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File #: 3288/138939

**VIA HAND DELIVERY AND ELECTRONIC FILING**

March 18, 2009

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor North  
PO Box 3265  
Harrisburg, PA 17105-3265

**RE:** Application of Exelon Corporation, Exelon Xchange Corporation and PECO Energy Company for Certificates of Public Convenience Evidencing Approval of the Transfer of Ultimate Control of NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC, Approval of the Related Affiliated Transactions, and All Other Approvals or Certificates Appropriate, Customary or Necessary under the Public Utility Code to Carry Out the Transaction Described in the Application; Docket No. A-2009-2093057, A-2009-2093058 and A-2009-2093059; **PRELIMINARY OBJECTIONS OF NRG ENERGY CENTER PITTSBURGH LLC AND NRG ENERGY CENTER HARRISBURG LLC**

Dear Secretary McNulty:

Enclosed for filing on behalf of NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC (collectively, the "NRG Companies") are an original and three (3) copies of Preliminary Objections in the above-referenced proceeding. Copies of this document have been served in accordance with the attached Certificate of Service.

Because protests to and petitions to intervene in the above-referenced Application are not due until March 30, 2009, there is a possibility that some interested parties are not yet known and, therefore, would be deprived of the opportunity to respond to these Preliminary Objections. Accordingly, the NRG Companies respectfully request that the period in which answers may be filed to these Preliminary Objections be extended to ten (10) days after the end of the protest/intervention period.

James J. McNulty, Secretary

March 18, 2009

Page 2

If you have any questions regarding this filing, please direct them to me. Please date-stamp the extra copy and return it with our messenger. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "David P. Zambito", with a long horizontal line extending to the right.

David P. Zambito

Counsel for

*NRG Energy Center Pittsburgh LLC and*

*NRG Energy Center Harrisburg LLC*

DPZ/kmg

Enclosures

c: Honorable Marlane R. Chestnut  
Bohdan R. Pankiw, Chief Counsel  
Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Exelon Corporation, Exelon	:	
Xchange Corporation and PECO Energy	:	
Company for Certificates of Public	:	Docket Nos. A-2009-2093057
Convenience Evidencing Approval of the	:	A-2009-2093058
Transfer of Ultimate Control of NRG Energy	:	A-2009-2093059
Center Pittsburgh LLC and NRG Energy	:	
Center Harrisburg LLC, Approval of the	:	
Related Affiliated Transactions, and All Other	:	
Approvals or Certificates Appropriate,	:	
Customary or Necessary under the Public	:	
Utility Code to Carry Out the Transaction	:	
Described in the Application	:	

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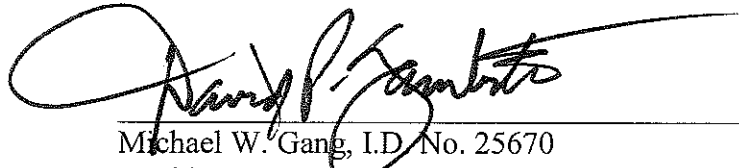
**NOTICE TO PLEAD**

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YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.101, YOU MAY ANSWER THE ENCLOSED PRELIMINARY OBJECTIONS WITHIN TEN (10) DAYS OF THE DATE OF SERVICE HEREOF.<sup>1</sup> YOUR ANSWER TO THE PRELIMINARY OBJECTIONS MUST BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL FOR NRG ENERGY CENTER PITTSBURGH LLC AND NRG ENERGY CENTER HARRISBURG LLC.

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<sup>1</sup> Because all interested parties are not yet known, NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC have asked the Presiding Officer to extend the period for answering the enclosed Preliminary Objections to ten (10) days beyond the end of the protest/intervention period set by the Secretary of the Pennsylvania Public Utility Commission.



Michael W. Gang, I.D. No. 25670  
David B. MacGregor, I.D. No. 28804  
David P. Zambito, I.D. No. 80017  
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DATED: March 18, 2009

Counsel for *NRG Energy Center Pittsburgh LLC*  
and *NRG Energy Center Harrisburg LLC*

**VERIFICATION**

I, Timothy W. Merrill, Vice President and General Manager, of NRG Energy Center Pittsburgh, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

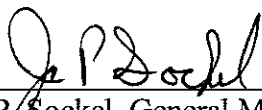
Date: 3/18/09

  
\_\_\_\_\_  
Timothy W. Merrill

**VERIFICATION**

I, Jan P. Sockel, General Manager and Vice President of NRG Energy Center Harrisburg LLC, hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 3/18/09

  
\_\_\_\_\_  
Jan P. Sockel, General Manager and Vice President  
NRG Energy Harrisburg LLC  
Harrisburg Energy Center  
100 North Tenth Street  
P.O. Box 3357  
Harrisburg, PA 17105-3357

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing Preliminary Objections upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party.)

**VIA ELECTRONIC AND FIRST CLASS MAIL**

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David M. Kleppinger, Esquire  
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Hawke McKeon & Sniscak LLP  
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P. O. Box 1778  
Harrisburg, PA 17105-1778

DATED: March 18, 2009

  
\_\_\_\_\_  
David P. Zambito

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Exelon Corporation, Exelon	:	
Xchange Corporation and PECO Energy	:	
Company for Certificates of Public	:	
Convenience Evidencing Approval of the	:	
Transfer of Ultimate Control of NRG Energy	:	Docket Nos. A-2009-2093057
Center Pittsburgh LLC and NRG Energy	:	A-2009-2093058
Center Harrisburg LLC, Approval of the	:	A-2009-2093059
Related Affiliated Transactions, and All Other	:	
Approvals or Certificates Appropriate,	:	
Customary or Necessary under the Public	:	
Utility Code to Carry Out the Transaction	:	
Described in the Application	:	

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**PRELIMINARY OBJECTIONS OF NRG ENERGY CENTER  
PITTSBURGH LLC AND NRG ENERGY CENTER HARRISBURG LLC**

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**TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:**

NRG Energy Center Pittsburgh LLC (“NRG Pittsburgh”) and NRG Energy Center Harrisburg LLC (“NRG Harrisburg”) (hereinafter, collectively “NRG Companies”), by and through their attorneys, Post & Schell, P.C., hereby file Preliminary Objections, pursuant to the Regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code § 5.101, and respectfully request that the Commission dismiss, in its entirety, the above-captioned Application filed by Exelon Corporation (“Exelon”), Exelon Xchange Corporation (“Exelon Xchange”), and PECO Energy Company (“PECO”), docketed at Docket Nos. A-2009-2093057, A-2009-2093058, and A-2009-2093059 (“Application”).

As a matter of law, Exelon, Exelon Xchange, and PECO (hereinafter, collectively “Exelon” or “Applicants”) are without authority to seek, in a unilateral manner, Commission approval of the transfer of the public service property of NRG Pittsburgh and NRG Harrisburg. The plain language of Section 1102(a)(3) of the Pennsylvania Public Utility Code (“Code”), 66

Pa.C.S. § 1102(a)(3), requires Commission approval before a public utility or its affiliate may transfer public service property, by any method or device whatsoever, even if such transfer is to another public utility company or its affiliate. Accordingly, the public utilities owning the property used in the public service, NRG Pittsburgh and NRG Harrisburg, must apply for and obtain Commission approval prior to transferring their public service property.

The NRG Companies are not applicants and, together with their parent company, NRG Thermal LLC (“NRG Thermal”), and its parent company, NRG Energy, Inc. (“NRG Energy”), oppose the speculative transaction proposed in Exelon’s Application. The business decision of the management of NRG Energy to not include the NRG Companies, certificated public utilities in good standing, as joint applicants renders the Application legally insufficient under the plain language of the Code, and the Application must be dismissed in its entirety by the Commission for lack of jurisdiction.

The Applicants have no authority or standing to file on behalf of the NRG Companies, and the Commission likewise does not have the authority to substitute its judgment for the business judgment of NRG Energy’s management. There are no allegations in the Application that the NRG Companies are in any way unfit to provide adequate, efficient, safe, and reasonable service to the public at just and reasonable rates. Indeed, Exelon is attempting to circumvent the General Assembly’s carefully-crafted regulatory scheme designed to protect the public’s interest in corporate takeover situations and to balance the competing interests of the aggressor corporation and the target corporation.

Exelon’s Application lacks sufficient specificity and is not ripe for adjudication. In order for an application to be sufficiently specific under Sections 1102 and 1103 of the Code, 66 Pa.C.S. § 1102, 1103, the application must allege facts demonstrating that the transaction will

affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. Assuming the facts presented in Exelon's Application and Exhibits for purposes of the preliminary objections, the Commission cannot reasonably conclude that there is a definitive transaction that can be meaningfully evaluated as required by the Code. The terms and conditions of the transaction continue to be fluid and are, at best, speculative. As shown in Exelon's SEC Form S-4 attached to the Application, there are multiple conditions precedent that must occur before Exelon would be able to effectuate the proposed transaction and, thus, it is uncertain whether the proposed transaction will even occur. Moreover, the final value of the common stock exchange and related financings are still uncertain and will inevitably affect the capital costs of the regulated utilities and impact their ratepayers. The impact on customer rates is an essential issue for the Commission to consider. In light of the foregoing, Exelon's Application clearly lacks sufficient specificity and is not ripe for adjudication. It should be dismissed in its entirety.

In support thereof, NRG Companies state as follows:

**I. THE PARTIES**

1. NRG Energy is a wholesale power generation company engaged in the ownership, development, construction, and operation of power generation facilities; in the transacting and trading of fuel and transportation services; and the trading of energy, capacity, and related products in the United States and select international markets. *See* Exelon Application, at p.9. It is also engaged in providing district heating and cooling services and in the development of district heating and cooling technologies. NRG Energy's Headquarters and principal executive offices are located at 211 Carnegie Center, Princeton, NJ 08540. NRG Energy was originally

incorporated as a Delaware corporation in 1992, and has existed in its current form since emerging from bankruptcy on December 5, 2003.

2. NRG Pittsburgh is a certificated Pennsylvania public utility providing steam, hot water and chilled water service to the public in the 21<sup>st</sup> and 22<sup>nd</sup> wards in the City of Pittsburgh pursuant to certificates of public convenience at Docket Nos. A-130001 *et seq.* See Exelon Application, at pp. 7-8. NRG Pittsburgh's principal place of business is 111 South Commons, Pittsburgh, PA 15212.

3. NRG Harrisburg is a certificated Pennsylvania public utility providing steam service to the public in the City of Harrisburg pursuant to certificates of public convenience at Docket Nos. A-130175 *et seq.* See Exelon Application, at p. 8. NRG Harrisburg's principal place of business is located at the Harrisburg Energy Center, 100 North 10<sup>th</sup> Street, Harrisburg, PA 17101.

4. NRG Pittsburgh and NRG Harrisburg are wholly-owned subsidiaries of NRG Thermal, which, in turn, is a wholly-owned subsidiary of NRG Energy. See Exelon Application, at p. 9.

5. Exelon is a public utility holding company that, through its subsidiaries, distributes electricity to customers in Illinois and Pennsylvania, as well as natural gas to customers in the Philadelphia area. Exelon's operations include energy generation, power marketing, and energy delivery. See Exelon Application, at p. 6. Exelon's principal executive offices are located at 10 South Dearborn Street, Chicago, IL 60603. Exelon is not a certificated public utility. Exelon's subsidiary, PECO, is a Pennsylvania public utility providing regulated electricity and natural gas services in southeastern Pennsylvania. See Exelon Application, at pp. 6-7.

6. Exelon Xchange is a wholly-owned subsidiary of Exelon that was formed for the sole purpose of acquiring the outstanding shares of NRG common stock and consummating a subsequent merger of Exelon Xchange with and into NRG. *See* Exelon Application, at pp. 7, 9. Upon information and belief, to date, Exelon Xchange has not engaged in any business activities and has no material assets or liabilities other than those incident to its formation and those incurred in connection with Exelon's tender offer for NRG Energy and the proposed subsequent merger of Exelon Xchange with and into NRG. Exelon Application, at pp. 7, 9. Exelon Xchange's principal executive offices are located at 10 South Dearborn Street, Chicago, IL 60603.

## II. FACTUAL BACKGROUND<sup>1</sup>

7. NRG Pittsburgh and NRG Harrisburg are both certificated Pennsylvania public utilities under Chapter 11 of the Code that provide service to the public in their respective service territories by using property that is used and useful in the public service. *See* Exelon Application, at pp. 7-8.

8. On or about October 19, 2008, John W. Rowe, Chairman and Chief Executive Officer of Exelon, contacted David Crane, President and Chief Executive Officer of NRG Energy, and informed him that Exelon's board of directors had authorized him to make an offer for each outstanding share of NRG Energy common stock in exchange for a fractional share of

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<sup>1</sup> The facts contained herein are limited, as they must be for purposes of preliminary objections, to the material facts alleged in the Application. However, any omission, averment, reference, or citation to the facts alleged in the Application, or any of its supporting exhibits, is solely for the purpose of the pending Preliminary Objections, and in no way constitutes an affirmation or denial of the same. The NRG Energy Companies reserve the right to dispute, challenge, or otherwise contest the facts alleged in the Application and, further, demand strict proof thereof.

Exelon stock. Thereafter, Mr. Rowe sent a letter to Mr. Crane that outlined Exelon's interest in acquiring all of the outstanding NRG Energy common stock. A copy of the correspondence is included in Exelon's amended Form S-4, which is attached to the Application and marked as "Exhibit A." *See* Exelon Application, Ex. A at pp. 24-25.

9. On November 9, 2008, NRG Energy sent correspondence to Exelon advising that the NRG Energy Board of Directors ("NRG Board") had refused the offer as inadequate, not in the best interests of the shareholders, and advised Exelon that it would not pursue further discussions regarding a merger for numerous reasons set forth therein. *See* Exelon Application, Ex. A at pp. 28-32.

10. On November 10, 2008, Bruce G. Wilson, Senior Vice President and Deputy General Counsel of Exelon, sent a letter to Drew Murphy, Executive Vice President and General Counsel for NRG Energy, setting forth Exelon's intent to expand the size of the NRG Board and nominate directors to fill the newly created directorships and take control of the NRG Board. *See* Exelon Application, Ex. A at p. 32.

11. On November 12, 2008, Exelon Corporation filed a Form SC TO (Tender Offer) Form S 4 (Registration Statement) with the United States Securities and Exchange Commission ("SEC"), wherein it detailed its intention to offer to acquire each outstanding share of NRG Energy common stock in exchange for a fractional share (0.485 share of Exelon stock per share of NRG stock) of Exelon common stock. *See* Exelon Application, at pp. 9-10. Exelon's S-4 subsequently has been amended on January 23rd and March 4, and its Form SC TO has been amended 24 times.

12. As set forth in the Form S-4, the exchange offer is the first step in Exelon's plan to acquire control of NRG Energy and acquire all of the issued and outstanding shares of NRG

Energy common stock. *See* Exelon Application, Ex. A at p. i. Exelon clearly states in the Form S-4 that “[t]he purpose of the offer is for Exelon to acquire control of NRG, and ultimately all of the outstanding shares of NRG Common Stock.” *See* Exelon Application, Ex. A at p. ii. Exelon further indicates its intent to seek to have NRG Energy consummate a second-step merger of Exelon Xchange, or other wholly-owned subsidiary of Exelon, within and into NRG Energy after completion of the acquisition. *See* Exelon Application, Ex. A at p. i.

13. In its Form S-4, Exelon indicates that in furtherance of facilitating its proposed offer, it intends to present a proposal at NRG Energy’s 2009 Annual Meeting of Stockholders to expand the size of the NRG Board, such that the directors to be elected at that meeting would constitute not less than 50% of the newly-expanded NRG Board, and then nominate and elect directors to fill the newly created directorships. *See* Exelon Application, Ex. A at p. 48.

14. The Form S-4 further provides that Exelon may, at its sole discretion, amend the terms of the proposed transaction, and acknowledges that the transaction is subject to several conditions precedent. *See* Exelon Application, Ex. A at pp. 37-38, 51. The initial expiration date of the tender offer was January 6, 2009, at 5:00 p.m. However, Exelon reserved the right to extend at its sole discretion the period of time in which the offer would remain open. *See* Exelon Application, at pp. 13, 37-38.

15. Exelon indicates in its S-4 Form that “Pennsylvania law requires prior [Commission] approval for any transaction by which an affiliate of a public utility will acquire control of the facilities of another public utility.” *See* Exelon Application, Ex. A at p. 58; *see also* Exelon Application, at p. 4; Exelon Application, Ex. A at p. iv.

16. On November 24, 2008, NRG Energy filed a statement with the SEC and issued a press release announcing that the NRG Board had voted unanimously to reject Exelon's exchange offer. *See* Exelon Application, Ex. A at p.34.

17. On February 26, 2009, Exelon filed the above-captioned Application, seeking Commission approval of the proposed change in control of NRG Energy and its affiliates, including NRG Pittsburgh and NRG Harrisburg. The applicants to the Application include only Exelon, Exelon Xchange, and PECO.

18. NRG Pittsburgh and NRG Harrisburg are not applicants to the Application and are opposed to the proposed transaction. Moreover, neither NRG Energy, NRG Pittsburgh, or NRG Harrisburg have authorized the filing of the Application.

19. The NRG Companies herein file these Preliminary Objections to Exelon's Application and, for the reasons explained below, request that the Application be dismissed in its entirety for lack of Commission jurisdiction due to legal insufficiency, and for insufficient specificity of the Application.

### **III. PRELIMINARY OBJECTIONS**

20. Preliminary Objection No. 1: Exelon's Application is legally insufficient because the plain language of Section 1102(a)(3) of the Code, 66 Pa.C.S. § 1102(a)(3), requires a transferor Pennsylvania public utility to obtain a certificate of public convenience from the Commission prior to transferring, by any method or device whatsoever, any property used or useful in the public service. Exelon has no authority or standing, statutory or otherwise, to file a unilateral application for the acquisition of the public service property of NRG Pittsburgh and NRG Harrisburg. Therefore, the Commission lacks jurisdiction to provide the relief requested by Exelon in the Application and the Application must be dismissed.

21. Preliminary Objection No. 2: Exelon's Application lacks sufficient specificity and is not ripe for adjudication because the terms and conditions of the transaction proposed by Exelon are speculative and, as a result, there is no way to determine if the proposed transaction will provide a substantial public benefit.

#### IV. STANDARD OF REVIEW

22. Pursuant to the Commission's regulations, preliminary objections in response to an application may be filed on several grounds, including:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

52 Pa. Code § 52.101(a).

23. In ruling on preliminary objections, the Presiding Officer must accept as true all well-pled allegations of material facts as well as all inferences reasonably deducible therefrom. *Stilp v. Cmwlth.*, 910 A.2d 775, 781 (Pa. Cmwlth. 2006) (citing *Dep't of Gen. Serv. v. Bd. of Claims*, 881 A.2d 14 (Pa. Cmwlth. 2005); accord *Complaint of Nat'l Fuel Gas Distrib. Corp. and Petition for an Order to Show Cause Why New Mountain Vantage GP, LLC And Others Acting in Concert with It Should Not Be Required to Apply for a Certificate of Public Convenience Approving the Acquisition of Control of Nat'l Fuel Gas Dist. Corp.*, Docket No. P-00072343 (December 26, 2007). However, the Presiding Officer need not accept as true

conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007). Preliminary objections should be sustained unless it appears with certainty that the law will permit the relief requested under the facts asserted. *Stilp*, at 781.

## V. PRELIMINARY OBJECTIONS

### A. **Preliminary Objection No.1: The Application is Legally Insufficient and the Commission Lacks Jurisdiction**

24. NRG Energy Companies incorporate by reference Paragraphs 1 through 23 as if fully set forth herein.

25. Exelon's Application is legally insufficient because the plain language of Section 1102(a)(3) of the Code, 66 Pa.C.S. § 1102(a)(3), requires a transferor Pennsylvania public utility to obtain a certificate of public convenience from the Commission before it may transfer, by any method or device whatsoever, any property used or useful in the public service. As such, the Commission lacks jurisdiction to provide the relief requested in Exelon's Application. Exelon has no authority or standing to act on behalf of the NRG Companies. Likewise, the Commission has no authority to substitute its judgment for the business judgment of NRG's management.

26. In its Application, Exelon asserts that it is attempting to acquire a controlling interest in NRG Energy, whether by acquiring 51% of NRG Energy Common Stock or by expanding the NRG Board and filling the additional seats with Exelon candidates, which in turn would give Exelon control of NRG Pittsburgh and NRG Harrisburg.

27. Exelon's Application unilaterally seeks Commission approval of the acquisition of NRG Pittsburgh and NRG Harrisburg, pursuant to Section 1102(a) of the Code, 66 Pa.C.S. § 1102. Exelon asserts incorrectly that it may unilaterally seek Commission approval of the

proposed hostile takeover of NRG Pittsburgh and NRG Harrisburg. Exelon's Application is legally insufficient.

28. The rights and requirements set forth in Section 1102(a) of the Code are matters of statutory construction. In evaluating a statutory construction issue, the goal is to "ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). Generally, a statute's plain language provides the best indication of legislative intent. *UMCO Energy, Inc. v. Dep't of Env'tl. Prot.*, 938 A.2d 530, 535 (Pa. Cmwlth. 2007). A statute must be construed to give effect to all of its provisions so that no provision is mere surplusage. 1 Pa.C.S. § 1921(a).

29. Section 1102(a) of the Code provides, in pertinent part, as follows:

Upon the *application of any public utility* and the approval of such application by the Commission evidenced by a certificate of public convenience *first had and obtained*, and upon compliance with existing law, it shall be lawful:

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(3) For any public utility or an affiliated interest of a public utility as defined in Section 2101 . . . *to acquire from, or to transfer to*, any person or corporation, . . . *by any method or device whatsoever*, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.

66 Pa.C.S § 1102(a)(3) (emphasis added).

30. The plain language of Section 1102(a)(3) of the Code requires an application for a certificate of public convenience *before* any of the following:

- (a) Before a public utility or its affiliate may acquire from any person or corporation property used or useful in the public service; or
- (b) Before a public utility or its affiliate may transfer to any person or corporation property used or useful in the public service.

66 Pa.C.S. § 1102(3). Thus, Section 1102(a)(3) requires Commission approval for at least two different scenarios: (1) before a public utility may acquire public service property it must first seek and obtain Commission approval; and, (2) before a public utility may transfer public service property it must first seek and obtain Commission approval.<sup>2</sup> Under either scenario, Commission approval, as evidenced by a certificate of public convenience, is required before the change in control.<sup>3</sup>

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<sup>2</sup> Section 1102(a)(3) requires approval “to acquire from, or to transfer to, any person or corporation.” The Code defines a “person” and “corporation” as follows:

“Corporation.” All bodies corporate, joint-stock companies, or associations, domestic or foreign, their lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers or privileges of corporations not possessed by individuals or partnerships, but shall not include municipal corporations, except as otherwise expressly provided in this part, nor bona fide cooperative associations which furnish service on a nonprofit basis only to their stockholders or members.

“Person.” Individuals, partnerships, or associations other than corporations, and includes their lessees, assignees, trustees, receivers, executors, administrators, or other successors in interest.

66 Pa.C.S. § 102. Therefore, a public utility must obtain Commission approval before it acquires public service property from any person or corporation. Similarly, a public utility must obtain Commission approval before it transfers public service property to any person or corporation.

A public utility is not excluded from the definitions of “person” and “corporation.” Indeed, a “public utility” is defined as follows:

- (1) Any *person or corporation* now or hereafter owning or operating in this Commonwealth equipment or facilities for:
  - (i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation.
  - (ii) Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public compensation.

66 Pa.C.S. § 102.

<sup>3</sup> The word “and” normally acts as a conjunctive, meaning “in addition to,” “also” or “as well as.” See Webster’s Third New International Dictionary 80 (1993). However, as explained by the Commonwealth Court:

(Continued on next page...)

31. In this case, Exelon concedes that, under the Commission's Policy and Section 1102(a) of the Code, Exelon must obtain Commission approval before it acquires the public service property of NRG Pittsburgh and NRG Harrisburg.<sup>4</sup> See Exelon Application, at p. 4; see also Exelon Application, Ex. A at pp. iv, 58. Indeed, the Commonwealth Court has held:

Subsections 1102(a) and 1102(a)(3) are prohibitive. They provide only that it is lawful for a public utility to transfer its assets upon the commission's approval of a certificate of public convenience for the utility.

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Thus, this court concludes that the December 1991 sales agreement between Public Service and Boland is unlawful because §

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(...continued from previous page.)

[I]t is beyond peradventure that the object of interpretation and construction of all statutes is to ascertain and effectuate the intent of the General Assembly. Section 1921(a) of the Statutory Construction Act of 1972, 1 Pa.C.S. §1 921(a). In construing statutory language to achieve the aim intended by the legislature, courts often are compelled to construe "and" as meaning "or" and vice versa. See e.g., *Pennsylvania Labor Relations Board v. Martha Company*, 359 Pa. 347, 59 A.2d 166 (1948); *Readinger v. Workers' Compensation Appeal Board (Epler Masonry)*, 855 A.2d 952 (Pa. Cmwlth. 2004), appeal denied, 581 Pa. 709, 867 A.2d 525 (2005); *Appeal of Martin*, 381 A.2d 1321 (Pa. Cmwlth. 1978).

*Mosley v. Workers' Comp. Appeal Bd. (City of Pittsburgh)*, 937 A.2d 607, 608-609 (Pa. Cmwlth. 2007).

<sup>4</sup> Exelon's Application does not clearly specify Exelon's position as to exactly when the change of control will occur -- which further demonstrates the fluid and uncertain nature of this transaction as discussed in the NRG Companies' Preliminary Objection No. 2 below. Under Section 1102(a) of the Code, approval must be "first had and obtained." See 66 Pa.C.S. § 1102(a). Under the Commission's Statement of Policy on "Utility Stock Transfer Under 66 Pa.C.S. § 1102(a)(3)," the change in control will arguably occur when Exelon acts in concert with others at NRG Energy's 2009 Annual Meeting of Stockholders to expand the size of the NRG Board, such that the directors to be elected at that meeting would constitute not less than 50% of the newly-expanded NRG Board, and then nominate and elect directors to fill the newly created directorships. See 52 Pa. Code § 69.901(b). A determination as to the moment of the change of control requires a factual inquiry which is beyond the scope of these Preliminary Objections. For purposes of the Preliminary Objections, the NRG Companies must accept as true the facts as pleaded in the Application.

1102(a)(3) mandates that the [commission] (sic) approve applications for certificates of public convenience *before* transferring assets of public utilities.

*Pub. Serv. Water Co. v. Pa. Pub. Util. Comm'n*, 645 A.2d 423 (Pa. Cmwlth. 1994) (emphasis in original). As a result, the Court ordered that the public utility assets be transferred back to the transferor.

32. The plain language of Section 1102(a)(3) of the Code imposes an obligation on not only a public utility or its affiliate that is *acquiring* public service property, *but also* on a public utility or its affiliate that is *transferring* public service property. Accordingly, the public utility owning the property used in the public service must obtain Commission approval before it may transfer such public service property even if such transfer is to another public utility company or its affiliate. To hold otherwise would simply render meaningless the plain language of Section 1102(a)(3), requiring a transferor public utility to first obtain approval prior to transferring public service property.

33. Therefore, Section 1102(a)(3) of the Code does not permit a public utility or its affiliate to acquire the public service property of another public utility without the transferor's consent as an applicant.<sup>5</sup> Absent amendment by the General Assembly, such a provision cannot

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<sup>5</sup> Exelon essentially argues that, because PECO is a Pennsylvania-regulated "public utility" as defined by the Code, Exelon (through PECO) may unilaterally seek Commission approval to take control of the NRG Companies. Exelon's interpretation of Section 1102(a) is fundamentally flawed because it would lead to an absurd result. Under Exelon's interpretation, it would not have been able to apply under similar circumstances if it did not own PECO. If only a Pennsylvania transferee public utility were permitted to apply (to the exclusion of an out-of-state public utility), the Code would violate the Dormant Commerce Clause of the United States Constitution by inhibiting interstate commerce. *See generally Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)(opining that a statutory scheme is unconstitutional under the Commerce Clause if it imposes a burden on interstate commerce that exceeds the putative local benefits). Accordingly, Exelon's interpretation of Section 1102(a) must be rejected. *See generally Jae v. Good*, 946 A.2d 802, 808 n.11 (Pa. Cmwlth. 2008)(citing 1 Pa. C.S. § 1922(3); *Payne v. Dep't of Corrections*, 582 Pa. 375, 383, 871 A.2d 795, 800 (2005))(explaining that a legislative enactment (Continued on next page...)

be read into the Code.<sup>6</sup> In this regard, Section 1102(a)(3) contains specific limited exceptions to the requirement that a transferor public utility must obtain Commission approval prior to the transfer of any public service property. *See* 66 Pa.C.S. §§ 1102(a)(3)(i) – 1102(a)(3)(iv). However, the General Assembly did not provide that the transfer of public service property by a public utility to another public utility or its affiliate as one of the explicit exceptions to Commission approval. Therefore, such omission must be construed as deliberate and demonstrates that the General Assembly intended that both the transferor utility and acquiring utility, or affiliate thereof, obtain certificates of public convenience. *See Cmwlth. v. Ostrosky*, 589 Pa. 437, 446 n.7, 909 A.2d 1224, 1229 n.7 (2006) (explaining that the maxim *expressio unius est exclusio alterius* means that the express inclusion of one thing implies the exclusion of another; this means that any omission by the General Assembly was deliberate).

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enjoys the presumption of constitutionality under both the rules of statutory construction and the decisions of the Supreme Court of Pennsylvania). In contrast, the NRG Companies' interpretation of Section 1102(a), *i.e.* that the transferor public utility must be an applicant, is entirely consistent with the Dormant Commerce Clause. Section 1102(a), pursuant to its plain language, merely regulates the process of how a Pennsylvania public utility must be acquired. It does not foreclose the possibility of an out-of-state entity (whether it be a public utility or other type of business enterprise) from obtaining control of a Pennsylvania public utility; provided that the out-of-state entity follows the necessary legal procedures and the shareholders who control the transferor public utility direct, through legal action if necessary, the utility to be a joint applicant. Exelon is attempting to circumvent the required statutory process by seeking Commission approval at this time.

<sup>6</sup> *See Melmark Home v. Workers' Comp. App. Bd. (Rosenberg)*, 946 A.2d 159, 162 (Pa. Cmwlth. 2008) (explaining that administrative bodies and courts have "no power to insert words into statutory provisions where the legislature has failed to supply them."); *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 567 Pa. 514, 525, 788 A.2d 955, 962 (2001) (cautioning that although an administrative agency or court must "listen to what a statute says[;] one must listen attentively to what it does not say"); *Capital BlueCross v. Pa. Ins. Dep't*, 937 A.2d 552 (Pa. Cmwlth. 2007) (explaining that administrative agencies, being creatures of the legislature, are vested only with those powers conferred by the statute or such as are necessarily implied from a grant of such powers; where authority is conferred on such an extrajudicial body, the legislative grant of power to act in any particular case must be clear).

34. Consequently, under the plain language of Section 1102(a)(3) of the Code, if both the transferor and transferee are public utilities or affiliates of public utilities, then *both* must obtain Commission approval prior to transferring public service property by any method or device whatsoever. Despite Exelon’s assertion to the contrary, this is indeed consistent with traditional, well-recognized Commission practice in which the transferor and transferee are both applicants.<sup>7</sup>

35. Exelon cites *Complaint of National Fuel*,<sup>8</sup> asserting that “the Commission refused to decline jurisdiction over a proceeding involving a potential unilateral change of control . . . despite the fact that the actual acquisition of control had not transpired and despite the fact that [National Fuel Gas Distribution] opposed the proposed transaction.” See Exelon Application, at p. 23. As explained below, Exelon’s reliance on this case for the proposition that the Commission has approved a unilateral acquisition of a public utility is misplaced.

36. In the *Complaint of National Fuel*, National Fuel Gas Distribution Corporation (“NFG Distribution”) filed a complaint and petition with the Commission seeking, *inter alia*, an

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<sup>7</sup> See, e.g., *Joint Application of PECO Energy Company and Public Service Electric and Gas Company for Approval of the Merger of Public Service Enterprise Group, Inc. with and into Exelon Corporation*, Doc. No. A-110550F0160, 2006 Pa. PUC LEXIS 2, 248 P.U.R.4th 1 (Order entered Jan. 27, 2005) (settled); *Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH for all approvals required under the Public Utility Code in connection with a change in control of Pennsylvania-American Water Company*, Doc. Nos. A-212285F0096, *et seq.*, 2002 Pa. PUC LEXIS 31, 221 P.U.R.4th 487 (Order entered Sept. 4, 2002) (litigated); *Joint Application for Approval of the Merger of GPU, Inc. with FirstEnergy Corp.; Petition of Metropolitan Edison Company and Pennsylvania Electric Company, as Supplemented, For Relief Under Their Approved Restructuring Plan and the Electricity Customer Choice and Competition Act*, Doc. Nos. A-110300F0095, *et seq.*, Pa. PUC LEXIS 16 (Order entered June 20, 2001) (litigated).

<sup>8</sup> *Complaint of Nat’l Fuel Gas Distrib. Co. and Petition for an Order to Show Cause Why New Mountain Vantage GP, LLC And Others Acting in Concert with It Should Not Be Required to Apply for a Certificate of Public Convenience Approving the Acquisition of Control of Nat’l Fuel Gas Distrib. Co.*, Doc. No. P-00072343 (Dec. 26, 2007) (“*Complaint of National Fuel*”).

order to show cause why New Mountain Vantage GP, LLC (“NMV”) and other entities working in concert with NMV should not be required to apply for a certificate of public convenience under Section 1102(a)(3) of Code prior to acquiring control of NFG Distribution.<sup>9</sup> NMV filed a petition to intervene and preliminary objections, requesting that the complaint should be dismissed and arguing, *inter alia*, that NMV’s activities did not amount to a change of control.

On December 26, 2007, the Commission issued an order denying NMV’s preliminary objections, holding that “we cannot conclude that the law will not permit [NFG Distribution’s] Complaint and Petition to prevail.” The Commission declined to dismiss NFG Distribution’s contention that actions to elect a *minority* of board members may constitute a change in control without prior Commission approval.<sup>10</sup> While the Commission declined to relinquish jurisdiction over the proposed transaction, the Commission did not opine on whether an acquiring entity may unilaterally file an application to acquire control of a certificated public utility.

Despite Exelon’s characterization of this case, the Commission never reached the question of whether NMV could unilaterally obtain approval to acquire NFG Distribution, as the complaint and investigation were settled and withdrawn. Exelon’s reliance on this case for the proposition that the Commission has the power to approve a unilateral acquisition of a public utility is inaccurate and/or a mischaracterization of the Commission’s decision.

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<sup>9</sup> Similar to this case, *sub judice*, NMV was attempting to gain control of NFG Distribution through a series of steps that included nominating and then electing three NMV representatives to the NFG Distribution board of directors.

<sup>10</sup> Unlike NMV, in this case, *sub judice*, Exelon intends to expand the size of the NRG Board, such that the directors to be elected at that meeting would constitute not less than 50% of the newly-expanded NRG Board, and then nominate and elect directors to fill the newly created directorships. See Exelon Application, Ex. A at p. 48. As explained in Paragraph 31, *supra*, before Exelon may take control of the board it must first obtain Commission approval. However, Exelon has not been authorized to obtain Commission approval and, as explained herein, lacks statutory authority to do so without the participation of NRG Pittsburgh and NRG Harrisburg.

37. Exelon also cites *Reorganization of Mercer Gas*<sup>11</sup> for the position that “the Commission has considered and granted unilateral applications seeking approval for hostile acquisitions of distressed utility’s assets.” See Exelon Application, at p. 23. As explained below, Exelon’s reliance on this case is misplaced -- primarily because Exelon does not even attempt to assert in its Application that the NRG Companies are distressed or otherwise unfit to provide service to the public at just and reasonable rates.

38. In *Reorganization of Mercer Gas*, Mercer Gas Company (“Mercer”) filed a Petition for Reorganization under Chapter 11 of the Bankruptcy Code. Pursuant to the requirements of the Bankruptcy Code, an unsecured creditor committee was appointed by the Bankruptcy Court to represent the interests of Mercer’s unsecured creditors throughout the bankruptcy proceeding. On July 7, 1989, the committee filed a proposed plan of reorganization with the Bankruptcy Court. The plan provided for the sale of the bulk of Mercer’s utility assets and accounts receivable, as well the sale of a gas cost escrow to National Fuel Gas Distribution Corporation (“NFG Distribution”), for amounts owed to its affiliate National Fuel Gas Supply Corporation (“NFG Supply”). NFG Supply’s claim comprised about 90% of the total unsecured debt and a large percentage, if not all, of the unsecured debt that would be paid under the plan. The reorganization plan provided that it was contingent on the approval of the Commission. The

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<sup>11</sup> *Petition of the Official Unsecured Creditors’ Committee for Approval of its Plan of Reorganization of Mercer Gas Co. and Application for Approval to Effectuate the Abandonment of Mercer Gas Company’s Gas Service through the Plan of Reorganization; Application of National Fuel Gas Distribution Corporation for the Acquisition of Certain Property of Mercer Gas Company and for the Issuance of a Certificate of Public Convenience Authorizing it to Supply Gas Service to the Public in the Territory Previously Served by Mercer Gas Company; Petition of National Fuel Gas Distribution Corporation to Charge its Present Tariff Rates to Former Mercer Gas Customers from the Effective Date of Transfer of Service*, Doc. Nos. T-880494, et seq., 71 Pa. PUC 19 (September 15, 1989) (“*Reorganization of Mercer Gas*”).

Bankruptcy Court approved the committee's submittal of the reorganization plan to the creditors for approval.

Because the Commission's regulations require Commission review and approval of any plan of reorganization filed in Bankruptcy Court for a public utility and because the plan was contingent on Commission approval, the committee filed a petition with the Commission seeking approval of its proposed plan of reorganization and the abandonment of Mercer's gas distribution system. *See* 52 Pa. Code § 1.61 (requiring Commission approval of a reorganization plan for a public utility). NFG Distribution filed an application with the Commission requesting approval of the purchase of Mercer's assets as set forth in the committee's reorganization plan. Mercer filed responsive pleadings to both the committee's petition and NFG Distribution's application, requesting that the Commission defer adjudication of all pleadings until the Bankruptcy Court acted on the committee's plan.

The Commission noted that the plan filed by the committee could be described as a hostile takeover in that the sale of Mercer's assets to NFG Distribution does not have Mercer's full support. However, the Commission found that the committee's plan would successfully accomplish the pay back of all or most of Mercer's outstanding debt in a timely manner.<sup>12</sup> The Commission approved the application of NFG Distribution for the acquisition of Mercer's assets, conditioned on the Bankruptcy Court's approval of the committee's plan.

Although Mercer may have opposed the acquisition of its assets by NFG Distribution, Mercer applied for bankruptcy and, as a result, a committee was appointed by the Bankruptcy

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<sup>12</sup> The Commission also found that Mercer had failed to pay its gas supplier even though it had been fully compensated by its customers. The Commission further found that Mercer had failed to report underpayments on its annual GCR filings and had been subject to frequent Commission actions regarding unsafe service.

Court to reorganize the assets, debts, and liabilities of Mercer in accordance with the requirements of the Bankruptcy Code. Pursuant to the Commission's regulations, the plan for organization of Mercer was required to be reviewed and approved by the Commission and, thus, the committee and NFG Distribution filed applications with the Commission seeking approval of the transfer of certain assets of Mercer. In light of the foregoing, it cannot be said that the Commission approved a unilateral application for a hostile takeover; rather, the Commission's regulations required approval of the plan of reorganization despite Mercer's lack of support. Stated otherwise, an application for the transfer of the assets of a public utility that has filed bankruptcy is a unique and distinguished situation that is treated separately under different regulations not applicable to a non-bankrupt and otherwise fit public utility.<sup>13</sup>

39. Exelon also cites *Lemont Water Company*<sup>14</sup> for the proposition that that "the Commission has considered and granted unilateral applications seeking approval for hostile acquisitions of distressed utility's assets." Exelon Application, at p. 23. *Lemont Water Company* is not applicable because there is *no* allegation by Exelon that NRG Pittsburgh or NRG Harrisburg are also "distressed utilities." Nevertheless, Exelon's interpretation of *Lemont Water Company* is a mischaracterization of the facts presented in *Lemont Water Company*.

40. In *Lemont Water Company*, the Lemont Water Company ("Lemont") filed the above-mentioned application seeking, *inter alia*, *nunc pro tunc* validation of the stock transfer to the College Township Water Authority ("Authority"). The application arose from the fight

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<sup>13</sup> The NRG Companies do not question the Commission's authority to revoke the certificate of public convenience of an unfit public utility company. Exelon's Application does not allege that the NRG Companies are unfit.

<sup>14</sup> *Application of Lemont Water Company for approval nunc pro tunc to abandon water service; Application of Lemont Water Company for approval nunc pro tunc of the partial transfer of stock to the College Township Water Auth.*, Doc. Nos. A-211690F2000, *et seq.*, 1998 Pa. PUC LEXIS 36 (July 10, 1998) ("*Lemont Water Company*").

between two groups for ownership and control of certain equipment and facilities furnishing water to about 2,309 customers. The first group, on whose behalf the application was filed, consisted of *both the Authority and the current board of directors of Lemont*, which sought approval to transfer a controlling interest in Lemont stock to the Authority. The second group consisted of protestants that opposed approval of the transfer. The protestants were shareholders of Lemont stock and included some former members of Lemont's board of directors. The protestants argued that the stock transfer was void *ab initio* for lack of prior Commission approval. Thus, the issue before the Commission in *Lemont Water* was not whether a joint application was required but, rather, whether the Commission had *nunc pro tunc* jurisdiction.

The ALJ noted that a public utility cannot lawfully convey, by sale or stock transfer, the title or use of property used and useful in the public service to a municipal corporation without first applying to the Commission for approval. The ALJ also noted that a public utility may not abandon service by transferring all its facilities to a municipal authority unless the utility receives Commission approval. Nevertheless, because rejection of the transfer, after the fact, would have resulted in an abandonment of service in contravention of the public interest, the ALJ recommended the protestants motion to declare the stock transfer void *ab initio* be denied. The Commission agreed and adopted the ALJ's determination.<sup>15</sup>

Despite Exelon's characterization to the contrary, the facts presented in *Lemont Water Company* fail to amount to a unilateral transfer or hostile takeover. Indeed, both the transferor,

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<sup>15</sup> The ALJ held that the lack of prior Commission approval under Section 1102 renders the act voidable by the Commission. However, this holding appears to be inconsistent with the binding precedent of the Commonwealth Court, which, as explained above in Paragraph 31, *supra*, held that Section 1102(a)(3) mandates that the Commission's approval is required *before* a public utility's assets may be transferred. *Public Serv. Water Co. v. Pa. Pub. Util. Comm'n*, 645 A.2d 423 (Pa. Cmwlth. 1994).

Lemont, and transferee, Authority, supported the stock transfer and, moreover, sought Commission approval. It was the shareholders that opposed the transfer, rather than the public utility. The protests by the shareholders were arguably an attempt to bring the equivalent of a shareholder derivative lawsuit to challenge the business judgment of the board of directors for Lemont.

41. Exelon also cites *Application of Total Environmental Solutions*<sup>16</sup> for the proposition that the Commission approved a unilaterally filed application for the acquisition of two water and two sewer utilities. However, Exelon's reliance on this case is misplaced.

42. In *Application of Total Environmental Solutions*, Four Seasons Sewer Company, Inc. ("Four Seasons") and Riviera Utilities Sewer Company of PA, Inc. ("Riviera") were both subsidiaries of a parent company ("Parent") that was the subject of an action in bankruptcy. The Bankruptcy Court appointed a trustee to manage and reorganize the Parent's assets. The trustee filed a plan of reorganization, which, in relevant part, sought to sell off the multi-state assets of the Parent and its subsidiaries to a qualified purchaser that sought approval before each of the applicable public service commissions. To satisfy this requirement, Total Environmental Solutions, Inc. ("TESI") filed applications seeking, *inter alia*, Commission approval of the acquisition of the public utility property of Four Seasons and Riviera. Concurrently therewith, Four Seasons and Riviera filed applications seeking Commission approval of the transfer by sale

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<sup>16</sup> *Application of Total Environmental Solutions, Inc. for the Approval of the Transfer, by Sale, of all Tangible and Intangible Property Used or Useful in the Public Service of Four Seasons Sewer Company, Inc. and Riviera Utilities Sewer Company of PA, Inc., to Total Environmental Solutions, Inc., and for the Issuance of Certificates of Public Convenience of Total Environmental Solutions, Inc., for Approval to Provide Wastewater Service to the Public in Portions of Foster, Dennison, and Butler Townships, Luzerne County, and Sandy Township, Clearfield County*, Doc. Nos. A-2330084, *et seq.* (Order entered Sept. 13, 2000) ("*Application of Total Environmental Solutions*").

of each utility's property to TESI, Docket Nos. A-230039F2000 and A-230405F2000 respectively. Thus, contrary to Exelon's characterization of this case, the acquisition was not unilateral.

The Commission found that TESI obtained the necessary financing to meet all foreseeable capital requirements. The Commission further found that the customers of Four Seasons and Riviera would have continuous and uninterrupted wastewater service as a result of the transfer of assets, and that TESI will charge for said service in accordance with the effective tariffs for Four Seasons and Riviera. Based thereon, the Commission approved the transfer.

43. Finally, Exelon cites *Application of Shenango Valley Water Company*,<sup>17</sup> for the proposition that the Commission may approve the acquisition of public utility assets despite the absence of an application from the transferor utility. However, Exelon's reliance on this case is also misplaced.

44. In *Application of Shenango Valley Water Company*, Shenango Valley Water Company ("Shenango") and Mercer Water Company ("Mercer") entered into a Commission approved agreement which provided that Shenango would build a pipeline to deliver water to Mercer and, in the event Mercer became substantially delinquent with regard to water provided by Shenango, Shenango could purchase Mercer's assets. Subsequently, Mercer became delinquent with regard to its water supply account with Shenango. Thereafter, Shenango filed an application seeking Commission approval of its acquisition of Mercer's public water service assets. Mercer filed a protest and complaint, raising the following: reformation of the contract; challenging Shenango's billing practices; whether the agreement was consistent with Mercer's

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<sup>17</sup> *Application of Shenango Valley Water Co., Mercer Water Co. v. Shenango Valley Water Co.*, Doc. Nos. A-212750F0002, *et seq.*, 1994 Pa. PUC LEXIS 110 (July 12, 1994) ("*Application of Shenango Valley Water Co.*").

tariff; whether Mercer was a troubled water company or financially insecure; valuation of Mercer's assets; Shenango's fitness; and whether Mercer provided inadequate service. The ALJ granted the application of Shenango.

In replies to exceptions, Shenango asserted that the transfer was not a forced takeover. Rather, the transaction was undertaken pursuant to a Commission-approved agreement with Mercer to sell certain assets to Shenango. The Commission agreed, noting that the parties had an agreement whereby Shenango could buy Mercer's assets if Mercer became substantially delinquent. The Commission found that, subsequent to the agreement, the financial stability and economic well-being of Mercer deteriorated, resulting in Shenango seeking to exercise its contract rights. The Commission enforced these contracts rights because it found to do so would be in the interest of the customers of both Shenango and Mercer.

Although Mercer technically opposed the transfer of its assets to Shenango, Mercer had previously agreed to such transfer pursuant to a voluntary and Commission-approved contract between the parties. Thus, Mercer had previously agreed in the acquisition of its assets by Shenango. *Application of Shenango Valley Water Company* does not support Exelon's position that the Commission can authorize a hostile acquisition. Rather, the issue in the case was whether a transfer of the public utility property must be effectuated since the terms and conditions by which Mercer previously agreed to such transfer existed at the time the application was filed.

45. On its face, Section 1102(a)(3) enumerates certain actions by public utilities that require prior approval, which include both acquiring and transferring public service property. Thus, in order for NRG Pittsburgh or NRG Harrisburg to transfer their public service property they must be applicants and obtain Commission approval, as evidenced by certificates of public

convenience, prior to the transfer. Exelon simply lacks authority and standing to seek, in a unilateral manner, Commission approval of the proposed transaction. Unlike the cases discussed above, there is no agreement, creditor committee, or trustee that provides Exelon or any of its affiliates authority to act on behalf of NRG Pittsburgh or NRG Harrisburg.<sup>18</sup> Indeed, the NRG Board voted unanimously to reject Exelon's proposed transaction and, therefore, declined to file an application seeking Commission approval. The Commission lacks jurisdiction to substitute its judgment for the judgment of NRG Energy's Board and management. The Commission must maintain neutrality and simply enforce the carefully-crafted regulatory scheme developed by the Pennsylvania General Assembly.<sup>19</sup>

46. In its application, Exelon alleges that the decision of the NRG Board to reject the proposed transaction and refusal to file an application with the Commission somehow interferes with the rights and interests of the NRG Energy shareholders. However, this is contrary to well-settled law. Under Pennsylvania law, the business decisions of a board of directors are presumed

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<sup>18</sup> It should be noted that Exelon also cites and relies on decisions from other jurisdictions. However, the fact that another jurisdiction permits unilateral takeovers of public utility companies is completely meaningless with regard to the interpretation and application of the Pennsylvania Public Utility Code. In fact, there are also jurisdictions that have antitakeover legislation that regulate or otherwise govern the process by which hostile takeovers may occur, which are similarly not relevant to the interpretation and application of the Pennsylvania Public Utility Code. *See, e.g., CTS v. Dynamics Corp. Am.*, 481 U.S. 69 (1987) (upholding Indiana's antitakeover legislation signaling a broad endorsement of a state's right to regulate takeovers). More importantly, the plain language of Section 1102(a)(3) of the Code is unambiguous and, therefore, according to the well-established canons of statutory construction there is no need to look beyond the plain language, including to foreign jurisdictions, to ascertain the clear intent of the General Assembly of the Commonwealth.

<sup>19</sup> The requirement that the transferor public utility be an applicant does not forever foreclose the possibility of a takeover under these circumstances. As explained in more detail *infra*, the ultimate control is vested in the shareholders who can direct the board and management to take certain actions, including the filing of an application for a certificate of public convenience. It is in the light of these other shareholders remedies that all provisions of Section 1102(a) of the Code (*i.e.*, transferor public utility as an applicant, and approval "first had and obtained") can be given meaning and effect. There is an overarching legal process that must be followed.

to be made on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. *Cuker v. Mikalauskas*, 547 Pa. 600, 692 A.2d 1042 (Pa. 1997). Further, absent proof of fraud, self-dealing, or other misconduct or malfeasance, there is a policy of judicial noninterference with the business decisions of corporate managers. *Id.* at 1046.

By filing its unilateral Application, Exelon seeks to eviscerate the business judgment of the NRG Board, which is presumed to be in the best interests of its shareholders, and asks the Commission to act as a super board of directors. However, the Commission's authority to interfere in the internal management of a public utility is limited. *See, e.g., Metropolitan Edison v. Pa. Pub. Util. Comm'n*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981). A public utility has a right to self-management of its affairs free from Commission interference absent a showing of an abuse of discretion or arbitrary action by the utility.<sup>20</sup> *Id.* If the shareholders of NRG Energy disagree or are otherwise dissatisfied with the business decisions of the NRG Board in rejecting the proposed transaction or refusing to file an application seeking Commission approval of the proposed transaction, then the shareholders, not Exelon, have authority to challenge the business judgment of the NRG Board through a derivative, fiduciary, or other shareholder suit, or satisfaction of the requirements of Section 203 of the Delaware General Corporation Law, DEL. CODE ANN. tit. 8, § 203.<sup>21</sup>

47. In summary, the plain language of Section 1102(a)(3) of the Code imposes an obligation on not only a public utility or its affiliate that is acquiring public service property, but

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<sup>20</sup> Notably, Exelon's application is void of any allegation that NRG Energy, NRG Pittsburgh, or NRG Harrisburg are not fit to provide the public service, let alone any allegation that the NRG Board abused its discretion or acted arbitrarily.

<sup>21</sup> Section 203 of the Delaware General Corporation Law requires either board approval or tender of 85% of the voting stock. DEL. CODE ANN. tit. 8, § 203.

also on a public utility or its affiliate that is transferring public service property. Accordingly, the public utilities owning the property used in the public service, NRG Pittsburgh and NRG Harrisburg, must apply for and obtain Commission approval, as evidenced by certificates of public convenience, before they may transfer, by any method or device whatsoever, such public service property -- even if such transfer is to another public utility company or its affiliate. Exelon is without authority or standing to seek, in a unilateral manner, Commission approval to transfer the public service property of NRG Pittsburgh and NRG Harrisburg. The absence of the NRG Companies as applicants makes the Application legally insufficient and the Application must be dismissed by the Commission for lack of jurisdiction to provide the requested relief.

WHEREFORE, NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC respectfully request that the Commission conclude that Exelon's Application is legally insufficient and dismiss the Application for lack of Commission jurisdiction on the basis that the NRG Companies must be applicants under Section 1102(a)(3). The NRG Companies must obtain approvals, as evidenced by certificates of public convenience, prior to the actions proposed by Exelon, which actions would result in the transfer by the NRG Companies of their property used or useful in the public service.

**B. Preliminary Objection No. 2: The Application Lacks Sufficient Specificity.**

48. The NRG Energy Companies incorporate by reference Paragraphs 1 through 47 as if fully set forth herein.

49. Exelon's Application lacks sufficient specificity and is not ripe for adjudication because the terms and conditions of the transaction proposed by Exelon are speculative and, as a

result, there is no way for the Presiding Officer and the Commission to determine if the proposed transaction will provide a substantial public benefit.

50. Exelon bears the burden of proving that the proposed transaction satisfies the requirements of Sections 1102 and 1103 of the Code, 66 Pa.C.S. §§ 1102, 1103. The Commission may issue a certificate of public convenience upon a finding that “the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” *Id.* § 1103(a).<sup>22</sup> This standard has been interpreted to require the Commission to find that the transaction would “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972). “Further, when the ‘public interest’ is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on all affected parties and not merely on one particular group . . . .” *Middletown Twp. v. Pa. Pub. Util. Comm’n*, 482 A.2d 674, 682 (Pa. Cmwlth. 1984). Accordingly, in order for an application to be sufficiently specific under Sections 1102 and 1103, the application must allege facts that, if accepted as true, would establish that the proposed transaction is in the public interest because it will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.

51. Exelon’s Application has failed to make any specific commitments or provide any details that would satisfy the requisite specificity. Indeed, the only reasons Exelon offers to establish that the proposed transaction is in the public interest is essentially limited to the

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<sup>22</sup> The purpose of a certificate of public convenience includes, *inter alia*, ensuring that the entity is fit to provide the public service. *Application of Newtown Artesian Water Co.*, 2003 Pa. PUC LEXIS 40 (July 1, 2003); *Re: O’Connor*, 54 Pa. PUC 547 (1980); *Warminster Twp. Municipal Auth. v. Pa. Pub. Util. Comm’n*, 138 A.2d 240 (Pa. Super. 1958).

following conclusory statements: Exelon is an experienced utility operator and is financially stable; NRG Pittsburgh and NRG Harrisburg will remain as they are; Exelon is a solid corporate citizen; and the proposed transaction will provide broad benefits to energy markets.<sup>23</sup> See Exelon Application, at pp. 17-22. Notwithstanding the foregoing and the fact that Exelon has not alleged that it has any experience in owning or operating district heating and cooling operations (as opposed to gas and electric facilities), Exelon has failed to, and is unable to, specifically define and describe the transaction. Indeed, its Application is premature.

52. The terms and conditions of the proposed transaction are unknown and speculative at best. The speculative nature of the transaction is demonstrated by the numerous conditions that remain before Exelon can, or is willing to, buy a single share of NRG stock. For example, in its Form S-4, Exelon states:

Exelon intends to continue to seek to negotiate with NRG with respect to the combination of NRG and Exelon. If such negotiations result in a definitive merger agreement between Exelon and NRG, the consideration to be received by the holders of NRG common stock could include or consist of Exelon common stock, other securities, cash or any combination thereof. In addition, the structure of a combination between Exelon and NRG under any such definitive merger agreement may be different than the structure of the offer and second-step merger. Accordingly, such negotiations could result in, among other things, the termination of the offer and submission of a different combination proposal to NRG's stockholders for their approval.

See Exelon Application, Ex. A at p. 36. The Form S-4 further indicates that Exelon may make any changes to NRG Energy or its subsidiaries that Exelon deems necessary or convenient, including:

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<sup>23</sup> See *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007) (explaining that the Presiding Officer need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion).

[C]hanges in NRG's business, corporate structure, assets, properties, marketing strategies, capitalization management, personnel or dividend policy or changes to NRG's Amended and Restated Certificate of Incorporation or Amended and Restated Bylaws.

See Exelon Application, Ex. A at p. 29. Other examples of the uncertainty and speculative nature of the proposed transaction include: approval by Exelon's shareholders, which has not occurred, see Exelon Application, Ex. A at p. 52; Exelon's obtaining the necessary financing, which has not been obtained, see Exelon Application, Ex. A at p. 50; and satisfaction of the requirements of Section 203 of the Delaware General Corporation Law, DEL. CODE ANN. tit. 8, § 203, which requires, *inter alia*, either the board of directors approve a transaction resulting in a stockholder becoming an interested stockholder or that the interested stockholder own at least 85% of the voting stock at the time the transaction commenced.<sup>24</sup>

The process of satisfying these conditions could result in significant changes to Exelon's proposal and, thereby, the Application. As such, the Application fails to provide sufficient specificity regarding the potential impacts the proposed transaction may have on not only the ratepayers of NRG Pittsburgh and NRG Harrisburg, but also on those of PECO. Indeed, the Application fails to provide any details regarding what effect, if any, the proposed transaction would have on the cost of capital, return on equity, rate of return, and debt costs all of which may ultimately be passed onto and affect the ratepayers in one form or another. The Commission cannot provide meaningful review of a transaction that is not yet defined.<sup>25</sup>

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<sup>24</sup> In its Application, Exelon has alleged that it currently owns only slightly above 50% of the NRG Energy common stock.

<sup>25</sup> This basic concept of Commission review of the actual, final transaction lends further credence to the NRG Companies' interpretation of the plain language of Section 1102(a)(3), which requires the transferor public utility to be an applicant and also requires approval "first (Continued on next page...)

53. Further, it is uncertain whether the proposed transaction will even occur. As a result, the Application is not ripe for review. The purpose of the ripeness doctrine is to avoid premature adjudication. *City & County of Phila. v. Dep't of Pub. Welfare*, 941 A.2d 766, 768 n.2 (Pa. Cmwlth. 2008) (citation omitted). The Commonwealth Court explained the ripeness doctrine as follows:

Ripeness and exhaustion are similar in that they both deal with timing of judicial review but they are distinct concepts. Ripeness arises out of a judicial concern not to become involved in abstract disagreements of administrative policies. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). It has been defined as the presence of an actual controversy. *American Council of Life Insurance Companies v. Foster*, 580 A.2d 448 (Pa. Cmwlth. 1990). It insists on a concrete context, where there is a final agency action so that the courts can properly exercise their function. The doctrine of ripeness is described as a legal principle “instructing courts to review government actions only when the government’s position has crystallized to the point at which a court can identify a relatively discrete dispute.” DAVIS & PIERCE, ADMINISTRATIVE LAW TREATISE, vol. II, § 15.12 (3rd edition).

*Gardner v. Dep't of Env'tl. Res.*, 658 A.2d 440, 444 (Pa. Cmwlth. 1995). In determining whether the ripeness doctrine applies, the Commission must consider: “(1) whether the issues are adequately developed for judicial review, including whether the claim involves uncertain and contingent events that may not occur as anticipated or at all; and (2) what hardship the parties will suffer if review is delayed.” *Banfield v. Cortes*, 922 A.2d 36, 45 (Pa. Cmwlth. 2007) (citation omitted); *see also Alaica v. Ridge*, 784 A.2d 837, 843 (Pa. Cmwlth. 2001).

54. In the Application, Exelon concedes that there is opposition to the proposed transaction. *See* Exelon Application, at p. 22. In fact, although Exelon alleges that it announced its exchange offer as early as November 12, 2008, Exelon alleges that only slightly above 50% of

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(...continued from previous page.)

had and obtained.” The Pennsylvania Legislature, in its wisdom, developed a regulatory scheme that ensured a deliberate review process in order to protect the public interest.

the NRG common stock had been tendered as of the date it filed the Application. *See* Exelon Application, at p. 11-12. Further, as explained in Paragraph 52, *supra*, there are multiple conditions precedent that must occur before Exelon would be able to effectuate the proposed transaction. Based on these allegations, there is substantial uncertainty as to whether the transaction presented by Exelon's Application will occur and, if a transaction were to occur, what form the transaction would take. Accordingly, Exelon's Application is not ripe for review because it is premised on uncertain and contingent events.

WHEREFORE, NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC respectfully request that the Commission dismiss Exelon's Application for lack of sufficient specificity and ripeness. The Application fails to provide sufficient detail to permit the Commission to review the proposed transaction in a meaningful manner and to determine whether the final transaction (if it ever even occurs) will affirmatively promote the service, accommodation, convenience or safety of the public in a substantial way.

## VI. CONCLUSION

55. NRG Energy Companies incorporate by reference Paragraphs 1 through 54 as if fully set forth herein.

56. Pursuant to the plain language of Section 1102(a)(3) of the Code, 66 Pa.C.S. § 1102(a)(3), a public utility that will transfer used and useful property, through a change of control or by any means or device whatsoever, must *first* apply for and obtain a certificate of public convenience authorizing the transfer of that property.

57. Consequently, as a matter of law, the public service property of NRG Pittsburgh and NRG Harrisburg cannot be transferred to Exelon, or an affiliate thereof, by any method or device whatsoever, without the NRG Companies *first* obtaining Commission approval. Rather,

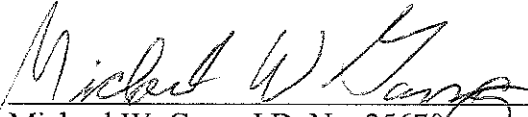
both entities must file an application pursuant to Section 1102(a)(3) to obtain Commission approval.

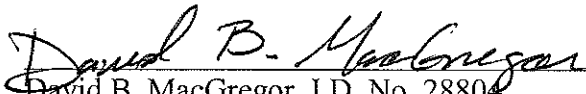
58. Further, the terms and conditions of the proposed transaction are unknown and speculative and, thus, Exelon's Application is not ripe for review because it is premised on uncertain and contingent events. The Commission cannot provide meaningful review of a transaction that has not yet been defined.

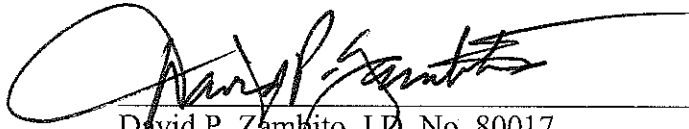
59. Accordingly, the Commission should enter an order, pursuant to 52 Pa. Code § 5.101(a), dismissing the above-captioned Application for lack of Commission jurisdiction to provide the requested relief due to the legal insufficiency of the pleading, and for the insufficient specificity of the pleading. Specifically, the public service property of NRG Pittsburgh and NRG Harrisburg cannot be transferred to Exelon, or an affiliate thereof, by any method or device whatsoever, without the NRG Companies *first* filing and obtaining Commission approval.

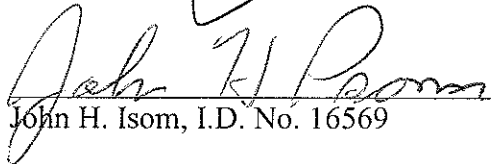
WHEREFORE, NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC respectfully request that the above-captioned Application be dismissed in its entirety.

Respectfully submitted,

  
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DATED: March 18, 2009

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