COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: April 9, 2009
Decided: April 14, 2009

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RE: Louisiana Sheriffs' Pension & Relief Fund and City of St. Clair Shores Police & Fire Retirement System, on behalf of themselves and all others similarly situated v. David Crane, et. al.
C.A. No. 4193-VCL

Dear Counsel:

I have considered the arguments made by the parties in their papers filed in connection with the plaintiffs' motion for expedited proceedings and the oral arguments made during the telephonic hearing of April 9, 2009. For the reasons set forth below, the plaintiffs' motion will be denied.

I.

The plaintiffs in this action are stockholders of NRG Energy, Inc. and the defendants are individual members of that company's board of directors. On September 26 and 30, 2008, officers from NRG and Exelon Corporation met to discuss a potential transaction. When those talks did not progress to its satisfaction, Exelon publicly announced a proposal to acquire NRG, offering .485 shares of its stock in exchange for each NRG share of common stock.[1] Approximately three weeks later, on November 9, 2008, the NRG board rejected

[1] As of the last trading day before the offer, the offer represented a premium of approximately 37% to NRG's stock price.

the offer as inadequate. On November 11, 2008, Exelon made the same offer directly to NRG's stockholders and filed a complaint against NRG and its board alleging, *inter alia*, that the directors breached their fiduciary duties in their response to Exelon's offer. By February 26, 2009, approximately 51% of NRG's shares had been tendered in response to that offer. Exelon has most recently extended the term of its offer until June 26, 2009.

In January 2009, seeking to press its acquisition proposal further, Exelon delivered a notice of intent to nominate nine directors to NRG's board and proposed a bylaw amendment to expand NRG's board from 12 to 19 directors. Exelon only seeks to elect nine of 19 directors because "poison puts" in NRG's debt instruments could accelerate approximately $4 billion in debt if a majority of NRG's board members are not "continuing directors."[2] Of its nine nominees, Exelon proposes to run four against the NRG incumbents up for re-election and the others to fill five of the seven empty seats that will be created if the bylaw amendment passes.

Exelon has publicly stated that the NRG board is free to fill the remaining two openings with its own nominees. On March 24, 2009, the NRG board expanded its size from 12 to 13 and elected Pastor Kirbyjon Caldwell to fill the vacancy. Shortly thereafter, NRG announced its intention to add another board member. NRG is expected to hold its annual meeting and elect directors on or before June 14, 2009.

On November 25, 2008, the plaintiffs filed their complaint in this action and on March 17, 2009 the plaintiffs filed an amended complaint. In the amended complaint, the plaintiffs allege, *inter alia*, that the defendants' failure to inform themselves sufficiently about the transaction, failure to negotiate with Exelon, and decision to use certain defensive measures led to a breach of fiduciary duties. On April 3, 2009, the plaintiffs filed a motion for expedited proceedings and a motion for injunctive relief. In its motion for injunctive relief, the plaintiffs request that the court enter an order requiring the defendants to rescind the appointment of

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[2] A "continuing director" is defined in NRG's credit agreement as meaning "as of any date of determination, any member of the Board of Directors of [NRG] who (a) was a member of such Board of Directors on the Closing Date; or (b) was nominated for election or elected to such Board of Directors with the approval of a majority of the Continuing Directors who were members of such Board of Directors at the time of such nomination or election."

Caldwell and enjoin the defendants from taking any action that will impede the vote for directors at the upcoming annual meeting.

II.

In order to grant a motion for expedited proceedings, the court must find that "the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury."[3] Here, the plaintiffs fail on the second part of the test and thus the court will not subject the defendants to the extra costs associated with an expedited proceeding.[4]

The plaintiffs argue that the defensive measures used by the NRG board will affect the stockholder votes at the upcoming meeting. The plaintiffs' motion for injunctive relief, however, is vague. In the only specific request, the plaintiffs ask the court to force NRG to rescind the appointment of Caldwell, but do not explain why such action is needed on an expedited basis and do not explain what harm would arise or has arisen from the appointment. The plaintiffs' arguments set forth in their papers and made during the telephonic hearing focus on how the stockholders will shy away from voting for the Exelon-nominated directors due to the risk of a "change of control" triggering the acceleration of NRG's debt. For there to be a change of control, as defined by NRG's credit agreement, a majority of the board must no longer be continuing directors. Caldwell's appointment actually makes it *less* likely that such a provision would be triggered because, as a director approved by a majority of the continuing directors, he adds to the number of continuing directors.

In this case, a "change of control" triggering debt acceleration is not a serious threat in the near future. Even if Exelon's proposed bylaw amendment expanding the board passed, all of Exelon's nominees were elected, and those nominees were not approved by the NRG board, only nine of 19 directors would be non-continuing—clearly less than a majority. If the bylaw amendment is not passed, Exelon's current proposal would only result in a possible four directors

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[3] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994); *see In Re Western Nat'l Corp. S'holders Litig.*, 1998 WL 51733, at *1 (Del. Ch. Feb. 4, 1998).

[4] Because the plaintiffs have failed to show a sufficient possibility of a threatened irreparable injury, the court declines to consider whether the plaintiffs articulated a sufficiently colorable claim.

(those running against the incumbents) of either 13 or 14 total board members—again, less than a majority.[5]

The plaintiffs attempt to analogize this case to *San Antonio Fire & Police Pension Fund v. Bradbury*,[6] where the court recently granted a motion to expedite on seemingly similar facts. In *Bradbury*, however, the dissident directors nominated were great enough in number to cause an immediate acceleration of the debt at issue, if elected. Here, the results of the upcoming board elections alone will not trigger the acceleration of debt. The plaintiffs expressed fear that future elections (in 2010 and beyond) and death or retirement by members of the NRG board could cause a change of control. At the moment, those fears are based on purely hypothetical situations. If, at a later date, the circumstances change so that there becomes an imminent possibility that the change of control provision will be triggered, the plaintiffs may move for expedited proceedings at that time.[7]

Unlike *Bradbury*, where the directors could not completely cleanse the board of dissident directors, the NRG board can approve of the Exelon nominees and avoid the chance that the change of control provision would be triggered in the future. If the NRG board determines that it will not approve the Exelon nominees, the court can determine what harm occurred, if any, in the normal course of litigation. Without an imminent threat of triggering the payment of debt, however, there is no justification for the added cost of expedited proceedings.

While not necessary for this ruling, it is worth noting that even Exelon, through its counsel, expressed its opposition to expedition in this case. Exelon believes that expedition in this case would divert NRG's attention, cutting against the ultimate reasons it nominated the directors, by slowing the resolution of issues at stake in the proposed transaction. The fact that the potential acquirer and entity nominating the directors opposes expedition weakens the plaintiffs' attempt to analogize this case to *Blasius Industries, Inc. v. Atlas Corp.*[8] and *MM Companies,*

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[5] If the bylaw amendment does not pass, it is unclear whether NRG would still add another board member, thereby expanding the board from its current 13 directors to 14.
[6] C.A. No. 4446-VCL (Del. Ch. Mar. 30, 2009) (TRANSCRIPT).
[7] *See Casale v. Bare*, 2009 WL 296262, at *2 (Del. Ch. Jan. 27, 2009) ("To grant a motion for expedited proceedings, the Court must find some imminent circumstance demanding immediate action.")
[8] 564 A.2d 651 (Del. 1988).

Inc. v. Liquid Audio, Inc.[9] In those cases, the defensive measures were erected by the target to fight off the potential acquirer and were strongly opposed by the potential acquirer. Here, while the potential acquirer takes issue with a number of the defendants' actions, it does not believe expedition in this case is necessary, and believes expedition may even hamper the proposed transaction, possibly preventing the NRG stockholders from receiving the premium price offered for their shares. Additionally, as explained above, the stockholder votes should not be swayed at the upcoming election, as the probability of a change of control occurring due to that election appears extremely low.

* * *

For the foregoing reasons, the plaintiffs' motion for expedited proceedings is DENIED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

[9] 813 A.2d 1118 (Del. 2003).