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File #: 3288/138939

**VIA HAND DELIVERY AND ELECTRONIC FILING**

May 7, 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 Nos. A-2009-2093057, A-2009-2093058 and A-2009-2093059; **PETITION FOR INTERLOCUTORY REVIEW AND ANSWER TO A MATERIAL QUESTION 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 are an original and three (3) copies of their Petition for Interlocutory Review and Answer to a Material Question.

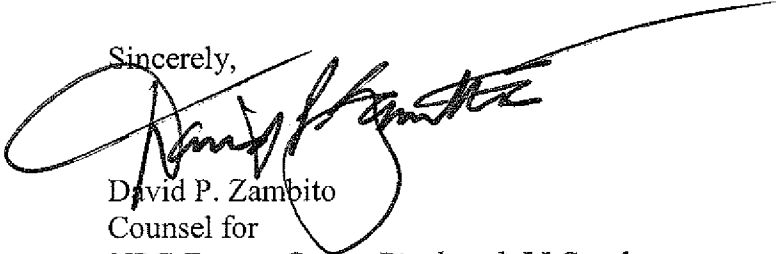
Copies are being served in accordance with the attached Certificate of Service. Please date-stamp my file copy and return it with our messenger. If you have any questions regarding this filing, please direct them to me.

James J. McNulty, Secretary

May 7, 2009

Page 2

Sincerely,

A handwritten signature in black ink, appearing to read "David P. Zambito". The signature is written in a cursive style with a long, sweeping horizontal line extending to the right across the top of the signature block.

David P. Zambito

Counsel for

*NRG Energy Center Pittsburgh LLC and*

*NRG Energy Center Harrisburg LLC*

DPZ/kmg

Enclosures

c: Honorable Marlane R. Chestnut

Kathy Niesborella

Bodhan R. Pankiw, Esquire

Robert F. Young, Esquire

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 Convenience Evidencing :  
Approval of the Transfer of Ultimate Control of : Docket Nos. A-2009-2093057  
NRG Energy Center Pittsburgh LLC and NRG : A-2009-2093058  
Energy 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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**NOTICE TO PLEAD**

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TO PARTIES:

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE §5.302(b), YOU MAY SUBMIT A BRIEF DIRECTED TO THE COMMISSION SUPPORTING OR OPPOSING THIS PETITION WITHIN TEN (10) DAYS OF SERVICE OF THIS PETITION. THE BRIEF MAY NOT EXCEED 15 PAGES AND MUST BE FILED WITH THE COMMISSION'S SECRETARY:

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street – Filing Room  
PO Box 3265  
Harrisburg, PA 17105-3265

COPIES SHOULD ALSO BE SERVED IN ACCORDANCE WITH THE OFFICIAL SERVICE LIST IN THIS MATTER.



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DATED: May 7, 2009

## CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing Petition for Interlocutory Review and Answer to a Material Question by NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC ("NRG Companies"), 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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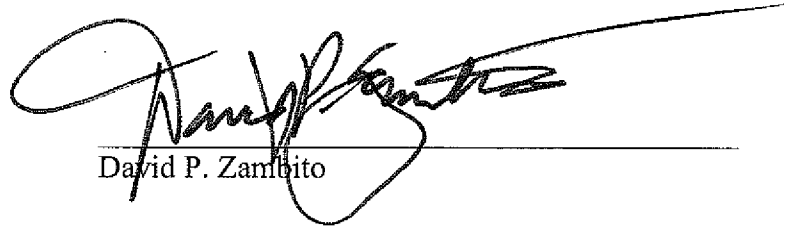
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DATED: May 7, 2009

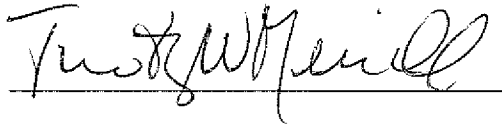


David P. Zambito

## VERIFICATION

I, Timothy W. Merrill, General Manager and Vice President of NRG Energy Center Pittsburgh 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: 5/07/09


A handwritten signature in black ink, appearing to read "Timothy W. Merrill", written over a horizontal line.

Timothy W. Merrill  
General Manager and Vice President  
NRG Energy Center Pittsburgh LLC  
111 South Commons  
Pittsburgh, PA 15212

**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: 5/7/09

  
\_\_\_\_\_  
Jan P. Sockel, General Manager and Vice President  
NRG Energy Harrisburg LLC  
Harrisburg Energy Center  
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Harrisburg, PA 17105-3357

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Exelon Corporation, Exelon Xchange Corporation and : Docket Nos.  
PECO Energy Company for Certificates of Public Convenience : A-2009-2093057  
Evidencing Approval of the Transfer of Ultimate Control of NRG Energy : A-2009-2093058  
Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC, : A-2009-2093059  
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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**PETITION FOR INTERLOCUTORY REVIEW AND  
ANSWER TO A MATERIAL QUESTION**

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NRG Energy Center Pittsburgh LLC (“NRG Pittsburgh”) and NRG Energy Center Harrisburg LLC (“NRG Harrisburg”) (collectively “NRG Companies”), by their attorneys, Post & Schell, P.C., file this Petition for Interlocutory Review and Answer to a Material Question, pursuant to the Regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code § 5.302. In support thereof, the NRG Companies aver as follows:

**I. BACKGROUND**

1. On February 26, 2009, Exelon Corporation, Exelon Xchange Corporation, and PECO Energy Company (collectively “Exelon”), filed the above-captioned Application, seeking Commission approval of the proposed change in control of the NRG Companies through Exelon’s acquisition of NRG Energy, Inc. (“NRG Energy”) Common Stock or by engaging in a proxy solicitation to expand the NRG Energy Board of Directors and elect Exelon-nominated directors to the expanded Board. On March 18, 2009, the NRG Companies filed Preliminary Objections requesting that the Application be dismissed in its entirety, which were denied by Administrative Law Judge Marlane R. Chestnut by Order dated April 24, 2009.

## II. MATERIAL QUESTION

2. Whether Exelon's unilateral application for approval of a hostile takeover of Pennsylvania public utilities should be dismissed without prejudice to refile, or alternatively held in abeyance, because the final terms and conditions of the proposed transaction are unknown and speculative, and the application therefore is not ripe for review.<sup>1</sup>

Suggested answer: *in the affirmative.*

## III. COMPELLING REASONS FOR INTERLOCUTORY REVIEW

3. The Commission cannot reasonably conclude that there is a definitive transaction that can be meaningfully evaluated as required by the Public Utility Code. The terms and conditions of the transaction are, at best, speculative. There are multiple conditions precedent that must occur before Exelon would be able to effectuate the proposed transaction, including, *inter alia*: approval by Exelon's shareholders, which has not occurred; Exelon's obtaining the necessary financing, which has not been obtained; various conditions precedent (other than regulatory approvals) related to the stock tender offer, which offer has not yet expired and could be again extended;<sup>2</sup> and, satisfaction of the requirements of Section 203 of the Delaware General Corporation Law, DEL. CODE ANN. tit. 8, § 203 that effectively require a negotiated deal in order for Exelon to consummate any transaction.<sup>3</sup> The final value of the common stock exchange and

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<sup>1</sup> In their Preliminary Objections, the NRG Companies also raised the issue of whether the Commission lacks jurisdiction over Exelon's Application because Exelon has no authority or standing under the plain language of 66 Pa.C.S. § 1102(a) to file a unilateral application for the acquisition of the NRG Companies, both public utilities in good standing. The NRG Companies' filing of this petition on the issue of ripeness does not constitute an affirmation, concession, or waiver of the issue of the Commission's jurisdiction over Exelon's unilateral application.

<sup>2</sup> As of February 25, 2009, only 51% of NRG Energy's outstanding shares had been tendered, subject to the terms and conditions of the exchange offer. Exelon Application at p. 12. Exelon has not and cannot accept these shares at this time, and cannot vote the shares. Importantly, the tendered shares can be withdrawn. On April 22, 2009, Judge John G. Koeltl of the United States District Court, Southern District of New York, rejected Exelon's motion to dismiss a complaint filed by NRG Energy pursuant to Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e). In the complaint, NRG Energy asserts that Exelon has made false and misleading statements in connection with its tender offer because Exelon has no good faith intention of actually closing the tender offer but instead seeks a negotiated transaction.

<sup>3</sup> See Delaware General Corporation Law, § 203, which provides that an "interested stockholder" -- defined as a stockholder who holds more than 15% of a company's stock -- cannot undertake a wide variety of transactions with the company, including mergers and other business combination transactions, for a period of three years from the date that the stockholder became an interested stockholder unless (1) the interested stockholder acquires more than 85% of the stock in the same transaction in which it becomes an interested stockholder, (2) the transaction was approved by the company's board before the stockholder became an interested stockholder, or (3) the transaction is approved by 2/3 of the outstanding shares of the company (other than those held by the interested stockholder) after the threshold is crossed.

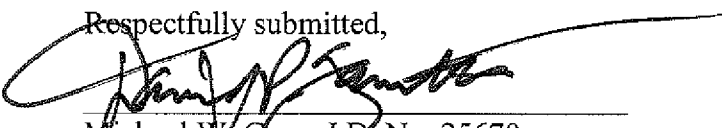
related financings likewise are still uncertain and will inevitably affect the capital costs of the regulated utilities (*i.e.*, the NRG Companies as well as PECO) and their ratepayers. Evaluation of Exelon's capital costs associated with the transaction are likewise essential to assessing, *inter alia*: maintenance and improvement of reliability; nuclear decommissioning funding; and, pension funding. There is effectively no transaction for the Commission to evaluate unless and until there is a negotiated deal.

4. Until the terms and conditions of the proposed transaction are finalized and known, the parties are unfairly prejudiced by being forced to litigate a transaction -- the terms, and conditions, of which are unknown. Further, a transaction ultimately may never occur.<sup>4</sup> If the Application is not dismissed or held in abeyance, the parties will be forced to prepare and present their case without an opportunity to address the definitive transaction or, alternatively, be required to re-litigate based on material changes of fact and broadened or different issues.

#### **IV. REQUEST FOR RELIEF**

WHEREFORE, the NRG Companies respectfully request that the Commission answer the material question in the affirmative and direct that Exelon's Application be dismissed without prejudice to refile or held in abeyance until either an agreement has been negotiated or appropriate action by NRG Energy's Board of Directors has been taken to approve the transaction.

Respectfully submitted,

  
\_\_\_\_\_  
Michael W. Gang, I.D. No. 25670  
David P. Zambito, I.D. No. 80017  
Post & Schell, P.C.  
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DATED: May 7, 2009

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

<sup>4</sup> Exelon's conditioned tender offer is significantly different than an application of an existing owner to increase its holdings to 20% or more in an exchange transaction, because of the uncertainty and lack of clarity regarding material terms -- as well as the impact on future operations.