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VIA HAND DELIVERY AND ELECTRONIC FILING

June 25, 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 THE PETITION OF THE NRG ENERGY COMPANIES FOR CERTIFICATION OF A DISCOVERY RULING FOR INTERLOCUTORY REVIEW**

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 the Petition for Certification of a Discovery Ruling for Interlocutory Review.

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.

Sincerely,

David P. Zambito
Counsel for
NRG Energy Center Pittsburgh LLC and
NRG Energy Center Harrisburg LLC

DPZ/kmg
Enclosures
c: Per Certificate of Service

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CERTIFICATE OF SERVICE
Docket Nos. A-2009-2093057, A-2009-2093058, and A-2009-2093059

I hereby certify that I have this day served true copies of the foregoing Brief in Support of Petition of the NRG Companies for Certification of a Discovery Ruling for Interlocutory Review, 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: June 25, 2009

David P. Zambito

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Administrative Law Judge
Marlane R. Chestnut

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

BRIEF IN SUPPORT OF PETITION OF THE NRG ENERGY COMPANIES FOR CERTIFICATION OF A DISCOVERY RULING FOR INTERLOCUTORY REVIEW

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 Certification of a Discovery Ruling for Interlocutory Review ("Petition"), pursuant to the Regulations of the Pennsylvania Public Utility Commission ("Commission") at 52 Pa. Code § 5.304. The Petition requests interlocutory review of the discovery issues explained below because they involve a novel issue of law in Pennsylvania, which should be resolved immediately by the Commission so that the NRG Companies and other parties have adequate information necessary for the complete development of their cases in a timely manner. 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. The Applicants include only Exelon, Exelon Xchange, and PECO. The NRG Companies are not applicants to the Application and oppose the proposed transaction.

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. *See* Exelon Application, Ex. A at p. i. Exelon intends 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 admits that the structure will change if it enters into a negotiated agreement.[1]

Pursuant to 52 Pa. Code § 5.341 and Prehearing Order No. 1, the NRG Companies served Interrogatories And Requests For Production Of Documents – Set I (hereinafter "NRG Interrogatories-Set I") upon Exelon on May 5, 2009.[2] On May 11, 2009, Exelon served Objections to fifty-three (53) of the NRG's eighty-three (83) Interrogatories (hereinafter "Exelon Objections"), including NRG Interrogatories-Set I, Nos. 21 and 22. More specifically, Exelon objected to NRG Interrogatories-Set I, Nos. 21 and 22 for the following reasons: that information related to its decision to undertake the proposed transaction and determine the price it would pay to acquire NRG Energy is not relevant; the information sought is either confidential,

[1] By order entered on June 25, 2009 at this docket, the Commission determined that evaluation of a negotiated agreement is not ripe for adjudication at this time.

[2] A Protective Order, agreed to by the parties, was issued on April 17, 2009 by Your Honor.

proprietary or highly confidential; and that the information requested in NRG Interrogatories-Set I, Nos. 21 and 22 is protected by the so-called "white knight privilege."

On May 14, 2009, after attempts to resolve Exelon's objections were unsuccessful, the NRG Companies filed a "Motion to Compel Applicants to Answer Interrogatories and Requests for Production of Documents Propounded by NRG Companies on Exelon – Set I." Exelon answered the NRG Companies' Motion to Compel on May 18, 2009. NRG attempted to resolve the Set I discovery disputes with Exelon on several occasions. As a result of those contacts and upon review of information eventually produced in response to the NRG Interrogatories-Set I, the NRG Companies withdrew a substantial portion of its Motion to Compel. The NRG Companies, however, did not withdraw their Motion with respect to NRG Interrogatories-Set I, Nos. 21 and 22.

In response to Interrogatories-Set I, Nos. 21 and 22, Exelon refused to provide any information, stating only that they have objected to these interrogatories. Therefore, on May 28, 2009, the NRG Companies filed an Amended Motion to Compel.

On June 15, 2009, Your Honor issued an order ruling on the NRG Companies' Amended Motion to Compel ("Discovery Order").[3] Therein, Your Honor concluded that the information sought in NRG Interrogatories-Set I, Nos. 21 and 22 was privileged from discovery pursuant to a

[3] Your Honor also questioned whether NRG had adequately pursued negotiations with Exelon on discovery issues. It should be noted however that Exelon never expressed any flexibility or willingness to compromise regarding NRG Interrogatories-Set I Nos. 21 and 22. Further, time for compromise had run out. It was necessary for NRG to take appropriate steps to attempt to obtain information needed for its prepared direct testimony that was due, under the truncated litigation schedule adopted at the request of Exelon, on June 5, 2009. Given the hostile nature of the acquisition, NRG is not a normal protestant and Exelon has no incentive to compromise. Indeed, Your Honor's determination will effectively provide Exelon with *carte blanche* to decline to answer NRG's discovery. In short, NRG will be denied its ability to present effectively its case.

business strategy privilege. *See* Discovery Order, at p. 4. Your Honor also held that NRG Interrogatories-Set I, Nos. 21 and 22 were irrelevant. *See id.*

Contrary to these broad conclusions, a business strategy privilege has not yet been recognized under Pennsylvania law,[4] but in any event it has been misapplied and does not serve as a blanket bar to the production of the information sought in NRG Interrogatories-Set I, Nos. 21 and 22 from discovery. Further, the information sought in NRG Interrogatories-Set I, Nos. 21 and 22 is highly relevant to the NRG Companies' claims in the above-captioned proceeding that: the Application is not ripe for review; Exelon lacks definitive plans for ownership and operation of the NRG Companies; and, the acquisition could adversely affect electric generation markets. For the reasons that follow, the NRG Companies respectfully request that the discovery question presented herein be certified to the full Commission for interlocutory review.

II. STATEMENT OF MATERIAL QUESTION

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

> Suggested answer: *To the extent that such a privilege exists, it has been misapplied in this case.*

III. ARGUMENT

In this case, Your Honor denied the Amended Motion to Compel of the NRG Companies and sustained Exelon's Objections to NRG Interrogatories-Set I, Nos. 21 and 22, concluding that

[4] Exelon, in its objections and answers to motions to compel, refers to the privilege as the "white knight privilege." For reasons discussed below, the "white knight" privilege is simply inapposite to the current situation.

the information sought was protected by a business strategy privilege and not relevant to this proceeding. However, there is no body of law in Pennsylvania that has yet recognized the business strategy privilege (or "white knight privilege," as referred to by Exelon). Were the Commission to recognize such a privilege, it must be applied very narrowly based upon a specific objection to disclosing specific facts regarding future business plans or ongoing negotiations, rather than as a broad objection to any analyses of transaction that is now public. Further, as explained below, the information sought in NRG Interrogatories-Set I, Nos. 21 and 22 is highly relevant to the NRG Companies' claims, as well as the Commission's review of the above-captioned proceeding.

A. The business strategy privilege is not applicable to the materials sought by the NRG Companies regarding the publicly announced proposed transaction that is before the Commission.

Your Honor denied the NRG Companies' Amended Motion to Compel and sustained the objections of Exelon, in part, on the basis that such information is privileged from discovery by a business strategy privilege. *See* Discovery Order, at p. 4. Your Honor concluded that the public policy considerations of the privilege prevent disclosure of the information requested in NRG Interrogatories-Set I, Nos. 21 and 22. However, there is no body of law in Pennsylvania that creates a business strategy privilege that serves as an absolute bar to discovery, and the creation of such a privilege is not warranted in the instant proceeding.

The so-called business strategy or "white knight" privilege developed in the context of hostile takeover litigation, where the Court of Chancery of Delaware "recognized *a target corporation's* need to protect secret business strategies, such as negotiations with a white knight, from discovery by a hostile bidder." *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv.*, Civ. Action No. 13389, 1995 Del. Ch. LEXIS 63, at *8 (Del. Ch. May 17,

1995)(emphasis added) (citing *Grand Metropolitan PLC v. The Pillsbury Company*, Civ. Action Nos. 10319, 10323, 1988 WL 130637 (Del. Ch. Nov. 22, 1989)).[5] The purpose behind the business strategy or "white knight" privilege has been explained as follows:

> [T]his court and others have recognized that in a contest for corporate control, the board of directors of a target company continues to have an ongoing responsibility to manage the corporation and, in the face of such a contest, that responsibility may entail the exploration of alternative transactions that would better promote corporate and shareholder welfare. The discovery process may legitimately give some consideration to such efforts. We have repeatedly recognized that disclosure of such efforts, while they are ongoing, may be detrimental to shareholder interests. Thus, *under authority of Rule 26(c)*, we have, when a threat of that kind is present, engaged in an analysis that attempts to evaluate the importance of the matter sought to be discovered to the party seeking it; the risk of nonlitigation injury that might occur to the target corporation if discovery is permitted; and the stage of the company's efforts, as well as the stage of the litigation.

Grand Metropolitan, at *2 (footnote omitted) (emphasis added).

Nevertheless, as explained by Court of Chancery of Delaware, the business strategy or "white knight" is not technically a privilege. *Grand Metropolitan*, at *2. *See also BNS, Inc. v. Koppers Co.*, 683 F. Supp. 454, 457 (D. Del. 1988) ("There is no Delaware case which protects 'white knight' documents through a 'white knight' privilege."); *Ipalco Enters. v. PSI Resources*, 148 F.R.D. 604, 606 (S.D. Ind. 1993) ("Neither federal common law nor federal case law establishes an evidentiary privilege for business strategies."). Rather, it is a basis for determining whether a target company's secret, defensive business strategies should be protected from discovery through a protective order.

Indeed, the rule relied upon by the Delaware Court in *Grand Metropolitan, supra*, Rule 26(c) of the Rules of the Court of Chancery of the State of Delaware, provides, in relevant part,

[5] Copies of the unpublished opinions of *Cincinnati Bell Cellular* and *Grand Metropolitan* are attached hereto and marked as Appendices A and B, respectively.

that a party may, upon good cause shown, seek a protective order providing that "confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Del. Ch. Ct. R. 26(c)(7). Similarly, federal cases dealing with the topic find protection, if needed, under the Federal Rules of Civil Procedure for protective orders, Rule 26(c).[6] Thus, to the extent that business strategy or other "white knight" information has been protected from discovery, such protection has been in the form of a protective order.

Importantly, there is no body of law in Pennsylvania that creates a business strategy privilege that serves as an absolute bar to broad categories of discovery and the creation of such a privilege is not warranted in the instant proceeding. Indeed, no Pennsylvania authority was cited in either Exelon's Objections, Exelon's Answer to the Amended Motion to Compel, or the Discovery Order to support the proposition that the information sought in NRG Interrogatories-Set I, Nos. 21 and 22 is immune from discovery under a business strategy privilege.[7] In fact, as

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[6] *See, e.g., Corning Inc. v. SRU Biosystems, LLC*, 2004 U.S. Dist. LEXIS 14831, 7-6 (D. Del. July 7, 2004); *Ipalco Enters. v. PSI Resources*, 148 F.R.D. 604, 607 (S.D. Ind. 1993); *Coastal Corp. v. Texas Eastern Corp.*, 707 F. Supp. 280, 281 (S.D. Tex. 1989); *BNS Inc. v. Koppers Co. Inc.*, 683 F. Supp. 454, 457 (D. Del. 1988); *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408, 419 (M.D. N.Car. 1992); *Temple Holdings Ltd. v. Sea Containers Ltd.*, 131 F.R.D. 360 (D. D.C. 1989); *Stena Finance B.V. v. Sea Containers Ltd.*, 131 F.R.D. 361, 362 (D. D.C. 1989); *Piven v. Sea Containers*, Fed. Sec. L. Rep. P 94,828 (D. D.C. 1989); *In the Matter of a Subpoena, Dated October 2, 1987 Issued to: Paine Webber Inc.*, 117 F.R.D. 352 (S.D. N.Y. 1987); *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 326 (S.D. Fla. 1985).

[7] In its Objections to NRG Interrogatories-Sets I, III & IV, Exelon cites five non-binding opinions for the proposition that the Commission should adopt a business strategy or "white knight" privilege. However, these cases are inapposite. First, two of the cases cited by Exelon concluded that Delaware has no "white knight" privilege within its body of jurisprudence, and that protection of business strategies from discovery, if it is to exist at all, must come in the form of a protective order. *See, Ipalco Enters. v. PSI Resources*, 148 F.R.D. 604, 606-607 (S.D. Ind. 1993); *BNS, Inc. v. Koppers Co.*, 683 F. Supp. 454, 457 (D. Del. 1988). Second, in *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408 (M.D.N.C. 1992), the court relied on *Grand Metropolitan, supra*, to conclude that the business strategy privilege "represents a sound application of *Rules 26(b)(1)* and *(c)*," *i.e.*, the Federal Rules regarding admissibility and protective orders. Third, in *Atlantic Research Corp. v. Clabir Corp.*, Civ. Action No. 3783, 1987 WL 758584 (Del. Ch. Feb. 10, 1987), the court did not hold that business strategy information is protected by the so-called "white knight" privilege; rather, the court compared the relevancy of the ongoing business strategy with the potential prejudice to conclude that the information did not need to be disclosed. Finally, in (Continued on next page...)

acknowledged in the Discovery Order, "the Commission has not yet had an opportunity to address this issue...." *See* Discovery Order, at p.3.

Similar to the Rules of the Court of Chancery of the State of Delaware and the Federal Rules of Civil Procedure, the Commission's regulations provide a mechanism by which a party may, for good cause shown, obtain a protective order to protect or limit discovery as follows:

> A trade secret or other confidential research, development or commercial information may not be disclosed or be disclosed only in a designated way. Protective order to protect or limit this type of information shall be issued under § 5.423 (relating to order to limit the availability of proprietary information).

52 Pa. Code § 5.362(a)(7). Section 5.423 of the Commission's regulations provide, in relevant part, as follows:

> A petition for protective order to limit the disclosure of a trade secret or other confidential information on the public record will be granted only when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public's interest in free and open access to the administrative hearing process. A protective order to protect trade secrets or other confidential information will apply the least restrictive means of limitation which will provide the necessary protections from disclosure.

52 Pa. Code § 5.423(a). Indeed, Commission regulations and policy recognize that a balancing of interests must occur -- as opposed to a blanket grant of privilege for information related to business strategy.

(...continued from previous page.)
Corporate Property Assocs. 8, L.P. v. Amersig Graphics, Civ. Action No. 13241, 1995 Del. Ch. LEXIS 40 at *6 (Del. Ch. Mar. 24, 1995), the court cited *Grand Metropolitan*, *supra*, and denied, in part, a motion to compel on the basis that the requesting parties had "not shown that these negotiations are vital to their case." Thus, contrary to Exelon's assertion, these cases did not simply excuse the disclosure of business strategy under the so-called "white knight" privilege but, rather, they analyzed the discovery requests in the context of protective orders, relevancy, and prejudice to the disclosing parties. Notwithstanding, and more importantly, the fact remains that the so-called business strategy or "white knight" privilege has not been recognized or accepted by Pennsylvania jurisprudence as explained herein.

Here, a protective order was issued on April 17, 2009 by Your Honor, under which the NRG Companies and all other parties are required to treat appropriately information identified as confidential, proprietary, or highly confidential.[8] Accordingly, to the extent that Exelon seeks to protect the information sought in the NRG Interrogatories-Set I, Nos. 21 and 22 as business strategy information or some other type of confidential information, such information is already adequately protected pursuant to the Commission's regulations and Your Honor's Protective Order.[9]

The creation of an absolute privilege, one that is applied broadly without any *in camera* review of the specific materials for which the privilege is being asserted, has hampered, and likely will hamper, the ability of the NRG Companies and other parties to access relevant information from Exelon that is necessary to advocate the issues of this case in a full and fair manner.[10] Exelon can use the newly-created and broadly applied privilege to avoid or delay the production of relevant information in this on-going proceeding and, therefore, immediate Commission review is necessary.

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[8] Your Honor's Protective Order in this proceeding, dated April 17, 2009 (to which all parties consented), already provides for attorney-eyes-only review of Highly Confidential information, as well as a mechanism for parties to seek additional protections of Proprietary and Highly Confidential information. *See* Protective Order, ¶¶ 5, 10. Exelon has not sought protection of discoverable materials on an information-specific basis, as contemplated by the Protective Order. Instead, it has sought, and now received, a blanket license to refuse to produce relevant information on the theory of an absolute business strategy privilege that has no basis in Pennsylvania law. As contemplated by the Protective Order, Exelon should be required to present specific information to Your Honor for *in camera* review. Your Honor could then determine the relevancy of the information and whether it is in fact too sensitive to disclose.

[9] It must be noted that NRG is not contesting Exelon's prerogative to designate materials as highly confidential under the Protective Order and to produce them only to counsel of record, who are bound not only by the explicit obligations of the Protective Order, but also by ethical obligations as members of the bar of the Commonwealth of Pennsylvania. Nor is NRG suggesting that information regarding future offers or transactions would be discoverable until the offer or transaction is publicly announced. Such information would be of questionable relevance to the Commission's consideration of the transaction that is currently before it for approval.

[10] Exelon continues to assert the business strategy privilege in this proceeding in order to avoid the disclosure of relevant information. For instance, on June 15, 2009, Exelon objected to nine interrogatories from NRG Interrogatories – Sets III & IV on the basis of a business strategy privilege.

Additionally, the "white knight" privilege is simply not applicable to Exelon as the acquiring company. To the extent that the business strategy or "white knight" doctrine has been used to protect or limit secret business strategies from discovery, such protection has arisen in the context of a *target company's* need to protect secret business strategies from discovery by a hostile bidder, such as negotiations with other non-hostile bidders, *i.e.*, the "white knights." *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); *Grand Metropolitan PLC v. The Pillsbury Company*, Civ. Action Nos. 10319, 10323, 1988 WL 130637 (Del. Ch. Nov. 22, 1989). Here, Exelon is the hostile acquiring company rather than the target company (i.e., NRG) and, therefore, Exelon is not entitled to assert the business strategy or "white knight" doctrine as a basis to protect or limit discovery.

Further, even assuming, *arguendo*, that Exelon is entitled to assert the business strategy or "white knight" doctrine as a basis for protection from discovery, which it is not as no such privilege is recognized under Pennsylvania law, the protections of the doctrine have expired to the extent they ever existed for Exelon. The protection provided by the business strategy or "white knight" doctrine provides only a temporary reprieve from discovery regarding pending strategy decisions. Once a decision has been made, the privilege disappears. *See, e.g., Grand Metropolitan,* at *2-*3 (holding that once a merger decision has been made, the basis for its determination is subject to judicial review and, thus, documents relevant to that decision are subject to discovery); *see BNS, Inc. v. Koppers Co., Inc.*, 683 F. Supp. 454, 458 (D. Del. 1988) (stating that once the target board announces its intention, the acquiring company will become immediately entitled to all documents related thereto). Here, Exelon's strategies to acquire NRG Energy and its subsidiaries, including NRG Pittsburgh and NRG Harrisburg, have been

announced publicly. Thus, no business strategy or "white knight" privilege for Exelon could exist at the present time.

In light of the foregoing, the Commission should not find that the information underlying Exelon's hostile takeover bid is immune from discovery under a so-called business strategy or "white knight" privilege. The NRG Companies and other parties are entitled, as a matter of due process and fundamental fairness, the explore the bases upon which Exelon has structured its proposed transaction.

B. The NRG Interrogatories are relevant to their claims, as well as to the Commission's review of Exelon's Application.

Section 5.321 of the Commission's regulations governs the scope of discovery permitted, and provides, in relevant part, as follows:

> [A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party.... It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321. A party objecting to a discovery request must demonstrate that the request is inappropriate by including "a description of the facts and circumstances purporting to justify the objection." 52 Pa. Code § 5.342(c)(2). Stated otherwise, an objecting party must provide some basis in law and/or fact to support the position that the information sought is not discoverable.

NRG Interrogatories-Set I, Nos. 21 and 22 provide as follows:

> NRG-1-21 Identify any and all documents relating to or referring to consideration by Exelon, or any officer or agent

> thereof, of the acquisition of NRG Energy, whether by tender offer, exchange offer, negotiated agreement, or otherwise.
>
> NRG-1-22 Identify the minutes of all meetings of board members of Exelon at or during which the acquisition of NRG Energy, whether by tender offer, negotiated agreement, or otherwise, was discussed, considered, analyzed, or authorized, and all documents that were prepared for or relied upon in any such meeting.

Your Honor concluded that NRG Interrogatories-Set I, Nos. 21 and 22 are not reasonably likely to lead to the discovery of admissible evidence. *See* Discovery Order at p.4. Your Honor concluded that the "terms of the specific transaction are before the Commission to evaluate, and the applicants' internal consideration and valuation of the transaction or any other potential transaction are irrelevant." *Id.*

Through NRG Interrogatories-Set I, Nos. 21 and 22, the NRG Companies are simply requesting any analyses of the transaction described in the Application and its varying effects on Exelon, the NRG Companies, future rates, and the service they would provide. The interrogatories seek disclosure of relevant information regarding: Exelon's projected cost of debt; its financing alternatives; the impact of the transaction on Exelon's credit rating; the anticipated impact on rates; any market share analysis; any analysis of antitrust issues; any anticipated cost savings and synergy projections; any potential impacts on reliability; and any anticipated impact on Exelon's other businesses – including its state-regulated public utilities. This information requested in NRG Interrogatories-Set I, Nos. 21 and 22 is directly related to the NRG Companies' and other parties' opposition to the above-captioned application and, moreover, is likely to lead to the discovery of admissible evidence necessary for the Commission to determine whether the transaction proposed in Exelon's Application satisfies the substantial

public benefit test.[11] The broad nature of the request was designed to prevent Exelon from withholding certain analyses based upon its characterization of the relevance of the analysis to the proposed transaction before the Commission. The NRG Companies and other parties should be permitted to explore Exelon's analysis of such issues.

Further, the best evidence regarding Exelon's intentions for the NRG Companies is Exelon's own analyses and other internal communications/presentations. The Discovery Order deprives the parties and the Commission of such evidence. Without permitting discovery of such analyses, the Commission would be hard-pressed to make a finding that Exelon's hostile takeover of NRG Energy and its Pennsylvania-regulated subsidiaries is in the public interest.

IV. STAY OF PROCEEDING

If Your Honor immediately corrects the Discovery Order and requires Exelon to respond promptly to NRG Interrogatories-Set I, Nos. 21 and 22, a stay of the proceeding is likely unnecessary if the NRG Companies and other parties are permitted to introduce supplemental testimony based on the discovery responses. If however the issue is certified to the Commission for interlocutory review, a stay of the proceedings is likely necessary in order to protect the substantial rights of the parties. It is unlikely that the Commission will resolve the discovery

[11] 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).

matter prior to the hearings currently scheduled in this proceeding for July 15-17, 2009. Plenty of time remains to extend the schedule without prejudice to any party.[12]

V. CONCLUSION

A business strategy privilege that is an absolute bar to discovery similar to the one created in Your Honor's Discovery Order and that is applied broadly does not exist under Pennsylvania law. To the extent that Exelon seeks to protect the information sought in the NRG Interrogatories-Set I, Nos. 21 and 22 as business strategy information or some other type of confidential information, such information is already adequately protected pursuant to the Commission's regulations regarding protective orders and Your Honor's Protective Order. Assuming that such a privilege exists under Pennsylvania law, the privilege is not applicable to Exelon as the hostile, acquiring company and further would have expired when Exelon went publicly announced the transaction that the Commission is now being asked to review. In any event, the privilege would need to be narrowly applied following an *in camera* review by Your Honor of the subject materials.

Further, the information requested in NRG Interrogatories-Set I, Nos. 21 and 22 is directly relevant to the Commission's obligation to ensure that the proposed transaction is in the public interest. The requested information also is likely to lead to the discovery of admissible evidence regarding the impacts of the proposed transaction.

[12] NRG notes that its Annual Shareholder Meeting is now scheduled for July 21, 2009. Further, Exelon extended its expiration of its tender offer to August 21, 2009. Finally, it should be noted that Exelon recently agreed to a procedural schedule in Texas with hearings in October.

WHEREFORE, NRG Energy Center Pittsburgh LLC and NRG Energy Center Harrisburg LLC respectfully request, pursuant to 52 Pa. Code § 5.304, that Administrative Law Judge Marlane R. Chestnut certify the discovery question presented herein for interlocutory review by the Pennsylvania Public Utility Commission.

Respectfully submitted,

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DATED: June 25, 2009

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

APPENDIX A

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 Bell Cellular Systems Co. v. Ameritech Mobile Phone Services of Cincinnati, Inc., et al.

Civil Action No. 13389

COURT OF CHANCERY OF DELAWARE, SUSSEX

1995 Del. Ch. LEXIS 63

May 9, 1995, Date Submitted
May 17, 1995, Date Decided

SUBSEQUENT HISTORY: [*1] Released for Publication by the Court June 12, 1995.

CASE SUMMARY:

PROCEDURAL POSTURE: By motion for protective order and motion in limine, plaintiff cellular corporation sought to dissolve a Delaware limited partnership in which it was a 45 percent limited partner. Defendant mobile service was a 52 percent owner of the partnership and brought a motion to compel discovery before the court.

OVERVIEW: A discovery dispute between the parties involved a meeting the cellular corporation's principal fact witness had with the CEO of the parent company. The witness disclosed she discovered a possible regulatory violation by the cellular corporation. At the witness's deposition, counsel for the cellular corporation refused to permit inquiry into the witness's allegations of improper motive or regulatory violation. On review, the court held that the allegations made by the witness fell within the broad scope of discovery. The court found that: 1) the cellular corporation could not invoke the attorney-client privilege to block the mobile service's inquiry into the facts that caused the witness to reach her conclusions; 2) the cellular corporation could not bar discovery into its employment negotiations with the witness even if violation issues were discussed; and, 3) a speculative threat of a takeover in the future was insufficient to support an assertion of the business strategy immunity by the cellular corporation. The court found that the attorney's pre-deposition interview of the witness and the CEO's notes, prepared for use in the litigation, were protected attorney work product.

OUTCOME: The court found the allegations made by the witness fell within the broad scope of discovery with the exception of two docu-

ments that were covered by attorney work product.

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Relevance
[HN1] A trial court has wide discretion to set the limits of discovery. In general, the court permits a party to inquire into any matter reasonably calculated to lead to the discovery of admissible evidence. Del. Ch. Ct. R. 26(b)(1).

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > Attorney-Client Privilege > General Overview
Legal Ethics > Client Relations > Confidentiality of Information
[HN2] The attorney-client privilege gives a client the right to refuse to disclose confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. D.U.R.E. 502(b). The privilege protects communications, but it does not protect facts from discovery, even if the exclusive source of a witness's knowledge of those facts is the client's attorney.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
Civil Procedure > Discovery > Relevance
[HN3] A report from an investigation conducted in the ordinary course of business is discoverable.

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Richard L. Sutton, Esquire, Morris, Nichols, Arsht & Tunnell, Wilmington, DE.

Thomas A. Beck, Esquire, Richards, Layton & Finger, Wilmington DE.

JUDGES: WILLIAM B. CHANDLER III, VICE-CHANCELLOR

OPINION BY: WILLIAM B. CHANDLER

OPINION

Cincinnati Bell Cellular Systems Company ("Cincinnati Bell") seeks to dissolve, pursuant to 6 *Del. C.* § 17-802, Cincinnati SMSA Limited Partnership (the "Partnership"), a Delaware limited partnership in which Cincinnati Bell is a 45% limited partner. Defendants include Ameritech Mobile Phone Service of Cincinnati, a 52% owner of the Partnership, and Ameritech Mobile Communications, Inc. (collectively referred to as "Ameritech"). The parties are before the Court on Cincinnati Bell's motion for protective order and motion in limine and Ameritech's motion to compel discovery.

The parties' discovery dispute arises out of an unusual event that occurred just prior to the close of discovery. A few days before the last scheduled deposition [*2] in this case, Cincinnati Bell's principal fact witness, Mary Beth Meyer ("Meyer"), met with John LaMacchia ("LaMacchia"), the CEO of Cincinnati Bell's parent company, Cincinnati Bell, Inc. (also "Cincinnati Bell"). Meyer told LaMacchia that she believed Cincinnati Bell's motive for suing Ameritech was to force Ameritech to buy another Cincinnati Bell affiliate, Cincinnati Bell Telephone, Inc. She also stated that she discovered a possible regulatory violation by Cincinnati Bell. At the same meeting, she presented LaMacchia with a written "consulting agreement" to compensate her for her role in this litigation. Cincinnati Bell rejected Meyer's offer as an outrageous attempt to extract unreasonable economic concessions from Cincinnati

Bell on the eve of her deposition. Cincinnati Bell also believes that ethical principles preclude it from paying a consulting fee to a fact witness. Cincinnati Bell rescheduled Meyer's deposition; but, in the meantime, it conducted its own interview of her with a court reporter present. The parties eventually resumed Meyer's deposition, but Cincinnati Bell refused to permit Ameritech to fully inquire into Meyer's allegations of Cincinnati Bell's improper [*3] motive or regulatory violation.

Cincinnati Bell moves for a protective order and/or motion in limine to preclude further discovery into the "Mary Beth Meyer Problem." Cincinnati Bell believes Meyer's allegations of improper motive and a regulatory violation by Cincinnati Bell are irrelevant to this lawsuit.

[HN1] This Court has wide discretion to set the limits of discovery. *Mann v. Oppenheimer & Co., Del. Supr., 517 A.2d 1056, 1061 (1986).* In general, the Court permits a party to inquire into any matter "reasonably calculated to lead to the discovery of admissible evidence." Ch. Ct. R. 26(b)(1). I believe the improper motive and regulatory violation allegations made by Meyer come within the broad scope of discovery. My decision to permit Ameritech to inquire into these issues does not constitute a ruling that the evidence they discover will be admissible at trial.

Cincinnati Bell resists disclosing many of the facts Ameritech requests on the grounds of attorney-client privilege, the work product doctrine, or the business strategy immunity. Ameritech contends that Cincinnati Bell is wielding its attorney-client privilege and work product immunity too broadly and that the business [*4] strategy privilege does not apply in the absence of a hostile takeover.

ATTORNEY-CLIENT PRIVILEGE

Cincinnati Bell relies on the attorney-client privilege to bar Ameritech's inquiry into the facts on which Meyer based her conclusions about Cincinnati Bell's motivation and regulatory violation. Because Meyer's exclusive source of this knowledge was privileged communications, Cincinnati Bell asserts that the attorney-client privilege protects communications between a client and its attorney, but does not preclude the discovery of facts discussed in those communications.

[HN2] The attorney-client privilege gives a client the right to refuse to disclose "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . ." D.U.R.E. 502(b). The privilege protects communications, but it does not protect facts from discovery, even if the exclusive source of a witness's knowledge of those facts is the client's attorney. *I.B.M. v. Comdisco. Inc.,* Del. Super., CA. No. 91-C007-199, Goldstein, J. (Mar. 11, 1992); *Upjohn Co v. United States, 449 U.S. 383, 395, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981).* Cincinnati Bell can rely on [*5] the privilege to prevent discovery of any communications with its legal counsel, such as its counsel's presentation at the board of directors' meeting where this lawsuit was authorized. However, Cincinnati Bell cannot invoke the attorney-client privilege to block Ameritech's inquiry into the facts that caused Meyer to conclude that Cincinnati Bell had an improper motive for bringing this lawsuit or engaged in a regulatory violation, even though she learned these facts from W. D. Baskett, Cincinnati Bell's general counsel.

Ameritech wants to inquire into Meyer's employment negotiations with Baskett or LaMacchia. Ameritech claims that Meyer moved across the table in these negotiations, thus Cincinnati Bell has no privilege in its discussions with her. During the negotiations of an employment agreement, Meyer did move across the table, but Cincinnati Bell retains its privilege over any other communications between Meyer and its attorneys. Applying this standard, Cincinnati Bell cannot bar discovery into its employment negotiations with Meyer, even if Meyer and LaMacchia or Baskett dis-

cussed the motivation or violation issues during these negotiations. Therefore, Cincinnati Bell shall: [*6] produce unredacted copies of the March 1995 correspondence between Meyer and LaMacchia and permit Ameritech to inquire into all employment negotiations between LaMacchia or Baskett and Meyer, including the meetings in which the motivation or violation issues were discussed in the context of employment negotiations.

Any communications between LaMacchia and Baskett, regardless of the issues discussed, fall squarely within the privilege and are not discoverable.

WORK PRODUCT

Cincinnati Bell relies on the work product doctrine for its refusal to respond to several of Ameritech's discovery requests. The two most important documents are the transcript of counsel for Cincinnati Bell's interview of Meyer and LaMacchia's notes from his interview of Meyer. Cincinnati Bell properly claims work product Protection for both of these documents.

Cincinnati Bell may refuse to produce the transcript of its attorneys' pre-deposition interview of Meyer because it is protected attorney work product. The transcript will provide Ameritech with insight into Cincinnati Bell's attorneys' opinions about the importance of the evidence and potentially reveal Cincinnati Bell's trial strategy. Ameritech can [*7] discover the facts it seeks in a deposition of Meyer.

LaMacchia's notes are also attorney work product. LaMacchia prepared the notes for use by Cincinnati Bell's attorneys in this lawsuit, which was well underway before LaMacchia made his notes. [HN3] A report from an investigation conducted in the ordinary course of business is discoverable. *Hopkins v. Chesapeake Utilities Corp., Del. Super., 300 A.2d 12, 15-16 (1972).* However, this report, created specifically for use by an attorney in an ongoing lawsuit, was not made in the ordinary course of business. Ameritech does not need the notes because it can question LaMacchia or Meyer about what occurred at this recent meeting.

BUSINESS STRATEGY IMMUNITY

Cincinnati Bell, relying on the business strategy immunity, refuses to provide copies of valuation reports performed by its consultants. Ameritech requests these reports because Meyer apparently deduced her motivation and violation theories from the information in them. Cincinnati Bell states that these reports, which Cincinnati Bell calls the Tiger and Zebra documents, contain valuations of its various businesses. Cincinnati Bell is loathe to turn this sensitive information over to Ameritech, [*8] a competitor and potential acquiror of Cincinnati Bell's businesses.

The business strategy immunity developed in the context of hostile takeover litigation. This Court recognized a target corporation's need to protect secret business strategies, such as negotiations with a white knight, from discovery by a hostile bidder. *See Grand Metropolitan PLC v. The Pillsbury Company,* Del. Ch., C.A. No. 10323, Allen, C. (Nov. 22, 1989), Let. Op. at 2. Cincinnati Bell invokes this immunity because Ameritech may, at some time in the future, seek to acquire Cincinnati Bell or one of its affiliates. This speculative threat to Cincinnati Bell is insufficient to support an assertion of the business strategy immunity. I recognize that Ameritech requests Cincinnati Bell to turn over sensitive information, but I believe that an "attorneys' eyes only" restriction on the Zebra and Tiger documents will provide Cincinnati Bell with sufficient protections against the widespread dissemination of this information.

IT IS SO ORDERED.

William B. Chandler III

APPENDIX B

Grand Metropolitan PLC v. The Pillsbury Company,
Civ. Action Nos. 10319, 10323, 1988 WL 130637 (Del. Ch. Nov. 22, 1989)

H

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
GRAND METROPOLITAN PLC, et al.
v.
The PILLSBURY COMPANY, et al.,
and In re The PILLSBURY COMPANY SHAREHOLDERS LITIGATION.
CIV. A. Nos. 10319, 10323.

Submitted: Nov. 21, 1988.
Decided: Nov. 22, 1988.

**1048 C. Stephen Bigler, Richards, Layton & Finger, Wilmington.

Joseph A. Rosenthal, Morris, Rosenthal, Monhait & Gross, P.A., Wilmington.

Edward P. Welch, Skadden, Arps, Slate, Meagher & Flom, Wilmington.

A. Gilchrist Sparks, III, Morris, Nichols, Arsht & Tunnell, Wilmington.

ALLEN, Chancellor.

*1 These actions arise out of a current tender offer by Grand Metropolitan PLC, through its subsidiary, Wendell Investments Limited, for up to all of the common stock of The Pillsbury Company at $60 per share cash. Two actions are consolidated. In one, plaintiffs are Grand Met and Wendell; plaintiffs in the second action are shareholders of Pillsbury. Currently pending are motions by both sets of plaintiffs to compel production of certain documents withheld by Pillsbury under a claim that those documents (or portions of documents) disclose ongoing business matters relating to the board's response to Grand Met's offer. These materials are said to be subject to a privilege or immunity from the discovery process, at least at this stage. That "privilege," which has been referred to in some of our decisions as a "white knight" privilege, is here somewhat more appropriately referred to as a "business strategy privilege."

A central issue at this stage of this litigation appears to be whether the board of Pillsbury has acted in good faith and with due care in reaching and adhering to a decision to resist the Grand Met offer and whether the steps it has taken to defeat that offer are reasonable in relationship to a threat that the offer is seen as presenting. *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985). The principal decision the board has made to thwart the Grand Met offer, which the board has determined with the advice of its bankers is at an inadequate price, is the decision to leave in place certain stock rights ("poison pill"), the existence of which **1049 apparently render it quite unlikely that Grand Met will be able to close its proposed transaction even if a large majority of Pillsbury shareholders seek to accept the offer. (It now appears that approximately 85% of the Pillsbury stock has been tendered to Grand Met).

An initial motion for an injunction requiring the board to redeem the stock rights was heard on November 4, 1988, approximately one month after the offer commenced. That motion was denied on the basis that as of its meeting of October 17, it appeared that the board was meeting its obligations in the circumstances. The board was at that time seen as actively considering steps to maximize shareholder interests in face of the Grand Met bid and the stock rights, therefore, were seen as serving a valid purpose at that time. Subsequent to the presentation of that motion, the board has announced an intention to spin off the Burger King business and its associated distribution company to Pillsbury stockholders as of December 2. That record date has now been changed to December 19. Plaintiffs have sought a time for the presentation of another motion seeking, among other relief, an or-

APPENDIX B

der requiring the board to now redeem the stock rights. That motion will be heard on December 12. It is in connection with that motion that the current motion under Rule 37 is pressed.

The general principles governing this motion may be stated without great difficulty. The application of those standards, however, is necessarily highly particularized and often difficult.

*2 The starting place is a recognition that the scope of permissible discovery under Rule 26(b) of the Rules of the Court of Chancery (which is modeled on the federal rules of civil procedure) is broad. There is no assertion here that the materials sought fail to satisfy the test of Rule 26(b). However, this court and others have recognized that in a contest for corporate control, the board of directors of a target company continues to have an ongoing responsibility to manage the corporation and, in the face of such a contest, that responsibility may entail the exploration of alternative transactions that would better promote corporate and shareholder welfare. The discovery process may legitimately give some consideration to such efforts. We have repeatedly recognized that disclosure of such efforts, while they are ongoing, may be detrimental to shareholder interests.[FN1] Thus, under authority of Rule 26(c), we have, when a **1050 threat of that kind is present, engaged in an analysis that attempts to evaluate the importance of the matter sought to be discovered to the party seeking it; the risk of nonlitigation injury that might occur to the target corporation if discovery is permitted; and the stage of the company's efforts, as well as the stage of the litigation. The effort is to fashion a discovery ruling that best balances and accommodates inconsistent yet valid contending interests.

Since the "business strategy privilege" or "white knight privilege" is not technically a privilege in the sense that proof of certain elements creates something akin to an entitlement, but is in the nature of a qualified immunity to discovery similar to the attorney's work product doctrine (*see Computervision Corp. v. Prime Computer, Inc.*, Del.Ch., C.A. No. 9513, Allen, C. (January 26, 1988); *BNS, Inc. v. Koppers Co., Inc.*, 683 F.Supp. 454 (D.Del.1988)), its invocation in all instances calls forth this balancing of interests approach. The cases engaging in this analysis, however, have developed a few helpful principles. Primary among these is the notion that, once a decision has been made, the shareholders "are entitled to test the validity of that decision and, for that purpose, to inquire into its underlying basis." *Plaza Securities Company v. Office*, Del.Ch., C.A. No. 8737, Jacobs, V.C. (December 15, 1986). In *BNS, Inc. v. Koppers*, Chief Judge Schwartz, applying federal, not Delaware, law, noted a similar view:

BNS will not be denied the documents forever. This fact has been a significant factor in the Court's efforts to accommodate the needs of the parties. As discussed above, BNS has a genuine need for the documents its seeks. It is equally clear at some future point BNS may be immediately entitled to that which has been refused it today. That point will be reached with respect to the $60 offer if, and when, the Koppers board formally rejects it. Similarly, if the Koppers board should formally announce its intent to adopt any one or a combination of defenses, BNS will become immediately entitled to all documents relating to all defensive strategies it had considered.

*3 683 F.Supp. at 458.

**1051 Here, plaintiffs say the board has made a decision to resist the Grand Met offer and to keep the rights in place. Therefore, now is the time for full disclosure (subject to the terms of a confidentiality agreement already in place).

Pillsbury contends that the principle that full disclosure of discoverable matters relating to an accomplished decision has been fully complied with in this case. It says that it has fully produced documents relevant to the board's decision to leave the poison pill in place except where those documents disclose information concerning options still being

actively considered.

Plaintiffs apparently seek an order of broad generality determining that, at this stage of the litigation, there can be no invocation of a business strategy privilege. This relief is overly broad, however. The board has determined to resist the Grand Met offer and thus, in light of the legal issue raised thereby, the basis for its determination must be subjected to limited judicial review. Documents relevant to that decision thus are subject to discovery. However, as the board does continue to function with respect to its alternative, the question whether production of documents disclosing elements of possible alternatives will be compelled must be addressed with particularity.

Turning to specifics, plaintiffs claim that they have been unable to obtain discovery of efforts by the Company to locate a so-called "white knight" or friendly alternative transaction. In this connection, they say it is surely relevant to the reasonableness of the board's judgment that Grand Met's $60 cash offer constitutes a "threat" and that that offer is "inadequate" to know (a) how many other potential buyers were contacted by Pillsbury's agents, (b) what they were told about the Company,[FN2] and (c) what the responses were.

This discovery has been resisted because the board apparently has not rejected the possibility of proposing such a transaction. That the Company may not yet have abandoned the idea of a possible alternative merger partner does not itself implicate the concerns that this "privilege" is meant to address, insofar as contacts that have failed to excite a still lively interest are concerned. With respect to any contacts that have led to a still lively interest, the identity of such person and the subject of discussions that may have occurred **1052 between them and the Company or its outside advisors would seem to implicate those concerns and, in the circumstances, to warrant protection at this time.

Accordingly, defendants shall inform plaintiffs of the identity of each person or entity that it solicited or with whom it otherwise had discussions relating to a possible business combination or other material transaction (whether by merger, sale of assets or other device)-except such persons or entities with whom such discussions may in good faith be said to be ongoing; and the Company shall be required to respond to discovery requests seeking the disclosure of the course and outcome of such discussions in each such instance (unless disclosure of the identity of such person or the substance of the contacts would breach an existing confidentiality agreement with such third party).

*4 Another subject to which plaintiffs point is the refusal of the Company to disclose materials relating to evaluation of any possible LBO option. Such a hypothetical transaction was one of several techniques employed by Pillsbury's investment bankers for valuing the Company. The Company claims that several alternative bases for determining that the Grand Met offer was "inadequate" have been disclosed (including the discounted cash flow analysis apparently), and that the LBO alternative is not critical. More importantly, they say that that alternative continues under active study as an option. While plaintiffs are quite skeptical that such an option can realistically be regarded as tenable at this date, I accept defendants' representation.

Plaintiffs presumably suppose that the LBO studies show that such a transaction would not be feasible at a price of $60 per share or more, and thus contend that the court must be apprised of that information, which was before the board, in evaluating the reasonableness of the board's reaction to the "threat" posed by the Grand Met offer. I agree that the information would appear quite relevant.

Moreover, information relating to possible recapitalization would appear to have a similar claim to relevance. That information too has been redacted because that type of transaction continues to be considered as an option.

These two, related subjects may be treated together.

Aside from their obvious relevance, the most important fact to note about these alternatives is that to the extent they were considered in a pre-Burger King spin-off environment, they are quite different from any such alternatives being considered now. The decision to spin-off that important asset entailed a decision to change the Pillsbury Company **1053 in a very substantial way. Studies relating to a recapitalization or an LBO of the pre-spin-off Company could not reveal ongoing negotiations or explorations, the disclosure of which so threatens injury to the Company as to outweigh the Rule 26(b) claim to inspection. The decision to do the spin-off rendered of historical interest studies to do alternatives incompatible with the spin-off. To the extent there are ongoing negotiations or consideration of an LBO or recapitalization of the Company as it would appear post spin-off, they would present the problem that the business strategy privilege addresses.

Accordingly, defendants will be required to produce all documents relating to or disclosing a possible LBO transaction or a recapitalization or restructuring of the Company previously withheld under a claim of business strategy privilege that were created prior to the board's approval of the spin-off. As to documents created after that time relating to such transactions, the motion to compel will be denied at this time insofar as counsel will represent that they relate to a form of transaction still under active consideration.

The request for the production of the Company's "corporate strategy/plan review" that was created prior to the offer shall be produced as it may have formed an important part on the board's determination that the Grand Met offer was inadequate in light of the future prospects for the Company. I cannot determine what subjects are redacted on the document produced. As with the Smith notes treated below, if the Company wishes to reargue this ruling in light of the specific matters redacted, it may do so by getting an appointment with me tomorrow. Otherwise, this document shall be produced promptly.

*5 The request that the Company be required to produce the minutes of its meeting since January 1, 1986, insofar as they relate to issues in this lawsuit, will be granted.

The request that the Company be required to produce documents relating to a Shearson Lehman study concerning the financial ability of Grand Met to acquire Pillsbury will be granted.

The request for the production of an unredacted copy of the handwritten notes of Mr. Philip Smith relating to the October 17 meeting will be granted, except defendants may move for reconsideration of this item within twenty-four hours, if they wish to supply the court with a copy of these notes in their unredacted form and reargue the basis of the objections with the particularities of that document in view.

**1054 As to the specific deposition question, I have reviewed the various transcripts and conclude as follows. Most, if not all, of the instructions were proper when given. All of the depositions occurred prior to the board decision with respect to the spin-off. As indicated above, that decision has consequences for the discovery in this case. Some of those instructions would not be appropriately given under the current state of affairs (*i.e.*, Levin Dep. pp. 52-55; Macke Dep. 158; McLamore Dep. 155; Slater Dep. 94-95; Spoor Dep. 142); the other questions would still be validly subject to an instruction. I will not order that all of the foregoing witnesses submit to further deposition as the instructions were proper. Plaintiffs should, however, be afforded some opportunity now to inquire into the subject of alternatives considered before the decision to accomplish the spin-off. The parties should confer on this.

As to the cross motion, I conclude that the instruction given to Mr. Giordiano was appropriate; the question did not seek the discovery of facts, but sought to engage the witness in a normative dis-

course. The limited scope of discovery of Grand Met's bankers, appropriate in light of the narrow relevance of its financial arrangements, together with the representation that no valuation data was provided to the banks by Grand Met, lead me to deny the Company's motion in this respect.

The materials required to be produced shall be produced by the close of business tomorrow.

FN1. *See, e.g., Newell Co. v. William E. Wright Co.*, Del.Ch., C.A. 9513, Allen, C. (September 26, 1985) (oral ruling); *Wickes Cos. v. Owens-Corning Fiberglass Corp.*, Del.Ch., C.A. 8572, Berger, V.C. (August 29, 1986); *Computervision Corp. v. Prime Computer, Inc.*, Del.Ch., C.A. 9513, Allen, C. (January 26, 1988).

FN2. As to this, I understand that the Pillsbury "book" prepared by its investment bankers has now been provided to plaintiffs with a single page redacted.

Del.Ch.,1988.
Grand Metropolitan PLC v. Pillsbury Co.
Not Reported in A.2d, 1988 WL 130637 (Del.Ch.), Fed. Sec. L. Rep. P 94,096, 14 Del. J. Corp. L. 1045

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