

“Federation Corner” column
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Pepco and Exelon and Montgomery County

By Abbe Milstein

Exelon’s acquisition of PHI/Pepco rounded into the final stretch last week. The companies have largely been extremely successful in their bid to provide minimal benefits for ratepayers and huge payouts for shareholders. For the past year it looked as though Exelon had conquered the necessary regulatory agency approvals in their quest to own PHI/Pepco.

State regulatory commissions in Virginia, New Jersey, Delaware and Maryland capitulated to Exelon’s paltry consumer offerings in granting approval to Exelon and its request to become the sole owner of PHI/Pepco. On Tuesday, August 25th, what financial analysts touted as the “last mini-bump” on Exelon’s road to regulatory approval became a veritable sink hole. The Public Service Commission of the District of Columbia (DC PSC) in a 3-0 decision boldly denied Exelon’s application to own PHI/Pepco. The DC PSC put the brakes on this deal.

The DC Commission’s fundamental reasons for rejecting the merger are (1) that Exelon is basically an electric generation company (using mostly non-renewables), but DC is aspiring to be a “green” energy jurisdiction that wants its local electric utility to be focused on energy efficient renewable energy distribution, not profits from generation; and (2) Pepco would have become a second level subsidiary, totally subservient to Exelon’s parent company’s operational and profit goals, which the Commission sees as being at odds with those of DC.

This 3-0, unanimous decision exposes the reprehensible 3-2 decision of approval by the Maryland Public Service Commission as being all the more embarrassing. Our Commission failed to follow Maryland regulations mandating actual benefits to consumers. Commissioners Hughes, Brenner and Speakes-Backman found Exelon’s application would benefit Maryland consumers by providing a “rare opportunity” for Pepco to leverage greater economies of scale, increase the potential for reliability performance with better cost control and benefit customers with synergy savings. The 52 page dissenting opinion, authored by Commissioners Williams and shockingly, Anne E. Hoskins, found Exelon’s justification for its takeover of Pepco to be grossly insufficient.

If the merger were approved by all agencies, Pepco and its shareholders will be the beneficiaries of more than \$1.8 billion and Exelon will have the ability to raise ratepayers’ costs with little regard for grid reliability, resiliency, affordability, energy efficiency and safety. Competition will be undermined, rates will substantially increase, significant economic burdens will be leveraged on low-income residents (just last year the State received over 150,000 applications from MD customers seeking electric bill assistance a 3.6% increase from 2013) and Exelon will dominate corporate governance (an out-of-state entity) with no local control.

The dissenting opinion from MD PSC Order No. 86990 in Case No. 9361, written by Williams and Hoskins (both Commissioners are former utility executives), provided a formidable argument against this merger:

“...we find the Joint Applicants' (Exelon/PHI) answers insufficient, and the mitigation offered wholly inadequate, to conclude that this merger is consistent with the public interest and imposes no harm, as mandated by the General Assembly. The merger application should have been denied. The Public Utilities Article and the Commission precedent provide unequivocally that the Commission must deny a merger application that imposes harm -- including even the risk of harm -- on consumers. The proposed merger fails that standard by causing unmitigated harm in three principal areas: it will undermine competition; it will increase rates, challenging affordability for many consumers; and it will eviscerate economic protections due to a weakened and compromised corporate governance structure.” (D-1)

“The rate increases are masked in the putative benefit of enhanced reliability. However its promised (but unsubstantiated) reliability gain is not a gift from the Applicants. Rather, customers will receive a recurring bill for decades to come for the infrastructure investments of almost \$1 billion embraced by the Majority today...The Majority's celebration of promised reliability gains essentially preauthorizes Exelon to increase its reliability budget at customer expense without appropriate review. The Majority erred in sanctioning Exelon's reliability commitment outside of the Commission's established reliability rulemaking or other processes, where the costs and benefits and alternative pathways could have been examined more carefully” (D-2, D-3)

Exelon's alleged “reliability commitments” condemns this merger as a substantial win for Exelon and a tremendous loss for consumers. The dissent states:

“Certain parties and the Majority argue that the merger should be approved because Pepco has been a poorly run utility and Exelon will operate it better. Indeed, Pepco has previously failed customers, particularly on matters of reliability and resiliency. However, the record indicates that, under strong oversight by the Commission, Pepco's reliability performance has improved and virtually kept pace with BGE's improvement over the past several years...The record also does not demonstrate how Exelon would actually improve Pepco's reliability performance, particularly given PHI's recent performance. Exelon's witnesses asserted that the "Exelon Management Model" would drive performance improvement, but they did not share the detail about how the model would do so. None of the witnesses that have actually been "instructed in [and] accountable for" the Exelon management model were made available to describe how Exelon would meet the annual reliability targets proposed in the settlement.” (D-40, D-41)

Montgomery County bears significant responsibility for this shameful decision. In the past the County recognized the need for safe, reliable, renewable and affordable power. The county hired professional advocates and fought tough reliability cases against Pepco at the Commission. Instead of fighting for consumers, today's County leadership has capitulated to Exelon's demands and provided cover for the PSC's terrible decision in granting approval for this appalling merger.

Since the Derecho of 2012, Powerupmontco has focused its efforts on the reliability of our electric distribution service. We have intervened in Pepco's rate cases and we became a full party to Exelon's proposed merger with Pepco. It was evident well before the Derecho that Pepco's substandard reliability performance required significant investment in its infrastructure. County Executive Ike

Leggett's Work Group Report on Pepco exposed a myriad of Pepco's failings. Prior to 2012 Montgomery County was a tremendous advocate at the Commission for reliable electric distribution to its residents. But over the years the County's advocacy and efficacy at the Commission has disappeared. County Executive Ike Leggett has failed to continue the fight against ever increasing rates and he appears unconcerned with stagnating reliability. Leggett and other elected officials serving on the County Council have accepted campaign contributions from Pepco and Exelon and ignored the pleas of Powerupmontco to fight this proposed merger with Exelon and not accept utility campaign contributions.

Governor Larry Hogan initially instructed Attorney General Brian Frosh/MEA, who represents the Governor, to fight the merger. Frosh's briefs against the merger effectively illustrated all the inherent problems with Exelon's acquisition of PHI and forcefully argued to stop the merger. Unexpectedly, on April 13, 2015, with the case nearly completed, Governor Hogan filed a letter of "impartiality" with the PSC on the Exelon acquisition. This letter completely undermined the efforts of Frosh and MEA sending a duplicitous message to the Commission about the Governor's commitment to fighting the merger and opened the gate for a Commission approval of the merger.

As of this writing Exelon/PHI's next steps are speculative. Under DC law, Exelon/PHI will need to file within 30 days for a rehearing and be denied the rehearing request by the DC PSC before the company can appeal to the DC Court of Appeals, the highest local court in DC. This is completely different from the procedural process in Maryland, where no petition for rehearing to the MD PSC is necessary before an appeal can be taken. All Maryland court appeals go to County Trial Circuit Courts, sitting as appellate courts of MD PSC orders. It is likely that Exelon/PHI will attempt to obtain some sort of expedited judicial review by the DC Court of Appeals. At this point, it is unclear whether any settlement package that Exelon/PHI could now offer would be acceptable to the DC OPC and the numerous other opposing parties.

Powerupmontco would like to recognize the pro bono efforts of our attorney Claire Morisset. Claire has been a tremendous asset to Powerupmontco's efforts before the PSC. She will now be spending more time with her beautiful family. Thank you to Claire for your years of work on behalf of Powerupmontco. As always, our experts Stan Balis, Esq. and Bob Loube, Ph.D are a tremendous asset to our efforts and Powerupmontco is indebted to them for their expertise and their unabashed willingness to volunteer.