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VIA EFILING

August 16, 2021

Andrew S. Johnston
Executive Secretary
Maryland Public Service Commission
William Donald Schaefer Tower
6 Saint Paul Street, 16th Floor
Baltimore, Maryland 21202

Re: *In the Matter of the Merger of Exelon Corporation and
Constellation Energy Group, Inc., Case No. 9271*

Dear Executive Secretary Johnston:

On March 11, 2021, Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (“Market Monitor”), submitted to the Maryland Public Service Commission (“PSC”) a letter and a confidential attached report (“March 11th Report”) pursuant to Order No. 84698, issued in this proceeding February 17, 2012 (“2012 Order”). The 2012 Order approved the referenced merger subject to conditions. One condition was compliance with the terms of a settlement reached between the Market Monitor and the applicants, now Exelon Corporation (“Settlement”).¹ The PSC also included the explicit additional requirement that Exelon remain in PJM.² In its March 11th filing, the Market Monitor, following the requirements in the 2012 Order, reported on the administration of the Settlement and recommended that the Settlement be continued with certain

¹ 2012 Order at 5 (“[W]e approve the Merger subject to the following conditions, which we detail at the end of this Order and summarize here: (1) Exelon shall (a) comply with the terms of the IMM Settlement, as modified in this Order...”). The 2012 Order recognized that “by deviating from the terms of the Joint Settlement, the Applicants have reserved the right to walk away from this Merger rather than proceeding to closing.” *Id.* Applicants proceeded to closing, accepting the conditions included in the 2012 Order.

² *Id.* at 63 (“PJM ICC introduced a related issue involving the ability of the Applicants to leave PJM voluntarily, thereby potentially escaping the commitments made in the IMM Settlement. [footnote omitted] We clarify, therefore, that the Applicants’ continued membership in PJM is an implied commitment in the IMM Settlement, and thus *a condition of approval.*” (emphasis added)).

modifications for an additional ten years, or indefinitely. On May 28, 2021, Exelon Corporation (“Exelon”) submitted a response (“Exelon Response”) opposing the Market Monitor’s recommendation and arguing that the Settlement should terminate in 2022.

Exelon submitted its first response to the March 11th Report on May 21, 2021. The Market Monitor replied to Exelon’s first response on June 15, 2021. On July 26, 2021, Exelon Corporation (“Exelon”) submitted a second response (“Exelon 2nd Response”) opposing the Market Monitor’s recommendation and arguing that the Settlement should terminate in 2022. Here the Market Monitor responds to the Exelon 2nd Response.

The Exelon 2nd Response relies primarily on a mischaracterization of the PSC’s 2012 decision in the merger case. The complete language of that decision is:

We will therefore require as a condition of Merger approval a possible extension of the behavioral commitments of the IMM Settlement. Specifically, the terms of the IMM Settlement shall expire in 10 years, provided that the Commission may extend the terms of the IMM Settlement if, after an evidentiary hearing addressing market conditions, the Commission determines that the expiration of the behavioral remedies in the IMM Settlement will, through the Applicants’ increased ability to exercise market power, pose a significant risk of harm to Maryland ratepayers. The IMM is requested to provide to the Commission within the ninth year of the IMM Settlement an evaluation of the effectiveness of the remedies still in place, and the impact of the expiration of the IMM Settlement on the ability of the Applicants to exercise market power in the markets controlled by the IMM Settlement. Although it is likely that some combination of market rules and market conditions will change in the intervening years, this modification ensures that BGE’s customers (and the citizens of our State as a whole) are protected in the perhaps unlikely event that market conditions remain static or even more concentrated for the expected life of these conditions.

Based on the order, the Market Monitor requests that the PSC examine Exelon's ability to exercise market power in Maryland, and decide whether continuation and enhancement of the Settlement, including the PSC's requirement that Exelon remain in PJM, is in the best interests of Maryland customers.

Rather than directly address the question of whether Exelon continues to have market power in Maryland, the Exelon 2nd Response asserts, at some length, that market rules have changed and therefore, based on a misreading of the 2012 Order, the settlement is irrelevant. The order clearly contemplates that rules will change and equally contemplates a hearing to determine whether Exelon's market power continues to be an issue.

Exelon never states exactly which provisions of the settlement it objects to. Exelon never states which of the conditions it would not comply with if the settlement were terminated. Exelon ignores the facts about its market position in Maryland, described in the Market Monitor's June 15th filing. Exelon never addresses the condition that Exelon agree to remain in PJM.

Citing *Hughes v. Talen Energy Marketing, LLC, et al.*, Exelon argues that the PSC "should not ... 'examine Exelon's ability to exercise market power in Maryland' when FERC is the entity with the exclusive authority to regulate participation in the wholesale power markets."³

This case involves the PSC's statutory authority and obligation to approve mergers.⁴ The PSC has the authority to review and approve mergers and to place conditions on those mergers.⁵ Applicants may accept conditions to obtain approval of a merger, which Exelon did in this case. Neither *Hughes* nor related cases changed, limited or addressed the scope of any state commission's authority to review mergers or to place conditions on those mergers.

State actions in *Hughes* concerned FERC's ability to regulate wholesale prices through competition. The Court was concerned in *Hughes* about state actions that conflict with

³ Exelon 2nd Response at 7, citing *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016); *National Ass'n of Regulatory Utility Commissioners v. FERC*, 964 F.3d 1177, 1181 (D.C. Cir. 2020); *FERC v. Elec. Power Supply Ass'n*, 557 US. 260, 277 (2016).

⁴ Maryland Code, Public Utilities § 6-105.

⁵ *Id.* § 6-105(g)(3)(ii) ("The Commission may condition an order authorizing the acquisition on the applicant's satisfactory performance or adherence to specific requirements.").

FERC's regulatory goals.⁶ Exelon has not identified any conflict between the merger conditions and FERC goals. FERC approved of and included the same behavioral obligations for Exelon in its own order approving the same merger.⁷ There is no conflict preemption.

Hughes has been narrowly construed by the Second Circuit to forbid programs that require wholesale market participation.⁸ The Second Circuit explained:

Plaintiffs argue that *Hughes* preempts state programs if they are tethered to 'FERC-regulated wholesale electricity prices.' ... But the tether in *Hughes* is tied to "wholesale market participation," not prices...; the Maryland program was unlawful because it conditioned payment on auction sales.⁹

Hughes establishes that preemption applies where payment of a state subsidy is contingent on the seller's unit clearing.¹⁰ No merger condition requires market participation or market clearing.

⁶ See *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41, 55 (2018) ("So long as a state is 'regulat[ing] production or other subjects of state jurisdiction, and the means chosen [are] at least plausibly . . . related to matters of legitimate state concern,' there is no conflict preemption 'unless clear damage to federal goals would result.'"); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 523 (2018) ("[T]he Maryland system effectively allocated to new entrants a long-term right of first sale in the auction and in the process depressed the price that other producers would receive. This feature—that the subsidy depended on selling power in the interstate auction—is what led the Justices to conclude that Maryland had transgressed a domain reserved to the FERC.").

⁷ See *Exelon Corporation, Constellation Energy Group, Inc.*, 138 FERC ¶ 61,167 (2012).

⁸ Exelon argued for, and prevailed in the appellate courts, a narrow interpretation of *Hughes*, which contrasts with the expansive interpretation Exelon argues for in this case. See Brief of Intervenor-Appellee Exelon Generation Company, LLC, Case No. 17-2433 (7th Cir. October 21, 2017); Brief for Intervenor-Defendants-Appellees (Exelon Corp., et al.), Case 17-2654 (2nd Cir November 20, 2017).

⁹ See 906 F.3d at 51.

¹⁰ See *Hughes* at 1295 ("CPV receives no payment from Maryland LSEs or PJM if its capacity fails to clear the auction. But CPV is guaranteed a certain rate if its capacity does clear").

Hughes has been narrowly construed by the Seventh Circuit to exclude incidental impacts on wholesale market pricing. The Seventh Circuit stated:

As the Supreme Court remarked in *Hughes*, the exercise of powers reserved to the states under §824(b)(1) affects interstate sales. Those effects do not lead to preemption; they are instead an inevitable consequence of a system in which power is shared between state and national governments.¹¹

The Second Circuit, citing the Seventh Circuit decision, also found no field preemption because “Plaintiffs have failed to identify an impermissible ‘tether,’ under *Hughes*.”¹² The Second Circuit held that the effects of the state program on price must be more than incidental and must operate to displace the price determined by FERC, stating:

To the extent the ZEC program distorts an efficient wholesale market, it does so by increasing revenues for qualifying nuclear plants, which in turn increases the supply of electricity, which in turn lowers auction clearing prices. But that is (at best) an incidental effect resulting from New York's regulation of producers. In any event, ZECs do not guarantee a certain wholesale price that displaces the NYISO auction price.¹³

Exelon fails to identify an impermissible tether under *Hughes*. No merger condition displaces a rate determined by FERC with a state determined rate. No price is guaranteed.

The merger conditions ensure that Exelon behaves competitively, before prices are known and without regard to whether wholesale prices are affected.¹⁴ No merger condition has

¹¹ See 904 F.3d at 524.

¹² See 906 F.3d at 46.

¹³ See *id.* at 57.

¹⁴ See *Hughes* at 1298–1299 (“Maryland instead guarantees CPV a certain rate for capacity sales to PJM regardless of the clearing price. But Mississippi Power & Light and Nantahala make clear that States interfere with FERC’s authority by disregarding interstate wholesale rates FERC has deemed just and reasonable”).

other than a potential incidental effect on wholesale pricing. No merger condition is preempted under *Hughes*. Exelon has not shown that *Hughes* prevents the PSC from implementing the conditions and process established in the 2012 Order to which Exelon agreed. Nothing in *Hughes* prevents the PSC from adapting the conditions established in 2012 to current market conditions, including the limited changes recommended by the Market Monitor. The 2012 Order did not limit review to consideration of the removal of conditions. The point of the review process to which Exelon agreed is to allow the PSC, consistent with its statutory authority, to ensure that the merger remains “consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers.”¹⁵

Please direct any questions about this letter or the Market Monitor Report to Joseph Bowring at (610) 271-8051.

Respectfully submitted,



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¹⁵ Maryland Code, Public Utilities § 6-105(g)(4).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list in Case No. 9271, as revised April 22, 2019. Dated at Eagleville, Pennsylvania, this 16th day of August, 2021.



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