# VIII. Finance, Mergers, and Acquisitions

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## A. Introduction

In 2015 and 2016, the Securities and Exchange Commission (SEC) continued in its efforts to increase transparency and accountability in the municipal securities markets by pursuing its Municipalities Continuing Disclosure Cooperation (MCDC) initiative. Canadian securities regulators continued the process began in 2013 to streamline documentation requirements for international issuers selling securities in Canada. The SEC issued a concept release to solicit comments on expanding issuer disclosures about their audit committees. Merger activity continued to be robust in the utility sector, although certain announced


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transactions encountered significant resistance from state and local regulatory authorities.

## B. Municipal Securities and MCDC

### 1. MCDC Settlements

In March 2014, the SEC established the MCDC, which was designed to encourage self-reporting of failure to comply with continuing disclosure obligations in municipal bond issues.

MCDC invited issuers and obligated persons involved in the offer or sale of municipal securities (collectively, issuers), as well as underwriters of such offerings, to voluntarily report to the SEC possible violations involving materially inaccurate statements in official statements relating to an issuer's prior compliance with the continuing disclosure provisions of Rule 15c2-12[1] under the Securities Exchange Act of 1934 (1934 Act).[2] Pursuant to Rule 15c2-12, any official statement used in a primary offering of municipal securities must disclose any instances during the previous five years in which the issuer failed to comply "in all material respects" with its previous continuing disclosure commitments under the Rule. In return, the SEC proposed to offer standardized enforcement settlement terms to self-reporting issuers and underwriters. The deadline for underwriters to self-report was September 9, 2014, and for issuers December 1, 2014.

On June 18, 2015, the SEC released administrative cease and desist orders regarding thirty-six municipal bond underwriters under the MCDC.[3] Each order was based on disclosure violations the underwriters self reported regarding municipal issuer non-compliance with the continuing disclosure requirements of Rule 15c2-12. The Orders indicated the SEC's views on underwriter due diligence obligations with respect to continuing disclosure. They also provided some insight into the SEC's views on what misstatements in offering documents regarding an issuer's continuing disclosure compliance are sufficiently material to constitute violations of the federal securities laws.

In each Order, the SEC alleged that an underwriter conducted inadequate due diligence in certain municipal bond offerings, resulting in materially misleading disclosure in offering documents regarding past compliance with Rule 15c-12 continuing disclosure requirements. The underwriters did not admit or deny the SEC's findings. Under the settlement terms of MCDC, the SEC determined that each of the underwriters violated the antifraud provisions of Section 17(a)(2) of the Securities Act of 1933 (1933 Act).[4]

1. 12 C.F.R. § 240.15c2-12.
2. Securities Exchange Act of 1934, Pub. L. No. 112-158 (2012).
3. Press Release, Securities and Exchange Commission, SEC Charges 36 Firms for Fraudulent Municipal Bond Offerings (June 18, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-125.html.
4. Securities Act of 1933, Pub. L. No. 112-106 (2012).

Rule 15c2-12 requires that a final official statement set forth any instances in the previous five years in which an issuer or obligated person failed to comply "in all material respects" with any continuing disclosure undertakings. The Orders stated that the underwriters acted in offerings in which the official statements "essentially represented that the issuer or obligated person had not failed to comply in all material prospects with any previous continuing disclosure undertakings." According to the SEC, certain of these disclosure statements were materially false or misleading because, in fact, the issuer or obligated person had not complied in all material respects with its previous continuing disclosure undertakings. Each of the Orders cited at least one, and as many as four, particular examples of misleading disclosures about prior compliance. The Orders maintained that the underwriters negligently failed to conduct adequate due diligence on these issuer disclosures, thereby failing to form a reasonable basis for believing the truthfulness of the issuer assertions regarding their compliance with prior continuing disclosure undertakings.

Each underwriter agreed to retain an independent consultant to review the underwriter's due diligence policies and procedures. In addition, pursuant to the terms of MCDC, each underwriter paid a civil penalty based on the particular underwriter's volume of problematic municipal securities underwritings identified.

### 2. Edward Jones Settlement

On August 13, 2015, the SEC announced that Edward Jones & Co. L.P. and the former head of its municipal underwriting desk, Stina R. Wishman, agreed to settle charges that they overcharged customers in new issue municipal bond sales. This settlement resolved the SEC's first case against an underwriter for pricing related fraud in the primary market for municipal securities.[5]

Municipal bond underwriters are required to offer new bonds to their customers at what is known as the "initial offering price," which is negotiated with the issuer of the bonds. An SEC investigation found that, in some cases, instead of offering bonds to customers at the initial offering price, Edward Jones took new bonds into its inventory and improperly offered them to customers at higher prices. In other instances, Edward Jones entirely refrained from offering the bonds to its customers until after trading commenced in the secondary market and then offered the bonds at prices higher than the initial offering prices. The SEC alleged that Edward Jones customers paid at least $4.6 million more than they should have for new bonds. In one instance, Edward Jones' actions resulted in an adverse federal tax determination for an issuer and put it at risk of losing valuable federal tax subsidies.

Edward Jones agreed to settle the case by paying more than $20 million, which included nearly $5.2 million in disgorgement and prejudgment interest

5. Press Release, Securities and Exchange Commission, Edward Jones to Pay $20 Million for Overcharging Retail Customers in Municipal Bond Underwritings (Aug. 13, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-166.html.

that will be distributed to current and former customers who were overcharged. Wishman agreed to pay $15,000 and will be barred from working in the securities industry for at least two years.

Edward Jones consented to the SEC order without admitting or denying the findings that the firm willfully violated Sections 17(a)(2) and (3) of the 1933 Act, Section 15B(c)(1) of the 1934 Act, and Rules G-17, G-11(b) and (d), G-27, and G-30(a) of the Municipal Securities Rulemaking Board. The SEC found that the firm also failed reasonably to supervise within the meaning of Section 15(b)(4)(E) of the 1934 Act. Edward Jones undertook a number of remedial actions and now discloses the percentage and dollar amount of markups on all fixed income retail order trade confirmations in principal transactions.[6]

### 3. Issuer Settlements

On February 10, 2016, the Government Finance Officers Association (GFOA) alerted its members that the Enforcement Division of the SEC has started to contact issuers in connection with the MCDC initiative. The SEC will offer settlement terms for potential misrepresentations in municipal bond offering documents regarding compliance with prior continuing disclosure obligations. According to the GFOA Alert, the SEC is contacting not only issuers that voluntarily self-reported, but issuers that may not have self-reported but were reported by underwriters.[7]

## C. Canadian Offerings

In 2013, Canadian regulators took significant steps to reduce the need for international issuers to supplement the disclosure in their offering documents with a "Canadian wrapper." The Ontario Securities Commission (OSC) created a temporary process under which individual broker-dealers could apply to be exempt from the wrapper requirements provided the foreign issuer and the transaction met certain requirements. On June 25, 2015, the Canadian Securities Administrators announced that rule amendments will codify the changes that were adopted by the OSC in 2013 (2015 Amendments).[8] The 2015 Amendments are

6. *In re* Edward D. Jones & Co., L.P., Order Instituting Administrative Case-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b), 15B(c), and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order.

7. GFOA Alert: The SEC MCDC Initiative and Issuer Settlements, *available a*t http://www.gfoa.org/gfoa-alert-sec-mcdc-initiative-and-issuer-settlements.

8. *See* CSA Notice of Amendment to National Instrument 33-105 *Underwriting Conflicts* (2015), 38 OSCB 5773, *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category3/csa_20150625_33-105_underwriting-conflicts.pdf; Amendment to Ontario Securities Commission Rule 45-501 *Ontario Prospectus and Registration Exemption and Form 45-106F1 Report of Exempt Distribution* (2015), 38 OSCB 5795, *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category4/rule_20150625_45-501_prospectus-exemptions.pdf; Multilateral Instrument 45-107 *Listing Representation and Statutory Rights of Action Disclosure Exemptions* (2015), *available at* http://www.albertasecurities.com/Regulatory%20Instruments/5070122-CSA_Notice_final_MI_45-107_.pdf.

similar to changes first adopted two years ago, but further clarify and streamline the offering process for non-Canadian issuers. The 2015 Amendments have been adopted across Canada and came into effect on September 8, 2015.

Pursuant to the new regulations, offerings of "eligible foreign securities" without a wrapper will be allowed as long as the security is offered primarily in a foreign jurisdiction and either (1) is issued by an issuer that is (a) incorporated under the laws of a foreign jurisdiction, (b) not a reporting company in Canada, and (c) has its head office outside of Canada with the majority of its officers and directors not being residents of Canada; or (2) is issued or guaranteed by the government of a foreign jurisdiction.

Consistent with the changes adopted in 2013, foreign securities sold using the exemption may be sold only to "permitted clients."[9] In addition, the U.S. offering document delivered to Canadian purchasers must comply with U.S. conflicts of interest disclosure, including applicable rules of the Financial Industry Regulatory Authority. In the adopting release for the 2015 Amendments, however, the OSC clarified that the exemption applies to both registered and unregistered U.S. offerings as long as the same conflicts of interest disclosure that is provided to U.S. investors is also provided to Canadian investors. Therefore, the wrapper exemption should also apply for qualifying Rule 144A[10] offerings.[11]

Notably, the 2015 Amendments broaden the number of broker-dealers who may use the wrapper exemption. Unlike the 2013 process in which each broker-dealer had to apply to use the exemption, the 2015 Amendments make the wrapper exemption available to all registered dealers and international dealers.

As with the earlier use of the wrapper exemption, broker-dealers are still required to provide notice to permitted clients that they will be offering the securities using the wrapper exemption. Like the previous requirements, the notice requirement is a one-time event that is broker-dealer specific. The 2015 Amendments, however, give the broker-dealer three ways of complying with this notice requirement. Disclosure can be provided (1) in the offering document itself, (2) in a separate document that accompanies the offering document, or (3) in the form of written notice. If the broker-dealer chooses to make the disclosure in a written notice, it must include a statement to the effect that the disclosure will apply to all future distributions. A significant change resulting from the 2015 Amendments is that broker-dealers no longer need to obtain acknowledgement and consent from a Canadian purchaser that it has received the notice.

While the 2015 Amendments will end the obligation of broker-dealers to furnish a monthly report to the OSC stating how often they relied on the wrapper

9. A permitted client is defined under Canadian securities law and the concept is similar to the U.S. Qualified Institutional Buyer.

10. 17 C.F.R. § 230.144A.

11. For 144A offerings with registration rights, however, the subsequent exchange offer would be considered a second distribution of securities in Canada and therefore a similar analysis about whether the wrapper exemption applies will have to be done at the time of the exchange. Furthermore, an automatic prospectus exemption is available in Canada if the exchange is for securities of the same issuer, but not if the new securities will be issued by a different issuer.

exemption, the obligation to provide post-closing trade reports remains. Any sales in Canada pursuant to the 2015 Amendments still needs to be reported within ten days of the distribution date and any relevant fees must also be paid.

The 2015 Amendments reduces the need for Canadian wrappers, but certain scenarios remain that require issuers to consult with Canadian counsel and potentially prepare a wrapper.[12] For example, the wrapper exemption may not be available to limited partnerships, bank issuers, offerings that are not made to "permitted clients," or rights offerings.

## D. Proposed Improvements to Audit Committee Practice and Disclosures

### 1. SEC Joins PCAOB in Proposed Audit Disclosure Overhaul

Following a 2013 report by the Public Company Accounting Oversight Board proposing greatly expanded disclosures concerning audit reports, on July 1, 2015, the SEC issued a concept release related to issuer disclosures about their audit committees.[13] The SEC's concept release contemplates an open-ended, narrative based disclosure regime similar to disclosures in a management's discussion and analysis presentation. The SEC's release notes that such disclosures "may provide useful information to investors as they evaluate the audit committee's performance in connection with, among other things, their vote for or against directors who are members of the audit committee, the ratification of the auditor, or their investment decisions."[14] The concept release covers changes to disclosures in four areas: (1) the audit committee's oversight of the auditor; (2) the audit committee's process for appointing or retaining the auditor; (3) qualifications of the audit firm and certain members of the engagement team selected by the audit committee; and (4) the location of the audit committee's disclosures in the company's SEC filings.

The concept release contained seventy-four requests for comments. The comment period expired on September 8, 2015. Potential changes to audit committee disclosure did not affect the 2016 proxy season but it is possible the SEC will issue proposed rules in the near future.

### 2. Voluntary Disclosures

In its July 2015 concept release discussed above, the SEC noted that "some have expressed a view that the Commission's disclosure rules do not provide investors with sufficient useful information regarding the role of and responsibilities

12. Issuers that do not have securities listed on a U.S. exchange, but whose securities are traded on the U.S. over-the-counter market, may still need to consult with Canadian counsel if they are intending to sell outside of Alberta, British Columbia, Ontario, and Québec.

13. The full text of the SEC's concept release is available at http://www.sec.gov/rules/concept/2015/33-9862.pdf.

14. *Id.*

carried out by the audit committee in public companies."[15] The SEC cited *A Call to Action*, a 2013 report published by the National Association of Corporate Directors, Corporate Board Member/NYSE Euronext, Tapestry Networks, the Directors' Council, the Association of Audit Committee Members, Inc., and the Center for Audit Quality.[16] The report asked that audit committees of public companies "voluntarily and proactively improve their public disclosures to more effectively convey to investors and others the critical aspects of the important work that they currently perform."[17] Some public companies have already started to include increased voluntary disclosure about their audit committees and audit committee practices. A recent report published by the Center for Audit Quality noted that in tracking public company disclosures in 2015, there was "double-digit growth in the percentage of S&P 500 companies disclosing information in several key areas of external auditor oversight, including external auditor appointment, engagement partner selection, engagement partner rotation, and evaluation criteria of the external audit firm."[18] Given the SEC's interest in overhauling the current disclosure regime and the rise in voluntary disclosures by some filers, changes affecting proxy statement disclosures on audit committee process, members, and oversight may be likely.

### E. SEC Proposal for Enhanced Hedging Disclosure Rules

In February 2015, the SEC proposed rules to require disclosure of a company's equity hedging policies under Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[19] Specifically, the proposed rules would require a company to disclose in its proxy or information statement concerning the election of directors whether its employees, including officers, or members of its board of directors, or any of their designees, are permitted to purchase financial instruments, including prepaid variable forward contracts, equity swaps, collars and exchange funds, or otherwise engage in transactions to hedge or offset any decrease in the market value of equity securities granted to the employee or board member as compensation, or held directly or indirectly by the employee or board member.[20]

Section 955 of the Dodd-Frank Act mandates the SEC to require issuers to disclose whether any employees or directors (or any designee of such employee

15. *Id.*

16. Audit Committee Collaboration, Enhancing the Audit Committee Report, A Call to Action (Nov. 20, 2013), available at http://www.thecaq.org/reports-and-publications/enhancing-the-audit-committee-report-a-call-to-action.

17. *Id.*

18. Center for Audit Quality, 2015 Audit Committee Transparency Barometer (Nov. 3, 2015), available at http://www.thecaq.org/newsroom/2015/11/03/second-annual-audit-committee-transparency-barometer-reveals-encouraging-disclosure-trends-for-public-companies-of-all-sizes.

19. 12 U.S.C. §§ 5301–5374, 124 Stat. 1376–2223.

20. Press Release, Securities and Exchange Commission, SEC Proposes Rules for Hedging Disclosure (Feb. 9, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-26.html.

or director) are permitted to hedge equity securities that are part of compensation arrangements or otherwise held by such employee or director. The SEC's proposed rule would add a new paragraph (i) to Item 407 of Regulation S-K that would implement Section 14(j) of the 1934 Act. The proposed amendment would keep disclosure requirements relating to corporate governance matters together in a single item in Regulation S-K.[21]

The proposed rules would cover all hedging transactions that establish downside price protection. An instruction to proposed Item 407(i) would clarify that companies would be required to disclose (1) the categories of persons who are permitted to engage in hedging transactions and those who are not, and (2) the hedging transactions permitted by the company. Additionally, the disclosure must be in sufficient detail to explain the scope of such permitted transactions, as well as those it prohibits. The SEC has proposed that the term "equity securities" mean any equity securities, as defined in the 1934 Act rules, issued by a company, any parent of the company, any subsidiary of the company, or any subsidiary of any parent of the company, that is registered under Section 12 of the 1934 Act. Additionally, the SEC's proposed rules state that the term "employee" should be interpreted to include everyone employed by the company, a member of the board of directors, or their respective designees.

Currently, limited hedging disclosure is required in a company's Compensation Discussion and Analysis (CD&A) section by Item 402(b) of Regulation S-K, but only to the extent that it is material information necessary to understanding a company's compensation policies and decisions regarding the named executive officers. The proposed rule would allow a company to cross-reference its hedging disclosure in Item 407(i) for purposes of Item 402(b) disclosure in its CD&A.

## F. Announced Transactions

### 1. Exelon Corporation and Pepco Holdings, Inc.

Exelon Corporation and Pepco Holdings, Inc. (PHI) announced on April 30, 2014, that they had entered into a definitive agreement to combine the two companies in an all-cash transaction.[22]

The transaction was subject to the satisfaction or waiver of specified closing conditions, including the approval by the holders of a majority of the outstanding shares of common stock of PHI, and the receipt of regulatory approvals, including approvals from the Federal Energy Regulatory Commission (FERC), the Federal Communications Commission (FCC), the District of Columbia Public Service Commission (DCPSC), the Maryland Public Service Commission

21. 17 C.F.R. Part 229.

22. Press Release, Exelon Corporation, Exelon to Acquire Pepco Holdings, Inc., Creating the Leading Mid-Atlantic Electric and Gas Utility (Apr. 30, 2014), *available at* http://www.pepcoholdings.com/library/templates/Interior.aspx?Pageid=87&id=644245881.

(Maryland PSC), the Delaware Public Service Commission (DPSC), the New Jersey Board of Public Utilities (NJBPU), and the Virginia State Corporation Commission (VSCC), as well as the expiration or termination of the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR).[23,24]

The shareholders of PHI approved the transaction on September 23, 2014. The transaction was approved by the VSCC on October 7, 2014,[25] and by the FERC on November 20, 2014.[26] On December 22, 2014, the U.S. Department of Justice, which had requested additional documentation and information in connection with Exelon and PHI's HSR filing, allowed the waiting period under HSR to expire without taking any action with respect to the merger.[27]

The MPSC approved the merger in a split vote on May 15, 2015. In approving the deal, the MPSC imposed forty-six conditions, including higher reliability standards and a $100 rate credit for Delmarva and Pepco residential customers. It also ordered the companies to spend $43.2 million for energy-efficiency programs in Prince George's and Montgomery Counties and in Delmarva's Maryland service area.

In New Jersey, a settlement agreement with the NJBPU staff was reached.[28] On February 11, 2015, the settlement was approved by the NJBPU.[29] On February 13, 2015, Exelon and PHI announced that they had reached a settlement agreement with the DPSC staff and other intervenors in the DPSC's review of the merger.[30] On June 2, 2015, the DPSC issued an order approving the merger.[31]

The DCPSC held hearings from February 9 to February 13, 2015, to determine whether the transaction is in the public interest.[32] On August 25, 2015,

23. Pepco Holdings, Inc., Form 10-Q for the quarterly period ended June 30, 2014, *available at* http://www.sec.gov/Archives/edgar/data/8192/000119312514290113/d738980d10q.htm.

24. 15 U.S.C. § 18a, tit. II.

25. Press Release, Exelon Corporation, State Corporation Commission of Virginia Approves Merger of Exelon and Pepco Holdings Inc. (Oct. 8, 2014), *available at* http://www.exeloncorp.com/newsroom/pr_20141008_EXC_VAMergerApproval.aspx.

26. Press Release, Exelon Corporation, FERC Approves Merger of Exelon and PHI Holdings Inc. (Nov. 21, 2014), *available at* http://www.exeloncorp.com/Newsroom/Pages/pr_20141121_EXC_PHIFERCapproval.aspx.

27. Pepco Holdings, Inc., Form 8-K, dated December 22, 2014, *available at* http://www.sec.gov/Archives/edgar/data/1135971/000157104914007392/t1402513_8k.htm.

28. Pepco Holdings, Inc., Form 8-K, dated January 14, 2015, *available at* http://www.sec.gov/Archives/edgar/data/8192/000157104915000219/t1500011_8k.htm.

29. Pepco Holdings, Inc., Form 8-K, dated February 11, 2015, *available at* http://www.sec.gov/Archives/edgar/data/8192/000157104915001021/t1500327_x1-8k.htm.

30. *Merger Stories-Deal Updates*, SNL Energy Fin. Daily (Feb. 16, 2015).

31. Press Release, Exelon Corporation, Delaware Public Service Commission Issues Order Approving Exelon and Pepco Holdings Inc. Merger (June 2, 2015), *available at* http://www.exeloncorp.com/newsroom/pr_20150602_EXC_DelawarePSC.aspx.

32. DCPSC Public Notice in Formal Case No. 1119, *In the Matter of* the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC, and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction.

the three-member DCPSC unanimously rejected the utilities' application, having deemed it not in the best interests of ratepayers.

On September 28, 2015, PHI and Exelon announced that they had filed an application for reconsideration with the DCPSC, requesting reconsideration of the DCPSC order rejected the merger.[33]

On October 6, 2015, PHI, Potomac Electric Power Company, a wholly owned subsidiary of PHI, Exelon, and certain of their respective affiliates entered into a Nonunanimous Full Settlement Agreement and Stipulation with the District of Columbia, the Office of the People's Counsel, and other parties and filed a motion with the DCPSC asking to consider approval of the proposed merger on such terms and conditions set forth in the Settlement Agreement.[34] On October 28, 2015, the DCPSC announced that it had approved the companies' application for reconsideration and set a procedural schedule for its review of this matter.[35]

The DCPSC voted two-to-one to reject the Settlement Agreement on February 26, 2016, citing concerns that Pepco's business ratepayers would not share in the rate relief package for residential customers.[36] The DCPSC decision did provide that the merger could proceed without further DCPSC action if the parties to the Settlement Agreement agreed to proposed changes to the Settlement Agreement suggested in the DCPSC order. Not all parties agreed to the proposed changes.

A March 7, 2016, filing by Exelon asked the DCPSC to approve the merger by April 7, 2016, via one of three alternatives: reconsidering the DCPSC's February 26 rejection of the Settlement Agreement; approving the transaction with the terms proposed by the DCPSC in its February 26 order, absent support of all settling parties; or adjusting the DCPSC's proposed terms to preserve rate credits and grid modernization investments included in the Settlement Agreement.[37]

On March 23, 2016, the DCPSC approved Exelon's acquisition of PHI.[38] The DCPSC effectively opted for the second of the three proposals set forth in the March 7 filing. The shares of PHI common stock, which traded under the symbol POM, were immediately suspended from trading on, and were delisted from, the New York Stock Exchange.[39] The merger combines Exelon utilities Baltimore

33. Pepco Holdings, Inc., Form 8-K (Sept. 28, 2015), *available at* http://www.sec.gov/Archives/edgar/data/8192/000113597115000029/sep28phi8k.htm.

34. Pepco Holdings, Inc., Form 8-K (Oct. 28, 2015), *available at* http://www.sec.gov/Archives/edgar/data/8192/000113597115000033/oct28phi8k.htm.

35. *Id.*

36. Chris Holly, *D.C. Officials Reject New Exelon Bid to Salvage Troubled Pepco Acquisition*, ENERGY DAILY, Mar. 14, 2016.

37. *Id.*

38. Formal Case No. 1119, *In the Matter of* the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC, and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, Order No. 18148, *available at* http://dcpsc.org/pdf_files/commorders/orderpdf/orderno_18148_FC1119.pdf.

39. Pepco Holdings, Inc., Form 8-K (Mar. 23, 2016), *available at* http://www.sec.gov/Archives/edgar/data/8192/000119312516515384/d104799d8k.htm.

Gas and Electric Company, Commonwealth Edison Company, and PECO Energy Company and PHI utilities Atlantic City Electric Company, Delmarva Power & Light Company, and Potomac Electric Power Company all under Exelon, as the ultimate holding company parent.

### 2. Hunt Consolidated, Inc. and Oncor Electric Delivery Company LLC

Energy Future Holdings Corp. (EFH), the former TXU Corp., filed for Chapter 11 bankruptcy protection on April 29, 2014.[40] EFH's regulated transmission and distribution business, Oncor Electric Delivery Company LLC, serves more than 3 million customers across North and West Texas.[41] Hunt Consolidated, Inc. announced in August 2015 that it would file an application to buy Oncor with the Texas Public Utility Commission (PUCT).[42] Hunt's plan would place Oncor into a real estate investment trust (REIT).[43]

Hunt's proposed acquisition of Oncor is opposed by Oncor's minority owners, Texas Transmission Investment LLC (TTI). In October 2015, EFH commenced a suit against TTI that would force it to relinquish its ownership interest, citing a drag-along provision that compels TTI to sell its share if EFH sells Oncor.[44]

On December 9, 2015, the PUCT staff filed testimony opposing Hunt's purchase of Oncor. The staff argued that the REIT structure would not provide "incremental service quality or other tangible benefits." In addition, in a later brief, the staff stated that the proposed structure would place "severe liquidity constraints on [Oncor's] ability to provide reliable service and pay for any unexpected expenses."[45] One of the principal objections is Hunt's proposal to continue collecting amounts from customers to pay income taxes that would never be incurred as a result of the REIT structure and the use of the amounts collected to pay additional dividends to shareholders.[46] In an open hearing on February 11, 2016, the PUCT Commissioners also indicated their concerns that too much of the tax benefits of a REIT structure would benefit shareholders as opposed to customers. However, the Commissioners disagreed with staff's recommendation to reject the transaction outright by indicating they may consider approving the transaction if an arrangement were worked out for the benefit of customers.[47]

40. Energy Future Holdings Corp., Form 8-K (Apr. 29, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1023291/000119312514164757/d716637d8k.htm.

41. James Osborne, *Moody's Warns Hunt of Risks on Oncor Deal*, DALLAS MORNING NEWS, July 30, 2015.

42. James Osborne, *With Hunt Deal in Hand, Energy Future Looks to End Bankruptcy*, DALLAS MORNING NEWS, Aug. 10, 2015.

43. *Id.*

44. Peg Brickley, *Energy Future Sues to Force Sale of Oncor Minority Stake*, WALL ST. J., Oct. 20, 2015.

45. Lillian Federico & Russell Ernst, *Texas PUC Staff Reiterates Opposition to Hunt/Oncor Deal, Claiming Structure Poses Risks to Ratepayers*, SNL FIN., Feb. 2, 2016.

46. *Id.*

47. Dan Testa, *PUCT Sees Merits in Tax-Sharing for Hunt Acquisition, REIT Conversion of Oncor*, SNL FIN., Feb. 11, 2016.

According to discussions at the March 21, 2016, PUCT meeting, approval of the transaction may entail rate credits for the Oncor's customers, totaling $100 million over two years.[48]

### 3. Wisconsin Energy Corp. and Integrys Energy Group, Inc.

On June 23, 2014, Wisconsin Energy Corp. (WEC) and Integrys Energy Group Inc. announced that they had entered into a definitive agreement for WEC to acquire Integrys. The transaction was valued at $9.1 billion. Integrys shareholders received common stock at a fixed exchange ratio of 1.128 WEC shares plus $18.58 in cash per Integrys share (total consideration is valued at $71.74 per Integrys share). The final, and most contentious, regulatory approval for the transaction was granted by the Illinois Commerce Commission (ICC) on June 23, 2015, and the two companies announced the consummation of the merger on June 29, 2015.[49]

The City of Chicago and the Illinois Citizens Utility Board, which were among the most vocal opponents of the merger, requested a rehearing with the ICC. That motion was denied on August 12, 2015. Upon the completion of the merger, Wisconsin Energy Corp. was renamed WEC Energy Group. The new company provides electricity and natural gas to 4.4 million customers in four states through its principal utilities: Wisconsin Gas LLC and Wisconsin Electric Power Co., which both do business as We Energies, Wisconsin Public Service Corp., Peoples Gas Light and Coke Co., North Shore Gas Co., Michigan Gas Utilities Corp., and Minnesota Energy Resources Corp.[50]

### 4. Macquarie Group Limited and Cleco Corporation

On October 20, 2014, Cleco Corporation announced that it had agreed to be acquired by a group of infrastructure investors led by Macquarie Infrastructure and Real Assets, a division of Macquarie Group Limited.

Pursuant to the merger agreement, at the effective time of the merger each outstanding share of Cleco common stock, par value $1.00 per share, will be converted into the right to receive $55.37 per share in cash, without interest, with all dividends payable before the effective time of the merger.[51]

The merger agreement provides for certain termination rights for Cleco. Upon termination of the merger agreement under certain circumstances, Cleco will be required to pay a termination fee of $120 million. In addition, if the merger agreement is terminated under certain circumstances, Macquarie will be required to pay a termination fee to Cleco equal to $180 million. Last, if the merger

48. *Oncor-Hunt Deal May Have $100M in Rate Credits*, MEGAWATT DAILY, Mar. 23, 2016.

49. WEC Energy Group, Inc., Form 8-K (June 29, 2015), *available at* https://www.sec.gov/Archives/edgar/data/783325/000110465915048374/a15-14883_18k.htm.

50. Amy Poszywak, *Wisconsin Energy Completes Integrys Acquisition, Forming WEC Energy Group*, SNL FIN., June 15, 2015.

51. Cleco Corporation and Cleco Power LLC, Form 10-Q for the quarterly period ended September 30, 2015, filed on October 28, 2015, *available at* https://www.sec.gov/Archives/edgar/data/18672/000108981915000052/cnl-9302015xq3.htm.

agreement is terminated due to lack of regulatory approval, neither Cleco nor Macquarie would be required to pay a termination fee. Upon completion of the merger, Cleco would pay an additional $12.0 million in contingency fees.[52]

The deadline for completing the merger was automatically extended to April 17, 2016, pursuant to the merger agreement to enable satisfaction of the closing conditions related to obtaining regulatory approvals.[53] On February 17, 2016, the Louisiana Public Service Commission (LPSC) administrative law judge presiding over the proposed sale said the deal, as structured, is not in public interest.[54] Specifically, ALJ Valerie Meiners' recommendation noted that the "$1.35 billion in acquisition debt is the driver of the financial risks, and while the commitments attempt to address the risks resulting from the over-leveraging, there is no offer, currently, to address the driver of those risks."[55]

The Louisiana Public Service Commission (LPSC) voted to reject the sale on February 24, 2016.[56] Describing the LPSC's primary concern for the decision, the order states "The Commission Staff argues that the increased debt on the books of Cleco Corporation will damage the financial integrity of both Cleco Power and Cleco Corporation and will 'negatively impact ratepayers, putting them at risk of significantly higher rates and potential impairment of service in the future.' "[57] The LPSC also expressed reservations about the "tax structure impacts" of the proposed transaction.[58]

On March 7, 2016, Macquarie and Cleco filed their joint motion for rehearing of the LPSC's decision.

### 5. NextEra Energy, Inc. and Hawaiian Electric Industries, Inc.

In December 2014, Hawaii Electric Industries, Inc. and NextEra Energy Inc. entered into a merger agreement valued at $4.3 billion. If the proposed merger is approved, Hawaii Electric will become the third principal business within NextEra, along with Florida Power & Light Company and NextEra Energy Resources, Inc.

The original termination date under the merger agreement of December 3, 2015, was extended for six months because the Hawaii Public Utilities Commission (HPUC) is still reviewing the proposed merger.[59] Because of considerable local opposition, the Hawaii House Energy & Environmental Protection

52. *Id*.
53. *Id*.
54. Selene Balasta, *La. Law Judge Finds Cleco Deal, As Structured, Not in Public Interest*, SNL FIN., Feb. 18, 2016.
55. Louisiana Public Service Commission, Docket U-33434, Recommendation of the Administrative Law Judge issued by Chief ALJ Valerie Seal Meiners, at 56.
56. Louisiana Public Service Commission, Docket Number U-33434, *In re: Joint Application of Cleco Power LLC and Cleco Partners L.P. for: (i) Authorization for the Change of Ownership and Control of Cleco Power LLC and (ii) Expedited Treatment*.
57. *Id.*
58. *Id*. at 6.
59. Amy Poszywak, *Hawaiian Electric Prepared to "Go It Alone" If Nextera Deal Falls Through*, SNL FIN., Feb. 12, 2016.

Committee passed a new bill that would require that the parties to any merger of major utilities demonstrate that there will be substantial net benefit, as determined by the HPUC, in order to proceed with such merger.[60] This new legislation may not be enacted by the time the HPUC makes a decision, but it is another sign of concern from the Hawaii government and is consistent with earlier statements from the governor's office and the Office of Planning and the Department of Business, Economic Development, and Tourism.[61]

In December 2015, Fitch Ratings issued a report on Hawaii Electric in which it indicated confidence that the transaction would close, while a recent report from Wells Fargo Securities put the odds at 50 percent.[62] More recently a UBS report has concluded that it does not believe the transaction will be completed.[63] The new deadline to receive regulatory approval and complete the transaction is June 3, 2016.

### 6. Iberdrola, S.A. and UIL Holdings Corporation

On February 25, 2015, UIL Holdings Corporation (UIL) announced that it had entered into a definitive merger agreement with Iberdrola USA, Inc. pursuant to which Iberdrola would acquire UIL to create a newly listed U.S. publicly traded company.[64] On December 16, 2015, after receiving all necessary shareholder and regulatory approvals, UIL and Iberdrola completed the merger.[65]

The newly formed company, Avangrid, is now listed on the New York Stock Exchange as AGR. Avangrid has approximately $30 billion in assets with operations in twenty-five states.[66] Besides the electric and natural gas distribution utilities, Avangrid also includes Iberdrola Renewables, which is the second-largest wind producer in the United States, with projects in eighteen states, and Iberdrola Energy Holdings, which includes natural-gas storage and energy services.[67]

60. Jeff Stanfield, *Hawaii Energy Panel Passes Bill to Require 'Substantial Net Benefit' for Mergers*, SNL FIN., Feb. 10, 2016.

61. Jeff Stanfield, *Hawaii Governor Comes Down Hard Against Nextera Purchase of HECO Utilities*, SNL FIN., July 21, 2015.

62. Duane Shimogawa, *Nextera Energy-Hawaiian Electric Sale Likely To Be Finalized, Fitch Says*, PAC. BUS. NEWS, Dec. 4, 2015.

63. Duane Shimogawa, *NextEra's Purchase of Hawaiian Electric Won't Happen*, UBS *Report Says*, PAC. BUS. NEWS, Jan. 11, 2016.

64. Press Release, Iberdrola USA, Iberdrola USA to Combine with UIL to Create a Leading, Diversified Publicly Traded Company Based in the Northeast (Feb. 25, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1082510/000110465915014105/a15-5457_1425.htm.

65. UIL Holdings Corporation, Form 8-K (Dec. 16, 2015), *available at* https://www.sec.gov/Archives/edgar/data/1082510/000119312515405155/d28739d8k.htm.

66. Press Release, Avangrid, Inc., AVANGRID, Inc. Will Join NYSE Tomorrow with $30 Billion of Assets in Wind Energy, Utilities, and Natural Gas Storage (Dec. 16, 2015), *available at* http://www.avangrid.com/NewsRoom/NewsReleases/2015/121615AVANGRIDJoinsNYSE.html.

67. Katherine Tweed, *Iberdrola USA and UIL Merge to Form Utility Giant Avangrid*, GREENTECH MEDIA, Dec. 18, 2015.

### 7. The Southern Company and AGL Resources Inc.

The Southern Company and AGL Resources, Inc. announced on August 24, 2015, that they had entered into an agreement to combine the two companies in an all-cash transaction.

The transaction is subject to certain closing conditions, including the approval by AGL shareholders; expiration or termination of the waiting period under HSR; and certain regulatory approvals, including those of the FCC, the California Public Utilities Commission, Georgia Public Service Commission, the ICC, the Maryland PSC, the NJBPU, and the VSCC.[68] AGL and Southern completed their joint filings seeking approval of the proposed merger with all of the required state regulatory agencies in the fourth quarter 2015.[69]

The shareholders of AGL approved the transaction on November 19, 2015.[70] Additionally, the AGL shareholders approved the proposed executive compensation that may be paid or may become payable to AGL's named executive officers in connection with or following the consummation of the proposed merger.[71]

On December 7, 2015, Southern and AGL announced that the waiting period under HSR had expired with regard to the companies' proposed merger.[72]

### 8. Emera Inc. and TECO Energy Inc.

On September 4, 2015, Emera Inc. and TECO Energy, Inc. entered into an agreement whereby Emera agreed to acquire TECO.[73] The all-cash transaction is valued at $10.4 billion.

Under the terms of the agreement, Emera will acquire all outstanding shares of TECO for $27.55 per share. Following the merger, the headquarters of TECO and Tampa Electric Company, including its gas distribution division, Peoples Gas System, will remain in Tampa, and the headquarters of another TECO subsidiary, New Mexico Gas Company, Inc., will remain in Albuquerque.[74] On December 3, 2015, TECO's shareholders voted to approve the merger.[75] The

68. Southern Company, Form 8-K (Aug. 23, 2015), *available at* https://www.sec.gov/Archives/edgar/data/92122/000009212215000077/falconk2.htm.

69. AGL Resources Inc., Form 10-K for the year ended December 31, 2015, *available at* http://www.sec.gov/Archives/edgar/data/1004155/000100415516000098/a201510-k.htm#sfeb681a15c634c63b86f315734702e58.

70. *Id.*

71. Press Release, Southern Company, AGL Resources Shareholders Vote to Approve Merger with Southern Company (Nov. 19, 2015), *available at* http://doingenergybetter.com/2015-11-19-article.cshtml.

72. Press Release, Southern Company, Southern Company, AGL Resources Announce Expiration of Hart-Scott-Rodino Waiting Period (Dec. 7, 2015), *available at* http://doingenergybetter.com/2015-12-07-article.cshtml.

73. TECO Energy, Inc., Form 8-K (Sept. 8, 2015), *available at* https://www.sec.gov/Archives/edgar/data/350563/000119312515314517/d71493d8k.htm.

74. Investor Presentation, Emera to Acquire TECO Energy (Sept. 8, 2015), *available at* https://www.sec.gov/Archives/edgar/data/350563/000119312515314517/d71493dex991.htm.

75. TECO Energy, Inc., Form 8-K (Dec. 3, 2015), *available at* https://www.sec.gov/Archives/edgar/data/350563/000119312515394407/d100109d8k.htm.

merger is subject to various additional closing conditions, including the termination of the applicable HSR waiting period and regulatory approvals from the FERC, the New Mexico Public Regulation Commission, and the Committee on Foreign Investment in the United States (CFIUS).[76]

The merger is supported by $6.5 billion of fully committed bridge loans and upfront convertible debenture financing. In addition, Emera expects long-term acquisition financing to be structured to maintain its existing credit rating profile. The merger was expected to close in mid-2016.[77]

### 9. Dominion Resources Inc. and Questar Corporation

On January 31, 2016, Dominion Resources Inc. and Questar Corporation entered into an agreement whereby Dominion agreed to acquire Questar.[78] The all-cash transaction is valued at approximately $4.4 billion.[79]

Questar is a natural gas distribution, pipeline, storage, and cost-of-service gas supply company headquartered in Salt Lake City. It has approximately 27,500 miles of gas distribution pipeline, 3,400 miles of gas transmission pipeline, and 56 billion cubic feet of working gas storage and serves nearly one million homes and businesses, primarily in Utah.[80]

Pursuant to the terms of the merger agreement, Questar shareholders will be entitled to $25 per share consideration and Dominion will assume Questar's outstanding debt.[81] The merger consideration represents an approximate 30 percent premium to Questar's volume-weighted average stock price of the twenty trading days ended January 29, 2016.[82] Following the merger, Questar will operate as a wholly owned subsidiary of Dominion.[83]

The transaction is subject to the approvals of Questar's shareholders, the Federal Trade Commission under HSR, the Utah Public Service Commission, the Wyoming Public Service Commission, and the Public Utilities Commission of Idaho and is expected to close by the end of 2016.[84] In the event the merger agreement is terminated under certain circumstances, the agreement provides for a break-up fee of $99 million payable by Questar and a reverse break-up

76. TECO Energy, Inc., Form 8-K (Sept. 8, 2015), *available at* https://www.sec.gov/Archives/edgar/data/350563/000119312515314517/d71493d8k.htm.

77. TECO Energy, Inc., Schedule 14A (Oct. 23, 2015), *available at* https://www.sec.gov/Archives/edgar/data/350563/000119312515352100/d95833ddefa14a.htm.

78. Dominion Resources, Inc., Form 8-K, dated February 1, 2016, *available at* http://www.sec.gov/Archives/edgar/data/715957/000119312516446233/d131314d8k.htm.

79. Press Release, Dominion Resources Inc., Dominion Resources, Questar Corporation to Combine (Feb. 1, 2016), *available at* http://www.sec.gov/Archives/edgar/data/715957/000119312516446233/d131314dex992.htm.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

fee of $154 million payable by Dominion.[85] The agreement also contains a no-shop prohibition with a window-shop exception.[86]

The transaction is supported by a $3.9 billion bridge and term loan facility from RBC Capital Markets, LLC and Mizuho Bank, Ltd.[87]

### 10. Algonquin Power & Utilities Corp. and Empire District Electric Co.

On February 9, 2016, Algonquin Power & Utilities Corp. and Empire District Electric Co. entered into a merger agreement whereby Algonquin will acquire Empire.[88]

Algonquin Power & Utilities Corp., headquartered in Oakville, Ontario, is a $4.8 billion North American diversified generation, transmission, and distribution utility.[89] The distribution group provides rate-regulated water, electricity, and natural gas utility services to approximately 560,000 customers in the United States.[90] The generation group owns a portfolio of North American based wind, solar, hydroelectric, and natural gas powered generating facilities representing more than 1,100 MW of installed capacity.[91] The transmission group invests in rate regulated electric transmission and natural gas pipeline systems in the United States and Canada.[92]

Empire is a regulated electric, gas, and water utility based in Joplin, Missouri, serving approximately 218,000 customers in Missouri, Kansas, Oklahoma, and Arkansas.[93]

Under the terms of the all-cash transaction, which is expected to close in the first quarter of 2017, Empire shareholders will be entitled to $34 per share, representing a 21 percent premium to the closing share price on February 8, 2016.[94]

Following the close of the transaction, Empire will operate as a wholly owned subsidiary of Algonquin and will cease to be a publicly held corporation.[95]

The transaction is subject to approvals from Empire's shareholders; relevant state commissions of the States of Arkansas, Kansas, Missouri, and Oklahoma and various federal agencies, including the FCC and FERC.[96]

85. Agreement and Plan of Merger by and among Dominion Resources, Inc., Diamond Beehive Corp. and Questar Corporation, dated January 31, 2016, *available at* http://www.sec.gov/Archives/edgar/data/715957/000119312516446233/d131314dex991.htm.

86. *Id.*

87. Dominion Resources, Inc., Form 8-K, dated February 1, 2016, *available at* http://www.sec.gov/Archives/edgar/data/715957/000119312516446233/d131314d8k.htm.

88. Algonquin Power & Utilities Corp. to Acquire the Empire District Electric Company in C$3.4 Billion (US$2.4 Billion) Transaction, dated February 9, 2016, *available at* https://www.sec.gov/Archives/edgar/data/1174169/000162828016010900/exhibit991-pressrelease.htm.

89. *Id*.

90. *Id*.

91. *Id*.

92. *Id*.

93. *Id*.

94. *Id*.

95. *Id*.

96. *Id*.

In the event the agreement is terminated under certain circumstances, it provides for a break-up fee of $53 million payable by Empire and a reverse break-up fee of $65 million payable by Algonquin.[97] The agreement also contains a no-shop restriction limiting Empire's ability to solicit alternative proposals, except with respect to the board of directors' compliance with fiduciary duties.[98]

The transaction is supported by a $1.6 billion bridge loan from CIBC Capital Markets, J.P. Morgan, Scotiabank, and Wells Fargo.[99] Permanent financing is expected to be obtained through the issuance of common and preferred equity, convertible debentures, and long term debt, along with the assumption of existing Empire indebtedness.[100]

### 11. Fortis Inc. and ITC Holdings Corp.

On February 9, 2016, Fortis Inc. and ITC Holdings Corp. entered into an agreement and plan of merger whereby Fortis agreed to acquire ITC.[101] The acquisition is valued at approximately $11.3 billion, including approximately $6.9 billion in Fortis common shares and cash and the assumption of approximately $4.4 billion of ITC's debt.[102]

ITC owns and operates high-voltage transmission facilities in Michigan, Iowa, Minnesota, Illinois, Missouri, Kansas, and Oklahoma and is a public utility and independent transmission owner in Wisconsin.[103]

Pursuant to the terms of the acquisition, ITC shareholders will receive consideration of $22.57 in cash and 0.7520 Fortis shares per ITC share.[104] At the closing price for Fortis common shares and the US$/CAD exchange rate on February 8, 2016, the per share consideration represents a 33 percent premium to ITC's closing share price on November 27, 2015, and a 37 percent premium to the average closing price over the thirty-day period prior to November 27, 2015.[105] Following the acquisition, ITC will operate as a subsidiary of Fortis and ITC shareholders will hold approximately 27 percent of the common shares of Fortis.[106] Fortis will apply to list its common shares on the New York Stock Exchange and continue to have its shares listed on the Toronto Stock Exchange.[107]

97. Empire District Electric Company, Form 8-K, dated February 9, 2016, *available at* https://www.sec.gov/Archives/edgar/data/32689/000110465916095067/a16-3759_18k.htm.
98. *Id.*
99. Algonquin Power & Utilities Corp., *supra* note 88.
100. *Id.*
101. ITC Holdings Corp., Form 8-K (Feb. 9, 2016), *available at* http://www.sec.gov/Archives/edgar/data/1317630/000110465916094831/a16-3847_18k.htm; Press Release, Fortis Inc., Fortis Inc. to Acquire Holdings Corp. for US$11.3 Billion (Feb. 9, 2016), *available at* http://www.sec.gov/Archives/edgar/data/1317630/000110465916095023/a16-3850_2425.htm.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

The acquisition is subject to the approvals of Fortis's and ITC's shareholders, the FERC, the FTC or U.S. Department of Justice under HSR, the FCC, the CFIUS, and regulatory authorities in the States of Illinois, Missouri, Kansas, Oklahoma, and Wisconsin. It is expected to close in late 2016.[108] In the event the acquisition agreement is terminated under certain circumstances, it provides for a break-up fee of $245 million payable by ITC and a reverse break-up fee of either $245 million or $280 million, depending upon the circumstances, payable by Fortis.[109] The agreement also contains a no-shop prohibition with a window-shop exception.[110]

The cash portion of the acquisition will be financed primarily through the issuance of approximately $2 billion of Fortis debt and the sale of up to 19.9 percent of ITC to one or more infrastructure-focused minority investors.[111] No such investor has yet been named.[112] The transaction will be supported by $3.7 billion of fully committed debt and equity acquisition bridge facilities.[113]



108. *Id.*; Fortis Inc., Investor Presentation (Feb. 9, 2016), *available at* http://www.sec.gov/Archives/edgar/data/1317630/000110465916095022/a16-3850_1425.htm; Fortis Inc., Edited Transcript of Conference Call (Feb. 9, 2016), *available at* http://www.sec.gov/Archives/edgar/data/1317630/000110465916095158/a16-3850_3425.htm.

109. Agreement and Plan of Merger Among FortisUS Inc., Element Acquisition Sub Inc., Fortis Inc. and ITC Holdings Corp., dated as of February 9, 2016, *available at* http://www.sec.gov/Archives/edgar/data/1317630/000110465916095992/a16-3850_4425.htm; ITC Holdings Corp., Form 8-K (Feb. 11, 2016), *available at* http://www.sec.gov/Archives/edgar/data/1317630/000110465916095969/a16-3847_38k.htm.

110. *Id.*

111. Press Release, *supra* note 101.

112. Fortis Conference Call, *supra* note 108.

113. *Id.*