**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

| | | |
|---|---|---|
| **Exelon Corporation** | **)** | **Docket No. EC05-43** |
| **Public Service Enterprise Group** | **)** | |

# REQUEST FOR REHEARING, OR ALTERNATIVELY, MOTION FOR STAY OF ORDER AUTHORIZING EXELON/PSEG MERGER OF PUBLIC CITIZEN'S ENERGY PROGRAM, ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, CITIZEN POWER, ENERGY JUSTICE NETWORK, ILLINOIS PUBLIC INTEREST RESEARCH GROUP, NEW JERSEY CITIZEN ACTION, NEW JERSEY PUBLIC INTEREST RESEARCH GROUP, PENNSYLVANIA PUBLIC INTEREST RESEARCH GROUP, PHILADELPHIA ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, SERVICE EMPLOYEES INTERNATIONAL UNION, SEIU NEW JERSEY STATE COUNCIL, TENANT ACTION GROUP, THREE MILE ISLAND ALERT, AND UTILITY WORKERS UNION OF AMERICA LOCAL 601

**Tyson Slocum, Research Director**
**Public Citizen's Energy Program**
**215 Pennsylvania Ave, SE**
**Washington, D.C. 20003**
**(202) 454-5191**
**tslocum@citizen.org**

**July 29, 2005**

**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

| | | |
|---|---|---|
| **Exelon Corporation** | **)** | **Docket No. EC05-43** |
| **Public Service Enterprise Group Inc** | **)** | |

# REQUEST FOR REHEARING, OR ALTERNATIVELY, MOTION FOR STAY OF ORDER AUTHORIZING EXELON/PSEG MERGER OF PUBLIC CITZEN, ET AL.

Pursuant to Section 313 of the Federal Power Act (FPA), 16 U.S.C. § 825l (2000), and Rules 212 and 713 of the Rules and Regulations of the Federal Energy Regulatory Commission (Commission or FERC), 18 C.F.R. §§ 385.212, .713 (2002), Public Citizen's Energy Program, Action Alliance of Senior Citizens of Greater Philadelphia,[1] Citizen Power, Energy Justice Network, Illinois Public Interest Research Group (IllinoisPIRG), New Jersey Citizen Action, New Jersey Public Interest Research Group (NJPIRG), Pennsylvania Public Interest Research Group (PennPIRG), Philadelphia Association of Community Organizations for Reform Now,[2] Service Employees International Union,[3] SEIU New Jersey State Council,[4] Tenant Action Group,[5] Three

[1] The Action Alliance of Senior Citizens of Greater Philadelphia is joining the request for rehearing and motion for stay. The Alliance is a long standing membership organization of older Americans and senior citizen groups in the Philadelphia area who advocate for seniors in the region. As lower income Americans on fixed incomes they are especially concerned about the costs of utility service which is essential to their vulnerable lives and health. They are concerned that the merger will lead to increased prices for electricity and reduced service quality.

[2] Philadelphia ACORN is joining the request for rehearing and motion for stay. Philadelphia ACORN is a grass-roots advocacy organization advocating for the lowest income residents of the City. ACORN is concerned that universal service programs and customer service, which were worsened after the 2000 merger between PECO and ComEd, will further deteriorate and threaten the lives of those who need electric service.

[3] SEIU is joining the request for rehearing and motion for stay. With 1.8 million members, SEIU is the largest and fastest growing union in North America, with 1.8 million members. Thousands of health care workers, janitors, public employees and industrial and allied workers have joined together in SEIU to gain a voice at work in providing better quality services for our communities.

[4] SEIU New Jersey State Council is joining the request for rehearing and motion for stay. SEIU New Jersey State Council represents over 27,000 working and retired members in New Jersey. Counting family members, SEIU represents nearly 50,000 New Jersey residents. Our health care membership work in hospitals, nursing homes and home care settings. Our service workers clean residential, industrial, commercial and institutional settings. Our public sector membership work in cities and other municipalities. We also represent Head Start workers and all of the auto inspection workers in New Jersey.

Mile Island Alert and Utility Workers Union of America Local 601[6] (together, Public Citizen *et al.)* hereby request a rehearing, or alternatively, move for a stay of the Commission's July 1, 2005, order in the above-captioned proceeding authorizing Exelon's application under Section 203 of the FPA to merge its jurisdictional facilities with those of PSEG. "Order Authorizing Merger Under Section 203 of the Federal Power Act," 112 FERC ¶ 61,011.

The order harms the public interest and consumers in that it results from *ex parte* meetings with utility executives on the part of the Commissioners, denies consumers due process of law by authorizing the biggest electricity merger in U.S. history without an evidentiary hearing, relies on industry analysts, and is otherwise in violation of the Federal Power Act.

## I. SPECIFICATION OF ERRORS

1. The Commissioners are required by the Administrative Procedure Act to record meetings if they have knowledge that the matter will be "noticed for hearing" as they did here.
2. The Commission failed to provide due process or satisfy FPA 203's requirement of affording an "opportunity for hearing," and failed to give a reason for its actions.
3. An evidentiary hearing was required to allow effective challenges to the analysis of the industry analyst on whom FERC relied.

---

[5] The Tenant Action Group is joining the request for rehearing and motion for stay. TAG is a Philadelphia city-wide organization advocating for tenants who are either paying directly or indirectly for their utility services. TAG believes the merger will be detrimental to universal service programs upon which many low income tenants rely.

[6] Utility Workers Union of America Local 601 is joining the request for rehearing and motion for stay. UWUA Local 601 represents approximately 1,400 employees in the customer operations sector of PSE&G in New Jersey. Members' job duties include call centers, meter reading , walk in customer service centers, office and field collections, internet and written correspondence and clerical work. Members also perform the leg work that support the appliance service business (only utility company that performs that duty), other portions of the gas business and electric business for over 2.2 million customers.

4. The Commission failed to consider issues of lack of federal regulation, post-PUHCA, in determining whether the merger harms regulation, but instead abdicated its responsibility to the states.
5. FERC failed to address the fact that the Exelon-PSEG market power analysis does not include their power marketing activities—an oversight requiring an evidentiary hearing to resolve.
6. FERC cannot abdicate its responsibility to ensure that the merger will not affect rates to the states, since they are required by the Supremacy Clause of the U.S. Constitution, as well as the doctrine of federal pre-emption, to pass through the costs of FERC-regulated wholesale power and transmission to retail customers.
7. The new energy bill may contain gaps in FERC jurisdiction over generation, which may allow Exelon-PSEG to simply reacquire divested facilities without the requirement of FERC approval.

## II. ARGUMENT

### A. THE COMMISSIONERS ERRED IN REMAINING SILENT ON THEIR MEETINGS WITH EXELON AND PSEG EXECUTIVES REGARDING THE MERGER, IN VIOLATION OF THE SUNSHINE ACT

The Merger Order completely fails to address the arguments that the Commissioners knew that the Exelon-PSEG merger would be "noticed for hearing" and that the Sunshine Act therefore required that all discussions of the merger be placed on the public record. The public is forced to speculate about the content and impact of these secret meetings because the conversations are not part of such a record. As a remedy, Public Citizen *et al* requested that all FERC Commissioners and all Exelon-PSEG

executives and their attorneys who were present during the secret meetings provide sworn testimony describing in detail what was discussed during these meetings and such sworn statements are presented in full for the public record of this proceeding. Unless sworn statements are provided detailing the content of these private meetings, the public cannot be guaranteed that FERC is acting and has acted in the public interest.

On December 21, 2004, Exelon filed an 8-k with the U.S. Securities and Exchange Commission titled, "Agreement and Plan of Merger Between Exelon Corporation and Public Service Enterprise Group Incorporated."[7] This official filing with the federal government of a "definitive agreement," detailing the merger agreement between the two companies, provided the public and FERC notice that the merger was going forward and would have to be filed for approval at FERC. It therefore should have been clear to FERC Commissioners in December 2004 that the creation of America's largest utility company would have to be "noticed for hearing," since Section 203 of the Federal Power Act requires an "opportunity for hearing." Therefore, FERC Commissioners should have known that their January 2005 meetings with Exelon and PSEG executives should be available for the public record.

Indeed, Exelon's press release on December 20 announcing the merger noted that "the merger is conditioned upon, among other things, the approval by shareholders of both companies, antitrust clearance and a number of regulatory approvals or reviews by federal and state energy authorities. These include…the Federal Energy Regulatory Commission."[8]

[7] www.sec.gov/Archives/edgar/data/22606/000095013704011288/c90624exv2w1.htm
[8] www.sec.gov/Archives/edgar/data/22606/000095013704011198/c90619exv99w1.htm

FERC's June 30 order approving the merger failed to even address or acknowledge our complaint about these private meetings. Even the media paid attention to the issue, noting that "consumer groups also took issue with what they say were private meetings between the FERC commissioners and executives with Exelon and PSEG on Jan. 13"[9]; "Public Citizen and its partners contend that private pre-filing meetings on the Exelon-PSEG merger involved commissioners, violating federal law and constituting 'a slap in the face to the public and consumer advocates who were offered no such private access to the powerful, unelected government officials'…the groups say a private meeting is not legal if a commissioner believes it would be followed by the company making a filing with FERC. In this case, the groups contend, the meetings violated the law because the utilities had announced their merger deal several weeks before their pre-filing meetings."[10]

FERC's order errs in failing to even acknowledge the alleged violation of the Sunshine Act by holding private meetings and our request to have participants in these meetings provide testimony for the public record about the content of these private meetings. The public is forced to speculate that FERC is hostile to serving the public and operating in an open, transparent manner. More importantly, the failure of FERC to address widely-publicized concerns about the impact these private meetings had on FERC's decision-making forces the public to speculate that perhaps the private meetings played a significant role in helping FERC determine that the merger should be approved without an evidentiary hearing.

[9] Suzette Parmley, "Exelon's $12 billion deal for PSEG is opposed by consumer groups," *The Philadelphia Inquirer*, March 29, 2005, www.philly.com/mld/inquirer/business/11253497.htm
[10] Mary O'Driscoll, "Consumer groups want to crash 'private club' of regulators," March 29, 2005, *Greenwire*.

According to documents Public Citizen acquired in response to two Freedom of Information Act requests,[11] three separate private meetings were held on January 13, 2005 between Exelon-PSEG employees and all four FERC Commissioners.[12] First, FERC Commissioner (and now Chairman) Joseph T. Kelliher met at 8:30am with John W. Rowe, Chairman, President and CEO of Exelon; E. James Ferland, Chairman, President and CEO of PSEG; Elizabeth A. Moler, a registered lobbyist for Exelon who served as a FERC Commissioner from 1988 to 1993 and as FERC Chairwoman from 1993 to 1997; Edwin Selover, Senior Vice President and General Counsel for PSEG; Karen Hill, a registered lobbyist for Exelon; and J.A. (Lon) Bouknight, Jr. and Clifford M. (Mike) Naeve, attorneys for Exelon-PSEG. In addition, four assistants to Commissioner Kelliher (Larry D. Gasteiger, Leonard M. Tao, Nils N. Nichols and Cathy W. Tripodi) may have also attended this meeting. FERC informed Public Citizen that no record or transcript exists of this meeting that could inform the public of what Commissioner Kelliher said to Exelon-PSEG executives and legal counsel, or vice-versa.

At 10am, Chairman Pat Wood and possibly his assistant Margaret K. Nelson privately met with the same Exelon-PSEG delegation. At 11:30am, the Exelon-PSEG delegation had their final private meeting, this one a joint session with Commissioners Nora Mead Brownell and Suedeen G. Kelly (possibly Commissioner assistant Donna J. Glasgow may have attended the meeting as well).

The Exelon-PSEG delegation provided a PowerPoint presentation during these private meetings that discussed the company's version of benefits of the merger. The

[11] FOIA Nos. FY05-23 and FY05-24.
[12] There are currently only three commissioners, as former Chairman Pat Wood stepped down after FERC's meeting on June 30.

presentation includes a section for "Q&A", which indicates a format inviting verbal exchanges between company executives, their attorneys, and FERC Commissioners.

The public must have a detailed description of what was said by whom of these meetings because they may have served as a *de facto* negotiation, where parties to a hearing that Commissioners should have known would be contested explicitly discussed the merger. Subsequent public statements by Chairman Wood indicate that the focus of the meeting was to discuss how to satisfy FERC's mitigation concerns.

We assume that FERC justifies holding these multiple private meetings with Exelon-PSEG under its rules, which prohibit "off-the-record communications" with "decisional" employees during any "contested on-the-record proceeding."[13] We assume FERC will argue that these multiple private meetings between FERC Commissioners and Exelon-PSEG executives to discuss the merger application were allowed to be "off-the-record" because the companies had not yet formally filed their merger application, and therefore there was not yet any "contested on-the-record proceeding."

But it appears as though this FERC rule, as applied in this case, conflicts with federal law. The federal Sunshine Act limits the ability of federal agencies to conduct "off-the-record" private meetings: "the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing *unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge*."[14] [emphasis added].

[13] 18 CFR § 385.2201, www.gpoaccess.gov/cfr/
[14] 5 USC § 557(d)(1)(E), www.gpoaccess.gov/uscode/

So the Sunshine Act is clear: if any FERC commissioner "has knowledge" that a proceeding "will be noticed" for hearing, then it is unlawful for that Commissioner to meet with the parties in private. It was evident to all FERC commissioners that a proposed merger announced in December 2004 (a month prior to the private meetings) to create one of the largest energy companies in the world would be filed at FERC and noticed for hearing, as required by the Federal Power Act. Therefore, these meetings were in violation of federal law and must be included in the public record.

The federal courts have recently ruled on this issue, finding that FERC's rules are not the last word on whether an *ex parte* contact is lawful. The U.S. Court of Appeals for the DC Circuit ruled that "the Sunshine Act is a statute of general applicability governing FERC and all other federal agencies within its compass. FERC has no authority whatsoever to change the terms of the Act; rather, FERC must conform its regulatory activities to comply with the overriding terms of the Sunshine Act…The key to exclusion under the Sunshine Act is not the label given the communication, but rather whether there is a possibility that the communication could effect the agency's decision in a contested on-the-record proceeding."[15]

Regardless of whether or not the Sunshine Act was violated, our due process was violated, along with our rights under the Administrative Procedure Act to an impartial decision maker, since the private meetings with interested parties have left the Commissioners biased.[16]

We also note that FERC has clear rules allowing for interested parties, such as Exelon-PSEG executives and their lawyers, to meet with FERC to resolve any questions

[15] *Electric Power Supply v. FERC*, Docket 03-1182, December 10, 2004, www.cadc.uscourts.gov
[16] *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583 (D.C. Cir. 1970)

they may have about filing for a merger application: "The Commission *staff* provides informal advice and assistance to the general public *and to prospective applicants for licenses, certificates, and other Commission authorizations.* Opinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission's functions. Inquiries may be directed to the chief of the appropriate office or division."[17] [emphasis added] Indeed, documents supplied to Public Citizen in response to our FOIA reveal that an Exelon-PSEG delegation met with FERC staff on January 12, 2005—*the day before meeting privately with FERC Commissioners*.

Public Citizen *et al.* seek on rehearing an amplification of the public record as required by the Sunshine Act, and, as requested below, an evidentiary hearing in which any inappropriate comments from either the merger Applicants or the Commission can be addressed on cross-examination and discovery.

### B. THE COMMISSION ERRED BOTH IN REFUSING TO GRANT THE REQUESTS FOR AN EVIDENTIARY HEARING AND IN FAILING TO EVEN ACKNOWLEDGE, MUST LESS ADDRESS, THESE REQUESTS IN ITS ORDER.

Numerous parties, including Public Citizen *et al.* requested an evidentiary hearing and raised numerous material facts that are issue. Section 203 requires an opportunity for such a hearing, and the Commission can only deny it if there are no material facts at issue. *PSNH v. FERC,* 600 F.2d 944 (D.C. Circ. 1979); *Citizens for Allegan County, Inc. v. FPC,* 414 F.2d 1125 (1969). The Commission, however, simply ignored all these requests and ignored the fact that it was rejecting them. Nothing to this effect even appears in the ordering paragraphs.

[17] 18 CFR § 388.104, www.gpoaccess.gov/cfr/

Numerous parties—including states—demanded evidentiary hearings. The New Jersey Board of Public Utilities noted that "there are a number of critical issues of fact raised by the MMU analyses that need to be addressed in discovery and full hearings.".[18] The New Jersey Ratepayer Advocate called on FERC to "schedule evidentiary hearings."[19] The People of the State of Illinois argued that "this matter should be set for hearing to determine the full extent of the market power problems associated with the proposed merger."[20] The Philadelphia Gas Works and the City of Philadelphia noted that "an evidentiary hearing is required."[21] The Pennsylvania Office of Consumer Advocate argued that the merger "should be set for hearings so that the full impact of the merger on competition, rates and regulation could be examined and adequate protections and mitigation measures could be thoroughly explored."[22] The PJM Industrial Customer Coalition and the Philadelphia Area Industrial Energy Users Group requested that FERC "reject the Application."[23] Amtrak also protested, concluding, "The proposed PSEG-Exelon merger raises serious market power concerns that are not adequately mitigated by the Applicants' proposed mitigation measures. Accordingly, the Application must be rejected."[24] And, of course, Public Citizen *et al* noted that our March 28, 2005 "intervention and protest raises a number of facts that dispute assertions made by Exelon-PSEG that can only be resolved in a hearing and we therefore request that FERC schedule a hearing."

[18] June 22, 2005
[19] May 27, 2005
[20] April 11, 2005
[21] May 27, 2005
[22] May 27, 2005
[23] April 11, 2005
[24] April 11, 2005

Aside from the numerous issues of fact raised by the various parties, this case is particularly needful of an evidentiary hearing because of the Commission's failure to make a public record of its prior meetings with the Applicants in violation of the Sunshine Act, and because the Commission relied on the analysis of the Applicant's witness without requiring that such analysis be subjected to cross-examination and discovery at an evidentiary hearing.

Public Citizen *et al.* also find that the Merger Order errs in failing to set for hearing the question of what financial regulation of Exelon will be lost forever with the repeal of the Public Utility Holding Company Act (PUHCA), see below. The loss of such regulation must be explored at hearing since the Commission appears to be unaware that it extends to numerous matters of loss of financial regulation of interstate registered holding companies by the SEC under PUHCA which no state can supply.

### C. THE COMMISSION ERRED IN CONTINUING TO RELY ON AN INDUSTRY-SUPPLIED ANALYST—INDEED, ON THE SAME INDUSTRY-SUPPLIED ANALYST—PARTICULARLY WITHOUT AN EVIDENTIARY HEARING WHERE HIS ANALYSIS COULD BE EFFECTIVELY CHALLENGED.

The Merger Order also failed to address our concern that it is dependent upon a merger analysis largely provided by one consultant—Dr. William H. Hieronymus—who is paid $550/hour by Exelon-PSEG—particularly without an evidentiary hearing where his analysis could be effectively challenged with discovery and cross-examination. This analyst has a clear financial incentive to provide results accommodating to Exelon-PSEG and should therefore be subject to challenge at an evidentiary hearing. Indeed, FERC has relied upon the analyses of Dr. Hieronymus

for an inordinate number of merger applications (most often hired by merger applicants, including Duke and Cinergy for their pending merger approval). FERC's reliance on prejudiced analysis, particularly without challenge at an evidentiary hearing, stands in stark contrast to the independent analyses used by federal anti-trust agencies, such as the Department of Justice and the Federal Trade Commission. A merger of this magnitude—creating the largest electric utility in the United States—should not be decided on an unchallenged analysis supplied by the applicants.

Furthermore, FERC's reliance on industry-supplied analysts threatens to provide the public with a patchwork view of market concentration, as the different analysts, predictably, have concluded different market analyses for the same markets.[25]

Indeed, many interveners hired their own analysts whose conclusions challenged many of Hieronymus' findings. These numerous discrepancies can only be resolved at an evidentiary hearing.

## D. THE COMMISSION ERRED IN ATTEMPTING TO SHIFT TO THE N.J. STATE COMMISSION THE QUESTION OF LACK OF EFFECTIVE REGULATION AFTER PUHCA REPEAL SINCE PUHCA IS A FEDERAL, NOT A STATE, STATUTE.

In our March 28 protest, we raised concerns of the proposed merger's impact on regulation. The Merger Order (at 217) dismissed our concerns, noting that FERC will be relying on the companies' vague "commitment" to voluntarily provide information under the *Ohio Power* policy: "We find that the merger will not adversely affect Commission or state regulation. We rely on Applicant's commitment to follow the Commission's Ohio Power policy in finding that the merger will not adversely affect Commission regulation.

[25] Diana L. Moss, *Electricity Mergers, Economic Analysis, and Consistency: Why FERC Needs to Change its Approach*, January 13, 2005, The American Antitrust Institute, www.antitrustinstitute.org

Applicants have shown that the transaction will not harm any state's ability to regulate any of the merging parties. The merger is subject to review by the NJBPU, who can therefore protect its jurisdictional interests…and the NJBPU will retain regulatory authority over the merged company. We note that none of the affected state commissions have requested that the Commission address the effect of the merger on state regulation."

To the contrary, the so-called "Ohio Power policy" deals with one small interface between the PUHCA and the FPA over fuel costs from affiliates.

Once PUHCA is repealed, there will be no federal or state body that will have jurisdiction over the finances of the interstate holding company and their interaction with the utility subsidiaries. The SEC still comprehensively regulates these financial transactions and all the securities offerings of the holding companies. Utilities cannot be forced to send their profits up to their parents as dividends except under PUHCA rules. Utilities can't make loans to parent companies. That is why PUHCA was passed in 1935: When Franklin D. Roosevelt was governor of New York, he was unable to protect New York electric consumers—even by appointing the best utility commission in the nation—because New York could not regulate the interstate holding companies that owned New York utilities. That fact remains true today, and there is nothing that the New Jersey Board of Public Utilities can do to change it.

## E. POWER MARKETING NOT INCLUDED IN ANALYSIS

FERC's order also failed to address our complaint that the Exelon-PSEG mitigation plan fails the public interest test because it does not include power marketing in its market concentration analysis. This is a fatal oversight, given the fact that Exelon is

the 6th largest power marketer and PSEG the 14th largest in America. Combined, the two companies would have the largest power marketing business in the United States, 6% larger than the current leader, Constellation Energy. These power marketing sales to non-affiliates greatly expand the ability of the merged company to command market power. While the power plant asset swap/sale mitigation proposed by Exelon-PSEG *may* reduce somewhat the size of the combined company's power marketing business, the mitigation plan, by not directly including the power marketing of either company, will do nothing to reduce the company's projected increase in market power with the combination of Exelon's and PSEG's power marketing businesses.

In addition, the power marketing activities of Exelon and PSEG extend outside PJM, so any market power analysis must include *all* geographic regions in which the companies sell power. The applicant's entire market concentration analysis therefore fails since it ignores the market concentration (and market power) impacts of the Exelon-PSEG power marketing businesses.

On a related note, FERC failed to address our challenge to the Exelon-PSEG request to waive the requirement in Exhibit F (wholesale power sales). The Electric Quarterly Reports (EQR) are notoriously complicated and labor intensive for average users to download and interpret. We therefore not only requested that this waiver request be denied, but we asked that the EQR filings for all Exelon and PSEG subsidiaries be summarized, with tabulated aggregate information listing the amounts of energy traded with each customer for 2003 and all available quarters of 2004, and aggregate summaries of the volume of trades by geographic sector. While we have compiled some of this

information, we feel it is crucial that Exelon-PSEG release and compile this information in a meaningful way for the public, and that the order errs in ignoring this request.

## F. FERC CANNOT RELY ON STATE REGULATION OF RETAIL RATES SINCE STATES ARE REQUIRED TO PASS THROUGH WHOLESALE POWER COSTS UNDER THE SUPREMACY CLAUSE AND FEDERAL PREEMPTION DOCTRINE.

The Commission erred in approving the proposed Exelon-PSEG merger because it will directly lead to higher rates for residential consumers. FERC's continued push to deregulate wholesale markets and allow market-based rates leaves state regulators with no ability to protect consumers by controlling rates for most generation—the way they had done for nearly a century. Approval of this merger will concentrate market power, allowing the new company to charge higher wholesale prices which, in turn, directly translate to higher retail rates for its captive residential consumers.

Since FERC has deregulated wholesale power markets, state commissions are left effectively powerless to substantively regulate retail rates. Therefore, it is not sufficient for FERC to rely upon the regulatory protections afforded by states since the states, under FERC's deregulation agenda, have only limited regulatory protections to offer consumers.

Both PSEG and Exelon enjoy virtual monopolies over generation in their retail service territories. 99.96% of the 1,772,286 residential customers in PSEG's service territory still buy power from PSEG.[26] 98% of Exelon's nearly 1.35 million residential customers are still buying their power from Exelon in Pennsylvania,[27] and none of the

[26] www.bpu.state.nj.us/energy/elecSwitchData.shtml
[27] www.oca.state.pa.us/cinfo/Stats0705.pdf

3,225,738 residential consumers in Exelon's Illinois service territory have switched.[28] If the Commission approves the merger, residential consumers in all three states will have no alternatives to the higher wholesale prices created by the market power of the Exelon-PSEG merger.

The Commission cannot rely upon any "rate reduction" deal promised by Exelon-PSEG to state regulators to act as an effective offset because such deals are always temporary in nature, while the market power created by the new merger will be permanent.

## G. CHAIRMAN KELLIHER HAS CONCEDED THAT THE MERGER WAS APPROVED EVEN THOUGH FERC HAS NO JURISDICTION OVER ACQUISITION OF GENERATION "WHICH MAY HAVE DRAMATIC IMPLICATIONS FOR COMPETITIVE MARKETS."

In various news articles, as elsewhere, Chairman Kelliher has acknowledged that the Commission has no jurisdiction over acquisitions of generating units and that this "may have dramatic implications for competitive markets."[29] Public Citizen *et al* submits that accepting the Applicants' agreement to give up a certain number of megawatts of generation is meaningless if they can simply turn around and reacquire them, and FERC has no jurisdiction to prevent it.

The recently passed energy bill (HR 6) muddles FERC's legal merger review authority over certain generation facilities. For example, the bill gives FERC authority over acquisitions of generating plants by "public utilities" but not necessarily by "holding companies." This means that a "public utility" may simply have its parent company acquire the generation assets instead of doing it directly, and

[28] www.icc.state.il.us/ec/switchstats.aspx
[29] "Kelliher Lays Out Priorities as New FERC Chairman," July 20, 2005, *Foster Electric Report*, Issue 416.

FERC may have no say over the acquisition. So, in effect, the Exelon-PSEG divesture plan may be irrelevant if Exelon-PSEG, through inventive legal wrangling, can simply reacquire the generation assets without FERC being able to stop the transaction. This problem arises because HR 6 retains the original definitions of "exempt wholesale generator"[30]

Public Citizen believes that FERC has admitted that it cannot effectively mitigate the market power of the merged entities, and the recently-passed energy bill further complicates the issue. Therefore, FERC must deny the merger.

## III. ALTERNATIVE MOTION FOR STAY

If the Commission does not grant rehearing, put its *ex parte* comments on the public record and set the merger application for an evidentiary hearing before an administrative law judge, Public Citizen *et al*. requests that the Commission stay the effectiveness of the Merger Order pending appeal to the United States Court of Appeals.

Under the Commission's stay analysis, the movant must show irreparable harm. Public Citizen, *et al*., will certainly suffer such harm since a multi-billion dollar merger, once completed or even far along the track, is unlikely to be stopped. The Applicants, on the other hand, will simply have to delay a little longer to get their merger, so they will not be irreparably harmed. Finally, the public interest will be protected by ensuring that the proper review of a huge holding company merger has occurred. Under the analysis for stays followed by the courts of appeal, Public Citizen *et al.* are likely to succeed, because the Commission has denied, without explanation, both the request that accurate

[30] Title XII, Subtitle F, Section 1262

accounts of the *ex parte* meeting be placed on the record as required by the Sunshine Act and that an evidentiary hearing be held where numerous facts are in dispute. Clearly, the public interest will be served by not going forward with an arguably illegal holding company merger and facing the possibility of having to break up such a merger after-the-fact. *Cf., Wisconsin Gas Co. v. FERC,* 758 F.2d 669 (DC Cir. 1985); *Virginia Petroleum Job. Ass'n v. Federal Power Act,* 259 F.2d 921 (D.C. Cir. 1958).

## CONCLUSION

For the reasons discussed above, the Commission should grant rehearing of its Merger Order, place an account of its ex parte meetings with executives from the merger Applicants on the record, and set the merger for an evidentiary hearing.

Respectfully submitted,

Tyson Slocum, Research Director
Public Citizen's Energy Program
215 Pennsylvania Ave SE
Washington, D.C. 20003
202.454.5191
tslocum@citizen.org

On behalf of itself and:

Jonathan M. Stein, General Counsel
Community Legal Services
1424 Chestnut St
Philadelphia, PA 19102-2505
215.981.3742[31]

David Hughes, Executive Director
Citizen Power
2121 Murray Ave
Pittsburgh PA 15217-2105
412.421.6072

Mike Ewall, Founder
Energy Justice Network
1434 Elbridge St
Philadelphia PA 19149
215.743.4884

John Gaudette, Legislative Advocate
Illinois Public Interest Research Group
180 W. Washington, Suite 510
Chicago IL 60602
312.364.0096 x211

Ev Liebman, Program Director
New Jersey Citizen Action
433 Market Street, Suite 201
Camden NJ 08102-1525
856.966.3091

Dena Mottola, Energy Associate
New Jersey PIRG
11 N. Willow St
Trenton NJ 08608
609.394.8155 x310

Beth A. McConnell, Director
Pennsylvania PIRG
1334 Walnut Street, 6th floor
Philadelphia PA 19107
215.732.3747

David McCann, Executive Director
SEIU New Jersey State Council
560 Broad St. 4th Floor
Newark, NJ 07102
973.824.3225

Glenn Adler
Service Employees International Union
1313 L Street, N.W.
Washington, DC 20005
202.898.3426

Eric Epstein, Chairman
Three Mile Island Alert
4100 Hillsdale Rd
Harrisburg PA 17112
717.541.1101

Noel J. Christmas, President
UWUA Local 601
55 Washington St # 200
Bloomfield, NJ 07003
973-748-0233

July 29, 2005

[31] On behalf of its three client organizations The Action Alliance of Senior Citizens of Greater Philadelphia, Philadelphia ACORN and Tenant Action Group.