

NRG ENERGY, INC.
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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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UNITED STATES OF AMERICA
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Docket No. EC09-_____

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 | 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)