If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Mark W. Caverly, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection 1117–0006:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Individual Manufacturing Quota for a Basic Class of Controlled Substance and for Ephedrine, Pseudoephedrine, and Phenylpropanolamine (DEA Form 189).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: DEA Form 189, Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: 21 U.S.C. 826 and 21 CFR 1303.22 and 1315.22 require that any person who is registered to manufacture any basic class of controlled substances listed in Schedule I or II and who desires to manufacture a quantity of such class, or who desires to manufacture using the List I chemicals ephedrine, pseudoephedrine, or phenylpropanolamine, must apply on DEA Form 189 for a manufacturing quota for such quantity of such class or List I chemical.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that each form takes 0.5 hours (30 minutes) to complete. In total, 31 firms submit 468 responses, with each response taking 0.5 hours (30 minutes) to complete. This results in a total public burden of 234 hours annually.

(6) *An estimate of the total public burden (in hours) associated with the collection:* In total, 31 firms submit 468 responses, with each response taking 0.5 hours (30 minutes) to complete. This results in a total public burden of 234 hours annually.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NW., Suite 2E–502, Washington, DC 20530.

July 15, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Keyspan Corporation; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comments received on the proposed Final Judgment in *United States* v. *Keyspan Corporation.* Civil Action No. 1:10–CV–01415–WHP, which were filed in the United States District Court for the Southern District of New York on June 11, 2010, together with the response of the United States to the comments.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr,* and at the Office of the Clerk of the United States District Court for the Southern District of New York. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Deputy Director of Operations.

In the United States District Court for the Southern District of New York

United States of America, Plaintiff, v. *Keyspan Corporation,* Defendant.

Civil Action No.: 1:10–cv–01415–WHP

Hon. William H. Pauley III

Plaintiff United States's Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) ("Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration, the United States continues to believe that the relief sought in the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).[1]

The United States brought this lawsuit against Defendant KeySpan Corporation ("KeySpan")to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. On January 18, 2006, KeySpan entered into an agreement in the form of a financial derivative (the "KeySpan Swap") that essentially transferred to KeySpan, the largest supplier of electricity generating capacity in the New York City market, the capacity of its largest competitor. The KeySpan Swap ensured that KeySpan would withhold substantial output from the capacity market, a market that was created to ensure the supply of sufficient generation capacity for the millions of New York City consumers of electricity. The likely effect of this agreement was to increase capacity prices for the retail electricity suppliers that must purchase capacity and, in turn, to increase the prices consumers pay for electricity.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment (to be modified pursuant to the Court's direction, *see,* supra, n. 1) and a

[1] The United States and KeySpan will submit an amended proposed Final Judgment that takes account of the retention of jurisdiction concerns expressed by the Court with respect to Section IV of the proposed Final Judgment.

Stipulation signed by the United States and KeySpan consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") in this Court on February 23, 2010; published the proposed Final Judgment and CIS in the **Federal Register** on March 4, 2010, see United States v. KeySpan corporation, 75 FR 9946–01, 2010 WL 723203; and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in The Washington Post for seven days beginning on March 10, 2010 and ending on March 16, 2010 and in The New York Post beginning on March 11, 2010 and ending on March 17, 2010. The 60-day period for public comments ended on May 16, 2010. The United States received seven comments, as described below, which are attached hereto.[2]

1. Background

A. The United States's Investigation of the Transaction

On November 21, 2006, the United States opened its investigation into the transaction at issue and its impact on the market. During the course of its extensive investigation, the United States received and considered over a million pages of documents and analyzed significant amounts of complex data, including bidding data from market participants. The United States issued Civil Investigative Demands to market participants and other entities with relevant information, interviewed market participants and the market's regulators, and conducted detailed economic analyses.

The United States considered the potential competitive effects of the KeySpan Swap in light of all relevant circumstances and concluded, as the Complaint alleges, that the KeySpan Swap was an anticompetitive agreement in violation of Section 1 of the Sherman Act.

B. The New York City installed Capacity Market

In the state of New York, sellers of retail electricity must purchase a product from generators known as "capacity:"[3] Electricity retailers are required to purchase capacity in an amount equal to their expected peak energy demand plus a share of reserve capacity. These payments for capacity assure that retail electric companies do not use more electricity than the system can deliver and encourage electric generating companies to build new facilities as needed. Because transmission constraints limit the amount of energy that can be imported into the New York City area from the power grid, the New York Independent System Operator ("NYISO") requires retail providers of electricity to consumers in New York City to purchase 80% of their capacity from generators in that region. The New York City Installed Capacity ("NYC Capacity") Market constitutes a relevant geographic and product market.

The price for installed capacity in New York City has been set through auctions administered by the NYISO. The NYISO organizes the auctions to serve two distinct seasonal periods, summer (May though October) and winter (November through April). For each season, the NYISO conducts seasonal, monthly, and spot auctions in which capacity for New York City can be acquired for all or some of the seasonal period. Capacity suppliers offer price and quantity bids in each of these three auctions. Suppliers may bid all of their capacity at a single price or in separate increments of capacity at different prices. Supplier bids are "stacked" from lowest-priced to highest. The stack is then compared to the amount of demand. The offering price of the last bid in the "stack" needed to meet requisite demand establishes the market price for all capacity sold into that auction. Any capacity bid at higher than this price is unsold, as is any capacity bid at what becomes the market price not needed to meet demand.

The NYC Capacity Market was highly concentrated during the relevant period, with three firms—KeySpan, Astoria, and NRG Energy, Inc.—controlling a substantial portion of the market's generating capacity. These three firms were designated as "pivotal" suppliers by the Federal Energy Regulatory Commission ("FERC"), meaning that at least some of each of these three suppliers' output was required to satisfy demand. The three firms were subject to bid and price caps—KeySpan's being the highest for nearly all of their generating capacity in New York City and were not allowed to sell their capacity outside of the NYISO auction process.

C. The Anticompetitive Agreement

As discussed more fully in the CIS, in the tight market conditions that existed from June 2003 through December 2005, almost all capacity in the New York City market was needed to meet demand, and KeySpan could sell nearly all of its capacity into the market even while bidding at its cap. KeySpan did so, and the market cleared at the price established by the cap, with only a small fraction of KeySpan's capacity remaining unsold.

Those tight conditions in the NYC Capacity Market were expected to end in 2006 due to the entry of approximately 1,000MW of new generating capacity, with excess supply of capacity forecast to last into 2009. The increased supply meant KeySpan could no longer be confident that "bid the cap" would remain its most profitable strategy during the 2006–2009 period. While bidding the cap would keep market prices high, doing so also would entail withholding sales of substantially more capacity. The additional withholding could reduce KeySpan's revenues by as much as $90 million a year. Alternatively, KeySpan could compete with its rivals for sales by bidding more capacity at lower prices, which could potentially produce much higher returns for KeySpan than bidding the cap, but carried the risk that competitors would undercut its price and take sales away.

KeySpan contemplated acquiring Astoria's generating assets, which were for sale. The acquisition would have solved the problem that new entry posed for KeySpan's revenue stream, as Astoria's capacity would have provided KeySpan with sufficient additional revenues to make continuing to bid its cap its best strategy. KeySpan, however, soon concluded that the market power issues raised by an acquisition of its largest competitor would imperil the contemplated transaction. Instead of purchasing the Astoria assets outright, KeySpan devised a plan to acquire a financial interest in Astoria's capacity. KeySpan would pay Astoria's owner a fixed revenue stream in return for the revenues generated from Astoria's capacity sales in the auctions. Rather than directly approach its competitor, KeySpan turned to a financial services company to act as the counterparty to the derivative agreement the KeySpan Swap recognizing that the financial services company would, and in fact did, enter an offsetting agreement with Astoria (the "Astoria Hedge").[4]

[2] To respond to the concerns raised by the submitted comments, this Response provides greater detail beyond the allegations in the Complaint.

[3] Except where noted otherwise, this description pertains to the market conditions that existed from May 2003 through March 2008.

[4] Although KeySpan knew about Astoria's role in the transaction, the financial services company did

Continued

The KeySpan Swap remained in effect from May 1, 2006 through April 30, 2008. During that two year period, KeySpan earned approximately $49 million in net revenues under the Swap.[5]

D. The Anticompetitive Effect of the KeySpan Swap

The clear tendency of the KeySpan Swap was to alter KeySpan's bidding behavior in the NYC Capacity Market auctions. The KeySpan Swap effectively eliminated KeySpan's incentive to compete for sales by lowering price. As a result, KeySpan bid its cap, causing capacity market prices to clear at a level higher than likely would have occurred absent the agreement.

1. Likely Bidding Scenarios Absent the KeySpan Swap

Absent the Swap, KeySpan likely would have chosen from a range of potentially profitable competitive strategies in response to the entry of new capacity and, had it done so, the price of capacity likely would have declined. Although one cannot confidently predict the price level that would have occurred but for the Swap, it is likely that oligopoly pricing in this highly concentrated market would have been the outcome; i.e., prices would have fallen below the cap levels but would have remained above levels that would have prevailed under perfect competition.[6]

In considering how to bid when the new capacity entered the market, the key suppliers KeySpan, Astoria and NRG (each of which would have remained pivotal) would have sought to mitigate the risk of lost sales that could occur if they bid too high and their capacity was not taken (*i.e.,* volume risk) and the risk of low price from competitive bidding (*i.e.,* price risk). To protect against these risks, these suppliers likely would have bid increments of capacity at different price levels ("tiered bids") rather than bid all of their capacity at a single price. The strategic tiering of bids at relatively high prices would have made sense for these suppliers because it would have preserved the possibility of obtaining the rewards of discounting (selling a greater volume of capacity) while simultaneously mitigating the price risk of discounting.

The United States believes that, absent the KeySpan Swap, KeySpan and the other pivotal suppliers would have engaged in tiered bidding upon the entry of new generation capacity in 2006.[7] In other words, in the but-for world, tiered bidding strategies at prices lower than the cap would have been compelling for KeySpan and the other pivotal suppliers because they offered significant upside, and these suppliers would have been able to structure their tiered bids to limit their downside risk relative to bidding their caps. As a result, market prices likely would have cleared at a level below the cap but above competitive levels.[8] This view is consistent with the pattern observed during prior periods of excess capacity, when prices did not fall to perfectly competitive levels.

2. With the KeySpan Swap in Place, KeySpan Bid Its Cap

With the Swap, capacity prices remained high. By providing KeySpan with revenues from Astoria's capacity in addition to KeySpan's own revenues, the Swap made bidding the cap KeySpan's most profitable strategy regardless of its rivals' bids. Following entry of the substantial amount of new capacity into the market in 2006, KeySpan continued to bid its cap even though a significant portion of its capacity went unsold. In contrast to the historic pattern following significant supply increases, the market price of capacity did not decline.

E. The Proposed Remedy

The proposed Final Judgment requires KeySpan to disgorge profits gained as a result of its unlawful agreement in restraint of trade. KeySpan is to surrender $12 million to the Treasury of the United States.

II. Summary Of Comments

A. The Pennsylvania Public Utility Commission (PaPUC)

The PaPUC stated it was deeply concerned with the "existence of a sophisticated multi year effort by the defendant to evade competition" and the impact of the defendant's conduct on electricity markets and electricity prices. The PaPUC expressed its appreciation to the Department of Justice for bringing this enforcement action, stating that it does not oppose the proposed Final Judgment and explaining that this enforcement action demonstrates that conduct in electricity markets that is "inimical to competition * * * may result in prosecution and serious consequences under the antitrust laws." The PaPUC concluded by noting that "the PaPUC and other public and private entities with a critical stake in the success of wholesale electric generation competition have benefitted from studying the facts of this case and will be better able to detect and deter similar schemes in the future."

B. New York State Consumer Protection Board (NYSCPB)

The NYSCPB commended the Department of Justice for pursuing the improper collusive behavior at issue. NYSCPB expressed two concerns with the settlement. First, it argued that the United States has a burden to provide sufficient evidence for the court to determine the total harm from the wrongful behavior, explain how the amount to be disgorged will deter future

not inform Astoria about KeySpan. It appears that Astoria believed that the financial services company had found a counter-party other than a competing supplier of capacity to offset the financial services company's market risk from the Astoria Hedge.

[5] The New York Public Service Commission ("NYPSC") estimated KeySpan's net revenues under the KeySpan Swap at $67.8 million for the period May 2006 through March 2008. See NYPSC Comment, Paynter Affidavit at ¶ 15. The estimate, however, fails to reflect the fact that the terms of the KeySpan Swap imposed a ceiling on the spot auction clearing price used to determine revenues under the Swap. This ceiling is based on the average of the bid caps for KeySpan, Astoria and NRG. Using this ceiling for the appropriate months, KeySpan's net Swap revenues were approximately $61 .2 million for the May 2006 through March 2008 period. The NYPSC estimate also fails to include the last month of the Swap (April 2008) in which KeySpan had to pay out approximately $12.2 million.

[6] The New York City Economic Development Corporation ("NYCEDC") comments cite an affidavit submitted in a FERC proceeding by the NYISO market monitor, David Patton, for the proposition that, had all capacity been sold, prices would have cleared under $6/kW month, which is less than half the level of the pivotal suppliers' caps (which were above $ 121kw month). NYCEDC Comments at 9; see also AARP Comments at 11. Dr. Patton described the effect all suppliers would have had on the auction if bidding as "price-takers" (*i.e.,* a "perfectly competitive" outcome), but he does not opine that suppliers actually would have bid in this manner absent the Swap.

[7] If all the pivotal suppliers used tiered bidding, it is more likely, at any given clearing price, that withholding would be shared (*i.e.,* that each would lose some sales) rather than one supplier taking on the high cost of being the sole withholder of capacity and losing the greatest share of sales.

[8] NYCEDC claims that the effect of the Swap was to "more than doubl[e] what would otherwise be the market clearing price" and that, absent the Swap, prices would have fallen to competitive levels. NYCEDC Comment at 9–10. In an attempt to show that prices but for the Swap would have fallen dramatically to levels consistent with perfect competition, NYCEDC compares prices for specific auction periods during certain years the Swap was in effect to those same auction periods after the Swap's expiration in April 2008. *See Id.* (*e.g.,* $12.34/kW-month price in May 2007 compared to $6.52/kW-month in May 2008). These comparisons, however, are flawed because FERC changed the rules for the auction in May 2008, requiring, among other things, that the pivotal suppliers bid zero, as would a "price taker," thereby causing prices to fall to the competitive floor. Given this significant rule change, these comparisons cannot serve as a meaningful test for how the auctions would have cleared had KeySpan, Astoria, and NRG been free, as they had been in the past, to engage in strategic, tiered bidding strategies.

wrongdoing, and identify the responsible officers. Second, it argued that the proposed Final Judgment is not in the public interest because the disgorgement proceeds are remitted to the Treasury rather than to the harmed electricity customers and concluded that the proposed Final Judgment should contain a mechanism to distribute the proceeds to customers or establish an energy efficiency program.

C. New York City Economic Development Corporation (NYCEDC)

The NYCEDC was "highly appreciative" of the enforcement effort and commended using antitrust remedies to address anticompetitive practices in the New York City energy sector. The NYCEDC criticized the $12 million disgorgement as inadequate "given the scale of unjust enrichment to KeySpan." It asserted that there are "professional estimates" and other evidence of the harm that the Court should use to review the adequacy of the remedy, including a KeySpan statement of the amount it made under the Swap and various independent estimates of capacity prices if KeySpan had not entered the Swap.

D. New York State Public Service Commission (NYPSC)

NYPSC stated that the Department of Justice "is to be commended for its faithful enforcement of the antitrust laws to protect the integrity of the electricity markets in New York City." It argued, however, that the Court has no basis for evaluating whether the proposed disgorgement will prevent KeySpan's unjust enrichment or whether it is sufficient to deter anticompetitive conduct in the future. It recommended that the Court order additional evidence to be produced and asserted that "anything less than full disgorgement" would be inadequate for deterrence.

NYISC also asserted that because "ratepayers may have no recourse" due to the filed rate doctrine, the remedy in the United States' case should reflect the "standard measure of damages," which is the amount of the "overcharge" in the capacity market. It concluded that payment to the U.S. Treasury instead of to consumers "would be a manifestly unfair result" and that the disgorged proceeds should either be credited to ratepayers or used to establish an energy efficiency program.

E. Consolidated Edison (Con Ed)

Con Ed argued that the settlement is not in the public interest because it fails to provide payment to electricity consumers despite the United States' recognition that "private individuals could not bring an antitrust suit here due to the barrier of the filed rate doctrine." It argued that the filed rate doctrine should have no application to the equitable distribution of disgorged funds to consumers as a remedy in this case.

F. AARP

AARP asserted that the settlement is not in the public interest because of the "lack of any monetary remedy or other discernible benefit for injured consumers, and the absence of a credible deterrent." It claimed that there is an inadequate factual foundation to determine the appropriateness of the amount of the remedy and its deterrent effect. It further noted that the decree contains no admission of guilt by KeySpan and no "public shaming."

AARP requested that the proposed Final Judgment be amended to require an acknowledgment of wrongdoing, identification of total "inflated prices" for capacity, identification of the derivative contracts at issue, and disgorgement of all profits. In the alternative, AARP argued that the record should be augmented to show the total profit "achieved by all sellers in the NYISO capacity market," an estimate of the "total damage and economic harm" to consumers in the entire state of New York, the revenues KeySpan received under the Swap, and the rationale for accepting less than full disgorgement and for not providing any remedy to benefit injured customers.

G. Nelson M. Stewart

Mr. Stewart urged the United States not to "accept a plea" from KeySpan. He alleged that KeySpan and related entities committed fraud, perjury, and forgery with respect to construction contracts wholly unrelated to the capacity market or the Swap.

III. Standards Governing the Court's Public Interest Determination Under the Tunney Act

As discussed in detail in the Competitive Impact Statement, the Court, in making the public interest determination called for by the Tunney Act, is required to consider certain factors relating to the competitive impact of the judgment and whether it adequately remedies the harm alleged in the complaint. *See* 15 U.S.C. 16(e)(1)(A) & (B) (listing factors to be considered).

This public interest inquiry is necessarily a limited one, as the United States is entitled to deference in crafting its antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy. See generally *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1458–62 (D.C. Cir. 1995); *United States* v. *SBC Commc'ns,* 489 F. Supp. 2d 1, 12–17 (D.D.C. 2007). Although the Tunney Act was designed to prevent "judicial rubberstamping" of proposed Unites States consent decrees, the "Court's function is not to determine whether the proposed [d]ecree results in the balance of rights and liabilities that is the one that will best serve society, but only to ensure that the resulting settlement is 'within the reaches of the public interest.'" *United States* v. *Alex Brown & Sons,* 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (quoting Microsoft, 56 F.3d at 1460) (emphasis in original), aff'd sub nom, *United States* v. *Bleznak,* 153 F.3d 16 (2d Cir. 1998).

With respect to the scope of the complaint, the Tunney Act review does not provide for an examination of possible competitive harms the United States did not allege. *See, e.g., Microsoft,* 56 F.3d at 1459 (holding that the district judge may not reach beyond the complaint to evaluate claims that the government did not make).

With respect to the sufficiency of the proposed remedy, a district court should accord due respect to the United States's views of the nature of the case, its perception of the market structure, and its predictions as to the effect of proposed remedies. *See, e.g., SBC,* 489 F. Supp. 2d at 17 (United States entitled to deference as to predictions about the efficacy of its remedies). Under this standard, the United States need not show that a settlement will perfectly remedy the alleged antitrust harm; rather, it need only provide a factual basis for concluding that the settlement is a reasonably adequate remedy for the alleged harm. *Id.*[9]

IV. Response to the New York Commentors and AARP

Disgorgement serves the public interest by depriving KeySpan of ill-gotten gains, thereby deterring KeySpan and others from engaging in similar anticompetitive conduct in the future. No other remedy would be as effective to fulfill the remedial goals of the Sherman Act to "prevent and restrain"

[9] Tunney Act review is not so that the court can 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)), or determine the relief "that will best serve society," Bechtel, 648 F.2d at 666, but simply for the court to determine whether the proposed decree is within the reaches of the public interest "even if it falls short of the remedy the court would impose on its own." United States v. AT&TCo., 552 F. Supp. 131, 151 (D.D.C. 1982).

antitrust violations.[10] Given that the KeySpan Swap has now expired and KeySpan no longer owns the generating assets associated with the anticompetitive conduct, injunctive relief against KeySpan would not be meaningful.[11]

The comments of the New York Public Service Commission, the New York State Consumer Protection Board, the New York City Economic Development Corporation, and Consolidated Edison Company (collectively the "New York Commentors") and AARP have two central objections: (1) That the $12 million dollar disgorgement is inadequate to serve its remedial purpose, and (2) that the disgorged proceeds, rather than being remitted to the Treasury, should directly or indirectly benefit electricity consumers who paid higher electricity bills or be used to fund programs that benefit electricity consumers. The United States has carefully considered these objections but finds that they do not warrant modification of the proposed Final Judgment.

A. The Proposed Remedy Is Appropriate and Deters Anticompetitive Conduct

The New York Commentors argue that disgorgement of $12 million is an inadequate remedy that will not serve as an effective deterrent, especially when compared to KeySpan's approximately $49 million net revenues earned under the Swap and the increased prices paid by electricity consumers. Such concerns are misplaced.

Disgorgement in and of itself constitutes significant and meaningful relief. This is the first time that the United States has sought disgorgement under the Sherman Act. Parties contemplating anticompetitive agreements similar to the KeySpan Swap now will have to take into account possible disgorgement, thereby directly affecting their incentives to engage in illegal behavior. Disgorgement is particularly appropriate here as the anticompetitive conduct at issue may not be subject to other remedies. For example, absent disgorgement, KeySpan likely would retain all the benefits of its anticompetitive conduct because the filed rate doctrine creates significant obstacles to the collection of damages.[12]

Had the case proceeded to trial, the United States would have sought disgorgement of the approximately $49 million in net revenues that KeySpan received under the Swap,[13] contending that these net revenues reflected the value that KeySpan received from trading the uncertainty of competing for the certainty of the bid-the-cap strategy. The United States recognizes that it has not proved its case at trial and that "a court considering a proposed settlement does not have actual findings that the defendant {] engaged in illegal practices, as would exist after a trial." [14] The $12 million disgorgement amount is the product of settlement and accounts for litigation risk and costs. As courts have stressed, it is altogether appropriate to consider litigation risk and the context of settlement when evaluating whether a proposed remedy is in the public interest.[15]

Commentors nevertheless assert that anything less than full disgorgement is inadequate as it would not deter the conduct at issue. This position ignores the fact that the loss to KeySpan of $12 million in Swap revenues would have had a deterrent effect on KeySpan's incentive to enter into the Swap. The United States contends that the Swap removed any incentive for KeySpan to bid competitively, locking it into bidding its cap instead of evaluating competitive choices, each of which could have resulted in different market clearing prices for capacity.[16] The violation was based on the anticompetitive effect of the agreement on KeySpan's incentives to compete, not on a specific lower price that would have resulted absent the Swap.[17] In evaluating whether to pursue an anticompetitive Swap, KeySpan would have engaged in a cost-benefit analysis weighing the returns from the anticompetitive strategy against the returns of various potential competitive bidding strategies. While we cannot quantify with certainty KeySpan's bid levels or the outcome of the market clearing price that would have resulted but for the Swap, depriving KeySpan of $12 million in Swap revenues would have reduced the value to KeySpan of engaging in the anticompetitive Swap strategy, thereby shifting the results of KeySpan's cost benefit analysis toward competitive strategies rather than entering into the Swap.[18]

Moreover, it is improper to consider the adequacy of the disgorgement amount by comparing $12 million to some measure of overcharges to consumers in the electricity market. Disgorgement is not aimed at making consumers whole. As this Court has previously recognized, the purpose of disgorgement is to deprive the violator of unjust enrichment rather than to compensate victims of the violation. [19] The extent of market harm is not relevant, as once a violation has been established, a district court "possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by [the violation]."[20] Such an inquiry would require the Court to assess the price of capacity that would have prevailed absent the Swap,[21] a

[10] U.S.C. 4 (investing district courts with equitable jurisdiction to "prevent and restrain" violations of the antitrust laws).

[11] The disgorgement here seeks to prevent anticompetitive conduct and, in this way, is similar in focus to the traditional antitrust remedy of injunctive relief.

[12] *See Keogh* v. *Chicago & NW. Ry. Co.,* 260 U.S. 156 (1922); *see* also, infra, § IV.B.

[13] The NYPSC suggests that the disgorgement calculation should also include the "profits gained by KeySpan through the unlawfully higher price of capacity." NYPSC Comments at 14 & n.5. The NYPSC appears to be contending that, for example, if KeySpan sold 1600 MW at its cap of approximately $12/kW-month under its anticompetitive Swap strategy but would have sold 2400 MW at a lower price (assume $8/kW-month), then KeySpan gained an additional profit of $6.4 million (1600 MW × $4/kW-month). This contention is misplaced, as it fails to account for revenues from the additional volume that KeySpan would have sold at the lower clearing price and thereby ignores the net auction revenues that KeySpan would have earned in the but-for world.

[14] SBC, 489 F. Supp. 2d at 15 (citing Microsoft, 56 F.3d at 1461).

[15] "It is therefore inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial. Remedies which appear less than vigorous may well reflect an underlying weakness in the government's case, and for the district judge to assume that the allegations have been formally made out is quite unwarranted." Microsoft, 56 F.3d at 1461; see also SBC, 489 F. Supp. 2d at 15 ("[R]oom must be made for the government to grant concessions in the negotiation process for settlements.")

[16] *See* Complaint, ¶¶ 4–5.

[17] *See* CIS at 6–7.

[18] KeySpan would have had two revenue streams to consider when deciding upon a bidding strategy: revenues directly from sales of capacity in the auctions and revenues from the Swap. It is likely that KeySpan absent the Swap would have earned more in auction revenues from tiered bidding strategies than from bidding its cap. Indeed, if this were not the case, the Swap would not have altered how KeySpan bid. KeySpan earned more total revenues by bidding its cap when accounting for earnings it receives with the Swap in effect. The disgorgement remedy here serves to reduce the additional earnings the Swap would have provided KeySpan.

[19] *SEC* v. *Bear Stearns & Co., Inc.,* 626 F. Supp. 2d 402, 406 (S.D.N.Y. 2009).

[20] *SEC* v. *Blavin,* 760 F.2d 706, 713 (6th Cir. 1985). *See also SEC* v. *Tome,* 833 F.2d 1086, 1096 (2d Cir. 1987) ("Whether or not [any victims] may be entitled to money damages is immaterial [to disgorgement].")

[21] Such an assessment is disfavored under the filed rate doctrine in cases where private claimants seek damages for overcharges. *See, e.g. Arkansas Louisiana Gas Company* v. *Hall,* 453 U.S. 571, 580–81 (1981) ("In the case before us, the Louisiana Supreme Court's award of damages to respondents was necessarily supported by an assumption that the [different] rate respondents might have filed with the [regulator] was reasonable. Otherwise, there would have been no basis for that court's conclusion * * * that the [regulator] would have approved the rate. But under the filed rate doctrine, the [regulator] alone is empowered to make that

problematic exercise given the uncertainty of determining market outcomes absent the Swap.[22]

B. Disgorgement Proceeds Should Be Remitted to the U.S. Treasury

Several commentors argued that KeySpan's $12 million disgorgement payment should be made to entities other than the U.S. Treasury in order to benefit the electricity customers in New York City who paid higher prices as a result of KeySpan's conduct. The United States shares the commentors' concern for the New York City ratepayers and, indeed, brought this case and sought disgorgement in order to deter future anticompetitive agreements like the KeySpan Swap. The United States has carefully considered the suggested alternative uses for the disgorgement proceeds but has determined that payment to the U.S. Treasury is the most appropriate result in this circumstance. The alternative distribution plans proposed by commentors seek, in effect, to restore funds to ratepayers. The United States, however, specifically chose to seek disgorgement, rather than restitution, as a remedy for this violation. As discussed in the CIS, disgorgement is particularly appropriate on the facts of this case to fulfill the remedial goals of the Sherman Act.[23] Disgorgement also provides finality, certainty, avoidance of transaction costs, and potential to do the most good for the most people.[24]

Legal concerns would arise with a remedy based on restitution that sought to directly or indirectly reimburse New York City ratepayers. Such a remedy would raise questions relating to the filed rate doctrine, which bars remedies (such as damages) that result, in effect, in payment by customers and receipt by sellers of a rate different from that on file for the regulated service.[25] Some of the commentors recognize the doctrine's potential limitation on their own ability to seek such reimbursement directly. They do not discuss the fact that regulators such as the FERC and the NYPSC seeking to offer refunds may also be constrained by the doctrine and its corollary bar to retroactive ratemaking.[26] The mechanisms suggested by the commentors could be seen as an end run around those well-established doctrines. In this case, payment to the U.S. Treasury avoids this unnecessary and thorny issue.

Moreover, the Miscellaneous Receipts Act ("MRA") states that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. 3302(b). Under this statute, members of the Executive Branch[27] that receive money for the United States are to remit such funds directly to the U.S. Treasury. A purpose of the statute is to protect Congress's appropriations authority by ensuring that money collected from various sources cannot be used for programs not authorized by law. The proposed remedy avoids any issues of compliance with the MRA.[28]

V. Response to Comments of Nelson M. Stewart

Mr. Stewart's comment alleges fraud, perjury, and forgery committed by KeySpan and its subsidiary KSI Contracting. The allegations concern conduct that is wholly unrelated to the capacity market or the KeySpan Swap and are unrelated to the antitrust violations that the United States alleges in its Complaint. As noted above, in making its public interest determination in accordance with the Tunney Act, it would be "error for the judge to inquire into allegations outside the complaint." Microsoft, 56 F.3d at 1463. These Tunney Act proceedings, therefore, are not an appropriate venue for the consideration of Mr. Stewart's claims.

VI. Conclusion

After careful consideration of the public comments, the United States remains of the view that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and that its entry would therefore be in the public interest. Plaintiffs' chosen remedy in this case deprives KeySpan of ill-gotten gains, effectively deters the harmful behavior, and establishes the United States's willingness to seek disgorgement in appropriate cases. The PaPUC (as well as other commentors) noted that the action has established an important antitrust enforcement precedent in regulated energy markets and that, as a result, it and other public and private entities with a critical stake in the success of wholesale electric generation competition will be better able to detect and deter similar schemes in the future.[29] Based on the factors set forth in the Tunney Act, entry of the proposed Final Judgment is in the public interest.

Pursuant to section 16(d) of the Tunney Act, the United States is submitting the public comments and this Response to the **Federal Register** for publication. This Response is also being provided to each of the commentors. After the comments and this Response are published in the **Federal Register**, the United States will move this Court to enter the proposed Final Judgment.

Dated: June 11, 2010.

Respectfully submitted,

/s/

Jade Alice Eaton,
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Nelson M. Stewart,
PO Box 1833
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April 10, 2010

Donna N. Kooperstein, Chief, Transportation, Energy and Agriculture Section, Antitrust Division, 115. Department of Justice, 450 5th St. NW., Suite 8000, Washington, DC 20530

Re: United States of America, U.S. Department of Justice, Antitrust Division v. Keyspan Corporation.

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judgment, and until it has done so, no rate other than the one on file may be charged.")

[22] Given the difficulty of definitively estimating the harm to the market and its irrelevance to the questions relating to the adequacy of the disgorgement remedy, the United States has no obligation, as AARP asserts, to provide estimates of total economic harm and profits received by all market participants resulting from the alleged violation.

[23] CIS at 9–10.

[24] *See Bear Stearns,* 626 F. Supp. 2d at 419 (directing the transfer of remaining disgorgement related settlement funds to the Treasury to be used by the Government for its operations).

[25] *See* generally Square D (o. Niagara Frontier, 476 U.S. 409, 423 (1986).

[26] *See, e.g.,* Ark/a, 453 U.S. at 578 ("Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. * * * This rule bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.' "(citations omitted)). Con Ed—a commentor here—directly requested that FERC order refunds of the higher cost of capacity due to KeySpan's behavior. The FERC declined to grant them. New York Indep. Sys. Operator, Inc., 122 FERC ¶ 61,211 (2008) (March 7, 2008 Order).

[27] The MRA applies to the Department of Justice as a member of the Executive Branch. We are not aware of its application to independent agencies such as the Securities and Exchange Commission.

[28] In addition to legal concerns, distribution of the disgorged funds to entities other than the Treasury also would raise practical concerns. Distribution directly to the numerous individual electricity consumers would have high administrative costs relative to the overall disgorgement amount. Distribution to the electricity companies that purchased capacity from generators for ultimate refund to consumers could involve monitoring and compliance issues. And, the funding of an energy efficiency program would also raise administrative issues (and would be attenuated from the harm alleged in the Complaint).

[29] E.g., PaPUC Comments at 3.

Dear Ms. Kooperstein, In accordance with the details of the February 22, 2010 press release issued by the United States Department of Justice I am writing to urge you not to accept the plea from Keyspan Energy that now awaits approval from the United States District Court. Keyspan Energy has been the subject of numerous investigations resulting from questionable conduct over the years. In many instances the company simply paid a fine and admitted no wrongdoing. Particularly with large corporations like Keyspan Energy, the profit gained from this behavior is usually much more substantial than the fines levied. Consider the golden parachute payments to William Catacasinos and other executives (a $1.5 million settlement was paid to the NYS Attorney General's Office) and the sale of $29 Million in stock by Keyspan's CFO, COO and President prior to the publication of substantial losses related to the acquisition of Roy Kay, Inc. I would contend that such penalties fail to alter misconduct and increase the temptation to push the boundaries of unethical conduct. Where one might expect the compliance office to guard against such conduct, the compliance office of Keyspan Energy and its parent company National Grid appears to ignore these actions and, on at least one occasion, even assisted in an attempt to retaliate against someone who endeavored to report them.

In 2008 I attempted to follow up on my third effort to notify Keyspan Energy/National Grid of fraud, perjury, forgery and accounting fraud committed by employees of Keyspan Energy, its wholly owned subsidiary 1(51 Contracting (The former Roy Kay, mc) and their attorneys. These highly unethical and illegal acts stem from two contract actions filed by my company related to work performed for the now infamous Roy Kay, Inc./KSI Contracting. On this third attempt I spoke with Margaret Ireland of the National Grid Compliance Office and detailed a number of these allegations. I further explained that the attorney defending this matter, Mark Rosen of McElroy, Mulvaney, Deutsche and Carpenter, UP, had used illegal and highly unethical tactics to prevent further discovery of the conduct I alleged. Ms. Ireland asked me to send her whatever recent documentation I had and said she would look into the matter. Having received no response I called again and asked if she would like me to send more documentation. Ms. Ireland stated she had not had time to look into the documents I had sent but I should call again at a later time. The document in Attachment a is the only response I have ever received from National Grid or Keyspan regarding the information I submitted to Ms. Ireland. It is the direct result of a message I left for Ms. Ireland with the National Grid compliance office after several failed attempts to contact her as she had suggested. Mr. Rosen's email is a continuation of the threats made in his letter of December 27, 2007 (See page of Attachment b) in response to my previous attempts to contact the defendants concerning the conduct of their employees and Mr. Rosen. To date I have made no less than five attempts to report this conduct to the compliance offices of Keyspan and National Grid. Mr. Rosen's letter and email are the only responses I have ever received. A copy of the documents sent to Ms. Ireland are included as Attachment c.

Mr. Rosen and his clients have good reason to thwart any discovery related to Roy Kay, Inc/KSI Contracting. In response to our initial claims to recover monies from work performed for Roy Kay, Inc/KSI Contracting the defendants produced two forged contracts and purported them to be genuine. One contract forged the signature of our company's president, Nelson Stewart, Sr. and the other reduced the amount of the original contract from $750,000.00 to $250,000.00 and altered the original date from March 15, 2002 to May 14, 2002 (despite the fact that the date of the signature page, which is identical on their contract and the genuine contract, reads March 15, 2002). The defendants also submitted false, unsubstantiated back charges and several of the statements made by employees of the defendants have proved to be untrue. In over seven years of litigation the defendants have never produced a single document that would refute or explain the evidence we have submitted.

The documentation we have been able to obtain from third parties provide evidence that Roy Kay/KSI Contracting was altering accounting documents and omitting information from job records to make it appear as though work performed by subcontractors was performed by KSI Contracting. What were actually liabilities to Roy Kay, Inc/KSI Contracting appear to have been misrepresented as money owed to the company. While the documents we obtained are only relevant to the two projects our company worked on, Roy Kay, Inc/KSI Contracting was involved in up to twenty-six projects at the time. Losses from Roy Kay, Inc/KSI Contracting, well over $100 Million in the third quarter of 2002 alone, were a thorn in the side of Keyspan Energy and company executives were desperate to stop them (Please see Attachment d). If this same conduct was found to be present at these other projects the amount of money being misrepresented would be enormous.

The ability to report allegations of unethical and criminal conduct to the compliance office of a publicly traded corporation without the threat of retaliation is a fairly reasonable expectation. Most first year law students, if not most lay people, would know that that represented parties to a litigation may discuss issues related to that litigation. I am not an attorney and neither is my business partner. My attempts to communicate with Ms Ireland were not improper. Yet this was the second time Mr. Rosen attempted to prevent such communication. Knowledge of the facts and the law mean little to Mr. Rosen and his clients. What is most important is the use of any tactic, however unethical, to deter continued discovery of the assertions raised in these matters. That the compliance office would refer this matter back to the same attorney who played a substantial role in the allegations at issue illustrates that these practices are systemic throughout the company. Keyspan's refusal to even consider these allegations is bad enough. Threats of further abuse of the legal process by their attorney in this matter demonstrate that the compliance offices of Keyspan Energy and National Grid exist simply to pay tip service to the ideal of ethical and legal business conduct. When these ideals become an inconvenience the compliance office not only steps aside but, as evidenced by attachment a, actively participates in attempting to remove that inconvenience.

The conduct of Keyspan Energy's compliance office in this matter is indicative of a pattern that has led to numerous allegations of misconduct over the years. I respectfully submit to the Department of Justice that fines have done little to correct the conduct of this company in the past and cannot be expected to alter such conduct in the future. It is worth noting that Mr. Rosen and his clients, no doubt encouraged by the support they have received thus far, continue the same pattern of obstructive and improper conduct to this day in the above referenced actions. For much the same reason that an independent auditor oversees the accounting statements of a public company, a separate compliance office, free from the influence of Keyspan Energy and National Grid, should be charged with the responsibility of enforcing the

ethical business standards to which both companies publicly claim to aspire. To deter the kind of behavior that is now before the United States District Court, Keyspan needs a truly independent compliance office that will respond to allegations of unethical practices in a diligent and appropriate manner. It is clear that the current management lacks the will to impose these standards on itself. Without this kind of impartial supervision of company conduct the next mendacious scheme will likely be a simple matter of time.

I truly appreciate the opportunity to voice an opinion in this matter and I thank you for your consideration.

Sincerely,

Nelson Stewart

List of Attachments

Please Note: The documents I have submitted and the allegations I have raised are by no means a complete account of the actions of Keyspan Energy and KSI Contracting with respect to these matters. There are well over 1,500 documents related to these matters.

In consideration of the two-month time constraint the court is acting under I have attempted to be as brief as possible while providing an informative sample of the unethical conduct of both Keyspan Energy and its compliance office. Additional documentation can he made available at your request.

Attachment a

This email was sent to my attorney in response to a phone call I placed to Margaret Ireland, compliance officer for National Grid. National Grid is the parent company of Keyspan Energy. Together with attachment b it is the only response I have ever received from Keyspan Energy regarding the allegations I raised.

Attachment b

This letter was sent in response to our numerous demands upon Mr. Rosen and his clients for the production of documents. The court did not accept Mr. Rosen's attempts to blame the plaintiffs for his failure to produce witnesses and documents. A motion to strike the defendants' answer in this matter was granted by the court on December 22, 2008.

Attachment c

These letters were sent to several members of the National Grid Compliance Office by return-receipt mail. They came back unsigned for. When Ms. Ireland of National Grid asked me to send her a copy of some of the allegations I had related to her I sent the letter to Vincent Miseo, Claims Attorney for Federal Insurance, (Federal issued the payment and performance bond on one of the projects) along with my letter to the NYS Insurance Department because they included the most recent developments with respect to these actions. Two previous letters containing substantial documentation of our allegations were sent on June 28, 2006 and October 24, 2006. A copy of these documents can be made available at your request.

Attachment d

The attached exchange between Keyspan executives demonstrates the frustration resulting from the Roy Kay losses. Keyspan eventually offset these losses by hiring out the remaining work on these projects to subcontractors and later refusing to pay them. Many of those who attempted to collect these sums in Court were met with the same tactics described in this letter.

http://wwss.justice.gov/atr/cases/f259700//259704-7pdf

United States District Court for the Southern District of New York

United States of America, Plaintiff vs. *KeySpan Corporation,* Defendant.

Civil Action No. 10–cv–1415 (WHP)

Comments of the New York City Economic Development Corporation Made Pursuant to the Antitrust Procedures and Penalties Act

The New York City Economic Development Corporation ("NYCEDC"), acting on its own behalf and on that of the City of New York City as electricity ratepayers in the market affected by the conduct of the Defendant, hereby files comments on the proposed Final Judgment in the above-captioned matter. These comments are responsive to a Notice published at 75 FR 9946, Proposed Final Judgment and competitive impact Statement, on March 4, 2010.

I. Interest of Title, New York City Economic Development Corporation, and of the City of New York as Electric Ratepayers in the New York Market

The City of New York ("City") and NYCEDC, along with other commercial and residential electricity ratepayers located in the jurisdiction of the City, are directly affected by the operation of the electric capacity market administered by the New York Independent System Operator (CCNYISO). The City is geographically coextensive with NYISO Zone J, one of several regions that comprise the NYISO's New York Control Area, which is itself coextensive with the State of New York. NYISO Zone J forms the relevant geographic market affected by the conduct of KeySpan set out in the Complaint filed in this matter by the Department of Justice on February 22, 2010. The relevant geographic and product market in the action brought by the Department of Justice against KeySpan is described in the Complaint as the "New York City Installed Capacity Market" or "NYC Capacity." [1]

Even more than most urban areas in the nation, New York City and its residents and businesses are particularly dependent on electricity for transportation and other critical energy needs. The costs borne by City ratepayers are among the highest in the continental United States, as was recognized by the Electric Energy Market Competition Task Force [2] in its Draft Report to Congress pursuant to section 1815 of the Federal Energy Policy Act of 2005.

NYCEDC, acting through its Energy Policy Department, serves as Mayor Michael Bloomberg's principal energy policy adviser, and also serves as the Chair of the City's Energy Policy Task Force, and the New York City Energy Planning Board. NYCEDC also serves as a catalyst for City economic development, capital investment, and growth. All of these concerns are vitally dependent on the provision of reliable energy at just and reasonable prices. The City is also a voting member in the NYISO governance structure as a large governmental end user.

II. Summary and Background

As noted in the materials submitted to the Court in this matter, a very large increment of in-City electric capacity, some 1000 megawatts ("MW"), entered the City market in early 2006. However, in contravention of basic economic theory, this addition resulted in no reduction in NYISO capacity prices, and in at least some instances, those prices actually rose. The premise of deregulated energy and capacity markets in New York as conceived by the New York State Public Service Commission ("NYSPSC") was in large measure based on the presumed salutary effects of rivalrous market behavior, including the expected value of new entrants in enhancing consumer welfare, and in moderating prices in the constrained New York electricity market.

[1] Complaint herein at page 4.

[2] Draft Report to Congress on Competition in the Wholesale and Retail Markets for Electric Energy, at pp. 20–22, 73 (issued June 5, 2006).

However, as the Complaint herein alleges, actions taken by KeySpan in violation of the Sherman Act had the effect of negating the beneficial effects associated with the arrival of new, highly efficient generation facilities. KeySpan's bidding practices, coupled with its artful use of a derivative financial instrument to leverage its already dominant market position as the City's largest generator, permitted it to distort the capacity market, and to impose artificially high capacity prices on City consumers. The imposition of these artificial prices resulted, as the Department of Justice notes, in unjust enrichment to KeySpan. Moreover, because of the manner in which the NYISO capacity operates and clears based on the highest bid that is accepted, the illegal conduct alleged here also served to provide supranormal capacity revenue prices to Zone J generation capacity providers at large, thereby exacerbating the already great consumer harm (done to ratepayers by the conduct described in the Complaint.

III. Discussion

The NYISO capacity market was intended to set the clearing price as a function of the free interplay of the forces of supply and demand. Here, however, that process was distorted through a form of market gaming by KeySpan.

More than ten years ago, when the New York State energy markets were deregulated by the NYSPSC, the City power plants were divested in an effort to reduce the potential for market power abuse. However, as the Complaint herein describes, the in-City capacity market is an oligopoly, with three dominant generation suppliers known as the divested generation owners ("DGOs"). This was true during the operative period of the illegal conduct alleged by the Department of Justice ("DOJ") Antitrust Division here, and it remains true today. KeySpan was a pivotal bidder, i.e., at least a portion of its capacity was needed to permit the market to clear. Moreover, it was the largest generation supplier in the City, with some 2400 megawatts of capacity.

In recognition of the market power enjoyed by DGO, the Federal Energy Regulatory Commission imposed capacity bid caps on them. KeySpan was given the highest bid cap dollar value, which actually served to increase the effect of the market-distorting conduct that the Complaint herein describes, as it permitted the highest possible clearing price in the relevant market. Economic withholding, the practice of pricing bids at artificially high prices, was permitted by the NYISO market rules so long as KeySpan bid at or below its fixed bid cap amount. The NYISO Services Tariff, Attachment H, Section 2.4 defines economic withholding in the energy market as "submitting bids for an Electric Facility that are unjustifiably high so that (i) the Electric Facility is not or will not he dispatched or scheduled, or (ii) the bids will set a market clearing price."

DGOs are prohibited by FERC-imposed NYISO market rules from physically withholding capacity in the periodic capacity auctions. In practice, however, as the Complaint here details, the form of economic withholding practiced by KeySpan achieved virtually the same end: Causing capacity prices to clear at supranormal levels.

The addition in early 2006 of a very large increment of new in-City capacity—1000 megawatts—failed to lower capacity prices, thus to a degree refuting the promise of the demand curve addition to the New York Control Area market earlier approved by the Commission. Indeed, in some instances the capacity clearing prices in 2006 actually increased compared to the equivalent 2005 auction levels, a result that was clearly anomalous.

These bidding practices distorted the capacity market and imposed excessive prices on the consuming public, while enriching incumbent capacity providers in a manner that exceeded even the generous existing capacity compensation formula. The price of a commodity should decrease as the supply of that commodity increases. This theory underlies the capacity demand curve market design that was implemented by the NYISO, and approved by the Federal Energy Regulatory Commission in 2003. The Commission observed in its Order that the price would gradually fall as the amount of available capacity beyond 1 18 percent of peak load.[3]

As noted above, in early 2006, approximately 1,000 MW of new capacity was added in the City, markedly increasing the amount that could be bid into the periodic NYISO capacity auctions.[4] Yet, the price of capacity remained at the maximum permissible price cap level.

The conduct of KeySpan as set out in the Complaint raised critical market power issues in the period of 2006–2008 and raised prices for some three million Zone J electric ratepayers. The illegal conduct alleged here was only stopped when the NYSPSC exercised its supervisory authority over KeySpan in early 2008, and compelled the company to bid in the Zone J capacity market as a price-taker, i.e., at a zero price. This action effectively eliminated the ability of KeySpan to raise capacity prices.

In the case of KeySpan, the issue of its status and role as the largest of the pivotal capacity DGO bidders was heightened by its use of a contractual arrangement with Morgan Stanley to financially purchase 1,800 MW of capacity in the New York City market for a period of three years at a fixed price of $7.57 per kW-month.[5] Under the contractual terms, KeySpan would profit to the extent that the City capacity price cleared above that level. The combination of its own very large generation presence, and this financial arrangement gave KeySpan a direct or indirect interest in the price of some 4200 MW of in-City capacity.

IV. Analysis of Proposed Disgorgement Remedy

As was observed by the New York State Department of Public Service in its comments herein,[6] there are two primary concerns: (1) The amount of the disgorgement fund amount that is appropriate here, and (2) the proper recipients of the disgorgement funds. The City and NYCEDC are in accord with the view expressed by NYSPSC that the proposed $12 million disgorgement is inadequate given the scale of the unjust enrichment to KeySpan here. We also believe that a credit for the disgorgement amount could readily be provided to the victims of the conduct here through credits provided through the NYISO wholesale market. Such credits would flow in the wholesale market operated by the NYISO to the load serving entities ("LSEs"), who would be compelled by the NYSPSC to maintain those funds as bill credits available to the retail customers of the LSEs. This process

[3] May 2003 Demand Curve Order in FERC Docket ERO3–647–009 at p. 3, ¶ 5; the Commission's decision also referenced a NYISO estimate that a 1% increase in capacity in the State would result in average consumer savings of $100 million annually. *Id.* at p. 6, ¶ 9 and at p. 16, fit 23.

[4] In early 2006, two new 500 MW combined-cycle, gas-fired power plants entered service in New York City. These were the SCS/Astoria, operated by Astoria Energy LLC, a subsidiary of SCS Energy LLC, and the New York Power Authority's new Poletti unit in Astoria, Queens. See Securities & Exchange Commission Form 8–K filed by KeySpan Corporation, May 4, 2006, Accession Number 0001062379–06–000054; KeySpan First Quarter 2006 Earnings Conference Call, p. 9 (held May 4, 2006).

[5] Securities & Exchange Commission Form 8–K filed by KeySpan Corporation, May 4, 2006, Accession Number 0001062379–06–000054; KeySpan First Quarter 2006 Earnings Conference Call, p. 9 (held May 4, 2006).

[6] Tunney Act Comments of the New York State Public Service Commission re *U.S.* v. *KeySpan,* Case No. 10–cv–14l5 (Comments filed April 30, 2010).

would avoid the kinds of customer apportionment issues and transaction costs that might otherwise present insuperable obstacles to the process of attempting to fashion disgorgement remedies intended to reach some three million electric ratepayers in the New York City market.

As to the proper amount of disgorgement that should be required of KeySpan, there are available in the record some professional estimates of the harm that was done to the City capacity market. There are also some available figures from KeySpan that bear to some degree on the same question. These estimates and corporate statements should provide guidance to the Court in exercising its judgment concerning the adequacy of the proposed settlement.

In early 2006, KeySpan publicly expressed confidence that average City capacity prices would in fact exceed the contractual level of $7.57, and observed that as of the first monthly summer capacity auction period in 2006, the Zone J capacity price settled at $12.71 per kW-month. Clearly, such corporate confidence concerning maintenance of capacity clearing prices was not misplaced: as a dominant entity it was in a position, even when acting unilaterally, to make capacity prices clear well above the contractual level established in the Morgan Stanley agreement. Regarding the gain attributable to the conduct challenged here by DOJ as violative of the Sherman Act, at least a portion of the benefits were disclosed by the company itself: KeySpan stated its gain attributable to the Morgan Stanley agreement was $44.3 million in the period from May through September of 2006.[7] Given the workings of the market clearing process, the overall adverse impact on City energy consumers flowing from the practices described in the Complaint was of course far larger.

An initial New York State Department of Public Service ("NYSDPS") analysis of the price level for the NYISO capacity auctions early June of 2006 revealed the price to be in large part the product of a failure to bid some 800 MW into the May and June 2006 auctions. Having conducted a preliminary review of the auction numbers, NYSDPS representatives indicated that economic withholding appeared to have effectively kept capacity prices considerably higher than they would have been had the remaining 800 MW been bid into the auction:

> Based on NYISO posted data, it appears that about 800 MW of NYC capacity went unsold in the spot auctions for May and June 2006. This implies higher prices in both the NYC and statewide capacity markets, compared to an auction where all available NYC supplies had cleared.
>
> If all available NYC capacity had been sold, the NYC UCAP price would have dropped by about $7.26/kW-month (from $12.71 to $5.45).
>
> In addition, the NYS UCAP price could have dropped by as much as 1.28kW month.[8]

This preliminary analysis by DPS was borne out in later estimates offered by the NYISO's own Independent Market Monitor, Dr. David B. Patton:

> Prior to 2006, nearly all of the ICAP [Installed Capacity] in New York City was scheduled or sold in the NYISO capacity markets. Beginning in January 2006, more than 1000 MW new capacity has been installed in NYC. Given that the marginal cost of selling capacity is close to zero for most units, the amount of capacity sold in New York City under the NYC Locality Demand Curve would have increased by this amount if the market were performing competitively. However, the total ICAP sales actually fell slightly after 500 MW of new capacity at Poletti became available in early 2006. This occurred because one incumbent supplier reduced its sales by approximately the same amount as the new capacity at Poletti. This supplier routinely offered the bulk of this unsold Capacity into the Energy market, which indicates that it could have been sold in the Capacity market with little additional cost.
>
> The unsold Capacity quantities increased in May 2006 when an additional 500 MW of Capacity from the SCS/Astona Energy LLC facility came online.
>
> The unsold Capacity in question was not sold because the supplier offered the Capacity at a price that was higher than the Capacity Demand Curve price levels that would have allowed the Capacity to clear. In particular. the DGO supplier offered the Capacity at the level of its offer cap, which exceeded $12 per KW-month in the Summer Capability Period. Had all Capacity been sold, the price during the May auction would have cleared at less than $6 per KW-month.[9]

It is thus clear, as Dr. Patton states, that the withholding of capacity took place, and moreover, that such withholding materially affected its price—more than doubling what would otherwise be the capacity market clearing price.

The foregoing is very important to this Court's assessment of whether the $12 million disgorgement cut amount proposed to be imposed on KeySpan in this matter is one that can be said to be in the interest of justice, and therefore should be approved for entry of a Final Judgment herein.

Moreover, the Court is not solely reliant on even such well-supported opinions as those advanced by Public Service Staff and by Dr. Patton estimating the excessive capacity charges imposed on City consumers. There is at least one other extrinsic form of evidence that can readily be accessed from an incontrovertible source.

A well recognized economic analytic tool in assessing antitrust damages is the during and after test that examines market activity during the period of illegal conduct and the period when that activity came to an end. The NYISO maintains extensive records of capacity prices in the various auctions that it operates. Attached as Exhibit A to this document is a summary of capacity clearing prices in the period between 2006, when the alleged conduct violating the Sherman Act began, during the succeeding period, and after the action of the NYSPSC put a stop to the conduct in question in early 2008 with its Order mandating that KeySpan bid into the various NYISO capacity auctions as price taker. Exhibit A was taken directly from the NYISO website, and these prices and other capacity price auction results from recent years are publicly accessible there.[10]

Zone J is reflected in Exhibit A as "NYC" and the prices reflected therein are telling and directly confirm the views of Dr. Patton on the effect of the conduct under scrutiny here. For example, in the six-month 2006 summer capability period strip auction (May-November), prices in NYC were $12.35 per kW-month, and $12.37 in the comparable period for 2007. However, by the summer strip auction of 2008, after the alleged illegal conduct had been halted, the NYC auction price fell to $6.50 per kW-month, and even in 2009 it was $6.75. The pattern in the monthly NYISO auction results is very similar: the May and June auctions in 2007 closed at $12.34 and $1 1.40 respectively, while the comparable results after the cessation of the market conduct challenged in the Complaint here were $6.52 and $6.49 respectively. The NYISO spot auction for capacity reveals a very similar pattern as well.

Armed with these numbers and the respective amounts of capacity affected 1800 MW in the Morgan Stanley agreement, and KeySpan's own offered capacity in the various NYISO auctions,

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[7] Interrogatory Response to DPS Request No. 75, Subpart 14 in New York State PSC Case No. 06–M–0878, relating to the proposed KeySpan-National Grid merger (response dated September 21, 2006).

[8] Discussion presentation by NYSDPS, "In-City Capacity Market Performance" at NYISO stakeholder meeting of the ICAP Working Group, June 12, 2006, available at: *nyiso.com/public/webdocs/committees/bicicapwg/meeting_materials/2006–06–12/in_city_capacity_markey_performance_nydps.pdf.*

[9] Affidavit of NYISO market Monitor Dr. David B. Patton in FERC Docket Number ERO7–360–000, at page 4 of 19 (filed December 22, 2006)[emphasis added]

one can readily ascertain at least an informed estimate of the impact on Zone J consumers of the overcharges associated with the conduct here.

V. Role of the Justice Department

One final observation: NYCEDC and the City are highly appreciative of the involvement of the Department of Justice and its Antitrust Division in this matter, and commend their action in utilizing Sherman and Clayton Act remedies to address anticompetitive practices in the New York City energy sector.

As has been noted, the City energy and capacity markets remain highly concentrated and bear the classic indicia of an oligopoly market: few significant suppliers, high barriers to entry, and accompanying high prices. Conduct similar to that outlined in the Complaint here may well occur in the future as it has in the recent past. While FERC has markedly increased its enforcement efforts in the period since the passage of the Federal Energy Policy Act of 2005, the record here also illustrates the continuing need for DOJ scrutiny of anticompetitive practices in the City's energy markets. The substantial penalties available to address Sherman Act violations will serve as a deterrent to market manipulation such as that seen here. Continued vigilance by the Antitrust Division will also operate to discourage illegal conduct, and will thereby enhance consumer welfare.

VI. Conclusion

For the foregoing reasons, the NYCEDC and the City ask that the Court carefully review the record before it, take judicial notice of publicly available evidence at FERC and at the NYISO, and examine the proposed Final Judgment with a view toward arriving at a result that will be equitable and will advance the interests of justice.

May 3, 2010

Respectfully submitted,

/s/Michael I. Delaney

Michael J. Delaney, *Director—Energy Regulatory Affairs*, *City of New York*,

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Attachment

Exhibit A—View Strip Auction Summary

BILLING CODE 4410–11–M

Installed Capacity

View Strip Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2006 Auction Month/Year May/2006 Display

View Strip Auction Summary

Summer 2006 Strip Auction Results for UCAP, Auction Starting 05/2006 Posted Date: 04/03/2006 02:54 PM	
LI	
Awarded (MW)	4.0
Price ($/kW - Month)	$6.50
NYC	
Awarded (MW)	2186.7
Price ($/kW - Month)	$12.35
ROS	
Awarded (MW)	3014.5
Price ($/kW - Month)	$1.44
HQ	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
IESO	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
NE	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
PJM	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
Total ROS Awarded (MW)	3014.5
Total Awarded (MW)	5205.2
ROS Price Paid By Bidders (Weighted Avg.)	$1.440

Footnotes:

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Installed Capacity

View Strip Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2007 Auction Month/Year May/2007 Display

View Strip Auction Summary

Summer 2007 Strip Auction Results for UCAP, Auction Starting 05/2007 Posted Date: 04/02/2007 01:06 PM	
LI	
Awarded (MW)	2.2
Price ($/kW - Month)	$3.75
NYC	
Awarded (MW)	1894.0
Price ($/kW - Month)	$12.37
ROS	
Awarded (MW)	3166.6
Price ($/kW - Month)	$2.25
HQ	
Awarded (MW)	30.0
Price ($/kW - Month)	$2.25
IESO	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
NE	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
PJM	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
Total ROS Awarded (MW)	3196.6
Total Awarded (MW)	5092.8
ROS Price Paid By Bidders (Weighted Avg.)	$2.250

Footnotes:

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Installed Capacity

View Strip Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2008 Auction Month/Year May/2008 Display

View Strip Auction Summary

Summer 2008 Strip Auction Results for UCAP, Auction Starting 05/2008 Posted Date: 04/02/2008 12:39 PM	
NYC	
Awarded (MW)	494.9
Price ($/kW - Month)	$6.50
ROS	
Awarded (MW)	2909.7
Price ($/kW - Month)	$2.67
LI	
Awarded (MW)	0.0
Price ($/kW - Month)	$2.80
HQ	
Awarded (MW)	85.0
Price ($/kW - Month)	$2.67
IESO	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
NE	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
PJM	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
Total ROS Awarded (MW)	2994.7
Total Awarded (MW)	3489.6
ROS Price Paid By Bidders (Weighted Avg.)	$2.670

Footnotes:

The 85 MWs awarded from HQ is wheeled through the IESO to the NYCA.

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Installed Capacity

View Strip Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2009 Auction Month/Year May/2009 Display

View Strip Auction Summary

Summer 2009 Strip Auction Results for UCAP, Auction Starting 05/2009 Posted Date: 04/01/2009 02:34 PM	
LI	
Awarded (MW)	53.3
Price ($/kW - Month)	$3.01
NYC	
Awarded (MW)	436.7
Price ($/kW - Month)	$6.75
ROS	
Awarded (MW)	2371.1
Price ($/kW - Month)	$3.01
HQ	
Awarded (MW)	0.0
Price ($/kW - Month)	$3.01
IESO	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
NE	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
PJM	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
Total ROS Awarded (MW)	2371.1
Total Awarded (MW)	2861.1
ROS Price Paid By Bidders (Weighted Avg.)	$3.010

Footnotes:

When an award of 0.0 MW is at a price, it indicates offers were made by supply at the location that was not awarded. ROS bidders purchased the following LI capacity: 53.3 MW at $3.01

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Installed Capacity
View Monthly Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2007 Auction Month/Year May/2007 Display

View Monthly Auction Summary

Summer 2007
Monthly Auction Results for UCAP, Auction Starting 05/2007
Posted Date: 04/16/2007 10:14 AM

	May	Jun	Jul	Aug	Sep	Oct
LI						
Awarded (MW)	3.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$3.75	$0.00	$0.00	$0.00	$0.00	$0.00
NYC						
Awarded (MW)	1099.1	15.0	15.0	15.0	15.0	15.0
Price ($/kW - Month)	$12.34	$11.40	$11.40	$11.40	$11.40	$11.40
ROS						
Awarded (MW)	2552.1	331.2	306.2	361.2	366.2	376.2
Price ($/kW - Month)	$2.40	$2.18	$2.11	$2.05	$2.05	$2.05
HQ						
Awarded (MW)	58.5	0.0	0.0	0.0	0.0	0 0
Price ($/kW - Month)	$2.40	$2.18	$2.11	$2.05	$2.05	$2.05
IESO						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
NE						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
PJM						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total ROS Awarded (MW)	2610.6	331.2	306.2	361.2	366.2	376.2
Total Awarded (MW)	3712.7	346.2	321.2	376.2	381.2	391.2
ROS Price Paid By Bidders (Weighted Avg.)	$2.400	$2.180	$2.110	$2.050	$2.050	$2.050

Footnotes:

The 58.5 MWs awarded from HQ is wheeled through the IESO to the NYCA.

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Installed Capacity
View Monthly Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2008 Auction Month/Year May/2008 Display

View Monthly Auction Summary

Summer 2008 Monthly Auction Results for UCAP, Auction Starting 05/2008 Posted Date: 04/15/2008 03:42 PM						
	May	Jun	Jul	Aug	Sep	Oct
LI						
Awarded (MW)	21.8	20.0	20.0	20.0	20.0	20.0
Price ($/kW - Month)	$2.80	$2.80	$2.79	$2.79	$2.75	$2.75
NYC						
Awarded (MW)	903.4	480.0	480.0	480.0	480.0	480.0
Price ($/kW - Month)	$6.52	$6.49	$6.49	$6.49	$6.49	$6.49
ROS						
Awarded (MW)	1851.8	551.1	249.5	239.6	398.6	398.6
Price ($/kW - Month)	$2.80	$2.80	$2.79	$2.79	$2.75	$2.75
HQ						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
IESO						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
NE						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
PJM						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total ROS Awarded (MW)	1851.8	551.1	249.5	239.6	398.6	398.6
Total Awarded (MW)	2777.0	1051.1	749.5	739.6	898.6	898.6
ROS Price Paid By Bidders (Weighted Avg.)	$2.800	$2.800	$2.790	$2.790	$2.750	$2.750

Footnotes:

ROS bidders purchased the following LI capacity: 19.3 MWs in May at $2.80, 20 MWs in June at $2.80, 20 MWs in July at $2.79, 20 MWs in August at $2.79, 20 MWs in September at $2.75, 20 MWs in October at $2.75

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Installed Capacity

View Monthly Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2009 Auction Month/Year May/2009 Display

View Monthly Auction Summary

Summer 2009
Monthly Auction Results for UCAP, Auction Starting 05/2009
Posted Date: 04/15/2009 10:57 AM

	May	Jun	Jul	Aug	Sep	Oct
LI						
Awarded (MW)	69.5	5.0	2.4	2.4	2.4	2.4
Price ($/kW - Month)	$3.01	$3.12	$3.01	$3.00	$3.01	$3.00
NYC						
Awarded (MW)	757.9	335.0	217.0	163.0	126.0	108.0
Price ($/kW - Month)	$7.00	$6.92	$6.89	$6.87	$6.86	$6.85
ROS						
Awarded (MW)	2500.2	806.6	551.5	551.3	428.4	406.2
Price ($/kW - Month)	$3.01	$3.12	$3.01	$3.00	$3.01	$3.00
HQ						
Awarded (MW)	0.0	40.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$3.01	$3.12	$3.01	$3.00	$3.01	$3.00
IESO						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
NE						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
PJM						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total ROS Awarded (MW)	2500.2	846.6	551.5	551.3	428.4	406.2
Total Awarded (MW)	3327.6	1186.6	770.9	716.7	556.8	516.6
ROS Price Paid By Bidders (Weighted Avg.)	$3.010	$3.120	$3.010	$3.000	$3.010	$3.000

Footnotes:

The 40 MWs awarded from HQ is wheeled through the IESO to the NYCA. When an award of 0.0 MW is at a price, it indicates offers were made by supply at the location that was not awarded. ROS bidders purchased the following LI capacity: 69.5 MW at $3.01 for May; 5 MW at $3.12 for June; 2.4 MW at $3.01 for July; 2.4 MW at $3.00 for August; 2.4 MW at $3.01 for September; 2.4 MW at $3.00 for October.

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BILLING CODE 4410–11–C

In the United States District Court for the Southern District of New York

Civil Case No. 10–CIV–1415

United States of America, Petitioner v. *KeySpan Corporation,* Respondent.

Comments of Consolidated Edison Company of New York, Inc.

Dated: May 3, 2010

Comments of Consolidated Edison Company of New York, Inc.

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) and in response to the March 4, 2010 Notice published in the **Federal Register**, U.S. Department of Justice, Antitrust Division, United States v. KeySpan Corporation, Proposed Final Judgment and Competitive Impact Statement, 75 FR 9946 (Mar. 4, 2010), Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company") hereby files these comments with respect to the settlement agreement entered into between the United States Department of Justice ("DOT") and KeySpan Corporation ("KeySpan").

I. Preliminary Statement

This case involves an antitrust violation that limited or restrained competition in the market for electric generating capacity in New York City for almost two years. Con Edison commends the DOJ for investigating and condemning the agreement entered into by KeySpan. As DOJ has advised the Court, the likely effect of that agreement was to increase the prices paid for electricity by consumers in New York City. In fact, once the subject agreement ceased to operate, the market price for capacity indeed declined. DOJ Complaint at ¶ 33. The DOJ's proposed consent judgment in this case requires that KeySpan disgorge $12 million of the profits it gained from its illegal agreement.

Unfortunately, however, the consent judgment does not provide for any of these disgorged funds to go the persons ultimately harmed by KeySpan's illegal conduct—the consumers subjected to the artificially inflated prices. The Competitive Impact Statement ("CIS") does not appear to address this alternative or explain why it was omitted. As a result of this shortcoming the proposed consent judgment does not acceptably satisfy the public interest standard as required by the Tunney Act. Indeed, it leaves the victims of KeySpan's antitrust violation without any remedy. This Court should not approve the proposed consent judgment until it is amended so that any monetary payments made by KeySpan are

distributed to the New York City retail electricity consumers who were harmed by its antitrust violations.

II. Background

On February 22, 2010, the DOJ entered into a consent judgment with KeySpan proposing to settle a civil antitrust proceeding brought by DOJ to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The relief provided in the proposed Final Judgment calls for KeySpan to pay the sum of $12 million to the United States government. Final Judgment at III.A. This payment by KeySpan represents "a portion of its ill gotten gains from its recent illegal behavior." 75 FR 9951.

According to the DOJ, this illegal behavior consisted of KeySpan entering into an anticompetitive agreement that would raise electricity prices to New York City consumers: "KeySpan entered into an agreement in the form of a financial derivative ['the KeySpan Swap Agreement'] essentially transferring to KeySpan, the largest supplier of electric generating capacity in the New York City market, the capacity of its largest competitor. 75 Fed. Reg. at 9947. The DOJ's CIS states that "[t]he likely effect of the Swap Agreement was to increase capacity prices for the retail electricity suppliers who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity." 75 FR at 9947.

III. The Proposed Consent Judgment Fails To Satisfy Tile Public Interest Because It Fails To Provide for a Remedy to the Electric Consumers Victimized by Tile Antitrust Violation

Before entering a proposed consent judgment in antitrust cases brought by the United States, a reviewing court must "determine that the entry of such judgment is in the public interest." 15 U.S.C. 1 6(e)(1). In making that determination, the court is required to 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 USCS § 16(e)(1)(A) & (B) (emphasis added).

As this statutory language makes clear, this Court must consider (i) whether the Government has met its duty of considering the appropriate remedies, (ii) whether the remedies in the proposed judgment cure the injuries flowing to the general public from the violation, and (iii) whether the remedies are adequate. Unfortunately, the remedy proposed in the consent judgment falls short in each of these respects.

The settlement is not in the public interest because it does not provide relief to the individuals that have been harmed by KeySpan's actions under the KeySpan Swap Agreement. The DOJ's CIS makes it explicit that the individuals ultimately harmed by KeySpan's actions are New York City's electricity consumers who were subjected to higher prices for electricity by reason of KeySpan's illegal conduct. While the DOJ commendably condemned KeySpan's anticompetitive actions, which artificially raised New York City capacity prices, and sought an equitable remedy disgorging profits, its proposed remedy is inadequate in that it provides for KeySpan to pay the $12 million to the U.S. Treasury rather than to the individuals who ultimately were harmed.

Unless these funds are paid to the consumers who were injured, the effects of the violation stated in the CIS are not cured and the proposed consent judgment is inadequate. Without providing relief to these parties, the settlement fails to satisfy the public interest standard.

As noted above, the effects of the antitrust violation on New York City electricity consumers are acknowledged clearly in DOJ's own filings with the Court. According to the DOJ, the KeySpan Swap Agreement unlawfully restrained competition in New York City's electric capacity market because it enabled KeySpan, which already possessed market power in the New York City capacity market, to "enter into an agreement that gave it a financial interest in the capacity of Astoria—KeySpan's largest competitor." 75 FR at 9947. The Keyspan Swap Agreement "effectively eliminated KeySpan's incentive to compete for sales" ' of capacity. 75 Fed. Reg. at 9948. The net result "was to alter KeySpan's bidding in the NYC Capacity Market auctions." 75 Fed. Reg. at 9948. "But for the Swap, installed capacity likely would have been procured at a lower price in New York City from May 2006 through February 2008." 75 Fed. Reg. at 9951. In other words, the KeySpan Swap Agreement enabled KeySpan to unlawfully and artificially raise capacity prices in New York City to the detriment of New York's retail electricity consumers.

In New York, "sellers of retail electricity must purchase a product from generators known as 'installed capacity.' " 75 FR 9947. The capacity price becomes part of the price of retail energy that is charged to retail consumers. Thus, any artificial increase in the price of capacity in New York City was initially borne by Load Serving Entities or "LSEs" (*i.e.,* retail sellers) and then passed on to their retail customers. As DOJ itself states, the ultimate effect of the KeySpan Swap Agreement "was to increase capacity prices for the retail electricity suppliers who must purchase capacity, and in turn, to increase the prices consumers pay for electricity." 75 FR 9949. As a generator in New York City, KeySpan knew that LSEs, like Con Edison, were required to buy capacity from the market on behalf of their retail electric customers. In fact, the New York Independent System Operator ("NYISO") "requires retail providers of electricity to customers in the New York City region to purchase 80% of their capacity from generators in that City region." 75 Fed. Reg. at 9947. Thus, KeySpan knew that the increases in the price of capacity caused by the KeySpan Swap Agreement were going to be paid, and, in fact were paid, for by New York City LSEs and their retail electric customers.

Thus, unlike objectors to the remedies proposed in *United States* v. *Microsoft Corp.,* 56 F.3d 1448 (D.C. Cir. 1995), who argued that additional remedies should be imposed for injuries not pleaded in DOJ's Complaint, Con Edison's comments here focus on the fact that the proposed decree does not remedy the injury that DOJ specifically identifies in its Complaint and CIS. Nor does Con Edison in effect seek any change in the Complaint as filed. All that Con Edison requests is that the Court exercise its powers in equity to modify a proposed decree whose "impact * * * upon the public generally and individuals alleging specific injury from the violations set forth in the complaint" is manifestly to fail to remedy those injuries. 15 USCS § 16(e)(1)(B).

Equity, along with the standards for reviewing this settlement, calls for those consumers that were the ultimate victims of the KeySpan Swap Agreement to be the beneficiaries of whatever relief is provided for in the

consent judgment (the $12 million payment). DOJ acknowledges that there is no adequate remedy here at law for individuals harmed by KeySpan's antitrust violation. 75 FR 9951. The reason is that private individuals could not bring an antitrust suit here due to the barrier of the filed rate doctrine. See Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981); *Keogh* v. *Chicago & NW. Ry. Co.,* 260 U.S. 156 (1922). Where, as here, no remedy exists at law, courts have broad authority to design equitable relief that ensures fairness in light of the circumstances.

As the Supreme Court has made clear: "[t]he essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision." *Freeman* v. *Pitts,* 503 U.S. 467, 487 (1992) (emphasis added). For example, when courts employ the "equitable remedy" of piercing the corporate veil, they are not "imposing [ ] liability" but rather "remedying the fundamental unfairness that would [otherwise] result." Trustees of *Nat'l Elevator Industry* v. *Lutyk,* 332 F.3d 188, 193 n.6 (3d Cir. 2003) (emphasis added, internal quotations omitted). "[T]hus, the theory of harm alleged may affect the scope of the remedy that equity demands." *Id; see* also *Taylor* v. *FTC*), 339 F. App'x. 995, 999 (Fed. Cir. 2009) ("district court's equity jurisdiction provides broad and flexible power to deliver justice in unique factual circumstances * * * to [the] court's best estimation").

In the circumstances of this case, the theory of harm (*i.e.,* the competitive injury) involves capacity prices that have been artificially increased as a result of the KeySpan Swap Agreement. In order to fairly redress that injury, the remedy, even if limited, should flow to the injured retail electricity consumers who paid those higher prices.

No basis exists on formalistic grounds to refrain from providing a remedy to the consumers injured by KeySpan's antitrust violation by distributing to them the $12 million disgorged by KeySpan from its illegal scheme. No party should be heard to rebuff this appropriate relief by arguing that the KeySpan Swap Agreement was with a counter-party, which entered into that transaction in arms-length bargaining, rather than consumers. That would exalt form over substance. It would also ignore the impact that the KeySpan Swap Agreement had on the New York City capacity market. As the DOJ's own CIS explicitly states, the ultimate effect of the antitrust violation was "to increase the prices consumers pay for electricity." Equitable remedies are needed because they ensure "that substance will not give way to form [and] that technical considerations will not prevent substantial justice from being done." *Pepper* v. *Littan,* 308 U.S. 295, 305 (1939); *Chase Manhattan Bank* v. *Brown & E. Ridge Partners,* 243 A.D.2d 81, 84 (NY. App. Div. 4th Dep't 1998) ("a court of equity looks to the substance of the action, not its form"); *see* also *Hechinger Liquidation Trust* v. *BankBoston* Retail Fin. Inc., 287 B.R. 145, 151–52 (D. Del. 2002) (citing Pepper and Chase in concluding that "the court should not employ a mechanical and formalistic" approach).

The DOJ does not explain in the CIS why it did not address the provision of relief to New York City consumers. Though it cites to the filed rate doctrine, DOJ appears to recognize that the filed rate doctrine does not apply to the disgorgement payments involved in the proposed consent judgment. Nor does the filed rate doctrine present any barrier to including in the judgment an equitable remedy in the form of payments to New York City consumers. The profits required to be disgorged by the proposed consent judgment are KeySpan's profits stemming from the KeySpan Swap Agreement, not from its sales of electric capacity under a filed rate. The KeySpan Swap Agreement is a private financial contract between KeySpan and the financial services company which was not filed with FERC. The KeySpan Swap Agreement is thus not part of the filed rate.[1] Accordingly, the filed rate doctrine is not a bar to providing relief to consumers in this case. Though the practical effects of restitution and disgorgement differ they are both equitable remedies. Restitution ultimately flows to the injured party, but it is neither a form of "damages" nor a means of providing "compensation for past injuries." *See Ellett Bros.,* Inc. v. *US. Fidelity & Guaranty Co.,* 275 F.3d 384, 388 (4th Cir. 2001) ("Restitution and disgorgement require payment of defendant's ill-gotten gains, not compensation of the [injured party's] loss."). Moreover, courts have interpreted statutes in a manner that does not interfere with a court's traditional equity powers, unless Congress clearly makes that "desire plain." *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329–30 (1944) ("The essence of equity jurisdiction has been the power * * * to do equity and to mould each decree to the necessities of the particular case."). The filed rate doctrine, in short, has no application to the equitable distribution of the disgorged funds as a remedy in this case.

Finally, it is not a bar to providing relief to consumers that the precise amount of harm to them has not been calculated. KeySpan's conduct may have caused much greater injury than the $12 million it has agreed to disgorge. Equity does not allow a party to take advantage of imprecision that a wrongdoer is responsible for creating. While KeySpan's wrongdoing may have made it difficult to calculate the extent of the harm to consumers, the DOJ's duty is to protect the general public, and its own findings that the likely effect of the violation was to raise prices, make it apparent that an adequate equitable remedy requires distribution of the disgorged funds to the consumers that were harmed.

Such relief would, at least, partially offset the economic damage inflicted upon New York City's electricity consumers. Accordingly, any relief in the form of monetary payments provided for by this consent judgment should be for the benefit of New York City's retail electric consumers. One method to effectuate such relief would be to provide for payments to be made to New York City LSEs in proportion to the amount of capacity that they procured during the May 2006 through February 2008 time period, with the proviso that such payments be distributed to end use consumers in proportion to their relative demand during this period. Alternatively, the Court could direct the NYISO to equitably distribute the payments among consumers.

IV. Conclusion

Con Edison respectfully requests that the Court find that the proposed consent judgment is not in the public interest until and unless any monetary payments disgorged by KeySpan are used to provide relief to New York City's electricity consumers.

Dated: May 3, 2010, New York City.

Respectfully submitted,

Consolidated Edison Company of New York, Inc.

By: Neil H. Butterklee, Assistant General Counsel, Consolidated Edison Company

[1] It is the NYISO Market Administration and Control Areas Services ("Services Tariff") that is the filed rate. All of the rules, procedures and pricing formulas associated with the NYISO's capacity auctions are contained in the Services Tariff which is on file at the Federal Energy Regulatory Commission ("FERC"). Thus, the filed rate is encompassed within the pages of the Services Tariff. It does not include the KeySpan Swap Agreement which is an extrinsic private contract.

of New York, Inc.

April 30, 2010

BY ELECTRONIC MAIL

Donna N. Kooperstein, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530.

Re: United States v. KeySpan Corporation; Proposed Final Judgment, Stipulation and Competitive Impact Statement

Dear Ms. Kooperstein: The New York State Consumer Protection Board ("NYSCPB") appreciates the invitation, provided in the **Federal Register** dated March 4, 2010, to discuss the appropriateness of the proposed Final Judgment, Stipulation and Competitive Impact Statement that have been filed with the United States District Court for the Southern District of New York in United States of America v. KeySpan Corp., CMI Case No. 10–CIV–1415. The NYSCPB is pleased that the United States Department of Justice ("USDOJ") has pursued the improper collusive behavior of KeySpan Corporation ("KeySpan" or "Company") in New York City's capacity market.[1] For almost two years, KeySpan was able to maintain artificially high capacity prices in New York City by controlling, through a third party, the bids of its main competitor and receiving that competitor's capacity revenues. The filed documents call this arrangement "the KeySpan Swap."

The NYSCPB believes that, for two reasons, entry of the proposed Final Judgment is not in the public interest. First, KeySpan has agreed to disgorge only $12 million, when the evidence is overwhelming that the Company's illicit conduct burdened New York Cit's energy consumers by at least $68 million and perhaps as much as several hundred million dollars in over payments.[2] Second, the ill-gotten gains should be paid to the victims of KeySpan's improper behavior, New York City's energy consumers, not to the Federal government.

Statement of Interest

The NYSCPB is an agency in the Executive Branch of New York State government statutorily charged with "* * * representing the interests of consumers of the state before Federal, state and local administrative and regulatory agencies. [3] Further, pursuant to Executive Order No. 45, the NYSCPB is authorized to:

Act as an advocate before other state and Federal entities by:

(a) representing the interests of consumers in proceedings of Federal, state and local administrative and regulatory agencies where the State Director deems the proceeding to affect the interest of consumers.

The NYSCPB has also been designated by the New York State Independent System Operator, Inc. ("NYISO") as the "Statewide Consumer Advocate," representing the interests of the State's residential, small business and farm electricity users in the NYISO governance process. The Agency has fully participated in the NYISO's stakeholder process since the inception of the organization in the late 1990's and has made numerous filings with the FERC.

Comments

The Competitive Impact Statement asserts that the "proposed Final Judgment remedies [KeySpan's] violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement." The NYSCPB respectfully disagrees. According to the NYSPSC, the KeySpan Swap unjustly enriched the Company by more than $68 million and imposed continued high electricity costs on consumers in amounts that could total hundreds of millions of dollars. Viewed in this context, disgorgement of $12 million will not deter the Company or other companies from engaging in anticompetitive conduct in the future. Not only is the penalty less than 20 percent of the ill-gotten gains, but it is so small compared to the Company's annual earnings that. shareholders would not notice it. Instead, the settlement should reflect KeySpan's wrongful gains from the swap, its wrongful gains from its capacity sales outside the swap, and the harm to consumers due to high capacity prices that were caused by the swap.

USDOJ has not sustained its burden to provide sufficient evidence for the Court to determine that a $12 million settlement is adequate reimbursement for KeySpan's unjust enrichment, or deter such anti-competitive conduct in the future. The NYSCPB agrees with the NYSPSC that USDOJ should be required to disclose the total amount of KeySpan's wrongful gains, and explain how, in light of these gains, a $12 million settlement would adequately recover KeySpan's unjust enrichment and deter such illegal practices. In addition, the managers who perpetuated this illegal conduct will likely suffer no negative consequences as a result of the settlement. Indeed, it is likely they received hefty bonuses as the illicit revenues began rolling in. Further, at the very least, the names of the managers who approved or condoned this behavior should be made public.

The proposed Final Judgment is also flawed because the people harmed by the Company's conduct would not receive any benefit from its remedy. Transferring $12 million to the Federal government would produce no impact on the economic lives of New York City energy consumers. A fairer and appropriate course of action would be to return the ill-gotten gains to the people from whom they were taken, primarily the electric customers in New York City (Zone J of the capacity market operated by the NYISO.) One way this could be accomplished would be to provide a credit to load serving entities within Zone J that could be used to offset the cost of current purchases. The NYSCPB recognizes, however, that it would be the NYISO's responsibility to implement such a credit mechanism. We recommend that the Court direct USDOJ to contact the NYISO to discuss the feasibility of implementing this mechanism.

If the credit mechanism proves impractical, as a substitute, we recommend using the money for expansion of energy efficiency programs in Zone J. Two New York State entities administer energy efficiency programs for low-income New Yorkers. The New York State Division of Housing and Community Renewal administers the Federally funded Weatherization Assistance Program and the New York State Energy Research and Development Authority administers the state-funded EmPower New York program. Annual and other reports by independent third-parties demonstrate that both of these entities ably administer well-designed energy efficiency and weatherization programs that lower the energy burden for low-income New Yorkers and reduce energy prices for everyone by lessening demand. The NYSCPB urges the Court to direct USDOJ to discuss with these State entities the process by which the funds could be transferred. We recommend transfer of the funds to these two State entities in equal shares, with the qualification that the funds must be used to expand their ongoing work in Zone J.

[1] USDOJ's action is especially commendable when compared to the failure of the Federal Energy Regulatory Commission (FERC") to take any action to protect consumers from KeySpan's conduct.

[2] The NYSCPB's comments rely on data contained in the affidavit accompanying the comments of the New York State Public Service Commission ("NYSPSC"). The NYSCPB supports the analyses and recommendations in the NYSPSC's comments as well as those in the comments of the City of New York.

[3] New York Executive Law § 553(2)(d).

Conclusion

The proposed Final Judgment should be rejected because it is not in the public interest. The Court should direct urge the parties to increase the amount of ill-gotten gains to be disgorged and require all disgorged funds to inure to the benefit of New York City energy consumers.

Thank you for consideration of our comments in this matter.

Respectfully yours,

Mindy A. Bockstein,
Chairperson and Executive Director.

Tariq N. Niazi,
Director of Utility Intervention.

Saul A. Rigberg,
Intervenor Attorney.

May 17, 2010

Donna N. Kooperstein, Chief, Transportation, Energy & Agriculture Section. Antitrust Division. United States Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530.

RE: Comments of the Pennsylvania Public Utility Commission on United States v. Keyspan Corporation Proposed Final Judgment and Competitive Impact Settlement, 1O–civ–1415 (USDC—Southern District, New York)

Dear Ms. Kooperstein: The Pennsylvania Public Utility Commission [1] ("PaPUC") herewith files these comments under the provisions of the Tunney Act, 15 U.S.C. 16(d), with respect to the Proposed Final Judgment and Competitive impact Settlement in the matter of United States v. Keyspan Corporation presently before the United States District Court for the Southern District of New York, Civil Action 10–civ–1415.

In 1997, the General Assembly enacted the Electric Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2801 *et seq,* restructuring Pennsylvania's traditional vertically integrated electric utilities and opening up retail markets to competition. As Pennsylvania is largely, and soon will be wholly within the control area of PJM interconnection, L.L.C., a FERC-jurisdictional Regional Transmission Organization, the competitiveness of Pennsylvania's retail electric markets is heavily dependent on the competitive results of the PJM electric generation wholesale markets. Approximately 80% of the delivered price of retail electricity is attributable to the wholesale cost of generation.

As a state public utility regulatory agency in a state that has, for more than a decade, supported both wholesale and retail competition in the electric power generation markets, we are deeply concerned by allegations contained in the complaint that appear to conclusively establish the existence of a sophisticated multi-year effort by the defendant to evade competition in the New York installed capacity market, resulting in higher retail electricity prices for retail users of electricity. The effort appears to have been carefully calculated and executed so as to avoid action by New York state authorities, Federal regulators and antitrust enforcers.

This concern is heightened by the fact that the Federal Energy Regulatory Commission, which has regulatory jurisdiction over the New York City wholesale generation market, was apparently unable to detect or deter the behavior recited in the instant Complaint.[2] As the complaint recites, during the 2006–2009 period, Keyspan was faced with the prospect of new competition in the New York City capacity market which had the prospect of substantially reducing its future capacity revenues. Unable to purchase control of its competitor and unwilling to risk head-to-head competition, Keyspan purchased a financial interest in the capacity sales of its competitor through a third party ("Keyspan Swap"). In turn, the third party sought and obtained a hedging agreement with the competitor Astoria to reduce its counterparty risk. The result was to make Keyspan indifferent with respect to competition, as it would receive revenue either through bidding into the capacity market or through its swap.

It appears from the factual recitations of the Complaint that Keyspan's scheme had a high likelihood of success.[3] This would seem to elevate the danger that New York City load serving entities, and ultimately the public could suffer competitive injury without remedy or the protection of the laws of New York State, or of the United States. That would seem to elevate the seriousness of the defendant's offense. Moreover, it is not clear that the facts in this case are limited in time and place; while the tariff rules in question in this case apply to a specific geographic location and time period, the general method employed by the defendant to avoid competition (i.e., the purchase of a financial interest in the operations of a competitor through a third party) is not so limited.

Because the PaPUC is a state regulatory agency with limited jurisdiction and power under Pennsylvania law, we must rely heavily upon the effective enforcement of the antitrust Jaws of the United States to protect the public and the competitive wholesale and retail electric generation markets.

The PaPUC understands that there has been a degree of difficulty associated with detecting and prosecuting the actions recited in this case; we do not oppose the proposed Stipulation and Final Judgment, although we cannot state whether the equitable and financial penalties in the Final Judgment result iii the full remedy of injury to the public from execution of the scheme.

This proceeding demonstrates that even if conduct inimical to competition is not effectively proscribed under the Federal Power Act, it may result in prosecution and serious consequences under the antitrust laws of the United States. The PaPUC and other public and private entities with a critical stake in the success of wholesale electric generation competition have benefitted from studying the facts of this case and will be better able to detect and deter similar schemes in the future.

Lastly, the PaPUC would like to convey our thanks to the U.S. Department of Justice—Antitrust Division for enforcing competition law in wholesale electricity markets and sanctions against a scheme that manifestly reduced competition and raised prices in the New York City capacity market.

Very truly yours,

Bohdan R. Pankiw,
Chief Counsel, *Pennsylvania Public Utility Commission.*

cc: James H. Cawley, Chairman

[1] The PaPUC is a state administrative commission created by the General Assembly of the Commonwealth of Pennsylvania and charged with the regulation of electric utilities, transmission siting and licensing of generation suppliers within the Commonwealth of Pennsylvania. 66 Pa.C.S. A., § 101, *et seq.*

[2] In 2007, the New York 150 sought, pursuant to Section 205 of the Federal Power Act to file capacity mitigation and market remediation tariffs to address perceived exercises of market power in the New York City capacity market. FERC rejected the proposed behavioral remediation tariffs and instead directed a staff investigation. New York Independent System Operator. Inc., 118 FERC ¶ 61,182 (2007) ("2007 FERC Order"). In the staff review of the allegations filed with respect to the New York City capacity market, it was apparently concluded, inter a/ia, that while Keyspan's actions did not violate any provision tariff or of the Federal Power Act, there was a potential problem with buyer's market power, (i.e., a potential for exercise of monopsony), and directed the New York ISO to file tariffs to address this purely theoretical concern.

[3] The facts appear to establish that there was a sophisticated effort by Keyspan to immunize its transactions from regulatory review by seeking to characterize them as ordinary and usual business transactions.

Tyrone J. Christy, Vice Chairman
Wayne E. Gardner, Commissioner
Robert F. Powelson, Commissioner

May 14, 2010

Donna N. Kooperstein, Chief, Transportation, Energy, arid Agriculture Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530

Re: Public Notice Inviting Tunney Act Comments in United States v. Keyspan, SDNY Civil Action No. 10–cv–1415 (WIIP), 75 Fed. Reg. 9946, March 4, 2010.

Dear Ms. Kooperstein: AARP submits these comments in response to the above-referenced notice regarding the proposed settlement of United States v. Keyspan, SDNY Civil Action No. 10–cv–1415 (WHP). AARP is a nonpartisan, nonprofit organization that helps people over the age of 50 to have independence, choice, and control in ways that are beneficial to them and society as a whole.[3] AARP has millions of members, including more than 2,500,000 members who reside in New York.[4] AARP is greatly concerned about the threats to health and safety of vulnerable citizens caused by New York's high electricity costs.[5] Because the cost of utilities has skyrocketed, many low and middle-income families and older people must now choose between paying their energy bills for heating and cooling and paying for other essentials such as food and medicine. AARP works to protect consumers from excessive rates and charges such as were set and charged by KeySpan and passed through to consumers. As consumers, AARP members depend upon the protection of the antitrust laws from the unlawful exercise of monopoly or market power and the enforcement of the antitrust laws by DOJ and the courts.

The United States Department of Justice Antitrust Division ("DOJ") filed a Complaint against KeySpan Corporation ("KeySpan") on February 22, 2010. The Complaint alleges violation of Section 1 of the Sherman Act in connection with KeySpan's successful efforts to inflate prices paid for wholesale electric capacity from May 2006 to February 2009 in a spot market operated by the New York Independent System Operator ("NYISO").[1] Keyspan achieved this price inflation using a strategy of economic withholding, by bidding the maximum possible amount in order to drive up the market clearing price paid to all sellers in the NYISO in-City capacity auction market. Keyspan also entered into a financial derivative swap contract with Morgan Stanley, which functioned to create an interest in sales of a major competitor, providing a stream of payments to KeySpan to offset diminished sales due its withholding strategy to raise prices.

On the same day the Complaint was filed, DOJ and Keyspan filed and moved for entry of a Proposed Final Judgment that would settle and discontinue this action. Under the terms of the Proposed Final Judgment, Keyspan would pay $12 million to the U.S. Treasury, with no admission of any wrongdoing, and the Complaint would be dismissed. The Proposed Final Judgment would provide no monetary remedy or other benefit for the consumers who paid higher prices for electricity due to the antitrust law violation described in the Complaint.[2] As required by the Antitrust Procedures and Penalties Act (the "TunneyAct"), 15 U.S.C. 16(e)–(f), DOJ filed a Competitive impact Statement recommending approval by the Court of the Proposed Final Judgment. The Tunney Act requires public notice and an opportunity for public participation and input to both DOJ and the Court prior to the Court's review and decision on the settlement of an antitrust case.

AARP members in New York state were adversely affected by the inflated capacity charges due to the alleged antitrust violations.[6] The inflated charges for capacity were paid in the first instance by load-serving utilities, such as Consolidated Edison Company of New York, Inc. ("Con Edison"), which then passed through all the excessive charges to retail customers. "The exercise of supplier market power, through economic withholding, leads to higher capacity prices, and a wealth transfer from consumers to suppliers." [7] Con Edison estimated the inflated costs in 2006 to be approximately $159 Million.[8] Of that amount, $119 million was paid by New York City area utilities, and $39 million was paid by utilities in the rest of the state. The amount of capacity overcharges for 2007 and until NYISO rules were changed in early 2008 have not been identified.

AARP urges DOJ not to settle the action as proposed and urges the Court not to approve the Proposed Final Judgment. AARP's reasons for disapproval, set forth in greater detail below, include, foremost, the lack of any monetary remedy or other discernible benefit for injured consumers, and the absence of a credible deterrent that would discourage others from exercising market power in the NYTSO markets in violation of the antitrust laws. Also, there is no factual foundation in the record

- to determine appropriateness of the $12 Million disgorgement of profits;
- to determine the portion of the profits received by KeySpan that would be disgorged;
- to quantify the harm to markets and consumers caused by the antitrust law violation described in the Complaint;
- to determine the basis for arriving at the $12.1 million partial disgorgement and its appropriateness;
- to clearly identify the swap contract and its terms which violated the antitrust laws; and
- to determine if the settlement is adequate to redress the antitrust law violation that occurred.

The public interest may be harmed by the settlement if, instead of the intended deterrent effect, it sends a message that antitrust violators who inflate prices through the exercise of market power in NYISO markets can (i) escape serious consequences, (ii) have no obligation to return illegally obtained profits to those injured by the antitrust violation described in the Complaint, (iii) make no admission of wrongdoing, and (iv) disgorge only an unstated portion of their profits from their unlawful scheme. Also, the proposed settlement may tacitly condone the future use by others of private financial derivative swap contracts to compensate sellers

[3] For more information about AARP see *http://www.aarp.org/.*

[4] For more information about AARP's New York state office, see *http://www.aarp.org/states/ny/.*

[5] New York residential electric rates are currently third highest in the nation, second only to Hawaii and Connecticut. Energy Information Agency, Electric Power Monthly, April, 2010, Year to Date, available at *http://www.eia.doe.gov/cneaf/images/xls.gif.*

[1] The Complaint is available at *http://www.justice.gov/atr/cases/f255500/255507htm.*

[2] The Proposed Final Judgment is available at *http://www.justice.gov/atr/cases/f255500/2555O9.htm.*

[6] "Every Con Ed customer in the five boroughs overpaid an average total of at least $40 over two years during a price-fixing scheme set up by the owners of a giant Queens power plant, the feds charge in a court case that would let the alleged gougers get away with most of the gains." Bill Sanderson, $157 M Power Abuse, N.Y. Post, March 9, 2010, available at *http://www.nypost.com/f/printlnews/local/power_abuse_SgLN9psbhjopRMEGU68fgK.*

[7] Affidavit of Peter Cramton, Ph.D., Feb. 8, 2007, attached as Exhibit A to Answer and Request for Leave to File Answer of Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., Mutliple Intervenors and the City of New York, in FERC Docket No. ER07–360, Re New York Independent System Operator, available at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11248666.*

[8] See Motion to Comment of Consolidated Edison Company of New York, Inc., etc., Re New York Independent System Operator, FERC Docket No. ER07–360 (Jan. 27, 2009), p. 2 and Affidavit of Stuart Nachmias, ¶ 13–14, available at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11236060.*

who employ anomalous withholding or bidding strategies to exert market power and inflate clearing prices in the NYISO or other organized electricity spot markets elsewhere in the nation.

Information filed in other proceedings suggests that the amount of disgorgement is not adequate, that the settlement will not deter use of private derivative contracts to support anomalous bidding in NYISO markets, and that the requisite factual foundation needed to support the proposed settlement is absent. At a minimum, further proceedings are needed to develop an adequate factual record upon which it would be possible for the Court to determine whether a proposal to compromise this antitrust action is in the public interest.

No Sufficient Factual Foundation Exists to Support a Conclusion That the Proposed Settlement Is a Reasonably Adequate Remedy or in the Public Interest

The Tunney Act proceeding is critically important because it tests, through public participation and the sunlight of public scrutiny, whether an adequate factual foundation exists to support a finding that the public interest would be advanced if a civil antitrust case brought by the United States is settled through compromise with the alleged violator. The Tunney Act provides, in relevant part:

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such 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

(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 USC 16(e)(l). As shown below, the necessary foundation of record support needed to answer even the most basic questions about the proposed settlement is lacking.

The Complaint filed by DOJ alleges that KeySpan violated Section 1 of the Sherman Act[9] by adopting an economic withholding strategy in the NYISO capacity market—bidding high to drive clearing prices up. Attendant to the withholding strategy was the possible consequence that not all its capacity would be sold at the maximum price that KeySpan bid, and that other competitors who bid lower would make sales and receive the high price set by KeySpan. To compensate itself for lost sales due to its withholding strategy, KeySpan entered into a financial derivative swap contract, which in effect gave it a financial interest in the capacity sales of a major new competitor. According to the Complaint:

On January 18, 2006, [KeySpan] and a financial services company executed an agreement (the "KeySpan Swap") that ensured that KeySpan would

On January 18, 2006, [KeySpan] and a financial services company executed an agreement (the "KeySpan Swap") that ensured that KeySpan would withhold substantial output from the New York City electricity generating capacity market * * *. The likely effect of the KeySpan swap was to increase prices for the retail electricity suppliers who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity.

Complaint, page 1. The contract was between KeySpan and Morgan Stanley, and Morgan Stanley entered into a reciprocal financial derivative arrangement with Astoria Generating, a major new competitor of KeySpan.[10] One of the conditions of the swap contract provided for its termination if the closing for the purchase of the competitor power plant by Astoria Generating did not occur. The swap contract is not in the record of this case but an excerpt is available in a FERC filing made by Con Edison.

Because all sellers are paid the same market clearing price in the NYISO capacity market auctions, a single seller who achieves a higher clearing price through an unlawful scheme ensures that all sellers reap the benefit of that inflated price, with the consequence that every megawatt of electric capacity sold, even by those sellers not participating in the scheme, is overpriced, to the detriment of consumers. The Complaint does not quantify the amount of higher prices obtained through KeySpan's scheme or the attendant cost borne by consumers. The Complaint simply alleges that "KeySpan had revenues of approximately $850 million in 2006 and $700 million in 2007 from the sale of energy and capacity at its Ravenswood facility." Complaint, ¶ 6. The Complaint does not indicate the portion of these KeySpan revenues attributable to the illegal scheme. Nor does the Complaint indicate the total NYISO capacity market revenue or the portion of that which was inflated due to KeySpan's scheme and ultimately paid by consumers.[11]

Despite the absence of any indication in the Complaint as to the amount of total damage to markets and consumers through the inflated capacity prices, and despite the absence of any assertion regarding KeySpan's share of those inflated charges, the DOJ Competitive Impact Statement asserts:

The proposed Final Judgment remedies this violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement.[12]

How can it possibly be said the proposed settlement "remedies this

[9] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." 15 U.S.C. 1.

[10] "On January 18, 2006, KeySpan entered into an International SWAP Dealers Association Master Agreement for a fixed for float unforced capacity financial swap (the "Agreement") with Morgan Stanley Capital Group Inc. ("Morgan Stanley"). The Agreement has a three year term that began on May 1, 2006. The notional quantity is 1,800,000kw (the "Notional Quantity") of In-City Unforced Capacity and the fixed price is $757/kWmonth ("Fixed Price"), subject to adjustment upon the occurrence of certain events. Cash settlement occurs on a monthly basis based on the In-City Unforced Capacity price determined by the relevant New York Independent System Operator ("NYISO") Spot Demand Curve Auction Market ("Floating Price"). For each monthly settlement period, the price difference equals the Fixed Price minus the Floating Price If such price difference is less than zero, Morgan Stanley will pay KeySpan an amount equal to the product of (a) the Notional Quantity and (b) the absolute value of such price difference. Conversely, if such price difference is greater than zero, KeySpan will pay Morgan Stanley an amount equal to the product of (a) the Notional Quantity and (b) the absolute value of such price difference. This derivative instrument does not qualify for hedge accounting treatment under SFAS 133 and is subject to fair value accounting treatment; although currently there is no observable market reference to value this derivative instrument. As noted, this is a financial derivative instrument and is unrelated to any physical production of electricity" Keyspan Form 10–Q, Annual Report, June 30, 2006, available at *http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHTML1?ID=4570402&SessionID=35GoWWvvg9LHL17.*

[11] As discussed infra, there are indications that the price of capacity was increased by KeySpan's gambit by approximately $157 million in 2006.

[12] DOJ Competitive Impact Statement, p. 8. (Emphasis added). The Competitive Impact Statement is available at *http://www.justice.gov/atr/cases/f255500/255578.htm.*

violation" if there is no identification anywhere in the Complaint, the Proposed Final Judgment, or the Competitive Impact Statement of the amount of damage to markets and to consumers caused by KeySpan's anticompetitive conduct? There is simply no factual foundation in the record to support DOJ's assertion that the proposed compromise of the action "remedies this violation."

The Competitive Impact Statement places great emphasis upon the agreement of KeySpan to pay $12 million to the United States Treasury. But there is no provision in the Proposed Final Judgment which would remedy or address the harm to AARP members and other consumers caused by KeySpan's successful efforts to inflate prices in the NYISO markets.

The Competitive Impact Statement refers frequently to disgorgement of profits by KeySpan under the Proposed Final Judgment, possibly creating an impression that KeySpan will not be allowed to benefit from its scheme (even if other sellers do, due to the design of the NYISO market):

The proposed Final Judgment remedies this violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement * * *. Disgorgement will deter KeySpan and others from future violations of the antitrust laws. [p. 1]

The proposed Final Judgment requires KeySpan to disgorge profits gained as a result of its unlawful agreement restraining trade. [p. 8]

Disgorgement is necessary to protect the public interest by depriving KeySpan of the fruits of its ill-gotten gains and deterring KeySpan and others from engaging in similar Anticompetitive conduct in the future. Absent disgorgement, KeySpan would be likely to retain all the benefits of its anticompetitive conduct. [p. 9]

Disgorgement here will also serve to restrain KeySpan and others from participating in similar anticompetitive conduct. [p. 10]

A disgorgement remedy should deter Keyspan and others from engaging in similar conduct. [p.11–12] [13]

Contrary to the impression cast by the above assertions, a $12 million payment by KeySpan as proposed would not amount to full disgorgement of its profits from the antitrust law violation described in the Complaint. Rather, it would represent only some undesignated portion of KeySpan's profits from the illegal scheme. The Competitive Impact Statement acknowledges that the proposed settlement does not require KeySpan to give up all its profits from the scheme:

Requiring KeySpan to disgorge a portion of its ill-gotten gains from its recent illegal behavior is the only effective way of achieving relief against KeySpan, while sending a strong message to those considering similar anticompetitive conduct.[14]

How can the the public know or Court determine if the proposed $12 million payment by KeySpan is appropriate when it represents only "a portion of its ill-gotten gains"? What portion? What is the reason, if any, for requiring KeySpan to give up less than 100% disgorgement of profits? DOJ has not explained its rationale for accepting less than full disgorgement of KeySpan's "ill-gotten gains from its recent illegal behavior.[15]

The Competitive Impact Statement asserts that "[b]ut for the Swap, installed capacity likely would have been procured at a lower price in New York City from May 2006 through February 2008." [16] Hut, as discussed above, there is no indication in the record of the total amount of "ill-gotten gains" received byKeySpan due to the antitrust violations, or of the total amount by which market prices were elevated due to the scheme. An estimate of the total market price inflation in 2006 was made by Con Edison, a purchaser in the NYISO capacity market:

The resulting harm to consumers was quite significant. Economic withholding caused the price of capacity to remain close to $13/kW-month instead of decreasing to less than $6 per kWmonth, a price that [NYISO Market Monitor] Dr. Patton said would exist under competitive market conditions * * *. As calculated by Con Edison witness Stuart Nachmias, the impact on New York State's consumers of economic withholding during the 2006 Capability Year on was approximately $157 million, of which approximately $119 million impacted New York City consumers alone * * *.[17]

This estimate was only for 2006. It also indicates that about $38 million in higher costs ($157 million total minus $119 million in New York City) were experienced in the rest of New York State in 2006 due to the KeySpan withholding. The scheme continued until March 2008, according to the Competitive Impact Statement, when NYISO rules were changed. KeySpan's share of the prices raised by dint of its anticompetitive actions is not known by AARP. According to a FERC Staff Report, the KeySpan—Morgan Stanley swap agreement identified in the Complaint as violative of antitrust law "produces almost $35 million in annual revenue." [18] If so, remitting just $12 million to the government, about one-third of the revenue from the derivative, plus the enhancement of market prices paid for capacity sold at excessive prices in addition to the income from the financial derivative contract, could be a good deal for KeySpan. But it would be a very bad result for consumers, markets, competition, and public confidence in Federal antitrust law enforcement.

With no remedy for consumers who overpaid, and without a factual foundation in the record as to how much KeySpan profited from its gambit to inflate NYISO market prices, there is no way to assess whether the proposed $12 million payment to the government would be a meaningful or appropriate remedy. Although a 2008 FERC Staff Report perceived no violation of FERC orNYISO rules, and exonerated KeySpan and Morgan Stanley, the Court should not ignore the fact that the FERC Staff Report did not emerge from an open proceeding with the benefit of discovery, public testimony, or cross examination by interested intervening parties. Indeed, the ineffectiveness of FERC, which eventually approved a prospective change in NYISO market rules in 2008, highlights the patchwork nature of jurisdiction over energy markets and derivatives,[19] and

[13] DOJ Competitive Impact Statement. (Emphasis added).

[14] *Id.,* p. 10.

[15] *Id.*

[16] DOJ Competitive Impact Statement, p. 7.

[17] Re New York Independent System Operator, Inc., FERC Docket No. ERO7–360.000, Motion to Comment of Consolidated Edison Company of New York, Inc., and Orange and Rockland Utilities, Inc., p. 2, available at *http:/elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11236060.*

[18] *Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the Ne York City Capacity Market,* FERC Enforcement Staff Report, at, (Feb. 28, 2008), P. 21, available at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11605597.*

[19] "Three Federal statutes, the Commodity Exchange Act (CEA), the Energy Policy Act of 2005 (EPAct 2005), and the Energy Independence and Security Act of 2007 (ElSA) all prohibit manipulation of various energy commodities and empower Federal agencies to impose penalties on manipulators Unlike the EPAct 2005 or the EISA, the CEA does distinguish between market power manipulations and fraud-based manipulations. However, a series of poorly reasoned legal decisions have undermined the efficacy of the CEA as a tool for combating market power manipulation. The EPAcI 2005 and EISA are both based on section 10b(5) of the Securities and Exchange Act, and focus on fraud-based manipulations. As a result, they are ill-suited to address market power manipulation, and attempts to use them to do so will inevitably lead to further legal confusions. * * * The FERC and FTC antimanipulation rules are newer, and have not been extensively tested in litigation, but from an economist's perspective, these rules (and the statutes that authorize them)

Continued

underscores the importance of vigorous antitrust law enforcement by DOJ to address, remedy, and deter anticompetitive conduct in the NYISO electricity markets.

In justification of the proposed settlement, the DOJ Competitive Impact Statement is replete with references to the putative deterrent effects the Proposed Final Judgment would have, claiming it would discourage future transgressions by NYISO market participants:

Disgorgement will deter KeySpan and others from future violations of the antitrust laws. [p. 2]

See *International Boxing Club* v. *United States,* 358 U.S.242, 253 (1959) (relief should "deprive 'the antitrust defendants of the benefits of their conspiracy,'" * * * The Second Circuit has held that disgorgement is among a district court's inherent equitable powers, and is a "well-established remedy * * * to prevent wrongdoers from unjustly enriching themselves through violations, which has the effect of deterring subsequent fraud." *SEC* v. *Cavanagh,* 445 F.3d 105, 116–17 (2d Cir. 2006). [p. 8–9].

Disgorgement is necessary to protect the public interest by depriving KeySpan of the fruits of its ill-gotten gains and deterring KeySpan and others from engaging in similar anticompetitive conduct in the future. Absent disgorgement, KeySpan would be likely to retain all the benefits of its anticompetitive conduct. {p. 9].

A disgorgement remedy should deter Keyspan and others from engaging in similar conduct. [p.11] [20]

There is no explanation in the DOJ Competitive impact Statement as to why only a portion of profits is being disgorged, what the total profits were, what portion is being disgorged, or how the disgorgement of part of the profits from an antitrust violation would possibly work to deter others from future efforts to inflate prices in the nation's electricity spot markets. The record is devoid of any explanation underlying DOJ's conclusion that only partial disgorgement of unquantified profits in this case would somehow deter similar conduct in the organized electric spot markets or send "a strong message to those considering similar anticompetitive conduct." [21] Indeed, DOJ, in its Competitive Impact Statement, suggests content and significance of the Proposed Final Judgment well beyond its text. DOJ states

The proposed Final Judgment remedies this violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement.[22]

Actually, the Proposed Final Judgment simply states that:

plaintiff and KeySpan, through their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, for settlement purposes only, and without this Final Judgment constituting any evidence against or an admission by KeySpan with respect to any allegation contained in the Complaint.[23]

On its face, the Proposed Final Judgment does not contain language identifying any "violation," does not mention profit disgorgement, does not state KeySpan will "disgorge profits," and does not determine that the swap agreement was "anticompetitive." as suggested by the DOJ Competitive Impact Statement.

There is no provision in the Proposed Final Judgment one could point to as even a rhetorical or symbolic "shaming" that might deter similar future conduct of sellers concerned with their good will and public image. Rather, the Proposed Final Judgment simply would require a payment to the government with no admission of wrongdoing, no acknowledgment of any anticompetitive conduct, and no remedy for consumers harmed. The "message" conveyed by the $12 million payment to other market participants may simply be that it was a nuisance settlement equal to the cost of a handful of New York lawyers for a couple of years. If the $12 million payment is only a fraction of KeySpan's ill-gotten gain; if all sellers in the NYISO or other organized electricity markets benefit from a successful exercise of market power by any one of them; if the cost of apprehension is small or nonexistent compared to the benefits; then other market participants may be emboldened to try similar strategies if the Proposed Final Judgment permitting such results is approved. In the NYISO and similarly designed electricity markets where all sellers benefit from the wrongdoing of the one who illegally drives prices up, the proposed settlement may only incent further testing of the limits and exploitation of markets and consumers.

Analogous to bid rigging schemes where the winner secretly pays a part of his excessive profits to other sellers who deliberately overbid far in excess of the winning "low" bid, the same result might be obtained by sellers in the organized electricity spot markets such as those of the NYISO, using a financial intermediary and derivative contracts to compensate the high bidder who raises the price but sacrifices some sales to do so. The DOJ Competitive Impact Statement does not sufficiently identify the details of the swap contract arrangements made by KeySpan with Morgan Stanley to ensure that KeySpan would receive additional benefits when sales were made by competitors at higher prices due to KeySpan's economic withholding.

When all sellers benefit from any successful price-raising gambit in NYISO and similar organized electricity markets, the real "message" conveyed by this case to those entertaining an exercise of market power in violation of antitrust law, if the settlement is approved, could be "go for it." If the gambit is discovered, the market participant can escape civil antitrust liability in an antitrust case brought by DOJ four years later by simply agreeing to cede an unspecified portion of one's profits, with no admission of wrongdoing. Thus, if approved, the Proposed Final Judgment may only encourage sellers to exploit the nation's electricity spot markets and consumers, with confidence that if they are caught by DOJ, they will not be ordered to provide a remedy to exploited consumers, but merely required to pay some portion of unlawfully obtained profits to the government.

AARP Recommendations

AARP recommends that DOJ renegotiate, or the Court modify, the Proposed Final Judgment to require the following:

1. Acknowledgment of wrongdoing and violation of the antitrust law by KeySpan as described in the Complaint;

2. Identification of the harm to markets and consumers including the total cost of the inflated prices in the NYISO capacity market due to KeySpan's anticompetitive conduct;

3. Identification of derivative contracts which violated the antitrust laws, and any other "determinative" documents under the Tunney Act;[24]

are completely misguided and hopelessly ill-suited to reach the kinds of manipulative conduct most likely to occur in energy markets. * * * Manipulation is a potentially serious problem in all derivatives markets, energy included. Craig Pirrong, Energy Market Manipulation: Definition, Diagnosis, and Deterrence, 31 Energy Law Journal 1–2 (2010) (Emphasis added).

[20] DOJ Competitive Impact Statement. (Emphases added).

[21] *Id.,*p. 1O.

[22] Competitive Impact Statement, p. 2.

[23] Proposed Final Judgment, para. 1 (Emphasis added,).

[24] The DOJ Competitive Impact Statement asserts that there are no "determinative" documents required to be submitted under the Tunney Act. See

4. Disgorgement by KeySpan of all profits it realized through the scheme to inflate prices;

5. Refunding by KeySpan of its profits from antitrust violations to reduce the harm to consumers, and other measures to protect consumers and deter similar schemes to exercise market power in violation of the antitrust laws.

Under the Tunney Act, there must be a "factual foundation for the government's decisions such that its conclusions regarding the proposed settlement are reasonable." *United States* v. *SBC Commc'ns,* Inc., 489 F. Supp. 2d1, 15–16 (D.D.C. 2007). For the reasons previously stated, the Proposed Final Judgment is not supported by the record as it now stands, and the requisite "factual foundation" for compromise of the action as proposed by DOJ and KeySpan is lacking. Accordingly, the request of DOJ arid KeySpan for Tunney Act approval of the Proposed Final Judgment should not be granted by the Court.

Alternatively, the Court should require DOJ to supplement the record, if DOJ does not renegotiate the proposed settlement or provide further factual support in response to these or other comments, or conduct a public hearing to determine whether the Proposed Final Judgment is in the public interest. Obtaining additional evidence is an appropriate way to assure protection of the public interest in a Tunney Act proceeding:

In addition, the Court found there to be insufficient material in the record, which consisted largely or exclusively of unverified legal pleadings, to allow the Court to adequately discharge its duties under the Tunney Act. * * * Rather than hold an evidentiary hearing, the Court ordered the government to provide further materials that would allow the Court to make the public interest determination required by the Tunney Act. The Court allowed the government to decide exactly what types of materials were appropriate to submit. The Court also provided the other parties and amici the opportunity to respond to this supplemental filing.

United States v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007).[25] AARP believes augmentation of the record in this case should include additional evidence sufficient to address, at a minimum, the following matters:

1. The total amount of inflated profits achieved by all sellers in the NYISO capacity market due to the antitrust law violation identified in the Complaint, and an estimate of the total damage and economic harm to electricity consumers in New York City and the rest of the state;

2. The total amount of inflated profits received by KeySpan due to the antitrust violation identified in the Complaint;

3. The relationship of any proposed disgorgement to the total profits received by KeySpan from the violation identified in the Complaint;

4. The amount of revenue received by KeySpan under its financial swap agreement with Morgan Stanley;

5. The rationale for not requiring full disgorgement of profits due to the antitrust violation, if the settlement proposal is not modified and partial disgorgement is still proposed;

6. The rationale for not providing any remedy to benefit customers injured by the antitrust violation identified in the Complaint, if the settlement proposal is not modified and no financial or other remedy for consumers is proposed.

Thank you for your consideration.

Respectfully submitted,

AARP, New York State Office.

AARP

United States v. *Central Contracting Co., Inc.,* 537 F. Supp. 571 (E.D. Va. 1982) ("The Court simply cannot accept an interpretation of legislation that permits the government to assert in 172 out of 188 cases that it considered neither documents nor any other materials determinative in reaching its conclusion to enter into a consent decree").

[25] If DOJ supplements the record the public should have an opportunity to comment on new material offered to justify the proposed settlement or any modification of it.

In the United States District Court for the Southern District of New York

Civil Case No. 10–CIV–1415

United States of America, Petitioner v. *KeySpan Corporation,* Respondent.

Comments of the Public Service Commission of the State Of New York, Pursuant to the Antitrust Procedures and Penalties Act, on the Proposed Final Judgment

Summary

The Public Service Commission of the State of New York ("PSC") submits these comments pursuant to the Antitrust Procedures and Penalties Act, 15 U.s.c. 16(b)–(h), in response to the notice published in the **Federal Register** on March 4, 2010, in this matter. U.S. Dep't ofJustice, Antitrust Div., *United States* v. *Keyspan Corporation,* Proposed Final Judgment and Competitive Impact Statement, 75 FR 9946 (March 4, 2010).

DOJ is to be commended for its faithful enforcement of the antitrust law to protect the integrity of electricity markets in New York City. The electric capacity market for New York City is highly concentrated. The antitrust law is properly applied in this case to address wrongful anti-competitive practices of KeySpan Corporation ("KeySpan"). DOJ's enforcement of the antitrust law is critical to protect consumers against the harmful effects of KeySpan's anti-competitive conduct in this particular case and, more generally, to protect the public interest in the integrity of the newly-created competitive electricity markets.

DOJ proposes to settle this litigation by having KeySpan pay the United States government $12 million. DOJ asserts such a settlement will be in the public interest because KeySpan's payment of $12 million into the U.S. Treasury will prevent KeySpan's unjust enrichment, and deter others from agreeing not to compete in the future. However, because DOJ has not offered any information as to how much KeySpan profited from its unlawful conduct, the Court has no basis for evaluating whether the proposed $1 2 million settlement will prevent KeySpan's unjust enrichment or is sufficient to deter such conduct in the future. Therefore, the Court should direct DOJ to supplement the record to show how much KeySpan gained by virtue of its anti-competitive conduct. Only in this way can the Court evaluate whether the proposed settlement would be in the public interest. POINT 1, below.

As explained more fully below, it is highly probable that KeySpan's gains were well in excess of $12 million. Its net profits under the complained-of "swap" agreement amounted to nearly $68 million. The proposed $12 million settlement would not prevent KeySpan's unjust enrichment, and would not deter such conduct in the future. POINT II, below.

Finally, KeySpan's unlawful anti-competitive conduct harmed consumers to an extent far exceeding both the proposed $12 million settlement and KeySpan's nearly $68 million net profit under the swap. The costs to consumers, in the form of excessive electricity costs caused by KeySpan's unlawful agreement, may well exceed hundreds of millions of dollars over a two-year period. Proceeds from any settlement should be used to benefit ratepayers, who were greatly harmed by KeySpan's wrongful conduct. POINT Ill, below.

Background

In this civil antitrust action, brought by the United States Department of Justice ("DOJ") under Section 1 of the Sherman Act, 15 U.S.C. 1, the government seeks equitable and other relief against KeySpan for violating the antitrust law. According to DOJ, KeySpan entered into an agreement (the

"KeySpan Swap" or the "swap") with an unnamed financial services company (the "FSC") which, in purpose and effect, ensured that KeySpan would "withhold substantial output from the New York City electricity generating capacity market. * * *" 75 FR 9947. DOJ states that "[t]he likely effect of the Keyspan Swap was to increase capacity prices for the retail electricity suppliers who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity." 75 FR 9947.

According to DOJ, the KeySpan Swap was an agreement that unlawfully restrained competition in New York City's electric capacity market. KeySpan entered into the swap agreement to protect itself against increased losses from its preferred bidding strategy, due to the entry of new competitors into the market. 75 FR 9947. Under the swap agreement, KeySpan, which already possessed substantial market power in the highly concentrated and constrained New York City capacity market, "enter[ed] into an agreement that gave it a financial interest in the capacity of Astoria—KeySpan's largest competitor." 75 FR 9947. By giving KeySpan revenues not only from its own sales, but also from the capacity sales of its largest competitor, the KeySpan Swap "effectively eliminated KeySpan's incentive to compete for sales" of capacity. 75 FR 9948. Thus, "[t]he clear tendency of the KeySpan Swap was to alter KeySpan's bidding in the NYC Capacity Market auctions." 75 FR 9948. After entering into the swap, KeySpan was able to continue bidding its capacity into the market at the highest level allowed, knowing any losses from foregone sales would be more than offset by profits from the swap and from its remaining sales. 75 FR 9948.

As a result, electric capacity prices remained unlawfully inflated, and KeySpan was paid, under the terms of the swap agreement, as much as $67.8 million. Attached Affidavit of Thomas Paynter dated April 27,2010 ("Paynter Affidavit") ¶ 15. In addition, the elimination of competitive pressures, due to KeySpan's anti-competitive agreement, imposed unnecessary costs on consumers which may total hundreds of millions of dollars.

DOJ's proposal, however, does not include enough information to allow the Court to find, as is required under the Tunney Act, 15 U.S.C. 16e(1), that the settlement would be in the public interest. DOJ asserts the public interest will be served by preventing KeySpan's unjust enrichment, but DOJ has not offered any estimates of how much money KeySpan made by agreeing, with its biggest competitor, not to compete. For the same reason, DOJ has not offered enough information to assess its claim that the settlement will deter such unlawful conduct in the future, Finally, the proposed settlement will do nothing to address the substantial harm to competitiveness of the market that KeySpan caused. For these reasons, the Court should direct DOJ to supplement the record with information about how much KeySpan profited, and how much KeySpan harmed the integrity of the electricity markets. Finally the Court should require that proceeds of any settlement be used to ameliorate the harm KeySpan caused to electric ratepayers in the downstate New York area.

Point I: DOJ Has Not Provided Enough Information to Determine Whether the Proposed Settlement is in the Public Interest

Before entering any consent judgment proposed by the United States, the Court must first determine that entry of such a judgment "is in the public interest." 15 USCS § 16(e)(1). In doing so, "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 USCS § 16(e)(1)(A) & (B).

In seeking the Court's approval, DOJ has the burden to "provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *United States* v. *SBC Communs.,* Inc., 489 F. Supp. 2d 1, 17 (D.D.C. 2007). In this case, DOJ has not met this burden. Neither the competitive impact statement, nor the proposed consent decree provides the information needed to evaluate whether this settlement would be a reasonably adequate remedy for the harm caused by KeySpan.

Under the proposed settlement, KeySpan would be required to pay the United States government $12 million dollars. *United States* v. *Keyspan Corporation;* Proposed Final Judgment and Competitive Impact Statement, 75 FR 9946, 9949 (March 4, 2010). According to DOJ, this amount "remedies [KeySpan's] violation by requiring KeySpan to disgorge profits obtained through the Anticompetitive agreement." 75 FR 9949. DOJ asserts that "[d]isgorgement is necessary to protect the public interest by depriving KeySpan of the fruits of its ill-gotten gains and deterring KeySpan and others from engaging in similar anticompetitive conduct in the future." 75 FR 9949. Thus, according to DOJ, the public interest is served because the proposed settlement will both prevent KeySpan's unjust enrichment, and will deter such wrongful conduct in the future.

Preventing any unjust enrichment on KeySpan's part is a legitimate purpose of any proposed settlement. In fashioning relief in response to a violation of the antitrust law, "[o]ne of [the] objectives * * * is to 'deny to the defendant the fruits of its statutory violation.' " *Massachusetts* v. *Microsoft Corp.,* 373 F.3d 1199, 1232 (D.C. Cir. 2004) (quoting *United States* v. *Microsoft Corp.,* 253 F.3d 34, 103 (D.C. Cir. 2001)). However, the unstated premise underlying DOJ's claims (*i.e.,* that disgorgement is necessary to prevent unjust enrichment and that a $12 million penalty is adequate), is that KeySpan realized a gain of $12 million. Yet DOJ has not offered anything to support this. The Complaint, the Competitive Impact Statement, and the proposed Consent Judgment are silent on the critical question of how much KeySpan improperly gained by violating the antitrust law.

It is, of course, axiomatic that "the fruits of a violation must be identified before they may be denied." *Massachusetts* v. *Microsoft Corp.,* 373 F.3d 1199, 1232 (D.C. Cir. 2004). The lack of any information as to how much KeySpan gained makes it virtually impossible for the Court to meaningfully evaluate whether $12 million "represents a reasonable method of eliminating the consequences of the illegal conduct." *National Soc. of Professional Engineers* v. *United States,* 435 U.S. 679, 698 (1978). This holds true both with respect to depriving KeySpan of any unjust enrichment, and with respect to evaluating whether the settlement will deter such wrongful conduct in the future. Thus, on the current record, the Court has no basis for finding the proposed settlement would be "in the public interest."

It is noteworthy that DOJ elsewhere implies KeySpan made more than $12

million as a result of its anti-competitive conduct. More specifically, DOJ indicates the $12 million settlement would effect only partial disgorgement of KeySpan's gains. 75 FR 9951 (claiming that "[r]equiring KeySpan to disgorge a portion of its ill-gotten gains * * * is the only effective way of achieving relief against KeySpan * * *.") (emphasis added). If DOJ is actually seeking only partial disgorgement, then the settlement would not prevent KeySpan's unjust enrichment. Anything less than full disgorgement would a forliori not strip KeySpan of its wrongful gains. Moreover, if $12 million represents only a fraction of the total amount of KeySpan's unjust enrichment, such a penalty would not deter future violations of the antitrust law. Such a penalty may instead amount to nothing more than a "cost of doing business." [1] This possibility is not remote. As discussed below in POINT H, it is highly probable that the total amount of KeySpan's ill-gotten gains was much greater than $12 million.

Given that DOJ has not proffered enough information to enable the Court to determine whether the proposed settlement is in the public interest, DOJ should be directed to do so. Under the Tunney Act, "[t]he court may 'take testimony of Government officials or experts' as it deems appropriate, 15 U.S.C. 16(f)(1); authorize participation by interested persons, including appearances by amici curiae, *Id.* § 16(f)(3); review comments and objections filed with the Government concerning the proposed judgment, as well as the Government's response thereto, *Id.* § 16(f)(4); and 'take such other action in the public interest as the court may deem appropriate,' iii. § 16(f)(5)." *Massachusetts* v. *Microsoft Corp.,* 373 F.3d 1199, 1206 (D.C. Cit. 2004). Requiring DOJ to adduce facts relating to how much KeySpan gained as a result of its anticompetitive conduct will provide a record basis for any public interest determination made by the Court. Cf *S.E.C.* v. *Bank of America Corp.,* ___ F. Supp.2d ___, 2010 U.S. Dist. LEXIS 15460 (S.D.N.Y. Feb. 22, 2010) (approving a proposed consent judgment because, inter alia, after the court rejected an earlier proposed settlement, the parties conducted extensive discovery which established facts supporting the new proposal).

Point II—The Proposed Consent Decree Would Not Deter the Unlawful Anticompetitive Conduct Identified By DOJ

KeySpan's swap, in both purpose and effect, violated the antitrust law. Its purpose was to "effectively eliminate[I KeySpan's incentive to compete for sales in the same way a purchase of Astoria or a direct agreement between KeySpan and Astoria would have done." 75 FR 9948. Thus, regardless of its effect on the market, the KeySpan Swap violated the Sherman Act. Cf. Summit *Health* v. *Pinhas,* 500 U.S. 322, 330 (1991) ("[B]ecause the essence of any violation of I [of the Sherman Act] is the illegal agreement itself[,] rather than the overt acts performed in furtherance of it, * * * proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful").

The KeySpan Swap also violated the Sherman Act because of its effect on the market. Its "clear tendency" was to alter KeySpan's bidding, in order to prevent competition and keep prices high. 75 FR 9948 (col. 3). Cf. *United States* v. *Stascuk,* 517 F.2d 53, 60 & n.17 (7th Cir. Ill. 1975) ("The Federal power to protect the free market may be exercised to punish conduct which threatens to impair competition even when no actual harm results")

KeySpan's ill-gotten gains far exceeded the $12 million payment DOJ is seeking. DOJ alleges the KeySpan Swap was effective from January 16, 2006 until March, 2008.[2] Under the swap agreement, if the market price for capacity exceeded $7.57 per kW-month, the financial services company ("FSC") would pay KeySpan the difference between the market price and $7.57, times 1800 MW. 75 FR 9950.

The average spot market price for capacity during the period from May, 2006, through March, 2008, was $9.21/kW-month. After subtracting the $7.57 per kW month amount specified under the swap agreement, KeySpan's average revenues under the swap agreement were $1.64/kW-month, times the 1800 MW covered by the swap agreement, for a period of 23 months. Multiplying these figures out yields a total of $67.8 million. Thus, under the swap agreement alone, KeySpan received revenues of almost $68 million.[3] Paynter Affidavit ¶ 15.

The proposed $12 million payment would amount to only 17.7% of KeySpan's direct revenues/net profits under the swap agreement. Thus, if the Court approves this settlement, KeySpan would be able to retain more that $55 million in ill-gotten gains, and the FSC would be able to retain more than $20 million in additional ill gotten gains. Such a settlement would clearly not materially prevent KeySpan's unjust enrichment. Moreover, under any reasonable measure, the proposed settlement would not deter KeySpan, or other market participants, from engaging in such anti-competitive conduct in the future. Thus, the proposed $12 million settlement would not satisfy either of DOJ's rationales (i.e., preventing KeySpan's unjust enrichment, and deterring such wrongful conduct in the future) for a judicial finding that the settlement is in the public interest.

Point III—The Proposed Settlement Would Not Ameliorate the Ratepayer Harm Caused by Keyspan

The Court Should Consider Ratepayer Harm

In determining whether the settlement is in "the public interest," the Court should also consider the impact of the proposed settlement on the ratepayers that were harmed by KeySpan's anti-competitive conduct. *See* 15 U.S.C. 16(e)(1)(B) ("the court shall consider * * * the impact of entry of such judgment upon * * * the public generally * * *") [4] DOJ acknowledges

[1] Arguably, even total disgorgement would have only a limited deterrent effect. "[T]o 'limit the penalty * * * to disgorgement is to tell a violator that he may [break the law] with virtual impunity; if he gets away undetected, he can keep the proceeds, but if caught, he simply has to be give back the profits of his wrong.'" *SEC* v. *Bear, Stearns & Co.,* 626 F. Supp. 2d 402, 406 (S.D.N.Y. 2009) (quoting *S.E.C.* v. *Rabinovich & Assoc.,* 2008 U.S. Dist. LEXIS 93595, 2008 WL 4937360, at *6 (S.D.N.Y. Nov. 18, 2008)).

[2] DOJ asserts the swap agreement was effective from May, 2006, through April, 2009. 75 FR 9950–51. According to DOJ, the "effects" of the swap continued only "until" March, 2008, because the New York State Public Service Commission required KeySpan to bid its New York City capacity at zero from March 2008 until KeySpan sold its Ravenswood plant. 75 FR 9951 & n. 2. However, the analysis below assumes the swap remained "effective" between the parties during March, 2008, because the PSC's requirement that KeySpan bid at zero would not have triggered the agreement's "regulatory out" clause. This has bearing on the total amount of KeySpan's gain under the swap agreement. Including March, 2008, reduces KeySpan's total revenues under the swap because, during March, 2008, the market price of capacity was below the $7.57 per kW-month trigger in the swap agreement. Thus, for March, 2008, KeySpan would have paid moneys to the FSC.

[3] In addition, the FSC received $0.50/kW-month under the swap agreement. Multiplying this amount by the 1800 MW covered by the swap agreement, times the 23 month duration of the swap agreement, yields total revenues to the FSC of approximately $20.7 million. Paynter Affidavit ¶ 17. The FSC's profits are potentially relevant because Astoria could have directly entered into a swap agreement with a load-serving entity serving New York City. If such agreement had a "trigger" price of $7.07, the load-serving entity would have realized revenues of $89 million (i.e., $67 million, plus $21 million), which would have inured to the benefit of consumers. Paynter Affidavit ¶ 18.

[4] Cf. *United States* v. *SBC Communs.,* Inc., 489 F. Supp. 2d 1, 17 (D.D.C. 2007) ("the court should be concerned with any allegations that the proposed settlement will injure a third party").

ratepayers were harmed, in the form of inflated capacity prices, because of KeySpan's conduct. According to DOJ, "[w]ithout the Swap, KeySpan likely would have chosen from a range of potentially profitable competitive strategies in response to the entry of new capacity. Had it done so, the price of capacity would have declined." 75 FR 9948. Because KeySpan decided to withhold capacity rather than compete, it realized ill-gotten gains on all of the capacity it sold, in addition to the nearly $68 million KeySpan received directly under the terms of the swap agreement itself.

Yet DOJ also indicates that ratepayers may have no recourse under the antitrust law because of the "fried rate" doctrine. 75 FR 9951. Moreover, ratepayers may not be able to obtain any relief from FERC because, in early 2008, FERC's Staff concluded there was no evidence that KeySpan's bidding behavior violated FERC's Anti-Manipulation Rule, 18 CFR 1c2(a). FERC Docket Nos. IN08–2–000 & ELO7–39–000, Enforcement Staff Report, Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market, p. 17 (February 28, 2008). Thus, in this case ratepayers harmed by KeySpan's anti-competitive conduct may have no meaningful recourse under either the antitrust law or the Federal Power Act.

This lack of a remedy for customers is highly significant, given the potential size of the harm to consumers caused by KeySpan's violation of the antitrust law. DOJ has not offered any factual information or analysis of how much KeySpan gained by maintaining prices at an artificially high level in violation of the antitrust laws, rather than choosing to bid at more competitive level. The measure of disgorgement should reflect the profits gained by KeySpan through the unlawfully higher price of capacity.[5] The Court should direct DOJ to address this defect in the settlement proposal. Cf. *Howard Hess Dental Labs. Inc.* v. *Dentsply Int'l, Inc.*, 424 F.3d 363, 374 (3d Cir. 2005) ("IlIhe standard method of measuring damages in price enhancement cases is overcharge, [that is] the difference between the actual price and the presumed competitive price multiplied by the quantity purchased"); New York Julius Nasso Concrete Corp., 202 F.3d 82, 88–89 (2d Cir. 2000) ("Where * * * there is a dearth of market information unaffected by the collusive action of the defendants, the plaintiffs burden of proving damages, is, to an extent, lightened[,] [and] the State need only provide the court with some relevant data from which the district court can make a reasonable estimated calculation of the harm suffered * * *.") (citations and internal quotations omitted); *Id.,* 202 F.3d at 89 ("[T]o do otherwise would be a perversion of fundamental principles of justice [and would] deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts"); New York Hendrickson Bros., Inc., 840 F.2d 1065, 1078 (2d Cir. 1988) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created") (quoting Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946)); *Fishman* v. *Estate of Wirt,* 807 F.2d 520, 551 (7th Cir. 111. 1986) ("The concept of a 'yardstick' measure of damages, that is, linking the plaintiffs experience in a hypothetical free market to the experience of a comparable firm in an actual free market, is also well accepted").

If KeySpan's illegal conduct harmed consumers by preventing price declines that could have totaled hundreds of millions of dollars, then the proposed $12 million settlement is so low it would not be fair, reasonable, adequate or in the public interest. Cf. *SEC.* v. *Bank of America Corp.,* 653 F. Supp.2d 507 (S.D.N.Y. 2009) disapproving a proposed settlement in part because the proposed $33 million fine was "a trivial penalty for a false statement that materially infected a multi-billion-dollar merger"). But cf. *SEC.* v. *Bank of America Corp.,* ___ F. Supp.2d ___, 2010 U.S. Dist. LEXIS 15460 (S.D.N.Y. Feb. 22, 2010) (approving a $150 million fine even though it would have only "a very modest impact on corporate practices or victim compensation").

Settlement Proceeds Should Be Used To Ameliorate The Ratepayer Harm

DOJ seeks disgorgement, through the exercise of the Court's "inherent equitable powers * * *." 75 FR 9951. DOJ maintains the public interest requires disgorgement to prevent KeySpan's unjust enrichment. 75 FR 9951. The legal doctrine of unjust enrichment "is an old equitable remedy permitting the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another." *Nimbus Techs., Inc.* v. *SunnData Prods.,* 2005 U.S. Dist. LEXIS 46509 (ND. Ala. Dec. 7,2005) (quoting *Battles* v. *Atchison,* 545 So. 2d 814, 815 (Ala. 1989)).

In this case, DOJ's proposed $12 million partial disgorgement of KeySpan's ill gotten gains would be deposited in the United States Treasury, and will not inure to the benefit of the ratepayers directly harmed by KeySpan. KeySpan's wrongful conduct harmed consumers, and damaged the credibility of the markets, by wrongly inflating capacity prices. The cost may have totaled hundreds of millions of dollars. Given the high level of consumer harm, the proceeds of any settlement should be used to ameliorate the consumer harm KeySpan caused. Depositing the settlement proceeds in the U.S. Treasury, as DOJ proposes, would be a manifestly unfair result.

Accordingly, in the proper exercise of its equitable powers, the Court should direct that proceeds of the settlement be used to benefit the ratepayers that were directly and materially injured by KeySpan's anti-competitive conduct. The need for such relief is particularly acute in this case because consumers may not be able to obtain relief under Section 4 of the Sherman Act, and may not be able to obtain relief from FERC. Accordingly, settlement proceeds should be credited to affected ratepayers (*i.e.,* ratepayers within the New York Independent System Operators' "Zone J"). This approach will directly address the harm KeySpan caused to consumers in New York City. If this approach is unworkable, either because it would not be cost-effective or would be unduly complex, then settlement proceeds should be used for energy efficiency programs within New York City administered by the New York State Energy Research and Development Authority. Promoting energy efficiency would reduce the demand for electricity. This, in turn, would both mitigate the market power of electric suppliers in New York City and help reduce electricity prices going forward. Such a use of settlement proceeds is particularly appropriate in this case, given the ratepayer harm KeySpan caused and the potential unavailability of other meaningful relief for those most directly affected by KySpan's anti-competitive conduct.

[5] That is, the analysis in the Paynter Affidavit shows a total harm to ratepayers of $89 million from KeySpan's, and the FSC's, financial interest in the 1800 MW controlled by the swap, even without assuming any drop in spot market prices. However, KeySpan also controlled an additional 2400 MW of capacity in the New York City market. By continuing to bid at its cap (even after accounting for KeySpan's additional lost sales due to the entry of new generation into the market), KeySpan realized gains outside the swap that, roughly speaking, equaled or exceeded the nearly $68 million KeySpan received under the swap. The need for disgorgement of these additional wrongful gains is underscored by the even larger consumer harm KeySpan caused. If KeySpan had competed for sales, the resulting declines in prices could easily have saved ratepayers hundreds of millions of dollars.

Respectfully submitted,

Peter McGowan,

General Counsel.

By: Sean Mullany, Assistant Counsel of Counsel, Public Service Commission of the State of New York.

Dated: April 30, 2010, Albany, New York.

Attachment: Affidavit of Thomas Paynter In Support of Comments of The Public Service Commission of The State of New York, (April 27, 2010).

United States District Court for the Southern District of New York

United States of America, Petitioner V. *Keyspan Corporation,* Respondent.

State of New York

ss.: County of Albany

Affidavit of Thomas Paynter in Support of Comments of the Public Service Commission of the State of New York

Civil Case No. 10–CIV–1415

THOMAS PAYNTER, being duly sworn, deposes and says:

1. I am employed by the New York State Department of Public Service ("DPS" or "Department") as Supervisor of Regulatory Economics in the Office of Regulatory Economics.

2. I received a Ph.D. in Economics from the University of California at Berkeley (1985), with fields in econometrics and labor economics. I have a B.A. in Physical Science and a BA. in Economics, also from the University of California at Berkeley (1975). I am a member of the American Economic Association.

3. From 1983 to 1986, I was an Assistant Professor of Economics at Northern Illinois University, where I taught graduate and undergraduate courses in economic theory. From 1986 to 1990, I was employed by the Illinois Commerce Commission as a Senior Economic Analyst in the Policy Analysis and Research Division; I was also a member of the Electricity Subcommittee of the National Association of Regulatory Utility Commissioners, and authored an article concerning coordination and efficient pricing for independent power producers, "Coordinating the Competitors," published by The Electricity Journal in November 1990. I joined the New York Department of Public Service in November of 1990.

4. My current responsibilities include analyzing competitive issues, efficient pricing, marginal costs, regulatory policies, and system planning. I am a member of a staff team responsible for analyzing and commenting upon the pricing rules of the New York Independent System Operator, Inc. (NYISO), which operates the New York transmission system. I have participated in numerous NYTSO committee meetings related to energy and transmission pricing, system planning, and other issues.

5. I make this affidavit in support of the comments filed by the Public Service Commission of the State of New York ("PSC" or "Commission") pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), in response to the notice published in the **Federal Register** on March 4, 2010, in connection with this matter. *U.S. Dep't of Justice, Antitrust Div., United States* v. *Keyspan Corporation,*

Proposed Final Judgment and Competitive Impact Statement, 75 FR 9946 (March 4, 2010).

6. DOJ states that the KeySpan Swap was executed on January 16, 2006, and was effective from May, 2006, through April, 2009. 75 FR 9950–51. According to DOJ, the effects of the swap continued only until March, 2008, because, as of March, 2008, the NYSPSC required KeySpan to bid its NYC capacity into the market at zero until KeySpan sold its Ravenswood plant. 75 FR 9951 & n. 2.

7. However, upon information and belief, the PSC's requirement that KeySpan bid its NYC capacity into the market at zero did not trigger the swap agreement's "regulatory out" clause. Therefore, upon information and belief, the swap continued in effect until April, 2008, when FERC lowered KeySpan's bid/price cap. Accordingly, the analysis below assumes the swap agreement remained in force during the Month of March, 2008. [Note that this assumption effectively reduces the estimate of the amount of KeySpan's net revenues/profits under the swap agreement because, during the month of March, 2008, the actual price of capacity was below the $7.57 per kWmonth trigger under the swap agreement (discussed below). As a result, during the month of March, 2008, KeySpan would have been paying moneys to the financial services company ("FSC"), rather than receiving moneys from the FSC.

8. Under the KeySpan Swap, if the market price for capacity was above $7.57 per kW-month, the FSC would pay KeySpan the difference between the market price and $7.57, limes 1800 MW; if the market price for capacity was below $7.07, KeySpan would pay the FSC the difference, limes 1800 MW. 75 FR 9950 (col. 3). Thus, a comparison of the actual market price for capacity during the period from May, 2006, through and including March, 2008, and the $7.57/kW month "trigger" (or "strike") price for KeySpan, will reveal the total net revenues/profits KeySpan received from the FSC under the KeySpan Swap.[1]

9. Regarding the actual market prices of capacity during the period of the KeySpan Swap, KeySpan's bid caps were seasonally "shaped," in order to reflect higher summer prices, and lower winter prices, due to differences between summer and winter supply. For the summer 2006 period (*i.e.,* May–October 2006), the unforced capacity ("UCAP") spot price cleared at the level of KeySpan's bid cap of $12.71/kW-month.[2]

"[A] generator's unforced capacity (UCAP) is its installed capacity ([UCAP) discounted or 'de rated' by its forced outage rate (or equivalent forced outage rate demand (EFORd)). The forced outage rate equals the historical percentage of the generator's maximum output lost to forced outages when such output is demanded. The translation of installed into unforced capacity can be represented mathematically as follows: UCAP = ICAP × (1 − EFORd) * * *" Kystian-Ravenswood, LLC FERC, 474 F.3d 804, 807 (D.C. Cir. 2007).

10. For the winter 2006–07 period (*i.e.,* November 2006–April 2007), the UCAP spot price cleared at KeySpan's bid cap of $5.84/kW-month.

11. For the summer 2007 period (*i.e.,* May–October 2007), the UCAP spot price cleared at KeySpan's bid cap of $12.72/kW-month.

12. For the winter 2007–08 period, the spot price cleared at KeySpan's bid cap of $5.77/kW-month for 4 months (*i.e.,* November 2007–February 2008), and then cleared at the lower statewide prices of $1.05/kW-month during March, 2008, and at $0.75/kW-month during April, 2008.

13. The lower price during April, 2008 reflects the fact that FERC's new mitigation measures forced KeySpan and other New York City electricity suppliers to bid their capacity into the market at or near $0.

14. To compare the actual UCAP spot market prices to the swap prices of $7.57/kW-month (for KeySpan), and $7.07/kW-month (for the FSC), one can

[1] KeySpan and the FSC likely incurred some costs in preparing the swap agreements (which would make their profits under the swap something less than their net revenues), but this analysis assumes those Costs were not very significant.

[2] In describing the $7.57/kW-month and $7.07/kW-month "trigger" prices under the KeySpan and Astoria swap agreements, DOJ refers only to "the market price for capacity". *See, e.g.,* 75 FR 9950. More specifically, the "trigger" prices under the swap agreements referred to the actual "unforced capacity" spot market prices. Similarly, in describing actual market prices, my analysis refers to the actual unforced capacity ("UCAP") spot market clearing prices.

refer to the average spot price over the twenty-three month period of the KeySpan Swap (*i.e.,* May, 2006, through and including March, 2008). This consists of twenty-two months at KeySpan's bid cap, and one month (*i.e.,* March, 2008) at the lower statewide price of $1.05/kW-month.

15. Over those twenty-three months, the actual average UCAP spot price was $9.21/kW-month. Based on the difference between this amount and the threshold price specified under the swap agreement (*i.e.,* $7.57/kW-month), the revenues to KeySpan under the swap agreement were $1.64/kW-month, multiplied by the 1800 MW of UCAP covered by the swap agreement, and further multiplied by the twenty-three month effective period of the swap agreement. This yields a total of revenues to KeySpan under the swap agreements of $67.8 million.

16. The FSC's corresponding agreement with Astoria specified that, if the market price for capacity was above $7.07 per kW-month, Astoria would pay the FSC the difference, times 1800 MW; if the market price was below $7.07, the FSC would pay Astoria the difference, times 1800 MW. 75 jkaLBgjster at 9948.

17. The differential between the "trigger" prices under the two swap agreements (*i.e.,* $7.57/kW-month for KeySpan, and $7.07/kW-month for Astoria) represented the FSC's "stake" in the swap arrangement. Because the actual average UCAP spot market price (*i.e.,* $9.21/kW-month) exceeded both the "triggers" under the swap agreements, the FSC's total revenues can be calculated by multiplying that differential (*i.e.,* $0.50/kW-month) by 1800 MW, and further multiplying it by the twenty-three month effective period of the swap agreements. Multiplying these figures out yields total revenues to the FSC of $20.7 million.

18. The FSC's profits are potentially relevant because Astoria could have directly entered into a swap agreement with a load-serving entity serving New York City. If such agreement had a "trigger" price of $7.07, the load-serving entity would have realized revenues of $89M (*i.e.,* $67 million, plus $21 million). Such revenues would have inured to the benefit of ratepayers.

Thomas Paynter,
Supervisor of Regulatory Economics,
Office of Regulatory Economics,
Department of Public Service of the State of New York.

Sworn to before me this 27th day of April, 2010.

Notary Public

Sean Mullany
Notary Public, State of New York
Regis. #02MU6180725
Qualified in Albany County
My Commission Expires January 14, 2012.

[FR Doc. 2010–16321 Filed 7–19–10; 8:45 am]
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DEPARTMENT OF LABOR

Office of the Secretary of Labor

Notice of Final Determination Updating the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Pursuant to Executive Order 13126

AGENCY: Bureau of International Labor Affairs, Labor.

ACTION: Notice of final determination.

SUMMARY: This final determination updates the list required by Executive Order No. 13126 ("Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor"), in accordance with the "Procedural Guidelines for the Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor." This notice sets forth an updated list of products, by country of origin, which the Departments of Labor, State and Homeland Security, have a reasonable basis to believe might have been mined, produced, or manufactured by forced or indentured child labor. Under a final rule by the Federal Acquisition Regulatory Council, published January 18, 2001, which also implements Executive Order No. 13126, Federal contractors who supply products on this list are required to certify, among other things, that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the item.

DATES: This document is effective immediately upon publication of this notice.

SUPPLEMENTARY INFORMATION:

I. Background

Executive Order No. 13126 (EO 13126), which was published in the **Federal Register** on June 16, 1999 (64 FR 32383), declared that it was "the policy of the United States Government * * * that the executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of good, wares, articles, and merchandise mined, produced or manufactured wholly or in part by forced or indentured child labor." Pursuant to EO13126, and following public notice and comment, the Department of Labor published in the January 18, 2001, **Federal Register**, a final list of products (the "EO List"), identified by their country of origin, that the Department, in consultation and cooperation with the Departments of State and Treasury [relevant responsibilities now within the Department of Homeland Security], had a reasonable basis to believe might have been mined, produced or manufactured with forced or indentured child labor (66 FR 5353). In addition to the List, the Department also published on January 18, 2001, "Procedural Guidelines for Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor" (Procedural Guidelines), which provide for maintaining, reviewing, and, as appropriate, revising the EO List (66 FR 5351). On September 11, 2009, in consultation and cooperation with the Department of State and the Department of Homeland Security, the Department of Labor published an initial determination proposing to update the EO List in the **Federal Register** (74 FR 46794), explained how the initial determination was made, and invited public comment through December 10, 2009. The initial determination and Procedural Guidelines can be accessed on the Internet at *http://www.dol.gov/ILAB/regs/eo13126/main.htm* or can be obtained from: OCFT, Bureau of International Labor Affairs, Room S–5317, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–4843; fax (202) 693–4830.

Pursuant to section 3 of E. O. 13126, the Federal Acquisition Regulatory Councils published a final rule in the **Federal Register** on January 18, 2001, providing, amongst other requirements, that Federal contractors who supply products that appear on the EO List issued by the Department of Labor must certify to the contracting officer that the contractor, or, in the case of an incorporated contractor, a responsible official of the contractor, has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce or manufacture any product furnished under the contract and that, on the basis of those efforts, the contractor is unaware of any such use of child labor. *See* 48 CFR Subpart 22.15.

II. Summary and Discussion of Significant Comments

Forty three public comments were received either through written submissions or through meetings held with the Department of Labor. All comments are available for public viewing at *http://www.regulations.gov*