

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, DC 20549

**FORM 8-K**

**CURRENT REPORT**

**Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

February 10, 2009

Date of Report (Date of earliest event reported)

<b>Commission File Number</b>	<b>Exact Name of Registrant as Specified in Its Charter; State of Incorporation; Address of Principal Executive Offices; and Telephone Number</b>	<b>IRS Employer Identification Number</b>
1-16169	EXELON CORPORATION (a Pennsylvania corporation) 10 South Dearborn Street P.O. Box 805379 Chicago, Illinois 60680-5379 (312) 394-7398	23-2990190
333-85496	EXELON GENERATION COMPANY, LLC (a Pennsylvania limited liability company) 300 Exelon Way Kennett Square, Pennsylvania 19348-2473 (610) 765-5959	23-3064219

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

## Section 8 — Other Events

### Item 8.01. Other Events.

On February 4, 2009, legal counsel for NRG Energy, Inc. (NRG) submitted a letter to the Nuclear Regulatory Commission (NRC) challenging the sufficiency of the application Exelon Corporation (Exelon) submitted to the NRC on January 29, 2009. In its letter, NRG asked the NRC to find that Exelon's application is "deficient" because Exelon lacks the consent of the existing licensee to submit the application. NRG also asserted that Exelon's application raises "significant policy issues". On February 10, 2009, legal counsel for Exelon submitted a letter to the NRC in rebuttal to NRG's February 4 letter. In its letter, Exelon noted, among other things, that NRC regulations very clearly do not require the licensee's consent for Exelon to submit the application or for the NRC to review the application. Exelon also addressed the "policy issues" raised by NRG by pointing out that Federal policy, dating from passage of the Williams Act in 1968, favors neither bidders nor incumbent management in unsolicited tender offers and evidences a broad policy that shareholders should be given the opportunity to make decisions on tender offers. Copies of NRG's February 4, 2009 letter and Exelon's February 10, 2009 letter are attached as Exhibits 99.1 and 99.2, respectively.

## Section 9 – Financial Statements and Exhibits

### Item 9.01. Financial Statements and Exhibits.

(d) Exhibits.

<u>Exhibit No.</u>	<u>Description</u>
99.1	NRG's letter to the NRC dated February 4, 2009
99.2	Exelon's letter to the NRC dated February 10, 2009

\* \* \* \* \*

### Important Additional Information

This report relates to the offer (Offer) by Exelon through its direct wholly-owned subsidiary, Exelon Xchange Corporation (Xchange), to exchange each issued and outstanding share of common stock (NRG shares) of NRG for 0.485 of a share of Exelon common stock. This report is for informational purposes only and does not constitute an offer to exchange, or a solicitation of an offer to exchange, NRG shares, nor is it a substitute for the Tender Offer Statement on Schedule TO or the Prospectus/Offer to Exchange included in the Registration Statement on Form S-4 (Reg. No. 333-155278) (including the Letter of Transmittal and related documents and as amended from time to time, Exchange Offer Documents) previously filed by Exelon and Xchange with the Securities and Exchange Commission (SEC). The Offer is made only through the Exchange Offer Documents. **Investors and security holders are urged to read these documents and other relevant materials as they become available, because they will contain important information.**

Exelon expects to file a proxy statement on Schedule 14A and other relevant documents with the SEC in connection with the solicitation of proxies (NRG Meeting Proxy Statement) for the 2009 annual meeting of NRG stockholders (NRG Meeting). Exelon will also file a proxy statement on Schedule 14A and other relevant documents with the SEC in connection with its solicitation of proxies for a meeting of Exelon shareholders (Exelon Meeting) to be called in order to approve the issuance of shares of Exelon common stock pursuant to the Offer (Exelon Meeting Proxy Statement). **Investors and security holders are urged to read the NRG Meeting Proxy Statement and the Exelon Meeting Proxy Statement and other relevant materials as they become available, because they will contain important information.**

Investors and security holders can obtain copies of the materials described above (and all other related documents filed with the SEC) at no charge on the SEC's website: [www.sec.gov](http://www.sec.gov). Copies can also be obtained at no charge by directing a request for such materials to Innisfree M&A Incorporated, 501 Madison Avenue, 20th Floor, New York, New York 10022, toll free at 1-877-750-9501. Investors and security holders may also read and copy any reports, statements and other information filed by Exelon,

Xchange or NRG with the SEC, at the SEC public reference room at 100 F Street, N.E., Washington, D.C. 20549. Please call the SEC at 1-800-SEC-0330 or visit the SEC's website for further information on its public reference room.

Exelon, Xchange and the individuals to be nominated by Exelon for election to NRG's Board of Directors will be participants in the solicitation of proxies from NRG stockholders for the NRG Meeting or any adjournment or postponement thereof. Exelon and Xchange will be participants in the solicitation of proxies from Exelon shareholders for the Exelon Meeting or any adjournment or postponement thereof. In addition, certain directors and executive officers of Exelon and Xchange may solicit proxies for the Exelon Meeting and the NRG Meeting. Information about Exelon and Exelon's directors and executive officers is available in Exelon's proxy statement, dated March 20, 2008, filed with the SEC in connection with Exelon's 2008 annual meeting of shareholders. Information about Xchange and Xchange's directors and executive officers is available in Schedule II to the Prospectus/Offer to Exchange. Information about any other participants will be included in the NRG Meeting Proxy Statement or the Exelon Meeting Proxy Statement, as applicable.

### **Forward Looking Statements**

This report includes forward-looking statements including, for example, statements regarding benefits of the proposed merger, integration plans and expected synergies. There are a number of risks and uncertainties that could cause actual results to differ materially from the forward-looking statements made herein. The factors that could cause actual results to differ materially from these forward-looking statements include Exelon's ability to achieve the synergies contemplated by the proposed transaction, Exelon's ability to promptly and effectively integrate the businesses of NRG and Exelon, and the timing to consummate the proposed transaction and obtain required regulatory approvals as well as those discussed in (1) Exelon's preliminary prospectus/offer to exchange that is contained in the Registration Statement on Form S-4, Reg. No. 333-155278, that Exelon has filed with the SEC in connection with the offer; (2) Exelon's 2008 Annual Report on Form 10-K in (a) ITEM 1A. Risk Factors, (b) ITEM 7. Management's Discussion and Analysis of Financial Condition and Results of Operations and (c) ITEM 8. Financial Statements and Supplementary Data: Note 18; and (3) other factors discussed in Exelon's filings with the SEC. Readers are cautioned not to place undue reliance on these forward-looking statements, which apply only as of the date of this report. Exelon does not undertake any obligation to publicly release any revision to its forward-looking statements to reflect events or circumstances after the date of this report, except as required by law.

Statements made in connection with the exchange offer are not subject to the safe harbor protections provided to forward-looking statements under the Private Securities Litigation Reform Act of 1995.

All information in this report concerning NRG, including its business, operations, and financial results, was obtained from public sources. While Exelon has no knowledge that any such information is inaccurate or incomplete, Exelon has not had the opportunity to verify any of that information.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, each Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

**EXELON CORPORATION**  
**EXELON GENERATION COMPANY, LLC**

/s/ Matthew F. Hilzinger

Matthew F. Hilzinger

Senior Vice President and Chief Financial Officer

Exelon Corporation

February 11, 2009

**EXHIBIT INDEX**

<u>Exhibit No.</u>	<u>Description</u>
99.1	NRG's letter to the NRC dated February 4, 2009
99.2	Exelon's letter to the NRC dated February 10, 2009

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February 4, 2009

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10 C.F.R. 50.80

U.S. Nuclear Regulatory Commission  
Attention: Document Control Desk  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852

SUBJECT:       **SOUTH TEXAS PROJECT, UNITS 1 AND 2**  
                  DOCKET NOS. STN 50-498, STN 50-499  
                  PRELIMINARY RESPONSE TO LICENSE TRANSFER  
                  APPLICATION SUBMITTED BY EXELON CORPORATION

By letter dated January 29, 2009, Exelon Corporation (“Exelon”) unilaterally submitted to the Nuclear Regulatory Commission (“NRC”) an Application for Approval of Indirect Transfer of Control of Licenses relating to Exelon’s proposed hostile acquisition of NRG Energy, Inc. (“NRG”). NRG, through its wholly-owned subsidiary NRG South Texas LP, owns the largest portion (44%) of South Texas Project, Units 1 and 2 (collectively “STP”), which are jointly owned by three entities that control and finance STP’s operator, STP Nuclear Operating Company (“STPNOC”). NRG South Texas LP is a co-holder of Facility Operating Licenses NPF-76 and NPF-80 for the STP units, and NRG, as the corporate parent company, has been approved by the NRC as a holder of indirect control of the facility operating licenses.<sup>1/</sup>

For the reasons described below, NRG respectfully requests that the NRC find that Exelon’s license transfer application is deficient in that Exelon lacks the

<sup>1/</sup> *Order Approving Application Regarding Proposed Indirect Acquisition of Texas Genco, LP by NRG Energy, Inc., dated January 12, 2006.*

requisite authority from the existing licensees to submit the subject application, and in any event, the application is premature. In addition, Exelon's hostile takeover attempt and unilateral application raises significant policy issues of first impression for the Commission.

#### ***Background of the Proposed Transaction***

The NRG board of directors (the "NRG Board") received an unsolicited acquisition proposal from Exelon on October 19, 2008, pursuant to which Exelon proposed to acquire all the outstanding shares of common stock of NRG at a fixed exchange ratio of 0.485 of a share of Exelon common stock for each share of NRG common stock. After evaluating the proposal, the NRG Board unanimously decided to reject the proposal, concluding that the offer significantly undervalued NRG and was not in the best interest of NRG's shareholders.

On November 12, 2008, Exelon, through its subsidiary Exelon Xchange Corporation, launched an exchange offer (or tender offer) to acquire all the outstanding shares of NRG common stock at the same fixed exchange ratio previously rejected by the NRG Board. That same day, Exelon filed a prospectus/offer to exchange on Registration Statement Form S-4 with the U.S. Securities and Exchange Commission relating to the exchange offer. According to the prospectus/offer to exchange, as amended, the expiration date of the exchange offer was initially January 6, 2009, but has been extended until February 25, 2009, unless further extended (which Exelon has reserved the right to do in its sole discretion). Exelon has the option, but not the obligation, to further extend the expiration date. Nevertheless, because Exelon "does not expect to be in receipt of the regulatory approvals" that are necessary for the proposed transaction prior to February 25, 2009, it has indicated in the prospectus/offer to exchange, as amended (at page 37), that it "currently intends to extend the expiration date of [the exchange offer] beyond February 25, 2009."

On January 30, 2009, Exelon gave notice to NRG that it intends to propose to increase the number of directors that constitute the NRG Board from 12 to 19, to nominate nine independent candidates for election at the NRG 2009 annual meeting of shareholders, and to solicit proxies for election of Exelon's nominees and approval of Exelon's proposals.

#### ***Insufficiency of the Application***

Neither NRG nor the operating licensee STPNOC has authorized Exelon to submit the license transfer application or make any other submittal related to STP. An applicant for an NRC license must demonstrate that it possesses all requisite authority for the license it seeks. See 10 C.F.R. 50.33. In this case, Exelon's license

transfer application pertaining to NRG's interests in STP and STPNOC has been submitted unilaterally by Exelon. Simply put, Exelon did not obtain the consent of NRG or, perhaps more importantly, STPNOC to the filing of the application, or even provide NRG or STPNOC a copy of the filing.<sup>2/</sup> Exelon thus lacks the requisite authority to submit an application for transfer of NRG's interests in the licenses.

NRC regulations in 10 C.F.R. 50.80(b)(2) provide that the Commission may require any applicant for a license transfer to file a written consent from the existing licensee. From a policy perspective, this consent requirement promotes the need for an orderly process for the transfer of control of NRC licenses. Requiring the consent of the existing licensee ensures that there is no confusion over which party retains control over the license or has responsibility for fulfilling all obligations under the license. The consent and participation of the existing licensee are also necessary to ensure that an application for transfer of a license is complete and accurate in all material respects as required by 10 C.F.R. 50.9. For similar reasons, the staff of the Texas Public Utilities Commission ("PUC") recently recommended that Exelon's application for regulatory approval by that agency be found insufficient.<sup>3/</sup> Accordingly, the NRC should find that Exelon's license transfer application is insufficient for filing in the absence of the requisite authorization or participation of NRG and STPNOC.

In addition, Exelon's application is premature. As it stands, the transaction is at best highly speculative. The consummation of any merger transaction remains subject to multiple conditions and contingencies, including a minimum level of tender by NRG shareholders in response to the tender offer (which has not been met), approval by Exelon's shareholders (which has not occurred), Exelon obtaining the necessary financing (as of January 22, 2009, Exelon indicated that it had not been successful in negotiating with NRG's bondholders and thus was going to have to pursue alternative sources of funding), and numerous regulatory approvals (including importantly by federal antitrust regulators and state commissions — none of which have been obtained). Importantly, Exelon has not committed to going

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<sup>2/</sup> NRG received a copy of the non-proprietary version of Exelon's application from the NRC on February 3, 2009. NRG has not received a copy of the proprietary version of Exelon's application, and in any event, cannot vouch for the accuracy or completeness of any of the information provided in Exelon's application. After it has an opportunity to review Exelon's application in more detail, NRG may submit additional views to the NRC.

<sup>3/</sup> The staff of the Texas PUC recommended that Exelon's application regarding the proposed transaction be found insufficient due to Exelon's failure to provide required information. Noting that Exelon is seeking to acquire NRG without NRG's consent, the PUC staff further recommended that Exelon explain *how* it is able to provide the required information related to NRG. See Commission Staffs Response to Order No. 1 and Motion to Certify a Threshold Issue to the Commission (Jan. 29, 2009) at 1-2 (copy attached).



forward with the transaction even if it were to obtain the necessary regulatory approvals.

Further, as Exelon itself acknowledges in its application transmittal letter, there is simply no definitive transaction for the NRC to review at this time and Exelon may pursue "alternative methods for structuring the transaction." Transmittal Letter at p. 3. Such alternative structures may have a material impact on Exelon's finances and thus on the financial health of its affiliated licensees. In view of these circumstances and the NRG Board's lack of support for the transaction as currently proposed, making it uncertain as to whether a merger will ever occur, Exelon's application should be considered premature. As the NRC is aware, the Commission discourages the submission of speculative transactions for review, and thus license transfer applications are normally submitted after the parties have entered into a definitive transaction. Unquestionably, the NRC need not and should not devote the substantial time and resources necessary for a review of Exelon's unilateral, speculative application.

#### ***Policy Issues***

Exelon's hostile takeover attempt, which is unprecedented in the nuclear power industry, raises significant policy issues of first impression for the Commission. First of all, the NRC should be particularly concerned that Exelon's takeover attempt could set a dangerous precedent. For example, a foreign entity might take significant steps to acquire control of an NRC licensee through a similar unilateral tender offer and board-packing process, thereby potentially circumventing the statutory restrictions under Sections 103 and 104 of the Atomic Energy Act on foreign ownership, control or influence over NRC licensees. To be clear in this regard, Exelon could potentially take control of NRG's board of directors *before* the transaction closes (and indeed it may never close) and *without obtaining regulatory approvals*.

Moreover, a hostile takeover action of this nature can also have a destabilizing effect on a licensee's organization and, among other things, may detract from a licensee's focus on safety, creating similar effects to those noted in Regulatory Issue Summary 2006-13, *Information on the Changes Made to the Reactor Oversight Process to More Fully Address Safety Culture*, issued July 31, 2006. Uncertainty about the effect of the hostile takeover on management and employees of a licensee would likely have an adverse effect on the licensee regardless of whether the takeover is eventually completed. These uncertainties may impair the licensee's ability to attract, retain and motivate key personnel until the takeover is completed or abandoned. Thus the Commission should recognize that hostile takeovers can be extremely disruptive to the orderly transfer of licenses and require that Exelon conform to the NRC's process for the consideration of

proposed license transfers, including the requirement to obtain the written consent of NRG and STPNOC as clearly authorized by the NRC regulations under 10 C.F.R. 50.80(b)(2).

For the foregoing reasons, the Commission should find, as a threshold matter, that Exelon's license transfer application is deficient in that Exelon has not obtained (or for that matter even sought) the requisite consent of the existing licensee to make the application, and in any event, find that the subject application is premature.

If the Commission requires any additional information concerning this matter, please contact me at (202) 637-5691.

Very truly yours,

/s/ Daniel F. Stenger

Daniel F. Stenger  
Amy C. Roma  
Counsel for NRG Energy, Inc.

cc: Chairman Dale E. Klein  
Commissioner Gregory B. Jaczko  
Commissioner Peter B. Lyons  
Commissioner Kristine L. Svinicki  
R. William Borchardt, NRC Executive Director for Operations  
Eric J. Leeds, Director, Office of Nuclear Reactor Regulation  
Elmo E. Collins, Jr., Regional Administrator, NRC Region IV  
Mohan C. Thadani, Project Manager, STP Units 1 and 2  
Susan L. Uttal, Office of General Counsel

Enclosure:

Public Utility Commission of Texas, Docket No. 36555, Commission Staff's Response to Order No. 1 and Motion to Certify a Threshold Issue to the Commission, dated January 29, 2009.

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ENCLOSURE

APPLICATION OF EXELON  
CORPORATION, EXELONE  
XCHANGE, AND EXELON  
GENERATION COMPANY, LLC  
PURSUANT TO SECTION 39.158  
OF THE PUBLIC UTILITY  
REGULATORY ACT

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PUBLIC UTILITY COMMISSION  
  
OF TEXAS

**COMMISSION STAFF’S RESPONSE TO ORDER NO. 1 AND  
MOTION TO CERTIFY A THRESHOLD ISSUE TO THE  
COMMISSION**

**COMES NOW** the Staff of the Public Utility Commission of Texas (Staff), representing the public interest and files this Response to Order No. 1 and motion to certify an issue to the Commission and would show the following:

**I. Background**

On January 5, 2009, Exelon Corporation, Exelon Xchange, and Exelon Generation Company, LLC (Exelon) filed an application pursuant to PURA §39.154 and §39.158 for approval of Exelon’s affiliation and consolidation with NRG Energy, Inc. (NRG). Order No. 1 was issued on January 7, 2009 requiring Staff to file comments regarding the sufficiency of the application, proposed notice and the procedural schedule proposed by Exelon. NRG filed a motion to intervene on January 21, 2009. Several other parties have also filed motions to intervene.

**II. Application Sufficiency**

Under PURA § 39.158(a), the Commission must account for each “owner of electric generation facilities that offers electricity for sale in this state” that will “merge, consolidate, or otherwise become affiliated.” However, Exelon has not indicated in its application which Exelon and NRG affiliate companies offer electricity for sale in Texas, including any such affiliates that are not wholly owned by Exelon or NRG. In order for the Commission to make a determination on Exelon’s application pursuant to PURA § 39.158(a), the Commission must have this information. Staff therefore recommends that the application be found insufficient pursuant to P.U.C. PROC. R. 22.73 (2), (3), and (6) and that Exelon be required to list which Exelon and NRG affiliates offer electricity for

sale in Texas. Because Exelon is seeking to acquire NRG without NRG's consent, Exelon should also be required to detail how it determined which NRG affiliates offer electricity for sale in Texas.

### III. Notice

Exelon requests that the Commission provide notice of its application through publication in the Texas Register and by posting a copy of the application on the Commission's website.<sup>1</sup> In addition, Exelon states that it will provide a copy of the application to the counsel for NRG.<sup>2</sup> The Commission's rules do not provide specific notice requirements for an application filed pursuant to PURA § 39.158, but the presiding officer may require a party to provide reasonable notice to affected persons. P.U.C.PROC., R. 22.55. Exelon's proposal is not reasonable because Exelon does not propose to serve notice on each Exelon or NRG affiliate "that offers electricity for sale in this state."<sup>3</sup> It should be required to do so.

### IV. Proposed Procedural Schedule

The adoption of a procedural schedule at this juncture would be premature in light of Exelon's deficient application and notice and Staffs motion for certification of a threshold issue as addressed below.

### V. Motion to Certify a Threshold Issue

Exelon proposes to acquire NRG, but NRG opposes the acquisition. Exelon seeks to acquire the voting securities of NRG by means of a tender offer and then to consummate a "second step" merger and consolidation of the two companies.<sup>4</sup>

It is not clear that this transaction is ripe for review under PURA § 39.158. PURA § 39.158(a) provides in pertinent part:

An owner of electric generation facilities that offers electricity for sale in the state and proposes to merge, consolidate, or otherwise become affiliated with another owner of electric generation facilities that offers electricity for sale in this state shall obtain approval of the commission before closing if the electricity offered for sale in the power region by the merged, consolidated or affiliated entity will exceed one percent of the total electricity for sale in the power region.

In light of NRG's opposition to Exelon's proposed acquisition of it, there is substantial

<sup>1</sup> *Id.* at 8.

<sup>2</sup> *Id.*

<sup>3</sup> See Section II, Application Sufficiency, above.

<sup>4</sup> Application at 2-3.

uncertainty as to whether the transaction will occur. Moreover, this appears to be an issue of first impression for the Commission since as far as Staff is aware all previous PURA §39.158 applications that have been filed at the Commission have involved transactions that have been agreed to between the affected companies. Pursuant to P.U.C. PROC. R. 22.127(b)(1), Staff requests that the presiding officer certify the following issue: Is the application in this docket premature? If the presiding officer concludes that this issue should not be certified, Staff alternatively requests that the presiding officer promptly establish a procedure that can be used to address this threshold issue.

Respectfully Submitted,

Thomas S. Hunter  
Division Director  
Legal Division

Keith Rogas  
Deputy Division Director  
Legal Division

/s/ Brennan J. Foley

Brennan J. Foley  
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Austin, Texas 78711-3326

**DOCKET NO. 36555**

**CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on this 29<sup>th</sup> day of January, 2009 in accordance with P.U.C. Procedural Rule 22.74.

/s/ Brennan J. Foley

Brennan J. Foley



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February 10, 2009

ATTN: Document Control Desk  
 U.S. Nuclear Regulatory Commission  
 Washington, DC 20555-0001

Re: South Texas Project, Units 1 and 2  
 Facility Operating License Nos. NPF-76 and NPF-80  
 NRC Docket Nos. 50-498 and 50-499  
 License Transfer Application Submitted by Exelon Corporation

By letter of February 4, 2009, counsel for NRG Energy, Inc. (NRG) submitted a letter to the Nuclear Regulatory Commission (NRC), challenging the sufficiency of Exelon Corporation's (Exelon) application for an indirect transfer of NRG's subsidiary, NRG South Texas LP's licenses to own a 44% share of the South Texas Project, Units 1 and 2 (STP). Although the NRG letter does not appear to have been submitted in accordance with NRC's procedures for processing license transfer applications, Exelon submits this letter in response to NRG's apparent argument that NRC should not consider the application for approval.<sup>1</sup>

Exelon's License Transfer Application (LTA), which was submitted on January 29, 2009, accurately and completely describes the nature of the proposed transaction which would result in the indirect transfer of NRG South Texas LP's licenses to own STP to Exelon, including that no change in the responsibility for the operation of STP or in the direct ownership of the licensee's 44% interest in STP is proposed. To the contrary, the indirect license transfer would be the result of the acquisition by Exelon of a majority of common shares in NRG, followed by a series of one or more corporate consolidations designed to provide Exelon with control of NRG. No acquisition or exercise of control over NRG is contemplated by Exelon prior to the approval by NRC of the indirect transfer of the STP licenses.

NRG's challenge to the sufficiency of the LTA is based primarily on NRG's objection to Exelon's offer to the shareholders of NRG to exchange fractional shares of Exelon common stock for shares of NRG common stock. NRG takes the position that unless NRG management approves the acquisition of NRG, Exelon's LTA is insufficient because NRG has not consented to the indirect transfer. NRG relies on a provision of 10 C.F.R. § 50.80(b)(2), which provides

<sup>1</sup> NRC has not yet published a Notice of Consideration for Approval and Opportunity for Hearing as to the application pursuant to 10 C.F.R. § 2.1301, and therefore NRG's letter cannot be characterized as a written comment pursuant to 10 C.F.R. § 2.1305. Nor does the letter qualify as a Petition to Intervene pursuant to 10 C.F.R. § 2.309. However because NRG appears to take the position that NRC should not consider the LTA, Exelon submits this response to address NRG's claims.



that the "Commission may require any person who submits an application for license pursuant to the provisions of this section to file a written consent from the existing licensee" to the transfer. NRG ignores the discretionary nature of the foregoing provision, effectively contending that the word "may" should be read "shall." NRG also ignores the fact that the provision allows the Commission to impose a condition for consent at any time during the review of an application or at the effective time of a transfer of a license, and does not impose a requirement that the application must demonstrate the current owner's consent in order to be sufficient for review.

NRG's over-reading of the provision leads it to the extraordinary conclusion that NRC should never allow the review of any application for an indirect transfer if incumbent management opposes a tender offer to the shareholders of the ultimate parent of a licensee. NRG's position would serve no meaningful purpose in NRC's regulatory function and would make NRC an involuntary ally in the incumbent management's effort to maintain control of the licensee, at the expense of the licensee's shareholders.

#### **Consent is Not Required for Sufficiency of the LTA**

Exelon recognizes and agrees that, as a practical matter, the transaction described in the LTA cannot be consummated before a majority of NRG shareholders have consented to the acquisition of NRG by Exelon by accepting Exelon's tender offer. Exelon does not propose to close on the acquisition of those shares until NRC has approved the LTA. These practical and regulatory conditions to the acquisition of NRG, however, do not mean that NRG's consent is required in order for Exelon's LTA to be sufficient for consideration, as NRG suggests.

The requirements for sufficiency of an application for a license transfer are set forth in 10 CFR § 50.80(b). Section 50.80(b)(1) provides that such an application "shall include" the information required in 10 CFR § 50.33 and § 50.34, and § 50.80(b)(2) provides that the application "shall include also a statement of the purposes for which the transfer of the license is requested, the nature of the transaction necessitating or making desirable the transfer of the license and an agreement to limit access to Restricted Data pursuant to § 50.37." (emphasis supplied) These provisions describe the requirements for the sufficiency of an application to transfer. That the Commission "may" require written approval of the current owners to the transfer not only demonstrates that such written consent is not required for sufficiency of the application, it also indicates that the Commission, in promulgating the regulation, recognized that there may be some instances where a demonstration of consent is not necessary in order for the LTA to be approved. It is noteworthy that consent of the current licensee is not listed as a condition to the approval of the transfer in 10 CFR § 50.80(c).

Exelon's LTA complies with the requirements of § 50.80 in every respect. The financial and other information contained in the LTA is either publicly available or based on and clearly attributed to Exelon's estimates based on its extensive experience as the owner and operator of the largest nuclear fleet in the United States. Inasmuch as the LTA does not contemplate or propose any change in the operating responsibility, funding, or capitalization of the owner of the

subject interest in STP, nothing of consequence would be adversely affected with respect to factors considered by the Commission in approving a transfer since the Commission approved NRG's latest application for an indirect transfer - except that Exelon would own NRG.

Nor is the LTA premature. Exelon's exchange offer for NRG very clearly spells out the terms and conditions through which Exelon proposes to acquire control of NRG in the absence of a negotiated transaction with NRG. The details of how Exelon would consummate the acquisition of NRG pursuant to a negotiated transaction with NRG are still undetermined, and various alternatives are summarized in the LTA. However, the details of the various options described in the LTA are not material to NRC's licensing decision. The demonstrations in the LTA of financial qualification, technical qualification, decommissioning assurance, financial responsibility, and other criteria will not be affected by which of the several mechanisms described in the LTA is used to integrate NRG into Exelon.

#### **Federal Policy Favors Neutrality With Respect to Tender Offers**

At least since the passage of the Williams Act in 1968, federal policy has favored neutrality with respect to tender offers. Although the specific provisions of the Williams Act relate to the provision of adequate information to shareholders to inform their voting, federal courts have found that the Williams Act, and its legislative history, evidences a broad federal policy that shareholders should be given the opportunity to make decisions on tender offers and that this opportunity should not be frustrated by management. *See Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982) ("We, therefore, agree with the Court of Appeals that Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice"); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 29 (1977) ("Congress was indeed committed to a policy of neutrality in contests for control. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose - the protection of investors").

In the regulatory context, the federal policy of neutrality means that agencies should process and evaluate a proposed transaction in the same fashion whether or not the management of the entity being acquired has acquiesced to the transaction. If the reviewing agency were to delay its evaluation or to apply a more onerous standard simply because the transaction has not been agreed to by management, then the attendant delay or more onerous requirements favor the existing management for reasons that are unrelated to the merits of the transaction. To the extent that this delay or burden causes the transaction to falter, then shareholders are denied the ability ever to decide whether the transaction is appropriate and should be consummated.

As a result, most federal agencies that review proposed mergers and acquisitions have taken the position that they will process the applications for approval of such transactions without regard to whether the management of both parties to the transaction have consented at the time the application is filed. Most notably, the Federal Trade Commission and Department

of Justice, which have primary responsibility for reviewing every merger and acquisition over a certain size, including this one, have adopted review timelines on the filings made by the acquirer without regard to the extent that the entity opposing the transaction complies with the applicable filing requirements. Other federal agencies that follow similar approaches include the Federal Energy Regulatory Commission, the Federal Communications Commission, and the Federal Reserve Board.

NRC should apply the same federal policy here. NRC should process Exelon's LTA under the same procedures and timelines, regardless of the current stance of NRG's management. As explained above, such a course is perfectly consistent with NRC's regulations. To do otherwise would favor NRG management and potentially defeat the transaction before NRG's shareholders ever have the opportunity to consent or, as described below, vote for new directors.

#### **NRG's Policy Arguments are Unavailing**

NRG's "policy" arguments for why incumbent management's opposition to an offer to the shareholders of a licensee should be an insurmountable obstacle to NRC's consideration of an application for transfer are without merit. First, NRG's concern over a hostile takeover of a domestic licensee at once relies on and ignores the Commission's foreign ownership and control (FOCI) restrictions. If the Commission determined that a transfer of a license was not consistent with section 103(d) of the Atomic Energy Act (42 U.S.C. §2133(d)), or NRC's regulations, it would simply deny the application on the authority of 10 CFR § 50.80(c).

NRG's suggestion that Exelon's proposal to NRG's shareholders could negatively impact nuclear safety borders on specious. Exelon's LTA makes clear that STPNOC will remain the operating licensee of STP. Neither NRG nor NRG South Texas LP have any role in the operation of STP other than to financially support STPNOC. The financial support role is not proposed to change nor could it change as a result of the transaction described in the LTA. NRG South Texas LP's interest in STPNOC does not give it the ability to control STPNOC, change its management or take any other action that would distract STPNOC from its focus on the safe operation of STP.

NRG's gratuitous characterization of Exelon's proposal to have shareholders elect new directors to the NRG Board as "board packing" is false and misleading. In its capacity as a shareholder of NRG, Exelon has proposed that the NRG Board of Directors - which currently has only twelve members - will be expanded to nineteen members. Exelon will offer independent candidates for five of the seven proposed new seats. Exelon will also offer independent candidates for the four Class III directorships that are up for election as a normal part of NRG's election cycle. If NRG's shareholders support Exelon's proposals, the new directors would then occupy nine of the Board's nineteen seats.

Any NRG shareholder could make the proposal that Exelon has made or propose other candidates for election to the NRG Board. Exelon is merely exercising its right, as a shareholder

of NRG, to propose expansion of the NRG Board and the election of new directors. The proposal to expand the number of seats on the NRG Board will require the support of a majority of the NRG shareholders. As the beneficial owner of only 1000 NRG shares, Exelon does not have the ability to exercise control over the decision to expand the NRG Board or the election of directors. The proxies that Exelon will solicit for the NRG annual meeting will be revocable proxies for voting only at the annual meeting; the proxies will designate a person to vote each shareholder's shares and will not give that person discretion to vote contrary to the instructions given by the shareholders executing the proxies. If the candidates proposed by Exelon are elected to the NRG Board, they will have been elected by the NRG shareholders, not by Exelon. Adoption of the proposal to expand the NRG Board and to elect the proposed slate of directors would no more constitute an indirect transfer of the STP licenses to Exelon than any other NRG shareholder that votes in favor of the proposal.

The candidates proposed by Exelon qualify as independent from NRG under the director independence standards applied by the New York Stock Exchange. If elected, the candidates will be obligated to act in the best interests of NRG and its shareholders. Each of the candidates has confirmed in writing that he or she is "not an employee or an agent or otherwise a representative of Exelon; that [he or she is] independent of, and not controlled by or acting at the direction of, Exelon; and that, if elected, [he or she] will be acting as a director of NRG, on behalf of NRG and all of the stockholders of NRG and will in no way be controlled by or acting at the direction of Exelon." Exelon has not obtained, nor did it seek, any commitments from the candidates other than their agreement to serve as directors of NRG if elected and to act in the best interests of NRG and its stockholders. The candidates, if elected, would be obligated under Delaware law to act in the best interests of NRG and its shareholders. The election of nine (of nineteen) independent, disinterested directors to the NRG Board - all of whom have pledged to use their "independent judgment" to "act in the best interests of NRG and its stockholders" - could not represent an exercise in control by Exelon over the NRG Board of Directors.

Exelon's proposal to elect directors to the NRG Board does not implicate 10 C.F.R. §50.80. As the NRC has stated in NUREG-1577 at page 12, "the NRC has evaluated transfers involving mergers, acquisitions, formations of holding companies, and sales of portions of facilities to other parties." Further, the NRC does "not deem as license transfers under section 50.80 those internal corporate reorganizations (i.e. that do not entail mergers, holding company formations, acquisitions, or divestitures) that do not alter the licensee's status as an 'electric utility,' do not substantially affect corporate ownership or identity of the licensee, or do not otherwise materially affect the licensee's financial qualifications." *Id.* at 13.<sup>2</sup> Exelon's proposal to its fellow shareholders to expand the NRG Board and to propose a slate of candidates does not even rise to the level of a corporate reorganization, much less the formation of a holding

<sup>2</sup> Similarly, neither the Federal Reserve nor the Federal Deposit Insurance Corporation treat proxy solicitations as requiring a notice of change of control under the Bank Control Act (12 U.S.C. § 1817(j)(1)). See 12 C.F.R. § 225.42(a)(5); 12 C.F.R. 303.83(a)(5).

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company or the acquisition of the licensee. Such a formation or acquisition would clearly require NRC approval. The purpose of the LTA is to request NRC approval before any such indirect transfer of the license takes place.

At bottom, NRG's objections to the LTA amount to no more than an effort to resist Exelon's offer to NRG's shareholders by manipulating the regulatory process. NRC's regulatory processes are intended to protect public health and safety and the common defense and security of the United States by ensuring that only qualified entities hold licenses to own and operate nuclear power plants. They are not intended to be used as a tool to restrict the opportunity of the shareholders of licensees to consider offers to acquire their shares or exercise their voting and other rights as shareholders. Exelon urges the NRC to proceed with the review and consideration of the LTA.

Yours very truly,

/s/ M. Stanford Blanton

M. Stanford Blanton

Counsel for Exelon Corporation

MSB:dc

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