UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2547

September Term, 2015

MARYLAND OFFICE OF PEOPLE'S COUNSEL, ET AL.

v.

MARYLAND PUBLIC SERVICE COMMISSION, ET AL.

Eyler, Deborah S.,
Reed,
Beachley,
JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 27, 2017

In this administrative appeal, we are asked to decide whether the Maryland Public Service Commission ("the Commission") clearly erred, acted arbitrarily or capriciously, or erred as a matter of law by granting, with conditions, an application by the Exelon Corporation ("Exelon"), Pepco Holdings, Inc. ("PHI"), Potomac Electric Power Company ("Pepco"), and Delmarva Power & Light Company ("Delmarva") (collectively "the Applicants") for approval of a cash-for-stock buy out of PHI by Exelon. We conclude that the Commission did not err and shall affirm the judgment of the Circuit Court for Queen Anne's County upholding the final agency decision.

FACTS AND PROCEEDINGS

Exelon is a utility services holding company incorporated in Pennsylvania and headquartered in Chicago, Illinois. Its principal subsidiaries are Baltimore Gas & Electric ("BGE"); PECO Energy Company ("PECO"), a Pennsylvania utility company; Commonwealth Edison Company ("ComEd"), an Illinois utility company; and Exelon Generation Company, LLC ("Exelon Generation"). Together, the three utility subsidiaries provide electricity service to 6.6 million customers and natural gas service to 1,155,000 customers. Exelon Generation operates Exelon's generation business, including its generation fleet and Constellation, its wholesale energy marketing and competitive retail sales business.

On July 18, 2014, Exelon and PHI entered into an Amended Merger Agreement by which Exelon agreed to pay $27.25 per share of common stock to buy out PHI ("the Merger"). PHI owns three public utilities, two of which serve Maryland customers.

Pepco delivers electricity to customers in Montgomery County and Prince George's County (as well as the District of Columbia), and Delmarva delivers electricity to the Eastern Shore of Maryland (and delivers electricity and natural gas to customers in Delaware).[1] Through its 2012 merger with Constellation Energy Group, Inc., Exelon had acquired BGE and, upon the approval of the Merger, it controlled, directly or indirectly, the provision of electricity service to more than eighty percent of Maryland customers.

On August 19, 2014, the Applicants submitted to the Commission an application for approval of the proposed Merger and supporting documents. Exelon proposed acquiring PHI in an all-cash transaction for $6.8 billion. After the Merger, PHI would become an indirect, wholly owned subsidiary of a special purpose entity, which in turn is a subsidiary of Exelon Energy Delivery Company, Exelon's holding company for its regulated utilities and a direct subsidiary. PHI would be governed by a seven-member board of directors, including members from the Delmarva, Pepco, and ACE service areas and four members who serve as officers or directors of Exelon and as officers of Delmarva, Pepco, and ACE. Christopher Crane, the CEO and President of Exelon, would serve as PHI's CEO and President after the Merger. Delmarva and Pepco each would be governed by its own board, which would be selected by the PHI board.

More than twenty-five parties, including the Maryland Office of People's Counsel ("OPC"), the Commission's Technical Staff ("Staff"), the Sierra Club/Chesapeake

[1] The third utility owned by PHI, Atlantic City Electrical Company ("ACE"), operates in New Jersey.

Climate Action Network ("the Sierra Club"), Montgomery County, and Prince George's County, petitioned to intervene in the Commission proceedings for the Merger application. The Commission directed intervenors to submit written testimony and then set up a briefing schedule.

Prior to the completion of briefing, the Applicants reached two settlements with intervening parties who initially opposed the Merger. The Applicants first settled with The Alliance for Solar Choice ("TASC") ("the first settlement"). It subsequently settled with Montgomery County, Prince George's County, the National Consumer Law Center, the National Housing Trust, the Maryland Affordable Housing Coalition, the Housing Association of Nonprofit Developers, and the Mid-Atlantic Off-Road Enthusiasts ("the multi-party settlement").

Beginning in January 2015, the Commission held five public hearings and 17 days of evidentiary hearings. Opponents of the Merger were the Staff; the Maryland Energy Administration ("MEA"); the OPC; the Sierra Club; the Clean Chesapeake Coalition; the Apartment and Office Building Association of Metropolitan Washington; Monitoring Analytics, LLC; the Mid-Atlantic Renewable Energy Coalition; the Maryland, District of Columbia, and Virginia Solar Energy Industries; Public Citizen, Inc.; POWERUPMONTCO; and Coalition for Utility Reform/City of Gaithersburg. The Applicants and the parties to the first settlement and the multiparty settlement supported approval of the Merger.

The legislature has mandated that the Commission review an application by "persons that are not engaged in the public utility business in [Maryland to acquire] the power to exercise any substantial influence over the policies and actions of a public service company that provides electricity or gas [in Maryland]" "in order to prevent unnecessary and unwarranted harm to the customers of the public service company." Md. Code (1998, 2010 Repl. Vol.), § 6-105 of the Public Utility Article ("PU"). Pursuant to PU section 6-105, the Applicants bore the burden of proving that the Merger was "consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers[.]" PU § 6-105(g)(3).

In assessing the "public interest," "benefits," and "no harm" prongs, the Commission was required to consider the following factors:

> (i) the potential impact of the acquisition on rates and charges paid by customers and on the services and conditions of operation of the public service company;
> (ii) the potential impact of the acquisition on continuing investment needs for the maintenance of utility services, plant, and related infrastructure;
> (iii) the proposed capital structure that will result from the acquisition, including allocation of earnings from the public service company;
> (iv) the potential effects on employment by the public service company;
> (v) the projected allocation of any savings that are expected to the public service company between stockholders and rate payers;
> (vi) issues of reliability, quality of service, and quality of customer service;
> (vii) the potential impact of the acquisition on community investment;
> (viii) affiliate and cross-subsidization issues;
> (ix) the use or pledge of utility assets for the benefit of an affiliate;
> (x) jurisdictional and choice-of-law issues;
> (xi) whether it is necessary to revise the Commission's ring fencing and code of conduct regulations in light of the acquisition; and
> (xii) any other issues the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience, and necessity.

PU § 6-105(g)(2). If, after assessing those factors, the Commission determined that the Applicants met their burden, it was required to approve the application. If it determined the burden was not met, the Commission still could approve the application subject to conditions designed to ameliorate any harm to ratepayers, to create benefits for ratepayers, or to make the Merger otherwise consistent with the public interest. Otherwise, it was required to deny the application outright.

After considering all of the testimony, both written and oral, and all of the other evidence, the Commission, by a three to two vote, decided to grant the application subject to conditions. On May 15, 2015, the Commission (by its three member majority) issued an 86-page decision explaining its reasons. The other two members issued a 52-page dissenting opinion. In sum, the Commission found that there was no evidence that the Merger, when subject to the conditions imposed, would harm ratepayers by diminishing the Commission's regulatory authority; by creating disincentives to distributed and renewable energy sources; or by causing an increase in rates (above the ordinary anticipated rate increases). The Commission approved "robust ring fencing measures" as part of the Merger to protect customers from any potential "financial turmoil related to Exelon's deregulated business activities."

The Commission found, moreover, that the Merger would create "specific and measurable benefits" for ratepayers in Maryland and was consistent with the greater public interest. Specifically, the Commission was persuaded by the evidence that by integrating support services for the three Maryland utilities it owned, along with its other distribution utilities, Exelon would save money for ratepayers and increase reliability of services. As a result, rates would be lower than if the Merger were not approved; system outages would decrease; and greater synergy savings would be realized and passed along to consumers. The Commission found that Exelon's "direct financial investment" also was a benefit to the customers of Pepco and Delmarva. Conditions imposed would require Exelon to give customers a one-time $100 residential rate credit, a total investment of $66 million; to invest an additional $43.2 million in energy efficiency programs in the affected counties; to invest $14.4 million in Green Sustainability Funds for Prince George's County and Montgomery County; and to invest $4 million for sustainable energy workforce development programs. The grant of the application was further conditioned upon Exelon's construction of twenty megawatts of renewable energy in Pepco's and Delmarva's service areas.

Three of the parties who had opposed the Merger before the Commission sought judicial review in the Circuit Court for Queen Anne's County: OPC, the Sierra Club, and Public Citizen, Inc. On January 8, 2016, the circuit court issued an opinion affirming the final decision of the Commission. The OPC and the Sierra Club noted separate appeals to this Court. The appellees are the Commission, Exelon, Prince George's County, and Montgomery County.

The OPC and the Sierra Club each pose two questions, which we have combined and rephrased as three:

> I. Did the Commission err as a matter of law by failing to consider the acquisition premium paid to PHI stockholders in assessing the "no harm," "benefits," and "public interest" requirements of PU section 6-105?
>
> II. Did the Commission err as a matter of law or act arbitrarily or capriciously in its assessment of whether the Merger would harm customers?
>
> III. Was it a violation of the Commission's enabling statute and/or the Sierra Club's procedural due process rights for the Commission to consider a report from the Office of Home Energy Programs ("OHEP") that was not part of the record?

We answer these questions in the negative and shall affirm the judgment of the circuit court.

STANDARD OF REVIEW

Our standard of review is governed by PU section 3-203. It states:

> Every final decision, order, or regulation of the Commission is prima facie correct and shall be affirmed unless clearly shown to be: (1) unconstitutional; (2) outside the statutory authority or jurisdiction of the Commission; (3) made on unlawful procedure; (4) arbitrary or capricious; (5) affected by other error of law; or (6) if the subject of review is an order entered in a contested proceeding after a hearing, unsupported by substantial evidence on the record considered as a whole.

We review the Commission's decision, not the decision of the circuit court on judicial review. *See Mid–Atl. Power Supply Ass'n v. Md. Pub. Serv. Comm'n*, 143 Md. App. 419, 432 (2002).

Recently, in *Accokeek, Mattawoman, Piscataway Creeks Community Council, Inc. v. Public Service Commission of Maryland*, ____ Md. ____, slip op. at *11, No. 26, September 2016 Term (filed December 16, 2016), the Court of Appeals explained that while appellate review of a decision of the Commission generally is subject to the same principles that apply to appellate review of any final decision of an administrative agency, Maryland appellate courts have "tended to accord particular deference (though not total deference) to . . . decisions [of the Commission]." Thus, while "questions of law are 'completely subject to review by courts,' as a general matter, '[s]o long as a reasoning mind could have reached the same conclusion as the agency, we will not disturb the agency's decision' and that because [the Commission] 'is well informed by its own expertise and specialized staff, a court reviewing a factual matter will not substitute its own judgment on review of a fairly debatable matter.'" *Id*. at *10 (quoting *CWA v. Pub. Serv. Comm'n*, 424 Md. 418, 433 (2012) (first alteration in *Accokeek*)).

DISCUSSION

I.

The OPC's primary contention is that the Commission erred by failing to consider whether permitting PHI stockholders to retain the excess of the purchase price paid by Exelon over the market value of PHI's stock, *i.e.*, the "acquisition premium," as OPC refers to it, was contrary to the public interest, a harm to the ratepayers, and an offset that negated any other benefits to the ratepayers. In the OPC's view, the premium paid by Exelon was not earned by PHI through the prudent management of its utilities but was a reflection of the "tangible and intangible assets" of the regulated utility and, therefore, should have "inured to the benefit of customers." It maintains that it presented unrefuted expert testimony quantifying the acquisition premium and "analyzing its appropriate treatment under the 'public interest' and 'benefits and no harm to consumers' requirements of [PU section] 6-105" but that the Commission "arbitrarily and capriciously" ignored all that evidence.

Exelon responds that the increase in PHI's stock price that resulted from Exelon's interest in purchasing it rightfully belonged to PHI's stockholders and that the OPC's argument to the contrary finds no support in the PU article, prior Commission cases, Maryland case law, or the case law of our sister states. It emphasizes that stockholders never would agree to sell their stock if the purchase price did not exceed the current value and, as such, were we to accept the OPC's argument, utility mergers effectively would be eliminated in Maryland. Exelon and the Commission contend, moreover, that the Commission only was required by PU section 6-105 to consider the allocation between stockholders and ratepayers of "savings" resulting from the Merger, not of any premium paid to PHI stockholders.

We briefly summarize the evidence before the Commission concerning the acquisition premium. OPC witness Scott Hempling, Esq., a professor at the Georgetown University Law Center and the former executive director of the National Regulatory Research Institute, testified that the amount of the premium was $3.9 billion as calculated as the excess of price over book value or $1.842 billion if calculated as the excess of price over market value. Pepco's CEO, Joseph M. Rigby, testified that the acquisition premium amounted to $1.126 billion, calculated as the excess of price over market value. Rigby testified that, absent the acquisition premium, "the transaction would not [have] take[n] place." Exelon agreed that the acquisition premium and other costs arising from the transaction would not be passed on to the ratepayers, and the approval of the Merger was expressly conditioned on that agreement.

OPC witnesses opined that PHI's value to Exelon was that it was a regulated utility with an "exclusive right to provide an essential service in return for monthly customer payments established by government," making it less volatile than Exelon's unregulated generation interests. There was no evidence that the premium paid by Exelon was reflective of managerial excellence by PHI. Thus, in the view of the OPC witnesses, the value of the premium was "created by government action," and it would be unfair and against the public interest to permit the shareholders to retain that value. Moreover, it was inherently harmful to consumers to permit PHI to auction off its monopoly right to the highest bidder because the highest bidder was not necessarily the best performer.

It is clear that the Commission did not "ignore" the OPC's acquisition premium argument.[2] It recognized that OPC's position was that the acquisition premium was a "windfall" to PHI shareholders and that the Staff's position was that the one-time $100 residential rate credit to customers should be higher "based on the premium that PHI's

[2] The dissenting opinion addressed the acquisition premium issue for the first time on page 43 of its 52 page opinion. The two dissenting members asserted that the "hugely disparate allocation of benefits between shareholders and ratepayers" was inconsistent with the public interest and argued that the majority should have rejected the Merger as a result or should have "lessened [the] inequity by providing additional benefits to ratepayers." Thus, the dissenting members did not view the acquisition premium as a harm to the ratepayers, but as being inconsistent with the public interest generally and/or an offset against the other benefits.

shareholders w[ould] realize." By deciding that the $100 rate credit was sufficient, the Commission implicitly rejected the testimony of the OPC witnesses that the acquisition premium was itself a concrete harm to the consumers and was inconsistent with the public interest.

Whether an acquisition premium factors into the "no harm," "benefits," and "public interest" analysis required by PU section 6-105 is precisely the type of issue committed to the expertise of the Commission and about which its decision is entitled to significant deference by this Court. *See Pub. Serv. Comm'n of Md. v. BGE*, 273 Md. 357, 373 (1974) (noting that the Commission, could "use its expertise to evaluate [an] expert's testimony and to accept or reject it"). Moreover, the Commission's determination that an acquisition premium does not factor into the PU section 6-105 harm, benefits, and public interest analysis was consistent with its decisions in recent merger cases that similar "acquisition premiums" that do not transfer utility property, but merely amount to transfers between shareholders, need not be "divert[ed] . . . to rate relief" in order to satisfy PU section 6-105(g). *In re Current & Future Fin. Condition of BGE Co.*, 100 Md. PSC 348 (2009), at *39 (analyzing the merger of E.D.F. and Constellation Energy Group under PU section 6-105). The Commission reasoned, to the contrary, that the stockholders are entitled to retain "the fair proceeds of a properly conditioned [t]ransaction." *Id.*

The cases relied upon by the OPC, on the other hand, hold that when a regulated utility sells assets that were included in the rate base, a gain on the sale must inure to the benefit of the ratepayers.[3] *See, e.g., Chesapeake and Potomac Tel. Co. of Md.*, 74 Md. PSC 595, 618 (1983) (stating that it is well settled that "to the extent that property has been included in rate base, any gains from the sale of that property should redound to the benefit of ratepayers"). We agree with Exelon that the sale of PHI's stock to Exelon is not analogous to the sale of a utility's assets. Here, Pepco and Delmarva retained the same property before and after the merger. The sale of PHI's stock merely changed the identity of the parent company that owned that property. And the ratepayers do not have a property interest in the shares of stock owned by the stockholders.

Moreover, in enacting PU section 6-105, the legislature anticipated mergers of this kind but did not include among the factors the Commission is required to consider a premium flowing to shareholders. The legislature did require the Commission to assess "the projected allocation of any savings that are expected to the public service company [as a result of the Merger] between stockholders and rate payers." PU § 6-105(g)(2)(v). The Commission made findings under that statutory factor, all supported by substantial evidence, that the projected "synergy savings" allocable to Pepco and Delmarva from the Merger amounted to $37 million over five years, whereas approval of the Merger was conditioned on an investment of $109.2 million in a Customer Investment Fund ("CIF"), 2.95 times the expected allocated savings. This ratio of savings to Exelon versus the

[3] The rate base "is the 'fair value of the company's property used and useful in rendering service to the public' upon which the Company is entitled to earn a reasonable rate of return." *Pub. Serv. Comm'n of Md. v. Baltimore Gas & Elec.*, 273 Md. 357, 363 (1974) (quoting Md. Code (1969 Repl. Vol.), § 69 of Article 78).

direct benefits to the ratepayers was "13% higher than the ratio" in the merger between Exelon and Constellation, which also had been approved by the Commission. The synergy savings also would result in lower rates going forward than if the Merger were not approved. These findings supported the Commission's determination that the acquisition premium did not factor into its "no harm," "benefits," and "public interest" analysis and further support a conclusion that the Commission did not legally err by not offsetting the benefit to PHI stockholders with additional rate relief.

II.

The OPC and the Sierra Club both contend the Commission erred in its assessment of the "no harm" prong of PU section 6-105(g). As a threshold matter, the OPC maintains that the Commission erroneously applied a "no net harm" standard because it reframed the issue as whether the Merger "transaction was structured not to harm the utility's ratepayers." This argument lacks merit. The Commission stated that the threshold question before it was whether the Merger would cause "*no harm* to Maryland ratepayers." (Emphasis in original.) It emphasized that it was required by PU section 6-105(g) and its prior decisions interpreting that statute to "'ensure that ratepayers are protected against *any* increased risks of harm from [the Merger]'" and, if any increased risks were identified, it was required to "'eliminate them'" by denying the application or by imposing conditions. (Quoting *In re: the Merger of Exelon Corp. and Constellation Energy Group*, 103 Md. PSC 22, 45 (2012) ("Exelon/CEG")) (emphasis in Exelon/CEG). The Commission made clear that it was not empowered to "offset" harm with benefits. By rephrasing the statutory "no harm" mandate as a question whether the Merger transaction was "structured" in such a way as to not harm ratepayers, the Commission merely recognized that its analysis was forward looking and predictive of future harms.

On the merits, the OPC, joined with respect to one issue by the Sierra Club, contends that the Commission failed to resolve conflicts in the evidence or articulate any findings with respect to four specific types of harm that could be caused by the Merger and that were raised in the contested proceeding by parties opposed to the Merger. Exelon and the Commission respond that the Commission made non-clearly erroneous factual findings on each of the "speculative harms" raised by OPC and the Sierra Club and properly rejected them.

We perceive no error. Pursuant to PU section 3-113(a), a decision and order of the Commission following a contested proceeding must be "in writing," "based on consideration of the record," and must "state the grounds for the conclusions of the Commission." In the case at bar, the Commission summarized the positions of each of the parties, analyzed the evidence, and stated in great detail the grounds for its conclusion that the Applicants had met their burden under PU section 6-105. It was not obligated to address the testimony of every single witness or to explain why it was unpersuaded as to every argument presented by the parties opposed to the Merger. *See, e.g.*, *Mid-Atlantic Power Supply*, 143 Md. App. at 442 (emphasizing that "[t]he Commission was free to accept or reject any witness's testimony" and "the mere failure of the Commission to mention a witness's testimony" does not mean that the Commission "did not consider that witness's testimony").

In any event, the Commission *did* address the specific issues the OPC and, with respect to one issue, the Sierra Club claim it ignored. First, the OPC and the Sierra Club assert that the Commission failed to make any findings on the issue whether Exelon's ownership interest in nuclear generation plants and other generation interests creates a conflict of interest that will harm Maryland consumers. They point to evidence that Exelon's own internal documents reflect its view that distributed generation and the renewable energy market are a threat to its centralized generation assets and to evidence presented by the MEA's expert witness that Exelon could exert influence over the pace of development of distributed generation through its management of Delmarva's and Pepco's distribution systems. In their view, the Commission "essentially ignored" ample evidence that Exelon has "strong economic incentives to restrain emerging technologies."

The Commission addressed the evidence that Exelon had an "alleged conflict related to distributed energy and other renewable resources" and had "an imbedded economic incentive to protect a generation fleet from policy and technological changes." The Commission found the concerns raised by the OPC and other intervenors that Exelon would "discourage development of renewable or distributed generation in Maryland," "press the . . . General Assembly for legislation favoring its generation interests," and/or discourage new grid developments to be entirely speculative and not rising to the level of a "harm" to ratepayers. It found, moreover, that Exelon's interest in maintaining the status quo with respect to the model of delivery of electricity did not differ in any significant respect from PHI's interest in maintaining its "volumetric revenues." The Commission further found that numerous commitments by Exelon and conditions imposed by the Commission in approving the Merger would promote distributed generation and renewable energy in Maryland, including the requirement that Exelon construct 20 megawatts of renewable energy generation, split between the Delmarva and Pepco service areas; its commitment to initiate "grid-of-the-future proceedings" on or before July 1, 2016; and, through its settlement with TASC, as modified by the Commission, a commitment to "enhance its interconnection process for behind-the-meter distributed renewable generation and storage energy projects." These factual findings were a sufficient articulation of the Commission's reasoning with respect to this issue.

In a related argument, the OPC contends the Commission failed to address whether the Merger would diminish the effectiveness of the Commission's regulatory authority, thus harming ratepayers. Specifically, it argues that the Merger will cause the Commission to lose the "perspective" offered by Pepco and Delmarva as companies "free of the conflict between customer interest in lower costs and efficiency, and generator interest in higher profits."

The Commission directly addressed the argument that approval of the Merger would result in "'Exelon [becoming] . . . practically the sole utility voice in Maryland for discussions of potential regulations and regulatory policy'" and that this would harm Maryland consumers by diminishing the Commission's ability to effectively regulate the electric utilities. It was unpersuaded by the argument. It emphasized that Exelon had presented evidence that the Commission's regulatory authority over Pepco and Delmarva would remain unchanged after the Merger, as would the policy-making authority of various governmental agencies charged with overseeing energy policy in Maryland. The Commission noted that 19 states and the District of Columbia have an investor-owned utility serving over 80% of the state's customer base and that it had before it no evidence that these states had lost the ability to effectively regulate the utilities. These factual findings supported the Commission's decision that the Merger would not result in a loss of regulatory effectiveness.

The OPC next argues that the Commission "failed to address many of the financial risks resulting from the [Merger]," specifically the risks that Exelon would subsidize its more volatile unregulated generation business with proceeds from its regulated businesses; that if Exelon's generation business faltered, that might affect its "cost of capital, which [could] raise rates for Pepco and Delmarva customers"; and that the potential for a "catastrophic loss" at one of Exelon's nuclear generation plants was a new risk to Pepco and Delmarva's customers. OPC witnesses also took the position that the ring fencing measures proposed by Exelon were insufficient to insulate Pepco and Delmarva customers from those risks.

In its written decision, the Commission noted that Exelon was motivated to enter into the Merger by a desire to "diversify its financial reliance on volatile power market revenues from its generation business with the steady income stream from increased ownership of regulated distribution companies." The Commission found that the evidence presented by those opposed to the Merger did not show that "Exelon [would] seek to loot the earnings from Delmarva and Pepco to the financial detriment of those utilities." Approval of the Merger also was conditioned upon Pepco's and Delmarva's maintaining a "rolling 12-month average annual equity ratio of at least 48%." The Commission addressed at length the ring fencing measures imposed to eliminate the "enormous financial risk" occasioned by Exelon's operation of a nuclear fleet and found that the OPC witnesses had failed to cite any "concrete examples" of harm to BGE customers after the prior merger that resulted from volatility tied to Exelon's generation interests. These findings, which are not challenged, plainly articulated the Commission's reasoning on this issue.

Finally, the OPC complains that the Commission failed to address the risk that the Merger would result in higher rates for Pepco and Delmarva customers. This argument likewise lacks merit. Section F of the Commission's decision, titled "Consumer Rate Impacts," assesses "whether the proposed [Merger] will potentially impact the rates and charges paid by customers." In that section, the Commission considered whether "rates [would] increase as a direct result of th[e] transaction and whether the identified rate increases constitutes 'harm.'" The Commission found that rate increases arising from reliability-related capital expenses would occur with or without the Merger and that the conditions imposed under the Merger vis-à-vis reliability related expenditures would "enhance the value realized by ratepayers"; and that other anticipated reliability expenditures by Pepco would be subject to the Commission's ordinary prudency oversight and were the types of improvements demanded by the customer base. It found, moreover, that evidence showed that synergy savings realized as a result of the Merger would cause rates to be lower than they would have been absent the Merger. These findings were based on substantial evidence in the record and supported the Commission's determination that rate increases resulting from the Merger were not a harm to ratepayers. The Commission was not required to specifically address every piece of testimony by OPC witnesses supporting its view that other aspects of the Merger might cause rate increases.

III.

The electrical universal service program ("EUSP") provides assistance to electricity customers with incomes at or below 175% of the federal poverty level. PU § 7-512.1(a). It is established by the Commission and administered by the Maryland Department of Housing and Community Development and the Maryland Department of Human Resources ("DHR"). EUSP is funded, in part, through charges assessed to ratepayers. PU § 7-512.1(b)(1). The DHR Office of Home Energy Programs ("OHEP") submits a report to the Commission each year to assist it in making recommendations to the legislature about funding for the EUSP. PU section 7-512.1(g) provides that if a

> party to a merger or acquisition of an electric company . . . is required to distribute a credit to the customers in the electric company's service territory under an agreement with the Commission in connection with the merger or acquisition, the Commission shall consider the adequacy of the current funding of the electric universal service program in providing assistance to customers who qualify under this section.

This requirement is intended to ensure that rate credits to customers who are not low-income will not deplete the EUSP fund by decreasing the rates upon which the funding assessments are levied.

In the case at bar, because the Commission authorized a $100 rate credit per residential customer in the Pepco and Delmarva service areas, it was required by PU section 7-512.1(g) to "consider the adequacy" of the EUSP funding. The Commission recognized this obligation and, on the second day of the evidentiary hearing, a Commission member raised the issue of PU section 7-512.1(g) and explained that the Commission was required to "look at the adequacy [of EUSP funding]" in light of the "customer credit" included in the Merger. The Commission did not ask the Applicants (or any other parties) to present any evidence on that issue, however, and none was introduced.

In its decision, the Commission stated that it was required by PU section 7-512.1(g)(1) to consider the adequacy of EUSP funding in light of the fact that a condition of the Merger was that Pepco and Delmarva grant a rate credit to residential customers. It did so by reference to the most recent OHEP report, which had been adopted by the Commission in a separate, unrelated proceeding, and based upon the conditions of the Merger. The Commission found, based on the OHEP report, that EUSP funding had been adequate in the prior fiscal year. It noted that the $100 rate credit approved by the Commission as part of the Merger would benefit low-income customers (in addition to the rest of the customer base), as would the condition that Delmarva and Pepco forgive all arrearages "over two years old at merger closing." Thus, to the extent that the $100 rate credit might decrease EUSP funding going forward, the benefits to limited income customers served by the EUSP program would offset that decrease.

The Sierra Club contends the Commission erred by relying upon the OHEP report that was not in evidence to determine that the Merger did not adversely impact the adequacy of EUSP funding. It relies upon PU section 3-111(b)(2), which states that "[f]actual information or evidence not made part of the record may not be considered in the determination of a case."[4]

Exelon responds that the Applicants had no burden on the issue of the adequacy of EUSP funding; that the Commission only was required to "consider" the adequacy of the EUSP funding in structuring any rate credits to residential customers; and that the EUSP statute specifically "contemplated the [Commission] would utilize OHEP's reports, at least where no party challenged EUSP funding." The Commission maintains that it was not required to make any findings on EUSP funding in order to satisfy PU section 7-512.1(g) and that the fact that it went "further than required and explained the basis for its conclusion" cannot be reversible error.

[4] PU section 3-111(d) further permits the Commission to take judicial notice "of judicially cognizable facts and also of general, technical, or scientific facts within its specialized knowledge," if it first "notif[ies] each party in an appropriate manner of the material noticed . . . [and] provide[s] each party an opportunity to contest the notice by the Commission." No such notice was given in the case at bar.

It is well-established that to show that an administrative agency has committed "a reversible error, 'the burden is on the appellant in all cases to show prejudice as well as error . . . .'" *Jacocks v. Montgomery Cty*., 58 Md. App. 95, 107 (1984) (quoting *Blondes v. Hayes*, 29 Md. App. 663, 671 (1976)). Here, the Sierra Club has not made that showing. The requirement that the Commission "consider" the adequacy of the EUSP funding is independent of the factors under PU section 6-105 governing approval of the Merger application and the Applicants did not bear the burden of producing evidence on that issue. Had the legislature intended for the approval of a merger under PU section 6-105 to be contingent upon consideration of EUSP funding, it would have added it to the PU section 6-105(g)(2) factors when it enacted PU section 7-512.1(g)(1). It did not. Thus, to the extent the Commission erred by going outside the record evidence to determine that the EUSP funding was adequate, the error did not prejudice the Sierra Club because it had no impact upon whether the Merger satisfied PU section 6-105(g).

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.