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PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1325 G STREET, N.W. SUITE 800
WASHINGTON, D.C. 20005

ORDER

October 28, 2015

FORMAL CASE NO. 1119, IN THE MATTER OF THE JOINT APPLICATION OF EXELON CORPORATION, PEPCO HOLDINGS, INC., POTOMAC ELECTRIC POWER COMPANY, EXELON ENERGY DELIVERY COMPANY, LLC AND NEW SPECIAL PURPOSE ENTITY, LLC FOR AUTHORIZATION AND APPROVAL OF PROPOSED MERGER TRANSACTION, Order No. 18011

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia ("Commission") grants the Motion of the Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC ("Joint Applicants") to Reopen the Record in *Formal Case No. 1119* to Allow for Consideration of Non-Unanimous Settlement Agreement Stipulation ("Motion to Reopen").[1]

2. Additionally, the Commission rejects DC Public Power's Opposition to Joint Applicants' Motion to Reopen the Record and Notification of Intent to Acquire PHI's DC-Based Assets;[2] and the Ward 3 Democratic Committee's Comments.[3] The Commission is still considering various requests for participation in this proceeding.

II. BACKGROUND

3. On April 30, 2014, Exelon Corporation ("Exelon") announced Exelon's purchase of Pepco Holdings, Inc. ("PHI"). On June 18, 2014, the Joint Applicants filed the Joint Application for approval by the Commission, pursuant to D.C. Code §§ 34-504 and 34-1001, for

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[1] *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction* ("*Formal Case No. 1119*"), Motion of the Joint Applicants to Reopen the Record in Formal Case No. 1119 to Allow for Consideration of Nonunanimous Full Settlement Agreement and Stipulation, or for Other Alternative Relief, filed October 6, 2015 ("Motion to Reopen").

[2] *Formal Case No. 1119*, DC Public Power Opposition to Joint Applicants' Motion to Reopen the Record and Notification of Intent to Acquire PHI's DC-Based Assets, filed October 16, 2015 ("DCPP's Opposition").

[3] *Formal Case No. 1119*, Ward 3 Democratic Committee's Comments on Joint Applicants' Proposed Procedural Schedule, filed October 16, 2015 ("Ward 3 Democrats' Comments").

a change of control of Pepco to be effected by the Proposed Merger of PHI with Purple Acquisition Corp. ("Merger Sub"), a wholly owned subsidiary of Exelon ("Joint Application").[4]

4. The Office of the Peoples' Counsel ("OPC") is the statutory party of right to any Commission investigation,[5] and it participated as a party in this case. In addition, the Commission granted petitions to intervene of 11 other entities to participate as parties in this proceeding.[6]

5. The Commission convened four (4) community hearings seeking input from the public on the Joint Application. The hearings were held between December 17, 2014, and January 20, 2015, at various times and locations throughout the District of Columbia. Eleven days of evidentiary hearings were held on March 30–April 8, 2015 and April 20–22, 2015. On May 27, 2015, the record closed.

6. On August 27, 2015, the Commission issued Order No. 17947, which denied the Joint Application and found that the proposed merger as filed was not in the public interest.[7] On September 28, 2015, the Joint Applicants filed an Application for Reconsideration of Order No. 17947.[8] Commission Rule 140.3 prescribes that responses to applications for reconsideration shall be filed within five (5) business days after receipt of the application.[9]

7. On September 30, 2015, the District Government and Joint Applicants filed their Joint Motion.[10] In the Joint Motion, the District Government and Joint Applicants request, as

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4 *See Formal Case No. 1119*, Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, p. 1, filed June 18, 2014 ("Joint Application").

5 D.C. Code § 34-804 (a) (2015).

6 *Formal Case No. 1119*, Order No. 17597, rel. August 22, 2014 ("Order No. 17597"). The other parties are: Apartment and Office Building Association of Metropolitan Washington ("AOBA"); the District of Columbia Government ("District Government"); D.C. Solar United Neighborhood ("DC SUN"); District of Columbia Water and Sewer Authority ("DC Water"); General Services Administration ("GSA"); GRID2.0 Working Group ("GRID2.0"), Maryland DC Virginia Solar Energy Industries Association ("MDV-SEIA"), Mid-Atlantic Renewable Energy Coalition ("MAREC"); Monitoring Analytics, LLC as the Market Monitor for PJM ("Market Monitor"); National Consumer Law Center, National Housing Trust, National Housing Trust Enterprise Preservation Corporation ("NCLC/NHT"); and NRG Energy, Inc. ("NRG").

7 *Formal Case No. 1119*, Order No. 17947, rel. August 27, 2015.

8 *Formal Case No. 1119*, Application of the Joint Applicants for Reconsideration of Order No. 17947, filed September 28, 2015 ("Reconsideration Application").

9 *See* 15 DCMR § 140.3 (1981). "Responses to applications for reconsideration or modification shall be considered by the Commission only if filed with the Commission within five (5) business days after receipt of the application."

10 *Formal Case No. 1119*, Joint Motion of the District of Columbia Government and Joint Applicants for a Stay or, in the Alternative, for an Extension of Time to Respond to the Application for Reconsideration of Order No. 17947, filed September 30, 2015 ("Joint Motion").

alternatives to the Commission granting a stay in the proceeding: "(i) grant the District a 30-day extension of time to respond to the Reconsideration Application, and (ii) issue an order tolling the 30-day period for Commission reconsideration set forth in 34 D.C. Code Section 604(b)[,]" or "provide the parties with three additional business days from the date of that Order to respond to the Application for Reconsideration."[11] The Joint Motion indicates that DC Water and MDV-SEIA "do not object to the relief requested" while OPC "takes no position."[12]

8. On October 1, 2015, AOBA and DC SUN filed a Joint Reply in Opposition to the Joint Motion ("Joint Opposition").[13] On October 2, 2015, GRID2.0 filed a reply in opposition to the Joint Motion.[14] Both filings generally opposed the Joint Motion, except for the granting of the limited three day extension. No other parties filed responses. On October 1, 2015, a non-party, District of Columbia Public Power, also filed an Opposition to the Joint Motion.[15]

9. On October 2, 2015, the Commission issued Order No. 17993, which pursuant to Commission Rule 146.1, waived the ten (10) day period for filing responses to the Joint Motion and directed parties to file their responses to the Joint Motion by close of business on October 6, 2015.[16] Additionally, the Commission stated "in no event will the responses [to the Application for Reconsideration] be due earlier than October 9, 2015."[17]

10. On October 6, 2015, the Joint Applicants filed their Motion to Reopen.[18] The Joint Applicants report:

> that extraordinary efforts have now yielded a Nonunanimous Full Settlement Agreement and Stipulation ("Settlement Agreement") joined by a broad cross-section of the parties to this case –

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[11] *Formal Case No. 1119*, Joint Motion at 1-2.

[12] *Formal Case No. 1119*, Joint Motion at 2.

[13] *Formal Case No. 1119*, Joint Response of the Apartment and Office Building Association of Metropolitan Washington and DC SUN to the Joint Motion of the District of Columbia Government and Joint Applicants for a Stay or, in the Alternative, for an Extension of Time to Respond to the Application of Reconsideration of Order No. 17947, filed October 1, 2015 ("Joint Opposition").

[14] *Formal Case No. 1119*, Response of the GRID2.0 Working Group to the Joint Motion of the District of Columbia Government and Joint Applicants for a Stay or, in the Alternative, for an Extension of Time to Respond to the Application of Reconsideration of Order No. 17947, filed October 2, 2015 ("GRID2.0 Opposition").

[15] *Formal Case No. 1119*, Opposition of D.C. Public Power to the Application of D.C. Government for a Stay of the Pending Reconsideration Proceeding and Tolling of the Time Periods Concerning Reconsideration of Order No. 17947, filed October 1, 2015.

[16] *Formal Case No. 1119*, Order No. 17993, ¶ 11, rel. October 2, 2015. (Citations Omitted).

[17] *Formal Case No. 1119*, Order No. 17993, ¶¶ 1, 12, rel. October 2, 2015.

[18] *Formal Case No. 1119*, Motion of the Joint Applicants to Reopen the Record in Formal Case No. 1119 to Allow for Consideration of Nonunanimous Full Settlement Agreement and Stipulation, or for Other Alternative Relief, filed October 6, 2015 ("Motion to Reopen").

> specifically, the Joint Applicants, Office of People's Counsel ("OPC"), the District of Columbia Government ("DCG"), the District of Columbia Water and Sewer Authority ("DC Water"); the National Consumer Law Center ("NCLC"); National Housing Trust ("NHT"); the National Housing Trust-Enterprise Preservation Corporation ("NHT-E"); and the Apartment and Office Building Association of Metropolitan Washington ("AOBA") (collectively, the "Settling Parties").[19]

Among other things, the Joint Applicants "request that the Commission toll consideration of the Application for Reconsideration . . . for such period of time as the Commission requires to fully consider the merits of the Settlement Agreement" and "toll the time for responses to the Application for Reconsideration."[20] The Joint Applicants state that "this request supersedes the Joint Motion of [the District Government] and Joint Applicants to stay the time for responses to the Application for Reconsideration that the Commission has scheduled for decision on October 7, 2015."[21]

11. In response to the Motion to Reopen, on October 8, 2015, the Commission issued Order No. 18000, which determined that the Joint Motion filed on September 30, 2015 and all responses filed to that Joint Motion are now moot.[22] Additionally, the Commission clarified that the stay of the filing of response to the Application for Reconsideration imposed in Order No. 17993 shall remain in effect until the Commission renders a decision on the Motion to Reopen.[23] The Commission also: (1) advised parties that under Commission Rule 105.8, responses to the Motion to Reopen are due no later than October 16, 2015; (2) directed parties to comment on the proposed procedural schedule, which includes a recommended hearing date and discovery schedule, including the submission of data requests with responses to the data requests; and (3) directed the Settling Parties and all other parties to specifically address the scope of any discovery that would be included in the procedures and whether any discovery would be limited by Commission Rule 130.6 and other rules pertaining to settlements (15 DCMR §130).[24]

12. On October 16, 2015, the Settling Parties – the Joint Applicants, OPC; AOBA; District Government; and NCLC/NHT filed Responses to Order No. 18000. On October 16, 2015, DC SUN, GRID2.0, MAREC, and MDV-SEIA (collectively "Nonsettling Parties"); and the U.S. General Services Administration ("GSA") filed Oppositions to the Motion to Reopen

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19 *Formal Case No. 1119*, Motion to Reopen at 1-2.

20 *Formal Case No. 1119*, Motion to Reopen at 11-12.

21 *Formal Case No. 1119*, Motion to Reopen at 13.

22 *Formal Case No. 1119*, Order No. 18000, ¶¶ 1, 11, 14, rel. October 8, 2015.

23 *Formal Case No. 1119*, Order No. 18000, ¶¶ 3, 12, 15, rel. October 8, 2015.

24 *Formal Case No. 1119*, Order No. 18000, ¶ 13, rel. October 8, 2015.

and Responses to Order No. 18000.[25] On the same date, a non-party, DC Public Power ("DCPP"), filed an Opposition to the Motion to Reopen the Record and Notification of Intent to Acquire PHI's DC-Based Assets, as well as a Motion to Request Late Intervenor Status.[26] Also on October 16, 2015, WGL Energy Systems, Inc. and WGL Energy Services, Inc. (together "WGL Energy") filed a Petition to Intervene Out of Time, and the Ward 3 Democratic Committee ("Ward 3 Democrats") filed Comments on the Proposed Procedural Schedule.[27]

13. On October 20, 2015, the District Government filed an Amended Response to Order No. 18000, and on that same date, the Joint Applicants filed a Response in Opposition to DCPP's Motion to Request Late Intervenor Status.[28] On October 27, 2015, DCPP filed its Response to Joint Applicants' Response in Opposition.[29]

III. JOINT APPLICANTS' MOTION TO REOPEN

14. In their Motion to Reopen, the Joint Applicants state that the purpose of the motion is to "obtain the Commission's guidance on the proper procedures" for allowing the Commission to rule on the Settlement Agreement.[30] The Joint Applicants "request that the Commission reopen the record in this proceeding to allow for consideration of the Settlement Agreement, supporting testimony and exhibits, and other evidence developed at the evidentiary hearing on the Settlement Agreement."[31] The Joint Applicants also "request that the Commission toll consideration of the Application for Reconsideration . . . for such period of time

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[25] *Formal Case No. 1119*, Nonsettling Parties' Opposition to Joint Applicants' Motion to Reopen the Record, filed October 16, 2015 ("Nonsettling Parties' Opposition"); *Formal Case No. 1119*, U.S. General Services Administration's Opposition to Joint Applicants' Motion to Reopen the Record, filed October 16, 2015 ("GSA's Opposition").

[26] *Formal Case No. 1119*, DC Public Power Opposition to Joint Applicants' Motion to Reopen the Record and Notification of Intent to Acquire PHI's DC-Based Assets, filed October 16, 2015 ("DCPP's Opposition"); and DC Public Power Motion to Request Late Intervenor Status, filed October 16, 2015 ("DCPP's Motion to Intervene").

[27] *Formal Case No. 1119*, Petition to Intervene Out of Time of WGL Energy Systems, Inc. and WGL Energy Services, Inc., filed October 16, 2015 ("WGL Energy's Petition to Intervene"); and *Formal Case No. 1119*, Ward 3 Democratic Committee's Comments on Joint Applicants' Proposed Procedural Schedule, filed October 16, 2015 ("Ward 3 Democrats Comments").

[28] *Formal Case No. 1119*, District of Columbia Government's Amended Response to Order No. 18000, filed October 20, 2015 ("DC Government's Amended Response"); and *Formal Case No. 1119*, Joint Applicants' Response in Opposition to DCPP's Motion to Request Late Intervenor Status, filed October 20, 2015 ("Joint Applicants' Response to DCPP's Motion").

[29] *Formal Case No. 1119*, DC Public Power's Response to Joint Applicants' Response in Opposition to DC Public Power's Motion for Late Intervenor Status and Joint Applicants' Request that the Commission Deny DC Public Power's Motion and Disregard DC Public Power's Opposition to Joint Applicants' Motion to Reopen the Record, and DC Public Power's Further Response to Joint Applicants' Application for Reconsideration, filed October 27, 2015 ("DCPP's Reply to Joint Applicant' Opposition").

[30] *Formal Case No. 1119*, Motion to Reopen at 4.

[31] *Formal Case No. 1119*, Motion to Reopen at 8.

as the Commission requires to fully consider the merits of the Settlement Agreement" and "toll the time for responses to the Application for Reconsideration."[32] The Joint Applicants then proceed to outline a schedule and process by which the Commission might consider the Settlement Agreement.[33] Finally, in the alternative, the Joint Applicants request that "the Commission confirm that [they] may submit the Settlement Agreement for approval in a new application and that . . . the Commission will set a schedule for that new application that . . .would allow for a final determination within 150 days."[34]

A. The Commission has Jurisdiction to Consider the Settlement Agreement during the Reconsideration Stage of this Proceeding.

15. The Joint Applicants present three arguments for why "the Commission has authority to consider the Settlement Agreement during the reconsideration stage of this proceeding without requiring an entirely new and duplicative application."[35] First, the Joint Applicants argue that "considering the Settlement Agreement now comports with the Commission Rules of Practice and Procedure, which contemplate that "settlements" may be submitted "at any time prior to the issuance of a final decision."[36] They assert that "Order No. 17947 is not a 'final decision' for purposes of this rule because the Joint Applicants have filed an Application for Reconsideration that automatically stays that order 'until the final action of the Commission upon the application [for reconsideration].'"[37]

16. Second, the Joint Applicants argue that "in accord[ance] with Commission regulations, Commission precedent supports parties submitting, and the Commission considering, settlements after full litigation of a merger proceeding."[38] For support, the Joint Applicants point out that the Commission "accepted, considered and ruled upon the settlement" in *Formal Case No. 1002*, which was filed "after evidentiary hearings had concluded, post-hearing briefs had been field, and the record had been closed."[39]

17. Third, the Joint Applicants argue that "even if the Commission's rules and precedent did not authorize the consideration of the Settlement Agreement, the Commission can

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32 *Formal Case No. 1119*, Motion to Reopen at 11,13.

33 *Formal Case No. 1119*, Motion to Reopen at 13-17.

34 *Formal Case No. 1119*, Motion to Reopen at 17.

35 *Formal Case No. 1119*, Motion to Reopen at 5.

36 *Formal Case No. 1119*, Motion to Reopen at 5.

37 *Formal Case No. 1119*, Motion to Reopen at 5-6, citing D.C. Code § 34-604 (b) (2001).

38 *Formal Case No. 1119*, Motion to Reopen at 7.

39 *Formal Case No. 1119*, Motion to Reopen at 7, citing *Formal Case No. 1002, In the Matter of the Joint Application of Pepco and the New RC, Inc. for Authorization and Approval of Merger Transaction*, Order No. 12395, ¶ 4, rel. May 1, 2002.

and should waive any rule that stands as an obstacle."[40] The Joint Applicants state, "there could be no argument that the Commission lacks *statutory* authority to consider the Settlement Agreement now: Under D.C. Code § 34-608, the Commission has plenary authority to 'at any time, rescind, alter, modify, or amend its order'—regardless of whether there has been a final order."[41] The Joint Applicants argue that "any provision of Section 130.10 that might be considered an obstacle to granting the relief requested here may be waived by the Commission" under Rule 146.1.[42] The Joint Applicants argue "the Commission's waiver authority, if deemed necessary, would be fully warranted here" as consideration of the Settlement Agreement "is the prudent, reasonable, and best course for reaching a final decision in this case."[43] The Joint Applicants state "the most efficient way to assess the [Settlement] Agreement is based on the extensive record that has already been developed."[44] Finally, the Joint Applicants argue that "the nonsettling parties will not be prejudiced at all from considering the Settlement Agreement as part of this proceeding" because:

> such parties cannot claim any vested right in the finality of Order No. 17947 that would be violated by the Commission's consideration of the Settlement Agreement – because the interval following the filing of an Application for Reconsideration exists for the express purpose of allowing the Commission to "rescind, modify, or affirm its order or decision."[45]

B. The Commission Should Reopen the Record in Formal Case No. 1119 to Allow for Consideration of this Settlement Agreement

18. The Joint Applicants request that the Commission reopen the record in *Formal Case No. 1119* "to allow for consideration of the Settlement Agreement, supporting testimony and exhibits, and other evidence developed at the evidentiary hearing on the Settlement Agreement."[46] The Joint Applicants argue that "Commission precedent permits the reopening of the record based on 'good cause' shown."[47] The Joint Applicants state, "[t]he Commission has

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[40] *Formal Case No. 1119*, Motion to Reopen at 7.

[41] *Formal Case No. 1119*, Motion to Reopen at 7.

[42] *Formal Case No. 1119*, Motion to Reopen at 7.

[43] *Formal Case No. 1119*, Motion to Reopen at 7.

[44] *Formal Case No. 1119*, Motion to Reopen at 7-8.

[45] *Formal Case No. 1119*, Motion to Reopen at 8.

[46] *Formal Case No. 1119*, Motion to Reopen at 8.

[47] *Formal Case No. 1119*, Motion to Reopen at 8, citing *Formal Case No. 1102, In the Matter of the Investigation into the Continued Use of Verizon Washington, DC, Inc.'s Copper Infrastructure to Provide Telecommunications Services ("Formal Case No. 1102")*, Order No. 17879, ¶ 15, rel. May 14, 2015 (In deciding to reopen the record, the Commission may consider a variety of factors, including whether re-opening the record would prejudice other parties; and where the interests of justice lie), citing *Formal Case No. 1090, In the Matter of the*

stated that 'good cause' is a case-by-case determination based on the particular facts of a proceeding" and "[i]n particular, the Commission considers whether re-opening the record would prejudice other parties, and where the interests of justice lie."[48]

19. The Joint Applicants argue, "good cause exists to reopen the record, and the interest of justice strongly supports doing so."[49] The Joint Applicants assert that "[t]he Commission has repeatedly emphasized its support for settlements and, in the Order No. 17947, clearly signaled its disappointment that a settlement had not been presented."[50] Further, the Joint Applicants state "[i]n the Order No. 17947, the Commission also discussed how it perceived its role in determining whether the proposed Merger is in the public interest and stated that it does not believe it has an "obligation" to "craft conditions" that might be necessary for a proposed merger to meet the statutory standard for approval."[51] The Joint Applicants represent that "[t]he Settling Parties have worked toward the Settlement Agreement in accordance with the Commission's directives" in Order No. 17947 and:

> After careful consideration of that Order and the direction it provided, the Settling Parties came together to try to develop a path forward that preserves the benefits of the Merger; addresses the deficiencies the Commission identified; and obeys the Commission's directions to achieve a settlement representing a "general agreement" on "mitigating factors" that addresses all of the public interest factors and permits the Commission to cast a straight up or down vote without having to consider additional commitments or conditions. The Settling Parties believe that the Settlement Agreement achieves all of those goals.[52]

On this basis, the Joint Applicants represent "the Settling Parties believe that the public interest strongly supports reopening the record to allow the Commission to admit into evidence the Settlement Agreement; written testimony that the Settling Parties will submit in support of the

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Investigation into the Reliability of Verizon Washington, DC's Telecommunications Infrastructure, Order No. 17143, ¶ 29, rel. May 30, 2013.

48 *Formal Case No. 1119*, Motion to Reopen at 8, citing *Formal Case No. 1102*, Order No. 17879, ¶ 15, rel. May 14, 2015, in which the Commission cited the Federal Communication Commission standard discussed in *John v. Sotheby's, Inc.*, 858 F. Supp. 1283, 1288 (S.D.N.Y. 1994) (In evaluating a party's motion to reopen the record the court must consider, *inter alia*, "the extent to which reopening the record might prejudice the nonmovant").

49 *Formal Case No. 1119*, Motion to Reopen at 9.

50 *Formal Case No. 1119*, Motion to Reopen at 9, citing *Formal Case No. 1119*, Order No. 17947, ¶ 6, rel. August 27, 2015.

51 *Formal Case No. 1119*, Motion to Reopen at 9, citing *Formal Case No. 1119*, Order No. 17947, ¶ 350, rel. August 27, 2015.

52 *Formal Case No. 1119*, Motion to Reopen at 9.

Settlement Agreement; and testimony and other admissible evidence that may be presented at any hearings held hereafter in this matter."[53]

20. The Joint Applicants argue that "the evidence concerning the Settlement Agreement is best considered as part of the current proceeding" because "the Settlement Agreement builds upon, and enhances, the commitments previously offered by the Joint Applicants and, as such, is properly considered in conjunction with the voluminous record developed thus far."[54] The Joint Applicants state, "[f]ollowing that course is administratively efficient, and it avoids requiring all the parties to expend needless, duplicative effort to recreate the existing record, in whole or in part, at a different docket number" and "would eliminate the need for the Commission to consider the Joint Applicants' Application for Reconsideration of Order No. 17947 and the potential appeal of that Order."[55] The Joint Applicants state that, "a refusal to consider the settlement would leave the Joint Applicants no option but to exercise their appellate rights or submit the Settlement Agreement as an entirely new request for Merger approval – or do both simultaneously."[56]

21. Finally, the Joint Applicants assert, "consideration of the Settlement Agreement as part of this proceeding will not prejudice the non-settling parties at all."[57] The Joint Applicants assert, the Commission's settlement rules provide non-settling parties "a full and fair opportunity . . . to examine the merits of the terms of the Settlement Agreement."[58] The Joint Applicants state that "the absence of prejudice from reopening the record is especially clear because the non-settling parties are simply in the same position they would have been in if the settlement were presented to the Commission on May 26, 2015, the day before the Commission closed the record in this proceeding."[59] The Joint Applicants conclude, "[t]here is simply no dilution of non-settling party due process rights under the Commission's settlement procedures."[60]

C. The Commission has Authority to Toll Consideration of the Application for Reconsideration

22. The Joint Applicants "request that the Commission toll consideration of the Application for Reconsideration filed by Joint Applicants on September 28, 2015 for such period

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53 *Formal Case No. 1119*, Motion to Reopen at 9-10.

54 *Formal Case No. 1119*, Motion to Reopen at 10.

55 *Formal Case No. 1119*, Motion to Reopen at 10.

56 *Formal Case No. 1119*, Motion to Reopen at 10.

57 *Formal Case No. 1119*, Motion to Reopen at 11.

58 *Formal Case No. 1119*, Motion to Reopen at 11.

59 *Formal Case No. 1119*, Motion to Reopen at 11.

60 *Formal Case No. 1119*, Motion to Reopen at 11.

of time as the Commission requires to fully consider the merits of the Settlement Agreement."[61] The Joint Applicants point out that "[t]he District of Columbia Court of Appeals has held that the Commission holds the authority to toll consideration of an Application for Reconsideration, despite the District of Columbia Code's provision that the Commission 'shall either grant or deny' an Application for Reconsideration within 30 days after its filing."[62]

23. The Joint Applicants assert "[t]his case fully warrants the exercise of the Commission's tolling authority."[63] Specifically, the Joint Applicants "request that the Commission not issue a decision based on procedural deadlines that the Commission can and in the past has tolled in order to allow for careful consideration of all issues."[64] The Joint Applicants state:

> Tolling the time for consideration of the Application for Reconsideration will allow the parties and the Commission to focus their resources on the Settlement, without investing time and resources on a parallel matter that may be rendered moot by a decision on the Settlement.[65]

The Joint Applicants also "request that the Commission also toll the time for responses to the Application for Reconsideration."[66] The Joint Applicants assert that no party will be prejudiced by this action and "[i]n fact, tolling the time by which the parties must respond to the Application for Reconsideration will only result in positive benefits as all those opposed to the Application for Reconsideration will be granted more time to prepare their papers."[67]

D. The Commission Should Promptly Set a Date for Evidentiary Hearings on the Merits of the Settlement Agreement

24. The Joint Applicants argue that "[c]onsistent with the Commission settlement procedures and recognizing the extensive evidentiary record already developed in this proceeding, the Joint Applicants request that consistent with the terms of the Settlement

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61 *Formal Case No. 1119*, Motion to Reopen at 11.

62 *Formal Case No. 1119*, Motion to Reopen at 11-12, citing *United States v. Public Service Commission of the District of Columbia*, 465 A.2d 829, 834 (Aug. 18, 1983), (which cites *California Co. v. Federal Power Commission*, 134 U.S. App. D.C. 5, 411 F.2d 720 (D.C. Cir. 1969)) and D.C. Code § 34-604 (b) (2001).

63 *Formal Case No. 1119*, Motion to Reopen at 12.

64 *Formal Case No. 1119*, Motion to Reopen at 12, citing *See, e.g., Formal Case No. 1016, In the Matter of the Application of Washington Gas Light Company, District of Columbia, for Authority to Increase Existing Rates and Charges for Gas Service*, Order No. 13033, rel. January 7, 2004.

65 *Formal Case No. 1119*, Motion to Reopen at 12.

66 *Formal Case No. 1119*, Motion to Reopen at 13.

67 *Formal Case No. 1119*, Motion to Reopen at 13.

Agreement agreed to among the Settling Parties, the Commission set a schedule within 45 days after today that allows for a Final Order to be issued within 150 days after today."[68] The Joint Applicants proposed a procedural schedule "for prompt Commission consideration of the Settlement Agreement, which includes provisions for post-hearing initial and reply briefs, providing opportunities in addition to those contained in the Commission's settlement procedure for non-settling parties to make their position on the Settlement known to the Commission."[69] Specifically, the Joint Applicants propose the following procedural schedule:

- Motion to Approve the Settlement Agreement and testimony in support of the Settlement Agreement to be filed on or before October 19, 2015;
- Discovery to commence immediately; all data requests to be submitted no later than November 3, 2015; and all responses to be provided within 5 business days;
- Evidentiary hearings on the merits of the Settlement Agreement on November 13, 2015;
- Initial Briefs to be filed on November 24, 2015; and
- Reply Briefs to be filed on December 8, 2015.[70]

IV. RESPONSES TO MOTION TO REOPEN AND ORDER NO. 18000

A. Joint Applicants Response to Order No. 18000

25. The Joint Applicants filed a response to Paragraphs 13 and 16 of Order No. 18000 which directed parties to: (1) comment on the procedural schedule proposed in the Joint Applicants October 8, 2015, Motion to Reopen the Record and (2) address the scope of discovery that would be included in the procedures and whether any discovery would be limited by Commission Rule 130.6 and other rules pertaining to settlements.[71] In their response, the Joint Applicants provide an updated proposed procedural schedule that provides for discovery for non-settling parties to commence immediately.[72] The updated proposed procedural schedule also provides for the "submission of post-hearing briefs" and "incorporates a period for filing of testimony by non-settling parties (with an expedited period for any related discovery and the opportunity for brief oral rebuttal by the Settling Parties).[73] The Joint Applicants assert that the updated proposed procedural schedule provides for "discovery and testimony by non-settling

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68 *Formal Case No. 1119*, Motion to Reopen at 15, citing Settlement Agreement ¶ 136 (a).

69 *Formal Case No. 1119*, Motion to Reopen at 15.

70 *Formal Case No. 1119*, Motion to Reopen at 15. (Citation omitted).

71 *Formal Case No. 1119*, Response of Joint Applicants to Commission Order no. 18000 Regarding the Schedule for this Proceeding and the Scope of Discovery, at 1-2, filed October 16, 2015 ("Joint Applicants' Response").

72 *Formal Case No. 1119*, Joint Applicants' Response at 2.

73 *Formal Case No. 1119*, Joint Applicants' Response at 2.

parties and full briefing [which] exceeds the requirements of the Commission's Rules . . . pertaining to settlements, and will serve to provide a full record for review of the Settlement Agreement and ruling on the Merger."[74] The Joint Applicants' updated procedural schedule is as follows:

- Settling Parties file Testimony in support of Settlement Agreement by C.O.B. October 30, 2015
- Discovery with respect to the Settlement Agreement to commence immediately, and discovery on the Settling Parties' testimony to commence immediately upon filing of such testimony; all data requests directed to Settling Parties to be served no later than November 6, 2015; and all responses to such data requests are to be served within five (5) business days (but in no event later than November 13, 2015);
- Testimony of the non-settling parties to be filed and served by end of business day on November 20, 2015;
- Discovery on testimony of the non-settling parties to commence immediately upon filing of the non-settling party's testimony; all data requests directed to the non-settling parties to be served no later than November 24, 2015; and all responses to such data requests are to be served within five (5) business days (but in no event later than December 2, 2015);
- Evidentiary hearing on the merits of the Settlement Agreement to be held on December 3, 2015 (which may continue on December 4, 2015, if necessary); Settling Parties will be permitted to present brief oral rebuttal testimony at the hearing;
- Initial Briefs by all parties to be filed on December 16, 2015; and
- Reply Briefs by all parties to be filed on December 23, 2015 (with the record closing on December 23, 2015).[75]

26. With regard to the scope of discovery, the Joint Applicants argue that discovery should be limited to factual inquires pertaining to matters within the four corners of the settlement agreement. The Joint Applicants note that the Commission's Rules on settlement "do not require any discovery," however, the Joint Applicants assert that "consistent with their desire that the process for considering and ruling upon the settlement be open and transparent, support a reasonable degree of discovery focused on the new and enhanced commitments set forth in the Settlement Agreement and the testimony of the Settling Parties and the non-settling parties filed in connection with the Settlement Agreement."[76]

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[74] *Formal Case No. 1119*, Joint Applicants Response at 2.

[75] *Formal Case No. 1119*, Joint Applicants' Response at 3

[76] *Formal Case No. 1119*, Joint Applicants' Response at 4.

27. The Joint Applicants assert that "Formal Case No. 1119 was fully litigated" and that all parties have an extensive record to aid in their consideration and review of the Settlement Agreement. Therefore, the Joint Applicants assert that it is appropriate for the Commission to limit discovery at this stage to the new and enhanced commitments set forth in the Settlement Agreement and that the Commission should "prohibit discovery that is unlimited in scope or that seeks to get a 'second bite at the apple' with respect to issues and matters that were explored previously."[77] The Joint Applicants cite Commission Rule 130.6 which prohibits discovery of any "[s]tatements made and documents considered by parties during the course of settlement negotiations and conferences," as support for its contention that such confidential statements and documents should not be admitted into evidence in this matter "irrespective of how they were obtained."[78]

B. OPC's Response to Order No. 18000

28. OPC indicates it is filing it response to Order No. 18000 to address the procedural schedule and the scope of discovery.[79] OPC states that "[w]hile the Office supports the expeditious consideration of the Settlement Agreement, it is equally committed to ensuring that the requirements of due process and the Commission's rules are enforced, regardless of which procedural vehicle is selected by the Commission."[80] OPC indicates that it "has reviewed and supports the procedural schedule proposed by the Joint Applicants in the response that they are filing."[81] OPC further states that it "strongly supports the proposal to afford any party seeking to oppose the Settlement Agreement an opportunity to conduct discovery and to submit opposing testimony on the terms of the Settlement Agreement."[82] Additionally, OPC requests that the Commission hold a community hearing before the filing of post-hearing reply briefs "so members of the public can testify, and provide their views with respect to the Settlement Agreement."[83] Regarding the scope of discovery, OPC states "Rule 130.6 is the bedrock for settlements before the Commission" and "that the scope of discovery must be limited by the prescriptions of Commission Rule 130.6 and, as applicable, the other provisions of 15 DCMR § 130 regarding confidentiality of settlement negotiations."[84]

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77 *Formal Case No. 1119*, Joint Applicants' Response at 4.

78 *Formal Case No. 1119*, Joint Applicants' Response at 5.

79 *Formal Case No. 1119*, OPC's Response at 1.

80 *Formal Case No. 1119*, OPC's Response at 2.

81 *Formal Case No. 1119*, OPC's Response at 2.

82 *Formal Case No. 1119*, OPC's Response at 2.

83 *Formal Case No. 1119*, OPC's Response at 3.

84 *Formal Case No. 1119*, OPC's Response at 3.

C. AOBA's Response to Order No. 18000

29. In its Response to Order No. 18000, AOBA asserts that "[w]hatever procedural process the Commission determines is appropriate, AOBA supports a process that is (1) transparent, (2) provides a reasonable schedule for the Commission and interested parties to participate in the necessary elements required of a comprehensive public interest review of the Settlement Agreement, (3) permits any interested party the opportunity to engage in prudent discovery, (4) ensures the right of a party to file written testimony, (5) provides for evidentiary hearings to receive testimony, cross-examination of witnesses, and evidence on the record regarding the merits of the Settlement Agreement, and (6) provides for the filing of post-hearing briefs on the issues raised in the Commission's review of the Settlement Agreement."[85] Ultimately, however, AOBA expresses its support for the procedural schedule proposed by the Joint Applicants and supported by OPC.

30. AOBA asserts that the Commission should adhere to its long-standing, consistently applied public interest standard when reviewing settlement agreements and "submits that in order to preserve the integrity and confidentiality of settlement negotiations, and the benefits derived from settlement agreements approved by the Commission . . . the underlying confidential discussions that led to the October 6, 2015 Settlement Agreement filed by the Joint Applicants must remain confidential and beyond the scope of discovery."[86]

D. District Government's Response to Order No. 18000

31. In its Response to Order No. 18000, the District Government provides a procedural schedule in-line with the updated proposed schedule provided by the Joint Applicants.[87] District Government asserts that the Joint Applicants' schedule "allows for the submission of testimony, discovery, and briefing by all parties and allows time for the Commission to issue a Final Order on the Motion to Approve Settlement on or before March 4, 2016."[88]

32. With regard to the scope of discovery, the District Government asserts that it "does not waive [Commission Rule] 15 D.C.M.R. § 130.6, which prohibits discovery or cross-examination on documents or statements made during the course of settlement negotiations."[89] Therefore, District Government argues, "any drafts of the Settlement Agreement, supporting workpapers, or other materials involving settlement negotiations, are not discoverable and are

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85 *Formal Case No. 1119*, Response of the Apartment and Office Building Association of Metropolitan Washington to Commission Order No. 18000, at 1-3, filed October 16, 2015 ("AOBA's Response").

86 *Formal Case No. 1119*, AOBA's Response at 4.

87 *Formal Case No. 1119*, District of Columbia Government's response to Order No. 18000, filed October 16, 2015 ("DC Government's Response").

88 *Formal Case No. 1119*, DC Government's Response at 1.

89 *Formal Case No. 1119*, DC Government's Response at 2.

not subject to cross examination."[90] District Government argues that "[d]iscovery should be strictly limited to the four corners of the Settlement Agreement itself, and testimony submitted in support thereof."[91]

E. NCLC/NHT's Response to Order No. 18000

33. NCLC/NHT states, its support for the Joint Applicants' request "'to obtain the Commission's guidance on proper procedures for considering'" the Settlement Agreement.[92] NCLC/NHT states that it supports "a fair and transparent process that will allow all interested parties a reasonable opportunity to review the Settlement and Comment upon it, including reasonable discovery procedures and holding an evidentiary hearing."[93] NCLC/NHT requests that "testimony from intervenors in support of the Settlement be allowed to be filed by October 30, 2015" and that the deadline for discovery as well as the hearing date "be moved back accordingly."[94] NCLC/NHT states, its belief "that an evidentiary hearing must be held, in accordance with 15 DCMR § 130.11" and "note[s] that a single evidentiary date may not prove adequate, depending on the extent of written testimony filed and the interest of the various parties in conducting cross-examination on that testimony."[95] NCLC/NHT requests, "at least a two-week period between the close of the evidentiary hearing and the filing of initial briefs" and that parties are allowed "no less than seven days" in which to file reply briefs.[96] NCLC/NHT states, "In order to ensure a fair and transparent review of the Settlement, the Commission should consider explicitly allowing for not only supporting testimony to be filed . . . but any opposing testimony as well."[97] Finally, regarding Commission Rule 130.6, NCLC/NHT requests that "any statements made or documents exchanged by the parties to the Settlement should explicitly be made non-discoverable in any procedural order that the Commission may issue."[98]

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90 *Formal Case No. 1119*, DC Government's Response at 2.

91 *Formal Case No. 1119*, DC Government's Response at 2.

92 *Formal Case No. 1119*, The Response of the National Consumer Law Center, National Housing Trust and the National Housing Trust Enterprise to Commission Order No. 18000, Paragraph 13 and Joint Applicants' Motion to Reopen the Record in Formal Case No. 1119 ("NCLC/NHT's Response"), at 2, filed October 16, 2015.

93 *Formal Case No. 1119*, NCLC/NHT's Response at 2.

94 *Formal Case No. 1119*, NCLC/NHT's Response at 2-3.

95 *Formal Case No. 1119*, NCLC/NHT's Response at 3.

96 *Formal Case No. 1119*, NCLC/NHT's Response at 3.

97 *Formal Case No. 1119*, NCLC/NHT's Response at 3-4.

98 *Formal Case No. 1119*, NCLC/NHT's Response at 4.

F. GSA's Opposition to the Motion to Reopen

34. GSA opposes the Joint Applicants' Motion to Reopen.[99] GSA argues that the Settlement Agreement is untimely and requires review in a new proceedings in order to "afford all parties the opportunity for discovery period, for community input, and for the Settlement Agreement to be scrutinized by the nonsettling parties and the public."[100] GSA provides three overarching reasons for its opposition to reopening the *Formal Case No. 1119* record to consider the Settlement Agreement: (1) the Settlement Agreement contains terms and conditions that warrant full consideration afforded through a new proceeding; (2) the Joint Applicants' proposed timeline deprives the nonsettling parties of a meaningful opportunity to vet the Settlement Agreement; and (3) the public needs an opportunity to determine how the proposed Merger and Settlement Agreement affects the public.[101]

35. In support of its first point GSA argues that consideration of the Settlement Agreement should not be rushed through an expedited schedule of 150 days and that doing so is against the public interest. GSA asserts that a new proceeding is necessary because "[n]ot all of the potential parties are a party to the Settlement Agreement, the result being that the Settlement Agreement lacks support from a significant portion of the public."[102] Furthermore, GSA contends that "the Settlement Agreement contains terms and conditions that may prompt some members of the public not previously involved to intervene" and "[u]nder a new docket, any new parties within the public may join the proceeding and all parties and members will have adequate time to review and analyze the Settlement Agreement."[103] GSA notes that the "Settlement Agreement contains terms and conditions[, like changes to battery storage,] that affect the public's interest and these terms are materially different from those that the Commission previously considered" in the Merger Application.[104]

36. Second, GSA opposes the Joint Applicants' proposed procedural schedule which includes a "truncated timeline" that GSA asserts "deprives the nonsettling parties and the community at large with [sic] a meaningful opportunity to vet the Settlement Agreement."[105] GSA argues that new terms in the Settlement Agreement that have not been previously considered "necessitate the involvement of experts to review and assess the long-term impact" and that such involvement will require time.[106] GSA contends that the Joint Applicants'

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99 *Formal Case No. 1119*, U.S. General Services Administration Opposition to Joint Applicants' Motion to Reopen the Record, filed October 16, 2015 ("GSA Response").

100 *Formal Case No. 1119*, GSA Response at 3-4.

101 *See generally*, *Formal Case No. 1119*, GSA Response.

102 *Formal Case No. 1119*, GSA Response at 4.

103 *Formal Case No. 1119*, GSA Response at 4-5.

104 *Formal Case No. 1119*, GSA Response at 5.

105 *Formal Case No. 1119*, GSA Response at 6.

106 *Formal Case No. 1119*, GSA Response at 6.

proposed timeline only provides "two months for filing testimony, discovery, responsive testimony, hearings, and briefing" but that "under normal circumstances, an adequate amount of time is no less than five months to complete this process."[107] GSA provides the following timeline for the Commission's consideration:

- Joint Applicants file a new application with supporting testimony and exhibits by October 26, 2015;
- Commission docketing of the new proceeding by October 30, 2015;
- Petitions to intervene filed by November 13, 2015;
- Commission's grant or denial of intervention petitions by November 20, 2015;
- Discovery commences upon the filing of the application with all data requests to the Joint Applicants or Settling Parties submitted no later than December 22, 2015, with all responses to be provided within five business days;
- Nonsettling parties submit their responsive testimony by January 20, 2016;
- All data requests from Joint Applicants or Settling Parties to the nonsettling parties no later than February 1, 2016;
- Joint Applicants' and Settling Parties' rebuttal testimony by February 10, 2016;
- Designation of portions of the record in Formal Case No. 1119 to be received in the new proceeding by February 12, 2016;
- Evidentiary hearings begin on February 15, 2016 and end on February 19, 2016;
- Initial Briefs to be filed on March 11, 2016; and
- Final Briefs filed on March 31, 2016.[108]

37. Lastly, GSA asserts that the public needs time to determine the effects of the Settlement Agreement. GSA argues that "[w]hile the Joint Applicants claim that the nonsettling parties will not be prejudiced, the veracity of this claim cannot be ascertained without an opportunity to analyze and review the Settlement Agreement."[109] By way of example, GSA asserts that "the Settlement Agreement does not contain any rate protections for commercial customers" and that "[a]t this time, it is unknown how commercial customers will be affected by the merger and terms of the Settlement Agreement."[110] GSA urges the Commission to, therefore, deny the Joint Applicants' Motion to Reopen.

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107 *Formal Case No. 1119*, GSA Response at 6-7.

108 *Formal Case No. 1119*, GSA Response, Proposed Schedule at 9-10.

109 *Formal Case No. 1119*, GSA Response at 7.

110 *Formal Case No. 1119*, GSA Response at 8-9.

G. Nonsettling Parties Opposition to the Motion to Reopen

38. The Nonsettling Parties oppose the Motion to Reopen. First, the Nonsettling Parties assert "the motion should be denied because the Commission's rules do not permit settlements to be submitted after a 'final decision,' which, in this case, was the Commission's August 27, 2015 order denying the Joint Applicants' request to approve the Exelon's acquisition of Pepco."[111] Second, the Nonsettling Parties argue, "the Commission is not bound by the Joint Applicants' self-imposed 150-day deadline for consummating their deal."[112] The Nonsettling parties state that "[t]he Commission must allot whatever time is required to permit full public participation and to scrutinize the terms of the deal that was negotiated with no input from the nonsettling parties or customers."[113] Third, the Nonsettling Parties state that "discovery related to the terms of the new application must be unfettered, subject only to the limitations in Rule 130.6 . . ."[114] The Nonsettling Parties state, "Within reason and without duplicating what has already been done or breaching the confidentiality of settlement materials, no stone should be left unturned in examining this latest iteration of the proposed transaction."[115]

1. The Commission's Rules Do Not Permit Reopening the Record After the August 27, 2015 Final Decision in Order No. 17947, and the Joint Applicants Must Submit a New Application in a New Proceeding

39. The Nonsettling Parties argue, "The Motion to Reopen improperly conflates 'final decision' with 'final action' when the two terms are distinct in both the empowering statute and in the Commission's rules."[116] They point out that the Joint Applicants "cite only the portion of the D.C. Code relating to 'final action,' but neglect the first portion of that same paragraph that defines 'final decision.'"[117] The Nonsettling Parties explain that a "request for reconsideration may be made only from the 'final order or decision,' and the Commission's disposition of the reconsideration request constitutes its 'final action.'"[118]

40. The Nonsettling Parties assert, "[t]he Commission's rules reflect this distinction," explaining

> When Joint Applicants filed their request for reconsideration on September 28, 2015, they acknowledged that Order No. 17947 was

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111 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 2.

112 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 3.

113 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 3.

114 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 4.

115 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 4.

116 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 4.

117 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 4.

118 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 5, citing D.C. Code § 34-605 (a).

> a "final order or decision" under D.C. Code § 34-604 and 15 DCMR § 140.1. Thus, it must also be considered a "final decision" for determining when a settlement may be submitted – i.e., settlements may be "presented at any time prior to the issuance of a *final decision*."[119]

41. The Nonsettling Parties argue that "the Commission's rules do not permit [the Joint Applicants] to reopen this record now and present new terms for the Commission's further consideration after its final decision."[120] They point out that "Joint Applicants neglect to note that there was no decision in that case before the parties submitted a unanimous settlement" in *Formal Case No. 1002*, which the Joint Applicants present as "precedent."[121] Arguing against, the granting of a waiver of the Commission's rules, the Nonsettling Parties point to two policy reasons. First, they state, "Many of the interested customers or groups have justifiably relied on the formal parties to present and champion their positions" and now that the various Settling Parties have changed positions those parties "no longer reliably represent" the views of interested customers or groups.[122] Second, the Nonsettling Parties argue that "granting Joint Applicants' motion would set a dangerous precedent" because "future applicants will have no incentive to negotiate a reasonable settlement during a proceeding, when it would save the parties and the Commission from the expense of protracted discovery, hearings, briefings, and decisions."[123]

42. The Nonsettling Parties state, "Joint Applicants are not entitled to a second bite at the apple in the same proceeding. If the Joint Applicants want the Commission to consider a new set of conditions, they should be required to submit an entirely new application that can be fully vetted through the Commission's processes."[124]

2. <u>The Schedule in Any New Proceeding Should be Dictated by the Need for Full and Fair Consideration of the New Application, Not by the Joint Applicants' Demands</u>

43. The Nonsettling Parties argue that "[t]he The Joint Applicants should not be permitted to put a gun to the Commission's head and to demand a decision within 150 days (i.e., by March 4, 2016)."[125] The Nonsettling Parties state, "We have heard this threat before. The

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[119] *Formal Case No. 1119*, Nonsettling Parties' Opposition at 5, citing 15 DCMR § 140.1 and 15 DCMR § 130.10.

[120] *Formal Case No. 1119*, Nonsettling Parties' Opposition at 5-6.

[121] *Formal Case No. 1119*, Nonsettling Parties' Opposition at 6, citing *Formal Case No. 1002*, Order No. 12395 at ¶ 4, rel. May 1, 2002.

[122] *Formal Case No. 1119*, Nonsettling Parties' Opposition at 6.

[123] *Formal Case No. 1119*, Nonsettling Parties' Opposition at 7.

[124] *Formal Case No. 1119*, Nonsettling Parties' Opposition at 8.

[125] *Formal Case No. 1119*, Nonsettling Parties' Opposition at 8, citing Motion to Reopen at 15.

original Merger Agreement provided that either Exelon or PHI could unilaterally terminate the transaction if 'the Merger shall not have been consummated by July 29, 2015,' which they could extend until October 29, 2015."[126] The Nonsettling Parties assert that "[t]he Commission should pay no heed to the Joint Applicants' capricious deadlines or dire threats," since the Joint Applicants have informed the New Jersey Board of Public Utilities that "the Joint Petitioners believe it is prudent to request that the Board amend the Merger Order to require that the merger be consummated on, or before, June 30, 2016."[127] The Nonsettling Parties conclude that "the Joint Applicants are content to refrain from terminating their merger agreement for at least 269 days from the time they filed their Motion to Reopen – i.e., until June 30, 2016 – not the 150 days that they contend is their absolute limit" and that "[t]he Commission may and should determine its schedule independent of any supposed ultimatum from the Joint Applicants."[128]

44. The Nonsettling Parties present a critique of the schedule the Joint Applicants included in the Motion to Reopen.[129] They propose the following schedule:

- Joint Applicants file a new application with supporting testimony and exhibits by October 26, 2015;
- Commission docketing of the new proceeding by October 30, 2015;
- Petitions to intervene filed by November 13, 2015;
- Commission's grant or denial of intervention petitions by November 20, 2015;
- Discovery commences upon the filing of the application with all data requests to the Joint Applicants or Settling Parties submitted no later than December 22, 2015, with all responses to be provided within five business days;
- Four community hearings to take testimony from the public in January 2016;
- Nonsettling parties submit their responsive testimony by January 20, 2016;
- All data requests from Joint Applicants or Settling Parties to the nonsettling parties no later than February 1, 2016;
- Joint Applicants' and Settling Parties' rebuttal testimony by February 10, 2016;
- Designation of portions of the record in Formal Case No. 1119 to be received in the new proceeding by February 12, 2016;
- Evidentiary hearings begin on February 15, 2016 and end on February 19, 2016;
- Initial Briefs to be filed on March 11, 2016; and
- Final Briefs to be filed on March 31, 2016.[130]

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126 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 8-9, citing *Formal Case No. 1119*, Amended and Restatement Agreement and Plan of Merger, filed July 29, 2014, § 8.2 (a).

127 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 9, citing *In the Matter of the Merger of Exelon Corp. and Pepco Holdings Inc.*, Docket No. EM14060581, Letter from Colleen A. Foley to Irene Kim Asbury, Secretary of the Board of Public Utilities (Sept. 16, 2015) at 2-3. (Attachment 2 to the Nonsettling Parties' Opposition).

128 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 10.

129 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 10-13.

130 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 13-14.

The Nonsettling Parties state, "This schedule gives the Commission more than three months to issue its decision while still meeting the date that the Joint Applicants represented to the New Jersey BPU as the deadline by which the merger must be consummated."[131]

3. Discovery Should Respect the Confidentiality of Statements Made and Documents Considered by Parties During the Course of Settlement Negotiations and Conferences

45. Regarding the application of Rule 130.6, the Nonsettling Parties state they "respect the confidentiality of statements made and documents considered by the parties in their settlement negotiations and conferences, and those materials will not be subject to discovery."[132] They state, "It will be necessary, however, to understand the basis for and the interpretation of the Settlement Agreement's terms, and those topics will be legitimate topics for discovery."[133] The Nonsettling Parties also indicate that they are looking at the Settlement Agreement to "decipher[ ] what the Settlement Agreement means, how and when it will be implemented, and how it might be enforced."[134]

46. The Nonsettling Parties also state that "the Joint Applicants should be required to comply with Rule 130.7, which specifies that '[a]ll filings contemplated under this section shall recite, in addition to the matters agreed upon at the conference, the date, time, and place of the conference, and the names of the parties in attendance.'"[135]

H. DCPP's Opposition to the Motion to Reopen and Notification of Intent to Acquire PHI's DC-Based Assets

47. In its Opposition, DCPP requests that the Motion to Reopen be denied as follows: (1) for the reasons stated in DC SUN's Opposition; (2) the Motion to Reopen "is in conflict with FC 1130, the stated purpose of which is to '. . . identify technologies and policies that can modernize our energy delivery system for increased sustainability and will make our system more reliable, efficient, cost-effective and interactive;'"[136] (3) the Joint Applicants' Motion seeks to create a new regulatory asset subject to a rate of return "without any further hearing, action or proceeding by the Commission;"[137] (4) were the Motion to be granted, "discovery related to the terms of the non-unanimous settlement agreement (NSA) must be unfettered;"[138] (5) DCPP

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131 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 14.

132 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 14, citing 15 DCMR § 130.6.

133 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 14-15.

134 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 11.

135 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 15.

136 *Formal Case No. 1119*, DCPP's Opposition at 2.

137 *Formal Case No. 1119*, DCPP's Opposition at 3.

138 *Formal Case No. 1119*, DCPP's Opposition at 3.

"declares and confirms its offer to acquire the DC-based assets of PHI;"[139] and (6) "the Joint Applicants' motion itself confirms that DCPP's proposal is inherently superior in its ability to effectuate the public interest."[140]

I. Ward 3 Democratic Committee's Response to Motion to Reopen and Order No. 18000

48. Broadly, Ward 3 Democrats assert, first, that the Joint Applicants and other Settling Parties present "a new merger proposal."[141] Second, Ward 3 Democrats argue that the Joint Applicants proposed procedural schedule is precluded by issues raised by the filling, which include consideration by the Commission of alternatives including public power.[142]

V. DISCUSSION

A. Motion to Reopen the Record

49. In considering the Motion to Reopen, we have two issues that must be addressed. First, we must decide whether it is permissible to reopen the record in this proceeding. Second, we must decide whether it is permissible to allow the presentation of the Settlement Agreement in this proceeding. Regarding the first issue, a decision to reopen the record is a discretionary matter, to be considered in each instance according to the particular facts of each case.[143] In the past, the Commission has noted that it will not reopen the record without good cause.[144] To determine whether good cause exists, the Commission may consider a variety of factors, including whether the moving party's failure to submit the evidence or comments earlier in this proceeding was the result of a lack of due diligence; whether reopening the record would prejudice other parties; and where the interests of justice lie, drawing on factors used by other regulatory commissions or courts faced with similar circumstances.[145]

50. The Joint Applicants assert, "good cause exists to reopen the record, and the interest of justice strongly support doing so."[146] The Joint Applicants further assert that the public interest strongly supports reopening the record to allow the Commission to admit into

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139 *Formal Case No. 1119*, DCPP's Opposition at 4.

140 *Formal Case No. 1119*, DCPP's Opposition at 4.

141 *Formal Case No. 1119*, Ward 3 Democrats' Response at 4-5.

142 *Formal Case No. 1119*, Ward 3 Democrats' Response at 5-16.

143 *Formal Case No. 1102, In the Matter of the Investigation into the Continued Use of Verizon Washington, DC, Inc.'s Copper Infrastructure to Provide Telecomm. Services* ("*Formal Case No. 1102*"), Order No. 17879, rel. May 14, 2015; *See also, John v. Sotheby's, Inc.*, 858 F. Supp. 1283, 1288 (S.D.N.Y. 1994).

144 *Formal Case No. 1090*, Order No. 17143, ¶29, rel. May 30, 2013.

145 *Formal Case No. 1102*, Order No. 17879, ¶ 15, rel. May 14, 2015.

146 *Formal Case No. 1119*, Motion to Reopen at 9.

evidence the Settlement Agreement, written testimony in support of the Settlement Agreement and other admissible evidence that may be presented at any hearings, and is best considered as part of the current proceeding.[147] The Joint Applicants state, "[c]onsideration of the Settlement Agreement as part of this proceeding will not prejudice the settling parties at all [because] [t]hey will have a full and fair opportunity under the Commission's settlement rules to examine the merits of the terms of the Settlement Agreement."[148] The Nonsettling Parties argue that granting the Joint Applicants motion would set a dangerous precedent.[149] The Nonsettling Parties further argue that reopening the proceeding now and permitting the Joint Applicants to "present yet another iteration of their proposed acquisition would trivialize the entire years-long process the Joint Applicants have put the Commission and the parties through."[150] The Nonsettling Parties assert, "[i]f the Joint Applicants want the Commission to consider a new set of conditions, they should be required to submit an entirely new application that can be fully vetted through the Commission's processes."[151] GSA argues that although the Joint Applicants state that nonsettling parties will not be prejudiced from considering the Settlement Agreement in Formal Case No. 1119, "the Joint Applicants have no way of knowing whether the nonsettling parties will not be prejudiced. Critical terms and conditions of the Settlement Agreement are too vague and ambiguous to ascertain how the nonsettling parties will be affected."[152]

51. Our decision on this first issue hinges on how we decide the second issue--namely whether it is permissible to allow the presentation of the Settlement Agreement at this juncture of the proceeding. Commission Rule 130.10 provides in pertinent part that "[s]ettlements may be presented at any time prior to the issuance of a final decision."[153] The Joint Applicants assert that Order No. 17947 is not a final decision because the Joint Applicants have filed an Application for Reconsideration that automatically stays that order until the final action of the Commission upon the Application for Reconsideration.[154] The Joint Applicants argue that because the Commission has not issued a final decision on the Application for Reconsideration, it may consider this Settlement Agreement.[155] The Joint Applicants further assert that the Commission's acceptance of the Unanimous Agreement of Stipulation and Full Settlement at the conclusion of the evidentiary hearing in *Formal Case No. 1002* serves as precedence in support

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147 *Formal Case No. 1119*, Motion to Reopen at 9-10.

148 *Formal Case No. 1119*, Motion to Reopen at 11.

149 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 7.

150 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 7-8.

151 *Formal Case No. 1119*, Nonsettling Parties' Opposition at 8.

152 *Formal Case No. 1119*, GSA Opposition at 4.

153 15 DCMR § 130.10.

154 *Formal Case No. 1119*, Motion to Reopen at 5-6 (citing D.C. Code § 34-604(b) and *Natural Motion by Sandra, Inc. v. D.C. Comm'n on Human Rights,*726 A.2d 194, 197 (D.C. 1999)).

155 *Formal Case No. 1119*, Motion to Reopen at 6.

for granting the Motion to Reopen.[156] The Nonsettling Parties counter by asserting that, when the Joint Applicants filed their Application for Reconsideration, "they acknowledged that Order No. 17947 was a 'final order or decision' under D.C. Code § 34-604 and 15 DCMR § 140.1. Thus, it must also be considered a 'final decision' for determining when a settlement may be submitted—i.e., settlements may be 'presented at any time prior to the issuance of a *final decision*.'"[157]

52. It is undisputed that Order No. 17947 was issued on August 27, 2015, after the record in this proceeding had closed and the Commission exercised its administrative rights in considering the record evidence before issuing its decision. The Supreme Court has consistently held that for an order to be final, it must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process."[158] Decisions of this Commission are memorialized in orders.[159] The Commission deems Order No. 17947 to be a final decision that is a result of the consummation of the administrative process in this proceeding. Therefore, Order No. 17497, for purposes of determining the timeliness of the presentation of the Settlement under Commission Rule 130.610 is a final decision.[160] The Settlement Agreement presented in the Motion to Reopen is, therefore, untimely.[161]

53. Under Commission Rule 146.1, "[t]he Commission may, in its discretion, waive any of the provisions of Chapters 1 and 2 of this title in any proceeding after duly advising the

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156 *Formal Case No. 1119*, Motion to Reopen at 7.

157 *Formal Case No. 1119*, Motion to Reopen at 5 (emphasis supplied).

158 *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948).

159 We note that Chapter 6 of Title 34 of the D.C. Code uses the terms "decision" and "order" interchangeably to account for the use of these terms as relates to actions taken by the Commission that are memorialized in writing.

160 The Commission notes, as argued by the Nonsettling Parties, the cases cited by the Joint Parties for the proposition that Order No. 17947 is not a final order are inapposite. The Joint Applicants conflate a "final order" (*i.e.*, an order that is the consummation of the agency's decision making process) with "final action" or "finality" (*i.e.*, exhaustion of administrative remedies). The D.C. Court of Appeals has determined in many cases that the order underlying a petition for reconsideration is the final order for the purposes of appellate review. In *Toz v. District of Columbia Rental Housing Commission*, 474 A.2d 827, 878 (D.C. 1984), the D.C. Court of Appeals made it clear that it does not have jurisdiction to hear an appeal from a denial of a petition for reconsideration by an administrative agency stating: "Of course, if we have jurisdiction to hear an appeal from the final order itself, we will treat the purported appeal from the denial of reconsideration as having been taken from that underlying order." *See also Vincent v. Anderson*, 621 A.2d 367, 370 (D.C. 1993) (DC Superior Court rules treat Motions for Reconsideration as "requests for relief from a final order." Indeed, "a motion in the nature of a motion for reconsideration filed pursuant to 59(e) is not an appealable order, appeals purporting to be from such orders allow us to view the appeal as being taken from the *final order* from which reconsideration was sought.") (emphasis added), *and see OPC v. PSC*, 414 A.2d 520, 521-22 (D.C. 1980).

161 We further note that Commission Rule 130.17(c) contemplates that the litigation of a case is among the alternative steps the Commission may take if it rejects a settlement. Thus, the case would proceed in accordance with any remaining steps that are set forth in the Commission's procedural schedule through the issuance of a final decision.

parties of its intention to do so." The Joint Applicants assert that the exercise of the Commission's waiver authority would be fully warranted here.[162] The Joint Applicants further assert that substantive consideration of the Settlement Agreement by the Commission is "the prudent, reasonable, and best course for reaching a final decision in this case."[163] GSA and the Nonsettling Parties argue to the contrary.

54. As we have previously stated: "The Commission's decision to address particular issues in specific dockets in accordance with certain procedures is solely within the Commission's own discretion . . . No principle of administrative law is more firmly established than that of agency control of its own calendar."[164] Indeed, not only does the Commission have control of its own calendar and "authority to manage its own cases and to select the issues that are appropriate for hearing in a particular case," but also "any ruling on the necessity of further proceedings is a matter of discretion and the Commission exercises that discretion on a case-by-case basis, as circumstances warrant."[165] It is in this discretionary context that we address the issues before us in the Motion to Reopen. Therefore, having considered fully the Motion to Reopen and all of the parties' responses thereto, the Commission believes it is administratively prudent, given the current state of this record, to invoke Commission Rule 146.1 and allow the Settlement Agreement to be presented for our consideration, even though a final decision has been issued in this proceeding. While we would generally frown upon the presentation of a settlement after a decision has been issued consistent with Commission Rule 130.10, we believe it is administratively prudent in this instance to grant a waiver. The Commission agrees with the Settling Parties that the Settlement Agreement is best considered as part of the current proceeding not only because of the voluminous record developed so far in *Formal Case No. 1119*, but further because this course is administratively efficient by avoiding the expense of time and resources duplicating the record in a new proceeding. If we were to decline to invoke Commission Rule 146.1 and direct the Joint Applicants to file the Settlement Agreement along with a new merger application in a new proceeding, we would still need to allow for the record in this proceeding to be lodged in the new proceeding so that we have a full and complete record before us as part of our consideration of the Settlement Agreement.

55. Having decided to invoke Commission Rule 146.1 and allow the Joint Applicants to file the Settlement Agreement in *Formal Case No. 1119*, we now address the merits of the Motion to Reopen. In evaluating a party's motion to reopen the record after the conclusion of a trial, courts consider (1) whether or not the moving party's failure to submit evidence was the

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162 *Formal Case No. 1119*, Motion to Reopen at 7.

163 *Formal Case No. 1119*, Motion to Reopen at 7.

164 *See Formal Case No. 1062, In the Matter of the Investigation of the Electric Power Outage in the District of Columbia on June 13, 2008*, Order No. 16432, ¶ 7, rel. July 8, 2011 (citing *Formal Case No. 1082, In the Matter of the Investigation into the Distribution System Reliability Performance of the Potomac Electric Power Company in the District of Columbia*, Order No.16077, ¶ 9, rel. December 6, 2010).

165 *See Formal Case No. 1103, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order No. 17141, ¶50, rel. May 29, 2013.

result of its own lack of diligence; (2) the extent to which reopening the record might prejudice the nonmovant; and (3) where the interests of justice lie.[166] There is no evidence before us that shows that the failure to submit a Settlement Agreement at an earlier time was the result of the movants' lack of diligence. Joint Applicants state that the Settling Parties have worked toward a Settlement Agreement in accordance with the Commission's directives and that work began before the closing of the record.[167] The Joint Applicants state further that, while earlier settlement discussions did not yield a settlement, "Order No. 17947 spurred new discussions."[168]

56. Next we consider whether the reopening the record in the current proceeding would prejudice any of the nonmovants. As we will discuss further in this Order, we believe it essential that our consideration of the Settlement Agreement be in accordance with our established rules for determining whether a Settlement Agreement is in the public interest. The Nonsettling Parties and GSA will have a full and fair opportunity to participate in the Settlement proceeding and make their views known to the Commission. Moreover, we will also permit the public to express its view and opinions regarding the Non-Unanimous Settlement Agreement.

57. Finally, we consider where the interests of justice lie. We acknowledge the concern of the Nonsettling Parties that the acceptance of a Settlement Agreement after the issuance of a final order is both bad precedent and bad policy. We have previously noted that the case before us falls outside of our Commission's ordinary course of business. By this Order, the Commission clarifies and puts interested persons on notice that our action today is one based strictly on the circumstances of this case and shall not be cited as controlling precedent for the orderly conduct of business at this Commission. We think the interest of justice lies in the expeditious resolution of this Merger proceeding through the conduct of a fair and transparent proceeding that will determine whether the Settlement Agreement that has been advanced by several major parties to this proceeding is in the public interest.

58. Under the circumstances before us, the Commission believes that it is in the public interest to exercise our discretion and waive the first sentence in Commission Rule 130.10 (pertaining to when settlements may be presented). Consequently, the Commission will reopen the record in *Formal Case No. 1119* solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest.[169] The Commission emphasizes that the record will be reopened for no other purpose.

59. The Commission further determines that this matter can and should be resolved expeditiously, but in no event at the expense of the due process rights of any of the parties.

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166 *John v. Sotheby's, Inc.*, 858 F. Supp. 1283, 1288 (S.D.N.Y. 1994).

167 *Formal Case No. 1119*, Motion to Reopen at 9.

168 *Formal Case No. 1119*, Motion to Reopen at 9.

169 The "'PSC is not bound to hold a hearing on every question' when evaluating a proposed settlement. In other words, PSC has a wide range of latitude in determining the range of issues it will explore when faced with a settlement offer as long as it still evaluates whether the settlement is in the public interest." *District of Columbia Water and Sewer v. Public Service Commission of the District of Columbia*, 802 A.2d 373, 378 (D.C. 2002).

Balancing the objectives of a reasonable time for review, comment, and consideration of the Settlement Agreement with the issuance of a decision in a timely manner, it is our considered opinion that the matter before us can be resolved in less than the full 150 days allotted in the Joint Applicants' proposed procedural schedule. Therefore, having given due consideration to the comments provided by all of the parties on a schedule to be adopted for this proceeding, the Commission has crafted the schedule provided as Attachment A to this Order and finds it to be the most appropriate course going forward. Therefore, the Commission adopts the Procedural Schedule in Attachment A.

60. Given the limited nature for which the record is being reopened, (*i.e.*, to consider whether the Settlement Agreement filed by the Settling Parties is in the public interest), the Commission will similarly limit the scope of discovery. As all commenters agree, discovery in this case is limited by Commission Rule 130.6, which provides for confidentiality of "Statements made and documents considered by parties during the course of settlement negotiations and conferences."[170] The Commission agrees with the Nonsettling Parties that "discovery should include what the Settlement Agreement means, how and when it will be implemented, and how it might be enforced."[171] The Commission also agrees with the NCLC/NHT and District Government assertions regarding the scope of discovery[172] and, therefore, determines that any statements made or documents exchanged by parties, including any drafts of the Settlement Agreement, supporting workpapers, or other materials involving the settlement negotiations, are not discoverable and are not subject to cross-examination consistent with Rule 130.6. Discovery in this proceeding is limited to the four corners of the Settlement Agreement itself and the testimony submitted in support of the Settlement Agreement. The Procedural Schedule in Attachment A provides appropriate discovery submission and response deadlines.

61. The Procedural Schedule adopted by this Order provides for both a Public Interest Hearing and a Community Hearing. Pursuant to Commission Rule 130.11, a "full settlement presented in a . . . contested case, which would have an impact on a utility's customers, competitors, or the public, shall only be accepted after a hearing on whether the settlement is in the public interest."[173] Commission Rule 130.12 provides that, at the public interest hearing held pursuant to Rule 130.11, "non-signatory *parties* to the agreement shall be provided the opportunity to cross-examine the witness(es) tendered by the signatory parties on whether the settlement agreement is in the public interest."[174] Commission Rule 130.13 provides that a "Commission decision to adopt a non-unanimous settlement agreement as a resolution on the

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170 15 DCMR § 130.6.

171 *See Formal Case No. 1119*, Nonsettling Parties' Opposition at 11.

172 The Commission notes that it has generally not permitted discovery during the consideration of a settlement agreement. *See Formal Case No. 945, In the Matter of the Investigation into the Electric Service Market Competition and Regulatory Practice*, Order No. 11746, ¶ 11, rel. August 9, 2000. However considering the "significance" of this case and the settling parties consent the Commission will permit the additional process. *See Formal Case No. 945*, Order No. 11845, ¶ 3, rel. December 5, 2000.

173 15 DCMR § 130.11.

174 15 DCMR § 130.12 (emphasis added).

merits shall be based upon substantial evidence upon the record."[175] Consistent with Commission precedent for other settlement proceedings, the determination of "in the public interest" is made within the context of the case.[176] To be in the public interest in the context of this proceeding, the Settling Parties must show that the Proposed Merger as set forth in the Settlement Agreement, when taken as a whole, is in the public interest under D.C. Code §§ 34-504 and 34-1001.

62. Therefore, pursuant to Rule 130.11, the Commission will hold a Public Interest Hearing in this proceeding at December 2-3, 2015 at 10:00 AM, in the Commission's Hearing Room, 1325 G St., N.W., Suite 800, Washington, D.C. 20005, for the purpose of considering whether the Settlement Agreement is in the public interest. The Commission also reserves December 4, 2015 as a hold over day for the hearing. In accordance with the Procedural Schedule in Attachment A hereto, the Settling Parties must file their testimony addressing why the proposed settlement is in the public interest pursuant to Paragraph 61 of this Order by October 30, 2015. The Settling Parties may, at their discretion, elect to file joint testimony. The Nonsettling parties must file their testimony addressing why the proposed settlement is not in the public interest pursuant to Paragraph 61 of this Order on November 17, 2015.

63. In addition, each non-signatory party must advise the Commission, by close of business, November 30, 2015, if it intends to conduct cross-examination at the Public Interest Hearing. If no non-signatory party informs the Commission that it wishes to conduct cross-examination of the Settling Parties, the Commission will waive Commission Rule Section 130.12, which provides non-signatory parties an opportunity to cross-examine the witnesses tendered by the signatory parties.[177] Though the Procedural Schedule in Attachment A provides for the filing of initial and reply briefs, such filings are at the discretion of the party.

64. The Commission further believes that the general public and interested persons who are not parties in the case should also have an opportunity to comment on whether the Settlement Agreement is in the public interest. Therefore, at date and time to be announced, the Commission will hold a Community Hearing in the Commission's Hearing Room, 1325 G St., N.W., Suite 800, Washington, D.C. 20005, for the purpose of receiving oral and written comments from interested persons who are not parties to this case on whether the Settlement Agreement is in the public interest. The Commission also invites interested persons who are not parties to this case who wish only to file written comments on the Settlement Agreement to submit those comments by mail or hand-delivery to Brinda Westbrook-Sedgwick, Commission Secretary, Public Service Commission of the District of Columbia, 1325 G Street, N.W., Suite 800, Washington D.C. 20005, or by email at psc-commissionsecretary@psc.dc.gov. The Office of the Commission Secretary will accept the written comments on the Settlement Agreement

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[175] 15 DCMR § 130.13.

[176] *Formal Case No. 1115, Application of Washington Gas Light Company for Approval of a Revised Accelerated Pipe Replacement Program*, Order No. 17789, rel. January 29, 2015, ¶¶ 61-62.

[177] *See Formal Case No. 1002*, Order No. 12362, ¶¶ 3-5, rel. March 20, 2002. (In the absence of opposing parties the Commission granted the settling parties motion to Motion to Waive Hearing on the Proposed Settlement.)

from the date of this Order until the close of the record, which is currently scheduled for December 18, 2015.

B. Non-party Responses to the Motion to Reopen

65. DCPP's Opposition to Joint Applicants' Motion to Reopen and Ward 3 Democrats Comments are rejected in accordance with Commission Rule 100.10.[178] Responding to motions filed in a proceeding is limited to parties.[179] Commission Rule 199.1 defines a "party" as "any person who is an applicant, complainant, petitioner, respondent, or intervenor in a proceeding."[180] It is clear that, at this time, DCPP and Ward 3 Democrats are not an applicant, complainant, petitioner, or respondent in this case. Furthermore, because the Commission is still considering various requests for participation in this proceeding they are not intervenors. Thus, they are not a "party" to this proceeding, and as such, they have no standing to file any document in response to the Joint Applicants' Motion to Reopen in this case. We, therefore, reject DCPP's Opposition to the Joint Motion and the comments filed by Ward 3 Democrats.

THEREFORE IT IS ORDERED THAT:

66. The Motion of Joint Applicants to Reopen the Record in *Formal Case No. 1119* to Allow for Consideration of Non-Unanimous Settlement Agreement Stipulation is **GRANTED**;

67. The Commission **ADOPTS** the Procedural Schedule in Attachment A;

68. DC Public Power's Opposition to the Joint Motion to Reopen the Record is **REJECTED**; and

69. Ward 3 Democratic Committee's Comments are **REJECTED**.

A TRUE COPY: **BY DIRECTION OF THE COMMISSION:**

CHIEF CLERK: **BRINDA WESTBROOK-SEDGWICK**
COMMISSION SECRETARY

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178 15 DCMR § 100.10 states: "The Commission may, at any time, reject all or any part of a filing that does not conform to the requirements of Chapters 1 and 2 of this title."

179 *See e.g.*, 15 DCMR § 105 (Answers, Cross-Complaints and Motions).

180 15 DCMR § 199.1.

PROCEDURAL SCHEDULE

1	Motion to Approve the Settlement Agreement and Supporting Testimony Filed	October 30, 2015
2	Data Requests to Settling Parties' Regarding Settlement Agreement and Supporting Testimony	November 6, 2015
3	Settling Parties' Responses to Data Requests Regarding Settlement Agreement and Supporting Testimony	November 13, 2015
4	Community Hearing	TBD
5	Nonsettling Party Testimony Filed	November 17, 2015
6	Data Requests to Nonsettling Parties Regarding Settlement Agreement and Supporting Testimony	November 20, 2015
7	Nonsettling Parties' Responses to Data Requests Regarding Settlement Agreement and Supporting Testimony	November 25, 2015
8	Public Interest Hearing (Two Days)	December 2-3, 2015 (December 4 as hold over day)
9	Initial Briefs	December 11, 2015
10	Reply Briefs	December 18, 2015