

NRG ENERGY, INC.
Form 425
December 22, 2008
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Filed by Exelon Corporation

Reg. No. 333-155278

Pursuant to Rule 425 under the

Securities Act of 1933, as amended

Subject Company: NRG Energy, Inc.

On December 18, 2008, Exelon filed an application with the FERC with respect to the proposed transaction with NRG Energy, Inc. A copy of the FERC application together with its exhibits (other than Exhibit I, which is the S-4 filing with the SEC) is included in this filing.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Exelon Corporation

) Docket No. EC09-_____

APPLICATION OF EXELON CORPORATION

UNDER SECTION 203 OF THE FEDERAL POWER ACT

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December 18, 2008

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APPLICATION OF EXELON CORPORATION

UNDER SECTION 203 OF THE FEDERAL POWER ACT

Pursuant to Section 203 of the Federal Power Act (FPA) and Part 33 of the Commission's Regulations, Exelon Corporation and its subsidiaries that are public utilities subject to the Commission's jurisdiction (collectively, Exelon) hereby request that the Commission approve a transaction (the Transaction) that is described in detail in Section III below, and which includes: (1) Exelon's acquisition of voting securities of NRG Energy, Inc. (NRG Energy²) (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. As described in more detail below, the proposed Transaction meets the Commission's standards for determining when a transaction is consistent with the public interest and as a result can be approved without a hearing. Exelon requests that the Commission grant its approval no later than May 1, 2009.

- ¹ The Exelon entities subject to the Commission's jurisdiction are identified below in Exhibit B of this Application.

- ² As described in more detail in Section III, Exelon is hopeful that it eventually will reach a negotiated agreement with NRG Energy that could result in an alternative transaction structure where NRG Energy purchases voting securities of Exelon instead of having Exelon purchase voting securities of NRG Energy. Exelon requests approval of this alternative structure as well.

- ³ The NRG entities subject to the Commission's jurisdiction are identified below in Exhibit B of this Application.

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I. INTRODUCTION

The Transaction provides for the combination of two companies with complementary assets that should allow for increased value to the benefit of each company, their customers and their shareholders. Among the expected benefits of the Transaction are: (1) increased generation efficiencies resulting from economies of scale; (2) cost savings from operational synergies; and (3) fuel and geographic diversification. These benefits should allow the combined company to reduce its costs and increase the competitiveness of its generation capacity, which is in the public interest.

To date, NRG's management has not recognized the benefits of the Transaction, and has rejected the offer to purchase NRG that Exelon made on October 19, 2008. This rejection has led Exelon to present a tender offer directly to NRG's shareholders. Exelon believes that a negotiated agreement with NRG would be preferable, and will continue to seek such an agreement with NRG management. To the extent that agreement is not reached, however, Exelon intends to continue pursuing its tender offer and to complete the Transaction.

The fact that there currently is not an agreement between Exelon and NRG's management should not affect the Commission's analysis of the Transaction. Exelon's offer is being made directly to NRG's shareholders, and ultimately it is NRG's shareholders who will decide whether that offer should be accepted. Exelon is not requesting that the Commission take sides or make any determination whether Exelon's offer should be accepted. Maintaining neutrality in this context requires the Commission to process this Application under its ordinary procedures. If the Commission were to decline to act until NRG's management agreed, management effectively would have a veto over shareholders' decisions to tender their shares to Exelon, because without the

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Commission's authorization Exelon cannot purchase more than 9.9% of NRG's voting shares. Processing an application under normal procedures is the course the Commission previously has taken when faced with a non-consensual corporate transaction. *See Kansas City Power & Light Co.*, 53 FERC ¶ 61, 097 at 61,282-84 (1990). Such a course of action also is consistent with the longstanding federal policy that favors neutrality between transactions supported by management and tender offers not supported by management, and agencies have implemented that policy by processing merger applications without regard to whether they have been approved by incumbent management.

Moreover, the recent amendments to FPA Section 203 require a ruling on an application by a holding company, such as Exelon, to purchase the securities of another holding company, such as NRG, in 180 days. Nothing in these amendments suggests that this requirement ceases to apply simply because the holding company's management objects to shareholders being allowed to sell their securities to the applicant.

Although the combination of Exelon and NRG will create the largest electric company in the United States, there is not a significant geographic overlap between the two companies' generation, and thus no significant competition concerns are raised by the Transaction. Further, Exelon has proposed a clean sweep divestiture of all of NRG's generation capacity in the PJM East market and of all of Exelon's generation capacity in the ERCOT market, which are the only two markets where there is any material overlap of generation assets. With these clean sweep divestitures, there can be no question of any adverse impact on competition resulting from the Transaction.

⁴ FPA Section 203(a)(5) does allow the Commission to take an additional 180 days to evaluate a transaction for good cause if the extra time is necessary to process the application. Nothing in Section 203(a)(5) suggests, however, that extra time should be required for a nonconsensual transaction.

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Nor does the Transaction implicate any of the other public interest issues considered by the Commission as part of its review of proposed mergers. Exelon is making the standard rate commitments required by the Commission to ensure that no customers with cost-based rates suffer adverse rate consequences from the Transaction. Neither the Commission nor any state utility commission will have its jurisdiction affected by the Transaction. Exelon also is making commitments to ensure that no cross-subsidization concerns are raised. As added protection against any prohibited pledge or encumbrance of utility assets or any inappropriate cross subsidization involving captive utility customers, Exelon is proposing ring-fencing commitments which will take effect upon closing of the Transaction.

In sum, with the commitments made by Exelon, it is clear that the Transaction is consistent with the public interest, as required by FPA Section 203. Exelon requests that the Commission process this Application under its standard procedures, and approve the Transaction no later than May 1, 2009, without conducting an evidentiary hearing.

II. DESCRIPTION OF EXELON AND NRG

A. Exelon

Exelon is a public utility holding company that, through its subsidiaries, is one of the nation's largest electric utilities. Exelon 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. Exelon has one of the industry's largest portfolios of electricity generation capacity, with a nationwide reach and strong positions in the Midwest and

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Mid-Atlantic. Exelon operates the largest nuclear fleet in the United States. Exelon operates through its principal subsidiaries Commonwealth Edison Company (ComEd), PECO Energy Company (PECO), and Exelon Generation Company, LLC (Exelon Generation) as described below.

1. ComEd and PECO

(a) ComEd

ComEd is engaged principally in the purchase, transmission, distribution and sale of electricity to a diverse base of residential, commercial, industrial and wholesale customers in Northern Illinois. ComEd's retail service territory has an area of approximately 11,300 square miles and an estimated population of eight million. The service territory includes the City of Chicago, an area of about 225 square miles with an estimated population of three million. ComEd has approximately 3.8 million customers.

ComEd does not own any generation. Beginning in January 2007, ComEd began procuring all of its energy requirements for retail customers from market sources pursuant to the Illinois Commerce Commission (ICC) approved procurement auction in 2006. Approximately one-third of ComEd's contracts that resulted from the 2006 auction expired in May 2008, another one-third will expire in May 2009, and the remaining contracts will expire in May 2010. Approximately 35% of the contracted supply from the 2006 auction came from Exelon Generation. Suppliers, including Exelon Generation, were limited to winning no more than 35% in either the fixed price section or the hourly price section of the auction.⁶

⁵ The results of the hourly price section of the auction were not approved by the ICC, so in accordance with the approved process, ComEd purchased that supply from the PJM spot market.

⁶ Subsequent to the 2006 auction, and in accordance with the auction rules, Exelon Generation purchased 10 tranches, or 2.7% of the contracted supply, from a counterparty. The supply commitment for these tranches ends in May, 2009.

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In 2007, the Illinois Legislature enacted new legislation that established a new competitive process for procurement to be managed by the Illinois Power Agency (IPA) and overseen by the ICC in accordance with electricity supply procurement plans approved by the IPA. Pursuant to that legislation, ComEd entered into a five-year financial swap agreement with Exelon Generation that provides for 1,000 megawatts (MW) of power in the first year of the agreement (June 1, 2008 through May 31, 2009), 2,000 MW in the second year and 3,000 MW in the third through fifth years. In the interim period between the enactment of this legislation and its implementation by the IPA, ComEd submitted to the ICC, and the ICC approved, a procurement plan for ComEd to secure its remaining requirements, *i.e.*, net of the swap agreement and the auction contracts, for power and other ancillary services for the period from June 2008 to May 2009. ComEd retained an independent third party to conduct a competitive RFP process and as a result of that process executed supply agreements pursuant to this approved plan in March 2008.

In July 2008, ComEd submitted a five-year forecast to the IPA, and the IPA developed a procurement plan for approval by the ICC 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 futurē.

⁷ In addition, ComEd makes a small amount of purchases from Qualifying Facilities (QFs) under the Public Utilities Policy Act of 1978 (PURPA).

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(b) PECO

PECO is engaged principally 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 the City of Philadelphia. PECO provides electric delivery service in an area of approximately 2,000 square miles, with a population of approximately 3.8 million. Natural gas service is supplied in an approximate 1,900 square mile area in southeastern Pennsylvania adjacent to Philadelphia, with a population of approximately 2.4 million. PECO delivers electricity to approximately 1.6 million customers and natural gas to approximately 480,000 customers.

Electric utility restructuring legislation was adopted in Pennsylvania in December 1996. Pennsylvania permits competition by alternative generation suppliers for retail generation supply while transmission and distribution service remains fully regulated. Pennsylvania allowed customers to choose an alternative electric generation supplier; imposed caps on rates during a transition period; and authorized the collection of competitive transition charges from customers to recover costs that might not otherwise be recovered in a competitive market.

Under Pennsylvania legislation, PECO is required to provide generation services to customers who do not or cannot choose an alternative supplier. PECO has provider of last resort (POLR) obligations to provide generation services (*i.e.*, full requirements) to those customers who do not take service from an alternative generation supplier or who choose to come back to the utility after taking service from an alternative supplier.

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PECO does not own any generation, but instead purchases the power needed to satisfy its POLR obligations from Exelon Generation.⁸ The contract between PECO and Exelon Generation expires at the end of 2010. To meet its POLR obligations beginning in 2011, PECO intends to purchase power through a competitive-procurement process approved by the Pennsylvania Public Utility Commission (PAPUC), including potentially from Exelon Generation.

(c) Transmission Services

ComEd and PECO have both placed their transmission systems under the operational control of PJM Interconnection, L.L.C. (PJM), which is the independent system operator and the Commission-approved RTO for the Mid-Atlantic and Midwest region in which it operates. PJM is the transmission provider under, and the administrator of, the PJM Open Access Transmission Tariff (PJM Tariff), operates the PJM Interchange Energy Market and a Forward Capacity Market, and conducts the day-to-day operations of the bulk-power system of the PJM region. Under the PJM tariff, 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. ComEd and PECO have each filed a transmission cost-based cost of service at the Commission, which PJM then uses to establish the charges that it imposes for transmission service.

(d) Gas Services

Exelon s regulated gas services business is conducted solely by PECO, and not by ComEd or any other Exelon company. PECO s gas-sales and gas-transportation revenues

⁸ PECO also purchases a small amount of power from QFs under PURPA.

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are derived pursuant to rates regulated by the PAPUC. Neither PECO nor any other Exelon company owns any interstate natural gas facilities that are subject to the Commission's jurisdiction under the Natural Gas Act. However, PECO does operate an intrastate natural gas distribution system in four counties that surround, but do not include, the city of Philadelphia. Its gas service area includes several third-party industrial customers and small generators, only a few of which use natural gas for generation other than as start-up fuel or backup. The few that are gas-fired generators are Merck (28 MW), Kimberly Clarke (55 MW), Crozier Chester Hospital (3.1 MW) and Hills at White Marsh (2 MW).

PECO's customers have the right to choose their gas suppliers or purchase their gas supply from PECO at cost. Approximately 30% of PECO's current total yearly throughput is supplied by third parties. Gas-transportation service is provided on an open-access basis and remains subject to regulation by the PAPUC.

2. Exelon Generation

Exelon's generation business is conducted by Exelon Generation, which was created in 2001, when Exelon restructured its business operations following the Unicom-PECO merger. Exelon Generation combines its large generation fleet with an experienced wholesale power marketing operation. Exelon Generation owns, or controls through long-term contracts, generation assets in the Northeast, Mid-Atlantic, Midwest, Southeast, South Central and Texas regions. For 2009, Exelon Generation is projected to own generation assets with an aggregate net capacity of 24,509 MW. In addition, Exelon Generation is projected to control another 5,543 MW of capacity through long-term contracts in 2009. A listing of Exelon Generation's generation assets (including long-term contracts) is attached as Exhibit J-3 to Dr. Hieronymus' testimony.

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Exelon Generation's wholesale power marketing unit, Power Team, a major wholesale marketer of energy, uses Exelon Generation's energy generation portfolio, transmission rights and expertise to ensure delivery of energy to Exelon Generation's wholesale customers under long-term and short-term contracts, including a contract for the load requirements of PECO, and contracts for a portion of ComEd load requirements. Power Team markets any remaining energy in the wholesale bilateral and spot markets.

B. NRG

As noted above, currently NRG's management opposes the Transaction, and NRG is not one of the applicants under this Application. The following description is based on public information released by NRG and is accurate to the best of Exelon's knowledge.

NRG is a wholesale power generation company with a significant presence in major competitive power markets in the United States. NRG 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.

Within the United States, NRG is projected to own 26,247 MW of generation capacity in 2009. NRG also is projected to control an additional 600 MW of capacity through long-term purchases. A listing of NRG's generation assets (including long-term contracts) is attached as Exhibit J-4 to Dr. Hieronymus' testimony.

⁹ Exelon does not know whether the information published by NRG may be inaccurate or whether there is additional material nonpublic information regarding NRG.

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III. DESCRIPTION OF THE TRANSACTION

A. Background of the Transaction

On October 19, 2008, Exelon delivered a letter to NRG setting forth a proposal for a business combination of Exelon and NRG. Under this proposal, Exelon would acquire all of the outstanding shares of NRG common stock at a fixed exchange ratio of 0.485 Exelon shares for each NRG common share. This offer represented a 37 percent premium to NRG stockholders above NRG's closing price on October 17, 2008.

NRG did not respond immediately to Exelon regarding this proposed offer. Instead, on October 20, 2008, NRG issued a press release confirming receipt of Exelon's proposal to acquire all of the outstanding shares of NRG common stock, indicating that NRG's board of directors was reviewing Exelon's proposal with its advisors and advising NRG stockholders to take no action at that time pending the board's review. However, on November 9, 2008, NRG issued a press release stating that it was rejecting NRG's proposed offer for a number of reasons.

On November 12, 2008, Exelon commenced a tender offer for NRG's outstanding common shares. If the tender offer is successful and NRG's management remains opposed to the Transaction (and if all necessary regulatory approvals are obtained), Exelon expects to implement the Transaction notwithstanding the opposition of NRG's management.

Exelon continues to believe that a negotiated agreement with NRG is preferable and would provide significant benefits for the combined company. For one thing, a negotiated agreement would allow the Transaction to be implemented pursuant to a structure, described more fully below, that might reduce the amount of NRG debt required to be refinanced upon the completion of the Transaction. For another, a

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negotiated agreement with NRG would benefit from the participation of officers and employees of NRG with intimate knowledge of the company, which should allow for the Transaction to be structured in a way to best capture the value of NRG for the combined company.

As a result, Exelon will continue its efforts to reach a negotiated agreement with NRG. At the present, however, Exelon is pursuing the Transaction without the cooperation of NRG's management.

B. Description of the Transaction

As noted above, Exelon hopes eventually to reach a negotiated agreement with NRG. Depending on whether or not such an agreement is reached, the various steps required to effectuate the combination could differ. The possible alternative deal structures are described in more detail below.

Regardless of the interim steps and the ultimate form of the Transaction, the substance of the Transaction that is relevant to the Commission's review under Section 203 of the Federal Power Act will be the same whether or not Exelon reaches a negotiated agreement with NRG's management. In particular, regardless of the form, the following are the key substantive principles of the Transaction:

1. The overall operations of Exelon and NRG will be consolidated under the control of Exelon.
2. 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 the ultimate corporate form, where NRG Energy may or may not be consolidated with Exelon Generation, the generation assets of NRG and Exelon Generation will be operated on a combined basis.
3. 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.

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4. Sufficient generation capacity will be divested, as described more fully below, to address any market power concerns.
5. 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.
6. Sufficient cross-subsidization commitments will be made, as described more fully below.

C. Potential Mechanisms for Implementing the Transaction

1. Transaction Mechanism Under Exelon's Tender Offer

Under the terms of the tender offer, Exelon, through Exelon Xchange, a wholly-owned subsidiary created for purposes of the Transaction, is offering to exchange 0.485 of a share of Exelon common stock (the exchange ratio) for each share of NRG common stock that is validly tendered and not withdrawn prior to the expiration date upon the terms and subject to the conditions contained in the prospectus/offer, which is attached to this Application as Exhibit I. The offer is subject to a number of conditions, including a condition that at least 50% of the NRG common stock must be tendered and not withdrawn at the time the offer expires. The current expiration date of the offer is January 6, 2009. However, this expiration date is subject to extension. Exelon will not consummate the Transaction until it has received all necessary regulatory approvals, including the Commission's approval under FPA Section 203, and other conditions of the offer have been met.

The tender offer is the first step in Exelon's acquisition of NRG and is intended to facilitate the acquisition of all shares of NRG common stock. After Exelon Xchange acquires NRG common stock pursuant to the offer, Exelon and Exelon Xchange will hold

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at least a majority of NRG's common stock. As soon as possible after completion of the tender offer, Exelon will seek to have NRG consummate a second-step merger of Exelon Xchange or another wholly-owned subsidiary of Exelon with and into NRG. The purpose of the second-step merger is to acquire all shares of NRG common stock not tendered and exchanged in the offer. Pursuant to the terms of the second-step merger, each remaining share of NRG common stock (other than shares of NRG common stock owned by Exelon, Exelon Xchange or NRG or held by NRG stockholders who perfect appraisal rights under Delaware law, to the extent available) would be converted into the right to receive the same number of shares of Exelon common stock as paid in the tender offer.

The second-step merger will be followed by the merger of NRG with and into Exelon or a wholly-owned subsidiary of Exelon (the forward merger), unless Exelon is able to obtain 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.

In addition, there will be internal reorganizations within the corporate structure of the combined company. These reorganizations will be undertaken to facilitate the consolidation of the generation and power marketing businesses of NRG and Exelon Generation and will be consistent with the substance of the Transaction, including the protections for PECO and ComEd, that are set forth in the six principles described above.

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% of the outstanding shares of Exelon common stock.

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2. Transaction Mechanism Under Negotiated Agreement

If Exelon is successful in reaching a negotiated agreement with NRG, Exelon may decide not to acquire NRG shares pursuant to the approach described above, and instead could use alternative methods for structuring the Transaction. For example, Exelon may pursue a structure whereby Exelon is merged into NRG, with NRG as the surviving corporation, and NRG then being renamed as Exelon Corporation, followed by the election of existing Exelon directors and officers to corresponding positions in the new Exelon Corporation. Such a structure might allow Exelon to reduce the amount of NRG debt that must be refinanced in connection with the Transaction.

In the course of any negotiations with NRG, Exelon also would be open to further suggestions from NRG regarding other aspects of the corporate structure of the combined company. This could lead to other changes in the internal corporate structure of the combined company. In addition, it is possible that any negotiated agreement with NRG management would include a change in the form and/or amount of consideration paid to NRG shareholders. Again, any such changes would be consistent with the six principles described in Section III.B. above.

Exelon therefore requests that the Commission approve the Transaction, whether it is structured as currently contemplated in Exelon's tender offer as described in Section III.C.1 above, or under alternative structures if Exelon reaches a negotiated agreement with NRG management, provided that the negotiated Transaction complies with the six principles described in Section III.B above.

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D. Anticipated Benefits of the Transaction

Exelon believes that the Transaction will provide a number of benefits, including the following:

Increased Scope and Scale The Transaction will create a combined company with increased scale and scope in generation. The combined company would constitute the largest power company in the U.S. by assets, market capitalization, enterprise value and generation capacity. The combined company is expected to have an enterprise value of approximately \$60 billion and a market capitalization of \$40 billion.

Increased Generation Efficiency Exelon believes that significant efficiencies of scale would be realized from the combination of the generation fleets of Exelon and NRG.

Synergies Although no assurance can be given that any particular level of cost savings and other synergies will be achieved, based on publicly available information, Exelon management believes that the Transaction may result in annual estimated synergies of approximately \$180 to \$300 million through the combination of operational, financial and service capabilities, before giving effect to costs to achieve the synergies, increased interest expense in connection with the refinancing of existing NRG indebtedness and any adjustments that may result from due diligence investigation.

Fuel and Geographic Diversification The combined company would have a more highly diversified mix of generation capacity with a presence in four major domestic competitive power generation regions and a diversified fuel mix using uranium, natural gas, coal and oil.

Enhanced Ability to Pursue Capital-Intensive Projects Exelon believes that the combined company's assets, enterprise value and market capitalization will enable Exelon to pursue more multi-year, capital intensive projects than would be possible absent the acquisition of NRG. This is particularly important with respect to the improved ability to finance the construction and operation of new nuclear facilities.

IV. THE COMMISSION SHOULD PROCESS THIS APPLICATION UNDER ITS STANDARD PROCEDURES FOR EVALUATING SECTION 203 APPLICATIONS

Exelon recognizes that this Transaction differs from the typical transactions reviewed by the Commission under FPA Section 203 in that, currently, management of NRG has rejected Exelon's proposal and opposes Exelon's tender offer. That fact,

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however, should affect neither the Commission's obligation to promptly review the proposed Transaction nor the process by which the Commission considers this Application. Exelon has made an offer directly to NRG's shareholders proposing to acquire their shares at what Exelon believes to be an attractive price. However, Exelon will not be able to follow through on its offer to purchase NRG shares, and NRG shareholders will not be able to sell their shares, until such time as the Commission approves this Application.

In order to give NRG shareholders the opportunity to tender and sell their shares if they so wish, the Commission should promptly review and approve the proposed Transaction, following the same procedures and applying the same standards that it would apply if NRG's management had agreed to the proposed Transaction. Exelon is asking for no more and no less. Otherwise, NRG's shareholders might never even be given the opportunity to vote for the proposed Transaction by selling their shares.

By following its standard policies and procedures in processing this Application, the Commission would maintain its policy of neutrality between acquisition proposals that are supported by incumbent management and those that are not. Because Exelon cannot purchase more than 9.9% of NRG's voting shares without the Commission's authorization, a failure to timely process this Application would infringe on the right of NRG's shareholders—who are the owners of NRG—to decide for themselves whether to exchange their stock under the terms of Exelon's offer.

That Congress intended for the Commission to process proposals for the acquisition of voting shares from shareholders without regard to management's agreement is made evident by the changes to FPA Section 203 that were implemented by the Energy Policy Act of 2005 (EPAct). The Commission now is required under

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Section 203(a)(2) to authorize the purchase by a holding company that owns an electric utility (such as Exelon) of the securities with a value in excess of \$10 million of a holding company that owns an electric utility (such as NRG). Nothing in Section 203(a)(2) suggests in any fashion that management of the company whose securities are being acquired has any role whatsoever in the process, much less that the purchase must be negotiated with or agreeable to that management. Nor has the Commission in the past interpreted Section 203(a)(2) as requiring management's acquiescence in the purchase of securities. *See, e.g. Horizon Management, Inc.* 125 FERC ¶ 61,209 (2008) (clarifying circumstances under which Commission approval is required for the purchase of securities of electric utilities and electric utility holding companies).

Moreover, Congress made clear in its EPA Act amendments to Section 203 that the Commission must adopt procedures for the expeditious consideration of dispositions, consolidations, or acquisitions under this section. FPA Section 203(a)(5). Congress also required the Commission to process all Section 203 applications in 180 days (subject to a 180-day extension). *Id.* Nothing in Section 203(a)(5) suggests that expeditious treatment is not required for transactions that are not supported by the management of the company being acquired. Thus, the EPA Act amendments to Section 203 make clear Congress' intent that the Commission must process Exelon's application expeditiously, as it would any other application, even though the Transaction currently is not supported by NRG's management.

Even before the enactment of the EPA Act amendments the Commission held, when faced with a proposed transaction that was opposed by the management of one of the parties, that it has the duty to process Section 203 applications when they are received, regardless of whether both parties have agreed to the transaction. *See Kansas City Power*

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& *Light Co.*, 53 FERC ¶ 61, 097 at 61,282-84. In that case, the Commission was presented with arguments that it should not process a Section 203 application unless the proposed transaction had been approved by both parties. The Commission rejected these arguments as follows:

We find that an acquirer's opposition to a proposed merger *in and of itself* is not enough to cause us to look unfavorably upon an applicant's request for section 203 approval, and thus we deny KG&E's motion to reject KCP&L's filing. As discussed *supra*, the Commission must discharge its statutory obligation to consider whether or not to approve jurisdictional mergers, in each case determining whether the transaction is consistent with public interest, and in each case ensuring the maintenance of adequate service and proper coordination. *We find no statutory authority or judicial precedent which would require us to distinguish between negotiated mergers, and those opposed by the proposed acquirer's board of directors. The Commission will entertain section 203 applications on a case-by-case basis, in each instance analyzing the proposed transaction in order to determine whether the outcome would be consistent with the public interest.*

Id. at 61,283 (second emphasis added). The Commission went on to explain that it was going forward with its processing of KCPL's application in order to remain neutral in the proposed tender offer:

[W]e stress that our action today should not be construed as favoring, or disfavoring, KCP&L's tender offer. The ultimate question before the Commission is not whether KCP&L's proposal will or should be consummated. Rather, the question is whether this proposed merger, if consummated, is consistent with the public interest.

Id. at 61,284.

The Commission's *KCPL* decision is consistent with the federal policy that has been in existence at least since the passage of the Williams Act in 1968.¹⁰ Although the specific provisions of the Williams Act relate to the provision of adequate information to

¹⁰ The Williams Act added new Sections 13(d), 13(e), 14(d), 14(e) and 14(f) to the Securities Exchange Act of 1934. Williams Act Pub. L. No. 90-439, 82 Stat. 454 (1968) et seq. (codified at 15 U.S.C. 78m(d)-(e) and 78n(d)-(f)).

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shareholders to inform their voting, federal courts have found that the Act, and its legislative history, evidences a broad federal policy that shareholders should be given the opportunity to make decisions on tender offers and that this opportunity should not be frustrated by management. *See Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982) (We, therefore, agree with the Court of Appeals that Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 29 (1977) (Congress was indeed committed to a policy of neutrality in contests for control . Neutrality is, rather, but one characteristic of legislation directed toward a different purpose the protection of investors).

The goal of this federal policy of neutrality is to protect shareholders and increase corporate efficiency. To the extent that a company s management is able to use federal regulatory processes to delay or defeat a superior proposal for corporate ownership, that is not in the public interest. Instead, a policy of neutrality allows shareholders to decide for themselves whether or not an offer to purchase their shares should be accepted over the opposition of management.

In the regulatory context, a policy of neutrality means that the reviewing agency should process and evaluate a proposed transaction in the same fashion whether or not the management of the entity being acquired has acquiesced to the transaction. If the reviewing agency were to delay its evaluation or to apply a more onerous standard simply because the transaction has not been agreed-to by management, then the attendant delay or more onerous requirements favor the existing management for reasons that are unrelated to the merits of the transaction. To the extent that this delay or burden causes the transaction to falter, then shareholders are denied the ability to decide whether the transaction is appropriate and should be consummated.

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The Commission's policy of neutrality in *KCPL* is consistent with the policy of other federal agencies that have addressed the question:

The FTC adopted a neutral policy toward nonconsensual transactions in its statement of basis and purpose accompanying its final rules implementing its review of proposed mergers under the Hart-Scott-Rodino Act (which also are applicable to reviews conducted by the Department of Justice (DOJ)), stating that although the interests of the acquiring and acquired person are divergent in a nonconsensual transaction, those conflicting interests alone would not appear to justify a rule which would give an advantage to an acquired company resisting the takeover. *Premerger Notification: Reporting and Waiting Period Requirements*, 43 Fed. Reg. 33,450, 33,514 (1978). In order to ensure neutrality, it explained that, unlike consensual acquisitions, there are concerns that an apathetic or hostile issuer could frustrate the transaction merely by neglecting to file notification, or delay of agency clearance could give the issuer time to defeat the offer and could affect the acquired company's stock to the detriment of the offer. *Id.* at 33483-84. As a result, in nonconsensual transactions, the FTC and DOJ base their review timelines on the filings made by the acquirer without regard to the extent that the entity opposing the transaction complies with the applicable filing requirements.

The FCC, in its Policy Statement in *In re Tender Offers and Proxy Contests*, stated that: Our third objective is to assure, to the fullest extent possible, that the procedures prescribed in this proceeding promote strict governmental neutrality in takeover contests. 59 Rad. Reg. 2d (P&F) 1536, P 6 (1986). In cases where incumbent management has argued against the transfer of its license to an acquirer, the FCC has been committed to scrupulously follow [its] established procedures to ensure neutrality, which demands that the Commission's actions not favor any party in the contest for corporate control. *ITT Corp.*, 13 FCC Rcd 5861 (1997).

The Federal Reserve Board, in evaluating a proposed nonconsensual acquisition of a bank, stated that: The [BHC] Act does not draw any distinction between acquisitions that are agreed to between the parties and those where, as here, there is no agreement. *The Bank of New York Co., Inc.*, 74 Fed. Res. Bull. 257, 259 (1988). *See also Wells Fargo & Co.*, 82 Fed. Res. Bull. 445, 457 (1996) (approving takeover of competitor bank without discussion of any distinct approval process for nonconsensual acquisitions).

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It thus is clear that the path that the Commission followed in the KCPL proceeding was consistent with the broad federal policy objectives of not allowing incumbent management to frustrate or delay the ability of shareholders to exercise their rights. That path is required even more today, after the EPAct amendments in 2005. The Commission should again adopt a posture of neutrality and process this Application in the ordinary course.

V. THE TRANSACTION IS CONSISTENT WITH THE PUBLIC INTEREST

Section 203(a)(4) of the FPA provides that the Commission shall approve the proposed disposition . . . if it finds that the proposed transaction will be consistent with the public interest. Exelon need not show that a transaction positively benefits the public interest, but rather simply that it is consistent with the public interest, *i.e.* that the transaction does not harm the public interest. *See, e.g., Texas-New Mexico Power Co.*, 105 FERC ¶ 61,028 at P 23 & n.14 (2003) (citing *Pacific Power & Light Co. v. FPC*, 111 F.2d 1014, 1016-17 (9th Cir. 1940)).

In determining whether a proposed disposition of jurisdictional facilities is consistent with the public interest, the Commission evaluates the impacts of the proposed disposition on competition, rates and regulation. *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 30,111 (1996), *order on recons.*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*). When considering impacts on competition, the Commission reviews both horizontal competition issues resulting from increases in concentration in energy and capacity markets and vertical competition issues resulting from increases in the ability or incentive to leverage control over electric transmission and natural gas transportation facilities to enhance revenues in generation markets. *See Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,872 (2000) (*Order No. 642*).

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In addition, the Commission also must determine under FPA § 203(a)(4) that a proposed transaction will not result in cross-subsidization of a non-utility associate company by a traditional utility company, or the pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge, or encumbrance will be consistent with the public interest. The standards for evaluating whether an improper cross-subsidization will result are set forth in Order Nos. 669, 669-A and 669-B,¹¹ and were recently clarified in the Commission's Supplemental Merger Policy Statement. *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Merger Policy Statement).

As demonstrated below, the Transaction satisfies all of these standards. Therefore, it is consistent with the public interest and should be approved.

A. Horizontal Competition Issues

Exelon has retained Dr. William H. Hieronymus to analyze the horizontal competition issues resulting from the Transaction. Dr. Hieronymus testimony addressing these issues is attached as Exhibit J to this Application. He concludes that, with Exelon's proposed divestitures, the Transaction will not raise any horizontal market power concerns.

To start his analysis, Dr. Hieronymus has determined how much generation Exelon and NRG own or control in each relevant geographic market. Generally, Dr.

¹¹ *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (Order No. 669), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 (Order No. 669-A), *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006) (Order No. 669-B).

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Hieronymus considered that the relevant geographic market consists of the RTO/ISO where the generation is located. For those parts of the country where there is not an RTO/ISO that meets the criteria established by the Commission to be considered a single relevant geographic market, Dr. Hieronymus has used the balancing authority where the generation is located. The following table shows the results of this initial screen, which is taken from Table 1 of Exhibit J-1.

GENERATION OWNED OR CONTROLLED BY EXELON AND NRG (MW)

Market	Exelon	NRG
PJM	23,698	1,644
ISO-New England	178	2,204
New York ISO	0	4,051
ERCOT	3,405	13,269
Cal ISO	0	2,633
Midwest ISO	1,043	0
Nevada Power	0	51
CSW	795	0
Entergy	853 ¹²	2,994
Southern Company	933	0
Total	30,052 ¹³	26,847

¹² Exelon has a long-term purchase contract to purchase capacity and energy from the Tenaska/Frontier unit, which is interconnected to both Entergy and ERCOT. As a result, the 853 MW of capacity from this unit is included both in Exelon's ERCOT and its Entergy market capacity number.

¹³ Because the 853 MW capacity of the Tenaska/Frontier unit is shown in both the ERCOT and Entergy markets, 853 MW has been removed from the total to prevent double-counting the Tenaska/Frontier capacity.

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As this table shows, Exelon and NRG have overlapping generation in only four markets, and two of these four markets – the New England ISO and Entergy markets – involve only a *de minimis* overlap where the combined company will control less than 10% of the total installed capacity in the market. Thus, although Dr. Hieronymus analyzes all four of these markets, on its face only two markets could be significantly affected by the Transaction. This limited overlap is graphically illustrated by the map showing the location of Exelon’s and NRG’s generation, which is provided in Exhibit K.

In addition to the above markets, Dr. Hieronymus also conducted an analysis of the CSW market, which is the closest jurisdictional market to ERCOT where Exelon controls a modest amount of generation. Again, however, the amount of generation controlled by Exelon in the CSW market in the first place is very small, and on its face it is unlikely that the Transaction would raise problems in the CSW market – a fact that Dr. Hieronymus’ analysis confirms as described below.

Furthermore, as described in greater detail below, Exelon is proposing a “clean sweep” divestiture in each market (or submarket) where there is any significant overlap of generation. In each of these markets, all of the generation owned by either Exelon or NRG will be divested. As a result, by definition the Transaction will not increase the level of concentration in any of these markets, except for the potential import of capacity into those markets. As Dr. Hieronymus demonstrates, the proposed clean sweep divestitures will adequately mitigate any potential adverse horizontal market power impacts from the Transaction.

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Once he performed his initial screen to determine the markets where Exelon's and NRG's generation overlaps, Dr. Hieronymus performed an Appendix A analysis of the Transaction as required by the Commission's Merger Regulations in each market where there is an overlap. As Dr. Hieronymus explains in detail in Sections III and IV of Exhibit J-1, this analysis requires the determination of pre and post Transaction market shares in each market analyzed, from which a Herfindahl-Hirschman Index (HHI) can be derived. As Dr. Hieronymus explains, to the extent that the increase in HHI is above 100 in a moderately concentrated market (HHI from 1000 to 1800) or above 50 in a highly concentrated market (HHI above 1800), then that is considered by the Commission to be a screen violation that requires further analysis and potential mitigation. To the extent that HHI increases are lower than the levels described above, or if the post-Transaction HHI is unconcentrated (HHI below 1000), then there are no screen violations and no competitive issues raised.

Dr. Hieronymus' analysis of each market is summarized below.

1. PJM

PJM, with over 165,000 MW of capacity, operates the largest centralized electric pool in the United States. Within PJM prices can separate for significant numbers of hours during the year due to internal transmission constraints. Thus, when considering market power issues in PJM, the Commission typically analyzes smaller submarkets within PJM as well as PJM as a whole. *See Market-Based Rates For Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, FERC Stats. &

¹⁴ The Appendix A analysis was first described in the Merger Policy Statement, III FERC Stats. & Regs. ¶ 31,044 at 30,130-135. The requirements of the Appendix A analysis since have been incorporated into the Commission's regulations (the Merger Regulations) at 18 CFR § 33.3 (2004).

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Regs. ¶ 31,352 at P 246 (2007). Therefore, Dr. Hieronymus analyzed the following PJM markets:

- (a) PJM as a whole.
- (b) PJM East, which consists of New Jersey, the Delmarva Peninsula, and eastern Pennsylvania. Historically, transmission constraints between PJM East and the rest of PJM have caused market prices in PJM East to separate and rise above prices in the rest of PJM. Although recent transmission expansion projects have relieved these transmission constraints to some degree, the Commission still typically evaluates PJM East as a separate market.
- (c) PJM Classic, which consists of the footprint of the original PJM utilities, including PJM East. Dr. Hieronymus explains that, although he believes that a larger market than PJM Classic can be justified, he has analyzed this market because it is the smallest market that includes all of Exelon's and NRG's PJM capacity that is not located in Illinois. Because NRG and Exelon both own generation assets located in Pennsylvania that are outside of PJM East, use of this market thus provides the most conservative possible evaluation of the combination of the non-Illinois PJM generation assets of Exelon and NRG.
- (d) Northern Illinois is not a separate relevant market *per se*, but Dr. Hieronymus presents facts to support the conclusion that the combination of Exelon's and NRG's generation in Northern Illinois does not have an adverse competitive effect. For PJM East, Dr. Hieronymus conducts a Delivered Price Test (DPT) analysis of (1) Economic Capacity and (2) Available Economic Capacity. For PJM and PJM Classic, Dr. Hieronymus analyzes Economic Capacity. He also analyzes relevant Ancillary Services markets in PJM.

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Dr. Hieronymus' analysis of PJM focuses primarily on the Economic Capacity analysis. In PJM, where most states have implemented retail competition, Available Economic Capacity—which measures capacity available after load obligations are met—becomes less relevant. Dr. Hieronymus' analysis of PJM and each PJM sub market is summarized below.

(a) PJM as a Whole

The ownership of capacity in the PJM market is relatively unconcentrated. As a result, even though Exelon's pre-merger market shares in the PJM market as a whole range from about 14%-16%, the addition of NRG's generation, which represents no more than 1% of the market, does not cause any screen violations. The results of Dr. Hieronymus' Economic Capacity analysis of the PJM market, which is included in Exhibit J-7, is reproduced below.

Economic Capacity, PJM (pre-mitigation)

Period	Price	Exelon			Pre-Merger NRG			Market Size	HHI	Post-Merger (Pre-Mitigation)			HHI Chg
		MW	Mkt Share		MW	Mkt Share				MW	Mkt Share	HHI	
S_SP1	\$ 250	23,961	14.5%	1,604	1.0%	165,368	790	25,565	15.5%	818	28		
S_SP2	\$ 160	23,197	14.4%	1,602	1.0%	161,314	798	24,799	15.4%	827	29		
S_P	\$ 90	21,669	14.3%	1,413	0.9%	151,602	817	23,082	15.2%	843	27		
S_OP	\$ 50	18,051	15.7%	999	0.9%	114,772	1,009	19,050	16.6%	1,036	27		
W_SP	\$ 105	21,460	14.1%	1,327	0.9%	151,769	765	22,788	15.0%	790	25		
W_P	\$ 75	18,841	14.2%	1,283	1.0%	132,677	811	20,124	15.2%	839	27		
W_OP	\$ 50	16,608	15.5%	896	0.8%	107,527	908	17,504	16.3%	933	26		
SH_SP	\$ 100	19,774	14.7%	1,227	0.9%	134,551	820	21,002	15.6%	847	27		
SH_P	\$ 70	15,903	14.5%	1,211	1.1%	109,931	905	17,114	15.6%	937	32		
SH_OP	\$ 45	15,463	17.4%	854	1.0%	88,781	1,062	16,317	18.4%	1,095	34		

¹⁵ Moreover, it becomes very difficult to measure load obligations of third parties who have divested their generation to an entity (whether or not affiliated) that makes all of its sales in the wholesale market, and in particular it is difficult to match specific generation units to specific loads. Dr. Hieronymus explains the method that he has used to estimate Available Economic Capacity, but these calculations by their very nature represent an estimate that does not have the same degree of precision as the Economic Capacity calculations. See Exhibit J-1 at 50-51.

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As this table shows, even after the combination of Exelon and NRG, the PJM Economic Capacity market is unconcentrated under most load conditions, and even though it becomes moderately concentrated in the Shoulder Off-Peak period, the HHI increase in this time period is 34 points, which is well below the 100 threshold used by the Commission for screening purposes. Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,896 n. 62.

The same is true for the impact of the Transaction on Ancillary Services markets in PJM as a whole. As Dr. Hieronymus explains, the Transaction does not have any adverse impact on these markets in PJM as a whole. Exhibit J at 55-60.

(b) PJM East

The PJM East submarket is the market where the Transaction is most likely to raise competition issues. Exelon's pre-merger Economic Capacity market shares in PJM East range from about 17%-23%, while NRG's market shares are between 2% and 4%. The results of Dr. Hieronymus' Economic Capacity analysis of the PJM East market, also included in Exhibit J-7, is reproduced below:

Economic Capacity, PJM East (pre-mitigation)

Period	Price	Exelon		Pre-Merger NRG		Market Size	HHI	Post-Merger (Pre-Mitigation)			HHI Chg
		MW	Mkt Share	MW	Mkt Share			MW	Mkt Share	HHI	
S_SP1	\$ 250	9,296	20.8%	1,116	2.5%	44,711	1,088	10,411	23.3%	1,192	104
S_SP2	\$ 200	9,298	20.8%	1,116	2.5%	44,647	1,090	10,414	23.3%	1,194	104
S_P	\$ 100	7,065	18.5%	948	2.5%	38,131	955	8,012	21.0%	1,047	92
S_OP	\$ 60	6,033	18.7%	910	2.8%	32,273	930	6,944	21.5%	1,036	105
W_SP	\$ 120	7,908	20.2%	845	2.2%	39,067	1,012	8,753	22.4%	1,099	88
W_P	\$ 90	6,573	18.3%	834	2.3%	35,856	940	7,407	20.7%	1,025	85
W_OP	\$ 65	5,554	17.9%	811	2.6%	31,029	883	6,365	20.5%	977	94
SH_SP	\$ 110	7,716	20.5%	823	2.2%	37,578	975	8,539	22.7%	1,064	90
SH_P	\$ 80	5,908	17.6%	813	2.4%	33,513	880	6,721	20.1%	965	86
SH_OP	\$ 55	5,522	19.1%	803	2.8%	28,924	867	6,326	21.9%	973	106

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This table shows that, after the Transaction, the PJM East Economic Capacity markets are at most moderately concentrated under all load conditions and there are HHI increases of over 100 points in 4 of the load conditions analyzed. Although these screen violations are minor, Exelon nevertheless commits to mitigate any concern by implementing a clean sweep of the PJM East market, which it would accomplish by divesting all of the NRG generation facilities located in PJM East. Specifically, Exelon will divest the Indian River (784 MW), Vienna (170 MW) and Dover Energy (104 MW) facilities. In total, this equals approximately 1,000 MW of divestiture in PJM East. The terms and conditions of this proposed divestiture are described in more detail in Section V.B. below.

Dr. Hieronymus has calculated the impact of the Transaction in the PJM East market after this divestiture. This analysis is based on the simplifying assumption that the divested units will all be sold to a single new entrant. As discussed below, the Commission will be able to assess the impact of the divestiture based on the actual purchaser(s) when Exelon files for approval of the sales in the future. Because of the clean sweep, the only change in concentration resulting from the Transaction results from imports of NRG's generation into PJM East from other markets. Not surprisingly, as the following table, reproduced from Exhibit J-8, shows, this increase is *de minimis*, and no screen failures result after the divestiture.

Table of Contents*Economic Capacity, PJM East (post-mitigation)*

Period	Price	Exelon		Pre-Merger NRG		Market Size	HHI	MW	Post-Merger (Pre-Mitigation)		HHI Chg
		MW	Mkt Share	MW	Mkt Share				Mkt Share	HHI	
S_SP1	\$ 250	9,296	20.8%	1,116	2.5%	44,711	1,088	9,403	21.0%	1,097	9
S_SP2	\$ 200	9,298	20.8%	1,116	2.5%	44,647	1,090	9,406	21.1%	1,099	9
S_P	\$ 100	7,065	18.5%	948	2.5%	38,131	955	7,165	18.8%	963	8
S_OP	\$ 60	6,033	18.7%	910	2.8%	32,273	930	6,097	18.9%	937	7
W_SP	\$ 120	7,908	20.2%	845	2.2%	39,067	1,012	8,001	20.5%	1,021	9
W_P	\$ 90	6,573	18.3%	834	2.3%	35,856	940	6,655	18.6%	948	8
W_OP	\$ 65	5,554	17.9%	811	2.6%	31,029	883	5,613	18.1%	889	6
SH_SP	\$ 110	7,716	20.5%	823	2.2%	37,578	975	7,821	20.8%	986	11
SH_P	\$ 80	5,908	17.6%	813	2.4%	33,513	880	6,003	17.9%	889	9
SH_OP	\$ 55	5,522	19.1%	803	2.8%	28,924	867	5,608	19.4%	877	10

Dr. Hieronymus analysis of the PJM East Available Economic Capacity and Ancillary Services markets reaches similar conclusions. After the clean sweep divestiture of all of NRG's assets in PJM East, there are no competitive concerns raised by the Transaction for these products. See Exhibit J-1 at 52-53.

(c) PJM Classic

Exelon and NRG both own generation in Pennsylvania that is located outside of PJM East. Accordingly, Dr. Hieronymus determined that it was appropriate to conduct an analysis of a geographic market that includes this additional Pennsylvania generation, but which is smaller than the entire PJM market. Exhibit J-1 at 41-42. In order to derive a conservative geographic market that includes all of the PJM East and Pennsylvania generation but otherwise is as small as possible, Dr. Hieronymus determined to base his analysis on a PJM Classic market that includes all of the original PJM members. *Id.*

Dr. Hieronymus analysis shows that, even in the conservatively small PJM Classic geographic market, the Transaction does not cause any competition concerns. As the following table, reproduced from Exhibit J-7, shows, the post-merger PJM Classic Market is unconcentrated in all load periods even before divestiture, and the HHI increases range from 36 to 45. Thus, the screen is passed in all periods. Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,896 n. 62.

Table of Contents**Economic Capacity, PJM Classic (pre-mitigation)**

Period	Price	Exelon		Pre-Merger NRG		Market Size	HHI	Post-Merger (Pre-Mitigation)			HHI Chg
		MW	Mkt Share	MW	Mkt Share			MW	Mkt Share	HHI	
S_SP1	\$ 250	11,094	13.6%	1,349	1.7%	81,473	807	12,443	15.3%	852	45
S_SP2	\$ 200	11,094	13.6%	1,350	1.7%	81,345	808	12,444	15.3%	853	45
S_P	\$ 100	8,804	12.3%	1,176	1.7%	71,449	775	9,980	14.0%	816	41
S_OP	\$ 55	7,699	13.0%	1,053	1.8%	59,093	803	8,752	14.8%	850	46
W_SP	\$ 115	9,454	13.4%	1,041	1.5%	70,806	788	10,495	14.8%	827	39
W_P	\$ 85	7,911	12.4%	928	1.5%	63,759	781	8,839	13.9%	818	36
W_OP	\$ 60	6,987	12.4%	922	1.6%	56,289	788	7,908	14.1%	828	41
SH_SP	\$ 105	8,987	13.6%	1,006	1.5%	66,322	776	9,994	15.1%	817	41
SH_P	\$ 80	7,101	12.2%	897	1.5%	58,365	767	7,998	13.7%	804	37
SH_OP	\$ 55	6,719	13.0%	904	1.8%	51,694	756	7,623	14.8%	801	45

(d) Northern Illinois Market

The only effect of the Transaction in Illinois relates to the combination of generation Exelon owns or contracts for in Illinois (about 13,000 MW, of which about 1,600 MW consists of peakers) with NRG's Rockford peaking station (448 MW). Thus, the impact of the Transaction, if any, only occurs when peaking units are economic, and thus the Rockford peaking station would ordinarily be dispatched, which is not often. As Dr. Hieronymus testifies, peakers in Northern Illinois had an annual capacity factor of only about 2 percent. Exhibit J-1 at 54. Dr. Hieronymus demonstrates that there is about 4,000 MW of similar vintage peaking capacity owned by unaffiliated third parties in the Illinois portion of PJM, and that, on average, there was more than 3,500 MW of competing generation operating in this region when some portion of the Rockford station was operating. Based on these facts, he concludes that there is no adverse effect from the Transaction in Northern Illinois. *Id.*

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2. ERCOT

The second geographic market where there is a significant amount of overlap of generation ownership is within the ERCOT region. The transmission and wholesale sale of electricity in ERCOT is not in interstate commerce and thus is not subject to the Commission's jurisdiction, and it therefore is not clear whether the Commission considers the impact of Transactions on competition in ERCOT as part of its Section 203 public interest review. In the past, the Commission has ruled on transactions that include assets located in ERCOT without indicating whether or not it has considered the impact of the transaction on competition in ERCOT. *See, e.g., Oncor Electric Delivery Company*, 120 FERC ¶ 61,215 (2007); *NRG Energy, Inc.*, 113 FERC ¶ 62,245 (2005).

To the extent that the Commission does consider competitive impacts in ERCOT, however, it is clear that the Transaction will not adversely impact competition in ERCOT. Exelon is committing, as part of this Application, to conduct a clean sweep divestiture by divesting all of Exelon's generation located in ERCOT. In particular, Exelon will divest the Mountain Creek, Handley and Laporte units¹⁶ that it owns in ERCOT and will, in addition, transfer the long-term power purchase agreement (PPA) rights that it has to the capacity and energy associated with the Tenaska/Frontier and Wolf Hollow units.¹⁷ In total, this will result in the divestiture of approximately 2,200 MW of capacity and the transfer of long-term contract rights for an additional approximately 1,200 MW of capacity. The terms and conditions of these divestitures are described below.

¹⁶ This includes the sale of the mothballed Mountain Creek Units 2-3 and Handley Units 1-2.

¹⁷ Exelon will either assign its rights and obligations to a third party, or in the event that it cannot obtain the necessary consents from the project owner to do so or cannot find an entity willing to take an assignment, may enter into a back-to-back power purchase agreement with a counterparty that will give that counterparty the same rights that Exelon has to the capacity and energy from the unit. In the latter case, Exelon contractually will stand between the plant owner and the counterparty to the back-to-back power purchase agreement, but all of Exelon's control over the output of the unit will have been contractually transferred to the counterparty, and Exelon will have no ability to withhold the capacity from the market, either operationally or economically by setting a high price for the sale of the units' output.

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With this clean sweep divestiture, there can be no real question but that the Transaction will have no adverse impact on competition in ERCOT. Nevertheless, because of the theoretical possibility of imports from other markets, Dr. Hieronymus has performed an analysis of the overall ERCOT market, as well as two of the four congestion zones within the ERCOT market, (i) Houston; and (ii) North, the two zones where Exelon and NRG's pre-merger generation ownership overlaps. Dr. Hieronymus limited his analysis to Economic Capacity because ERCOT has implemented retail competition and as a consequence no market participant has any native load obligations.

(a) ERCOT

Dr. Hieronymus determined that the ERCOT market as a whole is unconcentrated in all load periods, both before and after the Transaction, as shown on the following table taken from Exhibit J-10.

Table of Contents*Economic Capacity, ERCOT (pre-mitigation)*

Period	Price	Exelon			Pre-Merger NRG			Market Size	HHI	Post-Merger (Pre-Mitigation)			
		MW	Mkt Share		MW	Mkt Share				MW	Mkt Share	HHI	HHI Chg
S_SP1	\$ 250	2,995	3.8%		12,502	15.9%		78,427	847	15,497	19.8%	969	122
S_SP2	\$ 130	2,995	3.8%		12,502	16.0%		78,404	847	15,497	19.8%	969	122
S_P	\$ 75	2,750	3.7%		11,720	15.9%		73,801	865	14,470	19.6%	983	118
S_OP	\$ 65	1,118	1.9%		9,231	15.5%		59,386	790	10,349	17.4%	848	59
W_SP	\$ 90	2,964	3.8%		11,932	15.5%		77,085	822	14,896	19.3%	941	119
W_P	\$ 60	1,114	2.2%		5,285	10.2%		51,724	700	6,399	12.4%	744	44
W_OP	\$ 55	1,114	2.2%		5,285	10.3%		51,367	696	6,399	12.5%	741	45
SH_SP	\$ 100	2,803	4.0%		10,858	15.3%		70,873	807	13,661	19.3%	928	121
SH_P	\$ 70	1,505	2.4%		9,600	15.2%		63,171	827	11,105	17.6%	900	72
SH_OP	\$ 50	1,072	2.6%		4,208	10.1%		41,734	758	5,279	12.7%	809	52

As this table shows, the ERCOT market is unconcentrated even before the clean sweep divestiture. As a result, the Transaction passes the competitive screens and raises no competition issues in the ERCOT market as a whole, even though there are some modest increases in concentration.

(b) ERCOT North Zone

All but one of Exelon's generation facilities are located in the North Zone, as is NRG's Limestone plant with a capacity of almost 1,700 MW. As a result, the combination of the two companies causes six relatively small screen violations in ERCOT North, as shown in the following table, taken from Exhibit J-10.

Table of Contents*Economic Capacity, North Zone (pre-mitigation)*

Period	Price	Exelon		Pre-Merger NRG		Market Size	HHI	MW	Post-Merger (Pre-Mitigation)		HHI Chg
		MW	Mkt Share	MW	Mkt Share				Mkt Share	HHI	
S_SP1	\$ 250	2,878	8.4%	3,123	9.1%	34,370	1,762	6,001	17.5%	1,914	152
S_SP2	\$ 130	2,878	8.4%	3,123	9.1%	34,347	1,760	6,001	17.5%	1,912	152
S_P	\$ 75	2,750	8.3%	3,162	9.6%	32,971	1,757	5,912	17.9%	1,916	160
S_OP	\$ 65	1,118	4.2%	2,941	11.0%	26,837	1,495	4,059	15.1%	1,586	91
W_SP	\$ 90	2,842	8.4%	2,932	8.7%	33,705	1,660	5,774	17.1%	1,807	147
W_P	\$ 60	1,114	4.4%	2,243	8.9%	25,104	1,236	3,357	13.4%	1,315	79
W_OP	\$ 55	1,114	4.4%	2,244	8.9%	25,104	1,229	3,358	13.4%	1,308	79
SH_SP	\$ 100	2,697	8.6%	2,790	8.9%	31,382	1,618	5,487	17.5%	1,771	153
SH_P	\$ 70	1,505	5.4%	2,775	9.9%	28,087	1,635	4,280	15.2%	1,741	106
SH_OP	\$ 50	1,072	4.7%	2,151	9.4%	22,945	1,236	3,222	14.0%	1,324	88

However, these screen violations are completely eliminated by the clean sweep divestiture. As Dr. Hieronymus testifies, because the interties into ERCOT are completely reserved by parties other than Exelon or NRG, the clean sweep divestiture completely eliminates the HHI increases that result from the Transaction under his simplifying assumption that the divested units are sold to a purchaser with no pre-Transaction market presence. Exhibit J-1 at 65-67. Again, the Commission will be able to evaluate the impact of selling to a specific purchaser(s) when Exelon files for approval of the sales.

(c) ERCOT Houston Zone

Although Exelon has only a single peaking facility in the Houston Zone, NRG has over 8,000 MW of capacity in this zone. As a result, the Transaction causes five relatively modest screen violations in the peak load periods when Exelon's generation would be expected to run, as the following table taken from Exhibit J-10 shows.

Table of Contents*Economic Capacity, Houston Zone (pre-mitigation)*

Period	Price	Exelon		Pre-Merger NRG		Market Size	HHI	MW	Post-Merger (Pre-Mitigation)		HHI Chg
		MW	Mkt Share	MW	Mkt Share				Mkt Share	HHI	
S_SP1	\$ 250	483	1.8%	10,193	38.9%	26,202	1,875	10,676	40.8%	2,018	143
S_SP2	\$ 130	483	1.8%	10,193	38.9%	26,202	1,875	10,676	40.8%	2,018	143
S_P	\$ 75	349	1.5%	9,426	39.4%	23,932	1,977	9,776	40.9%	2,092	115
S_OP	\$ 65	184	0.9%	7,034	33.1%	21,262	1,639	7,217	33.9%	1,696	57
W_SP	\$ 90	519	1.9%	9,905	35.8%	27,711	1,667	10,424	37.6%	1,801	134
W_P	\$ 60	217	1.1%	3,429	17.9%	19,200	1,138	3,646	19.0%	1,178	40
W_OP	\$ 55	217	1.1%	3,431	17.9%	19,200	1,140	3,649	19.0%	1,180	40
SH_SP	\$ 100	504	2.0%	9,012	36.0%	25,037	1,668	9,516	38.0%	1,813	145
SH_P	\$ 70	243	1.1%	7,792	35.0%	22,249	1,696	8,035	36.1%	1,773	76
SH_OP	\$ 50	228	1.6%	2,541	18.2%	13,993	1,193	2,769	19.8%	1,252	59

Again, these screen violations are completely eliminated by the clean sweep divestiture under the assumption that the divested units are sold to a purchaser with no pre-Transaction market presence. Exhibit J-1 at 65-67.

3. CSW

Exelon, but not NRG, controls generation in the CSW market. Because CSW has interconnections with ERCOT and is the closest jurisdictional market to ERCOT, Dr. Hieronymus performed an Appendix A analysis of the CSW market to see if the potential for increased imports of NRG capacity from ERCOT into CSW somehow could create competitive concerns in the CSW market. Because there is no retail competition in CSW, Dr. Hieronymus conducted both an Economic Capacity and an Available Economic Capacity analysis in this market.

The Economic Capacity analysis for CSW is presented below, taken from Exhibit J-11. As this analysis shows, although the Economic Capacity market is highly concentrated, the market is almost completely unaffected by the Transaction. At most, there is an HHI increase of 3, even before taking the clean sweep divestiture into consideration. Thus, there are no Economic Capacity screen violations in the CSW market. Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,896 n. 62.

Table of Contents*Economic Capacity, CSW*

Period	Price	Exelon		Pre-Merger NRG				Post-Merger (Pre-Mitigation)			HHI Chg
		MW	Mkt Share	MW	Mkt Share	Market Size	HHI	MW	Mkt Share	HHI	
S_SP1	\$ 250	521	3.8%	15	0.1%	13,557	4,517	536	4.0%	4,517	1
S_SP2	\$ 130	521	3.9%	15	0.1%	13,528	4,517	536	4.0%	4,518	1
S_P	\$ 80	521	4.0%	15	0.1%	13,153	4,410	536	4.1%	4,411	1
S_OP	\$ 50	522	5.9%	20	0.2%	8,848	2,930	542	6.1%	2,933	3
W_SP	\$ 90	514	3.8%	24	0.2%	13,392	4,053	539	4.0%	4,054	1
W_P	\$ 65	516	4.3%	24	0.2%	12,018	3,707	541	4.5%	3,709	2
W_OP	\$ 40	2	0.0%	43	1.0%	4,357	5,484	45	1.0%	5,484	
SH_SP	\$ 90	484	3.9%	28	0.2%	12,497	3,976	513	4.1%	3,978	2
SH_P	\$ 70	487	4.1%	32	0.3%	11,886	3,860	519	4.4%	3,862	2
SH_OP	\$ 40	2	0.1%	57	1.4%	4,221	4,891	59	1.4%	4,891	

Dr. Hieronymus Available Economic Capacity analysis of the CSW market, also taken from Exhibit J-11, is shown below. This analysis shows that, although the HHI increases are larger than they are for the Economic Capacity analysis, there still are no screen violations. The largest increase of 80 points occurs during the Winter Off-Peak period, which is an unconcentrated market, and thus there is no screen violation. In those load conditions where the market is highly concentrated, the highest HHI increase is 30 points, well below the 50-point threshold for highly concentrated markets. Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,896 n. 62.

Table of Contents*Available Economic Capacity, CSW*

Period	Price	Exelon		Pre-Merger NRG		Market Size	HHI	MW	Post-Merger (Pre-Mitigation)		HHI Chg
		MW	Mkt Share	MW	Mkt Share				Mkt Share	HHI	
S_SP1	\$ 250	540	12.9%	17	0.4%	4,186	2,869	556	13.3%	2,879	10
S_SP2	\$ 130	536	12.8%	16	0.4%	4,186	2,862	552	13.2%	2,871	10
S_P	\$ 80	535	9.1%	15	0.3%	5,889	2,275	549	9.3%	2,279	5
S_OP	\$ 50	533	12.8%	48	1.2%	4,153	2,809	582	14.0%	2,839	30
W_SP	\$ 90	530	8.6%	22	0.4%	6,185	2,064	552	8.9%	2,070	6
W_P	\$ 65	546	8.8%	28	0.5%	6,227	2,060	574	9.2%	2,068	8
W_OP	\$ 40	14	1.7%	204	23.8%	857	892	218	25.5%	972	80
SH_SP	\$ 90	513	10.2%	40	0.8%	5,050	1,960	553	11.0%	1,976	16
SH_P	\$ 70	517	8.1%	29	0.5%	6,378	2,069	547	8.6%	2,077	7
SH_OP	\$ 40	17	1.7%	209	20.8%	1,005	795	226	22.5%	866	71

4. Entergy

Both Exelon and NRG also own or control generation in the Entergy market. However, Exelon's generation consists solely of its long-term PPA for the capacity and energy associated with the Tenaska Frontier Unit, which can sell power either into ERCOT or into Entergy. As explained above, Exelon is committing to transfer its rights under this contract to a third party as part of its clean sweep of ERCOT. Exelon's ERCOT-related commitment with respect to the Tenaska Frontier Unit will eliminate any overlap in the Entergy market as well.

5. ISO New England

There is some minor overlap of generation in the ISO New England (ISO-NE) market. However, Exelon owns only 178 MW of capacity, which is about 0.6% of the total installed capacity in ISO-NE, while NRG's 2,404 MW constitutes only a little over 7% of the installed capacity in ISO-NE. Moreover, Exelon's and NRG's generation is located in different sub-areas within ISO-NE. As Dr. Hieronymus explains, this is a *de minimis* overlap of generation that, under Section 33.2(a)(2)(i) of the Commission's regulations, does not require the preparation of an Appendix A analysis. Exhibit J at 69-70.

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B. Proposed Generation Divestiture

1. Timing of Divestiture

As noted above, Exelon has committed to divest 4,600 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 tolling PPA rights to approximately 1,200 MW of capacity located in ERCOT. Exelon commits that it will enter into contracts to sell its generation capacity and to transfer its long-term contract rights no later than 180 days after the consummation of the 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 of the Federal Power Act.

2. Identity of Purchasers

Dr. Hieronymus modeled the divestitures as having been made to a single purchaser in both the PJM East and ERCOT markets, and in both cases his analysis assumed that the purchaser has no pre-existing market presence, which was a simplifying assumption used for illustrative purposes. Exelon recognizes that the identity of the purchaser(s) of the divested generation could have an impact on the post-divestiture concentration in the markets where the divestitures take place. However, given that Exelon cannot sell the generation to be divested until it receives the Commission's approval to do so, Exelon does not believe that it is appropriate to make any commitments now about which purchaser(s) could purchase which units. The Commission will have the ability to consider any competition issues raised by the identity of the purchaser(s) when it conducts its Section 203 review of the specific divestitures that Exelon will be required to file at the time of the sales.

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3. Interim Mitigation

In the past, the Commission has required that merger applicants put interim mitigation measures in place from the time of the consummation of the merger until the required divestitures or other mitigation is in place. *See, e.g. AEP*, 91 FERC ¶ 61,208 (2000); *Ameren Services Co.*, 101 FERC ¶ 61,202 (2002); *Ameren Corp.*, 108 FERC ¶ 61,094 (2004). Exelon therefore commits to implement interim mitigation provisions that will go into effect upon the consummation of the Transaction, as described below.

As an initial matter, however, Exelon notes that it is much more difficult for market power to be exercised in large organized markets than it might have been when the Commission first began requiring interim mitigation. These markets have independent market monitors with detailed information about all market participants' costs and offers, which enable them to detect when a party might be attempting to affect prices through the exercise of market power, and who also can rely on tools memorialized in their RTOs' FERC-filed tariffs and agreements to mitigate the exercise of market power. For this reason, the Commission adopted a rebuttable presumption that the existing Commission-approved RTO/ISO mitigation is sufficient to address market power concerns with respect to market-based rate authority in the RTO/ISO market, including mitigation applicable to RTO/ISO submarkets. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, (Order No. 697-A), FERC Stats. & Regs. ¶ 31,268 at P 285 (2008).

The generation facilities that Exelon is proposing to divest here are located either in PJM or ERCOT, two of the largest competitive electric markets in the United States.

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Each has a sophisticated and active independent market monitor that undoubtedly would be able to detect any attempts by Exelon to manipulate market prices in the interim before divestiture. As a result, and given the relatively modest competitive overlaps in these markets, there should be no market power concerns with respect to the short period of time before the divestitures are completed. Nevertheless, because the Commission never has applied the rebuttable presumption in Order No. 697-A to mitigation in Section 203 proceedings, Exelon is proposing additional interim mitigation measures to ensure that no market power issues are raised as a result of the Transaction. Because the markets in PJM and ERCOT operate somewhat differently, the proposed interim mitigation in each market also is different.

(a) Interim Mitigation in PJM East

Exelon's interim mitigation will apply, with limited exceptions, to all of the fossil-fired and hydro units owned or controlled by Exelon and NRG (the PJM East Mitigated Units) that are located in PJM East. A list of the PJM East Mitigated Units is attached to this Application as Appendix 1. The interim mitigation will apply to sales of energy, capacity, and ancillary services from the PJM East Mitigated Units, and will be in effect from the time that the Transaction is consummated until the date that the last NRG unit located in PJM East is transferred to a new owner (the PJM East Interim Mitigation Period).

¹⁸ Three fossil-fired generation units located in PJM East are not being designated as PJM East Mitigation 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 market and have not been designated as PJM East Mitigation 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. Because Exelon cannot withhold the output of Grays Ferry from the market, Exelon is not including it as a PJM East Mitigation Unit.

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Energy Mitigation

During the PJM Interim Mitigation Period, all PJM East Mitigated Units, including both Exelon and NRG units, will be subject to cost-based caps equal to the Cost-Based Offer defined below on the offers that are made for the PJM East 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. 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, (the PJM Operating Agreement), Schedule 1, Section 6.4.2(a)ii and iii, available at www.pjm.com, in effect at the time the offer is made. Currently, this limits offers to the variable cost of a unit plus an adder, where variable cost is defined and recorded in PJM's Cost Development Task Force CDTF rules, PJM Manual 15, and where the adder for each unit is dependent on whether or not PJM has classified the unit as a frequently mitigated unit (FMU). Normally, this means a 10% adder for non-FMU units, and a fixed percentage and/or a fixed \$/MWH adder for FMUs. An offer to must-run a unit or a portion of a unit at zero price also will constitute a Cost-Based Offer.¹⁹

¹⁹ The Muddy Run pumped storage hydro unit cannot be offered into the market at all times. The first reason is that its dispatch is constrained as a function of PJM's management and operation of the Conowingo Dam, which PJM schedules. In addition, there are obligations contained in Exelon's FERC license for the Conowingo Dam governing water elevation levels, which also constrain Muddy Run scheduling, as well as NRC operating procedures that require sufficient water levels to enable the Peach Bottom nuclear facility to maintain operations. Exelon does commit, however, that it will bid in the Muddy Run unit as a must-run unit with a zero price offer at those times when it does offer and schedule the units into the energy market. In addition, the dispatch of Exelon's Conowingo hydro station is controlled by the PJM system operator, not Exelon. Exelon therefore commits to schedule the output from this unit dispatched by PJM as must-run with a zero price offer.

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Capacity Mitigation

The interim mitigation will apply to all of the RPM Base Residual Auctions (as that term is defined by PJM), if any, 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-approved Market Seller Offer Caps as defined in Section 6 of the PJM Open Access Tariff. Exelon may sell the capacity associated with any of these units that do not clear in any of these RPM Base Residual Auctions on a bilateral basis. With respect to any RPM Incremental Auction (as that term is defined by the PJM Operating Agreement) for additional capacity needed during the delivery period associated with a Base Residual Auction conducted during the PJM East 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.

Ancillary Services Mitigation

In PJM, there are only two market-based ancillary services – regulation and synchronized reserves. Dr. Hieronymus explains why the Transaction does not adversely affect these markets even without any mitigation. Exhibit J-1 at 57-60. As a result, there should be no need for any interim mitigation for these ancillary services.

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Nevertheless, for the avoidance of doubt, Exelon commits that to the extent that it offers ancillary services into these ancillary service markets during the PJM Interim Mitigation Period from any unit, not just the PJM East Mitigated Units, Exelon's offers will be consistent with the rules set out in PJM's Manual regarding cost-based bidding, PJM Manual 15 Cost Development Guidelines (the CDTF Manual).

With respect to regulation service, Section 9 of the CDTF Manual sets out a methodology for calculating the cost-based bid that a party must submit when offering regulation service to PJM. The rules are the same as they are for energy, meaning that they allow Exelon to make a market-based bid as well. Exelon will commit to cap any offer to sell regulation service from PJM East Mitigated Units at a price no greater than cost-based offer as determined in accordance with Section 9 of the CDTF Manual and will not avail itself of the market-based option. With respect to synchronized reserves, Section 7 of the CDTF Manual sets out a methodology for calculating a cost-based offer. That methodology includes a prescribed adder. Exelon will commit to cap its offers to sell synchronized reserves from PJM East Mitigated Units a price up to the value calculated in accordance with Section 7 of the CDTF Manual.

(b) Interim Mitigation in ERCOT

Exelon's interim mitigation will apply to fossil-fired units owned or controlled by Exelon and NRG (the ERCOT Mitigated Units) that are located in the ERCOT North and Houston Zones. A list of the ERCOT Mitigated Units is attached to this Application as Appendix 2. This mitigation will remain in effect from the time that the Transaction is consummated until the date that the last sale of an Exelon unit located in ERCOT that it will divest has closed (the ERCOT Interim Mitigation Period).

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Because the current ERCOT market operates very differently than the PJM market, Exelon's commitments relating to the ERCOT market are different from its commitments with respect to the PJM market. In ERCOT, Qualified Scheduling Entities (QSEs) submit balanced 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 the result of these submissions for a particular generator is such that the generator is committed to operate but has excess capacity, the generator 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 (referred to as 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.

Exelon 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 (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 of the OOMC resource a generic, 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

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OOMC operation.²⁰ Similarly, with respect to units that are already on-line, if ERCOT needs energy from a particular resource to enable it to relieve a local transmission constraint or other local reliability issue, it can issue an Out-of-Merit Energy (OOME) instruction calling for upward or downward movement from a specific unit to solve the constraint. ERCOT pays a generator subject to an OOME instruction 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 OOME instruction or if its costs exceed the generic payment, a generator may seek its verifiable costs from ERCOT.

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 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 Transaction, even before divestiture. As a result, there is no need for interim mitigation with respect to any of these ancillary services.

ERCOT clears the Balancing Energy market, however, on a zonal basis unless there is no congestion on ERCOT-designated Commercially Significant Constraints. As a result, Exelon will offer all energy from committed units not needed to serve bilateral contracts or to supply the other ancillary services into the Balancing Energy market that will not exceed the unit's applicable resource category generic costs for OOME service for upward instruction as set forth in the ERCOT Protocols, Section 6 Ancillary Services.

²⁰ 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.

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(c) The Proposed Interim Mitigation Should Be Accepted

Exelon's proposed interim mitigation should be accepted by the Commission. The proposed offer caps for both ERCOT and PJM efficiently implement the twin goals of preventing both physical withholding and economic withholding during the interim period before divestiture is completed. First, there is no possibility of physical withholding in PJM East because all of the PJM East Mitigated Units are required to be offered into the market, as explained above, while ERCOT dispatchers have the right to require any unit not committed to be dispatched and any unit not running at fully capacity to be ramped up. Second, the offer caps require all energy that is offered into the market (other than energy scheduled in ERCOT for bilateral transactions that by definition are economic) to be offered at cost-based prices, as defined by the relevant market rules for purposes other than to implement this proposal. Thus, the offer caps will prevent Exelon submitting offers at uncompetitive levels that would result in economic withholding.

There is an additional feature of Exelon's proposal that makes it superior to all previous interim mitigation proposals approved by the Commission. In every other proposal, the amount of capacity subject to interim mitigation has been equal to the amount of capacity ultimately being divested. Exelon, however, is proposing to place its offer caps on considerably more capacity than is being divested. In PJM East, Exelon is proposing to apply the offer caps on over 4,000 MW of fossil, hydro and biomass generation even though only about 1,000 MW of capacity is being divested. The generation covered by the offer cap includes the so-called "ability generation" that can set the market clearing price in PJM East and hypothetically could be withheld from the market to increase prices. In ERCOT, the offer caps apply to *all* generation owned by either Exelon or NRG in the North and Houston Zones, even though only the Exelon capacity will be divested. These offer caps thus should more than adequately mitigate market power during the Interim Mitigation Period. *See* Exhibit J-1 at 9-13.

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(d) Alternative Interim Mitigation Proposal for ERCOT

As explained in the testimony of Dr. Hieronymus and above, Exelon's interim mitigation proposal fully addresses any market power concerns that may arise in ERCOT during the ERCOT Interim Mitigation Period. Exelon recognizes, however, that while its proposal imposes offer caps that eliminate the potential for economic withholding in the zonal balancing energy markets, the proposal depends on ERCOT to address any potential physical withholding in these zonal balancing energy markets through the issuance of OOMC and OOME instructions. It would not be economic to require Exelon to make offers into the Balancing Energy market for all ERCOT Mitigated Units because this would require uneconomic units to be operated at minimum levels in order to be able to deliver balancing energy even though it is unlikely that the unit's bid actually would be accepted. Given the remote potential for physical withholding to affect the balancing energy markets and the ability of ERCOT to issue OOMC and OOME instructions, Exelon believes that its interim mitigation proposal is sufficient.

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To the extent, however, that the Commission determines that the proposed interim mitigation does not effectively mitigate merger-related changes in the combined company's market power in the ERCOT markets and the Commission finds it necessary to order additional interim mitigation in ERCOT, Exelon proposes an alternative interim mitigation plan for the Commission's consideration. This alternative would involve commitments with respect to the generation assets located in ERCOT that currently are owned by Exelon (the Exelon ERCOT Assets), which are listed on Appendix 2. In particular, under this alternative, Exelon would commit as follows with respect to the Exelon ERCOT Assets:

- (i) Control over the bidding and scheduling, as well as control over all other QSE services for the Mountain Creek and Handley units would be transferred to an independent third party during the ERCOT Interim Mitigation Period. That is, Exelon no longer would be the QSE for the units at these two facilities during the ERCOT Interim Mitigation Period. There are a number of entities that provide QSE services for generation owners in ERCOT, and therefore it will not be difficult to obtain such services for this purpose. The typical compensation paid to QSEs for such services is a fixed fee per MWH generated, which would not give any financial incentive to bid or dispatch the units in such a fashion as to benefit Exelon's other generation assets. To the extent that Exelon pays additional compensation, that compensation will be based solely on the QSE's performance with respect to the assets that it controls, which again will provide no incentive to benefit Exelon's other generation.

- (ii) Complex contractual arrangements associated with the Tenaska/Frontier, Wolf Hollow and LaPorte units would make it extremely difficult to transfer dispatch and bidding control of these units to a third party. Therefore, Exelon proposes to retain bidding control over those resources, but will commit during the ERCOT Interim Mitigation Period to bid into the balancing energy market any amount of the capacity that is not scheduled in the day ahead market or otherwise sold bilaterally, up to the full amount of the capacity of each of these units, except for 300 MW of the Tenaska/Frontier capacity that

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is subject to a pre-existing long-term sales contract for sales to Entergy.²¹ These bids will be at the same ERCOT-established generic cost-based prices described above. This commitment applies to every hour of the ERCOT Interim Mitigation Period, except to the extent that a unit is down for scheduled or unscheduled maintenance.²² As a result, the entire capacity of each of these units will be made available to the market in every hour that they are capable of operating for the full length of the ERCOT Interim Mitigation Period.

These commitments should easily address any lingering market power concerns particularly given the additional ability of ERCOT to issue OOMC and OOME instructions. In the ERCOT North Zone, the above commitments will apply to all assets except for NRG's Limestone coal-fired unit, which is a baseload unit particularly unsuited to the execution of a withholding strategy. Exelon would have very little incentive to operate the Limestone unit so as to benefit the Exelon assets, given that the variable operating costs of Limestone are significantly lower than the variable operating costs of the Exelon resources in the North Zone. At the same time the above proposed commitments will prevent the Exelon ERCOT Assets located in the North Zone from

²¹ As explained above, the Tenaska/Frontier Unit is capable of making sales in either the ERCOT or Entergy markets. Exelon currently has a long-term sales contract to sell 300 MW of capacity to Entergy through May of 2010. Exelon will satisfy this obligation through two of the three 150 MW gas turbines in the unit. The other gas turbine, plus the steam turbine will be subject to this commitment to the extent available, consistent with Exelon's contractual obligations to Entergy.

²² The Tenaska/Frontier and Wolf Hollow Units are not owned by Exelon, and Exelon has no control over any unforced outages that may require unscheduled maintenance. The Laporte Unit is operated by Air Products, and thus Exelon again has no control over forced outages that require unscheduled maintenance. Exelon does have the ability to suggest dates for the scheduled maintenance for all three facilities, but all planned outages must be submitted to, and approved by, ERCOT.

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being withheld in order to benefit the Limestone unit. Similarly, the only Exelon asset in the Houston Zone – the only other Zone where competitive issues are raised – is the LaPorte unit, which is a high-cost peaker. Exelon would have little incentive to operate the NRG assets located in the Houston Zone to benefit the LaPorte unit, and the commitment would prevent the LaPorte Unit from being withheld to benefit the NRG units in the Houston Zone.

Again, Exelon believes that its primary interim mitigation plan for ERCOT fully and efficiently mitigates any merger-related ability or incentive that Exelon might acquire as a result of the Transaction. As a result, this alternative proposal need not be required. Exelon strongly prefers its primary interim mitigation plan because it is less complicated and less costly to implement.

4. No Potential for Abuse of Natural Gas Transportation Market Power

The Commission’s Merger Policy and Merger Regulations also address the issue of the potential abuse of market power in the transportation of natural gas to gain a competitive advantage in energy markets. The concern is that when the ownership of natural gas assets serving electric generation facilities is combined with the ownership of electric generation facilities, the potential is created for the resulting merged company to use its control over the natural gas facilities to disadvantage the competing owners of the electric generation facilities. Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,904.²³

²³ The regulations governing vertical market power appear at Section 33.4 of the Merger Regulations.

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Here, neither Exelon nor NRG owns any natural gas transmission facilities. PECO does own natural gas distribution facilities and there are a number of independent natural gas-fired generation facilities in PECO's gas service territory. However, as Dr. Hieronymus explains, only a few generation facilities are served by PECO, and this minor amount of capacity served is unlikely to create vertical market power issues. Exhibit J-1 at 73. Moreover, PECO is obligated to provide open-access natural gas distribution service that is subject to continued regulation by the PAPUC. Under these circumstances, no vertical market power issues are raised by PECO's ownership of natural gas distribution facilities, particularly given that Exelon has committed to sell all of NRG's generation located in PJM East, where the PECO gas distribution system is located.

Finally, Dr. Hieronymus considered whether there could be any vertical market power issues raised by the combination of the natural gas transportation contract rights of Exelon and NRG, an issue that is not implicated by the Commission's merger regulations but which had been considered in the proposed merger of Exelon and PSEG. As Dr. Hieronymus observes, the Commission found that the Exelon/PSEG merger would not have raised vertical market power concerns with respect to their transportation contracts, and NRG has a significantly smaller share of transportation contracts than PSEG did. Exhibit J-1 at 73. Moreover, any contract rights that NRG has will be transferred to the purchaser of its generation facilities in PJM East. As a result, no vertical market power issues are raised with respect to the combination of natural gas transportation contract rights.

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C. No Adverse Impact On Rates

In considering the impacts of a merger on rates, the Commission looks primarily at impacts on transmission rates and on rates for long-term wholesale requirements customers. The Transaction will not have an adverse impact on either of these categories of rates.

1. Transmission Rates

With respect to transmission rates, Exelon proposes a hold harmless commitment, *i.e.* for a period of five years they will not seek to include merger-related costs in their filed transmission revenue requirements unless they can demonstrate merger-related savings equal to or in excess of the merger-related costs so included. The Commission has approved this type of commitment in its Merger Policy Statement and in a number of subsequent cases. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124; *see also Ameren Corp.*, 108 FERC ¶ 61,094 at P 6-8 (2004); *Great Plains Energy Incorporated*, 121 FERC ¶ 61,069 at P 48 (2007).

2. Wholesale Requirements Rates

Neither of the traditional franchised utilities involved in the Transaction has any wholesale requirements customers. Thus the Transaction can have no impact on any wholesale requirements rates and no commitments are required.

D. No Adverse Impact On Regulation

Although the Commission requires merger applicants to evaluate the effect of a proposed transaction on regulation, both at the federal and state level, the Commission indicated in Order No. 642 that it would not ordinarily set a merger application for hearing with respect to the impact on regulation unless: (a) the proposed transaction involves public utility subsidiaries of a registered holding company under the Public

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Utility Holding Company Act of 1935 (PUHCA 1935) and the relevant applicants do not commit to abide by the Commission s policies on pricing of non-power goods and services between affiliates, or (b) the affected state commissions lack authority over the proposed transaction and raise concerns about the effect on regulation. Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914-15. Neither of these concerns is raised by this Application.

The first prong of the test in the Merger Policy Statement no longer is applicable since the repeal of PUHCA 1935. Moreover, Exelon s and NRG s public utility subsidiaries will each remain as a jurisdictional public utility subject to regulation by the Commission after the Transaction closes to the same extent each was regulated before the closing of the Transaction. As a result, there will be no impact on the Commission s jurisdiction.

Nor does the Transaction have any impact on state regulation. Pennsylvania and Illinois will have the same jurisdiction over PECO and ComEd after the Transaction that they have today. No other state public utility commission with jurisdiction over any other Exelon or NRG entity will have its jurisdiction affected in any respect.

E. No Improper Cross-Subsidization

Under the amendments to Section 203 implemented by the Energy Policy Act of 2005, the Commission shall approve a proposed transaction if it finds that the proposed 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 cross-subsidization, pledge, or encumbrance will be consistent with the public interest. FPA § 203(a)(4).

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In Order Nos. 669, 669-A and 669-B, the Commission identified a four-factor test that applicants must satisfy in order to address the concerns identified in Section 203 regarding any possible cross-subsidization, pledge or encumbrance of utility assets associated with the proposed transaction. Under this test, the Commission examines whether a proposed transaction, at the time of the transaction or in the future, results in:

- (1) transfers of facilities between a traditional utility associate company with wholesale or retail customers served under cost-based regulation and an associate company;
- (2) new issuances of securities by traditional utility associate companies with wholesale or retail customers served under cost-based regulation for the benefit of an associate company;
- (3) new pledges or encumbrances of assets of a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company;
- (4) new affiliate contracts between non-utility associate companies and traditional utility associate companies with wholesale or retail customers served under cost-based regulation, other than non-power goods and services agreements subject to review under Sections 205 and 206 of the FPA.

Order No. 669 at P 169, FERC Stats. & Regs. ¶ 31,200; Order No. 669-A, FERC Stats. & Regs. ¶ 31,214 at P 144. Exhibit M hereto contains a verification, based on facts and circumstances known to Exelon or that are reasonably foreseeable, that the Transaction will not result in any of the above-outlined transfers of facilities, issuances or securities, pledges or encumbrance of assets or other agreements. Exhibit M also contains, as required by 18 CFR § 33.2(i), the existing pledges and encumbrances of the regulated utilities, ComEd and PECO (the Regulated Companies).

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As an additional measure of protection to ensure that the Transaction cannot result in any inappropriate cross subsidization of non-utility businesses by captive utility customers, Exelon is offering a comprehensive package of ring-fencing measures by which they commit to be bound upon closing of the Transaction. Exelon recognizes that the Transaction will expand the scope of Exelon's operations in competitive power businesses. Consequently, Exelon has decided to take appropriate steps to ensure that the Regulated Companies and their customers will not be affected adversely by the business cycles and risks that accompany competitive power businesses. The below-outlined ring-fencing measures go well beyond normal practices and ensure that the Transaction will not result in any change to the operations of the Regulated Companies.

Attached is an affidavit of Susan D. Abbott, an expert in utility credit ratings. Ms. Abbott worked for 20 years for Moody's Investors Services where, as Managing Director, she was responsible for the ratings of public electric and combination utilities, and project finance deals. Ms. Abbott has examined Exelon's ring-fencing commitments (set forth below) and concludes that they go beyond what the rating agencies (Moody's and Standard & Poor's) look for to consider a utility effectively ring-fenced from its parent and non-utility affiliates. In reaching this conclusion, Ms. Abbott explains Moody's very specific ring-fencing conditions and Standard & Poor's more general ring-fencing guidelines, and compares Exelon's commitments to the rating agencies' conditions for achieving effective ring-fencing.

Further, Ms. Abbott discusses the ring-fencing measures that protected Portland General Electric Company from Enron's bankruptcy and concludes that Exelon's commitments compare favorably to the Portland General measures. The Portland General ring-fencing measures are proven because neither Portland General's customers nor its bondholders suffered the effects of Enron's demise and bankruptcy, and Portland General was able to maintain a 9 credit rating notch difference above Enron. Given the favorable comparison of Exelon's commitments to Portland General's measures, Ms.

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Abbott is comfortable that Exelon's proposed provisions will ring-fence ComEd and PECO effectively. Ms. Abbott believes that Exelon's commitments satisfy the conditions of the rating agencies, and will provide an even stronger foundation for protection of ComEd and PECO from parent or affiliate financial difficulties than was in place for Portland General.

Ring-Fencing Commitments

The following ring-fencing commitments encompass both existing business practices and new procedures, and upon consummation of the Transaction these practices and procedures will become binding commitments that can be counted on by regulators as well as rating agencies and utility creditors. These ring-fencing commitments include the following:

Corporate Governance. The Regulated Companies each will 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.²⁴

Duties of the Boards of Directors. Under the laws of Illinois and Pennsylvania respectively, 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.

²⁴ For purposes of the following commitments, references to Exelon affiliates shall not, in the case of ComEd, include subsidiaries of ComEd, and shall not, in the case of PECO, include subsidiaries of PECO.

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Board Action. 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:

- a) seeking protection or relief under federal or state bankruptcy, insolvency, moratorium or similar law affecting the rights of creditors;
- b) the declaration and payment of dividends on its common stock; and
- c) 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.

Maintenance of Capital Structure. ComEd and PECO 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.

Cost of Capital of Regulated Distribution Operations. 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.

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Investment Conditions. Without prior regulatory approval from either the ICC or the PAPUC as appropriate, neither ComEd nor PECO shall:

- a) guarantee the debt or credit instruments of Exelon or any other Exelon affiliate;
- b) 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;
- c) include in any of ComEd's or PECO's debt or credit agreements cross default provisions between their respective securities and the securities of Exelon or any other Exelon affiliate;
- d) include in ComEd's or PECO's debt or credit agreements any financial covenants or rating agency triggers related to Exelon or any other Exelon affiliate.

Intercompany Borrowings. Neither ComEd nor PECO will lend money to, or borrow money from, Exelon or any other Exelon affiliate except pursuant to money pool arrangements filed with FERC.

Transactions Between Regulated Companies and Exelon Affiliates. ComEd and PECO 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 ComEd nor PECO, as applicable, bears costs associated with the business activities of any other Exelon affiliate other than the reasonable costs of providing materials and services to ComEd or PECO, as the case may be. ComEd and PECO 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 ICC and the PAPUC, respectively, and the FERC.

²⁵ Any money pool agreement will be filed for informational purposes in Docket No. RM02-14. 18 CFR § 141.500; *see also* Order No. 634-A, *Regulation of Cash Mgmt. Practices*, Order No. 634-A, FERC Stats. & Regs. ¶ 31,152 at P 39 (2003) (implementing reporting requirements for regulated entities that participate in cash management programs; requiring regulated entities file their cash management agreements with the Commission, and [] file any subsequent changes within 10 days from the date of change.)

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Books and Records. ComEd and PECO will each maintain its own separate books and records. Upon written request, Exelon will provide to the ICC, PAPUC and the FERC 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, respectively, to the ICC, the PAPUC or FERC jurisdiction. However, nothing set forth herein shall constitute or be interpreted as a waiver by Exelon or the Regulated Companies of their right to raise traditional discovery objections to any such requests, including, but not limited to, objections on the basis of relevance and privilege. Additionally, before responding to any such requests, Exelon or the Regulated Companies shall be permitted to require the imposition of protections to prohibit disclosure of proprietary or confidential information.

Notification of Certain Payments and Transfer of Funds. ComEd and PECO will notify the ICC and the PAPUC, respectively, 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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Ownership and Transfer of Assets. ComEd and PECO 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 ICC and the PAPUC, respectively, and any requisite approval under the Federal Power Act.

Non-Consolidation Opinion. Within 90 days of closing the Transaction, ComEd and PECO each will deliver to the ICC, the PAPUC, respectively, and the FERC an opinion of counsel that, in the event of a bankruptcy or liquidation of Exelon, then ComEd or PECO, as the case may be, will not be consolidated with or into the estate of Exelon and, in the event of a bankruptcy or liquidation of ComEd or PECO, as the case may be, then Exelon will not be consolidated with or into the estate of ComEd or PECO, as applicable.

Implementation of the above-outlined commitments, which can be changed only with Commission approval, will ring-fence ComEd and PECO from Exelon and other affiliates, thereby foreclosing the potential for cross-subsidization resulting from the Transaction. With these commitments, the Transaction readily meets the requirements of Section 203(a)(4).

F. The Internal Reorganization is Consistent with the Public Interest

As noted in Section III.C above, Exelon anticipates that there will be some internal reorganization of the combined company's corporate structure that cannot be precisely 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 into a structure that makes more sense for the combined company.

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Any such reorganization will be consistent with the requirements for blanket authorization under Section 33.1(c)(6) of the Commission's regulations. There will be no reorganization of either PECO or ComEd, which are the only traditional public utilities owned by either Exelon or NRG. Nor will that part of the holding company structure that includes PECO and ComEd be revised in any fashion, *i.e.* there will be no changes from Exelon Energy Delivery Company LLC and below, as shown on the organization chart attached as Exhibit C. Furthermore, the reorganization will not raise any cross-subsidization issues other than the ones raised by the Transaction in general, which are described above. Exelon therefore believes that the internal reorganization qualifies for the blanket authorization under Section 33.1(c)(6) and will not require the Commission's specific authorization in this proceeding. To the extent that the Commission disagrees, Exelon requests that the Commission authorize this reorganization as part of its authorization of the Transaction. Such authorization would be conditioned upon compliance with the commitment that neither PECO nor ComEd would be included in the reorganization.

VI. INFORMATION REQUIRED BY PART 33 OF THE COMMISSION'S REGULATIONS

Exelon submits the following information pursuant to Part 33 of the Commission's Regulations.

A. Section 33.2(a): Names and addresses of the principal business offices of the applicants.

1. Exelon's principal executive offices are located at 10 South Dearborn Street, Chicago, Illinois 60603.
2. NRG's principal business offices are located at 211 Carnegie Center, Princeton, NJ 08540-6213

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B. Section 33.2(b): Names and addresses of persons authorized to receive notices and communications in respect to the Application.

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C. Section 33.2(c): Description of Applicants.

See Section II, and Exhibits A through F, attached.

D. Section 33.2(d): Description of the jurisdictional facilities owned, operated or controlled by Applicants, their parents or affiliates.

See Section II and the testimony of Dr. Hieronymus.

E. Section 33.2(e): Narrative description of the Transaction.

A narrative description of the Transaction is provided in Part III of this Application.

F. Section 33.2(f): Contracts with respect to the Transaction.

See Exhibit I.

G. Section 33.2(g): Facts relied upon to show that the Transaction is in the public interest.

The facts relied upon to show that the Transaction is consistent with the public interest are set forth in Part V of this Application and in the testimony of Dr. Hieronymus, attached as Exhibit J.

H. Section 33.2(h): Physical property.

See Exhibit K.

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I. Section 33.2(i): Status of actions before other regulatory bodies.

See Exhibit L.

J. Section 33.5: Accounting Entries

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. Exelon does not intend to reflect any aspect of the Transaction on the books of either PECO or ComEd, and therefore there are no pro forma accounting entries to provide.

VII. CONCLUSION

As demonstrated above, as well as in the attached testimony and exhibits, the Transaction is consistent with the public interest as defined by the Commission in its Merger Policy Statement, Part 33 regulations, and merger cases. Exelon requests that the Commission approve the Transaction, without a hearing, no later than May 1, 2009.

Respectfully submitted,

/s/ Mike Naeve

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Counsel for
Exelon Corporation

December 18, 2008

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Exelon Corporation

) **Docket No. EC09-_____**
VERIFICATION

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District of Columbia)
) ss.
City of Washington)

NOW, BEFORE ME, the undersigned authority, personally came and appeared, Elizabeth A. Moler, who, after first being duly sworn by me, did say:

That she is Executive Vice President of Exelon Corporation; that she has the authority to verify the foregoing application and exhibits on behalf of Exelon Corporation]; that she has knowledge of the matters therein; and that to the best of her knowledge, information and belief, the representations made are true and correct.

SUBSCRIBED AND SWORN to before me this ____ day of _____ 2008. Elizabeth A. Moler

Notary Public

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Appendix 1 PJM East Mitigated Units

Exelon PJM East Mitigated Units

Sub Market	Unit Name	Unit Type
East	Chester 7-9	Peaker
East	Cromby 1,2	Coal/Oil
East	Croydon	Peaker
East	Delaware 9-12, D1	Peaker
East	Eddystone 1-4	Coal/Oil/NG
East	Eddystone 10-40	Peakers
East	Fairless Hills A,B	LFG/NG
East	Falls 1-3	Peakers
East	Montenay	Biomass Steam
East	Moser 1-3	Peakers
East	Muddy Run 1-8	Pumped Storage
East	Pennsbury	LFG
East	Richmond 91, 92	Peakers
East	Schuylkill 1	Oil
East	Schuylkill 10,11	Peakers
East	Conowingo 1-11	Hydro
East	Southwark 3-6	Peaker

NRG PJM East Mitigated Units

Sub Market	Unit Name	Unit Type
East	Indian River	Coal/Oil
East	Dover	NG/Coal
East	Vienna	Oil

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Appendix 2 *ERCOT Mitigated Units*

Exelon ERCOT Mitigated Units

Unit Name	Region	Capacity (MW)
Handley 3	ERCOTN	395MW
Handley 4, 5	ERCOTN	870MW
Mountain Creek 6, 7	ERCOTN	240MW
Mountain Creek 8	ERCOTN	565MW
LaPorte	ERCOTH	152MW
Wolf Hollow (PPA)	ETCOTN	350MW
Frontier (PPA)	SERC (Entergy- Texas)	830MW

NRG ERCOT Mitigated Units

Unit Name	Region	Capacity (MW)
WA Parish coal	ERCOTH	2,460MW
Limestone coal	ERCOTN	1,690MW
Cedar Bayou	ERCOTH	1,500MW
TH Wharton	ERCOTH	1,025MW
WA Parish	ERCOTH	1,190MW
SR Bertron	ERCOTH	840MW
Greens Bayou	ERCOTH	760MW
San Jacinto	ERCOTH	165MW

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Appendix 3

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

Exelon Corporation

) **Docket No. EC09-_____**
PROPOSED

PROTECTIVE ORDER

1. This Protective Order shall govern the use of all Protected Materials produced, by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Presiding Administrative Law Judge (Presiding Judge) or the Federal Energy Regulatory Commission (Commission).

2. A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury. A Participant may also designate as protected those materials that should be treated as Critical Energy Infrastructure Information subject to protection under Sections 388.112 and 388.113 of the Commission s regulations.

3. Definitions For purposes of this Order:

(a) The term Participant shall mean a Participant as defined in 18 C.F.R. § 385.102(b).

(b) (1) The term Protected Materials means (A) materials (including depositions) provided by a Participant in response to discovery requests and designated by such participant as protected; (B) any information contained in or obtained from such materials; (C) any other materials which are made subject to this Protective Order by the Presiding Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants; (D) notes of Protected Materials; and (E) copies of Protected Materials. The Participant producing the Protected Materials shall physically mark them on each page as PROTECTED MATERIALS or with words of similar import as long as the term Protected Materials is included in that designation to indicate that they are Protected Materials.

(2) The term Notes of Protected Materials means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 3(b)(1). Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials except as specifically provided in this order.

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(3) Protected Materials shall not include (A) any information or document contained in the files of the Commission, or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order.

(c) The term **Non-Disclosure Certificate** shall mean the certificate annexed hereto by which Participants who have been granted access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding.

(d) The term **Reviewing Representative** shall mean a person who has signed a Non-Disclosure Certificate and who is:

- (1) Commission Litigation Staff;
- (2) an attorney who has made an appearance in this proceeding for a Participant;
- (3) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in (2);
- (4) an expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;
- (5) person designated as a Reviewing Representative by order of the Presiding Judge or the Commission; or
- (6) employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.

4. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided in Paragraphs 7, 8, and 9.

5. Protected Materials shall remain available to Participants until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Protected Material is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that

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contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraph 6, below. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order.

6. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 8 and 9. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities.

For documents submitted to Commission Litigation Staff (Staff), Staff shall follow the notification procedures of 18 C.F.R. § 388.112 before making public any materials.

7. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

8. (a) If a Reviewing Representative's scope of employment includes the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy, the provision of consulting services to any person whose duties include the marketing of energy, or the direct supervision of any employee or employees whose duties include the marketing of energy, such Reviewing Representative may not use information contained in any Protected Materials obtained in this proceeding to give any Participant or any competitor of any Participant a commercial advantage.

(b) In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 3(d) above, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached, that person shall be a Reviewing Representative pursuant to Paragraph 3(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Presiding Judge for resolution.

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(c) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate provided that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

9. Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

10. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraphs 3(d), access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

11. Subject to Paragraph 17, the Presiding Judge shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Presiding Judge, the parties to the dispute shall use their best efforts to resolve it.

12. If a Participant tenders for filing any written testimony, exhibit, brief or other submission that includes, incorporates, or refers to Protected Materials, all portions thereof referring to such materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS" and shall be filed under seal and served under seal upon the Presiding Judge and all Reviewing Representatives who are on the service list. For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such, will also be filed with the Commission and served on all parties on the service list and the Presiding Judge. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

If any Participant desires to include, utilize or refer to any Protected Materials in such a manner that might require disclosure of such material, such Participant shall first notify both counsel for the producing Participant and the Presiding Judge of such desire, identifying with particularity each of the Protected Materials and the proposed manner of their use, and shall provide to both counsel for the producing Participant and the Presiding Judge, in a sealed envelope bearing the caption "PROTECTED MATERIALS" copies of the Protected Materials in the form they are intended to be used. Notification of the desire to use protected materials at trial without in camera restrictions shall be provided to counsel for the producing Participant not more than 10 calendar days prior to the date established for the oral argument to show cause. If the

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producing Participant is unwilling to waive objection to disclosure of such Protected Materials, the producing Participant shall provide to the Presiding Judge, not later than five days after the receipt of the Reviewing Participant's notification, affidavits²⁶ with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials, and a Master Index of the Protected Materials, and/or within the same time period the Participants shall file a trial stipulation waiving application of the Protective Order to the use at and after trial of Protected Material relative to adjudication of the stipulated issues, other than any Protected Materials applicable to Critical Energy Infrastructure information. The affidavit shall set forth facts delineating that the information designated as Protected Materials has been maintained in a confidential manner and the precise nature and justification for the monetary injury that would result from the disclosure of such information. The affidavit shall specify the name and corporate position of the person or persons supplying or preparing or assisting in the preparation of the information designated as Protected Materials and the name and corporate position of the person or persons to whom such information has been communicated. The producing Participant shall provide copies of the affidavits and Master Index of Protected Materials to each Reviewing Participant. Oral argument to show cause why such Protected Materials should remain protected shall be held in accordance with the procedural schedule in this proceeding. All objections and arguments related to the Protected Materials shall be conducted in camera, closed to all parties except the Reviewing Representatives as described in Paragraph 3(d), hereof. That portion of the hearing transcript which refers to such Protected Materials shall be sealed and subject to this Protective Order. All Protected Materials which ultimately may be admitted into evidence, shall be filed in sealed, confidential envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order.

13. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

14. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge, the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The Presiding Judge may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

15. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge or the Commission.

16. All Protected Materials filed with the Commission, the Presiding Judge, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order.

²⁶ The affidavits shall comply with International Paper Company v. Fireboard Corp., 63 FRD 88, 93-94 (D. Del. 1974) and Parsons v. General Motors Corp., 85 FRD 724, 726 (N.D. Ga 1980), and, if claims of work-product are concerned, with Cajun Electric Power Coop., Inc. v. Gulf States Utilities Co., 43 FERC ¶ 63,012 at 65,129 (1988).

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17. In the event that the Presiding Judge at any time in the course of this proceeding finds that all or part of the Protected Materials are not confidential, those materials nevertheless shall continue to be subject to the protection afforded by this Protective Order for three (3) business days from the date of issuance of the Presiding Judge's decision, and if the Participant seeking protection files an interlocutory appeal or requests that the issue be certified to the Commission, for an additional seven (7) business days. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Presiding Judge's decision respecting Protected Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof. The provisions of 18 C.F.R. § 388.112 shall apply to any requests for Protected Materials in the files of the Commission under the Freedom of Information Act. (5 USC § 552).

18. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

19. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

20. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this (these) proceeding(s). Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Exelon Corporation

) **Docket No. EC09-_____**
NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By:

Title:

Representing:

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Exhibit A

Exhibit A: Business Activities of Applicants

The business activities of Exelon are further described in Part II of this Application and in the attached testimony.

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Exhibit B

Exhibit B: List of Energy Subsidiaries and Affiliates

EXELON

A list of Exelon's energy subsidiaries and affiliates is attached as Exhibit B.1.

NRG

A list of NRG's energy subsidiaries and affiliates is attached as Exhibit B.2. This list is taken from NRG's most recent Section 203 filing in Docket No. EC07-93-000. Exelon does not know if there have been any material changes to this list that have not been reported by NRG.

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Exhibit B-1

Exhibit B-1 Exelon Affiliates:**(All companies are 100% owned directly or indirectly by Exelon Corporation)**

All Energy Gas & Electric Marketing Co., LLC	Sells natural gas at retail to commercial and industrial customers.
AmerGen Energy Company, LLC	AmerGen owns and operates Three Mile Island Unit 1 located in Pennsylvania, the Clinton Power Station located in Illinois and the Oyster Creek Generating Station in New Jersey.
Commonwealth Edison Company	Provides retail electric services to customers in and around Chicago.
Commonwealth Edison Company of Indiana, Inc.	Principally engaged in the transmission of electricity which is sold to the ComEd service territory.
ENEH Services, LLC	Provide operations and maintenance services to affiliated electric generation facilities in New England.
Exelon AOG Holding #1, Inc.	Holding Company.
Exelon AOG Holding #2, Inc.	Holding Company.
Exelon Energy Company	Provides gas and electric service to commercial and industrial customers in Illinois, Ohio, Pennsylvania, and Michigan.
Exelon Framingham, LLC	Fossil fueled peaking plants (Framingham 1, 2 and 3), utilizing a combination of fuel oil and natural gas.
Exelon Generation Company, LLC	Owns Exelon's generating assets and coordinates the dispatch and sale of generation, and markets energy in the wholesale, bilateral and spot markets.
Exelon New Boston LLC	Fossil fueled peaking plant (20 MW).
Exelon New England Power Marketing, Limited Partnership	Power Marketer.
Exelon West Medway, LLC	Fossil fueled peaking plants (Medway 1, 2 and 3) utilizing a combination of fuel oil and natural gas.
Exelon Wyman	Fossil fueled peaking plant with 36 MW. Exelon owns a 5.88% proportionate interest in this facility (operated by Florida Power and Light.)
PECO Energy Company	Provides electric and gas services in southeastern Pennsylvania.

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Exhibit B-1

PECO Energy Power Company	Owns 514 MW Conowingo Hydroelectric Project, a generating facility located on the Susquehanna River in Pennsylvania and Maryland. PEPCO owns Pennsylvania portion of the Conowingo project. The Maryland portion is owned by PEPCO's subsidiary, Susquehanna Power Company.
Southeast Chicago Energy Project, LLC	Owns a peaking plant in Chicago, Illinois.
Susquehanna Electric Company	Leases and operates Conowingo project; sells bulk power to PECO Energy Company; does not serve the public.
Susquehanna Power Company	Owns Maryland part of Conowingo project. (See PECO Energy Power Company - 514 MW Conowingo Hydroelectric Project, a generating facility located on the Susquehanna River in Pennsylvania and Maryland. PEPCO owns Pennsylvania portion of the Conowingo project.)

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Exhibit B-2

Exhibit B-2 NRG Energy Subsidiaries and Affiliates:

Subsidiary Name	Description	NRG
Arthur Kill Power LLC	Generator	100.00%
Astoria Gas Turbine Power LLC	Generator	100.00%
Bayou Cove Peaking Power, LLC	Generator	100.00%
Berrians I Gas Turbine Power LLC	Generation project development company	100.00%
Big Cajun I Peaking Power LLC	Generator	100.00%
Big Cajun II Unit 4 LLC	Generation project development company	100.00%
Cabrillo Power I LLC	Generator	100.00%
Cabrillo Power II LLC	Generator	100.00%
Camas Power Boiler Limited Partnership	Owns boiler in Camas paper mill in Washington	100.00%
Camas Power Boiler, Inc.	General partner in Camas Power Boiler Limited Partnership	100.00%
Conemaugh Power LLC	Generator (owns 3.72% of generator)	100.00%
Connecticut Jet Power LLC	Generator	100.00%
Devon Power LLC	Generator	100.00%
Dunkirk Power LLC	Generator	100.00%
Eastern Sierra Energy Company	Holds partnership interest in Saguaro facility	100.00%
El Segundo Power II LLC	Generation project development company; has filed for market-based rate authority	100.00%
El Segundo Power, LLC	Generator	100.00%
Elbow Creek Wind Project LLC	Wind project development company	100.00%
ESOCO, Inc.	Domestic holding company for individual ESOCO O&M companies	100.00%
Granite II Holding, LLC	Holding company for the inactive Batesville, Kendall and Denver City projects acquired from LS Power, LLC	100.00%
Granite Power Partners II, L.P.	Holding company for all LS Power, LLC's equity interest in independent power projects acquired by NRG on 1/20/2001	100.00%
Hoffman Summit Wind Project, LLC	Wind project development company	100.00%
Huntley Power LLC	Generator	100.00%
Indian River Operations Inc.	Provided O&M services to Indian River Power LLC	100.00%

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Exhibit B-2

Subsidiary Name	Description	NRG
Indian River Power LLC	Generator	100.00%
Keystone Power LLC	Generator (owns 3.7% of generator)	100.00%
Lake Erie Properties Inc.	Ethanol project development company	100.00%
Long Beach Generation LLC	Generator	100.00%
Louisiana Generating LLC	Generator	100.00%
LSP-Nelson Energy, LLC	Generation project development company	100.00%
Meriden Gas Turbines LLC	Generation project development company	100.00%
Middletown Power LLC	Generator	100.00%
Montville Power LLC	Generator	100.00%
NEO Corporation	Holding company for NEO Freehold-Gen LLC	100.00%
NEO Freehold-Gen LLC	Generator	100.00%
New Genco GP, LLC	Holding company for Texas non-nuclear assets	100.00%
New Genco LP, LLC	Holding company for Texas non-nuclear assets	100.00%
Norwalk Power LLC	Generator	100.00%
NRG Arthur Kill Operations Inc.	Provided O&M services to Arthur Kill Power LLC	100.00%
NRG Astoria Gas Turbine Operations Inc.	Provided O&M services to Astoria Gas Turbine Power LLC	100.00%
NRG Bayou Cove LLC	Holding company for Bayou Cove Peaking Power, LLC	100.00%
NRG Cabrillo Power Operations Inc.	Provided O&M services to Cabrillo Power I LLC and Cabrillo Power II LLC	100.00%
NRG California Peaker Operations LLC	Provided operating services to Red Bluff and Chowchilla II peaker plants in northern California	100.00%
NRG Capital II LLC	Holds the membership interest in NRG Peaker Finance Company LLC	100.00%
NRG Development Company Inc.	Created to conduct development activities in the U.S.	100.00%
NRG Devon Operations Inc.	Provided O&M services to Devon Power LLC	100.00%
NRG Dunkirk Operations, Inc.	Provided O&M services to Dunkirk Power LLC	100.00%
NRG El Segundo Operations, Inc.	Provided O&M services to El Segundo and Long Beach power stations	100.00%
NRG Energy Center Dover LLC	Generator	100.00%

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Exhibit B-2

Subsidiary Name	Description	NRG
NRG Energy Center Harrisburg Inc.	Provides district heating services in Pennsylvania	100.00%
NRG Energy Center Minneapolis LLC	Provides district heating services in Minnesota	100.00%
NRG Energy Center Paxton LLC	Owns cogeneration facility and sells steam to NRG Energy Center Harrisburg	100.00%
NRG Energy Center Pittsburgh	Provides district heating services in Pennsylvania	100.00%
NRG Energy Center Rock Tenn LLC	Owns assets in connection with the sale of steam to Rock-Tenn Corporation in St. Paul, Minnesota	100.00%
NRG Energy Center San Diego LLC	Provides district heating and cooling services in California	100.00%
NRG Energy Center San Francisco LLC	Provides district heating and cooling services in California	100.00%
NRG Energy Center Smyrna LLC	Provides O&M services to Smyrna, Delaware s Warren F. Beasley plant	100.00%
NRG Energy Jackson Valley I, Inc.	General partner in Jackson Valley Energy Partners, L.P.	100.00%
NRG Energy Jackson Valley II, Inc.	Limited partner in (i) Jackson Valley Energy Partners, L.P., (ii) San Joaquin Valley Energy Partners I, L.P., (iii) San Joaquin Valley Energy Partners IV, L.P. and (iv) Bioconversion Partners, L.P.	100.00%
NRG Generation Holdings Inc.	Holding company for Texas assets	100.00%
NRG Granite Acquisition LLC	Acquisition company used to purchase LS Power, LLC s independent power project portfolio	100.00%
NRG Huntley Operations Inc.	Provided O&M services to Huntley Power LLC	100.00%
NRG Mesquite LLC	Limited partner of Kaufman Cogen LP	100.00%
NRG Middletown Operations Inc.	Provided O&M services to Middletown Power LLC	100.00%
NRG Montville Operations Inc.	Provided O&M services to Montville Power LLC	100.00%
NRG New Jersey Energy Sales LLC	Power marketing entity	100.00%
NRG New Roads Holdings, LLC	Holding company to hold title to certain Cajun assets	100.00%
NRG Norwalk Harbor Operations Inc.	Provided O&M services to Oswego Power LLC and Norwalk Power LLC	100.00%
NRG Operating Services, Inc.	Provides operations and maintenance services for operating affiliates	100.00%

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Exhibit B-2

Subsidiary Name	Description	NRG
NRG Oswego Harbor Power Operations Inc.	Provided O&M services to Oswego Power LLC	100.00%
NRG PacGen Inc.	Holding company which acquired 100% of the stock of Pacific Generation Company	100.00%
NRG Power Marketing Inc.	Power marketing entity	100.00%
NRG Rockford Acquisition LLC	Holding company for certain U.S. projects	100.00%
NRG Rockford II LLC	Generator	100.00%
NRG Rockford LLC	Generator	100.00%
NRG Rocky Road LLC	Inactive	100.00%
NRG Saguardo Operations Inc.	Operator of generator in Henderson, Nevada	100.00%
NRG South Central Generating LLC	Holding company for subsidiaries in south central region	100.00%
NRG South Central Operations Inc.	Provides operations and maintenance services for affiliates in South Central region	100.00%
NRG South Texas LP	Owns 44% undivided interest in South Texas Project	100.00%
NRG Sterlington Power LLC	Generator	100.00%
NRG Telogia Power LLC	Holds 50% interest in Telogia Power Inc.	100.00%
NRG Texas LLC	Holding company for NRG South Texas LP and NRG Texas LP	100.00%
NRG Texas LP	Generator	100.00%
NRG Thermal LLC	Holding company for district heating and cooling projects and other U.S. projects	100.00%
NRG West Coast LLC	Formed as holding company for west coast limited liability companies	100.00%
ONSITE Energy, Inc.	Domestic holding company for ONSITE Marianas Corporation and limited partnership interest in Turners Falls project	100.00%
Oswego Harbor Power LLC	Generator	100.00%
Pacific Generation Company	Holding company for certain U.S. subsidiaries	100.00%
Pacific Generation Holdings Company	Holds limited partnership interest in Project Finance Fund III	100.00%
Padoma Wind Power, LLC	Wind farm developer	100.00%
Saguardo Power Company, L.P.	Generator	50.00%

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Exhibit B-2

Subsidiary Name	Description	NRG
Saguaro Power LLC	Holding company for Eastern Sierra Energy Company which owns a 50% interest in Saguaro Power Company	100.00%
San Joaquin Valley Energy I, Inc.	General partner in San Joaquin Valley Energy Partners I, L.P.	100.00%
San Joaquin Valley Energy IV, Inc.	General Partner in San Joaquin Valley Energy Partners IV, L.P. and Bioconversion Partners, L.P.	100.00%
San Juan Mesa Wind Project II, LLC	Wind project development company	100.00%
Somerset Operations Inc.	Provided O&M services to Somerset plant	100.00%
Somerset Power LLC	Generator	100.00%
Telogia Power Inc.	Owns 100% of Timber Energy Resources, Inc.	100.00%
Texas Genco GP, LLC	Holding company for ownership interests in South Texas Project	100.00%
Texas Genco Holdings, Inc.	Holding company for ownership interests in South Texas Project	100.00%
Texas Genco LP, LLC	Holding company for ownership interests in South Texas Project	100.00%
Vienna Power LLC	Generator	100.00%
WCP (Generation) Holdings LLC	Holding company for West Coast Power LLC	100.00%
West Coast Power LLC	Holding company for Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power, LLC, El Segundo Power II, LLC and Long Beach Generation LLC	100.00%

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Exhibit C

Exhibit C: Organizational Charts Depicting Current and Post-Transaction Structure

Attached are organizational charts that depict the pertinent corporate structure both before and after the Transaction. As described in Section III of this Application, Exelon may engage in certain additional reorganization to best align the assets of the two companies. Such additional reorganization will not involve PECO or ComEd.

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Exhibit C

Figure 1: Simplified Current Organization Chart for NRG Energy, Inc.

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Figure 2: Simplified Current Organization Chart for Exelon Corporation

* Exelon has additional subsidiaries besides the subsidiaries identified. These other subsidiaries do not own generation assets and are not material to the Commission's review of the Transaction.

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Figure 3: Simplified Proposed Final Structure Under Exchange Offer Structure

* Internal reorganizations may result in alternative structures, including either NRG Energy, Inc. being a direct subsidiary of Exelon Ventures Company, LLC or a merger of NRG Energy, Inc. into Exelon Generation Company, LLC

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Figure 4: Simplified Proposed Organization Chart Under Negotiated Agreement

Note: This structure involves the merger of Exelon Corporation into NRG Energy, Inc. with NRG being the surviving corporation and NRG's subsidiaries becoming subsidiaries of Exelon Generation Company. A negotiated transaction also may result in one of the final structures described in Figure 3.

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Exhibit D

Exhibit D: Description of All Joint Ventures, Strategic Alliances, Tolling Arrangements or Other Business Ventures

A description of all of Exelon's joint ventures, strategic alliances, tolling arrangements and other business ventures appears below. Exelon is not aware of any joint ventures, strategic alliances, tolling arrangements and other business ventures of NRG that are not described in Exhibit B.

Exelon Ownership Interests in Joint Ventures:

Chicago Equity Fund (<10%)

Conemaugh Fuels, LLC (20.72%)

Dearborn Park Corporation (<10%)

I.L.P. Fund C/O Chicago Capital Fund (<10%)

Keystone Fuels, LLC (20.99%)

Northwind Windsor (50%)

NuStart Energy Development, LLC (10%)

PECO Energy Capital, LP (3%)

Exelon Ownership Interests in Generation:

Conemaugh Generating Station Nuclear and Fossil (20.72%)

Keystone Generating Station Nuclear and Fossil (20.99%)

Merrill Creek Reservoir Project used for cooling water (44.24%)

Peach Bottom 2&3 Nuclear (50%)

Quad Cities 1&2 Nuclear (75%)

Salem Units 1&2 Nuclear and Fossil (42.59%)

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Exhibit E

Exhibit E: Common Officers or Directors of the Parties to the Transaction

There are no common officers or directors between Exelon and NRG.

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Exhibit F

Exhibit F: Description and Location of Wholesale Power Sales Customers and Unbundled Transmission Services Served by Applicants or their Affiliates

PJM provides unbundled transmission service to ComEd and PECO transmission customers. Neither ComEd nor PECO has any unbundled transmission service customers.

Neither ComEd nor PECO has any wholesale power sales customers. Wholesale power sales customers served by Exelon's Power Team and NRG are filed with the Commission in the Electronic Quarterly Reports. Accordingly, Exelon requests a waiver of the requirement with respect to wholesale sales made by Exelon's Power Team and NRG.

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Exhibit G

Exhibit G: Description of Jurisdictional Facilities of Applicants and Their Affiliates

Exelon's NRG's and their affiliates' jurisdictional facilities are described in Parts II, III and V of this Application and in the testimony of William Hieronymus attached as Exhibit J.

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Exhibit H

Exhibit H: Jurisdictional Facilities and Securities Associated with or Affected by the Transaction

The jurisdictional facilities and securities associated with or affected by the Transaction are described in Parts II, III and V of this Application and in the testimony of William Hieronymus attached as Exhibit J.

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Exhibit I

Exhibit I: Contracts with Respect to the Disposition of Facilities

There are no contracts in effect with respect to the Transaction. However, Exelon is attaching its Form S-4 filing at the SEC, which describes in detail the terms and conditions of its tender offer to NRG's shareholders.

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Exhibit J-1

Exhibit J: Facts Relied upon to Demonstrate Consistency with Public Interest

The facts relied upon to show that the Transaction is consistent with the public interest are set forth in Part V of the Application and in the testimony of William Hieronymus attached as part of this Exhibit J.

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Exhibit J-1

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

Exelon Corporation

) Docket No. EC09-____-000

APPLICATION OF EXELON CORPORATION

UNDER SECTION 203 OF THE FEDERAL POWER ACT

PREPARED DIRECT TESTIMONY AND EXHIBITS OF

WILLIAM H. HIERONYMUS

ON BEHALF OF APPLICANT

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Exhibit J-1

**DIRECT TESTIMONY OF
WILLIAM H. HIERONYMUS**

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Exhibit J-1

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I. PURPOSE, SUMMARY OF ANALYSIS AND CONCLUSIONS

Introduction

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is William H. Hieronymus. I am a Vice President of CRA International Incorporated. My business address is 200 Clarendon Street, T-33, Boston, MA 02116.

Q. PLEASE SUMMARIZE YOUR RELEVANT PROFESSIONAL BACKGROUND.

A. For the past 32 years, the primary focus of my consulting has been on the electricity sector. For the past 20 years, I have worked primarily on the restructuring of the electricity industry from a fully regulated to a more competitively oriented model, both in the U.S. and abroad. Much of my time has been spent on market power issues. I have developed and commented on market power-related regulatory rules and Regional Transmission Organization (RTO) (or foreign equivalent) market power mitigation as well as on issues of market structure. I have testified before the Federal Energy Regulatory Commission (Commission) and other regulatory bodies on market power on numerous occasions. This includes a number of mergers and acquisitions over the past dozen years, including approximately 20 mergers among electric utilities and convergence mergers of electric utilities and natural gas pipelines. Among these, I was Applicant s market power witness in Docket No. EC00-26-000, the merger of Unicom and PECO Energy Company that formed Exelon Corporation, and in Docket No. EC05-43-000, the proposed merger of Exelon Corporation and Public Service Electric and Gas that ultimately did not occur. My resume is attached as Exhibit J-2.

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Purpose**Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

A. I have been asked by Exelon Corporation (Exelon) and all its jurisdictional public utilities (collectively, the Applicant) to evaluate the potential competitive impact of the merger of Exelon and NRG Energy, Inc. (NRG) on relevant electricity markets. I performed the Competitive Analysis Screen described in Appendix A to the Commission's Merger Policy Statement (Order No. 592³), modified in the Revised Filing Requirements Under Part 33 of the Commission's Regulations⁴. The Competitive Analysis Screen is intended to comport with the Department of Justice and Federal Trade Commission (DOJ/FTC) Horizontal Merger Guidelines (Guidelines). I also have analyzed other electricity-related product markets (e.g., ancillary services and capacity). I further provide analyses to show that the proposed mitigation cures all screen failures in all relevant markets.

The primary focus of my testimony is potential horizontal market power effects arising from the combination of the electric generating assets owned or controlled by Exelon and its affiliates and those owned or controlled by NRG and its affiliates that potentially could create or enhance the merged firm's ability to increase prices in the electricity market. I also address vertical effects concerning barriers to entry that might undercut the presumption that long-run generation markets are competitive and, more generally, the potential to use control over fuel supply, fuel transportation facilities, or electric transmission to exert vertical market power to increase rivals' costs.

¹ These include, among others, PECO Energy Company (PECO), Commonwealth Edison Company (ComEd), and Exelon Generation Company, LLC (Exelon Generation).

² The exhibits to the Application include a complete list of relevant affiliates of Applicant.

³ Order No. 592, *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, FERC Stats. & Regs. (Regulations Preambles) ¶ 31,044 (1996), *on reconsideration*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

⁴ Order No. 642, Final Rule in Docket No. RM98-4-000, 18 CFR Part 33, 93 FERC ¶ 61,164 (2000) (Revised Filing Requirements).

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Summary of Analysis and Conclusions**Q. DOES YOUR ANALYSIS INDICATE THAT THE MERGER RAISES COMPETITIVE CONCERNS?**

- A. No. Despite the fact that NRG and Exelon are two large generators in North America, there are only two markets where both have non-trivial amounts of generation. (See Table 1. below.)

Table 1: Summary of Generation Owned by Exelon and NRG

Balancing Authority Area ⁵	Exelon	NRG
PJM	23,698	1,644
ISO-NE	178	2,204
NYISO		4,051
ERCOT	3,405	13,269
CAISO		2,633
MISO	1,043	
NEVP		51
CSWS	795	
EES/LAGN	853*	2,994
SOCO	933	
Total	30,052*	26,847

* The 853 MW connected to EES also is connected to ERCOT. The total removes the double count.

These two markets are PJM East,⁶ which is a submarket of the PJM Interconnection, L.L.C. (PJM) market and in some zones within the Electric Reliability Council of Texas, Inc. (ERCOT). Even in these markets, HHI changes are only slightly in excess of safe harbor levels and only in some time periods. Neither market is highly concentrated, and indeed, concentrations are at most at the low end of moderately concentrated. The Commission has previously approved mergers with similar screen results. Notwithstanding the modest competitive effects of the transaction, Exelon has proposed a mitigation plan that eliminates any screen failures and resultant competitive concerns that might have existed as a result of the merger. Its "clean sweep" approach commits to divesting all generation owned or controlled by Exelon in ERCOT, and all generation owned or controlled by NRG in PJM East. PJM East and submarkets within ERCOT are the only markets in which the combined firm would, absent mitigation, be a

⁵ The abbreviations in Table 1 (other than those already identified) are as follows: ISO-New England Inc. (ISO-NE), New York Independent System Operator, Inc. (NYISO), California Independent System Operator Corporation (CAISO), Midwest Independent System Operator, Inc. (MISO), the Nevada Power Company balancing authority area (NEVP), the Central and Southwest Services (also known as AEP-West) balancing authority area (CSWS), the Entergy Services, Inc. balancing authority area (EES), the Louisiana Generating, LLC (LAGN) and the Southern Company Services, Inc. (SOCO) balancing authority area.

⁶ A total of 8,454 MW of Exelon's PJM generation is in PJM East and 1,058 MW of NRG generating capacity is in PJM East.

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significant supplier and in which both firms presently control non-trivial amounts of generation.⁷ This clean sweep in these two markets cures even minor failures of the Commission's market power screen. There are no vertical issues arising from control over transmission or fuels supplies and delivery systems or any other potential entry barriers. Thus, once the proposed mitigation is taken into account, the merger does not raise competitive concerns. My analysis focuses on expected market conditions in 2009.

Q. PLEASE SUMMARIZE THE COMPETITIVE EFFECTS OF THE TRANSACTION IN PJM AND ERCOT.

- A. PJM operates the largest centrally dispatched, competitive wholesale electricity market in the United States, with approximately 165,000 MW of installed generation. This market is well-functioning, and has in place comprehensive, Commission-approved market monitoring and mitigation procedures that mitigate concerns about generation and transmission market power. Exelon owns or controls via contract approximately 24,000 MW of generation in PJM,⁸ approximately 14 percent of capacity installed in PJM (and a somewhat lower market share when imports are taken into consideration). NRG owns approximately 1,600 MW of generation in PJM, a share of installed capacity of less than one percent. As I describe in detail below, the PJM RTO-wide market is unconcentrated or at most in the lower part of the moderately concentrated range, and the HHI changes associated with this merger are within safe harbor thresholds, even before consideration of the planned generation divestiture.

The Commission has identified the PJM East submarket as a relevant geographic market in a number of contexts.⁹ PJM East contains approximately 35,000 MW of installed

⁷ Because the clean sweep of Exelon generation in ERCOT divests the contract giving it control over the 853 MW unit also connected to EES/LAGN, there is no overlap in that market post-divestiture.

⁸ Unless otherwise stated or by context, the generation ratings referred to in my testimony represent summer ratings.

⁹ See, for example, *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities*, Order No. 697, 119 FERC ¶ 61,295 (2007) (codified at 18 C.F.R. Part 35) (*Order No. 697*) at P 246, citing to *Exelon Corp.*, 112 FERC ¶ 61,011 (2005) at P 122.

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generation. Exelon Generation owns or controls via contract approximately 8,454 MW of generation in PJM East, an approximately 24 percent share of installed capacity (and a somewhat lower market share when imports are taken into consideration). NRG owns 1,058 MW of generation in PJM East, an approximately 3 percent share of installed capacity (again, a somewhat lower market share when imports are taken into consideration). The PJM East market is moderately concentrated and the change in HHI would, absent divestiture, slightly exceed 100 points in three time periods (plus one off-peak period when the post-transaction HHI is less than 1000). Exelon has committed to divest the three generating stations owned by NRG in PJM East – Dover Energy (104 MW), Vienna (158 MW), and Indian River (796 MW)⁹. As a result of this commitment, Exelon's share of this market will not increase and the competitive effect of the merger will be *de minimis*!

While ERCOT is not itself a FERC-jurisdictional market, I analyzed the effect of the merger on competition in the ERCOT market in the same manner as if it were a FERC-jurisdictional market. ERCOT operates the electric grid and manages the deregulated market for approximately 75 percent of Texas. Because ERCOT is asynchronous with both the Eastern and Western Interconnections, imports from the rest of the United States are limited to capacity on high voltage direct current (HVDC) ties with only 820 MW of capacity. Including imports, capacity in ERCOT is in excess of 80,000 MW. Exelon Generation owns or controls via contract approximately 3,400 MW of generation in ERCOT, an approximately 4 percent market share.¹² NRG owns approximately 13,000 MW of generation in ERCOT (including about 2,200 MW of mothballed generation), an approximately 16 percent market share. Exelon has committed to divest all of the

¹⁰ Two of the Indian River units (179 MW) are scheduled to be retired in 2010 and 2011.

¹¹ Under the Commission's Delivered Price Test analysis, NRG will be allocated a pro rata share of import capacity into PJM East. However, since NRG owns only a very modest share of generation in PJM outside of PJM East, its allocated share of imports into PJM East is small, as discussed below in describing the results of the Competitive Analysis Screens.

¹² Exelon currently has 190 MW of mothballed generation at Handley Units 1 & 2 and Mountain Creek Units 2 & 3. Exelon has filed with ERCOT to permanently decommission these units in the first quarter of 2009. Our analysis assumes that they are not available to run at any time in the 2009 analysis year.

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generating units it currently owns in ERCOT Mountain Creek (788 MW)³; Handley (1,262 MW), LaPorte (152 MW) as well as the generation it contracts for under long-term PPAs AES Wolf Hollow (350 MW) and Tenaska Frontier (853 MW)⁴. As a result of these commitments, Exelon's post-transaction, post-divestiture generation will be identical to what NRG would control without the transaction and hence, the competitive effect of the merger will be *de minimis*.

Q. ARE THERE MATERIAL COMPETITIVE EFFECTS IN MARKETS OUTSIDE OF PJM AND ERCOT?

A. No. While the merging parties each own or control generation outside of PJM and ERCOT, the extent of business transactions in other markets where both own generation is *de minimis*.

Exelon has affiliated generation located in ISO-New England Inc. (ISO-NE), Midwest Independent System Operator, Inc. (MISO), the Central and Southwest Services (also known as AEP-West) balancing authority area (CSWS), the Southern Company Services (SOCO) balancing authority area, and the EES balancing authority area.

NRG owns or controls generation in ISO-NE, the New York Independent System Operator, Inc. (NYISO), California Independent System Operator Corporation (CAISO), the Nevada Power Company balancing authority area (NEVP), and the Louisiana Generating, LLC (LAGN) and Entergy (EES) balancing authority areas. NRG's generation in the LAGN balancing authority area uses the transmission system of Entergy, and, for analytic purposes, is treated as if located in the EES balancing authority area.¹⁵

¹³ These ratings for Handley and Mountain Creek include the approximately 190 MW of currently mothballed capacity that is scheduled to be decommissioned. The capacity figures reported in the text excludes the 190 MW that will be retired.

¹⁴ Tenaska Frontier is the unit referenced previously that is capable of being interconnected directly onto both the ERCOT and Entergy (EES) balancing authority area grids. The total MW reported for Frontier represents its summer-rated capacity as reported by ERCOT. The contractual amount is 830 MW. 300 MW of the output of the Frontier facility is currently under contract to Entergy and is dispatched in the EES balancing authority area.

¹⁵ LAGN is a transmission dependent balancing authority area that utilizes the transmission systems of its transmission providers (primarily Entergy) to transmit energy from its generating units to its customers.

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Thus, only one of the two merging parties owns or controls generation in MISO (Exelon), CSWS (Exelon), NYISO (NRG), CAISO (NRG), SOCO (Exelon) and the NPC balancing authority area (NRG). In these markets, the merging entities do not currently conduct business in the same geographic markets,¹⁶ and hence there is no material competitive effect.

In the remaining two markets, ISO-NE and EES/LAGN, the extent of business transactions in the same geographic markets is sufficiently *de minimis* that no competitive concerns are raised and a full competitive analysis screen is not required.

In ISO-NE, a market with approximately 31,000 MW of installed generation, Exelon Generation owns approximately 178 MW of generation, less than a one percent share of installed capacity. This generation has high variable costs and rarely runs. NRG owns approximately 2,200 MW of generation in ISO-NE, about a 7 percent share of installed capacity (and a somewhat lower market share when imports are taken into consideration). ISO-NE is an unconcentrated market and Exelon's and NRG's shares are small. The HHI change at peak times is approximately 8 points. Moreover, there are no submarkets within ISO-NE that are relevant in the context of this merger. The identified load pockets in ISO-NE include Northeast Massachusetts (NEMA)/Boston, Southwest Connecticut (SWCT) and Connecticut (CT). While all but about 130 MW of NRG's 2,200 MW of generation is located in the SWCT and CT load pockets, none of Exelon's generation is located there. Similarly, while 107 of Exelon's 178 MW of generation in ISO-NE is located in the NEMA/Boston load pocket, none of NRG's generation is located there.

¹⁶ 18 C.F.R. § 33.3(a)(2)(i). Because Exelon's share of ISO-NE installed capacity is very small (less than one percent), its allocable share of the interface into NYISO will be truly trivial. As I discuss in more detail below, there also are no concerns raised by the possibility of potential imports between PJM and NYISO.

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Hence, the relevant market is ISO-NE as a whole, and, clearly, the effect of the merger in ISO-NE is not material.

EES is a balancing authority area market with approximately 42,000 MW of installed generation. The only generating asset owned or controlled by Exelon Generation in EES is the Tenaska Frontier facility (853 MW), which is controlled by it as a result of a long-term PPA, and is interconnected to both EES and ERCOT.¹⁷ The Tenaska Frontier facility represents about 2 percent of installed capacity in EES. NRG owns or controls approximately 3,000 MW of generation in EES/LAGN, an approximately 7 percent share of installed capacity. Both shares would be lower if imports were taken into consideration. The HHI change with imports ignored is about 29 points. Notably, the majority of the output of NRG's generating facilities located in the LAGN balancing authority area is used to supply requirements load under long-term contracts to several distribution cooperatives and public power authorities.¹⁸ Further, as already noted in the preceding discussion of the impact of the merger in ERCOT, Exelon has committed to divest the generation it controls under the Tenaska Frontier contract. Tenaska Frontier is the only Exelon-controlled generating unit connected to the EES transmission system. As a result of these commitments, the share of the combined company in EES will be NRG's pre-merger share and hence, the competitive effect of the merger will be *de minimis*.

¹⁷ Recall that 300 MW of this generation is subject to an agreement under which Entergy is purchasing energy through April 2010, and then 150 MW through April 2011.

¹⁸ Indeed, NRG has reported that "During limited peak demand periods, the load requirements of these contract customers exceed the baseload capacity of NRG's coal-fired Big Cajun II plant. During such peak demand periods, NRG typically employs its own gas-fired assets, or alternatively purchases power from external sources frequently at higher prices than can be recovered under the Company's contracts. Big Cajun II accounts for about half of NRG's generating assets in the LAGN balancing authority area." NRG's December 31, 2007 10-K, page 30.

<http://www.snl.com/Cache/5681447.pdf?O=3&IID=4057436&OSID=9&FID=5681447>

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Q. WHAT IS THE PLAN FOR INTERIM MITIGATION PRIOR TO DIVESTING NRG'S GENERATION IN PJM EAST AND EXELON'S GENERATION AND CONTRACTS IN ERCOT?

A. Exelon will not be able to divest the generation until the transaction is closed. Inevitably, there will be a period between closure and when divestiture contracts can be negotiated and necessary regulatory approvals (including approvals by FERC and the antitrust authorities) have been granted. Under these circumstances, the Commission generally has required interim mitigation. With respect to the PJM East market, the general interim mitigation commitment is to bid all energy and capacity of the units listed in Appendix 1 to the Application at or below mitigated prices determined according to PJM rules.¹⁹ As described in the application and below, all PJM capacity resources are required to offer energy into the day ahead market. Hence, there is no issue of physical withholding of energy.²⁰ The mitigated energy bids will be based on mitigated prices that in turn are based on costs computed according to PJM Cost Development Task Force (CDTF) rules. PJM rules for mitigated bids allow a margin over costs so-defined, generally 10 percent, but a higher fixed percentage or \$/MWh adder for Frequently Mitigated Units. Since the mitigation is an upper limit on prices, Exelon may bid below these cost-based levels. Consistent with current practice, some units, most notably the pumped storage capacity, will be bid in as must run and hence be a price taker in the market. The bidding of Exelon's existing and newly acquired shares of Keystone and Conemaugh (which are not PJM East units) is controlled by Reliant Energy Northeast Management Company, and not Exelon, as noted below.

¹⁹ As described in the Application, there are two old, small Exelon units that are not PJM capacity resources and are not bid into the PJM market. There also is a cogeneration resource, Grays Ferry, for which Exelon offers into PJM and from which Exelon has the right to energy dispatched onto the grid but that Exelon does not dispatch or otherwise control. It also is not subject to interim mitigation.

²⁰ Violation of RTO rules subjects the offender to draconian sanctions.

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Exelon also is committing to bid into the capacity market at or below mitigated prices. If any RPM Base Residual Auctions take place during the interim period, Exelon commits to bid all of the PJM East capacity in at prices no higher than the PJM-approved Market Seller Offer Caps. Any capacity that remains unsold and is not being used to cover a deficiency in capacity sold in the Base Residual Auction at the time of any interim (*i.e.*, incremental) RPM auction will be bid at or below the mitigated rate computed according to the existing PJM mitigation protocol for such auctions. This rate is the higher of 110 percent of the clearing price in the most recent Base Residual Auction or the unit's Market Seller Offer Caps.

As discussed elsewhere in this testimony, the transaction raises no market power concerns in the two market-based PJM ancillary services markets. These are not PJM-East markets but rather are markets that span the substantial majority of PJM. Consistent with results for energy, Exelon's and NRG's share of ancillary services capacity in these larger markets is too small to raise market power concerns. Notwithstanding that there is at most a small increase in Exelon's market share of PJM ancillary services in the interim period, Exelon is proposing to limit its bids into the ancillary services markets to cost-based bids computed according to existing PJM rules.²¹ Participation in PJM ancillary services markets is voluntary and it is not at all clear how a must-offer commitment to assure that there is no physical withholding could be crafted.²² However, even if there were reason to be concerned that Exelon will have gained material market power in the interim period, which there is not, there still would be no serious concern with physical withholding. PJM co-optimizes energy and the two ancillary services, so that all capacity bid to produce any of the three products can affect the price of all of the products. Since PJM rules require that all PJM capacity resources (which include all of the PJM East mitigated units) be bid into the energy market, capacity cannot be withheld from this co-optimized market. Hence, the mitigated bidding commitments for energy substantially inhibit any possible impact of Exelon's withholding bids from the ancillary services markets.

²¹ Exelon's and NRG's bids into the synchronous reserve market already are mitigated to these levels, as are the bids for all PJM generators.

²² Since these ancillary services can only be provided from units that are synchronized to the grid, a must-offer requirement in the real time market would require that all mitigated units be operating, which would be grossly inefficient since out-of-merit units would be consuming the fuel needed to sit at their lower operating levels.

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Exelon also is offering interim mitigation for the ERCOT market. The structure of the ERCOT market lends itself less readily to interim mitigation than PJM. In particular, unlike PJM where all energy must be bid into and clear in the PJM markets, ERCOT is organized on the basis of bilateral transactions and balanced schedules, with only a small proportion of energy transacted in the ERCOT balancing energy market. Fortunately, a corollary of the balanced schedule requirement is that the substantial majority of economic generation in ERCOT is sold bilaterally for at least intermediate periods.²³ The capacity that will be controlled by Exelon post-transaction is no exception; hence, most of Exelon's ERCOT capacity is likely to have been pre-committed bilaterally for at least a substantial part of the interim period at prices negotiated separately by Exelon and NRG prior to closing.

In any event, there is no basis to conclude that the transaction will create a pre-divestiture market power problem in the ERCOT bilateral energy market. While I have identified screen failures in two of the ERCOT zonal markets, it is notable that the balanced schedules submitted by market participants need not be feasible, in the sense of not causing inter-zonal congestion. For this reason, a bilateral buyer need not co-locate its load and delivery points. Hence, the screen failures within zonal markets cannot signal a cause for concern with respect to competition in the bilateral energy market. As noted above, the ERCOT-wide energy market is unconcentrated post-merger and pre-divestiture, and there are no pre-divestiture screen failures. Hence, there is no need for interim mitigation of the bilateral energy market. There is no capacity market in ERCOT. While there are insufficient data available to model ancillary services market structures explicitly, there is no reason to anticipate that there would be structural issues (screen

²³ We have no direct public data on the terms of wholesale electricity contracts. Wholesale electricity contracts are sold primarily to load serving entities that need to hedge fixed price contracts with retail customers. A review of retail offerings in ERCOT indicates that a one year term is the most common fixed price offering, though both longer and shorter products are available.

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failures) in ERCOT-wide ancillary services markets (i.e., markets for ancillary services other than balancing energy). There is nothing about Exelon's and NRG's ERCOT generation unit characteristics to suggest that their shares of ancillary services capability are notably different than their shares of energy production capability. The market-priced ancillary services, with the exception of balancing energy, are procured on an ERCOT-wide basis. Therefore, there is no reason to believe that there is a need to mitigate bids into the ERCOT ancillary services markets with the possible exception of balancing energy.

While ERCOT administers the balanced schedule dispatch and ancillary services other than balancing energy on an ERCOT-wide basis, the balancing energy market clears on a zonal basis. The screen failures in the Houston and North zones could signal a basis for concern that increased concentration within a zone could result in market power that would be used to drive up congestion costs. In particular, since the balancing energy market is used as a tool for managing zonal congestion, it is theoretically possible to raise balancing energy prices by using market power within a zonal market.

In order to moot potential concerns over market power in the ERCOT zonal energy markets, Exelon has committed as interim mitigation to offering all of the fossil energy it will control in ERCOT that is available to balancing energy markets (i.e., is on line and not already committed to a buyer's balanced schedule or to previously cleared ancillary service markets) at the Out of Merit Energy Up mitigated prices computed by ERCOT.

As is the case in PJM, it is not practicable to develop interim mitigation that expressly guards against physical withholding in mitigated ancillary services markets, in this case, the balancing energy market. Balancing energy necessarily comes from units synchronized to the grid. There are entirely legitimate reasons why not all units are synchronized all the time, and a requirement that these units offer all of the energy they could produce that is not committed bilaterally would wastefully require that uneconomic units be committed to operate continuously at lower operating levels in the unlikely event that they are needed for balancing energy purposes.

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Any theoretical concern with physical withholding of balancing energy is substantially mitigated by the fact that the ERCOT market operator is not passively reliant on the balancing energy market to solve congestion and preserve reliability. It also manages congestion with Out of Merit Energy, Out of Merit Capacity and Reliability Must Run (RMR) generation. ERCOT 's ability to schedule Out of Merit Capacity on a day-ahead basis (and intra-day if necessary) and Out of Merit Energy on a real time basis substantially inhibits any theoretical ability to physically withhold capacity needed for congestion management. If a unit is not running but could be used beneficially, the system operator can instruct that it be committed at a mitigated cost of bringing the unit to its lower operating level. If a unit is useful in real time (including but not limited to units committed as a result of Out of Merit Capacity instructions), the system operator can increase its output with an Out of Merit Energy instruction. Out of Merit Energy and Capacity prices and RMR energy prices also are not subject to elevation as a result of economic withholding since prices are mitigated by existing ERCOT rules on a cost-related basis.²⁴

Q. ARE THERE ANY POTENTIAL ISSUES THAT THE ERCOT MITIGATION DOES NOT MOOT?

- A. The ERCOT interim mitigation proposal relies on the ERCOT system operator using Out of Merit scheduling to defeat any possible physical withholding. Given the tools available to ERCOT and the relatively small amounts of Exelon 's existing generation that is retained in the interim period, any concerns arising from reliance on Out of Merit scheduling in the interim are tenuous. Nonetheless, to the extent this is deemed to be a concern, Exelon is proposing an alternative form of mitigation. The genesis of this form of mitigation is primarily to eliminate the potential to use the assets scheduled for divestiture (the current Exelon assets) to enhance the profits earned by the acquired NRG assets by physically

²⁴ Mitigated Out of Merit Energy prices are based on fuel costs and a heat rate that is generic to the type of unit being deployed. Only if generic heat rates are inappropriate to the specific unit being mitigated can the owner petition for a higher rate. Out of Merit Capacity is paid a generically determined cost of ramping to and holding at a unit 's lower operating level. The system operator can, and does, take costs into account in choosing what units to call on out of merit.

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withholding them and secondarily to limit the possible impact of the temporary retention of these assets on incentives to withhold the assets being acquired from NRG. The nub of this alternative mitigation proposal is to fully eliminate the ability to physically or economically withhold the generation scheduled for divestiture.

Exelon's alternative mitigation proposal begins with turning the Mountain Creek and Handley stations' relationship with ERCOT markets over to a third party Qualified Scheduling Coordinator (QSE). In ERCOT, QSEs are the market participants and there are several who act as agents for generation owners or entities serving retail customers. The contractual relationship with the QSE will be structured to insure that it has an incentive to maximize the profitability of controlled assets and is insulated from any incentive to advantage Exelon-owned assets that it does not control. The QSE will fully control all aspects of the bidding of these stations. Because the QSE will control only a subset of the assets currently controlled by Exelon and none of the NRG assets, there can be no valid concern that this arrangement will result in enhanced market power relative to the pre-merger condition.

For reasons that include contractual issues with counterparties, this third party control form of mitigation is not adaptable to some of the generation Exelon controls in ERCOT. Primarily, this relates to its PPAs deemed to give it control over Tenaska/Frontier and Wolf Hollow. The complexity of contractual issues with respect to these units precludes simply turning operational control over to other entities. Hence, Exelon proposes to retain bidding control over these units. To militate against physical withholding, Exelon would propose that each of these units will be scheduled to operate each day that they are not on outage and that the available capacity of these units (physically dispatchable capacity that was not pre-committed in the day-head schedules as either bilaterally dedicated for energy or for ancillary services) would be bid into the ERCOT balancing energy market at the mitigated prices discussed above. This assures that all available output from these units will be available to the ERCOT market at either contractually agreed or mitigated prices. In the case of the Tenaska/Frontier station, the amount of generation available to the ERCOT market will not include the 300 MW (two combustion turbine units) of capacity that are used to supply the long term contract with Entergy and are synchronized to the

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Eastern Interconnection. There also are contractual and operational issues precluding simply turning control of the LaPorte peaking unit in the Houston zone over to a third party QSE. To mitigate possible physical withholding of this unit, Exelon proposes as part of this alternative to bid the full uncommitted capacity of the LaPorte station into the ERCOT balancing market. The sole difference between the LaPorte-related mitigation and the mitigation for the PPAs is that LaPorte, being a peaking station that rarely is synchronized to the ERCOT grid, will be bid into that market as a quick start unit. As with the other units scheduled for divestiture that Exelon will retain control of during this interim period, bids will be limited to those allowed by ERCOT cost-based bid mitigation.

Under this alternative scheme of mitigation it could be argued that there remains a possibility of physically withholding generation by manipulating outage schedules. In the case of the units turned over to third parties, there is no incentive to do so since the QSE controlling these units has no interest in any profits earned by Exelon units it does not control and has an incentive to maximize the profits earned by its controlled units. For the two large stations controlled under PPAs, Exelon has no operational control and hence cannot falsely declare a forced outage nor schedule an unforced outage to affect the market. With respect to the LaPorte unit, it also is dispatched by a third party, Air Products, but Exelon does have some contractual right to schedule outages. This outage schedule must be submitted to ERCOT well in advance and approved by it. Hence, outage manipulation of the idiosyncratic and episodic nature relevant to units like LaPorte is not feasible.

Another possible objection to this mitigation proposal is that there is no mitigation of the NRG units. In theory, during the interim period, the ownership of the existing Exelon units could give it an incentive to bid the NRG units differently than NRG bids them today or than Exelon will bid them after the existing Exelon units are divested. Recall, however, that there is a market power issue to be resolved in ERCOT only when constraints cause it to fragment into zonal markets. Hence, this incentive issue will relate only to NRG assets within the zone containing the assets to be divested. In the North zone, the only NRG generation is Limestone, a baseload coal station. It simply is not plausible to postulate withholding a deep baseload unit to raise the prices earned by higher cost gas-fired generation. Megawatt-by-megawatt, this patently is a losing proposition. In the Houston

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zone, there is a much greater variety of NRG generation. However, the only generation being added to the NRG fleet in Houston is LaPorte, a high-cost peaker that is further up the supply curve than most of NRG's generation in Houston. In that sense, LaPorte is an incentive unit that could theoretically benefit from withholding NRG generation in the Houston zone only if it is in merit. To be profitable, this would require that a still-higher cost NRG-owned peaker be withheld to increase the market price in the zone. Since LaPorte rarely runs, and would gain little on these occasions, the incentive for withholding is small.

Q. WHAT DO YOU CONCLUDE FROM THESE INTERIM MITIGATION PROPOSALS?

- A. Either of the proposals robustly mitigates any increase in market power that may exist in the interim period. The primary proposed mitigation, which I understand to be preferred by Exelon, ensures that bidding commitments in PJM will effectively eliminate Exelon's ability to economically withhold generation and market rules effectively eliminate physical withholding. In ERCOT, there is no material competitive effect of the transaction in ERCOT-wide markets and the mitigation relies on market rules to effectively eliminate physical withholding. Exelon's proposal to cap its bids into the balancing market to the ERCOT-determined Out of Merit Energy Up rate eliminates the possibility of economic withholding. The alternative form of mitigation discussed immediately above, should the Commission require it, would fully mitigate the potential to exercise either physical or economic withholding with respect to the units that subsequently will be divested. The mechanism is somewhat different, relying in part on turning control of some of Exelon's divestible generation over to a third party, but the effect is to maintain the lack of a combined bidding strategy for NRG and Exelon legacy generation that exists prior to the Transaction.

Finally, I would make two general points about the ERCOT and PJM markets. First, both markets have market monitors who watch market behavior intently. Both ERCOT and PJM have substantial capabilities to curtail market behaviors that are deemed objectionable and to report such behaviors to the relevant regulatory bodies for further

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sanctions. Second, in both PJM East and ERCOT, Exelon proposes that interim mitigation apply to all of the capacity that it controls despite the fact that the amount of capacity to be divested, the divestiture of which will end interim mitigation, is a small fraction of the capacity it will control post-transaction. This tail wagging the dog interim mitigation likely will more tightly constrain Exelon's bidding behavior than is the case today or will be the case after divestiture is accomplished and interim mitigation ended.

Q. ARE THERE ANY VERTICAL MARKET POWER ISSUES RAISED BY THIS MERGER?

A. No. The merger creates no material vertical market power issues. There are no issues related either to transmission ownership and operation, or to the merger-related combination of electric generation assets with fuels supplies or fuels delivery systems. Exelon's transmission systems (owned by PECO and ComEd) are controlled by PJM. NRG owns no transmission other than the equipment necessary to connect its generation facilities to the grid.

Neither Exelon nor NRG owns any interstate gas transmission pipelines. PECO operates an intrastate natural gas distribution system in four counties that surround, but do not include, the city of Philadelphia. Its gas service area includes several third-party industrial customers and small generators, only a few of which use natural gas for generation other than as start-up fuel or backup. The few that are gas-fired generators are Merck (28 MW), Kimberly Clarke (55 MW), Crozier Chester Hospital (3 MW) and Hills at White Marsh (2 MW). Such limited local distribution operations do not provide Exelon an opportunity to use such control to favor affiliated activities, raise rivals' costs or otherwise disadvantage rivals.²⁵

²⁵ In its Order in Docket No. EC05-43, the Commission found that PECO's gas distribution facilities (and PSEG's somewhat more extensive facilities) created no vertical market power issues, primarily because upstream and downstream markets were not highly concentrated (112 FERC ¶61,011 (2005) at P. 200-202). The finding that the upstream market was not highly concentrated was in spite of the fact that the combined upstream market share of Exelon and PSEG (measured as their share of gas transmission capacity reservations) was 36 percent, contributing 1,270 HHI points to the upstream market total of 1,572. Exelon's share was 6 percent. Since NRG holds a very much smaller share of pipeline reservations than did PSEG, as I discuss below, the merged company's share of the market, and hence the HHI, is would be much smaller. Stepping back from the formality of the vertical analysis called for in the Commission's regulations, common sense dictates that since there is a clean sweep in the proposed transaction whereas there was an increase in applicants' downstream market share in the Exelon-PSEG transaction, the vertical concern surely should be less in this transaction.

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Given Exelon's commitment to divest all of NRG's generation assets located in PJM East, which includes the territory served by PECO's gas distribution system, there clearly are no vertical concerns raised by combining Exelon's limited gas operations and NRG's generation in PJM. The remainder of NRG's generation in PJM is located in far western Pennsylvania (139 MW) and Illinois (447 MW).

There are no other barriers to entry that raise concerns: Exelon and NRG do not have dominant control over generating sites and there has been substantial entry into relevant markets.

In short, none of the vertical concerns that the Commission focused upon in prior vertical mergers exist in this merger and the transaction does not create or enhance vertical market power.

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II. DESCRIPTION OF THE PARTIES

Exelon

Q. PLEASE DESCRIBE EXELON.

A. Exelon, a registered public utility holding company, is the parent corporation of *inter alia* PECO, ComEd, and Exelon Generation. Exelon Generation is a public utility that owns and operates electric generating facilities and engages in wholesale power and energy marketing and trading operations in the United State pursuant to Commission-approved market rate authority. All of the ownership interests in Exelon Generation are indirectly held by Exelon. Exelon Generation, through its subsidiaries, owns or controls via long-term contract approximately 30,000 MW of generation, primarily in PJM (24,000 MW), ERCOT (3,400 MW (excluding units scheduled for decommissioning prior to the transaction closing)), MISO (1,000 MW) and smaller amounts in ISO-NE and in the CSWS, SOCO and EES balancing authority areas. More than half of its generation capacity is nuclear. See Exhibit J-3.

Q. PLEASE DESCRIBE PECO AND COMED.

A. Exelon's energy delivery business consists of the regulated sale of electricity and distribution services by ComEd in northern Illinois and PECO in southeastern Pennsylvania (Philadelphia). Neither ComEd nor PECO owns or controls generation. ComEd and PECO also are the passive owners of transmission assets operationally controlled by PJM and regulated under the PJM tariff. In addition, PECO is engaged in the regulated sale of natural gas and distribution services in the Pennsylvania counties surrounding Philadelphia. PECO does not own or control any interstate gas transmission facilities or gas supplies.

The states of Pennsylvania and Illinois have retail access for electricity customers, and both PECO's and ComEd's customers have the right to choose competitive energy suppliers. The majority of retail customers in PECO's service territory continue to be

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served by PECO at generation rates that are capped through December 31, 2010. PECO procures generation to serve its retail customers from a PPA with Exelon Generation. Illinois is transitioning its procurement rules for providers of last resort. Initially, all power to serve such customers was procured by the local utility (if a regulated investor owned utility) via a simultaneously administered descending clock auction managed by the Illinois Commerce Commission (ICC). The amount that any supplier could supply was limited and Exelon Generation won 35 percent of the total ComEd requirement.²⁶ One-third of the contracts expire in each of three years. The first year s contracts have lapsed. The auction system has been replaced by a single procurement administered by a state agency. Unlike the descending clock auction, which required the bidding of physical generation, the state agency procurement is for financially firm contracts, not physical generation. Hence, it is possible that none of the generation used to serve investor-owned utility load in Illinois (including ComEd load) will be committed after 2010.

Q. PLEASE DESCRIBE EXELON S COMPETITIVE RETAIL ENERGY SUPPLY BUSINESS.

- A. Exelon Energy Inc. (Exelon Energy) is a retail energy marketer supplying electricity and natural gas to commercial and industrial customers. Exelon Energy currently markets electricity to customers in Illinois and natural gas and renewable energy products to customers in Illinois, Michigan, and Ohio.

²⁶ While Exelon Generation was limited to 35 percent of total ComEd contracts, there was no limit on whether the 35 percent would be one, two or three year contracts. Exelon Generation in fact won nearly all of the three year contracts, so that most of its load obligations will continue into the 2009 year covered by this analysis and, more importantly, through or well into the time period for which interim mitigation will apply.

²⁷ It is not at all clear how the Commission s definition of Available Economic Capacity will evolve to be applied to this type of market. A quite plausible outcome will be that the issue never will be ripe since the concept of Available Economic Capacity in a market where no entity has regulated load responsibility may itself lack meaning. While it is not possible fully to predict what state regulators and legislatures will do, it seems most likely that in all of the areas of PJM where Exelon will have generation or load, AEC will have lost its meaning by 2010.

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NRG

Q. PLEASE DESCRIBE NRG.

A. NRG is a wholesale power generation company, engaged primarily in the ownership and operation of electric generating facilities, transacting in fuel and transportation services, and the marketing and trading of energy, capacity and related products in the United States and internationally.

NRG, through its subsidiaries, owns or controls approximately 26,000 MW of generation throughout the United States, primarily in ERCOT (13,300 MW), NYISO (4,000 MW), EES/LAGN (3,000 MW), CAISO (2,600 MW), ISO-NE (2,200 MW), PJM (1,500 MW) and the Nevada Power (NEVP) balancing authority area (50 MW). See Exhibit J-4.

NRG also owns generating facilities in Australia (605 MW) and in Germany (475 MW).

A subsidiary of NRG, NRG Thermal LLC, owns and operates district energy systems and combined heat and power plants nationwide, including in Harrisburg and Pittsburgh, Pennsylvania. Another subsidiary, NRG Engine Services provides engine maintenance and parts supply. Padoma Wind Power, LLC is a subsidiary that is a wind energy development company that has several wind projects under active development, as well as a pipeline of wind projects under development as joint ventures with third parties. These projects are in several states, including California and Texas.²⁸

NRG owns no transmission or distribution facilities other than those necessary to connect its generating facilities to the grid.

²⁸ The planned wind projects in ERCOT are included to the extent they are scheduled to come on-line by 2009.

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III. FRAMEWORK FOR THE ANALYSIS

Q. WHAT ARE THE GENERAL MARKET POWER ISSUES RAISED BY MERGER PROPOSALS?

A. Market power is the ability of a firm profitably to maintain prices above competitive levels for a significant period of time. Market power analysis of a merger proposal examines whether the merger would cause a material increase in the merging firms' market power or a significant reduction in the competitiveness of relevant markets. The focus is on the effects of the merger, which means that the merger analysis examines those business areas in which the merging firms are competitors. This is referred to as horizontal market power assessment. In most instances, a merger will not affect competition in markets in which the merging firms do not compete. In the context of the proposed merger, therefore, the focus is properly on those markets in which Exelon and NRG are actual or (under some circumstances) potential competitors. The analysis is intended to measure the adverse impact, if any, of the elimination of a competitor as a result of the combination.

Potential vertical market effects of the merger relate to the merging firms' ability and incentives to use their market position over a product or service to affect competition in a related business or market. For example, vertical effects could result if the merger of two electric utilities created an opportunity and incentive to operate transmission in a manner that created market power for the generation activity of the merged company that did not exist previously. The Commission has identified market power as also arising from dominant control over potential generation sites or over fuels supplies and delivery systems. Such dominant control could undercut the presumption that long-run generation markets are competitive.

Q. WHAT ARE THE MAIN ELEMENTS IN DEVELOPING AN ANALYSIS OF MARKET POWER?

A. Understanding the competitive impact of a merger requires defining the relevant market (or markets) in which the merging firms participate. Participants in a relevant market

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include all suppliers, and in some instances potential suppliers, who can compete to supply the products produced by the merging parties and whose ability to do so diminishes the ability of the merging parties to increase prices. Hence, determining the scope of a market is fundamentally an analysis of the potential for competitors to respond to an attempted price increase. Typically, markets are defined in two dimensions: geographic and product. Thus, the relevant market is composed of companies that can supply a given product (or its close substitute) to customers in a given geographic area.

Horizontal Market Power Issues**Q. HOW HAS THE COMMISSION TYPICALLY EXAMINED PROPOSED MERGERS INVOLVING ELECTRIC UTILITIES?**

- A. In December 1996, the Commission issued Order No. 592,²⁹ the Merger Policy Statement, which provides a detailed analytic framework for assessing the horizontal market power arising from electric utility mergers. This analytic framework is organized around a market concentration analysis. The Commission adopted the DOJ/FTC *Horizontal Merger Guidelines* for measuring market concentration levels by the Herfindahl-Hirschman Index (HHI)³⁰ On November 15, 2000, the Commission issued its Revised Filing Requirements Under Part 33 of the Commission's Regulations³¹, which affirmed the screening approach to mergers consistent with the Appendix A analysis set forth in the Merger Policy Statement, and codified the need to file a screen analysis and the exceptions therefrom.

²⁹ Order No. 592, FERC Stats and Regs. ¶ 31,044 (1996).

³⁰ To determine whether a proposed merger requires further investigation because of a potential for a significant anti-competitive impact, the DOJ and FTC consider the level of the HHI after the merger (the post-merger HHI) and the change in the HHI that results from the combination of the market shares of the merging entities. Markets with a post-merger HHI of less than 1000 are considered unconcentrated. The DOJ and FTC generally consider mergers in such markets to have no anti-competitive impact. Markets with post-merger HHIs of 1000 to 1800 are considered moderately concentrated. In those markets, mergers that result in an HHI change of 100 points or fewer are considered unlikely to have anti-competitive effects. Finally, post-merger HHIs of more than 1800 are considered to indicate highly concentrated markets. The *Guidelines* suggest that in these markets, mergers that increase the HHI by 50 points or fewer are unlikely to have a significant anti-competitive impact, while mergers that increase the HHI by more than 100 points are considered likely to reduce market competitiveness. (See U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 1992 [amended 1997].)

³¹ Order No. 642, Final Rule in Docket No. RM98-4-000, 18 CFR Part 33, 93 FERC ¶ 61,164 (2000) (Revised Filing Requirements).

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Appendix A of the Merger Policy Statement, the Competitive Analysis Screen, specifies a delivered price screening test (DPT) to measure Economic Capacity, defined as energy that can be delivered into a destination market at a delivered cost less than 105 percent of the destination market price. The screening test also provides for an analysis of Available Economic Capacity, defined as energy over and above that required to meet native load and other long-term obligations that meets the delivered price test.

If a proposed merger raises no market power concerns (*i.e.*, passes the Appendix A screen), the inquiry generally is terminated. Both the Merger Policy Statement and the Revised Filing Requirements accept that merger applications involving no overlap in relevant geographic markets do not require a screen analysis or filing of the data needed for the screen analysis.³²

Q. WHAT PRODUCTS HAS THE COMMISSION GENERALLY CONSIDERED?

- A. The Commission generally has been concerned with three relevant product markets: non-firm energy, short-term capacity (firm energy) and long-term capacity.³³ Both Economic

³² Order No. 592 (at 30,113) states: it will not be necessary for the merger applicants to perform the screen analysis or file the data needed for the screen analysis in cases where the merging firms do not have facilities or sell relevant products in common geographic markets. In these cases, the proposed merger will not have an adverse competitive impact (*i.e.*, there can be no increase in the applicants' market power unless they are selling relevant products in the same geographic markets) so there is no need for a detailed data analysis.

The Revised Filing Requirements state that an analysis need not be filed if the applicant demonstrates that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic markets is *de minimis*.

³³ The market for long-term capacity generally does not need to be analyzed since the Commission has concluded as a generic matter that the potential for entry ensures that the long-term capacity market is competitive. See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Statutes and Regulations, ¶¶ 31,036 - 31,657 (1996). The presumption that long-term capacity markets are competitive can be overcome if the applicants have dominant control over power plant sites or fuels supplies and delivery systems. This exception is addressed below.

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Capacity and Available Economic Capacity³⁴ are used as measures of energy. The Commission's current policy does not specify required analyses of capacity markets as such, likely because competitive conditions in the energy market in peak periods closely correlate with conditions in capacity markets. Nevertheless, I have analyzed the PJM Reliability Pricing Margin (RPM) capacity market. ERCOT has no capacity market per se.

Under the Economic Capacity and Available Economic Capacity measures, energy production capability that is attributed to a market participant is that capacity controlled by it that can reach the destination market, taking transmission constraints and costs into account, at a variable cost no higher than 105 percent of the destination market price. As described above, the two measures differ as to the treatment of capacity used to meet native load requirements. The Commission has determined that long-term capacity markets are presumed to be competitive, unless special factors exist that limit the ability of new generation to be sited or receive fuel.

Order No. 642 directs applicants to analyze relevant ancillary services markets (specifically, reserves and imbalance energy) when the necessary data are available. As discussed below, I analyzed relevant ancillary services markets.

Q. HOW HAS THE COMMISSION ANALYZED GEOGRAPHIC MARKETS?

A. Traditionally, the Commission has defined the relevant geographic markets as centered on the areas where applicants own generation and on the balancing authority areas directly interconnected with the applicants' generation. Both Order No. 592 and the Revised Filing Requirements continue to define the relevant geographic market in terms

³⁴ As I discuss below, evaluating Available Economic Capacity is quite difficult in PJM, given retail access and the separation of generation ownership and customer supply functions in Pennsylvania, New Jersey, Delaware, Maryland and Illinois. Even identifying Exelon's load commitments is difficult, given the status of both Illinois and Pennsylvania restructuring. It is virtually impossible to match generation and load commitments for most PJM utilities. However, given the mitigation commitments, the conclusion is easily reached that there is no competitive effect in PJM East. I address this in more detail below.

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of destination markets.³⁵ Further, in a merger context, the Commission considers as potential additional destination markets other utilities that historically have been customers of the applicants.

This test is intended to be a conservative screen to determine whether further analysis of market power is necessary. If the Appendix A analysis shows that a company will not be able to exercise market power in its first-tier destination markets, it generally follows that the applicants will not have market power in more broadly defined and more geographically remote markets.³⁶ The screen is the first step in determining whether there is a need for further investigation. If the screening test is not passed, leaving open the issue of whether the merger will create market power, the Commission invites applicants to propose mitigation remedies targeted to reduce potential anti-competitive effects to safe harbor levels. In the alternative, the Commission will undertake a proceeding to determine whether unmitigated market power concerns mean that the merger is contrary to the public interest.

While destination markets typically are defined as individual balancing authority areas (previously, control areas), the Commission's practice has been to aggregate customers that have the same supply alternatives into a single destination market. This approach has been accepted in a number of merger filings in New York, PJM, and New England.³⁷ The Commission's indicative screens for purposes of determining eligibility to obtain

³⁵ *Revised Filing Requirements*, Section 33.3(a)(2). Identify each wholesale power sales customer or set of customers (destination market) affected by the proposed transaction. Affected customers are, at a minimum, those entities directly interconnected to any of the merging entities and entities that have purchased electricity at wholesale from any of the merging entities during the two years prior to the date of the application.

³⁶ This same logic urges that if there is no adverse effect on competition in areas in which applicants control generation, there will be no effect on first-tier markets either. There may be exceptions to this rule: suppose that applicant A has significant generation in market I and applicant B has significant generation in market III, the two markets not being first-tier to each other. There nonetheless might be a competitive issue in market II, assumed to be first tier to both I and III. In analyzing this transaction we have considered this possibility and found no candidate markets where this is a potential issue.

³⁷ *Revised Filing Requirements*, ¶¶ 31,311 at 31,844-5, citing *Atlantic City Electric Company and Delmarva Power & Light Company*, 80 FERC ¶ 61,126 (1997); *Consolidated Edison Co., Inc. and Northeast Utilities* 91 FERC ¶ 61,225 (2000). To the extent there are internal transmission constraints within these markets, the Commission has considered smaller markets within these single control areas as potentially relevant.

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authority to sell at market-based rates also uses balancing authority areas or the Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) as default geographic markets.³⁸ The Commission also has considered submarkets within RTOs/ISOs as separate geographic markets, including PJM East.³⁹

As discussed in the summary and detailed below, in the context of this merger the appropriate focus of the competitive analysis is on the PJM East submarket, as well as ERCOT and two zones within ERCOT (Houston and North). As I will describe, the overlap of generation ownership in other geographic markets is *de minimis* and therefore does not require a screen analysis.

Vertical Market Power Issues

Q. WHAT ARE THE POTENTIALLY RELEVANT VERTICAL MARKET POWER ISSUES?

- A. In the Revised Filing Requirements, the Commission set out several vertical issues potentially arising from mergers with input suppliers. The principal issue identified is whether the merger may create or enhance the ability of the merged firm to exercise market power in downstream electricity markets by control over the supply of inputs used by rival producers of electricity. Three potential abuses have been identified: the upstream firm acts to raise rivals' costs or foreclose them from the market in order to increase prices received by the downstream affiliate; the upstream firm acts to facilitate collusion among downstream firms; or transactions between vertical affiliates are used to frustrate regulatory oversight of the cost/price relationship of prices charged by the downstream electricity supplier.⁴⁰ The downstream products to be analyzed in a vertical analysis are the same as in the horizontal analysis.

³⁸ *Order No. 697* at P 231.

³⁹ *Id.* at P 246, citing to a number of Commission decisions involving electric utility mergers, including Exelon-PSEG.

⁴⁰ While *Order No. 642* identifies these three types of effects, the third is more properly an effect on rates and regulation, review criteria that exist separately from market power.

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With respect to the vertical analysis, the Commission proposes defining the downstream geographic and product markets in the same manner as in the horizontal analysis. For upstream markets, the relevant geographic market has not been defined by the Commission. In concept, it should include the area in which suppliers to generators competing in the downstream market are located.

Q. HOW DOES THE FRAMEWORK FOR ASSESSING VERTICAL MARKET POWER DIFFER FROM THE HORIZONTAL ANALYSIS FRAMEWORK?

- A. For the vertical market power screen, the Commission's focus is on the structural competitiveness of downstream and upstream product markets, as measured by HHIs. The main difference from the horizontal analysis is that in the vertical analysis, the focus is not on the change in HHIs resulting from the merger, but on the structure of those upstream and downstream product markets in geographic markets in which one or both merging parties sells upstream products and in which the other or both merging parties sells downstream products.

Q. WHAT ARE THE VERTICAL ISSUES THAT THE COMMISSION HAS FOUND REQUIRE INVESTIGATION IN THE CONTEXT OF MERGERS BETWEEN ELECTRIC UTILITIES AND GAS TRANSPORTATION PROVIDERS?

- A. The Commission has expressed its concern in decisions addressing convergence mergers between electric utilities and natural gas pipelines and in Order No. 642, that vertical mergers may create or enhance the incentive and/or ability for the merged firm to adversely affect prices and output in the downstream electricity market and to discourage entry by new generators.⁴¹

In addition to the three generic areas of vertical concern noted above, the Commission also has expressed concerns that (a) convergence mergers involving an upstream gas supplier serving the downstream merger partner, as well as competitors of that partner, could result in preferential terms of service; and (b) a pipeline serving electric generation could provide commercially valuable information to newly affiliated electricity generating or marketing operations.

⁴¹ III FERC Stats. & Regs. Preambles, ¶ 31,111 at 31,904.

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Finally, the Commission also has expressed the concern that an entity that control electric transmission could use that control to favor its own generation.

Q. HOW DOES THE COMMISSION DIRECT THAT VERTICAL MARKET POWER ISSUES BE ANALYZED?

- A. The Commission has stated that a necessary condition for a convergence merger to cause a vertical concern is that both the upstream and downstream markets are highly concentrated.⁴² In other words, the screen is passed if the downstream (or upstream) market is not highly concentrated, irrespective of the degree of concentration of the upstream (or downstream) market. A proper analysis of the upstream market requires that the structure of control of transportation capacity be examined, which requires that control of the transportation capacity be allocated to holders of firm capacity rights on the relevant pipelines with any unsubscribed capacity allocated to the pipeline owner. In my experience, this allocation has always resulted in a not highly concentrated market. In the context of this merger, which does not involve ownership of interstate natural gas pipelines *per se*, but merely control over shares of delivery capacity, a potential focus is on Exelon's and NRG's contractual rights to use the interstate pipeline delivery system into the relevant markets. Notwithstanding the analysis framework set forth in Order No. 642, merger applicants' contractual transportation rights have not been at the core of past vertical market power inquiries, and the Commission has recognized that open access gas

⁴² [H]ighly concentrated upstream and downstream markets are necessary, but not sufficient, conditions for a vertical foreclosure strategy to be effective. Revised Filing Requirements, ¶ 31,311 at 31,911. A vertical merger can create or enhance the incentive and ability of the merged firm to adversely affect electricity prices or output in the downstream market by raising rivals' input costs if market power could be exercised in both the upstream and downstream geographic markets. Order No. 642, *slip op.* at 79. This was confirmed in *Energy East*. (Applicants correctly conclude that because they have shown that the downstream markets are not highly concentrated, there is no concern about foreclosure or raising rivals' costs in this case.) *Energy East Corporation and RGS Energy Group, Inc.*, 96 FERC ¶ 61,322 (2001) at p. 9.

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pipeline regulations prevent sellers from withholding such capacity.⁴³ In any event, as noted above, the analysis I performed in the Exelon-PSEG merger case demonstrates clearly that the upstream gas market, structurally defined by firm pipeline rights, would not be highly concentrated after consummation of this transaction. Also potentially relevant is Exelon's control over a gas distribution system; I discuss this further below.

With respect to ownership of electric transmission facilities, the Commission in the past has focused on the extent to which the transmission owner provides open-access transmission or has transferred operational control over its transmission facilities to an ISO or an RTO.

⁴³ As the Commission noted in *Order No. 697* in connection with market-based rate authority, its open access regulations adequately prevent sellers from withholding interstate pipeline capacity. In addition, interstate pipeline capacity held by firm shippers that is not utilized or released is available from the pipeline on an interruptible basis. *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 430.

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IV. DESCRIPTION OF METHODOLOGY

Q. PLEASE SUMMARIZE THE METHODOLOGY THAT YOU USED TO ANALYZE THE COMPETITIVE EFFECTS OF THE MERGER.

- A. I evaluated the competitive effects of the merger using the delivered price test outlined in Appendix A and the Revised Filing Requirements. I implemented this analysis using a proprietary CRA model called the Competitive Analysis Screening Model (CASm). The source and methodology for the data required to conduct the delivered price test in CASm are described in Exhibit J-5. A technical description of CASm is provided in Exhibit J-6. As is appropriate for this transaction in which neither party controls significant upstream assets, the focus is on horizontal effects.⁴⁴

Q. WHAT DESTINATION MARKETS DID YOU CONSIDER?

- A. Consistent with the instructions in the Revised Filing Requirements, I identified the destination markets that could potentially be impacted by the merger. The first step in determining the potentially relevant markets is to identify where both Exelon and NRG owned or controlled generation. Table 1 below presents a summary of this information.

⁴⁴ Consistent with 18 C.F.R. § 33.4(a)(2), the merging entities do not provide inputs to electricity products (*i.e.*, upstream relevant products) and electricity products (*i.e.*, downstream relevant products) in the same geographic markets or the extent of the business transactions in the same geographic market is *de minimis*.

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Table 1: Summary of Generation Owned by Exelon and NRG

Balancing Authority Area	Exelon	NRG
PJM	23,698	1,644
ISO-NE	178	2,204
NYISO		4,051
ERCOT	3,405	13,269
CAISO		2,633
MISO	1,043	
NEVP		51
CSWS	795	
EES/LAGN	853*	2,994
SOCO	933	
Total	30,052*	26,847

* The 853 MW connected to EES also is connected to ERCOT. The total removes the double count.

Figure 1 below provides a map of where the parties' generation is located.

Figure 1: Location of Exelon and NRG Generating Facilities in the United States

Based on the data in Table 1 (and the more detailed plant listing included in Exhibits J-3 and J-4), the following facts are evident with respect to potentially relevant geographic markets.

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Exelon owns or controls generation in PJM, ERCOT, ISO-NE, MISO, and the CSWS, SOCO and EES balancing authority areas. NRG owns or controls generation in PJM, ERCOT, ISO-NE, NYISO, CAISO, and the NEVP and EES/LAGN balancing authority areas. As noted earlier, while LAGN is a separate balancing authority area, generation in LAGN used the transmission systems of transmission providers primarily Entergy to move generation to its customers. Generation in the LAGN balancing authority area is generally treated as part of the EES balancing authority.⁴⁵

Thus, the markets in which both Exelon and NRG own or control generation include PJM, ERCOT, ISO-NE, and the EES (including LAGN) balancing authority area. Each of these markets is analyzed, along with submarkets as appropriate, as discussed below. I conducted a Competitive Analysis Screen for PJM and its relevant submarket, PJM East, as well as ERCOT, and its North and Houston zones.⁴⁶ While I believe that this is sufficient to demonstrate a lack of competitive effect in jurisdictional markets, in anticipation of possible contrary views, I also present analyses of other markets as discussed below.

Q. WHAT TIME PERIODS/LOAD CONDITIONS DID YOU ANALYZE?

- A. For all markets for which full DPT analyses are performed, I examined ten time periods/load conditions. I used these 10 time periods for both the Economic Capacity and Available Economic Capacity measures. While the taxonomy is largely dictated by Commission policy and precedent, it is useful to recall that the origin of the DPT time periods is to provide a selection of snapshots that reflect a broad range of system conditions. Broadly, I evaluated hourly load data to aggregate similar hours. I defined periods within three seasons (Summer, Winter and Shoulder) to reflect the differences in unit availability, load and transmission capacity. Hours were first separated into seasons to reflect differences in generating availability and then further differentiated by load

⁴⁵ See, for example, *Affidavit of Matthew E. Arenchild, PhD, On Behalf of Entergy Services Inc., et al.*, Docket No. ER91-569-043 *et al.*, August 29, 2008, at note 10.

⁴⁶ I did not conduct an Available Economic Capacity analysis for ERCOT, for the reasons described below.

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levels during each season.⁴⁷ For each season, hours were segmented into peak- and off-peak periods.⁴⁸ The periods evaluated (and the designations used to refer to these periods in exhibits) are:

SUMMER (June-July-August)

Super Peak 1 (S_SP1):	Top load hour
Super Peak 2 (S_SP2):	Top 10% of peak load hours
Peak (S_P):	Remaining peak hours
Off-peak (S_OP):	All off-peak hours

WINTER (December-January-February)

Super Peak (W_SP):	Top 10% of peak load hours
Peak (W_P):	Remaining peak hours
Off-peak (W_OP):	All off-peak hours

SHOULDER (March-April-May-September-October-November)

Super Peak (SH_SP):	Top 10% of peak load hours
Peak (SH_P):	Remaining peak hours
Off-peak (SH_OP):	All off-peak hours

I also present an analysis of installed capacity (using summer ratings) to demonstrate that the impact of the transaction is *de minimis* in markets where both Exelon and NRG own or control generation. This is essentially the same as doing an analysis of the summer super peak.

⁴⁷ Appendix A requires applicants to evaluate the merger's impact on competition under different system conditions. For example, aggregating summer peak and shoulder peak conditions may mask important differences in unit availability and, therefore, a merger could potentially affect competition differently in these seasons. Thus, applicants are directed to evaluate enough sufficiently different conditions to show the merger's impact across a range of system conditions. On the other hand, the DOJ/FTC *Horizontal Merger Guidelines* discuss the ability to sustain a price increase, and a finding that a structural test (like the HHI statistic) violates the safe harbor for some small subset of hours during the year may not be indicative of any market power problems.

⁴⁸ Peak and off-peak hours were defined according to NERC's definition, except that I did not consider Saturdays to be peak days. For the Eastern Time Zone, on-peak hours include Hour Ending (HE) 0800-HE 2300 EST Monday through Saturday and off-peak hours include HE 2400-HE 0700 EST Monday through Saturday. See http://www.nerc.com/files/opman_12-13Mar08.pdf.

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Q. WHAT COMPETITIVE PRICE LEVELS DID YOU ANALYZE IN YOUR PJM ANALYSES?

- A. For the PJM East destination market, I evaluated conditions assuming destination market prices ranging from \$55/MWh in the Shoulder Off-Peak periods to \$250/MWh in the Summer Super Peak period. In Order No. 642, the Commission indicated that sub-periods within a season should be determined by load levels rather than by time periods. As discussed below, I analyzed each market at prices that range from the levels that would apply at the lowest load levels to those consistent with the highest load levels. These prices analyzed were selected based on a review of market prices. I considered the frequency and distribution of market prices, irrespective of season, as well as the distribution of market prices based on the seasonal definitions used for modeling purposes. Different price levels were used for PJM as a whole in recognition that PJM East has higher prices than the RTO as a whole. For PJM, I used prices ranging from \$45/MWh in shoulder off-peak to \$250/MWh in summer super-peak, with the prices in other time periods somewhat lower than those in the PJM East analysis as shown on the summary tables and exhibits discussed below.⁴⁹ For PJM Classic, prices were generally between the assumed PJM East and PJM prices, except for the top price, which was \$250/MWh in each of the markets. For ERCOT and its submarkets, I used prices ranging from \$50/MWh in the shoulder off-peak to \$250/MWh in the summer super-peak. These broad ranges of prices, in combination with the time periods, should be reflective of a sufficient range of system conditions such that a full effect of the merger is captured in the analysis. In addition, I conducted price sensitivity analyses around these base case prices, which evaluated somewhat higher and lower prices.⁵⁰

⁴⁹ I took into consideration actual prices in relevant PJM markets during 2007-2008, fuel prices in 2007 and 2008 and forecast fuel and electricity prices for the reference year of my analysis, 2009. I largely relied on forecast price data from Ventyx, The Velocity Suite.

⁵⁰ The results of these sensitivity analyses are provided in workpapers.

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Q. PLEASE DESCRIBE THE BASIC MODEL ARCHITECTURE YOU USED IN ANALYZING THIS MERGER.

- A. I used CRA's proprietary model, CASm, to perform the analysis. CASm is a linear programming model developed specifically to perform the calculations required in undertaking the delivered price test and has been used to provide analyses supporting scores of filings before the Commission. The model includes each potential supplier as a distinct node or area that is connected via a transportation (or pipes) representation of the transmission network. Each link in the network has its own non-simultaneous limit and cost. Potential suppliers are allowed to use all economically and physically feasible links or paths to reach the destination market. In instances where more generation meets the economic element of the delivered price test (*e.g.*, 105 percent of the market price) than can actually be delivered on the transmission network, scarce transmission capacity is allocated based on the relative amount of economic generation that each party controls at a constrained interface.

Q. HOW DID YOU ALLOCATE LIMITED TRANSMISSION CAPACITY?

- A. Appendix A notes that there are various methods for allocating transmission, and that applicants should support the method used.⁵¹ I allocated transmission based on a prorata, squeeze down method based on relative ownership shares of capacity at a transmission interface, rather than on the basis of economics, which would allocate limited transmission first to the generation with the lowest variable costs. The prorata squeeze-down method, so-named because it seeks to prorate capacity at each node, is the closest approximation to what the Commission applied in *FirstEnergy*⁵² that is computationally

⁵¹ See Order No. 592, ¶ 31,044 at 30,133: In many cases, multiple suppliers could be subject to the same transmission path limitation to reach the same destination market and the sum of their economic generation capacity could exceed the transmission capability available to them. In these cases, the ATC must be allocated among the potential suppliers for analytic purposes. There are various methods for accomplishing this allocation. Applicants should support the method used.

⁵² *Ohio Edison Company, et al.*, 80 FERC ¶ 61,039: When there was more economic capacity (or available economic capacity) outside of a transmission interface than the unreserved capability would allow to be delivered into the destination market, the transmission capability was allocated to the suppliers in proportion to the amount of economic capacity each supplier had outside the interface.

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feasible. Under this method, shares of available transmission are allocated at each interface, diluting the importance of distant capacity as it gets closer to the destination market. When there is economic supply (*i.e.*, having a delivered cost less than 105 percent of the destination market price) competing to get through a constrained transmission interface into a control area, the transmission capability is allocated to the suppliers in proportion to the amount of economic supply each supplier has outside the interface.

Shares on each transmission path are based on the shares of deliverable energy at the source node for the particular path being analyzed. The calculations start at the outside of a network, defined with the destination market as its center, and end at the destination market itself. A series of decision rules are required to accomplish this proration. The purpose of these decision rules is limited to assigning a unique power flow direction to each link for any given destination market analysis. Once the links are given a direction, the complex network can be solved. CASm implements a series of rules to determine the direction of the path. The first rule (and the one expected to be applied most frequently) is based on the direction of the flow under an economic allocation of transmission capacity. Other options take into consideration the predominant flow on the line based on desired volume (the amount of economic capacity seeking to reach the destination market, the number of participants seeking to use a path in a particular direction, and the path direction that points toward the destination market).

The model proceeds to assign suppliers at each node a share equal to their maximum supply capability. At each node, new suppliers (those located at the node outside of the next interface) are given a share equal to their supply capability, and the shares of more distant suppliers (those who have had to pass through interfaces more remote from the destination market in order to reach the node) are scaled down to match the line capacity into the node. Ultimately, the shares at the destination market represent the prorated shares of Economic Capacity (or Available Economic Capacity) that is economically and physically feasible.

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This is the same modeling architecture that I have used to analyze numerous previous mergers in testimony relied upon by the Commission. A summary of the transmission architecture used in analyzing the relevant PJM markets is included in Exhibit J-6. In my analysis, I treated MISO as a single exporting control area. However, I note that this treatment of MISO has no material effect on the results of the analysis because any such assumption is overridden by the simultaneous import limits.

Q. WHAT ASSUMPTIONS DID YOU MAKE ABOUT SIMULTANEOUS IMPORT CAPABILITY IN PJM?

- A. Analyzing the PJM and PJM East markets requires an assumption about simultaneous import limit (SIL). In my base case analysis, for imports into PJM, I used a SIL that PJM calculated recently in connection with market-based rate proceedings.⁵³ This is a SIL for a 2006 period, but should be broadly consistent with the SIL going-forward. Moreover, in the context of this merger, the precision of the SIL is less significant because (1) Exelon and NRG own relatively small shares of generation in markets first-tier to PJM (i.e., Exelon's Clinton plant in MISO and NRG's generation in NYISO) and areas adjacent to PJM East (i.e., PJM Central); and (2) the clean sweep mitigation approach limits the relevance of specific assumptions underlying the competitive screens themselves. I demonstrate the robustness of my results around a considerable range of assumptions for the SIL into PJM. Similarly, for PJM East, for my base case analysis, I start with the SIL that PJM calculated in connection with market-based rate proceedings.⁵⁴ I also conducted an analysis based on data published by PJM on the hourly Average Eastern Transfer

⁵³ *PSEG Energy Res. & Trade LLC*, 124 FERC ¶ 61,147 (2008) (PJM SIL Approval Order). As noted in the order, the PJM SIL studies were filed on April 30, 2008 (for the PJM market) and July 14, 2008 (for the PJM East market).

⁵⁴ *Id.* Note that as part of its SIL analysis for PJM East, PJM identified the specific units that it included within the PJM East submarket, and I followed PJM's convention for plants located in the East in my analysis.

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Limit.⁵⁵ In the context of its market-based rate analysis, the Commission specifically allows the use of actual flows as a proxy for the SIL,⁵⁶ but since PJM calculates a limit in addition to the actual flows, the SIL is better approximated by the limit. Nevertheless, I conducted sensitivity analyses using both maximum hourly transfer limit by season as well as actual flows by season.⁵⁷ Since both the transfer limit and the actual flows reflect only transfers from within PJM, and not from external sources, I considered augmenting this intra-PJM transfer capability with a transfer capability from NYISO, which also is interconnected to PJM East. NYISO connects to PJM East from three sources: (i) about 2,000 MW import capability from zone G (Hudson Valley) that is used primarily to wheel power back into NYISO; (ii) an interconnection with zone J (New York City) that has zero import capability into PJM since it is reserved to export wheeled power into Zone J; and (iii) the 660 MW Neptune cable between New Jersey and Long Island (zone K), which for all practical purposes is reserved by the Long Island Power Authority under a 20 year agreement with Neptune for delivery from PJM to Long Island, leaving available capacity into PJM at zero.⁵⁸ See Figure 2 below.⁵⁹ Hence, there is little if any ability to deliver power directly from NYISO into PJM East. Nevertheless, I modeled NYISO to PJM imports in a manner consistent with the transmission capacity assumptions underlying the figure, with the exception of the Neptune cable linking Long Island which I did not include as providing import capacity into PJM.⁶⁰ This means that NRG generation in NYISO outside of zone J is allowed to access PJM East via its allocable share of the link from zone G, or by entering PJM Central and West and competing for transmission within PJM into PJM East.

⁵⁵ <http://www.pjm.com/services/system-performance/downloads/flows/2007-flows.xls> and <http://www.pjm.com/services/system-performance/downloads/flows/2008-flows.xls>.

⁵⁶ *Order No. 697* at P 354 n.358.

⁵⁷ The actual maximum seasonal flows were 91-94 percent of the maximum limits in 2006.

⁵⁸ http://www.lipower.org/newscenter/pr/2007/062807_neptune.html

⁵⁹ http://www.nysrc.org/pdf/Reports/2009%20IRM_Assumption_Matrix_Final.pdf

⁶⁰ I include in my workpapers a sensitivity analysis that allows imports on the zone G to PJM East path, and includes the Neptune cable as exporting to PJM.

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Figure 2: Transmission Map of Assumptions for 2009-2010 New York IRM Requirement Study

The actual limitations on use of the NYISO to PJM East transmission also is relevant to analysis of the effect of this transaction both in PJM East and in NYISO. NRG's generation in NYISO is not directly importable into PJM East, and its generation in zones A and C can access PJM East primarily through PJM Central or West (due to the use of the Zone G interconnection to wheel power through PJM to New York City) and across the PJM transfer limit into PJM East.⁶¹ Exelon generation in PJM East can only be delivered into NYISO via connections in PJM Central and West into upstate New York.

⁶¹ Figure 2 provides some insight, but an incomplete picture, of the transfer capability between PJM East and New York. In addition to the Neptune DC line discussed previously, it shows a connection between PJM East and NYISO Zone G (up to 600 MW into G and 2,000 into PJM East), and between PJM East and Zone J (up to 1,200 MW into J and zero into PJM East). Superficially, this would seem to imply that up to 1,800 MW could flow from PJM East into NYISO, such that Exelon's presence in that market theoretically might not be *de minimis*. In reality, there is essentially no capability to use these two connections to export PJM East generation into NYISO. Collectively, they comprise the Farragut Wheel, a transmission path used to bypass a constrained interface in NYISO (Dunwoodie South) to bring power into Zone J (New York City). Hence, the path between NYISO Zone G and PJM East is loaded to bring power from NYISO into PJM and the path between PJM East and Zone J is loaded into Zone J to wheel this same power into the City. Because the path between PJM East and Zone J is reserved to transfer power into Zone J and the path between Zone G and PJM East is reserved for power that wheels back into NYISO, there also is essentially no ability for NRG generation in NYISO to compete in the PJM East market.

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When I analyzed the PJM East market, I assumed that generation in the rest of PJM competed for the limited transmission. In other words, I did not squeeze generation from Far West to West to Central. This is consistent with the assumption that, although PJM East is a sometimes-constrained market, the remaining interfaces in PJM are not often constrained or constrained at the same time as PJM East. More importantly for present purposes, this assumption is quite conservative in that it treats Exelon-controlled generation in Illinois equally with generation in portions of PJM far closer to the PJM East market.

Q. DID YOU EXAMINE ANY OTHER SUB-MARKETS WITHIN PJM?

A. Yes. Because of the West-to-East power flows within PJM, it has been traditional to examine cascading sub-markets within the Mid-Atlantic part of PJM (also referred to as pre-expansion or Classic PJM). Thus, in past transactions, I have examined sub-markets consisting of PJM East, PJM Central-plus-East and PJM West-plus-Central-plus-East, all of these being sub-areas within PJM Mid-Atlantic. Because NRG owns no generation in either PJM West or Central, this analysis would provide no additional insight to that informed by the PJM East analysis, since adding the other areas would serve only to dilute the combined Exelon and NRG market shares relative to the PJM East analysis.

While NRG owns essentially no generation in either West or Central,⁶² it does own a 127 MW share of Keystone and Conemaugh located in an area traditionally termed PJM Far-West. PJM Far-West is not a sub-market of any economic or electrical significance, nor is a cascading market consisting of PJM Far-West-plus-West-plus-Central-plus-East. Rather, PJM Far-West is merely the rump portion of PJM Classic that was west of the

⁶² The 12 MW Paxton Creek Cogeneration facility owned by NRG is located in Harrisburg, PA.

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first meaningful West-to-East constraint in PJM Classic, the West interface. The only generation within this portion of PJM is Keystone and Conemaugh. Because there are no transmission constraints that meaningfully separate PJM Far-West from areas to the west of it (e.g., AEP), there is no logic for an analysis that includes PJM Far-West in a sub-market but excludes areas further to the west.

I am nonetheless aware that some parties in the past have analyzed a PJM Classic (Mid-Atlantic) market. While I disagree for the reasons I have discussed, I have performed an economic capacity analysis of this market to demonstrate the absence of screen failures.

I also considered the effect of the transaction on Northern Illinois, where Exelon owns generation and NRG owns a single generating station (Rockford, a 447 MW peaking station). I am not suggesting that Northern Illinois is a relevant geographic market, but I nevertheless provide the pertinent facts to demonstrate that there is no adverse competitive effect in this area.

Q. WHAT MARKETS OUTSIDE OF PJM DID YOU ANALYZE?

- A. In view of the fact that both Exelon and NRG own generation in ERCOT, I performed an economic capacity analysis of ERCOT and the two zones within it, ERCOT North and Houston, where Exelon and NRG both own generation. I recognize that ERCOT is non-jurisdictional to the Commission for most or all purposes, but have included the analysis against the possibility of a party arguing that an analysis that did not look at ERCOT markets would be deficient. Of course, the clean sweep approach to mitigation of market power issues within ERCOT makes an analysis of pre-mitigation market structure changes relatively meaningless. It does serve the purpose of providing information concerning the extent to which regulators might be concerned about interim mitigation before Exelon's generation and contracts can be divested. I did not perform an available economic capacity analysis of ERCOT because there is full retail access and most generation is severed from retail load service.

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Because ERCOT is interconnected to the Eastern Interconnection, albeit quite weakly, there is a theoretical possibility that enough NRG generation in ERCOT would be allocated tie capacity sufficient to cause screen failures in adjacent jurisdictional markets in which Exelon controls generation. Both of the relevant ties, the North Tie and the East Tie, connect to the CSWS balancing area, an area in which Exelon has a modest amount of generation under a long-term contractual arrangement. In order to demonstrate that this theoretical problem is not real, I prepared a full Economic Capacity and Available Economic Capacity DPT for the CSWS balancing area.

With the exception of the CSWS balancing area, I prepared no analyses of markets in which only one of the entities has capacity. For those markets where the market shares of one or both of the entities is quite small, I demonstrate that the extent of business transactions in the same market is *de minimis* by performing a HHI analysis of installed capacity, equivalent to a DPT during the summer super-peak period. These analyses demonstrate the *de minimis* nature of the overlap and the lack of competitive effect.⁶³

Q. WHAT YEAR DID YOUR ANALYSIS COVER?

A. I analyze 2009 market conditions, consistent with the Order No. 642 requirement that the analysis be forward looking. Even though my analysis approximates 2009 market conditions, the primary source of data on generation and transmission is current and recent historical data. Where appropriate, I adjusted relevant data to approximate 2009 conditions. As described in Exhibit J-5, this includes load and generation dispatch (*i.e.*, fuel and other variable) costs. With respect to new generation, I only included generation already under construction and expected to be on-line by 2009; I did not include any additional planned generation

⁶³ As explained elsewhere, because Exelon's remaining ISO-NE generation is old and inefficient and has very low capacity factors, an installed capacity analysis captures the extent of competition in those time periods and product categories in which Exelon's generation is likely to compete. Neither entity's participation in the EES balancing area is *de minimis*, though their shares are relatively small. For this market, the purpose of the installed capacity analysis is to demonstrate that the clean sweep of Exelon's generation in ERCOT also eliminates its presence in EES, given that the only generation Exelon owns or controls in EES is the Frontier facility that is also interconnected to ERCOT and hence part of the ERCOT clean sweep.

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not yet under construction. With respect to retirements, I included only units already retired or already approved by PJM for retirement for retirement by 2009. I also treated Exelon's mothballed generation in ERCOT (190 MW) for which retirement is planned prior to closing this transaction as being retired.

Q. HOW DO YOU ACCOUNT FOR LONG-TERM PURCHASES AND SALES?

A. In the past, I have treated long-term power arrangements as resulting in a transfer of ownership and control to the purchaser, but the Commission's current policy appears to favor assigning control to the contractual party with dispatch rights.⁶⁴ For most purchases and sales, I am unable to determine whether the seller or buyer has control⁶⁵ and in those cases I assigned control to the buyer. I note, however, that the treatment of purchases and sales is inconsequential in terms of the results of my analysis, except with respect to Exelon's and NRG's contracts. As described below, I have assumed, as appropriate, that contracts transferring control to Exelon and NRG are treated as such. Exelon Generation has several long-term (more than one-year) contracts to purchase the output of various plants located in the former ComEd control area. Through February 2013, Exelon Generation has contracts with affiliates of Dominion to purchase the output

⁶⁴ *Revised Filing Requirements*, Section 33.3(c)(4)(i)(A).

Economic capacity means the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from such capacity could be economically delivered to the destination market. Prior to applying the delivered price test, the generating capacity meeting this definition must be adjusted by subtracting capacity committed under long-term firm sales contracts and adding capacity acquired under long-term firm purchase contracts (*i.e.*, contracts with a remaining commitment of more than one year). The capacity associated with any such adjustments must be attributed to the party that has authority to decide when generating resources are available for operation. Other generating capacity may also be attributed to another supplier based on operational control criteria as deemed necessary, but the applicant must explain the reasons for doing so. (emphasis added)

⁶⁵ This uncertainty arises both from ambiguity in the Commission's guidance and a lack of access to contract terms. Some of the ambiguity would remain even with more bright line guidance and full disclosure of contract terms. An example is a unit contingent contract (tolling or otherwise) in which the buyer has the right to nominate output from the unit. However, the seller controls whether the unit is made available (typically subject to penalties for non-availability). Moreover, if the buyer does not nominate the output, the seller frequently has the right to dispatch the plant for its own account. Given this mixture of circumstances, it is not wholly clear which party has control in the sense relevant to the Commission's market power tests. This example is not fanciful but is in fact a common type of contract.

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of the Kincaid coal-fired plant located in Illinois. In my analysis, I treated the entire output of this facility as available to (and controlled by) Exelon Generation when economic. Exelon Generation has two additional long-term PPAs that continue past 2009 for approximately 1,300 MW of supply from merchant generation (peakers), located in the former ComEd control area, that I also treated as under Exelon's control⁶⁶

With respect to purchases from QFs or non-utility generators (NUGs), I included as Exelon-affiliated generation its purchases from QFs and small non-utility generators (cumulatively totaling less than 200 MW) and treated them as must-take, non-dispatchable and hence economic in all time periods.

As described previously, Exelon has PPAs to purchase generation at the Wolf Hollow and Frontier stations in Texas and a PPA to sell output from Frontier to EES. I treated the PPAs to buy output from these two facilities as transferring control to Exelon, but did not assume that the PPA with EES transferred control of 300 MW away from Exelon. In CSWS, Exelon has a tolling agreement with respect to the Green Country facility, which I treated as giving Exelon control.

I am not aware of any long-term PPAs that NRG has that might convey control, other than a 600 MW tolling agreement in the EES balancing authority, which is reflected in Exhibit J-4 as under NRG's control.

⁶⁶ Exhibit J-3 also reflects other long-term PPAs or tolling agreements outside of PJM that are assumed to give Exelon Generation control for the output of generation.

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V. IMPACT OF THE MERGER ON COMPETITION**PJM****Q. WHAT PJM MARKETS DID YOU ANALYZE?**

- A. I examined a PJM RTO-wide market, as well as the PJM East and PJM Classic submarkets, where both Exelon and NRG own generation. As noted earlier, the Commission has deemed PJM East a relevant submarket in past transactions as well as in the context of its market-based rate screens.⁶⁷ The location of Exelon's and NRG's generation in PJM is summarized in Table 2 below:

Table 2: Exelon and NRG Generation in PJM

	Exelon (MW)	NRG (MW)
PJM East	8,454	1,058
PJM Classic	2,612	139
PJM Midwest (Illinois)	12,633	447
Total PJM	23,698	1,644

Exelon owns or controls approximately 8,400 MW of generation in PJM East, and NRG owns 1,058 MW in PJM East, consisting of Dover Energy (104 MW), Vienna (158 MW), and Indian River (796 MW). As I noted earlier, two of the Indian River units (176 MW) are scheduled to be retired in 2010 and 2011.

Outside of PJM East, the generation owned by NRG in PJM is located in western Pennsylvania (139 MW) and Illinois (447 MW). Exelon owns or controls about 15,000 MW of generation in PJM outside of PJM East, mostly in Illinois (approximately 12,600 MW) and the remainder in the original PJM footprint (approximately 2,600 MW). Exelon and NRG are each (minority) joint owners in the Keystone and Conemaugh, two large coal-fired stations in far western Pennsylvania that have a total generating capacity of approximately 3,400 MW. Exelon's share of the two generating stations is just under 21 percent, and NRG's share is about 3.7 percent. The units are operated and bid into the market by Reliant Energy Northeast Management Company but are deemed for purposes of this analysis to be controlled by Exelon and NRG for their respective shares.

⁶⁷ Order No. 697 at P 246, citing to *Exelon Corp.*, 112 FERC ¶ 61,011 (2005) at P 122.

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Q. WHAT SPECIFIC ANALYSES DID YOU CONDUCT IN PJM?

- A. Consistent with the guidance in the *Merger Policy Statement*, for the PJM and PJM East markets, I analyzed Economic Capacity and Available Economic Capacity. I also analyzed Economic Capacity for the PJM Classic market for the sole purpose of assessing the impact of including Exelon's and NRG's shares of Keystone and Conemaugh with their shares in PJM East. I also address PJM's RPM capacity market and relevant ancillary services markets. Finally, while I do not find that northern Illinois is a separate relevant market, and therefore do not conduct a DPT analysis for that area, I analyze market facts to evaluate the competitive effect of combining Exelon's and NRG's generation in northern Illinois.

Economic Capacity

Q. WHAT DID YOUR ANALYSIS SHOW FOR ECONOMIC CAPACITY IN PJM?