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File #: 3287/139323

April 3, 2009

VIA ELECTRONIC FILING AND HAND DELIVERY

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 Nos. A-2009-2093057, A-2009-2093058 and A-2009-2093059; **MOTION OF NRG ENERGY CENTER PITTSBURGH LLC AND NRG ENERGY CENTER HARRISBURG LLC FOR LEAVE TO FILE A BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS**

Dear Secretary McNulty:

Enclosed for filing with the Commission on behalf of NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC are an original and three (3) copies of their Motion for Leave to File a Brief in Support of Preliminary Objections in the above-captioned proceeding. Copies of this document have been served in accordance with the attached Certificate of Service.

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.

James J. McNulty, Secretary

April 3, 2009

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Sincerely,

A handwritten signature in black ink, appearing to read "David P. Zambito". The signature is fluid and cursive, with a long horizontal stroke 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
Per Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Motion of NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC for Leave to File a Brief in Support of 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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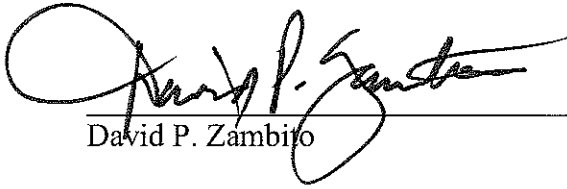
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DATED: April 3, 2009



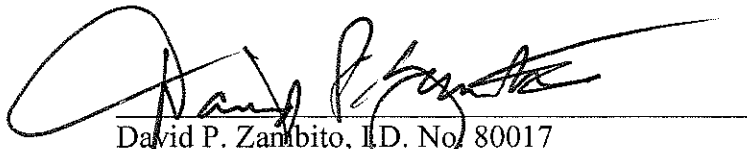
David P. Zambito

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Exelon Corporation, Exelon	:	
Xchange Corporation and PECO Energy	:	
Company for Certificates of Public	:	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	:	

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.103(c), YOU MAY ANSWER THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS OF THE DATE OF SERVICE HEREOF. YOUR ANSWER TO THE ENCLOSED MOTION 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.



David P. Zambito, I.D. No. 80017
Counsel for *NRG Energy Center Pittsburgh LLC*
and *NRG Energy Center Harrisburg LLC*

DATED: April 3, 2009

**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	:	

**MOTION OF NRG ENERGY CENTER PITTSBURGH LLC
AND NRG ENERGY CENTER HARRISBURG LLC FOR LEAVE
TO FILE A BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS**

TO ADMINISTRATIVE LAW JUDGE MARLANE R. CHESTNUT:

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 this Motion for leave to file a brief in support of the Preliminary Objections currently pending in the above-captioned matter, pursuant to the Regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code § 5.103. In support thereof, the NRG Companies aver as follows:

1. On February 26, 2009, Exelon Corporation, Exelon Xchange Corporation, and PECO Energy Company (hereinafter, collectively “Exelon”), filed the above-captioned Application, docketed at Docket Nos. A-2009-2093057, A-2009-2093058, and A-2009-2093059 (“Application”). Therein, Exelon unilaterally seeks Commission approval of the proposed

change in control of NRG Energy and its affiliates, including NRG Pittsburgh and NRG Harrisburg.

2. On March 18, 2009, the NRG Companies filed Preliminary Objections requesting that Exelon's Application be dismissed in its entirety as a matter of law for the following reasons:

- (a) Pursuant to the plain language of Section 1102(a)(3) of the Pennsylvania Public Utility Code, 66 Pa.C.S. § 1102(a)(3), 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.
- (b) 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.
- (c) The terms and conditions of the proposed transaction are unknown and speculative and, thus, Exelon's Application lacks sufficient specificity and is not ripe for adjudication. The Commission cannot provide meaningful review of a transaction that has not yet been defined.

3. On March 30, 2009, Exelon filed an Answer to the Preliminary Objections of the NRG Companies. Therein, Exelon acknowledges that the "Commission has never specifically addressed its jurisdiction to consider a unilateral application for transfer of control pursuant to an exchange offer or 'hostile takeover'...." See Exelon Answer to Preliminary Objections, at p. 10.

4. In the absence of a supporting brief, the NRG Companies have no meaningful opportunity to respond to the assertions raised in Exelon's Answer. As the parties that bear the burden of demonstrating "with certainty that the law will permit no recovery,"¹ the NRG

¹ *Stilp v. Cmwlth*, 910 A.2d 775, 781 (Pa. Cmwlth. 2006). In its Answer, Exelon asserts that the NRG Companies incorrectly stated the standard of review. See Exelon Answer to Preliminary Objections, at pp. 2 n.1, 7. While the NRG Companies stated the standard of review in the (Continued on next page...)

Companies should be permitted to file a brief in support of their objections and in response to Exelon's Answer.

5. The pending Preliminary Objections and Answer thereto raise substantial and novel legal issues. Indeed, the disposition of the issues will result in a statutory interpretation that will directly affect rights and requirements under Section 1102(a)(3) of the Code, and will ultimately impact future acquisitions of Pennsylvania public utilities.

6. Permitting the parties to file briefs in support of their respective positions will facilitate the Commission's review of the substantial and novel legal issues mentioned above.

7. Further, because the Preliminary Objections were filed (March 18, 2009) before protests and interventions were due in this matter (March 30, 2009), those protestants and intervenors, who represent a variety of perspectives, have not had the opportunity to opine on these important legal issues. Permitting briefs for the pending Preliminary Objections would allow the various protestants and intervenors to state their positions on the important legal issues raised in the Preliminary Objections.

8. Both the NRG Companies and Exelon have had an opportunity to state briefly their respective positions in the Preliminary Objections and Answer thereto. As a result, the NRG Companies request that all parties be given the opportunity, should they choose, to file initial briefs only. Stated otherwise, there is no need in this case for reply or sur-reply briefs.

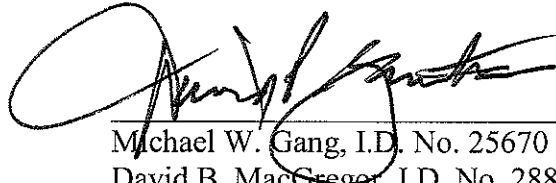
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positive, there is no fundamental disagreement as to the standard and the relative burdens of the parties thereunder.

9. In order to ensure a timely disposition of the Preliminary Objections, the NRG Companies request that all briefs be submitted no later than April 23, 2009, *i.e.*, two (2) weeks after the Prehearing Conference to be held in this matter on April 9, 2009.²

WHEREFORE, NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC respectfully request that Your Honor grant this Motion and establish a briefing schedule for the Preliminary Objections currently pending in the above-captioned matter.

Respectfully submitted,



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: April 3, 2009

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

² The NRG Companies have no objection to a waiver of Section 5.101(g) of the Commission's Rules of Practice and Procedure. *See* 52 Pa. Code § 5.101(g) (relating to decisions by the Presiding Officer).