, the Commission only reviews the specific elements of a compliance filing.[139] Finally, Applicants state that the specific details of their future compliance filings should not be at issue in this proceeding, including future recovery of costs.[140]

92. Applicants also request that the Commission deny the Illinois Attorney General's request to clarify that Applicants may not recover costs that exceed realized savings in a specific rate year to the extent that the Illinois Attorney General is arguing that rate recovery of transaction costs incurred in the first years of the merger cannot be deferred to subsequent years in which related savings are achieved. Applicants assert that the Illinois Attorney General's request is inconsistent with Commission precedent and, more important, the imposition of any such requirement would be inappropriate since any merger-related savings that accrue to the benefit of customers over a number of years may only be achieved by incurring upfront transition costs such as separation payments related to elimination of duplicative positions in the merging companies, which are typically made in the first year or two following the merger. Applicants state that it is appropriate, given the mismatch in timing between the incurrence of the cost and the achievement of the resulting savings, to allow for merger-related savings to be recovered over a number of years as the savings are achieved.[141] Applicants state they are not asking to recover such costs as part of the Joint Application but request that the Commission not make a blanket ruling that the Commission's established cost recovery rules for deferred rate recovery are inapplicable.[142] Furthermore, Applicants state that

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[138] *See id.* at 19.

[139] *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 148 FERC ¶ 61,056, at P 33 (2014); *Cal. Indep. Sys. Operator Corp.*, 148 FERC ¶ 61,023, at P 23 (2014)).

[140] *Id.*

[141] Applicants September 11 Answer at 3-4 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124; *Silver Merger Sub*, 145 FERC ¶ 61,261 at P 68; *Exelon*, 138 FERC ¶ 61,167 at P 118; *Ameren Corp.*, 108 FERC ¶ 61,094, at PP 62-68 (2004)).

[142] *Id.* at 4 (citing *Kentucky Utils. Co.*, 45 FERC ¶ 61,409 (1988)).

these cost recovery rules would only need to be addressed if Applicants make a compliance filing in a FPA section 205 docket requesting authorization to recover merger-related costs in transmission rates.

### ii. Costs Subject to Applicants Hold Harmless Commitment

#### (a) Comments and Protests

93. Southern Maryland states that the Commission should prohibit Applicants from recovering transaction costs and acquisition premium through wholesale transmission costs.[143] They state that Applicants have agreed not to recover these costs through retail rates but have not made the same commitment to wholesale transmission customers. Southern Maryland asserts that it would be unreasonable and unduly discriminatory to protect retail customers from these costs and to allow Applicants to seek to recover merger-related costs in their transmission revenue requirements to the extent Applicants can demonstrate that merger-related savings are equal to or in excess of all the transaction-related costs.[144] Southern Maryland asserts that any benefits from the Proposed Merger will only accrue to retail customers and, therefore, the Commission should condition approval of the Proposed Merger on the extension of these protections to wholesale transmission customers.[145] If the Commission does not bar the recovery of acquisition premium, Southern Maryland requests that the Commission condition approval of the Proposed Merger on Applicants including acquisition premium as a transaction cost subject to their hold harmless commitment and require that Applicants recover acquisition premium via an FPA section 205 filing.[146]

94. Delaware Municipal states that, though Applicants have proposed a hold harmless commitment, Applicants have not adequately addressed whether that commitment covers the recovery of any or all of the acquisition premium paid by Exelon. Delaware Municipal states that the Commission should require Applicants to clarify whether their hold harmless commitment covers recovery of any acquisition premium.[147] Further, Delaware Municipal asks that the Commission specify that any attempt by Exelon, Pepco

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[143] Southern Maryland Protest at 4.

[144] *Id.* at 4-5.

[145] *Id.* at 5.

[146] *Id.* at 5-7.

[147] Delaware Municipal Protest at 3.

Holdings, or their regulated subsidiaries to include such costs in any formula rate update, or in any compliance filings in the FPA section 205 docket in which any of their pertinent formula rates were approved, will be rejected.[148] Delaware Municipal states that, for the following reasons, Applicants should not be entitled to recover an acquisition premium: First, Applicants have committed to not seek acquisition premium in retail rates, and wholesale transmission customers should not be treated differently.[149] Second, Delaware Municipal notes that it has been Commission practice to "restrict rate base to the original cost of the facility."[150] Third, Delaware Municipal states that permitting recovery of any portion of the acquisition premium would be unduly detrimental to wholesale transmission customers because not only would such recovery inflate plant costs, it may have the effect of increasing the equity portion of the capital structure.

95. The Delaware Commission similarly notes that Applicants' hold harmless commitment does not provide complete assurance that Applicants will forego recovery of an acquisition premium, and therefore asks that, as a condition to any approval of the Proposed Merger, the Commission should require Applicants to expressly commit that none of their Commission-jurisdictional subsidiaries will seek to recover in rates any acquisition premium associated with the Proposed Merger.[151]

96. The Maryland People's Counsel asks that, if the Commission accepts Applicants' hold harmless commitment, it should make clear, consistent with precedent, that the commitment applies to all costs caused by the merger, including transaction and transition costs, in order to ensure that ratepayers are protected from adverse rate impacts.[152] The D.C. People's Counsel asks that the Commission clarify that Applicants' hold harmless commitment applies to both merger-related transaction costs and the costs

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[148] *Id.* at 4 (citing Staff's Guidance on Formula Rate Updates, at 4 (July 17, 2014), *available at* http://www.ferc.gov/industries/electric/indus-act/oatt-reform/staff-guidance.pdf).

[149] *Id.*

[150] *Id.* (citing *Duke Energy Moss Landing LLC*, 83 FERC ¶ 61,318, at 62,304 (1998)).

[151] *Id.* at 5-6.

[152] Maryland People's Counsel Protest at 4 (citing *Exelon*, 138 FERC ¶ 61,167 at PP 130-133; *FirstEnergy*, 133 FERC ¶ 61,222 at P 62 (interpreting a hold harmless commitment "to include all transaction-related costs, not only costs related to consummating the transaction")).

of integrating Pepco Holdings into Exelon.[153] Similarly, the Illinois Attorney General requests that the Commission clarify that Applicants' hold harmless commitment applies to all costs related to the transaction, including transition and integration costs, to ensure that Applicants' hold harmless commitment adequately protects retail ratepayers.[154]

**(b) Answers**

97. Applicants state that their hold harmless commitment addresses several commenters' concerns because it was intended to apply to transition costs and require any merger-related costs included in rates to be offset by merger-related savings.[155] Applicants state that they intended their hold harmless commitment to apply to acquisition premiums and that any acquisition premium included in rates would be offset by merger-related savings.[156] Applicants state that, if they attempt to recover acquisition premium during the hold harmless period, they will make a new filing under section 205 of the FPA.[157]

98. Applicants dispute Southern Maryland's claim that the proposed hold harmless commitment discriminates between retail and wholesale ratepayers. They state that their wholesale transmission customers are not similarly situated to their retail customers and, therefore, there is no undue discrimination. Furthermore, Applicants assert that the Commission has never required that wholesale rate design must be identical to retail rate design or required that wholesale rate commitments be identical to retail rate commitments made to retail regulators.[158]

99. Applicants also argue that Southern Maryland's and the Delaware Commission's concerns regarding the rate recovery of merger-related transaction and transition costs are beyond the scope of this proceeding. Applicants explain that the parties will be able to make their arguments regarding the recovery of specific costs if and when Applicants make a filing to recover those costs.[159]

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[153] D.C. People's Counsel Comments at 5.

[154] Illinois Attorney General Comments at 7-8.

[155] Applicants July 30 Answer at 15-16.

[156] *Id.*

[157] *Id.* n.15.

[158] *Id.* at 17-18.

[159] *Id.* at 20.

100. Noting that their hold harmless commitment applies only to transmission rates, Applicants state that the Illinois Attorney General nonetheless appears to believe that Applicants' hold harmless commitment applies to retail rates, as well. Therefore, Applicants request that, if the Commission grants the Illinois Attorney General's requested clarifications, the Commission should further clarify that it is not expanding Applicants' commitment to include retail rates.[160]

### iii. Formula Rate Protocols

#### (a) Comments

101. The Delaware Commission states that the existing formula rate protocols for Atlantic City Electric, Baltimore Gas & Electric, Delmarva, and Pepco are inadequate and do not provide a sufficient vehicle for verifying and, if necessary, challenging cost recovery. The Delaware Commission states that the existing protocols do not allow interested parties to receive all of the reasonably requested information needed to evaluate and verify the inputs, calculations, and accounting underlying the costs sought to be recovered and the merger-related savings claimed.[161]

102. Southern Maryland states that existing transmission customers will not be able to adequately verify Applicants' adherence to their hold harmless commitment given Pepco's existing tariff provisions. Therefore, Southern Maryland requests that the Commission condition any approval of the Proposed Merger on revisions to Pepco's formula rates and associated formula rate implementation protocols to ensure that transaction related-costs are not included in annual updates and may be challenged if included. Southern Maryland states that these protocols are insufficient to ensure compliance with Applicants' hold harmless commitment and that these conditions would be consistent with Commission actions addressing the formula rate protocols of other transmission providers since the acceptance of Pepco's protocols.[162]

103. Southern Maryland states that these revisions should include, but are not necessarily limited to: (1) adding an explicit statement permitting interested parties to

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[160] *See* Applicants September 11 Answer at 2.

[161] Delaware Commission Protest at 6.

[162] Southern Maryland Comments at 8-9 (citing *Kansas City Power & Light Co.*, 148 FERC ¶ 61,034, at P 13 (2014); *Westar Energy, Inc.*, 148 FERC ¶ 61,033, at P 15 (2014); *The Empire District Elec. Co.*, 148 FERC ¶ 61,030, at P 10 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 16 & n.17 (2013), *order on compliance*, 146 FERC ¶ 61,212 (2014)).

review and challenge the prudence of the costs and expenditures included in annual updates;[163] (2) requiring broader access to information and document requests than currently allowed under Pepco's protocols and allowing interested parties to request the appointment of a settlement judge or dispute resolution service to facilitate these requests;[164] (3) removing Pepco's requirement that all interested parties submit consolidated information requests;[165] (4) removing the term "material" from accounting disclosures to ensure that Pepco identifies and explains any changes in accounting policies, practices, and procedures;[166] and (5) clarifying that interested parties have the right to challenge, at whatever time they discover errors, the misapplication of Pepco's formula rate, the charging of rates contrary to the filed rate in the annual update process, or where erroneous data, incorrect calculations, inappropriate or imprudent costs are determined to have been used in the formula.[167]

### (b) Applicants Answer

104. Applicants state that the Commission is without jurisdiction to require any changes to their formula rate protocols in this FPA section 203 proceeding and may only

[163] *Id.* at 9 (stating that these revisions are consistent with revisions to the MISO rate protocols and interpretations of Delmarva's protocols) (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 at PP 15, 18; *Delmarva Power & Light Co.*, 145 FERC ¶ 61,055, at PP 20-24 (2013)).

[164] *Id.* at 10-11 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 at PP 90, 122 (requiring revisions by MISO transmission owners), *order on compliance*, 146 FERC ¶ 61,212 at PP 67, 107 (same)).

[165] *Id.* at 12 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 146 FERC ¶ 61,212 at P 63 (requiring the deletion of similar provisions as overly burdensome)).

[166] *Id.* at 12-13 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 at P 87 (requiring the disclosure of any change in accounting during the rate period that affects the inputs to the formula rate or resulting charges billed under the formula rate), *order on compliance*, 146 FERC ¶ 61,212 at P 65 (same)).

[167] *Id.* at 13-14 (stating that Pepco's protocols may be interpreted to provide a cut-off date by which applicants may file a challenge and asserting that the limit is contrary to Commission precedent) (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 146 FERC ¶ 61,212 at P 110; *Arkansas Public Serv. Commission v. Entergy Corp.*, 142 FERC ¶ 61,012, at PP 27-28 (2013); *American Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306, at P 35 (2008); *Public Service Elec. & Gas Co.*, 124 FERC ¶ 61,303, at P 17 (2008)).

require changes to an existing rate schedule under section 206 of the FPA.[168] They state that, while the Commission could institute an FPA section 206 proceeding into their formula rate protocols, there is no need to do so because there is already a pending proceeding against Baltimore Gas & Electric and Pepco Holdings' utilities.[169] They explain that, to the extent that the Commission believes that these issues have any merit, they are properly addressed in that proceeding. Second, Applicants assert that Southern Maryland's and the Delaware Commission's other arguments regarding the recovery of merger-related costs are properly addressed if and when Applicants seek to recover those costs.[170]

### c. Commission Determination

105. We find that the Proposed Merger will not have an adverse effect on rates, subject to certain clarifications discussed below. Applicants represent that they have no captive wholesale customers; therefore, the Proposed Merger can have no adverse impact on wholesale rates. Applicants state that they are willing to make commitments to ensure that the Proposed Merger does not have an adverse effect on transmission customers. Specifically, Applicants commit for a period of five years to hold transmission customers harmless from the rate effects of the Proposed Merger. For that five-year period, Applicants commit that they will not include merger-related costs in their transmission revenue requirements, except to the extent they can demonstrate that merger-related savings are equal to or in excess of all of the merger-related costs so included. We accept Applicants' commitment to hold transmission customers harmless for five years from costs related to the Proposed Merger. We interpret Applicants' commitment to apply to all merger-related costs, including costs related to consummating the Proposed Merger and transition costs (both capital and operating) incurred to achieve merger synergies, incurred prior to the consummation of the Proposed Merger or in the five years after merger consummation.[171] Further, we clarify that, if Applicants seek to recover merger-related costs that are the subject of a hold harmless commitment, they must submit a *new* filing under FPA section 205, and a concurrent informational filing[172] in this docket, in order to do so.

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[168] 16 U.S.C. § 824e (2012).

[169] Applicants July 30 Answer at 20.

[170] *Id.*

[171] *See, e.g.*, *Exelon*, 138 FERC ¶ 61,167 at P 118.

[172] Upon receipt, the Commission will not act on or notice the concurrent informational filing.

106. The Commission has established that, where applicants make hold harmless commitments in the context of mergers, in order to recover merger-related costs applicants must demonstrate offsetting benefits at the time they apply to recover those costs. We have concluded, on the basis of Commission precedent, Commission experience with auditing utilities that have made hold harmless commitments, and intervenors' arguments in this proceeding, that additional clarification of this process is warranted. Accordingly, we clarify that if applicants seek to recover merger-related costs incurred prior to the consummation of the Proposed Merger or in the five years after merger consummation, they must submit a new filing under FPA section 205, and a concurrent informational filing in the relevant FPA section 203 docket. We clarify that the Commission will not authorize the recovery of merger-related costs in an annual informational filing under existing formula rates. The Commission will notice the new section 205 filing for public comment. The Commission will determine both if there is adequate support to show that recovery of merger-related costs is consistent with the hold harmless commitment and that the resulting new rate is just and reasonable in light of all the other factors underlying the proposed new rate when Applicants seek to recover such costs pursuant to a new FPA section 205 filing.

107. In the FPA section 205 proceeding, the Commission will determine whether applicants have demonstrated offsetting savings to customers served under Commission jurisdictional rate schedules such that recovery of merger-related costs would be appropriate. In the FPA section 205 filing, applicants must: (1) specifically identify the merger-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the merger and realized by jurisdictional customers.[173] Applicants must show that the proposed rate is just and reasonable in addition to providing appropriate evidentiary support demonstrating that merger-related costs have been offset by merger-related savings in order to recover those merger-related costs and comply with their hold harmless commitment. The Commission will consider rates not to be "just and reasonable" if they include recovery of costs subject to a hold harmless commitment made in connection with an FPA section 203 application and if applicants fail to show offsetting savings due to the merger. The Commission realizes that showing savings or benefits may be difficult, because while costs may be documented and verified, savings can be realized as the absence of cost and may be more subjective. Applicants must provide, however, in their subsequent FPA section 205 filing, reasonable documentation and estimates of the costs avoided in order to recover merger-related costs. In addition, those savings must be realized prior to, or concurrent with, any authorized recovery. We clarify that evidence of offsetting merger-related savings cannot be based on estimates or projections of future savings, but must be based

[173] Additional instruction regarding the proper procedures and controls for recording of merger-related costs is explained in section III.6.d below.

on a demonstration of actual merger-related savings realized by jurisdictional customers, which, as Applicants note, may not occur until well after the transaction closes.[174]

108. If applicants submit a filing under FPA section 205 to recover merger-related costs, applicants must also submit concurrently an informational filing in the relevant FPA section 203 docket. The purpose of the filing in the FPA section 203 docket is informational only, to provide notice to interested parties regarding applicants' intention to recover merger-related costs. We do not expect to make any further findings under FPA section 203 for purposes of the hold harmless commitment in response to such an informational filing.

109. Accordingly, for purposes of the instant proceeding, if Applicants seek to recover merger-related costs incurred prior to the consummation of the Proposed Merger or in the five years after merger consummation, then Applicants must make that filing in a new FPA section 205 docket. The Commission will notice the new section 205 filing for public comment. Applicants must also submit concurrently an informational filing in the instant FPA section 203 docket. The purpose of the filing in the FPA section 203 docket is informational only, to provide notice to interested parties regarding Applicants' intention to recover merger-related costs. We do not expect to make any further findings under FPA section 203 for purposes of the hold harmless commitment in response to such an informational filing. In the FPA section 205 proceeding, the Commission will determine whether Applicants have demonstrated offsetting savings to customers served under Commission jurisdictional rate schedules such that recovery of merger-related costs would be appropriate. In the FPA section 205 filing, Applicants must: (1) specifically identify the merger-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the merger.[175]

110. The Commission will be able to monitor Applicants' hold harmless commitment under its authority under FPA section 301(c)[176] and the books and records provision of the Public Utility Holding Company Act of 2005.[177] Moreover, the commitment is fully enforceable based on the Commission's authority under FPA section 203.

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[174] Applicants September 11 Answer at 3. *See Audit Report of National Grid, USA*, Docket No. FA09-10-000 (Feb. 11, 2011) at 55; *see also Ameren Corp.*, 140 FERC ¶ 61,034, at PP 36-37 (2012).

[175] Additional instruction regarding the proper procedures and controls for recording of merger-related costs is explained in section III.6.d below.

[176] 16 U.S.C. § 825(c) (2012).

[177] 42 U.S.C. § 16452 (2012).

111. We note that Applicants clarify that their hold harmless commitment applies to any acquisition premiums in wholesale rates,[178] and acknowledge that, to the extent they may attempt to recover an acquisition premium during the time period when the hold harmless commitment applies, a new FPA section 205 filing will be required.[179] However, we remind Applicants that the Commission does not consider acquisition premiums to be part of transaction-related costs, and has historically not permitted rate recovery of acquisition premiums in jurisdictional rates.[180] If Applicants seek recovery of any acquisition premium (or acquisition adjustment) associated with the Proposed Merger, they must demonstrate in a subsequent proceeding under FPA section 205 that the acquisition was "prudent and provides measurable, demonstrable benefits to ratepayers."[181]

112. We believe that the clarification discussed above regarding Applicants' hold harmless commitment addresses many of the issues raised by intervenors. First, as Southern Maryland notes, the requirement that Applicants must propose to recover any merger-related costs via a new FPA section 205 filing will provide greater certainty to parties and ensure that rates remain just and reasonable and not unduly discriminatory. By requiring Applicants to submit a filing to recover merger-related costs pursuant to FPA section 205, Applicants will be prevented from recovering such costs subject to their hold harmless commitment without demonstrating that they are exceeded by benefits and savings from the merger and that the new rate is just and reasonable.

113. Likewise, Applicants' future FPA section 205 filing will provide the opportunity for intervenors like the Delaware Commission to scrutinize the merger-related costs that Applicants may propose to recover. As explained above, Applicants will be obligated to

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[178] Applicants July 30 Answer at 15-16.

[179] *Id.* at n.15.

[180] *See Silver Merger Sub*, 145 FERC ¶ 61,261 at P 68; *Exelon*, 138 FERC ¶ 61,167 at P 118. *See also* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,126. We note that this is a separate showing than required for the recovery of merger-related costs subject to a hold harmless commitment. The Commission's policy on the recovery of acquisition premium was established over the years on a case-by-case basis. The Commission's historical prohibition against the recovery of acquisition premium (or acquisition adjustment) applies to all transactions regardless of the offering of a hold harmless commitment, and thus requires a separate showing under FPA section 205 if applicants have also made a hold harmless commitment.

[181] *Silver Merger Sub*, 145 FERC ¶ 61,261 at P 68, n.132; *ITC Holdings Corp.*, 139 FERC ¶ 61,112, at P 50, n.116 (2012).

provide reasonable documentation and estimates of both merger-related costs and savings, and the Commission will be required to make a determination of whether recovery of those costs is just and reasonable, prior to Applicants recovering merger-related costs. Accordingly, the Delaware Commission and other intervenors will have the opportunity to review any merger-related costs before they are included in Applicants' rates. The Delaware Commission's specific concerns relating to the allocation of merger-related costs and merger-related savings between Applicants' operating companies and Southern Maryland's concerns regarding the allocation of benefits between retail and wholesale ratepayers are, however, beyond the scope of this proceeding. Intervenors may raise these concerns if and when Applicants seek to recover merger-related costs under FPA section 205.

114. However, we decline to accept the Delaware Commission's suggestion that we require Exelon and Pepco Holdings to provide a written commitment not to defer recovery of merger-related costs that are incurred during the five-year hold harmless period. Accordingly, for purposes of the instant proceeding, if Applicants seek to recover merger-related costs incurred prior to the closing of the Proposed Merger or incurred in the five years of their hold harmless commitment, then Applicants must make that filing in a new FPA section 205 docket.

115. We also decline to condition approval of the Proposed Merger on revisions to Applicants' formula rate protocols. The ongoing FPA section 206 proceeding in Docket No. EL13-48-000 addressing Atlantic City Electric's, Baltimore Gas & Electric's, Delmarva's, and Pepco's formula rate protocols should address intervenors' concerns regarding Applicants' formula rate protocols.[182] The hearing and settlement judge procedures in that proceeding should ensure that Applicants' formula rate protocols meet the Commission's standards,[183] which should address intervenors' concerns. Further, as noted above, pursuant to Applicants' hold harmless commitment, intervenors will be able

[182] *See Delaware Division of the Public Advocate v. Baltimore Gas and Electric Co.*, 148 FERC ¶ 61,134, at PP 27-28 (2014) ("In light of the detailed protocol concerns that Complainants have identified, we find that [Baltimore Gas & Electric's, Pepco's, Delmarva's, and Atlantic City Electric's] formula rate protocols may not satisfy our minimum standards and additional guidance, and may be unjust and unreasonable. Accordingly we will establish hearing and settlement judge procedures to ensure that [Baltimore Gas & Electric's, Pepco's, Delmarva's, and Atlantic City Electric's] formula rate protocols meet, if not exceed, our minimum standards and additional guidance as identified herein, regarding the scope of participation, transparency and challenge procedures."). The Delaware Commission and Southern Maryland are both among the complainants in the formula rate protocols proceeding.

[183] *Id.* P 28.

to adequately scrutinize any recovery of merger-related costs subject to Applicants' hold harmless commitment before such costs are included in Commission jurisdictional rates.

### 4. Effect on Regulation

#### a. Applicants' Analysis

116. Applicants state that, while the Commission requires merger applicants to evaluate the effect of a proposed transaction on federal and state regulation, the Commission indicated in Order No. 642 that it would not ordinarily set a merger application for hearing with respect to the impact on regulation unless: (a) the proposed transaction involves public utility subsidiaries of a registered holding company under the Public Utility Holding Company Act of 1935 (PUHCA 1935) and the relevant applicants do not commit to abide by the Commission's policies on pricing of non-power goods and services between affiliates; or (b) the affected state commissions lack authority over the proposed transaction and raise concerns about the effect on state regulation.[184] Applicants state that the Proposed Merger raises none of these concerns. Applicants assert that requirement (a) is no longer applicable since the repeal of PUHCA 1935. They add that the Proposed Merger will not have any impact on the jurisdiction of either the Commission or any state public utility commission over any of Applicants or any of their affiliates or subsidiaries each of which will remain subject to regulation after the Proposed Merger closes to the same extent each was regulated before the closing of the Proposed Merger.[185]

#### b. Comments and Protests

117. The D.C. People's Counsel questions whether state regulatory bodies will be able to effectively regulate the local utility or utilities subject to its jurisdiction after the consummation of the Proposed Merger. It states that the resulting company's complex corporate structure will pose serious challenges for state regulators and consumer advocates. For example, the D.C. People's Counsel is concerned that the Proposed Merger will make tracking decision making and incentive compensation programs, which it states is already a difficult task under Pepco Holding's pre-merger structure, more difficult to track over a larger holding company.[186] Therefore, the D.C. People's Counsel is concerned that the Proposed Merger will diminish the D.C. Commission's ability to

[184] Joint Application at 23 (citing Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914-15).

[185] *Id.*

[186] D.C. People's Counsel Comments at 4.

verify the workings of Exelon's corporate structure and craft orders and regulations that send the appropriate and effective regulatory signals.

118. Institute for Energy and Environmental Research states that the Commission should delay reviewing the Proposed Merger until all state regulatory bodies and the District of Columbia have reviewed the Proposed Merger so that the Commission can consider any amendments to the Proposed Merger that arise from the retail review process.[187]

### c. Answer

119. Applicants state that these concerns have no relationship with the Commission's analysis under the Merger Policy Statement and should be dismissed as outside the scope of the proceeding.[188]

### d. Commission Determination

120. Based on the representations presented in the Joint Application, we find no evidence that either state or federal regulation will be impaired by the Proposed Merger. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.[189] We find that the Proposed Merger will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the companies after consummation of the Proposed Merger.

121. As to the state level, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.[190]

122. Although the D.C. People's Counsel expresses concern that Applicants' post-merger corporate structure will impair the ability of consumer advocates and retail

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[187] Institute for Energy and Environmental Research Comments at 16.

[188] Applicants July 30 Answer at 23-24.

[189] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

[190] *Id*. at 30,125.

regulators to effectively regulate the merged company, the structure of Exelon following the consummation of the Proposed Merger will not impair state regulation because, as Applicants represent, all of Applicants' subsidiaries will remain subject to the same regulation as they were before the Proposed Merger. We note that no state commission, including the D.C. Commission, has requested that the Commission address the issue of the effect on state regulation.

123. Institute for Energy and Environmental Research requests that the Commission delay ruling on the Proposed Merger in order to consider any changes to the Proposed Merger that arise from the proceedings of the state commissions and the District of Columbia. We note that it is not the Commission's policy to delay ruling when there are parallel proceedings.[191]

124. Accordingly, the Commission finds that the Proposed Merger will not have an adverse effect on regulation.

### 5. Cross-Subsidization

#### a. Applicants' Analysis

125. Applicants state that the Proposed Merger will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of a traditional public utility for the benefit of any associate company. Specifically, Applicants verify that, based on the facts and circumstances known to them or that are reasonably foreseeable, the Proposed Merger will not result in, at the time of the Proposed Merger or in the future: (1) transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional facilities, for the benefit of an associate company; or (4) new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or

[191] *Id.* at 30,127-28 ("We will not delay our processing of merger applications to allow the states to complete their review . . . . However, we will be willing to consider late interventions by state commissions where it is practicable to do so. In cases where a state commission asks us to address the merger's effect on retail markets because it lacks adequate authority under state law, we will do so."). *See Appalachian Power Co.*, 143 FERC ¶ 61,074, at P 48 (2013).

provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.[192]

126. Applicants state that they are proposing additional ring-fencing provisions for Pepco Holdings' utilities before the relevant state commissions that will ensure that the Proposed Merger raises no cross-subsidization issues.[193]

### b. Comments and Protests

127. Public Citizen states that the Proposed Merger is not in the public interest because it improperly shifts risks from Exelon's shareholders onto captive ratepayers without adequate relief or enhanced consumer protections.[194] It asserts that the purpose of the Proposed Merger is to balance the volatile returns from Exelon's large merchant generation fleet with the stable returns from Pepco's captive ratepayers. Public Citizen asserts that Pepco's captive ratepayers will serve as a secure purchaser for Exelon's wholesale sales and assure guaranteed, cost-recovery returns to Exelon's shareholders.[195] Public Citizen also disputes Applicants' assurances that Pepco Holdings has no captive customers because its distribution utilities operate under retail competition.[196] It asserts that Pepco Holdings' customers have no viable alternatives and states that the average percentage of customers remaining with Pepco Holdings' distribution utilities show there is no robust retail alternative to Pepco Holdings' service.[197]

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[192] Joint Application at 46. Applicants add that Exhibit M to the Application also includes a list of the existing pledges and encumbrances of Applicants' regulated utilities, as required by 18 C.F.R. § 33.2(j)(1)(i).

[193] Joint Application at 3.

[194] Public Citizen Protest at 3.

[195] *Id.*

[196] *Id.* at 3-4.

[197] Public Citizen states that 83 percent of all of Pepco's retail customers remain with Pepco with 86 percent remaining in the District of Columbia, 77 percent remaining in Maryland, 90 percent remaining in Delaware, and 85 percent remaining in New Jersey. They also assert that Constellation Energy, an Exelon affiliate, provides a portion of the limited retail competition in these markets. *Id.* at 4.

128. Institute for Energy and Environmental Research expresses similar concerns and states that Exelon may use the Proposed Merger to subsidize its merchant fleet and shareholders by maintaining guaranteed profits in its regulated business at the expense of ratepayers.[198]

129. The Delaware Commission states that there is no indication given by Applicants as to whether Exelon Generation would seek to enter into contractual arrangements with operating company affiliates to serve larger amounts of default load. The Delaware Commission asks that the Commission require Applicants to provide further information regarding the potential impact of the merger on Exelon Generation's engagement in default supplier arrangements, including an evaluation of whether such arrangements may raise affiliate preference issues.[199]

130. Southern Maryland states that Applicants' ring-fencing provisions may be inadequate. First, Southern Maryland states that it cannot fully verify Applicants' commitments because Applicants have not submitted their application, including their ring-fencing proposal, to the state of Maryland.[200] Second, Southern Maryland states that Applicants' commitment that Pepco will maintain separate books may not be adequate to protect against affiliate cross-subsidization. Southern Maryland explains that audits of Pepco by the D.C. Commission illustrate that placing a ring-fenced structure around Pepco may not be adequate to prevent affiliate cross-subsidization.[201] Therefore, Southern Maryland requests that the Commission require Applicants to propose and implement accounting measures and cost allocation procedures to protect against cross-subsidization.

131. Delaware Municipal states that Applicants' cross-subsidization claims rely on ring-fencing measures that will be reviewed by relevant state commissions, which Delaware Municipal states it cannot verify because not all of the required filings had been made at the time of this filing.[202]

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[198] Institute for Energy and Environmental Research Comments at 13.

[199] Delaware Commission Protest at 14.

[200] Southern Maryland Comments at 15.

[201] *See id.* at 16-17 (stating that the audits show that Pepco has not provided the D.C. Commission with enough information to separate out and verify the reasonableness of operations by Pepco within the District of Columbia and detailing additional information the D.C. Commission requested to verify Pepco's operations).

[202] Delaware Municipal Protest at 6-7.

### c. Applicants Answer

132. Applicants state that the Proposed Merger does not present an opportunity for Exelon Generation to enter into long-term power sales agreements with Pepco Holdings' utilities, as suggested by the Delaware Commission and Public Citizen, because those utilities purchase capacity and electricity needed to serve default load under independently-controlled auctions supervised by their retail regulators.[203] Applicants assert that these auctions satisfy the Commission's requirements for sales from merchant generation companies to affiliated entities and, therefore, there is no potential for preferential rates between Exelon's generation affiliates and Pepco Holdings utilities.[204]

133. Applicants assert that, though Southern Maryland states it is raising cross-subsidization concerns, none of the issues it raises address the four factors identified in the Commission's test for cross-subsidization.[205] Therefore, they assert that Southern Maryland's claims should be rejected.[206]

### d. Commission Determination

134. Based on the representations as presented in the Joint Application, we find that the Proposed Merger will not result in inappropriate cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. Pepco, Delmarva, and Atlantic City Electric each purchase capacity and electricity to serve default load under independently-controlled auctions supervised by their retail regulators. These procedures prevent Applicants from using Pepco Holdings' regulated utilities as secure purchasers for Exelon Generation's merchant generation facilities or otherwise entering into contracts between affiliates at preferential rates.

135. In the Supplemental Policy Statement, the Commission stated it would consider ring-fencing protections in two ways: first, as a safe harbor for meeting the FPA section 203 cross-subsidization demonstration if a state commission adopts or has in place ring-fencing measures to protect customers against inappropriate cross-subsidization; and second, as support for the demonstration required by Exhibit M that the proposed

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[203] Applicants July 30 Answer at 22.

[204] *See id.* (citing *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004)).

[205] *Id.* at 23 (citing Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 169, *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 144, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 at PP 45, 49).

[206] *Id.* at 22-23.

transaction does not result in inappropriate cross-subsidization.[207] Applicants state that they propose additional ring-fencing measures for the Pepco Holding utilities, which will be reviewed by the relevant state commissions.[208] However, the Proposed Merger is still under review at these commissions. Accordingly, consistent with the Supplemental Policy Statement, we condition approval in this order on Applicants submitting an informational filing in this docket within 10 days of each relevant state commission approval of Applicants' proposed ring-fencing provisions.[209]

### 6. Other Issues

#### a. Environmental Risks

##### i. Protests

136. Clean Chesapeake Coalition states that its primary concern is "Exelon's general lack of environmental diligence and responsibility and the impacts that Exelon's inaction will have on the Chesapeake Bay and its tributaries and … restoration efforts."[210] Specifically, Clean Chesapeake Coalition is concerned that the Proposed Merger will allow Exelon to dominate the Maryland energy market and to continue to disregard the concerns of local governments as Clean Chesapeake Coalition asserts Exelon has done in its operation of the Conowingo Dam.[211] Clean Chesapeake Coalition states that Exelon's management of the dam, which is undergoing relicensing in a separate proceeding before the Commission, causes large environmental effects on the Chesapeake Bay, which negate the impact of the actions taken by the member counties of the Clean Chesapeake Coalition to improve water quality, as mandated by the state of Maryland.[212]

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[207] Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at PP 18, 24.

[208] *See* Joint Application, Exhibit B at 3-4.

[209] Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 26. *See, e.g.*, *Bangor Hydro Electric Co.*, 144 FERC ¶ 61,030, at P 28 (2013); *Puget Energy, Inc.*, 123 FERC ¶ 61,050, at P 36 (2008).

[210] Clean Chesapeake Coalition Protest at 2.

[211] *Id.* at 2-3.

[212] *Id.* at 3-4, 6-7. The Conowingo Dam relicensing is under review as Project No. P-405-106. Exelon's current license expired in September 2014.

137. Clean Chesapeake Coalition contends that the Commission should review the effect of the Proposed Merger under the National Environmental Policy Act of 1969 (NEPA)[213] because the Proposed Merger presents "extraordinary circumstances" that warrant review under NEPA.[214] Clean Chesapeake Coalition explains that Exelon's management of the Conowingo Dam makes the environmental effects of the Proposed Merger uncertain and that there should be no debate that the health of the Chesapeake Bay qualified as an "extraordinary circumstance."[215] Therefore, Clean Chesapeake Coalition asserts that the Proposed Merger qualifies as an exception to the categorical exclusion of mergers from review under NEPA, as established by the Commission's rules.[216] Clean Chesapeake Coalition contends that the public interest demands that the Commission conduct an environmental assessment of the Proposed Merger, consistent with Commission precedent requiring environmental review of a merger in certain circumstances.[217] Clean Chesapeake Coalition also claims that the terms of the Merger Agreement do not adequately address the threat posed by the Conowingo Dam to the Chesapeake Bay.[218] Based on these arguments, Clean Chesapeake Coalition requests that the Commission institute an evidentiary hearing in order to develop and establish adequate mitigation of its environmental concerns.[219]

138. Institute for Energy and Environmental Research states that the Proposed Merger will greatly increase Exelon's size, especially in Maryland and Washington, D.C., thereby giving Exelon a greater economic and political presence.[220] Institute for Energy and Environmental Research argues that this will enable Exelon to seek changes to energy policies that favor its nuclear generation fleet, which would have adverse effects on the development of solar and wind energy resources in the state of Maryland, increase the cost of greenhouse gas reductions, and increase costs to ratepayers.[221] Therefore,

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[213] 42 U.S.C. §§ 4321 *et seq.* (2012).

[214] Clean Chesapeake Coalition Protest at 7-8.

[215] *Id.* at 8.

[216] *See id.* (citing 18 C.F.R. § 380.4(b) (2014)).

[217] *Id.* at 8-9 (citing *Southern California Edison Co.*, 49 FERC ¶ 61,091 (1989)).

[218] *Id.* at 9.

[219] *Id.* at 10.

[220] Institute for Energy and Environmental Research Comments at 6.

[221] *See id.* at 3, 5.

Institute for Energy and Environmental Research states that the Commission must examine the effects of Exelon's preferred environmental and energy policies in evaluating the merger. Institute for Energy and Environmental Research also notes that Pepco Holdings has taken different policy positions from Exelon in the past and that the Proposed Merger could alter the positions Pepco Holdings previously advocated in Maryland.[222] In support of its argument that the Commission should consider Exelon's expanded political power, Institute for Energy and Environmental Research asserts that when opposing a state law to encourage renewable power projects Exelon applied pressure in Illinois by threatening to shut down its nuclear generation.[223]

### ii. Applicants Answer

139. Applicants contend that Clean Chesapeake Coalitions' and Institute for Energy and Environmental Research's concerns bear no relationship to any of the factors that the Commission has identified in determining whether a merger transaction is consistent with the public interest and, therefore, should be dismissed.[224]

### iii. Commission Determination

140. Institute for Energy and Environmental Research's concerns, including those regarding Exelon's policy preferences, and Clean Chesapeake Coalition's assertions concerning future operation and permitting of the Conowingo Dam are speculative and beyond the scope of this proceeding. Neither Clean Chesapeake Coalition nor Institute for Energy and Environmental Research has shown that the issues they raise are relevant to the factors that the Commission considers in evaluating applications under FPA section 203.[225] Further, as the Commission has explained, the Commission conditions authorizations under FPA section 203 only when needed to address specific, transaction-related harm.[226] The harms identified by Institute for Energy and Environmental

[222] *See id.* at 11 (noting that Pepco supported virtual net metering for community solar projects in Washington, D.C., while Exelon opposed virtual net metering for community solar projects in Maryland).

[223] *Id.* at 11-12.

[224] Applicants July 30 Answer at 23-24.

[225] *See supra* P 29.

[226] *See, e.g.*, *Entergy Gulf States, Inc.*, 121 FERC ¶ 61,182, at P 71 (2007); *Duke Energy*, 136 FERC ¶ 61,245 at PP 147, 153, 171, 184.

Research and Clean Chesapeake Coalition are speculative and unrelated to the Proposed Merger.

141. Furthermore, the Proposed Merger does not require analysis under NEPA. Under the Commission's regulations, approval of actions under FPA section 203 is categorically excluded from analysis under NEPA.[227] Under certain circumstances the Commission may determine that an action under FPA section 203 does not qualify for the categorical exclusion and require an environmental assessment or other environmental information.[228] But the regulation only requires an assessment where "circumstances indicate that an action may be a major Federal action significantly affecting the quality of the human environment."[229] Clean Chesapeake Coalition has not shown that approval of the Proposed Merger will have any impact on the quality of the environment. Clean

[227] 18 C.F.R. § 360.4(a)(16) (2014). *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 31,128 ("The Commission has recognized that a particular merger can have environmental effects and has been willing to study the issue in an individual case where justified. We do not see the need to change our regulation, which explicitly addresses the possibility that an [Environmental Assessment] or [Environmental Impact Statement] may, on rare occasions, be needed. However, both our categorical exclusion rule and the absence of environmental concerns from the list of three factors in this Policy Statement reflect the simple fact that most mergers do not present environmental concerns.") (footnote omitted); *see also Duke Energy Corp.*, 113 FERC ¶ 61,297 (2005), *order on reh'g*, 118 FERC ¶ 61,077, at P 35, n. 58 (2007) (noting the Commission typically does not consider environmental impacts in section 203 and 205 of the FPA proceedings because such actions are categorically excluded from National Environmental Policy Act analysis); *Cal. Indep. Sys. Operator Corp.*, 93 FERC ¶ 61,001, at 61,003 (2000) (same); *cf. Town of Norwood v. FERC*, 202 F.3d 392, 406-07 (1st Cir. 2000) (same).

[228] 18 C.F.R. § 360.4(b). *See, e.g.*, *Southern California Edison Co.*, 49 FERC at 61,357 (determining that the proposed merger required an environmental assessment because intervenors presented evidence that the proposed merger would result in a change in plant operations that would significantly increase emissions of NOx and other pollutants).

[229] 18 C.F.R. § 360.4(b). *See also Town of Norwood v. FERC*, 202 F.3d 392, 407 (1st Cir. 2000).

Chesapeake Coalition's environmental concerns are properly considered in the ongoing relicensing proceedings for the Conowingo Dam in Project No. 405-106.[230]

### b. Ex Parte Contacts

#### i. Protests

142. Public Citizen states that at least two Commissioners communicated with Exelon executives after Exelon submitted a Form 8-K with the Securities and Exchange Commission announcing the Proposed Merger.[231] Public Citizen states that these communications occurred before Applicants filed the Joint Application and speculates that Applicants likely contacted other Commissioners at the same time.[232] Public Citizen requests that all Commissioners who participated in any communications with Exelon or Pepco Holdings executives prior to the submission of the Joint Application provide detailed testimony about the content of any phone conversations or other communications with those parties as part of this docket.

143. Public Citizen argues that the Commissioners must provide testimony about these contacts because the Administrative Procedure Act (APA)[233] requires the Commissioners to record meetings if they have knowledge that the matter will be "noticed for hearing."[234] Public Citizen asserts that the Commissioners should have known the Proposed Merger would be noticed for hearing because of Exelon's Form 8-K filing and that the Government in the Sunshine Act[235] limits the ability of federal agencies to

[230] Clean Chesapeake Coalition is an intervenor in the relicensing proceeding for Project No. 405 and has filed comments in that proceeding regarding its concerns about the Conowingo Dam. Commission staff has issued its Draft Environmental Impact Statement and several parties, including Clean Chesapeake Coalition, have filed comments. The comments will be addressed in Commission staff's Final Environmental Impact Statement and considered when the Commission acts on the application for new license.

[231] Public Citizen Protest at 1.

[232] *Id.* at 2.

[233] 5 U.S.C. § 551 *et seq.* (2012).

[234] Public Citizen Protest at 2.

[235] Pub. L. No. 94-409, § 4(a), 90 Stat. 1241, 1246 (1976).

conduct "off-the-record" private meetings.[236] Public Citizen asserts that its due process rights, and rights under the APA, to an impartial decision-maker have been infringed by such private communications.[237] Public Citizen notes it is not requesting information regarding contact between Exelon or Pepco Holdings and Commission Staff under the Commission's rules of practice.[238]

### ii. Applicants Answer

144. Applicants assert that any contact they had with any of the Commissioners was not improper *ex parte* contact because the Commission's rules prohibiting such contacts do not apply until "the filing of an intervention disputing any material issue that is the subject of a proceeding."[239] Furthermore, Applicants contend that pre-filing meetings that take place before the filing of an application are not prohibited and that Public Citizen's assertion that these meetings violate the APA is misplaced.[240] Applicants assert that the Commission has explicitly rejected this claim and concluded that the *ex parte* provisions of the APA do not apply to its proceedings.[241]

### iii. Commission Determination

145. We reject Public Citizen's argument that the Commissioners' pre-filing meetings violated the APA. The APA does not bar the pre-filing meetings at issue here because

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[236] Public Citizen Protest at 2 (quoting 5 U.S.C. § 557(d)(1)(E) ("the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing *unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge*.") (emphasis added)).

[237] *Id.* (citing *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583 (D.C. Circuit 1970)).

[238] *Id.* at 2-3.

[239] Applicants July 30 Answer at 26 (quoting 18 C.F.R. § 385.2201(d)(iv)).

[240] *Id.* at 26-27.

[241] *Id.* at 27-28 (citing *Nat'l Grid plc*, 122 FERC ¶ 61,096, at PP 13-20 (2008); *Duke Energy*, 118 FERC ¶ 61,077 at PP 16-23; *MidAmerican Energy Holdings Co.*, 118 FERC ¶ 61,003, at PP 13-20 (2007)).

there was no proceeding at issue when the meetings took place.[242] Moreover, for the same reason there were no "parties" to whom "notice" could be given of any such communication.[243] Furthermore, section 557(d)(1)(E) of the APA does not support Public Citizen's arguments because no Commissioners had the requisite knowledge to trigger the Commission's *ex parte* communication prohibitions.[244]

### c. Corporate Relationships

#### i. Protest and Answer

146. Southern Maryland states that the Proposed Merger could damage its executive, operational, and technical relationships with Pepco if Exelon replaces current Pepco Holdings employees with Exelon employees following the Proposed Merger. Southern Maryland does not allege that any new staff would be unqualified but states that current Exelon employees are unlikely to be familiar with Southern Maryland's interests and its interconnections with Pepco. Therefore, Southern Maryland asks that Exelon assure it that the Proposed Merger will not negatively impact its relationship with Pepco.[245]

147. Applicants state that Southern Maryland's concerns are beyond the scope of a section 203 proceeding and, therefore, the Commission should dismiss them.[246]

#### ii. Commission Determination

148. We find Southern Maryland's concerns are speculative and go beyond the scope of this proceeding. Southern Maryland has not shown which particular relationships would be damaged nor how that damaged relationship will adversely affect Southern Maryland. Further, these issues have not been shown to have any bearing on the factors that the Commission considers in its evaluation of transactions under FPA section 203.[247]

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[242] *Nat'l Grid plc*, 122 FERC ¶ 61,096 at P 17.

[243] *Id.*

[244] *See id.* P 18 (explaining that the Commission's *ex parte* prohibition applies no earlier than the time the person responsible for the communication has knowledge that the proceeding will be noticed for hearing, not merely knowledge that there may be a filing).

[245] Southern Maryland Comments at 17-19.

[246] Applicants July 30 Answer at 24.

[247] *See supra* P 29.

### d. Accounting Treatment

149. As stated earlier, we accept Applicants' commitment to hold transmission customers harmless from all merger-related costs, including costs related to consummating the Proposed Merger and transition costs (both capital and operating) incurred to achieve merger synergies. Consistent with Commission precedent,[248] costs incurred to consummate the Proposed Merger are non-operating in nature and must be recorded in Account 426.5, Other Deductions.[249] Account 426.5 includes miscellaneous expense items which are non-operating in nature. Additionally, transition costs are generally considered to be operating in nature and may be recorded in an operating expense account or capitalized in an asset account, as appropriate.[250] This accounting however does not permit Applicants to recover any merger-related costs through their transmission rates without first making a section 205 filing and receiving authorization from the Commission as discussed above.

150. Applicants must implement appropriate internal controls and procedures to ensure the proper identification, accounting, and rate treatment of all merger-related costs incurred prior to and subsequent to the announcement of the proposed transaction, including all integration costs incurred after a merger is consummated. Internal controls and procedures must also track internal labor and time devoted to merger-related activities to enable the designation of an appropriate allocation of labor costs as a merger-related cost. These internal controls and procedures must describe, in detail, how Applicants designate, allocate, and account for merger-related costs, and specifically identify and describe direct and indirect cost classifications. Applicants state that Exelon and Pepco Holdings and their respective subsidiaries will track merger-related costs, including costs incurred for the purpose of effectuating the Proposed Merger and costs incurred to integrate Pepco Holdings into Exelon. According to Applicants, these costs include, among others, external legal and banking costs as well as internal labor costs. Applicants state that this separate tracking mechanism will enable Applicants and their subsidiaries to exclude merger-related costs as appropriate from Commission jurisdictional rates, or to demonstrate that merger-related savings exceed such costs. As stated earlier, if Applicants intend to seek recovery of any merger-related cost they

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[248] *See, e.g.*, *Exelon*, 138 FERC ¶ 61,167 at P 133.

[249] Transaction costs may include, but are not limited to, internal labor and third party costs for legal, consulting, and professional services incurred to consummate the Proposed Transaction. *See Silver Merger Sub*, 145 FERC ¶ 61,261 at P 77, n.146.

[250] Transition costs generally include integration, internal labor, and other operational costs incurred to achieve synergies from the Proposed Transaction. *See Upper Peninsula Power Co.*, 148 FERC ¶ 61,133, at P 45, n.67 (2014).

should have controls and procedures to identify and capture merger-related savings, along with all supporting data and calculations.

151. Further, if Applicants elect to push-down goodwill to any of its public utilities, they must debit Account 186, Miscellaneous Deferred Debits, and credit Account 211, Miscellaneous Paid in Capital, consistent with prior Commission guidance.[251] However, the Commission generally requires public utilities to maintain detailed accounting records associated with goodwill and all other merger-related accounting entries so as to facilitate the evaluation of the effects of the transaction on common equity and other accounts in future periods if needed for ratemaking purposes.[252] Consequently, we will require Applicants to maintain detailed accounting records associated with all merger-related accounting entries. We will also require Applicants that are required to keep their books in accordance with the Commission's Uniform System of Accounts to submit all final accounting entries related to the Proposed Transaction including goodwill and all other merger-related accounting entries. Such Applicant must also disclose the impact of the Proposed Merger in its FERC Form No. 1, Annual Report of Major Electric Utilities, Licensees and Others. In particular, such Applicant must explain the impact of the Proposed Merger in the Notes to the Financial Statements and provide disclosure in footnotes to the affected accounts on the financial statements of its FERC Form No. 1 in the year the accounting entries are made. The disclosures must also include a summary discussion of the Applicants' implemented internal controls and procedures to ensure proper identification, accounting, and rate treatment of all merger-related costs.

152. Finally, as stated above, Applicants have the opportunity to seek recovery of merger-related costs, demonstrate their merger-related savings, and seek to record as a regulatory asset any merger-related costs approved for rate recovery. However, we clarify that while there is the possibility of future rate recovery, it is not determined that such recovery is probable and therefore does not warrant the deferral of merger-related expenses until such rate recovery is affirmatively granted by the Commission.

### e. Other Obligations

153. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the

[251] *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307 (2008); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069 (2007); *Michigan Electric Transmission Co., LLC*, Docket No. AC03-9-000 (Feb. 5, 2004) (unpublished letter order).

[252] *Michigan Electric Transmission Co.*, 116 FERC ¶ 61,164 (2006); *Niagara Mohawk Holdings Inc.*, 95 FERC ¶ 61,381, *reh'g denied*, 96 FERC ¶ 61,144 (2001); *PPL*, 133 FERC ¶ 61,083.

characteristics the Commission relied upon in granting market-based rate authority.[253] To the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make any appropriate filings under section 205 of the FPA to implement the Proposed Merger.

154. Information and/or systems connected to the bulk power system involved in this Proposed Merger may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, and the like, must comply with all applicable reliability and cyber security standards. The Commission, NERC, or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Merger is hereby authorized, as discussed in the body of this order.

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in authorizing the Proposed Merger.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

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[253] Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413. *See* 18 C.F.R. § 35.42 (2014).

(F) Applicants, to the extent that they have not already done so, shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Merger.

(G) If Applicants seek to recover transaction- related costs through their transmission rates, they must make a filing in a new FPA section 205 docket and submit concurrently an informational filing in the instant FPA section 203 docket. In the FPA section 205 filing, Applicants must: (1) specifically identify the merger-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed Merger.

(H) If the Proposed Merger results in any adjustment to the books maintained by any Applicant that is required to keep its books in accordance with the Commission's Uniform System of Accounts, such Applicant shall submit its final accounting entries within six months of the date that the Proposed Merger is consummated, and the accounting submission shall provide all the accounting entries and amounts related to the Proposed Merger along with narrative explanations describing the basis for the entries. Such accounting entries include entries related to transaction costs, merger premiums, acquisition adjustments, goodwill, or any cost related to the Proposed Transaction.

(I) Applicants shall submit an informational filing in this docket within 10 days of each relevant state commission approval of any imposed ring-fencing provisions.

(J) Applicants shall notify the Commission within 10 days of the date on which the merger is consummated.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.