

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF )  
DELMARVA POWER & LIGHT COMPANY, EXELON )  
CORPORATION, PEPCO HOLDINGS, INC., PURPLE )  
ACQUISITION CORPORATION, EXELON ENERGY ) PSC Docket No. 14-193  
DELIVERY COMPANY, LLC AND SPECIAL PURPOSE )  
ENTITY, LLC FOR APPROVALS UNDER THE )  
PROVISIONS OF 26 DEL. C. §§ 215 AND 1016 )  
(Filed JUNE 18, 2014) )

ORDER NO. 8636

On In-Camera Inspection-Remaining Documents

AND NOW, this 11<sup>th</sup> day of September, 2014, the duly-appointed Hearing Examiner for this docket determines and orders the following:

1. Pursuant to ¶2 of Order No. 8581 (July 8, 2014), the Commission designated me as the Hearing Examiner for this docket and delegated the authority to me to resolve any discovery disputes among the parties.

2. On July 31, 2014, the Public Service Commission Staff ("Staff") timely served discovery on Delmarva Power & Light Company ("Delmarva"), Pepco Holdings, Inc. ("PHI") , Exelon Corporation ("Exelon"), Exelon Energy Delivery Company, LLC ("Exelon"), Purple Acquisition Corporation ("Merger Sub"), and Special Purpose Entity, LLC ("SPE") (collectively the "Joint Applicants").

3. On August 7, 2014, the Joint Applicants timely objected to a number of Staff's discovery requests and identified certain objections to documents in a Privilege Log.

4. On August 25, 2014, by PSC Order No. 8621, pursuant to the parties' agreement, I ordered that I would conduct an in-camera inspection of the documents which the Joint Applicants objected to producing.

5. On September 5, 2014, by PSC Order No. 8634, I conducted the in-camera inspection but could not open an attachment (Document No. 15) to an email (Document No. 14) provided to me by the Joint Applicants. I attach a portion of the Joint Applicants' Privilege Log describing these documents as **Exhibit "A"**. By PSC Order 8634, I informed the Joint Applicants of this issue, who confidentially provided these documents to me on September 9, 2014.

6. Document No. 14 is an email dated April 10, 2014 from Paul Bonney, Esq., Exelon's Senior Vice President and Deputy General Counsel, to Peter Meier, Kenneth Parker and Wendy Stark, Esq., Deputy General Counsel, Regulatory, for Pepco Holdings, Inc. ("Pepco") Although their positions were not provided to me, it appears that Mr. Meier is Pepco's Vice President of Legal Services. Mr. Parker is Pepco's Senior Vice President of Governmental Affairs and Corporate Citizenship. Only Mr. Parker is not designated as "an attorney or other legal personnel" in the Joint Applicants' Privilege Log, but he occupies an important position at Pepco.

7. Document 14 was also copied to two (2) Exelon attorneys, Darryl M. Bradford, Senior Vice President and General Counsel for Exelon Corporation, and Bruce Wilson, Exelon's Senior VP and Deputy General Counsel. The title of the email is "Purple Deck from this morning." Purple Deck sells software presentation programs.

8. Document 15, an attachment to the email, is entitled "The Exelon/Pepco Combination: Benefits of Creating the Pre-eminent Mid-Atlantic Energy Company." The first page of the document dated April 10, 2014, which appears to be a "PowerPoint presentation," states as follows: "Privileged & Confidential Common Interest Material Provided by Darryl M. Bradford, SVP [Senior Vice President] & General Counsel."

9. Despite its promotional sounding title, this document contains a joint legal strategy proposed by Exelon's Senior Vice President and General Counsel, Darryl Bradford, Esq. to Pepco. This joint legal strategy includes: a) the regulatory requirements regarding Pepco's four (4) jurisdictions including Delaware, such as the legal requirements for Application approval; b) regulatory approaches to energy generation liabilities; c) ring fencing; and d) the corporate structure of the merging companies before and after the merger.

10. The merger was signed and formally announced on April 29, 2014. (Applic., Appendix B.) Since these documents are dated April 10, 2014, I was primarily concerned as to whether the Common Interest Doctrine applied, like it did to the documents in my prior Order. Based on my review, for the reasons which follow, I find that the Joint Applicants have met their burden<sup>1</sup> of establishing that these documents are Attorney-Client privileged between Exelon's two (2) attorneys, and subject to the Common Interest Doctrine for Exelon's attorneys, and Pepco's attorney, Pepco's "legal personnel," and Pepco's high level manager.

11. "The Common Interest Doctrine is an extension of the attorney-client privilege that applies to parties engaged in a common enterprise." "It allows separately represented clients sharing a common legal interest to communicate directly with one another regarding that shared interest." Titan Investment Fund II, LP v. Freedom Mortgage Corp., 2011 WL 532011 (Del. Super. 2011) (unpublished opinion)

12. According to *Titan*, the common interest doctrine applies "if the parties were collaborating and sharing information in furtherance of a joint legal strategy or objective, rather than simply seeking legal advice

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<sup>1</sup> E.g., Moyer v. Moyer, 602 A.2d 68, 72 (Del. 1992).

with regarding to a commercial transaction." For example, in Rembrandt Technologies, L.P. v. Harris Corp., the Superior Court applied the common interest doctrine where the parties asserted their common interest of enforcing and exploiting patents. (Rembrandt, 2009 WL 402332 \*6.) Although the parties entered into a written Common Interest Agreement in *Rembrandt*, such an agreement between these publically-traded companies interested in merging could have subjected each to shareholder lawsuits for not pursuing the transaction which was in the best interests of the shareholders of the respective companies.

13. What was the status of the parties' relationship on April 10, 2014? Fortunately, Pepco's Proxy Statement, a document which was publically filed with the SEC on August 12, 2014, describes their relationship in detail. I attach a copy of Pepco's Proxy Statement as **Exhibit "B"**.

14. I am not going to repeat here what is in **Exhibit "B"**. However, although another bidder ("Bidder D") was still bidding as of April 10, 2014, I find that the common interest doctrine applies to these documents.

15. As described in *Titan*, "the parties were collaborating and sharing information in furtherance of a joint legal strategy or objective." Specifically, the documents reflect a proposed joint legal strategy for the objective of the merger to occur and be approved in Pepco's jurisdictions.

16. *Titan* also held that documents did not qualify under the common interest doctrine if they were "simply seeking legal advice with regarding to a commercial transaction." These documents do not fall in this category. These documents were emailed to Pepco's Counsel, Wendy Stark, Esq., Deputy General Counsel, Regulatory, so that Ms. Stark could evaluate whether the joint legal strategy for the objective of the merger to occur and be

approved in Pepco's jurisdictions as proposed by Exelon, was acceptable to Ms. Stark's client, Pepco.

17. The common interest doctrine encourages frank, confidential communications like those involved here. Invading this privilege between parties considering a merger will only discourage good communication.

18. Moreover, all material information contained in these documents can be easily obtained by the parties through other means.

19. Finally, because these documents were created pre-merger, they contain much enthusiasm for both Exelon and Pepco. My concern is that another party in this docket could use this enthusiasm for cross-examination of Exelon's and Pepco's witnesses, when the Joint Applicant's Application should be approved, modified or rejected on its own merit.

**It Is Ordered** this 11<sup>th</sup> day of September, 2014.

/s/ Mark Lawrence  
Mark Lawrence  
Senior Hearing Examiner

	FW: Regulatory Conditions Common Interest Materials	Confidential email between counsel providing legal advice regarding regulatory commitments	1 ACP/ WP
	Regulatory Conditions Common Interest Materials	Confidential email between counsel providing legal advice regarding regulatory commitments	1 ACP/ WP
	RE: Regulatory Conditions Common Interest Materials	Confidential email with attachment between counsel providing legal advice regarding regulatory commitments	1 ACP/ WP
14.	Purple Deck from this morning	Confidential e-mail communication between counsel client representative providing legal advice regarding merger	1 ACP/ WP
15.	The Exelon/Pepco Combination: Benefits of Creating the Pre-eminent Mid-Atlantic Energy Company	Confidential PowerPoint presentation drafted by counsel and providing legal advice regarding merger	ACP/ WP
	Re: FW: Ring Fencing and other Commitments - Privileged	Confidential e-mail communication between client representatives and counsel seeking and obtaining legal advice regarding a ring-fencing proposal	1 ACP/ WP
	FW: Ring Fencing and other Commitments - Privileged	Confidential e-mail communication between client representatives and counsel seeking and obtaining legal advice regarding a ring-fencing proposal	1 ACP/ WP
	Ring Fencing and other Commitments - Privileged	Confidential e-mail communication with attachment between attorneys discussing legal advice regarding a ring-fencing proposal	1 ACP/ WP
		Confidential attached memorandum to e-mail communication with attorney comments reflecting legal impression regarding a ring-fencing proposal	8 ACP/ WP
	RE: ring-fencing commitments (attorney-client privileged/confidential)	Confidential e-mail communication with attachment between client representatives and counsel seeking and obtaining legal advice regarding a ring-fencing proposal	1 ACP/ WP

**EXHIBIT No.**

"A"

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## THE MERGER

*This discussion of the Merger is qualified in its entirety by reference to the Merger Agreement, which is attached to this proxy statement as Annex A. You should read the entire Merger Agreement carefully as it is the legal document that governs the Merger.*

*The Merger Agreement provides that, upon satisfaction or waiver of the conditions to the Merger, Merger Sub will merge with and into PHI. PHI will be the Surviving Corporation in the Merger. You will not own any shares of the capital stock of the Surviving Corporation in the Merger.*

### Merger Consideration

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In the Merger, each outstanding share of our common stock (other than shares owned by Exelon, Merger Sub and us or any of their or our other direct or indirect, wholly-owned subsidiaries (in each case not held on behalf of third parties, but not including shares held by us in any "rabbi trust" or similar arrangement in respect of any compensation plan or arrangement)

and shares owned by stockholders who have perfected and not withdrawn a demand for, or lost their right to, appraisal with respect to such shares, which we refer to collectively as Excluded Shares) will be converted into the right to receive an amount in cash equal to \$27.25 per share, without interest and less any applicable withholding taxes.

### Background of the Merger

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The Board and senior management of PHI regularly review and assess PHI's long-term business plan and strategic alternatives available to PHI to enhance stockholder value, including potential business combination transactions. Lazard has participated and provided advice to the Board in connection with certain of these planning and review processes.

On January 27, 2014, PHI reported that its Chairman, President and Chief Executive Officer, Joseph M. Rigby, announced plans to step down from his position as President and Chief Executive Officer of PHI at the end of 2014 following the selection of his successor. PHI also announced that it would be conducting a search for a new chief executive officer. Mr. Rigby would continue to be employed by PHI through May 1, 2015 and would continue to serve as Executive Chairman through the date of PHI's 2015 annual stockholders meeting.

On January 28, 2014, Christopher M. Crane, the President and Chief Executive Officer of Exelon, called Mr. Rigby and expressed Exelon's interest in acquiring PHI in a cash transaction and asked Mr. Rigby to have dinner with him so that they could discuss the matter further. Mr. Rigby informed certain members of the Board and senior management of PHI of his conversation with Mr. Crane.

On February 4, 2014, Mr. Rigby received a call from the President and Chief Executive Officer of a company we will refer to as Bidder A, indicating that he wanted to have a discussion with Mr. Rigby about a possible transaction. On February 5 and February 9,

2014, Mr. Rigby informed certain members of senior management and certain members of the Board of his conversation with the Chief Executive Officer of Bidder A.

On the evening of February 5, 2014, Mr. Rigby had dinner with Mr. Crane. During dinner, Mr. Crane indicated Exelon's interest in acquiring PHI. Mr. Crane discussed the economics of an all-cash transaction at a price of approximately \$22.00 per share and the implied premiums to the then current market price of PHI's stock and the average price of PHI's stock over the last five years. Following the dinner, Mr. Rigby informed certain members of the Board and senior management of his conversation with Mr. Crane.

On February 7, 2014, certain members of senior management of PHI discussed the approaches from Exelon and Bidder A with representatives of Lazard and asked Lazard to prepare a preliminary financial analysis of PHI on a standalone basis. As noted previously, the Board and senior management had consulted with Lazard from time to time in the ordinary course and in connection with PHI's annual review of its long-term strategic plan.

On February 14, 2014, Mr. Rigby had a telephone conversation with Mr. Crane as a follow-up to their conversation on February 5. Also on February 14, Mr. Rigby received another call from the Chief Executive Officer of Bidder A regarding Bidder A's interest in acquiring PHI. Mr. Rigby informed certain members of the Board and senior management of his conversations.

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**EXHIBIT No.**

" B "

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On February 20, 2014, Mr. Rigby had a call with the Board that was also attended by certain members of senior management. Mr. Rigby discussed with the Board the inquiries made by each of Exelon and Bidder A, indicating that at the regular Board meeting scheduled for the following week PHI would invite outside financial and legal advisors to attend the meeting to discuss the inquiries received, possible responses and other alternatives available to PHI. After a discussion, the Board determined that Mr. Rigby should inform each of Exelon and Bidder A that their inquiries would be discussed by the Board. On February 20 and 21, 2014, Mr. Rigby contacted Mr. Crane and the Chief Executive Officer of Bidder A, respectively, to so inform them. Each of Mr. Crane and the Chief Executive Officer of Bidder A during such conversations indicated an interest in commencing a due diligence investigation of PHI.

On February 26, 2014, the Board held a meeting that was also attended by certain members of senior management and representatives of Lazard and Sullivan & Cromwell LLP, special counsel to PHI, which we refer to as Sullivan & Cromwell. A representative of Lazard reviewed with the Board various preliminary financial analyses with respect to PHI, including management's long-term strategic plan that had been discussed with the Board in September 2013, preliminary valuation analyses and sensitivities related to the foregoing. A representative of Lazard also discussed with the Board various options potentially available to PHI, including continuing to pursue its long-term business plan or pursuing a strategic transaction, companies that potentially could be interested in acquiring PHI, including financial counterparties (including private equity funds, infrastructure funds and pension funds), potential companies for PHI to consider acquiring, and possible paths for pursuing these options. A representative of Sullivan & Cromwell reviewed with the Board the directors' fiduciary duties under Delaware law in connection with considering the various options available to PHI, the importance of confidentiality and, if PHI were to pursue a strategic transaction, the regulatory approval process and the potential risks related thereto.

On February 27, 2014, the Board held a meeting that was also attended by certain members of senior management and representatives of Lazard and Sullivan & Cromwell. The Board continued to discuss the various options available to PHI, PHI's long-term strategic plan and potential risks in connection with the achievement of that plan, potential counterparties and potential risks with respect to the regulatory approval process if PHI were to decide to pursue a strategic transaction. After discussion, the Board determined that the inquiries from Exelon and Bidder A made further investigation of a strategic transaction advisable. The Board directed management and its advisors to contact six additional

potential strategic counterparties from the list that had been identified by Lazard and discussed with the Board (in addition to Exelon and Bidder A), each of which was a utility holding company, enter into non-disclosure agreements with each of those eight potential counterparties that were interested in doing so (referred to as the counterparties), provide limited due diligence information to each of them and ask each interested counterparty for an indication of their interest prior to the next Board meeting, so that the Board could determine, based on the indications, including price and commitment to obtaining regulatory approvals, whether to continue considering pursuit of a possible strategic transaction. The Board determined, based on the view of Lazard and discussions at the meeting, that the eight counterparties included the parties with the greatest likelihood to have the financial resources and strategic intent to acquire PHI. This aspect of the process is referred to as Phase I.

Between February 28, 2014 and March 4, 2014, Mr. Rigby contacted the chief executive officer and, at the direction of PHI, Lazard also contacted the chief executive officer or other senior officers, of each of the potential counterparties and informed each of them (i) that the Board had decided to explore pursuing potential strategic options, (ii) that in Phase I of this process it would permit each interested counterparty to conduct a limited, confidential due diligence review of PHI, (iii) of the timetable for Phase I, and (iv) that key issues for the counterparties to address would be price and potential regulatory risks and closing certainty in respect of any proposed transaction.

On March 6, 2014, one of the potential counterparties indicated it was not interested in participating in Phase I. On March 7, 2014, Bidder A indicated it was no longer interested in pursuing an acquisition of PHI. On March 7, 2014, a company we will refer to as Bidder B and Exelon each entered into non-disclosure agreements with PHI. On March 10, 2014, a company we will refer to as Bidder C entered into a non-disclosure agreement with PHI. On March 11, 2014, a company we will refer to as Bidder D entered into a non-disclosure agreement with PHI. On March 14, 2014, a company we will refer to as Bidder E entered into a non-disclosure agreement with PHI. On March 24, 2014, one of the potential counterparties indicated it was not interested in participating in Phase I. Each of the non-disclosure agreements entered into by PHI included a "don't ask, don't waive" standstill provision that prohibited the potential counterparty from making a proposal for PHI unless PHI asks for such proposal and prohibited such counterparty from asking PHI for a waiver of such provision.

Between March 13, 2014 and March 24, 2014, management of PHI provided each of Exelon and Bidders B, C, D and E with limited due diligence and

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non-public financial information regarding PHI, which included participating in due diligence calls with representatives and outside advisors of each of Exelon and Bidders B, C, D and E.

On March 17, 2014, the Finance Committee of the Board held a meeting that was also attended by certain members of senior management. At the meeting, management of PHI updated the members of the Finance Committee as to the status of Phase I, including the fact that PHI had entered into a non-disclosure agreement with each of Exelon and Bidders B, C, D and E, the status of due diligence materials provided to each of the various counterparties and the description of due diligence calls held with each of the various counterparties. Senior management and PHI's advisors stated that they would regularly update the Finance Committee on the status of Phase I.

On March 27, 2014, PHI received indications of interest from Exelon and each of Bidders B, C, D and E. The indication of interest from Exelon provided for an acquisition of PHI in an all cash transaction for \$24.00 per share; the indication of interest from Bidder D provided for an acquisition of PHI in an all cash transaction for \$26.00 per share; the indication of interest from Bidder E provided for an acquisition of PHI in a cash and stock transaction (with stock representing 50% to 75% of the consideration) amounting in the aggregate to a nominal value of \$24.00 per share; and the indication of interests from Bidders B and C were each at nominal values lower than \$24.00 per share.

On March 29, 2014, certain members of senior management of PHI and representatives of Lazard and Sullivan & Cromwell met to review the indications of interest received from each of Exelon and Bidders B, C, D and E and held calls with each of such counterparties to clarify and ask questions with respect to the indication of interest submitted by each counterparty.

On April 1, 2014, the Finance Committee of the Board held a meeting that was also attended by certain members of senior management and representatives of Lazard and Sullivan & Cromwell. Senior management reviewed with the Finance Committee PHI's updated long-term base case plan and regulatory upside case, which upside case assumed, among other things (as discussed in "—Forecasted Financial Information" beginning on page 46), 12-month forward reliability capital expenditures in the rate base in each of PHI's relevant jurisdictions. The Finance Committee discussed changes to both plans since September 2013 and potential risks and benefits contained in such plans. Senior management also discussed with the Finance Committee the potential negative financial impact on the base case plan if PHI were to enter into a merger agreement and be prohibited or limited in its ability to make rate case

filings for approximately 18 months while a transaction was pending. Representatives of Lazard also reviewed the Phase I process, including the indications of interest that had been received and the calls with each of the counterparties to review and clarify their indications of interest, and discussed each of the potential counterparties with the Finance Committee. The Finance Committee discussed with senior management and PHI's advisors potential next steps, potential timing and risks to completion of a transaction, including potential mitigation strategies, if PHI were to enter into a transaction. The Finance Committee also discussed with representatives of Sullivan & Cromwell the existence of any potential conflicts of interest of management or PHI's outside advisors and the merits of the Board retaining a separate financial advisor to advise the Board and to provide a review of the sale process being conducted by PHI as well as the value of PHI.

On April 3, 2014, the Board held a meeting that was also attended by certain members of senior management and representatives of Lazard and Sullivan & Cromwell. Representatives of Lazard reviewed the Phase I process, including the five indications of interest received and the various mixes of consideration offered in connection with each indication of interest. Representatives of Lazard discussed the various potential counterparties with the Board, including certain operating and regulatory issues facing Bidder E and the potential impact that such issues could have on the stock component of its proposal. A representative of Lazard reviewed with the Board its preliminary valuation of PHI on a standalone basis, its preliminary analysis of the indications of interest received and noted that in its view, the universe of potential buyers contacted included the parties with the greatest likelihood to have the financial resources and strategic intent to acquire PHI. Members of senior management reviewed the updated base case and regulatory upside case projections that were provided to the Finance Committee on April 1, 2014 and discussed the material differences between the two. A representative of Sullivan & Cromwell reviewed with the Board the directors' fiduciary duties under Delaware law. Members of senior management discussed with the Board certain regulatory considerations in connection with any merger transaction, including the regulatory approval process, potential risks related to the inability to complete a merger transaction and possible steps that could be taken to mitigate such risks, the likelihood that PHI would be unable to file new rate cases while a merger transaction was pending, the potential financial impact on PHI of up to an 18 month hiatus in new rate case filings and recent conditions imposed in other merger transactions by the regulators in jurisdictions relevant to PHI. The Board also discussed the potential retention by the Board of a separate financial advisor to review the sale process being undertaken by PHI.

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conduct a financial valuation of PHI independent of the valuation being conducted by Lazard and render a fairness opinion independent of the opinion that Lazard might be asked to provide. After discussion, the Board determined, based on the indications of interest received and the discussions with the counterparties regarding their indications of interest, to continue discussions with Exelon and Bidder D to determine if PHI could reach an agreement with either of such parties, at a price and on terms, including with respect to closing certainty and regulatory commitments, that the Board believed would achieve the best value reasonably available for PHI's stockholders in a transaction that would be likely to close. We refer to this aspect of the process as Phase II. The Board also determined that the Finance Committee should receive regular updates on the status of Phase II from senior management and PHI's advisors. Following this meeting, Exelon and Bidder D were invited to participate in Phase II and Bidders B, C and E were informed that they were not being invited to participate in Phase II.

Following the April 3, 2014 Board meeting and at the request of the Board, senior management of PHI and PHI's Lead Independent Director had discussions with Morgan Stanley regarding the potential retention by the Board of Morgan Stanley as a financial advisor, with Morgan Stanley having confirmed their availability to be so retained. On April 10, 2014, PHI received information from Morgan Stanley in response to questions posed by PHI as to any potential conflicts that would exist if Morgan Stanley were engaged by the Board as its financial advisor. On April 12, 2014, and following review of Morgan Stanley's prior relationships and notification by Morgan Stanley to PHI that there were no conflicts, Morgan Stanley executed an engagement letter with the Board. PHI had a due diligence call with Morgan Stanley on April 16, 2014.

On April 9, 2014, representatives of PHI and a representative of Sullivan & Cromwell met with representatives of Bidder D and a representative of outside counsel to Bidder D to discuss regulatory approval matters, including the nature of the potential regulatory commitments that Bidder D might be expected to make in order to secure the necessary regulatory approvals in the event of a transaction between PHI and Bidder D and the process for seeking and obtaining those approvals.

On April 10, 2014, the Finance Committee of the Board held a meeting that was also attended by certain other members of the Board, certain members of senior management and representatives of Lazard and Sullivan & Cromwell. The Finance Committee was provided with an update on Phase II, including with respect to the status of a draft Merger Agreement, the status of the establishment of an electronic data room, the status of discussions with Morgan Stanley

regarding its possible retention as a financial advisor to the Board, the discussions with counterparties who were not invited to proceed in Phase II, the status of PHI's consideration of regulatory approval matters, and the results of a meeting on regulatory matters that occurred with Bidder D on April 9, 2014. A representative of Sullivan & Cromwell also discussed with the Finance Committee key terms of a draft of a proposed Merger Agreement that had been prepared by Sullivan & Cromwell and members of senior management of PHI. In particular, Sullivan & Cromwell discussed with the Board a provision in the proposed Merger Agreement providing for a \$180 million reverse termination fee which a buyer would pay to PHI if the transaction did not close due to failure to receive regulatory approvals as a way to partially compensate PHI in the event of termination of the Merger Agreement for the inability of PHI to file new rate cases while a merger transaction was pending. Other provisions related to regulatory matters were also discussed. The representative of Sullivan & Cromwell also discussed with the Finance Committee a structure whereby PHI would obtain from the counterparty an up-front cash payment in the amount of the proposed reverse termination fee by requiring the counterparty to purchase Company preferred stock at the time the Merger Agreement was executed.

Later on April 10, 2014, representatives of PHI and a representative of Sullivan & Cromwell met with representatives of Exelon and a representative of Kirkland & Ellis LLP, outside counsel to Exelon, which we refer to as Kirkland & Ellis, to discuss regulatory approval matters, including the nature of the potential regulatory commitments that Exelon might be expected to make in order to secure the necessary regulatory approvals in the event of a transaction between PHI and Exelon and the process for seeking and obtaining those approvals.

On April 11, 2014, an initial draft of the Merger Agreement was provided to Exelon and Bidder D. On April 11, 2014, PHI made available to each of Exelon and Bidder D additional non-public information regarding PHI in an electronic data room. Management of PHI and representatives of Lazard also continued to respond to additional due diligence requests from Exelon and Bidder D.

During the week of April 14, 2014, PHI held management meetings with each of Bidder D and Exelon.

On April 17, 2014, the Finance Committee of the Board held a meeting that was also attended by certain other members of the Board, members of senior management and representatives of Lazard and Sullivan & Cromwell. The Finance Committee was provided with an update on Phase II, including with respect to the management due diligence meetings that took place with each of Exelon and Bidder D, the

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fact that the draft Merger Agreement had been provided to the counterparties on April 11, 2014 and that revised drafts of the Merger Agreement were expected from each of Exelon and Bidder D the week of April 20, 2014, the regulatory approval and commitment discussions held with each of Exelon and Bidder D, and possible timing for receiving final proposals from each of Exelon and Bidder D.

On April 18, 2014, representatives of Kirkland & Ellis sent to Sullivan & Cromwell a memo describing Exelon's most significant issues with respect to the April 11, 2014 Merger Agreement draft provided by PHI, including the amount and timing of the payment of a reverse termination fee, the definition of burdensome condition as it related to the level of regulatory commitments Exelon would be required to agree to with regulators, various deal protection provisions (particularly the terms of the no-shop provision and the amount and conditions for payment by PHI of a break-up fee), PHI's ability to pay a stub dividend to its stockholders prior to closing, and the length of time during which Exelon would be required to maintain certain levels of employee compensation and benefits after closing a merger transaction. On April 21, 2014, representatives of Sullivan & Cromwell discussed Exelon's most significant issues with representatives of Kirkland & Ellis. In particular, Sullivan & Cromwell provided guidance that limitations on the reverse termination fee and narrowing the definition of burdensome condition may significantly disadvantage Exelon's bid.

On April 18, 2014, the Compensation/Human Resources Committee of the Board, or the Compensation Committee, also held a meeting that was also attended by representatives of Sullivan & Cromwell, Covington & Burling, LLP, outside counsel to PHI with respect to compensation matters, which we refer to as Covington & Burling, and Pearl Meyer & Partners, LLC, the independent compensation consultant to the Compensation Committee, which we refer to as PM&P. The Compensation Committee discussed with its advisors its desire to extend the terms of Mr. Rigby's employment with PHI through the completion of a transaction in the event that PHI entered into a merger agreement with a counterparty. A representative of Sullivan & Cromwell informed the Compensation Committee that each of Exelon and Bidder D had indicated a preference to have Mr. Rigby remain as Chairman, President and Chief Executive Officer of PHI through completion of any merger transaction.

On April 21, 2014, representatives of PHI and Manatt, Phelps & Phillips, LLP, special regulatory counsel to PHI, met with representatives of Exelon and Kirkland & Ellis to discuss strategies for seeking necessary regulatory approvals.

On April 22, 2014, outside counsel to Bidder D sent to representatives of Sullivan & Cromwell comments on the April 11, 2014 Merger Agreement draft provided

by PHI. On April 23, 2014, after discussion with senior management of PHI, Sullivan & Cromwell discussed with outside counsel to Bidder D the significant issues with respect to its revised draft of the Merger Agreement, including the timing, triggers for payment and amount of a reverse termination fee, the definition of burdensome condition as it relates to the level of regulatory commitments Bidder D would be required to agree to with regulators, deal protection provisions, the definition in the draft of the Merger Agreement of a Company material adverse effect, PHI's ability to pay a stub dividend to its stockholders prior to closing, and the treatment of employee matters with respect to the period between signing and closing.

On April 23, 2014, Kirkland & Ellis sent representatives of Sullivan & Cromwell comments on the April 11, 2014 draft of the Merger Agreement provided by PHI. The comments reflected discussions had during the call between Sullivan & Cromwell and Kirkland & Ellis on April 21, 2014.

On April 24, 2014, the Finance Committee of the Board held a meeting that was also attended by all of the other members of the Board, certain members of senior management and representatives of Lazard, Morgan Stanley and Sullivan & Cromwell. A representative of Lazard discussed the status of various aspects of Phase II, including the proposed financing plans of each of Exelon and Bidder D and discussions by these potential counterparties regarding the transaction with the credit rating agencies, receipt of a revised draft of the Merger Agreement from each of Exelon and Bidder D, that final proposals were expected to be received on April 25, 2014, and that management and PHI's advisors would discuss the proposals and endeavor to negotiate terms with the potential counterparties in advance of the Board's meeting scheduled for April 29, 2014. After discussion, the Finance Committee determined that it would recommend to the Board that the Board meeting to consider the final proposals be held on April 29, 2014, and, based on terms and price, that a Board meeting be scheduled after the close of the market on May 2, 2014 to discuss and decide whether to proceed with a transaction and if so, to vote on a merger agreement with the leading bidder. A representative of Sullivan & Cromwell also reviewed with the directors the process undertaken by the Board in Phase I and Phase II and discussed with the directors certain aspects of the draft Merger Agreement and comments thereto from the counterparties. A representative of Sullivan & Cromwell also discussed with the directors that the non-disclosure agreements that PHI had entered into with each counterparty contained standstills that include "don't ask, don't waive" provisions and the effect of such provisions once PHI enters into a merger agreement. After discussion, the directors expressed the view that the "don't ask, don't waive"

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aspect of the standstill should be waived by PHI with respect to the counterparties who were not invited to participate in Phase II. With respect to Exelon and Bidder D, the Finance Committee and other Board members present determined that such counterparties should be informed that such provision would not be waived, and the provision would be enforced, with respect to the party that is not successful, so as to enable PHI to obtain each party's best price and terms as part of Phase II.

On April 24, 2014, the Board held a meeting that was also attended by certain members of senior management and a representative of Sullivan & Cromwell. A representative of Sullivan & Cromwell discussed with the Board the application of Delaware law with respect to evaluating the offers to be received, the duty of directors to consider both price and closing risks associated with any proposal and the complexities that can arise in such analysis based on contract terms and other differences between potential counterparties.

On April 24, 2014, the Compensation Committee also held a meeting that was attended by representatives of Sullivan & Cromwell, Covington & Burling and PM&P. The Compensation Committee discussed the possible extension of Mr. Rigby's employment agreement for a period of up to two years if PHI were to enter into a merger agreement, possible terms of such an extension agreement, discussions with Mr. Rigby regarding the terms thereof and the desire of each of Exelon and Bidder D to have Mr. Rigby remain as President and Chief Executive Officer of PHI while a merger transaction is pending. The Compensation Committee determined to continue discussions regarding such possible extension and obtain additional information regarding the amounts that would be payable in connection therewith.

After the April 24, 2014 discussions between PHI's directors, senior management and advisors at the Board meeting, at PHI's direction, Lazard informed Exelon that based on the price offered in its initial indication of interest and Exelon's comments on the draft Merger Agreement received on April 23, 2014, Exelon's proposal was less attractive on price and transaction terms, and that Exelon should take these matters into consideration when submitting its final proposal on April 25, 2014. At PHI's direction, Lazard also advised each of Exelon and Bidder D that the bids submitted on April 25, 2014 should represent their respective best and final offers and that each of them should not assume it would have an opportunity thereafter to improve their offers.

On April 25, 2014, PHI received final proposals to acquire PHI from each of Exelon and Bidder D, including revised drafts of the Merger Agreement. Exelon proposed to pay \$27.00 per share in cash and Bidder D proposed to pay \$26.50 per share in cash.

From April 26, 2014 through April 28, 2014, based on guidance received from the Board and members of

senior management, representatives of Sullivan & Cromwell negotiated, and exchanged multiple revised drafts of the Merger Agreement with outside counsel for each of Exelon and Bidder D to address the significant issues raised by them, as discussed above. During this exchange, the parties focused on the definition of burdensome condition, the timing of the preferred stock investment to fund the reverse termination fee, the amount of the termination fee and the circumstances under which the termination fee would be payable.

On April 27, 2014, the Board held a meeting that was also attended by certain members of senior management and representatives of Lazard, Morgan Stanley and Sullivan & Cromwell. Mr. Rigby updated the Board with respect to the process since the April 24, 2014 Board meeting, including the proposals submitted on April 25, 2014 by Exelon of \$27.00 per share in cash and by Bidder D of \$26.50 per share in cash. Mr. Rigby also discussed with the Board an April 26, 2014 meeting among certain members of senior management of PHI and PHI's outside legal and financial advisors during which different possible approaches had been discussed to seek to take advantage of the significant competition between Exelon and Bidder D to permit PHI to obtain the best possible price and the greatest transaction certainty. He advised the Board that during this meeting senior management and the outside advisors agreed with a proposed strategy of accelerating the process to reach final agreement with Exelon, as the bidder presenting both the highest price and best proposed contractual terms at the time, and given the risk to the process from public disclosure or speculation regarding a potential transaction, but continuing to negotiate strongly for the best possible contractual protections around transaction certainty from both bidders and remaining open throughout to the possibility of obtaining higher prices from Exelon and Bidder D. Mr. Rigby also discussed a subsequent telephone conversation on April 26, 2014 with representatives of Morgan Stanley and PHI's Lead Independent Director with respect to the foregoing strategy in which they agreed with the strategy. Mr. Rigby also described negotiations between representatives of Sullivan & Cromwell and counsel to each of Exelon and Bidder D on the draft of the Merger Agreement and the progress that had been made with respect to the significant issues discussed above. Mr. Rigby noted that based on these discussions, he spoke to Mr. Crane on April 26, 2014 to indicate PHI's potential desire to accelerate the timetable for entering into the Merger Agreement to following the close of business on April 29, 2014.

A representative of Sullivan & Cromwell discussed the status of negotiations with respect to the Merger Agreement with Exelon. The representative of Sullivan & Cromwell noted that Exelon had agreed generally to accept the material features of PHI's position on

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significant items, including the formulation of the definitions of burdensome condition and Company material adverse effect proposed by PHI on April 26, 2014, and agreeing that PHI could pay a stub dividend to PHI's common stockholders prior to closing. The representative of Sullivan & Cromwell also reported that agreement had been reached with Exelon on various deal protection provisions and on the amount and terms of the reverse break-up fee (whereby Exelon would agree to purchase \$90 million of PHI's preferred stock upon execution of the Merger Agreement, and would agree to purchase \$18 million of preferred stock every 90 days thereafter up to an aggregate of \$180 million). The representative of Sullivan & Cromwell also discussed the negotiations with respect to the Merger Agreement with Bidder D, including that Bidder D was still considering PHI's proposed definition of burdensome condition (which Bidder D generally agreed to on April 28, 2014) and was resisting various aspects of the exceptions to the definition of a Company material adverse effect, but that Bidder D had agreed to purchase \$180 million of PHI's preferred stock upon the signing of the Merger Agreement to fund the reverse termination fee and had agreed that PHI could pay a stub dividend to its common stockholders prior to closing.

After discussion, the Board determined that, given the status of the Merger Agreement discussions, the limited number of open issues, and the advice from senior management and PHI's advisors, it would be beneficial to PHI for the transaction and confidentiality reasons discussed above to seek to accelerate the timing of entering into a merger agreement. The Board also determined that senior management and PHI's advisors should proceed on such accelerated basis understanding that facts and circumstances could change such that the Board might not be in a position to make a decision on April 29, 2014. There was discussion of the possibility of accelerating the timing for reaching final agreement with both Exelon and Bidder D, but after a thorough discussion with senior management and its advisors that alternative was viewed as impractical to achieve with respect to both Exelon and Bidder D simultaneously. The Board concurred with senior management and PHI's advisors, and determined that if Bidder D ended up having the more attractive proposal, PHI would defer final action on that proposal until May 2, 2014.

On April 28, 2014, the Chief Executive Officer of Bidder D called Mr. Rigby and asked what level of price increase was necessary for Bidder D to be the highest bidder. In response, Mr. Rigby asked for Bidder D's best and final price, and in response, Bidder D raised its bid to \$27.00 per share in cash. Following that call, on April 28, 2014, Mr. Rigby

informed Mr. Crane that Bidder D had raised its bid and asked Mr. Crane for Exelon's best and final price. In response, Exelon raised its bid to \$27.25 per share in cash.

During the morning of April 29, 2014, the Board held a meeting attended by certain members of senior management and representatives of Lazard, Morgan Stanley and Sullivan & Cromwell. Mr. Rigby updated the Board with respect to the increased bids made by each of Exelon and Bidder D. Mr. Rigby noted that each such counterparty had indicated to Mr. Rigby that its increased bid was its best and final offer on price, and that based on the higher price being offered by Exelon and the other terms in the Merger Agreement draft that Exelon had agreed to, that the purpose of the meeting was for the Board to discuss and consider a proposed transaction with Exelon. Representatives of Sullivan & Cromwell reviewed with the Board the directors' fiduciary duties under Delaware law, the process followed by the Board in connection with considering the transaction and the terms of the draft Merger Agreement with Exelon. A representative of Lazard reviewed with the Board PHI's standalone management plan and discussed the firm's valuation analysis of PHI based on such plan as compared to the prices being offered by Exelon and Bidder D, including that the top end of the discounted cash flow analysis with respect to the management base case was below the prices being offered by each of Exelon and Bidder D. A representative of Morgan Stanley reviewed with the Board the sale process PHI had followed and Morgan Stanley's valuation analysis with respect to PHI, including the premium and multiple to be received in the Merger. Members of senior management reviewed with the Board the anticipated regulatory approval process, the regulatory commitments agreed to by Exelon and the due diligence that senior management had performed on Exelon and Bidder D, including with respect to regulatory relationships, reliability, operating track records and employee matters. Mr. Crane and certain other members of senior management of Exelon then joined the Board meeting. Mr. Crane addressed the Board, including as to Exelon's regulatory commitments in connection with the Merger.

On April 29, 2014, the Compensation Committee also held a meeting that was attended by representatives of Sullivan & Cromwell, Covington & Burling and PM&P. The Compensation Committee reviewed and discussed the terms of the proposed extension of Mr. Rigby's employment agreement and approved, subject to PHI entering into the Merger Agreement, the amendment of Mr. Rigby's employment agreement on such terms, which would, among other things, extend the term of his employment for an additional period of up to two years.

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In the afternoon of April 29, 2014, the Board held a meeting attended by certain members of senior management and representatives of Lazard, Morgan Stanley and Sullivan & Cromwell. Representatives of Sullivan & Cromwell summarized the negotiations that had taken place since the meeting earlier in the day and presented the final Merger Agreement, including the certificate of designation and subscription agreement for the Series A preferred stock, which Exelon would purchase in order to fund the reverse termination fee. Lazard delivered its oral opinion to the Board (which was subsequently confirmed by delivery of a written opinion dated April 29, 2014), to the effect that, as of April 29, 2014, and based upon and subject to the assumptions, procedures, factors, qualifications and limitations set forth in its opinion, the Merger consideration of \$27.25 in cash per share of outstanding Company common stock to be paid to holders of such Company common stock (other than excluded shares) in the Merger was fair, from a financial point of view, to such holders. Morgan Stanley delivered its oral opinion to the Board (which was subsequently confirmed by delivery of a written opinion dated April 29, 2014), to the effect that, as of April 29, 2014, based upon and subject to the assumptions made, procedures followed, matters considered and qualifications and limitations on the scope of review undertaken by Morgan Stanley as set forth in its opinion, the Merger consideration to be received by holders of shares of Company common stock (other than excluded shares) pursuant to the Merger Agreement was fair from a financial point of view to such holders. Thereafter, the Board

unanimously determined that the Merger is fair to and in the best interests of PHI and its stockholders and approved and declared advisable the Merger Agreement, the Merger and the other transactions contemplated thereby, and resolved that the Merger Agreement be submitted for consideration by the holders of PHI's common stock at a special meeting of stockholders, and recommended that such stockholders of PHI vote to adopt the Merger Agreement.

PHI then sent letters to each of Bidders B, C and E waiving the "don't ask, don't waive" aspect of the standstill provision contained in the non-disclosure agreements between PHI and each of such bidders.

Immediately thereafter, Exelon, PHI and Merger Sub executed the Merger Agreement and the subscription agreement with respect to the Series A preferred stock. On April 30, 2014, PHI and Exelon issued a joint press release announcing the execution of the Merger Agreement prior to the commencement of trading on the NYSE. The Certificate of Designation with respect to the Series A preferred stock was filed by PHI with the Secretary of State of the State of Delaware on April 30, 2014.

On July 18, 2014, PHI, Exelon and Merger Sub entered into the amended and restated Merger Agreement following approval thereof by their respective boards of directors. The amended and restated Merger Agreement did not make any material changes to the terms of the original Merger Agreement.

## Reasons for the Merger; Recommendation of Our Board

### Reasons for the Merger

The Board held six meetings at which the possibility of initiating or executing the exploration of a sales process was discussed. Beginning on February 26, 2014, PHI's outside legal advisor, Sullivan & Cromwell, and financial advisor, Lazard, participated in portions of the six meetings of the Board at which such subject matter was discussed. On April 12, 2014, the Board also retained Morgan Stanley as an additional financial advisor. The Board met in executive session at each meeting without management and advisors.

At a meeting held on April 29, 2014, the Board unanimously determined that the Merger is advisable and fair to and in the best interests of PHI and its stockholders, approved the Merger Agreement and resolved to recommend that PHI's stockholders adopt the Merger Agreement. On July 18, 2014, the Board approved amendments to the Merger Agreement and resolved to recommend that PHI's stockholders adopt the amended and restated Merger Agreement.

The Board believes that PHI's operating performance was improving and that over time, improved operating performance should improve regulatory outcomes and financial performance. However, the unsolicited inquiries regarding a possible transaction, combined with the announcement of Mr. Rigby's retirement plans, caused the Board to consider whether a sale transaction might be preferable to the status quo. The results of that exploration led to the Merger Agreement with Exelon and the \$27.25 Per Share Merger Consideration, which the Board approved because it believes it compensates stockholders not only for the value of PHI's current business and results but also for the potential that these results will improve as future regulatory outcomes improve. The Board also believes that the time to execute a sale for cash is advantageous because utility trading multiples are at historic highs due in part to the low interest rate environment and the resulting attractiveness of utility dividend yields. While it is impossible to accurately predict future