

127 FERC ¶ 61,161  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Exelon Corporation

Docket No. EC09-32-000

ORDER AUTHORIZING MERGER AND ACQUISITION  
OF JURISDICTIONAL FACILITIES

(Issued May 21, 2009)

1. Exelon Corporation, on behalf of itself and its subsidiaries that are public utilities subject to the Commission's jurisdiction (collectively, Exelon), filed an application seeking authorization under section 203 of the Federal Power Act (FPA)<sup>1</sup> for a transaction that includes: (1) Exelon's acquisition of voting securities of NRG Energy, Inc. (NRG Energy) through a tender offer, (2) Exelon's acquisition of control over NRG Energy and its subsidiaries that are public utilities subject to the Commission's jurisdiction (collectively, NRG), and (3) the subsequent restructuring and consolidation of Exelon and NRG to establish a more efficient corporate structure for the combined company.

2. The Commission has reviewed the proposed transaction under the Merger Policy Statement.<sup>2</sup> Although Exelon does not specifically state whether it seeks authorization

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<sup>1</sup> 16 U.S.C. § 824b (2006).

<sup>2</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

under section 203(a)(1), in the instant order the Commission will authorize the proposed transaction under both sections 203(a)(1) and 203(a)(2). We remind applicants that when they submit an application seeking authorization under section 203 of the FPA, they must specify the subsection(s) of section 203 under which they are seeking authorization.

**I. Background**

**A. Description of the Parties**

**1. Exelon**

3. Exelon is a public utility holding company that distributes electricity to approximately 5.4 million customers in Illinois and Pennsylvania, and natural gas to 480,000 customers in the Philadelphia area. Exelon's operations include energy generation, power marketing, and energy delivery, through Exelon's principal subsidiaries as described below:

- a. Commonwealth Edison Company (ComEd) is engaged in the purchase, transmission, distribution and sale of electricity to residential, commercial, industrial and wholesale customers in Northern Illinois, including retail service to Chicago. Exelon states that ComEd does not own any generation and that beginning in January 2007, ComEd began procuring all of its energy requirements for retail customers from market sources pursuant to an auction held in 2006. Approximately 35 percent of the contracted supply from the auction came from Exelon Generation Company, LLC (Exelon Generation), which is the limit for procurement from any one supplier. In 2007, the Illinois Legislature enacted new legislation that established a new competitive process for procurement to be managed by the Illinois Power Agency and overseen by the Illinois Commerce Commission (Illinois Commission) in accordance with electricity supply procurement plans approved by the Illinois Power Agency. Exelon also notes that, in July 2008, ComEd submitted a five-year forecast to the Illinois Power Agency, which developed a procurement plan for approval by the Illinois Commission to procure ComEd's remaining requirements for energy in periods subsequent to May 2009. This process will be repeated on an annual basis in the future.
- b. PECO Energy Company (PECO) is engaged in the purchase, transmission, distribution and sale of electricity to residential, commercial, and industrial customers in southeastern Pennsylvania and in the purchase, distribution and sale of natural gas to residential, commercial and industrial customers in the Pennsylvania counties surrounding Philadelphia. Pennsylvania permits competition by alternative generation suppliers for retail generation supply. Transmission and distribution service remains fully regulated.

PECO is required to provide generation services and provider of last resort services to customers who do not choose an alternative supplier. PECO does not own any generation, but satisfies its provider of last resort obligations by purchasing generation from Exelon Generation through a contract that expires in 2010. Beginning in 2011, PECO must satisfy its provider of last resort obligations through a competitive-procurement process approved by the Pennsylvania Public Utility Commission (Pennsylvania Commission).

- c. ComEd and PECO have both placed their transmission systems under the operational control of PJM Interconnection, L.L.C. (PJM). Under the PJM open access transmission tariff (OATT), transmission service is provided on a region-wide, open-access basis using the transmission facilities of the PJM members at rates based on the costs of transmission service.
- d. Exelon's regulated gas services business is conducted solely by PECO and the gas service rates are regulated by the Pennsylvania Commission.
- e. Exelon Generation is the generation business for Exelon, and has its own generation assets and wholesale power marketing unit. Exelon Generation owns, or controls through long-term contracts, generation assets throughout the country. The wholesale power marketing unit ensures delivery to its customers through long-term and short-term contracts, including PECO's load requirements and contracts for a portion of ComEd's load requirements, and markets any remaining energy in the wholesale bilateral and spot markets.

## 2. NRG

4. The application describes NRG's business from publicly-available information. NRG is a wholesale power generation company that is engaged in the ownership, development, construction and operation of power generation facilities, the transacting in and trading of fuel and transportation services, and the trading of energy, capacity and related products in the United States and select international markets.

### **B. Description of Tender Offer and Subsequent Merger**

5. On November 12, 2008, Exelon commenced a tender offer for NRG's outstanding common shares.<sup>3</sup> If the tender offer is successful and NRG's management remains

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<sup>3</sup> Exelon initially made an offer to NRG to acquire all of the outstanding shares of NRG common stock at a fixed exchange ratio of 0.485 Exelon shares for each share of NRG common stock. NRG rejected that offer.

opposed to the proposed transaction, then, subject to receipt of regulatory approvals, Exelon expects to implement the transaction notwithstanding the opposition of NRG's management. However, Exelon states that it will continue its efforts to reach a negotiated agreement with NRG, because a negotiated agreement would result in certain benefits that would not necessarily result from the tender offer. In the absence of a negotiated agreement with NRG, Exelon has attached, as Exhibit I to its application,<sup>4</sup> a copy of its Registration Statement on Form S-4 as filed with the Securities and Exchange Commission (SEC), which includes the form of the documentation used in the exchange of shares pursuant to the tender offer.

6. Exelon requests that, whatever the interim steps and ultimate form of the transaction, the Commission approve the substance of the transaction set forth in the instant application as long as it includes certain key substantive principles:
- a. The overall operations of Exelon and NRG will be consolidated under the control of Exelon.
  - b. The operations of NRG's generation facilities will be consolidated with the operations of Exelon Generation, which is an unregulated company with market-based rate authority that owns Exelon's generation assets. Regardless of whether NRG Energy is ultimately consolidated with Exelon Generation, the generation assets of NRG and Exelon Generation will be operated on a combined basis.
  - c. Exelon's two traditional franchised utilities – PECO and ComEd – will continue to operate separately from the unregulated businesses, including the Exelon Generation business. The transaction will not involve any transfer of assets between PECO or ComEd and any other Exelon or NRG company, nor will PECO or ComEd issue any debt or securities, assume any liabilities, or enter into any contracts in connection with the transaction. NRG does not own any traditional franchised utilities.
  - d. Sufficient generation capacity will be divested, as described more fully below, to address any market power concerns.
  - e. Sufficient rate commitments will be made, as described more fully below, to hold cost-based customers harmless from any adverse rate impacts of the transaction.
  - f. Sufficient cross-subsidization commitments will be made, as described more fully below.

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<sup>4</sup> 18 C.F.R. § 33.2(f) (2008).

7. Under the terms of the tender offer, Exelon, through Exelon Xchange, a wholly-owned subsidiary created for purposes of the proposed transaction, is offering to exchange 0.485 of a share of Exelon common stock for each share of NRG common stock that is validly tendered. The offer is subject to a number of conditions, including a condition that at least 50 percent of the NRG common stock must be tendered and not withdrawn at the time the offer expires. Exelon will not consummate the transaction until it has received all necessary regulatory approvals, including the Commission's approval under section 203, and other conditions of the offer have been met.

8. The tender offer is the first step in Exelon's acquisition of NRG. If Exelon Xchange acquires a majority of NRG's common stock pursuant to the tender offer, Exelon states that it will merge NRG with Exelon Xchange or another wholly-owned subsidiary in a "second-step merger," the purpose of which is to acquire the remainder of the shares of NRG common stock. The remaining shares of NRG common stock (other than those owned by Exelon, Exelon Xchange or NRG or held by NRG stockholders who perfect appraisal rights under Delaware law, to the extent available) will be converted into the right to receive the same number of shares of Exelon common stock as paid in the tender offer. Finally, NRG will merge either with Exelon or a wholly-owned subsidiary of Exelon in the "forward merger."<sup>5</sup>

9. In addition, Exelon will reorganize the corporate structure of the combined company to consolidate the generation and power marketing businesses of NRG and Exelon Generation, consistent with the six principles described above, including the protections for PECO and ComEd. Based on certain assumptions regarding the number of shares of NRG common stock to be exchanged, Exelon estimates that if all shares of NRG common stock are exchanged pursuant to the offer and the second-step merger, former NRG stockholders would own, in the aggregate, 16 percent of the outstanding shares of Exelon common stock.

10. If Exelon negotiates an agreement with NRG, Exelon may structure the transaction differently. For instance, Exelon may merge into NRG, with NRG as the surviving corporation; NRG would then be renamed Exelon Corporation and the existing Exelon directors and officers would be elected to corresponding positions in the new Exelon Corporation. Such a structure might allow Exelon to reduce the amount of NRG debt to be refinanced in connection with the proposed transaction.

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<sup>5</sup> The merger of NRG with Exelon will take two steps, unless Exelon obtains a legal opinion at the time of the second-step merger that the tender offer and the second-step merger, taken together and without the consummation of the forward merger, will qualify as a reorganization within the meaning of section 368(a) of the Internal Revenue Code.

11. Exelon states that, in the course of negotiating with NRG, it may change the proposed corporate structure of the combined company and may change the form and/or amount of consideration paid to NRG shareholders. Any such changes would be consistent with the six principles described above. Exelon therefore requests that the Commission approve the proposed transaction – whether it is structured as currently contemplated in Exelon’s tender offer or it is structured differently if Exelon reaches a negotiated agreement with NRG management – as long as it complies with the six principles described above.

## **II. Notice of Filing and Responsive Pleadings**

12. Notice of the application was published in the *Federal Register*, 74 Fed. Reg. 271 (2008), and amended on December 29, 2008, with interventions and protests due on or before February 17, 2009. The Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC filed a joint motion to intervene; Reliant Energy, Inc. also filed a motion to intervene. The Energy Program of Public Citizen, Inc. (Public Citizen), the International Brotherhood of Electrical Workers (IBEW), and NRG Energy filed timely motions to intervene and protests. The Delaware Public Service Commission and the Delaware Department of Natural Resources and Environmental Control (Delaware Agencies) filed joint comments, and Representatives Dave Winters and Tom Cross of the Illinois House of Representatives and Senator Christine Rodagno of the Illinois Senate each filed separate comments. The Public Utility Commission of Texas (Texas Commission), the People of the State of Illinois, and the Citizens Utility Board of Illinois filed motions to intervene out of time.

13. On March 4, 2009, Exelon filed an answer. On March 16, 2009 and March 19, 2009, Public Citizen and NRG, respectively, submitted additional filings. On April 2, 2009, Exelon filed an additional answer, in which it requested that the Commission reject NRG’s March 19 answer. On April 14, 2009, the Texas Commission filed supplemental comments. On April 17, 2009, NRG filed an additional answer. On April 28, Exelon filed a motion to reject NRG’s April 17 answer. On May 13, NRG filed a response to Exelon’s motion.

## **III. Discussion**

### **A. Procedural Issues**

#### **1. Motions to Intervene and Protests**

14. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure,<sup>6</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties

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<sup>6</sup> 18 C.F.R. § 385.214 (2008).

to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>7</sup> the Commission will grant the unopposed, late-filed motions to intervene of the Texas Commission, the People of the State of Illinois, and the Citizens Utility Board of Illinois given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>8</sup> prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We will accept all answers because they have provided information that assisted us in our decision-making process. In addition, we consider the comments submitted by Representatives Winters and Cross, Senator Rodagno, and the Delaware Agencies as part of the record.<sup>9</sup>

## **2. Request for Deficiency Letter or Hearing**

16. NRG requests that the Commission issue a deficiency letter to Exelon requesting alternative proposals for divestiture to mitigate the effect of the proposed transaction on competition, and additional information regarding screen failures in the ComEd market within PJM.<sup>10</sup> In the alternative, NRG recommends that the Commission set these issues for hearing. NRG also requests additional information regarding the anticipated capital structure of the consolidated company and the financing related to the proposed transaction. Public Citizen also requests that the Commission hold an evidentiary hearing on Exelon's application to show that it is consistent with the public interest or with the market-based rate program.<sup>11</sup>

17. Exelon responds that its initial divestiture proposal is appropriate because Exelon has identified the assets it intends to divest and has shown that the proposed divestiture mitigates any potential market power that results from the transaction.<sup>12</sup> Additionally,

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<sup>7</sup> 18 C.F.R. § 385.214(d) (2008).

<sup>8</sup> 18 C.F.R. § 385.213(a)(2) (2008).

<sup>9</sup> *See, e.g., Energy East*, 121 FERC ¶ 61,236, at P 34-38 (2007) (considering comments that were beyond the scope of the Commission's standard analysis under section 203).

<sup>10</sup> NRG Protest at 11 and 20-24 (Feb. 17, 2009).

<sup>11</sup> Public Citizen Protest at 5-6 (Feb. 17, 2009).

<sup>12</sup> Exelon Answer at 23-26 (March 4, 2009).

Exelon responds that it identified the correct PJM destination markets for its analysis and that the ComEd market need not be addressed separately in PJM.<sup>13</sup>

18. The Commission finds that, as discussed below, the application presents sufficient information to render a decision. We note that we need not craft alternatives to the transaction, only find that the proposed transaction is consistent with the public interest.<sup>14</sup> We will also deny Public Citizen's request to set Exelon's application for evidentiary hearing. Public Citizen has not shown that there are any material facts in dispute. We discuss concerns regarding competition, rates, and ring-fencing below.

### 3. Hostile Transaction

#### a. Applicant's Arguments

19. Exelon recognizes that this transaction is unusual given that the management of the company to be acquired opposes Exelon's tender offer. However, Exelon argues that this should affect neither the timeliness nor the process of the Commission's review.

20. Exelon argues that Congress intended for the Commission to act without regard to management's agreement, as evidenced by the 180-day deadline in section 203. Further, Exelon argues that the Commission should remain neutral as to the outcome of the tender offer by reviewing the application without considering whether the application is opposed by management of the entity to be acquired. Citing *Kansas City Power & Light Co.*,<sup>15</sup> Exelon notes that the Commission has previously rejected arguments that it should not process a section 203 application unless the transaction has been approved by both parties. Exelon contends that this is in keeping with a broad federal policy that shareholders should be given the opportunity to make decisions on tender offers without being frustrated by management.<sup>16</sup> Further, Exelon asserts that other regulatory agencies have also concluded that they must act to review proposed transactions, even if those transactions are opposed by the management of one party.<sup>17</sup>

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<sup>13</sup> *Id.* at 11-17.

<sup>14</sup> *Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007) (net benefits are not required).

<sup>15</sup> 53 FERC ¶ 61,097 (1990).

<sup>16</sup> Application at 20 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 29 (1977)).

<sup>17</sup> Application at 21 (citing Federal Trade Commission merger review timelines, which are based on filings by the acquirer without regard to possible opposition by the entity to be acquired, *Premerger Notification: Reporting and Waiting Period*

**b. Protests and Comments**

21. NRG argues that Exelon's proposal is subject to multiple conditions and contingencies, and is therefore too speculative for Commission action. Moreover, the Commission should not spend time and resources on a speculative transaction. NRG contends that it is still engaging in price discovery and negotiation with Exelon, and Commission action would affect those negotiations. NRG asserts that the Commission should refrain from issuing an order until after a final structure and price have been negotiated in order to not become "a pawn in Exelon's strategy to pressure NRG's Board to negotiate a deal."<sup>18</sup> In addition, NRG argues that the Commission should not expedite its review of the transaction, and should take the full 180 days, or longer, to consider Exelon's application.

22. Public Citizen also argues that the Commission should not consider a merger application that is "completely hypothetical" because details may be overlooked. Public Citizen notes that many of the specifics related to Exelon's proposed divestiture of generating plants, to be completed after this transaction is consummated, are unknown. IBEW echoes concerns that this proposed transaction is too speculative for the Commission to consider. Specifically, IBEW notes that Exelon has stated that the transaction may change if it is able to negotiate a merger with NRG, but Exelon has not explained whether that change would affect its plan to dispose of NRG's Indian River, Vienna, and Dover Energy plants.

**c. Applicant's Answer**

23. Exelon notes that, as of the date of its answer, 51 percent of all NRG shares had been tendered to Exelon, making the proposed transaction more likely to succeed. Moreover, the Commission has approved other applications that also had multiple contingencies.<sup>19</sup> Exelon states that its application is as suitable for consideration as those applications were, and that this application should also be approved.

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*Requirements*, 43 Fed. Reg. 33,450, 33,514, 33,483-84 (1978); Federal Communications Commission review guidelines, *ITT Corp.*, 13 FCC Rcd 5861 (1997); and the Federal Reserve Board's review of a proposed nonconsensual acquisition of a bank, *The Bank of New York Co., Inc.*, 74 Fed. Res. Bull. 257, 259 (1988)).

<sup>18</sup> NRG Protest at 8 (Feb. 17, 2009).

<sup>19</sup> Exelon Answer at 8, Exhibit B (March 4, 2009) (*e.g.*, *Great Plains Energy, Inc.*, 121 FERC ¶ 61,069 (2007); *National Grid plc*, 117 FERC ¶ 61,080 (2006)).

**d. NRG's Answer**

24. NRG states that Exelon has failed to submit a complete application. NRG argues that the application does not adequately and accurately describe the merger being proposed and states that the remaining contingencies are so numerous and relate to issues so fundamental that their resolution will impact those elements under the Commission's review.<sup>20</sup>

**e. Commission Determination**

25. While we appreciate NRG's concerns regarding efficient use of Commission resources, the Commission considers applications under section 203 as they are filed.<sup>21</sup> Moreover, the Commission does not consider the price of the transaction as a separate factor, only as part of the evaluation of the effect of the proposed transaction on rates.<sup>22</sup> NRG asserts that the Commission should wait until "key transaction elements are in place," and the transaction is more certain.<sup>23</sup> We note that we require, as Exhibit I to the application, "[a]ll contracts related to the proposed transaction together with copies of all other written instruments entered into or proposed to be entered into by the parties to the transaction."<sup>24</sup> In this case, in the absence of a negotiated agreement with NRG, Exelon has filed its SEC Form S-4 as Exhibit I. The Form S-4 describes in detail the terms and conditions of its tender offer to NRG's shareholders and includes the form of documentation used in the exchange of shares.

26. We will consider Exelon's proposal and the related commitments set forth in the application. We approve the transaction, as further discussed below, with the condition

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<sup>20</sup> NRG Answer at 15-17 (April 17, 2009).

<sup>21</sup> See, e.g., *Southaven Power, LLC*, 123 FERC ¶ 62,071 (2008) (approving application, but stating that order was voided if other transaction closed); *Southaven Power, LLC*, 123 FERC ¶ 62,063 (2008) (approving application of Tennessee Valley Authority, which won the auction). See also *Citizens Power LLC*, 83 FERC ¶ 61,082, at 61,411 and 61,411 n.3 (1998) (noting that another application to acquire the same asset was approved in *Citizens Power LLC, et al.*, 82 FERC ¶ 61,102 (1998)). See also *NorthWestern Corp.*, 117 FERC ¶ 61,100 (2006) (approving an application that was later withdrawn because it was not approved by the Montana Commission); *Kansas City Power & Light*, 53 FERC ¶ 61,097, at 61,283-84 (rejecting argument that the application was part of a negotiating strategy and therefore should not be considered).

<sup>22</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044, at 30,126 (1996).

<sup>23</sup> NRG Protest at 8 (Feb. 17, 2009).

<sup>24</sup> 18 C.F.R. § 33.2(f) (2008).

that Exelon provide the final documents within 10 days of the closing of the transaction.<sup>25</sup> We note that the Commission retains the authority to issue supplemental orders “for good cause shown.”<sup>26</sup> To assist us in determining whether supplemental orders may be necessary for the proposed transaction, we direct Exelon to inform the Commission within 30 days of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application.<sup>27</sup> In particular, if any jurisdiction issues a decision modifying Exelon’s proposed mitigation measures, including ring-fencing, divestiture, or other elements, we direct Exelon to file a copy of that decision with the Commission within 10 days of the issuance of that decision.

### **B. Standard of Review under Section 203**

27. Section 203(a)(4) requires the Commission to approve a merger if it determines that the merger will be consistent with the public interest. The Commission’s analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>28</sup> Section 203 also requires the Commission to find that the transaction “will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”<sup>29</sup> The Commission’s regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>30</sup>

28. In addition, as we have held in other orders addressing proposed mergers subject to a hostile takeover, “we stress that our action today should not be construed as favoring, or disfavoring, [the applicant’s] tender offer. The ultimate question before the Commission is not whether [the applicant’s] proposal will or should be consummated.

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<sup>25</sup> *Exelon New England Holdings, LLC*, 107 FERC ¶ 61,148, at P 19 and Ordering Paragraph (E) (2004).

<sup>26</sup> *See* 16 U.S.C. § 824b(b).

<sup>27</sup> *See Allegheny Energy, Inc.*, 113 FERC ¶ 61,077, at P 21 (2005).

<sup>28</sup> *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044, at 30,111.

<sup>29</sup> 16 U.S.C. § 824b(a)(4) (2006).

<sup>30</sup> 18 C.F.R. § 33.2(j) (2008).

Rather, the question is whether this proposed merger, if consummated, is consistent with the public interest.”<sup>31</sup>

**C. Analysis under Section 203**

**1. Effect on Competition – Horizontal Market Power**

**a. Applicant’s Analysis**

29. Exelon reviewed the markets in which it and NRG have generation, and found overlapping generation in four markets: PJM, ISO New England Inc. (ISO-NE), the Electric Reliability Council of Texas (ERCOT), and the Entergy Corporation (Entergy) balancing authority area.<sup>32</sup> Exelon contends that the overlap is *de minimis* in the ISO-NE and Entergy markets, where the combined company will control less than 10 percent of the total installed capacity in the market. Exelon also analyzed the Central and South West Corporation (CSW) balancing authority area, which is the closest jurisdictional market to ERCOT where Exelon controls a small amount of generation. To mitigate the effects on competition found in several areas, Exelon proposes a “clean sweep” divestiture in each market or submarket where there is any significant overlap of generation.

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<sup>31</sup> *Kansas City Power & Light Co.*, 53 FERC ¶ 61,097, at 61,284 (1990).

<sup>32</sup> Exelon retained Dr. William H. Hieronymous to analyze the competitive effects of the proposed transaction, and attached his testimony as Attachment J to the application. Dr. Hieronymous performed an Appendix A analysis, in which he determined the pre- and post-transaction market shares from which the market concentration or Herfindahl-Hirschman Index (HHI) change can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered moderately concentrated; and markets where the HHI is greater than or equal to 1,800 points are considered highly concentrated. The Commission has adopted the Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI in a highly concentrated market or an increase of 100 HHI in a moderately concentrated market fails its screen and warrants further review. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992), *revised*, 4 Trade Reg. Rep (CCH) ¶ 13,104 (April 8, 1997).

**i. PJM**

30. Exelon analyzed PJM as a whole, performing the Delivered Price Test (DPT) analysis of Economic Capacity. Exelon contends that the analysis of Economic Capacity is more relevant than the Available Economic Capacity analysis because most states in the study area have implemented retail competition. Under the Economic Capacity measure, post-merger HHI's range from 818 to 1,095, with the highest HHI in the Shoulder Off-Peak period. Even though the market becomes relatively concentrated in the Shoulder Off-Peak period, the HHI increase is well below the threshold used by the Commission for screening purposes.<sup>33</sup> Accordingly, Exelon states that the DPT analysis of the PJM market shows the transaction will have no adverse effect on competition in that market. The analysis also shows no impact on the Ancillary Services markets in PJM as a whole.

31. Exelon also analyzed the PJM-East submarket within PJM.<sup>34</sup> In PJM East, which consists of New Jersey, the Delmarva Peninsula, and eastern Pennsylvania, the analysis shows that the market will be moderately concentrated during all but two periods, and the HHI increases more than 100 points during three of those periods. To mitigate the increase in concentration, Exelon proposes divesting all of the NRG generation facilities in PJM East, specifically, the Indian River, Vienna, and Dover Energy facilities. The DPT was then performed based on the assumption that the three facilities would be sold to a single new entrant, and the result showed that the only change in concentration would result from imports of NRG generation into PJM East from other markets. This increase in concentration is *de minimis* and triggers no screen failures. According to Exelon, the DPT analysis of the PJM East submarket shows the transaction will have no effect on competition in that submarket after the clean sweep divestiture of NRG's generation facilities in that submarket.

**ii. ERCOT**

32. Exelon argues that, because the transmission and wholesale sale of electricity in ERCOT is not in interstate commerce and thus is not subject to the Commission's jurisdiction, it is unclear whether the Commission will consider the transaction's effect on competition in ERCOT. Assuming that the Commission will consider the effect in

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<sup>33</sup> Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 31,896 n. 62.

<sup>34</sup> Exelon also performed a DPT analysis of PJM Classic and Northern Illinois. We note that the Commission has not identified either of these areas as submarkets. Additionally, Exelon itself notes that Northern Illinois is not a separate relevant market *per se*, but that it analyzed the proposed transaction's effects there to bolster its analysis of PJM. Accordingly, we will not review Exelon's analysis of PJM Classic or Northern Illinois.

ERCOT in its overall analysis, Exelon contends that there will be no adverse impact because Exelon will divest all of its pre-merger generation located in ERCOT, particularly the Mountain Creek, Handley, and Laporte units, including the sale of the mothballed Mountain Creek Units 2-3 and Handley Units 1-2. Exelon also states it will transfer the long-term power purchase agreement rights that it has to the capacity and energy associated with the Tenaska/Frontier and Wolf Hollow units.

33. Exelon contends that, even without divestiture, the transaction would not have an adverse impact on competition in ERCOT, but still ran its analysis on the overall ERCOT markets, as well as two congestion zones where Exelon and NRG have generation ownership overlaps – Houston and North – considering the possibility of imports from other markets.

34. Analyzing ERCOT as a whole, Exelon contends that there are some modest increases in market concentration, but that the transaction still passes the competitive screens. In the ERCOT North zone, where Exelon has most of its ERCOT facilities and NRG has its Limestone plant, the transaction and resulting combination of these facilities would cause several screen violations. Exelon argues that these screen failures are remedied by the proposed divestiture, in which the specified plants are sold to a single purchaser that is not currently in the market. This will eliminate any possible increase in market power concentration because the interties into ERCOT are completely reserved by parties other than Exelon or NRG. In the ERCOT Houston zone, Exelon has a single peaking facility and Exelon represents that NRG owns over 8000 MW of capacity. This proposed transaction results in five screen violations in the ERCOT Houston zone, which Exelon submits will be mitigated by the proposed sale of Exelon's plant to a purchaser with no pre-transaction presence in the market.

35. Exelon also analyzed the CSW balancing authority area because it is a jurisdictional market which is first-tier to ERCOT. While NRG does not own any generation in the CSW balancing authority area, the market was analyzed to see if increased imports of NRG capacity from ERCOT could create competitive concerns. Exelon states that there is no retail competition in CSW, and the market is highly concentrated both before and after the proposed transaction; however, the market is only slightly affected by the proposed transaction, and there are no screen violations.

### iii. ISO-NE

36. In the ISO-NE market, Exelon owns 178 MW, which constitutes 0.6 percent of the total installed capacity, and NRG owns seven percent of the total installed capacity. Moreover, their generation is located in different sub-areas within the market. Exelon contends that this *de minimis* overlap does not require preparation of an Appendix A analysis.

**iv. Entergy**

37. Both Exelon and NRG own or control generation in the Entergy market, but Exelon proposes to divest itself of the generation that it controls, which consists of a long-term power purchase agreement (PPA) for the capacity and energy associated with the Tenaska Frontier Unit. Exelon states that divestiture of this contract will result in the proposed transaction having no adverse impact on competition in the Entergy market.

**v. Proposed Mitigation**

38. As noted above, Exelon has committed to divest 4,600 MW of generating capacity by selling three NRG plants with a capacity of approximately 1,000 MW in PJM East and three Exelon plants with a capacity of approximately 2,200 MW in ERCOT, and by transferring to third parties Exelon's long-term PPA rights to approximately 1,200 MW of capacity associated with the Tenaska/Frontier and Wolf Hollow units. Exelon commits that it will enter into contracts related to divestiture no later than 180 days after the consummation of the proposed transaction. Exelon will then close on the sales and transfers no later than 30 days after the receipt of all regulatory approvals, including the receipt of this Commission's approval under section 203.

39. In each scenario, the divestitures were modeled as having been made to a single purchaser in both the PJM East and ERCOT markets, assuming that the purchaser has no pre-existing market presence. Exelon contends that the identity of the purchaser(s) could have an impact on the post-divestiture concentration in the markets where the divestitures take place, which is best considered by the Commission when it conducts its review of the applications under section 203 that Exelon will file at the time of the sales.

**vi. Interim Mitigation**

40. Exelon also commits to implement interim mitigation provisions that will go into effect upon the consummation of the proposed transaction until the required divestitures or other mitigation is in place, as described below.

**(a) Interim Mitigation in PJM**

41. Exelon's interim mitigation will apply to certain fossil-fired and hydro units located in PJM East (PJM Mitigated Units), attached as Appendix 1 to Exelon's application.<sup>35</sup> The interim mitigation will apply to sales of energy, capacity, and

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<sup>35</sup> Three fossil-fired generation units located in PJM East are not being designated as PJM East Mitigated Units. First, the diesel-fired peakers located at Cromby and Schuylkill are not PJM Capacity Resources. These peakers are available to PJM only as Black Start resources. Accordingly, these units will not be offered into the PJM energy

(continued ...)

ancillary services from the PJM Mitigated Units and will be in effect from the consummation of the proposed transaction until the date that the last NRG unit located in PJM East is transferred to a new owner (PJM Interim Mitigation Period).

42. During the PJM Interim Mitigation Period, all PJM Mitigated Units, including both Exelon and NRG units, will be subject to cost-based caps – equal to the cost-based offer<sup>36</sup> – on the offers that are made for the PJM Mitigated Units into the PJM energy market. These are “up to” offer caps, meaning that Exelon will be permitted to submit offers lower than the offer caps or to must-run a unit with an offer price of zero for all or a portion of a unit’s capability.

43. In addition, the interim mitigation will apply to any Reliability Pricing Model<sup>37</sup> Base Residual Auctions<sup>38</sup> that take place during the PJM Interim Mitigation Period. For all such auctions, Exelon will offer all of the units listed in Appendix 1 up to their PJM-

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market and have not been designated as PJM East Mitigated Units. In addition, although Exelon does submit offers for the output of the Grays Ferry cogeneration unit, Exelon does not own the unit and does not have any contractual right to shut down the unit or reduce its output. Exelon states that because it cannot withhold the output of Grays Ferry from the market, Exelon is not including it as a PJM East Mitigated Unit.

<sup>36</sup> A “cost-based offer” means an offer to sell energy at the maximum price allowed under the version of the PJM “Amended and Restated Operating Agreement of PJM Interconnection, LLC,” (PJM Operating Agreement), Schedule 1, Section 6.4.2(a)(ii) and (iii), in effect at the time the offer is made. Currently, these provisions limit offers to the variable cost of a unit plus an adder of 10 percent for a unit that PJM has classified as a non-frequently mitigated unit, and a fixed percentage and/or a fixed \$/MWH adder for frequently mitigated units. An offer to must-run a unit or a portion of a unit at zero price also will constitute a cost-based offer.

<sup>37</sup> The Reliability Pricing Model is PJM’s resource adequacy construct that is used to develop a long-term pricing signal for capacity resources and load serving entity obligations that is consistent with the PJM Regional Transmission Planning Process. The goal of the Reliability Pricing Model is to add stability and a locational nature to the pricing signal for capacity by aligning capacity pricing with system reliability requirements and to provide transparent information to all market participants far enough in advance for actionable response to the information.

<sup>38</sup> The Reliability Pricing Model Base Residual Auction is held annually in May, three years prior to the capacity delivery year. Base Residual Auctions allow for the procurement of resource commitments to satisfy PJM’s unforced capacity obligation and allocates the cost of those commitments among the load serving entities.

approved Market Seller Offer Caps.<sup>39</sup> Exelon may sell the capacity associated with any of these units that do not clear in any of these Reliability Pricing Model Base Residual Auctions on a bilateral basis. With respect to any Reliability Pricing Model Incremental Auction for additional capacity needed during the delivery period associated with a Base Residual Auction conducted during the PJM Mitigation Period, Exelon will offer, at prices up to their PJM-approved Market Seller Offer Caps, all units that have: (1) not cleared in prior Base Residual Auctions; (2) not been used to cover any deficiencies in capacity sold in the Base Residual Auction; and (3) not been sold bilaterally to third parties before the upcoming Incremental Auction.

44. Further, in PJM, there are two market-based ancillary services – regulation and synchronized reserves – which Exelon argues are not adversely affected by this transaction and thus do not need mitigation.<sup>40</sup> However, out of an abundance of caution, Exelon commits that, during the PJM Interim Mitigation Period, its offers of ancillary services from any unit will be consistent with the rules set out in PJM’s manual regarding cost-based bidding.<sup>41</sup>

**(b) Interim Mitigation in ERCOT**

45. Exelon’s interim mitigation will apply to fossil-fired units owned or controlled by Exelon and NRG that are located in the ERCOT North and Houston zones, a list of which is attached as Appendix 2 to Exelon’s application. This mitigation will remain in effect from the consummation of the proposed transaction until the date the last proposed Exelon unit is divested in ERCOT (ERCOT Interim Mitigation Period).

46. Because ERCOT operates differently than PJM, Exelon proposes different mitigation measures. In ERCOT, Qualified Scheduling Entities (QSEs) submit balanced

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<sup>39</sup> As defined in Attachment DD, Section 6 of the PJM OATT a Market Seller Offer Cap, stated in dollars per MW-year, is applicable to price quantity offers within the Base Offer Segment for an existing Generation Capacity Resource, and shall be the Avoidable Cost Rate for such resource, less the Projected PJM Market Revenues for such resource. Avoidable costs are the costs that a generation owner would not incur if the generating unit did not operate for one year.

<sup>40</sup> Application, Exhibit J-1 at 57-60.

<sup>41</sup> See PJM Manual 15, Cost Development Guidelines (CDTF Manual). With respect to regulation service, Exelon commits to cap any offer to sell regulation service from PJM Mitigated Units at a price no greater than the cost-based offer and will not avail itself of the market-based option. See CDTF Manual, section 9. With respect to synchronized reserves, Exelon commits to cap its offers to sell synchronized reserves from PJM Mitigated Units. See CDTF Manual, section 7.

schedules on behalf of generators on a day-ahead basis, meaning that the generation scheduled is matched to energy sales that generators have made bilaterally. To the extent that a particular generator is committed to operate but has excess capacity, it may participate in the ancillary services markets that ERCOT administers. The ERCOT ancillary services are Regulation Up, Regulation Down, Responsive Reserve Service, Non-Spinning Reserve Service, and Balancing Energy Service either Up or Down (Balancing Energy). Generators are not required to make offers for the first four of these services and can also provide these bilaterally. If generators do submit such offers, however, to the extent their offers clear, their resources are committed to ERCOT to provide such service(s) on a firm basis for the next day.

47. Exelon states that it cannot physically withhold capacity from the ERCOT market by choosing not to enter into bilateral contracts or not bidding into the ERCOT bid-based markets. On both a day-ahead basis and in real time, ERCOT can issue an Out-of-Merit Capacity<sup>42</sup> (OOMC) instruction to a unit that is not on-line when ERCOT needs the capacity to relieve congestion or remedy extreme emergency conditions. When ERCOT does this, it pays the owner a cost-based amount equal to a generic heat rate by unit type multiplied by a gas index multiplied by the low operating limit of the resource multiplied by the number of hours for which the unit must be available for OOMC operation.<sup>43</sup>

48. Similarly, with respect to units that are already on-line, if ERCOT needs energy from a resource to enable it to relieve a local transmission constraint or other local reliability issue, it can issue an Out-of-Merit Energy<sup>44</sup> (OOME) instruction calling for upward or downward movement from a specific unit to solve the constraint. ERCOT pays the generator a price equal to a generic heat rate by unit type multiplied by the applicable gas index multiplied by the MW amount associated with the instruction or if its costs exceed the generic payment, a generator may seek its verifiable costs.

49. As a result, Exelon's interim mitigation proposal relates to energy associated with the capacity that is available from generating units that have been committed day-ahead after being dispatched to meet bilateral contract obligations. ERCOT clears the markets

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<sup>42</sup> As defined by ERCOT, Out-of-Merit Capacity is capacity provided by a resource selected by ERCOT outside the bidding process to resolve a reliability or security event when no market solution exists.

<sup>43</sup> If a generator's unit has an actual heat rate that is higher than the generic heat rate, the generator may submit its verifiable cost information to ERCOT and request that it be paid based on the higher, actual heat rate.

<sup>44</sup> As defined by ERCOT, Out-of-Merit Energy is energy provided by a resource selected by ERCOT outside the bidding process to resolve a reliability or security event when no market solution exists.

for the four ancillary services, other than Balancing Energy, on an ERCOT-wide basis. As described above, the ERCOT-wide market does not experience any screen failures as a result of the proposed transaction, even before divestiture, therefore, Exelon argues, interim mitigation with respect to any of these ancillary services is not necessary.

50. ERCOT clears the Balancing Energy market, however, on a zonal basis, unless there is no congestion on ERCOT-designated commercially significant constraints. As a mitigation measure, Exelon proposes to offer all energy from committed units, except that which is needed to serve bilateral contracts or to supply the other ancillary services, into the Balancing Energy market.<sup>45</sup>

51. Exelon urges the Commission to adopt the proposed interim mitigation set forth above, arguing that the proposed offer caps for both PJM and ERCOT prevent both physical withholding and economic withholding during the interim period before divestiture is completed. In addition, Exelon notes that the proposed mitigation will affect more capacity than will be divested, and in that way, will more than adequately mitigate market power during the interim mitigation periods.<sup>46</sup>

**b. Protests and Comments**

52. NRG protests several different aspects of Exelon's proposal as it relates to the Commission's analysis of the proposed transaction's effect on competition.

53. First, NRG challenges Exelon's analysis of the PJM market. NRG contends that Exelon proposes to divest NRG facilities in PJM East only, but by keeping NRG and Exelon facilities in the rest of PJM, Exelon's proposal will actually increase the concentration in PJM East by importing undivested NRG generation located outside of PJM East. For this reason, NRG contends that the Commission should examine alternative divestiture proposals. Further, NRG argues that Exelon should conduct additional sensitivity analyses, because HHI only examines MW capacity, not the ability to influence price. NRG asserts that Exelon's data show that the merger, even with mitigation, will increase Exelon's market share and could affect Exelon's ability to influence prices during peak periods. NRG states that Exelon should also conduct sensitivity studies that demonstrate the stability of its Economic Capacity and Available Economic Capacity results given changes in destination market prices. In addition, NRG contends that Exelon did not identify all of the relevant submarkets in PJM and should also perform the screens for the ComEd balancing authority area. In the alternative, NRG

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<sup>45</sup> Application at 47.

<sup>46</sup> Exelon also proposed alternative interim mitigation for ERCOT to the extent the Commission determined that the proposed interim mitigation did not effectively mitigate the merged company in the ERCOT market. Application at 49-52.

contends that Exelon should provide probative evidence that there are no transmission limitations between ComEd and the rest of PJM by providing evidence that there is no potential for price separation between ComEd and the rest of PJM and by evaluating the frequency of binding transmission limitations and congestion between ComEd and the rest of PJM.

54. Second, NRG contests Exelon's Available Economic Capacity analysis, arguing that the analysis did not account for all of the provider of last resort load obligations that would need to be satisfied, resulting in depressed HHI changes. NRG also argues that Exelon's study may not have accounted for the fact that, in the ComEd zone, a portion of Exelon's provider of last resort arrangements with ComEd may involve financial hedges and not contracts for physical delivery of electricity. NRG contends that Exelon should submit sensitivity studies showing that different assumptions will not significantly affect the results.

55. Third, NRG asserts that Exelon may not have proposed the best divestiture plan, and that another plan may be more appropriate. NRG contends that Exelon's proposed divestiture plan essentially eliminates a significant competitor, NRG, and creates several smaller competitors that will not be able to "discipline the actions of Exelon in any meaningful way."<sup>47</sup> Exelon's proposal, to sell assets to a new market entrant, could create a dominant firm, Exelon, with "competitive fringe," that is, smaller firms that act competitively but cannot discipline the behavior of larger players. NRG contends that this will have an adverse effect on competition, and therefore, the Commission should not approve a divestiture plan that requires that assets be sold to new market entrants.

56. Fourth, NRG objects to Exelon's proposed divestiture of NRG's generation on the Delmarva Peninsula. NRG contends that there is no overlap with Exelon generation in the Delmarva load pocket, and that the HHI screens do not properly reveal that aspect of the market. NRG proposes that Exelon should propose alternative divestiture packages, including divesting the Cromby and/or Eddystone, Rockford and Indian River Units 3 and 4.<sup>48</sup> NRG further contends that Exelon's proposed schedule for divestiture, within 180 days of consummation of the proposed transaction, is not realistic. Moreover, Exelon has not completed detailed due diligence as to NRG's assets, and other regulatory agencies have not yet completed their review; therefore, Exelon's plan for divestiture

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<sup>47</sup> NRG Protest at 21 (Feb. 17, 2009).

<sup>48</sup> NRG notes that in the proposed Exelon/PSEG merger, the Commission allowed Exelon discretion as to which facilities to divest, but the Department of Justice required Exelon to divest Cromby and Eddystone. *Id.* at 22 (citing *United States of America v. Exelon Corporation and Public Service Enterprise Group Incorporated*; Proposed Final Judgment and Competitive Impact Statement, 71 Fed. Reg. 49,477-01, at 4 (Aug. 23, 2006)).

may be modified. Because the proposed divestiture plan may be altered, NRG contends that consideration of this application is premature.

57. Fifth, NRG argues that, regardless of the Commission's decision as to other aspects of Exelon's proposed divestiture plan, it should not require divestiture of Dover Energy Center, located on the Delmarva Peninsula. NRG contends that Dover Energy Center is small and raises no competitive concerns. Moreover, NRG asserts that disposing of the Dover Energy Center, which is part of NRG Thermal LLC, will trigger the change in control repayment provision in NRG Thermal's loan agreements, which would likely result in increased debt costs to certain customers of NRG Thermal.

58. In addition, NRG asserts that the ERCOT wholesale power market is regulated by the Texas Commission, and NRG contends that the Commission should not interfere with the Texas Commission's regulation of the Texas intrastate power market. Specifically, NRG contends that the Commission should not impose mitigation measures as related to the ERCOT market. NRG states that the tolling agreement with the Tenaska Frontier facility is jurisdictional because it is dually interconnected to ERCOT and to Entergy, but that it is distinguishable from ERCOT-only assets. However, NRG requests that the Commission clarify that the agreement need not be divested because any market power concerns within ERCOT are not within the jurisdiction of the Commission, and that the tolling agreement has a minimal effect on market concentration in the Entergy market. NRG acknowledges that the Commission will consider whether the combination of Exelon's and NRG's ERCOT facilities would have competitive impacts on interstate markets, but asserts that the application's analysis shows that the impact of ERCOT exports on neighboring interstate markets does not result in competitive impacts that would require mitigation.

59. The Texas Commission argues that this Commission should not consider the effect of the proposed transaction on generation facilities located solely within ERCOT. The Texas Commission notes that it has the authority to consider any transaction which would result in an entity owning one percent or more of the electricity for sale in the ERCOT power region. Moreover, if the transaction would result in the ownership of more than 20 percent of the installed generation capacity in ERCOT, the Texas Commission may either reject the transaction or condition its approval of the transaction upon measures designed to mitigate market power abuse. If this Commission does consider the effect of the proposed transaction on facilities located within ERCOT, the Texas Commission requests that this Commission explicitly confirm that its order does not affect the authority of the Texas Commission to review the transaction.

60. Public Citizen argues that the Commission's competition analysis is incomplete because it is confined to regional markets, and does not consider nationwide competition. Open transmission access has been enhanced, asserts Public Citizen, and therefore the national market should be considered. Moreover, Public Citizen contends that the

Commission's analysis allows utility systems to grow, as long as they are not concentrated in a particular market.

**c. Applicant's Answer**

61. Exelon responds that because NRG's arguments are unsupported, NRG has failed to rebut Exelon's showing that the proposed transaction will not have an adverse effect on competition.<sup>49</sup>

62. Specifically, in response to NRG's claim that Exelon's share of the PJM market would increase post-divestiture, Exelon notes that NRG does not submit any supporting analysis or identify a different divestiture proposal. Regarding imports into PJM East, Exelon notes that its application presented an analysis showing the changes in concentration resulting from imports of NRG generation into PJM East, and the analysis raised no competitive concerns.<sup>50</sup>

63. In response to NRG's contention that Exelon had not analyzed the correct submarkets in PJM, Exelon cites Commission precedent stating that PJM East is the correct submarket to be analyzed in PJM.<sup>51</sup> Exelon states that the ComEd zone is not a destination submarket that should be analyzed on a stand alone basis. Moreover, Exelon states that ComEd is the lowest cost zone in PJM, and that there are neither transmission nor economic constraints in moving energy from the lowest cost zone to higher cost zones. Exelon did provide an analysis of the ComEd market in its application to show how NRG's Rockford plant, a 447 MW peaking facility, would overlap with generation already owned by Exelon in the ComEd zone. Exelon states that there is no impact on competition from the acquisition of the Rockford plant except in those hours when it would be economic to run, and even during those hours, other capacity is available as a substitute.<sup>52</sup>

64. Concerning NRG's arguments regarding the Available Economic Capacity analysis, Exelon notes that NRG presents no alternatives, and that the analysis presented

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<sup>49</sup> Exelon Answer at 9 (March 4, 2009) (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,119).

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 236, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 91, *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008).

<sup>52</sup> Exelon Answer at 15 (March 4, 2009).

in the application is consistent with the Merger Policy Statement.<sup>53</sup> Moreover, Exelon notes that NRG's protest supports Exelon's contention that Economic Capacity is the relevant metric in PJM. NRG's protest points towards treating more load as uncommitted; if this factor is considered in the Available Economic Capacity analysis, Exelon submits that the Available Economic Capacity analysis will approximate the Economic Capacity analysis.

65. Regarding NRG's arguments for a different divestiture plan than that proposed in the application, Exelon states that it is not committed to selling the facilities to a new entrant, and that any sale of a facility is subject to Commission approval under section 203. Exelon notes that it modeled the divestiture as a sale to a single new user for illustrative purposes because it was not possible to model all potential combinations of purchasers.

66. Regarding divestiture of NRG facilities on the Delmarva Peninsula, specifically the Dover Energy Center, Exelon states that its proposal adequately mitigates any potential market power that results from the transaction. Exelon notes that the Commission requires a mitigation proposal to identify the specific facilities to be divested,<sup>54</sup> and that this approach provides more useful information to the potentially affected state commissions and shareholders of both Exelon and NRG. Exelon states that it would not object if the Commission allowed it to retain the Dover Unit, but argues that the Commission should not then require a different facility to be divested.

67. Exelon reiterates that divestiture can be accomplished with 180 days, but it has no objection if the Commission extended the divestiture period to a year. Exelon also notes that interim mitigation provisions will be in place, and no intervenor has raised any concerns about the proposed interim provisions.

68. Concerning ERCOT, Exelon notes that the proposed transaction is also subject to the jurisdiction of the Texas Commission. Exelon provided an analysis of the proposed transaction's effect on competition in ERCOT and concludes that the proposed transaction, combined with the proposed mitigation, will not cause any adverse impacts on competition in ERCOT and no intervenor has suggested otherwise. Exelon further states that it does not anticipate changing its divestiture plan, including divestiture of the Tenaska Frontier contract. Exelon reiterates that it would not object if the Commission allowed it to retain the Tenaska Frontier contract, but argues that the Commission should not then require a different facility to be divested.

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<sup>53</sup> *Id.* at 18.

<sup>54</sup> *Id.* at 23 (quoting Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,136).

69. Regarding Public Citizen's protest, Exelon contends that it does not address the proposed transaction, but is instead a general attack on the Commission's merger policies. Specifically, Public Citizen opposes the Commission's market-based rate policy and the repeal of the Public Utility Holding Company Act of 1935. Exelon also states that Public Citizen provides no specific criticisms of the analysis performed by Exelon showing that the transaction is consistent with the public interest; thus, Public Citizen's protest should be rejected.

70. Responding to IBEW's comments, Exelon contends that IBEW is focused on the effect of the proposed transaction on the employment of IBEW's members, and that IBEW does not denote an area where the application is incomplete or in error.

**d. NRG's Answer**

71. NRG argues that Exelon's "clean sweep" divestiture of NRG generating assets in PJM East fails to address the most significant market power issue, namely, Exelon's ownership of strategic generating assets, and the increased incentive it will have to withhold these assets to raise marginal prices. NRG claims that Exelon has market power through the ownership of the Cromby and Eddystone assets, and that such market power would be enhanced by the merger. These assets have both coal and natural gas/oil fired units. NRG claims that the Cromby and Eddystone coal units are strategic because they could be marginal, and thus could set the PJM East market clearing price over 50 percent of the time. However, the HHI test does not take this into account because the HHI only considers total economic capacity. Further, NRG claims that the Cromby and Eddystone units become even more vital with the acquisition of NRG's shares in Keystone and Conemaugh, although those units are not located in PJM-East.<sup>55</sup> NRG states that this strategic position in the market as demonstrated on the supply curve, combined with Exelon's acquisition of NRG's shares of Keystone and Conemaugh, gives Exelon an additional incentive, as well as the opportunity to withhold capacity. NRG states that however small the quantities withheld, the effect would increase profits on Exelon's large nuclear and coal baseload units in PJM East. Given the strategic importance of the Cromby and Eddystone units, NRG contends that any mitigation plan should include all or some portion of these units, and perhaps NRG's interests in Keystone and Conemaugh as well.

72. NRG also states that the units that Exelon plans to divest – the Dover, Vienna, and Indian River units – are not strategic and have little or no market power implications. NRG claims that the Dover unit is small and inflexible<sup>56</sup> and that two of the Indian River

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<sup>55</sup> *Id.* at 5, 6.

<sup>56</sup> NRG states that the Dover unit is a 15 MW cogeneration facility whose operations are controlled by General Foods, the industrial host. *Id.* at 6.

units will be retired in 2010 and 2011. Moreover, the units are located on the Delmarva Peninsula, and thus may be unavailable to the rest of PJM East during high load periods because of congestion. NRG concludes that these adverse effects on competition “are not addressed by the mathematical simplicity of reducing megawatts of capacity below screen failure levels,”<sup>57</sup> and that the Commission should examine the effect of the proposed transaction on competition more closely.

73. NRG further argues that the ComEd zone should be evaluated as a separate market because it is physically separated from the rest of PJM, and there are limits on the quantity of imports that can be brought into this zone. NRG notes that ComEd is one of the defined local deliverability areas (LDAs) in PJM’s Reliability Pricing Model. In addition, NRG contends that the prices in the ComEd zone correlate more with the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) than with the rest of PJM. NRG includes a DPT analysis for the ComEd zone as a standalone submarket in PJM, showing screen failures during the periods when the Rockford facility is economic. NRG states that these screen failures become significant because lower prices in the ComEd zone relative to the rest of PJM provide opportunities for Exelon to raise prices within the ComEd zone up to a point at which it almost equalizes adjacent market prices. NRG requests that the Commission require Exelon to provide additional analysis to show that the proposed transaction will not have an adverse effect in the ComEd zone.<sup>58</sup>

74. NRG also contends that competition will be harmed by the loss of NRG as a competitor in the auctions that are utilized for provider of last resort service for customers of PECO and other utilities. As in other regions of PJM, the PECO balancing authority area is a retail choice area, where the incumbent utilities procure supplies to meet the majority of retail load through auctions. The competitiveness of those auctions turns on the number of suppliers, other than the dominant incumbent utilities like Exelon, that have scale, creditworthiness, and sophistication to support large, longer term commitments and meet auction requirements, and most importantly, that have access to generation that is proximate to the load and thus insulated from congestion costs. NRG says that many financial institutions that previously participated in these auctions are pulling back from participation in the electricity markets, and that loss of NRG as a competitor, while increasing the supply of Exelon as the dominant supplier, will present a threat to the competitiveness of the default service market.<sup>59</sup>

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<sup>57</sup> *Id.* at 10.

<sup>58</sup> *Id.* at 14.

<sup>59</sup> *Id.* at 9.

e. Applicant's Answer

75. Exelon argues that the Commission should reject NRG's second filing because it contains analysis that should have been submitted in the first round of comments. In the alternative, Exelon states that if the Commission considers NRG's answer, it should not delay a Commission decision on Exelon's application.<sup>60</sup>

76. In response to NRG's assertion that Exelon's "clean sweep" divestiture of NRG generating assets in PJM East fails to address market power issues, Exelon reasserts that NRG has not overcome Exelon's demonstration that the transaction will have no adverse impact on competition. Concerning PJM East, Exelon reiterates that its clean sweep divestiture means that the proposed transaction will have no impact on competition in that submarket, much less any adverse impact. Exelon also states concerning the ComEd zone that "NRG's own analyses show that no competitive issues are raised even if the ComEd zone is not analyzed as part of the total PJM market."<sup>61</sup>

77. Exelon also contends that NRG's analysis only shows that after the post-merger divestiture, "Exelon will own nothing more in PJM East than the exact same units located at the exact same points on the supply curve that it owned before the Transaction was completed."<sup>62</sup> Exelon further argues that NRG's supply curve analysis does not compel a different conclusion of the effects of the proposed transaction on competition than that presented in the application.<sup>63</sup>

78. Exelon also notes that because it already owns the Cromby and Eddystone units, it will have no greater incentive to use these units to pursue a withholding strategy to raise prices than it already has.<sup>64</sup> Exelon states that the initial analysis in its application considered NRG's capacity located outside of PJM East and its import potential into PJM East and found no competitive concerns, and that NRG has identified no errors in that analysis.<sup>65</sup>

79. In response to NRG's assertions that the merger would cause the loss of a competitor able to provide default service to PECO and other utilities, Exelon notes that NRG provides no information or analysis regarding the number of competitors in these

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<sup>60</sup> Exelon Answer at 5 (April 2, 2009).

<sup>61</sup> *Id.* at 6.

<sup>62</sup> *Id.* at 8.

<sup>63</sup> *Id.* at 9.

<sup>64</sup> *Id.* at 10.

<sup>65</sup> *Id.* at 8.

markets. Exelon states that this assertion of a “general claim of harm” should be rejected consistent with the Commission policy.

80. Exelon states that it has already responded in detail to NRG regarding whether the ComEd zone should be treated as a separate submarket within PJM.<sup>66</sup> Exelon again notes that transmission constraints are binding going out of the ComEd zone, not into the zone, and that the Commission has never found that the ComEd zone should be treated as a separate submarket within PJM. Moreover, Exelon points out that even if the ComEd zone were to be treated as a submarket, the NRG analysis shows only one minor screen violation. Exelon notes that the Commission has held on several occasions that similar single screen violations do not represent a systematic market power problem.<sup>67</sup>

81. Exelon also states that NRG’s own analysis shows that ComEd is not a submarket. Exelon states that NRG’s analysis shows that prices in the American Electric Power (AEP) zone do affect prices in the ComEd zone, suggesting that the ComEd and AEP zones are in the same market, even if they are separate from the remainder of PJM.<sup>68</sup> In addition, NRG’s analysis showing that prices in the Midwest ISO are highly correlated with those in the ComEd zone means that generators in those regions have an incentive to sell into ComEd if prices increase in the ComEd zone. Exelon notes that neither it nor NRG has any generation in AEP or the Midwest ISO, so including some or all of these markets with the ComEd zone, even if they were separated from the rest of PJM, would reduce HHI increases and eliminate the screen violation shown in NRG’s analysis.<sup>69</sup>

82. Exelon further states that NRG’s analysis reinforces Exelon’s showing that there are several thousand megawatts of capacity, not owned by Exelon or NRG, at the same level on the supply curve as the Rockford capacity. Exelon states that this capacity supports Exelon’s position that acquisition of the Rockford unit would not give Exelon the ability to engage in a successful withholding strategy.<sup>70</sup>

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<sup>66</sup> *Id.* at 11.

<sup>67</sup> *Id.* at 12.

<sup>68</sup> NRG performed the Granger Causality Test for ComEd and the rest of PJM. The test is designed to assess whether two time series of price data are causally associated with each other. Exelon states that the Granger Causality Test run by Ms. Frayer produced results that show prices in the AEP zone influence prices in the ComEd zone and prices in the ComEd zone influence prices in the AEP zone. NRG Answer, Exhibit A at 37 (March 19, 2009).

<sup>69</sup> Exelon Answer at 13 (April 2, 2009).

<sup>70</sup> *Id.* at 14.

**f. NRG's Answer**

83. In its third filing, NRG reasserts many of the arguments it has made in its protest and previous answer. NRG continues to argue that the Commission should tailor the mitigation proposal to specific harm posed by the proposed merger. NRG claims that Exelon's plan does not resolve the competitive harms the merger could cause and offers a variety of evidence that Exelon may have increased incentives to exercise market power in PJM East.<sup>71</sup> NRG also again emphasizes that the Commission should consider the competitive issues posed by this proposed transaction in the ComEd zone.<sup>72</sup> NRG also states that the proposed transaction, and the loss of a competitor in PJM East, may have an adverse impact on upcoming Pennsylvania provider of last resort auctions.

**g. Commission Determination**

84. We find that, based on Exelon's representations, the proposed transaction will have no adverse effect on horizontal competition. We begin by observing that, as a general principle, our task is to consider the effect of a proposed transaction on competition. In this case, we considered Exelon's proposed transaction, including its divestiture proposal.<sup>73</sup> In response to the concerns of IBEW and others regarding Exelon's divestiture proposal, we note that we need not craft alternatives to the divestiture proposal set forth in the application because Exelon's divestiture proposal mitigates any merger-related harm to competition,<sup>74</sup> and specific divestitures would be subject to additional applications under section 203. We are also aware that other jurisdictions may weigh in on the merits of Exelon's divestiture proposal, and if those jurisdictions require alternative divestiture plans, we will consider those as they arise. As to the specifics of Exelon's market analysis, we note that NRG's DPT analysis appears to affirm the accuracy of Exelon's DPT analysis, and NRG does not contend that Exelon's application is deficient in this regard.

85. Regarding NRG's contention that the Eddystone and Cromby facilities have strategic value, we question NRG's underlying assumptions.<sup>75</sup> NRG claims that the

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<sup>71</sup> NRG Answer at 3-7 (April 17, 2009).

<sup>72</sup> *Id.* at 7-10.

<sup>73</sup> If Exelon is unable to complete its divestitures in the timeline proposed in the application, Exelon can request an extension of time from the Commission. In the meantime, the interim mitigation measures will remain in effect.

<sup>74</sup> *Aquila, Inc.*, 117 FERC ¶ 61,276, at P 47 (2006) (rejecting arguments that Applicants should show how benefits of the transaction will flow through to customers).

<sup>75</sup> The Commission notes that NRG provides a DPT for PJM East showing that there are no post-merger, post-divestiture screen failures in PJM East; the sale of the

Eddystone and Cromby coal units are strategic during baseload and intermediate hours. However, we note that during these hours, there is less congestion in PJM, particularly on the seven major reactive transfer interfaces connecting eastern with western PJM.<sup>76</sup> Therefore, the relevant market is not limited to PJM East, but is expanded significantly and thus the units in question would be less likely to be strategic.

86. Regarding whether the ComEd zone should be treated as a separate market, NRG's position is founded on ComEd's physical separation from the rest of the PJM footprint and limits on the quantity of imports into the ComEd zone. However, we note there are significant interconnections between ComEd and the rest of PJM, including one 765 kV line, several 345 kV lines, and several 138 kV lines.<sup>77</sup> These lines provide direct interconnections between the ComEd zone and both the AEP zone and the rest of PJM. Moreover, NRG acknowledges that there are significant exports from the ComEd market to the rest of PJM.<sup>78</sup> Given that there are significant power flows between ComEd and the rest of PJM, and because NRG fails to cite any binding transmission constraints, we find that there is not sufficient evidence to conclude that the ComEd zone is a separate submarket within PJM.

87. NRG also says the ComEd zone is an LDA in PJM's Reliability Pricing Model.<sup>79</sup> While we agree, we note that all zones are treated as LDAs in the Reliability Pricing

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Dover, Vienna, and Indian River facilities would result in passage of all PJM East market screens. NRG also ran market screens where only the Vienna and Indian River facilities were sold, and this too resulted in passage during all periods. NRG Answer, Exhibit A at 25, 26 (March 19, 2009).

<sup>76</sup> NRG claims that the Eddystone and Cromby coal units owned by Exelon are strategic when loads are between 14,000 MW and 18,000 MW. NRG Answer, at 5 fig. 17 (March 19, 2009). These loads occur on the PJM East load duration curve between the 24th and 75th percentiles. NRG Answer, at 6 fig. 18 (March 19, 2009) (citing Exhibit A at 19-20). We note that this segment of a load duration curve is part intermediate and part baseload, when there are few if any transmission constraints. Further, the Eastern Interface experienced transmission constraints during 757 hours, or 8.6 percent of all hours, in 2008, when loads were highest. NRG Answer, Exhibit A, at 15 (April 17, 2009). Thus, the transmission constraints would occur during the hours on the highest 20th percentile of the PJM East load duration curve, which does not coincide with the hours on the PJM East load duration curve when NRG claims that the Eddystone and Cromby coal units are strategic.

<sup>77</sup> NRG Answer, Exhibit A, Fig. 2 (April 17, 2009).

<sup>78</sup> NRG Answer, Exhibit A at 23 (March 19, 2009).

<sup>79</sup> *Id.*, Exhibit A at 6.

Model, but being an LDA does not mean a zone is a submarket. PJM does not classify the ComEd zone as a submarket in its Reliability Pricing Model auctions, but as a market that includes all the rest of PJM. NRG also notes that prices in the ComEd zone correlate highly with prices in the Midwest ISO, perhaps even more so than with other PJM zones.<sup>80</sup> The correlation between prices in the ComEd zone and the Midwest ISO is consistent with the existence of the Midwest ISO-PJM Interconnection Joint and Common Market. However, the two systems remain different, and the generation and transmission facilities located in the ComEd zone are dispatched and controlled by PJM, not by the Midwest ISO or any other entity. NRG's position that Exelon could use the Rockford units or its position in the ComEd zone to extract higher profits is conditioned on the ComEd zone being a submarket, and on the rest of PJM having little or no access to this submarket. Because we find that Exelon need not analyze the ComEd zone for the effect of the proposed transaction on competition there, we also reject NRG's arguments regarding the possible anticompetitive effects of Exelon's operation of the Rockford facility.

88. As to ERCOT, and NRG's arguments that the Commission should not require the mitigation measures as proposed by Exelon, the Commission accepts the terms of Exelon's application, including its divestiture proposal,<sup>81</sup> as part of our finding that the proposed transaction has no adverse effect on competition and is consistent with the public interest.<sup>82</sup> However, we also acknowledge that other jurisdictions, notably the United States Department of Justice and the Texas Commission, will also consider the implications of the proposed transaction and its effect on competition. If another jurisdiction requires different mitigation measures, this Commission may re-examine the

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<sup>80</sup> *Id.* at 12; Exhibit A at 7.

<sup>81</sup> The Commission believes that the primary interim mitigation proposal for ERCOT mitigates any merger related effect on competition in ERCOT. Accordingly, the Commission has not considered the alternative mitigation proposal for ERCOT provided by Exelon.

<sup>82</sup> The Commission has considered competition within ERCOT in the context of considering the various aspects of whether a transaction is consistent with the public interest. See *Oncor Electric Delivery Company*, 120 FERC ¶ 61,215, at P 22-23, 27 (2007) (*Oncor*) (considering the effect of the proposed transaction on competition between generation in ERCOT and outside of ERCOT). "If a portion of a transaction requires authorization under section 203, the overall effect of the transaction must be considered before approval may be granted. We cannot ignore the full implications of a transaction for the public interest; the disposition of the transmission facilities is an integral part of the overall transaction." *Ameren Energy Generating Co.*, 108 FERC ¶ 61,081, at P 25 (2004) (footnote omitted).

measures approved in this order at a later time. We also confirm that this order does not affect the authority of the Texas Commission to review this transaction.

89. In response to Public Citizen, we agree with Exelon that Public Citizen only provided general criticisms of the application and the Commission's merger and market-based rate policies. We note that Public Citizen did not cite any specific deficiencies in the application. Instead Public Citizen argued that the Commission's policy is inadequate and that wholesale electric rate competition is not "national policy." Public Citizen did not identify any specific instances where Exelon's application is either in error, or incomplete with respect to requirements in section 203, the Commission's Merger Policy Statement, or Commission precedent. Accordingly, we find that Public Citizen's argument constitutes a collateral attack on the Commission's policies and is outside the scope of the current proceeding.

## **2. Effect on Competition – Vertical Market Power**

### **a. Applicant's Analysis**

90. Exelon argues that the proposed transaction raises no vertical market power concerns. Exelon states that NRG does not own any transmission facilities other than interconnection facilities.<sup>83</sup> Exelon's transmission facilities are under the operational control of PJM. Exelon states that neither Exelon nor NRG owns any natural gas transmission facilities. PECO owns natural gas distribution facilities in a territory that includes several independent natural gas-fired generation facilities, but it does not serve many of those facilities. Exelon argues that the minor amount of capacity served is unlikely to create vertical market power issues. Exelon also states that NRG has a single contract for gas delivery into PJM East.<sup>84</sup> Moreover, PECO is obligated to provide open-access natural gas distribution service that is subject to continued regulation by the Pennsylvania Commission. Under these circumstances, Exelon contends that PECO's ownership of natural gas distribution facilities raises no vertical market power issues, particularly in light of Exelon's commitment to divest NRG's generation located in PJM East, where the PECO gas distribution system is located. Exelon further states that the proposed transaction poses no concerns with respect to barriers to entry.

91. Further, Exelon compares this proposed transaction with the Exelon/PSEG merger, noting that, in that case, the Commission found that the Exelon/PSEG merger would not have raised vertical market power concerns with respect to each companies'

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<sup>83</sup> Application, Exhibit J-1, at 17.

<sup>84</sup> Application, Exhibit J-1, at 73 n.92.

transportation contracts.<sup>85</sup> Exelon contends that NRG has a significantly smaller share of transportation contracts than PSEG did, and that any contract rights held by NRG will be transferred to the purchaser of its generation facilities in PJM East. As a result, Exelon argues, no vertical market power issues are raised by the proposed transaction.

**b. Commission Determination**

92. In mergers combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel), competition can be harmed if a merger increases the merged firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival firms access to inputs or by raising their input costs, a merged firm could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.

93. In this case, we find that the proposed combination of Exelon and NRG transmission and generation assets, as well as the combination of natural gas distribution and generation assets, will not harm competition. Based on Exelon's representations, we find that there are no other barriers to entry that would raise vertical market power concerns.

**3. Effect on Rates**

**a. Applicant's Analysis**

94. With respect to transmission rates, Exelon proposes a "hold harmless" commitment for a period of five years, in which it will not seek to include merger-related costs in its filed transmission revenue requirements unless it can demonstrate merger-related savings equal to or in excess of the merger-related costs so included. Neither of the traditional franchised utilities involved in the proposed transaction has any wholesale requirements customers, so Exelon made no commitments related to such customers.

**b. Protests and Comments**

95. NRG notes that, when Exelon launched its hostile bid, Standard & Poor's (S&P) downgraded Exelon, Exelon Generation, and PECO, and placed them on negative credit watch; ComEd had S&P's lowest investment grade rating and was also placed on negative credit watch. Moody's also placed Exelon, Exelon Generation, and PECO on negative credit watch.

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<sup>85</sup> *Id.*, citing *Exelon Corporation*, 112 FERC ¶ 61,011, *reh'g denied*, 113 FERC ¶ 61,299 (2005).

96. NRG claims that recent ratings downgrades by S&P and a higher cost of capital resulting from the merger could have material impacts on rates, reliability and quality of service. NRG states that in Exelon's 10-K Annual Report to the SEC dated February 6, 2009, Exelon admits that the NRG merger would increase its indebtedness, possibly making it more difficult to pay or refinance its debts, and requiring the diversion of cash flow from operations to debt service.<sup>86</sup> As a result, NRG says the Commission must consider the rate effects in its evaluation of the proposed merger and require Exelon to provide additional information regarding the anticipated capital structure of the consolidated company and the financing related to the proposed transaction.

97. NRG also says Exelon's increased cost of capital could have negative consequences on service and reliability. NRG notes that an increased cost of capital may constrain the budgets of Exelon, PECO and/or ComEd. If so, the utilities may respond by delaying maintenance or other capital investments, potentially impairing reliability.<sup>87</sup>

**c. Applicant's Answer**

98. Exelon responds that NRG fails to address the factors the Commission considers in addressing the effect of a merger on rates, and that NRG's arguments do not have merit.

99. Exelon states that NRG's arguments are based on calculation of transmission, distribution, and in the case of PECO, natural gas distribution rates. Exelon states that in evaluating the rate impacts of a proposed transaction, the Commission does not consider these rates but focuses on protecting wholesale customers of merger applicants.<sup>88</sup>

100. Further, Exelon states that NRG is telling different stories to different audiences. Exelon states that, here, NRG presents itself as a risky investment for Exelon, which would result in a downgrade by credit agencies if Exelon were to acquire NRG. However, in public statements, NRG presents a more positive picture of its value, financial stability and growth potential. Exelon contends that NRG cannot have it both ways.<sup>89</sup> Exelon further states that NRG's public statements cast doubt on its analysis on the potential financial effects of the proposed merger on Exelon's credit ratings.

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<sup>86</sup> NRG Answer at 15 (quoting Exelon Corp., Annual Report (Form 10-K) at 59 (Feb. 6, 2009)) (March 19, 2009).

<sup>87</sup> *Id.* at 15.

<sup>88</sup> Exelon Answer at 15 (April 2, 2009) (citing Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 30,914).

<sup>89</sup> *Id.* at 17.

**d. NRG's Answer**

101. NRG reiterates its claim that the increased cost of capital will affect rates and argues that the Commission should find Exelon's application deficient and require Exelon to disclose its plans for financing the transaction and the impact of its debt on rates. NRG also states that none of its statements with regard to its financial health are untrue and that debt refinancing is not an issue except in the event of a hostile takeover.<sup>90</sup>

**e. Commission Determination**

102. We accept Exelon's commitment to hold transmission customers harmless from merger-related costs.<sup>91</sup> Additionally, we note that retail rates are not addressed by this Commission and are usually addressed by the relevant state commission.<sup>92</sup> Further, Exelon's hold harmless commitment ensures that ratepayers will not pay increased rates due to the effect of credit rating downgrades, and any effect of the credit rating adjustment on maintenance and reliability is speculative.<sup>93</sup> The Commission will be able to monitor the implementation of Exelon's hold harmless commitment through its authority to review Exelon's books and records.<sup>94</sup> We also note that no customer of Exelon or NRG has argued that the transaction would adversely affect rates. Based on Exelon's representations, we find that the proposed transaction will not adversely affect rates.

**4. Effect on Regulation**

**a. Applicant's Analysis**

103. Exelon states that its and NRG's public utility subsidiaries will remain jurisdictional public utilities subject to regulation by the Commission after the proposed

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<sup>90</sup> NRG Answer at 12-15 (April 17, 2009).

<sup>91</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044, at 30,124 (1996).

<sup>92</sup> See, e.g., *National Grid plc*, 117 FERC ¶ 61,080, at P 54 (2006).

<sup>93</sup> See *NorthWestern Corp.*, 117 FERC ¶ 61,100, at P 40 (2006) (finding speculative protestor's argument, that the proposed transaction would result in a credit ratings downgrade and lead to higher rates or lower reliability); see also *Old Dominion Electric Cooperative*, 117 FERC ¶ 61,313, at P 29 (2006) (affirming initial decision that "the record supports the conclusion that the credit downgrade will not raise rates").

<sup>94</sup> See 16 U.S.C. § 825 (2006) (section 301 of the FPA provides Commission access to books and records); see also *Consolidated Edison Development*, 123 FERC ¶ 61,022, at P 28 (2008) (citing Commission's authority to review books and records under PUHCA 2005).

transaction closes to the same extent they were regulated before the proposed transaction. As a result, Exelon argues there will be no impact on the Commission's jurisdiction.

104. Further, Exelon contends that the proposed transaction will not have any impact on state regulation. Pennsylvania and Illinois will have the same jurisdiction over PECO and ComEd after the proposed transaction is consummated. Exelon asserts that no other state public utility commission with jurisdiction over any other Exelon or NRG entity will have its jurisdiction affected in any respect.

**b. Commission Determination**

105. The Commission's review of a merger's effect on regulation is focused on ensuring that the merger does not result in a regulatory gap at the federal or state level.<sup>95</sup> At the federal level, the Commission will retain its regulatory authority over the merged companies. As to state regulatory authority, in the Merger Policy Statement, the Commission stated that it ordinarily will not set the issue of the effect of a merger on state regulatory authority for a trial-type hearing where a state has authority to act on a merger. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.<sup>96</sup> We note that no party alleges that regulation would be impaired by the proposed transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation. We find that neither state nor federal regulation will be impaired by the proposed merger.

**5. Cross-subsidization**

**a. Applicant's Analysis**

106. Exelon asserts that the proposed transaction will not result in, at the time of the proposed transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Specifically, Exelon verifies that, based on the facts and circumstances that are reasonably foreseeable as of the date of the affidavit: (i) the proposed transaction does not call for any transfers of any facilities of the regulated companies,<sup>97</sup> either at the time of the proposed transaction or in the future; (ii) no new securities will be issued by the regulated companies in connection with the proposed transaction and the time of the proposed transaction, and no issuances associated with the proposed transaction are contemplated in the future; (iii) the regulated companies will not enter into any new

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<sup>95</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>96</sup> *Id.* FERC Stats. & Regs. ¶ 31,044 at 30,125.

<sup>97</sup> Exelon refers to ComEd and PECO as the "regulated companies."

pledges or encumbrances in connection with the proposed transaction at the time of the proposed transaction, and there are no plans to do so in the future; and (iv) no new contracts between either of the regulated companies and any affiliates are contemplated by the proposed transaction, either at the time of the proposed transaction, or in the future. Further, Exelon discloses the existing pledges and encumbrances of utility assets of the regulated companies.

107. In addition, Exelon proposes ring-fencing measures to ensure that the regulated companies, and their customers, will not be adversely affected by the risks that accompany competitive power businesses. Exelon compares its ring-fencing measures to those used by Moody's and S&P to examine whether a utility is effectively ring-fenced from its parent and non-utility affiliates, as well as the ring-fencing measures that protected Portland General Electric Company from Enron's bankruptcy.

108. Exelon proposes the following measures as binding commitments:<sup>98</sup>

- a. The regulated companies will each maintain its own board of directors, separate from the Exelon board and the board of any other Exelon affiliate, with at least one independent director on each regulated company's board who is not an officer or director of Exelon or any other Exelon affiliate.
- b. Under relevant state laws, the business and affairs of the regulated companies will be managed by or under the direction of their respective boards of directors who shall manage the business and affairs of the regulated companies consistent with their unique obligations as public utilities and in accordance with the directors' fiduciary duties.
- c. Unless otherwise provided in a regulated company's certificate or articles of incorporation or bylaws, the act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors; provided that any action by a regulated company's board of directors to authorize the following acts shall require the affirmative vote of a majority of that company's directors present at the meeting at which a quorum is present, which affirmative vote shall include the vote of at least one independent director:

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<sup>98</sup> The Commission notes that similar ring-fencing proposals have been accepted in other merger proceedings. See *Puget Energy, Inc.*, 123 FERC ¶ 61,050, at P 30-36 (2008) (*Puget Energy*) (discussing ring-fencing protections, including those subsequently adopted by the Washington Commission); *Oncor*, 120 FERC ¶ 61,215, at P 36-41 (discussing ring-fencing protections).

- i. seeking protection or relief under federal or state bankruptcy, insolvency, moratorium or similar law affecting the rights of creditors;
  - ii. the declaration and payment of dividends on its common stock; and
  - iii. the purchase of electric energy or capacity or ancillary services unless undertaken pursuant to an auction, competitive bidding or similar process authorized by state law or managed or supervised by state authority.
- d. The regulated companies each will issue its own long-term debt and use reasonable efforts to maintain separate credit ratings for its publicly traded securities. Exelon has not guaranteed and will not guarantee any of the debt or other securities of the regulated companies or indemnify any person for losses resulting therefrom. Each regulated company will use its reasonable best efforts and exercise management prudence in matters relating to dividends and capital investments in order to preserve an investment grade credit rating.
- e. The cost of capital advocated by each regulated company for use in establishing its retail and wholesale rates shall not reflect any risk adjustment associated with Exelon or any other Exelon affiliate. For purposes of this commitment, cost of capital shall include the respective cost of debt, preferred stock and common equity as applied to the regulated company's individual capital structure.
- f. Without prior regulatory approval from the relevant state commission, the regulated companies shall not:
  - i. guarantee the debt or credit instruments of Exelon or any other Exelon affiliate;
  - ii. grant a mortgage or other lien on any property used and useful in providing retail or wholesale utility service or otherwise pledge such assets as security for repayment of the principal or interest of any loan or credit instrument of Exelon or any other Exelon affiliate;
  - iii. include in any of the regulated companies' debt or credit agreements cross default provisions between their respective securities and the securities of Exelon or any other Exelon affiliate;
  - iv. include in the regulated companies' debt or credit agreements any financial covenants or rating agency triggers related to Exelon or any other Exelon affiliate.

- g. The regulated companies will not lend money to, or borrow money from, Exelon or any other Exelon affiliate except pursuant to “money pool” arrangements filed with the Commission.<sup>99</sup>
- h. The regulated companies will each maintain reasonable accounting controls and other procedures for the allocation of overhead and other costs of jointly used assets and personnel. Such controls and procedures will be designed to provide reasonable assurance that neither regulated company bears costs associated with the business activities of any other Exelon affiliate other than the reasonable costs of providing materials and services to that regulated company. The regulated companies also will each maintain reasonable pricing protocols for determining transfer prices for transactions involving non-power goods and services between itself and any other Exelon affiliate consistent with the requirements of the relevant state commission and this Commission.
- i. The regulated companies will each maintain its own separate books and records. Upon written request, Exelon will provide to the state commissions and this Commission reasonable access to the books, accounts and other records of other Exelon affiliates to the extent: (a) such books, accounts and other records are relevant to the costs incurred by the regulated companies for purchases of goods and services from Exelon affiliates; or (b) access to such books, accounts and other records is necessary or appropriate for the protection of customers of the regulated companies with respect to rates subject to jurisdiction by the state commissions or this Commission.<sup>100</sup>
- j. The regulated companies will each notify the relevant state commission of (a) its intention to declare dividends on common stock at least 30 days before such a dividend is paid; and (b) its most recent quarterly common stock cash dividend within two business days after the declaration of such dividend.

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<sup>99</sup> Any money pool agreement will be filed for informational purposes in Docket No. RM02-14. *See* 18 C.F.R. § 141.500 (2008) (requiring participating regulated entities to file documentation establishing cash management programs with the Commission within 10 days of entry into the program, and to file any subsequent changes within 10 days of the change).

<sup>100</sup> Exelon and the regulated companies retain their rights to raise traditional discovery objections, including, but not limited to, objections on the basis of relevance and privilege, as well as the right to request the imposition of protections to prohibit disclosure of proprietary or confidential information.

- k. The regulated companies each will maintain ownership in its own name or the name of its subsidiaries all assets and other interests in property (including leasehold interests, easements, licenses, beneficial interests, and jointly owned assets) used or useful in its transmission and distribution businesses and will not transfer its ownership of any such property to any other Exelon affiliate without the requisite approval of or notification to the relevant state commission and this Commission.
- l. Within 90 days of closing the proposed transaction, the regulated companies will submit an opinion of counsel that, in the event of a bankruptcy or liquidation of Exelon, the regulated companies will not be consolidated with or into the estate of Exelon and, in the event of a bankruptcy or liquidation of either regulated company, Exelon will not be consolidated with or into the estate of bankrupt regulated company.

**b. Protests and Comments**

109. IBEW raises the concern that the proposed transaction could result in a higher cost of capital due to Exelon's lower credit ratings, which would in turn increase pressure on Exelon to divert operating and maintenance funds from the regulated utilities, in spite of the proposed ring-fencing measures.

110. NRG argues that the increased cost of capital will put pressure on Exelon to reduce other costs, possibly resulting in a negative impact on reliability and quality of service. NRG contends that the parent companies may place pressure on subsidiaries to dividend monies up to the parent, enter into shared service agreements, and direct the timing and nature of capital expenditure projects, and could also have influence over other key strategic decisions.<sup>101</sup> NRG warns that ring-fencing may not sufficiently protect against these possible harms.

111. NRG also criticizes Exelon's proposed ring-fencing conditions in other ways. NRG notes that Exelon does not propose a minimum equity capitalization ratio for its regulated subsidiaries. NRG contends that the conditions fail to include measures commonly found in standard credit agreements, so even if customers were held harmless from rate increases, Exelon could still delay maintenance to compensate for the increased cost of capital. Further, NRG asserts that the credit downgrades show that the ratings agencies do not have confidence in Exelon's ring-fencing proposal.

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<sup>101</sup> NRG Protest at 26 (Feb. 17, 2009).

**c. Applicant's Answer**

112. Exelon defends its ring-fencing proposal as including “significant, detailed investment conditions and borrowing restrictions.” Responding to NRG’s criticism that its package does not include a minimum equity requirement, Exelon notes that it proposed restrictions on paying dividends and committed that PECO and ComEd would not advocate for a cost of capital that included any risk adjustment associated with Exelon or any other Exelon affiliate. Further, Exelon argues that the credit rating downgrade was not related to its proposed ring-fencing provisions. Exelon argues that the affidavit of Ms. Abbott shows that its commitments “meet or exceed industry standards for assessing the adequacy of ring-fencing measures and compare favorably to ring-fencing measures that protected Portland General Electric.”<sup>102</sup>

**d. NRG's Answer**

113. NRG claims that Exelon’s ring-fencing measures may not be adequate to avoid merger-related rate increases. NRG states that Exelon should consider such ring-fencing measures as minimum equity capitalization ratios, dividend and distribution limitations, and restrictions on asset transfers and intercompany transactions. NRG also requests that the Commission consider additional conditions and require Exelon to provide additional information regarding the anticipated capital structure of the consolidated company and the financing related to the proposed transaction.<sup>103</sup>

**e. Applicant's Answer**

114. Exelon responds to NRG’s arguments regarding ring-fencing by stating that NRG’s arguments are flawed. Concerning the reasons for S&P’s downgrade of PECO, and the negative credit watch S&P placed on ComEd, Exelon notes: (i) of the three credit rating agencies only one (S&P) downgraded PECO; (ii) the downgrading cannot be solely attributed to the transaction because other factors were in play including uncertainties associated with the move to market-based retail commodity prices in 2011; (iii) none of the credit rating agencies downgraded ComEd, and again, only one agency (S&P) placed ComEd on credit watch; and (iv) Moody’s confirmed ComEd’s credit rating stating that it “reflects the standalone credit quality of this utility...as well as the separateness that exists at ComEd relative to the rest of the Exelon organization...”<sup>104</sup> Exelon also notes that the credit rating agencies’ actions took place before the ring-fencing proposal was announced. Exelon states that S&P and Moody’s have stated that they intend to review the credit implications of the proposed transaction at a future date

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<sup>102</sup> Exelon Answer at 33 (March 4, 2009).

<sup>103</sup> NRG Answer at 16 (March 19, 2009).

<sup>104</sup> Exelon Answer at 18, 19 (April 2, 2009).

when it is closer to consummation, showing that the credit agencies have not yet expressed an opinion on the ring-fencing proposal.<sup>105</sup> Exelon further states that NRG does not attempt to rebut Exelon's arguments that its ring-fencing proposal fully addresses Moody's and S&P's ring-fencing requirement guidelines.

115. Exelon also states that its ring-fencing proposal addresses NRG's arguments. Specifically, the ring-fencing proposal includes a special purpose entity to reduce the risk of a subsidiary being pulled into bankruptcy by its parent; a tightly drafted set of covenants; and limitations on the use of collateral at the subsidiary level.<sup>106</sup> Exelon responds to NRG's contention that effective ring-fencing is difficult to achieve, arguing that S&P and Moody's have published reports on the elements of effective ring-fencing, and the ring-fencing measures that separated Portland General Electric from Enron were successful. Exelon reiterates its assertion that its proposal compares favorably to the Enron/Portland General Electric ring-fencing measures, and that NRG does not rebut this showing.<sup>107</sup>

116. Further, Exelon disagrees with NRG's focus on whether the ring-fencing proposal adequately maintains a minimum level of common equity in its subsidiaries. First, Exelon states that due to its opposition to the proposed transaction, NRG will always find some additional feature that Exelon's ring-fencing proposal lacks. Additionally, while the ring-fencing proposal does not mandate a minimum equity level, other protections exist including the requirement that at least one independent director must vote affirmatively for the declaration and payment of dividends and a 30-day notice requirement to affected state commissions before any dividend is paid.<sup>108</sup> Exelon also states that the Commission has no rigid requirements for ring-fencing proposals and that the Commission will "examine the facts and circumstances of each transaction and determine on a case-by-case basis whether additional protections against inappropriate cross-subsidization or encumbrances of utility assets are necessary."<sup>109</sup> Exelon states that the Commission should not focus on a single feature while ignoring the totality of the ring-fencing protections.

117. Exelon also notes that it has committed to provide a two-way non-consolidation opinion confirming that ComEd and PECO will not be consolidated with Exelon in the

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<sup>105</sup> *Id.* at 19.

<sup>106</sup> *Id.* at 20.

<sup>107</sup> *Id.* at 21.

<sup>108</sup> *Id.* at 22.

<sup>109</sup> *Id.* at 21 (citing *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 23).

event of bankruptcy. Exelon observes that a similar non-consolidation opinion was part of the Puget Energy ring-fencing proposal approved by the Commission.<sup>110</sup>

118. Exelon further argues that NRG quoted Exelon's SEC 10-K Report out of context in indicating that Exelon has doubts about the efficacy of its ring-fencing proposal. Exelon states that the quotation referred to then-existing arrangements that treated ComEd and PECO as separate and independent companies, but did not address the detailed ring-fencing measures proposed in this application. Exelon states that the ring-fencing measures in the application reflect its commitment to maintaining the investment grade ratings of the parent company and its subsidiaries.<sup>111</sup>

**f. NRG Answer**

119. NRG reiterates many of its earlier arguments, and again contends that Exelon's proposal does not compare favorably to that of Enron when it acquired Portland General Electric. Specifically, NRG asserts that the separate boards of directors will not be as independent as those in the Enron acquisition of Portland General Electric, and that the independent director may be overruled, including in the case of a declaration of bankruptcy. NRG notes that, instead of committing to maintain a minimum equity ratio, Exelon states only that it will use "reasonable best efforts" in limiting dividends and maintaining capital investment to maintain investment grade ratings. Additionally, NRG states that Portland General Electric committed to review intercompany transactions, but Exelon's "money pool" arrangements filed with the Commission are still allowed under its plan and are not full restrictions on intercompany transfers. Also, instead of a prohibition on seeking a higher cost of capital, Exelon states that its cost of capital will not reflect the risk adjustment associated with Exelon. Further, NRG submits that Portland General Electric committed to maintain separate debt and preferred stock; Exelon only committed to issue separate long-term debt. NRG also contends that Exelon's commitment to not transfer assets to any affiliate without regulatory approval is illusory because it is only a commitment to comply with the law, and is not as strong as Portland General Electric's commitment to restrict Enron's access to Portland General Electric's assets. Where Portland General Electric committed to obtain permission from the state commission before imposing allocations/direct charges from the parent to a utility, Exelon commits only to transparency in cost allocation. In addition, NRG also argues that credit rating agencies are likely to impose stricter standards soon, and that Exelon's proposal will not meet heightened standards.

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<sup>110</sup> *Id.* at 22.

<sup>111</sup> *Id.* at 23.

**g. Applicant's Answer**

120. Exelon responded that its ring fencing proposal is comprehensive, consistent with rating agencies' standards, and fully supported by testimony demonstrating its effectiveness. Moreover, Exelon states that NRG mischaracterizes the ring fencing proposal, by asserting that the independent director could be overruled and will not have veto rights over dividend and bankruptcy decisions.

**h. Commission Determination**

121. In the Supplemental Policy Statement, the Commission stated that it would consider ring-fencing protections in two ways: first, as a safe harbor for meeting the section 203 cross-subsidization demonstration if a state commission adopts or has in place ring-fencing measures to protect customers against inappropriate cross-subsidization; and second, as support for the demonstration required by Exhibit M that the proposed transaction does not result in cross-subsidization.<sup>112</sup> The Commission declined to specify the ring-fencing measures that it would find sufficient to support a finding that a proposed transaction would not result in cross-subsidization and stated that it would consider each case on its own merit.

122. We note that, in this case, Exelon did not submit an application to the Illinois Commission and the application before the Pennsylvania Commission does not include a ring-fencing proposal. Therefore, we accept Exelon's ring-fencing proposal in support of its commitments under Exhibit M. Based on Exelon's representations and the facts as presented in the application, the Commission finds that the proposed transaction will not result in inappropriate cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.

123. Regarding NRG's arguments that Exelon should guarantee a minimum equity threshold for PECO and ComEd, we note that in past cases, state commissions have established a minimum equity requirement as part of their ring-fencing commitments.<sup>113</sup> While we defer to the state commissions' decisions on ring-fencing, we do not have the same requirements. The ring-fencing commitments to require an independent director's vote to declare a dividend, provide 30-day notice to state commissions on declaration of a dividend, and compliance with our money pool arrangements support the cross-subsidization protections set forth in Commission rules. To the extent that other issues

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<sup>112</sup> *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 18, 24.

<sup>113</sup> *Puget Energy*, 123 FERC ¶ 61,050, at P 34 (noting Applicant's proposal to the Washington Commission of a 44 percent minimum equity requirement); *Oncor*, 120 FERC ¶ 61,215, at P 39 (noting that Applicant would continue to meet the capital structure set by the Texas Commission at 40 percent minimum equity);

are raised regarding rates, those are discussed above; other issues regarding reliability and service are discussed below.

#### **D. Internal Reorganization**

##### **1. Applicant's Arguments**

124. Exelon also requests approval of the anticipated internal reorganization of the combined company's corporate structure the specifics of which cannot be determined at this time in light of the opposition of NRG's management. This reorganization would involve consolidating the various companies owned by Exelon and NRG. Exelon states that any reorganization will not affect PECO, ComEd, or the holding company structure that includes PECO and ComEd. In addition, the reorganization will not raise any cross-subsidization issues other than those already addressed by the proposed transaction.

125. Exelon contends that the internal reorganization qualifies for the blanket authorization under section 33.1(c)(6) of the Commission's regulations and will not require the Commission's specific authorization in this proceeding. However, to the extent that the Commission disagrees, Exelon requests that the Commission authorize the reorganization as part of its authorization of the proposed transaction. Such authorization would be conditioned upon compliance with the commitment that neither PECO nor ComEd would be included in the reorganization.

##### **2. Commission Determination**

126. Section 33.1(c)(6) authorizes "internal corporate reorganizations that do not result in the reorganization of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and that do not present cross-subsidization issues." Based on the information provided and Exelon's representations, and assuming that the future transaction complies with the blanket authorization in section 33.1(c)(6), as clarified in Order No. 708-A, we agree with Exelon that the blanket authorization would apply.<sup>114</sup>

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<sup>114</sup> We note that the Commission clarified that the blanket authorization in 18 C.F.R. § 33.1(c)(6) applies to transactions involving the transfer of assets from one non-traditional utility subsidiary (i.e., a public utility that does not have captive customers and does not own or control transmission facilities) to another non-traditional utility subsidiary when only one of the two non-traditional utility subsidiaries survives the transaction. *Blanket Authorization Under FPA Section 203*, Order No. 708, FERC Stats. & Regs. ¶ 31,265, *order on reh'g*, Order No. 708-A, 73 Fed. Reg. 43,066 (July 24, 2008), FERC Stats. & Regs. ¶ 31,273, at P 37 (2008).

**E. Accounting**

127. The filing also states that the only two entities owned by Exelon or NRG that are required to maintain their books in accordance with the Uniform System of Accounts are PECO and ComEd, and that Exelon does not intend to reflect any aspect of the proposed transaction on the books of either PECO or ComEd. Consequently no pro forma accounting entries were provided in the application. However, should PECO or ComEd subsequently include any portion of the proposed transaction on their books, they must make a filing with the Commission providing full particulars detailing how the transaction affected their accounts.

**F. Other Considerations****1. Additional Comments**

128. The Delaware Agencies submitted comments in which they requested that the Commission make clear that it is not approving divestiture of Dover Energy, Indian River, and Vienna Generation Station generation facilities in Delaware and Maryland in this order. The Delaware Agencies note that, with respect to the Indian River facility, NRG is obligated to perform various environmental actions, including air-pollution controls, ash management, and contaminated site remediation. The Delaware Agencies request that the Commission condition approval of the application upon assurances that Exelon will be bound to the legal processes and deadlines currently borne by NRG. Further, the Delaware Agencies express concern that the Indian River facility plays a role in Delaware's power reliability and environmental plans.

129. IBEW argues that the Commission should consider the impact of the proposed transaction on reliability and dependability. IBEW contends that the credit downgrades will affect the merged company's ability to make necessary capital investments.

130. Representative Dave Winters of the Illinois House of Representatives contends that the Commission should consider the proposed transaction and its effect on ComEd's service to Illinois consumers. Representative Winters further requests that the Commission consider related costs, especially the volatility involved in a complex and highly leveraged financial transaction, and their effect on customer rates. He notes that, in the proposed transaction, Exelon will assume additional debt, and voices the concern that, in response to that debt, Exelon may sell Illinois assets, or reduce maintenance and modernization on those assets, in order to service the debt. Representative Cross and Senator Rodagno echoed those concerns.

**2. Commission Determination**

131. Regarding the concerns of the Delaware Agencies about the proposed divestiture of certain generating facilities, the Commission has not yet received an application to

divest those facilities under section 203. We will consider an application to divest those facilities when and if we receive such an application. And with respect to the Indian River facility, we have no evidence that the facility will not be subject to environmental law and regulation after the proposed merger, and, in any event, environmental issues are subject to the review of other regulatory authorities.<sup>115</sup> In general, approval of a transaction under section 203 does not free an applicant from its other legal obligations.<sup>116</sup>

132. Regarding reliability and dependability issues, the Commission has authority to oversee the reliability of the Bulk Power System, and the Commission may impose fines up to one million dollars per day per violation of the reliability standards.<sup>117</sup> Both Exelon and NRG are required to follow the reliability standards, and have an incentive to do so, regardless of whether or not the proposed transaction is closed.

133. Finally, regarding concerns about the impact of this transaction on service quality for Illinois consumers, those concerns involve speculation and go beyond the scope of our analysis as set forth in the Merger Policy Statement.<sup>118</sup> And to the extent this concern relates to jurisdictional transmission customers, Exelon has made a commitment to hold transmission customers harmless for merger-related costs for five years. To the extent that this concern relates to retail customers, rates and service quality for retail customers are jurisdictional to the relevant state commission.

The Commission orders:

(A) The proposed merger and acquisition of jurisdictional facilities is hereby authorized, as discussed in the body of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

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<sup>115</sup> *Northeast Generation Company*, 117 FERC ¶ 61,068, at P 17 (2006).

<sup>116</sup> *Great Plains Energy*, 121 FERC ¶ 61,069, at P 58 (2007), *reh'g denied*, 122 FERC ¶ 61,177 (2008).

<sup>117</sup> *See* Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005). *See also* *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

<sup>118</sup> *National Grid*, 117 FERC ¶ 61,080, at P 77 (2006), *reh'g denied*, 122 FERC ¶ 61,096 (2008).

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Exelon shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the proposed merger.

(F) The Commission will hold Exelon to its commitment to hold transmission customers harmless for merger-related costs.

(G) Exelon shall notify the Commission and file the final documents within 10 days of the date that the merger and disposition of jurisdictional facilities have been consummated.

(H) Exelon must inform the Commission within 30 days of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application. If any jurisdiction issues a decision modifying Exelon's proposed mitigation measures, Exelon must file a copy of that decision with the Commission within 10 days of the issuance of that decision, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.