

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560 (in PA only)

IRWINA. POPOWSKY
Consumer Advocate

FAX (717) 783-7152
consumer@paoca.org

March 30, 2009

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

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 Approval or Certificates Appropriate, Customary or Necessary under the Public Utility Code to Carry Out the Transactions Described in the Application

Docket Nos. A-2009-2093057
A-2009-2093058
A-2009-2093059

Dear Secretary McNulty:

Enclosed for filing are of the Protest and Public Statement on behalf of the Office of Consumer Advocate, in the above referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

Handwritten signature of Kennedy S. Johnson in cursive script.
Kennedy S. Johnson
Assistant Consumer Advocate
PA Attorney I.D. # 203098

Enclosures

cc: Administrative Law Judge
Office of Special Assistants
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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 Approval or Certificates Appropriate,	:	
Customary or Necessary under the Public	:	
Utility Code to Carry Out the Transactions	:	
Described in the Application	:	

PROTEST OF THE
OFFICE OF CONSUMER ADVOCATE

The Office of Consumer Advocate (OCA) files this Protest in the above-captioned Application proceeding pursuant to the regulations of the Pennsylvania Public Utility Commission (PUC or Commission), 52 Pa. Code §§ 5.51-5.53, and Chapters 11, 21, 22 and 28 of the Public Utility Code. Through this Application, filed on February 26, 2009, Exelon Corporation (Exelon) seeks authorization for the transfer of ultimate control of NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC (collectively, NRG Energy Centers) to Exelon as a result of (1) an exchange offer by Exelon and a subsequent second-step merger acquiring all of the voting securities of the NRG Energy Centers' indirect parent NRG Energy, Inc. (NRG) or, alternatively, (2) a negotiated agreement between Exelon and Energy Centers.

Exelon formed Exelon Xchange, a wholly-owned subsidiary, for the purpose of acquiring the outstanding shares of NRG common stock with the goal of consummating a

subsequent merger of Exelon Xchange with and into NRG. Exelon Xchange has, as of February 25, 2009, acquired 125,403,103 shares of stock from NRG stockholders (subject to regulatory approval), representing over 51% of NRG's outstanding common shares.

As a preliminary matter, the OCA submits that the Application may not be ripe for Commission determination at this time. Currently, there is no final transaction with detailed terms and conditions of the merger or takeover, no final value of the transaction and no indication that the necessary conditions precedent to the transaction can or will be met. It is not clear how the Commission could make a finding as to whether or not such a transaction would provide substantial affirmative public benefits in Pennsylvania at this time.

If the Commission does, however, find the matter to be ripe, the OCA objects to the rapid consideration of the Application that the Exelon proposes—namely, that the Commission take final action on the Application at its April 30, 2009 public meeting. Applications of this magnitude typically take six or more months to resolve through a full hearing process, even under an expedited schedule. A prehearing conference in this proceeding has been scheduled for April 9, 2009, leaving—under the Exelon-proposed schedule—less than three weeks for Commission determination. The OCA also submits that this Application, if ripe, can be approved only if (1) it is found to be in the public interest; (2) it provides substantial affirmative benefits to ratepayers and the Commonwealth; and (3) it is in accordance with the Public Utility Code.

In support of its Protest, the OCA avers as follows:

1. The Protestant is Irwin A. Popowsky, Consumer Advocate, 555 Walnut Street, 5th Floor, Forum Place, Harrisburg, PA 17101-1923. Protestant's attorneys of record in

this matter are Tanya J. McCloskey, Senior Assistant Consumer Advocate and Jennedy S. Johnson, Assistant Consumer Advocate.

2. The OCA is authorized by law to represent the interests of utility ratepayers in all proceedings before the Commission. 71 P.S. §§ 309-1, *et seq.* The Consumer Advocate files this Protest to ensure the interests of ratepayers of NRG Energy Centers and PECO are protected in the proposed transactions.

3. The Commission must examine all aspects of the Application pursuant to Chapters 11, 21, 22 and 28 of the Public Utility Code.

4. Section 1102 of the Public Utility Code requires that the Commission issue a Certificate of Public Convenience as a legal prerequisite to offering service, abandoning service and certain property transfers by public utilities or their affiliated interests. 66 Pa. C.S. § 1102(a)(1)-(3).

5. The Code requires that a certificate shall only be granted upon findings that the granting of such certificate is “necessary or proper for the service, accommodation, convenience or safety of the public.” 66 Pa. C.S. § 1103(a). The Supreme Court has construed this section of the Code as requiring a finding that a proposed transaction will affirmatively benefit the public and, specifically, will “affirmatively promote the ‘service, accommodation, convenience or safety of the public’ in some substantial way.” City of York v. Pa. PUC, 295 A.2d 825, 828 (Pa. 1973); Popowsky v. Pa. PUC, 937 A.2d 1040 (Pa. 2007).

6. The Commission may impose conditions upon the issuance of a Certificate of Public Convenience. 66 Pa. C.S. § 1103(a). Section 1103(a) of the Code provides: “The Commission, in granting such a certificate, may impose such conditions as it may deem to be just

and reasonable.” The OCA submits that the Commission should consider the imposition of conditions to ensure that the public interest standard of the Code and applicable precedent is met.

7. Section 2102 of the Public Utility Code states that prior to any arrangement providing for the furnishing of certain services, e.g., management, supervisory, legal, etc., between a public utility and any affiliated interest, Commission approval must be obtained.

8. Section 2811 of the Public Utility Code requires that the Commission monitor the market for the supply and distribution of electricity to retail customers and take steps to prevent anticompetitive or discriminatory conduct and the unlawful exercise of market power. 66 Pa. C.S. § 2811(a)-(e).

9. Section 2811(e)(2) of the Code provides that in mergers or acquisitions of electricity suppliers, the Commission may impose “such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market.” 66 Pa. C.S. § 2811(e)(2). The OCA submits that the Commission should consider the imposition of such terms and conditions in this proceeding to ensure that the proposed transaction will not harm retail electricity markets.

10. Pursuant to Section 2210 of the Public Utility Code, enacted as a provision of the Natural Gas Choice and Competition Act, the Commission, in exercising its authority to consider mergers, acquisitions, consolidations or dispositions involving natural gas distribution, must consider (1) whether the proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail gas customers from obtaining the benefits of a properly functioning and effectively competitive retail natural gas market; and (2) the effect on the

employees of the natural gas distribution company. 66 Pa. C.S. § 2210(a). Section 2210(b) requires notice and an opportunity for open, public evidentiary hearings. Section 2210(b) also requires that the Commission only approve such transaction upon terms and conditions it finds necessary to preserve the benefits of a properly functioning and effectively competitive retail natural gas market.

11. Based upon the OCA's preliminary review of the Application, the OCA submits that the transaction described in the Application may not provide substantial, affirmative benefits to the public and may not affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. The OCA also submits that the Commission must resolve a number of important issues before the Commission may approve the transaction and issue Certificates of Public Convenience in this matter.

The OCA submits that the following areas, among others, require further Commission consideration:

a. Substantial Affirmative Public Benefits

The Application and accompanying Testimony do not demonstrate that the transaction will affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way. The request for merger approval should not be approved unless and until Exelon demonstrates and provides affirmative, substantial ratepayer benefits from this merger.

b. Market Power

Under Sections 2811 and 2210, the Commission must examine the effect of this merger on the competitive retail electric market and the competitive retail natural gas market. As to the electric market, the Applicants' own analysis shows market concentration in certain

wholesale markets that could have an impact upon the competitiveness of the wholesale markets. The Pennsylvania retail markets are, in turn, dependent upon these wholesale markets for their proper functioning. The Applicants have proposed a mitigation plan to address the potential for market power. The OCA submits that this mitigation plan must be scrutinized to determine if it appropriately mitigates any market power or market concentration that would affect the wholesale markets.

As to the retail natural gas market, the impact on the market should be further explored to assure that the merger does not negatively impact the retail market.

c. Costs to Achieve and Financing

Exelon plans to incur additional indebtedness to refinance and restructure NRG's debt. App. at 19. Additional information regarding the costs to achieve the transaction is necessary before the Commission can determine that the transaction meets Pennsylvania standards and that costs are reasonable. The Commission must also ensure that the financing vehicles and capital structure proposed by the Application are reasonable for ratemaking purposes, and will not result in harm to Pennsylvania ratepayers.

d. Impact on Rates

The Application asserts that the change in control will not have any effect on rates. App. at 17. It is likely, however, that a transaction such as this would ultimately affect customer rates. A reduced credit rating of Exelon and its subsidiaries, which occurred upon announcement of the transaction, could increase cost of capital to PECO electric and gas distribution ratepayers. In addition, if the market power mitigation plan is inadequate, there could be increased generation prices for customers dependent upon the PJM markets. The OCA

submits that the Commission must examine the impact of these and similar issues to ensure that the proposed transaction will not, in fact, affect rates.

e. Nuclear Risks

This merger will bring NRG's nuclear plants under one corporate control with PECO's nuclear plants. App. Exh. A at 29. This presents additional risks, such as the costs and uncertainties of unforeseen nuclear decommissioning and waste management costs, the costs and uncertainties of major outages, the potential significant liabilities that could result from increased safety requirements, and the significant costs of future capital additions. The Commission must ensure that the risks to ratepayers posed by the combination of nuclear plants under one corporate structure are not borne by Pennsylvania ratepayers.

12. The OCA reserves the right to raise additional issues as the case proceeds and further information is obtained from the Company.

WHEREFORE, the Office of Consumer Advocate respectfully requests that the Pennsylvania Public Utility Commission investigate and hold full hearings regarding the above-captioned Application. The OCA further requests that the Commission not approve this Application unless it finds that it is in the public interest by providing substantial, affirmative benefits to the public and is in accordance with the Public Utility Code. Additionally, the OCA requests that the Commission impose such terms and conditions upon the proposed transaction as are necessary to ensure that the Application meets the requirements set forth above.

Respectfully Submitted,



Tanya J. McCloskey

Senior Assistant Consumer Advocate

PA Attorney I.D. # 50044

E-Mail: TMcCloskey@paoca.org

Jennedy S. Johnson

Assistant Consumer Advocate

PA Attorney I.D. # 203098

E-Mail: JJohnson@paoca.org

Counsel for:

Irwin A. Popowsky

Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152

Dated: March 30, 2009

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PUBLIC STATEMENT OF THE
OFFICE OF CONSUMER ADVOCATE
PURSUANT TO 71 P.S. SECTION 309-4(e)

Act 161 of the Pennsylvania General Assembly, 71 P.S. Section 309-2, as enacted July 9, 1976, authorizes the Consumer Advocate to represent the interests of consumers before the Pennsylvania Public Utility Commission (PUC or Commission). In accordance with Act 161, and for the following reasons, the Consumer Advocate determined to file a Protest and Notice of Intervention and participate in proceedings before the Commission involving the proposed Application (Exelon Application) of Exelon Corporation, Exelon Xchange Corporation and PECO Energy Company (Exelon).

On February 26, 2009, Exelon filed the Application seeking authorization for the transfer of ultimate control of NRG Energy Centers to Exelon as a result of an exchange offer by Exelon and a subsequent second-step merger acquiring all of the voting securities of the NRG Energy Centers' indirect parent NRG Energy, Inc. or alternatively, a negotiated agreement between Exelon and Energy Centers.

The Consumer Advocate has filed this Protest with the Commission to ensure that the Petition is approved only if (1) it is found to be in the public interest; (2) it provides substantial affirmative benefits to ratepayers; (3) it does not adversely affect retail competition in Pennsylvania; and (4) it is in accordance with the Public Utility Code. Among the areas to be addressed by the OCA are: affirmative ratepayer benefits, costs to achieve, quality of service, impact on rates of the operating subsidiaries, market power and effects on competitive markets, and necessary ratepayer protections. The OCA will seek to ensure that affirmative benefits from the Petition are provided to Pennsylvania ratepayers and that all Pennsylvania ratepayers are properly protected.

CERTIFICATE OF SERVICE

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 Approval or Certificates Appropriate, :
Customary or Necessary under the Public :
Utility Code to Carry Out the Transactions :
Described in the Application :

I hereby certify that I have this day served a true copy of the foregoing documents, Protest and Public Statement of the Office of Consumer Advocate, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 30th day of March 2009.

SERVICE BY E-MAIL and INTEROFFICE MAIL

Richard A. Kanaskie, Esquire
Office of Trial Staff
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

SERVICE BY E-MAIL and FIRST CLASS MAIL

Paul R. Booney
Vice President and General Counsel
Exelon Business Services Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19103-8699
Counsel for: *Exelon Business Services Company*

Kevin J. McKeon, Esquire
Hawke McKeon & Sniscak LLP
100 North Tenth Street
P. O. Box 1778
Harrisburg, PA 17101
Counsel for: *Exelon Corporation, Exelon Xchange Corporation, PECO Energy Company*

David P. Zambito, Esquire
Post & Schell, P.C.
12th Floor
17 North Second Street
Harrisburg, PA 17101-1601
Counsel for: *NRG Energy Center Harrisburg
LLC and NRG Energy Center Pittsburgh, LLC*

David M. Kleppinger, Esquire
Charis Mincavage, Esquire
Barry A. Naum, Esquire
McNees Wallace & Nurick, LLC
P.O. Box 1166
100 Pine Street
Harrisburg, PA 17108-1166
Counsel for: *Philadelphia Industrial Energy
Users Group*

Robert C. Gerlach, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
51st Street
1735 Market Street
Philadelphia, PA 19103-7599
Counsel for: *Exelon Corporation, Exelon
Xchange Corporation, PECO Energy Company*

Steven C. Gray
Assistant Small Business Advocate
Office of Small Business Advocate
Commerce Building, Suite 1102
300 North Second Street
Harrisburg, PA 17101
Counsel for: *Office of Small Business Advocate*



Jennedy S. Johnson
Assistant Consumer Advocate
PA Attorney I.D. # 203098
E-Mail: jjohnson@paoca.org
Tanya J. McCloskey
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50044
E-Mail: TMcCloskey@paoca.org

Counsel for
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152

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