

September 17, 2010

Technical Director
Financial Accounting Standards Board

Submitted via email to director@fasb.org

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Exelon Corporation appreciates the opportunity to comment on the Financial Accounting Standard Board's (the Board) Proposed Accounting Standards Update, Contingencies (Topic 450): Disclosure of Certain Loss Contingencies. Exelon Corporation is one of the United States' largest electric utilities with approximately \$17 billion in annual revenues. The company has one of the industry's largest portfolios of electricity generation capacity and distributes electricity to approximately 5.4 million customers in Illinois and Pennsylvania and natural gas to approximately 485,000 customers in southeastern Pennsylvania.

We support the Board's objective of providing users of financial statements with sufficient information to assess the likelihood, timing and amounts of cash flows associated with loss contingencies. While we acknowledge the significant modifications that have been made to this proposed guidance to address stakeholder comments, we continue to have concerns about the proposed disclosures.

We have comments on certain aspects of the proposal, including the tabular reconciliation. We do not support the proposed requirement to provide a quarterly tabular reconciliation because we believe that it harms companies and shareholders by potentially providing confidential information to opposing parties in litigation. Additionally, we do not believe that the information this reconciliation provides to financial statement users is sufficiently decision-useful to mitigate this concern, or the incremental effort required to compile it. Further, we have comments on the proposals related to disclosures of unasserted claims and disclosure of damage estimates included in expert testimony.

These concerns are discussed in the following responses to questions posed in the Exposure Draft:

Question 1: Are the proposed disclosures operational? If not, please explain why.

We believe that the tabular reconciliation disclosure will provide litigation adversaries with significant insight into a company's litigation assessment and strategy. For a company like Exelon, with minimal material litigation, the tabular reconciliation is likely to disclose case-specific evaluations and reserves, and thereby prejudice the company's

position in litigation, particularly in settlement negotiations. This reconciliation, if required at all, should be included on an annual, as opposed to a quarterly, basis. Preparing the data for the reconciliations will require a significant amount of effort for financial statement preparers. Updating this information on a quarterly basis will not provide sufficiently useful information to financial statement users to justify the effort to compile it, because major contingencies (particularly litigation), and a company's assessment of its prospects, generally evolve over an extended period of time and disclosure on an annual basis will provide sufficient information related to developments in the contingencies. Finally, requiring this level of detail on a quarterly basis is not consistent with similar disclosures required for uncertain tax positions, which are required on an annual basis under Topic 740, Accounting for Income Taxes.

Regarding disclosures of unasserted claims, the implementation guidance includes examples of methods to determine the existence of unasserted claims, including studies in reputable scientific journals (or other credible sources that other entities in our industry review). We do not consider this guidance to be operational, or appropriate, because the determination of what constitutes a "reputable scientific journal" or "other credible source" will vary by preparer and by user and will result in inconsistent application of the proposed guidance. There are also instances in which reputable scientific journals are not aligned in their conclusions, which could result in confusion for readers and difficulty for preparers in complying with the disclosure requirement, thereby reducing the reliability of the financial statements.

The proposal calling for reliance on scientific journals or other sources also ignores the lengthy, iterative process of scientific and technical inquiry and the tendency of scientists to draw different conclusions from ongoing research. For example, a scientist might publish a theory or supposition about a possible cause-effect relationship on a given issue. That scientist, or another, might subsequently publish the results of some preliminary research indicating that the supposed cause-effect relationship does or does not exist. Subsequent, more thorough research might lead to an entirely different conclusion. A FASB requirement to rely upon the reports of these studies will force financial statement preparers to predict the eventual result of the scientific inquiry and will leave those companies subject to the inevitable second-guessing of plaintiffs' lawyers who scour financial statement disclosures for errors or misjudgments. It would be more appropriate for investors who are interested in the scientific inquiry to follow the research reports themselves and draw their own conclusions.

We also do not believe that disclosure of the amount of damages indicated by the testimony of expert witnesses is useful to users, because that testimony may not be indicative of the amount that will be claimed by the plaintiff. Expert witness testimony can vary considerably depending on the case and the party that retains the expert witness, leading to a lack of comparability and, in some cases, misleading information being presented. For individually material contingencies, the proposed guidance requires disclosure of information sufficient to obtain publicly available information about the case (including the court in which a claim is filed). This information is sufficient to allow interested users to obtain details of the damages sought in a particular matter and the testimony of expert witnesses.

## Question 2: Are the proposed disclosures auditable? If not, please explain why.

Providing auditors sufficiently detailed information to support the completeness of these expanded disclosures increases the likelihood of a breach of the attorney-client privilege and could waive other legal protections. Our expectation is that audit evidence will largely be comprised of confirmation from legal counsel and significant coordination between the company, legal counsel, and the auditors will be necessary for each period the disclosures are required. The current model for providing audit evidence regarding litigation matters is the result of a coordinated effort among the legal community, external auditors, and financial statement preparers. The expansion of the disclosures proposed by the Exposure Draft requires the current model to be revisited, and a final standard should not be issued until this matter is resolved.

Question 3: The June 2008 FASB Exposure Draft, Disclosure of Certain Loss Contingencies, had proposed certain disclosures based on management's predictions about a contingency's resolution. The amendments in this proposed Update would eliminate those disclosure requirements such as estimating when a loss contingency would be resolved and the entity's maximum exposure to loss. Do you agree that an explicit exemption from disclosing information that is "prejudicial" to the reporting entity is not necessary because the amendments in this proposed Update would:

- a. Not require any new disclosures based on management's predictions about a contingency's resolution.
- b. Generally focus on information that is publicly available.
- c. Relate to amount already accrued in the financial statements.
- d. Permit information to be presented on an aggregated basis with other similar loss contingencies?

If not, please explain why.

We believe that an exemption for disclosure of prejudicial information should be explicitly set forth in the final standard.

We remain concerned that the tabular reconciliation, which is required to be disaggregated by class of contingency, will lead to disclosure of prejudicial information if there are a small number of contingencies that can be aggregated or if there is no basis for aggregation. Additionally, the implementation guidance implies that, even in cases where aggregation is appropriate, further disclosure should be provided (such as a rollforward of activity including the number of claims and average settlement amounts). If a prejudicial exemption is provided, we would expect that some Registrants will omit the tabular reconciliation and provide a discussion of the reasons why the information requested therein is considered to be prejudicial.

The guidance in Topic 740, *Accounting for Income Taxes*, requires a similar tabular reconciliation on an annual basis, but does not require the additional qualitative disclosures (including risks, contentions of the parties, etc.) required by this proposal. Topic 740 requires additional details about the aggregated amounts in the rollforward to the extent they are expected to significantly change in the next 12 months. We do not feel that more stringent requirements should be applied to loss contingencies.

The inclusion of a transparent tabular disclosure, together with expanded qualitative disclosures, presents a high likelihood that prejudicial information will be disclosed,

which, as previously noted, may harm shareholders. Our concern is further exacerbated if the tabular disclosure is required quarterly rather than annually.

Question 4: Is the proposed effective date operational? If not, please explain why.

We believe that the guidance is not operational for this calendar year-end because companies will not have the final guidance until the fourth quarter and will need to exercise judgment around what level of aggregation is appropriate, what would be considered individually material for each registrant and whether any unasserted claims or remote claims exist that meet the disclosure criteria. Additionally, companies will need to work with their auditors to determine the audit evidence they will require to support these disclosures, and develop a process to provide that information without compromising the attorney-client privilege. We believe the effective date should be changed to periods ending after December 15, 2011.

**Question 5:** Do you believe that the proposed disclosures will enhance and improve the information provided to financial statement users about the nature, potential magnitude, and potential timing (if known) of loss contingencies?

Exelon seeks to provide robust and transparent disclosures of relevant, reasonably estimable financial information in its financial statements and filings. We are not convinced, though, that the disclosure modifications contemplated in the Exposure Draft will, in practice, provide users with more useful and reliable information than is currently provided under existing standards.

As discussed in our previous comments, of particular concern to us are the tabular reconciliation requirement due to the potential for disclosing prejudicial information that may be of more benefit to plaintiffs than to investors; we believe including estimates of damages provided by expert witnesses is not useful and may be misleading; and we do not think it is appropriate to identify unasserted claims through review of scientific journals due to the inherent uncertainty of scientific inquiry.

We appreciate your consideration of these comments. If you have any questions or would like to discuss this matter further, please contact me at 312-394-4736 (or duane.desparte@exeloncorp.com).

Respectfully submitted.

S/Duane M. DesParte
Vice President and Corporate Controller
Exelon Corporation