

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

UNITED STATES OF AMERICA

Plaintiff,

v.

DUKE ENERGY CORPORATION

Defendant.

Case No. 1:17-cv-00116 (BAH)

**PLAINTIFF UNITED STATES' MOTION AND MEMORANDUM IN SUPPORT OF
ENTRY OF FINAL JUDGMENT**

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA” or “Tunney Act”), Plaintiff United States of America (“United States”) moves for entry of the proposed Final Judgment filed in this civil antitrust proceeding on January 18, 2017 (attached as [Exhibit A](#)). The proposed Final Judgment may be entered at this time without further proceedings if the Court determines that entry is in the public interest. 15 U.S.C. § 16(e). The Competitive Impact Statement, also filed on January 18, 2017, explains why entry of the proposed Final Judgment would be in the public interest. The United States is filing simultaneously with this Motion and Memorandum a Certificate of Compliance (attached as [Exhibit B](#)) setting forth the steps taken by the parties to comply with all applicable provisions of the APPA and certifying that the sixty-day statutory public comment period has expired.

MEMORANDUM

I. BACKGROUND

On January 18, 2017, the United States filed a Complaint against Duke Energy Corporation (“Duke”) alleging that Duke violated Section 7A of the Clayton Act, as amended, 15 U.S.C. § 18a, also commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”), by acquiring Osprey Energy Center (“Osprey”) from Calpine Corporation (“Calpine”) before filing the required notification form and observing the required waiting period. As explained more fully in the Complaint, the combination of Duke’s agreement to purchase Osprey and the contemporaneously negotiated and interdependent “tolling agreement” transferred beneficial ownership of Osprey’s business to Duke before Duke had fulfilled its obligations under the HSR Act. As a result, Duke and Calpine did not continue to act as independent entities during the required waiting period while the Department of Justice investigated the proposed acquisition and determined whether to challenge it.

In addition to the Complaint, the United States also filed a Stipulation, a proposed Final Judgment, and a Competitive Impact Statement on January 18, 2017. The the proposed Final Judgment is designed to deter future HSR violations by imposing a civil penalty of six hundred thousand dollars (\$600,000). The Stipulation provides that the proposed Final Judgment may be entered by the Court after the completion of the procedures required by the APPA. The Competitive Impact Statement explains the basis for the Complaint and the reasons why entry of the proposed Final Judgment would be in the public interest. 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 Final Judgment and to punish violations thereof.

II. COMPLIANCE WITH THE APPA

The APPA requires a sixty-day period for the submission of public comments relating to the proposed Final Judgment. 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed a Competitive Impact Statement with the Court on January 18, 2017; published the proposed Final Judgment and Competitive Impact Statement in the *Federal Register* on January 31, 2017 (*see* 82 Fed. Reg. 8845); and ensured that a summary of the terms of the proposed Final Judgment, together with directions for the submission of public comments relating to the proposed Final Judgment and Competitive Impact Statement, were published in *The Washington Post*, in the District of Columbia, for seven days, beginning on January 26, 2017 and ending on February 1, 2017. The 60-day period for public comments ended on April 3, 2017. Plaintiff United States received no comments.

The United States has filed a Certificate of Compliance simultaneously with this Motion and Memorandum that states that all the requirements of the APPA have been satisfied. It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the proposed Final Judgment.

III. STANDARD OF JUDICIAL REVIEW

Before entering the proposed Final Judgment, the APPA requires the Court to determine whether the proposed Final Judgment is “in the public interest.” 15 U.S.C. § 16(e)(1). In making that determination, the Court shall consider:

- A. the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

- B. the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1)(A), (B). In its Competitive Impact Statement, the United States explained the meaning and proper application of the public interest standard under the APPA and now incorporates those portions of the Competitive Impact Statement by reference.

IV. ENTRY OF THE PROPOSED FINAL JUDGMENT IS IN THE PUBLIC INTEREST

As described above, the United States alleged in its Complaint that Duke violated the HSR Act by acquiring Osprey before filing the required notification form and observing the required waiting period. As explained in the Competitive Impact Statement, the proposed Final Judgment requires Duke to pay a civil penalty of six hundred thousand dollars (\$600,000), which is designed to deter future violations of the HSR Act.

The public has had the opportunity to comment on the proposed Final Judgment as required by the APPA. As explained in the Competitive Impact Statement, entry of the proposed Final Judgment is in the public interest.

V. CONCLUSION

For the reasons set forth in this Motion and Memorandum and in the Competitive Impact Statement, the Court should find that the proposed Final Judgment is in the public interest and should enter the proposed Final Judgment without further proceedings. Plaintiff United States respectfully requests that the proposed Final Judgment be entered at this time.

Dated: April 6, 2017

Respectfully submitted,

/s/ Robert A. Lepore
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