



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

ISSUED: APRIL 26, 2005

A-110550F0160

PAUL R BONNEY ESQUIRE  
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PECO ENERGY COMPANY  
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**DOCUMENT  
FOLDER**

Joint Application of PECO Energy Company and Public Service Electric and Gas Company for Approval of the Merger of Public Service Enterprise Group Incorporated with and into Exelon Corporation.

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Marlane R. Chestnut. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2<sup>ND</sup> FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

James J. McNulty  
Secretary

Encls.  
Certified Mail  
Receipt Requested  
FG

See Attached Listing for Additional Parties of Record.

Joint Application of PECO Energy Company and Public Service Electric and Gas Company for  
Approval of the Merger of Public Service Enterprise Group Incorporated with and Into Exelon  
Corporation  
Docket Number A-110550F0160

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RUSH

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(Senator Anthony H. Williams)

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCUMENT  
FOLDER

Joint Application of PECO Energy Company :  
and Public Service Electric and Gas Company :  
for Approval of the Merger of Public Service : A-110550F0160  
Enterprise Group Incorporated with and into :  
Exelon Corporation :

INITIAL DECISION

DOCKETED

APR 27 2005

Before  
Marlane R. Chestnut  
Administrative Law Judge

HISTORY OF THE PROCEEDING

On February 4, 2005, PECO Energy Company (PECO) and Public Service Electric and Gas Company (PSE&G) (collectively, joint applicants) filed with the Pennsylvania Public Utility Commission (Commission) a Joint Application requesting that the Commission issue an order approving, to the extent necessary, the merger of Public Service Enterprise Group Incorporated (PSEG), PSE&G's corporate parent, with and into Exelon Corporation (Exelon), PECO's ultimate parent corporation.

Notice of the Joint Application was published in the *Pennsylvania Bulletin* on February 19, 2005 and numerous entities filed Protests or Petitions to Intervene. Eric Joseph Epstein (Epstein) filed both a Protest and Petition to Intervene on March 7, 2005. On March 24, 2005, the joint applicants filed an Answer in opposition to the Petition to Intervene and a Motion to Dismiss the Protest, alleging lack of standing and issues that are outside the scope of this proceeding and outside the Commission's jurisdiction.

Mr. Epstein addressed the outstanding Answer and Motion at the prehearing conference which was held on March 29, 2005 in Philadelphia, PA. At that time, I took the Answer

and Motion under advisement, and permitted Mr. Epstein to participate in the proceeding pending resolution of the Answer and Motion.

On or about April 18, 2005, Mr. Epstein filed and served a Response to the joint applicants' Answer and Motion.

As discussed in more detail below, the Answer and Motion will be granted. Mr. Epstein is not a customer of PECO, does not live in PECO's service territory, is not an energy marketer within PECO's service territory and therefore lacks standing to participate in this proceeding as either an intervener or protestant. In addition, many of the issues he identified are outside the scope of this proceeding.

#### FINDINGS OF FACT

1. On February 4, 2005, PECO Energy Company (PECO) and Public Service Electric and Gas Company (PSE&G) (collectively, joint applicants) filed with the Pennsylvania Public Utility Commission (Commission) a Joint Application requesting that the Commission issue an order approving, to the extent necessary, the merger of Public Service Enterprise Group Incorporated (PSEG), PSE&G's corporate parent, with and into Exelon Corporation (Exelon), PECO's ultimate parent corporation.
2. On March 7, 2005 Eric Joseph Epstein (Epstein) filed both a Protest and Petition to Intervene.
3. Eric Joseph Epstein is not a customer of PECO, does not live in PECO's service territory and is not a marketer of electricity or gas in PECO's service territory.
4. In January 2001, with the Commission's approval, PECO transferred all of its generation (including its interest in the Nuclear Monitoring and Waste Storage Agreement) to Exelon Generation Company LLC.

5. Parties permitted to participate in this proceeding include inter alia the Office of Consumer Advocate, Office of Small Business Advocate, Office of Trial Staff, the Pennsylvania Department of Environmental Protection, the City of Philadelphia, the Philadelphia Area Industrial Energy Users Group and the Exelon Utility Coordinated Council, Locals 614 and 777 of the International Brotherhood of Electrical Workers.

### DISCUSSION

Essentially, two grounds were alleged by the joint applicants in opposing the Protest and Petition to Intervene filed by Mr. Epstein. The first was the failure to establish a direct, immediate or substantial interest in the proceeding that provides standing to protest or to intervene; the second was that the issues raised by Mr. Epstein's Protest and Petition to Intervene are outside the scope of this proceeding. Each of these issues is addressed below.

#### A. Standing to Intervene or Protest

Eligibility to intervene in a proceeding before the Commission is addressed in the regulations promulgated by the Commission. Specifically, §5.72 provides in relevant part that:

(a) *Persons*. A petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. The right or interest may be one of the following:

(1) A right conferred by statute of the United States or of the Commonwealth.

(2) An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.

(3) Another interest of such nature that participation of the petitioner may be in the public interest.

Allowance of intervention is a matter within the discretion of the Commission. City of Pittsburgh v. PA Public Utility Comm'n, 153 Pa.Super. 83, 33 A.2d 641(1943), N.A.A.C.P., Inc. v. PA Public Utility Comm'n, 5 Pa.Comm.w. 312, 290 A.2d 704(1972). "The interest of a petitioner seeking intervention must be direct and immediate." Re Pennsylvania Power & Light Company, 50 Pa. PUC 38, 40(1976).

Mr. Epstein claims that he is eligible to intervene pursuant to subsections (2) and (3) above. Primarily he relies on his assertions that he has participated in prior proceedings involving PECO (specifically, as a signatory to the Joint Petition for Negotiated Settlement of the Application of PECO Energy Company, Docket No. A-110550F0147, the PECO-Unicom proceeding), and that he has a signed agreement with PECO relating to the operation of the company's Peach Bottom nuclear facility (Nuclear Monitoring and Waste Storage Agreement).<sup>1</sup> He also alleges that his participation is in the public interest because he "represent[s] dedicated interests managed and administered by Mr. Epstein for ratepayers, citizens and communities in South Central Pennsylvania." Response, Paragraphs 20 and 21. Finally, he states that he should be permitted to intervene because he is a shareholder of Exelon Corporation (PECO's parent), and has developed expertise in the area of nuclear power economics.

None of these assertions rise to the level of an interest which is "directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding."

First, the fact that he participated in prior PECO proceedings is irrelevant. Unlike issues involving jurisdiction, for example, which cannot be waived by the parties, standing is waivable. Simply because PECO allowed Mr. Epstein, who is not a customer, to participate in

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<sup>1</sup> Although Mr. Epstein references Three Mile Island Alert, Inc. and the EFMR Monitoring Group in his Petition to Intervene, both the Petition to Intervene and Protest were filed by Mr. Epstein as an individual.

other PECO proceedings or to enter into monitoring agreements, is insufficient by itself to confer a direct and immediate interest in this particular proceeding. In this connection, it should be noted that since the conclusion of the PECO-Unicom merger proceeding, PECO's generating assets (including its interest and obligations pursuant to the Nuclear Monitoring and Waste Storage Agreement) were transferred to Exelon Generation Company, LLC.

Second, it is beyond argument that even if Mr. Epstein as an individual had a direct, immediate and substantial interest which may be directly affected in this proceeding, that interest certainly can be adequately represented by existing participants. All customer groups – as well as the public interest generally – are represented in this proceeding and, as noted by Mr. Epstein in his Response, have identified issues related to nuclear power generation in their respective Prehearing Memoranda. These parties are the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), the Office of Trial Staff (OTS), the Philadelphia Area Industrial Energy Users Group (PAIEUG), as well as the Pennsylvania Department of Environmental Protection (DEP). Other parties representing either employees, individual customers or groups of customers include the Action Alliance of Senior Citizens of Greater Philadelphia, Association of Community Organizations for Reform Now and Tenants' Action Group (Action Alliance et al.), Citizens for Pennsylvania's Future, Joy Bergey and Lisa Z. Leighton (PennFuture), the City of Philadelphia, the New Jersey Large Energy Users Coalition (NJLEUC, PECO customers only), the Energy Coordinating Agency of Philadelphia, Inc. (ECA), and the Exelon Utility Coordinated Council, Locals 614 and 777 of the International Brotherhood of Electrical Workers and Frank Kuders (Labor Parties). To the extent relevant, any of these parties can address issues relating to prior arguments entered into by PECO in other proceedings.

As the Commonwealth Court stated in Mid-Atlantic Power Supply Ass'n v. Pennsylvania Public Util. Comm'n, 746 A.2d 1196, 2000 Pa. Commw. LEXIS 86, \*11-12:

PECO does not represent the interests of its ratepayers. A party may not claim standing to vindicate the rights of a third party who has the opportunity to be heard. Pennsylvania Dental Assoc. v. Comm. of Pa., Dept. of Health, 461 A.2d 329 (Pa. Cmwlth. 1983).

Additionally, Section 902-A of the Administrative Code statutorily provided for the OCA to represent the interests of customers before the PUC, and the OCA, as intervenor, submitted its brief in support of the PUC's Final Order. PECO was not aggrieved by the order to release specified customers information to all licensed suppliers of electricity and therefore lacks standing.

It must be remembered that Mr. Epstein is an individual, and his Petition to Intervene and Protest were filed on that basis. There is no aspect of the public interest that requires intervention on his part. He is not a customer of PECO, is not a gas or electric marketer in PECO's service territory, does not live in PECO's service territory, has no direct, immediate or substantial interest in this proceeding that cannot be represented by any other party, and will not be aggrieved in any way as the result of the Commission's final order.

Third, his status as a shareholder of Exelon Corporation is insufficient to confer any direct, immediate or substantial interest in this proceeding. It is a corporation's board of directors that represents shareholder interests; a shareholder's interest has been characterized by the Commission as "indirect." See, American Society of Utility Investors v. Pennsylvania Public Utility Commission, 54 Pa. PUC 560, 1980 Pa. PUC LEXIS 3, \*2: "[a]n injury to a corporation may, to be sure, result in injury to the corporation's stockholders. Such injury, however, is regarded as 'indirect,' and insufficient to give rise to a direct cause of action by the stockholders. Kelly v. Thomas (1912) 234 Pa 419, 428, 83 Atl. 307."

Finally, the fact that Mr. Epstein "has been recognized as an expert witness before the Commission on nuclear economics" and "has worked cooperatively with AmerGen, FirstEnergy, PPL, PECO Energy, PPLICA, PAIEUG, the OCS and the OTS to resolve nuclear tariffs" (Response, Paragraphs 25 and 26) is completely irrelevant.

As Mr. Epstein has failed to establish the direct and immediate interest necessary to permit his intervention in this proceeding, he also has failed to establish that he has standing to file

a protest. As explained above, he is not a customer of PECO, is not an energy marketer with customers in PECO's service territory and does not live in its service territory.

Standing means that a party has a sufficient stake in an otherwise justiciable controversy to obtain a judicial resolution of that controversy. It is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented.

The Commission has adopted the criteria used in Pennsylvania civil law practice to determine if a party has standing. Courier Express, Inc. v. F. L. Shaffer Company, Inc., Docket No. C-892462 (Order dated April 11, 1990); Wm. Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975) (Wm Penn); Landlord Service Bureau, Inc. v. Equitable Gas Company, 1993 Pa. PUC LEXIS 54.

Standing requires that an aggrieved party have an interest which is substantial, direct, and immediate. To have a substantial interest means that there must be some discernible adverse effect to some interest of the complaining party other than the abstract interest of all citizens in having others comply with the law. To have a direct interest means that the aggrieved party must show causation of the harm to his interest by the matter of which he complains. To have an immediate interest means that the nature of the causal connection between the action complained of and the injury to the person challenging it is sufficiently close to present a justiciable controversy. Wm Penn, supra; In Re Francis Edward McGillick Foundation, 537 Pa. 194, 642 A.2d 467 (1994); PECO-Unicom proceeding, Commission Opinion and Order entered June 22, 2000.

As explained above, Mr. Epstein lacks standing to protest the Joint Application. The fact that he may have participated in prior proceedings and that he has entered into nuclear plant monitoring agreements is insufficient to confer standing. First, as standing is waivable, his prior participation is irrelevant to determining his interest in this proceeding. In addition, as

stated in PECO's Motion to Dismiss at Paragraph 5, PECO Energy is not the owner or operator of any nuclear facilities.

*In this connection, it should be noted that Mr. Epstein's contention at Paragraph 30 of his Response that he "is the only party with a binding agreement with PECO Energy that ensures adequate staffing levels as nuclear generation becomes linked to a regionalized work force" is insufficient to constitute a direct interest in this proceeding. As explained in more detail below, issues relating to nuclear plant operations are within the jurisdiction of the Nuclear Regulatory Commission (NRC). In addition, any claimed breach of the agreement, if properly before the Commission, would be addressed as a separate complaint proceeding, not in the course of this examination of the proposed merger.*

B. Issues

Mr. Epstein identified various potential issues in his Petition to Intervene and Protest. All of these issues relate in some way to nuclear generation, and most therefore are either outside the scope of this proceeding or outside the Commission's jurisdiction.

There is no question that issues relating to the operation or safety of nuclear facilities or the impact of extension of operating licenses are within the exclusive jurisdiction of the NRC. This has long been recognized by the Commission. See, Pa. P.U.C. v. Metropolitan Edison Co., 54 Pa.PUC 276, (1980); Re: Petition of Metropolitan Edison Co., 65 Pa.PUC 190 (1987). Any relevant issues relating to the operation or safety of any nuclear facilities will be addressed by the NRC, which is reviewing the proposed merger.

In addition, the Commission no longer regulates the generation of electricity, Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S.A. §2802. With respect to generation issues, the Commission's role in this proceeding is to determine whether the proposed merger "is likely to result in anticompetitive or discriminatory conduct" pursuant to 66 Pa.C.S.A. §§2210(a), 2811(e). As recognized in PECO's Motion at Paragraph 11, "policing the operation of

the wholesale generation market, including the appropriate remedies or sanctions for improper conduct, is primarily the role of the PJM Interconnection LLC and the Federal Energy Regulatory Commission (FERC) and, therefore involves matters outside the PUC's authority. Additionally, the entity to which Mr. Epstein's concerns are directed is not a utility and not otherwise subject to the jurisdiction of this Commission."

Therefore, even if Mr. Epstein had standing to intervene in this proceeding or to file a protest against the proposed merger, most if not all of the issues he raises are either outside the scope of this proceeding or not within the Commission's jurisdiction.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.
2. Eric Joseph Epstein has failed to establish that he has an interest in this proceeding which is direct, immediate and substantial.
3. Eric Joseph Epstein lacks standing to intervene in this proceeding or to protest the proposed merger which is the subject of this proceeding.
4. The Commission is without jurisdiction to regulate the generation of electricity as a public utility function.
5. The Nuclear Regulatory Commission has exclusive jurisdiction over the operation of nuclear generating facilities.
6. The Federal Energy Regulatory Commission has exclusive jurisdiction over the wholesale generation market.

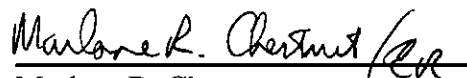
ORDER

THEREFORE

IT IS ORDERED:

1. That the Motion to Dismiss the protest of Eric Joseph Epstein filed by PECO Energy Company and Public Service Electric and Gas Company is granted;
2. That the Protest filed by Eric Joseph Epstein is dismissed; and
3. That the Petition to Intervene filed by Eric Joseph Epstein is denied.

Date: April 25, 2005

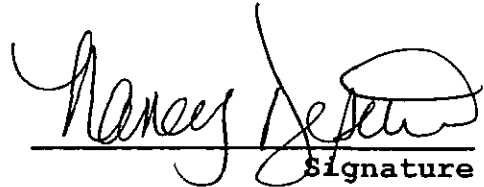
  
Marlane R. Chestnut  
Administrative Law Judge

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_,

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of an Initial Decision an official Commission document entered, issued, or otherwise promulgated under date of April 26, 2005 at Docket No.A-110550F0160 on behalf of:

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Signature

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05 APR 28 AM 8:07

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OFFICE OF TRIAL STAFF  
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05 APR 27 AM 11:33

RECEIVED

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this 28<sup>th</sup> day of April, 2005,

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of an Initial Decision an official Commission document entered, issued, or otherwise promulgated under date of April 26, 2005 at Docket No.A-110550F0160 on behalf of:

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SECRETARY'S BUREAU RECORD RETENTION  
PA PUBLIC UTILITY COMMISSION  
KEYSTONE BUILDING 2<sup>ND</sup> FLOOR  
400 NORTH STREET  
Harrisburg, PA 17105-3265

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PA PUC  
SECRETARY'S BUREAU

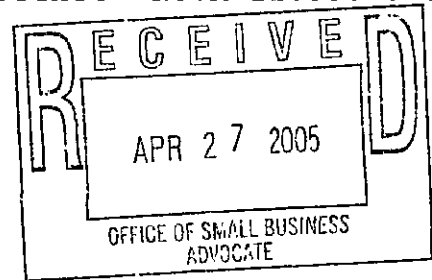
KJR

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_,

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of an Initial Decision an official Commission document entered, issued, or otherwise promulgated under date of April 26, 2005 at Docket No.A-110550F0160 on behalf of:

KAREN S MILLER ESQUIRE  
OFFICE OF SMALL BUSINESS  
ADVOCATE  
SUITE 1102 COMMERCE BUILDING  
300 NORTH SECOND STREET  
HARRISBURG PA 17101  
A-110550F0160



\_\_\_\_\_  
Signature

Kindly sign and date this acceptance of service and acknowledgement of receipt, and, return the same for filing to:

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KJR

**DOCKETED**

MAY 11 2005

Act 294

**DOCUMENT  
FOLDER**

**Case Identification:** .....

A-110550F0160; Joint Application of PECO Energy Co. and Public Service Electric & Gas Co. for Approval of the Merger of Public Service Enterprise Group Inc. with and into Exelon Corp.

**Initial Decision By:**

ALJ Marlane R. Chestnut

**Deadline for Return to OSA:**

May 10, 2005

SECRETARY'S BUREAU

MAY 10 PM 3:23

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**This decision has not been reviewed by OSA.**

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MAY 09 2005

OFFICE OF SPECIAL ASSISTANTS

\* \* \* \* \*

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

*Spandell J. Spillard*  
\_\_\_\_\_

Commissioner

*5/6/05*  
\_\_\_\_\_

Date

*RJP*

Act 294

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\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

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Rubert K. Bloom/ik

Commissioner

5-10-05

Date

Act 294

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**MAY 09 2005**

**OFFICE OF SPECIAL ASSISTANTS**

\* \* \* \* \*

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

*Kim Fitzgerald*  
\_\_\_\_\_  
Commissioner

*5/9/05*  
\_\_\_\_\_  
Date