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April 14, 2009

VIA ELECTRONIC FILING

James McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
2nd Fl., 400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

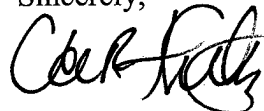
**Re: Application of Exelon Corporation, Exelon Xchange Corporation and PECO Energy Company for Certificates of Public Convenience Evidencing Approval of the Transfer of Ultimate Control of NRG Energy Center Pittsburgh, LLC and NRG Energy Center Harrisburg, LLC;
Docket Nos. A-2009-2093057; A-2009-2093058; A-2009-2093059**

Dear Secretary McNulty:

Enclosed is the original Answer of The Harrisburg Authority to the Preliminary Objections filed by the Applicants concerning the Authority's Petition for Intervention, which was electronically filed in the above matter. As evidenced by the attached Certificate of Service, the parties of record have been served in the manner indicated.

If you have any questions regarding this letter, please contact us at your convenience.

Sincerely,



Carl R. Shultz
For WolfBlock LLP

CRS/dmk
Enclosure

cc: Certificate of Service (w/enc)
Hon. Marlane R. Chestnut

HAR:89740.1/HAR366-247876

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the Authority's Answer to the Applicant's Preliminary Objections upon the persons listed below in the manner indicated and in accordance with the requirements of 52 Pa. Code Section 1.54.

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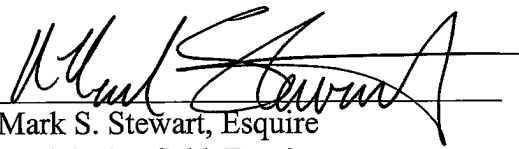
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Date: April 14, 2009



Mark S. Stewart, Esquire
Daniel Clearfield, Esquire
Carl R. Shultz, Esquire

**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 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 transactions described in the application.	:	Docket Nos.	A-2009-2093057
	:		A-2009-2093058
	:		A-2009-2093059

**ANSWER OF
THE HARRISBURG AUTHORITY
TO THE APPLICANTS' PRELIMINARY OBJECTIONS
TO THE PETITION TO INTERVENE OF
THE HARRISBURG AUTHORITY**

The Harrisburg Authority (“Authority”) hereby answers and responds to the preliminary objections (“Preliminary Objections”) filed by Exelon, Exelon Xchange, and PECO (collectively, the “Applicants”) to the Authority’s Petition for Intervention (“Petition”). The Authority has a direct, immediate and substantial interest in issues that are directly relevant to the question of whether the application will affirmatively advance the public interest – the key question in the proceeding.

The Authority has a 20 year steam purchase agreement with NRG Energy Center Harrisburg, LLC (“NRGH”), the merger “target” of the transaction proposed by the subject Application. This steam purchase agreement (excerpt attached) was reviewed and approved by the Pennsylvania Public Utility Commission (“PUC” or “Commission”) at the time it was executed, and is subject to the Commission’s continuing jurisdiction under the Public Utility Code at Docket No. U-00034965.

Contrary to the arguments of the Applicants, the Authority is not a some ordinary vendor of paper clips or office supplies. Rather, the Authority provides, on a wholesale level, a commodity (steam energy) that is used by NRGH to provide jurisdictional service to NRGH's customers. Therefore, how the contract may be affected by the proposed acquisition bears a fundamental and direct nexus to NRGH's ability to furnish and maintain adequate, safe, efficient and reliable service to the public as required by 66 Pa. C.S. § 1501. Indeed, the Applicants arguably should have included the steam purchase agreement in Application's listing of affected PUC Dockets.

The Commission's approval of the Application will include a determination, *inter alia*, that the proposed merger affirmatively impacts the public interest. As part of this determination, the Commission will be examining whether, following the transaction, the Applicants will employ adequate resources and investment to ensure that NRGH maintains adequate service quality to its customers in Pennsylvania. One of the resources available to NRGH is the steam purchase agreement. As such, the effect of the transaction on the steam purchase agreement has a fundamental and direct nexus to this proceeding. Moreover, labor unions, pipeline owners and commodity suppliers have been permitted intervention in prior merger (and other) proceedings involving the public interest. Like the Authority, these entities have standing because they provide services or commodities that directly impact jurisdictional service being provided.

The Applicants' post-acquisition plans for acquiring steam to meet its public utility obligation is directly relevant to the Authority, and the Authority has a direct interest in investigating these issues. Moreover, the PUC's final determination in the proceeding would impact the Authority's Commission-approved contractual and business relationships with

NRGH. Therefore, the Authority must be permitted to intervene so that it can protect and defend its direct interests in this proceeding.

In support of its Answer to the Applicants' Preliminary Objections, the Authority states as follows:

I. BACKGROUND

1 to 3. The Authority's steam purchase agreement with NRGH is subject to the Commission's jurisdiction under Section 507 of the Public Utility Code, 66 Pa. C.S. § 507.¹ It follows that the steam purchase agreement is also subject to the Commission's continuing jurisdiction under Section 508 of the Public Utility Code, 66 Pa. C.S. § 508. Thus, as a municipal contract, the Commission is charged with policing the operation of the steam purchase agreement to ensure that it is in the public interest.

The Authority denies the Applicants' characterizations and inferences that the relationships between the Authority and NRGH are ordinary or "garden variety." The Authority is a wholesale supplier of a commodity that is directly used by NRGH to provide jurisdictional service to NRGH's customers. Persons who provide commodities or services that directly impact jurisdictional service are routinely granted intervention in merger proceedings, despite the fact that they are not "customers" of the utilities involved. For example, (1) labor parties are routinely granted intervention because the services of their members impact the ability of utilities to furnish and maintain adequate, safe, efficient and reliable service to the public;² and (2) wholesale suppliers of natural gas have also been granted intervention in merger proceedings.³

¹ See *Agreement between the NRGH Energy Center and the Harrisburg Authority, PA* which was filed and approved at PUC Docket No. U-00034965.

² 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 Incorporated with and into Exelon Corporation, PA PUC Docket A-110550F0160, Initial*

Contrary to the Applicants' characterizations and inferences, the Authority's contractual and business relationships consist of more than past and future transactions. The steam purchase contract is an existing, and continuing, contractual relationship between the Authority and NRGH. The term of this contract extends for more than the next 15 years. The Authority also has other business commitments with NRGH including (but not limited to) commitments concerning the repair or replacement of the Authority's pipeline, which connects the Authority's facilities and NRGH's facilities. Thus, the Authority will be harmed by changes in these relationships that may result from the new ownership, or from the Commission's approval of the Application. Moreover, any such changes may also harm NRGH's ability to furnish and maintain adequate, safe, efficient and reliable service to the public.

II. LEGAL STANDARD

4 to 6. The Commission's regulation on eligibility to intervene is set forth at 52 Pa. Code § 5.72. In making intervention determinations, the Commission follows the standards articulated in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 296 (1975).

III. PRELIMINARY OBJECTIONS

A. Direct, Immediate, Substantial Interest

7 to 12. The Authority has stated a substantial, direct, immediate interest in this proceeding consistent with Commission precedent and *William Penn Parking Garage*:

Decision of ALJ Chestnut issued April 25, 2005 (granting intervention of Locals 614 and 777 of the International Brotherhood of Electrical Workers and Frank Kuders) adopted by Commission at 2005 WL 1959191 (Order entered July 18, 2005).

³ See, e.g., *Joint application of Equitable Resources, Inc., and The Peoples Natural Gas Company, d/b/a Dominion Peoples*, PA PUC Docket No. A 122250F5000 (Order entered April 13, 2007) (wherein the parties included the Utility Workers Union of America Local 69 Division 1, Amerada Hess Corporation, Constellation NewEnergy-Gas Division, LLC, the National Energy Marketers Association, and the Independent Oil and Gas Association).

- (a) The direct contractual and business relationships between the Authority and NRGH for wholesale steam satisfy the requirement of a substantial interest. A “substantial” interest means there must be some discernible adverse effect to some interest other than the general interest in having others comply with the law. *See William Penn Parking Garage*, 464 Pa. at 195, 346 A.2d at 282.

Simply put, the Commission approved contract between the Authority and NRGH is a discernible interest that goes well beyond having others comply with the law. *Cf. Re: Aqua Pennsylvania, Inc.*, 2006 WL 1083288 (Pa. PUC 2006) wherein the Commission found that the municipal entities did not have a substantial interest because their only concern was compliance with the law.

- (b) The contractual and business relationships between the Authority and NRGH satisfy the requirement of a direct interest. The requirement that an interest be “direct” means that a person claiming to be aggrieved must show causation of the harm by the matter of which he or she complains.

Unlike Mr. Epstein (referenced in the *Joint Application of PECO Energy Company and Public Service Electric and Gas Company, supra*) and the municipal entities (referenced in *In re: Aqua, supra*), the Authority can point to the potential disruption of existing contractual and business relationships (e.g., the steam purchase agreement) that will be adversely affected by the proposed transaction.

- (c) The contractual and business relationships between the Authority and NRGH satisfy the requirement of a immediate interest. An “immediate” interest is something more than a “remote consequence” and centers on the causal nexus and proximity between the action complained of and the injury to the party challenging it. *William Penn*, 464 A.2d at 197, 346 A.2d at 283.

The Commission’s approval of the Application will impact the post-merger operations of NRGH, including (but not limited to) NRGH’s contractual and business relationships with the Authority. Moreover, the relationships between the Authority and NRGH bear a fundamental nexus to NRGH’s ability to furnish and maintain adequate, safe, efficient and reliable service to the public because the Authority is providing, on a wholesale level, a commodity that is used by NRGH to provide jurisdictional service.

As a party to the steam purchase agreement, and a body corporate and politic of the Commonwealth,⁴ the Authority has an unique position to protect both its and the public interest.

B. Public Interest

13 to 14. The Authority submits that the scope of a merger proceeding is broad. A merger proceeding includes (a) mechanisms for ensuring that the proposed transaction affirmatively advances the public interest as required by *City of York*,⁵ and (b) commitments that

⁴ 53 Pa. C.S.A. § 5607(a). An authority is not the creature, agent or representative of the municipality, but is an independent agency of the Commonwealth. *See, e.g., Commonwealth v. Erie Metropolitan Transit Authority*, 281 A.2d 882, 444 Pa. 345, at 348 (1971).

⁵ *City of York v. Pa. PUC*, 449 Pa. 136, 139, 295 A.2d 825, 828 (1972).

the post-merger entity will be able to furnish and maintain adequate, safe, efficient and reliable service to the public as required by 66 Pa. C.S. § 1501. In light of these broad standards, the Commission may require participants in a merger to make commitments to employ adequate resources and investment to ensure that NRGH maintains adequate service quality to its customers in Pennsylvania.⁶

The issues raised by the Authority are within the scope this proceeding, and within the Commission's jurisdiction.⁷ The Authority's contractual and business relationships with NRGH relate directly to the jurisdictional service being provided by NRGH, through a contract that is subject to the Commission's jurisdiction.⁸ In other words, as both a pre-transaction and post-transaction obligation of NRGH, the steam purchase agreement is one resource available to NRGH to provide jurisdictional service. Thus, the stream purchase agreement is linked to the public interest and the general-well being of NRGH's customers.⁹ Accordingly, the Commission

⁶ See *Joint Application of The United Telephone Company of Pennsylvania d/b/a Sprint, and Sprint Long Distance, Inc.*, Docket Nos. A-313200F0007 and A-311379F0002 (Final Opinion and Order entered April 6, 2006) concerning the company's commitment to employ adequate resources and investment to ensure that the merged entity maintains adequate service quality to its retail customers in Pennsylvania. See also *Joint Application of the Merger of GPU et al.*, Docket No. A-110300F0095 et al. (June 20, 2001).

⁷ In comparison, Mr. Epstein (referenced in the *Joint Application of PECO Energy Company and Public Service Electric and Gas Company, supra*) raised issues related (a) to the generation of electricity as a public utility function, which ceased to be within the Commission's jurisdiction and (b) to the operation of nuclear generating facilities, which were within the exclusive jurisdiction of the Nuclear Regulatory Commission.

⁸ 66 Pa. C.S. §§ 507, 508, 1501.

⁹ See 66 Pa. C.S. §§ 507, 508, 1501. Contrary to the Applicants' assertion, utilities do not have complete and absolute discretion in using vendor-contractors to provide jurisdictional service. Such decisions must ensure that the utility maintains adequate service quality to its customers. See *Service Employees International Union v. The Peoples Natural Gas Company*, 98 Pa. PUC 509, 2003 WL 23338631 (2003) (finding no prohibition on the utility's use of outside contractors to perform the meter reading

(as it deems necessary) may require commitments from the Applicants related to the steam purchase agreement: (a) to ensure that proposed transaction is in the public interest; and (b) to employ adequate resources and investment to ensure that NRGH maintains adequate service quality to its customers in Pennsylvania.

To avoid this logical conclusion, the Applicants state that: “Nothing in the Application suggests that Exelon plans to alter whatever relationship NRGH presently has with the Authority.” Applicants’ Preliminary Objections, at ¶ 12. However, this lack of any “suggestion” provides no level of comfort or confidence to the Authority that its contractual and business relationships will not be adversely impacted by the Commission’s approval of the Application.¹⁰ Moreover, as part of their Application, the Applicants have the burden of proving their claim that the Authority’s existing quality of service will not be affected. The Authority believes that its contract is a key element of NRGH’s long term ability to provide adequate service to customers. The Authority’s interest in testing the Applicant’s assertions that overall service quality will not be adversely affected coincides with a key issue in the proceeding. Neither the Authority nor the Commission is not required to accept the Applicants’ mere promise.¹¹ Instead, the Authority must be given the opportunity to discover (and potentially challenge) the Applicants’ support for their claims.

function, provided there is no showing that the utility has provided inadequate or unsafe service).

¹⁰ See *Joint Application of SBC Communications, Inc., and AT&T Corp.*, at Docket No. A-311163 et al (October 6, 2005); *In Re: Informal Investigation of AT&T, Inc.*, at Docket I-00060111, Order entered May 19, 2006, concerning AT&T’s compliance with the staffing commitments made in its application.

¹¹ It should be noted that Application also states that it will not impact customers. See Application, p. 17-18 at ¶ 6B(1). But, it is not expected that customers or the statutory advocates accept that assertion at face value.

Further, during the course of this proceeding, actions may be taken by one or more parties that would impact the Authority's existing and ongoing contractual and business relationships with NRGH. It is neither fair nor reasonable to create a situation where the Applicants, NRGH or other parties to this proceeding could suggest changes (as part of a settlement or otherwise) to the Application (or the transaction) that could impact the Authority's Commission-approved contractual and business relationships with NRGH without giving the Authority the full and fair opportunity to protect and defend itself and its relationships.¹²

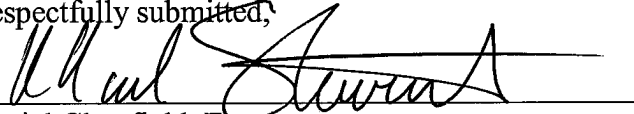
For all of these reasons, the Authority must be permitted to intervene to protect and defend its interests in this proceeding.

IV. CONCLUSION

WHEREFORE, the Authority respectfully requests that the Commission deny the Applicants' Preliminary Objections to the Authority's Petition and grant the Authority's intervention in this proceeding.

¹² If the change is ordered pursuant to Applicant's obligation to provide adequate and reasonable serve there may not be an adequate non-PUC remedy. Or, the availability of a civil complaint proceeding may not be sufficient to undo any harm to Authority's interests. In fact, the Authority can envision the situation where the Applicants' would claim that a subsequent complaint proceeding or civil action filed by the Authority would be precluded because the Authority failed to raise issues in this proceeding.

Respectfully submitted,



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Date: April 14, 2009

Attorneys for The Harrisburg Authority

ATTACHMENT

PENNSYLVANIA PUBLIC UTILITY COMMISSION

CERTIFICATE OF FILING

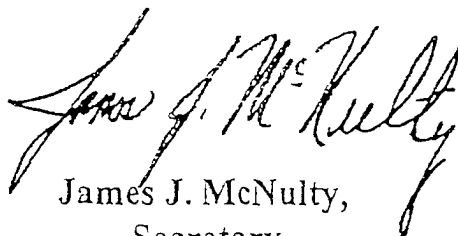
Agreement dated July 23 2003 between NRG Energy Center Harrisburg Inc and the Harrisburg Authority relative with a steam purchase agreement, in which NRG Harrisburg desires to purchase steam from the Authority for the purpose of reducing NRG Harrisburg's fuel costs and, in turn, passing all such fuel cost savings directly to downtown steam customers through NRG Harrisburg's steam cost rate.

U-00034965

BY THE COMMISSION:

AND NOW, August 20, 2003, the Public Utility Commission certifies that the above, captioned contract or indenture dated July 23, 2003 has been on file with the Commission since July 21, 2003, in accordance with Section 507 of the Public Utility Code, 66 Pa. C.S. §507.

PENNSYLVANIA PUBLIC UTILITY COMMISSION


James J. McNulty,
Secretary

15 A

1

STEAM PURCHASE AGREEMENT

BETWEEN

THE HARRISBURG AUTHORITY

AND

NRG ENERGY CENTER HARRISBURG INC.

NRG Agreement

AGREEMENT

This Agreement is made this 23rd day of July, 2003, between The Harrisburg Authority ("Authority"), a municipal authority organized and existing under the laws of the Commonwealth of Pennsylvania, with offices at One Keystone Plaza, Suite 104, Harrisburg, PA 17101, and NRG Energy Center Harrisburg Inc. ("NRG Harrisburg"), a corporation, organized and existing under the laws of Delaware, with its principal place of business at 100 North Tenth Street, Harrisburg, PA 17101 (collectively, the "Parties").

WHEREAS, NRG Harrisburg owns and operates the Bruce Mangione Steam Plant (the "Mangione Plant") located in Harrisburg, PA, which plant produces steam for the purpose of supplying steam to NRG Harrisburg customers; and

WHEREAS, NRG Harrisburg is a wholly-owned subsidiary of NRG Thermal LLC, which is a wholly-owned subsidiary of NRG Energy, Inc.; and

WHEREAS, while NRG Energy, Inc. is under the jurisdiction of the federal bankruptcy courts, NRG Thermal LLC and NRG Harrisburg are not and continue to operate in a profitable manner and are free, and willing and able to enter into long-term contracts for the purchase of steam energy; and

WHEREAS, the Harrisburg Materials, Energy and Resource Recovery Facility (the "Incinerator") is owned by the Authority, which facility processes municipal waste and produces steam or electrical energy; and

WHEREAS, pursuant to a December 1, 1993 Management Agreement, the Incinerator is operated and maintained by the City of Harrisburg (the "City"); and

XI. RECORDS AND INSPECTION

The Authority and NRG Harrisburg shall retain all financial and operating records and supporting data (including, but not limited to steam additive activity), related to this Agreement for each calendar month for a period ending two (2) years from the end of each such calendar month. The Authority and NRG Harrisburg shall have the right to inspect and audit such cost records and supporting data during this period of retention during normal business hours at the respective Party's normal place of business.

XII. ASSIGNMENT

This Agreement shall be assignable by a Party hereto only upon receipt, by that Party, of the prior written consent of the non-assigning Party, which consent shall not be unreasonably withheld.

XIII. PUBLIC UTILITY COMMISSION APPROVAL

The Parties agree that the contract is conditioned on the approval of the Commission pursuant to Section 507 of the Public Utility Code ("Code"), 66 Pa. C.S. §507. NRG Harrisburg will file for such approval within ten (10) days of the date of execution of this Agreement.

XIV. EFFECTIVE DATE

The effective date of this Agreement shall be January 1, 2006.

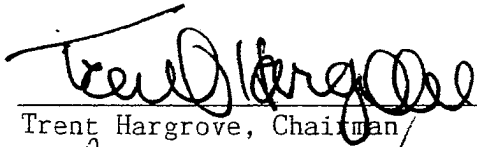
IN WITNESS WHEREOF, the Parties hereto have set their hands and seals as of the date indicated on the first page of this Agreement.

APPROVED AS TO FORM AND
LEGALITY

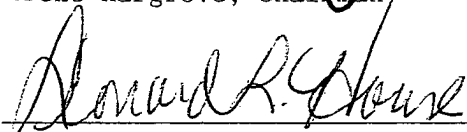


[NAME] J. Bruce Walter, Esquire
Authority Solicitor

THE HARRISBURG AUTHORITY



Trent Hargrove, Chairman



Leonard L. House, Secretary

NRG ENERGY CENTER HARRISBURG
INC.

