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File #: 3287/139323

April 7, 2009

**VIA ELECTRONIC AND FIRST CLASS MAIL**

Honorable Marlane R. Chestnut  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
1302 Philadelphia State Office Building  
1400 West Spring Garden Street  
Philadelphia, PA 19130

**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; **PREHEARING MEMORANDUM**

Dear Judge Chestnut:

In compliance with Your Honor's March 18, 2009 Prehearing Order in the above-referenced proceeding, enclosed are two (2) copies of the Prehearing Memorandum of NRG Energy, Inc., NRG Energy Center Pittsburgh LLC, NRG Energy Center Harrisburg LLC, NRG Energy Center Paxton LLC, Conemaugh Power LLC, and Keystone Power LLC. Copies of the enclosed document have been served on all parties and petitioners to intervene as indicated. Please do not hesitate to contact me if you have any questions.

Sincerely,

David P. Zambito  
Counsel for

*NRG Energy, Inc., NRG Energy Center Pittsburgh LLC, NRG Energy Center Harrisburg LLC, NRG Energy Center Paxton LLC, Conemaugh Power LLC, and Keystone Power LLC*

Honorable Marlane R. Chestnut  
April 7, 2009  
Page 2

DPZ/kmg  
Enclosures

c: James J. McNulty, Secretary (electronic filing)  
Per Certificate of Service

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Prehearing Memorandum of NRG Energy, Inc., NRG Energy Center Pittsburgh LLC, NRG Energy Center Harrisburg LLC, NRG Energy Center Paxton LLC, Conemaugh Power LLC, and Keystone Power LLC 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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DATED: April 7, 2009



David P. Zambito

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Administrative Law Judge Marlane R. Chestnut

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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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**PREHEARING MEMORANDUM OF NRG ENERGY, INC.,  
NRG ENERGY CENTER PITTSBURGH LLC,  
NRG ENERGY CENTER HARRISBURG LLC,  
NRG ENERGY CENTER PAXTON LLC,  
CONEMAUGH POWER LLC, AND  
KEYSTONE POWER LLC**

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Protestants NRG Energy Inc. (“NRG Energy”), NRG Energy Center Pittsburgh LLC (“NRG Pittsburgh”), NRG Energy Center Harrisburg LLC (“NRG Harrisburg”), NRG Energy Center Paxton LLC (“NRG Paxton”), Conemaugh Power LLC (“NRG Conemaugh”), and Keystone Power LLC (“NRG Keystone”) (hereinafter, collectively “NRG”), by and through their attorneys, Post & Schell, P.C., hereby present their Prehearing Memorandum in the above-

captioned proceeding in compliance with Paragraph 6 of Your Honor's Prehearing Conference Order dated March 18, 2009.

## **I. HISTORY OF THE PROCEEDING**

On February 26, 2009, Exelon Corporation ("Exelon"), Exelon Xchange Corporation ("Exelon Xchange"), and PECO Energy Company ("PECO") (hereinafter, collectively "Exelon") filed the above-captioned unilateral Application. In it, Exelon requests Commission approval of the proposed change in control of NRG Pittsburgh and NRG Harrisburg, regulated Pennsylvania public utilities, through Exelon's acquisition of NRG Energy Common Stock or by expanding the NRG Board of Directors and engaging in a proxy solicitation to elect Exelon-nominated directors to NRG's Board.<sup>1</sup> In addition to acquiring NRG Pittsburgh and NRG Harrisburg, Exelon's proposed transaction would result in the acquisition of NRG's generation assets located in Pennsylvania: NRG Conemaugh; NRG Keystone; and, NRG Paxton.

NRG Pittsburgh and NRG Harrisburg are not applicants to the Application and are opposed to the proposed transaction.<sup>2</sup> Moreover, neither NRG Energy nor its public utility subsidiaries authorized the filing of the Application.

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<sup>1</sup> Exelon has proposed to engage in a proxy solicitation and thereby expand the NRG Board of Directors from 13 to 19, seeking to elect a total of nine nominees. Exelon has proposed electing four of its nominees to replace four of NRG's incumbent Board members currently up for re-election, including NRG's Chairman, and is also proposing to enlarge the NRG Board and seat five more of its nominees at NRG's Annual Meeting, which has not yet been set. The 19 directors could be comprised of nine current NRG directors; either four incumbent or four new directors; Exelon's expanded slate of five director nominees; and one vacancy.

<sup>2</sup> Although docket numbers (A-2009-2093058 and A-2009-2095059) relating to NRG Pittsburgh and NRG Harrisburg have been assigned to this proceeding by the Commission's InfoMAP electronic filing system, NRG Pittsburgh and NRG Harrisburg are not applicants and have not otherwise consented to Exelon's unilateral filing. According to the Commission's Secretary, the docket numbers were automatically assigned to NRG Pittsburgh and NRG Harrisburg because of technical limitations of the InfoMAP system.

On March 18, 2009, NRG Pittsburgh and NRG Harrisburg filed a Petition to Intervene and Preliminary Objections challenging the propriety and legality of the Application.<sup>3</sup> Therein, NRG Pittsburgh and NRG Harrisburg assert that the Application must be dismissed in its entirety for the following reasons: the Application is legally insufficient under the plain language of subsection (a) of Section 1102 the Code, 66 Pa. C.S. § 1102(a), because NRG Pittsburgh and NRG Harrisburg are not applicants and, therefore, the Commission lacks jurisdiction over the Application; the Exelon Applicants have no authority or standing to file on behalf of NRG; the Commission does not have the authority to substitute its judgment for the business judgment of NRG Energy's Board of Directors; Exelon's Application lacks sufficient specificity; and, the Application is not ripe for adjudication. Exelon filed an Answer to the Preliminary Objections and Petition to Intervene on March 30, 2008. Exelon does not oppose intervention by NRG Pittsburgh and NRG Harrisburg for the limited purpose of filing the Preliminary Objections; however, Exelon opposes the relief requested in the Preliminary Objections.

On March 18, 2009, the Philadelphia Area Industrial Energy Users Group ("PAIEUG") filed a Petition to Intervene. PAIEUG expresses concern, *inter alia*, about "the size of the entity that will result from this merger and the potential ability of the Applicants to unilaterally affect the competitive generation market." PAIEUG Petition to Intervene, p. 3, ¶ 8.

On March 19, 2009, the Commission's Office of Trial Staff ("OTS") filed a Notice of Appearance.

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<sup>3</sup> The Petition to Intervene was filed for the sole purpose of obtaining "Intervenor" status in order to file their Preliminary Objections in a timely manner. To the extent that Exelon's Application is permitted to go forward (which it should not be), NRG Pittsburgh and NRG Harrisburg respectfully request that their party status be changed from "Intervenors" to "Protestants."

On March 26, 2009, the Office of Small Business Advocate (“OSBA”) filed a Notice of Intervention and Protest. OSBA questions “whether the transaction would provide substantial benefits to the public.” OSBA Protest, at p. 5, ¶ 11. OSBA also noted that “[b]ased upon its initial review, the OSBA is not yet prepared to take a position on whether the Application is properly before the Commission for adjudication.” *Id.*, p. 2, n.1.

On March 30, 2009, the Office of Consumer Advocate (“OCA”) filed a Protest and Public Statement. In it, OCA expresses concern regarding: the Application’s failure to demonstrate substantial affirmative public benefits; market power; costs of financing; impact on rates; and nuclear risks. OCA Protest, pp. 5-7. OCA also submits that Exelon’s Application may not be ripe for Commission determination at this time because “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.” *Id.*, p. 2.

On March 30, 2009, the City of Harrisburg, Pennsylvania (“Harrisburg”) filed a Petition to Intervene. Harrisburg expresses concern, *inter alia*, that the transaction “will have an adverse impact upon the City’s economic development efforts.” Harrisburg Petition to Intervene, p. 4, ¶ 10(b).

On March 30, 2009, The Harrisburg Authority (“Harrisburg Authority”) filed a Petition to Intervene. The Authority expresses concern, *inter alia*, that the transaction may have an adverse effect upon the Authority, its Harrisburg Resource Recovery Facility (which sells steam to NRG Harrisburg), and the public interest. Harrisburg Authority Petition to Intervene, p. 3, ¶¶ 6-7.

On March 30, 2009, NRG filed a formal Protest to Exelon's unilateral Application for the following reasons, *inter alia*: (1) NRG has an interest that will be directly, immediately, and substantially affected by the Commission's disposition of the Application, to which NRG will be bound; (2) the terms and conditions of the proposed transaction are unknown and speculative; (3) the transaction described in Exelon's Application does not demonstrate a public benefit; (4) the transaction may adversely affect the rates and reliability of the public utility affiliates of NRG and Exelon due, among other things, to Exelon's cost of capital resulting from the financing of the transaction; (5) Exelon has failed to demonstrate that it possesses the necessary technical fitness to provide adequate, efficient, safe, and reasonable steam heating and chilled water service; (6) Exelon has made no commitment to retain and operate NRG Pittsburgh and NRG Harrisburg for any period of time and at a specified level of rates; and, (7) Exelon has not demonstrated that the transaction in its entirety is in the public interest, particularly with regard to Exelon's acquisition of NRG's Pennsylvania generation, which will result in the loss of a competitor to the dominant owner of Pennsylvania generation, *i.e.*, Exelon.

On April 2, 2009, the County of Dauphin, Pennsylvania ("Dauphin County") filed a Petition to Intervene. Nonetheless, by Petition dated April 3, 2009, Dauphin County petitioned to withdraw its Petition to Intervene.

On April 3, 2009, NRG Pittsburgh and NRG Harrisburg filed a Motion for Leave to Brief the Preliminary Objections. It was denied by email from Your Honor to the parties, dated April 6, 2009.

On April 6, 2009, Exelon filed a Motion for Admission *Pro Hac Vice* of Matthew W.S. Estes and Clifford (Mike) M. Naeve. Messrs. Estes and Naeve are attorneys with the Washington, D.C. office of Skadden, Arps, Slate, Meagher & Flom, LLP.

## II. PRELIMINARY MATTERS

As a preliminary matter, the Commission must first take final action on NRG's Preliminary Objections, filed on March 18, 2009.<sup>4</sup> NRG objects to the commencement of any procedures relating to the consideration of Exelon's Application on its merits. The Commission lacks jurisdiction under Section 1102(a) of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 1102(a), to consider a unilateral application for approval of a hostile takeover of a fit public utility. Likewise, the Commission should not consider an application that lacks sufficient specificity and is, therefore, not ripe because the terms of the transaction have yet to be defined.

NRG's participation in the process for the Commission's consideration of Exelon's Application on its merits does not constitute a waiver of NRG's objection to such consideration. Such participation would be for the purpose of protecting NRG's rights and interests.

Rulings are outstanding on the Petitions to Intervene of NRG Pittsburgh, NRG Harrisburg, PAIEUG, Harrisburg, and Harrisburg Authority. NRG has no objection to the admission of PAIEUG, Harrisburg, and Harrisburg Authority as intervenors.

A ruling is also outstanding as to the *pro hac vice* admission of Exelon counsel, Messrs. Estes and Naeve. NRG does not oppose their admission for purposes of this proceeding.

## III. ISSUES AND SUB-ISSUES

If this matter proceeds to consideration of Exelon's Application on its merits (which it should not), the following issues and sub-issues, *inter alia*, must be addressed:

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<sup>4</sup> The Motion for Leave to Brief Preliminary Objections of NRG Pittsburgh and NRG Harrisburg, filed April 3, 2009, was denied by email from Your Honor, dated April 6, 2009.

1. Has Exelon demonstrated that its proposed hostile takeover of NRG Pittsburgh and NRG Harrisburg will produce a substantial affirmative public benefit?

*NRG Position: No.*

- a. Has Exelon adequately explained its plan for financing the transaction?

*NRG Position: No.*

- b. Will Exelon's proposed transaction adversely affect the rates, operations, and reliability of NRG Pittsburgh and NRG Harrisburg due -- among other things -- to Exelon's cost of capital that would result from the financing of the transaction?

*NRG Position: Yes.*

- c. Will Exelon's proposed transaction adversely affect the rates, operations, and reliability of Exelon's public utility affiliate, PECO, due -- among other things -- to Exelon's cost of capital that would result from the financing of the transaction?

*NRG Position: Yes.*

- d. Has Exelon made an adequate commitment to retain and operate NRG Pittsburgh and NRG Harrisburg for a reasonable period of time?

*NRG Position: No.*

- e. Has Exelon provided adequate assurances to protect the benefits and pension funding of NRG's employees?

*NRG Position: No.*

- f. Has Exelon provided adequate assurances to customers regarding the future of their service from NRG Pittsburgh and NRG Harrisburg?

*NRG Position: No.*

- g. Has Exelon's hostile takeover attempt of Pennsylvania public utilities in good standing created uncertainty and thereby adversely impacted the public interest?

*NRG Position: Yes.*

2. Has Exelon demonstrated that it possesses the necessary technical fitness to provide adequate, efficient, safe, and reasonable steam heating and chilled water service?

*NRG Position: No.*

3. Will Exelon's acquisition of NRG's Pennsylvania-based generation adversely affect the wholesale power markets and retail competition?

*NRG Position: Yes.*

#### **IV. PROPOSED WITNESSES**

NRG intends to present the testimony of the following witnesses at hearing:

1. *Mr. Timothy W. Merrill, General Manager and Vice President of NRG Pittsburgh, 111 South Commons, Pittsburgh, PA 15212.* Mr. Merrill will testify as to the financial status, service, operations, workforce, community and charitable activities, customer base, and initiatives of NRG Pittsburgh. He will also offer testimony regarding the competitive nature of the district heating industry and the effect of Exelon's hostile takeover attempt on employee morale.
2. *Mr. Jan P. Sockel, General Manager and Vice President of NRG Harrisburg, Harrisburg Energy Center, 100 North 10th Street, Harrisburg, PA 17101.* Mr.

Socketel will testify as to the financial status, service, operations, workforce, community and charitable activities, customer base, and initiatives of NRG Harrisburg. He will also offer testimony regarding the competitive nature of the district heating industry and the effect of Exelon's hostile takeover attempt on employee morale. Further, Mr. Socketel will describe the relationship between NRG Harrisburg and NRG Paxton.

3. *Mr. A.J. Goulding, Analyst for London Economics International LLC, 717 Atlantic Avenue, Unit 1A, Boston, MA 02111.* Mr. Goulding will testify as to the effect of Exelon's proposed transaction on the cost of capital of NRG Pittsburgh, NRG Harrisburg, and PECO. He will also offer testimony on the inadequacy of Exelon's ring-fencing proposals.
4. *Ms. Julia Frayer, Managing Director of London Economics International LLC, 717 Atlantic Avenue, Unit 1A, Boston, MA 02111.* Ms. Frayer will testify as to the detrimental effect of Exelon's proposed transaction on Pennsylvania wholesale power markets, default service auctions, and retail competition.

NRG reserves the right to present additional witnesses as the case progresses. NRG will provide timely notice to Your Honor and the other parties of its intent to present additional witnesses.

## **V. PROPOSED SCHEDULE**

NRG opposes Exelon's request for an expedited schedule because Exelon has provided no justifiable basis for expedited treatment of its Application. First, Exelon made filings for regulatory approvals significantly sooner in other jurisdictions and the transaction was similarly

uncertain at such time.<sup>5</sup> Second, it now appears that Exelon's hostile bid to acquire NRG may continue beyond the end of 2009. See **Appendix A**, "Exelon Says NRG Buyout Attempt May Last Beyond 2009," Bloomberg.com (April 3, 2009). As such, NRG respectfully submits that there is no good reason to expedite the schedule and jeopardize the procedural due process rights of interested parties.

NRG respectfully submits the following procedural schedule for consideration by Your Honor:

July 17, 2009	Service of Direct Testimony by Non-Applicant Parties <sup>6</sup>
August 14, 2009	Service of Rebuttal Testimony by Applicants
August 28, 2009	Service of Surrebuttal Testimony by Non-Applicant Parties
September 8-11, 2009	Public Input Hearings
September 17-18, 2009	Evidentiary Hearings
October 9, 2009	Filing and Service of Main Briefs by All Parties
October 23, 2009	Filing and Service of Reply Briefs by All Parties
November 20, 2009	Issuance of Initial Decision

## **VI. DISCOVERY**

NRG reserves the right to object to any discovery processes or requests that treat NRG as an applicant in this proceeding. NRG is not an applicant; nor has its Board of Directors authorized it in any way to become an applicant or otherwise assist in the processing of Exelon's

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<sup>5</sup> For example, Exelon filed for Federal Energy Regulatory approval on December 18, 2008.

<sup>6</sup> NRG has provided for approximately three months following Your Honor's ruling on NRG's Preliminary Objections in order for Non-Applicant Parties to file their direct testimony. NRG believes that three months is appropriate because of the likelihood that exceptions will be filed to Your Honor's Initial Decision on the Preliminary Objections by one side or the other, and in order to provide a reasonable period for the parties to conduct meaningful discovery.

Application. Further, Exelon should not be permitted to use the Commission's discovery process in order to conduct due diligence upon NRG for purposes of the transaction.

NRG nonetheless recognizes its rights and obligations as a party to this proceeding under the discovery rules set forth in the Commission's Rules of Practice and Procedure at 52 Pa. Code § 5.321 *et seq.* NRG will attempt in good faith to resolve informally any discovery disputes prior to them being brought to Your Honor for resolution.

## **VII. SETTLEMENT DISCUSSIONS**

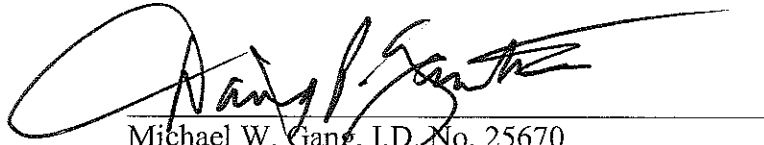
Because the Pennsylvania Public Utility Code does not permit a unilateral takeover of a fit public utility and because NRG's Board of Directors is opposed to Exelon's hostile takeover attempt, NRG cannot agree to any settlement in which the Commission would grant approval of a unilateral takeover. Nevertheless, NRG's Board of Directors and senior management are willing to engage in discussions with Exelon regarding a negotiated transaction. Unless and until the terms of a final transaction are set, the instant Application is not properly before the Commission.

## **VIII. PUBLIC INPUT HEARINGS**

NRG believes that public input hearings are warranted in this proceeding because of the potential impact of the proposed transaction and its financing upon the rates of customers of NRG Pittsburgh, NRG Harrisburg, and PECO. At least one public input hearing should be held in each of the three utilities' service territories. Public input hearings will also provide an opportunity for the Commission to hear public concerns regarding Exelon's electric generation market power. *See* 66 Pa. C.S. § 2811(e)(2)(regarding proposed mergers and consolidations by

electric utilities or electricity suppliers)(“Upon request for approval, the commission shall provide notice and an opportunity for open, public evidentiary hearings.”).

Respectfully submitted,



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DATED: April 7, 2009

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*Keystone Power LLC*

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By Katarzyna Klimasinska and Mark Chediak  
 April 3 (Bloomberg) -- [Exelon Corp.](#), the biggest U.S. utility owner by market value, said its hostile bid to acquire [NRG Energy Inc.](#) may continue beyond the end of this year.

Chicago-based Exelon continues to look at other energy assets, Chief Executive Officer [John Rowe](#) said today at a conference near Houston. "We keep looking, but meanwhile, we just keep working at this one," he said. "We think this is the right one at the right price. We are not changing the price."

NRG's agreement to purchase Reliant Energy Inc.'s Texas retail business may make the company more attractive to Exelon, Rowe said.

Exelon has offered 0.485 of a share for each NRG share, a bid repeatedly rejected by NRG as too low. As of Feb. 25, more than 51 percent of NRG shares were tendered in support of Exelon's offer.

To win approval of the \$5.3 billion takeover, which would create the largest U.S. power producer, Exelon has proposed expanding the NRG board to 19 members with the aim of winning election of nine candidates at this year's annual meeting.

**RESOURCES**

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Exelon rose \$1.72, or 3.7 percent, to \$48.60 in New York Stock Exchange composite trading. NRG rose 80 cents, or 4.3 percent, to \$19.40.


To contact the reporters on this story: [Katarzyna Klimasinska](#) in Houston at [kklimasinska@bloomberg.net](mailto:kklimasinska@bloomberg.net); [Mark Chediak](#) in San Francisco at [mchediak@bloomberg.net](mailto:mchediak@bloomberg.net).

Last Updated: April 3, 2009 16:18 EDT

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**APPENDIX A**

Stock Market Capitulation

Now's the Time When Fortunes Are Made... Here's  
How To Make Yours.

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