



17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Fax
www.postschell.com

John H. Isom

jisom@postschell.com
717-612-6032 Direct
717-731-1985 Fax
File #: 3288/138939

June 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 & A-2009-2093059

Dear Secretary McNulty:

Enclosed, for filing, is the Petition of the NRG Energy Companies for Certification of a Discovery Ruling for Interlocutory Review in the above- referenced proceeding.

As indicated on the certificate of service, copies are being provided to the parties in the manner indicated.

Respectfully Submitted,

John H. Isom

JHI/jl

Enclosures

cc: Honorable Marlane R. Chestnut
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA ELECTRONIC AND FIRST CLASS MAIL

Tanya J. McCloskey, Esquire
Jennedy S. Johnson, Esquire
Shaun A. Sparks, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923
E-mail: tmccloskey@paoca.org
E-mail: jjohnson@paoca.org
E-mail: ssparks@paoca.org

Richard Hahn, Consultant
LaCapra Associates
9th Floor
One Washington Mall
Boston, MA 02108
E-mail: rhahn@lacapra.com

Johnnie E. Simms, Chief Prosecutor
Richard A. Kanaskie, Senior Prosecutor
Office of Trial Staff
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor West
PO Box 3265
Harrisburg, PA 17105-3265
E-mail: josimms@state.pa.us
E-mail: rkanaskie@state.pa.us

William R. Lloyd, Esquire
Steven C. Gray, Esquire
Office of Small Business Advocate
Commerce Building, Suite 1102
300 North Second Street
Harrisburg, PA 17101-1303
E-mail: willoyd@state.pa.us
E-mail: sgray@state.pa.us

Paul R. Bonney, Esquire
Ward Smith, Esquire
Exelon Business Services Company
2301 Market Street, S26-2
Philadelphia, PA 19101-8699
E-mail: paul.bonney@exeloncorp.com
E-mail: Ward.smith@exeloncorp.com

Robert C. Gerlach, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Street
Philadelphia, PA 19103-7599
E-mail: Gerlach@ballardspahr.com

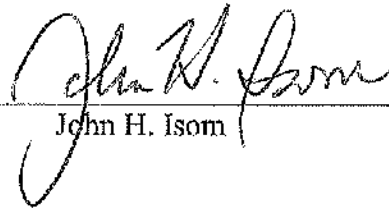
Kevin J. McKeon, Esquire
Thomas J. Sniscak, Esquire
Katherine E. Lovette, Esquire
Hawke McKeon & Sniscak LLP
100 North Tenth Street
P. O. Box 1778
Harrisburg, PA 17105-1778
E-mail: kjmckeon@hmslegal.com
E-mail: tjsniscak@hmslegal.com
E-mail: kelovette@hmslegal.com

Matthew W. S. Estes, Esquire
Clifford M. Naeve, Esquire
John S. Moot, Esquire
Skadden, Arps, Slate, Meagher
& Flom, LLP
1440 New York Avenue, N.W.
Washington, DC 20005
E-mail: Matthew.estes@skadden.com
E-mail: Mike.Naeve@skadden.com
E-mail: John.moot@skadden.com

David M. Kleppinger, Esquire
Barry A. Naum, Esquire
Charis Mincavage Esquire
McNees Wallace & Nurick LLC
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
E-mail: dkleppinger@mwn.com
E-mail: bnaum@mwn.com
E-mail: cmincavage@mwn.com

Daniel Clearfield, Esquire
Mark S. Stewart, Esquire
Carl R. Shultz, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
P.O. Box 1248
Harrisburg, PA 17108-1248
E-mail: dclearfield@eckertseamans.com
E-mail: mstewart@eckertseamans.com
E-mail: cshultz@eckertseamans.com

Dated: June 18, 2009



John H. Isom

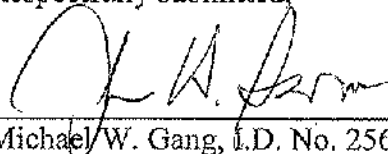
**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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 :

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT 52 PA. CODE § 5.304 YOU MAY FILE A RESPONSIVE BRIEF WITHIN SEVEN (7) DAYS AFTER THE DATE OF SERVICE OF THE ATTACHED PETITION. YOUR RESPONSIVE BRIEF SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL AND THE PRESIDING OFFICER AND ALL OTHER PARTIES.

Respectfully submitted,



Michael W. Gang, I.D. No. 25670
E-mail: mgang@postschell.com
David B. MacGregor, I.D. No. 28804
E-mail: dmacgregor@postschell.com
David P. Zambito, I.D. No. 80017
E-mail: dzambito@postschell.com
John H. Isom, I.D. No. 16569
E-mail: jisom@postschell.com
Christopher T. Wright, I.D. No. 203412
E-mail: cwright@postschell.com
Post & Schell, P.C.
17 North Second Street

DATED: June 18, 2009

12th Floor
Harrisburg, PA 17101
Telephone: 717.731.1970
Facsimile: 717.731.1985

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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Approval of the Related Affiliated Transactions, and All Other Approvals :
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Utility Code to Carry Out the Transaction Described in the Application :

**PETITION OF THE NRG ENERGY COMPANIES FOR CERTIFICATION OF A
DISCOVERY RULING FOR INTERLOCUTORY REVIEW**

TO ADMINISTRATIVE LAW JUDGE MARLANE R. CHESTNUT:

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 petition Administrative Law Judge Marlane R. Chestnut (“ALJ”), pursuant to 52 Pa. Code § 5.304 for certification of the discovery question presented below for interlocutory review by the Pennsylvania Public Utility Commission (“Commission”).

THE QUESTION PRESENTED

The NRG Companies request that the ALJ certify the following question for review by the Commission:

Whether Pennsylvania has adopted the white knight or business privilege to bar discovery related to business strategies and, if so, has the privilege been properly applied in this proceeding?

The NRG Companies respectfully submit that Pennsylvania has not adopted such privileges and that such privileges have not been applied in the sweeping manner in which they have been applied here even in those few jurisdictions that have adopted such a privilege.

The ALJ applied the business strategy or “white knight” privilege to sustain Exelon’s objections to NRG Interrogatories Set I, Nos. 21 and 22. *See* ALJ Order on Discovery, p. 4 (June 15, 2009) (“Discovery Order”). Contrary to the ALJ’s conclusion, such privileges have not been adopted by any Pennsylvania tribunal and even where adopted are applied narrowly.

In reaching her conclusion, the ALJ appeared to rely on Exelon’s contention that the information requested in NRG Interrogatory Nos. 1-21 and I-22. Exelon cited two judicial decisions regarding the so-called “white knight privilege,” neither of which was interpreting Pennsylvania law. One was *BNS, Inc. v. Koppers Co.*, 683 F. Supp. 454, 457 (D. Del. 1988)(“*BNS*”), where the Court concluded that: “There is no Delaware case which protects ‘white knight’ documents through a ‘white knight’ privilege.” Exelon also cited *Ipalco Enters. v. PSI Resources*, 148 F.R.D. 604, 606 (S.D. Ind. 1993). There, the Court concluded that: “Neither federal common law nor federal case law establishes an evidentiary privilege for business strategies.” There is no body of law in Pennsylvania that creates the so-called “white knight privilege” or business strategy privilege.¹

Even where such a privilege has been applied, it provides only a temporary reprieve from discovery regarding pending strategy decisions; once a decision has been made, the privilege disappears. *BNS*; *Cincinnati*; *Grand Metropolitan*. Here, Exelon’s strategies to acquire the NRG Companies have been announced publicly. Thus, no business privilege for Exelon exists.

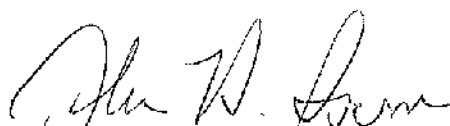
In ruling on the NRG Companies’ Amended Motion to Compel, the ALJ also concluded that NRG Interrogatories 21 and 22 were irrelevant. Such conclusion is erroneous, however,

¹ Further, to the extent that such a privilege exists and is somehow applicable to this case, it has arisen in the context of a *target corporation’s* need to protect secret business strategies, such as negotiations with other non-hostile bidders, *i.e.*, the “white knights”, from discovery by a hostile bidder. *See, e.g., Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv.*, Civ. Action No. 13389, 1995 Del. Ch. LEXIS 63 (Del. Ch. May 17, 1995)(“*Cincinnati*”); *Grand Metropolitan PLC v. The Pillsbury Company*, Civ. Action Nos. 10319, 10323, 1988 WL 130637 (Del. Ch. Nov. 22, 1989)(“*Grand Metropolitan*”).

because the price that Exelon is willing to pay for NRG shares is inexorably tied to the position that its assets would provide for Exelon in the electric generation marketplace – market power. This issue is unquestionably at issue in this proceeding. The ALJ also questioned whether NRG had adequately pursued negotiations with Exelon on discovery issues. Such concerns are misplaced because never did Exelon express any flexibility or willingness to compromise regarding NRG Interrogatories I-21 and I-22, and it would be disingenuous for Exelon to contend otherwise. Further, time for compromise had run out. It was necessary for NRG to take appropriate steps to attempt to obtain information needed for its case-in-chief, that was due, under the truncated litigation schedule adopted at Exelon’s behest, on June 5, 2009.

Interlocutory review of the discovery issues explained above should be granted because they involve a novel issue of law in Pennsylvania which should be resolved immediately by the Commission so that the NRG Companies have adequate information necessary for the complete development of its contentions in this proceeding in a timely manner.

Respectfully submitted,



E-mail: mgang@postschell.com
E-mail: dmacgregor@postschell.com
E-mail: dzambito@postschell.com
E-mail: jisom@postschell.com
E-mail: cwright@postschell.com

Michael W. Gang, I.D. No. 25670
David B. MacGregor, I.D. No. 28804
David P. Zambito, I.D. No. 80017
John H. Isom, I.D. No. 16569
Christopher T. Wright, I.D. No. 203412
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101
Telephone: 717-731-1970
Facsimile: 717-731-1985

DATED: June 18, 2009

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