ORDER NO. 84698

IN THE MATTER OF THE MERGER OF	*	BEFORE THE
EXELON CORPORATION AND	*	PUBLIC SERVICE COMMISSION
CONSTELLATION	*	OF MARYLAND
ENERGY GROUP, INC.	*	
	*	
	*	CASE NO. 9271
	*	

Issue Date: February 17, 2012

Before:

Douglas R. M. Nazarian, Chairman
Harold D. Williams, Commissioner
Lawrence Brenner, Commissioner
Kelly Speakes-Backman, Commissioner
W. Kevin Hughes, Commissioner

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I. INTRODUCTION

Exelon Corporation ("Exelon"), Constellation Energy Group ("CEG"), the Baltimore Gas and Electric Company ("BGE") and Exelon Energy Delivery Company LLC ("EEDC") (collectively "the Applicants") seek our approval, under § 6-105 of the Public Utilities Article ("PUA"), for a transaction (the "Merger") in which Exelon would, by acquiring all of the stock of CEG, acquire the power to exercise substantial influence over the policies and actions of BGE. For the reasons we discuss below, we approve the Merger subject to the conditions set forth in this Order.

As originally filed, this Merger raised serious concerns. After a comprehensive review, we can say that we could not have approved it in its original form. Most notably, the serious, unchecked potential for the merged companies to exercise market power would have created risks of harm to consumers inconsistent with the statutory standard, and the Applicants' initial proposal would not have mitigated the very real potential harm to consumers.

We also had concerns about the post-Merger vitality of the critically important ring-fencing measures we installed around BGE as conditions of an earlier transaction,[1] the adequacy of the benefits BGE's customers would receive from this transaction, and whether the public interest could be served by having BGE's parent, Board of Directors and ultimate management in Chicago. There is a lot at stake here, after all, for BGE's customers and for the State of Maryland as a whole: BGE is our largest utility company and CEG one of Maryland's few remaining Fortune 500 companies. What happens to BGE to a certain extent happens to us all, and we must ensure that at the outset the

[1] *In re the Current and Future Financial Condition of Baltimore Gas and Electric Company*, Order No. 82986, Case No. 9173, 100 Md. PSC 348, 369-71 (2009) ("the *EDF* Order").

protections and benefits are held in place for the sake of ratepayers, employees and taxpayers alike.

Although the Applicants insisted throughout the hearings that they had offered all the concessions and conditions they were prepared to make,[2] the pot sweetened twice as the case wound to a close – first in the Applicants' briefs, when they offered new renewable and non-renewable generation, among other things,[3] and again on December 15 when the Applicants, the State of Maryland and the Maryland Energy Administration ("MEA") and others announced a non-unanimous settlement (the "Joint Settlement") that included even more new generation as well as additional commitments.[4] Of course, the mere fact of a settlement would not resolve this case even if it were unanimous - we still must review any settlement independently for compliance with Public Utilities Article ("PUA") § 6-105,[5] and we have done so below. This is particularly true in light of the continuing objections to the Merger by the Office of People's Counsel ("OPC"), the PJM Industrial Customers Coalition, the International Brotherhood of Electrical Workers and other parties. In working through the issues, we have attempted to honor the Joint Settlement wherever the proposed terms are consistent with the statute. Although our conditions deviate somewhat from the proposal, the fact that most of the parties now agree on a new, and significantly enhanced, set of terms that largely comprise the final set of conditions demonstrates to us the importance and validity of our State's process for reviewing transactions like this.

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[2] *See e.g.*, Tr. 435-437 (Crane).
[3] Applicants' Initial Brief at Appendix A.
[4] Case No. 9271, Docket No. 222: "Joint Petition for Approval of Settlement."
[5] *See In the Matter of the Application of the Merger of FirstEnergy Corp. and Allegheny Energy, Inc.*, Order No. 83788 ("*FirstEnergy* Order") at 33; *compare* Fed. R. Civ. P. 23 (requiring federal courts to review class action settlements and to determine independently that the settlement is fair).

We cannot deny that this transaction arises in the context of broader trends in the national and international electricity markets that give us pause. As its Chairman and Chief Executive Officer ("CEO") testified, Constellation has sought (since its trading business melted down in 2008) to create a vertically integrated company that combines its regulated distribution business (BGE) with an unregulated retail supply business (Constellation New Energy, Inc.).[6] That, ironically, sounds a lot like the company BGE was *before* deregulation, but with one key difference: the parent gets the steady return on its monopoly distribution business *and* the upside of a supply business no longer restrained by the regulatory compact. As a result, though, the unregulated returns available to the supply side of the business drive the financial community's, and thus the parent company's, expectations for the company as a whole. This includes the regulated utilities, which in the Exelon model are expected to contribute a 10 percent return on equity to the parent.[7] In addition, as the companies' executives themselves acknowledged,[8] this business paradigm requires greater and greater scale. Current Exelon CEO John Rowe considers industry consolidation "inevitable,"[9] and so it seems, do the rest of the industry and the financial community.

It is not obvious to us that tying our regulated utility companies to this business model will be good in the long run for ratepayers or regulated utilities. Having watched major financial institutions become "too big to fail," we wonder too if further consolidation in the electricity sector could expose BGE to a wider range of unregulated business risks or bury BGE deeper down Exelon's priority list if the company grows still

[6] Tr. 235-236 (Shattuck).
[7] *Id*. at 210-211 (Crane).
[8] *Id*. at 132-133 (Shattuck).
[9] *Id*. at 941-942 (Shattuck).

bigger in the future. But these general reservations do not afford us a basis to deny approval to a transaction that otherwise passes muster under § 6-105. By repealing the Public Utility Holding Company Act and passing Maryland's electric restructuring laws, the United States Congress and the Maryland General Assembly created the legal and policy backdrop for transactions and companies like these, and it is not our role to thwart or second-guess those judgments here.

Instead, we must use, and have used, the tools provided to us by State law to ensure that BGE and its customers are fully protected from the potential risks presented by the Merger, that BGE and its customers benefit affirmatively from it, and that the transaction serves the broader public interest. We have analyzed the Application, as modified by the Applicants' briefs and settlements with various parties including the Joint Settlement, EDF and IMM Settlements, against the governing law and the full record we and the parties have developed in this case. As we discuss below, most of the proposed settlement conditions satisfy the requirements of the statute. We have, however, made changes where necessary to fulfill the requirements of § 6-105. Perhaps most notably, we have substituted the proposed payments into the Electric Universal Service Program ("EUSP") ($10 million), the EmPower Maryland programs ($10 million) and low-income weatherization ($50 million) and added a portion of the money attributable to future synergy savings ($43.5 million), to create a new $113.5 million fund that Exelon will invest in BGE's customers, at our direction, over the next three years in three equal annual installments, with the first installment to be deposited into an interest-bearing account within 90 days of the Merger.

These additional investments will primarily focus on longer-term benefits for low-income customers, homeowners and businesses by creating new and incremental opportunities for energy assistance and energy efficiency. Because we did not develop a full record in this case on the best way to utilize these funds, we will conduct further proceedings for this purpose; we may yet decide to allocate more to EUSP or to energy efficiency and weatherization, or to target the funds differently, but we will do so on a better-developed record. We note here that this Customer Investment Fund directly mirrors the $112 million in residential ratepayer credits, creating a balance between Exelon's short- and longer-term investments in its customers of all classes.

All of that said, we approve the Merger subject to the following conditions, which we detail at the end of this Order and summarize here:

(1) Exelon shall (a) comply with the terms of the IMM Settlement, as modified in this Order; and (b) develop 285-300 megawatts ("MW") of new generation within Maryland to protect Maryland consumers from higher rates resulting from Exelon's increased market power;

(2) Exelon shall comply with all previously established ring-fencing measures regarding BGE and shall strengthen those measures as we describe in this Order;

(3) Exelon shall provide all BGE residential consumers with a $100 rate credit within ninety (90) days of consummation of the Merger;

(4) Exelon shall invest $113.5 million, over a three-year period, into a Customer Investment Fund for the purpose of providing energy efficiency and low-income energy assistance to BGE customers;

(5) BGE shall not permit a net reduction in its employment level due to involuntary attrition for two years following the Merger, shall maintain its corporate headquarters in Baltimore and shall a maintain specific minimum numbers of local and independent directors on its Board;

(6) Exelon shall construct its local headquarters in Baltimore as described in this Order;

(7) Exelon shall provide at least an average of $7 million in annual charitable contributions within Maryland; and

(8) Exelon shall apply the values memorialized in BGE's Feb. 6, 2009 Memorandum of Understanding in promoting supplier diversity as well as its employment practices within Maryland.

Finally, we recognize that by deviating from the terms of the Joint Settlement, the Applicants have reserved the right to walk away from this Merger rather than proceeding to closing. Although we expect they will go forward, we direct the Applicants to advise us in writing of their intentions within ten days of this Order.

II. BACKGROUND

A. The Applicants

Exelon is a utility services holding company, incorporated in Pennsylvania and with its corporate headquarters in Chicago, Illinois, that operates through its principal subsidiaries, Exelon Generation Company LLC ("Exelon Generation") and EEDC, a subsidiary that holds 100 percent of the common stock of Commonwealth Edison Company ("ComEd") and PECO Energy Company ("PECO").[10]

Exelon Generation maintains one of the nation's largest portfolios of electricity generation capacity, consisting of a mixture of nuclear, fossil, hydroelectric, solar, landfill gas, and wind resources.[11] Exelon Generation currently has the largest nuclear fleet in the United States.[12] ComEd is a regulated public utility that provides electric distribution service to more than 3.8 million customers in Northern Illinois.[13] PECO is

[10] May 25, 2011 "Application of Exelon Corporation, Constellation Energy Group, Inc., and Baltimore Gas and Electric Company" ("Application") at 8.
[11] Application at 12. Exelon Generation includes four business units: Exelon Nuclear, Exelon Power, Exelon Power Team, and Exelon Energy. Exelon Nuclear and Exelon Power are responsible for Exelon's generation fleet. *Id*. Exelon Power Team is the wholesale power marketing division responsible for long-term sales and supply strategy. *Id.* Exelon Energy handles Exelon's retail marketing. *Id.*
[12] Application at 12.
[13] *Id*. at 11.

also a regulated public utility that provides similar service to 1.6 million customers throughout Pennsylvania.[14]

CEG was formed in 1995 in connection with the proposed, but never consummated, merger between Baltimore Gas and Electric Company ("BGE") and Pepco. In the wake of the Electric Customer Choice and Competition Act of 1999,[15] CEG became the holding company for the common stock of BGE.[16] Today, CEG remains a holding company that owns 100 percent of the stock of a variety of subsidiaries, including several entities that comprise CEG's generation business, a customer supply business (NewEnergy), and BGE.[17] BGE continues as a regulated electric transmission and distribution utility and a regulated gas distribution utility.

CEG's merchant energy business consists of: (1) an operation that develops, owns, owns interests in and operates electric generation facilities and a fuel processing facility in various regions of the United States; (2) a customer supply operation that provides energy services to both wholesale and retail customers (NewEnergy); and (3) a commodities operation that manages contractually-controlled physical assets and provides risk management services.[18] CEG also possesses a 50.01 percent interest in Constellation Energy Nuclear Group LLC ("CENG") a subsidiary that owns several nuclear generating facilities, including two units in Calvert Cliffs, Maryland.[19]

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[14] *Id.* at 10.
[15] Public Utilities Article ("PUA") §§ 7-501-7-517.
[16] CEG Form 10-Q for the period ended March 31, 1999 (May 14, 1999), at 6.
[17] CEG Form 10-K for the fiscal year ending December 31, 2010 at 2.
[18] *Id.*
[19] *Id.* at 2-3.

B. The EDF Transaction

The Applicants partially structured their original proposal around conditions we imposed in Case No. 9173, in which we reviewed a series of proposed transactions between CEG and Electricite de France International, SA ("EDF").[20] The conditions relevant to the present transaction included:

> (a) Capital Infusion. We required CEG invest $250 million in cash in BGE before June 30, 2010;
>
> (b) Dividend restriction. We prohibited BGE from paying dividends to CEG if its equity level after the dividend payment would fall below 48 percent, and we prohibited the payment of any dividends if BGE's credit rating fell below investment grade, as determined by any two of the three major credit rating agencies; …
>
> (c) Ring-fencing. Immediately after close of the EDF Transaction, we ordered CEG to implement a detailed series of measures designed to create distance between BGE and CEG for purposes of bankruptcy protection and credit rating separation, including prohibiting BGE from participating in CEG's cash pool…[21]

CEG and BGE thereafter submitted various filings that reflected their compliance with the protective measures we imposed.[22] Subsequent to our approval and the consummation of this transaction, EDF became CEG's largest shareholder.

C. The Proposed Merger (the "Merger")

1. The Merger Agreement

Under the terms of the proposed "Agreement and Plan of Merger" ("Merger

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[20] EDF, a *societe anonyme* organized under the laws of France, is the parent corporation of EDF Development, Inc., a Delaware corporation and the purchaser of the 49.99% interest described in this Order. For purposes of this Order, we will refer to both entities as EDF.

[21] *EDF* Order at 4-5. For the additional ring-fencing measures we imposed, see *id.* at 49-53.

[22] Case No. 9173, Dockets Nos. 223 (Jan. 15, 2010 correspondence from Mr. Gahagan confirming CEG's cash infusion into BGE and BGE's withdrawal from CEG's cash pool) and 225 (Feb. 4, 2010 correspondence from Mr. Gahagan confirming the full implementation of the required ring-fencing measures).

Agreement"),[23] CEG will merge with Bolt Acquisition Corporation ("Merger Sub"), a Maryland corporation and wholly-owned subsidiary of Exelon created to effectuate the Merger.[24] CEG's shareholders will receive 0.93 shares of Exelon common stock in exchange for each share of CEG common stock.[25] Following completion of the acquisition, Exelon shareholders will own approximately 78 percent, and CEG shareholders will own 22 percent of the combined company on a fully diluted basis.[26] CEG stock will no longer be publicly traded.[27]

CEG will continue as a surviving entity and become a wholly-owned subsidiary of Exelon.[28] CEG will then transfer its entire equity interest in RF HoldCo LLC, the Special Purpose Entity that we ordered as one of the ring-fencing measures in the *EDF* Order, to Exelon; thereafter Exelon will transfer that equity interest in RF HoldCo to EEDC.[29] As a result of this reorganization post-Merger, BGE will remain a direct subsidiary of RF HoldCo, LLC and become an indirect subsidiary of EEDC.[30]

Exelon also intends to create Exelon Utilities, an unincorporated division within Exelon,[31] to provide governance and oversight of Exelon's three utilities, including BGE if we approve the Merger.[32] This new entity would be a "small" organization with Mr. Denis O'Brien as its CEO.[33] Additionally, BGE (like PECO and ComEd) will be subject to the oversight of the Energy Delivery Oversight Committee ("EDOC"), a standing

[23] Application at Appendix B.
[24] *Id*. at 7.
[25] Direct Testimony of Christopher M. Crane ("Crane Direct") at 14. Appendix B to the Application at 16.
[26] Crane Direct at 14.
[27] Application at 7.
[28] *Id*. at 7. The new organization chart for Exelon is contained in the Application at Appendix C.
[29] Case No. 9271, Docket No. 40 at 2.
[30] *Id*.
[31] O'Brien Reply Testimony at 3-4.
[32] Crane Rebuttal Testimony at 4; O'Brien Rebuttal Testimony at 2-5; *See also*, Applicants' Ex. DPO-1.
[33] Tr. 672 (Crane/Shattuck).

committee of the Exelon Board "whose sole purpose and responsibility is to provide oversight and support for the regulated utilities."[34] The Charter responsibilities of the EDOC include "review[ing] significant legislative, regulatory and investment and recovery strategies (including rate cases), focusing on those with potential multi-state or multi-utility impact."[35]

Within the new, merged corporation, several key executive positions will change, including, among others: (1) Mr. Shattuck, CEG's current CEO, will serve as Executive Chairman of the Board for Exelon; (2) Mr. Crane, the current Chief Operating Officer of Exelon and President of Exelon Generation will serve as CEO for Exelon; and (3) Mr. DeFontes, BGE's current President and CEO, will continue to serve in that capacity in addition to joining Exelon's Executive Committee.[36]

2. <u>Market Power Mitigation</u>

In response to concerns that the increased concentration of generation resources resulting from the proposed merger will significantly increase the Applicants' market power in the wholesale markets for energy, capacity and ancillary services, the Application included three commitments by Exelon designed to alleviate these concerns.[37]

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[34] O'Brien Rebuttal Testimony at 10.

[35] Applicants' Ex. DPO-2.

[36] Crane Direct at 1; Tr. at 31 (Crane).

[37] Exelon initially submitted its proposed market power mitigation to this Commission primarily through the direct testimony of Dr. Joe Pace, an independent economic consultant, and Exelon's "Joint Application for Authorization of Disposition of Jurisdictional Assets and Merger under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act" submitted to the Federal Energy Regulatory Commission ("FERC") and this Commission (as Exhibit JDP-1) by CEG and Exelon on May 20, 2011 ("FERC Application"). As we discuss *infra*, the Applicants and the Independent Market Monitor for PJM eventually entered into an agreement by which the Applicants agreed to take additional steps intended to address the continuing concerns surrounding the effect of the merger on certain PJM markets.

First, the Applicants proposed to divest three of CEG's existing coal-fired generation facilities within the PJM-wide markets[38] – Brandon Shores, H.A. Wagner and C.P. Crane – that possess a combined 2,648 MW of capacity.[39] The Applicants have committed to enter into contracts to divest this generation capacity within 180 days of consummating the merger and close on the divestitures within thirty days of receiving all necessary approvals.[40]

Second, to address residual market power issues in the 5004/5005 submarket of PJM,[41] the Applicants offered to enter into power purchase agreements to sell 500 MW of baseload energy for delivery into the 5004/5005 submarket under certain specified terms.[42] This commitment would continue through December 31, 2014, when CEG's existing market contract with CENG to purchase 85 percent of the output of Calvert Cliffs nuclear plants ends.[43]

Third, in order to counter the market impact of CEG's tolling agreement for its Delta plant on the Eastern Mid-Atlantic Area Council ("EMAAC") capacity submarket,[44]

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[38] PJM stands for the Pennsylvania New Jersey Maryland Interconnection, LLC, a regional transmission organization that coordinates the movement of wholesale electricity in all or parts of 13 states and the District of Columbia.

[39] FERC Application at 25 and Attachment 4. H.P. Wagner and Brandon Shores are located on the same site and operate under the same umbrella for air emissions standards. Tr. at 387 (Shattuck). The Applicants have testified that they will sell all three units together to ensure that the H.P. Wagner unit continues to benefit from the environmental credits it currently receives for being under the same umbrella as Brandon Shores. *Id.* at 390 (Crane).

[40] FERC Application at 25. The Applicants have also proposed a series of "interim mitigation" measures that they commit to implement until they close on the divestitures. *Id.* at 41-46.

[41] The 5004/5005 submarket is a combination of the Keystone-Juniata 5004 transmission line and the Conemaugh-Juniata transmission line. Direct Testimony of Joe Pace, PhD ("Pace Direct") at fn 8. *See also*, *PJM Manual 03: Transmission Operations*, Revision: 38, at 45.

[42] FERC Application at 25-27.

[43] *Id.* at 26.

[44] The EMAAC submarket includes six local distribution areas ("LDAs"). Pace Direct at n13. Exelon owns over 8,500 MW of generation within the EMAAC submarket. *Id.* CEG's resources within the EMAAC submarket consist almost entirely of the 545 MW tolling agreement related to the Delta plant as well as demand reduction services. *Id.* Pursuant to a tolling agreement, the buyer (CEG) supplies the plant with its fuel and commits to purchase the output of the facility.

the Applicants offered to implement a "price cap" within the EMAAC submarket, in which they would:

> offer all their not-previously-committed generation capacity in the EMAAC submarket not subject to an RMR agreement in all PJM capacity auctions covering periods between the consummation of the Transaction and the earlier of May 31, 2017 or the date the toll is terminated or divested, either at or below the offer cap approved by PJM or the PJM Market Monitor for each resource. Moreover, the Applicants will bid the Delta plant at a zero price in all such auctions, unless the Delta tolling agreement is sold or terminated effective before any such auctions take place.[45]

Despite these offers, however, the Independent Market Monitor for PJM ("IMM" or "Market Monitor")[46] continued to express reservations about the adequacy of the Applicant's proposed mitigation measures and, on October 11, 2011, the Market Monitor and the Applicants submitted Settlement Terms and Conditions ("IMM Settlement") designed to address the Market Monitor's remaining concerns.[47]

Pursuant to the IMM Settlement, the Applicants agreed not to sell the three divested plants to certain identified potential buyers or any of their subsidiaries, based on the principle that no purchaser shall own more than three percent of the installed capacity in the overall PJM market.[48] The Applicants further proposed several significant "behavioral commitments" designed¸ among other things, to restrict Exelon's post-

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[45] FERC Application at 27.

[46] The Independent Market Monitor for PJM is currently Marketing Analytics LLC. This entity monitors compliance with PJM's rules, standards, procedures, and practices. It is also responsible, *inter alia*, for identifying structural problems in PJM markets that may inhibit robust and competitive markets.

[47] Case No. 9271, Docket Entry 118. The Market Monitor informed the Commission that it would not object to the proposed merger provided our approval was conditioned upon the Applicants complying with the terms of the Settlement. *Id.* at 2

[48] IMM Settlement at ¶ 1. The prohibited buyers are American Electric Power Company, First Energy Corp., GenOn Energy, Inc., Edison International, Dominion Resources, Inc., Public Service Enterprise Group Incorporated, Calpine Corp., and PPL Corporation.

merger participation in the wholesale energy markets and its ability to implement uprates or retirements of its generation facilities, and to restrict its market-based pricing offers.[49]

3. Exelon's Commitments

In its initial attempt to meet its statutory burden, Exelon provided the Commission with 34 "commitments" – various promises intended either to bring benefits to BGE ratepayers and the State of Maryland or to ensure that BGE suffered no "harm" resulting from this merger.[50] Although these commitments represented a good-faith effort to bring the Merger in line with the public interest, the testimony and evidence in this case revealed that several of the parties' ongoing concerns remained unresolved, including potential problems with BGE's current ring-fencing and the extent of Exelon's proposed investment in renewable energy generation within Maryland.

To address these ongoing concerns, Exelon provided the first substantive additions to their "package" of commitments in their initial brief at the conclusion of testimony.[51] These additional commitments included, among other things, a restriction on issuing any dividends on BGE's common stock through 2014, an increased commitment to develop new generation, including new renewable generation, within the State of Maryland, and additional ring-fencing measures to protect BGE.[52] Exelon characterized these new commitments as "substantially strengthening" its Application and recognized that they resulted from "listen[ing] carefully" to the issues developed during the course of the proceedings before

[49] *Id*. at ¶ 2.
[50] Exelon Exhibit CMC-1.
[51] Applicants' Initial Brief at Appendix A. Appendix B to this brief tracked the changes from the initial version of the commitments.
[52] *Id*. at 3-4.

us.[53] While we agree that this "second round" of commitments aligned the pending Application more closely with the public interest requirement of PUA § 6-105, Exelon continued informal discussions with several of the parties to resolve their remaining issues.

On December 15, 2011, negotiations among several of the parties culminated in a "Joint Petition for Approval of Settlement" ("Joint Settlement") by the State of Maryland and the MEA, the Mayor and City Council of Baltimore ("Baltimore City") and the Baltimore Building and Constructions Trades Council, AFL-CIO ("Building Trades") and the Applicants.[54] Among other things, this non-unanimous Settlement substantially increased Exelon's commitment to construct new generation in the State of Maryland, including natural gas projects, land-based wind, solar, support for an animal waste-fueled power plant, funding for research for offshore wind development in Maryland and funding for weatherization measures for low- and moderate- income customers. Exelon separates its now-40 commitments into five broad categories: (1) Direct Customer Benefits;[55] (2) Public Interest Benefits;[56] (3) Corporate Governance, Management, and No Harm to BGE Customers;[57] (4) Accounting and Financial Governance and No Harm to BGE Customers:[58] and (5) Market Power Mitigation and No Harm to BGE Customers.[59] These broad categories represent the Applicants' summary of their proposed commitments. The full set of Conditions to which the Applicants will be bound by this Order is found in Section IV.

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[53] *Id*. at 3.
[54] Case No. 9271, Docket # 222.
[55] Joint Settlement at 6.
[56] *Id*. at 8.
[57] *Id*. at 18.
[58] *Id*. at 23.
[59] *Id*. at 27.

a. *Direct Customer Benefits*

Exelon proposes to provide all BGE residential ratepayers with a one-time $100 rate credit within ninety days of consummation of the Merger.[60] Exelon also proposes to fund certain Maryland programs as follows:

(a) $10 million – paid in $2.5 million disbursements over 4 years – to offset costs to be incurred by BGE for its EmPower Maryland programs;[61]

(b) $10 million- also paid in $2.5 million disbursements over 4 years – to the Electric Universal Service Program ("EUSP);[62]

(c) $50 million – paid in $12.5 million over 4 years – to the Department of Housing and Community Development's ("DHCD") weatherization program;[63]

(d) $20,000 to RG Steel Sparrows Point LLC ("Sparrows Point") to allow Sparrows Point to participate in any of the programs under BGE's Energy Solutions for Business Program;[64]and

(e) A commitment to study why BGE customers suffer higher than acceptable outage durations and file its assessment with the Commission within twelve (12) months.[65]

b. *Public Interest Benefits*

Exelon offered several commitments intended to benefit the larger Maryland community and the Maryland economy. Perhaps the most significant of the new commitments that emerged from the parties' negotiations are the substantial promises to cause between 285 and 300 MW of new generation to be constructed in the State of Maryland by 2022.[66] Most of the proposed new generation would be fueled by natural gas and renewable energy sources, including: (1) 120 MW of primarily natural gas-fired

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[60] *Id*. at 6.
[61] *Id*. at 6-7. EmPower Maryland is a State initiative that requires gas and electric companies to encourage and promote the efficient use and conservation of energy by consumers.
[62] *Id*. at 7. EUSP is a state program that assists low-income customers pay the electric portion of their utility bills.
[63] *Id*. at 7-8.
[64] *Id*. at 8.
[65] *Id*. at 8. This average customer outage duration is referred to as the Customer Average Interruption Duration Index (CAIDI) – a reliability index commonly used by electric power companies.
[66] *Id*. at 31.

combustion turbines in Maryland within the 5004/5005 submarket by December 2015,[67] (2) 125 MW from Tier-1 renewable energy sources (at least half of which Exelon commits to be wind-generated);[68] (3) 10-25 MW of new animal waste-to-energy generation;[69] and (4) 30 MW of new solar generation in Maryland, with at least 10 MW within the City of Baltimore.[70] In addition, after several parties objected to Exelon's proposal to either construct or renovate existing commercial space for its new Baltimore headquarters, Exelon committed that this headquarters would constitute new construction.[71]

Exelon further offered to provide $32 million in funding for the development of off-shore wind generation.[72] This funding includes $30 million toward the development of a Construction and Operations Plan, including placing meteorological towers in the water and environmental studies, among other things,[73] and the remaining $2 million would support the development of university-level expertise on wind generation in

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[67] *Id*. at 12.

[68] Joint Settlement at 9-12. "Tier-1" energy sources are defined in PUA § 7-701(l) and reflect the most environmentally positive generation sources. This commitment also provides for liquidated damages of $900,000 per MW below the promised 125 MW, payable to the Maryland Strategic Energy Investment Fund should Exelon fail to deliver on this promise. *Id.* at 10-11.

[69] Joint Settlement at 12-15. Exelon could satisfy this commitment three ways:

1) Exelon would make a $60.00 per MW hour subsidy if the State accepted the currently outstanding RFPs for 10 MW by state agencies, or
2) If the State instead preferred to pass legislation for a 25 MW facility, Exelon would agree to contribute $90 million to the construction of the facility, or
3) Liquidated damages if the State does not accept the RFPs for 10 MW and does not pass legislation.

[70] Joint Settlement at 15-16. Additionally, Exelon commits not to use any solar Renewable Energy Credits ("SRECs") during the first three years to avoid saturating the market in light of the extent of solar generation development that has recently occurred in Maryland. Tr. 3565 (Bradford).

[71] Joint Settlement at 8-9. This headquarters will house Exelon's competitive energy business and its renewable energy development headquarters. *Id.* After the conclusion of our proceedings, Exelon entered into a contract to construct its Baltimore headquarters at Harbor Point, the currently vacant site of the old AlliedChemical plant. "*Exelon Picks Harbor Point for Future Headquarters,"* February 2, 2012 Baltimore Sun.

[72] The Federal Government, through its Bureau of Ocean Energy Management, Regulation and Enforcement, has approved certain waters off Maryland's eastern shore as suitable for wind generation. "Maryland Coast Opened to Offshore Wind Development," Nov. 10, 2010 Baltimore Sun.

[73] Joint Settlement at 16-17; Tr. 3733-3734 (Woolf).

Maryland through a competitive Request for Proposals ("RFP") conducted by the Maryland Higher Education Commission ("MHEC").[74]

Exelon also committed to "stay the course" in a number of areas, including (1) maintaining CEG's prior annual level of charitable contributions (approximately $7 million) for ten years;[75] (2) committing to no involuntary attrition at BGE for two years post-merger;[76] and (3) "fully support[ing]" BGE's February 6, 2009 Memorandum of Understanding ("MOU") regarding supplier diversity.[77]

c. *Corporate Governance, Management, and No Harm to BGE Customers*

BGE has been locally owned and operated for all of its 195-year existence, and Exelon has offered a series of commitments that seek to alleviate concerns about whether ownership outside of Maryland's jurisdiction might undermine BGE's operations. For example, Exelon committed to maintain BGE's headquarters in Baltimore and to ensure that BGE's Board of Directors includes at a minimum two independent board members and a majority who reside within BGE's service territory.[78] Exelon also committed to include Baltimore in its regular rotation of locations for meetings of its Board of Directors, shareholders and Executive Committee[79]and that BGE's CEO will be a member of Exelon's Executive Committee and will reside within BGE's territory.[80]

As mentioned, we imposed significant ring-fencing measures upon BGE in the EDF Order. Exelon proposes to continue those measures and to augment those

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74 Joint Settlement at 17; Tr. 3735 (Woolf).
75 Joint Settlement at 17. Although this would not constitute a benefit in the sense that Maryland charities are no better off post-merger, we recognize that including this commitment in its Application provides the Commission with the authority to enforce the existing level of contributions, if necessary.
76 *Id*. at 17-18.
77 *Id*. at 18.
78 *Id*. at 18
79 *Id*. at 19.
80 *Id*. at 19.

commitments further, by: (1) obtaining a new non-consolidation opinion from outside counsel that reflects the new post-merger corporate organization; (2) a promise not to petition the Commission for a modification of these measures for three years; (3) limiting any internal reorganizations which may undermine the effectiveness of current ring-fencing measures; and (4) a strictly defined separation of BGE's interests from those of ComEd and PECO.[81] Exelon committed as well to report to the Commission on a quarterly basis the activities of Exelon Utilities so that the Commission could analyze the allocation of costs and benefits BGE is incurring and receiving from Exelon Utilities.[82]

Finally, Exelon has offered to grant the Commission the authority to divest BGE from its parent company, based upon clear and convincing evidence, should certain serious calamities occur.[83]

d. <u>Accounting and Financial Governance and No Harm to BGE Customers</u>

Exelon has proposed a series of conditions that it claims will protect BGE from financial harm as a result of the Merger in regards to the new post-Merger corporate structure:

(a) Exelon will reimburse BGE for any federal income tax liability as a result of Exelon's consolidated tax filing above what BGE's stand-alone liability would have been;[84]

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[81] *Id*. at 19-21.

[82] *Id*. at 21. This commitment illustrates how our proceedings induced several improvements from the original Application. This particular commitment resulted from MEA's prior concern that BGE would be saddled with costs resulting from Exelon Utilities without receiving any benefits. Woolf Joint Settlement Testimony at 15-16; *see also* MEA Initial Brief at 51.

[83] Joint Settlement at 22-23. These calamities include; (1) a nuclear accident or incident involving the release of radioactive isotopes; (2) a material disruption of operations due to such an incident; (3) the closure of a material number of nuclear plants as a result of such an incident; (4) a bankruptcy filing by Exelon or its affiliates constituting 10% or more of Exelon's assets; (5) a credit rating downgrade to Exelon securities below B3 by Moody's or B- by S&P or Fitch; or (6) a series of material violations of lawful Commission orders or regulations.

[84] Joint Settlement at 23-24. This commitment also arose to resolve previously expressed concerns by the State. Woolf Joint Testimony at 13-14. *see also* MEA Initial Brief at 50.

(b) BGE will provide the Commission with side-by-side comparisons of BGE's shared services cost allocations and service company charges pre- and post-merger;[85]
(c) Exelon will ensure BGE's financial records do not reflect any goodwill or transaction costs associated with the merger, and that BGE's merger accounting is rate-neutral for BGE customers;[86]
(d) BGE will track all merger savings and account for such savings in its next rate case;
(e) BGE shall not guarantee the debt or credit instruments of, grant a mortgage or lien on the property of, or include a cross-default provision in any of its debt or credit agreements between its securities and the securities of Exelon or an Exelon affiliate;[87]
(f) Exelon will maintain BGE's Operations and Management ("O&M") and capital expenditures at or above 95 percent of BGE's 2011 level of expenditures for 2012 and 2013, and provide the Commission with its actual expenditures for 2012 and 2013 and its projected expenditures through 2016;[88]
(g) BGE will not pay out a dividend on its common shares through the end of 2014, and thereafter will provide the Commission with 30 days notice prior to issuing a dividend, which sets forth why the payment would not reduce BGE's equity ratio below 48 percent;[89]
(h) Exelon will report to the Commission if BGE's credit rating from S&P falls below BBB+;[90] and
(i) The Applicants will not relocate BGE employees to the Baltimore CEG headquarters without prior Commission approval.[91]

e. *<u>Market Power Mitigation and No Harm to BGE Customers</u>*

In addition to divesting H.A. Wagner, C.P. Crane and Brandon Shores Generating Stations as a group, Exelon committed in the Joint Settlement to comply with the IMM Settlement.[92] Exelon also committed to modify the IMM Settlement to provide that the

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[85] Joint Settlement at 25.
[86] *Id*. at 25-26
[87] *Id*. at 24-25. This commitment responds to a recommendation of Dr. Steven Schwarcz during live testimony. Tr. 2534-2535 (Schwarcz).
[88] Joint Settlement at 26.
[89] *Id*. Settlement at 27. The Applicants estimate that foregoing dividends through 2014 will cause BGE to retain almost $300 million for capital and O&M expenses. Applicants' Initial Brief at fn. 147.
[90] Joint Settlement at 26.
[91] *Id*. at 26.
[92] *Id*. at 27-28. In response to a remaining concern expressed by the IMM after the Joint Settlement, Exelon further committed that the new animal waste generation facility would be covered by the IMM Settlement. Tr. 3541-3542 (Bradford).

Commission would have the authority to enforce the provisions of that Settlement.[93] Exelon also claimed that its activities in satisfaction of its new generation commitments provided additional market power mitigation.[94]

D. Procedural History

On May 25, 2011, CEG, Exelon and BGE submitted the Application, along with supporting testimony and exhibits requesting authorization for Exelon to acquire the power to exercise substantial influence over BGE pursuant to PUA § 6-105.[95] Their supporting testimony included testimony from Christopher Crane,[96] Karie Anderson,[97] Ronald DeGregorio,[98] Calvin Butler,[99] Joe Pace,[100] Susan Tierney[101] and Kenneth DeFontes.[102]

In response, we issued Order No. 84058, which initiated this proceeding, and we scheduled a pre-hearing conference for June 28, 2011 to establish a procedural schedule, rule on requests to intervene, and address any other preliminary matters.[103] We received and granted requests to intervene from the Market Monitor, EDF, the Mayor and City Council of Baltimore, the MEA, PJM Industrial Customer Coalition, Chesapeake Climate Action Network, Environmental Integrity Project, Environment Maryland, Maryland

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93 Joint Settlement at 28. *See also* Tr. 3584 (Bradford).
94 Joint Settlement at 28.
95 Case No. 9271, Docket Nos. 6-7 (non-confidential version). On June 27, 2011, EEDC was added as an additional Applicant. Case No. 9271, Docket No. 40.
96 As noted, Mr. Crane is the current Chief Operating Officer for Exelon as well as President of Exelon Generation. He will serve as Exelon's CEO post-merger.
97 Ms. Anderson serves as a Vice-President of Corporate Financial Planning & Analysis for Exelon.
98 Mr. DeGregorio is a Senior Vice-President for Exelon and the Chief Operating Officer for Exelon Transmission.
99 Mr. Butler serves as a Senior Vice President of Corporate Affairs for Exelon.
100 Exelon retained Dr. Pace, an independent economic consultant, to testify regarding the market power issues related to the proposed merger.
101 Dr. Tierney holds a PhD in regional planning and serves as a Managing Principal for Analysis Group, Inc.
102 Mr. DeFontes serves as the President and CEO of BGE.
103 Case No. 9271 at Docket No. 8.

League of Conservation Voters, The Sierra Club, RG Steel Sparrows Point LLC, Good Jobs Better Baltimore, Retail Energy Supply Association, Interstate Gas Supply Inc., The Solar Alliance, International Brotherhood of Electrical Workers, Mid-Atlantic Renewable Energy Coalition, and NRG Energy Inc., as well as several individuals: Maria Allwine, Vincent Tola, Leo W. Burroughs Jr., Vicki Ann Harding and Chris Bush.

After the June 28, 2011 status conference, we issued an initial scheduling order, which we modified on August 24, 2011.[104] Pursuant to these orders, we established September 16, 2011 as the deadline for testimony unrelated to market power issues from Staff of the Public Service Commission ("Staff"), Office of People's Counsel ("OPC") and intervenors. We ordered these parties to submit testimony on issues related to market power on or before September 23, 2011.[105] We ordered all parties to submit rebuttal testimony on issues unrelated to market power on or before October 12, 2011 and on the issue of market power on or before October 17, 2011.[106] Finally, we ordered all parties to submit all surrebuttal testimony on or before October 26, 2011.[107]

We also scheduled a status conference and motions hearing on October 28, 2011 to resolve any remaining procedural issues between the parties.[108] We initially scheduled nine full days of hearings from October 31, 2011 through November 10, 2011.[109] However, when it became apparent that this schedule was overly optimistic, we added November 11, 2011 and November 18, 2011 as hearing dates and reserved November 21, 2011 and November 22, 2011 to be used if needed.[110] Finally, we established the

[104] Order No. 84154 at Docket Nos. 44 (Initial Order) and 86 (Modification of Scheduling Order).
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] Order No. 84154, Docket No. 44, 86.
[109] *Id.*
[110] Case No. 9271 at Docket No. 167.

deadlines for filing post-hearing briefs and reply briefs as December 1, 2011 and December 15, 2011, respectively. We established this ambitious schedule to ensure a thorough public interest review while remaining cognizant that PUA § 6-105(g)(6) required us to issue our order on or before January 5, 2012.[111]

Pursuant to our scheduling order, Staff submitted the written testimony of Howard Lubow, Robert Malko, Frank DiPalma Michael Rafferty, Greg Oetting, Ryan Pfaff, Robert Welchin, Richard Carlson, David Deramus and Songhoon Yang.[112] RG Steel Sparrows Point LLC submitted the testimony of Nicholas Phillips Jr.[113] Good Jobs Better Baltimore submitted the rebuttal testimony of Monica Jones.[114] The Market Monitor submitted its own testimony.[115] Interstate Gas Supply submitted the testimony of James L. Crist.[116] Chris Bush submitted his own testimony.[117] Mid-Atlantic Renewable Energy Coalition submitted the testimony of Bruce Burcat.[118] MEA submitted the testimony of Malcolm D. Woolf, Matthew I. Kahal, Alan Schwartz, Scott Hempling, Frank A. Wolak and Kevin Lucas.[119] OPC submitted the testimony of Nancy Brockway, Roger Colton, Hugh Larkin and Richard Hahn.[120] EDF submitted the testimony of Jeffrey W. Johnson.[121] Exelon submitted the rebuttal testimony of Christopher M. Crane, Denis P. O'Brien, Kenneth W. DeFontes Jr., Karie Anderson,

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[111] PUA § 6-105(g)(6)(i) generally requires a decision on an application within 180 days. However, we are authorized to extend that period an additional 45 days upon a finding of "good cause". Based upon the anticipated number of parties, witnesses and exhibits as well as the significance and complexity of the Application under review, we found good cause without objection from the Applicants. Order No. 84154, Docket No. 44 at 5-6.
[112] Case No. 9271 at Docket Nos. 98, 109, 115 and 153.
[113] *Id.* at Docket Nos. 97 and 159.
[114] *Id.* at Docket Nos. 100 and 160.
[115] *Id.* at Docket No. 101.
[116] *Id.* at Docket Nos. 102 and 157.
[117] *Id.* at Docket No. 103.
[118] *Id.* at Docket Nos. 104 and 161.
[119] *Id.* at Docket Nos. 105, 111 and 156.
[120] *Id.* at Docket Nos. 107, 110, 123 133 and 155.
[121] *Id.* at Docket No. 121.

Ronald DeGregorio, Calvin Butler, Steven Schwartcz, Lawrence Hamermesh, Susan Tierney, Michael Schnitzer, Todd Jirovec and Robert Willig.[122] NRG Energy, Inc. submitted the testimony of Jonathon Baylor and Glen Stancil.[123] Solar Alliance submitted the testimony of Carrie Cullen Hitt.[124] Chesapeake Climate Action Network submitted the testimony of David Schlissel.[125] Retail Energy Supply Association submitted the testimony of Jeffrey Levine.[126]

During the course of this proceeding, the parties conducted extensive discovery pursuant to discovery guidelines that we established, and we resolved several discovery disputes, including a hearing on August 18, 2011 to approve the terms of the Market Monitor Protective Agreement related to the disclosure of sensitive data by the Market Monitor[127] and separate discovery-related hearings on August 23, 2011 and August 31, 2011.[128] On October 31, 2011, we commenced eleven days of evidentiary hearings, during which we heard live testimony from 37 witnesses and admitted approximately 371 exhibits. These hearings generated a written transcript in excess of 3,500 pages.

As we have in similar prior cases, we also conducted three evening hearings for public comments - November 29, 2011, December 1, 2011 and December 5, 2011 in Bel Air, Baltimore and Annapolis respectively. During those hearings, we heard the views of many Maryland residents regarding the proposed Merger.[129]

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[122] *Id.* at Docket Nos. 122, 132 and 152.
[123] *Id.* at Docket No. 124.
[124] *Id.* at Docket No. 127.
[125] *Id.* at Docket No. 134.
[126] *Id.* at Docket No. 136.
[127] Hearing Transcript of August 18, 2011 Hearing, Case No. 9271 at Docket No. 76. We approved the Protective Agreement on August 25, 2011. Case No. 9271 at Docket No. 83.
[128] *Id.* at Docket Nos. 84, 108.
[129] *Id.* at Docket No. 114.

Following what we expected to be the close of the formal proceedings, we received the proposed Joint Settlement discussed above. Because this settlement materially altered the Application, we recognized that additional testimony would be necessary to ensure a thorough "public interest" review. We were sympathetic to the Applicants' desire to complete this process within the initial 225 days established by PUA § 6-105(g)(6)(i), and we appreciated their continued effort to resolve disagreements with certain parties, even toward the end of the litigation process. However, we concluded that additional proceedings would be required on a thorough but expedited basis and we held a status conference on December 16, 2011 to address how best to re-open the record without duplicating the parties' past efforts. Ultimately, the Applicants agreed to extend the deadline for a period of approximately six weeks, and on December 19, 2011, filed a formal stipulation extending the date upon which we would issue this Order to February 17, 2012.[130]

The Joint Settlement did not resolve our questions – and indeed posed further questions – regarding the Applicants' prior testimony as to how their proposed new generation would affect their post-Merger market power. Consequently, we requested additional expert testimony on these issues by December 20, 2011. Reply testimony from all other parties was due on or before January 20, 2012, and we scheduled two more days of hearing on January 25 and 26, 2012 during which we heard from nine witnesses. Between the submission of the Joint Settlement and the initiation of these hearings, EDF

[130] Case No. 9271, Docket No. 227.

informed us that it had settled its differences with the Applicants and no longer opposed the Application.[131]

E. Parties' Positions Regarding the Application

The Applicants called several witnesses to support the initial application for Merger approval and to testify regarding the IMM, Joint and EDF Settlements. Mr. Crane, President and Chief Operating Officer ("CEO") of Exelon provided a broad overview of the major aspects of the proposed Merger and testified regarding the Applicants' proposed commitments to BGE customers and Maryland. He testified that the Merger would provide direct and substantial benefits to Maryland ratepayers and that would be in the public interest. Ms. Anderson testified about the economic and financial implications of the Merger, including ring-fencing provisions and other financial commitments. She asserted that the Merger would not negatively affect the financial health of BGE, including the utility's credit rating, because the Applicants' ring-fencing provisions and other commitments would effectively shield BGE from any potential harm, including a filing by Exelon for bankruptcy.

Mr. DeGregorio, Senior Vice President for Exelon Corporation and CEO of Exelon Transmission Company, testified concerning his role as Chief Integration Officer during the Merger, where he leads the efforts of Exelon, Constellation and BGE to functionally and operationally integrate. He also addressed Merger-related savings expected to be recognized by BGE as well as the planned construction or renovation of a Baltimore-based headquarters building for Constellation. Mr. Butler, Senior Vice President of Corporate Affairs at Exelon Corporation, discussed charitable and

[131] The Applicants submitted the text of the settlement agreement with EDF, and EDF notified the Commission that it withdrew all objections to the Merger. *See* Case No. 9271, Docket Nos. 244 & 245.

community support pledges and supplier diversity commitments, and Exelon's commitment to continue those obligations at pre-Merger levels. Mr. DeFontes, President and CEO of BGE, testified concerning BGE's perspective on the proposed Merger, Exelon's commitments related to BGE such as its proposed contributions to EUSP and EmPower Maryland, and its contributions to BGE customers including the rate credit. He concluded that the Merger would benefit Maryland, BGE and the utility's ratepayers. Dr. Tierney testified regarding the direct and indirect economic and policy benefits of the proposed Merger. She used a social accounting input-output model called IMPLAN to model the financial consequences of the Merger commitments to the Maryland economy, including their effects on job creation, taxes and income. She testified that the Merger would benefit Maryland economically and produce a net positive impact on jobs.

Mr. O'Brien, President and CEO of PECO and an Executive Vice President of Exelon Corporation, testified about how BGE will operate and be managed within the structure of Exelon. As future CEO of Exelon Utilities, Mr. O'Brien also testified how he will coordinate and oversee the merged company's three utilities, BGE, PECO and ComEd. Professor Schwarcz provided testimony related to corporate structure, ring-fencing, and inter-affiliate transactions. Professor Hamermesh testified about corporate governance and concluded that the Merger will not negatively affect the ability of BGE to be locally controlled and managed. Mr. Jirovec testified concerning synergy savings and allocation.

Dr. Pace, Mr. Schnitzer, and Professor Willig presented testimony related to the effects of the Merger on competitive markets and the various market power mitigation commitments made by the Applicants and proposed by other parties. They testified that the Merger would not cause any harm to competitive markets, including Maryland's retail market, if the Commission accepts the Applicants' various market power mitigation conditions.

Commission Staff called several witnesses to address Merger issues, including Mr. Lubow and Dr. Malko, who testified regarding finance and corporate governance matters related to the Merger. They recommended that certain financial commitments made in the initial application be expanded, especially commitments concerning ring-fencing, equity ratio, capital expenditures, and the non-consolidation opinion. Mr. DiPalma and Mr. Rafferty discussed how the proposed Merger would affect the reliability, safety, and adequacy of BGE's electric and gas delivery business. They emphasized that the Commission should ensure that BGE's long-term access to capital not be impaired by the Merger, given the utility's existing commitments to significant infrastructure upgrade and replacement projects. Additionally, Mr. Welchlin testified regarding the net Merger synergies that will be attributable to BGE if the Merger is approved, using a discounted cash flow analysis. Dr. Carlson performed a cost-benefit analysis of the proposed Merger to BGE ratepayers and to the residents of Maryland, relative to the *status quo* of Constellation and Exelon remaining separate companies. Mr. Oetting and Mr. Pfaff filed joint testimony related to Merger accounting issues, including their recommendation to require the Applicants to maintain transaction costs of the Merger at the parent level and prevent BGE from incurring any costs related to the completion of the Merger transaction. Drs. DeRamus and Yang filed testimony for Staff related to the market power implications of the Merger and various mitigation strategies. They concluded that the market power issues could be resolved through the commitments made in the IMM Settlement and the Joint Settlement. After the IMM and Joint Settlements were reached, Staff concluded that the Commission should approve the Merger, subject to the commitments contained in those agreements and resolution of certain additional Staff concerns.

The IMM, represented by its president, Dr. Joseph Bowring, filed key testimony related to market power. He determined that the initial application failed to appropriately mitigate the exercise of market power. However, he concluded that the enforcement of certain structural and behavioral mitigation measures, to which the Applicants agreed in their settlement with the IMM, would adequately resolve all market power issues. He no longer objects to approval of the Merger.

MEA called several witnesses to testify during the Merger proceeding, including its Director, Malcolm D. Woolf. Director Woolf concluded that the initial Merger application's commitment to build 25 MW of renewable energy generation was not sufficient to meet the public interest standard of PUA § 6-105, especially given the loss of local control of BGE. Mr. Kahal also testified regarding the Applicants' proposed commitment to customer benefits in relation to the risks imposed on customers by the Merger. Mr. Kahal concluded that the synergy savings attributed to BGE in the original Merger application may have been understated and that the Merger should not be approved absent Applicant commitment to direct and tangible customer benefits. Professor Schwartz testified concerning governance and ring-fencing issues associated with the Merger. He asserted that BGE will lose local management and control and become subject to new corporate priorities and expectations as a result of the Merger. Mr. Hempling testified about certain risks related to the Merger, including the diminished role BGE will have in the Exelon corporate structure and the increased difficultly inherent in regulating a utility that will become part of a much larger parent. He concluded that if the Merger is approved, the Commission should retain jurisdiction to require the divestiture of BGE from Exelon in the event that a catastrophic event occurs that jeopardizes BGE's financial health. Mr. Lucas, Director of Energy Marketing Strategies at MEA, testified about the costs to the Applicants of implementing MEA's renewable energy generation recommendation. Dr. Wolak testified about market power, concluding that the original application did not adequately mitigate market power concerns.

After the Joint Settlement was reached, MEA concluded that all market power, corporate governance, and other issues related to the Merger were sufficiently resolved and it therefore now urges us to approve the Merger subject to those settlement conditions. The Mayor and City Council of Baltimore and the Baltimore Building and Construction Trades Council, AFL-CIO also signed the Joint Settlement and currently advocate for approval of the Merger, subject to the commitments contained in the settlement agreement.

OPC submitted the testimony of several witnesses including Ms. Brockway, who testified regarding the effects of the Merger on BGE, including the consequences of yielding corporate decision-making to a large out of state entity. She concluded that the loss of local control of BGE would significantly undermine the ability of the Commission to regulate the utility and ensure that BGE customers receive just and reasonable rates and adequate service quality and reliability. Mr. Larkin critiqued the Merger application, including Dr. Tierney's analysis. He concluded that the application was deficient, but in the event of approval, he proposed several additional conditions to protect BGE ratepayers from the risks and costs of the Merger. Those proposed conditions include an audit of Merger costs and benefits, appropriate allocation of Merger savings, a three-year rate case stay out, ring-fencing provisions and dividend restrictions, maintenance of bond ratings, and reporting requirements. Mr. Colton addressed the impact of the Merger on low-income customers. He concluded that consolidation of company services would reduce the customer service opportunities that have traditionally been available to BGE's low-income customers, such as flexible repayment options and referral to locally available assistance programs. Mr. Hahn testified regarding market power issues. He concluded that the Merger would harm BGE customers by introducing market power that the Applicants did not effectively mitigate. OPC concluded that the IMM and Joint Settlements did not sufficiently resolve the problems as enumerated by its witnesses, and urged the Commission to deny Merger approval.

The PJM Industrial Customer Coalition did not submit testimony, but it did submit a legal brief in which it recommended that the Merger not be approved, largely because of the market power concerns articulated by Mr. Hahn. Likewise, the International Brotherhood of Electrical Workers ("IBEW") did not present a witness, but it criticized Dr. Tierney's IMPLAN analysis, arguing that the conclusion that the Merger would achieve a net positive jobs impact was fundamentally flawed. Consequently, IBEW recommends that the Commission deny the Merger application. Alternatively, it requests the Commission to require the Applicants to (i) maintain current staffing levels at BGE for two years, rather than merely staying involuntary attrition for that time period and (ii) provide current and former BGE employees with wages and benefits that are at least at pre-Merger levels.

Mr. Johnson testified on behalf of EDF regarding market power issues and the negative impact of the Merger on the Constellation-EDF relationship, particularly with regard to CENG. On January 17, 2012, after EDF reached a settlement with the Applicants, it withdrew its objections to the Merger.

Interstate Gas Supply, Inc. presented Mr. Crist to testify regarding the implications of the Merger to Maryland's retail gas choice programs. Mr. Crist recommended that the Commission require BGE to implement certain modifications that would benefit Maryland's retail gas choice program, including changes to electronic data interchange and billing services, as a condition of Merger approval. RG Steel Sparrows Point presented the testimony of Mr. Phillips, who concluded that the Merger should not be approved absent a significant direct benefit to BGE's largest industrial customer, Sparrows Point. Mr. Phillips concluded that a rate credit of $1.67 million issued to Sparrows Point would be reasonable and commensurate with the proposed residential customer rate credit.

Mr. Stancil testified on behalf of NRG Energy, Inc. regarding the proposed commitment in the original application to provide a monetary contribution to electric vehicle ("EV") infrastructure. He concluded that the contribution could have a chilling effect on the development of competitive EV markets, if designed improperly. Additionally, Mr. Baylor testified for NRG that the Applicants' commitment to build renewable generation was deficient because it did not include a competitive bidding process.

Ms. Hitt filed testimony on behalf of the Solar Alliance and the Solar Energy Industries Association ("SEIA")[132] and stated that the 25 MW renewable energy commitment of the original application was deficient.[133]

The Retail Energy Supply Association ("RESA") filed the testimony of Mr. Levine. He testified that a certain mitigation measure proposed by MEA's witness, Dr. Wolak (regarding long-term fixed price standard offer service contracts) could harm competitive retail electric markets in Maryland. RESA did not otherwise take a position on the approval of the Merger.

Ms. Jones testified on behalf of Good Jobs Better Baltimore to advocate for an enhanced package of benefits to Baltimore, including an augmented rate credit. Mr. Bush filed testimony on his own behalf urging the Commission to impose re-regulation as a condition of Merger approval and recommending certain other Merger conditions related to smart meters and the Applicants' nuclear generators.

Mr. Burcat filed testimony on behalf of the Mid-Atlantic Renewable Energy Coalition ("MAREC"), an organization that was formed to help advance renewable energy development opportunities primarily within the PJM region. Mr. Burcat testified that the Applicants' original commitment to build a 25 MW renewable project was not sufficient to meet the public interest standard. After the Joint Settlement was filed, MAREC stated that it did not oppose that settlement, but nevertheless recommended that the Commission require that a mandatory competitive procurement process be utilized to effectuate the expanded renewable energy commitment in order to promote competitive markets.

[132] The Solar Alliance became wholly incorporated into SEIA on January 12, 2012.
[133] After the Joint Settlement was filed, SEIA submitted additional testimony into the record, but did not appear for the hearing, and the testimony was not admitted, so we have not considered it.

Mr. Schlissel provided testimony on behalf of the Chesapeake Climate Action Network, Environmental Integrity Project, Environment Maryland, the Maryland League of Conservation Voters, and the Sierra Club ("Environmental Intervenors.") Mr. Schlissel testified that the Applicants' proposed market power mitigation measure of divesting the Wagner, Crane and Brandon Shores plants was flawed because of the significant risk that those units would be retired. After the filing of the Joint Settlement and the Applicants' commitment to build significant new electric generation in Maryland, however, the Environmental Intervenors withdrew their objection to the Merger.

III. ANALYSIS AND DECISION

A. Standard of Review

As we discussed in Case No. 9173, PUA § 6-105 provides us with "broad discretion within a narrow legal space."[134] Our task here is to determine whether this Merger is "consistent with the public interest, convenience and necessity, including benefits and no harm to ratepayers."[135]

PUA § 6-105 directs three possible outcomes. If we conclude that the transaction is "consistent with the public interest, convenience and necessity, including benefits and no harm to consumers, we "shall issue an order granting the application."[136] If the transaction fails any one of those tests, we "shall issue an order denying the application."[137] Or, if appropriate, we may approve it with conditions that address the aspects of the transaction that prevented us from approving it on its face.[138] Section 6-

[134] *EDF* Order at 26.
[135] PUA § 6-105(g)(3).
[136] PUA § 6-105(g)(3)(i).
[137] PUA § 6-105(g)(4).
[138] PUA § 6-105(g)(3)(ii).

105(g)(2) contains the non-exclusive list of factors we must consider in reaching these conclusions:

1. the potential impact of the acquisition on rates and charges paid by customers and on services and conditions of operation of the public service company;
2. the potential impact of the acquisition on continuing investment needs for the maintenance of utility services, plant, and related infrastructure;
3. the proposed capital structure that will result from the acquisition, including allocation of earnings from the public service company;
4. the potential effects on employment by the public service company;
5. the projected allocation of any savings that are expected to the public service company between shareholders and ratepayers;
6. issues of reliability, quality of service, and quality of customer service;
7. the potential impact of the acquisition on community investment;
8. affiliate and cross-subsidization issues;
9. the use or pledge of utility assets for the benefit of an affiliate;
10. jurisdictional and choice of law issues[139];
11. whether it is necessary to revise the Commission's ring-fencing and code of conduct regulations in light of the acquisition; and
12. any other issues the Commission considers relevant to the assessment of the acquisition in relation to the public interest, convenience, and necessity.[140]

The Applicants bear the burden of proving that their transaction satisfies the requirements of § 6-105.[141] We have previously held, and reaffirm here, that our mandate to evaluate the "public interest" is "not…to decide whether the Transaction is a good or bad idea, nor to weigh it against alternative deals or the *status quo*."[142] That

[139] There is no dispute that the Commission will retain the same regulatory and oversight authority over BGE. Additionally, the Applicants agree that the Commission will possess jurisdiction to enforce the terms of this Order, including each of the conditions contained herein. Tr. 3546 (Bradford).
[140] PUA § 6-105(g)(2).
[141] PUA § 6-105(g)(5).
[142] EDF Order at 26.

said, we have struggled at the threshold with whether this Merger is good for Maryland, good for BGE, or good for its ratepayers. It certainly is good for CEG's shareholders – they will be paid a substantial premium over the value of their shares at the time the deal was announced.[143] Exelon's shareholders will receive CEG and all of its businesses and assets, as well as the opportunities that come with them. Although they are paying a premium for CEG's stock, they are paying less than 40 cents on the dollar of CEG's peak price from early 2008. The Applicants' bankers ($118.5 million),[144] lawyers ($15 million), accountants ($2 million) and consultants ($2 million) will be paid generously and in full at closing.[145] CEG's senior executives will collect change-of-control payments totaling $21 million after closing, and both companies will pay confidential "retention payments" of a similar magnitude to certain current employees of both companies.[146]

So obviously the Merger is good for those who have a personal or professional financial interest in the deal, but is it consistent with the public interest? The Applicants claim that it is, and we have worked within the guidelines of the statute to ensure this outcome. CEG would become part of a larger company that would have a larger balance sheet and stronger credit agency ratings.[147] As Messrs. Crane and Shattuck testified, CEG's growing retail supply business (which is short generation) matches well with Exelon's generation business (which is short supply), and the combined company would be better-positioned to compete in the national retail competitive space than either

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[143] Constellation shareholders will receive an 18.1% premium or $38.59 per share as a result of this Merger. http://www.exelonconstellationmerger.com/shareholders.
[144] This is not a typo. *See* Applicants' Ex. 100.
[145] *Id*.
[146] *Id*.
[147] Anderson Direct Testimony at 4-5.

company on its own.[148] By operating three utility companies instead of two, the combined Exelon Utilities companies would have opportunities to learn and improve from each other and gain some economies of scale.[149] And across the regulated and unregulated companies, the Applicants believe that they will find opportunities to achieve synergies.[150]

Until the Joint Settlement was reached, most other parties in this case opposed the Merger. They did so primarily on three grounds: (1) the Merger would, in the view of those other parties, concentrate excessive market power in the hands of the merged Companies; (2) the proposed benefits to BGE's ratepayers and proposed public interest measures were inadequate; and (3) by becoming a smaller component of a bigger, Chicago-based company, BGE would lose its local identity and management, and local needs and interests would be subjugated to those of Exelon.[151] During the course of the hearings, before the Joint Settlement was announced, the issues and sub-issues comprising these themes were examined fully and in great detail. With the exception of OPC and the PJM Industrial Users, who still oppose the Merger, the concessions the Applicants have made in the Joint Settlement[152] have resolved these fundamental concerns in the eyes of nearly all of the litigants.[153] That near-unanimous agreement does not end our obligation (nor would a unanimous agreement for that matter), but it does inform our analysis of the Settlement against the statutory requirements.

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[148] Tr. 235 (Shattuck); Crane Direct Testimony at 13.
[149] Crane Direct Testimony at 13; O'Brien Rebuttal Testimony at 7-8.
[150] *Id.*
[151] For example, at our December 1, 2011 public hearing in Baltimore, Ms. Dotty McGinniss spoke for many in the audience when she expressed her concern that ratepayers will "end up being collateral damage" should ultimate control of BGE move to Chicago. Dec. 1 Public Comment Hearing at 12.
[152] Or, in EDF's case, concessions the Applicants made in a separate side agreement.
[153] Some parties continue to have individual issues, such as Sparrow's Point's request for an increased rate credit. We will address these below.

We understood and shared the opponents' concerns, particularly the concerns regarding market power, throughout the case. Indeed, market power was the single most important issue in this case to us in that it posed the highest potential for harm in our view. Although in earlier cases we have analyzed the three prongs of § 6-105 in the order they appear in the text, the primacy of the market power concerns in this case caused us to place it first, and to satisfy ourselves first that the Merger would not cause immediate or an incremental risk of harm to ratepayers. We could not, and would not, approve this Merger if the resulting company would have the ability to manipulate electricity prices in the PJM markets, whether or not the post-Merger Exelon would be inclined to exercise its market power – the mere ability to exercise market power would, we find, constitute a harm both to BGE's customers and the public interest that would be wholly incompatible with § 6-105. So although this Merger presents other critically important issues, such as the preservation of the ring-fencing provisions we installed in the EDF Order, we begin our analysis with this threshold question. From there, we look at whether the Merger will bring certain, measurable and incremental benefits to ratepayers and whether it will be consistent with the public interest, convenience and necessity.[154]

B. The Applicants Must Ensure that the Transaction Causes No Harm to Ratepayers

We have carefully evaluated the potential effects of this merger to ensure that BGE customers do not incur new risks in the post-Merger world. The statute requires us to ensure that ratepayers are protected against *any* increased risks of harm from this

[154] Many intervening parties requested a variety of individually tailored rulings. To the extent a request is not discussed within this Order, the request is denied.

Merger;[155] it is our job to eliminate them, either by denying approval outright or through conditions, not to offset them with benefits.

As originally proposed, this Merger would fall significantly short of satisfying PUA § 6-105. Without mitigating conditions, this Merger would impose new and incremental risks upon ratepayers, most notably from the potential rate impacts of the merged companies' increased ability to exercise market power; increased exposure to nuclear and other merchant generation risks; increased tensions between a relatively small BGE and a much larger, unregulated parent company; and a distant management team balancing the public policy priorities of three different states and the financial conflict between affordable rates for utility consumers and its much larger generating revenues..

To their credit, the Applicants have made several commitments to remedy these shortcomings, and they have worked diligently to satisfy the concerns of the parties and the Commission. Specifically, they have offered several commitments designed to protect against potential threats to BGE customers and the public, including: (1) rate increases as a result of the merged companies' increased market power; (2) the loss of local control of BGE; (3) threats to BGE's ring-fencing and financial health; (4) increased rates due to the cost of the merger itself; (5) loss of employment at BGE due to the Merger; and (6) reduced reliability and service quality primarily due to redirecting or simply reducing BGE's capital and O&M expenditures.

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[155] *FirstEnergy* Order at 54.

1. Market Power Concerns

Testimony regarding market power consumed a significant portion of the evidentiary hearings in this case, and for good reason. As shown in the table below, Exelon and Constellation each own a significant portion of generation in the PJM market, and particularly large resources in the 5004/5005 and AP South[156] submarkets. The combined company will own over 34,000 MW of generation capacity, even after the Applicants' proposed divestiture of 2,648 MW of fossil fuel generation attributable to Wagner, Crane and Brandon Shores.[157] Moreover, the service territories of PECO and BGE are adjacent to one another and a significant percentage of the generating capacity owned by Exelon and Constellation is located within or near those service territories.[158] To the extent the Applicants' consolidation reduces competition and leads to higher levels of unmitigated market power, prices for wholesale energy and capacity will potentially increase, leading to unjust and unreasonable retail rates.

Table 1: Applicant Generation Ownership in PJM

Destination Market	Exelon	Constellation
5004/5005	9,419	5,962
AP South	9,419	5,962
PJM East	7,493	40
Total PJM	22,247	7,966

a. Initial Application

Dr. Pace, an independent economic consultant for the Applicants, presented testimony addressing the competitive impacts of the Merger as proposed in the original May 25, 2011 Merger application. With appropriate mitigation, Dr. Pace argued that the

[156] AP South includes the 5004/5005 market in addition to the DOM transmission zone.
[157] A Price Effects Analysis of the Proposed Exelon and Constellation Merger, by Frank A. Wolak, revised October 11, 2011 ("Wolak October 11, 2011 Testimony") at 1.
[158] *Id.* at 2.

Merger would not have any adverse impact on competition in wholesale electric markets in PJM for energy, capacity, or ancillary services or in any related submarkets.[159] Consequently, he claimed that the Merger would not negatively affect Maryland's retail electricity market.

Dr. Pace conducted a merger investigation in accordance with the Competitive Analysis Screen[160] utilized by the Federal Energy Regulatory Commission ("FERC"), including an evaluation of horizontal and vertical[161] market power concerns and FERC's Appendix A analysis, known as a Delivered Price Test ("DPT.") The DPT is a structural test that assesses whether a proposed merger will create or exacerbate market power in a relevant market. Specifically, the DPT model determines all megawatts that can be economically and physically delivered into a geographic market under various market conditions (such as summer super-peak) and then measures the market share through an index known as the Herfindahl-Hirschman Index ("HHI.").[162] Generally, higher HHI figures represent higher market concentrations. HHI will increase as the number of firms in the market decreases and as the disparity in size between those firms increases. According to the 1992 Merger Guidelines,[163] a market is unconcentrated if the post-

[159] Pace Direct Testimony at 3.

[160] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) ("Merger Policy Statement") and *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

[161] Vertical market power involves single company control over key inputs needed to support competitive generation development, including material components such as fuel supplies and fuel transportation facilities. We agree with the analysis of Dr. Pace that vertical market power is not at issue in this proceeding. Pace Direct at 5.

[162] The HHI is calculated by squaring the market shares of each firm that is competing in the relevant market and summing the results. Pace Direct Testimony at 5, FN 5.

[163] Merger Policy Statement, FERC Stats. & Regs. at 30,119-20, 30,128-37. On March 17, 2011, FERC issued a Notice of Inquiry seeking comment on whether it should revise its approach for examining horizontal market power concerns to reflect the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission on August 19, 2010 (2010 Guidelines). *Analysis of Horizontal*

merger HHI in the market is below 1,000 points. A market is classified as moderately concentrated if the post-merger HHI ranges from 1,000 to 1,800 and highly concentrated if the post-merger market's HHI exceeds 1,800.[164] The HHI analysis also evaluates the change in HHI resulting from a merger. For example, a merger in a moderately concentrated market that involves an increase in HHI of more than 100 points is considered to potentially raise "significant competitive concerns."[165]

Utilizing the HHI analysis to evaluate the effects on PJM's energy markets, Dr. Pace found what he considered to be "minor screen failures" during the off-peak and shoulder peak periods in the PJM-wide market as well as screen failures in the AP South and 5004/5005 submarkets.[166] Concerning PJM's capacity markets, Dr. Pace found no screen failures in the PJM-wide or Mid-Atlantic Area Council ("MAAC") region.[167] He did, however, find a screen failure in the Eastern MAAC ("EMAAC") market, which demonstrated a post-mitigation HHI change of 111.[168] Dr. Pace also found that Constellation's 545 MW tolling agreement with the new Delta generation facility contributed significantly to the screen failure in EMAAC.[169] In order to visually depict the areas of PJM potentially affected by market power, a map of the 5004/5005 submarket is reproduced below.

Market Power under the Federal Power Act, 134 FERC ¶ 61,191 (2011). Because that docket is still pending, parties to the Maryland proceeding submitted testimony analyzing horizontal market power pursuant to the 1992 Merger Guidelines, which the Commission finds appropriate.

[164] DeRamus and Yang Direct at 18.

[165] 134 FERC ¶ 61,191 at P 4.

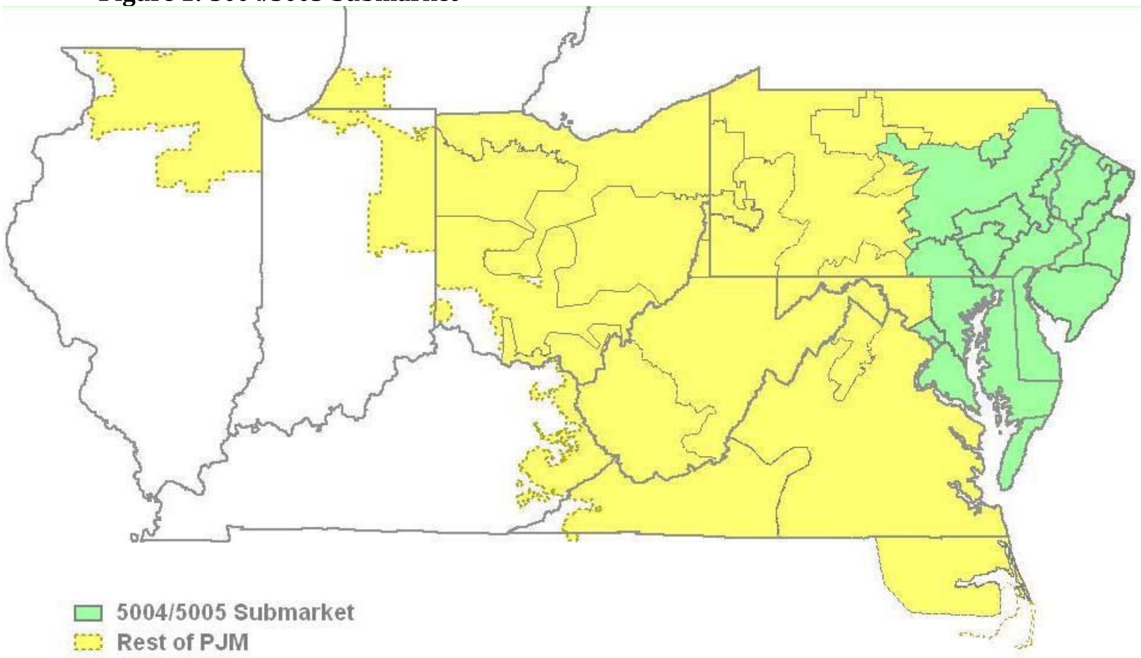
[166] Pace Direct at 9.

[167] *Id*. at 15.

[168] *Id*. at 15, Table 8.

[169] *Id*. at 16.

Figure 1: 5004/5005 Submarket



b. *Applicants' Proposed Mitigation*

In order to mitigate market power screen violations in the energy markets, the Applicants proposed to divest approximately 2,648 MW of generation in Maryland.[170] Additionally, they offered to enter into a fixed price power sales contracts for a duration of one year or longer to "contractually divest" 500 MW of baseload energy for delivery within the 5004/5005 submarket through the end of 2014.[171] The Applicants asserted that, if approved, this virtual divestiture would reduce the generation attributed to the Applicants by 500 MW, thereby lowering the HHI. The power sale would occur no later than 180 days after the consummation of the Merger. In the interim, the Applicants would bid all energy, capacity and ancillary services from all of their units within AP

[170] *Id*. at 12-13.
[171] Pace Direct, Exhibit J-1 at 13. The need for this mitigation measure stems from a contract the Applicants entered into with EDF to market 85 percent of the output of the CENG units, including Calvert Cliffs, through 2014. At that time, the Calvert Cliffs' output controlled by the Applicants will decline by about 600 MW, and in the Applicants' opinion, the mitigation measure will no longer be necessary.

South, 5004/5005 and the PJM East submarkets at or below the mitigated prices determined pursuant to PJM rules, subject to certain exceptions detailed in Dr. Pace's testimony.[172]

In order to mitigate the screen violations in the capacity markets, the Applicants proposed to implement a capacity offer cap whereby they would offer all of their generation capacity in the EMAAC submarket that was not previously committed into all PJM capacity auctions at or below the PJM-approved offer cap for each resource, from the consummation of the Merger to May 31, 2017, the date the Delta tolling agreement is set to expire. Additionally, the Applicants would offer the Delta plant at a zero price in all PJM capacity auctions.[173]

c. Party Response to Initial Application

Several parties filed comments objecting to the proposed Merger, including the IMM.[174] Although the IMM evaluated the Merger pursuant to FERC's Competitive Analysis Screen, it also analyzed the Merger through the Three Pivotal Supplier Test and actual PJM market data. The IMM found that the Merger as proposed would "significantly increase concentration in the PJM markets," including in energy, capacity, regulation, and day ahead scheduling reserve ("DASR") markets.[175] The IMM stated that the capacity market was particularly susceptible to the exercise of market power, noting

[172] Pace Direct, Exhibit J-1 at 15.
[173] Pace Direct at 17.
[174] On its website, the IMM describes its role as "monitoring compliance with the rules, standards, procedures, and practices of PJM markets. We observe and comment on actual and potential design flaws in market rules, standards, and procedures, and identify structural problems in PJM markets that may inhibit robust and competitive markets. We monitor the potential of market participants to exercise undue market power, the behavior of market participants that is consistent with attempts to exercise market power and the market performance that results from the interaction of market structure with participant behavior. We monitor the actions of PJM and the impact of those actions on market outcomes." http://www.monitoringanalytics.com/company/role.shtml.
[175] September 16, 2011 Testimony of IMM at 1, 48, 76, 93, and 103.

that the PJM capacity market is characterized by inelastic demand, tight supply-demand conditions, and a small number of non-affiliated load serving entities.[176] Although the Applicants' proposed divestiture would reduce market power concerns, the IMM concluded that they would not be eliminated. Additionally, the IMM noted that the divestiture plan did not limit the market participants to which assets could be divested, and determined that "divestiture to one of the significant players in these markets would exacerbate the impacts on concentration ratios from the proposed Merger."[177]

Mr. Hahn testified on behalf of OPC and concluded that the proposed Merger would cause "serious market power concerns in both the energy and capacity markets in PJM" and that the mitigation measures offered by the Applicants were inadequate.[178] Specifically, he found the Applicants' divestiture plan would not mitigate market power, but would simply transfer it to the (likely large) market entity acquiring the divested capacity.[179]

Mr. Hahn also opposed the short-term sale of 500 MW of power as a mitigation measure, arguing that because the sale is not tied to any particular generating unit, there is no way to transfer operational control to the buyer.[180] Furthermore, forward contracts can easily be unwound or changed so that the seller is "free to sell its generator output into the market and reap higher profits," rendering the mitigation ineffective.[181] Mr. Hahn argued that if the short-term sale is not credited, the proposed Merger results in

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[176] *Id*. at 76.
[177] *Id*. at 19, 21.
[178] Hahn Reply Testimony at 2.
[179] Mr. Hahn observed, for example, that divestiture to PSEG, PPL, or Reliant (large market participants) or Calpine (a medium market participant) would result in an unacceptably high HHI change post merger. Hahn Reply Testimony at 16, 17.
[180] Hahn Reply at 15, 34.
[181] *Id*. at 1, 4.

screen failures in every time period in the 5004/5005 submarket, with changes in HHI ranging from 103 to 158 points, even with divestiture.[182]

Mr. Hahn also objected to the Applicants' proposal to bid the output of the Delta plant at zero until its contract expires in 2017, arguing that this behavioral remedy should be rejected in favor of a permanent structural solution. He testified that permanent structural solutions are superior to behavioral solutions because "[t]emporary sales and bidding commitments require constant vigilance, an effort that is not feasible for the Commission or its staff."[183] Similarly, he criticized the Applicants' commitment to offer non-committed capacity in the EMAAC locational deliverability area ("LDA") at a zero price because such a strategy would not change the results of the HHI. As an alternative, Mr. Hahn argued that the Applicants should be required to divest a total of 3,080 MW of generation, which is approximately 637 MW more than the quantity of divestiture originally proposed by the Applicants.[184] Specifically, he advised that the Commission require the Applicants to divest Exelon's Croyden (386 MW), Fairless (60 MW), Richmond (96 MW), and Schuylkill (199) plants located in Pennsylvania.

Dr. Pace provided rebuttal testimony on behalf of the Applicants in response to Mr. Hahn. He explained that the 500 MW energy sale was designed to address the temporary contractual arrangement between Constellation Energy Commodities Group ("CCG") and CENG whereby CCG will market 85 percent of the output of Calvert Cliffs nuclear plant through the end of 2014, at which point the 600 MW share of Calvert Cliffs

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[182] DeRamus and Yang Direct at 40.
[183] Hahn Surrebuttal at 12.
[184] Hahn Reply at 3, Hahn Surrebuttal at 2. Mr. Hahn asserted that the additional 637 MW of divested generation should be located in the 5004/5005 market or the EMAAC capacity zone. *Id*.

will revert to EDF.[185] During the interim, Dr. Pace maintained that a temporary contractual remedy is sufficient. While he admitted that the right to market nuclear output can create an additional incentive to raise energy prices using other generation resources, he asserted that the temporary contracts will eliminate that incentive because the company will be unable to profit from higher prices.[186] Regarding the Delta tolling contract, he noted that given RPM's three-year forward auction, Constellation will bid the Delta plant into only two more base residual auctions (May 2012 and 2013) before the agreement expires.[187]

Dr. Wolak testified on behalf of the MEA. He criticized traditional FERC merger analysis, including the HHI, arguing that that it does not properly account for (i) the incentives of producers, (ii) the level of electricity demand and the elasticity of demand that suppliers face, or (iii) the potential for expansion of output by competitors and potential competitors.[188] As an alternative, Dr. Wolak evaluated the Merger based on the "oligopoly equilibrium model," a mathematical model of unilateral strategic behavior designed to capture those variables. Utilizing this model, Dr. Wolak determined that the Merger could cause harm to competition in the wholesale electric markets in which Exelon and Constellation currently compete, enable the heightened exercise of market power, and result in higher wholesale and retail rates.[189] He analyzed several post-Merger scenarios, including high demand and low forward contract counterfactuals, and found that under certain circumstances, prices could rise by as much as 25 percent.[190] To

[185] Hahn Rebuttal at 6.
[186] Pace Rebuttal at 8.
[187] *Id*. at 13.
[188] Wolak October 11, 2011 Testimony at 3-4.
[189] *Id*. at 2, 27.
[190] *Id* at 26.

mitigate this risk, Dr. Wolak advised the Commission to ensure that a high level of Maryland retail load is covered by fixed-price forward contracts, which, in his opinion, would limit the incentive of a large supplier with market power to raise short-term market prices. He also urged the Commission to require that any assets divested by the Applicants be sold to new entrants or small market participants.

Professor Willig responded to Dr. Wolak's testimony on behalf of the Applicants. He used Dr. Wolak's oligopoly equilibrium model to argue that the Merger would lower future prices across all scenarios, including high demand and reduced forward contracting counterfactuals.[191] Dr. Wolak rejoined that the Merger and the level of forward contracting are not independent events; rather, one is directly related to the other. He opined that the merged company, in order to maximize profits, would reduce its level of fixed price forward contract obligations so that more of its generation is sold at short-term market-clearing prices where the entity can exert its unilateral market power.[192] Additionally, as demand increased, the merged company would increase its exercise of market power and diminish its commitment to forward contracts.

Staff market power witnesses Dr. David DeRamus and Dr. Songhoon Yang testified that without adequate mitigation, the proposed Merger would significantly increase market concentration within PJM, especially the 5004/5005 submarket, in which the Applicants currently own or control 15,000 MW, corresponding to a market share of between 23 and 32 percent.[193] They also concluded that if the proposed Merger caused

[191] Willig Rebuttal at 3.
[192] Wolak Surrebuttal at 7.
[193] DeRamus and Yang Direct at 5. The percentage varies by time of year.

competitive harm to wholesale markets, it would adversely affect corresponding retail markets, in this case, Maryland's Standard Offer Service ("SOS") auctions.[194]

d. *Response to Applicants' Proposed Divestiture of Crane, Wagner and Brandon Shores*

Mr. Schlissel testified on behalf of the Environmental Intervenors and criticized the Applicants' divestiture plan because of the likely retirement of the Crane and Wagner plants. (The table below references the three plants the Applicants propose to divest). He observed that the coal-fired units of Crane, Wagner and Brandon Shores are at least 45 years old and argued that Crane and Wagner face a significant risk of early retirement due to low natural gas prices, rising coal prices, and current and impending EPA regulations pertaining to air emissions,[195] water discharge and solid waste disposal, as well as the risk of federal regulation regarding carbon dioxide emissions.[196] He asserted that the low annual capacity factors of the coal-fired units at Crane and Wagner (less than 40 percent in 2009 through 2010 for all coal-fired units with the exception of Wagner Unit 3) demonstrated the diminished operating performance and increased operating costs associated with the units.[197] He referenced the August 2011 PJM report, *Coal Capacity at Risk for Retirement,* as further evidence of the reduction in net energy market revenues available to coal generators to cover the impending costs of environmental retrofits, which especially affected coal-fired units less than 400 MW and older than 40 years in age.[198] The PJM report concluded that approximately 11,000 MW of coal capacity

[194] *Id*. at 4.
[195] Coal is the most carbon-intensive fuel among electric generating power plants. Schlissel Rebuttal at 15.
[196] Schlisel Rebuttal at 3.
[197] *Id*. at 10.
[198] *Id*. at 10-11.

within the PJM region is at high risk for retirement.[199] Consequently, Mr. Schlissel recommended that the Commission require the Applicants to identify a qualified and interested purchaser or develop a comprehensive contingency plan to address alternative mitigation.[200]

Table 2: Applicants' Physical Divestiture[201]

Plant Name	Location	No. of Units	Age (yrs) of Select Units	MW Coal	MW Oil/Gas	Total MW
Brandon Shores	Anne Arundel County, MD	2	Unit 1: 27 Unit 2: 20	1,286	0	1,286
H.A. Wagner	Anne Arundel County, MD	3	Unit 2: 52 Unit 3: 45	459	504	963
C.P. Crane	Baltimore County, MD	5	Unit 1: 50 Unit 2: 48	385	14	399
Total (MW)				2,130	518	2,648

Staff witnesses Drs. DeRamus and Yang also criticized the Applicants' original mitigation plan because the plants to be divested face a significant risk of retirement. They stated that given the age and condition of Crane and Wagner and the likely investments needed to remain in operation, their "useful economic life may be close to an end."[202] They pointed to the high heat rates of the plants, which require Crane to burn 22 percent more coal and Wagner 14 percent more coal than a generic new entrant to generate the same quantity of electricity.[203] The higher heat rates elevate the plants' operating costs, leading to less frequent dispatch of the units and lower capacity factors. Additionally, they testified regarding the potentially formidable cost of environmental compliance due to newly promulgated or impending regulations.[204] In order to comply

[199] Schlissel Rebuttal at 13, Exhibit DAS 3 at 23, 27 and 32.
[200] Schlissel Rebuttal at 18.
[201] *See* DeRamus and Yang Direct at 15, 47, and Schlissel Rebuttal at 10.
[202] DeRamus and Yang Direct at 8.
[203] DeRamus and Yang Joint Surrebuttal at 6.
[204] Those regulations include EPA's Cross-State Air Pollution Rule ("CSAPR"), which is designed to reduce the interstate transport of fine particulate matter and ozone, and the Mercury and Air Toxics

with these regulations, Drs. DeRamus and Yang testified that the ultimate purchaser of Crane and Wagner would need to make costly retrofits or retirement decisions within the 2012 to 2015 time period.[205] They therefore concluded that the Applicants should be required to submit a compliance filing after a tentative buyer is selected to demonstrate that the divested units will not be retired in the reasonably foreseeable future.

The Applicants opposed the recommendations of Staff and the Environmental Intervenors, asserting that a compliance filing would prolong the Merger hearing beyond the statutory deadline and introduce unnecessary uncertainty into the purchasing process.[206] Mr. Schnitzer testified on behalf of the Applicants that the parties materially overstated the retirement risk associated with the Crane and Wagner power plants.[207] *First*, he noted that Brandon Shores already contains state-of-the art environmental controls and will not require significant upgrades stemming from EPA regulations. Because MATS allows generating units at the same physical site burning the same fuel to average their emissions rates, and because Brandon Shores and Wagner are located at the same site, the Wagner units will benefit from Brandon Shores' environmental controls and over-compliance, in Mr. Schnitzer's opinion.[208] *Additionally*, Mr. Schnitzer stated that Crane units 1 and 2 and Wagner units 2 and 3 already contain mercury controls sufficient to meet MATS standards that were installed to comply with the Maryland

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Standards for Power Plants ("MATS"), which is intended to regulate mercury emissions as a hazardous air pollutant, along with six other hazardous air pollutants. DeRamus and Yang Joint Surrebuttal at 46. Additionally, the EPA has proposed a new rule to implement Section 316(b) of the Clean Water Act, addressing Cooling Water Intake Structures, and it has proposed regulations regarding Coal Combustion Residuals Disposal. *Id.*

[205] DeRamus and Yang Joint Direct at 48.

[206] Pace Rebuttal at 21.

[207] Schnitzer Market Power Rebuttal at 14.

[208] *Id*. at 19-20.

Healthy Air Act.[209] Mr. Schnitzer also observed that the Crane units have recently been reconfigured to burn cleaner western sub-bituminous coal instead of Appalachian coal, which will ease the unit's compliance with MATS and CSAPR and lower costs.[210] *Finally*, Mr. Schnitzer testified that Crane and Wagner will benefit from the higher energy and capacity prices found in the Maryland portions of the PJM region, which will generate higher margins for the units to fund needed retrofits.[211] He concluded that "both Crane and Wagner have significant forward-looking value and are unlikely to retire."[212]

e. The IMM Settlement

On October 11, 2011, the IMM filed a settlement agreement with the Applicants ("IMM Settlement") in which the IMM removed its objection to the Merger in exchange for the Applicants' agreement to certain structural and behavioral commitments. The structural commitments include the Applicants' agreement not to divest Brandon Shores, Crane or Wagner to any purchaser that owns three percent or more of the installed capacity in the overall PJM market or in the MAAC or 5004/5005 submarkets.[213] The behavioral commitments include restrictions on the retirement of capacity resources by the Applicants, such as the Applicants' agreement not to retire any generating unit unless it has failed to clear the auction and the Applicants have provided an economic analysis supporting the retirement decision.[214] Additionally, the Agreement requires the Applicants to offer any generation capacity uprates into the RPM auction subject to offer

[209] *Id*. at 16.
[210] Schitzer Surrebuttal at 6.
[211] Schnitzer Market Power Rebuttal at 22-23.
[212] Schnitzer Rejoinder Testimony at 7.
[213] IMM Settlement Agreement, at ¶ 1.
[214] *Id*. at ¶ 2(a)(ii).

caps.[215] The Applicants must also offer all peaking units into the PJM energy markets at specified capped prices and their bidding and scheduling of resources into PJM energy markets must reflect actual physical parameters and limitations.[216] Finally, the Agreement requires the Applicants to offer the same units and quantities post Merger which they historically offered into bid-based ancillary services markets prior to the Merger.[217] As negotiated in the IMM Settlement, the behavioral commitments would sunset ten years after the closing date of the Merger.

f. *Party Response to IMM Settlement*

Mr. Hahn criticized the IMM Settlement for over-reliance on behavioral commitments to mitigate market power. He argued that the behavioral commitments do not change the market screen failures, which require a structural remedy.[218] The Settlement's behavioral commitments are also inadvisable in his view because they will require persistent monitoring to ensure compliance and because the Settlement contains no penalties for non-compliance.[219] He observed "whenever there are behavioral rules, there will always be smart people seeking ways to circumvent them."[220]

Drs. DeRamus and Yang testified that the IMM Settlement sufficiently addressed concerns regarding the need to restrict the sale of the divested units to new or small market participants. However, they stated that the Settlement failed to address issues related to the risk of retirement of those units.[221] If that contingency materialized, the

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[215] This measure addresses a long-standing IMM concern that unlike existing capacity, uprates in PJM are not subject to certain RPM market power mitigation rules.
[216] IMM Settlement Agreement at ¶¶ 2(a)(i) and 2(b)(iii)-(v).
[217] *Id*. at ¶ 2(c).
[218] Hahn Surrebuttal at 17.
[219] *Id*. at 17.
[220] Id. at 19.
[221] DeRamus and Yang Joint Surrebuttal at 12.

economic costs to Maryland ratepayers through elevated energy and/or capacity prices could be substantial. Likewise, MEA argued that the IMM Settlement was insufficient because of the retirement risk of Crane and Wagner as well as the overall lack of material commitments by the Applicants to make the Merger in the public interest.

g. *Joint Settlement*

On December 5, 2011, the Applicants filed their Initial Brief, which outlined a number of additional commitments beyond the concessions made in the IMM Settlement. Some of those commitments involved further market power mitigation, including a proposal to develop 175 MW of additional generation, predominantly within the 5004/5005 submarket of PJM.[222] Nevertheless, those commitments were shortly subsumed within a more comprehensive settlement agreement reached with the State of Maryland and the Maryland Energy Administration, the Mayor and City Council of Baltimore, and the Baltimore Building and Constructions Trades Council, AFL-CIO ("the Joint Settlement.")

The Joint Settlement contains several material commitments pertaining to market power. Most significantly, the Settlement requires the Applicants to develop between 285 and 300 MW of new generation in Maryland within the ten-year period following the Merger. Specifically, the Applicants commit to developing 120 MW of natural gas-fired generation in the 5004/5005 submarket that will be placed on-line by December 2015. Additionally, the Applicants will develop 125 MW of Tier 1 renewable resources that will be placed online by January 15, 2022, though at least 50 MW of the 125 MW will begin operation by December 31, 2016.

[222] Applicants' Initial Brief at 3.

The Joint Settlement also contains provisions for new animal waste-to-energy generation.[223] The Settlement provides MEA with the discretion to elect either (i) a subsidy of $60 per MWh paid by Exelon for the duration of a 20-year power purchase agreement (or $70 per MWh of output delivered for the duration of a 15-year power purchase agreement) to support the development of up to 10 MW of animal waste generation, or (ii) construction of a 25 MW plant primarily combusting animal waste if certain legislation is enacted by July 2016 related to renewable energy credits ("RECs") for animal waste. The Settlement additionally provides that 30 MW of solar generation will be developed within the 5004/5005 submarket by December 2015 through a request for proposals ("RFP") or on a merchant basis. Of that 30 MW of solar capacity, Exelon will construct and own not less than 10 MW on sites owned or leased by Baltimore City. Finally, the Settlement states that the Applicants will provide $32 million of funding for purposes of realizing the development of offshore wind energy in Maryland. The new resources and timelines are presented in the table below.

Table 3: Joint Settlement Capacity Commitments [224]

Type of Capacity	**Within Maryland Portion of 5004/5005 Region**	**Within Maryland but not Necessarily in 5004/5005**
Tier 1 Renewable	30 MW Solar by Dec. 2015	• 125 MW by 2022 (at least 62.5 MW of which will be wind) • 50 MW of the 125 MW will begin operation by Dec. 2016
Fossil Fuel Generation	120 MW CT by Dec. 2015	0 MW
Other Tier 1 Renewable Support	10 MW poultry litter (or 25 MW poultry litter if certain legislation passed by 2016)	0 MW

[223] The fuel source will most likely be poultry litter.
[224] *See* Schnitzer Additional Testimony at page 4. Despite Mr. Schnitzer's testimony to the contrary regarding the location of the 10 to 25 MW animal waste facility, we see no requirement in the Joint Petition (at 12-13) that the animal waste plant be built in the 5004/5005 submarket of Maryland.

The Joint Settlement contains certain market power mitigation provisions unrelated to the development of new generation. Specifically, the Applicants committed to provide notice to the Commission of any unresolved dispute they might have with the Market Monitor regarding the IMM Settlement.[225] Additionally, they agreed to file with the Commission any future modification of the terms of the IMM Settlement and agreed that the Commission "shall have the authority to enforce the IMM Settlement."[226] The Settlement provides that Wagner, Crane and Brandon Shores will be divested as a group, rather than sold individually, a matter which had previously been unresolved.[227] Finally, during the evidentiary hearing, the Applicants committed to not permit a net reduction in employment due to involuntary attrition at the three divested plants for two years by incorporating that requirement into the bidding conditions when they sell the plants.[228]

Mr. Schnitzer filed testimony in support of the Joint Settlement on behalf of the Applicants. He asserted that the Applicants' new generation commitments were made to directly address the concerns articulated by Staff witness Dr. DeRamus[229] during the evidentiary hearing that the risk of retirement of Crane and Wagner necessitated the addition of 150 MW of new capacity in the 5004/5005 submarket. [230] By committing to construct at least 150 MW of generation, therefore, the Applicants hoped to fully resolve the market power concerns of Dr. DeRamus and the Commission.

Mr. Schnitzer asserted that although the 150 MW of new generation scheduled to be on-line by 2015 will be owned by the Applicants, it will be "new entrant equivalent"

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[225] We have removed the qualification from this condition (Condition # 8 in Section IV *infra*) and request that the Applicants provide notification to the Commission of *any* dispute with the Market Monitor.
[226] Joint Petition for Approval of Settlement at 28.
[227] Tr. at 390.
[228] *Id*. at 1461-1462.
[229] *See* Tr. 2641-56.
[230] Schnitzer Additional Testimony at 2.

and lead to "the maximum possible market power mitigation."[231] In other words, he argued that additional ownership of generation by the merged entity in PJM would not create new market power concerns. Mr. Schnitzer reasoned that the combination of existing PJM energy and capacity rules, coupled with the added provisions of the IMM Settlement and the types of generation resources committed to in the Joint Settlement prevented the Applicants from exerting market power. For example, the 120 MW of natural gas-fired generation will be offered into the PJM capacity market at the Minimum Offer Price Requirement ("MOPR") floor price, a price that a new entrant could not bid below. After clearing the MOPR, the capacity from this new generation will be bid subject to existing unit offer caps in all subsequent RPM auctions.[232] Regarding energy markets, the IMM Settlement will require the Applicants to offer the new natural gas-fired generation into PJM at cost-based caps. While the new solar and wind capacity will not be subject to those caps, Mr. Schnitzer maintained that those units – as intermittent resources – would be "price takers" for both the day-ahead energy market as well as capacity auctions.[233]

Dr. Pace testified that the Joint Settlement effectively resolves all market power issues. He asserted that the new generation provisions of the Settlement are "unambiguously pro-competitive" from an economic vantage point, because the expansion of electric supply in the market will move the supply curve to the right, lowering price.[234] He added that from a practical standpoint, "[m]aking the investment to

[231] *Id*. at 3, 5.
[232] Schnitzer Additional Testimony at 6.
[233] *Id*. at 7-8.
[234] Pace Additional Testimony at 15-16. *See also*, Applicants' Exhibit 81.

construct and maintain new capacity cannot possibly be a profitable strategy unless the additional output is offered and sold in the market." [235]

h. Party Response to Joint Settlement

Dr. DeRamus testified that the new generation commitments contained in the Joint Settlement in conjunction with the Applicants' prior market power mitigation commitments "adequately address all of the market power concerns raised in my Direct and Surrebuttal Testimony."[236] Although Dr. DeRamus advised the Commission in earlier testimony to require the Applicants to make a compliance filing regarding the retirement risk of Wagner and Crane, he retracted that recommendation as a result of the Applicants' latest commitments. He testified that the timing of the new generation commitments, specifically the 160 to 175 MW to be placed in service by December 2015, adequately addresses the risk of retirement of Crane and Wagner.[237] Even though, if approved, the Applicants would own more generation in PJM as a result of the Joint Settlement provisions, Dr. DeRamus explained that no new market power concerns were raised because the addition of new generation capacity to a market provides "unambiguous pro-competitive benefits by reducing both energy and capacity prices in Maryland."[238] He also testified that the new generation would benefit the public by providing employment and economic stimulus to the Maryland economy, enhancing reliability through additional peaking capacity, and increasing the use of renewable energy.

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[235] *Id*. at 16.
[236] DeRamus Reply Testimony at 2.
[237] *Id*. at 4.
[238] *Id*. at 3.

Dr. Bowring testified that the Joint Settlement, including its new generation commitments, would not raise additional market power concerns, with the exception of the up to 25 MW animal waste generator. He asserted that because this generation was potentially dispatchable, it could be used to exercise market power. However, Dr. Bowring stated that subjecting the animal waste capacity to the Combustion Turbine behavior rules of the IMM Settlement would adequately address all market power issues raised by the capacity additions of the Joint Settlement, and the Applicants agreed to make that additional commitment.[239] Dr. Bowring clarified that the solar and wind generation additions would not raise market power issues because they would not be dispatchable based on prevailing hourly prices but would be offered into markets on a must-run basis.

The Environmental Intervenors filed comments supporting the Joint Settlement and encouraging approval of the Merger. Regarding the market power concerns raised by their witness David Schlissel earlier in the proceeding, they stated that the risk of retirement of Crane and Wagner was adequately mitigated by the Joint Settlement commitment to develop new generation.[240]

Mr. Hahn filed testimony critical of the Joint Settlement on behalf of OPC. He stated that the new generation commitments made by the Applicants would exacerbate rather than alleviate market power concerns.[241] He also testified that the Joint Settlement failed to address the market power issues he had raised in earlier testimony. Those

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[239] Review of the Potential Impact of the Proposed Capacity Additions in the State of Maryland's Joint Petition for Approval of Settlement at 2. Hearing Transcript at 3541-42. Darryl Bradford, Exelon's General Counsel, agreed on behalf of Exelon to make the animal waste generating facility subject to the list of peaking facilities covered by the IMM Settlement.
[240] January 20, 2012 Comments of Environmental Intervenors at 2.
[241] Hahn Additional Reply at 2.

concerns include (i) the 500 MW block power sale is an ineffective mitigation measure; (ii) the IMM Settlement is flawed because it relies on behavioral provisions that are inherently difficult to enforce and should be replaced by structural commitments such as increased divestiture; and (iii) the Applicants' mitigation plan to divest 2,443 MW is inadequate because of the risk of retirement of Crane and Wagner and should be increased by 637 MW to 3,080 MW of divestiture. Additionally, Mr. Hahn revised the amount of divestiture he is recommending in his latest testimony. Because the Applicants propose to construct new generation capacity that affects the HHI calculation, Mr. Hahn recommended that the Commission require the Applicants to increase their total divestiture to between 3,250 MW to 3,650 MW of summer derated capacity in the 5004/5005 market.[242]

i. <u>*Commission Decision*</u>

We are not persuaded that *individually,* the market power provisions and restrictions contained in the original commitments, the IMM Settlement, the Joint Settlement, or agreement with the Anti-trust Division of the United States Department of Justice necessarily would resolve the market power concerns raised by the proposed Merger. Each expert on the subject provided testimony suggesting that their individual proposed remedies, be they structural or behavioral, were sufficient. When we reconvened our hearings in January subsequent to the Joint Settlement, we heard almost unanimously through testimony from Messrs. Deramus and Schnitzer and Drs. Bowring and Pace that the combination of commitments presented safeguards over and above what was necessary, albeit for distinct reasoning from each witness. In an effort to ensure

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

protection from immediate harm, or an incremental *risk of harm* to ratepayers, we therefore accept the Joint *and* IMM Settlements and *all* of the market power conditions made by the Applicants throughout this proceeding, including amendments made on the stand, and will incorporate them collectively as enforceable conditions in this Order, with one exception: we will modify slightly the sunset provision that lifts certain restrictions automatically in ten years' time and we require Commission approval for any change to the IMM Settlement.

Analysis of Market Power Pursuant to PUA § 6-105

As a preliminary matter, we note that the various market power witnesses utilized different methods to analyze the market power implications of the Merger and the effectiveness of different mitigation measures. For example, Dr. Pace relied on FERC's Appendix A Analysis, including changes in HHI, while the IMM employed the Three Pivotal Supplier Test and actual PJM market data, and Dr. Wolak used the oligopoly equilibrium model. Some parties criticized particular methods. Dr. Wolak argued that HHI does not adequately account for generator incentives while Drs. DeRamus and Yang asserted that structural screens such as HHI "may not fully capture the potential for the exercise of post-merger market power, nor do they predict the likely price impact of a merger."[243] We have not limited ourselves to one particular method. As OPC stated, "the Maryland Legislature has established a different standard than the one FERC uses to review mergers."[244] Pursuant to PUA § 6-105, the applicants of any proposed merger involving a Maryland public service company have the burden of demonstrating that the merger is "consistent with the public interest, convenience, and necessity, including

[243] DeRamus and Yang Joint Direct at 7.
[244] OPC Reply Brief at 16.

benefits and no harm to consumers." The introduction of or increase in market power as a result of a merger, absent mitigation, would constitute harm that would prevent our approval of a proposed merger. Accordingly, we will consider all credible evidence related to market power and not limit our analysis to one particular method.

Absent Mitigation, the Merger Poses Significant Market Power Concerns

We reject the characterization by Dr. Pace that the market power screen failures of the Merger as described in the original application were "minor."[245] The combined assets of the merged company are substantial, and without the market power mitigation measures agreed to in the IMM and Joint Settlements would have led to the increased presence and potential exercise of market power.[246] For example, without mitigation, Dr. Pace's analysis for the MAAC capacity submarket demonstrated a post-Merger HHI of 1023, which is considered to be moderately concentrated. Moreover, his evaluation showed an HHI change of 238 points, well above the 100 point threshold. Similarly, the EMAAC capacity submarket evidenced a post-Merger HHI of 1256 and an HHI change of 133, indicating a material increase in market power.

Similarly, Mr. Hahn observed that of the price points analyzed by the Applicants, AP South and the 5004/5005 submarkets failed the screen criteria 100 percent of the

[245] Pace Direct at 9.

[246] We find that the successful exercise of market power is inimical to competitive markets, produces inefficient market solutions, and can lead to artificially high prices that are not just and reasonable. On behalf of OPC, Mr. Hahn succinctly articulated the market power incentives of generators and the attendant risks to consumers. He stated:

> "In concentrated, uncompetitive markets where some participants may have a large portfolio of generating assets, they might be able to purposely bid high or withhold one particular set of units, and drive up market clearing prices received by all units operating in that hour. The increased market revenues from the remaining units due to higher market prices can more than offset the loss of market revenues from the withheld units. . . . The effect of these higher market prices is to also increase the cost to load serving entities, which would translate to higher electric rates in critical markets, such as Maryland and eastern Pennsylvania." Hahn Reply at 29.

time.[247] Drs. DeRamus and Yang also concluded that without adequate mitigation, horizontal merger analysis demonstrates "significant screen failures in all of the geographic markets under study" including the 5004/5005 submarket, "where significant screen failures occur in all load/price conditions…"[248] Finally, the IMM testified that the Merger increases HHI levels in MAAC by more than 200 points.[249] That finding is especially troubling given the IMM's "ongoing conclusion that market power is endemic to the capacity market in PJM [because] a small number of owners control a large portion of total capacity…"[250] Exelon has historically possessed either the largest or the second largest market share in RPM and Constellation has consistently been within the top ten.[251] The fact that the IMM found that the Merger, as it was proposed, created an increase in structural market power over the pre-Merger market structure demonstrates that the HHI violations are not "minor."[252]

The Terms and Limitations of the IMM Settlement

The IMM Settlement provides valuable behavioral and structural restrictions that significantly mitigate the ability of the Applicants to exercise market power. We adopt the IMM Settlement and all of the commitments provided therein as conditions of this Merger Order, but with certain modifications. The Joint Application stated that Exelon "shall file with the Commission any modification to the terms of the IMM Settlement."[253] As written, that provision leaves inappropriately wide leeway for the Applicants to

[247] Hahn Reply at 24.
[248] DeRamus and Yang Direct at 14.
[249] Review and Analysis of the Proposed Merger of Exelon and Constellation, ("September 16, 2011 IMM Testimony") at 81.
[250] September 16 Testimony of IMM at 91.
[251] *Id*. at 91.
[252] September 16, 2011 Testimony of IMM at 84, 90.
[253] Joint Petition for Approval of Settlement at ¶ 40.

change the conditions of the IMM Settlement, subject only to the requirement to provide the Commission with notification of the change. Because the IMM Settlement commitments are made conditions of this Merger Order, we will require the Applicants to file and obtain approval for any requested change to the IMM Settlement. PJM ICC introduced a related issue involving the ability of the Applicants to leave PJM voluntarily, thereby potentially escaping the commitments made in the IMM Settlement.[254] We clarify, therefore, that the Applicants' continued membership in PJM is an implied commitment in the IMM Settlement, and thus a condition of approval.

The IMM Settlement provides at Paragraph 2(d) that the term applicable to the behavioral commitments will be ten years. During the evidentiary hearing, the Commission asked several questions about the implications of the expiration of these behavioral commitments if the constrained conditions of the market do not improve or deteriorate. Dr. Pace responded on behalf of the Applicants:

> I think the logical answer to that has to be that if you deem the behavioral constraints and restrictions to be a necessary part of the solution now, given the structure of the industry, and you assume the industry doesn't change over ten years, that you would still deem them to be a necessary part of the solution at that point in time, unless something else were done like some additional divestiture to address the issue.[255]

Despite Dr. Pace's reference to further divestiture, however, we would not independently have jurisdiction to order additional divestiture ten years hence if market power concerns

[254] PJM ICC Supplemental Brief at 15. "The IMM Settlement would become meaningless if, at some point in the future, Applicants decide to withdraw from the PJM RTO." PJM ICC also asserts that an issue exists as to whether the Applicants would be bound by the IMM Settlement if the contract of Monitoring Analytics to act as the IMM was not renewed. PJM ICC Supplemental Brief at 16. We do not see an issue here. The IMM testified that the Applicants would be bound by the IMM Settlement regardless of which entity/person succeeds Monitoring Analytics in the IMM role and we agree with that interpretation. The Applicants will be bound by the IMM Settlement even if the contract for Monitoring Analytics is not renewed.

[255] Tr. 3869. Dr. Bowring also expressed concern if the market remained as constrained as it is currently, stating "if the market starts to look then as it does now, or more concentrated, then yes, you would have to worry." Tr. 3725.

reemerge after the expiration of the behavioral conditions of the IMM Settlement. That outcome leaves open the possibility that the Applicants could exercise market power after the expiration of the IMM Settlement.

Based on our questions of the Applicants' witnesses concerning this subject, it does not appear that the Applicants view the exercise of market power as a right to be invoked after the expiration of the ten-year term of the IMM Settlement. That would be an untenable position. It is also clear from the evidentiary hearing, however, that no party knows with any certainty what the state of the electric market will be in ten years, which leaves open the possibility that the market could be as constrained or more constrained than it is currently.

We will therefore require as a condition of Merger approval a possible extension of the behavioral commitments of the IMM Settlement. Specifically, the terms of the IMM Settlement shall expire in 10 years, provided that the Commission may extend the terms of the IMM Settlement if, after an evidentiary hearing addressing market conditions, the Commission determines that the expiration of the behavioral remedies in the IMM Settlement will, through the Applicants' increased ability to exercise market power, pose a significant risk of harm to Maryland ratepayers. The IMM is requested to provide to the Commission within the ninth year of the IMM Settlement an evaluation of the effectiveness of the remedies still in place, and the impact of the expiration of the IMM Settlement on the ability of the Applicants to exercise market power in the markets controlled by the IMM Settlement. Although it is likely that some combination of market rules and market conditions will change in the intervening years, this modification ensures that BGE's customers (and the citizens of our State as a whole) are protected in the perhaps unlikely event that market conditions remain static or even more concentrated for the expected life of these conditions.

Behavioral Conditions of IMM Settlement and the 500 MW Energy Sale

Mr. Hahn criticized the behavioral commitments contained in the IMM Settlement as well as the short-term 500 MW sale of energy, arguing that a permanent structural remedy is required to fully address market power issues. We disagree, and find that the behavioral commitments made in the IMM Settlement provide significant protection from market abuse. For example, the IMM Settlement Agreement will control bidding by Applicant generating units accounting for approximately 75 percent of the merged company's post-divestiture capacity in the 5004/5005 and AP South submarkets.[256] Additionally, 7,000 MW of the Applicants' 7,471 MW of baseload resources in the 5004/5005 submarket are nuclear resources, which in Dr. Pace's opinion have "no operational flexibility," and cannot be effectively withheld from the market.[257] The Applicants possess a significant quantity of peaking units, the vast majority[258] of which are covered by bidding restrictions contained in the IMM Settlement. Finally, the Applicants possess only 1,344 MW of mid-merit capacity, which while not constrained by the IMM Settlement, constitute only 8 percent of the mid-merit capacity in the 5004-5005 submarket, thereby limiting the effectiveness of withholding. Those IMM restrictions, as well as the extension of those restrictions to all of the new resources committed to in the Joint Settlement, will provide valuable mitigation.[259]

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[256] Pace Additional Testimony at 14.
[257] *Id*. at 12, 14.
[258] Dr. Pace notes that the Applicants' Muddy Run pumped storage plant is the only peaking unit not covered by the IMM Settlement's behavioral restrictions. Pace Additional Testimony at 12.
[259] Likewise, we find that behavioral mitigation applicable to the Delta generation facility located in EMAAC involving the use of offer caps until the tolling agreement expires in 2017 is reasonable.

We also find that the 500 MW sale of energy is a reasonable mitigation measure, given that it resolves a temporary problem. Indeed, when the marketing agreement between Constellation and EDF terminates at the end of 2014, there will be no need for this particular mitigation measure. Both Drs. DeRamus and Pace testified that the long-term sale by the Applicants of the 500 MW of power effectively removes the ability of the Applicants to market that power in the short-term markets.[260] Dr. DeRamus concluded that given the short-term problem the 500 MW sale was intended to address, requiring a permanent structural solution would be "overkill."[261] He added that the use of the power sale was "perfectly consistent with the use of contracts as interim mitigation."[262] Moreover, he testified that the Constellation power purchase agreement in question related to a portion of the output of the Calvert Cliffs nuclear facility that would be implausible for the Applicants to withhold from the market.[263] For those reasons, we find that this short-term mitigation measure prevents harm to Maryland ratepayers and is reasonably tailored to meet this short-term exposure caused by the Constellation-EDF agreement.

FERC's Duke Energy / Progress Energy Decision

Mr. Hahn cited the recent FERC decision in the Duke-Progress merger to support his criticism of the 500 MW energy sale proposed by the Applicants as a mitigation measure.[264] Specifically, he observed that FERC rejected the "virtual divestiture"

[260] Tr. at 2598, 2644.
[261] *Id*. at 2644.
[262] Tr. at 3973.
[263] *Id*. at 2599. He stated "my conclusion was that it was going to be adequate was further supported by the fact that it is a nuclear unit and . . . the prospects of withholding power or engaging in any market power type exercise with a nuclear unit is far less than if we're talking about a combined cycle facility."
[264] Hahn Additional Reply at 9-10. *Duke Energy Corp*., 137 FERC ¶ 61,210 (2011).

proposed by Duke-Progress to mitigate market power. Likewise, Mr. Hahn argued that the Commission should reject the Applicants' proposed energy sale.

Of course, FERC's decision regarding the sufficiency of market power mitigation in the Duke-Progress merger before FERC is not controlling on this Commission's decision as to whether the Exelon Constellation Merger will create harm pursuant to PUA § 6-105 (not least because that proceeding is still under way). Nevertheless, the decision could contain persuasive argument as to why temporary power sales should not be accepted as mitigation measures, as OPC argues. We do not find the decision applicable to the facts of this proceeding, however. Dr. Pace testified to the several distinguishing factors in the Duke-Progress decision, including (i) the temporary power sales offered in the Duke-Progress proceeding were the only mitigation measure to which the applicants committed; (ii) the mitigation measure would convey only excess energy available after native load obligations were met; (iii) the energy would be offered only on a day-ahead basis; (iv) the price was not clearly specified or locked in; and (v) the energy sales could be interrupted in the event of a reliability problem on the Duke or Progress system.[265] The Exelon-Constellation proceeding stands in contrast. The 500 MW sale is only one part of a comprehensive market power mitigation package, the sale is for long-term firm power supplied on a 24/7 basis without exceptions, and the quantity offered and time period covered are clearly defined. It is additionally noteworthy that FERC did not find conclusively that temporary power sales are inadequate mitigation measures, it merely

[265] Pace Additional Testimony at 20. Dr. DeRamus concurred that the FERC decision was inapplicable to the present proceeding, stating: "The market power mitigation proposed in the Duke-Progress merger is very different both in terms of the market context, the scope of issues that it is intended to address, the type of product being offered, and its actual implementation details as compared with the 500 MW long-term sale proposed by the Applicants in this proceeding." DeRamus Reply at 16.

found the single mitigation measure offered in Duke-Progress to be insufficient.[266] We therefore find that FERC's decision in the Duke-Progress order is inapplicable to the facts of this proceeding.

<u>The Risk of Retirement of Crane and Wagner</u>

We also find that the Applicants' initial mitigation plan was inadequate because it did not account appropriately for the risk that the Crane and Wagner plants could be retired in the near term. Even Dr. Pace conceded that if the Crane and Wagner units retire in the near future, HHI screen failures will occur.[267] Absent the additional resources committed by the Applicants in the Joint Settlement – a structural remedy rather than a behavioral one –the significant risk that Crane and/or Wagner would retire and undo vital market power mitigation would constitute harm and prevent Merger approval.

Despite lengthy testimony by several parties, the question of whether Crane and Wagner will retire is left unanswered, but the risk is real. Drs. DeRamus and Yang testified that in order to comply with CSAPR and NESHAP regulations, Crane and Wagner will likely require the installation of some combination of sulfur dioxide controls, such as limestone-based flue gas desulfurization ("FGD") or dry sorbent injection ("DSI").[268] If DSI is not feasible at Wagner or Crane, the Applicants will be required to control acid gas through the materially more expensive FGD.[269] In the opinion of Drs. DeRamus and Yang, neither Wagner nor Crane would be economically

[266] Indeed, FERC cited three prior decisions in which the agency held that power sales not tied to specific generation units nevertheless provide adequate mitigation, including *Ameren Services Co.*, 101 FERC ¶ 61,202 (2002), *American Electric Power Co.*, 90 FERC ¶ 61,242 (2000) and *CP&L Holdings, Inc.*, 92 FERC ¶ 61,023 (2000).
[267] Pace Additional Testimony at 7-8.
[268] DeRamus and Yang Joint Direct at 46.
[269] *Id*. at 5.

viable if the units required FGD retrofits.[270] Accordingly, they conclude that "Crane and Wagner are only marginally economic at best, and are at risk of being unable to generate sufficient revenues to cover the additional investment needed in pollution control equipment."[271] We agree that a significant risk of retirement exists and that the new resources committed in the Joint Settlement are necessary to mitigate that harm. However, the new gas-fired generation offered in the Joint Settlement serves as a structural remedy to the risk that Crane and Wagner will be retired, and thus obviates the need for us to direct the Applicants to identify a qualified and interested buyer for the generation plants it intends to divest or for any additional proceedings to examine the risk of retirement.

The Joint Settlement

We find that the market power provisions of the Joint Settlement, when combined with the other commitments reached in the IMM Settlement and made by the Applicants throughout this proceeding, mitigate the market power risks presented by the Merger.[272] During the evidentiary hearing in this proceeding, Dr. DeRamus testified that the risk of retirement of the Crane and Wagner coal-fired power plants could be mitigated by requiring the Applicants to implement new entry of approximately 150 megawatts.[273] After the filing of the Joint Settlement, he concluded that "the provisions of the Joint Petition with regard to the Applicants' commitment to build new generation in Maryland, in conjunction with the Applicants' prior market power mitigation proposals and the [IMM Settlement], adequately address all of the market power concerns raised in my

[270] *Id*. at 10.
[271] *Id*. at 8.
[272] Drs. DeRamus (Tr. at 3709) and Bowring (Tr. at 3541-42) testified during the evidentiary hearing that the market power mitigating commitments contained in the Joint Settlement and IMM Settlement adequately addressed all of the concerns they had regarding market power.
[273] Tr. 2641-56.

Direct and Surrebuttal Testimony."[274] Indeed, Dr. DeRamus testified that "[t]he total amount of the Applicants' proposed new generation is in excess of the amount that I considered strictly necessary to address the market power concerns with the potential retirement of Crane and Wagner."[275] Dr. DeRamus explained that the 175 MW of total new capacity that the Applicants committed to bring on-line by 2015 is likely to have a greater pro-competitive impact than an equivalent amount of generation redistributed through divestiture.[276]

Applicability of HHI Analysis to New Generation Commitments

Mr. Hahn performed an additional HHI analysis on the Applicants reflecting their commitment in the Joint Settlement to construct 285 to 300 MW of new generation. He determined that this commitment exacerbated market power concerns, raising HHI to 133 and requiring the divestiture of between 3,250 to 3,650 MW of capacity to bring the HHI to within acceptable levels.[277]

In contrast, Dr. Pace testified that HHI analysis is regularly conducted to evaluate changes in market concentration after mergers, but that it is not designed to judge the competitive effects of capacity additions by existing participants in a market. While the calculations can be made mathematically, "the impact on the market of a capacity expansion versus a merger of two suppliers is vastly different."[278] Dr. DeRamus testified similarly, stating that the "entire point of the HHI analysis is to isolate the change in market concentration resulting from the merger itself, assuming a fixed amount of

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[274] DeRamus Reply at 2.
[275] *Id*. at 5.
[276] Id.
[277] Pace Additional Testimony at 4-6.
[278] *Id*. at 19.

capacity." He concluded that it was not appropriate to include in an HHI analysis the capacity additions committed to as a Merger settlement condition.[279]

We find that the small change[280] in HHI numbers resulting from the commitment to build new generation to which Mr. Hahn testified does not demonstrate an effective increase in market power. As Staff asserted, "the new generation proposed in this proceeding in no way represents an incremental exercise of market power within the framework established by the [DOJ/FTC Horizontal Merger] Guidelines."[281] To the contrary, we find that the introduction of new generation to the market adds a valuable mitigating effect, as discussed below. That is especially true, given that the new generation will be subject to the behavioral constraints committed in the IMM and Joint Settlements.

<u>Market Power Implications of New Generation</u>

Mr. Hahn testified that new generation owned by the Applicants will heighten market power concerns because it will give them a greater presence in the market. Dr. Bowring agreed that in some circumstances, additional capacity introduced by a market participant could increase market power. However, he testified in these proceedings that the Applicants would be unable to exert market power effectively because of the behavioral restrictions contained in the IMM Settlement and other market power commitments made in this proceeding. He also testified that the combined effects of the new capacity resources and the behavioral restrictions contained in the IMM Settlement

[279] MEA agreed that the HHI analysis is "of limited use in evaluating competitive effects post-merger." MEA Reply Brief at 14.

[280] OPC admitted that the increase in market concentration resulting from the new capacity additions is "modest." OPC Reply Brief at 11. OPC also noted that in calculating the change in HHI, Mr. Hahn assumed a "worst case scenario" that all the new generation scheduled to be built through 2022 would be built immediately after the merger is closed. *Id*. at 12.

[281] Staff Omnibus Brief at 12.

would result in a more competitive market.[282] In contrast to Mr. Hahn, Dr. DeRamus testified that new generation, even if it is owned by the Applicants, will provide a pro-competitive benefit as long as it is truly incremental, as Dr. DeRamus found it to be with regard to the Joint Settlement. He explained that new generation expands the limits of the aggregate supply curve, reducing price and increasing output.[283] He added that even without collusion, it is easier for sellers to withhold in highly concentrated markets to increase the price of their remaining resources. New capacity additions therefore discourage withholding, in his opinion.

Additionally, Dr. DeRamus asserted that after building the new generation, the Applicants would have an incentive to bid it into the market to at least cover their variable costs rather than withholding it and foregoing profits. He added that it was highly unlikely that the Applicants would "spend hundreds of millions of dollars on new generation investments in order to then withhold that new capacity from the markets."[284] Moreover, he noted that the renewable capacity, as an intermittent resource, would be bid in as a "price taker" so was particularly unsusceptible to withholding strategies.[285]

We agree with Dr. DeRamus on this point. We find that the new generation that would not otherwise have been built but for this Merger and whose market power is restricted through the provisions of the IMM and Joint Settlements provides a pro-competitive benefit to Maryland markets and appropriately reduces the ability of the

[282] Tr. at 3724-25. Specifically, he stated: "Under our behavioral rule in the Settlement, we know it's going to be competitive. So therefore it will make the market more competitive. That's a good thing."
[283] DeRamus Reply at 7-8.
[284] *Id*. at 11.
[285] *Id*. at 9.

Applicants to exercise market power.[286] After building the significant quantities of new generation required by the Joint Settlement, the Applicants would have to withhold an entire equivalent amount in order to return to the *status quo* and then withhold an additional amount in order to exert pre-Settlement levels of market power, all while foregoing a return on the newly constructed generation. Moreover, the behavioral restrictions of the IMM Settlement and the meteorological constraints of the new renewable resources would further restrain the Applicants' ability to exercise market power. We therefore find that the commitment to build new generation provides valuable market power mitigation.

2. **Local Control of BGE**

In the *FirstEnergy* Order, we found a source of potential harm to local ratepayers from the facts that "Potomac Edison will become a small, and more distant, part of a much larger utility holding company"[287] and that "the newfound size and corporate relationships exposes Potomac Edison to risks it does not face now."[288] These concerns are even more troublesome in the present case, especially since the Merger before us is proposed for reasons that have nothing to do with BGE, but rather to match Exelon's generation assets with CEG's retail energy business.[289] Post-Merger, BGE's percentage of its parent company's revenue will decline substantially,[290] potentially reducing the importance of BGE and our regulatory oversight to the parent company.

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[286] We offer no opinion on whether new generation is always pro-competitive, regardless of other mitigation. Under the facts of this proceeding, however, the new generation is properly constrained through the behavioral mitigation of the IMM Settlement, as testified to by Dr. Bowring. Tr. at 3723.
[287] *FirstEnergy* Order at 53.
[288] *Id.*
[289] Tr. 235-236 (Shattuck)(explaining this to be the "leading strategic aspect of the merger").
[290] BGE currently represents 33% of Constellation's revenue. Post-merger, that figure will be 8-9%. Hempling Direct Testimony at 23 (citing Crane deposition).

On the one hand, there is no dispute that BGE will lose a degree of local control post-Merger. Indeed, it is the acquisition of this outside control over BGE that Exelon is applying to receive and that gave rise to these proceedings. BGE's CEO will report to Mr. O'Brien, Exelon's anticipated CEO of Exelon Utilities. BGE will be subject to the "Exelon Management Model" and the "Exelon Utilities Management Model."[291] Exelon will expect BGE to meet its utility reliability, dividend, rate of return and capital structure targets. And BGE will be subject to the oversight of Exelon Utilities, the Executive Committee and Exelon's EDOC.

OPC in particular has expressed concerns about BGE's management under the new Exelon model.[292] OPC contends that BGE's interests will be a lower priority within a post-merger Exelon and that Exelon's intent to standardize practices among its three utilities may conflict with Maryland-specific policies and goals.[293] We understand the inevitable potential for conflict between the goals of a holding company and its subsidiaries. But we are comfortable that we have removed the potential opportunities for mischief through our extensive ring-fencing of BGE, and through our acceptance of additional measures such as the independent and local board members, executive leadership residence in Maryland, retention of divestiture rights, protection of BGE employee levels, and commitments to certain reliability and service quality metrics

[291] Mr. O'Brien testified that he intends "that we would develop a standard management model for the utilities so that they have programs, policies, procedures and processes that drive high performance."). Tr. 1002 (O'Brien).

[292] Brockway Additional Reply Testimony at 3-4 ("Exelon's control will be a structural reality, and any collaborative approach to subsidiary management or responsiveness will be purely discretionary.").

[293] OPC Initial Brief at 12-13. OPC points to ComEd's success in convincing the Illinois General Assembly to permit recovery for smart meter installation through a rate rider, thereby reversing a decision by the Illinois Commerce Commission to disallow such a rider. Although this Commission disallowed BGE's request for a similar rider in Case No. 9208 (Order No. 83531), we cannot conclude that a contrary result in a different state in any way harms BGE or threatens to harm BGE going forward. We will continue to regulate BGE based upon our view of the best interests of ratepayers.

described below. Just as important, there is nothing in the Merger that will otherwise reduce our statutory power to ensure BGE complies with the specific rulings and policies of this Commission and this State.[294]

OPC also points to Exelon's stated goal of expanding in size either through additional generation assets or additional utilities.[295] However, the Merger proposal under review is evidence that CEG has a similar view of the benefits of expansion, a view that seems to be shared by the industry as a whole and that we recognize as a cause of concern, albeit one outside our authority to reverse given the current legal and policy backdrop we find ourselves in.

We note that both PECO and ComEd have retained significant local control under the Exelon umbrella. Mr. O'Brien, the current CEO of PECO, testified that Exelon has never denied one of his capital requests,[296] and both PECO and ComEd outperform BGE in several reliability metrics.[297] So although we might envision and protect against potential threats from the Merger, Exelon has a long, established track record operating utilities in different states. The record is replete with hypothetical harmful scenarios that might come to BGE, but similar harms could also befall BGE in the absence of the Merger. The ultimate proof will come in the execution, and we cannot find that BGE ratepayers will suffer risks or harms from the Merger under the new Exelon management model that are different than the risks or harms they would face from poor or inattentive local management.

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[294] As an additional potential harm, OPC posits that Exelon's multi-state utility family may harm low-income BGE ratepayers because "[c]ustomer service representatives will have less discretion to provide the specific services relied upon by low-income customers." OPC Initial Brief at 2. We are confident that BGE understands how closely we will review its performance in administering programs for its low-income customers and take appropriate action should that performance decline.

[295] OPC Initial Brief at 13-14.

[296] Tr. 1126 (O'Brien).

[297] *Id*. at 214-217 (Crane/Shattuck); DiPalma/Rafferty Direct Testimony at 19.

Additionally, in this Order we ensure Exelon will take several positive steps to maintain local management of BGE. Its proposed Delegation of Authority for BGE provides BGE's CEO with identical independent approval authority as the current Delegation (up to $25 million),[298] and it increases the BGE Board's authority, by providing independent approval authority for expenditures between $50 and $75 million, authority that currently resides in CEG's Board.[299]

Exelon has committed that BGE will maintain its headquarters in Baltimore, that at least one-third of its Board members will be independent and that a majority will reside within BGE's service territory.[300] BGE's CEO will also reside within BGE's service territory and will sit on Exelon's Executive Committee.[301] Baltimore will also be added to the regular rotation of Exelon's Board, shareholder and Executive Committee meetings.[302]

On balance, we do not find that this geographic reality will cause any harm to BGE ratepayers *per se*, especially in light of the various protective conditions that we include in this Order.[303] The statute does not require that we find harm from the inevitable fact that BGE's ultimate parent will be farther away going forward, and we cannot conclude from the record that Exelon's distance from Baltimore necessarily will affect BGE's management adversely.[304] Exelon's witnesses repeatedly expressed their

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[298] Crane Rebuttal, Ex. CMC-4; DeFontes Rebuttal, Ex. KWD-4.
[299] Crane Rebuttal , Ex. CMC-4; Defontes Rebuttal at 4.
[300] Joint Settlement at ¶ 18.
[301] *Id*. at ¶ 19.
[302] *Id*. .
[303] The human instinct to associate proximity with improved management is strong. However, we can conceive of situations in which proximity causes an insularity that undermines effective management.
[304] In fact, BGE is currently the only investor-owned utility with a Maryland-based parent. Potomac Electric Power Company and Delmarva Power and Light Company are owned by Washington D.C.-based Pepco Holdings, Inc., The Potomac Edison Company is owned by Ohio-based FirstEnergy Corp., and Washington Gas Light Company is owned by Washington D.C.-based WGL Holdings, Inc.

commitment to BGE, its customers and to Maryland on the record during the hearing, and we will not hesitate to remind Exelon of those commitments, and enforce them, should that ever prove necessary.

3. Divestiture

The State Settlement contains a provision that allows severance of BGE from Exelon if, after an investigation and hearing, the Commission makes certain findings based upon clear and convincing evidence that generally indicate that BGE is facing extreme financial hardship as a result of its connection to Exelon.[305] Unsurprisingly, the proposed conditions for divestiture of BGE are lengthy and difficult to meet.

As a preliminary matter, the Settlement Agreement limits severance to four divestiture conditions. Those conditions are (i) a nuclear accident at an Exelon facility that results in a material disruption of operations and material financial loss to Exelon that is not covered by insurance or indemnity, or the permanent closure of a material number of Exelon nuclear plants as a result of such accident, (ii) a bankruptcy filing by Exelon or a subsidiary, subject to certain additional conditions, (iii) the rating for Exelon's senior unsecured debt is downgraded to a rating that indicates "substantial risk" by two of three major credit rating agencies for a period of more than six months, or (iv) Exelon and/or BGE have committed a pattern of material violations of lawful Commission orders or regulations, and after notice and an opportunity to cure, have continued to commit those violations.

It is not sufficient under the Joint Settlement, however, for the Commission to find by clear and convincing evidence that one of those divestiture conditions has

[305] Joint Settlement at ¶ 26.

occurred. The Commission must also find by the same evidentiary standard that (a) a divestiture condition has caused BGE to fail to meet its obligations as a public utility, and (b) divestiture is necessary to allow BGE to meet its obligations and to protect the interest of BGE customers. Quite frankly, we do not agree that we are bound by these specific conditions to call for an investigation and hearing, in considering such a divestiture.

MEA has maintained throughout this proceeding that the Commission should require as a condition of Merger approval that BGE may be removed from the Exelon corporate family if certain extreme contingencies occur, such as Exelon experiencing a catastrophic event that threatens BGE's ability to meet its statutory obligations as a public utility.[306] The agency therefore asserts that the State Settlement condition regarding severance is a significant concession by the Applicants and that it adequately addresses the corporate governance risks associated with the Merger that MEA raised in earlier testimony.

OPC sees the severance provision in a much different light. Ms. Brockway testified that the severance provision may weaken the Commission's authority to regulate BGE effectively by requiring an excessively high evidentiary burden and overly narrow grounds for divestiture.[307] For example, she asserted that a significant accident at a nuclear plant of the type owned by Exelon but not in fact belonging to that company would not trigger the condition, even if the accident caused serious and deleterious financial consequences to BGE because of its relationship with an energy company highly leveraged with nuclear assets. Although she did not provide a legal opinion as to whether the Commission possesses the authority to order divestiture absent the State

[306] Woolf Joint Petition Testimony at 16.
[307] Brockway Additional Reply at 9.

Settlement agreement, she did question "whether any Settlement Agreement provision . . . can lawfully narrow the grounds on which divestiture may be ordered, or prescribe a standard of proof for such an order…"[308] In other words, she expressed concern that the Commission would waive its statutory authority by accepting the condition.

The usefulness of the severance provision hinges in the first place on whether we possess the authority to order divestiture of a utility under exigent circumstances, a question this Commission has thankfully never had to answer. Our statute provides that "[a] public service company shall furnish equipment, services, and facilities that are safe, adequate, just, reasonable, economical, and efficient, considering the conservation of natural resources and the quality of the environment."[309] The General Assembly has granted us certain specific statutory powers to see to it that our public service companies accomplish this, starting with PUA § 2-112:

> (a) Jurisdiction. To the full extent that the Constitution and laws of the United States allow, the Commission has jurisdiction over each public service company that engages in or operates a utility business in the State and over motor carrier companies as provided in Title 9 of this Article.
>
> (b) General powers. (1) The Commission has the powers specifically conferred by law.
>
> (2) The Commission has the implied and incidental powers needed or proper to carry out its functions under this division.
>
> (c) Liberal construction. The powers of the Commission shall be construed liberally.

Focusing on the precise tools granted to us by the legislature, we are authorized to adopt regulations "that prescribe standards for safe, adequate, reasonable, and proper

[308] *Id*. at 10.
[309] PUA § 5-303.

service. . . ."[310] The statute goes on to authorize the Commission to enforce those regulations and "by order, as the Commission considers necessary, require changes and additions in the service of any public service company or gas master meter operator, including: (i) repairs or improvements in plant; (ii) increase in motive power; and (iii) change in schedule or manner of operations."[311] The primary explicit enforcement tool provided the Commission by the legislature is the power to levy civil fines.[312] As noted by OPC, the Commission also grants public service companies the right to exercise its franchise,[313] and in extreme cases, the Commission can revoke that authority.[314]

Although these powers have been granted specifically, they do not constitute the full range of our legal authority. As already noted, PUA § 2-112(b)(2) grants us "implied and incidental powers needed or proper to carry out its functions." Maryland courts on several occasions have found administrative agencies have implied powers to fashion remedies not specifically authorized by statute. "Although administrative agencies exist by statute, the absence of express statutory or regulatory authority does not necessarily preclude an agency's power to order specific remedies."[315] The initial step is an examination of the statutory scheme creating the agency. "[I]n determining whether a state administrative agency is authorized to act in a particular manner, the statutes, legislative background and policies pertinent to that agency are controlling."[316] "Where the legislature has properly and broadly delegated regulatory authority to an agency, we

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[310] PUA § 5-101(a).
[311] PUA, § 5-101(c)(2).
[312] *See* PUA §§ 13-201 and 13-202.
[313] OPC Reply Brief, pp. 4 –43.
[314] PUA, § 5-201. *Highfield Water Co. v. Public Service Commission*, 46 Md. App. 332, 416 A.2d 1357, *cert. denied*, 288 Md. 736 (1980).
[315] *Dept. of Economic and Employment Development v Lilley*, 106 Md. App. 744, 759, 666 A.2d 921, (1995).
[316] *Lussier v. Md. Racing Comm*ission, 343 Md. 681, 686, 684, A.2d 804 (1996).

have quite liberally construed the scope of the agency's implied powers to act in that area."[317] Examples of the Court finding an administrative agency had implied power to fashion remedies not specifically enumerated in its statute include: *Fogle v. H & G Restaurant*, 337 Md. 441, 654 A.2d 449 (1995) (agency authorized to prohibit smoking in most workplaces); *Christ v. Md. Dept. of Natural Resources,* 335 Md. 427, 644 A.2d 34 (1994) (agency authorized to impose a minimum age for operating a boat); and *McCullough v. Wittner*, 314 Md. 602, 552 A.2d 881 (1989) (Inmate Grievance Commission authorized to make monetary awards to inmates).

Given the breadth of the authority granted to us pursuant to the PUA, we make a preliminary finding that we do have the authority to order divestiture, although we would consider such an action to be an extreme remedy that would only be utilized as a last resort. BGE is required by statute to furnish safe, adequate, just, reasonable, economical, and efficient service to its customers. The Commission was created to ensure "a more effective and stringent regulation of firms or corporations engaged in the conduct of public utilities."[318] While we have not been hesitant to levy fines on electric utilities when they have failed to deliver adequate service,[319] and we will not hesitate to do so again if necessary, there may be instances where fines would not be sufficient to bring a public service company into compliance and may even be counterproductive. In such instances, we see no necessity, and certainly no expediency, in threatening to revoke the exercise of a franchise to indirectly accomplish the end of getting a holding company to

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[317] *Board of Liquor License Commissioners v. Hollywood Productions, Inc*., 684 Md. 2, 11, 684 A.2d 837 (1996).

[318] *Gregg v Public Service Commission*, 121 Md. 1, 87 A. 111 (1913).

[319] *In the Matter of an Investigation into the Reliability and Quality of the Electric Distribution Service of Potomac Electric Power Company*, Case No. 9240, Order No. 84564.

divest a utility as OPC suggests.[320] Instead, under extreme circumstances, the Commission would have the authority to require the divestiture of BGE directly.

Despite our preliminary finding of authority to order divestiture, we will accept the Applicants' severance commitment subject to modification. In the event that the Commission finds that a divestiture condition has occurred that is within the confines of the commitment offered by the Applicants, they will be bound by the language of the severance commitment. We modify the language, however, to reject the use of the clear and convincing evidence standard, which is a standard that this Commission does not use and is not found in the PUA. We also clarify that by accepting this commitment, we are in no manner limiting the authority of the Commission under the PUA to order divestiture under circumstances different than those prescribed in the severance commitment.[321]

4. <u>Ring-Fencing/Financial Health of BGE</u>

BGE's current ring-fencing protections have been described as the "gold standard" for ring-fencing utilities,[322] and they have protected BGE's financial strength and improved its credit rating since we first created them.[323] This is not an accident. Although other provisions of the EDF Order may have garnered more headlines, the ring-fencing protections we installed around BGE in that case were the most important conditions we imposed on that transaction. The Merger before us poses threats that are similar, albeit greater in scale, than those that motivated us to ring-fence BGE so

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[320] OPC Reply Brief at pp. 42-43.

[321] In the event that we find that divestiture is necessary under circumstances that do not constitute a "divestiture condition" as provided in the Applicants' severance commitment, the Applicants retain the right to challenge our authority under to the PUA to do so. Of course, if we make a finding that a divestiture condition has occurred, the Applicants have waived their right to challenge that legal authority by agreeing to the severance condition, though not the right to dispute any factual finding during an evidentiary hearing.

[322] Tr. 2547-2548 (Schwarcz).

[323] Subsequent to requiring BGE's current ring-fencing, BGE's credit rating improved from BBB to BBB+. Case No. 9173, Dec. 1, 2009 Hearing Transcript at 8-9 (Gahagan).

thoroughly in the EDF Order. The operation of a nuclear fleet carries enormous financial risk, and Exelon's nuclear fleet exceeds that of any utility in the United States.[324] As we observed in the EDF Order, "a catastrophic failure of a nuclear project (operational or not) place[s] the entire CEG corporate family at risk – even more so as CEG's commitment to nuclear energy grows."[325] Additionally, Exelon's unregulated trading operations provide a substantial portion of Exelon's income, and similar operations nearly drove CEG into bankruptcy in 2008.

The continuation and strengthening of these ring-fencing measures are critical to our comfort with BGE's position within Exelon's post-Merger structure. Our ability to make peace with that structure flows in large measure from the knowledge that we have, as before, structurally limited Exelon's ability to require dividends from BGE and structurally protected BGE from harm at the hands of Exelon's unregulated operations. And we cannot emphasize too strongly that, as a condition of approval, Exelon must take all steps necessary to ensure that these structural protections remain intact.

From the beginning of these proceedings, Exelon has committed to maintaining these ring-fencing measures.[326] However, the course of litigation revealed several areas in which Exelon's post-merger corporate structure might harm BGE in spite of its "golden" ring-fencing. In response, the Applicants have offered an additional package of commitments that we find (and no remaining party disputes) will address the parties' significant concerns, and will result in what could be described as the "platinum

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[324] To appreciate the order of magnitude that this Merger presents, Constellation currently owns approximately 2,000 MW of nuclear generation. FirstEnergy owns approximately 3,900 MW of new generation. However, Exelon owns 20,000 MW of nuclear capacity from 19 reactors at ten different sites. Tr. 273-274 (Crane).

[325] *EDF* Order at 44.

[326] Currently memorialized as Commitment No. 20, Joint Settlement at 19.

standard" in ring-fencing. These additional commitments include (1) a prohibition on all dividend payments until 2014; (2) a commitment not to petition for a change in ring-fencing for three years; (3) a new non-consolidation opinion from outside counsel that accounts for the new post-merger corporate structure; (4) a prohibition on any internal reorganization that might undermine BGE's ring-fencing; (5) a commitment that BGE shall not guarantee the debt of, grant a mortgage or lien on the property of, or include a cross-default provision in any of its debt or credit agreements between its securities and the securities of Exelon or an Exelon affiliate; (6) a commitment that Exelon will not alter EEDC's corporate character; and (7) a commitment that BGE shall not own any direct or indirect interest in PECO or ComEd.

The precise ring-fencing conditions are set forth in full below, in the conditions section, and we will not repeat them here. We find that the ring-fencing measures offered in the Joint Settlement will continue to protect BGE's financial health post-Merger, so long as Exelon adheres to its commitments, and we order them as conditions of approval.[327]

5. Rates to Customers Due to Transaction Costs, Goodwill, and the Allocation of Post- Merger Costs and Benefits

Exelon has committed that BGE will not incur any costs associated with this merger, including goodwill.[328] It has further committed it will ensure that the Merger is rate neutral for BGE's customers,[329] and it will provide a quarterly report on the activities

[327] We decline to impose OPC's suggested condition that BGE maintain its BBB+ credit rating. OPC Initial Brief at 56. BGE's credit rating is at least partially subject to variables outside of Exelon's control, such as economic conditions within BGE's service territory and sovereign credit ratings. Anderson Rebuttal Testimony at 14. We are confident that we have sufficiently limited what Exelon *can* control that this additional commitment is unnecessary.

[328] Joint Settlement at 25-26.

[329] Joint Settlement at 26.

of Exelon Utilities to allow us to review the costs allocated to BGE and the benefits received as a result of the Merger.[330] We have previously required similar commitments to ensure compliance with PUA § 6-105,[331] and with these protections in place, we conclude that BGE's customers will suffer no transaction-related harm as a result of the Merger.

6. <u>BGE Employment Levels</u>

PUA § 6-105(g)(2)(iv) requires us to review the potential effect of the Merger on BGE's employment. To satisfy this requirement, the Applicants have committed to not permitting a net reduction in employment due to involuntary attrition for a period of two years after the Merger.[332] We stated in *FirstEnergy* that "we recognize the public benefit in the Applicants' commitments to protect existing Potomac Edison employment levels in Maryland upon approval of the Merger and for a period of two years after consummation of the Merger," and in the absence of the Merger BGE would be free to reduce employment on its own (consistent, of course, with its obligations to provide safe and reliable service to its customers). We conclude, therefore, that the Merger will not cause new or incremental harm to BGE's employment.

7. <u>Reliability and Service Quality</u>

Several parties have expressed concerns that a post-Merger BGE will face an internal battle for capital that might cause BGE to reduce service quality and reliability,

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[330] Joint Settlement at 21. This commitment was intended to address MEA's concerns that BGE would be a net payer under the new Exelon Utilities regime. Woolf Joint Settlement Testimony at 15-16.
[331] *FirstEnergy* Order at 48.
[332] Joint Settlement at 17-18. The Applicants have also committed not to transfer any BGE employees to the Constellation headquarters without prior Commission approval. Joint Settlement at 26. Finally, the Applicants have committed to protect against job loss due to involuntary attrition at the Crane, Wagner and Brandon Shores facilities following their divestiture. DeGregorio Direct Testimony at 16-17; Tr. 1461-1462 (DeGregorio) ("[W]e voluntarily announced our commitment to those employees that…bids need to include a provision that all those employees will be maintained at the same equivalent…compensation and benefits for at least two years.").

especially over the next two years during which BGE anticipates greater than average project activity.[333] Mr. DeFontes testified that BGE cannot satisfy its short-term capital and O&M needs, in addition to Exelon's dividend requirement, through internally generated funds.[334] Additionally, Exelon intends to bring BGE into "first quartile" status with respect to two reliability metrics – SAIFI (System Average Interruption Frequency Index) and SAIDI (System Average Interruption Duration Index).[335] Although we commend this goal, and despite Mr. Crane's testimony to the contrary,[336] we agree here with Mr. Shattuck that significant capital will be required to achieve it, and BGE's planned capital expenditures over the next five years currently exceed anticipated internally generated funds.[337]

In response to these concerns, Exelon has offered several commitments intended to prevent a reduction in service quality due to capital shortfalls, including a commitment to maintain BGE's capital and O&M expenses for 2012 and 2013 at or above 95 percent of its projected needs and a commitment not to pay a dividend on BGE common stock for those two years.[338] These commitments, in addition to the ongoing prohibition against paying a dividend on BGE stock that will result in an equity ratio below 48 percent, persuade us that us that BGE's service quality will not deteriorate as a result of

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[333] DiPalma/Rafferty Direct Testimony at 9. While noting that BGE's capital and O & M requirements are trending upward, Mr. DiPalma and Mr. Rafferty ultimately conclude, and we agree, that "the higher level of reliability performance exhibited by ComEd and PECO, indicates a commitment on the part of Exelon companies to pursue and achieve a higher level of reliability improvement." *Id.* at 19.

[334] Tr. 1309 (DeFontes). We note, however, that Exelon's internal dividend requirements do not and cannot trump our ring-fencing condition prohibiting dividends whenever the payment would bring the equity share of BGE's capital structure below 48%.

[335] Tr. 213-214 (Crane). The record also reflects that since the merger of PECO and Unicom in 2000, both of Exelon's operating utilities – PECO and ComEd – have become among the nation's top performing utilities. *See generally*, O'Brien Rebuttal Testimony.

[336] Tr. 216-217 (Crane).

[337] Tr. 1221 (DeFontes).

[338] Joint Settlement at 26-27. As noted, foregoing paying a dividend through 2014 will cause BGE to retain almost $300 million that can be used for capital improvements. Exelon Initial Brief at fn. 47.

insufficient capital funding. The Applicants will also provide the Commission with a side-by-side comparison of projected and actual capital and O&M spending for 2012 and 2013 (in addition to projected spending through 2016) to allow us to monitor BGE's investments in necessary service quality projects and to ensure that customers are not harmed under the new regime.[339]

These conditions complement the service quality standards in *Revisions to COMAR 20.50 – Service Supplied by Electric Companies – Proposed Reliability and Service Quality Standards*, Administrative Docket RM 43, with which BGE will be required to comply regardless. The Merger does not reduce our authority to enforce these standards, and we will require BGE, like all Maryland utilities, to take the necessary steps to ensure that they meet these standards.[340] With these commitments, we are satisfied that the Merger will not harm BGE ratepayers in this regard.

C. The Applicants Must Provide Certain, Specific and Measurable Benefits to BGE Ratepayers.

Even with conditions in place to shield ratepayers from the risk of harm, we must still reject a transaction if it fails to provide "benefits" to, in this case, BGE ratepayers.[341] As we have held previously, the benefits must flow to BGE ratepayers "in their capacity as BGE customers, not just their share of the Transaction's impact on the public at large."[342] In evaluating proffered benefits, we consider "each transaction on its own

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[339] We are also cognizant that both ComEd and PECO exceed BGE in most service and reliability metrics. Tr. 1164, 1166 (O'Brien).

[340] OPC and Staff have urged that we require Exelon, as a condition to the Merger, to establish a $68 million fund to improve BGE's reliability. OPC Reply Brief at 38; Staff Initial Brief at 18. If we believed that the Merger posed a serious threat to BGE's service quality, we would not approve the Merger. However, with the current commitments in place as well as our ongoing oversight, we decline to establish a separate fund for this purpose.

[341] PUA § 6-105(g)(4).

[342] *EDF* Order at 2.

terms, and in the context of the parties and circumstances at the time" of the Application.[343] However, for a benefit to qualify under the statute, it must be "direct" and "certain" as opposed to "contingent" or "intangible."[344] The Applicants are cognizant of this and have included in their Application several commitments that target benefits in this way, most obviously the $100 rate credit to all BGE residential customers.

1. Rate Credit

In calculating an appropriate rate credit, we have refused to adopt a "mathematically rigid" standard in any given case.[345] In *FirstEnergy*, we ordered a rate credit approximately double what was initially offered, and we required that it be paid up front, rather than in installments, to ensure that it had a "meaningful impact."[346] We also recognized that, unlike the EDF Transaction, the FirstEnergy merger was "a stock-for-stock merger that will not produce a post-closing pool of cash proceeds that can be allocated immediately to a large rebate."[347]

The parties disagree as to whether a $100 rate credit sufficiently benefits BGE residential customers in light of the much higher payments received by bankers, executives, lawyers and shareholders. The record reflects that $100 is approximately half the credit provided by Exelon to PECO customers at the time of the PECO/Unicom merger.[348] Both OPC and Staff have argued that a $200 credit would reflect a benefit to

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343 *FirstEnergy* Order at 46.
344 *EDF* Order at 38.
345 *FirstEnergy* Order at 46.
346 *Id*. at 48.
347 *Id*. at 41-42.
348 Lubow/Malko Direct Testimony at 10.

ratepayers commensurate with the scale of this Merger and its attendant risks, including most notably the introduction of an out-of-state entity as BGE's parent company.[349]

We have struggled hard with this issue, both as to the extent of the rate credit and whether an immediate, one-time credit reflects the best way to provide relief to ratepayers. For example, the record reflects that a longer-term relief in the form of investment in certain energy efficiency programs would have "more bang for the buck" than a one-time rate credit.[350] Dr. Tierney testified that energy efficiency investments yield direct near-term *and* indirect long-term benefits, including increased local employment, lower monthly energy bills over the course of years for participating customers, lower regional electrical system demand resulting in lower wholesale power prices, and positive macroeconomic impacts through increased consumer disposable income.[351] But although we acknowledge the debate over the amount of increased benefits, we recognize the directional advantages of long-term relief to all ratepayers in the form of energy efficiency. Accordingly, in light of the Applicants' additional commitments to fund energy efficiency programs that we discuss below, we will not require a higher credit than that offered. The Applicants' immediate $100 rate credit constitutes a benefit to customers under PUA § 6-105, especially in current economic conditions. At the same time, we recognize that the long-term benefits of energy efficiency, if perhaps not always immediately felt by consumers, can have a more meaningful impact over the long-term.

[349] Staff Initial Brief at 7; OPC Initial Brief at 59-60.
[350] Tr. 3702-3703 (Tierney).
[351] Tierney Supplemental Testimony at 12.

2. <u>Synergy Savings, Best Practices, Shared Services</u>

The Applicants have presented extensive evidence as to various benefits that will inure indirectly to all BGE ratepayers in the form of synergy savings, the sharing of "best practices," and lowering BGE's costs for "shared services." Most significantly, the Applicants estimate that BGE ratepayers will realize, through rate reductions or postponed rate increases, $87.3 million in benefits based upon merger-related synergy savings.[352] The Applicants quantified this amount through a consulting firm's analysis that combined company-wide savings and then allocated those savings among the Applicants' competitive and regulated business segments, including BGE.[353] Staff and MEA even suggested that these savings might be under-stated, highlighting the need for this Commission to ensure that BGE ratepayers actually receive the full extent of any merger-related savings.[354]

We do not discount the Applicants' firm belief that such benefits will ultimately accrue to ratepayers, and we will require BGE to fully account for all merger-related savings in its next rate case.[355] However, projections of benefits through synergies, "shared services" or "best practices" are inherently speculative and, to the extent they materialize, will likely benefit ratepayers only as "forgone requests for rate relief," which we have previously held to be too intangible to qualify as a benefit under PUA § 6-105.[356]

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352 DeGregorio Direct at 8-9; Applicants' Initial Brief at 13.
353 DeGregorio Direct at 12.
354 Welchlin Direct at 14; Kahal Direct at 21.
355 The Applicants have committed to do so. Joint Settlement at 25. They have also committed to provide the Commission with a side-by-side comparison of its pre- and post-merger shared services costs. We share the Applicants' hope that these will be real and substantial. However, PUA§ 6-105 requires that benefits to ratepayers be direct and certain at the time the Merger is approved.
356 *FirstEnergy* Order at 41-42.

Instead, we believe that the statute requires that BGE ratepayers receive at least a portion of these benefits as immediately and certainly as Constellation's shareholders.[357] We also believe that ratepayers should receive a fair balance between the short-term financial benefits that will accrue through the rate credit and the long-term rate reduction that will result from longer-term investments, such as additional energy efficiency. We will therefore require that Exelon invest 50 percent of its projected synergy savings ($43.5 million) into the Customer Investment Fund that we describe below. Combined with the additional funding we discuss below, this will provide an essentially even balance ($112 million v. $113.5 million) between short-term and long-term benefits to ratepayers. We will require that Exelon track and account for any merger-related synergy savings in the next rate case, and we will give any such savings appropriate consideration at that time.[358]

3. <u>EmPower Maryland, EUSP and Funding for Weatherization</u>

Exelon has made three funding commitments (all in equal annual payments over four years) intended to bring energy efficiency benefits to ratepayers: (1) $10 Million to reduce the EmPower Maryland BGE ratepayer surcharge;[359] (2) $10 million for

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[357] PUA § 6-105(g)(2)(5) explicitly requires that we consider the allocation of benefits between ratepayers and shareholders.

[358] We decline to adopt OPC's suggested condition that we prohibit BGE from filing a rate case for three years after the merger. OPC Brief at 53-55. OPC contends that BGE will either seek to recover its rate credit through its next rate case or will obtain higher rates as a result of a distorted test year that occurs before BGE realizes the majority of the Merger-related benefits. However, as we observed in *FirstEnergy*, "[o]ur decision to require an up-front, lump sum rate credit funded by FirstEnergy obviates the need for any distribution rate freeze, stay-out, moratorium or regulatory liability in this case." *FirstEnergy* Order at 50. We have previously observed that ratepayers and the utility can be better served by more frequent base rate cases, which allow for a closer alignment between costs and rates. *In the Matter of the Application of the Washington Gas Light Company for Authority to Increase its Existing Rates and Charges and to Revise its Terms and Conditions for Gas Service*, Case No. 9267, Order No. 84475 at 3.

[359] Joint Settlement at 6-7

Maryland's EUSP;[360] and (3) $50 million to encourage energy efficiency through the Department of Housing and Community Development's (DHCD) weatherization program.[361]

It is certainly a commendable goal of these commitments to bring substantial benefits to Maryland ratepayers through improved energy efficiency and consequent lower energy bills. However, as currently structured, we believe the proposed expenditures fall short of achieving substantial results. We find the $10 million contribution to EmPower Maryland to be the functional equivalent of a rate credit, which customers will barely feel if at all over four years and that, in any case will not result in any additional investments in energy efficiency.[362] Likewise, we are unconvinced that dedicating $10 million to retiring bill arrearages is the best way to assist BGE customers participating in EUSP, especially when the funding is spread out over four years. Finally, we do not believe an adequate record has been developed to approve an additional $50 million in weatherization-related programs as proposed for DHCD, particularly since we have just directed $71 million in ratepayer funds to that purpose in the EmPower Maryland context. We agree with OPC that BGE customers should be the beneficiaries of these funds, in contrast to the Department's proposal to replace U.S. Department of Energy weatherization funds that would be shifted to non-BGE territories.[363]

We have enough concern about the effectiveness of the proposed investments to know that resources of this magnitude could be put to better use for the benefit of BGE's residents (especially low-income customers) and businesses (especially small

[360] Joint Settlement at 7.
[361] Joint Settlement at 7-8.
[362] Tr. 3731 (Woolf).
[363] OPC Reply Brief at 53.

businesses). Rather than making small additional investments in existing programs, we will explore the possibility of accomplishing greater incremental good with this investment. We recognize the importance of energy efficiency investments and the critical need for additional energy assistance funding for low-income customers. But we have yet to develop an adequate record in this proceeding to date to determine with greater precision how best to deploy these additional resources to achieve the maximum impact for customers.

Instead of devoting those funds – $70 million in total – to their proffered purposes, we find that they should be combined with the up-front portion of synergy savings ($43.5 million)[364] into a single Customer Investment Fund for Exelon to invest in BGE and its customers. As a condition of approval, then, we direct the Applicants to pay $113.5 million in equal annual installments over the three years after closing into a fund that will be invested, at our direction, in the following forms of short-term and long-term economic benefits to BGE residential and business customers:

a) Energy assistance for low-income-eligible customers;
b) Energy efficiency and weatherization for low income eligible customers;
c) Zero-interest and low-interest financing for residential and commercial energy efficiency and conservation projects;
d) Targeted energy efficiency programs for businesses; and
e) Other innovative programs related to energy efficiency that serve the purpose of removing barriers to adoption of technologies and behaviors related to energy use in homes and small businesses.

The goal here is to create a meaningful and lasting impact on BGE's customer base and the community at large. This Merger represents Exelon's entrance into

[364] *See*, PUA § 6-105(g)(2)(5).

Maryland, and it will get but one chance to make a first impression on its new customers. We will hold further proceedings for the purpose of determining how best to allocate and deploy these funds, with an eye toward creating the maximum possible long-term benefit to complement the short-term rate relief benefit.[365]

4. Sparrows Point

Finally, the Applicants have committed $20,000[366] to allow Sparrows Point to participate in any of the programs under BGE's Energy Solutions for Business Program.[367] Sparrows Point contends that it is instead entitled to a rate credit of $1.16 million.[368] Although Sparrows Point is BGE's largest customer, we will not order customer-specific benefits under PUA § 6-105, which might ultimately cause proceedings to devolve into lobbying efforts that distract from the larger public issues to be resolved. Sparrows Point, like all BGE customers, will suffer no harm from this Merger, and Sparrows Point (and other business customers) will have the opportunity to benefit from the Customer Investment Fund discussed above. The Applicants have offered $20,000 in funding, and we will accept that commitment as a condition to the merger.

D. The Application Must Be Generally Consistent with the Public Interest, Convenience and Necessity

We have previously held that the "public interest" is a "broader concept of greater good, and the Transaction need only be 'consistent' with that notion" in order to satisfy

[365] We will also require BGE to bid the efficiency created by these to-be-specified investments into the capacity markets to ensure that all BGE customers realize benefits in reduced future rates.
[366] The Applicants initially committed "up to" $20,000. However, they have subsequently committed the full $20,000. Exelon Reply Brief at 51.
[367] Joint Settlement at 8.
[368] Sparrows Point Initial Brief at 17.

this statutory requirement.[369] After reviewing an extensive record, we conclude that the Merger is consistent with the "public interest, convenience and necessity" so long as the Applicants comply with the conditions set forth in this Order. The Applicants have identified several benefits to the State of Maryland that are broadly consistent with the public interest, even if the extent of their contribution to that interest remains disputed. The Applicants claim that the Merger, through the commitments we have discussed above, will result in investments in excess of $1 billion within Maryland, including approximately 6,000 new jobs.[370] The precise value, however, is not terribly important – for our purposes, the question is whether the broader impact of the Merger is consistent with the public interest, convenience and necessity. And with the conditions we order, we find that it is.

1. <u>New and Renewable Generation</u>

The Applicants and MEA have emphasized the benefits that the new renewable generation commitments articulated in the State Settlement will provide for Maryland. For example, Mr. Woolf testified that the renewable generation will provide greater energy diversity, environmental and health benefits, and economic opportunities through job creation.[371] He also highlighted the importance of diversifying Maryland's energy portfolio, reducing reliance on Maryland's aging generation fleet, and enhancing Maryland's growing green business climate. Finally, Mr. Woolf asserted that the animal waste–to-energy generation facility will help reduce the excessive nutrient runoff from

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[369] *EDF* Order at 32.
[370] Applicants' Exhs. SFT-1, SFT-2; Joint Settlement at 1. Dr. Carlson included projected synergy benefits in his analysis and arrived at higher estimates. Carlson Rebuttal at 1.
[371] Woolf Joint Petition Testimony at 10. In his Direct Testimony, Mr. Woolf explained in more detail that renewable energy systems help reduce air pollution and greenhouse gas emissions by replacing older, less efficient fossil fuel generation, thereby reducing respiratory problems such as asthma. Woolf Direct at 11-12.

animal waste into the Chesapeake Bay watershed.[372] He therefore argues that the new generation commitments of the State Settlement constitute a public benefit. The Applicants agree, of course,[373] and additionally suggest that the generation additions, regardless of their fuel source, provide a benefit beyond their mitigation of market power because they will bring much-needed generation to the State of Maryland.[374]

As we have already discussed in this Order, the Commission finds that the new generation, in conjunction with the other market power mitigation commitments made by the Applicants, effectively prevents the harm that the merger would otherwise cause to electric customers through the exercise of market power. Absent all of the market mitigation commitments made in this proceeding, the merger would present a risk to customers that prices for electricity, including retail rates, would rise to unjust and unreasonable levels. That outcome would constitute harm that would preclude the Commission from approving this merger, pursuant to PUA § 6-105, and the primary value of the new generation commitments lies in their ability to mitigate that harm. A significant risk also exists that Crane and Wagner will retire, which would thereby eviscerate a substantial portion of the Applicants' original market power mitigation plan. The commitment to build new generation resolves that harm by expanding the available capacity of generation, making it more difficult for the Applicants to withhold power.

At the same time, the new generation commitments are also consistent with the public interest. *First*, we have expressed outside of this proceeding the concern that wholesale market forces are not incenting new generation in Maryland. We have opened a separate proceeding, which is still pending, for the purpose of determining whether to

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[372] Woolf Joint Petition Testimony at 9.
[373] *See* Applicants' Initial Brief at 41-43.
[374] Joint Settlement at 32-33.

order new natural-gas fired generation in Maryland, and in that case to preserve the option of going forward we have issued a Request for Proposals for new generation.[375] The Applicants' commitment to build new gas-fired generation in the constrained areas of Maryland addresses this public interest at the same time it mitigates the market power concerns the Merger itself created.

Second, aside from market power issues, MEA contends that the public interest is served by devoting a significant portion of the new generation resources to renewable resources. In addition to the market power mitigating properties that renewable resources share with other new resources, such as fossil fuel plants, renewable resources present environmental, health, and economic benefits, as Director Woolf testified.[376] The new renewable generation will diversify Maryland's fuel mix and reduce the State's exposure to fuel price volatility.[377] Additionally, as provided in the comments of the Environmental Intervenors, renewable resources may create more job years on a per MWh basis than fossil fuel generation plants.[378] The $30 million offshore wind generation fund will also facilitate Phase I development of offshore wind in Maryland, producing valuable information and reducing uncertainties and risk to offshore wind developers and their financers.[379] The $2 million contribution to higher education institution funding will "help build Maryland as a center for offshore wind and get the

[375] Case No. 9214, In the Matter of Whether New Generating Facilities Are Needed to Meet Long-Term Demand for Standard Offer Service.
[376] The General Assembly also extolled the benefits of renewable generation. *See* PUA § 7-702(b)(1)("The General Assembly finds that…the benefits of electricity from renewable energy resources, including long-term decreased emissions, a healthy environment, increased energy security, and decreased reliance on and vulnerability from imported energy sources, accrue to the public at large.")
[377] MEA Reply Brief at 17, Tr. 3310.
[378] January 20, 2012 Comments of Environmental Intervenors at 2.
[379] Tr. at 3734.

economic development down the road."[380] We therefore find that the Applicants' commitment to fund offshore wind development and to build a portion of the new generation resources as renewable resources is in the public interest.

2. Job Creation

The Applicants contend that the Merger will be net-positive for jobs in Maryland despite the anticipated reduction of an estimated 630 positions at Constellation.[381] Specifically, they contend that between 5,819 and 8,091 direct and indirect "job-years" will result as natural offshoots from their investment in new generation, their funding commitments and construction related to their new Baltimore headquarters.[382] Dr. Tierney calculated this total through the IMPLAN macroeconomic modeling tool, which purports to project a low and high range of created job-years as a result of different monetary investments.[383] Several parties have doubted whether IMPLAN can predict a particular investment's effect on job creation as accurately as Dr. Tierney claims, and we share those doubts.[384] While IMPLAN may be a useful tool to generally discuss the directional macroeconomic benefits of Exelon's commitments, we do not share the Applicants' full confidence regarding its precise predictions of job impact.

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[380] *Id*. at 3735.

[381] Tr. 1414 (DeGregorio). Exelon expects to achieve 350-400 of these reductions through currently vacant positions. Additionally, Exelon intends to transfer 200-250 employees from its Exelon Power Team in Kennett Square to join Constellation NewEnergy's approximately 1,030 employees. Exelon Initial Brief at 39-40.

[382] Applicants' Ex. SFT-2.

[383] *See generally* Tierney Direct Testimony; Tierney Supplemental Testimony at 10. Dr. Tierney defined "job years" as the number of "full-time equivalent jobs created in the event year." Tierney Rebuttal at 36. For simplicity's sake, Dr. Tierney assumed that all economic activity would occur in 2012. *Id.* To the extent that actual jobs last longer than a year, one job-year would equate to less than one job. Similarly, to the extent that actual jobs last less than a year, one job-year would equate to more than one job.

[384] OPC Reply Brief at 58-69; Dr. Carlson, while generally supportive of the IMPLAN model, conceded that it "makes certain simplifying assumptions about the way firms and households allocate spending." Carlson Direct at 18.

However, we need not measure these impacts with precision to find that the public interest is served. And in this case, the record supports the conclusion that the effect of the Merger upon job creation in Maryland will be net-positive and is "consistent with the public interest." The construction of a significant new office building in Baltimore, the investment of $113.5 million in low-income energy assistance and energy efficiency programs that we detailed above, and we expect that the construction of 285-300 MW of new generation in Maryland will likely offset Constellation's 630 anticipated position reductions as a result of the Merger (a figure that does not include out-of-state jobs Exelon expects to transfer to Baltimore or the growth of Constellation's retail supply business). For example, Dr. Tierney testified that investing in energy efficiency creates a "higher multiplier economically" because

> [y]ou're actually spending money in the economy to hire people to put on insulation, et cetera, and you are lowering the customer's bill by having lower demand, and you're on a lower part of the price curve and you end up spending less overall.[385]

This is obviously no consolation to those employees whose positions will be eliminated, and despite Mr. DeGregorio's explanation as to the difference between a "job reduction" and a "layoff," and the fact that 630 reductions will not necessarily result in 630 people losing their jobs, its impact on Marylanders is not lost on us.[386] However, PUA § 6-105 requires that we analyze the Merger from the standpoint of the broader "public interest," and the overall record supports the conclusion that the investments in Maryland that the Applicants have offered and we have required as a condition to this Merger likely will create a net increase in employment within the State.

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[385] Tr. 3051-3052 (Tierney).
[386] Tr. 1590 (DeGregorio); DeGregorio Rebuttal at 8-10.

3. New LEED-Certified Silver Baltimore Headquarters

At first blush, the construction of a new LEED-certified Baltimore headquarters would not appear to support the public interest, since Exelon would have constructed a headquarters by necessity, without regard for the public at large, and all new construction in downtown Baltimore is already required to be LEED-certified. However, we recognize that this construction will only occur as a result of this Merger – *i.e.*, if we reject the Application, Exelon will not construct the building – so it is properly seen as naturally flowing from the terms of the Merger, as opposed to associated commitments that the Applicants have offered. Moreover, we have previously held that

> [w]e agree that establishment of a regional headquarters for Potomac Edison in Maryland represents a positive economic development opportunity for Western Maryland and our State in general. In addition to any short-term benefits of construction or refurbishment of physical facilities required for the headquarters itself, it is reasonable to expect ongoing benefits to the State and to the local area in the form of employment and community development….we share the view that this headquarters would bring positive public benefits to the parts of our State that Potomac Edison serves.[387]

We do not put a great deal of weight on this factor, not least because the combined companies' move to their new Harbor East building will leave a substantial vacancy in Constellation's existing downtown building, so the net impact on downtown Baltimore is diminished, perhaps considerably. Overall, though, we find that the new construction that will result from the Merger is consistent with the public interest, if perhaps not overwhelmingly so.

[387] *FirstEnergy* Order at 36-37.

4. **Charitable Contributions**

Exelon has committed to maintain CEG's average annual charitable contributions of $7 million for a period of ten years.[388] Obviously, such a commitment does not harm the public interest, even if it also fails to advance it. And the commitment does convert CEG's *average* contributions into the new *minimum* going forward, and provides the Commission with the new authority to enforce this level of charitable donations. However, given the enormous size of the Merger and the significant benefits and responsibilities Exelon will receive as a result, we recognize this commitment to simply maintain the status quo. As we did in *FirstEnergy,* we accept Exelon's commitment to continue CEG's investments in the Maryland community which are consistent with the public interest, and hope that Exelon's charitable investments in Maryland will grow over time.[389]

5. **Supplier and Workforce Diversity**

While Exelon's commitment to fully support BGE's February 6, 2009 Memorandum of Understanding regarding supplier diversity is acceptable, it adds nothing new, and the merged companies must go further.[390] Exelon contends that the Merger brings an opportunity to share certain diversity "best practices," especially in "high margin" diverse spending (such as legal, accounting and investment banking) where Exelon believes its expertise might benefit BGE.[391] That is a good start, but Exelon's commitment to supplier diversity should also include an initiative to develop and utilize minority, women and disabled service veterans in mutually beneficial business

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[388] Joint Settlement at 17.

[389] Regarding FirstEnergy's commitment to maintain Allegheny Energy's prior level of charitable contributions, we found that "the commitment the Applicants *are* making supports a finding that the Merger is in the public interest." (emphasis in original). *FirstEnergy* Order at 38-39.

[390] Joint Settlement at 18.

[391] Exelon Initial Brief at 43-44; Butler Rebuttal at 3.

endeavors. And ultimately, supplier diversity must be an integral part of the procurement process, and should foster sustainability and enhance accessibility for new products and services.

Similarly, work force diversity requires a commitment to employment goals that foster inclusiveness and generate work force environments that produce creativity and retention. The proof of whether Exelon's past success in promoting diversity is as remarkable as it claims will come when we see tangible improvement in BGE's diversity hiring throughout the organization including boards and upper management – something we will monitor closely.

Given the Commission's consistent and long-standing policy to encourage its regulated utilities to remove artificial glass ceilings and provide opportunities for all qualified employees at all levels of leadership, we urge the Applicants to take concrete steps to advance and achieve goals that will elevate and engage people on all levels. Opportunities should exist that promote diverse viewpoints, creativity, and a work environment that fosters retention. To that end, Exelon should, if it has not already, appoint a company-wide team tasked with ensuring that both supplier and work force diversity are fundamental parts of the business culture in the merged Company.

IV. CONDITIONS OF APPROVAL

For the reasons set forth above, we find that the Merger satisfies the three-part test of PUA § 6-105(g)(3)(i), and therefore approve it, subject to the conditions listed below, which we consider to be Merger conditions pursuant to PUA § 6-105(g)(3)(ii) and therefore not subject to modification without Commission approval:

The Transaction Will Cause No Harm to Ratepayers

Ring-Fencing Commitments

1) RF Holdco Ownership of BGE: BGE shall remain a direct, wholly-owned subsidiary of RF HoldCo.

2) BGE Ring-Fencing: Exelon, RF HoldCo, BGE and EEDC shall ensure continued and ongoing compliance with the ring-fencing requirements applicable under Condition Numbers 2, 4, 5, and 6 of Commission Order No. 82986 in Case No. 9173. Exelon shall not, for three years following consummation of the Merger, be permitted to file with the Commission a petition for a modification to the ring-fencing measures, and, after three years, may only do so if there is a material change in circumstances.

3) Non-Consolidation Opinions: Within 180 days after consummation of the Merger, Exelon shall obtain new non-consolidation opinions from outside counsel to BGE and Exelon concluding that a bankruptcy court, following established legal precedent, would not substantively consolidate: (i) the assets and liabilities of RF HoldCo with those of Exelon or EEDC in the event of an Exelon or EEDC bankruptcy; or (ii) the assets and liabilities of BGE with those of (a) RF HoldCo in the event of an RF HoldCo bankruptcy, or (b) Exelon or EEDC in the event of an Exelon or EEDC bankruptcy. If, for whatever reason, the Applicants are unable to obtain an acceptable opinion letter, Exelon and BGE shall take whatever additional measures are necessary to secure this letter.

4) Requirements Associated with Corporate Reorganizations: Exelon shall not engage in an internal corporate reorganization relating to RF HoldCo, BGE, or EEDC for which Commission approval is not required without 90 days prior written notification to the Commission. Such notification shall include: (i) an opinion of reputable bankruptcy counsel that the reorganization does not materially impact the effectiveness of BGE's existing ring-fencing; or (ii) a letter from reputable bankruptcy counsel describing what changes to the ring-fencing would be required to ensure BGE is at least as effectively ring-fenced following the reorganization and a letter from Exelon committing to obtain a new non-consolidation option following the reorganization and to take any further steps necessary to obtain such an opinion. Exelon will not object if the Commission elects to open an investigation into the matter if the Commission deemed it appropriate, but may complete the reorganization prior to the conclusion of the Commission's investigation if Commission approval is not otherwise required. Exelon shall not, without prior Commission approval, engage in a reorganization relating to RF HoldCo, BGE, or EEDC if that reorganization would be inconsistent with Commission Order No. 82986 or would prevent BGE from obtaining a new non-consolidation opinion. This provision does not negate or alter any statutory authority the Commission may otherwise have with respect to such reorganization, including pursuant to Public Utilities Article § 6-105, and does not apply to transactions such as changes in capitalization or ownership of subsidiaries of EEDC other than RF HoldCo and BGE (e.g., ComEd and PECO)

or acquisitions or dispositions of utilities or utility assets other than RF HoldCo and BGE.

5) Maintain EEDC's Corporate Character: Exelon shall not, without prior Maryland Public Service Commission approval, alter EEDC's corporate character to become a functioning corporate entity providing common support services for EEDC subsidiaries.

6) ComEd and PECO Independence from BGE: At no time post-Merger shall BGE directly or indirectly own or control, or have any direct or indirect interest in or management or operation of, ComEd or PECO.

7) Reporting on Exelon Utilities: Exelon shall report to the Commission on a quarterly basis the activities of Exelon Utilities until the completion of BGE's first rate case following consummation of the Merger and shall file such reports thereafter as the Commission deems appropriate. Each report shall include: (i) a narrative description of the activities undertaken by Exelon Utilities; (ii) cost data for Exelon Utilities; (iii) the basis on which Exelon Utilities' costs are proposed to be allocated to BGE; and (iv) a cost-benefit analysis assessing the utility of Exelon Utilities and its benefits to BGE.

Market-Power Mitigation

8) Structural and Behavioral Remedies: In addition to divesting H.A. Wagner, C.P. Crane, and Brandon Shores Generating Stations (the "Generating Stations"), which shall be divested as a group, as well as the additional mitigation measures identified on pages 12-16 of Exhibit JDP-1, Exelon shall comply with the IMM Settlement terms identified in the filing with the Maryland Public Service Commission made by Monitoring Analytics, LLC on October 11, 2011 and attached to this Order as Attachment A. If the animal waste facility required by the Joint Settlement is considered dispatchable by Exelon and PJM rules, Exelon agrees that this facility will be added to the list of peaking facilities covered by the IMM Settlement. In accordance with the agreements reached with Anti-trust Division of the United States Department of Justice, Exelon shall enter into contracts to divest the Generating Stations no later than 180 days after consummation of the Merger, and then will close on the divestitures no later than 30 days after the receipt of all regulatory approvals, including the receipt of the Federal Energy Regulatory Commission's approval under Section 203 of the Federal Power Act. Exelon shall provide notice to the Commission of any dispute regarding the IMM Settlement, and shall file a request for approval with the Commission for any proposed modification to the terms of the IMM Settlement. Given that the Applicants' membership in PJM is an implied commitment in the IMM Settlement, continued membership in PJM is a condition of Merger approval. The Commission shall have the authority to enforce the IMM Settlement. Exelon's activities in satisfaction of Condition 10, "New Generation," provide additional market-power mitigation.

9) IMM Settlement Expiration Terms: The terms of the IMM Settlement shall expire 10 years from the date of the closing of the Merger, *provided* that the Commission may extend the terms of the IMM Settlement if, after an evidentiary hearing addressing market conditions, the Commission determines that the expiration of the behavioral remedies in the IMM Settlement will, through the Applicants' increased ability to exercise market power, pose a significant risk of harm to Maryland ratepayers. The IMM is requested to provide to the Commission within the ninth year of the IMM Settlement an evaluation of the effectiveness of the remedies in place and the impact of the expiration of the IMM Settlement on the ability of the Applicants to exercise market power in the markets controlled by the IMM Settlement.

10) New Generation within the State, and within specifically constrained transmission regions: Exelon shall develop or assist in the development of 285 MW to 300 MW (nameplate capacity) of new generation in Maryland within the ten-year period following consummation of the Merger. Projects pursuant to this condition shall be selected at Exelon's discretion, subject to the requirements below. Projects that have, as of the date of this Settlement, either commenced construction or that the Applicants have committed to construct other than as part of this proceeding do not qualify toward fulfillment of this condition. The generating capacity shall be derived from the following resources:

(a) *New Natural Gas-Fired Generation*: 120 MW of primarily gas-fired combustion turbines in Maryland within the 5004/5005 submarket by December 2015. The gas-fired generation shall be developed on a merchant basis. The foregoing deadline shall be tolled for reasonable delays in permitting or zoning beyond the developer's or Exelon's control and for conditions of force majeure affecting construction;

(b) *New Tier 1 Generation*: 125 MW of Tier 1 renewable resources by January 15, 2022. The Tier 1 projects shall be developed on a merchant basis, except that up to 75 MW may be developed pursuant to requests for proposals ("RFPs") issued by the Commission, one or more Maryland electric distribution companies or cooperatives, or the State, a state or Federal agency, or a local or municipal governmental entity, for new generation in Maryland. Further, as to the Tier 1 projects:

i. 50 MW of the 125 MW shall begin operation by December 31, 2016;

ii. At least 62.5 MW of the 125 MW shall be from wind projects;

iii. The following shall not be considered to fulfill this paragraph 8 (a): (1) solar projects, including but not limited to those developed pursuant to paragraph 8(d); and (2) new animal waste-to-energy projects developed pursuant to Paragraph 8(c);

iv. To the extent projects are developed pursuant to a State-or Commission-issued RFP, Exelon shall provide a $500,000 per MW payment to the State upon commercial operation of such projects. It is the intent of the Signatory Parties that any payment paid by Exelon pursuant to this paragraph 8(a)(iv) be used to support the creation of new Tier 1 renewable energy sources in Maryland. The payment shall be deposited in the Maryland Strategic Energy Investment Fund pursuant to Section 9-20B-05(e)(6), State Government Article, Annotated Code of Maryland, and the monies shall be used solely to support the creation of new Tier 1 renewable energy sources in Maryland, exactly as if such monies were compliance fees being used pursuant to Section 9-20B-05(i)(l), State Government Article, Annotated Code of Maryland, and may not be used for any other purpose;

v. For any shortfall below 50 MW as of December 31, 2016, Exelon shall, on or before January 15, 2018, pay liquidated damages equal to $900,000 per MW below 50 MW, unless the period is extended by consent of Exelon and the State. For any shortfall below 125 MW as of January 15, 2022, Exelon shall, on or before January 15, 2023, pay liquidated damages equal to $900,000 per MW below 125 MW, less the amount of liquidated damages, if any, paid pursuant to the preceding sentence, unless the period is extended by consent of Exelon and the State. Payment of the liquidated damages shall release Exelon from the obligation for which the liquidated damages are paid. It is the intent of the Signatory Parties that any payment paid by Exelon pursuant to this paragraph 8(a)(v) be used to support the creation of new Tier 1 renewable energy sources in Maryland. Any liquidated damages paid by Exelon pursuant to this paragraph 8(a)(v) shall be deposited in the Maryland Strategic Energy Investment Fund pursuant to Section 9-20B-05(e)(6), State Government Article, Annotated Code of Maryland, and the liquidated damages payment shall be used to support the creation of new Tier 1 renewable energy sources in Maryland, exactly as if such monies were compliance fee being used pursuant to Section 9-20B-05(i)(l), State Government Article, Annotated Code of Maryland, and may not be used for any other purpose. In either case, to the extent facility construction is in progress with a reasonable likelihood of completion no later than one year following the conclusion of the period, the liquidated damages clause shall not apply;

vi. The foregoing deadlines shall be tolled for reasonable delays in permitting or zoning beyond the developer's or Exelon's control and for conditions of force majeure affecting construction;

(c) *New Animal Waste-to-Energy Generation*: At the State's election, either (i) $60 per MWh of output delivered to the State in subsidy paid by Exelon to the State or its designee for the duration of a 20-year Power Purchase Agreement (or $70 per MWh of output delivered for the duration of a 15-year Power Purchase Agreement) signed under the Clean Bay Power RFP to support development of up to 10 MW of generation under the Clean Bay Power RFP primarily combusting animal waste/manure-based fuels (in which case Exelon would: (1) have the right of first refusal to purchase any renewable energy credits ("RECs") or any other environmental attributes created by the generation and received by the State or its designee and not otherwise transferred or assigned to the State's load serving entity or entities to be used for compliance purposes for the State's energy usage, at the then-current fair market value should the State or its designee determine to sell its RECs or environmental attributes received from the generation; (2) have the option, subject to the State's or its designee's prior consent, to assume and exercise any contract option the State or its designee may have to extend the contract term beyond its initial period, in which case Exelon will be subject to all terms and conditions that would have applied to the State or its designee, and the State or its designee shall have no further obligation under the contract; and (3) have access to and non-exclusive rights to use commercial and environmental information related to the project development if the State reserves or holds such rights and is authorized by law or contract to extend such rights to Exelon or the holder of such rights gives any required consent thereto), or (ii) construction of a 25 MW plant primarily combusting animal waste/manure-based fuels if legislation is enacted by July 2016 providing for a carve-out for RECs for animal waste/manure-based fuels (at a quantity at least equal to the equivalent output of the 25 MW plant) that is deemed appropriate by consent of both Exelon and the State. Further:

i. If, by December 31, 2016, the option in clause (c)(i) above has been selected, and the Clean Bay Power RFP has resulted in a project less than 10 MW in nameplate capacity, Exelon shall pay the State liquidated damages fro any shortfall below 10 MW in the amount of $4.4 million per MW, unless the deadline is extended by consent of Exelon and the State;

ii. If, by December 31, 2016, the option in clause (c)(ii) above has been selected, and Exelon fails to construct or cause to be constructed the generation required by such election within four years after such election was made or four years after the required legislation was enacted, whichever is later, Exelon shall pay liquidated damages for any shortfall below 25 MW equal to $1.76 million per MW, unless the period is extended by consent of Exelon and the State and except to the extent facility construction is in progress with a reasonable likelihood of completion no later than one year following the conclusion of the period. The foregoing deadline shall be tolled for reasonable delays in permitting or zoning beyond the developer's or Exelon's control and for conditions of force majeure affecting construction;

iii. If, by December 31, 2016, neither option in clause (c)(i) above nor in clause (c)(ii) above has been selected, Exelon shall pay the State liquidated damages in the amount of $44 million, unless the deadline is extended by consent of Exelon and the State;

iv. It is the intent of the Signatory Parties that any liquidated damages paid by Exelon pursuant to paragraphs 8 (c)(i)-(iii) above be used to support the creation of new Tier 1 renewable energy sources in Maryland. Any and all liquidated damages paid by Exelon pursuant to paragraphs 8(c)(i)-(iii) above shall be deposited in the Maryland Strategic Energy Investment Fund pursuant to Section 9-20B-05(e)(6), State Government Article, Annotated Code of Maryland, and the liquidated damages payment shall be used solely to support the creation of new Tier 1 renewable energy sources in the State, exactly as if such monies were compliance fees being used pursuant to Section 9-20B-05(i)(l), State Government Article, Annotated Code of Maryland, and may not be used for any other purpose;

d) *New Solar Generation*: 30 MW of solar generation in Maryland in the City of Baltimore and other jurisdictions within the 5004/5005 submarket by December 2015, which may be developed on either a merchant basis or pursuant to an RFP issued by the Commission, one or more Maryland electric distribution companies or cooperatives, or the State, a State or Federal agency, or a local or municipal government entity, for new generation in Maryland. Solar facilities may include behind-the-meter installations at residences and public commercial, and industrial facilities, and at locations to accommodate larger-scale, grid-connected projects. Additionally:

i. Of the 30 MW, Exelon will construct and own not less than 10 MW of solar capacity (whether on one or more sites, the "Solar Project") on one or more City-owned or City-leased sites, subject to terms mutually agreeable to the City and Exelon. Exelon will work together with the City to identify an optimal location or locations for the construction of the Solar Project (understanding that the City has identified sites with up to 25 MW of potential solar capacity), on which the Solar Project will be located. The City and Exelon will jointly participate in the permitting and interconnection processes. The City and Exelon will use commercially reasonable efforts to complete the construction of the Solar Project by December 31, 2015, subject to the identification and selection of the permitting and interconnection processes. Exelon will retain the solar renewable energy certificates ("SRECs") and tax attributes for the Solar Project. The City will purchase the energy produced from the Solar Project under a power purchase agreement ("PPA") for a term of 15 years at a price per kWH to be determined by the City and Exelon;

ii. The SRECs created by such projects may not be used by any person for Maryland Renewable Portfolio Standard (RPS") compliance prior to 2018, though SRECs created in prior years may be banked and may then be used in 2018 or thereafter to the extent permitted by law;

iii. Exelon shall provide Staff an annual report delivered to Staff no later than April 1 each year detailing the vintage, GATS ID number, quantity, and status (i.e. banked, expired, retired for non-MD compliance, etc.) of all SRECs from these projects through calendar year 2019; and

iv. The foregoing deadlines shall be tolled for reasonable delays in permitting or zoning beyond the developer's or Exelon's control and for condition of force majeure affecting construction.

Other Commitments Ensuring No Harm to Ratepayers

11) <u>Maintain Employment at BGE</u>: Upon approval of the Merger and for at least the first two years following consummation of the Merger, Exelon (i) shall not permit a net reduction, due to involuntary attrition as a result of the Merger integration process, in the employment levels at BGE, and (ii) shall provide current and former BGE employees compensation and benefits that are at least as favorable in the aggregate as the compensation and benefits provided to those employees immediately before the Merger.

12) <u>Maintain Employment at the Divested Crane, Wagner and Brandon Shores Generation Plants</u>: Exelon shall require, as a condition to purchasing the divested Crane, Wagner and Brandon Shores generation plants, that all bidders agree that (i) they will not permit a net reduction in the employment level at each plant, due to involuntary attrition, for a period of two years after Exelon (or one of its affiliates) relinquishes ownership of the plants, and (ii) will provide current and former employees at each plant compensation and benefits that are at least as favorable in the aggregate as the compensation and benefits provided to those

employees immediately prior to Exelon (or one of its affiliates) relinquishing ownership of the plants.

13) BGE Headquarters: BGE shall maintain its headquarters in Baltimore, remain locally managed as described within this Order, and continue to serve its customers under its own name.

14) BGE Board of Directors: Subsequent to the first BGE Board of Directors meeting after consummation of the Merger and continuing thereafter, Exelon shall ensure that at least one-third, and no less than two members, of the BGE Board of Directors will be independent members as that term is defined under New York Stock Exchange rules. Additionally, a majority of the BGE Board of Directors shall have primary residence or principal place of business or employment in BGE's service territory.

15) Exelon Board and Shareholder Meetings: Exelon's Board of Directors will add Baltimore to its regular rotation of the location of Exelon's board and shareholder meetings.

16) Executive Committee Meetings: Exelon Management's Executive Committee shall meet at least annually in Baltimore and shall file notice with the Commission when it holds meetings in Baltimore.

17) BGE Representation on Exelon Executive Committee: BGE's CEO shall be a member of Exelon Management's Executive Committee.

18) Local BGE CEO: BGE's CEO shall reside within BGE's service territory.

19) Severance of Exelon-BGE Relationship: Notwithstanding any other powers that the Commission currently possesses under existing, applicable law, the Applicants agree that the Commission may, after investigation and a hearing, order Exelon to divest its interest in BGE on terms adequate to protect the interests of utility investors (including Exelon investors) and consumers and the public, if the Commission finds that: (a) one or more of the divestiture conditions described below has occurred, (b) that as a consequence BGE has failed to meet its obligations as a public utility, and (c) that divestiture is necessary to allow BGE to meet its obligations and to protect the interests of BGE customers in a financially healthy utility and in the continued receipt of reasonably adequate utility service at a just and reasonable price. The divestiture conditions covered by this agreement are: (i) a nuclear accident or incident at an Exelon nuclear power facility involving the release or threatened release of radioactive isotopes, resulting in (x) a material disruption of operations at such facility and material loss to Exelon that is not covered by insurance or indemnity or (y) the permanent closure of a material number of Exelon nuclear plants as a result of such accident or incident; (ii) a bankruptcy filing by Exelon or any of its subsidiaries constituting 10% or more of Exelon's consolidated assets at the end of its most

recent fiscal quarter, or 10% or more of Exelon's consolidated net income for the 12 months ended at the close of its most recent fiscal quarter; (iii) the rating for Exelon's senior unsecured long-term public debt securities, without third-party credit enhancement, are downgraded to a rating that indicates "substantial risks" (i.e., below B3 by Moody's or B- by S&P or Fitch) by at least two of the three major credit rating agencies, and such condition continues for more than 6 months; or (iv) Exelon and/or BGE have committed a pattern of material violations of lawful Commission orders or regulations, or applicable provisions of the Public Utilities Article and, despite notice and opportunity to cure such violations, have continued to commit the violations.

20) <u>Tax Indemnification</u>: Exelon shall indemnify BGE for any liability for federal income taxes (including interest and penalties related thereto, if any) in excess of BGE's standalone liability for federal income taxes (including interest and penalties related thereto, if any) for any period during which BGE is included in a consolidated group with Exelon. Under applicable law, following the Merger BGE will have no liability for federal income taxes (including interest and penalties related thereto, if any) of Exelon or any other subsidiary of Exelon for any period during which BGE was not included in a consolidated group with Exelon (i.e. any period before the Merger). Exelon will take no action to cause BGE to have any liability for federal income taxes (including interest and penalties related thereto, if any) of Exelon or any other subsidiary of Exelon for any period during which BGE was not included in a consolidated group with Exelon for purposes of filing federal income tax returns. If BGE is included in a consolidated group with Exelon for purposes of filing federal income tax returns and the rating for Exelon's senior unsecured long-term public debt securities, without third-party credit enhancement, is downgraded to a rating that indicates "substantial risks" (below B3 by Moody's or B- by S&P or Fitch) by at least two of the three major credit rating agencies, the Commission may, after investigation and hearing, require Exelon to deliver to BGE collateral of the type and amount determined by the Commission pursuant to the hearing to secure Exelon's tax indemnity to BGE if the Commission finds that such collateral is necessary for the protection of BGE's interests under Exelon's tax indemnity. BGE shall be required to surrender or release such collateral security to Exelon (1) promptly after the rating of Exelon's senior unsecured long-term public debt, without third-party credit enhancement, is restored to a rating above "substantial risks" (at or above B3 by Moody's or B- by S&P or Fitch) by at least two of the three major credit rating agencies, or (2) if and when BGE is determined by a body of competent jurisdiction no longer to be liable for federal income taxes as a member of a consolidated group with Exelon, other than BGE's standalone liability for federal income taxes (including interest and penalties related thereto, if any), or (3) upon a finding by the Commission, after investigation and hearing upon application of Exelon, that the conditions under which such collateral security was originally required no longer exist.

21) Prohibition of Cross-Default Provisions: BGE shall not: (i) guarantee the debt or credit instruments of Exelon or any other Exelon affiliate (other than a subsidiary of BGE); (ii) grant a mortgage or other lien on any property used and useful in providing retail or wholesale utility service to, or otherwise pledge such assets as security for repayment of the principal or interest of any loan or credit instrument of, Exelon or any other Exelon affiliate (other than a subsidiary of BGE); (iii) include in any of BGE's debt or credit agreements cross-default provisions between BGE's securities and the securities of Exelon or any other Exelon affiliate (other than a subsidiary of BGE); or (iv) include in its debt or credit agreements any financial covenants or rating-agency triggers related to Exelon or any other Exelon affiliate (other than a subsidiary of BGE).

22) Recording of Goodwill: Exelon and BGE shall not record goodwill resulting from the Merger on BGE's books unless required to do so by the Securities and Exchange Commission ("SEC"). If the SEC requires that goodwill be recorded on BGE's books, then Exelon and BGE shall ensure that such goodwill does not impact rates charged to BGE's customers.

23) Shared Services Comparison: As part of its Cost Allocation Manual filings for 2014, 2015, and 2016, BGE shall provide the Commission with a side-by-side comparison, by function, of (i) its post-Merger shared services costs for 2013, 2014, and 2015 and (ii) its equivalent pre-Merger functional costs for 2011.

24) Tracking Charges for Services Provided to BGE: In the first quarter after the first full calendar year following consummation of the Merger, BGE shall prepare and file with the Commission a side-by-side comparison of the corporate component of Exelon's service company charges to BGE for that full calendar year with the corporate component of CEG's 2011 charges to BGE.

25) Tracking Merger Savings: BGE shall track Merger savings and account for such savings in its next electric rate proceeding and gas rate proceeding.

26) No Transaction Cost Recovery: BGE shall not seek recovery in rates of: (i) any acquisition premium or "goodwill" associated with the Merger; or (ii) transaction costs incurred in connection with the Merger by Applicants or their subsidiaries. The categories of "transaction costs" are the following incurred with respect to consummation of the Merger: (i) consultant, investment banker, and legal fees; (ii) change in control or retention payments; and (iii) costs associated with the shareholder meetings and proxy statement/registration statements related to the Merger.

27) No Relocation of BGE Employees: Exelon shall not, without prior Commission approval, relocate any BGE employees to the Baltimore CEG Headquarters.

28) Neutral Merger Accounting: Exelon and BGE shall ensure that Merger accounting is rate-neutral for BGE's customers. Exelon and BGE shall ensure

that any accounting treatments associated with Merger accounting do not affect rates charged to BGE customers or the calculation of BGE's equity level pursuant to Commission Order No. 82986 in Case No. 9173.

29) Credit Metrics Reporting: BGE shall report to the Commission promptly if BGE's credit rating from S&P falls below its current level of BBB+. BGE shall also report to the Commission on a quarterly basis the following credit metrics for the then current year: FFO/debt, FFO/interest, and debt/capitalization.

30) BGE Capital and O&M Expenditures: Absent Commission approval, BGE shall maintain its capital and O&M expenditures at or above 95% of its combined project capital and O&M expenditures for 2012 ($1.285 billion) and 2013 ($1.494 billion), adjusted to reflect actual synergy savings net of costs to achieve. In 2014, BGE shall provide the Commission with a report of its actual capital and O&M expenditures for 2012 and 2013, and provide the Commission with its projected capital and O&M expenditures for 2014, 2015, and 2016.

31) BGE to Retain Internally Generated Equity Through 2014: BGE will not pay a dividend on BGE's common shares through the end of 2014.

32) BGE Notice to Commission of Dividends: Following the conclusion of the dividend-restriction period described above in Condition 31, BGE will notify the Commission that it intends to declare dividends on common stock at least 30 days before such a dividend is paid. BGE will continue, as required by Condition 2 of Order No. 82986, to provide the Commission with a compliance filing, made within 5 business days after payment of a dividend on common stock, setting forth the calculations used to determine BGE's equity level at the time the BGE Board considered payment of dividends and the calculations to demonstrate that the equity ratio after the dividend payment will not fall below 48%.

Certain, Specific and Measurable Benefits to Ratepayers

33) Residential Rate Credit: Exelon shall, within 90 days after consummation of the Merger, fund a one-time distribution of $100 per BGE residential customer in direct rate credits, which shall be credited within 90 days after consummation of the Merger, and amount to approximately $112 million, and which shall not be recoverable in rates. The credits will be provided for all residential customers of record with active accounts on a specified date following the Merger. Residential customers served under both a residential electric schedule and a residential gas schedule will receive one credit.

34) Customer Investment Fund: Exelon shall invest $113.5 million over a three-year period in an interest bearing Customer Investment Fund subsequent to the consummation of the Merger. Funds shall be credited in equal installments, with the first installment credited within 90 days after consummation of the Merger, or as otherwise approved by the Commission, and shall not be recoverable in rates.

This investment shall be directed to a fund for the purpose of providing long-term benefits in the form of energy efficiency and low-income energy assistance to BGE customers. These funds shall be directed towards the goals set forth in this Order, which we will specify after further proceedings to determine their most effective use.

35) BGE CAIDI Study: BGE shall, within 12 months following consummation of the Merger, conduct and file with the Commission an assessment and identification of the casual factors that contribute to BGE's CAIDI performance.

36) Contribution to RG Steel Sparrows Point LLC ("Sparrows Point"): Exelon shall fund $20,000, which shall not be recoverable in rates, to allow Sparrow's Point to participate in any of the programs and associated incentives under BGE's Energy Solution's for Business Program.

Public Interest Benefits

37) Baltimore CEG Headquarters: Exelon shall upon consummation of the Merger, invest in new construction in the Downtown/Harbor area of Baltimore City for the headquarters of the combined company's competitive energy businesses, as well as the combined company's renewable energy development headquarters. As part of this commitment, Exelon will construct or cause to be constructed (by entering into a lease of at least 15 years) a building to house the two headquarters, which will be constructed to at least LEED-certified Silver standards. Subject to permitting, zoning, planning, and all other applicable governmental requirements, Exelon shall select a developer and a site, and construction of the building shall begin within twelve months after consummation of the Merger. Exelon shall provide to the Commission and the intervening parties, as soon as possible following consummation of the Merger and to the extent available (and in further periodic updates), details on whether Exelon will be developing or leasing the building, the terms of the lease, information on whether union labor will be used, the number of jobs associated with the building construction, and cost outlays.

38) Funding for Offshore Wind Development: Exelon shall provide, within 90 days after consummation of the Merger, $30 million in funding for the State's use in its efforts to realize an offshore wind project, including the development of a Construction and Operations plan. If and to the extent that the State has reserved or holds rights to any analysis and other work product relating to wind speed, sea state, and ecological resource assessment on the Outer Continental Shelf, as a direct result of the funding and is authorized by law or contract to make such rights available to Exelon, and if any other interested party holding rights in and to such analysis and work product gives any requires consent thereto, the State will, upon request of Exelon, grant Exelon non-exclusive rights to use any such analysis and other work product resulting from the funding solely for purposes of

development of wind energy in Maryland. Exelon shall donate an additional $2 million to public institution or institutions of higher learning within Maryland, as selected by the State, to support research and development in wind energy applications. The Maryland Higher Education Commission ("MHEC") shall conduct a competitive process such that all public institutions of higher learning in the State will have the opportunity to compete for some or all of the $2 million. Once MHEC has determined which public institution or institutions shall be awarded the monies, and in what amount, MHEC shall direct Exelon to make the donation(s) to the selected recipients within 60 days.

39) Charitable Giving: Exelon and its subsidiaries shall, during the ten-year period following consummation of the Merger, provide at least an annual average of $7 million in charitable contributions and traditional local community support within Maryland.

40) Support for Supplier Diversity: Exelon shall fully support the goals of the Memorandum of Understanding ("MOU") signed by BGE on February 6, 2009 regarding supplier diversity, including all of the terms and conditions thereof, and shall use its best efforts to assist BGE with the implementation of the MOU and meeting its obligations pursuant to the MOU. BGE shall meet its obligations pursuant to the MOU.

IT IS THEREFORE, this 17th day of February, in the year Two Thousand and Twelve by the Public Service Commission of Maryland,

ORDERED: (1) That the Application for Approval of the Merger submitted by Exelon, CEG BGE and EEDC in this proceeding is hereby granted, subject to the conditions and requirements contained in this Order;

(2) That Exelon, CEG, BGE and EEDC shall notify the Commission in writing by February 27, 2012, whether they intend to close the Merger and, if so, provide the date on which closing will occur; and

(3) That Exelon, CEG, BGE and EEDC remain subject to the Commission's jurisdiction for enforcement of the provisions of this Order.

(4) All other motions not granted herein are denied.

/s/ Douglas R.M. Nazarian

/s/ Harold D. Williams

/s/ Lawrence Brenner

/s/ Kelly Speakes-Backman

/s/ W. Kevin Hughes
Commissioners

ATTACHMENT A

Settlement Terms and Conditions **Attachment**

The following are the terms and conditions of the agreement (the "Settlement") between the Independent Market Monitor for PJM ("IMM"), and Exelon Corporation ("Exelon") and Constellation Energy Group ("Constellation") (together referred to as "NewCo"), which Settlement satisfies the IMM's concerns regarding the proposed merger of Constellation and Exelon, such that if the order(s) issued by either the Federal Energy Regulatory Commission ("FERC") or the Maryland Public Service Commission ("MPSC"), or both, approving the proposed merger are conditioned upon compliance by NewCo with the terms and conditions of the Settlement, then the IMM will not object to the merger.

1. STRUCTURAL COMMITMENTS

NewCo commits to divest the following units: Brandon Shores, CP Crane and HA Wagner (the "Divested Units"), and further commits not to sell the Divested Units to any of the purchasers listed below which, based on the May 20, 2011 testimony of witness Joe Pace in the FERC proceeding, own three percent or more of the installed capacity in the overall PJM market, in the PJM MAAC sub-market, or in the PJM 5004/05 sub-market. On this basis, NewCo is precluded from selling the Divested Units to American Electric Power Company; First Energy Corp.; GenOn Energy, Inc.; Edison International, Dominion Resources, Inc.; Public Service Enterprise Group Incorporated; Calpine Corp.; and PPL Corporation or to any of their directly or indirectly held subsidiaries.

2. BEHAVIORAL COMMITMENTS

Sections 2(a), 2(b) and 2(c) below apply to generating units owned or controlled by NewCo, and which are either in PJM or selling into PJM.

a. Capacity/Retirements

i. Subject to the provision below in Section 2(a)v regarding uprates, for all of its generating units NewCo will calculate its RPM auction Market Seller Offer Caps, as that term is defined in Attachment DD of the PJM Tariff, using the methodologies set forth in Attachment DD of the PJM Tariff. NewCo will calculate the Avoidable Project Investment Recovery Rate ("APIR") using actual NewCo-approved capital and outage spend budgets, updated at the time of each auction to reflect the current best information. With respect to all non-APIR elements, NewCo will use the most recent full year actual expenses, adjusted using the most recent Handy-Whitman Index inflation factors posted on the Monitoring Analytics website for the relevant delivery year. These estimates will be updated at the time of subsequent RPM incremental auctions as more current calendar year data becomes available.

ii. Absent catastrophic failure or significant regulatory changes which make continued operation of the unit uneconomic, NewCo will not give notice to retire a unit unless, (1) it has offered such unit into the most recent base residual RPM auction at the Market Seller Offer Cap as determined in accordance with Section 2(a)(i), and (2) the unit does not clear in that auction.

iii. Absent catastrophic failure or significant regulatory changes which make continued operation of the unit uneconomic, NewCo will provide to PJM and the IMM 18 months written notice before retiring any generating unit owned by NewCo; provided, however, that if after such announcement, PJM determines that there are no reliability issues associated with the retirement of the unit which would cause PJM to request that NewCo enter into a reliability must run agreement, then NewCo may, at its option and in its sole discretion, accelerate the retirement date. The IMM agrees that the provisions of this Section 2(a)(iii) shall not apply to one Exelon generating unit which did not clear in the two most recent base residual auctions and which has been identified to the IMM.

iv. As expeditiously as possible after NewCo announces the decision to retire any generating unit owned by NewCo, NewCo will provide the IMM with NewCo's economic analysis supporting the retirement decision.

v. Should NewCo wish to uprate a unit, and the uprate would not materially change the operational characteristics of the unit, such uprate will be subject to the PJM Market Seller Offer Caps, as defined in Attachment DD for existing units. Should NewCo wish to uprate a unit, and the uprate would materially change the operational characteristics of the unit (e.g., uprating a simple cycle combustine turbine unit to a combined cycle unit), at least six months before offering the uprated capacity in an RPM base residual auction, NewCo will provide to the IMM NewCo's proposed offer for the amount of MW associated with the uprate. NewCo's offer will reflect NewCo's view of the future likely energy and ancillary services revenue offset, estimated actual costs, and required return on investment, of the proposed uprate. Such offer will be subject to the PJM Market Seller Offer Caps, as defined in Attachment DD.. If the IMM does not approve the offer, NewCo will have no obligation to offer the proposed uprate into a PJM capacity auction; provided, however, that NewCo will have the right to seek approval from FERC, and if FERC grants its approval, NewCo may submit the proposed offer in PJM capacity auctions notwithstanding the lack of IMM approval.

b. Energy Market Offers

i. Subject to the provisions of Section 2(b)(ii) below, for all non-nuclear units owned or controlled by NewCo, NewCo's post-merger market-based offers will be consistent with the physical capabilities of the units – e.g., actual unit minimum and maximum (no block loading), ramp rates and minimum run times.

ii. With respect to each non-nuclear unit owned or controlled by NewCo, NewCo will continue to set notification and start up times such that the total amount of time between notice and synchronization to the grid is a function only of the physical capability of each unit. NewCo will not adjust the notification and/or start-up time for any unit based on any factor other than the physical capability of the unit without prior review and approval of the IMM. NewCo also will comply with any new PJM rules applicable to unit notification and start-up time to the extent that such rules are more stringent that the provisions of this Settlement.

iii. For all peakers owned or controlled by NewCo, in addition to its obligations set forth in the previous Sections 2(b)(i) and 2(b)(ii), NewCo's maximum market-based offers as of the date of the closing of the merger and for the term of this Settlement will be developed as follows: (1) unit costs determined daily in accordance with the PJM Cost Development Guidelines as set forth in PJM Manual No. 15, plus (2) the higher of ten percent of such costs or the applicable percentage of cost permitted under the PJM Tariff to the extent a unit is a frequently mitigated unit, plus (3) an adder not to exceed $1.00/MWh.

iv. No unit or part of a unit will be offered as "Max Emergency" for more than one week except as necessary to comply with environmental restrictions or if otherwise approved by the IMM.

v. Each nuclear unit for which NewCo has the authority to determine offers will be self-scheduled/must run at Economic Maximum ("Ecomax") unless reduced in response to negative prices, physical limitations of the unit, or transmission limitations.

vi. Conowingo Generation will be scheduled by PJM.

c. Ancillary Services Offers

For regulation and synchronized reserve ancillary services from units owned by NewCo on the date of the merger, NewCo will continue to offer the same units and quantities historically offered into these markets. For the Day-Ahead Scheduling Reserves ("DASR") market, NewCo's market-based offers for nuclear units will be zero dollars, it being understood that NewCo will not forego opportunity costs as provided in the DASR market design.

d. Applicable Term

The term applicable to the behavioral commitments set forth in this Section 2 will be ten years from the date of the closing of the merger; provided that, at any time during such term, if NewCo believes that there is an extraordinary change in circumstances that calls into question whether certain of the commitments made by NewCo in Section 2 should still be required, then NewCo will work in good faith with the IMM to develop an appropriate and mutually agreeable amendment to this Settlement. Examples of such changes are elimination of the RPM capacity market or elimination of a single market clearing price energy market structure. Should NewCo and the IMM be unable to agree to such an amendment, NewCo can file with FERC in Docket No. EC11-83-000 requesting authorization to implement changes to this Settlement.