



Agenda Date: 11/17/21
Agenda Item: 2M

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF THE PETITION OF)
ATLANTIC CITY ELECTRIC COMPANY FOR A) ORDER
DECLARATORY RULING) DOCKET NO. EO21060893

Parties of Record:

Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel
Cynthia L.M. Holland, Esq., on behalf of Atlantic City Electric Company

BY THE BOARD:

On June 7, 2021, Atlantic City Electric Company ("ACE" or "Company") filed a petition with the New Jersey Board of Public Utilities ("Board") requesting a declaratory ruling to confirm that Board approval is not required for the consummation of the spinoff of the generation business from Exelon Corporation ("Exelon") ("Petition").

BACKGROUND AND PROCEDURAL HISTORY

Exelon became the parent company of ACE and Pepco Holdings, LLC ("PHI") on March 23, 2016, in accordance with the Board's Order in Docket No. EM14060581.¹ The Merger Approval Order contained several commitments from ACE and Exelon regarding, among other things, rates, employees, safe and adequate utility service, competition, and ring-fencing.

Additionally, as part of a stipulation approved by Board Order dated October 31, 2016, ACE was to submit a Ring Fencing Report with the Board.² The report reviewed each of the ring-fencing measures incorporated into the Merger Approval Order to maintain a management framework that provides a way of protecting ACE from possible risks of financial harm from affiliated companies.

¹ In re the Merger of Exelon Corporation and Pepco Holdings, Inc., Docket No. EM14060581, Order dated March 6, 2015 ("Merger Approval Order").

² In re the Merger of Exelon Corporation and Pepco Holdings, Inc. - Order Approving Joint Recommendation For Settlement Of The Most Favored Nation Issue, Docket No. EM14060581, Order dated October 31, 2016 ("MFN Order").

Another Exelon subsidiary, Exelon Generation Company, LLC (“ExGen”), operates Exelon’s existing generation business, including its generation plants, wholesale energy operations, and a competitive retail sales business.

On February 24, 2021, Exelon announced its intention to transfer 100% ownership of ExGen to a newly created subsidiary that will then be “spun-off” to become ExGen’s new, ultimate parent company (“Transaction”). As a result of the Transaction, ExGen and its subsidiaries will no longer be owned by Exelon. Subsequent to the spin-off, Exelon will no longer own merchant generation businesses.

On March 30, 2021, ACE filed a letter providing the Board with notice and information about the Transaction (“March 2021 Letter”). In the March 2021 Letter, ACE explained that the Transaction will have no impact on the ownership or control of Exelon or the ownership or control of ACE. ACE asserted that Exelon will continue to be the sole owner of ACE and all other existing Exelon transmission and distribution utilities.

PETITION

In the Petition, ACE asserted that the Transaction does not fall within the purview of Board regulation or authority because it does not involve a public utility and is not the type of enumerated transaction subject to Board jurisdiction. Additionally, ACE asserted that the Transaction will have no impact on ACE’s service, rates, governance, employment levels, or day-to-day operations, nor will it impact the ownership or control of Exelon or ownership or control of ACE. Post Transaction, Exelon will continue to be the sole owner of Exelon Energy Delivery Company, LLC (“EEDC”), and through EEDC, indirectly the sole owner of ACE and all other existing Exelon transmission and distribution utilities. ACE also stated that all commitments made in connection with the 2016 merger of Exelon and PHI, and incorporated into the Merger Approval Order, will remain unaltered. ACE and other PHI utilities will remain “ring-fenced” and insulated from business risks associated with any utility or non-utility activities of Exelon outside of PHI after the Transaction.

In the Petition, ACE maintained that Board approval is not necessary for consummation of the Transaction, as it will not be implemented by, nor have any impact to or affect the performance of any New Jersey public utility subject to the Board’s jurisdiction. ACE further claimed that the Transaction does not involve, nor will it result in, any of the specifically enumerated transactions that are subject to Board jurisdiction. Specifically, ACE noted that Board approval is necessary (i) to acquire or seek to acquire control of a public utility, see N.J.S.A. 48:2-51.1; (ii) for a public utility to sell, lease, mortgage, or otherwise dispose of or encumber its property, franchises, privileges, or rights, or any part thereof; or merge or consolidate its property, franchises, privileges, or rights, or any part thereof, with that of any other public utility, see N.J.S.A. 48:3-7; or (iii) to transfer any share or shares of its capital stock, to any other public utility, or to any corporation, domestic or foreign, or any person, the result of which sale or transfer in itself or in connection with other previous sales or transfers would be to vest in such corporation or person a majority in interest of the outstanding capital stock of such public utility, see N.J.S.A. 48:3-10. Therefore, ACE asserted that the Transaction is not subject to review or approval under N.J.S.A. 48:2-51.1, N.J.S.A. 48:3-7, or N.J.S.A. 48:3-10.

In response to discovery, ACE stated that the Transaction is: 1) not expected to impact the financial leverage of Exelon or its utility subsidiaries (including ACE); 2) has not resulted in any changes to credit ratings or the underlying financial integrity of Exelon or its utility subsidiaries (including ACE); 3) will have no effect on ACE's collective bargaining agreements for employees covered under existing agreements; and 4) will not change the cost allocation factors utilized to allocate Exelon Business Service ("BSC") costs to ACE.

RATE COUNSEL COMMENTS

On September 17, 2021, the New Jersey Division of Rate Counsel ("Rate Counsel") submitted comments on the Petition.

In its comments, Rate Counsel asserted that the Board should exercise its broad authority under N.J.S.A. 48:2-51.1 and apply the positive benefits test on the Transaction as set forth in N.J.A.C. 14:1-5.14(c). Rate Counsel Comments at 4. Rate Counsel argued that the measures that were approved in the Merger Approval Order should also serve as protection for ACE customers from any adverse effects of Exelon's actions in selling off its affiliate generation. Rate Counsel stated that these commitments must be maintained for ACE to ensure its customers are protected from any adverse effects of the Transaction now and going forward. Id. at 5.

For the above reasons, Rate Counsel stated that the issuance of any declaratory ruling that Board approval is not necessary for the Transaction should be conditioned on the satisfaction of a positive benefits test as well as Exelon's continued adherence to the commitments required by the Merger Approval Order, particularly those commitments regarding ring-fencing. Id. at 6.

ACE REPLY COMMENTS

On September 28, 2021, ACE filed reply comments. In its reply comments, ACE reaffirmed that all commitments undertaken in connection with the Merger Approval Order and the MFN Order will remain unchanged. ACE Reply Comments at 2. ACE stated that Exelon has complied with and will continue to adhere to the requirements in those Orders, including but not limited to ensuring ACE will remain ring-fenced. ACE further stated that the Company is willing to provide an updated ring-fencing report if the Board required it to do so. Id.

ACE disagreed with Rate Counsel's assessment that the Board previously exercised authority over, and applied a positive benefits test to, transactions similar to the Transaction. ACE asserted that the transactions cited by Rate Counsel are materially different than the proposed Transaction as the Transaction does not involve any entity with control over ACE, nor will result in any change in control over ACE. Id. at 4.

ACE objected to the application of a positive benefits test, but stated that should the Board wish to apply a variant of the positive benefits test, the Board should find that the transaction is not likely to create any adverse impacts, is in the public interest, and has the likelihood of creating positive benefits. ACE noted that the spin-off of Exelon's generation business will result in an Exelon that is solely focused on its regulated utility business and its utility strategic initiatives. Id.

ACE reaffirmed its request that the Board issue a declaratory ruling confirming that approval is not required for the consummation of the Transaction and, if necessary, find that: 1) all commitments undertaken in connection with the Merger Approval Order and the MFN Order, including ring-fencing commitments, will remain unchanged; and 2) the Transaction is not likely to create any adverse impacts, is in the public interest, and has the likelihood of creating positive benefits. Id. at 5.

DISCUSSION AND FINDINGS

The Board reviewed the record in this matter, including the Petition and the comments submitted. Notice of the Transaction was provided to the Board through the submission of the Petition and the March 2021 Letter, as described above.

The Board evaluated the assertions in the Petition regarding the change of control and its impacts on competition, rates, employees, and the provision of safe and adequate utility service at just and reasonable rates. As noted in the Petition and in ACE's Reply Comments, the merger commitments undertaken by ACE and Exelon, as set forth in the Merger Approval Order, will remain unchanged following the Transaction, and ACE will remain insulated from risks associated with any utility or non-utility activities of Exelon outside of PHI.

In the Petition, ACE asserted that the Transaction will not create any adverse impact on ACE or its customers. ACE further asserted that the Transaction will not result in a change in control over ACE, which would require Board approval pursuant to N.J.S.A. 48:2-51.1, and the Transaction will not result in the sale or disposition of any property, franchises, privileges, rights, or capital stock, which would subject the Transaction to the Board's review under N.J.S.A. 48:3-7, and/or N.J.S.A. 48:3-10.

Notwithstanding ACE's assertion that the Transaction is not subject to Board review and approval, the Board will conduct its review based upon the framework set forth in N.J.A.C. 14:1-5.14(c) regarding possible impacts on competition, employees, rates, and service quality:

1. Impact on Competition

At the distribution level, there is no impact on the rate-regulated activities of ACE. In the wholesale market, the Federal Energy Regulatory Commission ("FERC") approved the transaction after conducting its own review of the competitive impacts.³

2. Impact on Employees

Pursuant to discovery responses submitted in this matter, the Transaction will have no effect on collective bargaining agreements for EEDC, ACE or Exelon BSC for employees covered by existing agreements. Additionally, as part of the stipulation approved in the Merger Approval Order, ACE will maintain its local operational headquarters in Mays Landing, New Jersey and will honor all existing collective bargaining agreements.

³ See FERC Order Authorizing Disposition of Jurisdictional Facilities dated August 24, 2021 in FERC Docket No. EC21-57-000.

3. Impact on Rates

According to the Petition, the Transaction will have no impact on rates. Petition at 3.

4. Impact on Service Quality

The Petition indicates that the Transaction will have no impact on ACE's service or day-to-day operations. Id. As part of the stipulation approved in the Merger Approval Order, ACE committed to several reliability improvement measures and reporting. To date, all of those commitments and filing requirements have been met.

Having reviewed the record in this matter, the Board is **HEREBY SATISFIED** that the Transaction will have no adverse impacts on competition, employees, rates, or service quality.

The Merger Approval Order required Exelon to implement and maintain ring-fencing. Specifically, Exelon was to obtain a legal opinion satisfactory to the Board that, as a result of the ring-fencing measures, a bankruptcy court would not consolidate: 1) the assets and liabilities of the Special Purpose Entity ("SPE") with those of Exelon or EEDC, in the event of an Exelon or EEDC bankruptcy, or 2) the assets and liabilities of PHI or its subsidiaries with those of either the SPE, Exelon or EEDC, in the event of a bankruptcy of the SPE, Exelon or EEDC. Merger Approval Order at 25.

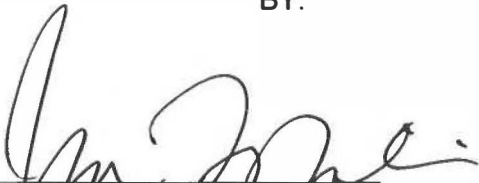
Additionally, in compliance with the MFN Order and as noted above, ACE filed a Ring Fencing Report with the Board in June 2017. The report reviewed each of the ring-fencing measures incorporated into the Merger Approval Order to maintain a management framework that provides a way of protecting ACE from possible risks of financial harm from affiliated companies. There is a continuing obligation to ensure that ACE's customers are protected from these possible risks. Accordingly, the Board **HEREBY DIRECTS** ACE to, within 180 days following consummation of the Transaction, file an updated Ring Fencing Report and an updated legal opinion as discussed in the previous paragraph.

Based upon the Board's review of the record in this matter, the Board **HEREBY FINDS** that the Transaction is not likely to create any adverse impacts, is in the public interest, and has the likelihood of creating positive benefits. Accordingly, the Board **FURTHER FINDS** the proposed Transaction is in compliance with relevant law and regulations and therefore **HEREBY APPROVES** the Transaction as described in the filing and related documents, including all the stated merits and assertions of neutral or positive benefits.

The effective date of this Order is November 24, 2021.

DATED: November 17, 2021

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER



DIANNE SOLOMON
COMMISSIONER



UPENDRA J. CHIVUKULA
COMMISSIONER



ROBERT M. GORDON
COMMISSIONER

ATTEST:



AIDA CAMACHO-WELCH
SECRETARY

IN THE MATTER OF THE PETITION OF ATLANTIC CITY ELECTRIC COMPANY FOR A
DECLARATORY RULING - DOCKET NO. EO21060893

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