IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
v.
MORGAN STANLEY,
Defendant.

Civil Action No.: 11-civ–6875 WHP
Hon. William H. Pauley III

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

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), the United States files the public comments concerning the proposed Final Judgment in this case and the United States' response to those comments. 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).

I. PROCEDURAL HISTORY

The United States brought this lawsuit against Defendant Morgan Stanley on September 30, 2011, to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. In January 2006, Morgan Stanley Capital Group Inc. ("MSCG"), a subsidiary of defendant Morgan Stanley,[1] executed agreements with KeySpan Corporation ("KeySpan") and Astoria Generating Company

[1] MSCG and Morgan Stanley are collectively referred to hereinafter as "Morgan."

Acquisitions, L.L.C. ("Astoria") that would effectively combine the economic interests of the two largest competitors in the New York City electric capacity market. The likely effect of this combination 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.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and a Stipulation signed by the United States and Morgan 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 September 30, 2011; published the proposed Final Judgment and CIS in the *Federal Register* on October 11, 2011, *see United States v. Morgan Stanley*, Proposed Final Judgment and Competitive Impact Statement, 76 Fed. Reg. 62843 (Oct. 11, 2011); 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 ("PFJ"), in *The Washington Times* for seven days (October 10 through October 14 and October 17 and 18, 2011) and in *The New York Post* for seven days (October 25 through October 31, 2011). The 60-day period for public comments ended on December 30, 2011. The United States received two comments, as described below, which are attached hereto.

II. THE COMPLAINT AND THE PROPOSED FINAL JUDGMENT

A. Background

As alleged in the Complaint and as discussed more fully in the CIS [Dkt. #2] at 2-7, this case involves Morgan's participation in an agreement with KeySpan that caused an

anticompetitive effect in the New York City Capacity Market.[2]

In 2005, KeySpan, a pivotal capacity supplier, anticipated that tight supply and demand conditions in the New York City capacity market would ease due to entry of new generation. Concerned that market entry would lead to lower prices and revenues, KeySpan studied various options, including the direct purchase of Astoria. Such an acquisition, however, would have raised significant market power concerns. KeySpan decided instead to approach Morgan to arrange a financial transaction that would provide KeySpan an indirect financial interest in Astoria's capacity sales. Morgan informed KeySpan that such an agreement between Morgan and KeySpan would be contingent on Morgan also entering into an agreement with Astoria, the only other generator with sufficient capacity to offset Morgan's payments to KeySpan.

In January 2006, Morgan entered into a financial derivative agreement with KeySpan (the "Morgan/KeySpan Swap"), and, at the same time, an offsetting agreement with Astoria (the "Morgan/Astoria Hedge"). Under the terms of the Morgan/KeySpan Swap, when the market clearing price for capacity was above a certain amount, Morgan essentially was required to pay KeySpan a multiple of the difference between the clearing price and the strike price.[3] The terms of both the Morgan/KeySpan Swap and the Morgan/Astoria Hedge ran from May 2006 through April 2009. Morgan earned approximately $21.6 million in net revenues from the two

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[2] In the state of New York, sellers of retail electricity must purchase a product from generators known as installed capacity ("capacity").

[3] Under the Morgan/KeySpan Swap, if the market price for capacity was above the strike price ($7.57 per kW-month), Morgan would pay KeySpan the difference between the market price and $7.57 times 1800 MW; if the market price was below $7.57, KeySpan would pay Morgan the difference times 1800 MW. Under the Morgan/Astoria Hedge, if the market price for capacity was above $7.07 per kW-month, Astoria would pay Morgan the difference times 1800 MW; if the market price was below $7.07, Astoria would be paid the difference times 1800 MW. Morgan retained the differential (*e.g.*, $7.57 - $7.07 times 1800 MW) as revenues.

agreements.

The revenues from Astoria's capacity sales that KeySpan obtained through the Morgan/KeySpan Swap effectively eliminated 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. As a result, KeySpan consistently bid its capacity into the capacity auctions at the highest allowed price and, despite the addition of significant new generating capacity in New York City, the market price of capacity did not decline.[4] This result would not have been achieved without Morgan's participation.

B. *United States v. KeySpan*

On February 22, 2010, the United States filed suit against KeySpan for its role in the Morgan/KeySpan Swap. Simultaneous with the filing of its Complaint, the United States filed a proposed Final Judgment requiring KeySpan to pay to the United States $12 million as disgorgement of ill-gotten gains. *See* Complaint, *United States v. KeySpan Corp.*, No. 10-1415 (S.D.N.Y. Feb. 22, 2010). On February 2, 2011, after completion of the Tunney Act procedures, the Court entered the *KeySpan* Final Judgment, and, in making its public interest determination, found that disgorgement is available to remedy violations of the Sherman Act. *See United States v. KeySpan Corp.*, 763 F. Supp. 2d 633, 638–41 (S.D.N.Y. 2011) (WHP).

[4] The effects of the Morgan/KeySpan Swap continued until March 2008, at which time changes in regulatory conditions eliminated KeySpan's ability to affect the market price. KeySpan was sold to another company in August 2007. The State of New York conditioned its approval of the acquisition on the divestiture of KeySpan's Ravenswood generating assets and required KeySpan to bid its New York capacity at zero from March 2008 until the divestiture was completed. Since then, the market price for capacity has declined.

C. The *Morgan* Complaint and proposed Final Judgment

On September 30, 2011, the United States filed the current suit against Morgan for its role in the Morgan/KeySpan Swap. The United States alleges that Morgan entered into an agreement (the Morgan/KeySpan Swap), the likely effect of which was to increase prices in the New York City Capacity Market, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Simultaneous with the filing of its Complaint, the United States filed a proposed Final Judgment requiring Morgan to pay to the Treasury of the United States $4.8 million as disgorgement of ill-gotten gains. The proposed Final Judgment requires Morgan to disgorge profits gained as a result of its unlawful agreement in restraint of trade. As stated in the CIS, the proposed relief serves the public interest by depriving Morgan of ill-gotten gains, thereby deterring Morgan and others from engaging in similar anticompetitive conduct in the future.

II. STANDARDS GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION UNDER THE TUNNEY ACT

The Tunney Act calls for the Court, in making its public interest determination, 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). Under the Tunney Act, 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." *KeySpan*, 763 F. Supp. 2d at 637 (*quoting 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 it is improper to reach beyond the complaint to evaluate claims that the government did not make).

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

III. SUMMARY OF COMMENTS

The United States received formal comments from the Public Service Commission of the State of New York ("PSC") and from AARP, a nonprofit organization that helps people over the

age of fifty.[5] At the outset, both comments commend the United States for enforcing the antitrust laws to protect the integrity of New York capacity markets.

The comments raise three central objections: (1) that the proposed $4.8 million dollar disgorgement is inadequate to deter similar anticompetitive conduct or otherwise serve its remedial purpose, especially given the likely magnitude of the injury to consumers from any increase in New York City capacity prices (PSC Cmts at 7-14; AARP Cmts at 11-16 & 19-25); (2) that the decree does not contain an admission of wrongdoing by Morgan (AARP Cmts at 16-18); and (3) that the disgorged proceeds, rather than being remitted to the Treasury, should directly or indirectly benefit electricity consumers who paid higher electricity rates as a result of the illegal agreement (AARP Cmts at 10-16).

AARP recommends that the United States withdraw from the proposed settlement and proceed in the litigation or renegotiate a settlement with Morgan that would provide equitable relief to electric utility customers, an admission by Morgan of its violation of the Sherman Act, a quantification of the total harm to consumers, and a disgorgement of all profits Morgan realized from the transaction at issue. AARP Cmts at 28. The PSC asks the Court to order the United States to supplement the record. PSC Cmts at 16.

IV. RESPONSE TO THE COMMENTS

The United States has carefully considered these objections but finds that they do not warrant modification of the proposed Final Judgment.

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[5] On January 13, 2012, State Senator Michael Gianaris and New York City Council Member Peter Vallone sent a joint letter to the Court asking the Court to re-evaluate the proposed settlement. The letter was placed in the case docket [Dkt. # 9]. The letter raises issues similar to those raised by the PSC and AARP; accordingly, these issues will be fully addressed in this response of the United States to the formal comments submitted by the PSC and AARP.

A. The Proposed Remedy is Appropriate and Deters Anticompetitive Conduct

The commenters argue that disgorgement of $4.8 million is an inadequate remedy that will not serve as an effective deterrent, especially when compared to Morgan's approximately $21.6 million net revenues earned under the Swap and the increased prices paid by electricity consumers. Such concerns are misplaced.[6]

The proposed remedy constitutes significant and meaningful relief. In its action against KeySpan, the United States sought disgorgement under the Sherman Act for the first time. In approving that settlement, this Court recognized that the disgorgement by a power generator engaged in an alleged anticompetitive scheme would become "an important marker for enforcement agencies and utility regulators alike." *KeySpan*, 763 F. Supp. 2d at 642. In this case, the United States seeks disgorgement from the financial services firm that facilitated the transaction. Just as the *KeySpan* remedy created an important marker for disgorgement from the principal competitor in an anticompetitive scheme, the proposed remedy in this unprecedented case demonstrates the United States' resolve to pursue financial services firms that leverage derivative agreements for anticompetitive ends, and the antitrust liability that may result from such enforcement actions. Financial services firms contemplating the use of such anticompetitive agreements will now recognize the prospect of Sherman Act liability and disgorgement, thereby diminishing their appetite for and deterring this illegal conduct. Indeed, the filing of the proposed settlement has already prompted legal commentators to warn about the enforcement issues raised

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[6] AARP requests access to the derivative agreements. AARP Cmts at 21. The agreement that the United States alleged violated the Sherman Act – the Morgan/KeySpan Swap – is publicly available as an attachment to KeySpan's January 18, 2006 Form 8-K filing with the SEC in which KeySpan announced that it had entered into the transaction, available at http://www.sec.gov/Archives/edgar/data/1062379/000106237906000004/ex101-8kjan2406.txt.

by this case, including the duty of financial services firms to consider the implications of their agreements on competition in the underlying markets.[7]

The PSC and AARP nevertheless argue that disgorgement of anything short of the $21.6 million in net revenues earned by Morgan under the Swap[8] will not strip Morgan of the entirety of its ill-gotten gains and therefore will not deter the conduct at issue. This position ignores the deterrent value of the proposed settlement described above. It also ignores the disputes that would likely arise in calculating Morgan's ill-gotten gains for the purpose of determining disgorgement. The theory of the United States' case rests on the illegality of the Morgan/KeySpan Swap but not the Astoria Hedge. As such, were this matter to proceed to trial, Morgan would likely contend that but for the Morgan/KeySpan Swap, it would have entered into a legitimate transaction with someone other than KeySpan to offset the Astoria Hedge, and that any disgorgement remedy should be adjusted downward to account for a legitimate return.[9] Although

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[7] *See, e.g.*, Mary Ann Mason & William Monts III, Morgan Stanley to Disgorge Profits Earned from Anticompetitive Derivative Agreements, Hogan Lovells (Dec. 9, 2011) (reporting that "[t]he key points from the Morgan Stanley case for financial services clients are: (1) the DOJ is prepared to use Section 1 to outlaw financial arrangements aimed at producing anticompetitive effects, (2) the DOJ will take enforcement action against the financial services companies that facilitate these arrangements, even though they do not participate in the underlying physical commodity market, and (3) pure financial players may have a duty to examine the competitive effects of their arrangements on the underlying markets"), available at http://emailcc.com/rv/ff000213bdac60e42b089aa3f84a8b12fdc2a196; Barry Nigro & Maria Cirincione, DOJ Orders Financial Services Firm to Disgorge Profits from Derivative Contract, Fried Frank Antitrust & Comp. L. (Oct. 17, 2011) (reporting that this case "puts firms on notice that any type of agreement facilitating anticompetitive conduct is subject to scrutiny and that the DOJ may seek penalties against indirect third party participants, as well as direct competitors"), available at http://www.friedfrank.com/siteFiles/Publications/Final%2010-17-11%20DOJ%20Orders%20Financial%20Services%20Firm%20to%20Disgorge%20Profits%20from%20Derivative%20Contract.pdf.

[8] There is no dispute that Morgan earned $21.6 million under the two derivative agreements.

[9] Though a legitimate off-setting counter-party would likely not have agreed to the strike price as high as the $7.57 per kW-month found in the Morgan/KeySpan Swap, Morgan would nonetheless have earned revenues from a legitimate off-setting transaction so long as it exceeded the $7.07 per

the United States would have contested these arguments and sought disgorgement of the full $21.6 million in net revenues had this action proceeded to trial, the settlement reflects, among other things, the fact that there is a dispute about the amount of Morgan's net revenues that were ill-gotten.

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." *SBC Commc'ns*, 489 F. Supp. 2d at 15 (citing Microsoft, 56 F.3d at 1461). The $4.8 million disgorgement amount is the product of settlement negotiations and accounts for litigation risks and costs. It is appropriate to consider litigation risk and the context of a settlement when evaluating whether a proposed remedy is in the public interest.[10] As this Court has recognized "[t]he adequacy of the disgorgement amount must be evaluated in view of the Government's decision to settle its claims and seek entry of the consent decree. When a litigant chooses to forgo discovery and trial in favor of settlement, full damages cannot be expected."[11]

Here, the litigation costs and risks are not insignificant. The United States would have had to establish at trial that the KeySpan Swap caused anticompetitive effects in the New York capacity market, a complex endeavor that would have required substantial fact and expert

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KW-month price in the Astoria Hedge. In the alternative, Morgan would also dispute that the entire $21.6 million earned under both agreements is cognizable as ill-gotten gains. *See* CIS at note 4.

[10] Indeed, "room must be made for the government to grant concessions in the negotiation process for settlements." *SBC*, 489 F. Supp. 2d at 15.

[11] *KeySpan*, 763 F. Supp. 2d at 642 (citing *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 633 (E.D. Pa 2004) (collecting cases) & *In re Milken & Assocs. Sec Litig.*, 150 F.R.D. 46, 54 (S.D.N.Y 1993) ("The Second Circuit has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought.")).

testimony and evidence. And, in the present case against Morgan Stanley, the United States would have had the additional burden of establishing the liability of a financial services firm for using a derivative agreement to facilitate an anticompetitive effect even though the company itself was not a participant in the underlying market. Assuming the United States prevailed on liability, there would be additional risk, as discussed above, in establishing the proper disgorgement amount. While the United States is confident that it could prevail on these issues at trial, the settlement obviates the risk – and significant cost – of litigation.

The PSC and AARP also argue that the reasonableness of the proposed remedy should be evaluated in light of the ratepayer harm caused by Morgan. PSC Cmts at 13-15; AARP Cmts at 5, 11, 16. In essence, they seek a disgorgement amount that takes into account the losses suffered by retail electricity consumers. As this Court recognized in *KeySpan*, such comments "fail to comprehend the nature of the disgorgement remedy. The 'primary purpose of disgorgement is not to compensate investors,' but rather to divest a wrongdoer of the proceeds of their misconduct." *KeySpan*, 763 F. Supp. 2d at 642 (quoting *SEC v. Cavanaugh*, 445 F. 3d 105, 117 (2d Cir. 2006)). Indeed, the extent of market harm is not relevant to the disgorgement calculation; 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]."[12]

In this case, the source of Morgan's ill-gotten gains is the revenues it earned under the derivative agreements. Indeed, the derivative agreements represent Morgan's only source of

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[12] *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].").

revenue in this case. Morgan did not participate in the actual capacity market and thus it did not earn any auction revenues, much less pocket consumer overpayments. Moreover, as the United States explained in the *KeySpan* proceedings,[13] an inquiry into consumer harm would require the Court to assess the price of capacity that would have prevailed absent the Swap, a problematic exercise given the uncertainty of determining market outcomes absent the Swap. Accordingly, 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, AARP's assertion that the United States is obligated to provide estimates of total economic harm and profits received by all market participants resulting from the alleged violation should be rejected.

B. Public Policy Rejects the Contention that a Settlement of a Government Antitrust Case Should Contain an Admission of Wrongdoing

AARP argues that the proposed final judgment is not in the public interest because it does not contain an admission or finding that Morgan violated the law. Similarly, the PSC quotes language from *SEC v. Citigroup* challenging the sufficiency of a consent judgment "that does not involve any admissions" by the defendant.[14]

Government antitrust suits are governed by a specialized statutory regime that provides no basis to require that consent decrees include either a finding or an admission of liability.[15]

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[13] *See* October 12, 2010 Transcript of Hearing in *United States v. KeySpan*, 1:10-cv-01415-WHP, at 10-14. In addition, in this case as in *KeySpan*, commenters' estimates of consumer harm may be significantly overstated. *Id.* at 14-15.

[14] AARP Cmts at 16-18 & 28 (recommending that the PFJ be amended to include an "admission by Morgan of its violation"); PSC Cmts at 10 (quoting *SEC v. Citigroup Global Markets, Inc.,* Slip Op. at 10, 2011 WL 5903733 at *5 (S.D.N.Y. 2011)).

[15] The district court proceedings in the *Citigroup* case have been temporarily stayed by the Court of Appeals (pending a panel ruling on a motion to stay pending appeal). *SEC v. Citigroup Global Markets Inc.*, 2011 WL 6937373 (2nd Cir. Dec. 27, 2011).

Congress has designed the remedial provisions of the antitrust laws to encourage consent judgments, which allow the government to obtain relief without the "time, expense and inevitable risk of litigation." *United States v. Armour and Co.*, 402 U.S. 673, 681 (1971). Thus, for nearly a century, the antitrust laws have expressly limited the ability of private plaintiffs seeking treble damages to rely on consent decrees entered in government cases. Section 5 of the Clayton Act, originally enacted in 1914,[16] provides that litigated final judgments establishing a violation in civil or criminal cases "brought by or on behalf of the United States under the antitrust laws" shall be "prima facie evidence" against the defendant in subsequent private litigation, but the statute specifies that this provision does not apply to "consent judgments or decrees entered before any testimony has been taken." 15 U.S.C. § 16(a). Under this regime, a defendant can elect to accept a consent decree and avoid the risk of a litigated judgment that would seriously weaken its position in follow-on private litigation. Congress provided this exception to the Clayton Act's prima facie evidence provision "in order to encourage defendants to settle promptly government-initiated antitrust claims and thereby to save the government the time and expense of further litigation." *United States v. National Ass'n of Broadcasters*, 553 F. Supp. 621, 623 (D.D.C. 1982) (collecting cases). Requiring admissions or findings of liability as a prerequisite to entering a consent decree would undercut Congress's purpose and contravene the public interest in allowing the government to obtain relief without the risk and delay of litigation.

Congress confirmed its continuing recognition of the importance of consent decrees when it amended the Clayton Act in 1974 to specify procedural requirements governing a district court's determination of whether entry of a proposed consent decree in a government antitrust case is in

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[16] 63 Cong. Ch. 323, 38 Stat. 730, 731, codified as amended at 15 U.S.C. § 16(a).

the public interest. Antitrust Procedures and Penalties Act, § 2, Pub. L. No. 93-528, 88 Stat 1706 (1974), codified at 15 U.S.C. § 16(b)-(h) ("Tunney Act"). The repeated references to the "alleged" violation in the language of the Tunney Act strongly suggest that Congress did not expect decrees arising under the antitrust laws to contain admissions of liability.[17] And the legislative history unambiguously demonstrates Congress' understanding that government antitrust settlements typically occur without an admission or finding of liability. The Senate Report accompanying S. 782, the bill that became the Tunney Act, explains:

> The entry of a consent decree is a judicial act which requires the approval of a United States district court. Once entered the consent decree represents a contract between the government and the respondent upon which the parties agree to terminate the litigation. Pursuant to the terms of the decree, the defendant agrees to abide by certain conditions in the future. *However the defendant does not admit to having violated the law as alleged in the complaint.* Obviously, the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere.[18]

The corresponding House Report is equally clear on the point: "Ordinarily, defendants do not admit to having violated the antitrust or other laws alleged as violated in complaints that are settled."[19] Moreover, both reports plainly reveal that Congress not only understood the practice

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[17] With one exception, every reference to "violation" or "violations" in the Tunney Act is immediately preceded by "alleged." The only exception is a reference to "the violations set forth in the complaint." 15 U.S.C. § 16(e)(2) as enacted, currently 16 U.S.C. § 16(e)(1)(B). The Tunney Act contains no reference to admissions or findings of violations or of liability. Congress amended the Tunney Act in 2004, but those amendments do not affect the analysis here.

[18] S. Rep. No. 298, 93d Cong., 1st Sess. (1973) ("S. Rep.") at 5 (emphasis added). *See also* 119 Cong. Rec. 3449, 3451 (Feb. 6, 1973 floor statement of Senator Tunney: "Essentially the decree is a device by which the defendant, while refusing to admit guilt, agrees to modify its conduct and in some cases to accept certain remedies designed to correct the violation asserted by the Government."). (The legislative history of the Tunney Act, including the House and Senate Reports and the statement of Senator Tunney cited herein, is available at http://www.justice.gov/jmd/ls/legislative_histories/pl93-528/pl93-528.html).

[19] H. Rep. No. 1463, 93 Cong., 2d Sess. (1974) ("H. Rep.") at 6, reprinted at 1974 U.S. Code Cong. & Admin. News 6535, 6536-37. *See also id.* ("Present law, 15 USC § 16(a), encourages

of entering into such consent decrees, but encouraged it, considering them a "legitimate and integral part of antitrust enforcement" and urging that they be retained "as a substantial antitrust enforcement tool."[20]

Accordingly, the government routinely enters into antitrust consent decrees explicitly disclaiming admissions or findings of liability.[21] The Supreme Court has long endorsed the entry of consent judgments in which there is no finding of liability,[22] and it has done so even when the defendant has affirmatively *denied* the alleged violation.[23]

Following enactment of the Tunney Act, courts have expressly recognized the Congressional intent to preserve the policy of encouraging antitrust consent decree expressed in that legisilation.[24] Only once, to our knowledge, has a district court objected to a proposed

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settlement by consent decree as part of the legal policies expressed in the antitrust laws. . . . The bill preserves these legal and enforcement policies . . . .").

[20] S. Rep. at 3 & 7; *see also* H. Rep. at 8, 1974 U.S.C.C.A.N. at 6539 (also describing consent decrees as a "viable settlement option").

[21] The proposed Final Judgment in this case states that the United States and defendant Morgan have "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 Morgan for any purpose with respect to any claim or allegation contained in the Complaint." PFJ at 1. Equivalent statements are conventional in government antitrust consent decrees negotiated pre-trial.

[22] *Cf. Armour*, 402 U.S. at 681 (interpreting consent decree in which defendants had denied liability for the allegations raised in the complaint); *see also* 18A Wright and Miller, *Federal Practice and Procedure* § 4443, at 256–57 (2d ed. 2002) ("central characteristic of a consent judgment is that the court has not actually resolved the substance of the issues presented").

[23] *See Swift & Co. v. United States*, 276 U.S. 311, 327 (1928) (refusing to vacate injunctive relief in consent judgment that contained recitals in which defendants asserted their innocence).

[24] *E.g.*, *United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235, 238-39 (S.D.N.Y. 1997) ("In enacting the Tunney Act, Congress recognized the high rate of settlement in public antitrust cases and wished to encourage settlement by consent decrees as part of the legal policies expressed in the

consent decree on the basis that a defendant had not admitted liability or wrongdoing, but this objection was specifically rejected on appeal. In *United States v. Microsoft*, the district court refused to enter the proposed consent decree in part because the defendant denied "that the conduct charged in the Government's complaint to which it has consented, violates the antitrust laws."[25] The D.C. Circuit reversed, expressly holding "unjustified" the district court's criticism of the defendant "for declining to admit that the practices charged in the complaint actually violated the antitrust laws."[26] The Court of Appeals emphasized that the "important question is whether [the defendant] will abide by the terms of the consent decree regardless of whether it is willing to admit wrongdoing."[27] We are aware of no government antitrust case in which a court refused to enter a consent decree because a defendant had failed to admit liability.

AARP's contention that absent an admission of wrongdoing or an adjudication of the facts entry of the decree would not be in the public interest is unwarranted. The relief that would be afforded by the proposed decree is appropriate to the violation alleged. The Tunney Act and the public interest require no more. To insist on more is to impose substantial resource costs on government antitrust enforcement; to risk the possibility of litigation resulting in no relief at all; to contravene a century of congressional and judicial policy; and to establish a precedent that could impede enforcement of the antitrust laws in the future.

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antitrust laws.") (internal quotations omitted).

[25] *United States v. Microsoft*, 159 F.R.D. 318, 337 (D.D.C. 1995), *rev'd* 56 F.3d 1448 (D.C. Cir. 1995).

[26] *United States v. Microsoft*, 56 F.3d at 1448, 1461 (D.C. Cir. 1995).

[27] *Id.*

C. Disgorgement of Proceeds to the U.S. Treasury is Appropriate

AARP argues that Morgan's $4.8 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 Morgan's conduct. The United States shares AARP's concern for the New York City ratepayers and, indeed, brought this case and sought disgorgement in order to deter financial services firms from entering into financial arrangements that cause anticompetitive effects. 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 plan proposed by AARP seeks, in effect, to restore funds to ratepayers. As this Court recognized in *KeySpan*, 763 F. Supp. 2d at 643. a remedy that seeks to reimburse funds to New York City ratepayers 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. *See generally Square D Co. v. Niagara Frontier*, 476 U.S. 409, 423 (1986). Indeed, a lawsuit filed by private plaintiffs seeking damages from KeySpan and Morgan based on the Swap has been dismissed on the ground that the action is barred as a matter of law under the filed rate doctrine.[28]

In this case, the United States 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. CIS at 9-10. Disgorgement also provides finality, certainty, avoidance of transaction costs, and potential to do

[28] *See Simon v. KeySpan*, 785 F. Supp. 2d at 138-39 (dismissing actions based on filed rate doctrine and other grounds). Plaintiffs have appealed this decision to the Second Circuit, but a decision has not yet been rendered.

the most good for the most people. As in *KeySpan*, the proposed remedy here is well within the reaches of the public interest.[29]

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.

[29] *KeySpan*, 763 F. Supp. 2d at 643. Moreover, the Miscellaneous Receipts Act ("MRA") provides that members of the Executive Branch (including employees of the Department of Justice) who receive money for the United States are to remit such funds directly to the Treasury. 31 U.S.C. § 3302(b) (2006). A purpose of the statute is to protect Congress' 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.

The United States is submitting this Response and the public comments to the Federal Register for publication pursuant to 15 U.S.C. § 16(d). After publication occurs, the United States will move this Court to enter the proposed Final Judgment.

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Respectfully submitted,

/s/

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