

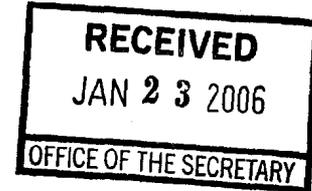


Jon Corzine
Governor

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January 23, 2006



Via Fax and UPS Overnight Mail

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Exelon Corporation; Public Service Enterprise Group, Incorporated

SEC File No. 70-10294

Dear Secretary Morris:

Please find enclosed for filing in the above-captioned matter, an original and three copies of a timely Motion to Intervene and Comments by the New Jersey Board of Public Utilities with respect to Exelon Corporation and Public Service Enterprise Group, Incorporated's Amended U-1 Application.

A copy of this filing will be served upon all Applicants of record.

Respectfully submitted,

**NANCY KAPLEN
ACTING ATTORNEY GENERAL OF NEW JERSEY**

By: /s/ Helene S. Wallenstein

Helene S. Wallenstein
Senior Deputy Attorney General

Enclosures

c: Applicants of Record [w/enclosures]

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

**I/M/O THE FORM U-1/A APPLICATION-DECLARATION)
OF EXELON CORPORATION AND PUBLIC SERVICE)
ENTERPRISE GROUP INCORPORATED UNDER THE)
PUBLIC UTILITY HOLDING COMPANY ACT OF 1935)**

FILE NO. 70-10294

**MOTION TO INTERVENE AND COMMENTS
OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES**

Pursuant to Rule 210(b)(2) of the Securities and Exchange Commission's ("Commission") Rules of Practice, 17 C.F.R. 201.100 et seq., the New Jersey Board of Public Utilities ("NJBPU") hereby moves to intervene as of right in the above captioned proceeding, and submits these timely comments in response to Exelon Corporation's ("Exelon") and Public Service Enterprise Group Incorporated's ("PSEG") (together, "Applicants") amended U-1/A application-declaration ("Amended Application") under the Public Utility Holding Company Act of 1935 ("PUHCA"), which was noticed in the Federal Register on January 10, 2006. PUHCA was repealed by the Energy Policy Act of 2005 ("EPAAct 2005"), Pub. L. No. 109-58, 119 Stat. 594 (August 8, 2005), effective February 8, 2006. The NJBPU became aware at approximately 5 p.m. on January 20, 2006, that the Applicants filed a further amendment ("January 20th Amendment") to their application on January 20, 2006.

For the reasons set forth herein, the NJBPU respectfully submits that it would be premature for the Securities and Exchange Commission ("Commission") to approve the Applicants' request at this time in light of the many uncertainties and unresolved issues

surrounding the proposed merger, and particularly in light of the ongoing merger proceeding before the NJBPU, which is not expected to be concluded for several months. Furthermore, the Transaction is currently under review at the Department of Justice, Antitrust Division ("DOJ"), under the Hart-Scott-Rodino Antitrust Improvements Acts of 1976, as amended. Extensive discovery has been sought by the Department of Justice, and the NJBPU has requested similar information. Thus, the NJBPU further submits that it would be premature for the Commission to act on the Applicants' filing while this review remains ongoing.

The NJBPU is the administrative agency charged under New Jersey law with the general supervision, regulation, jurisdiction and control over all public utilities in the State, including their rates and the provision of safe, adequate and reliable electric and gas service to retail customers in New Jersey. N.J.S.A. 48:2-13; N.J.S.A. 48:2-21; N.J.S.A. 48:2-23.

The transaction at issue in this case ("Transaction") involves the potential acquisition of the State's largest energy utility, Public Service Electric and Gas Company ("PSE&G"), and its affiliated companies, which own, operate and/or control a significant portion of the electric generation facilities serving the State. Applicants admit that the proposed Transaction will create market power, which they proposed to offset via the divestiture of unspecified generating units. The Transaction has the potential to cause very substantial harm to the State of New Jersey and its energy consumers. Accordingly, the NJBPU submits that it has a direct and substantial interest in the outcome of this matter, which interest cannot be adequately represented by any other party. Thus, the NJBPU is entitled to intervention.

Pursuant to N.J.S.A 48:2-51.1, and other State statutes, the Applicants must receive written approval of the Transaction from the NJBPU. Among the issues that the NJBPU must examine, as a matter of law, are the impact of the Transaction on competition, rates, service and employees. The NJBPU has ruled that the Applicants must prove that the Transaction will result in positive benefits for customers and the State of New Jersey.

The NJBPU has set the Applicants' NJBPU application for hearings, which began this month and are expected to continue through the end of February. Thereafter, the schedule provides for the filing of briefs and reply briefs, an Initial Decision by the Administrative Law Judge, exceptions and reply exceptions from the Initial Decision to the NJBPU, and final decision by the NJBPU.

As specified in their amended U-1/a filing, Applicants are seeking various approvals from this Commission with respect to the Transaction. In addition to authorization for the merger, the divestiture of generation assets and the restructuring of Exelon's generation, Applicants are also requesting certain related approvals including:

- 1) authorizations related to service company and other affiliate transactions;
- 2) issuance by Exelon of common stock in connection with the merger and employee and director compensation plans;
- 3) authorization to consolidate existing indebtedness and obligations of PSE&G and its subsidiaries with those of Exelon;
- 4) modifications to Exelon's existing omnibus financing authority granted by Order of April 1, 2004; and

- 5) approval of a section 11(e) plan with respect to the divestiture of generation assets to qualify for special tax treatment under section 1081 of the Internal Revenue Code.

As will be discussed herein, the NJBPU is also examining many of these issues pursuant to its State statutory authority. In particular, in addition to the issue of market power, open and disputed issues exist with respect to service company and other affiliate transactions; service quality; merger savings and their disposition; money pool and other financial issues; and numerous other issues. The Applicants' submissions before the NJBPU and this Commission leave open many material issues of fact that must be thoroughly investigated and resolved before a determination can be made that the Transaction meets the applicable legal standards for approval. The NJBPU has retained independent experts, including economists, accountants and engineers, to assist the NJBPU and its Staff in the analysis of the proposed Transaction. While the NJBPU has not made a final determination on any of the substantive issues before it in the State proceeding, in their prefiled testimony in the State proceedings, these experts, as well as experts for numerous other intervenors, have raised significant issues associated with the proposed Transaction.

The issue of market power that would result from the proposed Transaction is one of significant concern to the NJBPU. New Jersey has been in the forefront of advancing competitive retail energy markets and has implemented Basic Generation Service ("BGS") auctions which subject virtually all retail electric load in the State to market prices. The citizens of New Jersey are dependent on competitive markets and market forces to keep their rates in check. If Exelon's proposed acquisition of PSEG is

consummated and results in the exercise of market power, the negative financial impact will be felt directly and immediately by all customers within the State.

If the Transaction is consummated, it would, by all common metrics, result in one of the largest energy utilities in the nation. The uncontested facts demonstrate the need for substantial divestiture and mitigation of unequivocal market power in concentrated markets. The Applicants have proposed a variety of complicated and novel mitigation measures, the exact shape and results of which cannot be known on the current record before the NJBPU or this Commission.

In particular, record evidence raises troubling concerns that the Applicants may be able to exercise market power in the electric generating capacity and energy markets. The NJBPU's experts, as well as experts for various intervenors, have expressed concerns about the unprecedented concentration of generation plants that would result from the merger, which could result in decreased competition and a large potential for harm to New Jersey customers.

The record is not adequate for the NJBPU to determine whether Applicants' "sliding scale divestiture" proposal adequately mitigates uncontested and irrefutable market power. The Applicants have not specified which plants they intend to divest, but instead promise to reveal their plans after the merger is approved and consummated.

The NJBPU, as well as many other parties, submitted numerous pleadings to the Federal Energy Regulatory Commission ("FERC"), requesting that the FERC hold evidentiary hearings and consider expert testimony, including testimony by the PJM Market Monitoring Unit ("PJM-MMU") with respect to the market power issue. The PJM-MMU raised concerns about potential market power and expressed the need for more

specific information with respect to the units to be divested. Unfortunately, the FERC accepted the Applicants' vague mitigation plan without holding hearings or entertaining expert testimony. The FERC indicated that it would conduct a further review of the market power issue after the Transaction is completed. The FERC's decision is being appealed by several parties, and the NJBPU is considering filing a petition for review of the FERC decision with the federal court as well.

Until very recently, the Applicants have refused to provide specific details on their divestiture plan. However, while still making no commitment with respect to which units they propose to divest, on the eve of the hearings in the State proceeding, which began in the first week of January, the Applicants asked the PJM-MMU to analyze a number of divestiture scenarios involving specific plants. These proposals will be analyzed, but it has resulted in an extension of the hearing schedule through the end of February. Thus, the record on market power is not yet complete, and accordingly any action by the Commission with respect to divestiture of generation would be premature.

In addition to market power concerns raised by the proposed Transaction, the record is inadequate to determine the sufficiency of the Applicants' claim that the Transaction would produce competitive efficiencies that will benefit the public interest. Material issues of fact exist with respect to each of the items which the NJBPU is required to consider under State law. Open issues exist with respect to service quality; cost-allocation methodologies and requested authorizations related to service company and other affiliate transactions; access to books and records; corporate governance; merger savings and their disposition; money pool and other financial issues; as well as numerous other issues. The NJBPU is concerned with several aspects of the proposed

service agreement filed by Exelon for use after the proposed merger has been approved. For example, Exelon proposes not to allocate as many costs on a direct allocation of costs basis, as PSE&G is currently committed to under a stipulation approved by the NJBPU as recently as July 2003. The NJBPU also has concerns with respect to the allocation of revenues from BGS and Basic Gas Supply Service ("BGSS"). It is our understanding that the Commission has been reluctant to approve holding company service agreements, prior to their being fully reviewed and approved by the state commissions. Thus, approval by the Commission of the service company agreement would be premature at this time.

Furthermore, as noted above, the Transaction is currently being reviewed by DOJ under the Hart-Scott-Rodino Antitrust Improvements Acts of 1976, as amended. Extensive discovery has been sought by the Department of Justice. The NJBPU respectfully submits that it would be premature for the Commission to act on the Applicants' filing while this review remains ongoing.

While the Applicants point to the Court's ruling in Madison Gas & Electric Co. v. SEC, 188 F.3d 1337, 1341-42 (D.C. Cir. 1999), that the Commission is entitled to "watchfully defer" to the proceedings before and determination of other regulatory bodies (Amended Application at 38-39), in that case, all the other agencies' regulatory proceedings and determinations were complete. In the within matter, neither the State of New Jersey, which is critically affected by the Transaction, nor the Department of Justice, has completed their regulatory reviews. Moreover, the decision of the FERC is under appeal, and the very nature of the FERC decision, namely its reliance on the fact

that it would conduct a further review after the Transaction is completed, makes it clear that FERC has not yet had the last word on this Transaction.

In their January 20, 2006 Amendment, the Applicants now seek the Commission's approval, on a stand-alone basis, of a Section 11(e) Plan with respect to divestiture of unspecified generation units, so that they can be eligible for more favorable tax treatment under Section 1081 of the Internal Revenue Code. The Applicants argue that the Commission can consider the Applicants' Section 11(e) Plan on a stand-alone basis. The NJBPU respectfully disagrees. The Applicants' January 20, 2006 Amendment reflects recognition of the requirement in Section 10(f) of PUHCA that the Commission shall not approve any acquisition unless all State laws as may apply with respect thereto have been complied with. (January 20, 2006 Amendment at 10). This requirement has not yet been met, as the NJBPU has not yet ruled that the Transaction complies with State law.

The BPU submits that Applicants' reasoning that their Section 11(e) Plan can be considered on a stand-alone basis is flawed, because Section 11(e) must be read together with the other provisions of Section 11, most notably 11(b) which, in turn, implicitly require approval of the merger transaction itself. The divestiture plan being proposed by Applicants is based on the proposed existence of a new merged entity, which has not yet received all necessary state and federal approvals. But for such merger, there would be no divestiture proposal, and in the absence of obtaining all necessary approvals for such merger, there is nothing yet for the Commission to act on under Section 11. Section 11 is entitled "simplicification of holding-company systems," but in this case, the new holding company system has yet to be authorized. The

Applicants admit that Section 11(e) needs to be considered together with Section 11(b). Significantly, however, Section 11(b)(1)(C), requires the Commission to order each registered holding company to take appropriate measures to ensure that "the combination of systems under the control of the holding company is not so large as to impair the advantages of localized management, efficient operation or the effectiveness of regulation." The NJBPU respectfully submits that the Commission cannot make such a finding unless and until it has completed its Section 10 review, after the final decisions of the affected states and the DOJ.

It is premature for the Commission to decide at this time whether the Transaction satisfies the applicable legal standards. There are simply too many material issues of fact that remain in dispute and warrant closer examination. Thus, the NJBPU respectfully submits that this Commission should, consistent with Section 10(f), refrain from ruling on the Applicants' filing prior to a final decision by the NJBPU as to compliance with State law. The Commission should not to rush to approve the Transaction when the Transaction cannot close until after the NJBPU has completed its own hearing process. The Applicants argue that there is no harm to the protected interests in their requested relief (January 20, 2006 Amendment at 12), but to the contrary, the Applicants have not agreed that they will refrain from seeking to use any approval by the SEC to refute any arguments of the parties or bar any findings of the NJBPU.

While the NJBPU, in principle, has no objection to any units receiving more favorable tax treatment, since it would be the NJBPU's position that such benefits should be shared with customers, it would nonetheless be premature for the

Commission to issue such a ruling in the absence of final State and federal approvals of the Transaction and in light of the uncertainty as to how much and which generation units would be required to be divested if such a merger were to be approved by New Jersey.

The NJBPU has ruled on several merger transactions in recent years, which also required Commission approval, and the longstanding sound policy has been for the Commission to refrain from issuing its decision until all affected states have considered the applications before them and have issued their rulings. The NJBPU respectfully submits that no good cause exists for the Commission to deviate from this policy, and that it would be premature for the Commission to grant approval of the application before it, when so many important and contested issues surrounding the proposed Transaction are currently being litigated in New Jersey. Given the complicated nature of the markets here in issue, the lack of demand elasticity, and the potential harm that can result from the exercise of market power, the complicated nature of the Applicants' proposal makes a full review process essential to the fulfillment of protecting the public interest.

Accordingly, for the reasons stated above, the NJBPU respectfully requests that the Commission decline to issue the Order requested by the Applicants. In the event the Commission determines that it has authority to issue an Order in this matter in the absence of other approvals by state and federal agencies, the NJBPU urges that any such Order be limited and narrowly tailored to issuance of authorizations only to the extent necessary to preserve potential tax savings should the Transaction ultimately receive all requisite approvals. Furthermore, any such Order should make it clear that

such Order is subject to receiving final NJBPU approval of the Transaction and that NJBPU's statutory authority is in no way preempted by or otherwise intended to be adversely impacted by the Commission's decision.

Respectfully submitted,

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January 23, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served, on this 23rd day of January, 2006, a copy of the foregoing Comments of the New Jersey Board of Public Utilities by U.S. first class mail, postage pre-paid, upon each of the applicants in this proceeding.

/s/ Helene S. Wallenstein

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EXELON CORPORATION - PUBLIC SERVICE ENTERPRISE GROUP, INC.

**SERVICE LIST FOR APPLICANTS OF RECORD
FILING UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935**

SEC FILE NO. 70-10294

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