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COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

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 :  
 Joint Application of PECO Energy Company :  
 and Public Service Electric & Gas Company : Docket No.  
 for approval of merger of Public Service : A-110550F0160  
 Enterprise Group, Incorporated with and :  
 into Exelon Corporation. :  
 :  
 Further Telephonic Pre-Hearing Conference :  
 :  
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Friday, September 9, 2005

Met, pursuant to notice, at 1:09 p.m.

BEFORE:

MARLANE R. CHESTNUT, Administrative Law Judge

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WITNESS INDEX

WITNESS

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(None.)

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FORM 2



P R O C E E D I N G S

1  
2 ADMINISTRATIVE LAW JUDGE MARLANE R. CHESTNUT: This  
3 is the further pre-hearing conference at Docket  
4 A-110550F0160. For the record, let me state that I am  
5 Administrative Law Judge Marlane R. Chestnut.

6 I will note the following appearances for the record.  
7 Mr. Bonney, Mr. Gadsden?

8 MR. GADSDEN: Here, Your Honor.

9 JUDGE CHESTNUT: For PECO Energy Company. Mr.  
10 Clearfield, are you there for PSE&G?

11 MR. CLEARFIELD: Yes, Your Honor.

12 JUDGE CHESTNUT: Mr. Perry and Ms. Shindman for DEP?

13 MR. PERRY: Yes, Your Honor.

14 MS. SHINDMAN: Yes, Your Honor.

15 JUDGE CHESTNUT: Mr. Rubin, are you there for the  
16 labor parties?

17 MR. RUBIN: Yes, Your Honor.

18 JUDGE CHESTNUT: Ms. McCloskey for OCA?

19 MS. McCLOSKEY: Yes, Your Honor.

20 JUDGE CHESTNUT: And do you have Mr. Popowsky with  
21 you or somebody else?

22 MS. McCLOSKEY: No, I do not today, Your Honor.

23 JUDGE CHESTNUT: Okay. Ms. Pennington for OSBA?

24 MS. PENNINGTON: Yes, Your Honor, and William Lloyd,  
25 too.

1 JUDGE CHESTNUT: Okay. I'm going to add you then,  
2 Mr. Lloyd.

3 MR. LLOYD: Thank you, Your Honor.

4 JUDGE CHESTNUT: Mr. Mickens for OTS?

5 MR. MICKENS: Yes, Your Honor, and Rob Eckenrod.

6 JUDGE CHESTNUT: Okay. I've got you, then. Ms.  
7 Mincavage for the Philadelphia Area Industrial Users Group?

8 MS. MINCAVAGE: Here, Your Honor.

9 JUDGE CHESTNUT: Mr. McPhedran and Mr. Hanger for the  
10 PennFuture parties?

11 MR. MCPHEDRAN: Yes, Your Honor.

12 THE REPORTER: I'm sorry, who was that?

13 JUDGE CHESTNUT: That was Mr. McPhedran. Let me  
14 mention that you really should identify yourselves unless  
15 it's clear that you're responding to something I'm saying to  
16 somebody specific for the benefit of the court reporter.  
17 Thank you.

18 Mr. Dillon, Mr. Kaplan for the PPL companies?

19 MR. DILLON: Yes, Your Honor. This is Mr. Dillon.  
20 We are both on the phone.

21 JUDGE CHESTNUT: Thank you. Ms. Heep, for the City  
22 of Philadelphia?

23 MS. HEEP: Yes, Your Honor.

24 JUDGE CHESTNUT: Mr. Niesen and Mr. Thomas for PGW?

25 MR. NIESEN: Yes, Your Honor. This is Mr. Niesen.

1 We are both here on the phone.

2 JUDGE CHESTNUT: Okay. Mr. Ogden and Mr. Feld for  
3 the FirstEnergy Company?

4 MR. OGDEN: Yes, Your Honor. This is Mr. Ogden. Mr.  
5 Feld will not be joining us today.

6 JUDGE CHESTNUT: All right. Mr. Clark for the  
7 Reinvestment Fund?

8 MR. CLARK: Yes, I'm here, Your Honor.

9 JUDGE CHESTNUT: Mr. Stein for the Action Alliance  
10 parties?

11 MR. STEIN: Yes, Judge. I'm here, joined by my  
12 colleagues, Phil Bertocci and Thu Tran.

13 JUDGE CHESTNUT: Okay. I'll add them later.

14 Mr. Goldenberg for the -- what is it, the --

15 MR. GOLDENBERG: Retail Energy Supply Association.  
16 Yes, Your Honor.

17 JUDGE CHESTNUT: I'm changing this because it did  
18 have MAPSA listed.

19 MR. GOLDENBERG: Thank you.

20 JUDGE CHESTNUT: But is your information the same in  
21 terms of where you are, your phone number and all, I assume?

22 MR. GOLDENBERG: Yes, it is, Your Honor.

23 JUDGE CHESTNUT: Okay. Mr. Engelmyer, are you there  
24 for Senator Williams?

25 MR. ENGELMYER: This is Mr. Engelmyer speaking and

1 I'm here, Your Honor.

2 JUDGE CHESTNUT: Okay. Mr. Stewart for Direct Energy  
3 Services?

4 MR. STEWART: Good afternoon, Your Honor. This is  
5 Todd Stewart.

6 JUDGE CHESTNUT: And Ms. Adamucci and Mr. Hershey,  
7 obviously you're here.

8 MR. HERSHEY: Yes.

9 JUDGE CHESTNUT: Mr. Hershey, you didn't sign this or  
10 have somebody sign for you.

11 Before we talk about the issues that we're here to  
12 discuss, I do want to mention one housekeeping matter. Mr.  
13 Dillon, on September 2nd, apparently you filed a motion with  
14 the Commission. You did not serve me directly, and it was  
15 just lucky that I happened to get a copy of it this morning.  
16 So everybody, please remember to serve me.

17 MR. DILLON: We'll do so in the future. Sorry, Your  
18 Honor.

19 JUDGE CHESTNUT: That's okay, but I'm sure that -- is  
20 there any objection to the motion?

21 MR. BONNEY: No objection, Your Honor.

22 JUDGE CHESTNUT: Okay. Then obviously it's granted.

23 Then, Mr. Bonney, I guess we're here to talk about  
24 how to proceed with the case in light of the settlement of  
25 some or all of the issues.

1 I got your e-mail that you sent with the proposal,  
2 but do you want to tell me what's going on?

3 MR. BONNEY: Yes, Your Honor. Thank you. We  
4 continue to have discussions with a number of parties about  
5 settlement and that is progressing. We may have settlement  
6 as early as the end of the day today or Monday. Some  
7 parties, I would expect --

8 JUDGE CHESTNUT: Excuse me.

9 MR. BONNEY: -- would not be signing --

10 JUDGE CHESTNUT: When you say --

11 MR. BONNEY: -- the settlement --

12 JUDGE CHESTNUT: -- by the end of the day -- wait,  
13 stop for a second. When you say by the end of today or  
14 Monday, what do you mean?

15 MR. BONNEY: I mean having a signed agreement in your  
16 hands, hand delivered to you and probably mailed to the  
17 Commission for filing.

18 JUDGE CHESTNUT: Okay.

19 MR. BONNEY: We've proposed in what I sent around  
20 just a bit ago a chance to the schedule to permit the  
21 continued litigation of issues being pursued by non-settling  
22 parties as well as an opportunity for parties to raise  
23 opposition to the settlement once it's filed.

24 JUDGE CHESTNUT: Okay, now, this proposed --

25 MR. BONNEY: And I can walk through what I had in

1 mind there, Your Honor, if you would want me to do that.

2 JUDGE CHESTNUT: This proposed settlement is of some  
3 issues and agreed to by some parties?

4 MR. BONNEY: That's correct.

5 JUDGE CHESTNUT: Okay. Let's talk about your  
6 schedule, then. Let me just state also, Ms. Heep, I did  
7 receive an e-mail copy of your letter regarding the City and  
8 PGW's position with respect to this.

9 MS. HEEP: Thank you for letting me know.

10 JUDGE CHESTNUT: Okay. Does anybody have a problem  
11 with Mr. Bonney's schedule? Mr. Hershey?

12 MR. HERSHEY: Yes, Your Honor. We object to the  
13 settlement. We don't believe that it addresses our market  
14 power concerns --

15 JUDGE CHESTNUT: Okay, I understand that. Let's move  
16 on and talk about the schedule.

17 MR. HERSHEY: And we don't think that the proposed  
18 schedule provides adequate opportunity to respond, but would  
19 I think be -- the schedule would work by moving everything  
20 after the September 14 entry back by approximately ten days.

21 And the reason for that is that Mr. Carpenter is on  
22 the West Coast in another engagement next week, will not  
23 have an opportunity to both prepare for his cross-  
24 examination and present draft testimony in response to the  
25 settlement and whatever testimony and statements are

1 presented by the signing parties.

2 But he is available, his schedule is unfettered after  
3 the 22nd, so if we move the schedule back --

4 JUDGE CHESTNUT: I don't know if we can do that.  
5 That pushes everything back. That calls into play new  
6 hearing dates. I'd really like to work within the confines  
7 of the schedule that we have already if we can do that.

8 MR. HERSHEY: I spoke to him at noon today and he  
9 told me he's simply not available.

10 JUDGE CHESTNUT: Well, perhaps you might have to get  
11 somebody else. Does he have an associate?

12 MR. HERSHEY: I don't know if she is with him on the  
13 same engagement on the West Coast, but he is our principal  
14 witness. He has been the spokesperson on this issue.

15 MR. BONNEY: Your Honor, if I may, two things.

16 JUDGE CHESTNUT: Sure.

17 MR. BONNEY: We have shared copies of the term sheet  
18 and the settlement agreement with Mr. Hershey and PGW, so  
19 they're aware of what it is likely to look like when it is  
20 finished.

21 And in addition, we're not proposing a chance to the  
22 day that Mr. Carpenter had previously been scheduled to  
23 testify, and I don't know what all Mr. Hershey has planned  
24 in terms of his testimony, but the settlement does not  
25 address the market power issues that Mr. Carpenter has

1 raised in his prior testimony.

2 MR. HERSHEY: Well, Your Honor, there is one very  
3 significant paragraph in the proposed settlement which  
4 attempts, that is I assume it is the signing parties'  
5 attempt to address the market power issues.

6 And it is very important for the record in this case  
7 that Mr. Carpenter have adequate opportunity to address that  
8 particular paragraph, and that was not fleshed out in any  
9 detail prior to end of the day yesterday.

10 And so we've not had opportunity to prepare a  
11 response or even think about a response to that paragraph.  
12 So we do need the time. We have not had time previously,  
13 and that is at the core of the market power issue as  
14 addressed by the signing parties.

15 MR. KAPLAN: Your Honor, this is Donald Kaplan for  
16 PPL. From our point of view, we are not a settling party.  
17 We do plan to go forward and are prepared to go forward on  
18 the existing schedule with respect to the issues we  
19 addressed in our testimony and have our witnesses available  
20 for cross-examination and are prepared to cross-examine Dr.  
21 Hieronymus on those issues on the date he is scheduled.

22 But the main concern that we have at this point is,  
23 if this settlement is designed to resolve our market power  
24 concerns, then we obviously need additional time to address  
25 the settlement because it fails to address our market power

1 concerns.

2           However, if it is the understanding of the settling  
3 parties and if Mr. Bonney could stipulate that our market  
4 power concerns are not resolved by the settlement and that  
5 those issues will be considered on the merits by Your Honor  
6 and then the Commission in its decision on your initial  
7 decision, then we can probably go forward on something close  
8 to the schedule that's proposed.

9           JUDGE CHESTNUT: Mr. Bonney, do you have a response?

10           MR. BONNEY: We expect that we would continue to  
11 litigate the market power issues that PP&L has raised, so a  
12 stipulation along the lines of what Mr. Kaplan just  
13 mentioned would be acceptable to us.

14           JUDGE CHESTNUT: How about Mr. Hershey's concern?

15           MR. BONNEY: Your Honor, I don't see that we need ten  
16 days to respond to one paragraph. I think that the schedule  
17 we've laid out here is more than adequate time to respond if  
18 there's any implication for the settlement that needs  
19 additional testimony.

20           JUDGE CHESTNUT: Does anybody else have a comment?

21           MR. RUBIN: Your Honor, this is Scott Rubin for the  
22 labor parties. We have I guess some concern about the  
23 company's attempt to move witnesses to different days than  
24 where they had been originally scheduled.

25           I'm certainly willing to work with the company and we

1 have some flexibility, but one of our witnesses is with a  
2 PECO team that's down in Mississippi and he won't be back in  
3 Pennsylvania until the 17th.

4 I've been trying to reach him by cell phone, but so  
5 far I haven't been able to get cell phone service that  
6 works.

7 JUDGE CHESTNUT: Is that Mr. McGill?

8 MR. RUBIN: Yes. So I can't commit today that he  
9 would be available on the 23rd which is the date that's in  
10 the schedule that Mr. Bonney circulated, but we're certainly  
11 trying to get in touch with him and are willing to work with  
12 the company to try to come up with a schedule that works for  
13 everybody.

14 MR. BONNEY: Likewise, Your Honor, we too are happy  
15 to accommodate Mr. McGill and Mr. Rubin in terms of his  
16 witness' availability.

17 JUDGE CHESTNUT: Yes, I think we all realize that  
18 that's exigent circumstances and I expect that you'll work  
19 to resolve that, to make Mr. McGill available at a  
20 reasonable time.

21 If he can't be presented on the 23rd, perhaps on the  
22 26th, I don't know. But how about if you just see what you  
23 can work out with him, recognizing that this is a legitimate  
24 excuse for him being unavailable right now.

25 MR. RUBIN: Thank you, Your Honor. I talked with Mr.

1 Murphy from the company earlier this afternoon and we're  
2 going to keep talking and try to get this worked out.

3 JUDGE CHESTNUT: Okay, good.

4 Mr. Bonney, who are these additional witnesses?

5 MR. BONNEY: Yes, Your Honor. We sent a letter  
6 identifying three additional witnesses: John McDonald, Ken  
7 Bowman and Jerry Brauckman.

8 And as noted in that, they are in response to new  
9 witnesses submitted on surrebuttal by the labor witness Mr.  
10 McGill and the City of Philadelphia's witness Tumar  
11 Alexander.

12 And what we would propose would be to present oral  
13 rejoinder of these witnesses in response to that surrebuttal  
14 testimony.

15 JUDGE CHESTNUT: Okay. So it would be oral rejoinder  
16 from McDonald, Bowman and Brauckman?

17 MR. BONNEY: Yes, Your Honor.

18 JUDGE CHESTNUT: Specifically to the labor and City  
19 of Philadelphia issues?

20 MR. BONNEY: Correct.

21 JUDGE CHESTNUT: So it's pretty limited, I would  
22 think?

23 MR. BONNEY: Yes, Your Honor.

24 JUDGE CHESTNUT: Okay.

25 MS. HEEP: Will the City of Philadelphia's witness

1 have an opportunity to respond orally to their testimony?

2 JUDGE CHESTNUT: No, Ms. Heep. The applicants, since  
3 they have the burden of proof, start and close.

4 MR. STEWART: Your Honor, this is Todd Stewart. I  
5 just have one question, really. I think it's a question. I  
6 hope it's a question. There appears to be a minor  
7 discrepancy between what's scheduled on the 14th and the  
8 19th as far as the filing of testimony.

9 On the 14th, it provides for the filing of testimony  
10 and statements in support of the joint petition, but on the  
11 19th, Mr. Bonney's schedule only provides for the filing of  
12 testimony in opposition. I was wondering if that also  
13 includes filing statements in opposition to the joint  
14 petition.

15 MR. BONNEY: That's fine with me, Your Honor.

16 JUDGE CHESTNUT: Well, a statement isn't going to do  
17 you much good without some testimony to support it, I think,  
18 but yes, if you want to file a statement as opposed to  
19 testimony, yes.

20 MR. STEWART: Okay, thank you. That was my only  
21 question. Thank you.

22 JUDGE CHESTNUT: Okay. Although I would think a  
23 statement would be more appropriate in your brief, but  
24 that's something for you to think about.

25 MR. HERSHEY: Your Honor, I have one additional point

1 with regard to the schedule.

2 JUDGE CHESTNUT: Can everybody hear Mr. Hershey?

3 MR. BONNEY: No.

4 MR. HERSHEY: I'm sorry, one additional point with  
5 regard to the schedule for Dr. Carpenter. Dr. Carpenter,  
6 while his main testimony addresses market power, he does  
7 briefly address Directed Questions No. 1 and 5.

8 I would ask that the parties not make him come in on  
9 the second day and if there's any cross for him, that it all  
10 be done on one visit.

11 JUDGE CHESTNUT: I think you can work that out, can't  
12 you?

13 MR. BONNEY: Yes, that's acceptable to us, Your  
14 Honor.

15 MR. HERSHEY: Thank you.

16 JUDGE CHESTNUT: Now, does anybody else have a  
17 comment with respect to this proposed schedule?

18 MR. OGDEN: Your Honor, this is Ed Ogden for  
19 FirstEnergy Companies. I would just note, and I think Mr.  
20 Bonney has already noted in his letter that he just sent  
21 around to parties and to Your Honor, FirstEnergy Companies  
22 have no cross-examination for the joint applicants'  
23 witnesses.

24 My understanding is that the joint applicants  
25 likewise have no cross for the FirstEnergy Company

1 witnesses. I think we're both satisfied to rely on the  
2 testimony if it can be stipulated into the record. That  
3 would facilitate obviously getting hearings conducted in a  
4 good manner. So unless somebody has some objection, I would  
5 ask that that be permitted to be done.

6 JUDGE CHESTNUT: Does anybody anticipate doing cross  
7 on the FirstEnergy witnesses?

8 (No response.)

9 JUDGE CHESTNUT: Hearing no response, I'll assume  
10 that there is nobody that plans to cross them, therefore  
11 they don't have to appear. Their testimony can be admitted  
12 by stipulation.

13 MR. OGDEN: Thank you, Your Honor.

14 JUDGE CHESTNUT: What I will do, of course, once we  
15 finalize the schedule here, is I will be sending out another  
16 witness grid that I expect everybody to respond to, okay?  
17 But it looks like the schedule is doable to me.

18 I understand your concern, Mr. Hershey, but if you  
19 need perhaps an extra day for Mr. Carpenter or something --  
20 but without seeing what the settlement addresses, it's hard  
21 for me to know how congruent it is with the testimony that's  
22 already been submitted.

23 But it seems to me that given that the market  
24 concentration issues aren't addressed in the settlement,  
25 that there's really not much of a problem.

1           So why don't you have him take a look and see what  
2 you can do.

3           MR. HERSHEY: I will do that. I would ask, if you're  
4 not going to change the schedule substantially, if we could  
5 move Mr. Carpenter from the 22nd to the 23rd, and that would  
6 provide some help without substantially altering the  
7 schedule, and perhaps one additional day for his filing of  
8 his testimony in opposition.

9           JUDGE CHESTNUT: Well, why don't we wait and see if  
10 he can file his testimony in a timely fashion, and if you  
11 need more time, then we'll see, okay?

12           MR. HERSHEY: And I shall inform you by letter, is  
13 that --

14           JUDGE CHESTNUT: Yes. Work it out with Mr. Bonney  
15 and everybody.

16           MR. HERSHEY: I'll do that.

17           JUDGE CHESTNUT: Because I'm just concerned that  
18 everybody have an adequate chance to review obviously  
19 everybody else's testimony and my concern is really the  
20 hearing days. I'm not that concerned about when you file  
21 testimony.

22           MR. HERSHEY: Understood.

23           JUDGE CHESTNUT: I think if we move Mr. Carpenter to  
24 the 23rd, that makes a kind of crowded day. Does anybody  
25 have a problem with that, or can we move somebody to the

1 22nd instead? Mr. Bonney,, how about you?

2 MR. BONNEY: I'm fine with the movement. There are  
3 various people we could change. Mr. Kalt could go on the  
4 22nd. I haven't spoken with Mr. Kaplan or Mr. Dillon about  
5 that, but --

6 MR. DILLON: We actually were not planning on that,  
7 and --

8 JUDGE CHESTNUT: Wait. Is that Mr. Dillon?

9 MR. DILLON: This is Mr. Dillon. We were not  
10 planning on Mr. Kalt on the 23rd. Perhaps you could  
11 consider moving a PECO witness instead, Mr. Bonney.

12 JUDGE CHESTNUT: Wait. Mr. Dillon, are you saying  
13 that Mr. Kalt should go on the 22nd?

14 MR. DILLON: No, no. We were not considering moving  
15 him to the 22nd. We thought he was staying on the 23rd and  
16 we have not made arrangements for him to be here on the 22nd  
17 at this time.

18 JUDGE CHESTNUT: Okay.

19 MR. BONNEY: Your Honor, why don't I propose to move  
20 Jack Crowley to the 22nd from the 23rd, subject to my just  
21 double-checking with him on his availability.

22 JUDGE CHESTNUT: Is that okay with everybody?

23 (No response.)

24 JUDGE CHESTNUT: Okay. Thank you, Mr. Bonney.

25 Does anybody else have any comments with respect to

1 the proposed schedule? Ms. McCloskey, do you have anything  
2 to day?

3 MS. McCLOSKEY: No, I have nothing to add, Your  
4 Honor.

5 JUDGE CHESTNUT: Okay. Anybody else?

6 (No response.)

7 JUDGE CHESTNUT: Okay. What I'll do then is I will  
8 go ahead and issue a pre-hearing order that contains the  
9 schedule, but I expect that you'll work together to resolve  
10 any problems that may come up. I think we recognize that  
11 obviously there are situations that come up that can't be  
12 addressed right now, but I expect you all to work together  
13 and to exercise the professionalism and good faith that I've  
14 seen so far.

15 And I do want to congratulate you for at least  
16 settling some of the issues, although I wait to see what the  
17 actual settlement says. Anything else from anybody, then?

18 MR. HERSHEY: Mr. Bonney and I will talk today and  
19 inform you as to where we are on that.

20 JUDGE CHESTNUT: Okay. That's fine. Like I said, my  
21 concern is that we really are able to accommodate the  
22 hearing days that we have already scheduled. Anything  
23 further then from Mr. Bonney or anybody else?

24 MR. BONNEY: No. Thank you, Your Honor.

25 JUDGE CHESTNUT: Okay, then. Thank you very

1 much. This pre-hearing conference is adjourned.

2 (Whereupon, at 1:30 p.m., the proceedings were  
3 concluded.)

4 C E R T I F I C A T E

5 I hereby certify, as the stenographic reporter, that  
6 the foregoing proceedings were taken stenographically by me  
7 and thereafter reduced to typewriting by me or under my  
8 direction, and that this transcript is a true and accurate  
9 record to the best of my ability.

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12 By:

*John A. Kelly*

13 John A. Kelly, *gef*  
14 Certified Verbatim Reporter

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