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September 17, 2021

Via Electronic Mail

Hon. Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 9th floor
P.O. Box 350
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Board.Secretary@bpu.nj.gov
Aida.Camacho@bpu.nj.gov

**Re: I/M/O the Petition of Atlantic City Electric Company ("ACE") for a
Declaratory Ruling
BPU Docket No.: EO21060893**

Dear Secretary Camacho-Welch:

Please accept for filing in the above-referenced matter the comments of the New Jersey Division of Rate Counsel ("Rate Counsel") regarding the Atlantic City Electric Company's ("ACE" or "the Company") Petition seeking a Declaratory Ruling from the New Jersey Board of Public Utilities ("BPU" or the "Board") stating that BPU approval is not required for Exelon to transfer its merchant generation subsidiaries out of Exelon Corporation through what it calls the Exelon Generation Spin Transaction ("EGST").

Consistent with the March 19, 2020 Order of the Board in *I/M/O the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations*, BPU Docket No. EO20030254, copies of this comment letter are being provided to each person on the service list by electronic mail only. No paper copies will follow. **Please acknowledge receipt of this comment letter.** Thank you.

COMMENTS

The New Jersey Division of Rate Counsel (“Rate Counsel”) appreciates the opportunity to comment on the Atlantic City Electric petition seeking a declaratory ruling.

Background

On June 7, 2021 Atlantic City Electric filed a petition with the Board seeking a declaratory ruling¹ stating that BPU approval is not required for Exelon to transfer its merchant generation subsidiaries out of Exelon Corporation through what it calls the Exelon Generation Spin Transaction (“EGST”).

ACE is a subsidiary of PHI Holdings, Inc., (“PHI”) which in turn is a subsidiary of Exelon Energy Delivery Company (“EEDC”). ACE notified the BPU by letter on March 30, 2021 that Exelon was moving to transfer, through its EGST, 100% ownership of Exelon Generation Company, LLC (“Exelon Generation”) to a newly created subsidiary which will then be spun off from Exelon (“EXGEN Spin off”). ACE states that this transaction will separate Exelon Generation from Exelon Corporation thereby removing merchant generation businesses from Exelon Corporation ownership.

The Company alleges that this transaction will have no impact on ACE or PHI ownership, control, service, rates, governance, employment levels or day-to-day operations, and there will be no transfer of assets between Exelon Generation, PHI, or ACE as part of the transaction.²

ACE also states that ACE, PHI, and the additional Exelon utilities will continue to be “ring-fenced”³ and insulated from any possible business risks arising out of any non-utility business

¹ N.J.S.A. 52:14B-8 provides that the Board may issue a ruling regarding “...applicability to any...state of facts of any statute or rule enforced or administered by” the BPU.

² I/M/O the Petition of Atlantic City Electric Company for a Declaratory Ruling, BPU Docket No. EO21060893 at p. 2, § 6 (“DR Petition”).

³ “Ring-fencing” is a financial strategy that creates a virtual barrier to separate a portion of a company’s assets from the rest of the company.

activities of Exelon outside of PHI after the EGST is completed in compliance with the terms of the 2016 Exelon PHI Merger Approval Order⁴ (“Exelon PHI Merger Order”).⁵

ACE responded to Board staff data requests on July 16, 2021 outlining the Exelon corporate structure through Pre- and Post-spin off organizational charts. The Exelon Corporation Organizational Chart⁶ which shows Exelon Corporation as parent to Exelon Energy Delivery Company, LLC, which is identified as a FERC Jurisdictional Holding Company. PHI Holdco LLC is located under Exelon Energy Delivery Company, LLC and seven utilities and holding companies are located under PHI Holdco LLC. These include PHI Service Company, PEPCO Holdings LLC, Atlantic City Electric Company, Atlantic City Transition Funding LLC and three others. The second post spin-off organizational chart, the SPINCO Organization Chart places Exelon Generation, comprised of a cluster of 36 companies, under a new parent company Constellation New Holdco, Inc. which is then moved from aligning under the Exelon parent company. The new SPINCO Organization Chart alignment removes any Constellation New Holdco, Inc., connection to the cluster of entities that comprise Exelon Energy Delivery Company.⁷

ACE asserted through responses to Board Staff discovery that the transaction has not affected ACE, and they anticipate that it will not affect ACE, in regards to: 1) financial leverage or annual equity ratio, 2) credit rating or financial integrity, 3) collective bargaining agreements, 4) the Business Servicing Company (“BSC”), and/or 5) any tax ramifications post-merger.

Discussion

The Board’s Statutory Authority

Exelon is a utility services holding company⁸ that is incorporated in Pennsylvania, maintains its corporate headquarters in Chicago, Illinois, and operates through its principal indirect

⁴ I/M/O the Merger of Exelon Corporation and PHI Holdings, Inc., BPU Docket No. EM14060581, (March 9, 2015)(approving stipulation of settlement)(“Exelon PHI Merger Order”).

⁵DR Petition, p. 3, § 9.

⁶ Staff Discovery Response, S-ACE-1, Attachment 1, p. 1 of 2.

⁷ Staff Discovery, Response. A-ACE-1, Attachment 3, p. 1 of 1.

⁸ A public utility holding company is defined in N.J.S.A. 48:3-51 (d) as: “(1) any company that, directly or indirectly, owns, controls, or holds with power to vote, ten percent or more of the outstanding voting securities of an

subsidiaries: Exelon Generation Company, LLC ("Exelon Generation"), Baltimore Gas and Electric Company ("BGE"), Commonwealth Edison Company, and PECO Energy Company ("PECO"), Constellation Energy Group, Inc., and PHI Holdco LLC.⁹

Although Exelon is not directly responsible for the distribution of electricity to retail customers in New Jersey, the Board is empowered by the Legislature to review certain public utility transactions. Under N.J.S.A. 48:2-51.1, the Board may "evaluate the impact of the acquisition on competition, on the rates of ratepayers affected by the acquisition of control, on the employees of the affected public utility or utilities, and on the provision of safe and adequate utility service at just and reasonable rates." See also N.J.A.C. 14:1-5.14(c) (setting forth the Board's positive benefits test standard). While ACE asserts in its Petition that N.J.S.A. 48:2-51.1 does not apply to the EXGEN Spin off, the Board has chosen to exercise its authority and apply the positive benefits test on transactions of a similar nature.¹⁰ Rate Counsel believes the Board should once again base its decision upon this framework and be satisfied that positive benefits will flow to customers based upon the record.

Exelon's Post-Merger Obligations

In addition to its statutory oversight, the Board has specific authority over ACE under the March 6, 2015 Exelon PHI Merger Order. The Stipulation of Settlement ("Stipulation") approved by the Board contained a list of terms affecting rates, employees, safe and adequate utility service,¹¹ competition, commitment to stay in PJM (until 2025), separate advocacy personnel, and compliance with the ACE-PHI Merger Order Stipulation. The Stipulation also contained extensive terms related to corporate organization, governance, financial integrity, ring-fencing, affiliate transactions and the General Services Agreement ("GSA").¹² These terms were incorporated to address the necessity to ensure "that the Merger result[ed] in good corporate

electric public utility...or (2) any person that the Securities and Exchange Commission, or its successor, determines such a controlling influence over the management or policies of an electric public utility...or public utility holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in the Public Utility Holding Company Act of 1935 or its successor."

⁹ Exelon PHI Merger Order, p. 2.

¹⁰ See e.g. In the Matter of the Business Combination of FirstEnergy Corp., Docket No. EM11010012 (Feb. 10, 2011) (applying the positive benefits test to FirstEnergy, Corp.'s merger with Allegheny Energy, Inc.).

¹¹ N.J.S.A. 48:2-51.1 outlines issues that must be addressed by the BPU in merger/acquisitions of public utilities.

¹² Exelon PHI Merger Order, pp. 21-27 & 40-41.

practices while also insulating ACE from potential impacts resulting from decisions by other affiliates under the merged parent company.”¹³

Pursuant to its merger obligations, ACE filed the “ACE Ring Fencing Report” with the BPU on June 30, 2017. This report reviews each of the ring-fencing measures incorporated into the Order to maintain a management framework that arguably provides a way of protecting ACE, a regulated utility, from possible risks of financial harm from affiliated companies. The report states the ring-fencing measures put in place are designed to

protect ACE against risk of defaulting on its own obligations... due to the financial stress or bankruptcy of its parents or affiliates, maintain ACE’s separate identity and viability so that ACE is capable of running its own business on a stand-alone basis, as well as avoiding a substantive consolidation with Exelon or Exelon affiliates, and protect ACE against a voluntary bankruptcy petition for any reason other than ACE’s individual financial circumstances.¹⁴

The Stipulation and Board Order also required that a new limited liability company be created as a special purpose entity (“SPE”) and 100% of the interest in PHI be transferred to the SPE (a specific subsidiary of EEDC) with the specific intent to protect ACE from the transactions of other Exelon subsidiaries.

The Exelon PHI Merger Order further required ACE to file “at the time the SPE is formed and every year thereafter...” with the Board, “...a certificate from an officer of Exelon certifying: (a.) Exelon shall maintain requisite legal separateness in the corporate reorganization structure....”¹⁵ The latest Annual Certification of Legal Separateness filing was filed by ACE on March 23, 2021.

These measures, which were put into place as part of Exelon’s merger commitments to protect ratepayers from issues arising from other Exelon entities, should also serve as protection for ACE customers from any adverse effects of Exelon’s actions in selling off its affiliate generation. Therefore, these commitments must be maintained for ACE to ensure its customers are protected from any adverse effects of the EGST now and going forward into the future.

¹³ Id. p. 40.

¹⁴ ACE Ring Fencing Report, p. 6, June 30, 2017.

¹⁵ Id. p. 26. See also 2021 Annual Certification of Legal Separateness (Mar. 23, 2021).

Conclusion

Based on the foregoing, Rate Counsel believes the issuance of any Declaratory Ruling that Board approval is not necessary to transfer the Exelon merchant generation subsidiaries out of Exelon Corporation through its EGST should be conditioned on the satisfaction of a positive benefits test as well as Exelon's continued adherence to the commitments required by the Merger Stipulation of Settlement, and the Board's corresponding orders, particularly those commitments regarding ring-fencing.

Very truly yours,

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DIVISION OF RATE COUNSEL

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c. Service List (via electronic mail)

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BPU Docket No. E021060893
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