File No. 70-10294

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM U-1/A

AMENDMENT NO. 5
TO THE
APPLICATION-DECLARATION
UNDER
THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

Exelon Corporation
(and the Subsidiaries listed on the Signature Page hereto)
10 South Dearborn Street
37th Floor
Chicago, IL 60603

Public Service Enterprise Group Incorporated
(on behalf of the Subsidiaries listed on the Signature Page hereto)
80 Park Plaza
Newark, New Jersey 07102

(Name of companies filing this statement and address of principal executive office)

Exelon Corporation

(Name of top registered holding company)

Randall E. Mehrberg
Executive Vice President and
General Counsel
Exelon Corporation
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Newark, New Jersey 07102

(Name and address of agent for service)

The Commission is requested to send copies of all notices, orders and communications in connection with this Application-Declaration to:

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Applicants hereby provide the following supplemental information in File No. 70-10294:

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Item 1. Description of Proposed Transaction.

A. Approval of the Pennsylvania Public Utility Commission

On January 27, 2006, the Pennsylvania Public Utility Commission ("PaPUC") voted unanimously to approve the merger ("Merger") between Exelon Corporation ("Exelon") and Public Service Enterprise Group Incorporated ("PSEG"), finding that the combination "is in the public interest and provides substantial affirmative benefits." Upon closing, the Merger will bring local consumers $120 million over four years in rate discounts and will provide rate certainty for consumers through the end of 2010. As part of a settlement that led to PaPUC approval, PECO Energy Company ("PECO") committed substantial funding for alternative energy and environmental projects, economic development, and expanded outreach and assistance for low-income customers. The company has also made commitments for enhanced customer service and reliability, and pledges for maintaining its Philadelphia headquarters, charitable giving, and employment.

B. Motion to Intervene and Comments of the New Jersey Board of Public Utilities and Comments and Request for Hearing of the City of Philadelphia and Philadelphia Gas Works

Applicants recognize that some parties to the pending case oppose Commission action to approve the Merger at this time, and agree that action on the Merger itself would be premature. Applicants are not aware, however, of any opposition to action on the limited request for tax relief.

As the New Jersey Board of Public Utilities ("NJBPU") notes in its pleading, "The uncontested facts demonstrate the need for substantial divestiture and mitigation of unequivocal market power in concentrated markets." Further, the NJBPU states that it, "in principle, has no objections to any units receiving more favorable tax treatment." The NJBPU urges that any order issued in this matter be narrowly drawn and have no preemptive or preclusive effect on a subsequent NJBPU determination:

> 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.

Applicants accept these conditions and undertake not to assert that anything in this Commission's actions will bind, preclude or otherwise preempt the State's determination. To the contrary, if the NJBPU does not approve the Merger, the transactions will not close and this Commission's order will be of no consequence.

The City of Philadelphia and Philadelphia Gas Works have filed an intervention that raises issues concerning the gas operations of Exelon and PECO. As the intervenors note, these issues also have been raised in other forums, "specifically, Federal Energy Regulatory Commission ('FERC') Docket No. EC05-43-000, Pennsylvania ('PPUC') Docket No. A-110550F0160, and New Jersey Board of Public Utilities ('NJBPU') Docket No. EM05020106" and, in fact, the PaPUC has instituted a separate proceeding to deal with the intervenors' issues. The City of Philadelphia and Philadelphia Gas Works do not, however, raise any issues relating to the request before this Commission for approval of the Section 11(e) plan.

C. Letter to Chairman Cox and Commissioners

On January 27, 2006, the Chairmen of Exelon and PSEG sent a letter to Chairman Cox and the Commissioners requesting that the Commission issue a very narrow, focused order that would enable the surviving company in the Merger to defer taxation on gains associated with the government-mandated divestiture of generation. The text of the letter, which was sent to all of the intervenors, is as follows:

January 27, 2006

Hon. Christopher Cox, Chairman
Hon. Cynthia A. Glassman, Commissioner
Hon. Paul S. Atkins, Commissioner
Hon. Roel C. Campos, Commissioner
Hon. Annette L. Nazareth, Commissioner
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Exelon Corporation, et al. (SEC File No. 70-10294)

Dear Mr. Chairman and Commissioners:

We are writing on behalf of Exelon Corporation and Public Service Enterprise Group Incorporated to request the Commission to act in this matter prior to February 8, 2006, the effective date of repeal of the Public Utility Holding Company Act of 1935 ("PUHCA"). Our request is simple: we are asking the Commission to issue a very narrow, focused order that would enable the surviving company to defer taxation on gains associated with a government-mandated divestiture of generating assets. Although the filing relates to the proposed merger of Exelon Corporation and Public Service Enterprise Group Incorporated, we are not asking the Commission to approve the merger at this time.

Our request is consistent with the intent of Congress that companies required by the government to divest assets not be economically penalized in doing so. Congress has provided for these benefits under Section 1081 of the Internal Revenue Code, one of a series of tax provisions intended to mitigate the "taking" component of a government-mandated divestiture. In this matter, the sale of 4,000 MW of electric generation has already been ordered by the Federal Energy Regulatory Commission ("FERC"). In order for the tax relief to be granted, we need approval by both this Commission and the Internal Revenue Service.

For many years, this Commission has paid "watchful deference" to any market power measures, including divestiture mandated by FERC. In this particular case, the Commission will not have an opportunity to act on the pending merger application before PUHCA repeal is effective. Recognizing this possibility, Congress expressly provided for the continued availability of Section 1081 tax benefits in circumstances such as ours, where, notwithstanding the preexisting obligation (in this case, the FERC issued its order on July 1, 2005), the actual divestiture will not take place until after the effective date of repeal. [1]

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1 *See* section 1271(c) of the Energy Policy Act of 2005 ("Tax treatment under section 1081 of the [Internal Revenue Code] as a result of transactions ordered in compliance with the [Act] shall not be affected in any manner due to the repeal of that Act and the enactment of the Public Utility Holding Company Act of 2005.").

We recognize that some parties to the pending case oppose SEC action to approve the merger at this time. We agree that action on the merger itself would be premature. We are not aware, however, of any opposition to action on the limited request for tax relief. As the New Jersey Board of Public Utilities (NJBPU) notes in its pleading, "The uncontested facts demonstrate the need for substantial divestiture and mitigation of unequivocal market power in concentrated markets." Further, the NJBPU states that it, "in principle, has no objections to any units receiving more favorable tax treatment." The NJBPU urges that any order issued in this matter be narrowly drawn and have no preemptive or preclusive effect on a subsequent NJBPU determination:

> 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.

We accept these conditions. We note further that nothing in this Commission's actions will bind, preclude or otherwise preempt the State's determination. To the contrary, if the NJBPU does not approve the merger, the transactions will not close and this Commission's order will be of no consequence.

Comments and a request for hearing have also been filed jointly by the City of Philadelphia and Philadelphia Gas Works. The Philadelphia submission raised numerous issues previously raised in other regulatory proceedings. None of these issues is relevant to the narrow order we are requesting to preserve available tax benefits.

We believe that we have demonstrated an ample basis in law and in fact for the Commission to grant the requested relief. Further, we have been advised by the SEC Staff that they have "absolutely no problem" with the merger as such. Congress has seen fit not to penalize companies in circumstances such as ours. The congressional intent, however, is not self-executing. We need and ask your help in issuing the requested order.

We urgently request the Commission to act prior to February 8, 2006 when PUHCA repeal is effective to provide the requested tax relief. Otherwise, this intended benefit will be lost.

Sincerely,

John W. Rowe
Chairman of the Board, President
and Chief Executive Officer
Exelon Corporation
P. O. Box 805398
Chicago, Illinois 60680-5398

E. James Ferland
Chairman of the Board, President
and Chief Executive Officer
Public Service Enterprise Group Incorporated
80 Park Plaza
Newark, NJ 07102

D. Proposed Draft Order

In view of the time constraints faced by the Commission, with PUHCA repeal effective one week from today, Applicants are submitting the following proposed draft order for the Commission's review in order to facilitate timely Commission action:

SECURITIES AND EXCHANGE COMMISSION

(Release No. 35-___; 70-10294)

Exelon Corporation, et al.

Order Approving Plan Submitted Pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, and Reserving Jurisdiction

February ___, 2005

Exelon Corporation ("Exelon") and its subsidiary companies, Commonwealth Edison Company, Exelon Energy Delivery Company, LLC, Exelon Business Services Company, Exelon Ventures Company, LLC ("Ventures"), PECO Energy Company and Exelon Generation Company, LLC ("Exelon Generation"), and their subsidiary companies (together, the "Exelon Companies"), and Public Service Enterprise Group Incorporated ("PSEG"), and its subsidiary companies, Public Service Electric and Gas Company, PSEG Power LLC ("Power"), PSEG Energy Holdings L.L.C., PSEG Services Corporation and their subsidiaries (together, the "PSEG Companies" and, together with the Exelon Companies, the "Applicants") have filed with the Securities and Exchange Commission ("Commission") an application-declaration, as amended, ("Application") under Sections 6(a), 7, 8, 9, 10, 11(b), 11(e), 12, 13, 32 and 33 of the Public Utility Holding Company Act of 1935 (the "1935 Act" or "Act") for authority to engage in various transactions related to the merger of Exelon and PSEG (the "Merger"). The Commission issued a notice of the Application on December 30, 2005. A Motion to Intervene and Comments were filed by the New Jersey Board of Public Utilities, and Comments and Request for Hearing were filed by the City of Philadelphia and Philadelphia Gas Works.

For the reasons that follow, the Commission hereby approves Applicants' proposal pursuant to Section 11(e) of the Act (the "Section 11(e) Plan" or "Plan") to divest certain assets in mitigation of market power concerns that might otherwise be raised by the Merger. The Commission reserves jurisdiction over the remainder of Applicants' requests.

I. Background

At the time the Merger was announced, Applicants noted that, absent divestiture of a large amount of generation, the Merger could create significant market power concerns. To that end, Applicants proposed, and the Federal Energy Regulatory Commission ("FERC") accepted, a mitigation plan (the "Mitigation Plan") to address FERC requirements for competitive markets. A substantial part of the Mitigation Pan is the proposed "very substantial divestiture of generation," including the divestiture by sale of 4000 MW of generation. See Order Authorizing Merger under Section 203 of the Federal Power Act, 112 FERC 61,011 (July 1, 2005) (the "FERC Merger Order"). In December, 2005, the FERC affirmed its decision. In addressing the arguments raised on rehearing, the FERC emphasized that the proposed merger included mitigation measures to curb any competitive harm that might arise from the utilities' merger through "substantial divestiture of generation and several compliance filings." [2] Applicants propose to effect the Divestiture pursuant to a voluntary plan under Section 11(e) of the Act.

Applicants had previously asked the Commission to approve the Merger and related transactions. In view of the imminence of repeal, Applicants have amended their Application to request instead that the Commission issue a very narrow, focused order that would enable the surviving company to defer taxation

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2 Exhibit G-4 to the Application is a listing of generation facilities subject to divestiture as initially proposed by Exelon and PSEG (1,000 MW of peaking capacity and a total of 1,900 MW of mid-merit capacity of which 550 MW would be coal-fired). Subsequent to filing the Application, the proposed Generation Divestiture was expanded by an additional 1,100 MW for the total divestiture as approved in the FERC Merger Order of 6,600 MW (in a combination of divestiture by sale and "virtual" divestiture) and certain other generation facilities were added to the list subject to divestiture. See Exhibit G-4.1 for the final list of the facilities that may be subject to the Generation Divestiture.

on gains associated with a government-mandated divestiture of generating assets. [3] Specifically, Applicants seek to qualify for relief under section 1081 of the Internal Revenue Code of 1986, as amended ("Code"). Applicants believe that the net present value of the tax relief would exceed $100 million.

Applicants acknowledge that the proposed Section 11(e) Plan is forward-looking and contingent on events that will take place, if at all, only after the effective date of repeal. They note, in support of their request, that: section 1271(c) of the Energy Policy Act of 2005, which expressly provides that: "Tax treatment under section 1081 of the [Code] as a result of transactions ordered in compliance with the [Act] shall not be affected in any manner due to the repeal of that Act and the enactment of the Public Utility Holding Company Act of 2005." [4]

Applicants acknowledge that an order on the Section 11(e) Plan does not constitute Commission approval of the Merger itself. They note that the Merger will continue to be subject to the approval of the New Jersey Board of Public Utilities ("NJBPU") and undertake not to assert that the NJBPU's statutory authority is in any preempted or otherwise adversely impacted by this Commission's decision.

II. Divestiture Transactions

In order to maximize the amount a buyer would be willing to pay for the Subject Assets, defined below, the Applicants are considering alternative options for effecting the disposition by sale of the subject electric generating assets (the "Subject Assets"), as required by the Generation Divestiture. Subsequent to the Merger but prior to the implementation of any of the options set forth below, Exelon would cause assets owned by PSEG Fossil LLC, an indirect wholly-owned subsidiary of PSEG, to be transferred to Exelon Generation (the "Consolidating Transfers"). Pursuant to Option 2 described below, an internal restructuring would occur immediately prior to the disposition of the Subject Assets to the buyer that would change the ownership structure of the Subject Assets. The particular tax characteristics of the sale of a generating unit, including the buyer's desired business and tax structures, would determine which option would be utilized. Because there are likely to be multiple buyers of the Subject Assets (each such buyer a "Third Party"), the Applicants may utilize either of the disposition options to effectuate the sale of the Subject Assets to each Third Party (the disposition to each such Third Party is referred to herein as a "Divestiture Transaction"). Each of the Subject Assets would be acquired pursuant to each Divestiture Transaction in exchange for cash and/or notes (the "Transfer Consideration").

Option 1: Each sale of assets from the list in Exhibit G-13 would be accomplished by a sale from Exelon Generation to a Third Party pursuant to the Divestiture Transaction in exchange for the Transfer Consideration. Exelon Generation may distribute to Exelon (via Ventures) the Transfer Consideration received.

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[3] On Monday, August 8, 2005, the Energy Policy Act of 2005 (H.R. 6, 109th Cong.) was signed by the President and became law, Pub.L. 109-58. Title XII of the Energy Policy Act is the Electricity Modernization Act of 2005 (the "Modernization Act"). Subtitle F of the Modernization Act, the Public Utility Holding Company Act of 2005 ("PUHCA 2005") repeals the 1935 Act, effective six months after the date of enactment (February 8, 2006 or the "Effective Date").

[4] In addition, Congress has passed legislation (HR 4440) that includes technical corrections that, among other things, repeal Section 1081 prospectively. The technical explanation of the Senate bill contains the following description regarding the technical correction dealing with the 1935 Act and Section 1081 repeal:

> Repeal of the Public Utility Holding Company Act of 1935 (Act sec. 1263). The provision repeals sections 1081-1083 of the Code (relating to exchanges in obedience to SEC orders) to conform to the repeal of the Public Utility Holding Company Act of 1935. The repeal does not apply to any exchange, expenditure, investment, distribution, or sale made in obedience to an order of the Securities and Exchange Commission.

Id. at p. 75.

Option 2: Each sale of assets from the list in Exhibit G-14 would be accomplished by a sale from Exelon Generation, in exchange for an amount of cash equal to the Transfer Consideration, to the corporation wholly-owned by Ventures that is listed as the "Acquiring Sub" next to that asset in Exhibit G-14. Exelon Generation may distribute to Exelon (via Ventures) the cash received. Ventures would then sell all of the interests in the Acquiring Sub to the Third Party in exchange for the Transfer Consideration.

The particulars of the option selected for each Divestiture Transaction would be specified in the applicable post-Merger FERC Compliance Filing. All of the steps outlined in Options 2 and 3 above (including the internal restructurings) could occur simultaneously.

III. Analysis

A. Section 11 Analysis

Applicants propose to effect the Generation Divestiture pursuant to a voluntary plan under Section 11(e) of the Act. Section 11(e) of the Act provides a voluntary means for complying with Section 11(b) of the Act. The United States Supreme Court, in American Power Co. v. SEC, 329 U.S. 90, 119 (1946), noted that: "Section 11(e) merely permits the holding companies to formulate their own programs for compliance with § 11(b)(1) or to submit plans in conformity with prior Commission orders under § 11(b), ..." To approve a Section 11(e) plan, the Commission must determine, after notice and opportunity for hearing, that the plan is both "necessary to effectuate the provisions of" Section 11(b), and "fair and equitable to the persons affected by such plan." Northeast Utilities, Holding Co. Act Release No. 24908 (June 22, 1989), citing Valley Gas Co., 40 S.E.C. 162, 167 (Aug. 10, 1960).

(1) Necessity for Plan

The Commission has found that "[a] plan is 'necessary' within the meaning of section 11(e), ... if it accomplishes the objectives required by section 11(b) in an appropriate manner." Midland Utilities, 24 S.E.C. 463, 475 (1946). Applicants assert that the Divestiture, which has been approved by the FERC as an appropriate means of market power mitigation, fits squarely within the stated goals of Section 11(b) by ensuring that the resulting electric-utility system not be "so large as to impair . . . the effectiveness of regulation."

In its July 1, 2005 order approving the Merger, the FERC determined that a "very substantial divestiture of generation," including the divestiture by sale of 4,000 MW of generating capacity, was necessary to address potential anticompetitive consequences of the Merger. The Commission has long believed, and the courts have agreed, that it is appropriate for the Commission to "look to" or "watchfully" defer to the expertise of the FERC in matters such as these, involving the operation and regulation of competitive energy markets. See Madison Gas & Electric Co. v. SEC, 168 F.3d 1337, 1341-42 (D.C. 1999) ("when the SEC and another regulatory agency both have jurisdiction over a particular transaction, the SEC may 'watchfully defer[]' to the proceedings held before - and the result reached by — that other agency"), citing City of Holyoke Gas & Electric Department v. SEC, 972 F.2d 358 (D.C. Cir. 1992). In the ordinary course of its merger review, the Commission would "watchfully defer" to the FERC's action, including the need for divestiture, for purposes of its findings under Section 10(b)(1) of the 1935 Act that the Merger not result in a "concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers."

The Commission's findings under Sections 10 and 11 of the 1935 Act are closely linked. "Sections 9 and 10 are preventive in purpose. Their essential function is to avoid recreating, by acquisition, what Section 11(b) was designed to undo or eliminate." Public Service Company of Oklahoma, Holding Co. Act Release 19090 (July 17, 1975). The Commission has explained that "Section 10, in particular was intended to prevent acquisitions which would be 'attended by the evils which have featured the past growth of holding companies.'" American Electric Power Company, Inc., Holding Co. Act Release No. 20633 (July 21, 1978) (footnotes omitted). Chief among those "evils" was "lack of effective regulation." Section 1(b)(5) of the Act.

The Federal Power Act and the 1935 Act are coordinate titles of the Public Utility Act of 1935. Responsibility, sometimes overlapping, was allocated between the two agencies with the goal of ensuring "effective public regulation" of the utility industry. The legislative history makes clear that the purpose of Section 11 of the Act "is simply to provide a mechanism to create conditions under which effective Federal and State regulation will be possible." S. Rep. No. 621, 74th Cong., 1st Sess. 11 (1935) (Report of Senator Wheeler from the Committee on Interstate Commerce). In this regard, Section 11 "is therefore the very heart of the title," and its requirements, including the continuing obligation of the Commission to enforce integration standards, are "most essential to the accomplishment of the purposes of the Act." Id.

Developments in recent years, in particular, the development of competitive wholesale energy markets under the stewardship of the FERC represent an important reason why market power — as well as geographic expanse — is an important factor in determining whether an electric-utility system is, in fact, so "large" as to impair the effectiveness of regulation. In this regard, the Divestiture that is necessary and appropriate to "avert the process of concentration of power" for purposes of Section 10(b)(1) is similarly necessary and appropriate to ensure that the acquisition that is the subject of the Section 10 review does not result in a system that is "so large . . . as to impair the effectiveness of regulation" for purposes of Section 11(b), by reference to Section 2(a)(29). Accordingly, we find that Applicants' Divestiture plan is "necessary" within the meaning of Section 11(e).

(2) Fairness

As noted above, before the Commission may approve the Plan, it must also find that the provisions of the proposed Plan are "fair and equitable to the persons affected by such plan," namely, the shareholders of Exelon and PSEG. The securities of these companies are publicly held and are registered under the Securities Act of 1933. Both Exelon and PSEG are subject to the continuous disclosure requirements of the Securities Exchange Act of 1934. The sale of generation pursuant to the Mitigation Plan will be to third parties in arms'-length transactions.

Applicants note that if, for some reason, the Merger does not close, the order approving the Section 11(e) Plan will be of no effect. If, however, as Applicants anticipate, the Merger does close in the first half of 2006, Applicants state that the tax deferrals will contribute to the financial health of the merged company and so be in the "public interest" for purposes of the Act. Similarly, although the 1935 Act does not provide extra protection for shareholders of registered holding companies, the tax deferrals will clearly be beneficial to the interest of investors and, by bolstering the financial health of the merged company, similarly beneficial to the interests of consumers. [5]

The Commission finds, in light of the foregoing and the entire record before it, that the Plan is "fair and equitable" to the persons affected thereby.

B. Section 1081 Findings

Applicants state that Code section 1081 and related provisions are intended to mitigate the "taking" component of a government-mandated divestiture.

Code section 1081(b)(1) provides for the nonrecognition of gain or loss from a sale or exchange of property made in obedience to a Commission order; however, gain will not be recognized only to the extent that it can be (and is) applied to reduce the basis of the transferor's remaining assets as provided in Code

5 See Southern Company, Holding Co. Act Release No. 25639 (Sept. 23, 1992) (finding that concerns with respect to the interest of investors "have been largely addressed by developments in the federal securities laws and in the securities markets themselves").

section 1082(a)(2). In the event that the transferor receives "nonexempt property" in the exchange, [6] Code section 1081(b)(2) mandates that gain be recognized unless, within 24 months of the exchange, the transferor uses the nonexempt property to acquire property other than nonexempt property or invests the nonexempt property in accordance with that paragraph, and an order of the Commission recites that such expenditure or investment is necessary or appropriate to the integration or simplification of the transferor's holding company system.

Code section 1081(d) provides for the nonrecognition of gain or loss from certain intercompany transactions between members of the same system group if such transactions are made in obedience to a Commission order. System group is defined in Code section 1083(d) to include, as a general matter, corporations connected by common ownership with at least 90 percent of each class of stock of the corporations owned by other members of the system group.

Applicants have requested that the order of the Commission on this Application: (i) recite that the sale or disposition of generating units as part of the Generation Transactions is necessary or appropriate to the integration or simplification of the post-Merger Exelon holding company system and to effectuate the provisions of Section 11(b) of the Act; and (ii) require post-Merger Exelon to take appropriate actions to cause its direct and indirect subsidiaries, as the case may be, to complete the Generation Divestiture as required in order to comply with the FERC Merger Order. [7]

In particular, the Applicants request that the Commission include the following in its order:

The transfer of the assets listed in Exhibit G-11 from PSEG Fossil to PSEG Power, followed by the transfer of the interests in PSEG Power by Exelon to Ventures and then by Ventures to Exelon Generation, followed by the transfer of the assets listed in Exhibit G-11 by PSEG Power to Exelon Generation, are found to be necessary or appropriate to the integration or simplification of the post-Merger Exelon holding company system and to effectuate the provisions of Section 11(b) of the Act; and Exelon shall cause PSEG Fossil to transfer to PSEG Power the assets listed in Exhibit G-11, followed by the transfer of the interests in PSEG Power by Exelon to Ventures and then by Ventures to Exelon Generation, followed by the transfer of the assets listed in Exhibit G-11 from PSEG Power to Exelon Generation, in exchange for cash and/or notes (the notes referred to as the "Consolidation Notes") in accordance with section 1081(d) of the Code.

Each sale of the assets listed in Exhibit G-13 from Exelon Generation to a Third Party is found to be necessary or appropriate to the integration or simplification of the post-Merger Exelon holding company system and to effectuate the provisions of Section 11(b) of the Act; each sale of the assets listed in Exhibit G-13 by Exelon Generation shall be made to the Third Party in exchange for cash and/or notes in accordance with section 1081(b)(1) of the Code; and to the extent that the cash and/or notes received in such sale constitutes "nonexempt property," Exelon shall cause such proceeds to be reinvested within 24 months of the divestiture date in a manner that complies with section 1081(b)(2) of the Code, which includes the satisfaction by Exelon Generation of the Consolidation Notes.

Each sale of the assets listed in Exhibit G-14 from Exelon Generation to the corporation wholly-owned by Ventures that is listed as the "Acquiring Sub" next to that specific asset in Exhibit G-14,

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6 The term "nonexempt property" is defined in Code section 1083(e) to include, among other things, cash and indebtedness of the transferor that is cancelled or assumed by the purchaser in the exchange.

7 The Commission has issued a number of orders making similar Section 1081-related tax recitals in connection with other divestitures in compliance with orders under Section 11(b)(1) of the Act in furtherance of voluntary Section 11(e) plans. See, e.g., Ameren Corp., Holding Company Act Release No. 27645 (January 29, 2003); KeySpan Corp., Holding Company Act Release No. 27541 (June 19, 2002); NiSource, Inc., Holding Company Act Release No. 27525 (April 29, 2002) and Progress Energy, Inc., Holding Company Act Release No. 27444 (Sept. 26, 2001).

followed by each sale of such Acquiring Sub stock by Ventures to a Third Party, are found to be necessary or appropriate to the integration or simplification of the post-Merger Exelon holding company system and to effectuate the provisions of Section 11(b) of the Act; each sale of the assets listed in Exhibit G-14 by Exelon Generation shall be to the corporation wholly-owned by Ventures that is listed as the "Acquiring Sub" next to that specific asset in Exhibit G-14 in exchange for cash in accordance with section 1081(d) of the Code, and shall be followed by the sale of such Acquiring Sub stock by Ventures to a Third Party in exchange for cash and/or notes in accordance with section 1081(b) of the Code; and to the extent that the cash and/or notes received in the sale of the Acquiring Sub stock to the Third Party constitutes "nonexempt property," Exelon shall cause such proceeds to be reinvested within 24 months of the divestiture date in a manner that complies with section 1081(b)(2) of the Code, which includes the satisfaction by Exelon Generation of the Consolidation Notes.

Each distribution by Exelon Generation to Ventures, followed by each distribution by Ventures to Exelon, of the cash and/or notes received by Exelon Generation on the sale of the assets listed in Exhibit G-13 to a Third Party or the assets listed in Exhibit G-14 to an Acquiring Sub, and each distribution from Ventures to Exelon of the cash and/or notes received on the sale of the stock of Acquiring Sub to a Third Party, are found to be necessary or appropriate to the integration or simplification of the post-Merger Exelon holding company system and to effectuate the provisions of Section 11(b) of the Act; and each distribution by Exelon Generation of the cash and/or notes received by Exelon Generation on the sale of the assets listed in Exhibit G-13 to a Third Party or the assets listed in Exhibit G-14 to an Acquiring Sub shall be made to Ventures in accordance with section 1081(d) of the Code, each distribution by Ventures of such cash and/or notes shall be made to Exelon in accordance with section 1081(d) of the Code, and each distribution by Ventures of the cash and/or notes received on the sale of the Acquiring Sub stock to a Third Party shall be made to Exelon in accordance with section 1081(d) of the Code.

C. Other Applicable Standards of the Act

The sale of utility assets generally requires prior Commission approval under Section 12(d) of the Act and Rule 44 thereunder. The legislative history explains that:

> Subsection (d) prohibits registered holding companies from disposing of their assets and securities in contravention of the rules and regulations of the Commission regarding costs, accounts, competitive bidding, fees, disclosure of interest, and similar matters so that both the investor and the underlying properties may be protected in the reorganization of systems. This section is essential to prevent piecemeal evasion of the reorganization safeguards set up in Section 11 and to prevent the sacrifice of the investor's equity. Far from forcing the sacrifice of the investor's equity, the bill deliberately safeguards it.

Applicants represent that the Divestiture Transaction will not take place until after the effective date of repeal of the Act and so, no approvals may be required for the disposition of the utility assets. Further, it is our understanding that the subject assets will be sold to third parties in arm's-length transactions and so, the Divestiture Transaction would not appear to implicate the policy concerns underlying Section 12(d).

D. Implementation of the Plan

Applicants undertake the following:

(i) notwithstanding the effectiveness of repeal of the Act, from and after the Effective Date, to comply with the Commission's order to divest control, securities or other assets and for other action by a company and/or subsidiary company thereof for the purpose of enabling the company or any subsidiary company thereof to comply with the provisions of subsections (b) and (e) of Section 11 of the Act (an "Implementation Order") as to each and every condition ordered in the Implementation Order to the extent, but only to the extent, that such conditions also remain required pursuant to an order of the FERC or an order of any State or other Federal commission or an order of any State or Federal court; and

(ii) to submit to the authority of the FERC, from and after the Effective Date, in respect of such aspects of the Implementation Order that remain in force and effect (including, but without limitation, full power and authority to amend or change the surviving provisions of the Implementation Order as FERC may deem necessary or appropriate in the circumstances).

The Applicants consent and agree that consummation by them of the Merger shall constitute their acceptance of the survival of this Implementation Order for purposes of Section 1271(c) of the Energy Policy Act of 2005 and Section 1081 of the Internal Revenue Code of 1986, as amended, notwithstanding the effectiveness of the repeal of the 1935 Act.

IV. Motion to Intervene and Comments of the New Jersey Board of Public Utilities and Comments and Request for Hearing of the City of Philadelphia and Philadelphia Gas Works

Interventions have been filed by the New Jersey Board of Public Utilities ("NJBPU") and the City of Philadelphia and Philadelphia Gas Works. The intervenors request that the Commission not act to approve the Merger at this time. Applicants agree that action on the Merger itself would be premature and have amended their Application to seek only the findings needed to support the section 1081 tax relief. There does not appear to be any opposition to Commission action in respect of the limited request for tax relief.

As the NJBPU notes in its pleading, "The uncontested facts demonstrate the need for substantial divestiture and mitigation of unequivocal market power in concentrated markets." Further, the NJBPU states that it, "in principle, has no objections to any units receiving more favorable tax treatment." The NJBPU urges that any order issued in this matter be narrowly drawn and have no preemptive or preclusive effect on a subsequent NJBPU determination:

> 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.

Applicants accept these conditions and undertake not to assert that anything in this Commission's actions will bind, preclude or otherwise preempt the State's determination. To the contrary, if the NJBPU does not approve the Merger, the transactions will not close and this Commission's order will be of no consequence.

The City of Philadelphia and Philadelphia Gas Works have filed an intervention that raises issues concerning the gas operations of Exelon and PECO. As the intervenors note, these issues also have been raised in other forums, "specifically, Federal Energy Regulatory Commission ('FERC') Docket No. EC05-43-000, Pennsylvania ('PPUC') Docket No. A-110550F0160, and New Jersey Board of Public Utilities ('NJBPU') Docket No. EM05020106" and, in fact, the PaPUC has instituted a separate proceeding to deal with the intervenors' issues. The City of Philadelphia and Philadelphia Gas Works do not, however, raise any issues relating to the request before this Commission for approval of the Section 11(e) plan.

V. Conclusion

The Commission has carefully examined the Plan filed by Applicants. In our discussion, we articulated the applicable standards of the Act and concluded in each instance that the Plan is consistent with those standards. Upon the basis of the facts in the record, the Commission finds that the Plan is necessary to effectuate the provisions of Section 11(b) of the Act, and fair and equitable to the persons affected thereby and so, approves the Plan. The Commission hereby reserves jurisdiction over the remainder of Applicants' requests pending completion of the record.

Item 6. Exhibits and Financial Statements

G-15 Response to Staff Questions Concerning Request for Order Approving Proposed Divestiture under Section 11(e) of the Public Utility Holding Company Act of 1935, memorandum dated January 6, 2006.

SIGNATURES

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, each of the undersigned companies has duly caused this amended Application/Declaration to be signed on its behalf by the undersigned thereunto duly authorized.

Date: February 1, 2006

Public Service Enterprise Group Incorporated

Public Service Electric and Gas Company*
PSEG Power LLC*
PSEG Energy Holdings L.L.C.*
PSEG Service Corporation
80 Park Plaza
Newark, New Jersey 07102

* Including one or more subsidiaries

By Public Service Enterprise Group Incorporated

By: /s/ R. Edwin Selover
Name: R. Edwin Selover
Title: Senior Vice President and General Counsel
Public Service Enterprise Group Incorporated
80 Park Plaza
Newark, New Jersey 07102

Exelon Corporation

Exelon Energy Delivery Company, LLC*
Exelon Business Services Company*
Exelon Ventures, LLC*
10 South Dearborn Street
37th Floor
Chicago, Illinois 60603
PECO Energy Company*
2301 Market Street
Philadelphia, Pennsylvania 19101
Exelon Generation Company, LLC*
300 Exelon Way
Kennett Square, Pennsylvania 19348

* Including one or more subsidiaries

By Exelon Corporation

By: /s/ Elizabeth A. Moler
Name: Elizabeth A. Moler
Title: Executive Vice President
Government and Environmental Affairs and Public Policy
Exelon Corporation
101 Constitution Avenue, NW
Suite 400 East
Washington, DC 20001

Commonwealth Edison Company*
10 South Dearborn Street
37th Floor
Chicago, Illinois 60603

*Including one or more subsidiaries

By Commonwealth Edison Company

By: /s/ J. Barry Mitchell
Name: J. Barry Mitchell
Title: President
One Financial Place
440 South LaSalle
Suite 3300
Chicago, Illinois 60605

EXHIBIT 6.15

To: Office of Public Utility Regulation
Division of Investment Management
Securities and Exchange Commission

From: Exelon Corporation
Public Service Enterprise Group Incorporated

Date: January 6, 2006

Re: **Response to Staff Questions Concerning Request for Order Approving Proposed Divestiture under Section 11(e) of the Public Utility Holding Company Act of 1935.**

A. Introduction

1. On December 29, 2005, the Commission issued a notice in File No. 70-10294, relating to the proposed merger (the "Merger") of Exelon Corporation ("Exelon") and Public Service Enterprise Group Incorporated ("PSEG" and, together with Exelon, the "Applicants"). The return date on the notice is January 23, 2006.

2. The Public Utility Holding Company Act of 1935 (the "1935 Act" or "Act") will be repealed effective February 8, 2006.

3. Because it appears unlikely that the New Jersey Board of Public Utilities will act before February 8, 2006, Applicants will ask the Commission to rule only on their proposed Section 11(e) Plan relating to the post-Merger divestiture of certain generation assets (the "Divestiture"), and reserve jurisdiction over the remainder of the Merger-related requests.

4. The Divestiture is intended to assure that the Merger, which will otherwise significantly increase the total capacity of generation resources owned or controlled by a single company, does not "impair . . . the effectiveness of regulation" by creating a "concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers."

5. Applicants are seeking the Section 11(e) order so that they may secure important tax benefits (with net present value in excess of $100 million) that will otherwise be permanently lost.

B. Basis for Tax Relief

1. Briefly stated, Section 1081 of the Internal Revenue Code of 1986, as amended (the "Code"), enables a party to defer — not avoid — recognition of gain on transactions that have been found to be "necessary or appropriate to effectuate the provisions of Section 11(b)" of the 1935 Act. Such an order is an absolute requirement for the application of Code Section 1081, which was enacted with the specific intent of parties such as Applicants to defer the recognition of gain on regulatorily-impelled transactions such as the Divestiture.

2. Section 11(b), with narrow exceptions, limits a registered holding company to a "single, integrated public-utility system," which is defined by reference to a number of factors, including size. Of interest here, an integrated electric-utility system cannot be "so large . . . as to impair the effectiveness of regulation." Section 2(a)(29)(A) of the Act.

3. As noted above, absent Divestiture, the Merger will create significant market power concerns. To that end, Applicants have proposed, and the Federal Energy Regulatory Commission ("FERC") has accepted, a mitigation plan (the "Mitigation Plan") to address FERC requirements for competitive markets.[1] A substantial part of the Mitigation Pan is the proposed "very substantial divestiture of generation." See Order Authorizing Merger under Section 203 of the Federal Power Act, 112 FERC 61,011 (July 1, 2005) (the "FERC Merger Order"). On December 15, 2006, the FERC affirmed its decision. In addressing the arguments raised on rehearing, the FERC emphasized that the proposed merger included mitigation measures to curb any competitive harm that might arise from the utilities' merger through "substantial divestiture of generation and several compliance filings."

4. Market power is a consideration in both FERC and SEC merger determinations. As noted above, the Divestiture is intended to assure that the Merger does not "impair . . . the effectiveness of regulation" under Section 11(b)(1) of the 1935 Act, by creating a "concentration

1 Capitalized terms used herein without definition have the meanings specified in the Application/Declaration, as amended (the "Application").

of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers" in violation of Section 10(b)(1) of the Act.

5. The determination in this regard requires expertise in operational issues. The Commission has long recognized, and the Courts have agreed, that it is appropriate for the Commission to "look to" or "watchfully" defer to the expertise of the Federal Energy Regulatory Commission ("FERC") in matters such as these, involving the operation and regulation of competitive energy markets. See Madison Gas & Electric Co. v. SEC, 168 F.3d 1337, 1341-42 (D.C. 1999) ("when the SEC and another regulatory agency both have jurisdiction over a particular transaction, the SEC may 'watchfully defer[]' to the proceedings held before — and the result reached by — that other agency"), citing City of Holyoke Gas & Electric Department v. SEC, 972 F.2d 358 (D.C. Cir. 1992).

6. Consistent with its precedent, the Commission therefore can properly rely on the FERC Merger Order in concluding that the proposed Divestiture is "necessary or appropriate to effectuate the provisions of Section 11(b)" of the 1935 Act.

C. Response to Staff Concerns

1. The requirements of Sections 10(b)(1) and 11(b)(1) are integrally linked.

There does not appear to be a serious dispute about the Commission's ability to rely on the FERC's findings for purposes of anticompetitive concerns under Section 10(b)(1). Rather, the Staff appears to draw a distinction between the standards for acquisitions under Section 10 and those for divestiture under Section 11. The Staff's position, as we understand it, is that the fact that divestiture might be required for purposes of Section 10(b)(1) does not mean that it is similarly necessary for purposes of Section 11(b)(1).

We are not aware of any cases that support this position. Indeed, this distinction would appear inconsistent with the Commission's long-standing position that a company "cannot acquire what it cannot retain." As the Commission, in Public Service Company of Oklahoma, Holding Co. Act Release 19090 (July 17, 1975), explained, the requirements of the two sections are integrally linked and, indeed, the purpose of Section 10 review is to avoid acquisition that would create issues for purposes of Section 11:

> Sections 9 and 10 are preventive in purpose. Their essential function is to avoid recreating, by acquisition, what Section 11(b) was designed to undo or eliminate, and this statutory link is explicitly recognized in Section 10(c)(1) which prescribes that we not approve an acquisition that "is detrimental to the carrying out of the provisions of Section 11." These reticulated provisions should be applied so as to effect their common purpose.

Although Public Service of Oklahoma involved nonutility interests, the principle applies to utility holdings as well. The Commission in a 1978 decision discussed this interplay at length:

> The Act . . . focused on the elimination of the perceived abuses and excesses against which it was directed. The key provision is Section 11(b) which requires the Commission, with narrow exceptions, to limit each holding company system to a single "integrated public-utility system" as defined in Section 2(a)(29). This provision has been referred to by the Supreme Court as the "heart of the Act," and its implementation was a principal activity of the Commission during the early years of the Act's history.
>
> Various other provisions of the Act were designed . . . to prevent a recurrence of the practices which gave rise to the Act. * * * * * Section 10, in particular was intended to prevent acquisitions which would be "attended by the evils which have featured the past growth of holding companies."

American Electric Power Company, Inc., Holding Co. Act Release No. 20633 (July 21, 1978) (footnotes omitted) (the "1978 Decision").

Notwithstanding this relationship, the Staff has suggested that the "size" concerns under Section 10(b)(1) are different and distinct from those addressed by Section 11. The precedent, however, does not appear to support this distinction. To the contrary, the 1978 Decision highlights the interrelation of the "size" standards of Sections 10(b)(1) and 11(b)(1) as means to a common end:

> In the 1946 proceeding, AEP had applied for permission to acquire the stock of CSOE. There our predecessors, in a 2-1 decision, rejected AEP's application on the basis that it did not satisfy the acquisition standards of the Act. The majority's rationale was that "the substantially enlarged group of properties that would result from the acquisition . . . cannot be found to be 'not so large as to impair . . . the advantages of localized management and the effectiveness of regulation.'" The opinion . . . emphasized that an

essential part of the spirit of the Act was the desire to avert the process of concentration of power which had characterized the growth of holding companies.

Emphasis added.[2] Divestiture that is necessary and appropriate to "avert the process of concentration of power" for purposes of Section 10(b)(1) is similarly necessary and appropriate to ensure that the acquisition that is the subject of the Section 10 review does not result in a system that is "so large . . . as to impair the effectiveness of regulation" for purposes of Section 11(b).

Nor are we aware of any basis for the argument that the doctrine of "watchful deference" is strictly limited to findings under Section 10(b)(1). Implementation of the FERC findings concerning market power is a means of ensuring the "effective public regulation" contemplated by the Act. See Sections 1(b) and 1(c) of the Act. Further, the legislative history makes clear that the purpose of Section 11 "is simply to provide a mechanism to create conditions under which effective Federal and State regulation will be possible." S. Rep. No. 621, 74th Cong., 1st Sess. 11 (1935) (Report of Senator Wheeler from the Committee on Interstate Commerce). In this regard, consistent with its precedent, the Commission should watchfully defer to the FERC's determinations concerning market power, including the need for the proposed Divestiture.

2. Section 11(e) provides a voluntary means for complying with Section 11(b).

Voluntary divestiture plans have long been used by public utility holding companies to identify and divest non-compliant interests. Joel Seligman, in The Transformation of Wall Street 252 (Third Edition), described the Commission's historical reliance on voluntary plans under Section 11(e) as a means of achieving compliance with the policies and principles of the Act:

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[2] The Commission in approving the CSOE acquisition in 1978 did not abandon its long-standing position that a company cannot acquire what it cannot retain. Rather, the Commission focused on changed circumstances. In a footnote in the 1978 Decision, the Commission stated that "change in the state of the art would serve to distinguish the 1946 Decision — even if we were disposed, which we are not, to apply concepts such as res judicata or stare decisis to the essentially regulatory and policy determinations called for in a Holding Company Act case such as this. *See Union Electric Company*, Holding Co. Act Release No. 18368 (April 10, 1974), 4 SEC Docket 89, 100 n. 52, *aff'd sum nom. City of Cape Girardeau v. SEC*, 521 F.2d 324 (C.A.D.C., 1975)." *American Electric Power*, *supra*, n. 26. So, too, in this matter, would changes in the state of the art, in particular, the development of competitive wholesale energy markets under the stewardship of the FERC

> The essence of the Commission's enforcement strategy after 1940 involved creating incentives (and removing disincentives) so that the utilities themselves would offer acceptable divestiture and simplification plans. This was known as the 11(e) strategy, since the Holding Company Act authorized enforcement under Subsection 11(b) under either Subsection 11(d), which empowered the SEC to seek a federal district court order requiring compliance with a Commission reorganization plan, or Subsection 11(e), which authorized the SEC to approve and, if necessary, seek court approval of a reorganization plan offered by a utility. Although the threat of imposing the more draconian Subsection 11(d) was deemed "indispensable" to the enforcement of the Act by the Commission, it was employed only once in the 1940-1952 period.

Id. (emphasis added) (footnotes omitted). Accord Hawes, Utility Holding Companies 2-20 ("Usually, . . . companies complied voluntarily by submitting a plan under Section 11(e)."). The submission of a Section 11(e) plan does not in any way limit or reduce the Commission's authority. Rather, as explained below, the Commission must make a Section 11(b) determination in considering whether to approve a Section 11(e) plan.

The United States Supreme Court, in American Power Co. v. SEC, 329 U.S. 90, 119 (1946), noted that: "Section 11(e) merely permits the holding companies to formulate their own programs for compliance with § 11(b)(1) or to submit plans in conformity with prior Commission orders under § 11(b), ..." Emphasis added. In this matter, the Divestiture is being proposed to render regulation more effective by reducing the generation market power of the combined companies. In this regard, the Divestiture, which has been accepted by the FERC as an appropriate means of market power mitigation, fits squarely within the stated goals of Section 11(b) by ensuring that a utility system not be "so large as to impair . . . the effectiveness of regulation."

3. The Commission can properly issue a stand-alone order approving the Section 11(e) Plan.

The Staff raises various objections to approval of a Section 11(e) Plan. In essence, their argument appears to be that the Commission cannot approve a Section 11(e) plan without having first made a Section 11(b) determination; that the Section 11(b) determination would be made in the context of a Merger order; that, under Section 10(f), the Commission

cannot issue a Merger order unless and until all state approvals have been received; and, since it is unlikely that New Jersey approval will be received prior to the effective date of repeal, the Commission cannot issue a Merger order or approve a Section 11(e) Plan.

We note at the outset that there is precedent to support the issuance of Merger order, the effectiveness of which is conditioned upon receipt of subsequent New Jersey approval. See Northeast Utilities, Holding Co. Act Release No. 25221 (Dec. 21, 1990) ("Pursuant to rule 24(c)(2), when an issue under state law is raised, we may approve the transaction under section 10, subject to compliance with state law."), citing Central and South West Corporation, Holding Co. Act Release No. 22635 (Sept. 16, 1982). The need for Merger approval, however, will be moot as of February 8, 2006 and so, rather than ask the Commission to issue an unnecessary order, Applicants are amending their filing to ask the Commission to issue a stand-alone Section 11(e) order and to reserve jurisdiction over the remainder of Applicants' requests.

Applicants' request is dictated by the exigencies of the circumstances, namely, that the Act is repealed effective February 8, 2006. If the Act had not been repealed, Applicants would have asked the Commission to make the Divestiture findings as part of the Merger Order. Typically, the Commission would consider the Section 11(e) Plan in the context of a global order approving the Merger and related transactions. Such an order would typically be issued only after receipt of the final state approval (in this case, New Jersey) approving the Merger. Although Applicants have been working in good faith to resolve the state issues, they cannot reasonably control the timing of the New Jersey decision. Indeed, at this point, it appears highly unlikely that New Jersey will issue a decision prior to the effective date of repeal.

The Divestiture does not require prior approval under Sections 9(a)(1) and 10 and so, the Section 10(f) concerns that may prevent the Commission from issuing a Merger Order prior to the effective date of repeal do not apply to the proposed Section 11(e) Plan. Nor is the forward-looking nature of the Section 11(e) Plan problematic. The Commission routinely issues orders concerning financing transactions, for example, that may or may not occur in the future. Further, in hopes that the New Jersey order might be received in time for an early February closing, the Applicants have provided a detailed analysis of not only the Section 11(e) Plan but also the entire Merger and related transactions.

Applicants are asking the Commission to issue an order approving the Section 11(e) Divestiture plan before February 8, 2006. Such an order is necessary for Applicants to secure the benefits of Section 1081 tax treatment. Failure of this Commission to act will mean that these benefits are irreparably lost.

4. The standards for approval of a Section 11(e) plan are met.

To approve a Section 11(e) plan, the Commission must determine, after notice and opportunity for hearing, that the plan is both "necessary to effectuate the provisions of" Section 11(b), and "fair and equitable to the persons affected by such plan." Northeast Utilities, Holding Co. Act Release No. 24908 (June 22, 1989), citing Valley Gas Co., 40 S.E.C. 162, 167 (Aug. 10, 1960).

(a) Necessity for Plan

As noted above, the proposed Divestiture is intended to address market power concerns under both the Federal Power Act and the 1935 Act and so, to enable the electric utility company operations of Exelon post-Merger to meet the standards of an integrated electric public-utility system. The Section 11(e) Plan has been designed to bring the merged companies into compliance with the requirements of Section 11(b)(1) by providing for the divestiture of certain electric-utility assets. The Commission has declared that "[a] plan is 'necessary' within the meaning of section 11(e), . . . if it accomplishes the objectives required by section 11(b) in an appropriate manner." Midland Utilities, 24 S.E.C. 463, 475 (1946). "It thus seems clear that section 11(e) permits a company to propose particular transactions which under our ordinary practice we would not, or perhaps could not, specifically require by order under Section 11(b)." See also Mission Oil Co., 35 S.E.C. 540 (1954) (in which the Commission authorized a Section 11(e) plan to enable applicant to obtain tax relief). As explained in Northeast Utilities, supra, "The Commission has consistently held that a plan under Section 11(e) of the Act may be found "necessary" if it provides an appropriate means for achieving results required by Section 11(b) of the Act, although a different method may have been chosen, or though further action may be required to effectuate compliance with the standards of section 11(b)." Id. (footnotes omitted). The Applicants submit that the proposed Plan is a suitable means of accomplishing the required

objective of assuring that the resulting system is not so large as to impair the effectiveness of regulation, and thus it meets the necessity standard of Section 11(e) of the Act.

(b) Fairness

Finally, there is no harm to the protected interests in the requested relief. If, for some reason, the Merger does not close, the order approving the Section 11(e) Plan will be of no effect. If, however, as Applicants anticipate, the Merger does close in the first part of 2006, the tax deferrals will contribute to the financial health of the merged company and so be in the "public interest" for purposes of the Act. Similarly, although the 1935 Act does not provide extra protection for shareholders of registered holding companies, the tax deferrals will clearly be beneficial to the interest of investors and, by bolstering the financial health of the merged company, similarly beneficial to the interests of consumers.

D. Repeal of the Act and the Savings Provision

1. As noted above, the 1935 Act has been repealed effective February 8, 2006, subject to certain savings provisions, including the Section 1081 Savings Provision, which become effective prospectively on or after February 8, 2006.[3] Nothing in the Energy Policy Act of 2005 directs, authorizes or countenances changes in the Commission's jurisdiction, activities or enforcement in relation to the 1935 Act prior to February 8, 2006. Indeed, the plain language of the statute indicates that Congress intended that the Commission continue to administer the Act during this interim period so as to give effect to the Congressional intent and purpose embodied in Section 1081 Savings Provision.[4]

2. Included in the Public Utility Holding Company Act of 2005 is a savings provision (Section 1271(c)) that specifically expressly provides for the continuing application of Section 1081 of the Code:

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3 The Section 1271 savings provisions are not included in the portions of subtitle F of the Energy Policy Act which became effective upon enactment; only the Section 1272 implementation provisions became effective upon enactment.

4 Indeed, the authorization of appropriations provision, Section 1276, appropriating "such funds as may be necessary to carry out [subtitle F]"), like the bulk of subtitle F, comes into effect only at February 8, 2006. Section 1276 clearly shows Congressional intent that Act-related activities will continue subsequent to February 8, 2006.

> Tax treatment under Section 1081 of the [Code] as a result of transactions ordered in compliance with the [Act] shall not be affected in any manner due to the repeal of that Act and the enactment of the Public Utility Holding Company Act of 2005.

3. The House and Senate have passed the hurricane tax relief bill, including technical corrections that, among other things, repeal Section 1081 prospectively. The technical explanation of the Senate bill contains the following description regarding the technical correction dealing with the 1935 Act and Section 1081 repeal:

> Repeal of the Public Utility Holding Company Act of 1935 (Act sec. 1263).-The provision repeals sections 1081-1083 of the Code (relating to exchanges in obedience to SEC orders) to conform to the repeal of the Public Utility Holding Company Act of 1935. The repeal does not apply to any exchange, expenditure, investment, distribution, or sale made in obedience to an order of the Securities and Exchange Commission. (emphasis added)

Attached as Annex B are the statutory language and the technical explanation of HR 4440 as passed by the House and Senate. With respect to PUHCA and sec. 1081 repeal, please see p. 39 of the statutory language and p. 75 of the technical explanation.

4. As demonstrated in Annex A, the FERC was faced in 1990 with a similar situation — a repealed regulatory scheme and a Federal tax regime (extended by a savings provision) which continued to hinge on the FERC performing functions under repealed Sections of the Natural Gas Policy Act of 1978. The FERC continued to perform the requisite functions for a number of years and, after a several year hiatus, begun to perform them anew in 2000 in response to a court decision which stated that the tax benefit in question required continued FERC involvement. The seeming anomaly faced by the Commission in relation to the repeal of the Act and the Section 1081 Savings Provision is not novel where regulatory regimes intersect with the tax code provisions.

E. Conclusion

Section 11(e) is an appropriate mechanism for Exelon and PSEG to effect the Divestiture. The Divestiture is being proposed to render regulation more effective by reducing the generation market power of the combined companies, which fits squarely within the stated goals of Section 11(b) of ensuring that the size of an integrated public utility system not become

"so large as to impair...the effectiveness of regulation."[5] Voluntary divestiture plans have been routinely utilized by public utility holding companies required to divest non-compliant interests.[6] As the Commission's policy allowing for beneficial tax treatment for divestitures has been aimed at imposing the least tax burden on a company and its security holders, while not frustrating the purposes of the Act or in delaying the attainment of its objectives, Applicants urge the Commission to approve the Section 11(e) Plan and to make the requested tax recitals.

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5 Section 2(a)(29)(A) of the Act.

6 See, e.g., Seligman, The Transformation of Wall Street 252 (Third Edition), noting the Commission's historical reliance on voluntary plans under Section 11(e) of the Act:

Well Category Determinations for Certain
Categories of High-Cost Gas under
NGPA Section 107: A Chronology

1. Section 29 of the Internal Revenue Code allows taxpayers to claim a tax credit for certain qualified fuels which fuels which are: (i) produced from wells drilled after December 13, 1979 and before January 1, 1993; and (2) were sold prior to January 1, 2003. Section 29 provides that the determination whether or not gas falls into a category qualifying for tax credit" shall be made in accordance with Section 503 of the [Natural Gas Policy Act of 1978] ("NGPA"). NGPA Section 503 sets forth the procedures used for determining whether or not gas qualified for the various categories of gas entitled to higher ceiling prices established by the NGPA as incentives for increased production.

2. The Wellhead Decontrol Act of 1989 (the "Decontrol Act") decontrolled wellhead sales of natural gas by January 1, 1993 and repealed NGPA Section 503 as of that date. After decontrol, the FERC's policy was not to accept determinations for any post-January 1, 1993 drilling activity. The FERC, however, continued to process well category determinations it received from jurisdictional agencies through April 30, 1994, for wells spudded before January 1, 1993, and pre-January 1, 1993 recompletions. The FERC explained that the reason for continuing to review those agency determinations for a transition period was that, while NGPA Section 107 well category determinations no longer had any price consequence, they were necessary to obtain the Section 29 tax credit:

> In Order No. 523, the Commission recognized its duty to continue processing requests for well category determinations, including tight formation designations, to allow producers to obtain tax credits, even if the determinations no longer affected the price of the gas. The Commission stated its intention to continue processing such requests until January 1, 1993, after which tax credits for newly spudded wells will no longer be available. The Senate Report on the 1989 Wellhead Decontrol Act, which repeals Section 503 of the NGPA, states in part, "The Committee intends the usual 'savings clause' interpretations, such as those in 1 U.S.C. 109, to be applied to this legislation. . . . The Committee intends that any incomplete Section 503 procedures continued to be carried

out the state agencies and the FERC, so that the necessary determination can be made as to sales of gas delivered before contract expiration and decontrol." Similarly, the House Report on the 1989 Wellhead Decontrol Act states, "the gradual expiration of controls after enactment and before January 1, 1993, and their complete expiration on and after that date, will not affect civil or criminal proceedings pending at the time of decontrol, nor any action or proceeding based on pre-decontrol acts or conduct." Therefore, Congress did not intend that repeal of NGPA Title I and Section 503, would terminate the authority of the Commission to process tight formation applications filed with the jurisdictional agencies on or before December 31, 1992."

FERC Order No 539, April 19, 1992, "Qualifying Certain Gas For Tax Credit," part G.

3. On July 29, 1994, the FERC issued its Order No. 567 which deleted regulations that were no longer required due to the decontrol of wellhead sales of natural gas, including regulations which set forth the eligibility requirements, filing requirements, and the procedures for making well determinations under Section 503 of the NGPA.

4. In 1999, the United States Court of Appeals for the 10th Circuit held in True Oil Co. v. Comm'r of Internal Revenue, 170 F.3d 1294 (1999) that, in order to obtain the Section 29 tax credit, there must be a formal determination under the procedures provided in NGPA Section 503 that the gas is high cost gas.

5. On July 26, 2000, the FERC in its Order No. 616 issued final regulations to reinstate provisions for well category determinations for certain categories of high-cost gas under NGPA Section 107.