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**VIA EFILING**

January 27, 2022

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

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

Dear Executive Secretary Johnston:

On December 30, 2021, Exelon Corporation (“Exelon”) and the Independent Market Monitor (“Market Monitor”) for PJM Interconnection, L.L.C. (“PJM”) filed a partial settlement (“Settlement Agreement”) that addresses the offer behavior of generation owned by Exelon. The Market Monitor explained, by letter dated December 30, 2021, that the Settlement Agreement does not address the Market Monitor’s recommendation that the Commission make explicit that the Commission’s 2012 condition that Exelon remain in PJM continues to be a condition of merger approval.<sup>1</sup> As stated in the Market Monitor’s prior filings in this proceeding, the Market Monitor requests that the Commission rule on this issue and make explicit that Exelon’s participation in PJM remains a condition of merger approval, as it has been since 2012.<sup>2</sup>

Because Order No. 84698 contemplates a decision on the Market Monitor’s recommendation within ten years of the effective date, the Market Monitor requests a decision both approving the

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<sup>1</sup> See *In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Inc.*, Order No. 84698, Case No. 9271 (February 17, 2012) at 104–105 (“Order No. 84698”).

<sup>2</sup> See Market Monitor, Filing and Confidential Report: “Exelon Merger Agreement Compliance: March 12, 2012 to December 31, 2020” (Attachment A), Case No. 9271 (March 11, 2021); Market Monitor, Filing, Case No. 9271 (June 15, 2021) at 5 (“Perhaps the most important behavioral commitment in the Settlement is Exelon’s commitment to ongoing PJM membership. The Commission stated that Exelon’s “continued membership in PJM is an implied commitment in the IMM Settlement, and thus a condition of approval.” [footnote omitted] The most significant exercise of market power available to Exelon is its ability, as a transmission owner, to leave PJM or to threaten to leave PJM.”).

partial settlement and making explicit Exelon's continuing commitment to remain in PJM by no later than March 12, 2022.

On January 21, 2022, Exelon filed a letter in response to the Market Monitor's letter stating (at 1): "the Commission should reject the IMM's request." Exelon states that "[n]o further briefing or hearings on the issue are necessary." While that may be true, it is not for the reasons advanced by Exelon. The clear conclusion is that, while Exelon would prefer to ignore the facts of the situation, Exelon agreed to remain in PJM as a condition of the settlement in 2012. That simple fact obviates Exelon's legal arguments about why such a condition is untenable. The Market Monitor recommends that the Commission extend the settlement, with that condition intact, despite the irrelevant fact that Exelon has chosen to divide itself into two companies. The Market Monitor is available for hearings and briefing as directed by the Commission.

The fact that the Market Monitor agreed to a partial settlement in this matter as a way to facilitate the Commission's decision making is not, and should not be construed as, a concession that the obligation of Exelon to remain in PJM is no longer relevant. The partial settlement was a result of the fact that Exelon and the Market Monitor could not agree on the requirement that Exelon remain in PJM. The most important behavioral requirement in Order No. 84698 is the directive (at 104–105) that Exelon remain in PJM. Exelon cannot meet its commitments under the submitted partial settlement if Exelon's transmission assets do not remain in PJM.

The Commission should order that Exelon be held to all the terms of the 2012 original settlement, including the requirement that Exelon remain in PJM, as updated by the partial settlement filed with the Commission that provides for generation behavioral commitments to help ensure competitive market outcomes for the benefit of Maryland customers. Regardless of Exelon's assertion that the Commission's own modification of the 2012 original settlement is irrelevant, it is clearly extremely relevant and clearly before the Commission for a decision.

Exelon suggests four reasons why the Commission cannot continue to require that Exelon remain in PJM. None of Exelon's reasons are supportable.

First, Exelon states (at 3) that Exelon "in short order will be a wires-only company that has no ability to exercise market power in the PJM-administered markets, nor any affiliation with the company settling with the IMM." The company settling with the IMM is Exelon. Exelon Generation is a subsidiary of Exelon. Order No. 84698 approved the merger of Exelon Corporation and Constellation Energy Group, Inc., with conditions. The conditions apply to the combined Exelon Corporation, which resulted from the merger. The conditions continue to apply to Exelon even after the imminent split of Exelon into two companies, and should continue to apply to both successor companies for the next 10 years. The Market Monitor has reached a partial settlement that addresses Exelon's generation assets and their participation in PJM markets. The partial settlement does not address Exelon's transmission assets. Inclusion of Exelon's

transmission assets in PJM is part of the Commission's order in this matter.<sup>3</sup> Exelon generation cannot continue to meet the terms of the settlement if Exelon's transmission assets do not remain in PJM.<sup>4</sup> Exelon cannot make this fundamental issue and condition of the original settlement disappear by assertion or by corporate reorganization. The 2012 original settlement was entered into by Exelon, including both its transmission and generation assets, and those terms should be extended.

Second, Exelon states (at 4): "The Commission has no legitimate interest in applying special rules to negate a fundamental right of large transmission owners in order to limit their perceived influence over policymaking." The Commission has a clear interest in PJM policies that includes and also extends beyond the ability of a generation company to exercise market power in the PJM energy and capacity markets. PJM policies affecting Maryland customers also address financial transmission rights, transmission planning, line ratings, demand response programs, energy efficiency, distributed energy resources, and other issues. These are also markets. Exelon has interests and market power in these markets. The merger, subject to the merger conditions, combined the transmission and generation assets of the two companies. But regardless, without this condition, Exelon would be unable to meet its commitments under the settlement as the generation assets, connected to the Exelon transmission system, would no longer be in PJM.

The Commission's interest in protecting Maryland ratepayers from harm has not changed. The Commission has appropriately taken a strong interest in and has been actively involved in PJM and PJM markets for decades. The Commission has an interest in how Exelon participates in the governance of PJM, and how its participation, or a potential decision not to participate, in PJM could harm Maryland ratepayers. Exelon has not proved that its asserted fundamental right to withdraw supersedes the public interest in limiting its influence over policymaking related to PJM. Exelon's asserted rights are not at issue in this proceeding. In 2012, Exelon voluntarily agreed to the conditions included in Order No. 84698, including the provision for the extension of those conditions through the process now underway. Exelon agreed to the merger conditions

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<sup>3</sup> See Order No. 84698 at 63 ("Applicants' continued membership in PJM is an implied commitment in the IMM Settlement, and thus a condition of approval.").

<sup>4</sup> See *id.* ("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.[n.254: PJM ICC Supplemental Brief at 15. "The IMM Settlement would become meaningless if, at some point in the future, Applicants decide to withdraw from the PJM RTO..."").

in order to obtain approval of the merger, including the condition to remain in PJM and to the process to permits the extension of those conditions.

Third, Exelon states (at 4): “The IMM’s requested ruling is unlawful for three reasons: it is preempted by federal law; it violates the dormant Commerce Clause of the U.S. Constitution; and it violates Maryland law.” Exelon’s arguments are misplaced and untimely. In a prior pleading, the Market Monitor refuted Exelon’s arguments related to the U.S. Constitution.<sup>5</sup> Arguments about the Constitutional limits of the Commission’s authority are beside the point. All of Exelon’s arguments apply to limits on the ability of the Commission to regulate behavior that is outside of Maryland and has no impact on Maryland ratepayers. The Commission has not attempted in Order No. 84698 to regulate behavior outside of its jurisdiction. Limits on Exelon’s behavior apply to Exelon based on Exelon’s voluntary commitments. Exelon has not pointed to any legal requirement outside of Maryland that prevents it from meeting its commitment to remain in PJM. Exelon’s arguments depend on a conflict of law that does not exist and is not at issue in this proceeding.

Exelon also voluntarily committed, in its discretion, that it would remain in PJM in response to Order No. 84698. There is no issue about unlawful regulatory mandates. There is also no conflict between Exelon’s commitments under Order No. 84698 and Order No. 86990, the Commission’s order that approved Exelon’s merger with PHI.<sup>6</sup> Since Order No. 86990 issued on May 15, 2015, Exelon has been subject to the commitments under both Order No. 86990 and Order No. 84698. Exelon does not explain why it cannot continue to adhere to its commitments under both orders as it has since May 15, 2015.

Exelon’s arguments about comity (at 6) are also unavailing. Order No. 84698 does not apply to or limit in any way actions that other regulators may take within their jurisdictions. Exelon should avoid making voluntary commitments to other regulators that conflict with its commitments to the Commission. The conditions in Order No. 84698 have been in place for nearly a decade, and

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<sup>5</sup> See Market Monitor, Response to Exelon, Case No. 9271 (August 16, 2021) at 3–6.

<sup>6</sup> See *In the Matter of the Merger of Exelon Corporation and PEPCO Holdings, Inc.*, Order No. 86990, Case No. 9361 (May 15, 2015) at A-30 (“Exelon commits that ACE, Delmarva, Pepco, PECO, and BGE shall remain as members of PJM until January 1, 2025; provided, however, that if there are significant changes to the structure of the industry or to PJM, including markets administered by PJM, during that period that have material impacts on ACE, Delmarva, Pepco, PECO or BGE, then any of those companies may file with FERC to withdraw from PJM.”).

Exelon has not shown that any regulator raised objections that the conditions intrude upon their authority.

The only issue now before the Commission is whether it is in the public interest to extend the term of Exelon's voluntary commitment in 2012 to remain in PJM. The Commission has not been asked to make a new ruling on the condition that Exelon remain in PJM. The Commission is not required to decide the legal merits of a hypothetical mandate for Exelon's continued participation in PJM. The proceeding now concerns the extension, through an agreed process, of an existing agreed condition for approval of the merger in 2012.<sup>7</sup> Exelon accepted the conditions and the process for extending those conditions, and they have now been effective for nearly a decade. The only limited issue that remains for the Commission to decide is whether an extension of Order No. 84698's conditions for approval of the merger is appropriate.

Fourth, Exelon states (at 6–7): “If Exelon or some of the Exelon utilities ever sought to leave PJM, they could not simply withdraw... any party seeking to withdraw from PJM must first obtain FERC approval...” Exelon does not attempt to reconcile this argument with its arguments that the condition that it remain in PJM violates its “fundamental right” or violates federal law. Exelon does not explain why it resists the extension of the condition that it remain in PJM, when it believes exiting PJM could be difficult even without the extension of the condition. FERC allowed a transmission owner to withdraw from an RTO citing its policy of voluntary participation.<sup>8</sup> Whatever obstacles may exist to Exelon exiting PJM, they are not a reason for discontinuing the Order No. 84698 condition that Exelon remain in PJM.

Exelon agreed in 2012 to the condition that it remain in PJM. Exelon agreed in 2012 to the provision for a process that would potentially extend the condition that it remain in PJM. The Commission made Exelon remaining in PJM a condition of approval of the merger and a condition of the 2012 settlement because Exelon could not meet its commitment under the settlement without remaining in PJM.<sup>9</sup> For exactly the same reason, the commitment to remain in PJM is an implicit term of the settlement now pending before the Commission. Exelon cannot

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<sup>7</sup> *See id.* at 64 (“Based on our questions of the Applicants’ witnesses concerning this subject, it does not appear that the Applicants view the exercise of market power as a right to be invoked after the expiration of the ten-year term of the IMM Settlement. That would be an untenable position.”).

<sup>8</sup> *See Louisville Gas and Electric Company, et al.; LG&E Energy LLC*, 114 FERC ¶ 61,282 at P 29 (2006) (“The Commission has stated that participation in an RTO is voluntary. Moreover, the just and reasonable standard under the FPA is not so rigid as to limit rates to a “best rate” or “most efficient rate” standard.”).

<sup>9</sup> Order No. 84698 at 63.

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comply with the terms of the settlement unless Exelon and its transmission assets continue to participate in PJM. The condition that Exelon remain in PJM should therefore remain explicit. The Market Monitor requests that the Commission extend the explicit requirement of the merger approval that Exelon remain in PJM.

Respectfully submitted,



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cc: Parties of record to Case No. 9271