UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. **EXELON CORPORATION** and **CONSTELLATION ENERGY GROUP, INC.** Defendants.	Case: 1:11-cv-02276 Assigned To : Sullivan, Emmet G. Assign. Date : 12/21/2011 Description: Antitrust

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 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

Defendant Exelon Corporation ("Exelon") and Defendant Constellation Energy Group, Inc. ("Constellation") entered into an Agreement and Plan of Merger, dated April 28, 2011, under which Exelon would merge with Constellation. The United States filed a civil antitrust Complaint on December 21, 2011 seeking to enjoin the proposed merger. The Complaint alleges that the likely effect of this merger would be to lessen competition substantially for wholesale

electricity in sections of the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would increase wholesale electricity prices, raising retail electricity prices for millions of residential, commercial, and industrial customers in parts of the Mid-Atlantic states.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Stipulation") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the merger. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest three electric generating plants (collectively the "Divestiture Assets"). The Stipulation and proposed Final Judgment require Defendants to take certain steps to ensure that these assets are preserved and maintained and that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants 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 thereof. Defendants have also stipulated that they will comply with the terms of the Stipulation and the proposed Final Judgment from the date of the signing of the Stipulation, pending entry of the proposed Final Judgment by the Court and the required divestiture. Should the Court decline to enter the proposed Final Judgment, Defendants have also committed to abide by its requirements and those of the Stipulation until the expiration of the time for appeal.

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

A. The Defendants and the Proposed Transaction

Defendant Exelon is a Pennsylvania corporation, with its headquarters in Chicago, Illinois; it owns Exelon Generation Company, LLC, which owns electric generating plants located primarily in the Mid-Atlantic and the Midwest with a total generating capacity of more than 25,000 megawatts ("MW") and annual revenues in 2010 of about $18.6 billion. Defendant Constellation is a Maryland corporation, with its headquarters in Baltimore, MD; it owns Constellation Power LLC, which owns electric generating plants located primarily in Maryland with a total generating capacity of more than 11,000 MW and annual revenues in 2010 of about $14.3 billion. By combining the generating plants owned by Exelon and Constellation, the proposed merger would enhance the ability and incentive of the merged firm to reduce output and raise wholesale electricity prices in areas of the Mid-Atlantic where Defendants are significant generators of electricity. Thus, the transaction as originally proposed would lessen competition substantially in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

B. Wholesale Electricity in the Mid-Atlantic

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. Generating units typically are fueled by uranium, coal, oil, or natural gas.

Generating units vary considerably in their operating costs, which are determined primarily by the cost of fuel and the efficiency of the unit's 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.

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").

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 an area encompassing 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").

PJM oversees two auctions for the sale and purchase of wholesale electricity: (1) a day-ahead auction that clears the day before electricity is to be generated and delivered and (2) a real-time auction that clears the day electricity is delivered. In these auctions, generation owners submit offers to sell electricity and electricity retailers submit bids to purchase electricity. Buyers submit bids that indicate the amount of electricity they are willing to buy at different prices. Sellers submit offers that indicate the amount of electricity they are willing to sell at different prices. PJM adds up the bids and offers to determine the total demand and supply for electricity. The amount of electricity that actually is generated and delivered is determined by the PJM auctions. Buyers and sellers of wholesale electricity may also enter into contracts with each other or with third parties, outside of the PJM auction process; the prices of these contracts generally reflect expected auction prices.

Subject to the physical limitations of the transmission grid, PJM generally attempts to minimize the total cost of generating electricity required for the next day by operating generation in "merit" order. As a result, PJM "calls" the generation with the lowest offers in the day-ahead auction, accepting the least expensive offer first and then continuing to accept offers to sell generation output at progressively higher prices until PJM has called enough generation to meet anticipated demand for each hour of the next day. The "clearing price" for any given hour is essentially determined by the highest-priced generation offer that is accepted by PJM for that hour, and all sellers for that hour receive that price, regardless of their offer or their costs. In PJM's real-time auction, which accounts for differences between the generation called to meet the day-ahead projections and that needed to meet actual demand, PJM likewise accepts additional sellers' offers in merit order until there is a sufficient quantity of additional electricity to meet actual demand. If generation is withheld from the auctions, such as by submitting a

significantly higher offer than is warranted by the generation's costs, additional generation with higher offers must be called by PJM, leading to higher overall prices for the PJM system.

At times when transmission constraints prevent the generation with the lowest offers from meeting demand in a particular area, PJM calls additional generation in that area that is not already running. In addition to satisfying demand, the additional energy from this generation also acts to relieve the constraints by helping to limit the amount of energy that otherwise would have to flow across the constraints. The effectiveness of a particular generating unit for relieving a constraint is a function of where the generating unit is located on the transmission grid in relation to that constraint and is measured by the "shift factor" of that generating unit with respect to that constraint. Generally, generating units with the highest shift factors and thus the greatest impact for relieving the constraint receive the highest prices. In the mid-Atlantic area of PJM, for example, electricity generally flows from west to east. This means that generation to the east of the major transmission constraints tends to relieve congestion and receives relatively high prices, whereas generation to the west of the major transmission constraints tends to exacerbate congestion and receives relatively low prices. A particular geographic area within the PJM control area may be affected by more than one set of transmission constraints.

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 Washington D.C. This area, referred to in the Complaint as "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. The Exelon generation in eastern Pennsylvania is particularly well suited to relieve congestion on these transmission lines,

though the Constellation generation in Maryland also provides some relief to these transmission lines. When these transmission lines are constrained, PJM is limited in its ability to meet additional demand located east of the constraint with electricity from generation located west of the constraint. PJM often responds to constraints on these transmission lines by calling on additional generation east of the constraint to run, generally resulting in higher prices in PJM Mid-Atlantic North.

PJM Mid-Atlantic South. Another constrained area in PJM also includes eastern Pennsylvania, eastern Maryland, Washington D.C., Delaware, and most of Virginia. This area 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. The Constellation generation in eastern Maryland is particularly well suited to relieve congestion on these transmission lines, though the Exelon generation in Pennsylvania also provides some relief to these transmission lines. When these transmission lines are constrained, PJM is limited in its ability to supply additional demand located east of the constraint with electricity from generation located west of the constraint. PJM often responds to constraints on these lines by calling on additional generation east of the constraint to run, generally resulting in higher prices in PJM Mid-Atlantic South.

C. Product Market

The Complaint alleges that wholesale electricity, electricity that is generated and sold for resale, is a relevant antitrust product market. Wholesale electricity demand is a function of retail electricity demand: electricity retailers, who buy wholesale electricity to serve their customers, must provide exactly the amount of electricity their customers require. Retail electricity

consumers' demand, however, is largely insensitive to changes in retail price; thus, an increase in retail prices due to an increase in wholesale prices will have little effect on the quantity of retail electricity demanded and little effect on the quantity of wholesale electricity demanded. As a result, a small but significant increase in the wholesale price of electricity would not cause a significant number of retail electricity consumers to substitute other energy sources for electricity or otherwise reduce their consumption of electricity.

D. Geographic Markets

The Complaint alleges that "PJM Mid-Atlantic North" and "PJM Mid-Atlantic South" are relevant antitrust geographic markets defined by transmission lines in the PJM control area: PJM Mid-Atlantic North is defined by transmission lines that include the 5004-5005 Interface, and PJM Mid-Atlantic South is defined by transmission lines that include the AP South Interface. When these lines approach their operating limits, purchasers of electricity have limited ability to purchase electricity generated outside the relevant geographic market to meet their needs. Shift factors affect which generating units on the transmission grid are likely to be called when constraints occur. At such times, the amount of electricity that could be obtained from outside PJM Mid-Atlantic North or PJM Mid-Atlantic South by consumers located within those areas is insufficient to deter generators located in PJM Mid-Atlantic North or PJM Mid-Atlantic South from seeking a small but significant price increase. Thus, PJM Mid-Atlantic North and PJM Mid-Atlantic South are relevant antitrust geographic markets.

E. Market Shares and Concentration

The Complaint alleges that Exelon's proposed merger with Constellation would eliminate competition between them and give the merged firm the incentive and ability profitably to raise wholesale electricity prices, resulting in increased retail prices for millions of residential,

commercial, and industrial customers in the PJM control area. In PJM Mid-Atlantic North during 2010, more than $11 billion of wholesale electricity was sold; in PJM Mid-Atlantic South during 2010, more than $13 billion of wholesale electricity was sold. In PJM Mid-Atlantic North and PJM Mid-Atlantic South, the merged firm would own or control a substantial share of total generating capacity in markets that would be moderately concentrated after the merger. More importantly, in both geographic markets the merged firm would own or control low-cost baseload units that provide incentive to raise prices and higher-cost units that provide ability to raise prices.

Market shares in PJM Mid-Atlantic North and PJM Mid-Atlantic South. In PJM Mid-Atlantic North, Exelon currently owns or controls approximately 18 percent of the generating capacity and Constellation currently owns or controls approximately 10 percent of the generating capacity. After the merger, Exelon would own or control approximately 28 percent of the total generating capacity in PJM Mid-Atlantic North. In PJM Mid-Atlantic South, Exelon currently owns or controls approximately 14 percent of the generating capacity and Constellation currently owns or controls approximately 9 percent of the generating capacity. After the merger, Exelon would own or control over 22 percent of the total generating capacity in PJM Mid-Atlantic South.

Concentration in PJM Mid-Atlantic North and PJM Mid-Atlantic South. 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.[1] Market concentration is often one useful indicator of the

[1] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010.html The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30,

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. Exelon's merger with Constellation would yield a post-merger HHI in PJM Mid-Atlantic North of approximately 1,600 points, representing an increase of almost 400. Exelon's merger with Constellation would yield a post-merger HHI in PJM Mid-Atlantic South of approximately 1,800 points, representing an increase of approximately 250 points. Thus, the proposed merger potentially raises significant competitive concerns in PJM Mid-Atlantic North and PJM Mid-Atlantic South.

F. Competitive Effects of the Transaction

The Complaint alleges that the proposed merger would substantially lessen competition. The combination of Constellation and Exelon's generation would increase the merged firm's ability and incentive to withhold selected output, forcing PJM to turn to more expensive generation to meet demand, resulting in higher clearing prices in PJM. [1]

20, and 20 percent, the HHI is 2,600 (302 + 302 + 202 + 202 = 2,600). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

[1] The competitive effects described in this section are closely analogous to the competitive effects described in the Horizontal Merger Guidelines, § 6.3, Example 20.

In determining the competitive effects of a firm potentially withholding electricity, we consider the operating cost, offer, technology, and shift factor of generating units.[2] Specifically, these concepts impact (1) the cost to the PJM system of PJM calling substitute generation when there is withholding and (2) the benefits and losses to the post-merger firm from the potential withholding strategy.

Baseload units, such as nuclear and efficient coal-fired steam, typically generate electricity around the clock during most of the year; certain lower-cost mid-merit units, including some coal-fired steam units, generate electricity for a substantial number of hours during the year. When they are running, such baseload and mid-merit units are positioned to benefit from an increase in wholesale electricity prices. Because they run so frequently, these units provide a relatively significant incentive to withhold output and raise prices.

Higher-cost units provide ability to withhold output to increase the market-clearing price. Higher-cost units can have costs that are close to clearing prices for a substantial number of hours during the year. Where their costs are close to clearing prices, the opportunity cost of withholding output from these units – the lost profit on the withheld output – is smaller than it would be for low-cost baseload units.

Here, by giving post-merger Exelon an increased amount of relatively lower-cost capacity, combined with an increased share of higher-cost capacity, the merger substantially

[2] Shift factors inform both the substitutability of generation and the price increases the merging parties receive from withholding at times of constraint. The cost to the PJM system of using a unit to relieve a constraint is a function of both the generating unit's shift factor with respect to the constraint and the unit's offer as submitted by the unit owner. In general, and holding constant for the offer, the greater a generating unit's shift factor with respect to relieving a transmission constraint, the greater the economic effect of withholding a generating unit when that transmission line is constrained. This is because, if the most effective generation is not available, PJM must call more generation, at a greater overall cost to the system, in order to limit the amount of energy that flows across the constraint. Thus mergers may be more problematic where the shift factors of the parties' generation indicate that one party's generation is a meaningful substitute for the other party's generation with respect to a given major constraint.

increases the likelihood that Exelon would find it profitable to withhold output and raise price. With its increased share of higher-cost capacity, the merged firm would more often be able to reduce output and raise market-clearing prices at relatively low cost to it. And with its increased amount of lower-cost capacity, the merger would make it more likely that the increased revenue on this capacity would outweigh the cost of withholding its higher-cost capacity. In other words, 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. Thus the merger increases Exelon's incentive and ability to reduce output and raise market prices.

G. Entry

The Complaint alleges that entry through the construction of new generation or transmission capacity would not be timely, likely, and sufficient to deter or counteract an anticompetitive price increase. Given the necessary environmental, safety, and zoning approvals required, it would generally take many years for sufficient new entry to take place.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve the competition that would have been lost in PJM Mid-Atlantic North and PJM Mid-Atlantic South had Exelon's merger with Constellation gone forward as proposed without divestitures. Within 150 days after consummation of their merger, subject to two thirty-day extensions of that period of time by the United States, Defendants must sell all of their rights, titles, and interests in the Divestiture Assets. The assets and interests will be sold to purchasers acceptable to the United States in its sole discretion. In

addition, the Final Judgment prohibits the merged company from reacquiring or controlling any of the Divestiture Assets.

A. Divestiture

The Complaint alleges that the merger would significantly enhance the merged firm's ability and incentive profitably to reduce output and raise prices in PJM Mid-Atlantic North and PJM Mid-Atlantic South. The divestiture requirements of the proposed Final Judgment will maintain competition for wholesale energy in these geographic markets by allowing one or more independent competitors to acquire the Divestiture Assets. The Divestiture Assets are three generating plants located in PJM Mid-Atlantic North and PJM Mid-Atlantic South:

- Brandon Shores Power Plant, 2030 Brandon Shores Road, Baltimore, MD 21226
- H.A. Wagner Power Plant, 3000 Brandon Shores Road, Baltimore MD 21226
- CP Crane Power Plant, 1001 Carroll Island Road, Baltimore, MD 21220

Effect of divestiture on ability and incentive profitably to withhold output and raise prices. Although the divestiture will reduce market shares and concentration levels compared to the levels that would have prevailed absent divestiture, the purpose of the divestiture is to preserve competition, not merely maintain HHIs or market shares at their pre-merger levels.[2] Accordingly, the proposed Final Judgment seeks to restore effective competition by depriving Exelon of key assets that would have made it profitable for it to withhold output and raise prices in PJM Mid-Atlantic North and PJM Mid-Atlantic South. Capacity at all three divestiture plants consists primarily of coal-fired units which, depending on demand levels, would have increased either the incentive or the ability of Exelon to exercise market power. Divestiture of the three

[2] U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies § I (June 2011), *available at* http://www.usdoj.gov/atr/public/guidelines/272350.htm ("[E]ffectively preserving competition is the key [principle] to an appropriate merger remedy.").

plants eliminates that increased ability and incentive. In this way, the proposed Final Judgment assures that the merger is not likely to lead to consumer harm.

Requirements regarding divestiture. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers. Defendants must also provide acquirers information relating to personnel that are or have been involved, at any time since July 1, 2011, in the operation of, or provision of generation services by, the Divestiture Assets. Defendants further must refrain from interfering with any negotiations by the acquirer or acquirers to employ any of the personnel that are or have been involved in the operation of any of the Divestiture Assets. Moreover, the proposed Final Judgment restricts Defendants from reacquiring any of the Divestiture Assets during the term of the proposed Final Judgment.

B. Use of a Divestiture Trustee

In the event that Defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all the costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. If *either* (1) the trustee has not entered into definitive contracts for sale of the Divestiture Assets within ninety (90) days after the appointment of the trustee *or* (2) the trustee has not accomplished the divestitures within six (6) months after the appointment of the trustee,

the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The divestiture provisions will eliminate the anticompetitive effects of the merger in wholesale electricity markets in PJM Mid-Atlantic North and PJM Mid-Atlantic South.

IV. EXPLANATION OF THE HOLD SEPARATE STIPULATION AND ORDER

The Stipulation entered into by the United States and Defendants ensures that the Divestiture assets are preserved and maintained and that competition is maintained during the pendency of the ordered divestiture. First, the Stipulation includes terms requiring that Defendants maintain the Divestiture Assets as economically viable and competitive facilities. Second, the Stipulation includes terms ensuring that Defendants do not withhold output from the wholesale electricity market. In particular, the Stipulation requires that Defendants offer the output from certain generating units into the PJM auctions at no more than specified price levels until the Divestiture Assets are sold. The Stipulation also requires the Defendants (1) to submit certain data about their offers to the Division, (2) to grant permission for the Division to discuss that data and related information with PJM and the PJM Market Monitor, (3) to submit certain proposed contracts for the output of generating assets not owned by the Defendants to the United States for review, and (4) if required to do so by the Division in its sole discretion, to hire an auditor to ensure that Defendants are offering their units at the specified price levels and are not withholding generation to raise prices. These requirements seek to ensure that Defendants will not offer their generation into the PJM auctions in ways that allows Defendants to raise market prices.

Requiring Defendants to hold the Divestiture Assets separate and distinct, a typical requirement in Antitrust Division hold separate stipulation and orders, would not have prevented competitive harm in the interim period from consummation to divestiture. The operator of the Divestiture Assets would have recognized that reducing their output would increase the clearing price and benefit Defendants' remaining generating units. Therefore, the Stipulation requires that Defendants maintain offers for output of the Divestiture Assets at the specified levels. Defendants are relieved of the requirement to offer their units at no more than specified levels if they transfer to a third party the rights to offer and receive the revenues from the sale of the complete output of the Divestiture Assets.

V. 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 attorneys' 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 Defendants.

VI. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants 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 (60) 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 (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

William H. Stallings
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8000
Washington, DC 20001

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.

VII. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Exelon's acquisition of certain Constellation assets. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the market for wholesale electricity in PJM Mid-Atlantic North and PJM Mid-Atlantic South. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60)-day comment period, after which the Court shall determine whether entry of 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
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> (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 considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.").[3]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. 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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[3] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

> [t]he 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.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[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. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (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.*

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[4] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

United States, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; see also *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator

Tunney explained: "[t]he 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." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[5]

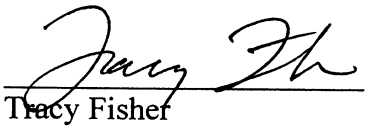
IX. DETERMINATIVE DOCUMENTS

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.

[5] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("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."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Dated: December 21, 2011

Respectfully submitted,



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