



May 25, 2018

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

**RE: *Conowingo Hydroelectric Project, FERC Project No. 405-106*
Lodging of Filings Regarding Clean Water Act Section 401 Certification Challenges**

Dear Secretary Bose:

Exelon Corporation, on behalf of its wholly-owned subsidiary, Exelon Generation Company LLC ("Exelon"), respectfully submits copies of the following documents filed today related to the Conowingo Hydroelectric Project ("Project"): a federal Complaint filed in the United States District Court for the District of Columbia (attached as Exhibit A); a state Protective Petition for Reconsideration and Administrative Appeal filed with the Maryland Department of the Environment ("MDE") (attached as Exhibit B); and a state Complaint for Declaratory Relief, Petition for Judicial Review, and Complaint for Mandamus filed in the Circuit Court for Baltimore City, Maryland (attached as Exhibit C). Exelon has sought, and/or will seek, expedited consideration of these matters.

Each of these filings raises significant legal challenges to the Clean Water Act Section 401 Certification for the Project ("Certification") issued by MDE. In light of these legal challenges, Exelon has requested MDE to stay the Certification. In addition, in Exelon's state Complaint, Exelon seeks relief including a stay.

At the outset, there is a substantial issue whether the Certification is complete and actionable as a matter of state law. Although the Certification asserts it is a "final decision," Certification at 27, and MDE has submitted the Certification to FERC, the Certification also expressly provides that "a contested case hearing shall be available in accordance with the applicable provisions of State Government Article, § 10-201, et seq., Annotated Code of Maryland." *Id.* Under the referenced State Government Article, a contested case hearing is not an "appeal" of an agency decision. It is, instead, a full evidentiary hearing *within* the administrative process, before it is concluded. Thus, a contested case hearing may be conducted by an agency head, or delegated by an agency head to other appropriate authority. State Government Article, § 10-205(a)(1). The hearing officer shall provide written notice of the hearing. *Id.*, § 10-208. Each party – here, both Exelon and MDE – has the right to present evidence. *See id.*, § 10-213(a)(1) ("Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record."); *id.*, § 10-213(a)(2) ("If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall

make the evidence part of the record.”). A party is entitled to call witnesses, cross-examine any witness that another party or the agency calls, and introduce documents. *Id.*, § 10-213(f), (g). Given these administrative proceedings that MDE has acknowledged still “shall be available in accordance with the applicable provisions of the State Government Article,” Certification at 27, the administrative process obviously is not yet complete, and it remains to be seen what final administrative decision will result.

Exelon’s federal law challenges to the existing Certification filed by MDE at FERC also raise several important issues of first impression that will have precedent-setting implications for the hydroelectric industry. For example, the Certification would require Exelon to remove pollutants that were introduced upstream by third-party sources, not by the Project. Such an assertion of state authority is unprecedented, and Exelon contests its legality as described at greater length below and in the attached filings.

First, the Certification’s requirements that Exelon remove pollutants from the Susquehanna River are not supported by the factual record developed in the instant FERC docket. The Final Environmental Impact Statement (“FEIS”) expressly determined: “Nearly all sediment entering Conowingo Pond is contributed by the river’s upstream watershed; contributions from project lands are minimal.”¹ The FEIS further concluded: “It is reasonable that Exelon and the other project owners on the lower river are not considered the primary source of sediment and nutrient loading to the Bay, and that the TMDL [Chesapeake Bay Total Maximum Daily Load] recognizes that it is a watershed issue.”²

Second, issuing a FERC license order prior to judicial or administrative review of the issues raised by Exelon could have significant and pervasive impacts on pending and future relicensings. Following MDE’s precedent, state water quality agencies could require other licensees to remove pollutants introduced by upstream sources. Such water quality certification conditions would have widespread economic consequences for the hydroelectric industry and adversely impact hydropower production in the United States.

Third, issuing a license order that incorporates MDE’s Certification conditions would immediately jeopardize Project operations. As explained in the filings lodged here, the Certification could require Exelon to make annual payments to MDE exceeding \$172 million, or more than \$7 billion over the term of the license. These amounts exceed, by orders of magnitude, the economic value of the Conowingo Project as an operating asset.

Fourth, the environmental impacts associated with the conditions in the Certification have not been not analyzed in the FEIS. For example, in Section 7.D.iv of the Certification, MDE

¹ FERC Office of Energy Projects, Final Multi-Project Environmental Impact Statement for Hydropower Licenses, Susquehanna River Hydroelectric Projects: York Haven Project – FERC Project No. 1888-030 - Pennsylvania, Muddy Run Project – FERC Project No. 2355-018 - Maryland, Conowingo Project – FERC Project No. 405-106 - Maryland, FERC/FEIS 0255F, at 77 (2015).

² *Id.* at 138.

identifies dredging of Conowingo Reservoir as a measure for meeting dissolved-oxygen standards. While dredging was discussed in the FEIS – and disregarded as ineffective and too costly – the environmental impacts associated with dredging Conowingo Reservoir (portions of which are within the FERC-jurisdictional Project) have not been addressed by FERC.

These are simply some of the significant issues raised in the attached filings, for which Exelon maintains a withdrawal or stay of the Certification is appropriate. Exelon respectfully requests that the Commission defer action on the federal license while these significant state and federal law issues are addressed. Exelon will press these matters expeditiously, and will provide updates to the Commission on the status of the litigation every 90 days, commencing no later than September 2, 2018. If there is an update before that time, Exelon shall promptly notify the Commission.

If you have any questions or require additional information regarding this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/ Colleen E. Hicks

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Attachments: Complaint filed in the United States District Court for the District of Columbia
Protective Petition for Reconsideration and Administrative Appeal filed with the
Maryland Department of the Environment
Complaint for Declaratory Relief, Petition for Judicial Review, and Complaint for
Mandamus filed in the Circuit Court for Baltimore City, Maryland

cc: Vince Yearick (FERC)
Nick Jayjack (FERC)
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Michael Pedone (MDE)
Denise Keehner (MDE)
Official Service List for Docket No. P-405