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STATE OF NEW YORK
EXECUTIVE DEPARTMENT
CONSUMER PROTECTION BOARD

Mindy A. Bockstein
Chairperson and Executive Director

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, D.C. 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.,* Civil 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 City'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

[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.

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

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

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.

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