

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

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	Case: 1:11-cv-02276
)	
v.)	
)	
EXELON CORPORATION)	
)	
and)	
)	
CONSTELLATION ENERGY GROUP, INC.)	
)	
Defendants.)	

**RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENT ON
THE PROPOSED FINAL JUDGMENT**

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA” or “Tunney Act”), plaintiff, the United States of America (“United States”) hereby files the public comment concerning the proposed Final Judgment in this case and the United States’ response to that comment. After careful consideration of the comment submitted, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

I. BACKGROUND

A. Procedural History

On April 28, 2011, Defendant Exelon Corporation (“Exelon”) agreed to merge with Defendant Constellation Energy Group, Inc. (“Constellation”). Exelon and Constellation are two of the largest sellers of 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. Wholesale electricity is resold to customers by utilities and other organizations, generally for resale to end-use consumers.

On December 21, 2011, the United States filed a civil antitrust Complaint alleging that the proposed merger of Exelon and Constellation would substantially lessen competition in the provision of wholesale electricity in parts of the Mid-Atlantic states in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and result in higher wholesale electricity prices, raising retail electricity prices for residential, commercial, and industrial customers in these markets. Simultaneously with the filing of the Complaint, the United States filed the proposed Final Judgment and a Hold Separate Stipulation and Order (“Hold Separate Order”) signed by the United States and Defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the APPA, 15 U.S.C. § 16. The Court signed and entered the Hold Separate Order on December 30, 2011.

Pursuant to the requirements of the APPA, the United States filed a Competitive Impact Statement (“CIS”) in this Court on December 21, 2011; published the proposed Final Judgment and CIS in the *Federal Register* on December 28, 2011 (*see* 76 Fed. Reg.

81528); and arranged for the publication of a summary of the terms of the proposed Final Judgment, together with directions for the submission of written comments relating to the proposed Final Judgment, in *The Washington Post* for seven days beginning on December 26, 2011 and ending on January 2, 2012. The Defendants filed the statement required by 15 U.S.C. § 16(g) on January 3, 2012. The 60-day period for public comments ended on March 2, 2012; one comment was received as described in Section III below and is attached hereto.

B. The Complaint and Proposed Final Judgment

The Complaint alleges that the combination of Exelon's and Constellation's generating units would enhance post-merger Exelon's ability and incentive to reduce output and raise wholesale electricity prices, likely resulting in increased retail electricity prices for customers in two regions, PJM Mid-Atlantic North and PJM Mid-Atlantic South, as defined in the Complaint and as discussed in detail in the CIS (at pp. 8-12). Absent the merger, Exelon and Constellation would compete against each other to sell electricity at wholesale. As explained in the CIS, the proposed merger would substantially lessen competition by combining the ownership or control of (a) low-cost baseload units that provide the incentive to raise prices with (b) higher-cost units that provide the ability to raise prices, and thus substantially increasing the likelihood that post-merger Exelon would find it profitable to withhold output and raise prices.

The proposed Final Judgment would preserve the competition that would have been lost had the merger gone forward without divestitures. The remedy in the proposed Final Judgment resolves the alleged competitive effects by requiring defendants to divest three electric generating plants to a viable purchaser approved by the United States in its

sole discretion. In addition, the proposed Final Judgment prohibits the merged company from reacquiring or controlling any of the divested assets. *See* CIS at pp. 12-15.

C. Review of Proposed Merger by Other Government Agencies

In addition to a review under the antitrust laws by the United States Department of Justice, which led to the Complaint and proposed Final Judgment, the proposed merger required approvals from the Federal Energy Regulatory Commission, the Public Service Commissions of Maryland and New York, the Public Utility Commission of Texas, the Federal Communications Commission, and the Nuclear Regulatory Commission. Exelon and Constellation sought and have received all of the required approvals.¹ The parties completed their merger on March 12, 2012.

II. STANDARD OF REVIEW UNDER THE TUNNEY ACT

As discussed in the CIS (at pp. 18-22), the Tunney Act calls for the Court, in making its public interest determination, to consider certain factors relating to the competitive impact of the proposed Final Judgment and whether it adequately remedies the harm alleged in the complaint. *See* 15 U.S.C. § 16(e)(1)(A) & (B) (listing factors to be considered).

¹ See Federal Energy Regulatory Commission, “Order Conditionally Authorizing Merger and Disposition of Jurisdictional Facilities [in Docket Nos. EC11-83-000 and EC11-83-001],” March 9, 2012, available at <www.ferc.gov/EventCalendar/Files/20120309175632-EC11-83-000a.pdf>; Maryland Public Service Commission, “Order No. 84698 [in Case 9271],” available at <webapp.psc.state.md.us/Intranet/Casenum/CaseAction_new.cfm?CaseNumber=9271,Item278>; New York Public Service Commission, “Sale of Upstate Nuclear Power Plants Approved — Exelon Can Acquire Nine Mile, Ginna Power Plants from Constellation,” available at <[www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/6CC8C521EDC6A62F85257967005A45F6/\\$File/pr11104.pdf?OpenElement](http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/6CC8C521EDC6A62F85257967005A45F6/$File/pr11104.pdf?OpenElement)>; Public Utility Commission of Texas, “Order [in Docket 39413],” available at <interchange.puc.state.tx.us/WebApp/Interchange/Documents/39413_11_703899.pdf>; Federal Communications Commission, “ULS Application 0004826990,” available at <wireless2.fcc.gov/UlsApp/ApplicationSearch/applMain.jsp?applID=6358842>; Nuclear Regulatory Commission, “NRC Approves Exelon-Constellation Merger, Indirect Transfer of Five Nuclear Power Plant Licenses,” available at <pbadupws.nrc.gov/docs/ML1204/ML120470203.pdf>.

This public interest inquiry is necessarily a limited one as the United States is entitled to deference in crafting its antitrust settlements. *See generally United States v. SBC Commc'ns*, 489 F. Supp. 2d 1 (D.D.C. 2007); *see also United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995); *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 (D.C. Cir. 2004) (A “district court's ‘public interest’ inquiry into the merits of the consent decree is a narrow one.”).

With respect to the scope of the complaint, the Tunney Act review does not provide for an examination of possible competitive harms the United States did not allege. *See, e.g., Microsoft*, 56 F.3d at 1459 (holding that it is improper to reach beyond the complaint to evaluate claims that the government did not make); *SBC Commc'ns*, 489 F. Supp. 2d at 12.

With respect to the sufficiency of the proposed remedy, the United States is entitled to deference as to its views of the nature of the case, its perception of the market structure, and its predictions as to the effect of proposed remedies. *See, e.g., SBC Commc'ns*, 489 F. Supp. 2d at 17 (holding that the United States is entitled to deference as to predictions about the efficacy of its remedies); *United States v. KeySpan*, 763 F. Supp. 2d 633, 642 (S.D.N.Y. 2011). Under this standard, the United States need not show that a settlement will perfectly remedy the alleged antitrust harm; rather, it need only provide a factual basis for concluding that the settlement is a reasonably adequate remedy for the alleged harm. *SBC Commc'ns*, 489 F. Supp. 2d at 17. A court should not reject the United States' proposed remedies merely because other remedies may be preferable. *KeySpan*, 763 F. Supp. 2d at 637-38.

III. SUMMARY OF PUBLIC COMMENT AND THE UNITED STATES' RESPONSE

During the sixty-day comment period, the United States received one public comment, authored by Dr. Charles L. Rogers, which is attached hereto. As explained below, after careful review, the United States continues to believe that the proposed Final Judgment is in the public interest.

A. Summary of the Public Comment

Dr. Rogers raises a concern that the three generating units to be divested under the proposed Final Judgment are not sufficient to address the potential negative impact of the merger.² Dr. Rogers states his belief that the plants to be divested are “three old dirty generating plants.”³ Thus, Dr. Rogers’s comment reflects concerns about the type of units being divested and the sufficiency of the divestiture.⁴

B. Response to Comment

The remedy called for in the proposed Final Judgment is an effective one given the facts and circumstances of this matter. As explained in the CIS, the primary competitive issue presented by Exelon’s merger with Constellation is the potential that the combined portfolio of the merged firm would substantially increase the likelihood that the merged firm would find it profitable to withhold output and raise price. The cost

² Comment at 1-2.

³ Comment at 2.

⁴ Dr. Rogers also raises other concerns that do not relate to the settlement or allegations raised in the Complaint. *See e.g.*, Comment at 1-2 (raising concerns about topics such as access to natural gas services on the distal peninsula of Anne Arundel county, the reliability of the utility grid, and the ability of the state public service commissions to oversee the behavior of utilities that do business in more than one state). These concerns are beyond the scope of the Complaint and therefore outside Tunney Act review. As noted above, other state and federal agencies conducted independent reviews of the merger to address public interest and other factors as appropriate. In addition, Dr. Rogers expresses his concern with the content and tone of two emails that were inadvertently sent to him by Antitrust Division attorneys in response to one of his emails. Upon realizing what had occurred, a Division attorney contacted Dr. Rogers to apologize, and all Division managers and staff have been reminded to exercise caution and professionalism in the use of email communications.

of operating a generating unit varies depending on the cost of fuel for the unit and the efficiency of the unit's technology in transforming the energy in fuel into electricity. Baseload units, such as nuclear and efficient coal-fired steam, typically generate electricity around the clock during most of the year at relatively low cost. These low-cost units, which run frequently, benefit from an increase in wholesale electricity prices and thus act as an incentive for a firm to attempt to raise prices. Higher-cost units that run somewhat less frequently, such as the ones to be divested, provide the ability to withhold output to increase market-clearing prices; and because their costs are closer to the market-clearing price than lower-cost units, the lost profit on the withheld output, and therefore the cost of withholding output from these units, is less than it would be for lower-cost 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 increases the likelihood that Exelon would find it profitable to withhold output and raise price by giving Exelon both additional incentive and additional ability to reduce output and raise market prices.

The divestiture will essentially remove from the firm's combined portfolio all of the higher-cost units, other than those already being retired by Exelon, that are well suited to being systematically withheld as part of an effort to exercise market power. The merged firm will be left with only low-cost nuclear "baseload" units that run almost constantly and natural gas-fired "peaking" units that run rarely. By depriving the merged firm of key assets that would have made it profitable for it to withhold output and raise prices, the proposed Final Judgment seeks to restore effective competition and assure that the merger is not likely to lead to consumer harm.

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2012, I caused the Response of Plaintiff United States to Public Comment on the Proposed Final Judgment and attached exhibit to be electronically filed with the Clerk of the Court using the CM/ECF system, which will provide electronic notice to the following counsel.

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Respectfully Submitted,

/s/

Tracy Fisher
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Transportation, Energy and Agriculture
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Antitrust Division
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2 March 2012
4140 Cadle Creek RD
Edgewater, MD 21037

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

Dear Mr. Stallings,

Thank you for your generous offer. Actually, I had given up hope of having any impact, based on the stonewall I have encountered at the USDOJ other than Ms. Tracy Fisher. Time is our most important resource and as I get older I have less and less interest in beating my head against a bureaucracy that appears impregnable, wasting time of which all of us have a limited amount on this earth. I will send this letter by snail mail in addition to electronically. I have written myself silly, literally dozens of emails with hard economic reasoning comparing competitors to these merger applicants listed below regarding the economic and potentially negative impact that the creation of an electrical and natural gas utility can have should an untoward economic event occur taking down a \$37 billion market capitalization behemoth, both merger partners of which carry corporate bond ratings of BBB or BBB- just one notch above "junk bond" status. With the sole exception of Ms. Tracy Fisher, my email communication with the USDOJ have been met with total silence by Ms. Sharis Pozen and abusive and snarky insults by Angela Hughes as well as Ms. Janet Urban, such that I have lost respect of or hope that the USDOJ gives a damn about the citizens of this country.

Additionally, BGE has been so irresponsible that there are several public schools in Anne Arundel County which have no access to natural gas for heating forcing the county to heat the schools with fuel oil not to mention thousands of residents. Does anyone believe a \$37 billion corporation gives a flying flip about building out a natural gas distribution system or that the citizens of Anne Arundel County will have any impact on the corporate bureaucracy of such a huge utility that stretches across 1/3rd of the country? If they do, I have a bridge for sale in New York City, inexpensively!

We desperately need access to natural gas on all the distal peninsula's of Anne Arundel County, but I see this merger as the deathnell of that possibility, despite having started an electronic petition seeking natural gas infrastructure here to present to my State Senator John Astle with whom I last spoke in December. He agreed with me in his own words that energy deregulation "does not work." It caused the greatest white collar crime wave in history in the form of Enron, and now threatens to make a mega-merger like Constellation Energy and Exelon a government unto itself, making the rules itself, and playing by them. I should know, because BGE burned down my house in February 1994, then lied about it for three years, while they mitigated their costs by 10%/yr in a high interest rate environment. When I proved their liability they finally settled out of court, minus the 30% I lost to inflation and the 33% the lawyers received. Even the insurance company received subrogation compensation, while I was left with trying to rebuild the house in the Critical Areas requiring three variances, being treated arrogantly by the judge that I dare ask for a building permit to rebuild the house.

To say that I am outraged at the irresponsibility of the entire state and Federal government's USDOJ arrogance and impotence is without question. Were this type of treatment be meted out to someone fortunate enough to be represented by the ACLU over a civil rights issue, I have little doubt that there would be a substantially less abusive behavior of all mentioned and a more constructive outcome, but I had to fight these battles alone.

There are thousands of citizens living within an hour's drive of the Capital building living like they are in the 19th century, heating their houses with wood. Some of them are approaching 90 or more, with no access to natural gas. Now with this merger, which the Exelon executives bought the USDOJ anti-trust's division blessing by palming off three old generating plants consisting of about 70% coal, 20% oil and 10% natural gas generation relieving themselves of major costs to upgrade or replace dirty old generating plants, even less hope of ever being able to convince a mega corporation that access to gas is critical. Once again the USDOJ was suckered and they bought it hook, line, and sinker. We also live with a 19th century electrical grid which fails routinely, courtesy of Constellation Energy. Residents of Columbia, MD laugh at Anne Arundel County when the power is out. They almost never have power outages because their utilities are underground. I lived in rural Fairfax county with underground utilities for 30 years and can remember only a handful of power outages, none lasting more than 6-8 hours. In the winter this is potentially a life saving situation. Constellation Energy appears to care more about the \$36,000,000 its executives will collect for this merger than the customers it serves, a true oxymoron.

As a secretary of the local Catholic church said this afternoon, the government has us exactly where they want us, working like dogs without the time or resources to protect ourselves from the Wall Street-Constellation crowd who will reap another \$36,000,000 from this merger after throwing away nearly \$1/2 billion on the 2008 default by BGE to be bought by Mid American Energy (see Edgar filing of Mid American Energy 9/23/2008), or protect ourselves from our own government.

<http://www.sec.gov/Archives/edgar/data/1081316/000095012308011286/y00178e8vk.htm>

Mid American Energy is a regulated electrical energy company serving (in the most complete sense), unlike Constellation, 2.4 million of its customers over Iowa, Wyoming, and parts of Utah, a geographical area many times that of Constellation for a total cost of \$0.0635/KWH and hasn't raise its rates since 1999. Additionally it has been able to generate \$5.4 billion to invest in 2,909 megawatts of wind power. BGE charges \$0.13-14/KWH and Exelon charges PECO customers in Philadelphia \$0.017/KWH, fully more than twice Mid American's charges. In fact Mid American Energy is selling power into Commonwealth Edison Energy's market in Chicago \$0.0635/KWH (originally part of the Exelon merger with PECO in 2004) as reported on the Maryland Public Service website.

How can the USDOJ allow itself to be bought off by Exelon dumping three old dirty generating plants thereby relieving itself of massive costs to comply with EPA requirements and roll over by this magical madness? The anti-trust division of the USDOJ has failed miserably to do its job, while allowing a massive multi-state energy merger, which degrades each state Public Service Commission's ability to prevent abuse of the customers. This is the very definition of restraint of trade and abuse of government sanctioned franchise power.

Ida Tarbell was right. Vituperation is not the way to fight monopolistic power, for the public will soon tire of such nonsense, but the bald facts of abuse of power speak for themselves in the form of Exelon's and Constellation Energy's price structure compared with MidAmerican Energy.

When people are abused by their governments, they frequently vote with their feet, as happened in the middle of the last century from 1947 to 1960 when as Churchill famously said, "From Stettin on the Baltic, to Trieste on the Adriatic an iron curtain descended across Europe enslaving Eastern Europe and all of Soviet Asia." But the Soviets left an escape hatch, West Berlin. The flood of those who left everything behind and walked into freedom became such a Tsunami that the East German Government built a wall around West Berlin, then started shooting people who tried to climb over the wall, and then the most determined to get out tunneled underneath the wall. It took thirty years and a determined group of church and political leaders, Pope John Paul II, Ronald Reagan, and Margaret Thatcher to bring down that wall and allow freedom from economic and political slavery to end. No wall can be built around Maryland or the USA to keep people inside.

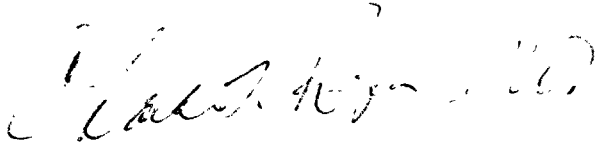
I hope the above is a cogent argument why such mega mergers of giant electrical and gas utilities are inherently anti-competitive, and reduce the power of individual state Public Service Commissions, because the utilities have a choke hold on the delivery of BOTH electrical and natural gas energy. The argument should be self evident to the most casual observer, but then I have little faith, based on previous experience that the USDOJ is interested in anything more than "snarky" insulting email messages and Ms. Sharis Pozen simply ignores the citizenry. I believe that the courts are more interested in themselves than improving the lives of the citizens, and I am not the only person I know who is so cynical. This letter cannot be mailed until Friday 3/9 so it may well be as impotent as other opposition to this travesty which appears simply yet a second example of legalized extortion of the ratepayers of Constellation Energy since 2008.

I would expect such a decision by a Republican USDOJ on philosophical grounds, but for a Democratic USDOJ to make such a foolish and boneheaded blunder is beyond comprehension. If this sounds like I'm angry you are absolutely correct. The generalized disgust and cynicism about the government both local and Federal among those with whom I have talked (and there are many) is so palpable one could cut it with a knife. This is what the "Occupy Wall Street Protest movement is all about. Just wait until Michael Bloomberg brings out the mounted police to clear out the park in Manhattan. His political career will be toast just like Gray Davis in California for failure to control Enron. The USDOJ is failing just like Davis did.

In my case, at the risk of sounding extreme (Barry Goldwater thought extremism in the defense of liberty was no vice, but what is forgotten is that he followed up that incendiary comment with the following statement: **And let me remind you also, that moderation in the pursuit of justice is no virtue!**)

I know I have ventured far afield from a legal brief opposing the Exelon Constellation Energy merger, but it that is what it takes to make people wake up and smell the coffee I will do it again, and again, and again until some order is brought out of chaos, and sanity is created from madness. If something constructive and reasonable does not occur here in Maryland, I plan to sell all real estate, and leave Maryland, possibly the USA Costa Rica and/or New Zealand are looking better and better all the time

All the best,



Charles L. Rogers, MD
4140 Cadle Creek RD
Edgewater, MD 21037
410 798-6022

PS

Below are the juvenile and insulting comments by Ms Hughes and Ms. Urban when I praised Ms Fisher for her decency and integrity, providing me with information how to engage this process I hope you are as proud of them as they seem to be of themselves

From "Hughes, Angela"
Date: Feb 15, 2012 12:59 54 PM
Subject: RE RE: Exelon-Constellation
To <clr22182@verizon.net>

Okay now his emails to you are getting creepy.

From: clr22182@verizon.net [mailto:clr22182@verizon.net]
Sent: Wednesday, February 15, 2012 12:55 PM
To: Fisher, Tracy; ronh@opc.state.md.us; elfenber@yahoo.com; rglidewell@washgas.com
Subject: Re: RE: Exelon-Constellation

Dear Ms. Fisher,

I hope you will accept this thought in the sense it is offered. You are truly a beautiful person I will augment and edit the last letter I wrote to you and submit it via certified mail return receipt I will also notify Ron Herzfeld at the Maryland Office of Public Counsel should he not be aware of this opportunity He has consistently exhibited unimpeachable integrity over this issue and should be given the opportunity to participate, should he find his thoughts pertinent.



Urban, Janet | Janet.Urban@usdoj.gov | Add to Contacts
Wednesday, Feb 15 02 02 PM | Hide Details | View source

reply-to: Janet.Urban@usdoj.gov

to clr22182@verizon.net
RE RE: Exelon-Constellation
Sheesh, he really thinks he's your BFF

From: clr22182@verizon.net [<mailto:clr22182@verizon.net>]
Sent: Wednesday, February 15, 2012 12:55 PM
To: Fisher, Tracy; ronh@opc.state.md.us; elfenber@yahoo.com; rglidewell@washgas.com
Subject: Re: RE: Exelon-Constellation

Dear Ms Fisher,

I hope you will accept this thought in the sense it is offered. You are truly a beautiful person. I will augment and edit the last letter I wrote to you and submit it via certified mail return receipt. I will also notify Ron Herzfeld at the Maryland Office of Public Counsel should he not be aware of this opportunity. He has consistently exhibited unimpeachable integrity over this issue and should be given the opportunity to participate, should he find his thoughts pertinent.

With kindest and best regards,

Charles L. Rogers, MD

On 03/08/12, Stallings, William<William.Stallings@usdoj.gov> wrote

Dr. Rogers,

Under the Tunney Act, we must publish formal comments on the proposed Exelon-Constellation settlement and the Department's response to the comments in the Federal Register and submit copies of them to the court. In your email to Tracy Fisher of February 15, 2012, you indicated that you intended to send a letter offering formal comments on the merger via certified mail. To date, we have not received such a letter from you. If you sent a letter or intend to do so, please let me know. As you know, the statutory deadline to file comments was last Friday, March 2, 2012, but we would be willing to accept your comments if you send them this week.

Thank you for your interest in this matter.