UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
U.S. Department of Justice
Antitrust Division
450 5th Street, NW
Suite 8000
Washington, DC 20001

Plaintiff,

v.

EXELON CORPORATION
10 South Dearborn Street
Chicago, IL 60603

and

CONSTELLATION ENERGY GROUP, INC.
100 Constellation Way
Baltimore, MD 21202

Defendants.

Case: 1:11-cv-02276
Assigned To : Sullivan, Emmet G.
Assign. Date : 12/21/2011
Description: Antitrust

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the merger of Exelon Corporation ("Exelon") and Constellation Energy Group, Inc. ("Constellation") and alleges as follows:

1. On April 28, 2011, Exelon entered into an Agreement and Plan of Merger with Constellation. The transaction would create one of the largest electricity companies in the United States with total assets of $72 billion and annual revenues of $33 billion.

2. Exelon and Constellation sell wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

3. Exelon's merger with Constellation would eliminate significant competition between them in two smaller regions within this broad area and give the merged firm the incentive and the ability to raise wholesale electricity prices, resulting in increased retail electricity prices for millions of residential, commercial, and industrial customers in these areas.

4. Accordingly, the merger would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

I. JURISDICTION AND VENUE

5. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

6. Exelon and Constellation are engaged in interstate commerce and in activities substantially affecting interstate commerce. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

7. Exelon and Constellation transact business and are found in the District of Columbia. Venue is therefore proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c).

II. THE DEFENDANTS AND THE TRANSACTION

8. Defendant Exelon is a Pennsylvania corporation, with its headquarters in Chicago, Illinois. Exelon owns Exelon Generation Company, LLC, which owns electric generating plants located primarily in the Mid-Atlantic and the Midwest and has a total generating capacity of more than 25,000 megawatts ("MW"). Exelon also owns two distribution companies: PECO Energy Company, a gas and electric utility that serves customers in the Philadelphia area, and Commonwealth Edison Company, an electric utility that serves customers in the Chicago area.

9. Defendant Constellation is a Maryland corporation, with its headquarters in Baltimore, MD. Constellation owns Constellation Power LLC, which owns electric generating plants, located primarily in Maryland, with a total generating capacity of more than 11,000 MW. Constellation also owns a distribution company, Baltimore Gas and Electric, an electric and gas utility that serves customers in the Baltimore area.

10. Following Exelon's merger with Constellation, the combined company would be known as Exelon Corporation, with its corporate headquarters in Chicago, Illinois.

III. TRADE AND COMMERCE

A. Background

11. Electricity supplied to retail customers is generated at electric generating plants, which consist of one or more generating units. An individual generating unit uses any one of several types of generating technologies (including hydroelectric turbine, wind turbine, steam turbine, combustion turbine, or combined cycle) to transform the energy in fuels or the force of wind or flowing water into electricity. The fuels used by a generating unit include uranium, coal, oil, or natural gas.

12. Generating units vary considerably in their operating costs, which are determined primarily by the cost of fuel and the efficiency of the technology in transforming the energy in fuel into electricity. "Baseload" units – which typically include nuclear and very efficient coal-fired steam turbine units – have relatively low operating costs. "Peaking" units – which typically include oil- and gas-fired combustion turbine units – have relatively high operating costs. "Mid-merit" units – which typically include combined-cycle and less efficient and thus higher-cost coal-fired steam turbine units – have costs lower than those of peaking units but higher than those of baseload units.

13. Once electricity is generated at a plant, an extensive set of interconnected high-voltage lines and equipment, known as the transmission grid, transports the electricity to lower voltage distribution lines that relay the power to homes and businesses. Transmission grid operators must closely monitor the grid to prevent too little or too much electricity from flowing over the grid, either of which might damage lines or generating units connected to the grid. For example, to prevent such damage and to prevent widespread blackouts from disrupting electricity service, a grid operator will manage the grid to prevent additional electricity from flowing over a transmission line as that line approaches its operating limit (a "transmission constraint").

14. In the Mid-Atlantic, the transmission grid is overseen by PJM Interconnection, LLC ("PJM"), a private, non-profit organization whose members include transmission line owners, generation owners, distribution companies, retail customers, and wholesale and retail electricity suppliers. The transmission grid administered by PJM is the largest in the United States, providing electricity to approximately 58 million people in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio,

Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia (the "PJM control area").

15. PJM oversees two auctions for the sale and purchase of wholesale electricity: a day-ahead auction that clears the day before the electricity is required, and a real-time auction that clears the day the electricity is required. Generation owners sell through these auctions to electricity retailers that provide retail electric service in the PJM control area. Buyers and sellers of wholesale electricity may also enter into contracts for the sale and purchase of electricity with each other, or third parties, outside of the PJM auction process; prices for these bilateral contracts generally reflect expected auction prices.

16. In the day-ahead auction, each buyer typically submits to PJM the amount of electricity the buyer expects to need each hour of the next day. PJM then adds up the amount of electricity buyers will need to determine how much electricity will be demanded each hour. Each seller submits to PJM an offer to sell electricity indicating the amount of electricity it is willing to sell the next day and the price at which it is willing to sell. PJM then sorts the offers to sell from lowest to highest offer price to determine how much electricity will be supplied each hour at any given price.

17. Subject to the physical limitations of the transmission grid, PJM seeks to have generating units operated in "merit" order, from lowest to highest offer. In the day-ahead auction, as long as transmission constraints are not expected, PJM takes the least expensive offer first and then continues to accept offers to sell at progressively higher prices until the needs for each hour the next day are covered. In this way, PJM minimizes the total cost of generating electricity required for the next day. The clearing price for any given hour essentially is determined by the generating unit with the highest offer price that is needed for that hour, and all

sellers for that hour receive that price regardless of their offer price or their units' costs. In the real-time auction, which accounts for differences between anticipated and actual supply and demand, PJM accepts sellers' offers in merit order, subject to the physical and engineering limitations of the transmission grid, until there is a sufficient quantity of electricity to meet actual demand.

18. At times, transmission constraints prevent the generating units with the lowest offers from meeting demand in a particular area within the PJM control area. A particular geographic area within the PJM control area may be affected by more than one set of transmission constraints. When that happens, PJM's primary response is to call on more expensive units located within the smaller area bounded by the transmission constraints (a "constrained area"), and prices to the buyers in that area adjusts accordingly. Because more expensive units are required to meet demand, prices in a constrained area will be higher than they would be absent the transmission constraints.

19. **PJM Mid-Atlantic North.** One historically constrained area within the PJM control area includes the densely populated areas of eastern Pennsylvania, eastern Maryland, Delaware, and the District of Columbia. This area ("PJM Mid-Atlantic North") is defined by a set of major transmission lines that divides this area from the rest of the PJM control area. The most important of these lines is the "5004/5005 Interface," which includes the Keystone-Juniata 5004 line and the Conemaugh-Juniata 5005 line.

20. When these transmission lines are constrained, PJM has limited ability to supply additional demand located east of the constraints with electricity from generating units located west of the constraints. PJM often responds to constraints on these lines by calling on additional

generating units east of the constraint to run. When the units east of the constraint are called to run, prices in PJM Mid-Atlantic North rise.

21. In PJM Mid-Atlantic North during 2010, more than $11 billion of wholesale electricity was sold to over 20 million people.

22. **PJM Mid-Atlantic South.** A second constrained area in PJM also includes eastern Pennsylvania and eastern Maryland as well as the District of Columbia, Delaware, and most of Virginia. This area ("PJM Mid-Atlantic South") is defined by a set of major transmission lines that divides this area from the rest of the PJM control area. The most important of these lines is the "AP South Interface," which includes the Mt. Storm-Doubs 512 line, the Greenland Gap-Meadowbrook 540 line, the Mt. Storm-Valley 550 line, and the Mt. Storm-Meadowbrook (TrAIL) line.

23. When these transmission lines are constrained, PJM is limited in its ability to supply additional demand located east of the constraints with electricity from generating units located west of the constraints. PJM often responds to constraints on these lines by calling on additional generating units east of the constraints to run. When the units east of the constraint are called to run, prices in PJM Mid-Atlantic South rise.

24. In PJM Mid-Atlantic South during 2010, more than $13 billion of wholesale electricity was sold to over 30 million people.

B. Relevant Product Market

25. Wholesale electricity is a relevant product market and a line of commerce within the meaning of Section 7 of the Clayton Act. In the event of a small but significant increase in the price of wholesale electricity, insufficient purchasers would switch away to make that increase unprofitable.

C. Relevant Geographic Markets

26. When the 5004-5005 Interface is constrained, purchasers of wholesale electricity for use in PJM Mid-Atlantic North have limited ability to turn to generation outside of PJM Mid-Atlantic North. At such times, the amount of electricity that could be obtained by consumers from outside PJM Mid-Atlantic North is insufficient to deter generators located in PJM Mid-Atlantic North from seeking a small but significant price increase.

27. PJM Mid-Atlantic North is a relevant geographic market and a section of the country within the meaning of Section 7 of the Clayton Act.

28. When the AP South Interface is constrained, purchasers of wholesale electricity in PJM Mid-Atlantic South have limited ability to turn to generation outside of PJM Mid-Atlantic South. At such times, the amount of electricity that could be obtained by consumers from areas outside PJM Mid-Atlantic South is insufficient to deter generators located in PJM Mid-Atlantic South from seeking a small but significant price increase.

29. PJM Mid-Atlantic South is a relevant geographic market and a section of the country within the meaning of Section 7 of the Clayton Act.

IV. MARKET STRUCTURE AND ANTICOMPETITIVE EFFECTS

A. Market Shares and Concentration

30. The relevant markets are moderately concentrated and would become more concentrated as a result of the proposed transaction.

31. As articulated in the *2010 Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission ("Guidelines"), the Herfindahl-Hirschman Index ("HHI") is a measure of market concentration. Market concentration is often

one useful indicator of the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition harming consumers. The Guidelines consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated. Under the Guidelines, transactions that increase the HHI by more than 100 points in moderately concentrated markets potentially raise significant competitive concerns.

32. Exelon owns or controls approximately 18 percent of the generating capacity in PJM Mid-Atlantic North. Constellation owns or controls approximately 10 percent of the generating capacity in PJM Mid-Atlantic North. After the merger, Exelon would own or control approximately 28 percent of the total generating capacity in PJM Mid-Atlantic North. Exelon's merger with Constellation would yield a post-merger HHI in PJM Mid-Atlantic North of about 1,600, representing an increase of almost 400.

33. Exelon owns or controls approximately 14 percent of the generating capacity in PJM Mid-Atlantic South. Constellation owns or controls approximately 9 percent of the generating capacity in PJM Mid-Atlantic South. After the merger, Exelon would own or control over 22 percent of the total generating capacity in PJM Mid-Atlantic South. Exelon's merger with Constellation would yield a post-merger HHI in PJM Mid-Atlantic South of approximately 1,800, representing an increase of approximately 250.

B. Effect of Transaction

34. In addition to owning or controlling a significant share of overall generating capacity in PJM Mid-Atlantic North and PJM Mid-Atlantic South, the merged firm will own or control generating units with a wide range of operating costs, including low-cost baseload units that provide the incentive to exercise market power and higher-cost units that provide the ability

and incentive to exercise market power. The combination of Exelon's and Constellation's generating units would enhance Exelon's ability and incentive to reduce output and raise prices in PJM Mid-Atlantic North and PJM Mid-Atlantic South.

35. The merger would enhance Exelon's ability to reduce output and raise price in PJM Mid-Atlantic North and PJM Mid-Atlantic South by increasing its share of higher-cost capacity in those markets. With a greater share of higher-cost capacity, Exelon would more often be able to reduce output and raise clearing prices by withholding capacity. Exelon could withhold capacity in several ways, such as by submitting high offers in the PJM auctions for some of the capacity from its higher-cost units such that they are not called on to produce electricity. By reducing its output, Exelon could force PJM to turn to more expensive units to meet demand, resulting in higher clearing prices in PJM Mid-Atlantic North and PJM Mid-Atlantic South.

36. The merger would enhance Exelon's incentive to reduce output and raise price in PJM Mid-Atlantic North and PJM Mid-Atlantic South by increasing the amount of baseload capacity it owns or controls in these markets. With a greater amount of baseload capacity, Exelon would more often find it profitable to reduce output and raise market-clearing prices by withholding capacity. For example, as clearing prices increased due to its withholding of its higher-cost capacity, Exelon would earn those higher prices on its expanded post-merger baseload capacity, making it more likely that the benefit of increased revenues on its baseload capacity would outweigh the cost of withholding higher-cost capacity.

37. Increasing Exelon's incentive and ability to profitably withhold output increases the likelihood that Exelon will exercise market power after its merger with Constellation,

resulting in significant harm to competition and increased prices. Thus, the effect of the merger may be substantially to lessen competition in violation of Section 7 of the Clayton Act.

V. ENTRY

38. Entry into the wholesale electricity market through the addition of new generating capacity in PJM Mid-Atlantic North or PJM Mid-Atlantic South or the addition of new transmission capacity that would relieve the constraints that limit the flow of electricity into PJM Mid-Atlantic North or PJM Mid-Atlantic South would generally take many years, especially considering the necessary environmental, safety, and zoning approvals.

39. Entry into the PJM Mid-Atlantic North or PJM Mid-Atlantic South wholesale electricity market would not be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract an anticompetitive price increase resulting from the merger.

VI. VIOLATION ALLEGED

40. The effect of Exelon's proposed merger with Constellation, if it were consummated, may be substantially to lessen competition for wholesale electricity in PJM Mid-Atlantic North and PJM Mid-Atlantic South in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Unless restrained, the transaction would likely have the following effects, among others:

a) competition in the market for wholesale electricity in PJM Mid-Atlantic North would be substantially lessened;

b) prices for wholesale electricity in PJM Mid-Atlantic North would increase;

c) competition in the market for wholesale electricity in PJM Mid-Atlantic South would be substantially lessened; and

d) prices for wholesale electricity in PJM Mid-Atlantic South would increase.

VII. REQUESTED RELIEF

41. Plaintiff requests that this Court:

a) Adjudge Exelon's proposed merger with Constellation to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b) Permanently enjoin and restrain Defendants from consummating the proposed merger of Exelon and Constellation or from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to combine Exelon and Constellation;

c) Award the United States its costs for this action; and

d) Award the United States such other and further relief as the Court deems just and proper.

Dated: December 21, 2011

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

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