

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Exelon Corporation) Docket No. EC05-43-000
Public Service Enterprise Group Incorporated)

**NEW JERSEY DIVISION OF THE
RATEPAYER ADVOCATE'S
REQUEST FOR REHEARING**

**SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE**

Division of the Ratepayer Advocate
State of New Jersey
31 Clinton Street - 11th Floor
P.O. Box 46005
Newark, New Jersey 07101
(973) 648-2690

By: Kurt S. Lewandowski, Esq.
Asst. Deputy Ratepayer Advocate

August 1, 2005

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's ("Commission", "FERC") Rules of Practice and Procedure, 18 C.F.R. Sec. 385.713, the New Jersey Division of the Ratepayer Advocate ("NJ Ratepayer Advocate") respectfully seeks rehearing of the Commission's July 1, 2005 "Order Authorizing Merger Under Section 203 of the Federal Power Act" (hereinafter "July 1 Order") in the above-captioned docket. In response to the Commission's notices, the NJ Ratepayer Advocate submitted filings for consideration by the Commission.¹ Therein, the NJ Ratepayer Advocate raised issues of material fact which form the basis of the instant filing. The instant request for rehearing rests largely on due process concerns regarding the opportunity for parties to present their arguments and factual support in the context of evidentiary hearings where material issues of fact exist. The NJ Ratepayer Advocate respectfully submits that the Commission should vacate its rulings on the issues enumerated below where material issues of fact were presented, and convene evidentiary hearings so that the factual issues may be addressed and a record developed upon which the Commission may later rule on the identified issues.

I. Specification of Errors

The NJ Ratepayer Advocate respectfully submits that the Commission should reconsider the following errors in the July 1 Order in this docket:

- A. The Commission erred in summarily ruling, without an evidentiary hearing, that Exelon Corporation and Public Service Enterprise Group

¹ On April 11, 2005, the NJ Ratepayer Advocate submitted its comments and request for evidentiary hearings or, alternatively, additional time for discovery, etc., which included the affidavits of its consultants: the Joint Affidavit of Bruce E. Biewald and David A. Schlissel ("Synapse Affidavit"), and the Affidavit of Richard LeLash ("LeLash Affidavit"). On May 27, 2005, the NJ Ratepayer Advocate submitted its reply to the Applicant's amendment to filing which included the supplemental joint affidavit of Messrs. Biewald and Schlissel ("Synapse Supplemental Affidavit") and supplemental affidavit of Mr. LeLash ("LeLash Supplemental Affidavit").

(hereinafter “Applicants”) need not analyze the merger’s effect on their ability to engage in strategic bidding where material issues of fact existed;

- B. The Commission erred in summarily ruling, without an evidentiary hearing, that the gas operations of the combined post-merger company will not harm competition where material issues of fact existed;
- C. The Commission erred in summarily ruling, without an evidentiary hearing, that the proposed merger will not adversely affect competition in the Northern PSE&G wholesale electricity market where material issues of fact existed;
- D. The Commission erred in summarily ruling, without an evidentiary hearing, that the proposed virtual divestiture of nuclear capacity “effectively” transfers operational control of the output to the buyer of the capacity where material issues of fact existed;
- E. The Commission erred in concluding, without an evidentiary hearing, that the Applicants’ proposed divestiture of generating units can adequately mitigate merger-related harm to competition without identification of the specific units to be divested where material issues of fact existed; and
- F. The Commission erred in rendering summary rulings on other matters, without evidentiary hearings, where material factual issues were raised by the NJ Ratepayer Advocate and other parties.

Furthermore, the NJ Ratepayer Advocate respectfully submits that in the absence of evidentiary proceedings addressing material issues of fact, the Commission’s rulings on those matters are arbitrary and capricious and do not comport with reasoned decision making. The NJ Ratepayer Advocate respectfully submits that the Commission should vacate its findings on the areas enumerated herein where material issues of fact exist and convene evidentiary hearings.

II. Summary of Argument

The Commission’s Rules of Practice and Procedure provide that the Commission may summarily dispose of all or part of a proceeding if it finds that there is “no genuine

issue of fact material to the decision of a proceeding or part of proceeding.”² Here, as set forth below, the NJ Ratepayer Advocate respectfully submits that the Commission erred in summarily ruling on issues where material issues of fact were presented. The NJ Ratepayer Advocate respectfully submits that parties must have a reasonable opportunity to present their arguments and factual support, such as that provided by evidentiary hearings. The NJ Ratepayer Advocate was not given a reasonable opportunity, through evidentiary hearings, to present its arguments and factual support prior to the Commission’s rulings on the contested issues.

Determinations regarding the proposed merger’s effect on competition and markets turn on the issues of fact identified here. In a merger of this size and of such wide-ranging impact, the facts at issue warrant careful scrutiny in the context of evidentiary hearings. As set forth in the NJ Ratepayer Advocate’s earlier submissions, the stakes in this proceeding are huge. The proposed transaction will result in a truly massive new company in PJM that will own between 18.3 percent and 23.4 percent of the total capacity in Expanded PJM and control capacity in markets which historical data show are already highly concentrated.³ Furthermore, the effect on rates of any adverse impact on competitive markets could easily greatly exceed the claimed merger benefits accruing to ratepayers from the proposed transaction. In a filing with the New Jersey Board of Public Utilities, the Applicants have claimed that electric merger related savings in New Jersey only amount to an average of \$12 million per year for the first four years.⁴

² 18 C.F.R. 385.217(b).

³ Synapse Supplemental Affidavit, p. 2.

⁴ Direct testimony of William D. Arndt on behalf of Exelon and PSE&G, filed in New Jersey BPU Docket No. EM05020106, p. 54.

The claimed merger savings could easily be negated by even a slight up-tick in market prices, such as that caused by a possible merger-related exercise of market power.

The NJ Ratepayer Advocate respectfully requests that the Commission vacate its findings on the issues set forth below where material issues of fact exist and convene evidentiary hearings to address those issues.

III. Argument

A. The Commission Erred in Concluding without an Evidentiary Hearing that the Applicants Need Not Analyze the Merger's Effect on their Ability to Engage in Strategic Bidding.

The potential for strategic bidding is of particular concern to New Jersey. As set forth in the NJ Ratepayer Advocate's earlier filings,⁵ New Jersey has much at stake in this proceeding. PSE&G is the largest electric and gas utility in the State of New Jersey, serving approximately 2.0 million electric and 1.6 million gas customers.⁶ Furthermore, energy restructuring legislation enacted in 1999⁷ introduced New Jersey's retail electric and gas markets to competition. The restructuring legislation resulted in New Jersey's electric public utilities divesting or transferring to affiliates nearly all of their electric generating units. Now, retail electric customers in New Jersey who elect not to switch to competitive electric suppliers are presently served by Basic Generation Service ("BGS"), with energy procured through an auction process.⁸ As a result, New Jersey's electric customers now rely on the existence of competitive markets for their energy purchases.

⁵ See NJ Ratepayer Advocate's May 27, 2005 filing, pp. 4-6.

⁶ Application, dated February 4, 2004, p. 9.

⁷ New Jersey *Electric Discount and Energy Competition Act*, codified at N.J.S.A. 48:3-49 *et seq.*

⁸ See *I/M/O Provision of Basic Generation Service*, New Jersey BPU Docket No. EO04040288 (Decision and Order, December 1, 2004), 237 P.U.R. 4th 489.

In order for an auction to minimize costs to New Jersey ratepayers, the energy markets serving the State's electric customers must be as competitive as possible.

Although the extent of PSE&G and its affiliates' participation in the State's BGS auction is not exactly known due to auction confidentiality rules, various press reports have indicated that PSEG subsidiaries have participated in the auction as likely wholesale suppliers and bidders.⁹ The merged company will likely have a larger presence in the BGS auction. For example, in addressing the Applicants' virtual divestiture proposal the Commission noted that the merged company has "designed their baseload energy auction product to support sales into the BGS auction."¹⁰ While the Applicants' will not control the baseload energy sold at auction, as a practical matter, the auction price for the baseload product will likely be the *de facto* floor price for energy bids by the BGS bidders who purchase the baseload product.

In finding that the proposed merger would not increase the likelihood of the merged firm exercising unilateral market power, the Commission relies on the HHI screen, the Applicants' divestiture proposal, and the enforcement of Market Behavior Rules.¹¹ However, as the Commission noted in earlier pronouncements, the Appendix A HHI screen is "not infallible" and "the screen may not detect certain market power problems."¹² Here, the strategic bidding concern involves not market share but, rather, potential manipulation which affects the price bid into the BGS auction by PSE&G and those they supply. Thus, the existing HHIs cannot uncover the strategic bidding

⁹ See Tom Johnson, *Utilities Hurt by Cool Economy and Warm Weather*, *The Star Ledger* (Newark), January 23, 2002, (Business) p. 16; Kevin G. DeMarrais, *BPU Approves Second Auction; Sale Helps Stabilize Cost of Electricity*, *The Record* (Hackensack), November 7, 2002, p. B-01; *I/M/O Provision of Basic Generation Service for Year Three*, New Jersey BPU Docket No. EO04040288 (Decision and Order, February 17, 2005), Attachment A.

¹⁰ July 1 Order, p. 47.

¹¹ *Id.* at 44-45.

¹² Order No. 592, p. 26.

problems. Nonetheless, the Commission did not require the Applicants to file any additional analyses whatsoever addressing strategic bidding.¹³

The NJ Ratepayer Advocate respectfully submits that the issue of whether the merged company has the potential to exercise unilateral market power through strategic bidding is a material question of fact that should be subjected to the scrutiny of evidentiary hearings. The Applicants and Dr. Hieronymous acknowledged that they have not conducted strategic bidding analyses.¹⁴ Mr. Frame's supplemental testimony also revealed that he did not perform any strategic bidding analysis.¹⁵ As set forth in the affidavits of the NJ Ratepayer Advocate's consultants, simulation models could be used to assess market power under a wide variety of conditions.¹⁶ The NJ Ratepayer Advocate respectfully submits that the Commission erred in summarily ruling on the strategic bidding issue and not convening evidentiary hearings.

B. The Commission's Refusal to Grant a Hearing Regarding the Anti-Competitive Effect of the Merger on Gas Market Power Violated Due Process.

In their protests to the Commission in this matter, the NJ Ratepayer Advocate and other intervening parties requested that the Commission hold evidentiary hearings regarding the issue of gas market power. The Commission summarily rejected the NJ Ratepayer Advocate's request, thereby violating the NJ Ratepayer Advocate's due process rights.

Hearings would have created a record concerning horizontal gas market power issues that may result from the change in ownership, the merger of PECO's and PSEG's

¹³ July 1 Order, p. 44.

¹⁴ Applicants' Answer, pp. 24-25; supplemental Hieronymous testimony, Exh. J-17, p. 37, ln. 4-24.

¹⁵ Synapse Supplemental Affidavit, p. 3.

¹⁶ Synapse Affidavit, pp. 4-6; Synapse Supplemental Affidavit, pp. 3-4.

gas capacity assets, the potential for aggregating additional power by providing asset management services for third parties, and the effect of such activities on various markets.¹⁷ There well may be horizontal market power concerns for the gas supply market separate and apart from the vertical market power issues addressed by the Commission.¹⁸ A full evaluation of this merger would not only have addressed market power issues in the upstream market as they relate to potential adverse effects on the downstream electric market, but would have addressed potential concerns that relate solely to the issue of horizontal gas market power. The Commission’s failure to hold hearings has resulted in its failure to address this critical gas market power issue.

With respect to horizontal market power, the Commission limited its consideration to “the effects of an increase in concentration in the upstream market to the extent that it could harm competition in wholesale electricity markets.”¹⁹ Although the Commission stated that “[a]pplicants have shown that the merger, with the mitigation proposed, will not harm competition in any relevant energy market”²⁰, the Commission clearly focused on the merger’s impact on the electric market and the impact that gas market power could have on electric pricing. It failed to address whether the merged company will have undue market power within the gas market (in addition to the electric market), and whether constraints should be placed on the combined company to ensure that its market share of gas capacity does not become materially greater and that it does not use its gas capacity to negatively affect the Mid-Atlantic gas market.²¹ This limitation in the scope of the Commission’s review would appear to be unreasonable

¹⁷ LeLash Affidavit, p.1, para. 1.

¹⁸ *Id.* at 2, para. 5.

¹⁹ July 1 Order, p. 69.

²⁰ *Id.*

²¹ LeLash Affidavit, p. 2, para. 6.

given that millions of gas consumers in the PJM East region rely upon natural gas as an essential service and are materially affected by its pricing in addition to gas pricing's impact on the wholesale electricity market.

Without a full record to support its decision, the Commission arbitrarily concluded that the “[a]pplicants have shown that the combination of their generation and natural gas distribution facilities will not harm competition.”²² However, the basis of the Commission’s conclusion is fundamentally flawed. The concern relative to horizontal market power in the natural gas market is not natural gas *distribution facilities*, but *transportation and storage rights*. There is thus a potential for gas price manipulation even when there is not a high level of concentration in the market. Indeed, an entity holding 35.6 percent of available capacity²³ in the PJM East region may affect delivered natural gas prices, at least during certain periods of the year.²⁴ Despite the procedural limitations imposed by the lack of a hearing, Philadelphia Gas Works and the City of Philadelphia, intervenors in this proceeding, filed a motion with the Commission that addressed this issue. Their witness, Paul R. Carpenter, discussed the merged entity’s market power and its incentive to adversely affect the public interest and competition in the gas markets. He also addressed vertical market power issues, testifying that the proposed combined company would have as much as 40 percent of the capacity in a market with an HHI index of 1,942.²⁵ Thus, Mr. Carpenter’s testimony challenged the Applicants’ position on vertical market power issues and demonstrated that the Applicants’ HHI analysis was seriously flawed.

²² July 1 Order, p. 69.

²³ Hieronymus, Ex. J-6.

²⁴ LeLash Affidavit, p. 2, para. 3, 4.

²⁵ Carpenter testimony, p. 4.

In its submissions in this matter, the NJ Ratepayer Advocate raised issues of material fact regarding the impact of the proposed merger on the gas market. Absent the requested hearings, the Commission's finding that there has been a showing "that the upstream market is not highly concentrated" relies solely on the unsubstantiated assertions of the Applicants.²⁶ As NJ Ratepayer Advocate witness Richard W. LeLash stated in his April 8 Affidavit,

The gas market is currently experiencing major changes in its scope and structure. Factors that constitute market power in the gas industry have changed and are, in many respects, still evolving. The Commission's decision concerning gas market power and public interest merger issues will be [*sic*] only be made once; however, the consequences and impact of that decision on gas consumers will only become evident over time and subject to the changing market.²⁷

The NJ Ratepayer Advocate respectfully submits that, given the existence of material issues of fact such as those discussed herein, the Commission's failure to address those issues violated the NJ Ratepayer Advocate's due process right to a full and fair hearing. The NJ Ratepayer Advocate therefore respectfully submits that the Commission should vacate its Order in this matter and conduct hearings that will include the proposed merger's effect on the gas market independent of the electric market.

C. The Commission Erred in Concluding without an Evidentiary Hearing that the Proposed Merger will not Adversely Affect Competition in the Northern PSE&G Wholesale Electricity Market.

The Applicants contend that the Northern PSE&G (Northern New Jersey) market is not a relevant geographic area. Nonetheless, they indicated that divesting 100 MW of generation located in that region would fully mitigate any screen failures in that area, in

²⁶ July 1 Order, p. 69.

²⁷ LeLash Affidavit, p. 5, par. 21.

addition to other mitigation measures in the PJM East region of which the Northern PSE&G market is a part.²⁸ Notably, the Applicants did not explicitly commit to the divestiture of 100 MW of generation in that area.

The Commission rejected the Applicants' contention about the relevant markets for study and concluded that the Northern PSE&G market is a relevant geographic market and that the merger as proposed (including the proposed mitigation) will result in certain instances in which there would be a worsening of the market concentration (i.e., screen failures).²⁹ However, the Commission accepted the Applicants' mention of the divestiture of 100 MW of generation and their proposed mitigation in the PJM East market as sufficient to support a finding that the merger will not adversely affect competition in the Northern PSE&G market.³⁰

The NJ Ratepayer Advocate respectfully submits that the Commission's finding is not supported in the record. As the Commission noted, the Applicants have never actually stated the cited 100 MW divestiture commitment. Moreover, without further evidence, there is no basis to determine whether the proposed mitigation is adequate to mitigate any screen failures. The magnitude of the screen failures in the Northern PSE&G market and the adequacy of the Applicants' mitigation proposal are material issues of fact deserving of further exploration and analysis in evidentiary hearings. The NJ Ratepayer Advocate respectfully submits the Commission erred in not holding evidentiary hearings on the material questions of fact relevant to the Northern PSE&G market and should, therefore, schedule the matter for evidentiary hearings.

²⁸ Application, Exh. J-1, p. 54, ln. 11-14.

²⁹ July 1 Order, p. 41.

³⁰ *Id.*

D. The Commission Erred in Concluding without an Evidentiary Hearing that Proposed Virtual Divestiture of Nuclear Capacity “Effectively” Transfers Operational Control of the Output to the Buyer of the Capacity.

The Applicants propose to mitigate off-peak Appendix A screen failures through the “virtual divestiture” of nuclear generating capacity. Specifically, the Applicants propose the virtual divestiture of 2,600 MW of nuclear capacity. The Commission accepted the Applicants virtual divestiture proposal.³¹

One of the factors to consider in evaluating the Applicants’ mitigation proposal is whether the Applicants propose to transfer operational control of the generating facilities to the purchasers of the capacity. In Order 642, the Commission recognized the importance of operational control of the generating facilities in determining whether capacity should be attributed to the seller.³² The NJ Ratepayer Advocate respectfully submits that the issue of operational control is material. Absent the Commission’s acceptance of the Applicants’ proposed mitigation using virtual divestiture, the off-peak Appendix A screen failures would remain unmitigated and the proposed merger would fail the Appendix A screen analysis for that product and geographic area.

In the instant case, without an evidentiary hearing, the Commission found that the Applicants’ virtual divestiture proposal “effectively transfers control of the output ...from the merged firm to the purchasers.”³³ The Commission further found that “the operational characteristics of, and regulatory scrutiny over, nuclear units virtually eliminates the possibility of withholding output to drive up prices.”³⁴ However, the NJ Ratepayer Advocate respectfully submits that material facts relevant to operational

³¹ July 1 Order, pp. 46-48.

³² Order No. 642, p. 40.

³³ July 1 Order, p. 46.

³⁴ *Id.*

control in the Applicants' virtual divestiture proposal were in dispute and the Commission should have held evidentiary hearings prior to making a determination on the adequacy of the Applicants' proposal.

The Applicants' operational control over the nuclear generating units subject to the virtual divestiture proposal was addressed in the affidavit of the NJ Ratepayer Advocate's expert witnesses submitted as part of its April 11, 2005 filing:

In none of the virtual divestiture alternatives, that is, virtual divestiture through the auction of rolling three-year firm contracts or through long-term energy sales contracts or swaps, would operational control over any of the combined companies' nuclear units be transferred to any buyer. Instead, in all instances, the combined companies would retain all of the operational control over the scheduling of the output of the plant and of plant outages. The combined company created by the merger would retain control and decision making authority over all aspects of plant operations, such as decisions to require the plant to run or shut-down, to declare an unscheduled outage, or to establish plant output levels when operating.³⁵

The NJ Ratepayer Advocate respectfully submits that whether the Applicants would retain operational control over the nuclear generating units affected by the virtual divestiture proposal is a material question of fact and the Commission erred when summarily ruling on the issue without convening evidentiary hearings.

E. The Commission Erred in Concluding without an Evidentiary Hearing that the Applicants' Proposed Divestiture of Generating Units can Adequately Mitigate Merger-related Harm to Competition Without Identification of the Specific Units to be Divested.

As part of their mitigation proposal, the Applicants propose to divest 4,000 MW of non-nuclear generation. However, the Applicants failed to specify the exact units that they intend to divest. Furthermore, the Applicants did not identify which generating units identified as divestiture candidates would be offer-capped.

³⁵ Synapse Affidavit, p. 14.

The Applicants' failure to specifically identify the units which it intends to divest is at odds with the Commission's stated policy in divestitures associated with merger-related market power issues. In its Merger Policy Statement, the Commission stated that "[r]emedial commitments must state specifically which facilities are affected by the commitment, e.g., which generating unit(s) will be divested."³⁶ The Commission further addressed mitigation measures in its Order on merger filing requirements, Order 642. Therein, the Commission held forth: "[mitigation] [p]roposals must be specific, and applicants would have to demonstrate that the proposed measures would adequately mitigate any adverse effects of the merger."³⁷ While the Commission acknowledged that its ruling departed from the Merger Policy Statement's call for specificity, the Commission nonetheless found the Applicants' divestiture proposal adequate for the reasons set forth in its July 1 Order.

The NJ Ratepayer Advocate respectfully submits that the failure to specifically identify the units selected for divestiture raises material factual issues regarding market power concerns upon which the question of whether the proposed merger will adversely affect market power turns. Whether the proposed mitigation through divestiture is effective turns on the units to be divested and the market power of the purchasers of the divested units. As shown in the supplemental affidavit submitted on behalf of the NJ Ratepayer Advocate on May 27, 2005, an analysis of two reasonable divestiture scenarios under the Applicants' revised proposed purchase restrictions results in screen failures.³⁸ The NJ Ratepayer Advocate respectfully submits that the Commission erred in not

³⁶ Order No. 592, p. 83.

³⁷ Order No. 642, p. 95.

³⁸ Synapse Supplemental Affidavit, pp. 9-12.

conducting hearings to address the material factual issues arising from the Applicants' non-nuclear divestiture proposal, including identifying the units to be divested and an assessment of different divestiture scenarios.

Aside from practical concerns regarding the assessment of the impact of divestiture on market power, the Commission's reliance in the instant case on post-merger compliance filings and actions runs counter to its stated guidelines, as found in its Merger Policy Statement and Order 642. In its Merger Policy Statement, the Commission stated that "[w]e do not intend to rely on post-merger review or on new remedies imposed after a merger is approved."³⁹ Although the Commission found that the proposed divestiture adequately mitigates the competitive harm, the Commission relies much on post-merger compliance filings and other actions to ensure that the screen failures are mitigated. The Commission ordered the Applicants to make a compliance filing within 30 days of its Order and also set forth the content of the ordered filing.⁴⁰ The Commission ordered the Applicants to include in the compliance filing an Appendix A analysis based on the actual units divested. Furthermore, the Commission acknowledged that if the Appendix A analysis submitted in the compliance filing shows inadequate mitigation, additional mitigation might be ordered.⁴¹

The NJ Ratepayer Advocate respectfully submits that the Commission erred in summarily finding – without evidentiary hearings – that the divestiture proposal adequately mitigated identified screen failures. The NJ Ratepayer Advocate respectfully submits that the Commission should conduct evidentiary hearings whereby the specific units to be divested should be identified and any competitive harm resulting from a

³⁹ Order No. 592, p. 33; see also Order No. 642, p. 70.

⁴⁰ July 1 Order, pp. 47-52.

⁴¹ *Id.* at 49.

potential purchase by a buyer with market power could be analyzed more fully. Evidentiary hearings would permit the parties to examine, among other issues, reasonable divestiture scenarios and their respective effect on competition.

F. The Commission Erred in Rendering a Decision without an Evidentiary Hearing to Address Other Material Factual Issues Raised by the NJ Ratepayer Advocate.

The NJ Ratepayer Advocate respectfully submits that the Commission erred in finding – without evidentiary hearings - that the proposed merger would not have an adverse effect on competition without addressing several other material issues of fact identified by the NJ Ratepayer Advocate.

First, the Commission did not address the fact that historical data published by PJM indicates that certain PJM markets are substantially more concentrated than the Applicants' modeling analyses suggest. For example, historical data published by PJM indicates that the PJM East energy market is substantially more concentrated than the Applicants' modeling analyses suggest.⁴² Additionally, historical data published by PJM indicates that the PJM capacity markets are substantially more concentrated than the Applicants' modeling analyses suggest.⁴³

Second, the Commission did not fully address through hearings the unreasonable import assumptions incorporated in the Applicants' modeling of capacity markets. In their modeling of capacity markets, Dr. Hieronymus and Mr. Frame ignore Exelon, PSE&G, and the newly combined firm as importers of power into the PJM East and Expanded PJM markets. Both witnesses for the Applicants unreasonably assume that imports in the PJM East and the Expanded PJM markets are controlled by four equal-

⁴² Synapse Affidavit, pp. 6-7.

⁴³ *Id.* at 8-10.

sized firms, none of which are Exelon, PSE&G, or the new combined firm created by the proposed merger.⁴⁴

Third, the Commission erred in not convening hearings to address several other over-simplified and unrealistic assumptions in the Applicants' models which cause their HHIs to understate the levels of pre-merger and post-merger market concentration.⁴⁵ The reasonableness of the assumptions underlying the Applicants' models is not undisputed and material issues of fact were presented which warrant evidentiary hearings. For example, Dr. Hieronymus' and Mr. Frame's analyses:

- assume that scheduled outages only occur during the non-peak (shoulder) periods;⁴⁶
- unrealistically represent outages in the CASm model;⁴⁷
- use generic, not unit-specific planned, and forced outage rates for generating facilities;⁴⁸ and
- exclude any transmission system outages or deratings.⁴⁹

In addition, Dr. Hieronymus unrealistically models that all of the capacity from the generating units being modeled is available for use in the specific geographic areas being studied, subject to the transmission import capability limits. In practice, much of this capacity might not be available because of planned or forced outages, because it might already be committed to serving other load, or it might be diverted to other areas for economic reasons.⁵⁰

Fourth, the Commission erred in not convening hearings to address the relationship between Firm Transmission Rights ("FTRs") and market power. For example, if a company that owns capacity in PJM also owns FTRs for power delivery

⁴⁴ *Id.* at 10.

⁴⁵ *Id.* at 10-12.

⁴⁶ *Id.* at 11.

⁴⁷ *Id.*

⁴⁸ *Id.* at 12.

⁴⁹ *Id.*

⁵⁰ *Id.*

into PJM East, then the total market price-based revenue that company receives includes revenue from both energy sales and FTRs.⁵¹ Hearings would permit an examination of the linkage between market price, FTR ownership, and total revenues.

Finally, the Commission erred in not convening hearings where certain factual discrepancies between the Applicants' models and PJM data could be addressed. The Applicants failed to explain and reconcile the significant differences between the results of their experts' computer modeling and actual PJM concentration levels.⁵² The Applicants failure to reconcile the data violates the Commission's requirements.⁵³

⁵¹ Synapse Supplemental Affidavit, pp. 8-9.

⁵² *Id.* at 5.

⁵³ 18 C.F.R 33.3(c)(5).

Conclusion

For the reasons set forth hereinabove, the NJ Ratepayer Advocate respectfully submits that the Commission erred in summarily ruling on the issues set forth above where material issues of fact existed. The NJ Ratepayer Advocate respectfully submits that in the absence of evidentiary proceedings addressing material issues of fact, the Commission's rulings on those matters are arbitrary and capricious and do not comport with reasoned decision making. The NJ Ratepayer Advocate respectfully submits that the Commission should vacate its findings on the identified issues where material issues of fact exist and hold evidentiary hearings on those issues.

Respectfully submitted,

SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE

By: : _____
Kurt S. Lewandowski, Esq.
Assistant Deputy Ratepayer Advocate

Division of the Ratepayer Advocate
State of New Jersey
P.O. Box 46005
31 Clinton Street, 11th floor
Newark, New Jersey 07101
(973) 648-2690

Dated: August 1, 2005