

March 28, 2005

Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Re: Docket EC05-43

Motion to Intervene and Protest, and Request for a Hearing

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), Public Citizen's Energy Program and Three Mile Island Alert hereby provide this motion to intervene and protest the proposed merger of Exelon-PSEG because it is not in the public interest on any of the three tests mandated by FERC: the impacts on regulation, rates and competition.¹ Unless all of our requests/concerns detailed below are met, the merger fails the public interest test because it will erode benefits to the public.

This 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. Because of the merger's potential significant impact on New Jersey and Pennsylvania consumers, the public interest cannot be satisfied by holding such a hearing in Washington, DC where consumer groups of modest means will be unable to attend. Therefore, we request that hearings be held in New Jersey and Pennsylvania.

Citizen Power is a regional public policy research, education and advocacy organization. Citizen Power has a long track record of working to increase the use of renewable energy and energy efficiency technologies, secure least cost electricity for low income customers and establish rules that prevent market power and help to ensure a level playing field in the deregulated electricity marketplace. Citizen Power utilizes media education and litigation in state and federal regulatory venues to achieve its goals.

Energy Justice Network is a nonprofit, nonpartisan environmental justice organization based in Philadelphia with over 5,000 individuals in its network in Pennsylvania, New Jersey and Illinois. Most of its work has focused on Pennsylvania, but it serves as a resource on national energy policy and on state energy legislation in multiple states. The main work of EJN involves supporting local, grassroots organizations in their struggles against polluting energy and waste facilities.

IllinoisPIRG is a statewide, non-profit, non-partisan public interest advocacy organization with 20,000 citizen members. For the past 15 years, IllinoisPIRG has advocated for clean, safe, affordable and reliable energy for Illinois' consumers. Currently, IllinoisPIRG is working to pass an energy efficiency appliance standards act in the state legislature and codify a statewide, 15% renewable energy portfolio standard by 2020.

¹ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act*, Order # 592, Docket RM96-6, issued December 18, 1996, <http://elibrary.ferc.gov>

New Jersey Citizen Action is the state's largest citizen watchdog organization representing 60,000 family members and 100 affiliated labor, tenant, environmental, faith-based, women's, senior, civil rights and neighborhood organizations. NJCA works to protect and expand the rights of individuals and families and to ensure that government officials respond to the needs of people rather than the interests of those with money and power. Through organizing campaigns that promote economic, social, racial and political justice, NJCA encourages the active involvement of New Jersey residents in challenging the public and private institutions and agencies that impact our lives. For two decades, NJCA has fought for fair and affordable energy rates for New Jersey consumers. NJCA has five principal and sixteen satellite offices around the state.

New Jersey PIRG is a statewide, non-profit, non-partisan public interest advocacy organization with 25,000 citizen members and a 33 year history of representing both environmental and consumer interests, whose interest is to protect residential ratepayers in the PSEG service area while ensuring that all ratepayers have access to reliable, clean and affordable energy.

PennPIRG is a statewide, non-profit, non-partisan consumer advocacy organization with 8,000 citizen members. For the past 30 years, PennPIRG has advocated for affordable and reliable energy for Pennsylvania's consumers. Most recently, PennPIRG established PIRG Fuel Buyers, a consumer oil co-op that is the Delaware Valley's largest fuel buying group. PIRG Fuel Buyers also acts as advocates and educators on public energy assistance programs and energy efficiency issues.

Public Citizen is a nonprofit, nonpartisan consumer rights organization based in Washington, DC with 17,034 dues-paying individual members in Illinois, New Jersey and Pennsylvania. Our Energy Program does extensive work at the federal and state levels to promote energy policies that best protect consumers.

Three Mile Island Alert is a safe-energy organization based in Harrisburg, PA and founded in 1977. TMIA monitors Peach Bottom, Susquehanna, and Three Mile Island nuclear generating stations.

Together, we represent consumers directly impacted by this proposed merger. Our collective participation in this proceeding is unique and in the public interest, and we will not be adequately represented by any other party to this proceeding.

Our intervention and protest is comprised of five general sections, each numbered below:

1. Secret FERC-Exelon-PSEG Meetings Violate Federal Law, Public Interest

Over the course of three separate meetings, all four FERC Commissioners met privately with Exelon-PSEG executives to discuss parameters of the companies' merger application. The public was not invited to participate, and, according to FERC's response to a Public Citizen Freedom of Information Act request², no notes or transcripts of the meetings were kept that recorded what FERC Commissioners or Exelon-PSEG executives said during these secret meetings. Secret meetings involving government decisionmakers and parties under their direct regulatory control are a slap in the face to the public and consumer advocates who were offered no such private access to powerful, unelected government officials. As we will document in our letter, these private meetings were held in violation of federal law.

² FOIA Nos. FY05-23 and FY05-24.

Unless all four 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, the public cannot be guaranteed that FERC is acting in the public interest and the merger must be rejected. Unless FERC agrees to this request, the public will be forced to continue speculating that these private meetings helped develop the “rules of the game” before the public had an opportunity to be involved.

According to documents Public Citizen acquired in response to a Freedom of Information Act request, three separate private meetings were held on January 13, 2005 between Exelon-PSEG executives and all four FERC Commissioners. First, FERC Commissioner 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) 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 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 Suedeem G. Kelly (along with Commissioner assistant Donna J. Glasgow).

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

Following is the text of a news article by Platts on January 12, 2005 describing the context of the meeting:

US Federal Energy Regulatory Commission Chairman Pat Wood told reporters Wednesday that he will meet with the chief executives of merger partners Exelon and PSEG on Thursday to be briefed ahead of their merger application. Wood said that, for FERC, the main focus of the review will be examining the merger’s impact on generation competition and that the companies likely will need to divest some assets. “It’s too early to tell, but it’s not a stretch to get there,” he said. Wood noted that the US Dept. of Justice will also review the deal, which would bring together \$79-bil in assets. FERC will “probably be looking for some mitigation out of that merger,” Wood said. FERC will measure the generation concentration impact on the wholesale market under the delivered price

test. Asked if large mergers can occur under FERC's market-power restrictions, Wood said yes, "if they're mitigated."³

So this and other news articles suggest that, at a minimum, the private meetings served to "telegraph" FERC Commissioners' intentions on what Exelon-PSEG executives could do to satisfy the Commission's market power concerns. Exelon-PSEG executives presumably asked "What do we need to do to get this merger approved?" and they were apparently informed by FERC Commissioners what they needed to do to satisfy FERC's concerns *before the public was even allowed to be involved*. It cannot be merely coincidence that Pat Wood's public statements about this meeting focused on forcing Exelon-PSEG to divest generation in order to satisfy FERC concerns of competition, and that the bulk of the companies' merger application focuses on this very point. We have been forced to speculate about the content and impact of these meetings because they are not part of the public record; only until sworn statements describing details of the meeting are made part of the public record can we have confidence that FERC Commissioners are acting in the public interest.

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."⁴ 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.*"⁵ [emphasis added]

So federal law is clear: if any FERC commissioner "has knowledge" that a proceeding "will be noticed," then it is unlawful for that commissioner to meet with the parties in private. It should have been 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 contested. Therefore, these meetings were in violation of federal law and must be included in the public record.

The federal judiciary has 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

³ www.platts.com

⁴ 18 CFR § 385.2201, www.gpoaccess.gov/cfr/

⁵ 5 USC § 557(d)(1)(E), www.gpoaccess.gov/uscode/

a possibility that the communication could effect the agency's decision in a contested on-the-record proceeding."⁶

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 decisionmaker, since the private meetings with interested parties have left the Commissioners biased.⁷

We also note that FERC has clear rules allowing for interested parties, such as Exelon-PSEG executives, to meet with FERC to resolve any questions 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."⁸ [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. We ask why FERC Commissioners felt it was necessary to meet privately with the Exelon-PSEG delegation to discuss the merger after FERC staff had already done so as prescribed by FERC's own rules.

2. Impact On Regulation If PUHCA Is Repealed

Prior to this merger, PSEG was not a "registered," or regulated, holding company under the Public Utility Holding Company Act (PUHCA) because its corporate holding company is headquartered in New Jersey and the bulk of its domestic utility business is in New Jersey, thus allowing the New Jersey Board of Public Utilities (BPU) to regulate the utility transactions of the holding company incorporated in New Jersey. But if PSEG is swallowed up by the multi-state holding company Exelon, the BPU will be effectively powerless to protect consumers or take steps to force PSEG to re-submit to state regulation should PUHCA be repealed.

PUHCA currently provides vital consumer protections far above and beyond what FERC is able and willing to provide through its enforcement and interpretations of the Federal Power Act. PUHCA is particularly important for those consumers in states where a former locally-based utility is absorbed into a sprawling, out-of-state utility holding company. In this case, while we are concerned about the impact the merger will have on consumers in all effected states generally, we are particularly concerned about the impact the merger will have on New Jersey consumers and the ability of the BPU to have adequate tools to protect consumers once PSEG ceases to exist as a company incorporated in New Jersey.

There is a strong chance that the 109th Congress will repeal PUHCA, as has been proposed in the unsuccessful comprehensive energy legislation debated in the 107th and 108th Congressional sessions. PUHCA repeal is a component of the draft energy legislation from the House Energy & Commerce Committee released on February 8, 2005.⁹ If PUHCA is repealed, the state of New Jersey may lose any significant voice in the regulation of the transactions between PSEG and the owners of utility subsidiaries.

⁶ *Electric Power Supply v. FERC*, Docket 03-1182, December 10, 2004, www.cadc.uscourts.gov

⁷ *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583 (D.C. Cir. 1970)

⁸ 18 CFR § 388.104, www.gpoaccess.gov/cfr/

⁹ http://energycommerce.house.gov/108/energy_pdfs.htm, Title XII, Subtitle F

Considering that PUHCA may be repealed prior to the completion of the merger review process, and that the Applicant's proposed alternative is inadequate to PUHCA's protections, FERC must assess the impact on regulation without PUHCA's consumer protections in place. We protest this merger because consumers in general, and New Jersey consumers in particular, will be harmed if this merger is allowed to proceed without a guarantee that PUHCA will be there to protect them.

3. The Merger's Effect On Competition

There are seven parts to our protest of this section:

3A. FERC Should Not Rely On Industry-Supplied Analysts

FERC's process of assessing the merger's effect on competition is fundamentally flawed because it is dependent upon an analysis provided by a consultant—Dr. William H. Hieronymus—who is paid \$550/hour by Exelon-PSEG. This raises clear conflict of interest concerns, since the analyst has a financial incentive to provide results accommodating to Exelon-PSEG. Indeed, FERC has relied upon the analyses of Dr. Hieronymus for an inordinate number of merger applications (most often hired by energy companies). FERC's reliance on prejudiced analyses stands in stark contrast to the independent analyses used by other federal anti-trust agencies, such as the Department of Justice and the Federal Trade Commission. A merger of this magnitude—creating one of the largest energy companies in the United States—should not be decided on analysis supplied by the companies.

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.¹⁰

3B. FERC Should Not Rely On Its Appendix A And HHI Screen

FERC's reliance on its Appendix A and HHI screen to assess market power is faulty, as "HHI is far too simplistic an index to measure market power in an industry as complex as the electric industry,"¹¹ particularly with a merger as large as the one proposed by Exelon-PSEG. For example,¹² FERC's Appendix A analysis lacks the "causal connection between market concentration and market power...[as] there is no link between the HHI indicator or changes in market concentration, and changes in market power." In order for consumers to be adequately protected under this proposed merger, FERC's Appendix A analysis must be expanded to more accurately measure market power and the damaging effect it has on wholesale, and in turn, retail, prices. Specifically, use of simulation modeling that directly measures market power, with a Price-Cost Margin Index (capturing examples of market power by documenting when prices are charged above marginal costs, or the "perfectly competitive" price); calculating the effects of generator's and power marketer's strategic behaviors to exercise market power (such as the use of strategic bidding and capacity withholding, neither of which HHI adequately measure); and additional variables, such as modeling the impact the merger will have in light of PJM's specific market structure, must be included.

¹⁰ 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

¹¹ Heidi Kroll and Richard Rosen, *A Critique of FERC's New Merger Guidelines: Implications for Analyzing Market Power, Mergers and Deregulation*, May 30, 1997, www.tellus.org

¹² Comments on the shortcomings of FERC's Appendix A analysis are summarized or quoted from: Dr. Aleksandr Rudkevich and Dr. Richard A. Rosen, *Use of Computer Simulation Models to Analyze Market Power in Electricity Markets*, Docket PL98-6, June 13, 1998, <http://elibrary.ferc.gov/>

We therefore request that the testimony of Dr. Hieronymus be discarded and FERC staff, in direct coordination with DOJ and FTC staff, commission its own independent analysis of the merger's effect on competition including the new criteria we describe.

3C. PJM Is Uncompetitive Prior To The Merger

The HHI analysis clearly fails because the PJM market is already uncompetitive; therefore *any amount of additional accumulation of generation will make it even less competitive, harming the public interest.* In its *2004 State of the Market* report, the PJM Market Monitoring Unit concludes:

“Market power in the Capacity Markets remains a serious concern given the structural issues of high levels of supplier concentration, frequent occurrences of pivotal suppliers and extreme inelasticity of demand. Market power is endemic to the structure of PJM Capacity Markets...The Ancillary Service Markets in PJM are not structurally competitive, with the exception of the Regulation Market in the PJM Mid-Atlantic Region, as they are characterized by high levels of supplier concentration, frequent occurrences of pivotal suppliers and inelastic demand.”¹³

If PJM concludes that certain aspects of its market are uncompetitive today, and that market participants possess some ability to exercise market power, then the merger of two large owners of generation in PJM will result in an increase in the ability of this new company to exercise market power, even with the mitigation plan proposed by Exelon-PSEG. Since consumers will clearly be harmed by this new increase in market power, the public interest is not served by this merger.

In addition, the recent release of Enron tapes describing that company's successful efforts to manipulate a market under the direct regulatory control of FERC implies that market power may be obtained by controlling, through power marketing, as little as 52 megawatts of generation (as opposed to owning plants outright).¹⁴ While there are clear differences between the market FERC oversaw in California and the PJM market that FERC also regulates, there are enough similarities to force one to conclude that at certain peak hours, control over small amounts of generation can lead to large control of market power. This fact is overlooked in Hieronymus' simplistic HHI analysis.

3D. Power Marketing Is Not Included In Market Concentration Analysis

The Exelon-PSEG mitigation plan fails the public interest test because it does not include power marketing in its market concentration analysis. This is an incredible 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.

¹³ www.pjm.com/markets/market-monitor/som.html

¹⁴ Jonathan Peterson, "Tapes Reveal Enron's Power Plant Rigging," *Los Angeles Times*, February 4, 2005.

We therefore protest the entire market concentration analysis since it ignores the market concentration (and market power) impacts of the Exelon-PSEG power marketing business.

On a related note, we challenge the Exelon-PSEG request to waive 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 request that this waiver request be denied, but we ask 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.

3E. Nuclear Consolidation Should Not Be Allowed

Exelon-PSEG writes in its mitigation plan that:

“An outright sale of nuclear units would not be in the public interest because it would eviscerate the very operating, efficiency and reliability benefits that motivate the proposed Transaction...The Applicants intend to apply the world class operating expertise of Exelon to increase the reliability, availability and safety of PSEG’s nuclear capacity. Indeed, because a prime motivation for the Transaction relates to achieving these benefits for the Applicants’ nuclear generation, it is unlikely that the Transaction would be consummated if the Applicants are not permitted to retain ownership and control of PSEG’s nuclear units.”

In addition to asking why FERC has any expertise in making this decision (since when did FERC have any knowledge or responsibility to judge whether Exelon’s nuclear operation is “world class?”), if Exelon’s nuclear operations are indeed “world class,” then the world has dangerously low standards of nuclear operations. **As a result, we protest the request by Exelon-PSEG that nuclear divestiture be off the table, as the consolidation of base-load nuclear assets (and even the “virtual divestiture” proposal offered by Exelon-PSEG) presents too many market power concerns.**

Safe utility service, particularly in regard to nuclear power generation, will be negatively impacted in Exelon’s proposed acquisition is approved. Federal regulators have criticized Exelon’s safety record in New Jersey, Illinois and Pennsylvania. Exelon has cut on-site staffing levels, extended or sought to extend the licenses of aging plants, experimented with increases in power output, instilled a work culture in which staff are restricted from raising safety concerns, and delayed critical maintenance projects.

A former Exelon nuclear engineer-turned-whistleblower, Oscar Shirani, has presented evidence of negligence at Exelon’s nuclear operations.¹⁵ Shirani served as lead quality assurance inspector for ComEd, and then Exelon, for much of the 1990s. Shirani also performed that function for the Nuclear Users Procurement Issues Committee (NUPIC). Shirani was repeatedly selected by NUPIC to lead quality assurance inspections of Holtec dry casks, which both store and transport nuclear waste.

Shirani’s whistleblower complaint stems from inaction and tampering on the part of Exelon/ComEd in response to concerns Shirani raised regarding the safety of Holtec dry casks. In August 2000, Shirani submitted an audit reporting nine significant, unresolved problems with the casks. In December 2000,

¹⁵ <http://njpirg.org/NJ.asp?id2=15434>

without Shirani's knowledge, Exelon submitted an altered report of Shirani's findings to the NRC, filing the false conclusion that all problems had been successfully resolved.

Shirani is not alone. Between January 2001 and January 2005, the NRC received 98 substantiated allegations from employees working at Exelon plants.¹⁶ These allegations make up 21% of the total substantiated allegations nationwide. For example, Exelon was found to have retaliated against an Exelon employee at Pennsylvania's Byron reactor for raising safety concerns in August 2000. Because Exelon admitted fault to the NRC, the company was not charged, the case was settled, and the employee remains anonymous.¹⁷

Exelon's safety record is problematic at many of its nuclear reactors. The NRC issued an enforcement action against Exelon in March 2004 for problems at Oyster Creek;¹⁸ in November 2002 cited the company for security violations at two of its nuclear power plants;¹⁹ in February 2004 cited Exelon for deficient performance;²⁰ and in 2001 documented criminal behavior by two of Exelon's Emergency Preparedness personnel.²¹ In March 2002, cracks and leaks formed in the main control room of Exelon's Quad Cities reactor after the company ramped up power production by 20 percent.²²

Oyster Creek has had its share of staffing and maintenance problems since Exelon bought the plant in 1999. The safety culture had deteriorated so badly that workers could not accept the status quo. In the summer of 2003, the 127 International Brotherhood of Electrical Workers (IBEW) employees at the plant went on strike in part because of safety concerns. Ed Stroup, the local IBEW President, said Exelon proposed sweeping changes in workplace rules that would allow it to transfer employees to positions for which they were inadequately trained or skilled, and that his union members are "terrified" about the impact on the plant's safety. He also said, "There just aren't enough people to do everything that needs to be done... Our members are the last line of defense of safety at that plant and that's what they're [company officials] trying to break down."²³

On January 17, Exelon took over management at PSEG-owned Salem I, II and Hope Creek reactors in southern New Jersey. The week before Exelon took over management at the plants, Exelon agreed with PSEG's decision to restart the Hope Creek reactor, which had been shut down since October 2004 due to a faulty recirculation pump.²⁴ Despite protests from New Jersey's Department of Environmental Protection,²⁵ Exelon decided to restart the reactor without fixing the recirculation pump until their next refueling outage, scheduled for the spring of 2006, even though the NRC Region I Administrator stated that the pump was designed, manufactured and would be ready to install in March 2005.²⁶

¹⁶ NRC allegations substantiated by CY received January 2001-January 2005, www.nrc.gov/what-we-do/regulatory/allegations/stats/substant.pdf

¹⁷ Confirmatory Order (Effective Immediately) (Office of Investigations Report No. 3-2001-005) NRC October 3, 2002

¹⁸ EA-04-033, www.nrc.gov/reading-rm/doc-collections/enforcement/actions/reactors/ea04033.html

¹⁹ EA-02-142, www.nrc.gov/reading-rm/doc-collections/enforcement/actions/reactors/ea02142.html

²⁰ EA 03-224, www.nrc.gov/reading-rm/doc-collections/enforcement/actions/reactors/ea03224.html

²¹ EA-01-188, www.nrc.gov/reading-rm/doc-collections/enforcement/actions/reactors/ea01188.html

²² <http://njpirg.org/NJ.asp?id2=15432>

²³ "Oyster Creek owners, union continue to disagree over reductions," *The Asbury Park Press*, July 20, 2003

²⁴ Letter from Dave Lochbaum, Nuclear Safety Engineer, Union of Concerned Scientists to Mr. A. Christopher Bakken, President and Chief Nuclear Officer, PSEG Nuclear LLC, November 18, 2004

²⁵ Letter from Bradley Campbell, NJ DEP Commissioner, to NRC Chairman Nils Diaz, December 29, 2004 NRC ADAMS Document # ML043650179

²⁶ Samuel Collins, NRC Region I Administrator, at NRC Public Meeting on January 12, 2005

Exelon's management at the Three Mile Island and Peach Bottom nuclear power plants is marred with failure to correct serious problems. Between 1999 and 2002, 143 workers and short-term contractors at Three Mile Island and Peach Bottom tested positive for drugs or alcohol, according to bi-annual fitness for duty reports.²⁷ In November 2003 the NRC increased its inspections after four unplanned shutdowns at Peach Bottom. In April 2004, the NRC cited Peach Bottom for deficient performance²⁸ and announced that at Three Mile Island, personnel did not consistently recognize degraded conditions and did not identify them in a timely manner.²⁹ In January 2005 the National Nuclear Accreditation Board (NNAB) placed Three Mile Island's operator training program on probation. The NNAB's decision is likely connected to a May 2004 NRC inspection report in which 25% of Three Mile Island's control room crews failed re-qualification exams on accident scenarios performed on a control room replica.³⁰

These incidents clearly demonstrate that Exelon's claims of operating a "world class" nuclear power program are false, and therefore FERC must disallow the consolidation of nuclear generation assets.

3F. Interim Mitigation Plan Harms Consumers

The Exelon-PSEG interim mitigation plan—selling short-term capacity until the sale/swap of assets is complete—presents too much market power harm to consumers. The only effective interim mitigation plan is for Exelon-PSEG to charge only cost-based rates until the sale/swap of assets is complete. This is the only means by which consumers can be guaranteed to be protected from market power. We therefore request that FERC reject the interim mitigation plan proposed by Exelon-PSEG.

3G. Asset Sales—Not Swaps—Should Be Required

We demand that any divestiture requirement made to satisfy FERC's market concentration concerns be only in the form of asset sales, and that asset swaps not be allowed to qualify as an effective mitigation tool. Asset swaps will still enable Exelon-PSEG to control too much generation, allowing it to exercise market power with the help of its power marketing divisions.

4. The Merger's Effect On Rates

We protest 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 anymore to protect consumers by controlling rates—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.

Due to changes forced by Congress and FERC that 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.

²⁷ *York Daily Record*, November 14, 2004

²⁸ *York Dispatch*, April 10, 2004

²⁹ NRC Annual Assessment Meeting, Middletown, Borough Hall, April 30, 2004

³⁰ Ad Crable, "NRC: 25% in TMI's control room failed test," *Lancaster New Era*, February 4, 2005

Both PSEG and Exelon enjoy virtual monopolies in their retail service territories. 99.95% of the 1,751,134 residential customers in PSEG's service territory still buy power from PSEG.³¹ 96% of Exelon's nearly 1.4 million residential customers are still buying their power from Exelon in Pennsylvania,³² and none of the 3,225,738 residential consumers in Exelon's Illinois service territory have switched.³³ If FERC 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.

FERC 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.

5. The Merger's Impact On Reliability

The applicants make no mention of the merger's potential impact on reliability. Given the poor reliability record of Exelon and of recently-approved FERC mergers, and because we see nothing in the Exelon-PSEG filing describing how the merger will ensure that reliability will be consistent with the public interest, we protest this merger.

The Illinois Commerce Commission, which routinely reviews reliability, gives Exelon poor marks:

"The most serious... recommendation concerns how ComEd will maintain or improve reliability and customer satisfaction with future projected distribution capital investment amounts less than the levels in the mid 1990's. From actual 1995 to projected 2005 values for distribution capital spending [ICC] Staff noted a declining annual compounded growth rate of 6.48%... The second most serious recommendation concerns the number of interruptions that ComEd classified as being controllable. Staff found it absurd that in 2002 ComEd classified only 2.6% of the total interruptions as controllable. Staff believes that most service interruptions are controllable... Staff remains concerned by ComEd's poor ranking compared to other jurisdictional utilities in 2002 for worst performing circuit. Staff continues to recommend that ComEd focus on improving customer service... Staff did state that field observations indicate that there is much potential for improvement in ComEd's vegetation management program... Staff noted that ComEd's future tree trimming budgeted spending levels are declining from 2002 actual levels."³⁴

If Illinois regulators already have major criticisms with Exelon's reliability record, how can the public interest be served by Exelon acquiring an out-of-state utility?

If recent multi-state mergers are any guide, reliability suffers when multi-state holding companies are created through mergers. In 1997, FERC approved the creation of FirstEnergy, a multi-state holding company consisting of Cleveland Electric, Ohio Edison, Toledo Edison, Jersey Central Power & Light, Metropolitan Edison, Pennsylvania Power and Pennsylvania Electric. Since this merger, FirstEnergy has been cited by federal and state authorities for poor reliability. The joint U.S.-Canada Power System Outage Task Force laid much of the blame for the August 2003 blackout on mismanagement at FirstEnergy:

"The blackout was initiated when three high-voltage transmission lines operated by FirstEnergy Corporation short-circuited and went out of service when they came into contact with trees that were too close to the lines; FirstEnergy's control-room alarm system wasn't working properly—and the control-room operators were unaware

³¹ www.bpu.state.nj.us/energy/elecSwitchData.shtml

³² www.oca.state.pa.us/cinfo/Stats0105.pdf

³³ www.icc.state.il.us/ec/switchstats.aspx

³⁴ ICC Assessment 2002 - Commonwealth Edison (ComEd), Docket 04-0114, www.icc.state.il.us/ec/ecReliability.aspx

it was not working properly—which meant they were also unaware that transmission lines had gone down; And because FirstEnergy’s monitoring equipment wasn’t telling them about the downed lines, the control room operators took no action—such as shedding load—which could have kept the problem from growing, and becoming too large to control. Moreover, because FirstEnergy operators did not know their monitoring equipment had failed and were unaware of the growing problems, they did not inform neighboring utilities and reliability coordinators, who also could have helped address the problem. The loss of the three lines resulted in too much electricity flowing onto other nearby lines, which caused them to overload.”³⁵

In 2004, the Ohio Consumers’ Counsel (OCC) identified significant reliability concerns with FirstEnergy.³⁶ The OCC further contends that FirstEnergy made significant cutbacks in staff between 1998 and 2002. The OCC further noted that it received numerous complaints from FirstEnergy customers that “indicate that reliability problems are already occurring throughout Ohio.”³⁷ In early 2004, the Pennsylvania PUC launched a formal investigation into reliability at the FirstEnergy’s Pennsylvania operations. In launching the investigation, the PUC alleged that a review of reliability data showed the company was not meeting state standards, and in November 2004 forced FirstEnergy to spend at least \$765 million over three years on improving its distribution and transmission system.³⁸

The New Jersey BPU commissioned a report concluding FirstEnergy’s New Jersey operations were also suffering from reliability problems. In response to significant power outages, the BPU ordered an audit of FirstEnergy’s New Jersey subsidiary in July 2004. The audit concluded that:

“JCP&L’s levels of spending [on capital expenditures and operating and maintenance expenditures over the last five years] have not been sufficient to prevent the deterioration of the electric system...During 2002, FirstEnergy transitioned from GPU engineering, design, construction and maintenance practices to standardized FirstEnergy policies that are applicable to all FE operating utilities. The design philosophy of the FirstEnergy Corporation is built around the excess utilization of thermal capacity in equipment and overhead conductors. The system is built to meet actual, not projected, load requirements. JCP&L planning procedures and policies result in a program that has all the characteristics of operating equipment to its ultimate failure...During the interview of [FirstEnergy’s] two Regional Presidents...there were two substantial overriding themes being purported at all levels of management. These themes were (1) safety is the company’s number one priority and (2) FirstEnergy intends to impose upon [JCP&L’s] Planning, Operations and Maintenance Practices, Policies and Procedures FirstEnergy’s “Best Practices” developed processes...we often determined neither theme seems to be reflected in the actual system operations or maintenance procedures or planning processes as reflected in the field or through the staff’s practices.”³⁹

PSEG is the last remaining New Jersey-based electric transmission and distribution company in the state, and it has the best reliability record in New Jersey. According to the BPU electricity systems performance reports that assess CAIDI (hourly interruptions) and SAIFI (frequency of disturbances), between 1994 and 2003, PSEG had a consistently low number of interruptions and the lowest frequency of disturbances with a slight increase over time. Based on the state’s analysis, PSEG—the only utility not controlled by an out-of-state holding company—is the most reliable transmission and distribution company in New Jersey.⁴⁰

³⁵ Comments by Secretary of Energy Spencer Abraham, November 19, 2003, www.energy.gov

³⁶ www.pickocc.org/electric/reliability-filing.doc

³⁷ *The Ohio Consumers Council Motion to intervene, protest, motion for hearing and proposal for commission investigation into the reliability of Wires Service by Ohio’s Investor-Owned Electric Companies*, Case 03-2570-EL-UNC, January 8, 2004, <http://dis.puc.state.oh.us/>

³⁸ Docket I-00040102, www.puc.state.pa.us

³⁹ Booth & Associates, Focused Audit of the Planning, Operations and Maintenance Practices, Policies and Procedures of Jersey Central Power & Light Company, Docket No. EX02120950. June 2004 www.bpu.state.nj.us/tmp/Boothfinalreport.pdf

⁴⁰ www.bpu.state.nj.us

Wherefore, the organizations listed below provide this Motion for Intervention and Protest and request a hearing in the above-captioned proceedings and respectfully request that the Motion be granted for the reasons set forth herein.

Respectfully submitted,

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