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VIA HAND DELIVERY AND ELECTRONIC FILING

May 18, 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; **BRIEF IN SUPPORT OF 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 nine (9) copies of their Brief in Support of 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 18, 2009
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Sincerely,

A handwritten signature in black ink, appearing to read "David P. Zambito", with a long horizontal flourish 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 James H. Cawley, Chairman
Honorable Tyrone Christy, Vice-Chairman
Honorable Kim Pizzingrilli
Honorable Robert F. Powelson
Honorable Wayne E. Gardner
Honorable Marlane R. Chestnut
Kathy Niesborella
Bodhan R. Pankiw, Esquire
Robert F. Young, Esquire
Cheryl Walker Davis
Per Certificate of Service

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 Brief in Support of Petition for Interlocutory Review and Answer to a Material Question by NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC (collectively "NRG Companies"), upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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DATED: May 18, 2009



David P. Zambito

**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 :

**BRIEF IN SUPPORT OF PETITION FOR INTERLOCUTORY
REVIEW AND ANSWER TO A MATERIAL QUESTION**

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., hereby file this Brief in Support of their Petition for Interlocutory Review and Answer to a Material Question (“Petition”), pursuant to the Regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code § 5.302. The Petition requests that the Commission dismiss without prejudice or hold in abeyance the above-captioned Application filed by Exelon Corporation (“Application”), because the basic terms, conditions, and form of the proposed transaction are unknown and speculative, and the Application therefore is not ripe for review. For the reasons that follow, the Petition should be granted.

I. BACKGROUND

On February 26, 2009, Exelon filed the above-captioned Application, seeking Commission approval of the proposed change in control of NRG Energy Inc. (“NRG Energy”) and its affiliates, including NRG Pittsburgh and NRG Harrisburg. However, as shown in Exelon’s SEC Form S-4 attached Exhibit A to the Application, there are multiple conditions precedent that must occur before Exelon would be able to effectuate the proposed transaction

and, thus, it is uncertain whether Exelon will even pursue the proposed transaction to conclusion. Exelon's Application is not ripe for review because the basic terms, conditions, and form of the proposed transaction are unknown and speculative.

As set forth in the Form S-4, the exchange offer is the first step in Exelon's plan to acquire control of NRG Energy and acquire all of the issued and outstanding shares of NRG Energy common stock.¹ See Exelon Application, Ex. A at p. i. Exelon indicates its intent to seek to have NRG Energy consummate a second-step merger of Exelon Xchange, or other wholly-owned subsidiary of Exelon, within and into NRG Energy after completion of the acquisition. See Exelon Application, Ex. A at p. i. However, Exelon itself recognizes that the structure will change if it enters into a negotiated agreement -- which, as explained below, it would like to do and will have to do as a practical matter.²

The initial expiration date of the tender offer was January 6, 2009, at 5:00 p.m. However, the tender offer was extended to February 26, 2009 and then again to June 26, 2009. Exelon has reserved the right to extend the tender offer again at its sole discretion -- and likely will have to do so if its has not achieved a negotiated agreement. See Exelon Application, at pp. 13, 37-38.

¹ In its Application, Exelon proposed, through a proxy solicitation, to expand NRG Energy's Board of Directors from 12 to 19, seeking to elect a total of nine of Exelon's nominees. Exelon proposed electing four of its nominees to replace four of NRG Energy's incumbent Board members currently up for re-election, including NRG Energy's Chairman, and also proposed to enlarge the NRG Energy Board and seat five more of its nominees at NRG Energy's Annual Meeting. The 19 directors would have thereby been comprised of nine current NRG Energy Directors; either four incumbent or four new directors; Exelon's expanded slate of five director nominees; and two newly created seats. See Exelon Application Ex. A at p. 48. NRG Energy has seated two directors in two newly created seats.

² See, e.g., Exelon Application, at p. 14: "If Exelon is successful in reaching a negotiated agreement with NRG, Exelon may decide not to acquire NRG shares pursuant to the exchange offer and subsequent second step-merger structure described above, and instead could use an alternative method for structuring the Transaction. NRG might merge with a wholly owned subsidiary of Exelon, Exelon Ventures or Exelon Generation, in a transaction similar to the second-step merger described above. Alternatively, Exelon may pursue a structure whereby Exelon is merged into NRG, with NRG as the surviving corporation, and NRG then being renamed as Exelon Corporation, followed immediately by the election of existing Exelon directors and officers to corresponding positions in the new Exelon Corporation."

On March 18, 2009, the NRG Companies filed Preliminary Objections requesting that the Application be dismissed in its entirety for the following reasons: (1) Exelon's Application is legally insufficient because the plain language of Section 1102(a)(3) of the Code, 66 Pa.C.S. § 1102(a)(3), requires a transferor Pennsylvania public utility to obtain a certificate of public convenience from the Commission prior to transferring, by any method or device whatsoever, any property used or useful in the public service; and (2) Exelon's Application lacks sufficient specificity and is not ripe for adjudication because the terms and conditions of the transaction proposed by Exelon are speculative and, as a result, there is no way to determine if the proposed transaction will provide a substantial public benefit. On March 30, 2009, the NRG Companies filed a Protest to the Application together with supporting exhibits. On April 24, 2009, Administrative Law Judge Marlane R. Chestnut issued an order denying the NRG Companies' Preliminary Objections ("PO Order").

On May 7, 2009, the NRG Companies filed, pursuant to 52 Pa. Code § 5.302, the pending Petition. The NRG Companies herein file this Brief in Support of the Petition and, for the reasons explained below, request that Exelon's application for approval of a hostile takeover of the NRG Companies be dismissed without prejudice to refile, or alternatively held in abeyance, because the basic terms and conditions and form of the proposed transaction are unknown and speculative, and the Application therefore is not ripe for review.

II. STATEMENT OF MATERIAL QUESTION

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 terms and conditions of the proposed transaction are unknown and speculative, and the application therefore is not ripe for review?³

Suggested answer: *in the affirmative.*

III. ARGUMENT

The Commission cannot reasonably conclude that there is a definitive transaction that can be meaningfully evaluated as required by the Public Utility Code. The basic terms and structure of the transaction are not known. *See, e.g.*, Exelon Application at p. 14. Likewise, there are material conditions precedent that must occur before Exelon would be able to effectuate a final transaction. *See, e.g., id.*, Ex. A at p. 48-65. Indeed, it is speculative whether Exelon will even pursue the proposed transaction to conclusion,⁴ but yet it has seen fit to preoccupy NRG Energy and its regulated subsidiaries with premature legal actions throughout the country.

Foremost among the uncertain terms of Exelon's speculative proposal is the final capital structure of the combined entities and related financings resulting from the transaction. Exelon's ultimate capital structure will inevitably affect the capital costs of the regulated utilities (*i.e.*, the

³The applicants to Exelon's Application include only Exelon, Exelon Xchange, and PECO. NRG Pittsburgh and NRG Harrisburg are not applicants to the Application and, as directed by the NRG Energy Board of Directors, are opposed to the proposed transaction. Moreover, NRG Energy, NRG Pittsburgh, and NRG Harrisburg have not authorized the filing of the Application. In their Preliminary Objections, the NRG Companies also raised the issue of whether the Commission lacks jurisdiction over Exelon's Application. Exelon has no authority or standing under the plain language of Section 1102(a)(3) of the Code, 66 Pa.C.S. § 1102(a)(3), to file a unilateral application for the acquisition of the public service property of NRG Pittsburgh and NRG Harrisburg because this Section requires that Commission approval be obtained by the transferor public utilities as well as the transferee. *See* Preliminary Objections of the NRG Companies, at Section V.A. If, as requested in this Petition, the Application is dismissed or held in abeyance and refiled after either a negotiated agreement or appropriate action by the board of directors of NRG Energy approving the transaction, this issue may become moot. Notwithstanding, the NRG Companies filing of this petition herein in no way constitutes an affirmation, admission, concession, or otherwise waives the issue of the Commission's jurisdiction over Exelon's Application.

⁴ Exelon has stated that: "[It] reserves the right, however, at any time to determine not to commence either proxy solicitation (or to terminate any solicitation which has previously been commenced) if Exelon determines it to be in its best interests to do so or if Exelon determines that such solicitation is unnecessary, including if (1) NRG and Exelon and/or any of its subsidiaries have entered into a definitive agreement to effect a business combination of NRG and Exelon and/or any of its subsidiaries, or (2) Exelon determines that the NRG Board of directors has (a) recommended that NRG stockholders accept the offer and (b) not adopted a "poison pill" or stockholders rights plan." *See* Exelon Application, Ex. A at p. 48.

NRG Companies as well as PECO) and rates paid by their ratepayers. Evaluation of Exelon's capital costs and resulting access to capital associated with the transaction are likewise essential to assessing, *inter alia*: maintenance and improvement of reliability; nuclear decommissioning funding; and pension funding. As discussed further herein, because of these and other complexities of law, there is effectively no transaction for the Commission to evaluate unless and until there is a negotiated deal between NRG Energy and Exelon.

A. The Requirement Of Ripeness Avoids Premature Adjudication.

The purpose of the ripeness doctrine is to avoid premature adjudication. *City & County of Phila. v. Dep't of Pub. Welfare*, 941 A.2d 766, 768 n.2 (Pa. Cmwlth. 2008). In determining whether the ripeness doctrine applies, the Commission must consider: "(1) whether the issues are adequately developed for judicial review, including whether the claim involves uncertain and contingent events that may not occur as anticipated or at all; and (2) what hardship the parties will suffer if review is delayed." *Banfield v. Cortes*, 922 A.2d 36, 45 (Pa. Cmwlth. 2007) (citation omitted); *see also Alaica v. Ridge*, 784 A.2d 837, 843 (Pa. Cmwlth. 2001). Exelon's speculative proposal clearly is not ripe for consideration, as there is no final transaction for the parties to advocate for or against and for the Commission to evaluate. Likewise, Exelon will suffer no harm if the Commission requires it to refile its Application if and when it achieves its stated goal of a negotiated agreement.

B. Issues Are Not Adequately Developed For Commission Review.

1. Exelon cannot meet its burden where there is no definitive transaction.

Exelon bears the burden of proving that the proposed transaction satisfies the requirements of Sections 1102 and 1103 of the Code, 66 Pa.C.S. §§ 1102, 1103. The Commission may issue a certificate of public convenience upon a finding that "the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of

the public.” *Id.* § 1103(a). This standard has been interpreted to require the Commission to find that the transaction would “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972). “Further, when the ‘public interest’ is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on all affected parties and not merely on one particular group” *Middletown Twp. v. Pa. Pub. Util. Comm’n*, 482 A.2d 674, 682 (Pa. Cmwlth. 1984). Accordingly, in order for an application to be sufficiently specific under Sections 1102 and 1103, the application must allege facts that, if accepted as true, would establish that the transaction is in the public interest because it will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.

Because the basic terms and structure of the transaction are not known, Exelon’s Application has failed to make any specific commitments or provide any details that would satisfy the standard of affirmative public benefits. Exelon, accordingly, can only offer broad generalizations that the proposed transaction is in the public interest. Notwithstanding the foregoing, and the fact that Exelon has not alleged that it has any experience in owning or operating district heating and cooling operations (as opposed to gas and electric facilities), Exelon has failed to, and is unable to, specifically define and describe the transaction and any benefits that will derive from the transaction. Indeed, it is uncertain whether the proposed transaction will even occur because Exelon has not committed to proceed with the tender offer. As a result, the Application is not ripe for review.

In addressing the ripeness issue raised in the Preliminary Objections of the NRG Companies, ALJ Chestnut expressed that she “agreed that the terms and conditions of the

proposed transaction – as well as the impact on the jurisdictional customers of the involved utilities – are speculative to some extent.” PO Order at p. 9. However, ALJ Chestnut concluded that, although Exelon “may or may not be able to sustain [its] burden of establishing the requisite public benefits imposed in these types of application proceedings, the Application on its face contains sufficiently pleaded facts that could allow the Commission to approve the Application.” PO Order at p. 10. However, the issue of ripeness is not a matter of burden of proof or whether the terms of the proposed transaction may become final at some unknown point in the future. Rather, the issue is whether the basic terms and structure of the transaction are adequately developed and known so that the Commission may determine whether the transaction would affirmatively provide a substantial public benefit; they are not.

First and foremost, Exelon lacks a definitive plan for financing its proposal.⁵ Accordingly, there may -- and likely will be -- a dramatic and adverse effect on the cost of capital for Exelon’s regulated utilities (including the NRG Companies and PECO) if review of the Application proceeds without requiring Exelon to have a definitive financing plan. Exelon’s increased cost of capital, resulting from the transaction, could have material impacts on rates, reliability, and quality of service. Exelon’s proposed acquisition of NRG could result in increased debt, higher risk profile, and increased cost of capital. These factors may have a significant impact on the consolidated companies’ business, future operations and cash flows, as well as an impact on the rates of the regulated entities. Further, Exelon’s increased cost of capital could affect service and reliability, and may delay maintenance or other capital investments. The parties have a right to, and the Commission is statutorily required to, closely

⁵ With regard to financing, Exelon offers only that it “*believes* that it will be able to secure sufficient funds prior to the consummation of the offer with respect to the NRG indebtedness to be refinanced and other payments required to be made to complete the transactions.” Exelon Application, Ex. A at p. 50 (emphasis added).

examine these issues to ensure that ratepayers are adequately protected and that the substantial public benefit test is met. However, Exelon cannot provide sufficient information for the Commission to review regarding the anticipated capital structure of the consolidated company and the financing related to the transaction until a definitive transaction is identified.⁶

In addition, without a negotiated agreement and an agreement with NRG Energy's lenders, a transaction could trigger change in control clauses in NRG Energy's debt -- resulting in lenders having the right to call the debt. To consummate the proposed transaction, Exelon would need to obtain financing, negotiate with NRG Energy's lenders not to trigger change of control provisions, or engineer a reverse merger. Exelon has not and cannot offer information concerning its plan to obtain the required funds to finance its proposal or avoid the change in control clauses of NRG Energy's debt because there is no definitive transaction. *See* Exelon Application, Ex. A at p. 50. By prematurely pressing forward, all Exelon can offer at this point is risk to the NRG Companies' ratepayers.

The lack of a basic transaction also prevents any meaningful review of the fate of the employees of the NRG Companies including the effect that the transaction will have on their benefits and pension funding. Similarly, while the Application purports that Exelon will retain

⁶ Although Exelon is dismissive regarding the impact of the proposed transaction on ratepayers, *see* Exelon Application, at p. 17, its cost of capital is an important component in the calculation of regulated rates. Exelon has admitted that acquiring NRG could bring its credit ratings down and its cost of capital up. Furthermore, Exelon has admitted that its increased indebtedness "could have a significant impact on Exelon's business and its future results of operations and cash flows." Exelon Corp., Annual Report (Form 10-k), at p. 59 (Feb. 6, 2009) ("Exelon Annual Report"). As Exelon explained recently:

Exelon's indebtedness following the consummation of an acquisition of NRG will be higher than Exelon's existing indebtedness. Therefore, it may be more difficult for Exelon to pay or refinance its debts, and Exelon may need to divert its cash flow from operations to debt service payments. The additional indebtedness could limit Exelon's ability to pursue other strategic opportunities and increase its vulnerability to adverse economic and industry conditions.

Id. The Commission must consider these rate effects in its evaluation of the proposed transaction and should require Exelon to provide the additional information necessary for the Commission to do so, once a final transaction and the effects therefrom are known.

the current management of NRG Pittsburgh and NRG Harrisburg, it is unknown for how long or on what basis under the transaction. Without a definitive transaction, there can be no meaningful transition plan nor plans for ring-fencing and other protections.

Because the basic terms and conditions of the transaction are not certain, Exelon also has not and cannot make any commitment to retain the NRG Companies and continue in the district heating and cooling business for any specified period of time. Indeed, the Form S-4 indicates that Exelon may make any changes to NRG Energy or its subsidiaries that Exelon deems necessary or convenient, including:

[C]hanges in NRG's business, corporate structure, assets, properties, marketing strategies, capitalization management, personnel or dividend policy or changes to NRG's Amended and Restated Certificate of Incorporation or Amended and Restated Bylaws.

See Exelon Application, Ex. A at p. 29. Until the terms and conditions of an agreement have been negotiated, Exelon arguably cannot make any binding commitments regarding the NRG Companies.

2. Financing is chief among many material conditions.

As more fully discussed above, Exelon's proposed transaction is contingent upon its obtaining the necessary financing. While Exelon may "believe" that it will be able to do so, see Exelon Application, Ex. A at p. 50, there is no guarantee that it will be able to do so. Indeed, without a known and final transaction, it likely will not be able to obtain the necessary financing.

Other conditions demonstrating the uncertainty and speculative nature of the Exelon proposal include, but are not limited to: minimum tender; satisfaction of the requirements of Section 203 of the Delaware General Corporation Law, DEL. CODE ANN. tit. 8, § 203;⁷

⁷ Because there is no definitive transaction, Exelon also cannot explain how it intends to satisfy the requirements of Section 203 of the Delaware General Corporation Law, DEL. CODE ANN. tit. 8, § 203. Section 203 of the Delaware General Corporation Law provides that an "interested stockholder" (*i.e.*, a stockholder who holds more than 15% of (Continued on next page...))

competition approvals and other regulatory approvals; and, Exelon shareholder approval. Exelon Application, Ex. A at 51-52. The process of satisfying these material conditions could result in significant changes to Exelon's proposal and, thereby, the Application. As such, the Application has not and cannot provide sufficient details regarding the potential impacts the transaction may have on not only the ratepayers of NRG Pittsburgh and NRG Harrisburg, but also on those of PECO. The Commission cannot provide meaningful review of a transaction that is not yet defined.

3. *The effects on energy markets cannot be determined.*

In its Application, Exelon asserts that the transaction will provide broad benefits to energy markets. *See* Exelon Application, at p. 21. Exelon's proposed transaction would result in the acquisition of all of NRG's generation assets including those located in Pennsylvania. Far from constituting a "clean sweep" of NRG's generation in PJM East, *cf.* Application at p. 28, Exelon's divestiture package proposes to retain NRG's Pennsylvania assets (NRG Conemaugh, NRG Keystone, and NRG Paxton) -- as well as other assets that could be imported into PJM East. However, there is no definitive transaction and Exelon's ultimate plans for and fate of NRG's Pennsylvania generation assets may change. Because the fundamental terms and conditions of the transaction are unknown, the Commission cannot properly evaluate the

(...continued from previous page.)

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. Until there is a definitive transaction or negotiated agreement that satisfies the requirements of Section 203 of the Delaware General Corporation Law, it is uncertain whether the proposed transaction can even occur and, therefore, the Commission cannot reasonably conclude that there is a definitive transaction that can be meaningfully evaluated as required by the Code. Because of Section 203, the conditional tender of 51% of NRG Energy shares is of little relevance to the instant proceeding. The negotiation process has not yet even begun, much less been completed.

proposed transaction's effect on energy markets. *See* 66 Pa. C.S. § 2811(e)(2) (“[T]he commission shall not approve such proposed merger, consolidation, acquisition or disposition, except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market.”).

4. *Exelon's ultimate goal is a negotiated agreement.*

The speculative nature of Exelon's proposal is demonstrated by the numerous conditions that remain before Exelon can, or is willing to, buy a single share of NRG stock. Exelon's Application and public filings clearly indicate that Exelon's ultimate goal is to reach a negotiated agreement with the NRG Energy Board of Directors, which may or may not eventually occur.⁸ *See* Exelon Application, at p. 14. For example, in its Form S-4, Exelon states:

Exelon intends to continue to seek to negotiate with NRG with respect to the combination of NRG and Exelon. If such negotiations result in a definitive merger agreement between Exelon and NRG, the consideration to be received by the holders of NRG common stock could include or consist of Exelon common stock, other securities, cash or any combination thereof. In addition, the structure of a combination between Exelon and NRG under any such definitive merger agreement may be different than the structure of the offer and second-step merger. Accordingly, such negotiations could result in, among other things, the termination of the offer and submission of a different combination proposal to NRG's stockholders for their approval.

See Exelon Application, Ex. A at p. 36. Exelon intends to engage in a proxy contest to elect allegedly independent directors to gain control of NRG's Board, and then essentially negotiate the particulars of a transaction with the reconstituted Board of Directors. *See* Exelon Application, at pp. 10-11.

Given Exelon's expressed intention of only entering into a negotiated agreement, the basic terms of any transaction or agreement are unknown. It is not practical or fair to the parties

⁸ In financial parlance, Exelon's course of conduct is commonly known as a “bear hug” – *i.e.*, “[a] hostile takeover predicated on making an offer at a premium large enough to ensure shareholder support even in the face of resistance from the target's board of directors.” *See* www.investorwords.com (last visited May 15, 2009).

for the Commission to conduct any hearing or issue any ruling until Exelon has committed to specific terms of a transaction or agreement. Requiring the NRG Companies and other parties to proceed at this stage denies them of due process by forcing them to litigate a transaction without notice and an opportunity to address the merits of the terms and conditions of any transaction. *See Vaders v. Pa. State Horse Racing Comm'n*, 964 A.2d 56 (Pa. Cmwlth. 2009) (explaining that, in an administrative hearing, due process requires, at a minimum, notice and the opportunity to be heard). Indeed, none of these fundamental concerns will be resolved by the date that the NRG Companies' direct testimony is due under the accelerated procedural schedule, *i.e.*, June 5, 2009.

The mere fact that certain NRG Energy shareholders have tendered their shares to Exelon does not mean that there is, or will be, an actual transaction. In fact, 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. *See* Exelon Application at p. 12. In denying the Preliminary Objections of the NRG Companies, ALJ Chestnut concluded that "Exelon has already been tendered more than 20% of NRG's stock, so the Commission's review has been triggered." PO Order at p. 9. However, Exelon has not and cannot accept these shares at this time and, moreover, cannot vote these shares because Exelon has yet to obtain approval by its shareholders or obtain the necessary financing. *See* Exelon Application, Ex. A at pp. 50, 52. Importantly, the tendered shares can be withdrawn.

5. *A policy of "neutrality" favors deferred Commission action.*

In its response the Preliminary Objection of the NRG Companies regarding whether the Commission lacks jurisdiction over Exelon's unilateral Application, Exelon asserted that precluding the Commission's review of the transaction would be contrary to federal policy that favors neutrality between non-hostile, negotiated transactions and hostile transactions. This is

not the purpose and standard for the Commission's review of the transfer of public service property. Rather, the Commission must review a transaction to determine whether it will result in an affirmative substantial public benefit. However, the Commission cannot meaningfully evaluate whether the transaction proposed in Exelon's Application will provide a substantial public benefit because there is no definitive transaction.

Exelon is using its Application to gain regulatory approval in an attempt to gain leverage with the shareholders and possibly improve its prospect of obtaining sufficient votes to reach and consummate a negotiated agreement. In other words, Exelon is using the Commission's approval process to tighten the grip of its "bear hug" upon NRG Energy. Nevertheless, the Commission should recognize that Exelon's use of its Application in the absence of a definitive transaction results in a denial of the due process rights of the NRG Companies and other parties, as well as precludes the Commission from meaningful review of the transaction.

C. Exelon Will Suffer No Harm If Commission Review Is Delayed.

Exelon will not be prejudiced if the Commission's review of the Application is held in abeyance or if the Application is dismissed with leave to refile. Indeed, Exelon does not intend to close on the transaction until sometime in late 2009 or 2010. *See* Exelon Application, Ex. A at p. 37. Thus, Exelon would not be prejudiced by the Commission's delaying of the pending Application until such time as the fundamental terms, conditions, and form of the final transaction are known. Further, delaying the Commission's review until the terms, conditions, and form of the transaction are known will ensure that the due process rights of all the parties to this proceeding are adequately protected.

D. The Commission Cannot Make An Informed Decision On An Application That Is Not Ripe.

Because the transaction is not certain, Exelon has not and cannot adequately explain how the proposed transaction affirmatively promotes the “service, accommodation, convenience, or safety of the public in some substantial way.” *See City of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972). Exelon’s Application does not and cannot provide any meaningful commitments or any specific details about the benefits, substantial or otherwise, that the proposed transaction would provide to NRG Pittsburgh, NRG Harrisburg, PECO, and their respective ratepayers, or the general public. Indeed, the Application simply commits that, following the proposed transaction, NRG Pittsburgh and NRG Harrisburg will continue to operate without any change in the service to customers, the facilities used to provide such services, or the rates, terms, and conditions of such services. *See Exelon Application*, at p. 17. Such a static, generic promise is insufficient to satisfy the Pennsylvania’s standard of an affirmative public benefit and clearly indicates that Exelon’s Application is not ripe for consideration.⁹

IV. CONCLUSION

Exelon seeks the Commission’s blessing of a “bear hug” as opposed to approval of an actual transaction. The Commission cannot reasonably conclude that there is a definitive transaction that can be meaningfully evaluated as required by the Public Utility Code and principles of due process of law. The terms and conditions of the transaction are, at best,

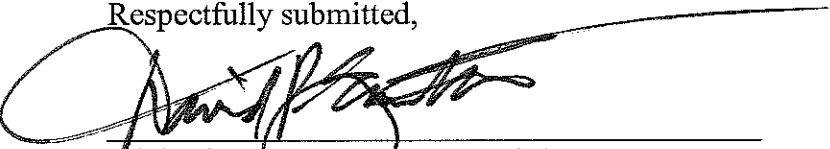
⁹ *See Pa. Pub. Util. Comm’n, et al. v. The Peoples Natural Gas Co.*, Docket No. R-00038170, 2003 Pa. PUC LEXIS 53, at *31-*34 (Order entered Sept. 19, 2003) (dismissing an application by a gas company to sell storage facilities, stating that the “identify of the prospective buyer has not been determined, nor the terms of the purported sale or the expected sales date. We cannot pre-approve possible sale to some unknown party at an undetermined value at some unspecified future date. To do so would be contrary to the public interest...it is premature to approve any sale before the buyer and terms have been determined.... We will dismiss the Application without prejudice so that Peoples may refile an application at any time in the future containing the information and details necessary for us to entertain it.”).

speculative. There are multiple conditions precedent that must occur before Exelon would be able to effectuate the transaction and finalize its terms. Until the terms and conditions of the transaction are finalized and known, the parties are unfairly prejudiced and denied due process of law by being forced to litigate a transaction -- the terms, conditions, and form of which are unknown. Further, a transaction ultimately may never occur. 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. Further, Exelon would not be prejudiced by the Commission's abstention on the pending Application until such time as the terms, conditions, and form of the final transaction are known.

WHEREFORE, NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC respectfully request that the Pennsylvania Public Utility Commission answer the material question in the affirmative and direct that Exelon's Application be dismissed without prejudice to refile or, in the alternative, 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,

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