The form is used by persons who are members of the United States Armed Forces.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 9,000 respondents will complete a 30 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 4,500 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: August 17, 2006.

Lynn Bryant,

Department Clearance Officer, Department of Justice.

[FR Doc. E6–13937 Filed 8–22–06; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States of America v. Exelon Corporation and Public Service Enterprise Group Incorporated; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Exelon Corporation and Public Service Enterprise Group Incorporated,* Civil Action No. 1:06CV01138. On June 22, 2006, the United States filed a Complaint alleging that the proposed acquisition by Exelon Corporation (''Exelon'') of Public Service Enterprise Group Incorporated (''PSEG'') would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleges that the acquisition would reduce competition substantially for wholesale electricity in the Mid-Atlantic United States. Specifically, the Complaint alleges that Exelon's acquisition of PSEG's electric generation assets would enhance Exelon's ability and incentive to raise wholesale electricity prices, resulting in increased retail electricity prices for millions of residential, commercial, and industrial customers. The proposed Final Judgment requires Exelon and PSEG to divest six electric generation plants. The plants to be divested are Cromby Generating Station and Eddystone Generating Station in Pennsylvania and Hudson Generating Station, Linden Generating Station, Mercer Generating Station, and Sewaren Generating Station in New Jersey.

Copies of the Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 325 7th Street, NW., Room 215, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within sixty (60) days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Donna N. Kooperstein, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, Department of Justice, 325 7th Street, NW., Suite 500, Washington, DC 20530 (telephone: 202–307–3278).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

United States District Court, District of Columbia

United States of America, U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Suite 500, Washington, DC 20530, Plaintiff, v. *Exelon Corporation, 10 South Dearborn Street, Chicago, IL 60603, and Public Service Enterprise Group, Incorporated, 880 Park Plaza, P.O. Box 1171, Newark, NJ 07101–1171, Defendants*

Case No. 1:06CV01138
Judge: John D. Bates
Deck Type: Antitrust
Date Stamp: 06/22/2006

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 Public Service Enterprise Group Incorporated (''PSEG'') and alleges as follows:

1. On December 20, 2004, Exelon entered into an agreement to merge with PSEG. The transaction would create one of the largest electricity companies in the United States, with total assets of $79 billion and annual revenues of $27 billion.

2. Exelon and PSEG compete to sell wholesale electricity throughout the Mid-Atlantic and in Illinois, North Carolina, West Virginia, and Ohio.

3. Exelon and PSEG are the two largest electricity firms in the area encompassing central and eastern Pennsylvania, New Jersey, Delaware, the District of Columbia, and parts of Maryland and Virginia. Together, they would account for more than 35 percent of the electric generating capacity in this area and would have wholesale electricity revenues of approximately $4 billion.

4. In the eastern portion of this area, which includes the densely populated northern New Jersey and Philadelphia areas, Exelon and PSEG together would account for more than 45 percent of the electric generating capacity in this area and would have wholesale electricity revenues of approximately $3 billion.

5. Exelon's merger with PSEG would eliminate competition between them 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.

6. 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

7. This action is filed by the United States under 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.

8. Exelon and PSEG are engaged in interstate commerce and in activities substantially affecting interstate commerce. The Court has jurisdiction over this action and the parties pursuant to Sections 15 and 16 of the Clayton Act, 15 U.S.C. 25, 26; and 28 U.S.C. 1331, 1337.

9. Exelon and PSEG transact business and are found in the District of Columbia. Venue is proper 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

10. 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 with a total generating capacity of more than 25,000 megawatts (''MW''). Exelon also owns two electricity retailers that buy wholesale electricity and resell it to consumers: 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 northern Illinois.

11. Defendant PSEG is a New Jersey corporation, with its headquarters in Newark, New Jersey. PSEG owns PSEG Power LLC, which owns electric generating plants located primarily in New Jersey with a total generating capacity of more than 15,000 MW. PSEG also owns a gas and electric utility, Public Service Electric and Gas Company, that serves customers in New Jersey.

12. Following Exelon's merger with PSEG, the combined company would be known as Exelon Electric & Gas, with corporate headquarters in Chicago.

III. Trade and Commerce

A. Background

13. 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, steam turbine, combustion turbine, or combined cycle) to transform the energy in fuels or the force of following water into electricity. The fuels used by a generating unit include uranium, coal, oil, or natural gas.

14. 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 some 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 some coal-fired steam turbine units—have costs lower than those of peaking units but higher than those of baseload units.

15. 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. To prevent such damage and to prevent widespread blackouts from disrupting electricity service, a grid operator will manage the grid to prevent any more electricity from flowing over a transmission line as that line approaches its operating limit (a ''transmission constraint'').

16. 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 51 million people in an area encompassing New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, the District of Columbia, and parts of North Carolina, Kentucky, Ohio, Indiana, Michigan, Tennessee, and Illinois (the ''PJM control area'').

17. 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 located in the PJM control area 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.

18. 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. Then PJM 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. Then PJM sorts the offers to sell from lowest to highest offer price to determine how much electricity will be supplied at any given price.

19. Subject to the physical and engineering 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.

20. At times, transmission constraints prevent the generating units with the lowest offers from meeting demand in a particular area within the PJM control area. When that happens, PJM often calls on more expensive units located within the smaller area bounded by the transmission constraints (a ''constrained area''), and the clearing price for the buyers in that area adjusts accordingly. Because more expensive units are required to meet demand, the clearing price in a constrained area will be higher than it would be absent the transmission constraints.

21. *PJM East.* One historically constrained area within the PJM control area includes the densely populated northern New Jersey and Philadelphia areas. This area (''PJM East'') is defined by the ''Eastern Interface,'' a set of five major transmission lines that divides New Jersey and the Philadelphia area from the rest of the PJM control area. When the Eastern Interface is constrained, PJM is limited in its ability to supply demand located east of the constraint with electricity from generating units located west of the constraint. PJM often responds to constraints on the Eastern Interface by calling on additional generating units east of the constraint to run, generally resulting in higher prices in PJM East because the cost of additional generation east of the constraint is higher than the cost of additional generation west of the constraint

22. In PJM East during 2005, more than $10 billion of wholesale electricity was sold for resale to nearly 6 million retail customers.

23. *PJM Central/East.* A second constrained area in PJM includes PJM East and central Pennsylvania. This area is defined by two major transmission lines known as ''5004'' and ''5005'' that run from western to central Pennsylvania and divide the area east of the lines (''PJM Central/East'') from the rest of PJM. When the 5004 and 5005 transmission lines are constrained, PJM is limited in its ability to supply demand located east of the constraint with electricity from generating units located west of the constraint. PJM often responds to constraints on the 5004 and 5005 lines by calling on additional generating units east of the constraint to run, generally resulting in higher prices in PJM Central/East because the cost of additional generation east of the constraint is higher than the cost of additional generation west of the constraint.

24. In PJM Central/East during 2005, more than $19 billion of wholesale electricity was sold for resale to nearly 9 million retail customers.

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 Eastern Interface is constrained, purchasers of wholesale electricity for use in PJM East have limited ability to turn to generation outside of PJM East. At such times, the amount of electricity that could be purchased outside PJM East is insufficient to make it unprofitable for generators located inside PJM East to seek a small but significant price increase.

27. PJM East is a relevant geographic market and a section of the country within the meaning of Section 7 of the Clayton Act.

28. When the 5004 and 5005 transmission lines are constrained, purchasers of wholesale electricity in PJM Central/East have limited ability to turn to generation outside of PJM Central/East. At such times, the amount of electricity that could be purchased outside PJM Central/East is insufficient to make it unprofitable for generators located inside PJM Central/East to seek a small but significant price increase.

29. PJM Central/East is a relevant geographic market and a section of the country within the meaning of Section 7 of the Clayton Act.

IV. Anticompetitive Effects

A. Market Shares and Concentration

30. Exelon owns approximately 20 percent of the generating capacity in PJM East. PSEG owns approximately 29 percent of the generating capacity in PJM East. After the merger, Exelon would own approximately 49 percent of the total generating capacity in PJM East.

31. Using a measure of market concentration called the Herfindahl-Hirschman Index (''HHI''), explained in Appendix A, Exelon's merger with PSEG would yield a post-merger HHI in PJM East of more than 2,700, representing an increase of more than 1,100.

32. Exelon owns approximately 19 percent of the generating capacity in PJM Central/East. PSEG owns approximately 21 percent of the generating capacity in PJM Central/East. After the merger, Exelon would own approximately 40 percent of the total generating capacity in PJM Central/East.

33. Exelon's merger with PSEG would yield a post-merger HHI in PJM Central/East of approximately 2,100, representing an increase of approximately 800.

B. Effect of Transaction

34. In addition to owning a significant share of overall generating capacity in PJM East and PJM Central/East, the merged firm will own generating units with a wide range of operating costs, including low-cost baseload units that provide the incentive to exercise market power, mid-merit units that provide the ability and incentive to exercise market power, and certain peaking units that provide additional ability to exercise market power in times of high demand. The combination of Exelon's and PSEG's generating units would significantly enhance Exelon's ability and incentive to reduce output and raise prices in PJM East and PJM Central/East.

35. The merger would enhance Exelon's ability to reduce output and raise prices in PJM East and PJM Central/East by increasing its share of mid-merit and peaking capacity in those markets. With a greater share of mid-merit and peaking capacity, Exelon would more often be able to reduce output and raise clearing prices at relatively low cost to it by withholding capacity. Exelon could withhold capacity in several ways. For example, it could submit high offers in the PJM auctions for some of the capacity from its mid-merit units such that they are not all 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 East and PJM Central/East.

36. The merger would enhance Exelon's incentive to reduce output and raise price in PJM East and PJM Central/East by increasing the amount of baseload and mid-merit capacity it owns in these markets. With a greater amount of baseload and mid-merit capacity, Exelon would more often find it profitable to reduce output and raise market-clearing prices by withholding capacity. For example, as clearing prices increase due to its withholding certain of its mid-merit capacity, Exelon would earn those higher prices on its expanded post-merger baseload capacity, which almost always runs, making it more likely that the benefit of increased revenues on its baseload capacity would outweigh the cost of withholding mid-merit capacity.

37. Increasing Exelon's incentive and ability to profitably withhold output makes it likely that Exelon will exercise market power after its merger with PSEG, 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 East or PJM Central/East or the addition of new transmission capacity that would relieve the constraints that limit the flow of electricity into PJM East or PJM Central/East would take many years, especially considering the necessary environmental, safety, and zoning approvals.

39. Entry into the PJM East or PJM Central/East wholesale electricity market would not be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract an anticompetitive price increase.

VI. Violation Alleged

40. The effect of Exelon's proposed merger with PSEG, if it were consummated, may be substantially to lessen competition for wholesale electricity in PJM East and PJM Central/East 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 East would be substantially lessened;

b. prices for wholesale electricity in PJM East would increase;

c. competition in the market for wholesale electricity in PJM Central/East would be substantially lessened; and

d. prices for wholesale electricity in PJM Central/East would increase.

VII. Request for Relief

The United States requests:

41. that Exelon's proposed merger with PSEG be adjudged a violation of Section 7 of the Clayton Act, 15 U.S.C. 18;

42. that Defendants be permanently enjoined and restrained from carrying out the Agreement and Plan of Merger dated December 20, 2004, or from entering into or carrying out any agreement, understanding, or plan by which Exelon would merge with or acquire PSEG, its capital stock or any of its assets;

43. that the United States be awarded the costs of this action; and

44. that the United States have such other relief as the Court may deem just and proper.

Dated: June 22, 2006.

Respectfully submitted.

For Plaintiff United States:

Thomas O. Barnett,
Assistant Attorney General.

J. Bruce McDonald,
Deputy Assistant Attorney General.

Dorothy B. Fountain,
Deputy Director of Operations.

Donna N. Kooperstein,
Chief, Transportation, Energy & Agriculture Section.

William H. Stallings,
Assistant Chief, Transportation, Energy & Agriculture Section.

Mark J. Niefer (DC Bar #470370),
Jade Alice Eaton (DC Bar #939629),
Tracy Lynn Fisher (MN Bar #315837),
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Stephanie Toussaint (TX Bar #24045253),
Janet Urban,
David S. Zlotow (CA Bar #235340),
Trial Attorneys, U.S. Department of Justice, Antitrust Division, Transportation, Energy & Agriculture Section, 325 7th Street, NW., Suite 500, Washington, DC 20004. Telephone: (202) 307–6318. Facsimile: (202) 307–2784.

Appendix A—Definition of HHI

The term ''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. 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, 20, and 20 percent, the Hill is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size and 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 when a market is controlled by a single firm. The HID increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,000 and 1,800 are considered to be moderately concentrated, and markets in which the HHI is in excess of 1,800 points are considered to be highly concentrated. *See Horizontal Merger Guidelines* ¶ 1.51 (revised Apr. 8, 1997). Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise significant antitrust concerns under the Department of Justice and Federal Trade Commission. *See id.*

Certificate of Service

I hereby certify that on June 22, 2006, I caused a copy of the foregoing Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Plaintiff United States' Explanation of Procedures for Entry of the Final Judgment to be served on counsel for defendants in this matter in the manner set forth below:

By electronic mail and hand delivery:

Counsel for Defendant Exelon Corporation, John M. Nannes (DC Bar #195966), John H. Lyons (DC Bar #453191), Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Avenue, NW., Washington, DC 20005. Telephone: (202) 371–7500. Facsimile: (202) 661–9191.

Counsel for Defendant Public Service Enterprise Group Incorporated, Douglas G. Green (DC Bar #183343), Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW., Washington, DC 20036. Telephone: (202) 429–3000. Facsimile: (202) 429–3902.

Mark J. Niefer (DC Bar #470370),
Department of Justice, Antitrust Division, 325 Seventh Street, NW., Suite 500, Washington, DC 20530. Telephone: (202) 307–6318. Facsimile: (202) 307–2784.

United States District Court for the District of Columbia

United States of America, Plaintiff; v. Exelon Corporation and Public Service Enterprise Group Incorporated, Defendants

Case No.: 1:06CV01138
Judge: John D. Bates
Deck Type: Antitrust
Filed: 06/22/06

Proposed Final Judgment

And Whereas, Plaintiff, United States of America, filed its Complaint on June 22, 2006, relating to the proposed merger of Defendants Exelon Corporation (''Exelon'') and Public Service Enterprise Group Incorporated (''PSEG'');

And Whereas, Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And Whereas, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, the essence of this Final Judgment is the prompt divestiture of certain assets by Defendants to assure that competition is not substantially lessened;

And Whereas, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And Whereas, Defendants have represented to the United States that the divestitures required below can and will be made, subject to receipt of necessary regulatory approvals, and that Defendants will later raise no claim of mistake, hardship, or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained below;

Now Therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *Ordered, Adjudged, and Decreed:*

I. Jurisdiction

The Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C.

II. Definitions

As used in this Final Judgment:

A. ''Acquire'' means obtain any interest in any electricity generating facility, including real property, deeded development rights to real property, capital equipment, buildings, or fixtures.

B. ''Acquirer'' or ''Acquirers'' means the entity or entities to whom Defendants divest any of the Divestiture Assets or with whom Defendants have entered into definitive contracts to sell any of the Divestiture Assets.

C. ''Control'' means have the ability, directly or indirectly, to set the level of, dispatch, or offer the output of one or more units of an electricity generating

facility or to operate one or more units of an electricity generating facility.

D. ''Designated Utility Zones'' means the service territories in which the following companies on June 1, 2006, owned the wires through which electricity is distributed:

1. Atlantic City Electric Company,
2. Baltimore Gas and Electric Company,
3. Delmarva Power and Light Company,
4. Jersey Central Power and Light Company,
5. Metropolitan Edison Company,
6. Rockland Electric Company,
7. PECO Energy Company,
8. Potomac Electric Power Company,
9. PPL Electric Utilities Corporation, and
10. Public Service Electric and Gas Company.

E. ''Divestiture Assets'' means the following facilities: (1) Cromby Generating Station, 100 Cromby Rd. at Phoenixville, PA, 19460; (2) Eddystone Generating Station, Number 1 Industrial Hwy. at Eddystone, PA, 19022; (3) Hudson Generating Station, Duffield & Van Keuren Aves. at Jersey City, NJ, 07306; (4) Linden Generating Station, 4001 South Wood Ave. at Linden, NJ, 07036; (5) Mercer Generating Station, 2512 Lamberton Rd. at Hamilton, NJ, 08611; and (6) Sewaren Generating Station, 751 Cliff Rd. at Sewaren, NJ, 07077; and

a. For each of those facilities, all of Defendants' rights, titles, and interests in any tangible and intangible assets relating to the generation, dispatch, and offering of electricity at the facility; including the land; buildings; fixtures; equipment; fixed assets; supplies; personal property; non-consumable inventory on site as of June 1, 2006; furniture; licenses, permits, and authorizations issued by any governmental organization relating to the facility (including environmental permits and all permits from federal or state agencies and all work in progress on permits or studies undertaken in order to obtain permits); plans for design or redesign of the facility or any assets at the facility; agreements, leases, commitments, and understandings pertaining to the facility and its operation; records relating to the facility or its operation, wherever kept and in whatever form (excluding records of past offers submitted to PJM); all equipment associated with connecting the facility to PJM (including automatic generation control equipment); all remote start capability or equipment located on site; and all other interests, assets, or improvements at the facility customarily used in the generation, dispatch, or offer of electricity from the facility; provided, however, that ''Divestiture Assets'' shall not include (i) electric and gas distribution or transmission assets located in, or appurtenant to, the boundaries of the facility, or (ii) any communications links between the facility and Defendants, which will be disconnected.

b. At the option of the Acquirer of the Linden Generating Station, the natural gas pipeline facilities connecting any assets at the Linden Generating Station (including the assets listed in Section ILE.a. for the Linden Generating Station), to an interconnection with the Texas Eastern Gas Transmission LP, and all of Defendants' rights, titles, and interests in any tangible and intangible assets relating to the delivery of natural gas from the Texas Eastern Gas Transmission LP interconnection with the Linden Generating Station, including the land; buildings; fixtures; equipment; fixed assets; supplies; personal property; non-consumable inventory on site as of June I, 2006; furniture; licenses, permits, and authorizations issued by any governmental organization relating to the facility (including environmental permits and all permits from federal or state agencies and all work in progress on permits or studies undertaken in order to obtain permits); plans for design or redesign of the facility or any assets at the facility; agreements, leases, commitments, and understandings pertaining to the facility and its operation; records relating to the facility or its operation, wherever kept and in whatever form, and all other interests, assets, or improvements customarily used in the delivery of natural gas from the interconnection of the Texas Eastern Gas Transmission LP to the Linden Generating Station.

To the extent that any licenses, permits, or authorizations described in Section IIE.a. or Section II.E.b. are nontransferable, Defendants will use their best efforts to obtain the necessary consent for assignment to the Acquirer or Acquirers of the license, permit, or authorization.

F. ''Exelon'' means Exelon Corporation, a Pennsylvania corporation headquartered in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures (not including Exelon's participation in the ownership, operation, dispatch, or offering of output of the Keystone Generating Station or the Conemaugh Generating Station), and their directors, officers, managers, agents, and employees.

G. ''Exelon/PSEG Transaction'' means the merger of Exelon and PSEG that is the subject of HSR Transaction Identification No. 2005–696, which was filed pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C.A. 18a (West 1997) (''HSR Act''), including any changes in the terms of that merger that do not necessitate a new Hart-Scott-Rodino filing.

H. ''Good Utility Practice'' means any of the practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods, and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision is made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. ''Good Utility Practice'' is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather is intended to include acceptable practices, methods, or acts generally accepted in the region.

I. ''Including'' means including but not limited to.

J. ''Person'' means any natural person, corporation, association, firm, partnership, or other business or legal entity.

K. ''PJM'' means PJM Interconnection, LLC.

L. ''PSEG'' means Public Service Enterprise Group Incorporated, a New Jersey corporation headquartered in Newark, New Jersey, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures (not including PSEG's participation in the ownership, operation, dispatch, or offering of output of the Keystone Generating Station, the Conemaugh Generating Station, or the Yards Creek Generating Station), and their directors, officers, managers, agents, and employees.

III. Applicability

A. This Final Judgment applies to Defendants Exelon and PSEG, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their electricity generating facilities in the Designated Utility Zones or of lesser business units that include the Divestiture Assets, that the purchaser agrees to be bound by the provisions of

this Final Judgment, provided, however, that Defendants need not obtain such an agreement from the Acquirers of the Divestiture Assets.

IV. Divestitures

A. Defendants are hereby ordered and directed, in accordance with the terms of this Final Judgment, to sell the Divestiture Assets to Acquirers acceptable to the United States in its sole discretion. Defendants shall enter into definitive contracts for sale of the Divestiture Assets within 150 days after consummation of the Exelon/PSEG Transaction. The United States, in its sole discretion, may extend the time period set forth in Section IV.A. for entering into definitive contracts for sale for an additional period not to exceed thirty (30) calendar days and shall notify the Court in such circumstances. Defendants shall use their best efforts as expeditiously and timely as possible (1) to enter into these contracts, and (2) after obtaining the United States' approval of the Acquirers, to seek the necessary approvals of the sale of Divestiture Assets from regulatory agencies with jurisdiction over the Exelon/PSEG Transaction. Defendants shall consummate the contracts for sale no later than twenty-one (21) calendar days after receiving, for each Divestiture Asset, the last necessary regulatory approval required for that Divestiture Asset.

B. In accomplishing the requirements imposed by Section IV.A., Defendants promptly shall make known, by usual and customary means, the availability for sale of the Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that the sales are being made pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. Defendants shall also offer to furnish to prospective Acquirers who have been invited to submit binding bids, subject to reasonable protection for confidential commercial information, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process, except such information subject to attorney-client privilege or the attorney work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Subject to reasonable protection for confidential commercial information, Defendants shall permit prospective Acquirers who have been invited to submit binding bids for the Divestiture Assets to have reasonable access to their personnel and to make such inspection of the Divestiture Assets and any and all of their financial, operational, or other documents and information customarily provided as part of a due diligence process, as well as access to any and all environmental and other permit documents and information.

D. Defendants shall provide to each Acquirer of any of the Divestiture Assets, and to the United States, the name and most recent contact information (if known) for each individual who is currently, or who, to the best of Defendants' knowledge, has, at any time since January 1, 2006, been stationed at a specific Divestiture Asset and involved in the operation, dispatch, or offering of the output, of that Divestiture Asset to be purchased by the Acquirer. Defendants shall not impede or interfere with any negotiations by the Acquirer or Acquirers to employ such persons.

E. Defendants also agree to preserve the Divestiture Assets in a condition and state of repair at least equal to their condition and state of repair as of the date the Complaint was filed, ordinary wear and tear excepted, and consistent with Good Utility Practice.

F. Defendants shall warrant to the Acquirers of the Divestiture Assets that each asset (other than assets retired in place as of June 1, 2006) will be operational, consistent with Good Utility Practice, on the date of sale, subject to legal or regulatory restrictions on any of the Divestiture Assets in existence on the date of sale.

G. Defendants shall warrant to the Acquirers of the Divestiture Assets that there are no undisclosed material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to any permits or certifications relating to the operation of the Divestiture Assets, or otherwise take any action to impede the divestiture or operation of the Divestiture Assets.

H. The divestitures, whether accomplished by Defendants pursuant to Section IV, or by the trustee appointed pursuant to Section V of this Final Judgment, shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirers as part of viable, ongoing businesses engaged in the provision of electric generation services. The divestitures, whether pursuant to Sections IV or V of this Final Judgment, (1) shall be made to Acquirers that, in the United States' sole judgment, have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the business of the provision of electric generation services; and (2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirers and Defendants give Defendants the ability unreasonably to raise the Acquirers' costs, to lower the Acquirers' efficiency, or otherwise to interfere in the ability of the Acquirers to compete effectively.

V. Appointment of Trustee

A. If Defendants have not entered into definitive contracts for sale of the Divestiture Assets within the time specified in Section IV.A. of this Final Judgment, Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets, including the application for necessary regulatory approvals. Until such time as a trustee is appointed, Defendants shall continue their efforts to effect the sale of the Divestiture Assets as specified in Section IV.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestitures at the earliest possible time to Acquirers acceptable to the United States, in its sole discretion, at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as the Court deems appropriate. Subject to Section V.D. of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the judgment of the trustee to assist in the divestitures.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI of this Final Judgment.

D. The trustee shall serve at the cost and expense of Defendants, on such terms and conditions as the United

States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Defendants, and the trust shall then be terminated. The compensation of the trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which they are accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture, including their best efforts to effect all necessary regulatory approvals. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and assets at the facilities to be divested, and Defendants shall develop financial or other information relevant to the assets to be divested customarily provided in a due diligence process as the trustee may reasonably request, subject to reasonable protection for confidential commercial information. Defendants shall permit prospective Acquirers who have been invited to submit binding bids for any of the Divestiture Assets to have reasonable access to their personnel and to make such inspection of the Divestiture Assets and any and all financial, operational, or other documents and other information as may be relevant to the divestitures required by this Final Judgment, subject to reasonable protection for confidential commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment; provided however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished such divestitures within sixty (60) calendar days after its appointment, the trustee shall file promptly with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures; (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, who shall have the right to make additional recommendations consistent with the purpose of the trust. The Court shall enter thereafter such orders as it shall deem appropriate to carry out the purpose of this Final Judgment which may, if necessary, include extending this Final Judgment and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestitures

A. Within two (2) business days after signing a definitive contract for sale of any of the Divestiture Assets, Defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United Stales of any proposed divestiture required by Sections IV or V of this Final Judgment, and submit to the United States a copy of the proposed contract for sale and any other agreements with the Acquirer relating to the Divestiture Assets. If the trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture (including the name, address, and telephone number of the proposed Acquirer), and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirers, any other third party, or the trustee if applicable, additional information concerning the proposed divestiture, the proposed Acquirers, and any other potential Acquirers. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirers, any third party, and the trustee, whichever is later, the United States shall provide written notice to Defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture, provided, however, that the United States may extend the period for its review up to an additional thirty (30) calendar days. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section V.C. of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer, or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V.C., a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter and every thirty (30) calendar days thereafter until the Divestiture Assets have been sold, whether pursuant to Sections IV or V of this Final Judgment, Defendants shall deliver to the United States an affidavit as to the fact and manner of compliance with Sections IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts that Defendants have taken to solicit purchasers for the Divestiture Assets and to provide required information to prospective purchasers including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to

information provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. The affidavit also shall include a description of Defendants' efforts to maintain the Divestiture Assets in operable condition at no less than current capacity configurations with current levels of staffing and management and to otherwise comply with the Hold Separate Stipulation and Order. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavit(s) filed pursuant to this Section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestitures have been completed.

VIII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Sections IV or V of this Final Judgment.

IX. Hold Separate

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by the Court. Defendants shall take no action that would jeopardize, delay, or impede the divestiture order by the Court.

X. No Reacquisition

Defendants may not acquire or control any of the Divestiture Assets during the term of this Final Judgment.

XI. Prior Approval

A . Without the prior approval of the United States, Defendants shall not acquire any electricity generating facility, or enter into any contract to obtain control of, an electricity generating facility or of one or more units of an electricity generating facility in the Designated Utility Zones, which facility or units are in existence as of June I, 2006, or are listed in Attachment A. Such prior approval shall be within the sole discretion of the United States.

This prior approval requirement shall not apply to:

1. Upgrades, expansions, or uprates of existing units up to the amount of such upgrades, expansions, or uprates;

2. Units that are rebuilt, repowered, or activated out of inactive status after June 1, 2006, as long as such rebuild, repowering, or activation, if done by Defendants, begins within one year of purchase of the facility that includes the unit; and

3. Acquisitions of a facility of 25 megawatts or less of summer net capability, as defined by PJM, or contracts to control 25 megawatts or less of summer net capability, as defined by PJM, provided, however, that Defendants do not acquire, or enter into contracts to obtain control of, more than 100 megawatts of summer net capability from units at a single facility during a single calendar year. For the purpose of Section XI.A.3., the summer net capability of a unit that is an intermittent capacity resource, as defined by PJM, will be measured as of the date of acquisition of the unit, or of entry into the contract to control the unit, in accordance with the methodology used by PJM for calculating capacity values for intermittent capacity resources.

B. Unless a transaction subject to Section XI.A. is otherwise subject to the reporting and waiting period requirements of the HSR Act:

1. Defendants shall provide notification to the United States within five (5) calendar days of acceptance of any contract subject to Section XI.A. and shall submit copies of the contracts and any management or strategic plans discussing the proposed transaction, and the names of the principal representatives of the parties to the agreement who negotiated the agreement. Defendants shall send the required materials to Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, United States Department of Justice, 325 Seventh Street, NW., Suite 500, Washington, DC 20530. Should oversight of this Final Judgment be the responsibility of another section of the Antitrust Division, the required materials shall be sent to the chief of the section responsible for oversight of this Final Judgment;

2. Within thirty (30) calendar days of the receipt of the required materials, if the transaction is not reportable under the HSR Act, the United States will determine whether it requires additional information from the parties to the contract. If the United States makes such a request for additional information, the parties will provide the information requested.

C. Once the parties have provided all of the information requested under Section XIB. or under the HSR Act, the United States must notify Defendants within thirty (30) calendar days if the United States disapproves the proposed transaction.

D. Section XI.A. shall be broadly construed and any ambiguity or uncertainty shall be resolved in favor of requiring prior approval.

E. Nothing in this Section limits Defendants' responsibility to comply with the requirements of the HSR Act with respect to any acquisition.

XII. Compliance Inspection

For purposes of determining or securing compliance with this Final Judgment, or of determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

1. Access during Defendants' office hours to inspect and copy, or at the United States' option, to require Defendants to provide copies of, all books, ledgers, accounts, records, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports, or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings

to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XIII. Retention of Jurisdiction

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

XIV. Expiration of Final Judgment

Unless the Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. Public Interest Determination

Based on the record in this case, entry of this Final Judgment is in the public interest, and the parties have complied with the procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

Dated: _____

_____

United States District Judge

ATTACHMENT A

State	Identification number PJM Queue, *www.pjm.com*	Substation
DE	Q42	Indian River.
NJ	P23	Bayonne 138 kV.
NJ	Q08	Red Oak 230 kV.
NJ	Q11	Red Oak 230 kV.
NJ	Q26	Churchtown 230 kV.
NJ	Q41	Mt. Hope Mine 34.5 kV.
PA	CO2	South Lebanon 230 kV.
PA	G06	Martins Creek #4.
PA	M11	Susquehanna #1.
PA	M12	Susquehanna #2.
PA	P04	Peach Bottom 500 kV.
PA	Q20	Holtwood.
PA	Q28	Eldred-Frackville 230kV.

United States District Court for the District of Columbia

United States of America, Plaintiff; v. *Exelon Corporation and Public Service Enterprise Group Incorporated, Defendants*

Case No. 1:06CV01138
Judge: John D. Bates
Deck Type: Antitrust
Filed: August 10, 2006

Competitive Impact Statement

The 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

On December 20, 2004, Defendants entered into an Agreement and Plan of Merger under which Exelon Corporation (''Exelon'') would merge with Public Service Enterprise Group Incorporated (''PSEG''). On June 22, 2006, the United States filed a civil antitrust Complaint seeking to enjoin the proposed merger. The Complaint alleges that the merger likely would 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 would result in increased 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 filed a Hold Separate Stipulation and Order (''Stipulation'') and proposed Final Judgment that are designed to eliminate the anti competitive effects of the merger. Under the proposed Final Judgment, as explained more fully below, Defendants are required to divest six 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 of it. 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''). Defendant PSEG is a New Jersey corporation, with its headquarters in

Newark, New Jersey; it owns PSEG Power LLC, which owns electric generating plants located primarily in New Jersey with a total generating capacity of more than 15,000 MW. By combining the generating plants owned by Exelon and PSEG, the proposed merger would enhance the ability and incentive of the merged firm to reduce output and raise prices for wholesale electricity in two areas of the Mid-Atlantic where Defendants are the largest 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 anyone of several types of generating technologies (including hydroelectric turbine, steam turbine, combustion turbine, or combined cycle) to transform the energy in fuels or the force of flowing water into electricity. The 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 some 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 some 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 following over the grid, either of which might damage lines or generating units connected to the grid. To prevent such damage and to prevent widespread blackouts from disrupting electricity service, a grid operator will manage the grid to prevent any more 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 51 million people in an area encompassing all or parts of New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, the District of Columbia, North Carolina, Kentucky, Ohio, Indiana, Michigan, Tennessee, and Illinois (the PJM control area'').

PJM oversees two auctions for the sale and purchase of wholesale electricity: A day-ahead auction that clears the day before electricity is to be generated and delivered, and a real-time auction that clears the day electricity is delivered. In these auctions, generation owners located in the PJM control area 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 and engineering 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 of 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 also accepts sellers' offers in merit order until there is a sufficient quantity of electricity to meet actual demand, subject to the physical and engineering limitations of the transmission grid.

At times, transmission constraints prevent the generating units with the lowest offers from meeting demand in a particular area within the PJM control area. When that happens, PJM often calls on more expensive units located within the smaller area bounded by the transmission constraints (a ''constrained area), and the clearing price for the buyers in that area adjusts accordingly. Because more expensive units are required to meet demand, the clearing price in a constrained area will be higher than it would be absent the transmission constraints.

PJM East. One historically constrained area within the PJM control area includes the densely populated northern New Jersey and Philadelphia areas. This area, referred to in the Complaint as ''PJM East,'' is defined by the ''Eastern Interface,'' a set of five major transmission lines that divides New Jersey and the Philadelphia area from the rest of the PJM control area. When the Eastern Interface is constrained, PJM is limited in its ability to meet demand located east of the constraint with electricity from generating units located west of the constraint. PJM often responds to constraints on the Eastern Interface by calling on additional generating units east of the constraint to run, generally resulting in higher prices in PJM East than otherwise would exist because the cost of additional generation east of the constraint is higher than the cost of additional generation west of the constraint.

PJM Central/East. A second constrained area in PJM includes PJM East, central Pennsylvania, and eastern Maryland. This area is defined by two major transmission lines known as ''5004'' and ''5005'' that run from western to central Pennsylvania and divide central Pennsylvania, eastern Maryland, and PJM East (''PJM Central/East'') from the rest of PJM. When the 5004 and 5005 transmission lines are constrained, PJM is limited in its ability to supply demand located east of the constraint with electricity from generating units located west of the constraint. PJM often responds to constraints on the 5004 and 5005 lines by calling on additional generating units east of the constraint to run, generally resulting in higher prices in PJM Central/East than otherwise would exist because the cost of additional

generation east of the constraint is higher than the cost of additional generation west of the constraint.

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 East'' and ''PJM Central/East'' are relevant antitrust geographic markets defined by transmission lines in the PJM control area: PJM East is defined by the Eastern Interface, and PJM Central/East is defined by the 5004 and 5005 transmission lines. 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. At such times, the amount of electricity that could be purchased outside PJM East or PJM Central/East is insufficient to make it unprofitable for generators located inside those areas to make a small but significant price increase. Thus, PJM East and PJM Central/East are relevant antitrust geographic markets.

E. The Competitive Effects of the Transaction on Wholesale Electricity

The Complaint alleges that Exelon's proposed merger with PSEG 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 PJM East and PJM Central/East. In PJM East during 2005, more than $10 billion of wholesale electricity was sold for resale to nearly 6 million retail customers; in PJM Central/East during 2005, more than $19 billion of wholesale electricity was sold for resale to nearly 9 million retail customers. In PJM East and PJM Central/East, the merged firm would own a substantial share of total generating capacity in highly concentrated markets. More importantly, in both geographic markets the merged firm would own low-cost baseload units that provide incentive to raise prices, mid-merit units that provide incentive and ability to raise prices, and certain peaking units that provide additional ability to raise prices in times of high demand.

Market shares in PJM East and PJM Central/East. In PJM East, Exelon currently owns approximately 20 percent of the generating capacity and PSEG currently owns approximately 29 percent of the generating capacity. After the merger, Exelon would own approximately 49 percent of the total generating capacity in PJM East. In PJM Central/East, Exelon currently owns approximately 19 percent of the generating capacity and PSEG currently owns approximately 21 percent of the generating capacity. After the merger, Exelon would own approximately 40 percent of the total generating capacity in PJM Central/East.

Concentration in PJM East and PJM Central/East. The U.S. Department of Justice and the Federal Trade Commission's 1992 Horizontal Merger Guidelines consider markets in which the post-merger Herfindahl-Hirschman Index (''HHI''), a measure of concentration explained in Appendix A of the Complaint, exceeds 1800 points to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise significant antitrust concerns under the Horizontal Merger Guidelines.[1] Exelon's merger with PSEG would yield a post-merger HHI in PJM East of approximately 2750 points, representing an increase of more than 1100 points. Exelon's merger with PSEG would yield a post-merger HHI in PJM Central/East of approximately 2080 points, representing an increase of approximately 790 points. Thus, the proposed merger raises a presumption of significant antitrust concerns in PJM East and PJM Central/East.

Increased ability and incentive profitably to withhold output and raise prices. The Complaint alleges that the proposed merger would substantially lessen competition. The combination of PSEG and Exelon's generating units would increase the merged firm's ability and incentive to withhold selected output, forcing PJM to turn to more expensive units to meet demand, resulting in higher clearing prices in PJM East and PJM Central/East.

Baseload units, such as nuclear steam and some hydroelectric units, 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.

Mid-merit units also provide substantial ability to withhold output to increase the market clearing price. Mid-merit units have costs that are close to clearing prices for a substantial number of hours during the year. Because their costs are so 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 base load units. This fact is also true of certain peaking units during times of the year when demand is higher.

By giving the merged firm an increased amount of baseload and mid-merit capacity, combined with an increased share of mid-merit and peaking capacity, the merger substantially increases the likelihood that Exelon would find it profitable to withhold output and raise price. With its increased share of mid-merit and peaking 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 baseload and mid-merit capacity, the merger would make it more likely that the increased revenue on the merged firm's baseload and mid-merit capacity would outweigh the cost of withholding its higher-cost mid-merit and peaking capacity. Thus the merger facilitates Exelon's incentive and ability to reduce output and raise market prices.

F. 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 anti competitive price increase. Given the necessary environmental, safety, and zoning approvals required, it would take many years for such new entry to take place. Thus, entry via new generation or

[1] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1.51 (April 2, 1992) *available at http://www.usdoj.gov/atr/public/guidelines/hmg.htm.*

transmission capacity would, at a minimum, not be timely.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment would preserve the competition that would have been lost in PJM East and PJM Central/East had Exelon's merger with PSEG gone forward as proposed. Within 150 days after consummation of their merger, 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, as well as limits its ability to acquire, or enter into contracts to control, generating units in PJM East or PJM Central/East.

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 East and PJM Central/East. The divestiture requirements of the proposed Final Judgment will maintain competition for wholesale energy in these geographic markets by allowing independent competitors to acquire the Divestiture Assets. The Divestiture Assets are six generating plants located inPJ East and PJM Central/East that comprise mid-merit and peaking units:

- Cromby Generating Station, 100 Cromby Rd. at Phoenixville, PA 19460;
- Eddystone Generating Station, Number 1 Industrial Hwy. at Eddystone, PA 19022;
- Hudson Generating Station, Duffield & Van Keuren Aves. at Jersey City, NJ 07306;
- Linden Generating Station, 4001 South Wood Ave. at Linden, NJ 07036;
- Mercer Generating Station, 2512 Lamberton Rd. at Hamilton, NJ 08611; and
- Sewaren Generating Station, 751 Cliff Rd. at Sewaren, NJ 07077.

The Divestiture Assets include all of the merged firm's coal-fired steam units in PJM East and PJM Central/East (located at the Eddystone, Cromby, Hudson, and Mercer plants); one of the merged firm's two combined cycle units (located at the Linden plant); and several efficient peaking units (located at the Eddystone, Cromby, Linden, Hudson, and Sewaren plants).

Effect of divestiture on market shares and concentration. Divestiture of these plants will reduce market shares and concentration substantially relative to what they would have been absent divestiture. Absent divestiture, the merged finn's share of capacity would be approximately 49 percent in PJM East and 40 percent in PJM Central/East. With divestiture, the merged firm's share of capacity will be approximately 32 percent in PJM East and 29 percent in PJM Central/East.

The pre-merger HHI concentration levels for PJM East and Central East are approximately 1590 points and 1290 points, respectively. Absent divestiture, the post-merger HHIs would increase to highly concentrated levels of approximately 2750 points and 2080 points, respectively. The divestiture, however, significantly reduces these levels.

Effect of divestiture on ability and incentive profitably to withhold output and raise prices. Although the divestiture will substantially 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 premerger 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 East and PJM Central/East. Divestiture of the six generating plants deprives the merged firm of key generating plants whose output it would otherwise have had the ability profitably to withhold. At the same time, the divestiture reduces the incentive the merged firm otherwise would have had to withhold output. In this way, the proposed Final Judgment assures that the merger is not likely to lead to consumer harm.

The proposed Final Judgment requires divestiture of generating units that would have significantly enhanced the merged firm's ability profitably to withhold output. These units include all of the merged firm's coal-fired steam units in PJM East and PJM Central/East (located at the Eddystone, Cromby, Hudson, and Sewaren plants); one of the merged firm's two combined cycle units (located at the Linden plant); and several efficient peaking units (located at the Eddystone, Cromby, Linden, Hudson, and Sewaren plants). Because their operating costs are relatively close to clearing prices for a substantial number of hours during the year, the opportunity cost of withholding output from these units—the lost profit on withheld output from them—is relatively small. Without these units, Exelon will be left with few assets in PJM East and PJM Central/East that operate close to clearing prices for a substantial number of hours of the year. This will increase significantly the opportunity cost of withholding output and make it less likely to be profitable. Thus the divestiture will substantially limit the ability of the merged firm profitably to withhold output and thereby raise prices.

The divestiture will also reduce the merged firm's incentive to withhold output and raise prices.[3] Certain of the divested assets—the coal-fired steam and combined cycle units—have operating costs that are below the market clearing price for a substantial portion of the year and which therefore are frequently in a position to benefit from an increase in the market clearing price. Divestiture of these units will reduce the potential gains to the merged firm of withholding output and thus reduce the incentive of the merged firm to withhold output in the first place.

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 January 1, 2006, 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. Finally, the proposed Final Judgment requires that Defendants, with certain exceptions, obtain advance approval from the Department of Justice, for the entire duration of the Final Judgment, to acquire or enter into contracts to control any generating plants within the utility

[2] *C.f.* U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies § II (October 2004), *available* at *http://www.usdoj.gov/atr/public/guidelines/205108.htm* (''Restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels'').

[3] Post divestiture, Exelon will retain a significant amount of low-cost, baseload nuclear capacity. Although this capacity may provide Exelon with incentive to exercise market power by withholding output, the divestiture called for by the proposed Final Judgment substantially limits Exelon's ability to withhold output. Moreover, it is not likely that Exelon will withhold output from nuclear units given the large opportunity cost—the lost profit on withheld nuclear output—of withholding.

zones within PJM East or PJM Central/East.

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. At the end of sixty (60) days, if the divestiture has not been accomplished, 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.

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 that they continue to own after consummation for sale into the PJM auctions at no more than specified price levels until the Divestiture Assets are sold. The Stipulation also calls for appointment of an auditor to ensure that Defendants offer their units at no more than the specified price levels and that they do not withhold the output of generating units to raise prices. These requirements seek to ensure that Defendants will not offer their units into the PJM auctions in a way that allows Defendants to raise the market clearing price.

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.

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**. All comments received during this period will be considered by the 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: Donna N. Kooperstein, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United States Department of Justice, 325 Seventh Street, NW., Suite 500, Washington, DC 20530.

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 PSEG 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 East and PJM Central/East.

VIII. Standard of Review Under the APPA for the Proposed Final Judgment

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)(I). 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).[4] As the United States Court of Appeals for the

[4] In 2004, Congress amended the APPA to ensure that courts take into account the above-quoted list

Continued

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 *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995).

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. Courts have held that:

[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, 1648 F.2d at 666 (emphasis added) (citations omitted).[5] In making its public interest determination, a district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case. *United States* v. *Archer-Daniels-Midland Co.*, 272 F.Supp.2d 1, 6 (D.D.C. 2003).

Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[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. *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).

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. 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. *Id.* at 1459–60.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction ''[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). This language codified the intent of the original 1974 statute, expressed by Senator Tunney in the legislative history: ''[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:

[a]bsent 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 a reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

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.

Dated: August 10, 2006.

Respectfully submitted,

Mark J. Niefer (DC Bar #470370),
Jade Alice Eaton (DC Bar #939629),
Tracy Lynn Fisher (MN Bar #315837).

Certificate of Service

I hereby certify that on August 10, 2006, I caused a copy of the foregoing Competitive Impact Statement to be served on counsel for Defendants in this matter in the manner set forth below:

By electronic mail and hand delivery:

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request extension of an information collection currently in use. The information collection is NA Form 6045, Volunteer Service Application Form, used by individuals who wish to volunteer at the National Archives Building, the National Archives at College Park, regional records services facilities, and

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of relevant factors when making a public interest determination. Compare 15 U.S.C. 16(e) (2004) with 15 U.S.C. § 16(e)(1) (2006) (substituting ''shall'' for ''may'' in directing relevant factors for court to consider and amending list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms). This amendment does not affect the substantial precedent in this and other Circuits analyzing the scope and standard of review for Tunney Act proceedings.

[5] *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' '').