

BEFORE THE
MARYLAND PUBLIC SERVICE COMMISSION

IN THE MATTER OF
THE MERGER OF EXELON
CORPORATION AND
PEPCO HOLDINGS, INC.

CASE NO. 9361

SURREBUTTAL TESTIMONY
OF
RICHARD D. TABORS
ON BEHALF OF THE STATE OF MARYLAND
AND THE
MARYLAND ENERGY ADMINISTRATION

January 21, 2015

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STATE OF MARYLAND AND THE MARYLAND ENERGY ADMINISTRATION**

1 **Q. ARE YOU THE SAME RICHARD TABORS WHO SUBMITTED DIRECT**
2 **TESTIMONY IN THIS PROCEEDING?**

3 A. Yes.

4 **Q. PLEASE SUMMARIZE THE CONCLUSIONS AND RECOMMENDATION OF**
5 **YOUR DIRECT TESTIMONY.**

6 A. The conclusions of my Direct Testimony were that the proposed merger poses the
7 potential for harm to Maryland ratepayers, and the State as a whole, and I do not perceive
8 an adequate means of mitigating that potential harm. My recommendation was that the
9 Commission should not approve the merger. The primary bases of this recommendation
10 are three-fold. First, that the acquisition of Pepco and Delmarva by Exelon will result in
11 Exelon's assumption of a dominant position in the Maryland retail electric market, and
12 would affiliate the PHI Maryland utilities with substantial generating assets, which is not
13 the case today. Second, that the acquisition will reduce the ability of the Commission
14 and customers to rely upon "across the fence" comparisons as a tool to ensure reliable
15 service at reasonable rates, particularly at what is expected to be a transformational time
16 in the industry. Third, that the merged entity will have the ability, and the motivation, to

1 limit or otherwise restrict the development of distributed energy resources in Maryland,
2 to the detriment of the state as a whole and customers of the Exelon companies in
3 particular. In advancing these contentions, I have relied centrally on the facts as
4 presented in the Applicants' own documents, as well as in the depositions of the CEOs of
5 both Exelon (Mr. Crane) and PHI (Mr. Rigby).

6 **Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?**

7 A. My surrebuttal testimony responds to the rebuttal testimonies of those Exelon witnesses
8 who address the key points presented in my Direct Testimony. Those Exelon witnesses
9 are Mr. Crane, Mr. Rigby, Mr. O'Brien, Mr. Gould, Mr. Butler, Ms. Tierney, Mr.
10 McGowan, Ms. Kelly and Dr. Willig.

11 **Q. DO ANY OF THESE EXELON REBUTTAL WITNESSES PRESENT EVIDENCE**
12 **THAT REFUTES THE KEY POINTS ADDRESSED IN YOUR DIRECT**
13 **TESTIMONY?**

14 A. No. Exelon's rebuttal witnesses spend a fair amount of time testifying about the points I
15 cover in my testimony, but they do not present evidence that refutes those points.
16 Specifically, my testimony relies upon the depositions of Mr. Crane and Mr. Rigby,
17 details of Exelon's 2014 "Strategic Plan" and related documents. To the extent that these
18 materials are addressed by Exelon's witnesses, they do so without regard for specific
19 statements in those documents, responding to them (if at all) only at higher and more
20 general levels. For example, Mr. Crane responds to my concerns by noting (at 17:17-20)
21 that Exelon's utilities currently account for the majority of Exelon's aggregate corporate
22 earnings and that Exelon will not jeopardize those earnings. That statement is not
23 responsive to either the content of Exelon's strategic plan documents (which are reviewed

1 in my testimony), or to the reality that Exelon’s fiduciary responsibility is to maintain its
2 utility earnings while concurrently protecting and increasing the value of its other capital
3 assets, including its substantial generating assets.

4 **Q. WHAT IS YOUR CONCLUSION ABOUT THE RESPONSE OF EXELON’S**
5 **REBUTTAL WITNESSES TO YOUR PRESENTATION?**

6 A. I have seen nothing in the significant amount of testimony submitted in response to my
7 presentation that convinces me that the concerns about the acquisition that I have
8 expressed in my Direct Testimony are misplaced, exaggerated, or otherwise no longer
9 applicable. My conclusions and recommendation therefore remain unchanged.

10 **Q. HOW IS THE REMAINDER OF YOUR SURREBUTTAL TESTIMONY**
11 **ORGANIZED?**

12 A. The remainder of my surrebuttal testimony presents my response to points raised by the
13 various Applicants’ rebuttal witnesses. The fact that I do not respond to every point of
14 every rebuttal witness should not be interpreted to mean that I agree with those points.

15 **Q. DR. WILLIG TESTIFIES THAT YOUR CONCERNS ABOUT THE LEVEL OF**
16 **CONCENTRATION IN THE MARYLAND RETAIL MARKET RESULTING**
17 **FROM APPROVAL OF THE ACQUISITION ARE IRRELEVANT BECAUSE**
18 **THE PROVISION OF ELECTRIC DISTRIBUTION SERVICE IS A “NATURAL**
19 **MONOPOLY,” SUCH THAT THE PHI AND EXELON UTILITIES DO NOT**
20 **COMPETE TO PROVIDE SERVICES OUTSIDE THEIR OWN SERVICE**
21 **TERRITORIES. HOW DO YOU RESPOND?**

22 A. Dr. Willig’s point—that BGE, for example, does not compete to provide distribution
23 service in the Pepco service territory—is not responsive to my testimony. My point is

1 that distribution utilities—especially those that are neighboring or contiguous—compete
2 with one another both for new customers—who have choices as to where they decide to
3 live—and for existing customers—who have the ability to relocate if their energy costs or
4 quality of service is more favorable in a different location with a different service
5 provider. This is surely the case for major industrial customers, but may also apply to
6 individual consumers.¹ As I stated at my deposition (in response to questioning by
7 Applicants’ counsel): **[BEGIN CONFIDENTIAL]**

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 [REDACTED] **[END**
16 **CONFIDENTIAL]** Witness McGowan’s contentions (at 8:9) that “there is no
17 competition among [Pepco, Delmarva, and BGE] for customers” is not credible.

18 **Q. PLEASE CONTINUE.**

19 A. More broadly, the notion that BGE and Pepco/Delmarva are not in competition to provide
20 electric distribution services is inconsistent with the matters at issue in this proceeding.
21 Exelon’s argument for why it should be able to acquire Pepco and Delmarva is based on
22 the contention that Exelon—with its “management model,” “Exelon Utilities” structure,
23 and “enhanced reliability commitments”—will be able to do a better job than the PHI
24 companies at providing distribution services in the Pepco and Delmarva service
25 territories. Fundamentally, this case is about whether Pepco and Delmarva customers and

¹ Fringe competition exists where service boundaries are altered in circumstances such as the expansion of city limits or the development of major new facilities in an underserved area.

1 Maryland as a whole are better off with Exelon holding the franchise to provide service
2 to them.

3 **Q. WHAT DOES DR. WILLIG HAVE TO SAY ABOUT THE ROLE OF**
4 **FRANCHISE COMPETITION IN THIS CASE?**

5 A. Dr. Willig has explained that he is not addressing it. In response to a data response
6 concerning this issue, attached as Exhibit No. RDT-21, Dr. Willig states that “franchise
7 competition and competition for new load are different from the type of competition that
8 his testimony addresses.”

9 **Q. HOW HAVE EXELON’S WITNESSES RESPONDED TO YOUR CONCERNS**
10 **ABOUT THE LOSS OF “ACROSS THE FENCE” COMPETITION?**

11 A. They have argued that the absence of Pepco and Delmarva as a source of comparison
12 makes no difference because the loss of the PHI companies as an independent voice is
13 not “material” (Kelly at 6:4-6) or “meaningful” (Willig at 6:9-12), and that the
14 Commission’s reliance on such comparisons is at best an “anecdotal.” (Willig at 6:1-2).
15 Rather than limit comparison, witness O’Brien contends (at 2:6-17) that it will
16 “significantly enhance collaborations among [the] utilities.” But that is precisely the
17 problem: the value of this vital regulatory tool will be reduced if the merger is
18 consummated at this time of critical change in the distribution utility industry.

19 **Q. HOW DO YOU RESPOND?**

20 A. The loss of Pepco and Delmarva as an independent voice is significant and detrimental. I
21 explained the concern both in my Direct Testimony and, more recently, in response to
22 questioning at my deposition by Applicants’ counsel, who asked that I explain [BEGIN

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CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] In my view, there is no question that the ability to conduct across the fence comparisons is important to the ability to ensure just and reasonable rates.

Q. BEYOND WHAT YOU HAVE SAID IN YOUR DIRECT AND DEPOSITION TESTIMONY, CAN YOU IDENTIFY OTHER SUPPORT FOR YOUR VIEWS ON THE IMPORTANCE OF ACROSS THE FENCE COMPETITION AS A REGULATORY TOOL?

1 A. Yes. In response to a discovery request, I provided a list of examples of Maryland Public
2 Service Commission decisions in which the Commission relied on direct comparisons
3 between and among the utilities it regulates in taking specific regulatory actions. The
4 response is attached hereto as Exhibit No. RDT-22. Regardless of whether the
5 Commission uses the specific phrase “across the fence” competition in its decisions, there
6 would appear to be little doubt that in regulating the utilities subject to its jurisdiction, the
7 Commission can—and regularly does—avail itself of such competition and comparison.

8 **Q. CAN YOU IDENTIFY ANY FURTHER SUPPORT FOR THIS POINT?**

9 A. Yes. In my Direct Testimony, I noted that the California Public Utilities Commission had
10 denied the proposed merger of San Diego Gas and Electric Company and Southern
11 California Edison Company based in part upon the loss of essential across the fence
12 competition that would occur. The California Commission’s decision is express on this
13 point. In rejecting the merger, the CPUC stated:

14 There is a perhaps indirect, but indisputably important,
15 influence on the quality of utility service which we elect to
16 term ‘across-the-fence rivalry.’ It arises when existing or
17 potential customers are able to compare the rates and quality
18 of service between utility providers in adjacent service areas.
19 If significant disparities are discovered, at least three
20 consumer reactions may be anticipated, each of which will
21 pressure the management of the less desirable utility to
22 narrow the gap. Existing customers who are facing other
23 pressures to relocate, such as plant modernization or
24 expansion, may select a site within the area served by the
25 preferred utility. New customers, without an existing location
26 in either service area, will make the same election. These will
27 include residents who may be accommodated by housing or
28 commercial development in areas of the service territory
29 which admit such expansion. Finally, existing consumers
30 with neither the opportunity nor means to relocate will take
31 their complaints to the management of the utility deemed to
32 charge excessive rates or deliver inferior service.

1 SCECorp, S. Cal. Edison Co. & San Diego Gas & Elec. Co., No. 91-05-028, 1991 Cal.
2 PUC Lexis 253, at *236-237 (May 8, 1991).

3 What is especially noteworthy here, is that the loss of Pepco and Delmarva as across the
4 fence competitors to BGE is coming at a time of great change, what Exelon describes as

5 [BEGIN CONFIDENTIAL] [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] [END CONFIDENTIAL]

9 **Q. WHAT IS YOUR RESPONSE TO DR. WILLIG'S CONTENTION (AT 7:7-8)**
10 **THAT "MEANINGFUL YARDSTICK COMPETITION METHODOLOGY IS**
11 **INHERENTLY SUPERIOR TO THE COMPARISON OF ONLY TWO OR**
12 **THREE UTILITIES LOCATED IN THE SAME STATE?"**

13 A. I have several concerns with this assertion. Dr. Willig appears to focus largely on
14 numerical comparisons of operational characteristics such as reliability performance and
15 related SAIFI and SAIDI statistics. Across the fence comparisons differ from yardstick
16 comparisons or benchmarking in several important respects. First, across the fence
17 comparisons reduce the burden placed on regulation as the sole pressure on utilities to
18 ensure reliable service at reasonable rates, *i.e.* if distribution service utilities perceive that
19 they are competing to retain existing customers and attract new customers, then it is in
20 their direct financial self-interest to provide reliable service at reasonable rates. Second,
21 across the fence comparison provides a source of information on policies and procedures
22 from similarly-situated utilities within the state.

1 In contrast, yardstick comparisons or benchmarking may not be generally applicable to
2 specific policy issues. Instead, they are at best applicable to standardized operational and
3 financial metrics such as SAIDI, SAIFI, return on equity, and weighted average cost of
4 capital. Yet, as the Commission is no doubt aware, the types of yardstick and
5 benchmarking comparisons Dr. Willig cites in his testimony almost always come with the
6 caveats regarding the comparability of the data and the problems associated with using
7 the results.

8 **Q. PLEASE ELABORATE.**

9 A. Relying on a 2008 study funded by the Department of Energy, Dr. Willig states (at
10 8:6-11) that there are considerable, publicly available data on utility performance levels.
11 The 2008 study to which he refers is a survey of state PUC collection processes for
12 SAIDI and SAIFI reliability data (and related metrics). While Dr. Willig is correct that
13 the study refers to the increasing practice of state PUCs to collect reliability data, the
14 study also makes plain that these data cannot readily take the place of comparisons
15 among BGE, Pepco and Delmarva. While finding that “State PUC interest in electricity
16 reliability is growing,” the study’s “conclusions and recommendations” include:²

17 • However, differences in utility reporting practices hamper
18 meaningful comparisons of reliability information reported by
19 utilities to different state PUCs and, therefore, may limit the
20 effectiveness of efforts to measure the effectiveness of efforts to
21 improve reliability.

22 • Efforts to eliminate differences that are solely due to reporting
23 practices are just beginning. These efforts, which focus on using
24 standard definitions, such as those promoted by IEEE Standard
25 1366-2003, are promising and should be encouraged.

² An excerpt from this study is attached as Exhibit No. RDT-23. The full study can be accessed at <http://certs.lbl.gov/pdf/lbnl1092e-puc-reliability-data.pdf>.

1 • Until IEEE Standard 1366-2003 is adopted universally, regulators
 2 concerned about the definition and treatment of major events in
 3 reporting reliability information should consider requiring
 4 reporting of SAIDI and SAIFI both including and not including
 5 major events, as well as descriptive information on each major
 6 event.

7 • More work is required to better understand the sources of
 8 discrepancies and the importance of seeking greater consistency
 9 between reliability information reported to national bodies and that
 10 reported to state PUCs.

11 Dr. Willig next notes (at 8:11-14) that comparative data is available through a “voluntary
 12 annual survey” conducted by “The Institute of Electrical and Electronics Engineers.” An
 13 excerpt from this survey is attached as Exhibit No. RDT-24.³ One of the slides states that
 14 the data are “[i]ntended to provide information for users to assess their performance
 15 relative to peers,” not by state commissions. The same slide notes that the list is
 16 anonymous and voluntary, meaning that the process of using the information for
 17 comparative purposes may be challenging. In fact, slide 3, headed “Benchmarking,”
 18 states:

19 Data may not be directly comparable, since
 20 – Data collection & system differences exist
 21 – Certain exclusion differences can occur

22 The same slide goes on to state that IEEE 1366-2003/2012 (which, as noted above, the
 23 2008 study cited by Dr. Willig explains needs to be adopted “universally”):

- 24 • addresses data basis issues by clearly defining the rules.
- 25 • It DOES NOT address the data collection issues
- 26 • Companies may not report all forms of outages, due to data
 27 collection issues or other reasons

³ The full IEEE presentation can be accessed at <http://grouper.ieee.org/groups/td/dist/sd/doc/2014-08-Benchmarking-Results-2013.pdf>.

1 Thus, I continue to believe that side-by-side comparisons between or among utilities
2 within the same state are likely to be more useful than statistical information culled
3 (perhaps anonymously and without assurance of identical collection methods) from
4 utilities across the country.

5 **Q. WHAT ARE YOUR OTHER CONCERNS?**

6 A. I am concerned that there are many areas of utility comparison that fall outside of
7 numerical operating characteristics, such as programs, policies and service offerings.
8 These considerations are likely to be central to addressing the implementation of the
9 technological advances that underpin the “utility of the future” issues focused on in
10 **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]**
11 and which were the subject of considerable and high-level PHI management attention
12 prior to the pursuit of the Exelon acquisition. It is true that the Commission will have the
13 benefit of other utility voices and other stakeholders as these regulatory matters are
14 played out going forward. But I believe this is no answer to my concern that, as compared
15 with utilities throughout the nation, across the fence comparisons between the utilities
16 that the Commission regulates, and who are competitors, are essential sources of
17 information in helping the Commission to carry out its regulatory mission.
18 Fundamentally different from other utilities (and stakeholders) elsewhere, the
19 Commission regulates BGE, Pepco, Delmarva and Potomac Edison.⁴ The Commission
20 can order the production of directly comparable information from the utilities it directly
21 regulates, can direct their participation in rulemaking proceedings and technical

⁴ Although the Commission also regulates the Southern Maryland Electric Cooperative it is, as a cooperative, different in many respects from an investor-owned utility. And while the Commission can look to Delmarva’s Delaware operations, for example, as a source of information, those operations are differently situated because they are regulated by the Delaware Commission, and other relevant facts and circumstances may make comparisons difficult (for example, my understanding is that Delmarva in Delaware does not have rate decoupling).

1 conferences, can order them to participate in competing pilot projects, and essentially can
2 hold their feet to the fire in myriad ways. In-state utilities are also, understandably, those
3 with whom the Commission is most familiar with, and who operate under the same
4 regulatory environment. The same cannot be said for the utilities for whom SAIFI or
5 SAIDI data may be available through a national survey document.

6 **Q. MESSRS. CRANE AND BUTLER COMMENT THAT THE COMMISSION'S**
7 **REGULATIONS CONCERNING THE INTERCONNECTION OF SMALL**
8 **GENERATORS AND STANDARDS OF CONDUCT TO PREVENT AFFILIATE**
9 **ABUSE ARE SUFFICIENT SAFEGUARDS AGAINST THE MARKET POWER**
10 **AND DISCRIMINATION CONCERNS IDENTIFIED IN YOUR DIRECT**
11 **TESTIMONY. HOW DO YOU RESPOND?**

12 A. Advances in the technologies at issue are likely to raise a host of concerns that are not
13 covered in the interconnection rules or adequately ameliorated by the standards of
14 conduct.

15 As I noted in my Direct Testimony, going forward utility of the future issues are likely to
16 operate in substantial gray areas, and distribution utilities that are inclined to litigate can
17 seek to slow down competing implementations. For example, one significant issue may
18 be whether the costs of a system upgrade necessary for implementation of a
19 customer-owned distributed energy resource should be directly assigned or included as an
20 overall cost, both as a general rule, and in any particular case as regards the
21 implementation of a proposed distributed energy resource. The devil is often in the
22 details. By way of example, I do not see where the interconnection regulations address
23 the issue of liability insurance. More broadly, I do not know that they address what

1 should happen if a utility adopts system plans that conflict with customer interconnection
2 requests that are already in the queue. The issue of resource dispatch appears to be wholly
3 unaddressed. A particular form of electric storage may be economic under one dispatch
4 regimen, but not under another. [BEGIN CONFIDENTIAL] [REDACTED]
5 [REDACTED] [END
6 CONFIDENTIAL] and it is not reasonable to believe that the existing interconnection
7 rules and behavioral standards of conduct are a complete and adequate solution to ensure
8 the proper, efficient, and economic development of these new resources.

9 **Q. WHAT ABOUT THE ABILITY OF A COMPANY OR CUSTOMER TO SEEK**
10 **RELIEF FROM THE COMMISSION IF IT WERE THWARTED IN ITS**
11 **EFFORTS TO CONNECT NEW DISTRIBUTED RESOURCES?**

12 A. There is no question that a customer could (and might well) seek relief from the
13 Commission. But, as I explained at my deposition, [BEGIN CONFIDENTIAL] [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
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23 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 [REDACTED] [END CONFIDENTIAL]

7 **Q. WITNESS KELLY STATES THAT YOU HAVE OVERSTATED THE CONCERN**
8 **THAT THE PROPOSED ACQUISITION INVOLVES THE COMBINATION OF**
9 **DISTRIBUTION WIRES AND UNREGULATED GENERATION, NOTING**
10 **THAT MARYLAND LAW DOES NOT PROHIBIT SUCH A COMBINATION.**
11 **HOW DO YOU RESPOND?**

12 A. Witness Kelly is correct that Maryland does not prohibit a single holding company from
13 owning both unregulated generation and a distribution utility. But that does not mean
14 that such a combination is in every instance consistent with the public interest. More
15 specifically, it does not mean that having Exelon control service to 80% of Maryland's
16 distribution load, and aligning that load with an affiliated company that owns 35,000
17 megawatts of unregulated generation, is a positive development. I have explained in my
18 Direct Testimony the reasons—based primarily on Exelon's own documents—why the
19 proposed acquisition raises significant issues. Witness Kelly's response that state law
20 does not prohibit this combination fails to demonstrate that my concerns are unwarranted.

21 **Q. WITNESS KELLY ASSERTS THAT YOU HAVE MISUNDERSTOOD FERC**
22 **ORDER NOS. 888 AND 889, AND THAT THE CIRCUMSTANCES BEFORE**
23 **THE FERC IN ISSUING THOSE ORDERS ARE NOT ANALOGOUS TO THE**

1 **CIRCUMSTANCES IF THE ACQUISITION IS APPROVED. HOW DO YOU**
2 **RESPOND?**

3 A. Witness Kelly claims that I have erred in comparing the proposed acquisition to the
4 situation facing FERC when it issued Order Nos. 888 and 889. She points out that in
5 issuing Order Nos. 888 and 889, FERC's two landmark open access orders, FERC did
6 not require the physical divestiture of generation resources or "corporate unbundling,"
7 meaning that transmission-owning utilities could have generation affiliates. She suggests
8 (at 12:8-16) that in so doing FERC was able to "address all competition concerns and
9 achieve its regulatory objectives," such that "effective state regulation" is likely all that is
10 needed to address my concerns. In other words, witness Kelly seems to be saying that the
11 policy FERC established in Order Nos. 888 and 889 was sufficient to "achieve its
12 regulatory objectives," thereby implying that whatever policies Maryland may establish
13 will likewise be enough to address whatever concerns may arise as a result of the
14 acquisition.

15 In reality, FERC has had to issue several additional, landmark orders in the nearly two
16 decades since Order Nos. 888/889 in an effort to pursue workable competition in the
17 wholesale markets. Examples include the 1999 issuance of Order No. 2000 (which
18 highlighted the problems with "functional unbundling" and urged the formation of
19 regional transmission organizations) and the much more recent issuance of Order No.
20 1000, which addressed regional planning. In between, FERC has had to implement
21 market monitoring regimens, to advocate (at times unsuccessfully) for the development
22 of new (and broader in scope) regional transmission organizations, and to approve the
23 design and re-design of competitive markets (most notably capacity markets). Congress

1 granted FERC new anti-market manipulation authority and FERC created an entire new
2 Office of Enforcement. FERC's 1996 issuance of Order Nos. 888/889 was the beginning
3 of a regulatory process that, nearly twenty years later, remains ongoing.

4 Witness Kelly's broader point is that I erred in likening the current "utility of the future"
5 debate to the circumstances before FERC when it issued Order Nos. 888 and 889. As I
6 explained in a data response (attached as Exhibit No. RDT-25), FERC Order No. 888 was
7 challenged and reviewed by the United States Supreme Court. In that context, the Court
8 addressed the FERC Notice of Proposed Rulemaking that led to Order No. 888, noting
9 that the NOPR stated that "market power through control of transmission is the single
10 greatest impediment to competition. Unquestionably, this market power is still being used
11 today, or can be used, discriminatorily to block competition." *New York v. FERC*, 535
12 U.S. 1, 10 (2002) (quoting NPRM, ¶ 33,049). The Court also noted that elsewhere in the
13 NOPR, FERC found:

14 that utilities owning or controlling transmission facilities
15 possess substantial market power; that, as profit
16 maximizing firms, they have and will continue to exercise
17 that market power in order to maintain and increase market
18 share, and will thus deny their wholesale customers access
19 to competitively priced electric generation; and that these
20 unduly discriminatory practices will deny consumers the
21 substantial benefits of lower electricity prices.

22 *Id.* at 10 n.7 (quoting NPRM, ¶ 33,052). I believe that the circumstances facing the
23 Commission in this proceeding are in pertinent respects analogous. The Commission
24 here faces the prospect of the acquisition of the ownership of the vast majority of the
25 State's distribution facilities by an entity with extraordinary interests in unregulated
26 generation. In addition, the proposal comes at a time of great industry uncertainty, and in
27 which documentary evidence [BEGIN CONFIDENTIAL] [REDACTED]

1 [REDACTED]
2 [REDACTED] [END

3 **CONFIDENTIAL]** The transmission and distribution systems are the roadways, if you
4 will, that permit the delivery of electricity: the leveraging concern is real.

5 I note that the “straw proposal” advanced by the Staff of the New York Public Service
6 Commission in its “REV” (or “Reforming the Energy Vision”) proceeding identified
7 similar concerns.

8 **Q. PLEASE CONTINUE.**

9 A. In their August 22, 2014, “Straw Proposal On Track One Issues,” (“Straw Proposal”) the
10 NY PSC Staff addresses potential market power concerns should the incumbent
11 distribution utilities be called upon to serve as the “platform provider” for DER. The
12 Staff reviews the pros and cons of this approach, stating that “the most obvious” of the
13 disadvantages “is the risk of vertical market power at the distribution level.” Straw
14 Proposal at 69. The Staff goes on to state:

15 Where a utility has a stake in DER and also owns the distribution
16 system and operates DSP markets, the utility may have incentives
17 to favor its own facilities. A utility could discriminate against
18 third-party competitors in various ways. For example, a utility
19 could create barriers to entry through burdensome or delayed
20 processing of interconnection requirements. A utility would have
21 an incentive to create or maintain distribution constraints that favor
22 the economics of its own DER. The prospect of such vertical
23 market power is great at the distribution system level because
24 distribution circuits are easily constrained. In a mature DSP
25 market, utilities would have an incentive to favor their own
26 projects and affiliate-owned projects in the dispatch of DER.

27 A related risk stems from the informational asymmetry that favors
28 incumbent utilities. This risk applies both to information about the
29 capabilities and limitations of their distribution systems and to
30 customer usage data in utilities’ possession. Given their knowledge
31 of distribution system needs and capabilities, and customer energy
32 usage, incumbent utilities can readily identify where DER can be

1 sited most efficiently. In a vertically integrated model, such
2 efficiencies are part of the rationale for allowing a monopoly. In a
3 competitive model, however, such asymmetry can effectively
4 dissuade private capital from participating in emerging markets.

5 Straw Proposal at 69-70 (footnotes omitted).⁵

6 **[BEGIN CONFIDENTIAL]** [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 [REDACTED] **[END CONFIDENTIAL]** Absent the acquisition, Pepco and Delmarva serve as
14 pure distribution utilities who are a foil to Exelon’s generating assets, including and
15 particularly how those interests are advanced by BGE. I believe the Commission would
16 be better served by focusing on Exelon’s own words and statements of its strategic intent
17 as I have in my Direct Testimony and did in my deposition, rather than upon the often
18 decontextualized pronouncements of its expert witnesses.

19 **Q. DOES THIS CONCLUDE YOUR SURREBUTTAL TESTIMONY?**

20 **A. Yes.**

⁵ An excerpt from the Staff Straw Proposal is attached as Exhibit No. RDT-26. The full proposal can be accessed at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BCA26764A-09C8-46BF-9CF6-F5215F63EF62%7D>.

Exhibit RDT-20
CONFIDENTIAL

Exhibit RDT-21

Response of the Applicants
Maryland Public Service Commission – Case No. 9361
In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.

Discovery request submitted by: Maryland Energy Administration

Discovery request set number: Sixth Set

Response prepared by or under the direction of: Dr. Robert D. Willig

Response date: January 16, 2015

MEA 6-4:

With reference to Dr. Willig's rebuttal testimony at 5:2-5, does Dr. Willig contend that franchise competition and competition for new load would not be "competition over distribution services in [BGE's, Pepco's or Delmarva's] service territories in the future"? Please provide the basis of your answer in full.

Response:

Dr. Willig's referenced testimony at 5:2-5 addresses competition in Maryland to provide distribution service in the service territory of another utility and Dr. Willig contends that franchise competition and competition for new load are different from the type of competition that his testimony addresses. To the extent that BGE competes with Pepco or Delmarva in these respects, the Merger would have no material effect on such competition.

Exhibit RDT-22

**Response of Maryland Energy Administration
Maryland Public Service Commission Case – No. 9361
In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.**

Discovery request submitted by: Applicants

Discovery request set number: Fifth Set

Response prepared by or under the direction of: Richard Tabors

Response date: December 30, 2014

Applicants JA-V-8:

Please identify all orders in the last ten years Dr. Tabors believes the Maryland Public Service Commission relied upon “across-the-fence” competition or its effects and, as to each, identify the basis for such belief.

Response:

The State/MEA has lodged objections to this request. Without waiving those objections, Dr. Tabors states:

Dr. Tabors’s opinion that the Maryland Public Service Commission relies upon “across the fence” competition and its effects is not based upon an exhaustive review of all Maryland PSC orders issued in the last ten years in which the Commission has expressly made or relied upon “across-the-fence” comparisons. Dr. Tabors believes that even where the Commission does not expressly compare or contrast one utility with another, the existence of across-the-fence competition serves as an implicit and common consideration in Commission regulation in general, including as a check on any one locally regulated utility’s performance and proposals.

Dr. Tabors lists below a sampling of recent Commission decisions in various contexts which illustrate that such comparisons are commonplace and that they appear to inform Commission decision-making on the specific matters at issue:

- Order No. 86293, *In re 2014 Arrearage Collection & Termination Practices of Md. Elec., Gas, or Elec. & Gas Utils.*, Case No. 9340 (Md. Pub. Serv. Comm’n Apr. 11, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\Casenum\9300-9399\9340\33.pdf (evaluating Maryland utilities’ billing-related practices, in connection with high prices following extreme winter weather). *See, e.g.*, slip op. at 10 (“[W]e note that BGE, Pepco and Delmarva have each committed to extend the Winter Restrictions prescribed in COMAR 20.31.03.03 through May 31, 2014, which will extend the benefits of more flexible payment plans and a retroactive budget billing option, if requested. We strongly urge other utilities to do likewise.”).

- Order No. 86366, *In re Potomac Edison Co. D/B/A Allegheny Power's Energy Efficiency, Conservation & Demand Response Programs Pursuant to the Empower Md. Energy Efficiency Act of 2008*, Case No. 9153 (Md. Pub. Serv. Comm'n May 28, 2014), http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\Casenum\9100-9199\9155\591.pdf (assessing Maryland utilities' semi-annual EmPOWER reports and requests for budgetary and programmatic modifications). *See, e.g.*, slip op. at 34 (“Delmarva and Pepco requested to eliminate the pre-approval requirement within the prescriptive program for projects receiving incentives less than \$5,000. In support of this request, both Staff and the PHI Companies argue that this modification will help to streamline the program’s implementation and drive additional participation. Furthermore, the other Utilities (BGE, PE, and SMECO) do not administer this pre-approval requirement for their prescriptive program projects.”) (citation omitted).
- Order No. 85987, *In re Potomac Edison Co. d/b/a Allegheny Power's Energy Efficiency, Conservation & Demand Response Programs Pursuant to the Empower Maryland Energy Efficiency Act of 2008*, No. 9153, 2013 Md. PSC LEXIS 44 (Md. Pub. Serv. Comm'n Nov. 12, 2013), http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\CaseNum\9100-9199\9153\444.pdf, slip op. at 5 (“In considering whether to grant a particular utility’s request for a specific program, we took into account the ... the program’s performance compared to similar programs offered by the other Utilities; ... and its cost to achieve the savings, as compared to the other Utilities.”).
- Order No. 85776, *In re the Investigation into the Regulatory Treatment of Providers of Elec. Vehicle Charging Stations & Related Servs.*, Case No. 9261, 306 P.U.R.4th 331 (Md. Pub. Serv. Comm'n Aug. 12, 2013), http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\CaseNum\9200-9299\9261\81.pdf (comparing and approving, as modified, BGE and Pepco electric vehicle charging station pilot programs). *See, e.g.*, slip op. at 5 (“As is evident from the filings of BGE and Pepco, and as was noted at the June 14, 2013 hearing in this matter, we have been presented with two very different proposals. As admitted by the Companies, both Pilot Programs have strengths and weaknesses.”).
- Order No. 85724, *In re Potomac Elec. Power Co. for an Increase in Its Retail Rates for the Distrib. of Elec. Energy*, Case No. 9311, 306 P.U.R.4th 1 (Md. Pub. Serv. Comm'n July 12, 2013), http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\Casenum\9300-9399\9311\164.pdf, slip op. at 108, footnote omitted (In addressing the contention that Pepco’s ROE should be reduced to reflect its “Bill Stabilization Adjustment,” the Commission addresses how the issue was handled in a recent BGE rate proceeding, stating “[t]here, as a result of the issuance of Order Nos. 84653 and 85177, and the greater prevalence of BSAs in electric utility proxy groups, we found that “a strict basis point reduction of 50 points may no longer be warranted. We find so here as well.”).

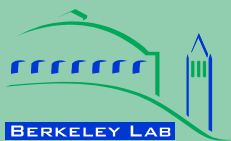
- Order No. 85374, *In re Application of Baltimore Gas & Electric Company for Adjustment in its Electric and Gas Base Rates*, Case No. 9299, 303 P.U.R.4th 183 (Md. Pub. Serv. Comm’n Feb. 22, 2013), http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\Casenum\9200-9299\9299\78.pdf, slip op. at 38, 303 P.U.R.4th at 205, footnote omitted (In approving a BGE request for \$2.8 million increase in additional electric O&M expenses, the Commission states that “recognition of the RM44 adjustment is consistent with safety-related adjustments that we have approved for other utilities in recent years”); and slip op. at 42, 303 P.U.R.4th at 206 (in rejecting “piecemeal change[s]” to depreciation rates, that Commission notes “our decision in this case is consistent with our decision in Case No. 9217, where we rejected Pepco’s proposal to make a piecemeal change to its depreciation rates[.]”).
- Order No. 85817, *Revisions to COMAR 20.50 – Service Supplied by Electric Commission Electric Companies – Proposed Reliability and Service Quality Standards*, Admin. Docket RM43 (Md. Pub. Serv. Comm’n Sept. 3, 2013), http://webapp.psc.state.md.us/intranet/AdminDocket/NewIndex3_VOpenFile.cfm?ServerFilePath=C%3A%5CAdminDocket%5CRuleMaking%5CRM43%5C082%2Epdf (comparing reliability performance of Maryland utilities). *See, e.g.*, slip op. at 4 (“For the prorated reporting year (July 1, 2012 through December 31, 2012), five of the six reporting Utilities – BGE, Potomac Edison, Pepco, Choptank and SMECO - met the system-wide SAIDI and SAIFI reliability standards. Delmarva did not meet the standards for the prorated year, reporting an index of 1.83 hours for SAIDI against the COMAR required 1.63 and an index of 0.9 interruptions for SAIFI against a COMAR requirement of 0.89. However, on an annual basis all of the Utilities, including Delmarva, met the standard for 2012.”).
- Order No. 85385, *In the Matter of the Electric Service Interruptions in the State of Maryland Due to the June 29, 2012 Derecho Storm*, Case No. 9298 (Md. Pub. Serv. Comm’n Feb. 27, 2013), http://webapp.psc.state.md.us/Intranet/casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\Casenum\9200-9299\9298\63.pdf (comparing storm response of Maryland utilities). *See, e.g.*, slip op. at 10 (“While Pepco experienced double the number of outages after the Derecho as compared to Hurricane Irene, BGE had very similar numbers of outages with the Derecho as with Hurricane Irene. However, BGE’s average customer outage duration was almost 1 day longer than Pepco’s.”).
- Order No. 84569, *In re Potomac Edison Co. d/b/a Allegheny Power’s Energy Efficiency, Conservation and Demand Response Programs Pursuant to the Empower Maryland Energy Efficiency Act of 2008*, Case No. 9153, 2011 Md. PSC LEXIS 36 (Md. Pub. Serv. Comm’n Dec. 22, 2011), http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\CaseNum\9100-9199\9153\268.pdf, slip op. at 12 (“[W]e approve Potomac Edison’s proposed program, with one modification discussed below, and we direct all of

the other Companies to develop a [conservation voltage reduction] program (or, in BGE's case, to accelerate the CVR program it is currently developing)").

- Order No. 84564, *In the Matter of an Investigation Into the Reliability and Quality of the Electric Distribution Service of Potomac Electric Power Co.*, Case No. 9240, 295 P.U.R.4th 373 (Md. Pub. Serv. Comm'n Dec. 21, 2011), http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\CaseNum\9200-9299\9240\107.pdf, slip op. at 46, 295 P.U.R.4th at 394 (“for Pepco, the ten-year delay to transition to a four-year cycle proved to be another missed opportunity to utilize prudent vegetation management practices that other Maryland utilities employed years earlier.”).

In addition, please see (1) Dr. Tabors's testimony at page 8, lines 14-22, and pages 11-12; and (2) Dr. Tabors's response to Applicants Data Request No. JA-II-19.b.

Exhibit RDT-23



ERNEST ORLANDO LAWRENCE BERKELEY NATIONAL LABORATORY

Tracking the Reliability of the U.S. Electric Power System:

An Assessment of Publicly Available Information Reported to State Public Utility Commissions

Joseph H. Eto and Kristina Hamachi LaCommare

October 2008

The work described in this report was funded by the Office of Electricity Delivery and Energy Reliability of the U.S. Department of Energy under Contract No. DE-AC02-05CH11231.

6. Summary of Findings and Conclusions

Our findings regarding state PUC practices and rules on reliability information reported by utilities are summarized as follows:

- Thirty-five state PUCs, including DC, require routine reporting of reliability event information. This is a net increase of 10 state PUCs over the number reported in a similar survey conducted by the NRRI in 2004.
- These 35 PUCs require annual reporting of SAIDI and SAIFI and/or CAIDI, which, along with SAIFI, can be used to derive SAIDI. Only two state PUCs require reporting of MAIFI.
- Twenty-one PUCs have reporting requirements that formally define major events. Of these 21, four require reporting following the IEEE Standard 1366-2003, IEEE Guide for Electric Power Distribution Reliability Indices, which introduces a consistent means for defining major events using the concept of “major event days.”
- An additional four PUCs receive reliability information from utilities, though not as a result of a formal reporting requirement.
- Thirty-seven state PUCs, including DC, make publicly available or summarize in publicly available documents the reliability information they collect from utilities.

Our findings regarding utility practices for collecting and reporting reliability information to state PUCs are summarized as follows:

- All utilities reported SAIDI and SAIFI (and/or CAIDI). Only 12 of the 123 utilities reported MAIFI.
- Summary statistics for reported SAIDI, SAIFI, and MAIFI exhibit observable though not statistically significant variations across census regions.
- The definition of and practices for recording sustained and momentary interruptions have evolved over time leading to inconsistencies among utilities.
- Differences in the definition of a sustained interruption do not appear to affect SAIDI or SAIFI in a statistically significant manner.
- Utilities define major events as a means for distinguishing between utility performance in planning for and responding to routine interruptions versus that for non-routine or extraordinary interruptions.
- The definition of a major event is not consistent among the majority of utilities.
- IEEE Standard 1366-2003 introduces a consistent means for defining major events using the concept of “major event days.”
- Some utilities report SAIDI and SAIFI both including and not including major events; other utilities only report SAIDI and SAIFI not including major events.
- When major events are not included, SAIDI is lowered relatively more than SAIFI compared to when major events are included.
- Many utilities report descriptive information on each major event
- Use of IEEE Standard 1366-2003 does not appear to bias SAIDI or SAIFI values compared to using prior definitions of major events.

We also collected information on bulk power system emergencies reported by utilities in near real-time to national bodies in 2006, including DOE and NERC, and compared aspects of this information to that reported by utilities to state PUCs. Our findings are summarized as follows:

- Information on electricity reliability reported to these two national bodies consists of descriptive information that is reported in near real-time on individual, large events that affect the bulk power system. The reporting takes place in near real-time because an important purpose of the reporting is to notify relevant industry and public bodies of significant power system events that may require immediate response. With few exceptions, the same information is reported to both DOE and NERC at the same time.
- Many, but not all, events reported to these national bodies also cause power interruptions to customers. For these events, the number of customers affected is reported.
- An initial assessment of these events supports the conventional wisdom that the majority of power interruptions experienced by customers are not due to large events that affect the bulk power system; they are due to more localized events that affect only utility distribution systems.
- It is difficult to cross-reference information reported to national bodies on individual large bulk power system events that cause power interruptions, as defined by these national bodies, with information reported to state PUCs on individual major events, as defined by either the PUC or the reporting utility.

From these findings, we draw the following conclusions and recommendations:

- State PUC interest in electricity reliability is growing.
- However, differences in utility reporting practices hamper meaningful comparisons of reliability information reported by utilities to different state PUCs and, therefore, may limit the effectiveness of efforts to measure the effectiveness of efforts to improve reliability.
- Efforts to eliminate differences that are solely due to reporting practices are just beginning. These efforts, which focus on using standard definitions, such as those promoted by IEEE Standard 1366-2003, are promising and should be encouraged.
- Until IEEE Standard 1366-2003 is adopted universally, regulators concerned about the definition and treatment of major events in reporting reliability information should consider requiring reporting of SAIDI and SAIFI both including and not including major events, as well as descriptive information on each major event.
- More work is required to better understand the sources of discrepancies and the importance of seeking greater consistency between reliability information reported to national bodies and that reported to state PUCs.

Exhibit RDT-24

IEEE Benchmark Year 2014 Results for 2013 Data

July 29, 2014 General Meeting
Distribution Reliability Working Group
Washington D. C.

Background to IEEE DRWG Benchmark Study

- 1. Initiated in 2003, conducted annually*
- 2. Participants are anonymous with key identifier to retain anonymity*
- 3. Participation list is not revealed to anyone*
- 4. Each participant can choose to share their results*
- 5. No inference is made about good or bad reliability*
- 6. Intended to provide information for users to assess their performance relative to peers*

Benchmarking

- Using annual key metrics (SAIDI, SAIFI and CAIDI) to assess performance of a system may be useful, however, needs to be tempered
- DRWG Study attempts to identify various aspects that could cause a difference in reported metrics
- Data may not be directly comparable, since
 - Data collection & system differences exist
 - Certain exclusion differences can occur
- IEEE 1366-2003/2012
 - addresses data basis issues by clearly defining the rules.
 - It **DOES NOT** address the data collection issues
 - Companies may not report all forms of outages, due to data collection issues or other reasons

Exhibit RDT-25

**Response of Maryland Energy Administration
Maryland Public Service Commission Case – No. 9361
In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.**

Discovery request submitted by: Applicants

Discovery request set number: Second Set

Response prepared by or under the direction of: Richard D. Tabors

Response date: December 23, 2014

Applicants JA-II-12:

With respect to your Direct Testimony at page 44, lines 3-6, please provide all data, studies, workpapers, and analyses supporting your contention that, “FERC recognized that if the entity that owned generation also owned the transmission assets, it had an inherent economic interest to favor its own generation over any that might be competitive, either by hampering or outright preventing access to the controlled transmission wires.”

Response: State/MEA has lodged objections to this request. Without waiving those objections, Dr. Tabors states:

Dr. Tabors noted in his Direct Testimony (at page 44) that FERC Order 888 was challenged and reviewed by the United States Supreme Court. In that context, the Court addressed the FERC Notice of Proposed Rulemaking that led to Order 888, noting that the NOPR stated that ““market power through control of transmission is the single greatest impediment to competition. Unquestionably, this market power is still being used today, or can be used, discriminatorily to block competition.”” *New York v. FERC*, 535 U.S. 1, 10 (2002) (quoting NPRM, ¶ 33,049). The Court also noted that elsewhere in the NOPR, FERC found:

that utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices.

Id. at 10 n.7 (quoting NPRM, ¶ 33,052).

Exhibit RDT-26

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

CASE 14-M-0101 - Proceeding on Motion of the Commission in
Regard to Reforming the Energy Vision.

DEVELOPING THE REV MARKET IN NEW YORK: DPS
STAFF STRAW PROPOSAL ON TRACK ONE ISSUES

August 22, 2014

Using these advantages, utilities can promote the adoption of innovative DER technologies not yet been widely in use.

Utility engagement in DER would also give utilities experience and confidence in how the integration of DER will affect the reliable operation of distribution systems. Whether or not utilities own DER, they must put in place transparent procedures and controls related to the reliable use and dispatch of DER; however, utility ownership would facilitate the planning process.

Direct ownership of DER by a utility can reduce the risk of revenue erosion. Where a utility owns assets behind the meter, the customer is retained, and revenues from that customer, as well as costs and benefits of the asset, accrue to all ratepayers.

As to the disadvantages of utility engagement in DER, the most obvious is the risk of vertical market power at the distribution level. In its 1998 policy statement, the Commission stated vertical market power occurs “when an entity that has market power in one stage of the production process leverages that power to gain advantage in a different stage of the production process.”³⁸

Where a utility has a stake in DER and also owns the distribution system and operates DSP markets, the utility may have incentives to favor its own facilities. A utility could discriminate against third-party competitors in various ways. For example, a utility could create barriers to entry through burdensome or delayed processing of interconnection requirements. A utility would have an incentive to create or maintain distribution constraints that favor the economics of its own DER. The prospect of such vertical market power is great at the distribution system level because distribution circuits are easily constrained.³⁹ In a mature DSP market, utilities would have an incentive to favor their own projects and affiliate-owned projects in the dispatch of DER.

A related risk stems from the informational asymmetry that favors incumbent utilities. This risk applies both to information about the capabilities and limitations of their distribution

³⁸ Case 94-E-0891 - Electric Rate/Restructuring, Statement of Policy Regarding Vertical Market Power (issued July 17, 1998), Appendix I, p. 1.

³⁹ In the long term, market power concerns are not limited to utilities. In a mature market where DER pricing is differentiated at the level of individual distribution circuits, a third party provider controlling a significant portion of load on a given circuit could have the ability to manipulate power flows in order to create favorable pricing opportunities.

systems and to customer usage data in utilities' possession. Given their knowledge of distribution system needs and capabilities, and customer energy usage, incumbent utilities can readily identify where DER can be sited most efficiently. In a vertically integrated model, such efficiencies are part of the rationale for allowing a monopoly. In a competitive model, however, such asymmetry can effectively dissuade private capital from participating in emerging markets.

One of the principal reasons for the transition into a competitive model for electric generation was to transfer risk of failure away from ratepayers and onto market participants. If utilities are allowed to own DER, their relatively lower business risk will enable them to undercut some competitors who do not enjoy the utilities' lower costs of capital. Utility ownership risks crowding out new investment in New York DER. Commenting parties point out that investors have choices, and a New York DER market with utility ownership can discourage investors from choosing New York. Long-term success in animating a DER market in our state depends on leveraging private capital and spreading risk beyond ratepayers. These goals could be threatened by utility DER ownership.

Concomitantly, as many parties note, with competitive investment comes the strongest force for innovation. Unrestricted utility ownership of DER could, even if immediately successful, stifle the growth of an innovative, competitive DER market for the longer term.

2. Factors to Consider in Mitigating Market Power

An absolute prohibition against utility engagement in DER would eliminate these concerns but would also deny the potential benefit of DER growth that is needed to develop an asset base for DER markets. Therefore Staff does not recommend this outcome. Many parties also support a pragmatic approach. This requires consideration of various combinations of mitigation measures to overcome the potential for vertical market power.

In considering whether or not to allow utility engagement in specific cases, the Commission should take into consideration a range of variables:

- what type of DER is at issue: the balancing of market power concerns versus potential benefits will vary depending whether the DER is generation, storage, demand response, or energy efficiency;
- what type of engagement: utilities can be engaged in DER by direct ownership, through contracting for services, or by providing financing assistance;
- the need for the DER: if it is targeted to resolve a major system need, a direct coordinated effort by a utility may be warranted;