UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA U.S. Department of Justice Antitrust Division 325 Seventh Street, N.W. Suite 500 Washington, DC 20530 Plaintiff, v. **ENOVA CORPORATION** 101 Ash Street San Diego, CA 92101 Defendant.	Case Number: 98-CV-583 (TFH) Judge: Thomas F. Hogan Filed: June 8, 1998

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States filed a civil antitrust Complaint on March 9, 1998, alleging that the proposed merger of Pacific Enterprises ("Pacific") and Enova Corporation ("Enova") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Pacific is a California gas utility company and Enova is a California electric utility company, and that this transaction would give the combined company ("PE/Enova") both the incentive and the ability to

lessen competition in the market for electricity in California. In particular, this acquisition would give PE/Enova the incentive and ability to limit the supply of natural gas to California electric power plants, raising their costs and the price California consumers pay for electricity. The acquisition is thus likely to lessen competition substantially among providers of electricity, and so violate Section 7 of the Clayton Act. The prayer for relief in the Complaint seeks (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a preliminary and permanent injunction preventing consummation of the proposed merger; (3) an award to the United States of the costs of this action; and (4) such other relief as is proper.

At the same time the Complaint was filed, the United States also filed a proposed settlement that would permit Pacific and Enova to merge, but requires a divestiture that would preserve competition in the market for electricity in California. This settlement consists of a Stipulation and Order ("Stipulation") and a proposed Final Judgment ("Final Judgment").

The proposed Final Judgment orders Enova to sell all of its rights, titles, and interests in Encina and South Bay electricity generation facilities located at Carlsbad and Chula Vista, California (the "Divestiture Assets"), to a purchaser or purchasers acceptable to the United States in its sole discretion.[1] Enova must submit required applications to divest the assets no later than ninety days after entry of the Final Judgment, and complete the divestiture as soon as practicable after receipt of all necessary government approvals, in accordance with the procedures specified in the proposed Final Judgment. The Stipulation and Final Judgment also require Enova

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[1] The Final Judgment provides that the approvals by the United States required by this Final Judgment for sale of these assets are in addition to the necessary approvals by the California Public Utilities Commission ("CPUC") or any other governmental authorities for the sale of such assets.

to ensure that until the divestiture mandated by the Final Judgment has been accomplished, the management of any electricity generating facilities will be kept separate and apart from the management of Enova's other businesses.

The United States and Enova have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations of it.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Enova, Pacific, and the Proposed Transaction

Enova, a California corporation headquartered in San Diego, California, owns San Diego Gas & Electric Co. ("SDG&E"), which is an electric utility that serves the San Diego area. Through SDG&E, Enova is a major provider of electricity in southern California, with approximately $1.6 billion in annual electricity sales. It sells electricity generated by plants that use coal, gas, nuclear power, and hydropower for fuel.

Pacific, through its wholly owned subsidiary Southern California Gas Company, is virtually the sole provider of natural gas transportation services to plants in southern California that use natural gas to produce electricity ("gas-fired generators" or "gas-fired plants"). Pacific is also the sole provider of natural gas storage services throughout all of California.

Under an Agreement and Plan of Merger and Reorganization dated October 12, 1996, Enova and Pacific will each become wholly owned subsidiaries of a common holding company parent as soon as all state and federal regulatory approvals have been obtained.

B. Trade and Commerce

The Complaint alleges that the effect of the merger of Pacific and Enova would be to lessen competition substantially in the provision of electricity in California during high demand periods.

California's electricity industry is dominated by Enova and two other regulated, investor-owned utilities. Electricity services are also provided by California public power providers such as municipalities, water districts, irrigation districts and the state of California. As a result of a legislatively mandated restructuring, the California electric power market will experience significant changes in 1998. As of March 31, 1998, most electricity generated in California is bought and sold through the California Power Exchange ("the pool"), a central, computerized bidding system that matches electricity supply and demand during every half-hour period during the day. State regulations require regulated utilities to buy and sell all their electricity through the pool during a four-year transition period.[2]

With the pool, all sellers of electricity send in bids for every half hour in which they want to sell electricity. Similarly, all buyers of electricity send in bids for every half hour in which they wish to buy. The pool allocates power until all demand is met. The price per unit of electricity for any given half hour is determined by the most expensive unit sold that half hour with all sellers receiving that price, regardless of their costs or their bids. Nuclear-powered generators, however, will continue to receive regulated rates for at least four years after the California pool began operation.

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[2] Under these state regulations, the utility companies continue to own California's electricity transmission grid. The transmission grid, however, is under the operational control of an Independent Systems Operator ("ISO"), and distribution continues to be regulated by the CPUC.

Currently, regulated electric utilities sell over 80% of all retail electricity in California. Because these utilities must buy all of their electricity from the pool, the pool prices -- the price the utilities pay for the electricity they distribute -- will directly affect the price most consumers in California pay for electricity.

Electricity sold in California is generated from power plants using one of four fuels -- gas, coal, hydropower, and nuclear -- and the costs of generating electricity from these plants differ significantly. Although certain gas-fired plants are more efficient than others, gas-fired plants are in general the most costly to operate. Because they cost the most to operate, the gas-fired plants will bid the highest prices into the pool and are the last ones to be turned on to meet consumer demand for electricity. They operate about 30% to 50% of the time, primarily during periods of high electricity demand, such as the summer when consumer use of air conditioning and other electric-powered appliances increases and less expensive hydroelectric power is unavailable. During these periods, the gas-fired plants, as the most costly to operate and thus the highest bidders into the pool, are able to set the price for all electricity sold through the pool.

Gas-fired power plants cannot and do not switch to other fuels in response to price increases in natural gas transportation or storage services, and in California Pacific controls almost all gas-fired generators' access to gas supply because the state of California has granted Pacific a monopoly on transportation of natural gas within southern California. Consequently, 96% of gas-fired generators in southern California buy gas transportation services from it. Pacific also has a monopoly on all natural gas storage services throughout California. Although regulated by the California Public Utilities Commission ("CPUC"), Pacific has the ability to restrict the availability of gas transportation and storage to consumers, including gas-fired generators, by limiting their supply or cutting them off

entirely. Limiting or cutting off gas supply raises the price gas-fired plants pay for delivered natural gas and in turn raises the cost of the electricity they produce.

C. The Relevant Market

The Complaint alleges that the provision of electricity in California during high demand periods constitutes a relevant market for antitrust purposes -- that is, in the language of the Clayton Act, it is a "line of commerce" and is in a "section of the country."

Consumers of electricity in California cannot and do not switch to other products in response to an increase in the price of electricity. Thus, a small but significant and nontransitory increase in prices for electricity would not cause a significant number of electricity consumers to substitute other energy sources for electricity, and electricity is a relevant product for antitrust purposes.

During periods of high demand, California consumers can only obtain electricity from local power plants. There is very limited electricity transmission capacity into California, with only two major transmission lines leading into the state, one from the hydroelectric and coal-rich northwestern United States, and one from several coal and nuclear plants in Arizona. During peak hours, the two major transmission lines are filled to capacity, and generation located within the state must supply the remaining electricity required by California consumers. Thus, in periods of high demand, consumers are unable to turn sources of electricity generated outside of California, and California is therefore a relevant geographic market for antitrust purposes.

D. Anticompetitive Consequences of the Acquisition

The Complaint alleges that, if the proposed transaction would have the following effects, among others, unless it is restrained:

1. Competition in the market for electricity in California during high demand periods may be substantially lessened; and

2. prices for electricity to consumers in California during high demand periods are likely to increase.

By virtue of its monopoly over natural gas transportation and storage, Pacific currently has the ability to increase the price of electricity, when during high demand periods, electricity from California gas-fired generators is needed to supplement less costly electricity. Pacific can restrict gas-fired generators' access to gas, which has the effect of raising the cost of gas-fired generators in general. Alternatively, Pacific can cut off or impede the more efficient gas generators' access to gas, leaving higher-cost generators to meet consumer demand for electricity. In either case, Pacific is able to increase the cost of electricity from gas-fired plants, thereby increasing the prices they bid into the pool and ultimately the price of electricity sold through the pool. But Pacific currently owns no electricity generation plants that would benefit from an increase in the pool price for electricity.

Enova, on the other hand, controls over 2600 MW of electricity, some of which comes from lower cost plants that run most of the time, and as a consequence, would benefit from an increase of the price of electricity sold through the pool. However, Enova currently has no ability to increase the price of electricity by raising the costs of competing electric utilities because it does not control any input, such as gas.

Once Pacific's control of gas is combined with Enova's low-cost electricity generation facilities, the merged firm, PE/Enova, would have the ability to raise electricity prices by limiting gas supply to competing gas-fired generators, as well as the incentive to do so. PE/Enova's ownership of lower-cost generation would enable it to profit substantially from any increase in the price of electricity sold through the pool, and these profits would more than offset any losses from reducing its gas

transportation and storage sales to competing gas-fired plants. The merged firm, PE/Enova, would thus have the incentive and ability to lessen competition in the market for electricity in California. As a result, consumers would likely pay higher prices for electricity.

E. Entry

Successful entry or expansion in either the market for electricity generation or the market for intrastate natural gas transportation and storage in California would not be timely, likely, or sufficient to prevent any harm to competition. Entry or expansion would be difficult, time consuming, and costly, as well as extremely unlikely. Entry into electricity generation could counteract a post-merger price increase only if the entrants provided significant generation capacity and were not dependant on natural gas to generate electricity. Entry by building new hydro-powered, coal-fired, or nuclear-powered generators is highly unlikely, however. Each of these face substantial safety, environmental, and other regulatory barriers that would make entry costly, time consuming, and uncertain. Similarly, entry by building new lines to transmit electricity from outside California requires myriad environmental, safety, and zoning approvals, which would be difficult, costly, and time consuming to obtain. Finally, California's present regulatory scheme makes it economically impossible for alternative suppliers of natural gas transportation to enter the California market. California's pipeline certification process discourages entry by intrastate firms, while its restrictions on access to intrastate gas transportation markets discourages entry by interstate pipelines.[3]

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[3] Entry into gas storage requires access to appropriate geologic formations, such as drained aquifers and abandoned gas fields and salt mines of a particular size and porosity, which, in California, are all owned by Pacific.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve the competition that would have been lost in California's emerging competitive market for electricity had the PE/Enova merger gone forward as originally structured. Within eighteen months after filing the proposed Final Judgment, Defendant must sell all of Enova's rights, titles, and interests in the Divestiture Assets. The assets and interests will be sold to a purchaser or purchasers acceptable to the United States in its sole discretion. In addition, the Final Judgment limits the ability of the merged company to reacquire or control any similar assets, or to enter into contracts to manage generating plants in California.

A. Divestiture

The Final Judgment requires Defendant to sell all generation assets that would likely give PE/Enova the incentive to raise electricity prices.[4] To that end, the Final Judgment requires Defendant to divest all of its low-cost gas generators -- 1644 MW of generation assets in total. In particular, Defendant is required to divest South Bay plant (951 MW) in Chula Vista, California, and the Encina plant (693 MW) in Carlsbad, California. Because these generators operate in almost all hours of the year and are relatively low-cost, if PE/Enova were to own them, it could earn substantial profits (revenues exceeding its costs) by restricting the supply of natural gas which, as explained above, would increase the overall price for electricity in the pool and thus the price PE/Enova would receive for electricity.

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[4] The relief in the proposed Final Judgment is intended to remedy only those anticompetitive effects stemming from the PE/Enova merge. Nothing in the Proposed Final Judgment is intended to limit the United States' ability to investigate or to bring actions, where appropriate, challenging other past or future activities of Pacific or Enova.

Under the Final Judgment, Enova is required to use its best efforts to sell the Divestiture Assets under auction procedures approved by the CPUC. Enova has already requested that the CPUC begin an auction of all of the Divestiture Assets.[5] Under the Final Judgment, bid proposals will be submitted to the United States for review to determine whether the divestiture to that bidder would be acceptable.

Defendant will have eighteen months after entry of the Final Judgment to auction the Divestiture Assets.[6] The United States may extend this eighteen-month period, and both parties may jointly agree to extend the auction period further. If any part of the Divestiture Assets are not sold within the eighteen months or any extension, Defendant must withdraw those assets from the California auction process and allow them to be sold by a trustee, under specific procedures designed to ensure expeditious sales.

Enova is not required to divest certain generation assets that are not likely to provide an incentive to raise pool prices. These are combustion turbine assets ("CTAs"), nuclear assets, cogeneration assets presently under contract ("Cogeneration Assets"), and a long-term contract with Public Service Company of New Mexico ("New Mexico Contract").[7]

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[5] The CPUC proceeding contemplates 18 months for completion of the divestitures. See Application of San Diego Gas & Electric Company (U 902-E) for Authority to Sell Electrical Generation Facilities and Power Contracts before the CPUC (Dec. 19, 1997).

[6] The divesture period, which is longer than the usual period permitted by the Division, avoids unnecessary conflict with the ongoing state regulatory process for divestiture.

[7] Although the Final Judgment does not place any additional obligation on the Defendant to sell any assets beyond South Bay and Encina, the Defendant has applied to the CPUC to sell all its generation assets, including the nuclear assets, the CTAs, and the Cogeneration Assets, in the CPUC auction. See Application of San Diego Gas & Electric Company (U 902-E) for Authority to Sell Electrical Generation Facilities and Power Contracts before the CPUC (Dec. 19, 1997).

1. CTAs -- The CTAs are seventeen generators scattered throughout California, none of which exceed 20 MW capacity. They are fueled primarily by natural gas, and in some cases by diesel fuel. They are very expensive to run and were built to be used only at times of the very highest peak demand. Owning CTAs gives PE/Enova little, if any, incentive to raise electricity prices -- even with increased electricity prices, PE/Enova cannot count either on selling the electricity from these generators or obtaining a price that significantly exceed their costs. Further, air pollution restrictions may prevent operation of certain CTAs during peak summer hours.

2. Nuclear -- Enova holds a 20% (or 430 MW) non-operating interest in the San Onofre Nuclear Generating Station ("SONGS") and its output. PE/Enova, however, will not receive the pool price for SONGS electricity for at least the next four years, because nuclear plants will remain price regulated. If nuclear power prices become deregulated after 2001, the Final Judgment provides that (1) SONGS capacity will count towards calculation of Defendant's reacquisition cap (see discussion of cap, infra); and (2) the Final Judgment will remain in effect for ten years instead of five.

3. Cogeneration Assets -- The cogeneration assets comprise nine contracts of no more than 50 MW each, for a total of 207 MW. Their output is more costly than most of the electricity produced in California and will be sold at a regulated rate. Retention of these assets, therefore, does not provide PE/Enova with the incentive to increase the pool price for electricity.

4. The New Mexico Contract -- This contract provides Enova with 100 MW. Given the other divestitures, the small amount of capacity involved, and the fact that the contract expires in less than three years, it provides little incentive to raise the pool price.

B. Limitations on Acquisition

1. Reacquisition

The Final Judgment limits Enova's ability to reacquire the same kind of assets that it has been ordered to divest: existing, low-cost assets inside California. These assets are referred to in the Final Judgment as "California Generation Facilities."[8] At any time during the Final Judgment, if Defendant owns or controls more than 500 MW (total) of California Generating Facilities,[9] then it cannot acquire or gain control of additional California Generation Facilities without prior approval of the United States.[10] Because the Divestiture Assets count towards calculation of the 500 MW acquisition cap, Enova cannot acquire or gain control of any more California Generation Facilities without prior approval by the United States until Enova substantially completes the divestiture.

Prior approval of subsequent acquisitions ensures that PE/Enova does not circumvent the divestiture ordered by the Final Judgment by acquiring or controlling generating facilities that give it the same incentive to raise the pool price for electricity as the Divestiture Assets did. Because of the

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[8] The Final Judgment specifically defines "California Generation Facilities" to mean "(1) electricity generation facilities in California in existence on January 1, 1998, excluding such facilities that are rebuilt, repowered, or activated out of dormancy after January 1, 1998, as long as such rebuilding, repowering, or activation out of dormancy project, if done by Defendant, begins within one year of purchase; and (2) any contract for operation and sale of output from generating assets of the Los Angeles Department of Water and Power."

[9] A contract with Portland Gas & Electric for 75 MW, along with the same amount of firm transmission capacity, is included in the 500 MW cap, because it is a source of low-cost generation that can be sold in the pool. The Final Judgment allows Defendant to keep the contract, which expires Dec. 31, 2013, but reduces the cap by 75 MW until the contract is divested.

[10] The Final Judgment defines "acquire" to include "obtaining any interest in any electricity generating facilities or capacity," and defines "control" to mean "have the ability to set the level of output of an electricity generation facility."

California electricity market restructuring (which includes CPUC orders requiring major divestiture from regulated utilities), unusual and significant amounts of generating capacity will be readily available for purchase, lease, or contractual control for the next few years.

2. The Acquisition Cap

The Final Judgment allows the merged company to own or control 500 MW of existing California Generation Facilities. As a California retail distributor, PE/Enova may operate more effectively if it owns or controls some local capacity. This 500 MW capacity provides PE/Enova a source of back-up electricity for its 1600 MW retail sales in case of problems with electricity supply bought on the open market. At the same time, it does not provide PE/Enova with sufficient wholesale electricity sales to give it the incentive to raise the pool price for electricity by reducing its gas sales.

3. Limitation Applicable Only to Existing California Assets

The Final Judgment does not impose the prior approval requirement on Enova's acquisition of assets outside of California. As noted above, Pacific has the ability to raise the price of electricity during high demand periods because significant transmission constraints limit electricity imports from outside of the state. These import constraints mean that PE/Enova cannot count on the sale in the California pool of electricity from assets outside California, and thus acquisition of such assets would not give it the incentive to raise the pool price.

In addition, the Final Judgment does not prevent PE/Enova from building new capacity in California, or from acquiring capacity built in California after January 1, 1998. New capacity will only be built in California if the output is inexpensive enough to be sold in many hours. By increasing the amount of less expensive power available to meet demand, new, low-cost capacity will reduce the number of hours in which the most costly gas-fired capacity is needed. This in turn will limit

PE/Enova's ability to raise the pool price since it is more costly and difficult for PE/Enova to restrict gas to more numerous low-cost plants. For the same reasons, the Final Judgment allows the merged company to acquire or gain control of plants that are rebuilt, repowered, or activated out of dormancy after January 1, 1998. Output from such plants is the equivalent of output from new-build capacity.

Finally, Enova may own, operate, and control any cogeneration or renewable resources and may enter into tolling agreements and reverse tolling agreements,[11] so long as it does not control the plant's output level. None of these arrangements or facilities will provide PE/Enova significant additional ability or incentive to raise the price for electricity by reducing its gas sales.

C. Limitations on Management Contracts

The Final Judgment provides a check on Enova's ability to acquire control of California Public Power Provider ("CPPP") owned assets through management contracts.[12] With the exception of Los Angeles Department of Water and Power's ("LADWP") facilities, the generation facilities owned by CPPPs are primarily small, gas-and oil-fired or hydroelectric plants. Management contracts enable

[11] Tolling agreements allow one company to produce electricity with its own gas at another company's generator for a set fee. Reverse tolling agreements allow a gas supplier to stop providing natural gas to a generator at the supplier's discretion. The Final Judgment provides that Defendant may enter into tolling and reverse tolling agreements with any electricity generation facilities in California, provided Defendant does not control such facilities; provided further, that all such tolling and reverse tolling agreements include the following provision: "In accordance with the Final Judgment in United States v. Enova Corporation, entered on [date], Enova's successors and their affiliates shall not have any ability to set the level of output of this electricity generation facility."

[12] The Final Judgment defines a specific type of management services contract -- a "California Public Power Generation Management Services Contract" -- to mean "a bona fide contract for managing the operation and sale of output from California Generation Facilities owned by a municipality, an irrigation district, other California state authority, or their agents on January 1, 1998; provided, however, that a contract for managing the operation and sale of output from generation assets of LADWP shall not be deemed a California Public Power Generation Management Services Contract."

CPPPs to hire experts in generation management to run their plants for them. The current investor-owned utilities, including Enova, plan to compete for these contracts. Under these contracts, the manager may obtain control of the generation facilities and all or most of the profits which, if PE/Enova were the manager, could give it the incentive to raise electric prices.

The Final Judgment directs that Defendant shall provide notice to the United States of any management contract that Defendant enters, unless such management contract is reportable under the Hart-Scott-Rodino Antitrust Improvements Act. The notice provision balances the efficiencies of competition for CPPP management contracts with the possible anticompetitive effect from Defendant controlling CPPP assets. It enables the United States to monitor Defendant's level of capacity control without removing it as a viable competitor for these contracts.

If PE/Enova were to enter into a management contract with LADWP, however, it would be required to obtain prior approval from the United States. LADWP controls 3700 MW of capacity in or directly linked to California. A large part of this capacity is low cost. Absent the prior approval requirement, the merged company could regain in one transaction even more incentive to raise the pool price than it had before auctioning the Divestiture Assets. The probable competitive harm threatened by Defendant's sudden reacquisition of all or a substantial part of LADWP's 3700 MW of generation via management contacts more than offsets possible efficiencies gained by Enova bidding on LADWP management contracts.

D. Termination or Modification of the Final Judgment

The Final Judgment -- and its prior approval and notice obligations -- remain in effect until the tenth anniversary of the date of its entry unless the Final Judgment is terminated earlier under specific

conditions. The Final Judgment also provides that the reacquisition limitations will be modified under certain conditions.

1. Termination of the Final Judgment

The Final Judgement provides that it shall terminate at any time if the United States determines that the merger between Enova and Pacific identified in the Complaint has been terminated. It will also terminate if the United States determines that an Independent System Operator ("ISO") has assumed control of Pacific's gas pipelines within California. In that event, PE/Enova will lose the ability to control access to gas transportation and storage. Without these tools, the merged company will not be able to raise the price for electricity sold through the pool by reducing its gas sales, and the basis for the Final Judgment would be removed.

In addition, the decree will terminate after five years under certain conditions. As noted above, the decree imposes continuing prior approval and notice obligations to ensure that PE/Enova does not simply reacquire assets similar to those it has divested, which it could readily do during the restructuring of California's electricity market.[13] Most of the changes in ownership in electric generation and control should occur in the next five years. Hence termination of the decree at the end of five years would be reasonable.

There would be a cause for concern, however, if PE/Enova could sell SONGS capacity at the unregulated pool price -- it would be in essence be acquiring 430 MW of output without opportunity for the government to challenge. For this reason, the decree will terminate in five years only if (1) Enova no longer owns any of its existing nuclear assets; (2) its nuclear assets are no longer in

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[13] As discussed above in Section III (B)(1), significant amounts of generating capacity will be available for purchase, lease, or contractual control during the next few years.

operation; or (3) the output of those nuclear assets is required by law or regulation to be sold at a fixed price.

Finally, the Final Judgment will partially terminate as to any Divestiture Asset if any governmental authority permanently revokes any license or permit necessary for the operation of such asset, properly exercises power or eminent domain with respect to such asset, or enters into a settlement agreement with Enova regarding the disposition of such asset to a third party.

2. Modification of Reacquisition Limits

The Final Judgment provides that the 500 MW ownership cap may increase under two conditions: (1) If Enova divests all of its existing nuclear generation assets, the acquisition cap will increase to 800 MW; and (2) if defendant's total retail electricity sales at any point exceed 8,000 MW the ownership cap will be increased up to 10% of such retail electricity sales. The first condition allows an adjustment of the ownership cap in the event that SONGS is sold to replace a portion of the SONGS generation. (The 500 MW cap is a cap on acquisitions in addition to holding SONGS.) The second condition provides for the possibility that SONGS is not sold but that Enova's retail sales exceed 8,000 MW, and it allows defendant sufficient local generation to back up its expanded retail sales.

E. Trustee Provisions

Until the ordered divestiture takes place, Enova must take all reasonable steps necessary to accomplish the divestiture, and cooperate with any prospective purchaser. If defendant does not accomplish the ordered divestiture within the specified time period, the proposed Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestiture. In that case, Defendant must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that Defendant will pay all costs and expenses of the trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price for the assets to be divested, and to accomplish the divestiture as quickly as possible. After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee shall file promptly with the Court a report that sets forth (1) the trustee's efforts to accomplish the divestiture, (2) the reasons, in the trustee's judgment, why the divestiture has not been accomplished, and (3) the trustee's recommendations. The trustee's report will be furnished to the parties and shall be filed in the public docket, except to the extent the report contains information the trustee deems confidential. The parties each will have the right to make additional recommendations to the Court. The Court shall enter such orders as it deems appropriate to accomplish the purposes of this Final Judgment.

F. Provisions for Separate Management

The Stipulation and Final Judgment require Enova to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, the management of any electricity generating facilities shall be kept separate and apart from the management of defendant's other businesses, and will not be influenced by defendant. Enova must appoint a person or persons to oversee the Divestiture Assets and to be responsible for it's compliance with these provisions.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Enova.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Roger W. Fones, Chief
Transportation, Energy, & Agriculture Section
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against Defendant. The United States is satisfied, however, that the divestiture of the assets and other relief contained in the proposed Final Judgment will preserve viable competition in the market for electricity in California that otherwise would be affected adversely by the acquisition. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the government's Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court *may* consider:

> (1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the United States Court of Appeals for the District of Columbia Circuit has held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the Final Judgment is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the Final Judgment may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[14] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

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[14] 119 Cong. Rec. 24598 (1973). See also United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, see 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

United States v. Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added).[15]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" United States v.

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[15] See United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983).

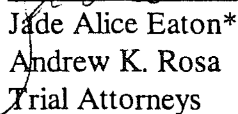
American Tel. & Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982) (citations omitted) (quoting United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: June 8, 1998

Respectfully submitted,



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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that I have caused a copy of the foregoing Competitive Impact Statement to be served on counsel for defendant in this matter in the manner set forth below:

By first class mail, postage prepaid:

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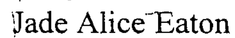

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