

IN THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

PETITION OF *
OFFICE OF PEOPLE'S COUNSEL *
FOR JUDICIAL REVIEW OF *
THE DECISION OF *
THE PUBLIC SERVICE COMMISSION *
IN THE MATTER OF THE MERGER *
OF EXELON CORPORATION *
AND PEPSCO HOLDINGS *
(PSC CASE NO. 9361) *

Case No.: 17-C-15-019974

* * * * *

**MEMORANDUM OF ATTORNEY GENERAL BRIAN E. FROSH
AS *AMICUS CURIAE***

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QUESTION PRESENTED

In dismissing, without explanation, substantial evidence that Exelon Corporation's proposed acquisition of two Maryland public utilities would harm consumers and the environment by impeding the transformation of Maryland's electric industry, did the Public Service Commission fail both to resolve significant evidentiary conflicts and to state clearly the rationale for its decision, necessitating that its decision be vacated?

INTEREST OF *AMICUS CURIAE*

This case concerns a transaction – Exelon Corporation's proposed acquisition of Delmarva Power and Light Company ("Delmarva") and Potomac Electric Power Company ("Pepco") – that would have a profound impact on the future of the electric industry in Maryland, on the experience of consumers in gaining access to electricity, and on the State's environment. This case also concerns the manner in which the Public Service Commission ("the PSC" or "the Commission") approved the proposed acquisition and, in particular, the sufficiency under Maryland administrative law of the Commission majority's explanation for its decision.

The Attorney General has an interest both in the environmental and consumer issues presented to the Commission and in the administrative law question presented to this Court. With respect to the impact of this case on the State's environment and on Maryland consumers, the Attorney General has principal responsibility for enforcement of the State's environmental and consumer protection laws. The General Assembly has directed the Attorney General to "take charge of, prosecute, and defend on behalf of the State every case arising under" the State's major environmental protection laws, including Maryland's

clean air laws. *See* Md. Code Ann., Envir. § 2-614. The General Assembly has also directed the Attorney General both to administer the State’s consumer protection laws and, more broadly, to study, report on, and make recommendations concerning problems faced by Maryland consumers. *See* Md. Code Ann., Comm. Law §§ 13-201, 13-203. The Attorney General is particularly concerned that Exelon’s proposed acquisition of Pepco and Delmarva would impede, at a “transformative time in the electricity industry,” *see* Order No. 86990, *In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.*, Case No. 9361, Dissenting Opinion of Commissioners Williams and Hoskins (“Dissent”) at D-1, the adoption in Maryland of technologies and practices that could reduce substantially both the environmental impact of the electric industry and the cost of electricity paid by consumers but that pose a threat to Exelon’s business.

With regard to the administrative law issues in this case, the Attorney General has “general charge of the legal business of the State.” *See* Md. Code Ann., State Gov’t § 6-101. Although the Attorney General, on occasion, challenges on judicial review the decisions of federal and State administrative agencies, including in cases affecting Maryland’s environment, *see, e.g., American Farm Bureau Federation v. Environmental Protection Agency*, 559 F.3d 512 (D.C. Cir. 2009) (challenge to EPA air quality standards), the Office of the Attorney General far more frequently defends on judicial review the decisions of Maryland administrative agencies. This case, because of its importance and complexity, may well yield a published appellate decision concerning the standard under which Maryland courts review decisions of administrative agencies. The Attorney General, therefore, has a particular interest in judicial recognition that the result sought by the petitioners – an order vacating the PSC’s decision and remanding this matter to the

Commission – is fully consistent with existing, deferential standards for judicial review in Maryland courts.¹

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The Attorney General adopts the statement of the case and statement of facts contained in the memorandum of law submitted by petitioner Office of People’s Counsel. *See* Mem. of Law of Md. Office of People’s Counsel at 3-5.

ARGUMENT

THE COMMISSION MAJORITY PRECLUDED JUDICIAL REVIEW OF ITS DECISION WHEN IT DISMISSED, WITHOUT EXPLANATION, EVIDENCE THAT EXELON’S PROPOSED ACQUISITION OF PEPSCO AND DELMARVA WOULD IMPEDE THE ONGOING TRANSFORMATION OF MARYLAND’S ELECTRIC INDUSTRY.

At a “transformative time in the electricity industry,” Dissent at D-1, a bare majority of the Public Service Commission approved a transaction that would tether the future of electric utility service in Maryland to the Exelon Corporation. As a result of Exelon’s proposed acquisition of Pepco and Delmarva, Exelon would own three of Maryland’s four investor-owned public utilities (it has already acquired Baltimore Gas & Electric), and it would control distribution of electricity to more than 80% of Maryland consumers. Moreover, as the D.C. Public Service Commission has recognized in disapproving this transaction on behalf of the District of Columbia, the changes wrought by the proposed transaction would be, effectively, “permanent.” Formal Case No. 1119, Order No. 17947, Public Service Commission of the District of Columbia (August 27, 2015) at ¶ 5 (“This

¹ The Office of the Attorney General represented the Maryland Energy Administration (“MEA”) in this matter in proceedings before the Public Service Commission. MEA, which urged the PSC to reject the proposed acquisition, has elected not to participate in judicial review proceedings.

decision is forever.”). No subsequent action by the PSC, or by any other agency or court, could readily address any harms flowing from this transaction if it is allowed to proceed.

Record evidence, relied upon by the dissenting commissioners, shows that Exelon has a deep commercial interest, due to its ownership of the nation’s largest fleet of nuclear power plants and substantial other generation assets, to resist the adoption of certain emerging technologies and practices that could significantly reduce both the environmental impact and the cost of electricity consumption. *See id.* at D-7 to D-9. These technologies and practices – described by Exelon’s CEO as, collectively, “[t]he most fundamental evolution in the technologies of our business we have ever seen,” Confidential Exhibit A² - principally involve the integration into the electric distribution system of smaller, more decentralized, and cleaner sources of electricity, including distributed generation (such as solar photovoltaic cells), microgrids, and other renewable sources. All of these displace sales from Exelon’s central grid generation. *See Dissent* at D-7 to D-9. As a result of Exelon’s proposed acquisition of Pepco and Delmarva, Exelon would obtain the power to impede the adoption of these “transformative” technologies and practices in Maryland. *See id.* at D-10. Moreover, Exelon’s ownership of three of Maryland’s four major distribution utilities would curtail the development of alternative approaches to these technologies and practices – in particular, approaches developed by utilities, like Pepco and Delmarva, not under common ownership with entities in the power plant business and therefore not

² *See* C. Crane September 11, 2014 letter to Exelon Board of Directors, Exhibit RDT-10 to Direct Testimony of Richard D. Tabors, Docket Entry No. 93. Although Dr. Tabors quoted from Mr. Crane’s letter in testimony that the Commission determined not to be confidential, Exelon has continued to designate the letter itself as confidential. Confidential Exhibit A is therefore being filed separately under Rule 16-1010.

threatened by the potential availability of alternative sources of electricity. *See id.* at D-14 to D-15, D-16.

This Court's role, of course, is not to adjudicate these issues directly, but rather to review the manner in which the Commission majority decided them. And, with respect to these issues, the majority's decision is fundamentally lacking. In a footnote, the majority simply dismisses, as "little more than speculation," all of the documentary evidence and expert testimony regarding electric industry transformation and Exelon's disposition toward it. *See Order No. 86990, In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.*, Case No. 9361 ("Majority") at 39 n.186.

A person reading only the Commission majority's decision could be excused for thinking that the ongoing transformation of Maryland's electric industry was itself a mere "footnote" during the evidentiary hearings in this case. It was not. Industry transformation, and the particular threat it poses to Exelon, were subjects of multiple days of live expert testimony introduced by at least eight groups of parties objecting to the proposed acquisition, including non-profit advocacy groups, a private company with commercial interests in alternative sources of electricity, two state government entities committed to safeguarding the public interest, and the Commission's own technical staff. The two dissenting commissioners found this evidence sufficiently compelling to dedicate the first section of their opinion to a discussion of it. *See Dissent at D-7 to D-20.*

The Commission majority gave such short shrift to this evidence, however, that it effectively failed even to take a position, let alone explain the reasons for any position it might have taken and identify evidence to supports that unstated position. Does the majority doubt the existence of the "tectonic shift in Maryland's distribution system"

described by the dissent? *See id.* at D-4. Does it disagree that these transformative technologies and practices particularly threaten Exelon's bottom line? Does the majority doubt that Exelon's acquisition of Pepco and Delmarva would give Exelon significant new tools to impede the adoption of these technologies and practices? Does the majority believe that the Commission's regulatory authority would be sufficient to facilitate the adoption of new technologies and practices, despite resistance from Exelon? And, significantly, what is the evidence on which the majority relies? The majority does not answer any of these questions, and therefore it is impossible for a reader – or, more to the point, a reviewing court – to know.

Under these circumstances, well-settled principles of Maryland administrative law require that the Commission's decision be vacated and that this matter be remanded to the Commission. As explained in numerous decisions of the Court of Appeals, an administrative agency's failure to "resolve all significant conflicts in the evidence" and to "present a clear statement of the rationale for its decision" "precludes judicial review." *See, e.g., Walker v. Dep't of Housing & Cmty. Dev.*, 422 Md. 80, 106-07 (2011); *Forman v. Motor Vehicle Admin.*, 332 Md. 201, 221-22 (1993); *United Steelworkers of America v. Bethlehem Steel Corp.*, 298 Md. 665, 678-79 (1984).

Moreover, it does not ameliorate the deficiencies in the majority's decision that this matter is a complex one, that the majority's decision is long, or that the majority may have adequately explained its reasoning on other, different issues. Numerous federal cases arise from agency decisions where the matter presented to the agency was substantively and procedurally complex, and where the agency explained its reasoning on various matters, but where, as here, the agency failed to make factual findings or to explain its reasoning on

a significant issue. Applying legal principles analogous to those applied in Maryland, the federal courts vacate such agency decisions and remand the matter to the agency for further consideration. *See, e.g., Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 532-35 (2007); *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1984).

A. To Provide an Adequate Basis for Judicial Review of a Decision Approving the Acquisition of a Public Utility Company, the Public Service Commission Must Resolve Any Conflicts and Clearly Explain Its Reasoning With Respect to any Significant Record Evidence that the Acquisition Would Harm Consumers or Adversely Affect the Public Interest.

This Court must determine whether the Public Service Commission correctly applied the standards set forth in the Public Utilities Article for the review of an acquisition of a public utility company. Those standards are quite stringent, as the Office of People’s Counsel has explained. *See* Mem. of Law of Md. Office of People’s Counsel at 6-8.

The Public Utilities Article provides: “If the Commission does not find that the acquisition is consistent with the public interest, convenience and necessity, including benefits and no harm to consumers, the Commission *shall* issue an order *denying the application.*” Md. Code Ann., Pub. Util. § 6-105(f)(4) (emphasis added). Moreover, a party seeking to acquire a Maryland public utility “bears the burden of showing that granting the acquisition is consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers.” *Id.* § 6-105(f)(5).

Under these provisions, if a party objecting to the acquisition of a Maryland utility introduces significant evidence that the transaction would adversely affect the public interest, the acquiring entity – here, Exelon – bears the burden of rebutting that evidence.

Moreover, and significantly, the Commission must disapprove the acquisition unless the Commission itself finds that the acquiring entity has rebutted the evidence of harm. *See id.* § 6-105(f)(4).

A Commission decision making the required findings and drawing the required conclusions would, of course, be accorded deference by a reviewing court.³ It is a settled principle of Maryland administrative law, however, that a reviewing court may accord such deference only if the agency makes factual findings and supplies reasoning to which the court may defer. *See, e.g., Walker*, 422 Md. at 106-07; *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 62-66 (2002); *Bucktail, LLC v. County Council of Talbot Cnty.*, 352 Md. 530, 552-58 (1999); *Forman*, 332 Md. at 221-22; *Harford Cnty. v. Preston*, 322 Md. 493, 504-05 (1991); *United Steelworkers*, 298 Md. at 678-79.

As the Court of Appeals has explained,

[j]udicial review of administrative action differs from appellate review of a trial court judgment. In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. *However, in judicial review of*

³ Under § 3-203 of the Public Utilities Article, orders of the Commission are “prima facie correct and shall be affirmed unless clearly shown to be: (1) unconstitutional; (2) outside the statutory authority or jurisdiction of the Commission; (3) made on unlawful procedure; (4) arbitrary or capricious; (5) affected by other error of law; or (6) . . . unsupported by substantial evidence on the record considered as a whole.” This standard is substantively identical to the standard applied by courts in reviewing decisions of other administrative agencies under the general judicial review provisions of the Administrative Procedure Act. *See State Gov’t § 10-203.*

Unlike the judicial review provision applicable to PSC decisions, the APA’s judicial review provision does not expressly recognize that agency decisions are “prima facie correct,” but the courts have long held that such recognition is implied in the APA. *See, e.g., Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-69 (1999); *Younkens v. Prince George’s Cnty.*, 333 Md. 14, 18-19 (1993) (quoting *Hoyt v. Police Comm’r*, 279 Md. 74, 88-89 (1977)).

agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.

Walker, 422 Md. at 107 (quoting *United Steelworkers*, 298 Md. at 679) (emphasis added; brackets in original).

Thus, “[i]n order to apply the appropriate standard of review . . . the reviewing court first must know why the agency reached its decision. It must know what it is reviewing.” *Mehrling*, 371 Md. at 65 (quoting *Forman*, 332 Md. at 220-21). “Without findings of fact on all material issues, and without a clear statement of the rationale behind” the decision maker’s action, “a reviewing court cannot properly perform its function.” *Id.* “At a minimum, one must be able to discern from the record the facts found, the law applied, and the relationship between the two.” *Id.* When an administrative agency fails to make necessary findings of fact, fails to resolve substantial evidentiary conflicts, or fail to explain its reasoning on a material issue, such a failing “precludes judicial review,” and the agency’s decision must be vacated. *See, e.g., Walker*, 422 Md. at 107 (quoting *United Steelworkers*, 298 Md. at 679).⁴

⁴ Maryland administrative law differs from federal administrative law in at least one formal but apparently non-substantive respect. Federal courts, applying an analogous substantive standard, treat an evaluation of the adequacy of the agency’s findings of fact and explanation of its reasoning as *part of*, rather than prior to, the process of judicial review. Rather than finding an inadequate agency decision to “preclude[] judicial review,” the federal courts find such a decision, as part of the process of judicial review, to be “arbitrary and capricious.” *See, e.g., Massachusetts v. EPA*, 549 U.S. at 534 (“EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore arbitrary, capricious, . . . or otherwise not in accordance with law.”); *State Farm*, 463 U.S. at 46 (“The first and most obvious reason for finding the [decision] arbitrary and capricious is that NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized.”).

Here, under the principles discussed above, this Court must determine whether the PSC, in addressing evidence that Exelon's acquisition of Pepco and Delmarva would impede the beneficial transformation of Maryland's electric industry, made "findings of fact on all material issues," "resolve[d] all significant conflicts" between its decision and this evidence, and gave a "clear statement of the rationale behind [its] action," *Forman*, 332 Md. at 220-21. Any significant evidence of harm to consumers or the public interest would undoubtedly be "material" to the Commission's decision, because the General Assembly has mandated that the Commission "*shall*" disapprove an acquisition unless it finds affirmatively that the acquisition is consistent with the public interest and does not harm consumers. *See* Md. Code Ann., Pub. Util. § 6-105(f)(4). The Commission's decision must be vacated if, in dismissing evidence of harm to consumers and the public interest as "little more than speculation," Majority at 39 n. 186, the Commission failed to provide a meaningful explanation and instead relied on a "broad conclusory statement" or a "boilerplate resolution." *Bucktail*, 352 Md. at 553.

B. Substantial Record Evidence Shows that Exelon's Proposed Acquisition of Pepco and Delmarva Would Impede the Transformation of Maryland's Electric Industry and Therefore Harm Consumers and the Public Interest.

The Commission majority's approval of the proposed acquisition conflicts with substantial evidence that the acquisition would harm consumers and adversely affect the public interest by impeding the ongoing transformation of Maryland's electric industry. While the Commission majority barely acknowledges this evidence, the dissenting commissioners would have premised extensive findings and conclusions on it. *See* Dissent at D-7 to D-20.

Exelon “operates the nation’s largest fleet of nuclear power plants, which produce 17,263 [megawatts] in addition to the other substantial generation interests owned by the company. PHI [the current corporate owner of Pepco and Delmarva], is a regulated transmission and distribution company whose regulated utilities . . . account for approximately 96 percent of its revenues. PHI and Exelon therefore have very different economic incentives and form divergent perspectives on energy issues . . .” *Id.* at D-7 to D-8.

As the dissent explained, “this merger has been proposed at a time of significant change in the electric industry, from advances in distributed energy resources, to advanced metering infrastructure, and increased integration of renewable resources and demand response programs.” *Id.* at D-8. The dissent described a “tectonic shift in Maryland’s distribution system,” in which “opportunities abound for more efficient and clean electricity service.” *Id.* at D-4. Therefore, according to the dissent, “[i]t is not a propitious time for a dominant company with significant generation interests to control 80 percent of the electric service accounts of the State. The new merged entity will have strong economic incentives to restrain emerging technologies that could present a risk to its generation assets.” *Id.* at D-8.

The dissenting commissioners would have found not only that these emerging technologies and practices threaten Exelon’s business, but that, by acquiring Pepco and Delmarva, Exelon would acquire substantial new power actually to suppress the adoption of these technologies and practices in Maryland. “Beyond the economic incentives that are misaligned with customer interests, the evidence in this proceeding demonstrates that Exelon will have the opportunity . . . once the merger is consummated . . . [to] control the

pace of development of distributed energy resources by exerting influence over its utilities' system planning, system infrastructure, operational parameters, access to customer information, tariff proposals, and dispatch functions." *Id.* at D-10. "Additionally, Exelon could use its interconnection protocols to limit the amount of distributed energy resources that are developed in the Pepco and Delmarva service territories, either by preventing the installation of renewable generation, making it cost-prohibitive, or limiting its size." *Id.* Referring to the standard for approval of an acquisition set forth at § 6-105(f)(4) of the Public Utilities Article, the dissent concluded: "The risk that Exelon will use its control" over 80% of the State's electricity distribution "to curtail new technology . . . to protect its generation assets at the expense of its customers presents a significant harm for which no adequate mitigation has been proposed." *Id.*

Exelon's post-acquisition dominance in Maryland would impede the transformation of Maryland's electricity industry in two ways. *First*, as discussed above, Exelon would acquire, through its ownership of distribution utilities serving more than 80% of the State's customers, the power to suppress directly the adoption of transformative technologies and practices. *Second*, by placing three of four Maryland utilities under Exelon's control, the proposed would curtail the development of alternative and likely more accommodating approaches to these technologies and practices. Of particular concern to the dissenting commissioners, Exelon's acquisition of Pepco and Delmarva would extinguish the development in Maryland of alternative approaches by distribution utilities outside the control of a corporate parent with substantial investments in power plants. After the acquisition, there would be no such utilities left in Maryland. The harm, the dissent explained, "is not just that Exelon could use its influence over its utilities to protect its

generation interests at the expense of Maryland ratepayers, it is that Pepco and Delmarva could have come up with alternative ideas regarding energy efficiency, demand response, integration of renewable resources and other energy issues.” *Id.* at D-14.

The dissenting commissioners identified a great deal of record evidence supporting their conclusions, including internal Exelon documents. In a Strategic Plan, Exelon articulated a need “to insulate our centralized generation from the increased threat of [distributed generation],” recognizing that distributed generation, microgrids and other emerging technologies posed a risk of “cannibalization of our core business.” *Id.* at D-9; Confidential Exhibit B.⁵ The dissenting commissioners also cited expert testimony. At least eight groups of parties opposing the transaction introduced expert testimony concerning the transformation of the electricity industry, including non-profit advocacy groups, a private company, two state government entities committed to safeguarding the public interest, and the Commission’s own staff.

A former chair of the New York Public Service Commission and member of the federal Nuclear Regulatory Commission, testifying on behalf of the Mid-Atlantic Renewable Energy Coalition, testified that “the utility business is changing in fundamental ways that go largely unacknowledged in this merger proposal” and that “it would be shortsighted not to recognize that Exelon’s subverting of renewable energy is fundamentally

⁵ See Exelon Strategic Plan (excerpts), Exhibit RDT-7 to the Direct Testimony of Richard D. Tabors, Docket Entry No. 93. Although the Commission determined that portions of the Strategic Plan are not confidential, and the dissenting commissioners quoted from the Strategic Plan in their opinion, Exelon has continued to designate the plan documents themselves as confidential. Confidential Exhibit B is therefore being filed separately under Rule 16-1010.

incompatible with these emerging trends.” Direct Testimony of Peter Bradford at 31, Docket Entry No. 83. The Maryland Energy Administration, a State agency responsible for developing and implementing energy conservation and alternative energy policies, sponsored testimony from Dr. Richard Tabors, a co-director of the Utility of the Future project at the Massachusetts Institute of Technology. Dr. Tabors testified that, if the acquisition were approved, “the merged entity will be the central and dominant player in the Maryland distribution utility market” and “may well seek to close doors for competitors to enter the distributed resources or energy efficiency markets in order to advantage Exelon’s substantial grid generation or its own distributed resources. Keeping those doors open is in the best interest of Maryland ratepayers.” Direct Testimony of Richard D. Tabors, Docket Entry No. 93 at 43. Dr. Tabors further explained that the merged entity will have both the incentive and the ability to deter the development of distributed energy resources in Maryland, because distributed energy resources “compete with central grid generation and with the current, utility-controlled system for delivery of energy to the end consumer.” *Id.* at 42; *see also* Dissent at D-9 (citing MEA testimony).

The PSC’s own technical staff likewise urged the Commission to disapprove the acquisition. The Director of the PSC’s Division of Energy Analysis and Planning, Crissy Godfrey, testified that Exelon has a “clear conflict of interest to the State’s policy goals pertaining to energy efficiency, demand response, distributed generation and renewable energy.” Direct Testimony of Crissy Godfrey, Docket Entry No. 88 at 3. With respect to the loss of alternative approaches that would otherwise be developed by Pepco and Delmava, the Assistant Executive Director of the PSC’s staff, Calvin Timmerman, testified that “the fewer utilities we have that are genuinely individual operations, the more limited

our perspective will be on different ways of solving the various . . . things that distribution utilities are expected to do.” Dissent at D-16.

C. The Commission Majority Did Not Meaningfully Explain Its Dismissal of Evidence that Exelon’s Proposed Acquisition of Pepco and Delmarva Would Impede Electric Industry Transformation and Therefore Harm Consumers and the Public Interest.

With regard to all of the evidence discussed above – hundreds of pages of pre-filed testimony, numerous supporting documents, and days of cross-examination – the Commission majority’s “findings” are contained almost exclusively in a single sentence in a footnote. The majority stated: “We find the concerns that Exelon will discourage development of renewable or distributed generation in Maryland . . . and that Exelon may encourage BGE, Delmarva and Pepco to be resistant to other new grid developments to be little more than speculation, and they do not rise to the level of ‘harms.’” Majority at 39 n.186.

The majority did not, elsewhere in its decision, identify what aspect of these “concerns” it found to be “little more than speculation.” Of all the evidence introduced at the hearing, in other words, the majority never identified which evidence it regarded as close-to-speculative, nor did it explain why.

In theory, at least, the majority could have meant to cast doubt on the existence or significance of ongoing changes in the electric industry. But this seems highly unlikely, given that the majority later acknowledges that distribution utilities have already sought changes in rate structure to account for these developments. *See* Majority at 40. Exelon’s own Chairman and CEO, in a September 11, 2014 letter to Exelon’s Board of Directors introducing issues to be discussed at a “Strategy Retreat,” referred to these developments

as “the most fundamental evolution in the technologies of our business we have ever seen.” Confidential Exhibit A. Exelon’s Strategic Plan is driven by its recognition of these developments, the risks they pose, and Exelon’s need to adapt to them. *See* Confidential Exhibit B.

Alternatively, the majority might have intended to take the position that emerging technologies and practices do not, in fact, threaten Exelon’s predominant commercial interest in the ownership and operation of power plants. But, again, the majority does not say so, and such a finding would be contrary both to logic and to evidence. Exelon’s own corporate strategy papers recognize, for example, that these developments could result in the “cannibalization of our core business.” Dissent at D-9; Confidential Exhibit B.

Perhaps the majority meant to find that emerging technologies pose no less of a threat to distribution utilities than they pose to power plant owners like Exelon. The majority at least hints at such a finding, noting that “distribution companies are also susceptible to such concerns.” Majority at 40. Such a finding would be contrary to the evidence introduced at the hearing, however. According to this evidence, alternative rate structures for distribution utilities, through which a utility’s revenues are partially or fully “decoupled” from the volume of electricity the utility sells to consumers, can protect a utility, standing alone, against such threats. Direct Testimony of Richard D. Tabors, Docket Entry No. 93 at 20, 23-24. These mechanisms permit a utility to earn a target amount of revenue regardless of the volume of electricity sold, with distribution rates adjusted up or down to allow for the achievement of the target. *See id.* Exelon itself has recognized in its Strategic Plan that “volumetric decoupling” could permit a distribution utility to become “agnostic” toward distributed generation. *See* Confidential Exhibit B.

Decoupling affords no financial protection, however, to entities in the power plant business, and, if Exelon were to acquire Pepco and Delmarva, all of Maryland's major utilities would be under common ownership with such entities.

Finally, and just as significantly, the majority does not identify what evidence could be understood to support any unstated implication of its decision. A reviewing court "may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency." *Walker*, 422 Md. at 107. Here, the Commission majority's "little more than speculation" footnote leaves it for a reviewing court itself to speculate not only about what the majority actually found, but about what record evidence supports the majority's views.

In addressing the dissent's separate but related concern that the proposed acquisition would extinguish Pepco and Delmarva's commercially distinct viewpoint and their development of alternative approaches, *see* Dissent at D-14 to D-15, D-16, the majority largely responds to a strawman, as the Office of People's Counsel has explained. *See* Mem. of Law of Md. Office of People's Counsel at 18-21.

The majority observes states "that there is nothing in this merger that will otherwise reduce our statutory power to ensure Delmarva and Pepco comply with specific rulings and policies of the Commission and the State." Majority at 39. But the Commission's "statutory power" is not the issue, or at least not the core of the issue. Rather, the harm identified by the dissent, by PSC staff, and by numerous other objecting parties, is the loss of "*alternative ideas.*" *See* Dissent at D-14, D-16. It is far from clear, in the face of "transformative" changes in the electricity industry, that the Commission has sufficient capacity to decide by itself the optimal policies for an Exelon-owned utility "regarding

energy efficiency, demand response, integration of renewable resources, and other pressing energy issues.” Dissent at D-14. This would be particularly true if the Commission were to deprive itself, through its approval of this acquisition, of access to examples of other policies on these subjects crafted by Maryland utilities, like pre-acquisition Pepco and Delmarva, unconstrained by the commercial imperatives of the generation business.

The Commission may also mean to address the disappearance of Pepco and Delmarva’s alternative viewpoint when it observes that, “[i]n the District of Columbia and nine other states, one investor-owned utility or its affiliates serve 100% of the customer base.” Majority at 38. However, this finding – if it is a finding – is erroneous. The majority cites testimony introduced by Exelon, *see* Majority at 38 nn.183, 184, in which the witness identified the largest investor-owned utility (or “IOU”) in each state and provided the percentage of “*total IOU customers*” in the state served by that utility, not the total “customer base.” Post-Settlement Reply Testimony of Susan F. Tierney, Ph.D., Docket Entry No. 241 at 12. In Alabama, Georgia and Tennessee, all of which appear on the Commission majority’s list of ten jurisdictions in which one utility supposedly serves “100% of the customer base,” *see* Majority at 38 n.184, a significant proportion of the state’s electricity customers are served by electric cooperatives or other non-IOU entities, and the number of “total IOU customers” in the state and the state’s total “customer base” are therefore quite different numbers. For instance, in Tennessee, Kingsport Power serves only a small city in a tiny corner of northeastern Tennessee, and the overwhelming majority of the state’s consumers are served by other entities. Exelon’s proposed dominance of the

utility industry in Maryland is in no way analogous to Kingsport Power's supposed dominance in Tennessee, which extends only to Kingsport.⁶

The Commission may mean to imply, notwithstanding this error, that regulators in small jurisdictions like the District of Columbia and Rhode Island could in theory gain sufficient understanding of the range of possible responses to the transformation of the electricity industry, despite the existence of only one utility in their states. *See* Majority at 38 n.184. In responding to a “tectonic shift,” however, the existence of a variety of approaches within a state – particularly of approaches not developed in deference to the conflicting demands of an affiliated merchant generation business – would seem to represent a distinct advantage to regulators. The record evidence introduced at the hearing supports this common sense view. *See, e.g.*, Dissent at D-16. The Commission majority, however, without explanation, has decided that Maryland should join the ranks of states much smaller than itself and be deprived of that advantage. If the Commission majority does not view the elimination of alternative approaches as a harm, it must provide a meaningful explanation why not. *See* Pub. Util. § 6-105(f)(4).

D. Under Settled Principles of Administrative Law, the Commission's Decision Must be Vacated, and this Matter Must be Remanded to the Commission.

As discussed in Part B, above, significant record evidence shows that Exelon's core commercial interests are threatened (in Exelon's own words, potentially “cannibaliz[ed]”) by what Exelon's CEO has described as “the most fundamental evolution in the technologies of our business we have ever seen.” Confidential Exhibit A. Exelon's

⁶ A map showing Kingsport Power's small service area within eastern Tennessee is available at <https://www.appalachianpower.com/info/community/externalAffairs/tn.aspx>.

proposed acquisition of Delmarva and Pepco would give it the power to impede the pace of these developments in Maryland. *See* Dissent at D-10. The acquisition would also extinguish the development of alternative and likely more accommodating approaches to these transformative developments by utilities not affiliated with the generation business. *See id.* at D-14. The Commission majority dismisses all of this evidence as, in some undisclosed respect, “little more than speculation,” Majority at 39 n.186, offering no meaningful explanation for this statement and citing no evidence.

The Commission thus has not made “findings of fact on all material issues,” has not “resolve[d] all significant conflicts” between its decision and this evidence, and has not provided a “clear statement of the rationale behind [its] action.” *See, e.g., Mehrling*, 371 Md. at 65; *Forman*, 332 Md. at 220-21. The Commission majority has instead, in addressing this evidence, relied upon a “broad conclusory statement” or a “boilerplate resolution.” *Bucktail*, 352 Md. at 553. The Commission’s decision “precludes judicial review.” *See, e.g., Walker*, 422 Md. at 107 (quoting *United Steelworkers*, 298 Md. at 679).

The Maryland cases themselves, particularly those that involve complex matters in which the agency explained its decision in certain respects, confirm this conclusion.

In *Bucktail, LLC v. County Council of Talbot County*, for example, the Court of Appeals held that certain factual findings by the Talbot County Council in a complex land use matter were “insufficient to permit judicial review.” 352 Md. at 552. The Council made ten “findings,” but the court found, on a petition for judicial review by the affected landowner, that five of these “findings” were “merely conclusory statements” reciting statutory factors but “fail[ing] to advise” the parties of the Council’s reasoning as to each factor. *See id.* at 558. Here, in asserting that some aspect of the evidence regarding the

transformation of the electric industry was “little more than speculation,” the Commission majority failed to advise the parties of what evidence in particular it regarded as close-to-speculative, why it so regarded that evidence, and on what evidence it premised its own conclusions.

In *United Steelworkers v. Bethlehem Steel Corporation*, the Court of Appeals found that the Commissioner of Labor had not adequately explained the basis for his conclusion that the death of a steelworker had resulted from a violation by Bethlehem Steel of the Maryland Occupational Safety and Health Act. 298 Md. at 673-80. In rendering his decision, the Commissioner had referred to “ample evidence” offered by agency staff “concerning achievable measures that were readily available to [Bethlehem]” to prevent the fatal accident. *Id.* at 679 (brackets in original). The Court of Appeals found, however, that this statement referring generally to “achievable measures” – arguably more specific than the Commission majority’s “little more than speculation” footnote at issue here – “tells us nothing in relation to this record and precludes judicial review.” *Id.*

Finally, in *Baltimore Gas & Electric Co. v. Public Service Commission*, the PSC partially denied BG&E’s request, after carelessness by a worker resulted in a two-week shutdown of a generator at Calvert Cliffs, to recover the cost of replacement power during the period of the outage, allowing BG&E to recover only 50% of these costs. 75 Md. App. 87, 89-91 (1988). The Commission found that “the worker’s carelessness was so great as to call into question the company’s procedures for instilling appropriate awareness, alertness and diligence upon employees.” *Id.* at 96. The Court of Special Appeals described this statement as representing only the Commission’s “ultimate findings,” and the court faulted the Commission for failing to “articulate the basis for those findings.” *Id.*

at 96-97. Here, the Commission majority declined even to make any “ultimate findings” concerning the impact of the acquisition on the transformation of Maryland’s electric industry, altogether refusing to consider the issue.

Federal case law supplies an even richer set of analogous cases, including landmark decisions from the United States Supreme Court. *See, e.g., Massachusetts v. EPA*, 549 U.S. at 532-35 (finding “arbitrary and capricious” EPA’s failure to offer a “reasoned explanation” for its refusal to regulate greenhouse gas emissions); *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 46-57 (finding “arbitrary and capricious” NHTSA’s decision to rescind regulations requiring that automobiles be equipped with passive restraints, where agency did not give consideration to various policy alternatives identified by proponents of the regulations); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 405-06, 411-13 (1971) (holding that record failed to disclose adequate basis for judicial review of decision to provide federal funds for construction of highway through existing public park); *Organized Village of Kake v. United States Dep’t of Agriculture*, 795 F.3d 956, 967-70 (9th Cir. 2015) (en banc) (holding that agency failed to provide adequate explanation for its decision to permit road construction in the Tongass National Forest); *American Farm Bureau Federation v. Environmental Protection Agency*, 559 F.3d 512, 519-26 (D.C. Cir. 2009) (holding that, in setting air quality standards for fine particulate matter, “EPA failed adequately to explain why, in view of the risks posed by short-term exposures and the evidence of morbidity resulting from long-term exposures, its annual standard is sufficient ‘to protect the public health [with] an adequate margin of safety’”); *Missouri Public Serv. Comm’n v. Federal Energy Regulatory Comm’n*, 324 F.3d 36, 40-42 (D.C. Cir. 2000) (finding FERC rate order to be “arbitrary and capricious,” where

FERC failed to “fully articulate the basis for its decision” that proposed rates were “in the public interest”); *Getty v. Federal Savings & Loan Ins. Corp.*, 805 F.2d 1050, 1055-57 (D.C. Cir. 1986) (holding that FSLIC failed to provide adequate explanation for its approval of Citicorp’s acquisition of troubled thrift institution).

These cases parallel the present case in a number of critical respects. *First*, in many of these cases, Congress charged the agency with a special duty to guard against public harms analogous to the duty that the General Assembly here imposed on the PSC to deny a proposed acquisition unless it finds “no harm to consumers” and “consisten[cy] with the public interest.” Pub. Util. § 6-105(f)(4).⁷

Second, many of these cases involved both procedural and substantive complexity equivalent to, or even greater than, the proceedings at issue here. For example, the rulemaking petition that ultimately gave rise to the decision in *Massachusetts v. EPA* was filed by a group of 19 private organizations, and EPA’s request for public comment in response to that petition elicited more than 50,000 comments. 549 U.S. at 510-11. The air

⁷ See, e.g., *Massachusetts v. EPA*, 549 U.S. at 533 (“If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles.”); *State Farm*, 463 U.S. at 48 (“[T]he mandate of the Safety Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags.”); *Citizens to Preserve Overton Park*, 401 U.S. at 405-06 (Congress prohibited Secretary of Transportation from authorizing federal funding for highway through existing public park if a “feasible and prudent” alternate route existed and permitted funding “only if there has been ‘all possible planning to minimize harm’ to the park”); *American Farm Bureau*, 559 F.3d at 520 (through Clean Air Act, Congress directed EPA to establish air quality standards that “protect the public health [with] an adequate margin of safety”); *Missouri Public Serv. Comm’n*, 324 F.3d at 38 (“public convenience and necessity” standard established in Natural Gas Act “impose[d] on the Commission a duty to engage in a most careful scrutiny and responsible reaction to initial price proposals of producers”).

quality standards at issue in *American Farm Bureau* represented the culmination of a nine-year rulemaking process. 559 F.3d at 517-18. In these cases, neither the number of parties nor the substantive complexity of the issues mitigated the agency's obligation to provide a meaningful explanation for rejecting substantial challenges to the agency's action.

Third, in many of these cases, the agency explained at length some of the reasons for its action, but the agency failed, as the PSC failed here, to provide a meaningful explanation of its reasoning on other important issues. For example, in *State Farm* and *American Farm Bureau*, the agency published an extended explanation in the Federal Register of its decision concerning the regulations at issue. *See State Farm*, 463 U.S. at 38-39; *American Farm Bureau*, 559 F.3d at 517-18. The fact that the agency may have cogently explained its reasoning on some issues, however, did not excuse its failure to provide a meaningful explanation on other issues. *See, e.g., American Farm Bureau*, 559 F.3d at 526-28, 531-39 (rejecting numerous other challenges to EPA's decision asserted both by environmental groups and by industry groups).

Writing for the Supreme Court in the *State Farm* case, Justice White explained the standard to which courts hold administrative agencies when reviewing agency decisions that involve complex policy judgments and uncertainty about the future. "Recognizing that policymaking in a complex society must account for uncertainty," Justice White wrote, "*does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions.* The agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 52 (emphasis added) (citation and quotation marks omitted).

Here, all parties, including Exelon, acknowledge that the electric industry is undergoing “transformative change.” Dissent at D-10. Despite “uncertainty” about the exact impact of this change, *State Farm*, 463 U.S. at 52, the Public Service Commission must grapple with the evidence that the proposed acquisition would impede these developments in Maryland and thereby deprive the State of the more efficient, more environmentally sustainable electric grid that might otherwise be achieved. Exelon itself has developed a Strategic Plan for the mitigation of threats to its business posed by these “fundamental” changes. *See* Confidential Exhibit B. The want of a crystal ball, as Justice White explained, is no justification for the Commission majority’s refusal, in reviewing Exelon’s proposed acquisition of Pepco and Delmarva, to do the same for Maryland.

CONCLUSION

The decision of the Public Service Commission should be vacated, and this matter should be remanded to the Commission.

Respectfully submitted,

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