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September 28, 2021

VIA ELECTRONIC MAIL

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Aida Camacho-Welch
Secretary to the Board
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

RE: In the Matter of the Petition of Atlantic City Electric Company for a Declaratory Ruling
BPU Docket No. EO21060893

Dear Secretary Camacho-Welch:

Enclosed herewith for filing is an electronic copy of the Reply Comments of Atlantic City Electric Company (“ACE” or the “Company”) in the above-captioned matter.

Consistent with the Order issued by the New Jersey Board of Public Utilities (“BPU” or “Board”) in connection with *In the Matter of 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, Order dated March 19, 2020, this document is being electronically filed with the Board and the New Jersey Division of Rate Counsel. No paper copies will follow.

Thank you for your assistance with this matter.

Respectfully submitted,



Cynthia L.M. Holland
An Attorney at Law of the
State of New Jersey

Enclosure

cc: Service List

**Reply Comments of Atlantic City Electric Company
BPU Docket No. EO21060893**

Introduction

On June 7, 2021, Atlantic City Electric Company (“ACE” or the “Company”) filed a petition in the above-captioned matter seeking a declaratory ruling that New Jersey Board of Public Utilities (“BPU” or “Board”) approval is not required in connection with the “Exelon Generation Spin Transaction” (as defined therein). Subsequently, Board Staff submitted data requests to the Company. The Company responded to these data requests on July 16, 2021, and those responses were provided to the Service List, including the New Jersey Division of Rate Counsel (“Rate Counsel”).

On September 17, 2021, Rate Counsel submitted a comment letter to the Board in this proceeding. Although Rate Counsel did not oppose the Exelon Generation Spin Transaction, the comments sought conditions on the issuance of any declaratory ruling finding that Board approval of the Exelon Generation Spin Transaction is not necessary. Rate Counsel commented that such a declaratory ruling should be conditioned on (i) the satisfaction of a “positive benefits” test and (ii) Exelon’s continued adherence to the requirements set forth in “the Merger Stipulation of Settlement, and the Board’s corresponding orders, particularly those commitments regarding ring-fencing.”¹ The Company appreciates Rate Counsel’s comments in this matter and takes this opportunity to offer brief reply comments for the Board’s consideration.

¹ In the Matter of the Merger of Exelon Corporation and PEPCO Holdings, Inc., Docket No. EM14060581 (Order Approving Stipulation of Settlement) (Order, March 6, 2015) (the “Exelon PHI Merger Order”); In the Matter of the Merger of Exelon Corporation and PEPCO Holdings, Inc., Docket No. EM14060581 (Order Approving Joint Recommendation for Settlement of the Most Favored Nation Issue) (Order, October 31, 2016) (the “MFN Order”).

Merger Commitments

As a threshold matter, the Company reaffirms that all commitments undertaken in connection with the Exelon PHI Merger Order, and the MFN Order, will remain unchanged. Exelon has complied with² and will continue to adhere to the requirements set forth therein, including but not limited to ensuring that ACE will remain ring-fenced. See ACE Petition, ¶ 9. Although the Company maintains that annual filings are unnecessary, the Company is willing to provide an updated ring-fencing report if the Board would require it.

Positive Benefits Test

The Company does not believe that issuance of a declaratory order in this proceeding should be conditioned upon the satisfaction of a positive benefits test. Rate Counsel notes in its comments that the Board is empowered by the Legislature “to review certain public utility transactions” under N.J.S.A. 48:2-51.1, and that the Board has applied “a positive benefits test on *transactions of a similar nature.*” See Rate Counsel Comments, p. 4 (emphasis added).

In pertinent part, N.J.S.A. 48:2-51.1 states:

. . . no person shall acquire or **seek to acquire control of a public utility directly or indirectly** through the medium of an affiliated or parent corporation or organization, or through the purchase of shares, the election of a board of directors, the acquisition of proxies to vote for the election of directors, or through any other manner, without requesting and receiving the written approval of the [Board]. Any agreement reached, or any action taken, in violation of this act shall be void. In considering a request for approval of an acquisition of control, the [B]oard shall evaluate the impact of the acquisition on competition, on the rates of ratepayers affected by the

² Although Commitment No. 64 of the Merger Order required that “ACE will file with the BPU an annual compliance report with respect to the ring-fencing and other requirements,” the language in Commitment No. 13 of the MFN Joint Recommendation approved by the Board on October 31, 2016 clearly revised and eliminated this annual requirement. Commitment No. 13 provides that “Exelon shall conduct an analysis of its operational and financial risk to determine the adequacy of existing ring-fencing measures. Exelon will include this analysis on a one-time basis in the report filed with the Board... This paragraph revises and supersedes paragraph 64 of the Stipulation of Settlement.” (emphasis added). The Company complied with its commitment and filed the report with the BPU on June 30, 2017 and has received no inquiries regarding the report from the BPU.

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 . . .

(emphasis added).

As noted in the Company's petition, the Exelon Generation Spin Transaction will not result in any acquisition or change in control over ACE directly, or in any entity that directly or indirectly has any control over ACE. The Exelon Generation Spin Transaction will result in a change in ownership only over Exelon Generation Company, LLC ("Exelon Generation"), which is an unregulated subsidiary of Exelon that does not have any ownership in or control over ACE. Thus, the Exelon Generation Spin Transaction does not contemplate or involve an acquisition or change in control of a public utility that would subject the proposed transaction to Board review pursuant to N.J.S.A. 48:2-51.1. See ACE Petition, ¶ 18. In other words, the transaction is neither a "public utility transaction" that requires Board approval under N.J.S.A. 48:2-51.1 nor the type of transaction that would be subject to Board review under N.J.S.A. 48:3-7 or N.J.S.A. 48:3-10.³ See ACE Petition, ¶¶ 17-20.

The Company respectfully disagrees with Rate Counsel's assessment that the Board has previously exercised authority over, and applied a positive benefits test, to transactions *similar to* the Exelon Generation Spin Transaction. The Board decision cited by Rate Counsel for this claim was the Board's 2011 approval of the merger of FirstEnergy Corp. ("FirstEnergy") and Allegheny Energy, Inc. ("Allegheny"). See In the Matter of the Business Combination of FirstEnergy Corp.,

³ Rate Counsel does not suggest that Board review of the Exelon Generation Spin Transaction is required under either N.J.S.A. 48:3-7 or N.J.S.A. 48:3-10. N.J.S.A. 48:3-7 provides that Board approval is necessary for a public utility to sell, lease, mortgage, or otherwise dispose of or encumber its property, franchises, privileges, or rights, or any part thereof; or merge or consolidate its property, franchises, privileges, or rights, or any part thereof, with that of any other public utility. N.J.S.A. 48:3-10 provides that Board approval is necessary to transfer any shares or shares of a public utility's capital stock, to any other public utility, or to any corporation, domestic or foreign, or to any person, the result of which sale or transfer in itself or in connection with other previous sales or transfers would be to vest in such corporation or person a majority interest of the outstanding capital stock of such public utility.

Docket No. EM11010012, 2011 WL 1211019 (Feb. 10, 2011). The Exelon Generation Spin Transaction is not a merger transaction, and is clearly distinguishable.

The FirstEnergy-Allegheny transaction contemplated that FirstEnergy, the direct parent of Jersey Central Power & Light Company (“JCP&L”), would merge with Allegheny. Allegheny shareholders would then acquire an approximately 27% ownership in FirstEnergy. Allegheny executives would also assume senior positions in FirstEnergy. *Id.* at 1.

The Exelon Generation Spin Transaction is materially different from the First Energy transaction. ACE is an indirect subsidiary of Exelon Energy Delivery Company, LLC (“EEDC”), whose direct parent is Exelon. ACE Petition, ¶ 2; ACE Petition, Ex. A. The Exelon Generation Spin Transaction will result in the “spin-off” of Exelon Generation – another Exelon subsidiary, which is separate from and without any control over EEDC or any of its subsidiaries, including ACE. The Exelon Generation Spin Transaction will result in the unregulated Exelon Generation and its subsidiaries no longer being owned by Exelon. The transaction does not involve any entity with control over ACE, nor will it result in any change in control over ACE. *See* ACE Petition, ¶¶ 2-4. Therefore, the application of a positive benefits test is not applicable or appropriate here.

Assuming that the Board wishes to apply a variant of the positive benefits test, notwithstanding the Company’s objection to the application of such, the Board should find that the transaction is not likely to create any adverse impacts, is in the public interest, and has the likelihood of creating positive benefits. C.f., In the Matter of Aqua America, Inc.’s Acquisition of LDC Funding, LLC, Docket No. WM19050565, 2019 WL 2656058 (Order, June 21, 2019). Importantly, the spin-off of Exelon’s generation business will result in an Exelon that is solely focused on its regulated utility businesses and its utility strategic initiatives. ACE will be a part of the nation’s largest transmission and distribution utility company, with more than 16,400

employees delivering electricity and natural gas to more than 10 million customers and generating 2020 revenue of \$33 billion, *all of which will be a positive benefit to ACE's customers*. As noted in the Company's responses to Staff discovery, the Exelon Generation Spin Transaction (i) is not expected to impact the financial leverage of Exelon or its utility subsidiaries (including ACE), (ii) has not resulted in any changes to credit ratings or the underlying financial integrity of Exelon or its utility subsidiaries (including ACE), (iii) will have no effect on ACE's collective bargaining agreements for employees covered under existing agreements, and (iv) will not change the cost allocation factors utilized to allocate Exelon Business Service Company costs to ACE. *See S-ACE-2, S-ACE-3, S-ACE-5, and S-ACE-6*. Thus, the Exelon Generation Spin Transaction is not likely to create any adverse impacts, is in the public interest, and has the likelihood of creating positive benefits.

Conclusion

For these reasons, and the reasons set forth in the ACE Petition, ACE respectfully requests the Board grant the relief requested in the ACE Petition, issue a declaratory ruling confirming that approval is not required for consummation of the Exelon Generation Spin Transaction and, to the extent necessary, find that (i) all commitments undertaken in connection with the Exelon PHI Merger Order and the MFN Order, including the ring-fencing commitments, will remain unchanged, and (ii) the Exelon Generation Spin Transaction is not likely to create any adverse impacts, is in the public interest, and has the likelihood of creating positive benefits.

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