



STATE OF DELAWARE
THE PUBLIC SERVICE COMMISSION
861 SILVER LAKE BOULEVARD, SUITE 100
CANNON BUILDING
DOVER, DELAWARE 19904

TELEPHONE: (302) 736-7500
FAX: (302) 739-4849

January 8, 2009

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

VIA ELECTRONIC FILING

Re: Application of Exelon Corporation under Section 203 of the Federal
Power Act
Docket No. EL09-32-000

Dear Secretary Bose:

For the referenced docket, please find enclosed the Joint Comments of the Delaware Public Service Commission and the Delaware Department of Natural Resources and Environmental Control to the Application of Exelon Corporation Under Section 203 of the Federal Power Act.

Please call me with any questions or concerns.

Very truly yours,

/s/ Joseph C. Handlon
Joseph C. Handlon
Deputy Attorney General
Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100

102 West Water Street
Dover, DE 19904
Phone: 302-736-7558
Fax: 302-739-4849
joseph.handlon@state.de.us

Enclosure

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

-----)
Exelon Corporation) Docket No. EC09-32-000
-----)

**JOINT COMMENTS OF THE DELAWARE PUBLIC
SERVICE COMMISSION AND THE DELAWARE DEPARTMENT
OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
TO THE APPLICATION OF EXELON CORPORATION UNDER
SECTION 203 OF THE FEDERAL POWER ACT**

The Delaware Public Service Commission (the "Delaware PSC") and the Delaware Department of Natural Resources and Environmental Control ("DNREC") respectfully submit these joint comments to the Application of Exelon Corporation ("Exelon") Under Section 203 of the Federal Power Act (the "Application") as follows:

BACKGROUND

1. On December 18, 2008, Exelon submitted its Application, pursuant to section 203 of the Federal Power Act, 16 U.S.C. § 824b (the "FPA"), and Part 33 of the Commission's Regulations, of a contemplated transaction in which Exelon would: (1) acquire voting securities of NRG Energy, Inc. ("NRG"); (2) acquire control over NRG Energy, Inc. and certain NRG subsidiaries; and (3) subsequently restructure and consolidate Exelon and NRG (the "Transaction"). Application, p. 1.

2. Exelon would prefer a negotiated deal with NRG. Accordingly, the Application also sets forth a plan for a consensual merger with NRG.

However, NRG has rejected Exelon's proposal to date. Application, pp. 10-15. Thus, Exelon is planning to move forward with a hostile takeover of NRG.

3. Following its hypothetical takeover, Exelon asserts that it plans to divest itself of Dover Energy, Indian River, and Vienna Generation Station, power generation facilities in Delaware and Maryland that supply electricity to residential, industrial and commercial customers in Delaware (the "Facilities"). Application, p. 30. Exelon does not identify any potential acquirer of those facilities, nor does it provide any details regarding these proposed divestitures, other than it would divest itself of these assets within 180 days of approval of the merger with NRG. Exelon recognizes that it will have to come back to FERC to seek approval of these divestitures. Application, p. 41.

COMMENTS

4. As Exelon acknowledges, under section 203 of the FPA, no

holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire or take any security with a value in excess of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility or electric utility company with a value in excess of \$10,000,000 without first having secured an order of the Commission authorizing it to do so.

16 U.S.C. § 824b(a)(2). Section 203 also prohibits public utilities from selling or disposing of facilities subject to FERC's jurisdiction or any part thereof of a value in excess of \$10,000,000. 16 U.S.C. § 824b(a)(1)(A). Applicants under section 203 are required to make "full disclosure of all material facts," and "the burden is

on them [to] show affirmatively that the acquisition or merger is consistent with the public interest.” Pacific Power & Light Co. v. Federal Power Comm’n, 111 F.2d 1014, 1017 (9th Cir. 1940).

5. Because Exelon’s Application is based upon a number of contingencies (indeed, while seeking approval of a hostile takeover, Exelon continues to attempt to reach a negotiated deal), it recognizes, as it must, that it will have to return to FERC for approval under section 203 of the FPA before it sells and divests itself of the Facilities. Nevertheless, the undersigned submit these comments out of an abundance of caution in the event that approval of the Application could be viewed as approval of that portion of Exelon’s plan. Any order approving the Application, respectfully, should make clear that FERC is not approving the divestiture of the Facilities.

6. Exelon has not met its burden of showing that the contemplated transaction is consistent with a large percentage of the public interest that will be affected by the proposed takeover and subsequent divestiture of the Facilities. Exelon provides no details regarding how it plans to make those divestitures, including the identity of potential purchasers, and why such divestitures are consistent with the public interest. Instead it just states, as it must, that it will sell off the plants because, otherwise, it would not be able to obtain approval of the application.

7. It should also be noted that, at least with respect to the Indian River facility, NRG is obligated to perform various environmental protection actions, including air-pollution controls, ash management and contaminated site

remediation. NRG has begun work on stabilizing a contaminated site, pursuant to Secretary's Order No. 2008-A-0032 (July 30, 2008) and the related Final Plan of Remedial Action, and is undertaking reviews of additional remediation action alternatives. Also NRG has already begun installation of required air-pollution controls are already underway, pursuant to air-pollution regulations. (See Regulation NO. 1146 Electric Generating Unit (EGU) Multi-Pollutant Regulation (Exhibit A)) and under a Consent Order with the State of Delaware to make certain upgrades to its facility including the shutdown of two units and installation of various environmental upgrades to remaining units. (Exhibit B (without attachments)). There are strict deadlines for the completion of the engineering, permitting and construction of these upgrades and shutdown. The potential sale of this facility to an unknown entity with unknown financial and technical capacity could prove extremely disruptive to the process and the Court-mandated deadlines. Failure to comply timely could cause harm to human health and the environment. Moreover, circumventing these environmental obligations through a financial deal could undermine actions of important state regulatory authorities needed to provide broad public health protection. Respectfully, the Commission should condition approval of the Application upon assurances that Exelon will be bound to the Consent Order, as successor, and be required to perform any and all obligations of NRG under any and all orders, agreements and decrees, including the Consent Order.

8. Finally, the Indian River facility targeted for divestment plays a critical role in Delaware's power reliability, and the projects contained in the

Consent Order have a direct impact on Delaware's State Implementation Plans for attaining the Ozone and PM2.5 standards. Because Exelon has the burden on its Application, it should be required to explain how its proposed merger is consistent with the public interest with respect to power reliability in Delaware and with respect to NRG's obligations under these plans.

CONCLUSION

Exelon has the burden to prove that the proposed merger with NRG is consistent with the public interest. Exelon has not met its burden. Any approval of the divestiture of the Facilities is premature, as Exelon fails to detail why divestiture is consistent with the public interest. DNREC and the Delaware PSC respectfully request that, if FERC approves the Transaction, FERC clarify that it is not approving the divestiture of the Facilities and that Exelon will be bound to the Consent Order as detailed above.

Respectfully Submitted,

/s/ Joseph C. Handlon
Joseph C. Handlon
Deputy Attorney General
861 Silver Lake Boulevard
Cannon Building, Suite 100
102 West Water Street
Dover, DE 19904
Phone: 302-736-5736
Fax: 302-739-4849
joseph.handlon@state.de.us

/s/ John A. Hughes
John A. Hughes
Secretary
Delaware Department of Natural
Resources and Environmental Control
81 Kings Highway
Dover, DE 19901
Phone: 302-739-6242
Fax: 302-739-6242
john.hughes@state.de.us

*Counsel to the Delaware Public
Service Commission*

Date: January 8, 2009

EXHIBIT A



**TITLE 7 NATURAL RESOURCES & ENVIRONMENTAL CONTROL
DELAWARE ADMINISTRATIVE CODE**

1

1100 Air Quality Management Section

1146 Electric Generating Unit (EGU) Multi-Pollutant Regulation

12/11/2006

1.0 Preamble

This regulation establishes Nitrogen Oxides (NO_x), Sulfur Dioxide (SO₂), and mercury emissions limits to achieve reductions of those pollutants from Delaware's large electric generation units. The reduction in NO_x, SO₂, and mercury emissions will: 1) reduce the impact of those emissions on public health; 2) aid in Delaware's attainment of the State and National Ambient Air Quality Standard (NAAQS) for ground level ozone and fine particulate matter; 3) help address local scale fine particulate and mercury problems attributable to coal and residual oil-fired electric generating units, 4) satisfy Delaware's obligations under the Clean Air Mercury Rule (CAMR), and 5) improve visibility and help satisfy Delaware's EGU-related regional haze obligations.

While the purpose of this regulation is to reduce air emissions, any emission control equipment installed to meet the requirements of this regulation may impact other media (e.g., water), and any overall environmental impacts must be considered by subject entities when they design their overall compliance strategy. Any emission controls installed to meet the requirements of this regulation will be subject to public review and comment through air permitting requirements of 7 DE Admin. Code 1102 and 1130.

Separate from this regulation the Department will propose regulations to address CO₂ emissions from these units, and regulations to satisfy direct fine particulate matter Reasonably Available Control Technology (RACT) and Best Available Retrofit Technology (BART) requirements. Together, these regulations will cover current and foreseeable requirements relative to the subject units.

12/11/2006

2.0 Applicability

This regulation applies to coal-fired and residual oil-fired electric generating units located in Delaware with a nameplate capacity rating of 25 MW or greater that commenced operation on or before the effective date of this regulation.

12/11/2006

3.0 Definitions

The following words and terms, when used in this regulation, shall have the following meanings:

"Administrator" means the Administrator of the United States Environmental Protection Agency or the Administrator's duly authorized representative.

"Coal" means any solid fuel classified as anthracite, bituminous, sub-bituminous, or lignite.

"Coal-fired" means combusting any amount of coal or coal-derived fuel, alone or in combination with any amount of other fuel, during any year.

"Department" means the State of Delaware Department of Natural Resources and Environmental Control as defined in 29 Del.C., Ch 80, as amended.

TITLE 7 NATURAL RESOURCES & ENVIRONMENTAL CONTROL
DELAWARE ADMINISTRATIVE CODE

"Designated representative" means the natural person who is authorized by the owners and operators of the source and all units at the source to legally bind each owner and operator in matters pertaining to this regulation. If the source subject to this regulation is also subject to the Federal Acid Rain Program, then this natural person shall be the same person as the designated representative under the Acid Rain Program.

"Emissions" means air pollutants exhausted from a unit or source into the atmosphere.

"Generator" means a device that produces electricity.

"Heat input" means the product (in MMBTU/time or TBTU/time) of the gross calorific value of the fuel (in MMBTU/lb or TBTU/lb) and the fuel feed rate (in lb of fuel/time) into a combustion device; or as calculated by any other method approved by the Department and the Administrator, and does not include the heat derived from pre-heated combustion air, recirculated flue gasses, or exhaust from other sources.

"Inlet mercury" means the average concentration of mercury in the flue gas at the inlet to any pollution control device or devices

"Nameplate capacity" means, starting from the initial installation of a generator, the maximum electrical generating output (in MWe) that the generator is capable of producing on a steady state basis and during continuous operation (when not restricted by seasonal or other de-ratings) as specified by the manufacturer of the generator or, starting from the completion of any physical change in the generator resulting in an increase in the maximum electrical generating output (in MWe) that the generator is capable of producing on a steady state basis and during continuous operation (when not restricted by seasonal or other de-ratings), such increased maximum amount as specified by the person conducting the physical change.

"Operator" means any person who operates, controls, or supervises a unit or source subject to this regulation and shall include, but not be limited to, any holding company, utility system, or plant manager of such unit or source.

"Ounce" means 28.4 grams.

"Owner" means: A) any holder of any portion of the legal or equitable title in a unit; B) any purchaser of power from a unit under a life-of-the-unit, firm power contractual arrangement, provided that, unless expressly provided for in a leasehold agreement, owner shall not include a passive lessor, or a person who has an equitable interest through such lessor, whose rental payments are not based (either directly or indirectly) on the revenues or income from the unit.

"Residual oil" means No. 5 or No. 6 fuel oil.

"Ton" means 2000 pounds.

"Unit" means, for the purposes of this regulation, a stationary, fossil-fuel-fired boiler supplying all or part of its output to an electric generating device.

12/11/2006

4.0 NO_x Emissions Limitations

4.1 From May 1, 2009 through December 31, 2011, no unit subject to this regulation shall emit NO_x at a rate exceeding 0.15 lb/MMBTU.

4.1.1 Compliance with the requirements of 4.1 of this regulation shall be demonstrated on a rolling 24-hour average basis.

- 4.1.2 NO_x emissions from multiple units subject to this regulation at a common facility may be averaged on a heat input basis to demonstrate compliance with the requirements of 4.1 of this regulation.
- 4.2 On and after January 1, 2009, no unit subject to this regulation shall emit annual NO_x mass emissions that exceed the values shown in Table 4-1 of this regulation.
 - 4.2.1 From January 1, 2009 through December 31, 2011, compliance with the requirements of 4.2 of this regulation may be achieved by demonstrating that the total number of tons of NO_x emitted from a common facility does not exceed the sum of the tonnage limitations for all of the units subject to this regulation at that facility.
 - 4.2.2 Compliance with the requirements of 4.2 of this regulation shall not be achieved by using, tendering, or otherwise acquiring NO_x allowances under any state or federal emission trading program.
 - 4.2.3 For the purpose of determining compliance with the requirements of 4.2. of this regulation, the total tons for a specified period shall be calculated as the sum of all recorded hourly emissions, with any remaining fraction of a ton equal to or greater than 0.50 ton deemed to equal one ton and any remaining fraction of a ton less than 0.50 ton deemed equal to zero tons.
- 4.3 On and after January 1, 2012, no unit subject to this regulation shall emit NO_x at a rate exceeding 0.125 lb/MMBTU, demonstrated on a rolling 24-hour average basis.
- 4.4 Compliance with the requirements of 4.1 through 4.3 of this regulation shall be demonstrated with a continuous emissions monitoring system that is installed, calibrated, operated, and certified in accordance with 40 CFR Part 75 (May 18, 2005 amendment) or other method approved by the Department and the Administrator, and meeting the requirements of 40 CFR Part 96, subpart HH (April 28, 2006 amendment).

12/11/2006

5.0 SO₂ Emissions Limitations

- 5.1 From May 1, 2009 though December 31, 2011, no coal fired unit subject to this regulation shall emit SO₂ at a rate exceeding 0.37 lb/MMBTU heat input.
 - 5.1.1 Compliance with the requirements of 5.1 of this regulation shall be demonstrated on a 24-hour rolling average basis.
 - 5.1.2 SO₂ emissions from multiple units subject to this regulation at a common facility may be averaged on a heat input basis to demonstrate compliance with the requirements of 5.1 of this regulation.
- 5.2 On and after January 1, 2012, no coal-fired unit subject to this regulation shall emit SO₂ at a rate exceeding 0.26 lb/MMBTU heat input, demonstrated on a rolling 24-hour average basis.
- 5.3 On and after January 1, 2009, no unit subject to this regulation shall emit annual SO₂ mass emissions that exceed the values shown in Table 5-1 of this regulation.
 - 5.3.1 From January 1, 2009 through December 31, 2011, compliance with the requirements of 5.3 of this regulation may be achieved by demonstrating that the total number of tons of SO₂ emitted from a common facility does not exceed the sum of the tonnage limitations for all of the units subject to this regulation at that facility.

TITLE 7 NATURAL RESOURCES & ENVIRONMENTAL CONTROL
DELAWARE ADMINISTRATIVE CODE

- 5.3.2 Compliance with the requirements of 5.3 of this regulation shall not be achieved by using, tendering, or otherwise acquiring SO₂ allowances under any state or federal emission trading program.
- 5.3.3 For the purpose of determining compliance with the requirements of 5.3 of this regulation, the total tons for a specified period shall be calculated as the sum of all recorded hourly emissions, with any remaining fraction of a ton equal to or greater than 0.50 ton deemed to equal one ton and any remaining fraction of a ton less than 0.50 ton deemed equal to zero tons.
- 5.4 Compliance with the requirements of 5.1 through 5.3 of this regulation shall be demonstrated with a continuous emissions monitoring system that is installed, calibrated, operated and certified in accordance with 40 CFR Part 75 (May 18, 2005 amendment) or other method approved by the Department and the Administrator, and meeting the monitoring and reporting requirements of 40 CFR Part 96, subpart HHH (April 28, 2006 amendment).
- 5.5 On and after January 1, 2009, no residual oil with a sulfur content in excess of 0.5%, by weight, shall be received for any residual oil-fired unit subject to this regulation.
- 5.5.1 Compliance with the requirements of 5.5 of this regulation shall be demonstrated by fuel oil sampling and analysis. Samples shall be collected:
- 5.5.1.1 From the transport vessel for each shipment of residual fuel oil received at the facility for combustion in the subject residual oil-fired unit, or
- 5.5.1.2 From the supply pipeline each day residual oil is delivered to the facility via pipeline for combustion in a residual oil-fired unit subject to this regulation, after sufficient fuel oil has been drained from the sampling line to remove any fuel oil that may have been standing in the sampling line, or
- 5.5.1.3 From the supply pipeline at the inlet to the residual oil-fired unit subject to this regulation each day the unit fires any quantity of oil fuel, after sufficient fuel oil has been drained from the sampling line to remove any fuel oil that may have been standing in the sampling line.
- 5.5.2 Fuel oil samples shall be analyzed in accordance with ASTM D 129-00, ASTM D 1552-03, ASTM D 2622-05, or ASTM D 4294-03.

12/11/2006

6.0 Mercury Emissions Limitations

- 6.1 From January 1, 2009 through December 31, 2012, any coal-fired unit subject to this regulation shall, on a quarterly average basis:
- 6.1.1 Emit mercury at a rate that does not exceed 1.0 lb/TBTU heat input, or
- 6.1.2 Capture and control a minimum 80% of baseline inlet mercury emissions.
- 6.2 On or after January 1, 2013, any coal-fired unit subject to this regulation shall, on a quarterly average basis:
- 6.2.1 Emit mercury at a rate that does not exceed 0.6 lb/TBTU heat input, or
- 6.2.2 Capture and control a minimum 90% of baseline inlet mercury emissions.

- 6.3 Annual mercury mass emissions from the coal-fired units subject to this regulation shall not exceed the values shown in Table 6-1 of this regulation.
- 6.3.1 Compliance with the requirements of 6.3 of this regulation shall be demonstrated on an annual basis.
- 6.3.2 Compliance with the requirements of 6.3 of this regulation shall not be achieved by using, tendering, or otherwise acquiring mercury allowances under any state or federal emissions trading program.
- 6.4 Compliance with the requirements of 6.1 through 6.3 of this regulation shall be demonstrated as follows:
- 6.4.1 Compliance with the requirements of 6.1.1, 6.2.1 and 6.3 of this regulation shall be demonstrated with a continuous emissions monitoring system that is installed, calibrated, operated, and certified in accordance with 40 CFR Part 75 (May 18, 2005 amendment) and meeting the monitoring and reporting requirements of 40 CFR Part 60 (June 9, 2006 amendment).
- 6.4.2 Compliance with the requirements of 6.1.2 and 6.2.2 of this regulation shall be demonstrated as follows:
- 6.4.2.1 During the period January 1, 2007 through March 31, 2008, the owner or operator shall conduct at least four quarterly stack tests to measure the mercury in the flue gas stream.
- 6.4.2.1.1 Except as provided for in 6.4.2.1.2 of this regulation, the test sampling location shall be located upstream of any pollution control device.
- 6.4.2.1.2 The sampling location may be located downstream of any SNCR injection points.
- 6.4.2.2 There shall be at least three valid stack tests per quarter and at least 45 days between stack tests performed for a given quarter and the stack tests performed for the preceding quarter, unless otherwise approved by the Department.
- 6.4.2.3 Each stack test shall be conducted in accordance with a testing protocol approved by the Department. Proposed test protocols shall be submitted to the Department no less than 90 days prior to conducting the mercury tests.
- 6.4.2.4 The baseline inlet mercury emission rate for the affected unit, in lb/TBTU, shall be determined as the arithmetic average of the quarterly stack tests conducted on that unit in accordance with 6.4.2.1 of this regulation.
- 6.4.2.5 No later than June 1, 2008, the owner or operator shall submit a petition to the Department requesting the establishment of a unit specific mercury emission rate limit. As a minimum, the report shall contain the following information:
- 6.4.2.5.1 Identification and brief description of the affected unit.
- 6.4.2.5.2 A list and brief description of all emissions control equipment installed on the affected unit at the time of the stack tests, including operating status at the time of the stack tests.
- 6.4.2.5.3 An accounting of all fuels and fuel quality being fired during the emissions tests.

TITLE 7 NATURAL RESOURCES & ENVIRONMENTAL CONTROL
DELAWARE ADMINISTRATIVE CODE

- 6.4.2.5.4 Results of each quarterly mercury emissions tests.
- 6.4.2.5.5 Proposed mercury emission limits that are no greater than 20% of the baseline uncontrolled mercury emission rate determined in accordance with 6.4.2 of this regulation for the annual periods January 1, 2009 through December 31, 2012, and no greater than 10% of the baseline uncontrolled mercury emission rate determined in accordance with 6.4.2 of this regulation for the annual periods starting January 1, 2013 and beyond.
- 6.4.2.5.6 Summary description of the actions anticipated by the owner or operator of the affected unit to attain compliance with the proposed mercury emission limits.
- 6.4.2.6 The owner or operator of the affected unit shall submit to the Department any additional information requested by the Department necessary for review and approval of the petition.
- 6.4.2.7 The Department shall establish, for the affected unit, a unit specific mercury emission rate no greater than 20% of the unit's baseline uncontrolled mercury emissions rate for the period January 1, 2009 through December 31, 2012, and no greater than 10% of the unit's baseline uncontrolled mercury emission rate for the period January 2013 and beyond.

12/11/2006

7.0 Recordkeeping and Reporting

- 7.1 The owner or operator of a unit subject to this regulation shall comply with all applicable recordkeeping and reporting requirements of 40 CFR Part 75 (May 18, 2005) and this regulation.
- 7.2 The owner or operator of a unit subject to this regulation shall maintain, for a period of at least five years, copies of all measurements, tests, reports, and other information required by 40 CFR Part 75 (May 18, 2005 amendment) and this regulation. This information shall be provided to the Department upon request at any time.
- 7.3 After January 1, 2009, the owner or operator of a unit subject to this regulation shall submit to the Department semi-annual reports in conjunction with the reporting requirements of 7 **DE Admin. Code** 1130. The semi-annual reports shall contain, as a minimum, the following information:
 - 7.3.1 Tabulation of emission monitoring results reduced to one-hour averages, on a clock basis, for the period in units consistent with the applicable emission standard.
 - 7.3.2 In addition to the requirements of 8.3.1 of this regulation, the following calculations shall be made and reported in the semi-annual report:
 - 7.3.2.1 For mass emission standards based on daily limits, the daily mass emission on a calendar day basis for each day in the period, in units consistent with the applicable emission standard.
 - 7.3.2.2 For mass emissions based on an annual limit, the calendar year-to-date summation of mass emissions through the period being reported, in units consistent with the applicable emission standard.

- 7.3.2.3 For emission rate averaging, identification of the units being averaged, hourly heat input of the respective units, hourly emission rate of the respective units, and the hourly combined heat input weighted emission average for the affected units.
- 7.3.3 Identification of any period~~(s)~~ or periods of, and cause for, any invalid data averages.
- 7.3.4 Records of any repairs, adjustment, or maintenance to the monitoring system.
- 7.3.5 The results of all fuel oil sulfur analysis.
- 7.3.6 Identification of any exceedance of any emission standard provided by this regulation, cause of the exceedance, and corrective action taken in response to the exceedance.
- 7.3.7 Results from all tests, audits, and recalibrations performed during the period.
- 7.3.8 Any other relevant data requested by the Department.
- 7.3.9 A statement, "I am authorized to make this submission on behalf of the owners and operators of the affected facility or affected units for which this submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge true, accurate and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."
- 7.3.10 Signature by the designated representative.

12/11/2006

8.0 Compliance Plan

- 8.1 The owner or operator of a unit subject to this regulation shall submit a compliance plan to the Department on or before July 1, 2007.
- 8.2 The compliance plan shall contain, at a minimum, the following information:
- 8.2.1 Identification of the subject unit.
- 8.2.2 A description of any existing NO_x, SO₂, or mercury emissions control technologies installed on the unit, including identification of the initial installation date of the control technologies.
- 8.2.3 Identification of the requirements of this regulation applicable to the unit.
- 8.2.4 A description of the plan or methodology that will be utilized to demonstrate compliance with this regulation.
- 8.2.5 Identification of emission control technologies, or modifications to existing emission control technologies, that will be utilized to comply with the applicable emissions limitations of this regulation. This shall include:
- 8.2.5.1 A description of the control technology and its applicability to the subject unit.
- 8.2.5.2 The design control effectiveness or design emission rate following installation of the emission control technology on the subject unit.

**TITLE 7 NATURAL RESOURCES & ENVIRONMENTAL CONTROL
DELAWARE ADMINISTRATIVE CODE**

- 8.2.5.3 Estimated dates for start of construction, start-up of the emissions control technology, and estimated project completion date.
- 8.2.6 A description of the emissions monitoring methodology to be utilized for demonstrating compliance with the emissions limitations of this regulation, including estimated installation dates, start-up dates, and testing dates.
- 8.2.7 Identification of any planned changes to administrative or operating procedures or practices intended to achieve compliance with applicable emissions limitations of this regulation.
- 8.2.8 Any other relevant information requested by the Department.
- 8.2.9 A statement, "I am authorized to make this submission on behalf of the owners and operators of the affected facility or affected units for which this submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge true, accurate and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."
- 8.2.10 Signature by the designated representative.
- 8.3 A facility that has submitted a complete compliance plan for its impacted units in accordance with the requirements of 8.0 of this regulation may on one occasion for each unit request an extension of up to one year for any deadline set out in 5.1 and 5.3 of this regulation. The facility shall have the burden of demonstrating that good faith efforts have been made to comply with the original deadline; that the facility is unable to comply because of events or circumstances beyond the control of the facility, including any entity controlled by it; that the delay could not have been prevented by the facility's exercise of due diligence; and that the facility has taken all reasonable steps or measures to avoid or minimize the delay. The Secretary shall exercise his discretion to grant a request that satisfies all the criteria.

12/11/2006

9.0 Penalties

The Department may enforce all of the provisions of this regulation under 7 Del.C. Ch 60.

**Table 4-1
Annual NO_x Mass Emissions Limits**

Unit	Control Period NO _x Mass Emissions Limit (tons)
Edgemoor 3	773
Edgemoor 4	1339
Edgemoor 5	1348
Indian River 1	601
Indian River 2	628
Indian River 3	977
Indian River 4	2032
McKee Run	244

**Table 5-1
Annual SO₂ Mass Emissions Limits**

Unit	Control Period SO ₂ Mass Emissions Limit (tons)
Edgemoor 3	1391
Edgemoor 4	2410
Edgemoor 5	2427
Indian River 1	1082
Indian River 2	1130
Indian River 3	1759
Indian River 4	3657
McKee Run	439

**Table 6-1
Annual Mercury Mass Emissions Limits**

Unit	Mercury Mass Emissions 2009 - 2012 (ounces)	Mercury Mass Emissions 2013 and Beyond (ounces)
Edgemoor 3	266	106
Edgemoor 4	462	183
Indian River 1	207	82
Indian River 2	216	86
Indian River 3	337	134
Indian River 4	700	278

10 DE Reg. 1022 (12/01/06)

12 DE Reg. 347 (09/01/08)

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

NRG ENERGY INC.,

Plaintiff,

v.

JOHN A. HUGHES, SECRETARY,
DELAWARE DEPARTMENT OF NATURAL
RESOURCES & ENVIRONMENTAL
CONTROL,

DELAWARE DEPARTMENT OF NATURAL
RESOURCES & ENVIRONMENTAL
CONTROL,

and,

STATE OF DELAWARE,

Defendants.

NON-ARBITRATION CASE

C.A. No. 07C-02-283FSS

CONSENT ORDER

WHEREAS, Defendants Secretary John A. Hughes and the Delaware Department of Natural Resources & Environmental Control ("DNREC") issued Order No. 2006-A-0256, which adopted Regulation 1146 "Electric Generating Unit (EGU) Multi-Pollutant Regulation" (the "Regulation," attached hereto as Exhibit 1) to reduce emissions of mercury ("Hg"), Sulfur Dioxide ("SO₂") and Nitrogen Oxides ("NO_x") effective December 11, 2006;

WHEREAS, Plaintiff, NRG Energy Inc., on behalf of itself and its subsidiaries, Indian River Power LLC and Indian River Operations Inc. (hereinafter "NRG") has filed a complaint in this Court pursuant to 7 *Del. C.* § 6008(g) and 29 *Del. C.* § 10141 ("Complaint") seeking

appellate review of DNREC Regulation 1146 and claiming that the Regulation is arbitrary, capricious and otherwise not in accordance with law;

WHEREAS, NRG has filed a Compliance Plan as required by Regulation No. 1146, which indicates that NRG will fail to comply with certain emissions reductions required by Phase I of Regulation 1146;

WHEREAS, DNREC has issued a Notice of Violation ("NOV") to NRG based on the submitted Compliance Plan, which indicates expected non-compliance with Regulation 1146 (the Notice of Violation is attached hereto as Exhibit 2);

WHEREAS, NRG, Secretary Hughes and DNREC (collectively "Parties") have agreed, and the Court so finds, that this Consent Order was negotiated at arms length and in good faith, will avoid protracted litigation over the validity and legality of both the Regulation and the Notice of Violation, and is fair, reasonable and in the interest of the Parties and the people of this State;

WHEREAS, the Parties agree that resolution of the NOV and NRG's anticipated non-compliance with Regulation 1146 may be most expeditiously resolved in connection with resolution of NRG's request for appellate review of Regulation 1146 before this Court,

WHEREAS, this Consent Order produces greater long-term environmental benefits for Delaware by requiring NRG to achieve emissions reductions beyond those required by the Phase II limits for SO₂ and NO_x and to achieve mercury reductions prior to the dates required by Regulation 1146 while relieving NRG of certain obligations under Phase I of Regulation 1146;

NOW, THEREFORE, without any admission of fact or law, and without any admission of the potential violations alleged in the Complaint or listed in the Notice of Violation, and with the consent of the Parties, it is hereby ORDERED AND DECREED as follows:

6. On December 11, 2006, DNREC promulgated Regulation 1146 to reduce Hg, SO₂ and NO_x from electric generating units including NRG's Indian River Units 1, 2, 3 and 4. Regulation 1146 requires Hg, SO₂ and NO_x emissions reductions in separate phases. Phase I starts in 2009 and Phase II starts in 2012 for SO₂ and NO_x and in 2013 for Hg.

7. Regulation 1146 required NRG to submit a Compliance Plan by July 1, 2007, demonstrating how NRG intended to meet the requirements of Regulation 1146.

8. On June 29, 2007, NRG submitted its Compliance Plan, which indicated that it would not be able to install pollution reduction technologies in sufficient time to achieve the reductions on Units 1, 2, 3, and 4 necessary to comply with the required Phase I SO₂ and NO_x reductions.

9. On September 10, 2007, DNREC issued a Notice of Violation alleging that NRG's Compliance Plan is deficient and in violation of the obligations of Regulation 1146.

IV. GENERAL PROVISIONS REGARDING EMISSION REDUCTIONS

10. NRG shall achieve the emission reduction and emission rate obligations set forth in this Consent Order through the installation of control technology, fuel switching, repowering, reduced utilization, temporary or permanent shut down of units, and/or any combination thereof. The emission reductions and emission rates required by this Consent Order shall not be construed to limit NRG's rights to receive, hold, sell or transfer any emission allowances for SO₂ and NO_x that it currently owns or may receive through other federal or state programs or to use such allowances to comply with other federal or state programs. NRG may not utilize allowances issued through any state or federal program to comply with this Consent Order.

V. MERCURY EMISSION REDUCTIONS

11. By no later than December 1, 2008, NRG will operate Units 1, 2, 3, and 4, so that Hg emissions from each Unit do not exceed 1.0 lb/tBtu heat input, or shall install and operate control technology to capture and control a minimum 80 percent of baseline inlet mercury emissions.

12. Beginning on December 1, 2008, NRG shall not exceed annual Hg mass emissions limits for each of its units as follows: Unit 1 - 207 ounces; Unit 2 - 216 ounces; Unit 3 - 337 ounces; Unit 4 - 200 ounces. The first compliance demonstration shall be due 30 days after the end of the annual period (December 31, 2009), and successive annual demonstrations shall be submitted within 30 days of the end of each following calendar year.

13. NRG shall make reasonable efforts by May 1, 2011, to operate Units 3 and 4 in a manner so that Hg emissions from each Unit do not exceed 0.6 lb/tBtu heat input, or shall install and operate control technology to capture and control a minimum 90 percent of baseline inlet mercury emissions; however, NRG's compliance obligations shall be pursuant to Paragraph 14 below.

14. By no later than December 31, 2011, NRG shall operate Units 3 and 4 so that Hg emissions do not exceed 0.6 lb/tBtu heat input, or shall install and operate control technology to capture and control a minimum 90 percent of baseline inlet mercury emissions.

15. Beginning with the 2012 calendar year, NRG shall comply with and not exceed annual Hg mass emissions limits for each of its units as follows: Unit 1 - 82 ounces; Unit 2 - 86 ounces; Unit 3 - 134 ounces; Unit 4 - 278 ounces.

VI. NO_x REDUCTIONS

16. Upon signing the Consent Order, NRG shall optimize and begin year-round operation of the existing selective non-catalytic reduction ("SNCR") pollution reduction equipment on Units 3 and 4.

17. By no later than May 1, 2008, NRG shall install and operate skid-mounted SNCR on Units 1 and 2 and shall maintain the NO_x emissions from Units 1 and 2 at or below 0.30 lbs/mmBtu on a 24-hour rolling basis after installation.

18. By May 1, 2011, NRG shall make reasonable efforts to operate Units 3 and 4 in a manner so that NO_x emissions do not exceed 0.10 lbs/mmBtu on a 24-hour rolling basis, however, NRG's compliance obligations shall be pursuant to Paragraph 22 below.

19. The ozone season runs yearly from May 1st through September 30th.

A. For the 2009 through 2011 ozone seasons, NRG shall comply with a facility-wide ozone season NO_x emissions cap of 1,700 tons.

B. In the event NRG exceeds the 1,700 tons facility-wide ozone season NO_x emissions cap specified in subparagraph A above, NRG shall pay to DNREC the following stipulated penalties pursuant to the procedures set forth in Paragraph 34:

1. \$750 per ton from 1,701 tons to 1,799 tons;
2. \$1,100 per ton from 1,800 to 1,999 tons;
3. \$2,000 per ton from 2,000 tons to 2,199 tons; and
4. \$2,500 per ton from 2,200 tons and more.

20. The substitute data protocol required by 40 C.F.R. Part 75 shall be utilized for determining total tonnage or assessing stipulated penalties pursuant to Paragraph 19 in the event that NRG fails to submit parameter monitoring data sufficient to demonstrate to DNREC's satisfaction what actual NO_x emissions were during any continuous emissions monitoring system outage.

21. For the calendar years 2009 through 2011, NRG shall submit an annual report of total facility wide NO_x emissions during the ozone season to DNRFC within 30 days of the end of each ozone season.

22. By no later than December 31, 2011, NRG shall achieve NO_x emission rates of no greater than 0.10 lbs/mmBtu on a 24-hour rolling basis on Unit 3 and Unit 4. NRG will take all necessary actions to incorporate this NO_x limit into its operating permits.

VII. SO₂ REDUCTIONS

23. Between May 1, 2008 and January 1, 2012, NRG shall not receive any coal with a sulfur content exceeding 1.2 percent, except if NRG is able to accept enforceable limits of 0.20 lbs/mmBtu of SO₂ for each unit on a 24-hour rolling basis, in which case NRG may be relieved of the obligation to comply with the preceding sentence prior to January 1, 2012.

24. NRG shall make reasonable efforts by May 1, 2011, to operate Units 3 and 4 in a manner so that SO₂ emissions do not exceed 0.25 lbs/mmBtu per unit on a 24-hour rolling basis; however, NRG's compliance obligations shall be pursuant to Paragraph 25 below.

25. By no later than December 31, 2011, NRG shall operate Units 3 and 4 in a manner such that SO₂ emission rates do not exceed 0.20 lbs/mmBtu per unit on a 24-hour rolling basis. NRG will take all necessary actions to incorporate this SO₂ limit into its operating permits.

VIII. OTHER COMMITMENTS

26. Within 60 days after signing this Consent Order, NRG shall notify PJM and other pertinent or relevant entities of NRG's intent to moth ball Units 1 and 2 as required by the following two paragraphs (27 and 28). At the same time, NRG shall provide DNRFC with a copy of the notice to PJM.

IX. PERMITTING

32. This Consent Order is not a permit. Except as provided herein, this Consent Order in no way affects or relieves NRG of its responsibility to comply with all applicable federal, state and local laws, regulations and permits.

33. NRG shall apply for all necessary permits to effectuate the requirements of this Consent Order and, in particular, to seek to incorporate the SO₂ and NO_x emissions limits in Paragraphs 22 and 25, above. DNREC agrees to make all reasonable efforts to timely issue any permits required under this Consent Order.

X. ENFORCEMENT/PENALTIES

34. NRG shall pay stipulated penalties to DNREC, consistent with the requirements of Paragraph 19.B. Subject only to Paragraph 50 of this Consent Order, NRG shall pay such stipulated penalties upon written demand by DNREC no later than 30 days after NRG receives such demand. NRG shall make payment to DNREC by submitting a check payable to the State of Delaware, to Valerie S. Cizmada, Deputy Attorney General, Department of Justice, 102 W. Water Street, 3rd Floor, Dover, DE 19904.

35. In the event that NRG disputes the demand for stipulated penalties pursuant to Paragraph 50, NRG shall within 30 days deposit the disputed amount in a commercial escrow account pending resolution of the matter. If the dispute is resolved in favor of NRG, the escrowed amount plus accrued interest shall be returned to NRG. If the dispute is resolved in favor of DNREC, then DNREC shall be entitled to the amount determined to be due by the Court, plus accrued interest on such amount from the date of deposit, from the escrow account. The balance of the escrow account, if any, shall be returned to NRG.

which NRG has failed to comply with such law or requirement, and if voided, it shall be of no effect as to the particular event involved.

40. DNREC shall notify NRG in writing regarding its claim of a delay or impediment to performance within 20 business days of receipt of the Force Majeure notice required under Paragraph 38.

41. If DNREC agrees that the delay or impediment to performance has been or will be caused by circumstances beyond the control of NRG, including any entity controlled by it (including, without limitation, the issuance of an order by the Federal Energy Regulatory Commission, a federal court or the Secretary of Energy as discussed in Paragraph 51), and that it could not have prevented the delay by the exercise of due diligence, the parties shall stipulate to an extension of the required deadline(s) for all requirements(s) affected by the delay by a period equivalent to the delay actually caused by such circumstances, or such other period as may be appropriate in light of the circumstances. Such stipulation may be filed as a modification to this Consent Order by agreement of the parties pursuant to the modification procedures established in this Consent Order.

41A. If NRG is unable to operate in compliance with the emission requirements in paragraph 31 during the timeframe the Unit are ordered to operate, DNREC and NRG agree to negotiate with urgency and in good faith regarding appropriate measures to minimize relevant emissions and establish enforceable interim limits including an expedited compliance schedule if necessary.

42. If DNREC does not accept NRG's claim of a delay or impediment to performance, NRG must submit the matter to this Court for resolution to avoid other enforcement. If NRG objects the matter to this Court for resolution and the Court determines

that the delay or impediment to performance has been or will be caused by circumstances beyond the control of NRC, including any entity controlled by it, and that it could not have prevented the delay by the exercise of due diligence, NRC shall be excused as to that event(s) and delay (including any penalties), for all requirements affected by the delay for a period of time equivalent to the delay caused by such circumstances or such other period as may be determined by the Court.

43. NRC shall bear the burden of proving that any delay of any requirement(s) of this Consent Order was caused by or will be caused by circumstances beyond its control, including any entity controlled by it, and that they could not have prevented the delay by the exercise of due diligence. NRC shall also bear the burden of proving the duration and extent of any delay(s) attributable to such circumstances. An extension of one compliance date based on a particular event may, but does not necessarily, result in an extension of a subsequent compliance date or dates.

44. Unanticipated or increased costs or expenses associated with the performance of NRC's obligations under this Consent Order shall not constitute circumstances beyond its control, or serve as the basis for an extension of time under this Section.

45. Notwithstanding any other provision of this Consent Order, this Court shall not draw any inferences nor establish any presumptions adverse to any party as a result of NRC delivering a notice of Force Majeure or the parties' inability to reach agreement.

46. As part of the resolution of any matter submitted to this Court under this Section, the parties by agreement, or this Court, by order, may, in appropriate circumstances extend or modify the schedule for completion of work under this Consent Order to account for the delay in

the work that occurred as a result of any delay or impediment to performance agreed to by DNREC or approved by this Court.

XII. EFFECT OF SETTLEMENT

47. Satisfaction of the requirements of this Consent Order constitutes full settlement of, and shall forever resolve all civil liability of NRG, including its subsidiaries, Indian River Power LLC and Indian River Operations Inc., to the State of Delaware for noncompliance with the requirements of Regulation 1146, Section 8.2.4 (relating to the Compliance Plan), Section 5.1 (Phase I SO₂ Emissions Rate), and Section 4.1 (the Phase I NO_x Emission Rate), Section 4.2 (NO_x annual limit through December 31, 2011), Section 5.3 (SO₂ annual limit through December 31, 2011), and the NOV issued against NRG on September 19, 2007, related to the Compliance Plan submitted pursuant to Section 8.2.3 of Regulation 1146.

48. RESERVED.

XIII. GENERAL PROVISIONS

49. Other Laws. This Consent Order in no way affects or relieves NRG of its responsibility to comply with all applicable federal, state and local laws, regulations and permits except as provided herein with respect to Regulation 1146 and the NOV.

50. Dispute Resolution. In the event of a dispute between the Parties as to the implementation of or compliance with the Consent Order, including the imposition of stipulated penalties, the Party raising the dispute must provide written notice to the other Party within 5 business days of determining that a dispute exists. The notice must describe the nature of the dispute and set forth the raising Party's position with regard to such dispute. The Parties will meet and confer within 30 days of the notice to make a good faith effort to resolve the dispute. If the Parties are unable to resolve the dispute through informal means within an additional 30

As to DNREC

Robert Clausen, Planner
Air Quality Management
Delaware Department of Natural Resources
& Environmental Control
156 S. State Street
Dover, DE 19901

Ali Mirzakhali, Administrator
Air Quality Management
Delaware Department of Natural Resources
& Environmental Control
156 S. State Street
Dover, DE 19901

Valerie S. Gaznada
Deputy Attorney General
Department of Justice
102 W. Water Street
Dover, DE 19904

54. Either party may change either the notice recipient or the address for providing notices to it by serving the other party with a written notice setting forth such new notice recipient or address.

55. The undersigned representative of each Party to this Consent Order certifies that he or she is duly authorized by the Party whom he or she represents to enter into the terms and bind that Party to them.

56. The Parties shall bear their own costs and attorneys' fees related to this action as well as the action at the Environmental Appeals Board relating to the Regulation.

57. Effective Date. The effective date of this Consent Order shall be the date it is ordered and entered by this Court.

58. Modification. This Consent Order may be modified only by the written consent of DNREC and NRC or by Order of the Court.

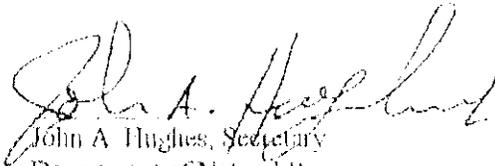
59. Continuing Jurisdiction. This Court retains jurisdiction of this case after entry of this Consent Order to enforce compliance with the terms and conditions of this Consent Order and to take any action necessary or appropriate for its interpretation, construction, execution, or modification. During the term of this Consent Order, any party may apply to the Court for any relief necessary to construe or effectuate this Consent Order.

60. This Consent Order constitutes the entire agreement and settlement between the Parties.

XIV. TERMINATION

61. This Consent Order shall be subject to termination upon motion by DNRC Co. NRG after NRG satisfies all requirements of this Consent Order. The requirements for termination include payment of any stipulated penalties that may be due to the State of Delaware under this Consent Order, installation of control technology systems as specified herein and the performance of all other Consent Order requirements and the receipt of all permits specified herein. At such time, if NRG believes that it is in compliance with all the requirements of the Consent Order and have paid all stipulated penalties required by this Consent Order, then NRG shall so certify to DNREC, and unless DNREC objects in writing with specific reasons within 60 days of receipt of the certification, this Consent Order shall be terminated on NRG's motion. If DNREC objects to NRG's certification, then the Parties shall follow the dispute resolution procedures in Paragraph 52. In the event the matter is submitted to the Court for resolution pursuant to Paragraph 52, NRG shall bear the burden of proving that this Consent Order should be terminated. Termination of this Consent Order under this paragraph shall conclusively and finally establish that NRG has satisfied all of the requirements of this Consent Order for purposes of Paragraph 47 (effect of settlement).

FOR DEFENDANTS.



John A. Hughes, Secretary
Department of Natural Resources
& Environmental Control
89 Kings Highway
Dover, DE 19901

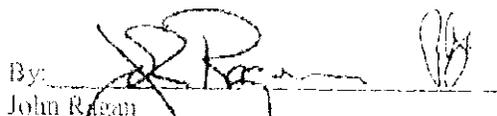
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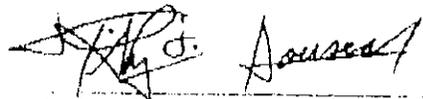
Valerie S. Csizmadia, I.D. No. 3937
Deputy Attorney General, Attorney at
Record for DNREC
102 W. Water Street, 3rd Floor
Dover, DE 19904
(302) 739-4636

Date: 9-24-07

FOR NRG ENERGY INC

By: 
John Ryan
Executive Vice President and Regional
President, Northeast
NRG Energy Inc.
211 Carnegie Center
Princeton, NJ 08540-6213

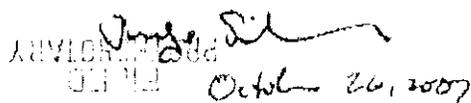
Date: September 18, 2007



Timothy Jay Houseal, Esquire, I.D. No. 2880
Young, Conaway Stargatt & Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, DE 19899-0391
(302) 571-6682
Attorney for Plaintiff NRG

Date: 9-24-07

SO ORDERED.


JUDGE
OCT 26, 2007

2007 OCT 26 09:25

11/20/2007

SO ORDERED this ___ day of ___, 2007.

Judge

CERTIFICATE OF SERVICE

I hereby certify that, by virtue of this electronic filing, I have this day served the foregoing document upon each party designated on the official service list compiled by the Secretary in Docket No. EI.09-32-000.

Dated: January 8, 2009

/s/ Joseph C. Handlon
Joseph C. Handlon (DE Bar No. 3952)
Deputy Attorney General
Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
102 West Water Street
Dover, DE 19904
Phone: 302-736-7558
Fax: 302-739-4849
joseph.handlon@state.de.us