

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	
)	
<i>Petitioner,</i>)	Supplemental Action to
)	Civil No. 1:11-cv-02276
v.)	
)	
EXELON CORPORATION,)	
)	
<i>Respondent.</i>)	
)	

**PETITION BY THE UNITED STATES FOR AN ORDER TO SHOW CAUSE WHY
RESPONDENT EXELON CORPORATION SHOULD NOT BE FOUND IN CIVIL
CONTEMPT**

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, presents this Petition for an Order requiring Respondent Exelon Corporation (“Exelon”) to show cause why it should not be found in civil contempt of the Hold Separate Stipulation and Order (“Hold Separate,” Dkt. #5) entered by this Court on December 30, 2011, and the Final Judgment (Dkt. #13), entered by this Court on May 23, 2012, in *United States v. Exelon Corporation, et al.*, Civil Action No. 1:11CV02276 (D.D.C. 2011). The United States represents as follows:

I. RESPONDENT

1. Exelon, a named defendant in *United States v. Exelon Corporation, et al.*, Civil Action No. 1:11CV02276 (D.D.C. 2011), is a corporation organized and existing under the laws of Pennsylvania.

II. JURISDICTION OF THE COURT

2. This petition alleges violations of the Hold Separate and Final Judgment by Exelon. This Court has jurisdiction both under its inherent powers to enforce compliance with its orders and under Section XII of the Final Judgment, which provides:

This Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

III. BACKGROUND

3. On December 21, 2011, the United States filed a civil antitrust Complaint under Section 7 of the Clayton Act, 15 U.S.C. § 18, seeking to permanently enjoin the proposed acquisition by Exelon of Constellation Energy Group, Inc. (“Constellation”). The Complaint alleged that the proposed transaction would substantially lessen competition in the provision of wholesale electricity in two regions of the northeast United States, which the Complaint defined as PJM Mid-Atlantic North and PJM Mid-Atlantic South.

4. These regions are part of “PJM,” an independent regional transmission organization, sanctioned by the Federal Energy Regulatory Commission (“FERC”), that manages the high-voltage transmission grid and coordinates the wholesale electricity market in an area stretching from Illinois to New Jersey.

5. Generators of electricity, such as Exelon and Constellation, submit offers on a daily basis to sell electricity into the wholesale market in auctions conducted by PJM. The generators’ offers are essential in determining the “market-clearing prices” wholesale customers pay for electricity. The market-clearing price is essentially determined by the highest-priced generation

offer that is required by PJM to meet demand, and all sellers receive that price, regardless of their offer or costs.

6. Simultaneously with filing the Complaint, with the consent of Exelon, the United States also filed a proposed Final Judgment and Hold Separate. To preserve competition for wholesale electricity in PJM Mid-Atlantic North and PJM Mid-Atlantic South, the proposed Final Judgment ordered Exelon to divest three electric generating plants (the “Divestiture Assets”).

IV. RELEVANT TERMS OF THE HOLD SEPARATE AND FINAL JUDGMENT

7. The Hold Separate in this case, among other provisions, seeks to ensure that Exelon does not offer generation into the PJM auction in ways that would allow Exelon to raise market prices for the period between the closing of its acquisition of Constellation and the completion of the divestitures required by the Final Judgment.

8. Section VI.A of the Hold Separate requires that, from the time of the closing of Exelon’s acquisition of Constellation until the Divestiture Assets are sold, Exelon will “offer into the PJM Day-Ahead Energy Market the units listed in Attachment A [to the Hold Separate Order] at offers no more than the Cost-Based Offer,” with the term “Cost-Based Offer” being defined in Section I.E. of the Hold Separate.

9. Section VIII of the Final Judgment requires that “[u]ntil the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by the Court.” Exelon agreed to abide by all terms and provisions of the Final Judgment from the date of the signing of the Hold Separate. As such, the terms and provisions of the Final Judgment “were in full force and effect as an order of the Court” from the time Exelon completed its acquisition of Constellation. Hold Separate, Section IV. B.

V. EXELON'S CONDUCT

10. Exelon agreed to refrain from closing its acquisition of Constellation until the Court had signed the Hold Separate. The Court signed and entered the Hold Separate on December 30, 2011.

11. Exelon closed its acquisition of Constellation on March 12, 2012. From that date forward, Exelon became responsible for making daily offers to PJM for the electricity produced by the generation units formerly owned by Constellation, including those units subject to the Hold Separate's Cost-Based Offer provisions. Also from that date forward, Exelon earned revenues from sales of electricity generated at the generation units formerly owned by Constellation.

12. For a period of time following March 12, 2012, Exelon submitted offers for certain units that were subject to the Hold Separate at prices higher than the Cost-Based Offer levels allowed by the Hold Separate. For example, from March 12 until March 28, 2012, Exelon offered certain coal-fired generating units formerly owned by Constellation at prices higher than the Cost-Based Offer.

13. In preparing to make these offers, Exelon failed to take all steps necessary to comply with the Cost-Based Offer provisions of the Hold Separate.

14. On March 27, 2012, Exelon brought to the attention of the United States certain offers at prices higher than the Cost-Based Offer that Exelon had discovered by that date.

VI. RELATED PROCEEDINGS

15. The Federal Energy Regulatory Commission ("FERC") and the State of Maryland Public Service Commission ("Maryland PSC") also reviewed Exelon's proposed acquisition of

Constellation and each also required Exelon, as a condition of final approval for the transaction, to make certain cost-based offers.

16. In addition to providing notice to the United States as described in Paragraph 14 above, Exelon also notified FERC and the Maryland PSC about Exelon's discovery of its above-cost offers. On April 6, 2012, Exelon submitted an initial report on those offers to FERC and the Maryland PSC, as well as to the United States. ("Initial Report," attached to the Memorandum of the United States in Support of Motion to Enter the Settlement Agreement and Order ("Memorandum of the United States") as Exhibit 1.) On April 12, 2012, the Maryland PSC issued an Order to Show Cause as to whether Exelon had violated the terms of the Maryland PSC approval order.

17. On August 10, 2012, Exelon submitted a final report to FERC and to the Maryland PSC, as well as to the United States, providing the results of Exelon's internal review of its offers from the time Exelon's obligations to make Cost-Based Offers went into effect. This final report examined the events surrounding the offers that were made at prices higher than the Cost-Based Offer and the steps Exelon had taken to ensure prospective compliance with its obligations. "Results of the Top-to-Bottom Review of Exelon's Program for Calculating Costs Under PJM Energy Offer-Cap Commitments and Summary of Actions Taken to Remedy All Issues," dated Aug. 10, 2012 ("Final Report," attached to the Memorandum of the United States as Exhibit 2.)

18. To address initial estimates of direct harm and excess profits caused by offers at prices higher than the Cost-Based Offer, Exelon agreed to (1) refund certain operating ("make whole") payments Exelon had collected only because of the above-cost offers, (2) return to PJM approximately \$141,000, which reflected initial estimates of the excess profits made by Exelon, and (3) return to the Maryland PSC approximately \$151,000, which reflected initial estimates of

the harm to Maryland customers. *See* Final Report at 2-3. PJM later determined that these initial estimates were excessive and calculated that the offers at prices higher than the Cost-Based Offer caused a total, market-wide effect on all PJM customers of less than \$100,000 and that Exelon did not make any excess profits. Final Report at 6. Exelon stated that it would honor the payments it originally agreed to make, notwithstanding the results of the subsequent PJM analysis, which shows that the payments made by Exelon exceed any impact from the above-cost offers. Final Report at 9.

VII. VIOLATIONS ALLEGED

19. Exelon violated Section VI.A. of the Hold Separate by submitting offers to PJM that were above the Cost-Based Offer limits in the Hold Separate.
20. Exelon violated Section VIII of the Final Judgment by failing to take all steps necessary to comply with the Hold Separate.
21. By the acts described above, Exelon has been in civil contempt for violating Section VIII of the Final Judgment and Section VI.A. of the Hold Separate.

VIII. PRAYER

For the foregoing reasons, the United States respectfully requests that this Court enter an Order directing Exelon to appear before this Court at a time and place to be fixed in that Order and to show cause why it should not be adjudged in civil contempt of this Court. The United States also prays for the following relief:

1. that Exelon be found in civil contempt for the violations of the Final Judgment and Hold Separate as described above;
2. that Exelon be ordered to pay an amount deemed appropriate by this Court for contempt of the Final Judgment and Hold Separate Order;

3. that the United States be awarded costs and attorneys fees incurred in investigating Exelon's conduct and filing this Petition; and
4. that the United States have any and all other relief as the Court may deem justified.

Dated: November 14, 2012

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

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