

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

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DISTRICT OF COLUMBIA
PUBLIC SERVICE COMMISSION

ORDER

December 17, 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. 18058

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia (“Commission”) grants Public Citizen Foundation’s (“Public Citizen”) Motion for Leave to Reply to the Joint Applicants’ Response to Public Citizen’s Petition to Intervene,¹ and denies Public Citizen’s Petition for Leave to Intervene.²

II. BACKGROUND

2. On April 30, 2014, Exelon Corporation (“Exelon”) announced Exelon’s purchase of Pepco Holdings, Inc. (“PHI”), the parent company of the Potomac Electric Power Company (“Pepco”). 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 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”).³

3. On June 27, 2014, the Commission directed that any interested person desiring to formally intervene in this proceeding shall file a petition to intervene with the Commission no

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 for Leave to Reply to the Joint Applicants’ Response to Public Citizen’s Petition to Intervene, filed November 27, 2015 (“Public Citizen’s Motion”).*

² *Formal Case No. 1119, Petition for Leave to Intervene of Public Citizen Foundation, filed November 19, 2015 (“Public Citizen’s Petition”).*

³ *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”).*

later than July 11, 2014.⁴ 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 Public Citizen did not file a petition to intervene by the designated filing date of July 11, 2014.

4. Following four days of Community hearings and 11 days of evidentiary hearings, the Commission, on August 27, 2015, 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

5. On September 30, 2015, the District Government and Joint Applicants filed a Joint Motion for a Stay or, in the Alternative, for an Extension of Time to Respond to the Application for Reconsideration.¹⁰ 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, 2015.¹¹ Additionally, the Commission stated "in no event will the responses [to the Application for Reconsideration] be due earlier than October 9, 2015."¹²

⁴ *Formal Case No. 1119*, Order No. 17530, ¶¶ 30, 36, rel. June 27, 2014.

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"); GRID 2.0 Working Group ("GRID 2.0"); 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").

¹¹ *Formal Case No. 1119*, Order No. 17993, ¶ 11, rel. October 2, 2015. (citations omitted).

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

6. On October 6, 2015, the Joint Applicants filed a Motion to Reopen the Record in *Formal Case No. 1119* to Allow for Consideration of a Non-unanimous Full Settlement Agreement and Stipulation (“Settlement Agreement”), which was submitted as Attachment A.¹³ In an Order issued October 28, 2015, the Commission granted the Motion to Reopen the Record in *Formal Case No. 1119*, and set a procedural schedule for an evidentiary public interest hearing (to be held on December 2-4, 2015) and a community hearing (on a date to be determined) to determine whether the Settlement Agreement is in the public interest.¹⁴ In Order No. 18018, issued October 30, 2015, the Commission denied Petitions to Intervene filed by DC Public Power¹⁵ and WGL Energy Systems, Inc.¹⁶

7. The community hearing, at which Public Citizen provided comments on the record, was held on November 17-18.¹⁷ On November 19, 2015, Public Citizen filed a Petition for Leave to Intervene in *Formal Case No. 1119*. On November 23, 2015, the Joint Applicants filed a Response in Opposition to Public Citizen’s Petition for Leave to Intervene.¹⁸

8. On November 24, 2015, the Commission amended its posted agenda for the November 25, 2015 meeting and added the Public Citizen Motion as an action item. At the Commission’s open meeting on November 25, 2014, the Commission voted to deny Public Citizen’s Petition stating that a written Order would follow at a later date. On November 27, 2015, Public Citizen filed a Motion for Leave to Reply to the Joint Applicants’ Response to Public Citizen’s Petition to Intervene.¹⁹ No written Order by the Commission had issued at the time of the filing. No opposition was filed to Public Citizen’s Motion to Reply.

9. On December 2, 2015, at the start of the Public Interest Hearing, the Commission granted Public Citizen’s Motion to Reply and accepted its Reply into the record and reaffirmed its decision to deny Public Citizen’s Petition to Intervene.²⁰ This Order memorializes the Commission’s decision to deny Public Citizen’s Petition.

¹³ *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”).

¹⁴ *Formal Case No. 1119*, Order No. 18011, rel. October 28, 2015.

¹⁵ *Formal Case No. 1119*, DC Public Power Motion to Request Late Intervenor Status, filed October 16, 2015 (“DCPP’s Motion to Intervene”).

¹⁶ *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”). The Commission *sua sponte* granted WGL Energy Systems, Inc. limited participation in the proceeding.

¹⁷ *Formal Case No. 1119*, Community Hearing November 18, 2015, Tr. 400-405.

¹⁸ *Formal Case No. 1119*, Joint Applicants’ Response in Opposition to Petition for Leave to Intervene of Public Citizen Foundation, filed November 23, 2015 (“Joint Applicants’ Opposition”).

¹⁹ See generally, Public Citizen’s Motion.

²⁰ *Formal Case No. 1119*, Public Interest Hearing December 2, 2015, Tr. 12-13.

III. DISCUSSION

A. **Public Citizen's Petition to Intervene**

10. Public Citizen asserts that granting it "late intervention is justified" because "no current party . . . adequately represents affected customers or the public interest."²¹ In support of its Petition, Public Citizen states the following: (1) it "is a national nonprofit membership organization with over 400,000 members and supporters;" (2) it works to "promote good government and protect consumer and the public interest at the national, state, and local levels;" (3) it has members in the District of Columbia as well as two offices; and (4) it has "a substantial interest . . . because [it] represents District consumers and the public interest."²² Public Citizen also asserts that it has "good cause to intervene and granting the [P]etition would be reasonable" because "the proposed settlement contains new and detailed provisions that have no analogue in the original application, and therefore the application failed to provide potentially interested parties with adequate notice of the settlement that the Commission is now weighing."²³ Public Citizen adds that "it is difficult to see how the parties could be prejudiced by intervention. . . [I]ntervention would do no more than permit an additional party with a valuable perspective to participate in the process." Indeed, Public Citizen asserts that it, as well as "the general public [] would be prejudiced if the Commission declines to permit intervention."²⁴

11. Public Citizen asserts that since the Commission waived its rules to consider the settlement agreement, then the Commission should "bend its rules . . . in an even-handed manner."²⁵ Public Citizen argues that the "Commission has taken extraordinary actions in granting the settling parties' requests that it waive its rules," including setting "a schedule of proceedings so speedy that it makes adequate scrutiny of the proposed settlement exceedingly unlikely and contravenes express language of the D.C. Code requiring at least 45 days' notice before public hearings."²⁶

12. Public Citizen advances two arguments to further support its Petition: (1) the differences between the settlement agreement and the original application provide justification for the Commission to deem the Petition timely or for finding that granting the Petition is reasonable and supported by good cause; and (2) there is no party participating in the proceeding that adequately represents the voice of the consumers and the public interest.²⁷ In support of its first argument, Public Citizen argues that the substantial differences between the settlement

²¹ Public Citizen's Petition at 1, 2.

²² Public Citizen's Petition at 1.

²³ Public Citizen's Petition at 2.

²⁴ Public Citizen's Petition at 3.

²⁵ Public Citizen's Petition at 2.

²⁶ Public Citizen's Petition at 1-2.

²⁷ Public Citizen's Petition at 3, 5.

agreement and the original petition are evidenced by the fact that the settlement agreement “contains nearly three times as many words (roughly 15,500 rather than 5,800) and numerous new and detailed provisions” (*i.e.*, “cost, synergies, and rates”).²⁸ Public Citizen asserts that the new, more detailed settlement provisions “require public scrutiny and a thorough process before the Commission to evaluate adequately.”²⁹

13. In support of its second point, Public Citizen asserts that OPC “previously safeguarded the public’s interest in having a voice in this proceeding,” however, now that the People’s Counsel is a party to the settlement agreement, Public Citizen contends the public’s representation is inadequate.³⁰ As one of several examples provided by Public Citizen as support for its conclusion that absent OPC’s advocacy consumers are inadequately represented, Public Citizen states that the People’s Counsel was silent when the Commission “announced a November 17 community hearing on November 9 – just eight days in advance – and also scheduled it during the workday and failed to give participants advanced notice of the times they could expect to speak.”³¹ Public Citizen asserts granting it intervention will help fill the void left by OPC.³²

14. Ultimately, Public Citizen asserts that granting it intervention “should remedy” problems created by the Commission’s decision to both reopen the record to consider the settlement agreement without providing additional time for intervention and to proceed with what Public Citizen contends is a “rapid” procedural schedule.³³

B. The Joint Applicants’ Opposition

15. The Joint Applicants oppose Public Citizen’s Petition as both “grossly untimely” and failing to “establish the threshold requirement of a ‘substantial interest’ in this proceeding.”³⁴

²⁸ Public Citizen’s Petition at 4.

²⁹ Public Citizen’s Petition at 4-5.

³⁰ Public Citizen’s Petition at 6.

³¹ Public Citizen’s Petition at 6.

³² Public Citizen’s Petition at 9.

³³ Public Citizen’s Petition at 9.

³⁴ Joint Applicants’ Opposition at 2, 7.

1. Public Citizen's Petition is Grossly Untimely

16. In support of its first point, the Joint Applicants assert that intervention is not a matter of right, but a discretionary matter for the Commission's determination. The Joint Applicants contend that the extremely untimely nature of Public Citizen's filing is sufficient grounds to warrant a denial, but also Public Citizen has no "legitimate 'good cause' for its long delay."³⁵ Instead, the Joint Applicants argue that "Public Citizen made a tactical choice not to intervene in the merger proceedings, evidenced by the fact that it "*did* intervene in the parallel proceedings before Maryland's Public Service Commission" where it participated "extensively [] even though Maryland's Office of People's Counsel was also litigating in opposition of the Merger."³⁶ By contrast, the Joint Applicants assert that "[i]n the District . . . Public Citizen chose only to file comments and not to participate as a party; [h]aving made that choice, Public Citizen cannot show 'good cause' for reversing course at this late date."³⁷

17. The Joint Applicants assert that not only is Public Citizen's Petition untimely considering the original intervention deadline in this proceeding, but also when considering the fact that the "Joint Applicants filed their Motion to Reopen more than six weeks ago, on October 6, 2015" and between that time and now the Commission has considered multiple petitions to intervene, granted the Motion to Reopen, and set a procedural schedule for considering the Settlement Agreement.³⁸ The Joint Applicants argue that Public Citizen has failed to provide good cause for its initial delay as well as its subsequent decision to wait "to file its Petition until more than a month after the similar motions by [DC Public Power] and [WGL Energy Systems, Inc.]" were denied.³⁹

18. Additionally, the Joint Applicants assert that "Commission precedent contradicts Public Citizen's argument that recent events . . . entitle it to intervene or restart the intervention clock," arguing that "[s]ettlements *always* result in certain parties withdrawing their opposition and *always* contain new and different conditions" – "that fact does not entitle new parties to intervene."⁴⁰ To the contrary, the Joint Applicants argue that "the Commission [has] recognized that permitting post-settlement intervention is generally 'unfair to the settling parties, contrary to [the Commission's] rules, and contrary to the concept of administrative efficiency.'"⁴¹

³⁵ Joint Applicants' Opposition at 2.

³⁶ Joint Applicants' Opposition at 2-3.

³⁷ Joint Applicants' Opposition at 3.

³⁸ Joint Applicants' Opposition at 3.

³⁹ Joint Applicants' Opposition at 3.

⁴⁰ Joint Applicants' Opposition at 4.

⁴¹ Joint Applicants' Opposition at 5, citing Order No. 18018 at pp 21-22.

19. The Joint Applicants further assert that “[r]ejecting Public Citizen’s untimely Petition will not raise any concerns about fairness or inconsistency” for a reviewing court.⁴² The Joint Applicants argue that Public Citizen’s argument that the Commission should allow it to intervene because it waived its rules to permit consideration of the Settlement Agreement is not persuasive because the interests of justice supported the Commission’s decision to consider the Settlement Agreement, but nothing compels the Commission “to waive *all* of its rules at *any* putative party’s request even where good cause is absent.”⁴³ The Joint Applicants note that “the existing parties could [] have reached the Settlement Agreement before the Commission reached any decision in this case – in which case Public Citizen would not have even an arguable basis for seeking intervention.”⁴⁴

2. Public Citizen Lacks a Substantial Interest in the Proceeding

20. The Joint Applicants argue that Public Citizen has failed to articulate a substantial interest warranting intervention in this proceeding asserting that “Public Citizen’s only attempt to satisfy this essential requirement is to assert that ‘we represent District consumers and the public interest.’”⁴⁵ However, the Joint Applicants contend that this is a false assertion and argue that “[n]o one elected or appointed Public Citizen to represent the District’s citizens, and nothing in the Commission’s rules allow Public Citizen to participate as a self-appointed representative of the public in order to advance its own vision . . . of what it believes the ‘public interest’ to be.”⁴⁶ The Joint Applicants add that “Public Citizen’s claim that OPC ‘is no longer representing the public interest,’ simply because [OPC] has agreed to the Settlement Agreement, is both incorrect and irrelevant.”⁴⁷

21. The Joint Applicants also respond to the examples provided by Public Citizen of how the public has been inadequately represented absent OPC’s opposition by asserting that: (1) OPC has not abandoned its statutory obligation to protect the public interest simply by joining the Settlement Agreement; and (2) pointing out flaws in Public Citizen’s “examples.”⁴⁸ Most notably, the Joint Applicants assert that Public Citizen’s argument that D.C. Code § 34-909 (a) requires 45 days’ notice for the public hearing in this proceeding is wrong because that provision concerns rate cases – which this proceeding is not.⁴⁹ The Joint Applicants assert that “the fact that Public Citizen raises meritless objections to the Commission’s schedule, weeks after the

⁴² Joint Applicants’ Opposition at 6.

⁴³ Joint Applicants’ Opposition at 6.

⁴⁴ Joint Applicants’ Opposition at 6.

⁴⁵ Joint Applicants’ Opposition at 7, citing Public Citizen Petition at 1.

⁴⁶ Joint Applicants’ Opposition at 7.

⁴⁷ Joint Applicants’ Opposition at 7, citing Public Citizen Petition at 5.

⁴⁸ Joint Applicants’ Opposition at 8.

⁴⁹ Joint Applicants’ Opposition at 8-9.

Commission set that schedule, only underscores the prejudice that its participation would inflict.”⁵⁰ The Joint Applicants conclude that “virtually every settlement requires the parties, on both sides, to accept provisions that do not reflect their most aggressive litigation positions;” however, “[s]ettlements are ‘highly favored’ under Commission precedent” and the Commission should reject Public Citizen’s Petition.⁵¹

C. Public Citizen’s Motion for Leave to Reply

22. In its Motion, Public Citizen requests leave to reply to the Joint Applicants’ Opposition asserting that the Joint Applicants insist that “Public Citizen’s petition is untimely only because they have fabricated a deadline, claiming that Public Citizen should have petitioned to intervene when the utilities moved to reopen the record.”⁵² Public Citizen asserts that the Joint Applicants “want a second chance to win a contest they squarely lost; they want to block an [sic] important other players, the public and consumer and public interest representatives, from taking the field.”⁵³ In response to the Joint Applicants’ assertions that Public Citizen’s request to intervene is extremely untimely, Public Citizen contends that “there is no rule governing this situation, and therefore no deadline to miss,” adding that it “did not intervene immediately when the utilities’ filed the [Motion to Reopen] because [it] reasonably anticipated that the Commission would deny the motion or, at a minimum, schedule a new round of interventions.”⁵⁴ Public Citizen further contends that it petitioned to intervene “as soon as practicable after learning of the circumstances that gave rise to [its] intervening,” asserting that it believed its “course of action was reasonable.”⁵⁵

23. Public Citizen argues that despite the Joint Applicants’ contrary assertions, good cause exists for granting its Petition to Intervene because: “[t]he Commission is permitting new proceedings on an application quite different from the original one; there is no longer adequate representation of District consumers or the public interest in this case; and there is a severe risk that the settlement will not be subjected to full and fair scrutiny and that the public will lack adequate – or even legally required – opportunities to weigh in.”⁵⁶ Public Citizen adds that “over 2,000 of its members and supporters are District consumers” and that there is “no adequate counterweight” to the Joint Applicants’ position in the proceeding.⁵⁷

⁵⁰ Joint Applicants’ Opposition at 9.

⁵¹ Joint Applicants’ Opposition at 10.

⁵² Public Citizen’s Motion at 2.

⁵³ Public Citizen’s Motion at 2.

⁵⁴ Public Citizen’s Motion at 2.

⁵⁵ Public Citizen’s Motion at 2.

⁵⁶ Public Citizen’s Motion at 3.

⁵⁷ Public Citizen’s Motion at 3-4

24. Additionally, Public Citizen asserts that the Joint Applicants confuse “prejudice” with “inconvenience” and that because the public has a right to participate in the proceedings there would be no prejudice in permitting Public Citizen to participate on behalf of the public.⁵⁸ Public Citizen argues that the Joint Applicants are wrong in their assertion that D.C. Code § 34-909(a)’s provision for a 45-day notice of a public hearing only applies to rate case proceedings. Instead, Public Citizen contends that that provision clearly “applies in ‘every’ case in which the Commission ‘has a public hearing.’”⁵⁹ Public Citizen contends that the Joint Applicants’ “offer no real response” to OPC’s failure to advocate for at least 45 days’ notice before the Public Hearing in this matter.⁶⁰ Public Citizen concludes that it “believe[s] the Commission is making errors of law and discretion that could lead to reversal by a court” and that it is seeking to intervene “to help the Commission craft an open, fair proceeding and follow the law – a role that is not being adequately filled at present.”⁶¹

IV. DECISION

A. Public Citizen’s Motion for Leave to Reply

25. We note at the outset that the procedural posture of this case, *i.e.*, reopening the record to consider a settlement agreement submitted after the final decision in the case has been rendered, is atypical of this Commission’s proceedings. As we stated in Order No. 18018, we could have denied the Motion to Reopen and determined that this matter instead be litigated in a new proceeding. However, in the interest of administrative efficiency, we chose to reopen the record in this case to consider the Settlement Agreement. Having said that, we want to ensure that no one will be disadvantaged by our decision to consider the Settlement Agreement in the existing case vis à vis a new case. Therefore, we consider Public Citizen’s pleadings in that context.

26. As a preliminary matter, Section 105.9 of the Commission’s rules provides that “[n]o rejoinders or replies to responses shall be accepted without leave of the Commission.”⁶² Public Citizen requested Leave to Reply to the Joint Applicants’ Opposition alleging that the utilities’ response to Public Citizen’s Petition to Intervene “continues a pattern of advocacy that will lead the Commission astray.”⁶³ Filing a reply to a response is not contemplated by our rules and we could deny it out of hand absent some extraordinary circumstance. However, in light of the extraordinary posture of this proceeding, the Commission wants to make certain that it has fairly and fully considered Public Citizen’s arguments in support of its Petition to Intervene as

⁵⁸ Public Citizen’s Motion at 4.

⁵⁹ Public Citizen’s Motion at 4.

⁶⁰ Public Citizen’s Motion at 6.

⁶¹ Public Citizen’s Motion at 6.

⁶² 15 DCMR § 105.9.

⁶³ Public Citizen’s Motion at 1.

well as any objection thereto.⁶⁴ For that reason, we have elected to exercise our discretion to grant Public Citizen's Motion for Leave to Reply and consider its additional arguments when ruling on its Motion to Intervene in these proceedings.

B. Standard for Intervention

27. As a general matter, our rules governing settlement proceedings in 15 DCMR §§ 130.1–130.17 make no provision for participation in settlement proceedings by non-parties to the case. Public Citizen offered no authority allowing its participation in the settlement proceedings other than the Commission's standard intervention rules.⁶⁵ Section 106.1 of the Commission's regulations, 15 DCMR § 106.1, governs intervention in Commission proceedings. The provision reads:

Any person as defined by this chapter, not named as a party in the pleadings initiating a proceeding but having a substantial interest therein, may petition the Commission for leave to intervene.⁶⁶

A petition for leave to intervene shall be in writing and shall be filed by the prospective intervenor in compliance with the direction set forth in the public notice of the filing or application, or as may be otherwise ordered by the Commission.⁶⁷

A person whose petition for leave to intervene has been granted by the Commission shall be permitted to appear and participate as a party in the proceeding.⁶⁸

28. Intervention is not a matter of right. Instead, pursuant to Section 106.5, intervention is entirely within the discretion of the Commission. In determining whether intervention is appropriate in a particular case, we are guided by the same practical and equitable concerns as courts and will permit intervention if the petitioner demonstrates a substantial interest in a proceeding warranting intervention. Courts have not precisely defined the term "interest" but have opted instead, under court rules, to set forth the circumstances under which intervention is either required or permissive. Generally, an individual has an interest requiring

⁶⁴ The Commission notes that D.C. Public Power also filed a Response to the Joint Applicants' Opposition to its Petition to Intervene, which the Commission rejected by Order No. 18018 as neither "necessary" nor "warranted." Whereas Public Citizen sought leave to reply under Rule 105.9; "DCPP made no such request for leave from the Commission and fails to articulate any rational basis for the Commission to deviate from our general practice." Order No. 18018, ¶ 31.

⁶⁵ See Public Citizen's Petition at 1 ("Public Citizen Foundation petitions the Commission for leave to intervene in this proceeding under Rule 106.").

⁶⁶ See 15 DCMR § 106.1 (1981).

⁶⁷ 15 DCMR § 106.3.

⁶⁸ 15 DCMR § 106.6.

intervention when the individual: (1) has an interest in the transaction which is the subject matter of the suit, and (2) the disposition of the suit may as a practical matter impair the individual's ability to protect that interest; however, even if those factors are met, intervention can be denied if the interest(s) are already adequately represented.⁶⁹ In all other cases, intervention is at the discretion of the court.⁷⁰ Because intervention is not a matter of right under our rules, guidance under the court rules is limited to judicial precedent regarding a recognizable "substantial interest." Further, in reviewing motions filed out of time the Commission looks to see if the proponent of the motion provided good cause⁷¹ and if granting the motion would be reasonable,⁷² or would not prejudice any party to the proceeding.⁷³

C. Public Citizen's Petition to Intervene

1. Public Citizen has failed to show good cause for its late filed Petition

29. Petitions to Intervene in this proceeding were due by July 11, 2014.⁷⁴ Public Citizen did not seek leave to intervene in this proceeding by the deadline established by the Commission. Moreover, Public Citizen did not seek leave to late file its Petition. Therefore, on that basis alone Public Citizen Petition's would be denied. More importantly, we are not persuaded by its arguments to ignore its untimely request. As pointed out by the Joint Applicants, their Motion to Reopen the Record to consider the Settlement Agreement, with notice of OPC's support, was filed on October 6, 2015. That filing also contained the proposed procedural schedule. If, as Public Citizen now argues, its primary reason for intervening is the fact that OPC no longer represented District consumers and the public interest, then Public Citizen had ample time to petition to intervene before the Commission acted on the Joint Applicants' Motion to Reopen the Record. Two other entities timely sought to intervene at that time, albeit for different reasons; Public Citizen waited until November 19, 2015, to file its Petition to Intervene. Its Petition came six weeks after learning of OPC's position and three weeks after the Commission granted the Motion to Reopen the Record on October 28, 2015.

30. Public Citizen asserts that "[i]t was reasonable for parties to believe that if the [C]ommission ever came to pass on something as different as the proposed settlement, it would

⁶⁹ See D.C. Super. Ct. Civ. R. 24(a)(2).

⁷⁰ See D.C. Super. Ct. Civ. R. 24(b).

⁷¹ See, e.g., *Formal Case No. 962, In the Matter of the Implementation of the District of Columbia Telecommunications Competition Act of 1996 and Implementation of the Telecommunications Act of 1996* ("Formal Case No. 962"), Order No. 12428, ¶ 13, rel. July 2, 2002 ("Order No. 12428").

⁷² See, e.g., *Formal Case No. 712, In the Matter of the Investigation into the Public Service Commission's Rules of Practice and Procedure* ("Formal Case No. 712"), Order No. 15353, ¶ 2, rel. August 10, 2009 ("Order No. 15353").

⁷³ See, e.g., *TAC 19, Petition of Verizon Washington, DC Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Order No. 13873, ¶ 3, rel. February 7, 2006; *Formal Case No. 712*, Order No. 15353, ¶ 2; *Formal Case No. 962*, Order No. 12428, ¶ 13.

⁷⁴ See, *Formal Case No. 1119*, Order No. 17530, rel. June 27, 2014.

do so in a new proceeding or would otherwise permit a new round of interventions.”⁷⁵ The Joint Applicants’ Motion to Reopen the Record set out multiple options for the Commission’s consideration with respect to addressing the Settlement Agreement. Public Citizen was therefore on notice that one of the options before the Commission was to reopen the record in this proceeding to consider the Settlement Agreement. During the three weeks that elapsed between the record being reopened and Public Citizen filing its Petition, procedural matters in this case progressed. Not only was initial supporting testimony and exhibits filed by the Joint Applicants, but also the discovery period began, other Petitions to Intervene were ruled on by the Commission, and the Community Hearings were held – where Public Citizen submitted comments on the record. Public Citizen waited until after the Community Hearings and just days before the Public Interest Hearing in this proceeding to file its Petition. Its only explanation for the delay was its assumption of “what was reasonable for parties to believe” that the Commission would do in response to the Joint Applicants Motion to Reopen the Record.⁷⁶

31. Next, Public Citizen asserts that it has “good cause to intervene and granting the [P]etition would be reasonable” because “the proposed settlement contains new and detailed provisions that have no analogue in the original application, and therefore the application failed to provide potentially interested parties with adequate notice of the settlement that the Commission is now weighing.”⁷⁷ The Commission is not persuaded that the mere fact that the terms of the Settlement Agreement are different than the terms of the Merger Application constitutes sufficient good cause to grant Public Citizen’s late filed Petition. The Commission regularly accepts settlement agreements from parties to a proceeding. Our rules allow for a hearing so that non-parties can lodge opposition to a settlement or its terms – terms which frequently include provisions that were not in the original petition or application. That is the procedure that has been followed in this case.

32. Finally, Public Citizen adds that “it is difficult to see how the parties could be prejudiced by intervention. . . [I]ntervention would do no more than permit an additional party with a valuable perspective to participate in the process.” Indeed, Public Citizen asserts that it, as well as “the general public [] would be prejudiced if the Commission declines to permit intervention.”⁷⁸ The Joint Applicants asserted that “the fact that Public Citizen raises meritless objections to the Commission’s schedule, weeks after the Commission set that schedule, only underscores the prejudice that its participation would inflict.”⁷⁹ The Commission concludes that if Public Citizen’s late filed petition were granted, then major adjustments to the procedural posture of this proceeding would have to be made to ensure that Public Citizen could fully participate in the proceeding. As stated above, the existing parties have already filed testimony, conducted discovery, participated in Community Hearings as well as a Public Interest Hearing

⁷⁵ Public Citizen’s Petition at 2.

⁷⁶ Public Citizen’s Petition at 2.

⁷⁷ Public Citizen’s Petition at 2.

⁷⁸ Public Citizen’s Petition at 3.

⁷⁹ Joint Applicants’ Opposition at 9.

where they presented witnesses for cross-examination. Therefore, it is clear that permitting Public Citizen to enter the proceeding at this stage would raise a number of procedural and administrative challenges given the lateness of the intervention and would cause the parties and the Commission to duplicate work that has already taken place. Public Citizen has failed to persuade the Commission that there is a good reason to order such actions, assuming such procedures could even be crafted.

33. Based on the foregoing facts, we find that Public Citizen's arguments for why the Commission should use its discretion to grant the organization leave to intervene at this late date are not persuasive and that Public Citizen has failed to show good cause for its untimely actions.

2. Public Citizen has failed to demonstrate a substantial interest warranting intervention in this proceeding

34. Public Citizen asserts, "But if the Commission deems the petition late, it meets the Commission's standard for intervention."⁸⁰ We disagree. Public Citizen asserts that it is a "national nonprofit membership organization with over 400,000 members and supporters . . . Many of our members and employees reside in the District of Columbia, and two of our three offices are located here."⁸¹ Public Citizen adds in its Reply that 2,000 of its members and supporters are District consumers, and it argues that it has "a substantial interest in this proceeding because *[it] represent[s] District consumers and the public interest*, and what is good for consumers and what is in the public interest are core issues in this proceeding."⁸² Public Citizen asserts that one of the goals of the organization is to further the interest of the public and for that reason it is seeking to intervene on behalf of every District consumer.

35. The standard of "substantial interest" in our cases has been liberally construed and has never required a showing of a legal or equitable interest. As articulated in its pleadings, Public Citizen's membership includes 2,000 District consumers and its organizational mission is to protect the public interest. The organization has a history of participating in utility cases in other jurisdictions. That profile is sufficient to show a substantial interest in this proceeding which focuses on making an ultimate public interest determination. Based on these facts, Public Citizen would have been granted party status had it timely applied for intervention, *i.e.*, at the start of the case as outlined in our procedural order. However, establishing a substantial interest in any Commission proceeding alone is insufficient to justify granting a last minute request for intervention, especially when other existing parties represent similar interests.

36. Public Citizen argues that its intervention is warranted because its interest – or the interest of its members who are District consumers – is no longer represented by OPC, which is a signatory to the Settlement Agreement. OPC's role as the statutory representative of the people of the District of Columbia in all Commission proceedings is a statutory one pursuant to D.C.

⁸⁰ Public Citizen's Petition at 2.

⁸¹ Public Citizen's Petition at 1

⁸² Public Citizen's Petition at 2. (emphasis added).

Code § 34-804(a). Public Citizen has cited no statutory provision that allows it or any other entity to step into the shoes of OPC and assume OPC's duties simply because they disagree with OPC's litigation decisions. Furthermore, Public Citizen has provided no explanation as to why its interest are not adequately represented by other existing parties who represent District consumers and are opposed to the Settlement Agreement because they believe it is not in the public interest, *i.e.*, MAREC, GRID 2.0, DC SUN, and GSA. Based on the foregoing, the Commission finds that Public Citizen does not have a substantial interest warranting intervention at this late stage of this proceeding.

37. Lastly, in its Reply, Public Citizen asserts that by bending the rules in favor of the Joint Applicants to allow the Settlement Agreement to be considered by reopening the *Formal Case No. 1119* record, but declining to bend the rules to permit Public Citizen's late intervention, the Commission is making errors of law that may warrant reversal by a reviewing court and that Public Citizen is seeking to intervene "to help the Commission craft an open, fair proceeding."⁸³ However, contrary to Public Citizen's assertion, we have not acted in an arbitrary fashion and we have fully explained our rationale for making the discretionary decisions that Public Citizen now attacks. Therefore, for all of the reasons set out in this Order, Public Citizen's Petition to Intervene is denied.

THEREFORE IT IS ORDERED THAT:

38. Public Citizen Foundation's Motion for Leave to Reply to the Joint Applicants' Response to Public Citizen's Petition to Intervene is **GRANTED** and the Reply is **ACCEPTED** into the record of this case; and

39. The Petition for Leave to Intervene of Public Citizen Foundation is **DENIED**.

A TRUE COPY:

BY DIRECTION OF THE COMMISSION:

CHIEF CLERK:


BRINDA WESTBROOK-SEDGWICK
COMMISSION SECRETARY