GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

KARL A. RACINE
ATTORNEY GENERAL

Public Interest Division
Public Integrity Unit

E-Docketed

April 22, 2016

Ms. Brinda Westbrook-Sedgwick
Public Service Commission
of the District of Columbia Secretary
1325 G Street, NW
Suite 800
Washington, D.C. 20005

Re: Formal Case No. 1119 – In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction.

Dear Ms. Westbrook-Sedgwick:

On behalf of the District of Columbia Government, I enclose an original and fifteen (15) copies of the District of Columbia Government's Application for Reconsideration of Order No. 18148. If you have any questions regarding this filing, please do not hesitate to contact the undersigned.

Sincerely,

KARL A. RACINE
Attorney General

By: */s/ Brian R. Caldwell*
BRIAN R. CALDWELL
Assistant Attorney General
(202) 727-6211 – Direct
Brian.caldwell@dc.gov

cc: Service List

BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE JOINT APPLICATION OF EXELON CORPORATION, PEPCO HOLDINGS, INC., POTOMAC ELECTRIC POWER COMPANY, EXELON ENERGY DELIVERY COMPANY, LLC AND NEW SPECIAL PURPOSE ENTITY, LLC FOR AUTHORIZATION AND APPROVAL OF PROPOSED MERGER TRANSACTION	))))))	**Formal Case No. 1119**

DISTRICT OF COLUMBIA GOVERNMENT'S
APPLICATION FOR RECONSIDERATION OF ORDER NO. 18148

INTRODUCTION

Pursuant to D.C. Code § 34-604(b) and 15 D.C.M.R. § 140.1 of the Rules of Practice and Procedure of the Public Service Commission of the District of Columbia (Commission), the District of Columbia Government (District Government), by and through its Office of the Attorney General, submits its Application for Reconsideration of Commission Order No. 18148[1] approving the merger of the above-captioned companies (Joint Applicants) over the objections of the District Government and other parties.

By unilaterally modifying the terms of the Non-Unanimous Settlement Agreement (NSA)[2] and approving the terms of the Revised Non-Unanimous Settlement Agreement (RNSA) as a resolution on the merits, the Commission committed a series of procedural and substantive

[1] *Formal Case No. 1119, rel.* Mar. 23, 2016.

[2] *See* Non-Unanimous Settlement Agreement (NSA) that was submitted by Potomac Electric Power Company (Pepco), Exelon Corporation (Exelon), Pepco Holdings, Inc. (PHI), Exelon Energy Delivery Company, LLC, and New Special Purpose Entity, LLC (collectively, Joint Applicants); the Office of People's Counsel of the District of Columbia (OPC); the Apartment and Office Building Association of Metropolitan Washington (AOBA); the District of Columbia Government (District Government); the District of Columbia Water and Sewer Authority (DC Water); and the National Consumer Law Center; National Housing Trust; the National Housing Trust-Enterprise Preservation Corporation (collectively, NCLC) (collectively, Settling Parties). The NSA was admitted into the record of this case as Joint Applicants' Exhibit NSA-1 on December 5, 2015.

errors that require it to reconsider and vacate Order No. 18148. After reopening Formal Case 1119 "solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest" and "for no other purpose,"[3] the Commission proposed and then, without the Settling Parties' consent, approved alternative terms it would have preferred to see in the settlement. If allowed to stand, this Order denies the District Government and most of the other Settling Parties their due process rights.

At its core, Order No. 18148 deprives the Settling Parties, including the District Government, of the benefits of the bargains they reached through arm's-length negotiations and submitted to the Commission as an unalterable proposed resolution of this proceeding.[4] In addition, the Order will have a chilling effect on future settlement negotiations because parties will fear that, in agreeing to proposed settlement terms, they run the risk of the Commission proposing and approving alternative settlement terms without the parties' consent. For these reasons, the Commission should reconsider and vacate Order No. 18148.

PROCEDURAL BACKGROUND OF ORDER NO. 18148

On June 18, 2014, Joint Applicants filed an application with the Commission for approval of a proposed merger of Pepco and PHI into Exelon pursuant to D.C. Code §§ 34-504 and 34-1001 (Proposed Merger).[5] After a lengthy discovery process and eleven days of evidentiary hearings, the Commission issued Order No. 17947 unanimously rejecting Joint

[3] Order No. 18011 ¶ 58.

[4] *See* 15 D.C.M.R. § 130.16 ("Given the negotiated nature of a settlement, the Commission shall either accept or reject a settlement in its entirety, unless the parties have specifically stated that the provisions of the settlement are severable.")

[5] The procedural history of this case is set forth in detail in Commission Order No. 17947 ¶ 25-37 (*rel.* August 27, 2015) and incorporated by reference herein.

Applicants' Proposed Merger as not being in the public interest.[6] Of particular note, the Commission refused to undertake an examination of what conditions, if any, could be imposed on the transaction to make it in the public interest. The Commission stated that there was nothing in its statute that required them to make such a determination.[7] The Commission further stated that "from a policy perspective, if the Commission were to take on the task of shoring up every proposal that it received, we would run the risk of undermining the public's confidence in the fairness of this review process."[8]

Nevertheless, by providing a roadmap of sorts for Joint Applicants to attempt to correct the many deficiencies in their initial application to merge, Order No. 17947 jumpstarted efforts by the Joint Applicants and other parties, including the District Government, to reach a settlement agreement. After weeks of intense negotiations, Joint Applicants and the other Settling Parties executed the NSA on October 6, 2015.

The NSA was the result of "extraordinary efforts . . . joined by a broad cross-section of the parties to this case."[9] The NSA was negotiated with an eye toward addressing the many deficiencies of the Proposed Merger cited by the Commission in its Final Order. Notably, the

---

[6] *See Formal Case No. 1119*, Order No. 17597 ¶ 124, *rel.* Aug. 22, 2014. In determining whether the Proposed Merger is in the public interest, the Commission considered the Proposed Merger's effect on: (1) ratepayers, shareholders, the financial health of the utilities standing alone and as merged, and the economy of the District; (2) utility management and administrative operations; (3) public safety and the safety and reliability of services; (4) risks associated with all of the Joint Applicants' affiliated non-jurisdictional business operations, including nuclear operations; (5) the Commission's ability to regulate the new utility effectively; (6) competition in the local retail, and wholesale markets that impacts the District and District ratepayers; and (7) conservation of natural resources and preservation of environmental quality.

[7] Order No. 17947 ¶ 353.

[8] *Id*.

[9] *Formal Case No. 1119*, Order No. 18011 *rel.* Oct. 28, 2015, *citing* Motion of the Joint Applicants to Reopen the Record in Formal Case No. 1119 to Allow for Consideration of Nonunanimous Full Settlement Agreement and Stipulation, or for Other Alternative Relief (filed Oct. 6, 2015) at 1-2.

amount of the Customer Investment Fund (CIF) was increased from $33.75 million to $72.8 million, and another $5.2 million in Workforce Development funds were added.

Of particular concern to the District Government was the effect that the Proposed Merger might have on regular and low-income residential customers, including those living in Master-Metered Apartments.[10] Accordingly, the District Government negotiated several key provisions.

First, the District Government insisted that the NSA include a mechanism to protect residential ratepayers from any post-merger rate increases until at least April 2019. That objective was achieved by requiring that $25.6 million of the CIF be earmarked as a credit, to offset any increases to the distribution portion of residential ratepayers' bills, from the closing of the merger to April 2019.[11] And, if $25.6 million were insufficient to fully offset increases until April 2019, Joint Applicants would cover the increases with additional amounts that Pepco could treat as a regulatory asset earning a 5% rate of return.[12] However, in no event would Pepco be allowed to recover in rates more than $1 million per year for an offset exceeding $25.6 million.[13]

Second, the District Government sought supplemental funding for its chronically underfunded Low-Income Home Energy Assistance Program (LIHEAP). As a result, the District Government negotiated into the NSA a provision setting aside $9 million for LIHEAP funding.[14]

Separately, the District Government negotiated several provisions that set aside funding for programs administered by its Department of Energy and Environment (DOEE) in furtherance

[10] *See*: http://mayor.dc.gov/release/mayor-bowser-announces-negotiated-settlement-pepco-exelon-merger (Oct. 6, 2015).

[11] NSA ¶ 4.

[12] *Id*.

[13] *Id*.

[14] NSA ¶ 9(b)

of the District Government's Sustainable DC Plan. For example, to encourage the development of renewable energy resources in the District of Columbia, the District Government negotiated for $3.5 million to be deposited into its Renewable Energy Development Fund.[15] To support DOEE's energy efficiency programs, the District Government negotiated for $3.5 million to be deposited into its Sustainable Energy Trust Fund.[16] And to support a number of DOEE's sustainability initiatives, the District Government negotiated for $10.05 million to be deposited into its Green Building Fund.[17] In sum, the District Government negotiated for $33.2 million in funding to be applied to programs administered by DOEE.

It was the Settling Parties' expectation that the Commission would either approve the NSA in its entirety without modification or reject the NSA. To make this understanding crystal clear, the Settling Parties included the following terms in the NSA:

> ¶ 135. This Settlement Agreement contains terms and conditions each of which is interdependent with the others and essential in its own right to the signing of this Settlement Agreement. Each term is vital to the Settlement Agreement as a whole, since the Settling Parties expressly and jointly state they would not have signed the Settlement Agreement had any term been modified in any way.
>
> ¶ 137. This Settlement Agreement is submitted to the Commission for approval as a whole and the Settling Parties state that its provisions are not severable, in accordance with 15 D.C.M.R. § 130.10(f).
>
> ¶ 140. This Settlement Agreement may only be modified by a further written agreement executed by all the parties to this Settlement Agreement.

Invoking 15 D.C.M.R. §146.1 of its Rules of Practice and Procedure and waiving its rule requiring that a settlement agreement be presented to the Commission before a final order is

[15] NSA ¶ 6; D.C. Code § 34-1436.

[16] NSA ¶ 7; D.C. Code § 8-1774.10.

[17] NSA ¶ 8; D.C. Code § 6-1451.07.

issued, the Commission reopened the record to consider the NSA after having issued a final decision rejecting the Proposed Merger.[18] In doing so, the Commission stated it "will reopen the record in *Formal Case No. 1119* solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest. The Commission emphasizes that the record will be reopened for no other purpose."[19]

Subsequently, the Non-Settling Parties conducted discovery "limited to the four corners of the Settlement Agreement"[20] and its supporting testimony. The Commission held three days of evidentiary hearings, at which the Settling and Non-Settling Parties presented testimony and exhibits and answered questions from the Commission. Following the filing of post-hearing briefs, the Commission issued Order No. 18109 on February 26, 2016, deciding by a 2 to 1 vote that the NSA as filed was not in the public interest and rejecting the NSA under 15 D.C.M.R. § 130.16 (Rule § 130.16).

However, the Commission did not stop there. Instead, the Commission decided, again by a 2 to 1 vote, to exercise its discretionary power and proceed under 15 D.C.M.R. § 130.17 (b) (Rule 130.17 (b)) to "approve a Revised NSA with alternative terms *if accepted by all of the Settling Parties*."[21] Attachment A to Order No. 18109 contains the terms of the RNSA. The changes made by the RNSA have the effect of:

1. Removing the guarantee that Residential ratepayers would not see an increase to the distribution portion of their bills before April 2019.

[18] Order No. 18011 ¶ 54, *rel.* Oct. 28, 2015; 15 D.C.M.R. § 130.10.

[19] *Id*. ¶ 58.

[20] *Id*. ¶ 60.

[21] *Id*. ¶ 17 (emphasis added); *see also* ¶ 139 ("if the NSA is revised to include the alternative terms as set out in Attachment A and accepted by all of the Settling Parties, it will result in a Merger Application which is, taken as a whole, in the public interest.")

2. Removing the provisions allocating $33.2 million for specific DOEE programs, including the supplemental LIHEAP funding, and instead directing Joint Applicants to allocate: (1) $21.55 million for a Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount; and (2) $11.25 million for an Energy Efficiency and Energy Conservation Initiatives Fund Subaccount. Withdrawal of funds from either of these accounts could be requested by a number of different parties, subject to Commission approval.

3. Removing the provision requiring Exelon to enter into good faith negotiations to develop and construct 5 MW of solar generation at DC Water's Blue Plains facility.

4. Removing the provision committing Pepco to work with the District Government to develop at least four microgrids.[22]

The Commission then directed the Settling Parties to decide whether to accept the Revised NSA or request other relief, and provided the Non-Settling Parties with the opportunity to respond to a request for other relief:

> Pursuant to Rule 130.17 (b), all of the Settling Parties are directed to review the alternative terms set forth in Paragraphs 140-161 of Commissioner Fort's concurrence as captured in the Revised NSA at Attachment A and file a Notice with the Commission Secretary no later than fourteen (14) days from the date of this Order, either accepting the Revised NSA, or requesting other relief.[23]
>
> If the Settling Parties request other relief under Rule 130.17, then the Nonsettling Parties may file comments on the Settling Parties' filing requesting other relief with the Commission Secretary, within seven (7) days of the date of the Settling Parties' filing of requesting alternative relief.[24]

In a filing that did not comport with the Commission's directions to the Settling Parties or with the Commission's "limited purpose" in reopening Formal Case 1119, Joint Applicants submitted their own separate Request for Other Relief on March 7, 2016, which set forth three offers. The first offer (Option 1) was for the Commission simply to adopt the terms of the NSA

[22] Order No. 18109, Attachment D.

[23] *Id.* ¶ 206.

[24] *Id.* ¶ 208.

that had been agreed to by the Settling Parties but rejected by the Commission. The second offer (Option 2) was to adopt the terms of the RNSA as proposed by the Commission. The third offer (Option 3) was to adopt the terms of the RNSA except to restore the $25.6 million set aside for offsetting increases to residential ratepayers' bills, and allocating $20 million from the MEDSIS Pilot Project Fund Subaccount to be used for offsetting increases to commercial ratepayers' bills.

As Commission staff noted, "Paragraphs 206 and 208 of Order No. 18109 contemplated that all of the settling parties jointly file a notice accepting the revised NSA or jointly file a request for other relief."[25] Pursuant to the Commission's Order, the District Government filed a Notice informing the Commission that the District Government did not accept the terms of the RNSA and further responded to Joint Applicants' Request for Other Relief by stating that the only offer acceptable to the District Government was the adoption of the settlement terms previously agreed upon in the original NSA.[26] Similarly, DC Water filed a Notice explaining that the only resolution acceptable to them was to implement the NSA as agreed upon and filed. OPC filed a Notice opposing all three offers. NCLC filed a Notice stating that it would support either the first offer or the third offer, but not the RNSA. Not surprisingly, the only Settling Party that did not oppose the RNSA, besides Joint Applicants, was AOBA, whose commercial class clients stood to gain by virtue of the RNSA's provision removing the restriction that the $25.6 million be used to offset increases to the bills of residential ratepayers only.[27]

[25] Email dated Mar. 9, 2016, from Commission attorney Richard Herskovitz to representatives of all parties to this proceeding (emphasis in original).

[26] *Formal Case No. 1119,* Notice of the District of Columbia Government Regarding Alternative Settlement Terms and Response to Joint Applicants Request for Other Relief.

[27] Washington Gas Energy Services (WGES) also filed a Notice informing the Commission that it did not oppose the RNSA. However, WGES was granted only limited intervention in this case to address competition issues.

In addition, Non-Settling Parties MAREC, DC Solar United Neighborhoods (DC Sun), Maryland District Virginia Solar Energy Industries Association (MDV-SEIA), Grid 2.0, and General Services Administration (GSA) all submitted filings in opposition to each of Joint Applicants' offers. However, on March 23, 2016, notwithstanding the groundswell of opposition to the RNSA from Settling as well as Non-Settling parties, the Commission issued Order No. 18148, which superseded Order No. 17947's rejection of the Proposed Merger, adopted Joint Applicants' second offer as a resolution on the merits, and approved the merger based on the Commission-proposed terms in the RNSA.[28]

SPECIFICATION OF ERRORS

In Order No. 18148, the Commission committed the following errors:

1. The Commission committed legal error because it did not have the authority to accept Joint Applicants' offer of settlement.

2. The Commission failed to clearly or rationally explain the basis for its asserted authority to accept Joint Applicants' offer of settlement.

3. The Commission failed to clearly or rationally reconcile its interpretation of Rule 130.17 (b) with the positions it expressed in prior orders.

4. The Commission abused its discretion by exercising its discretionary power under Rule 130.17 (b) in a manner that contradicted the clear language of the NSA.

5. The Commission's decision to accept Joint Applicants' offer of settlement was arbitrary and capricious because the Commission failed to supply a reasoned analysis indicating that its prior policies and standards were being deliberately changed, not casually ignored.

[28] The approved RNSA actually contained an additional revision from the originally proposed RNSA, which restored the so-called incremental offset provision from the NSA. For simplicity this Application will refer to both versions of the RNSA interchangeably as the RNSA.

6. The Commission committed legal error by failing to make the findings necessary to support its conclusion that the RNSA is in the public interest.

7. The Commission denied the District Government due process by not giving the District Government a fair opportunity to challenge the terms of the RNSA, including terms that were part of the NSA.

APPLICABLE LEGAL STANDARD

Review of Commission orders is limited to "questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings . . . are unreasonable, arbitrary, or capricious."[29] Although courts do not give the Commission's legal conclusion "the same deference owed factual determinations," courts will nevertheless sustain it if "reasonable and based upon factors within the Commission's expertise."[30] "In reviewing a Commission order, [the Court] must determine whether its overall effect is just and reasonable, and whether the Commission has respected procedural requirements, has made findings based on substantial evidence, and has applied the correct legal standards to its substantive deliberations."[31] "To ensure that judicial review can be meaningful," courts require the Commission to "explain its actions fully and clearly."[32] "A passing reference is not sufficient to satisfy the Commission's obligation to carry out reasoned and principled decision-making. [Reviewing courts] have repeatedly required the Commission to fully

[29] *District of Columbia v. Pub. Serv. Comm'n*, 802 A.2d 373, 376 (D.C. 2002) (*quoting* D.C. Code § 34-606).

[30] *Id.* (*quoting Watergate East, Inc. v. Pub. Serv. Comm'n*, 662 A.2d 881, 886-87 (D.C. 1995)).

[31] *Washington Gas Light Co. v. Pub. Serv. Comm'n*, 465 A.2d 1098, 1104 (D.C. 2004) (internal citations and quotation marks omitted).

[32] *Id.* (*quoting Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 661 A.2d 131, 135 (D.C. 1995)).

articulate the basis for its decision."[33] "By requiring the Commission to explain its decisions fully and rationally, [a reviewing court] can be confident that missing facts, gross flaws in agency reasoning, and statutorily irrelevant or prohibited policy judgments will come to a reviewing court's attention."[34] "An agency's view of what is in the public interest may change either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . ."[35]

ARGUMENT

I. The Commission Did Not Have Legal Authority To Adopt Joint Applicants' Other Relief.[36]

A. The District's Administrative Procedures Act does not authorize contested cases to be resolved by offers of settlement.

The Commission lacked authority to adopt Joint Applicants' proffered other relief and adopt their second offer as a resolution on the merits. As Commissioner Phillips states in Order No. 18109 ¶ 199, the situation here is not the same as an initial merger proceeding where the Commission has clear statutory authority to approve the proposed merger with conditions. Here, after the Settling Parties submitted the NSA as a *post-final-order* settlement agreement, the Joint Applicants submitted the RNSA as *post-final-order* offer of settlement. It is unclear what specific cases the Commission relied upon for authority to adopt Joint Applicants' other relief

[33] *Mo. Pub. Serv. Comm'n v. FERC,* 234 F.3d 36, 41 (D.C. Cir. 2000)

[34] *Great Lakes Gas Transmission Ltd. P'ship v. FERC,* 984 F.2d 426, 432 (D.C. Cir. 1993).

[35] *Greater Boston Television Corp. v. FCC,* 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971).

[36] As Commissioner Phillips states in Order No. 18109 ¶ 199, the situation here is not the same as an initial merger proceeding where the Commission unquestionably retains power by statute to approve a merger with conditions. The NSA was submitted as a (post-final order) settlement agreement.

because the Commission refers only generically to "cases like *Placid Oil"* in the Decision portion of its Order 18148.[37] However, all the federal cases cited in Order No. 18148, and relied upon by Joint Applicants for the proposition that the Commission may consider and adopt other relief proffered by only one party to a settlement agreement, are inapposite because those cases address the settlement-approval powers provided to federal commissions under the federal Administrative Procedures Act (APA). By statute, federal commissions are given greater settlement-approval authority than this Commission has.[38]

The federal APA specifically authorizes federal commissions to resolve disputes by adopting offers of settlement as a resolution on the merits. By contrast, the District's Administrative Procedures Act grants District commissions, including this Commission, no such power.[39] An "offer of settlement" is "an offer by one party . . . to settle a dispute amicably to avoid or end a lawsuit or other legal action."[40] Joint Applicants' other relief was in substance an offer of settlement because it was offered by only Joint Applicants as a means to resolve this proceeding.

Placid Oil Co. v. Federal Power Comm'n, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom*., *Mobil Oil Corp. v. Federal Power Comm'n*, 417 U.S. 283 (1974), is expressly cited by the Commission for its authority to consider and adopt, as a resolution on the merits, one of the

---

[37] Order No. 18148 ¶ 39.

[38] *Mobil Oil Corp. v. Fed. Power Comm'n*, 417 U.S. 283, 314 (1974) (cited in Order No. 18148 ¶ 14); *Michigan Consol. Gas Co. v. Fed. Power Comm'n*, 283 F.2d 204, 224 (D.C. Cir. 1960) (quoted in Order No. 18148 ¶ 15); *Placid Oil Co. v. Fed. Power Comm'n*, 483 F.2d 880, 893 (5th Cir. 1973) (cited in Order No. 18148 ¶ 14 [quoted at n. 42] and ¶ 39); *Pennsylvania Gas & Water Co. v. Fed. Power Comm'n*, 463 F.2d 1242, 1250-51 (D.C. Cir. 1972) (cited in Order No. 18148 ¶ 16); *In re Hugoton-Anadarko Area Rate Case*, 466 F.2d 974, 980 (9th Cir. 1972) (cited in Order No. 18148 ¶ 16).

[39] *See* D.C. Code § 2-509(a). Chesapeake *& Potomac Telephone Co. v. Pub. Serv. Comm'n*, 339 A.2d 710, 712-713 (D.C. 1975) ("After a careful review of the legislative history of the APA, we find inescapable the conclusion that the Act was intended to apply to the Commission.")

[40] Black's Law Dictionary, 9th ed.

offers presented by Joint Applicants.[41] The *Placid Oil* court was reviewing a Federal Power Commission (FPC) order that established area ceiling rates at which natural gas producers could sell gas in the Southern Louisiana Area. After noting the experimental nature of the FPC's effort to formulate area-wide ceiling rates, the lengthy history and expansive record before the FPC in the matter, and the differing positions of stakeholders, the court held that it was reasonable for the FPC to adopt a proposed resolution offered by one of the parties to the proceeding as a decision on the merits.[42] As further justification for the propriety of the FPC adopting the one-party proposal as a resolution on the merits, the court relied on the "broad support" for the proposal by other parties representing broad and diverse interests.[43]

Critically, however, the *Placid Oil* court prefaced its determination by finding that the FPC was "employing its settlement power under the [federal] APA, 5 U.S.C.A. § 554(c), and its own rules 18 C.F.R. § 1.18(a), to further the resolution."[44] The Federal APA § 554(c) states:

> The agency shall give all interested parties opportunity for (1) the submission and consideration of facts, arguments, *offers of settlement*, or proposals of adjustments when time, the nature of the proceeding, and the public interests permit; and (2) to the extent

[41] Order No. 18148 ¶ 39 ("As noted by the Joint Applicants, the Commission would not be accepting a settlement agreement in the traditional sense, but cases like *Placid Oil* allow the Commission, under these unique circumstances, to consider the options presented as a resolution of this matter on the merits and adopt one of the options as such if doing so would be in the public interest and supported by substantial evidence on the record as a whole.")

[42] *Placid Oil Co.*, 483 F.2d at 893-894 ("UDC is a coalition of 32 major distribution companies representing approximately 25% of the gas distribution in the United States and serving about 10.3 million customers at retail. The proposal was also supported by Associated Gas Distributors (AGD), *all* interstate pipelines purchasing gas from SLA, and 46 natural gas producers comprising 80% of the total gas production in the area. Obviously, this broad base of support was an important consideration for FPC.")

[43] *Id*. 483 F.2d at 893.

[44] *Id*. 18 C.F.R § 1.18(a) provided: "(a) To adjust or settle proceedings. In order to provide opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, for settlement of a proceeding, or any of the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the parties to the proceeding and staff for such purposes may be held at any time prior to or during such hearings before the Commission or the officer designated to preside thereat as time, the nature of the proceeding, and the public interest may permit."

> that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title [emphasis added].

In contrast with this federal provision, the analogous provision in the District's APA states that "unless otherwise required by law, other than this subchapter, any contested case may be disposed of by stipulation, agreed settlement, consent order, or default."[45] Even if the provision for other relief in Rule 130.17 (b) could be read to encompass offers of settlement, it is the words of the statute that must control, and the regulations must conform to the underlying statute.[46] Thus, the District's APA requires a settlement or other agreement for a resolution on the merits, and the Commission was without authority to consider and adopt Joint Applicants' offer of settlement.

Further, the District of Columbia Court of Appeals cases cited in Order No. 18148 for the proposition that the Commission may consider and adopt Joint Applicants' other relief as a resolution on the merits also are inapposite. These cases stand for the proposition that the Commission may consider, and adopt as a resolution on the merits, settlement agreements that are non-unanimous (*i.e.*, settlement agreements that do not include all the parties to a

[45] D.C. Code § 2-509(a).

[46] *Abadie v. District of Columbia Contract Appeals Bd.,* 843 A.2d 738 (D.C. 2004).

proceeding), such as the NSA.[47] This proposition is undisputed and clearly set forth in the Commission's regulations regarding settlement.[48]

There is a big difference, however, between the Commission adopting settlement agreements that do not enjoy the support of all the parties, and the Commission adopting offers of settlement from individual parties seeking "other relief." The Commission appears to have conflated these two concepts to arrive at the erroneous conclusion that it possesses authority that it does not have. Acceptance of settlement agreements are authorized by the District's APA and Commission rules. Offers of settlement are not.

B. In any event, reliance on *Placid Oil* is not reasonable because the offer of settlement in *Placid Oil* is not similar to the one presented here.

Even if cases such as *Placid Oil* did allow this Commission to consider and adopt offers of settlement, which they do not, the situation presented here is very different from that in *Placid Oil*. *Placid Oil* was affirmed on appeal to the Supreme Court, which observed that the offer of settlement at issue in *Placid Oil* was acceptable to "a large majority of all interests."[49] Specifically, in the proposal adopted by the FPC, the *Placid Oil* court found:

> Certainly consumers were involved. UDC is a coalition of 32 major distribution companies representing approximately 25% of the gas distribution in the United States and serving about 10.3 million customers at retail. The proposal was also supported by Associated Gas Distributors, *all* interstate pipelines purchasing gas from SLA, and 46

[47] *Metro. Washington Bd. of Trade v. PSC*, 432 A.2d 343 (D.C. 1981), *cited* at Order No. 18148 ¶ 14 (Commission adopted and incorporated in final order recommendations of signatory parties to a Data Conference Report, to which some parties later raised procedural arguments); *United States v. Pub. Serv. Comm'n*, 465 A.2d 829 (D.C. 1983), *cited* at Order No. 18148 ¶ 14 (Commission considered and adopted terms of non-unanimous settlement agreement among all parties and intervenors, with the exception of GSA); *District of Columbia v. Pub. Serv. Comm'n*, 802 A.2d 373 (D.C. 2002), *cited* at Order No. 18148 ¶ 14 (Commission considered and adopted terms of non-unanimous settlement agreement among Pepco, Washington Gas Light Company, the Apartment and Office Building Association of Metropolitan Washington, the Consumer utility Board, the General Services Administration, the International Brotherhood of Electrical Workers, and the Washington Metropolitan Area Transit Authority, and opposed by the Water and Sewer Authority, and the District of Columbia Government).

[48] *See* 15 D.C.M.R. §§ 130.10(c), 130.12, 130.13, 130.14.

[49] *Mobil Oil Corp.*, 417 U.S. at 297.

> natural gas producers comprising 80% of the total gas production in the area. Obviously, this broad base of support was an important consideration for FPC.[50]

Unlike the offer of settlement reviewed by the *Placid Oil* and *Mobil Oil* Courts, this Commission-adopted offer of settlement has attracted a decided lack of support from virtually all the parties to this case. Here, the only major party not opposed to this offer of settlement is AOBA, which represents an association of commercial class ratepayers who stand to gain from the revised terms in the offer of settlement.[51] Nearly every other party to this proceeding opposed the Commission-adopted offer of settlement. These opposing parties represent residential class ratepayers, low-income ratepayers, large individual commercial customers, government interests, and environmental interests. It is likely that a reviewing court will view this broad opposition as another significant factor to reverse the Commission's decision granting Joint Applicants' offer of settlement.[52]

C. The Commission ignores and fails to explain its own inconsistent interpretations of *Placid Oil.*

In Order No. 18109, Commissioner Phillips explicitly states that Commissioner Fort "misreads *Placid Oil Co. v. FPC* . . ." as authority "for a Commission to unilaterally redraft a settlement agreement."[53] In fact, Commissioner Phillips states that he could find no authority for such an act, which he described as "rare or even unprecedented."[54] Inexplicably, however,

---

[50] *Placid Oil*, 483 F.2d at 893.

[51] AOBA was also a signatory to the NSA. Washington Gas Energy Services also did not oppose but was granted only limited intervention status to address any competitive concerns raised by the NSA.

[52] *See U.S. v. PSC*, 465 A.2d at 832 ("we think it is clear that the Commission . . . does have the authority to impose a settlement which is substantially acceptable to most, if not all, the parties.") Notably, the court was determining whether it was proper to accept a Non-Unanimous Settlement Agreement as a resolution on the merits, not as an offer of settlement.

[53] *See* Order No. 18109 ¶ 199 n. 317.

[54] *Id.*

Placid Oil is the case cited as authority for imposing the same "unprecedented" action in Order No. 18148, which Commissioner Phillips joined. The Commission makes no attempt to explain this glaring inconsistency with Order No. 18109.

II. The Commission Erred In Interpreting Rule 130.17 (b) As Not Requiring That The Same "Other Relief" Must Be Requested By All Settling Parties.

In Order No. 18148, the Commission states that "although the Commission contemplated a joint filing by the Settling Parties asking for other relief, neither the Commission's rules nor the language of Order No. 18109 states that unless 'all of the Settling Parties' join in the request for other relief, then any request for other relief filed separately could not be considered by the Commission."[55] However, an appropriate reading of Rule 130.17 (b) and Order No. 18109 leads to the inescapable conclusion that joint agreement among the Settling Parties as to "the other relief requested" is a prerequisite for Commission consideration and adoption of such relief as a resolution on the merits.

A. The Commission itself believed that other relief would be requested jointly.

By the Commission's own statement, "Order No. 18109 contemplated" that "all of the settling parties jointly file a notice accepting the revised NSA or jointly file a request for other relief."[56] The Commission cannot in fairness point to the absence of express language in Order No. 18109 requiring "all of the Settling Parties [to] join in the request for other relief" as justification for not requiring a joint filing for other relief when a joint filing is exactly what the Commission, in fact, contemplated.

[55] Order No. 18148 ¶ 38.

[56] Email dated March 9, 2016, from Commission attorney Richard Herskovitz to representatives of the other parties (emphasis in original). See also Order No. 18148, ¶ 37.

B. A rational reading of Order No. 18109 leads to the conclusion that other relief must be requested jointly by all settling parties.

In his opinion in Order No. 18109, Commissioner Phillips made clear that any Commission-imposed resolution on the merits had to have the support of all Settling Parties to the NSA to be valid.[57] First, he cites to the case of *Davis v. J.P. Morgan Chase & Co.* 827 F.Supp.2d 172 (W.D.N.Y. 2011), for the proposition that courts, when deciding whether to accept or reject a settlement, must bear in mind that their role is circumscribed and they may not "delete, modify, or substitute certain provisions."[58] Commissioner Phillips then cites to Rule 130.17 in the context of other Commission rules regarding settlement. In particular, he quotes Rule 130.16, which states that "[g]iven the negotiated nature of a settlement, the Commission shall either accept or reject a settlement in its entirety, unless the parties have specifically stated that the provisions of the settlement are severable."[59]

Significantly, Commissioner Phillips emphasizes the value of predictability in encouraging settlement negotiations:

> The Commission does not serve its mission by seeking to author a better settlement than what the parties have negotiated simply because we believe there are terms or conditions that could have been included. In fact, this practice discourages parties from entering into meaningful settlement negotiations because all they achieve can be negated by a Commission that rewrites the agreement without being privy to the give-and-take that led to compromise. Rather, I believe that the Commission should continue its practice of making its settlement review process predictable, so that parties can know what is expected. This decision does the opposite.
>
> Given that OPC, District Government, AOBA, NCLC/NHT, and DC Water negotiated the terms of the NSA in good faith, and the Commission was not at the bargaining table, to reshuffle the CIF substitutes the Commission's judgment for that of the Settling Parties, which is counter to our standard of review and a plethora of case law. And any

[57] Order 18109 ¶ 171-204.

[58] *Citing Evans v. Jeff D.*, 475 U.S. 717. 726 (1986) and *In re Agent Orange Product Liability Litigation*, 821 F.2d 137, 144 (2d Cir.1987).

[59] Order 18109 ¶ 196. The NSA specifies that the provisions of the Agreement are not severable.

> benefit derived from reshuffling the CIF now, even with the best of intentions, is outweighed by the potential to unravel the deal struck by the Settling Parties and erode confidence in the Commission.[60]

Recognizing, however, that the benefits conferred by the NSA would be totally lost if the Settling Parties could not consider Commissioner Fort's proposed conditions, Commissioner Phillips accepted "Commissioner Fort's conditions for the sole purpose of giving the Settling Parties, who [Commissioner Phillips] believes negotiated a Settlement that should be approved, an avenue to consummate *their agreement*, instead of resulting in an outright denial."[61] To prevent the NSA from being "rejected outright for lack of a quorum to approve it," and "[f]or that reason . . . alone," Commissioner Phillips did "not object to Commissioner Fort circulating alternative terms to the Settling Parties. If the Settling Parties accept Commissioner Fort's alternative terms, then so will I."[62] Thus, it was an agreement – either an agreement to accept the RNSA, or an agreement on other relief – that Order No. 18109 authorized.

Commissioner Phillips clearly saw danger in the Commission's "reshuffling" of the CIF to purposes other than what was negotiated by the Settling Parties to the NSA because of the potential to "unravel the deal." If Commissioner Phillips believed that Rule 130.17 (b) permitted the Commission to adopt offers of settlement from only one Settling Party there would have been no cause for concern that the deal would be "unraveled." Individual parties simply could propose whatever relief they wished. Thus, as Commissioner Phillips's analysis demonstrates, any resolution would unravel unless all of the Settling Parties agreed to the revised terms or agreed upon other relief.

---

[60] *Id*. at ¶ 200 - ¶ 201.

[61] *Id*. at ¶ 2 (emphasis added).

[62] *Id*. at ¶171.

Moreover, if Commissioner Phillips did not believe the other relief requested had to be requested jointly by all Settling Parties, he would not have stated that the decision in Order No. 18109 would "at a minimum" send the Settling Parties back to the negotiating table.[63] Commissioner Phillips worried that the RNSA might not be favorable to at least some of the Settling Parties. As such, the parties would have to go back to the negotiating table to try to reach a new agreement. But, if Commissioner Phillips believed that Rule 130.17 (b) permitted the Commission to adopt offers of settlement from only one Settling Party, there would be no cause for concern that a new agreement would have to be negotiated. In short, the views and concerns expressed by Commissioner Phillips in his opinion in Order No. 18109 support the logical reading that the other relief had to be requested jointly by all Settling Parties.

C. The Commission abused its discretion under Rule 130.17(b).

Finally, Rule 130.17 (b) must be read in the context of the NSA itself. Indeed, the Settling Parties specifically contemplated that the NSA "may only be modified by a further written agreement executed by all parties to this Settlement Agreement."[64] An appropriate reading of Rule 130.17 (b) ought to take note of what the Settling Parties themselves intended under the NSA for other relief to be considered: the request must come from all of the Settling Parties.[65] The Commission clearly abused its discretion when it voted to proceed under Rule 130.17 (b) -- a discretionary (not mandatory) procedure -- to authorize a settlement-modification procedure that was contrary to express provisions of the NSA.[66]

---

[63] *Id*. at ¶201 n. 320.

[64] NSA ¶ 140.

[65] The NSA as filed contained twelve critical paragraphs (¶ 131 - ¶ 142) entitled "Additional Provisions" which govern the rights and obligations of the Settling Parties under the NSA. These paragraphs do not appear in the Commission's Attachment A to Order No. 18109.

[66] Order No. 18109 ¶ 17.

III. The Commission Erred By Failing To Fully And Clearly Articulate The Basis For Departing From A Number Of Previously Expressed Policies.

A. The policy of encouraging settlements.

In Order No. 18109, Commissioner Phillips cites to a line of cases in support of established policy that tribunals encourage settlement agreements to conserve judicial resources, and to avoid the costs and risks associated with litigation.[67] Commissioner Phillips expresses deep concern that, by proposing revised terms to a settlement agreement negotiated at arm's-length, the Commission would discourage parties from entering into meaningful settlement discussions.[68] Thus, it would stand to reason under Commissioner Phillips's logic that by not only proposing revised settlement terms, but by actually imposing those revised terms upon the Settling Parties over their objections, the Commission will be deterring parties from entering into settlement agreements in the future. In imposing the Joint Applicants' other relief despite the objections of other Settling Parties, the Commission failed to explain or even address its change in well-established policy.[69]

B. The policy of not "shoring up" deficient applications.

Second, the Commission failed to articulate a basis for its departure from previously-stated policy in Order No. 17947 that it would not attempt to "shore up" every application to merge because "from a policy perspective . . . we would run the risk of undermining the public's confidence in the fairness of this review process."[70] Yet this is exactly what the Commission did

---

[67] Id. ¶ 174.

[68] Id. ¶ 200.

[69] *Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 36, 41 (D.C. Cir. 1993) ("By requiring the Commission to explain its decisions fully and rationally, we can be confident that . . . prohibited policy judgments will come to a reviewing court's attention.")

[70] ¶ 353.

in Order Nos. 18109 and 18148. Not only did the Commission endeavor to "shore up" the NSA with revised terms, it actually imposed those terms on the Settling Parties over their objections. Given the Commission's previously expressed policy in Order No. 17947, the District could not have anticipated that the Commission would act as it did – either when the District initially decided to negotiate a settlement with Joint Applicants post-final order, or when responding to Joint Applicants' Request for Other Relief. Commission Order No. 18148 is arbitrary and capricious.

C. The policy of reopening a finally decided case for a very limited purpose.

The Commission erred in failing to explain why it departed from its decision to reopen Formal Case 1119 "solely for the *very limited* purpose of considering whether the Settlement Agreement *filed by the Settling Parties* is in the public interest. The Commission emphasizes that the record *will be reopened for no other purpose*."[71] This language can only be read to mean that the Commission was proceeding solely under Rule 130.16 to determine whether the NSA as filed by the Settling Parties should be accepted or denied. The Commission does not explain why, in the context of its earlier opinion in this case, it chose to exercise its discretionary powers under Rule 130.17 to explore alternatives to the filed Settlement Agreement, let alone alternatives proposed by only one party.[72]

---

[71] Order No. 18011 ¶ 58 (footnote omitted) (emphasis added).

[72] Order No. 18109 ¶ 17.

IV. The Commission Fails To Fully And Clearly Explain Why Previously Cited Criticisms Of The RNSA Are No Longer Of Concern.

In Order No. 18109, Commissioner Phillips expressed a number of criticisms of the RNSA's terms, but he does not address those criticisms again in Order No. 18148 when he approves the RNSA. For example, in Order No. 18109 Commissioner Phillips states:

- "I am not convinced that the record supports reallocating the proposed rate credit to benefit commercial customers, a condition that no commercial customer requested"[73] because courts have found "[t]here is no rule that settlements benefit all class members equally . . . as long as the settlement terms are rationally based on legitimate considerations."[74]

- "I am not persuaded by the record that [Joint Applicants' commitment to develop solar and distributed generation], as asserted by the majority, will not improve Pepco's distribution system, and that Exelon/Pepco post-merger project development roles are anti-competitive."[75]

- "There is no evidence that Formal Case No. 1130 (energy system modernization initiative), as asserted by the majority, is at odds with the NSA."[76]

- "I do not agree with the majority's objection to the administration of CIF funds by the District Government because the majority dismisses critical evidence in the record."[77]

- "In my view, the majority has 'stepped into the shoes' of the parties in a way that is simply unwarranted in order to justify their rejection of the NSA. Under our standard of review, the Commission is not tasked with fashioning the *best* or even a *better* settlement, which is what the proposed alternative terms aim to do [emphasis in original]."[78]

Given Commissioner Phillips's conclusion that the record does not support the Commission's proposed revisions to the NSA in Order No. 18109, it is unclear on what basis he

[73] *Id*. ¶ 188.

[74] *Id*. ¶ 186, *quoting Dehoyos v. Allstate Corp.*, 240 F.R.D. 269, 316 (W.D. Tex. 2007), *citing UAW v. General Motors Corp.*, No. 05-CV-73991-DT, 2006 WL 891151, at *28 (E.D. Mich. Mar. 31, 2006).

[75] *Id*. ¶ 189.

[76] *Id*. ¶ 193 (footnote omitted).

[77] *Id*. ¶ 194.

[78] *Id*. ¶ 195.

joined the Commission's approval of these revisions in Order No. 18148. Following such extensive criticism of the RNSA's terms by a Commissioner whose vote was later needed for a majority–decision approving the RNSA, the Commission has failed to fully and clearly articulate a reasoned and principled basis for approving the RNSA terms that the Commissioner critiqued. For this reason, the findings of fact underlying the revisions in the RNSA, including the removal of terms from the NSA by Order No. 18148, are arbitrary and capricious.[79]

V. The Commission Failed To Make The Required Findings That The RNSA's Terms Are In The Public Interest.

The Commission also erred by failing to apply the correct standard of review in order to conclude that the RNSA as a whole is in the public interest. In particular, the Commission failed to make affirmative findings that the previously uncontested provisions of the NSA were in the public interest. When reviewing the NSA, Commissioner Fort had concluded that "in the absence of objections, there is no basis to find that [the uncontested terms] are not in the public interest."[80] That conclusion made sense when the Commission was considering the Non-Settling Parties' objections to the Settling Parties' NSA. But when the RNSA failed to garner the support of all the Settling Parties, the Commission could no longer base its approval of the RNSA's terms on the Non-Settling Parties' failure to object to those terms in the NSA. Instead, the Commission was required to affirmatively find that all of the RNSA's terms were in the public interest, after giving each of the Settling Parties a fair opportunity to object to any term (even terms that were part of the original NSA supported by all the Settling Parties). The Commission could not properly approve the RNSA without making such affirmative findings after providing all of the Settling Parties with due process.

[79] *See, e.g.*, Order No. 18148 at 25, Findings of Fact Q and S.

[80] Order No. 18109 ¶ 82.

Moreover, courts require that the Commission make the independent public interest findings that are based on "substantial evidence."[81] With regard to the uncontested NSA terms, the only "evidence" the Commission points to is the lack of objections by other parties. As the D.C. Circuit stated in *Arco Oil and Gas Co. v. F.E.R.C.*, "the Commission's conclusory statements cannot substitute for the reasoned explanation that is wanting."[82]

VI. The Commission Denied The District Government Due Process By Failing To Permit It To Challenge The Terms Of The RNSA.

To reach its ultimate conclusion that the RNSA is in the public interest, the Commission "start[s] with the fact that the Settling Parties already decided that the NSA as submitted (and reflected in Option 1) met this threshold test."[83] What the Commission fails to consider, however, is whether, in the view of all the Settling Parties, the NSA would have come anywhere close to passing this "threshold test" if it had not included the terms that the RNSA removed.[84]

As one significant example, the Commission relies on the Settling Parties' agreement in the NSA to find that the $72.8 million in CIF funding is sufficient to be in the public interest.[85] However, the NSA and RNSA provide no indication of what the District Government would have required from Joint Applicants to settle if Joint Applicants had not agreed to restrict to residential ratepayers the benefit of the $25.6 million in rate credits. Similarly, the NSA and

---

[81] *Washington Gas Light Co.* 856 A.2d at 1104.

[82] 932 F.2d 1501, 1504 (D.C. Cir. 1991).

[83] *Id*. ¶45.

[84] The NSA itself states at ¶ 135 that "this Settlement Agreement contains terms and conditions each of which is interdependent with the others and essential in its own right to the signing of this Settlement Agreement. Each term is vital to the Settlement Agreement as a whole, since the Settling Parties expressly and jointly state they would not have signed the Settlement Agreement had any term been modified in any way."

[85] No party objected to the NSA on the basis that the $72.8 million in total CIF funding was not a sufficient amount. *See* Order No. 18109 ¶ 82 ("in the absence of objections, there is no basis to find that the [commitments] are not in the public interest.")

RNSA provide no indication of what the District Government would have required from Joint Applicants to settle if they had not agreed to make funds directly available for DOEE programs. The "threshold test" cited by the Commission is an unreliable benchmark from which to begin analyzing whether the RNSA is in the public interest.

Further, even though the Commission characterizes the revisions in the RNSA as "limited," the Commission failed to "be mindful that inherent in compromise is a yielding of absolutes and an abandoning of highest hopes."[86] The Commission took from the District Government without providing a corresponding negotiated benefit. And, in the final stage of the proceeding, instead of providing the District Government with an opportunity to oppose the rewriting of the NSA, the Commission expressly limited the role of the Settling Parties to either accepting the RNSA or proposing other relief.[87] By unilaterally rewriting the NSA and then imposing those terms over the District Government's objection, the Commission denied the District Government its due process right to challenge any or all of the NSA's provisions, following the RNSA's omission of key NSA terms valued by the District Government. This was error.

CONCLUSION

For the foregoing reasons, the Commission should reconsider and vacate Order No. 18148 and, following further proceedings to ensure due process, approve the NSA subject to such additional terms as the Commission determines will satisfy the public interest, or if the

[86] *Cotton v. Hinton*, 599 F.2d 1326, 1330 (5th Cir. 1977), *quoting Milstein v. Werner*, 57 F.R.D. 515, 524-25 (S.D.N.Y. 1972)

[87] Order No. 18109 ¶ 208. The Commission gave no indication that it expected the Settling Parties to address the merits of the RNSA in response to the Joint Applicants' Request of Mar. 7, 2016, other than to indicate whether they accepted the RNSA.

Commission concludes after further proceedings that the public interest cannot be satisfied, disapprove the merger.

Respectfully Submitted,

KARL A. RACINE
Attorney General for the District of Columbia

ELIZABETH SARAH GERE
Deputy Attorney General
Public Interest Division

/s/ Bennett Rushkoff
BENNETT RUSHKOFF (D.C. Bar # 386925)
Assistant Deputy Attorney General
Public Integrity Unit

/s/ Brian R. Caldwell
BRIAN R. CALDWELL (D.C. Bar # 979680)
Assistant Attorney General
Public Advocacy Section
441 4th Street, N.W., Suite 650-N
Washington, D.C. 20001
Tel: (202) 727-6211
Fax: (202) 741-8779
Email: Brian.Caldwell@dc.gov

April 22, 2016

Attorneys for the District of Columbia Government

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 2016, I caused true and correct copies of the foregoing District of Columbia Government's Application for Reconsideration of Order No. 18148 to be electronically delivered to the following parties:

Sandra Mattavous-Frye, Esq.
Office of the People's Counsel
1133 15th Street, NW, Suite 500
Washington, DC 20005
smfrye@opc-dc.gov

Frann G. Francis, Esq.
Apartment and Office Building
Assoc. of Metropolitan Washington
1050 17th Street, NW, Suite 300
Washington, DC 20036
ffrancis@aoba-metro.org

Peter E. Meier, Esq.
Potomac Electric Power Company
701 Ninth Street, NW
Suite 1100, 10th Floor
Washington, D.C. 20010
Peter.meier@pepcoholdings.com

Olivia Wein, Esq.
National Consumer Law Center
1001 Connecticut Avenue, NW, Suite 510
Washington, D.C. 20036-5528
owein@nclc.org

Abraham Silverman, Esq.
NRG Energy Inc.
211 Carnegie Center
Princeton, NJ 08540
Abraham.Silverman@nrgenergy.com

Anya Schoolman
D.C. Solar United Neighborhoods
1826 Lamont Street, NW
Washington, D.C. 20010-2693
Anya.schoolman@gmail.com

Richard Herskovitz, Esq.
Associate General Counsel
Public Service Commission of the
District of Columbia
1333 H Street, N.W., 7th Floor East
Washington, D.C. 20005
rherskovitz@psc.dc.gov

Leonard E. Lucas, III, Esq.
Office of General Counsel
General Services Administration
1275 First Street, N.E., 5th Floor
Washington, D.C. 20002
leonard.lucas@gsa.gov

Richard M. Lorenzo, Esq.
Loeb & Loeb
345 Park Avenue
New York, NY 10154
rlorenzo@loeb.com

Brian R. Greene, Esq.
GreeneHurlocker, PLC
707 East Main Street, Suite 1025
Richmond, VA. 23219
BGreene@GreeneHurlocker.com

Jeffrey W. Mayes, Esq.
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eaglesville, PA 19403
Jeffrey.mayes@monitoringanalytics.com

Robert I. White, Esq.
Nancy A. White, Esq.
Squire Sanders Patton Boggs, LLP
1200 19th Street, NW, Suite 300
Washington, D.C. 20036
Nancy.white@squirepb.com

Randy E. Hayman, Esq.
D.C. Water & Sewer Authority
5000 Overlook Avenue, SW
Washington, D.C. 20032
Randy.hayman@dcwater.com

Bruce R. Oliver
Revilo Hill Associates, Inc.
7103 Laketree Drive
Fairfax Station, VA 22039
revilohill@verizon.net

Carolyn Elefant, Esq.
Law Offices of Carolyn Elefant
2200 Pennsylvania Ave, NW, 4th FL East
Washington, D.C. 20037
Carolyn@carolynelefant.com

Larry Martin
Grid 2.0
lmartindc@gmail.com

Randall Speck, Esq.
Kaye Scholer LLP
901 Fifteenth St. NW
Washington, D.C. 20005
Randall.Speck@kayescholer.com

/s/ Brian R. Caldwell
Brian R. Caldwell