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May 14, 2010

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: Public Notice Inviting Tunney Act Comments in *United States v. Keyspan*, SDNY Civil Action No. 10-cv-1415 (WHP), 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

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[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, Yeat to Date, available at http://www.eia.doe.gov/cneaf/images/xls.gif .

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

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

prices for electricity due to the antitrust law violation described in the Complaint.[2] As required by the Antitrust Procedures and Penalties Act (the "Tunney Act"), 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

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[2] The Proposed Final Judgment is available at http://www.justice.gov/atr/cases/f255500/255509.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/print/news/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

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 NYISO 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 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 U.S.C. § 16(e)(1). 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

[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.

> 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 electricty 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

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[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 $7.57/kW-month ("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=35GoWWvvg9LHLl7.

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:

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

> 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 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-*

[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..

> *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

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

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

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] But, as discussed above, there is no indication in the record of the total amount of "ill-gotten gains" received by KeySpan 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 kW-month, 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

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[15] Id.

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

[17] *Re New York Independent System Operator, Inc.*, FERC Docket No. ER07-360-000, *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.

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 or NYISO 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 underscores the importance of vigorous antitrust law enforcement

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[18] *Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New 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 (EISA) 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

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]

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manipulation. The EPAct 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 anti-manipulation 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) 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. (*Emphasis added*).

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

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

[22] Competitive Impact Statement, p. 2.

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

not determine that the swap agreement was "anticompetititve." 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]

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. 2d 1, 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 and 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

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

> 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;

[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.

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,

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