Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[3] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating: "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11.[4]

[3] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[4] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: February 24, 2010.

Respectfully submitted.

Rachel J. Adcox,

U.S. Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530, (202) 305–2738.

Certificate of Service

I, Rachel J. Adcox, hereby certify that on February 24, 2010, I caused a copy of the foregoing Competitive Impact Statement to be served upon defendants Bemis Company, Inc., Rio Tinto plc, and Alcan Corporation by mailing the documents electronically to the duly authorized legal representatives of defendants as follows:

Counsel for Defendant Bemis Company, Inc.:

Stephen M. Axinn, Esq., John D. Harkrider, Esq., Axinn, Veltrop & Harkrider LLP, 114 West 47th Street, New York, NY 10036, (212) 728–2200, *sma@avhlaw.com, jdh@avhlaw.com.*

Counsel for Defendants Rio Tinto plc and Alcan Corporation:

Steven L. Holley, Esq., Bradley P. Smith, Esq., Sullivan & Cromwell LLP, 125 Broad Street, New York, NY 10004, (212) 558–4737, *holleys@sullcrom.com, smithbr@sullcrom.com.*

Rachel J. Adcox, Esq.,

United States Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530, (202) 616–3302.

[FR Doc. 2010–4550 Filed 3–3–10; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Keyspan Corporation; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement 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. On February 22, 2010, the United States filed a Complaint alleging that KeySpan Corporation ("KeySpan") entered into an agreement with a financial services company, the likely effect of which was to increase prices in the New York City (NYISO Zone J) Capacity Market, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment, filed the same time as the Complaint, requires KeySpan to pay the government $12 million dollars.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 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 these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Donna N. Kooperstein, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530 (telephone: 202–307–6349).

Patricia A. Brink,

Deputy Director of Operations and Civil Enforcement.

United States District Court for the Southern District of New York

Civil Action No.: 10–cv–1415 (WHP)

ECF CASE

United States of America, U.S. Department of Justice, Antitrust Division, 450 5th Street, NW., Suite 8000, Washington, DC 20530, Plaintiff, v. *Keyspan Corporation, 1 Metrotech Center, Brooklyn, NY 11201,* Defendant.

Received: February 22, 2010

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action under Section 4 of the Sherman Act, as amended, 15 U.S.C.

4, to obtain equitable and other relief from defendant's violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. 1.

On January 18, 2006, KeySpan Corporation ("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, a market that was created to ensure the supply of sufficient generation capacity for New York City consumers of electricity. The 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.

I. Introduction

1. Between 2003 and 2006, KeySpan, the largest seller of electricity generating capacity ("installed capacity") in the New York City market, earned substantial revenues due to tight supply conditions. Because purchasers of capacity required almost all of KeySpan's output to meet expected demand, KeySpan's ability to set price levels was limited only by a regulatory ceiling (called a "bid cap"). Indeed, the market price for capacity was consistently at or near KeySpan's bid cap, with KeySpan sacrificing sales on only a small fraction of its capacity.

2. But market conditions were about to change. Two large, new electricity generation plants were slated to come on line in 2006 (with no exit expected until at least 2009), breaking the capacity shortage that had kept prices at the capped levels.

3. KeySpan could prevent the new capacity from lowering prices by withholding a substantial amount of its own capacity from the market. This "bid the cap" strategy would keep market prices high, but at a significant cost—the sacrificed sales would 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. This "competitive strategy" could earn KeySpan more than bidding its cap, but it carried a risk—KeySpan's competitors could undercut its price and take sales away, making the strategy less profitable than "bidding the cap."

4. KeySpan searched for a way to avoid both the revenue decline from bidding its cap and the revenue risks of competitive bidding. It decided to enter an agreement that gave it a financial interest in the capacity of Astoria—KeySpan's largest competitor. By providing KeySpan revenues on a larger base of sales, such an agreement would make a "bid the cap" strategy more profitable than a successful competitive bid strategy. Rather than directly approach its competitor, KeySpan turned to a financial services company to act as the counterparty to the agreement—the KeySpan Swap—recognizing that the financial services company would, and in fact did, enter an offsetting agreement with Astoria (the "Astoria Hedge").

5. With KeySpan deriving revenues from both its own and Astoria's capacity, the KeySpan Swap removed any incentive for KeySpan to bid competitively, locking it into bidding its cap. Capacity prices remained as high as if no entry had occurred.

II. Defendant

6. KeySpan Corporation is a New York corporation with its principal place of business in New York City. During the relevant period of the allegations in this Complaint, KeySpan owned approximately 2,400 megawatts of electricity generating capacity at its Ravenswood electrical generation facility, which is located in New York City. 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.

III. Jurisdiction and Venue

7. The United States files this complaint under Section 4 of the Sherman Act, 15 U.S.C. 4, seeking equitable relief from defendant's violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

8. This court has jurisdiction over this matter pursuant to 15 U.S.C. 4 and 28 U.S.C. 1331 and 1337.

9. Defendant waives any objection to venue and personal jurisdiction in this judicial district for the purpose of this Complaint.

10. Defendant engaged in interstate commerce during the relevant period of the allegations in this Complaint; KeySpan's electric generating units interconnected with generating units across the country, and KeySpan regularly sold electricity to customers outside New York.

11. One generation facility located in New Jersey supplies capacity to the New York City installed capacity market.

IV. The New York City Installed Capacity Market

12. Sellers of retail electricity must purchase a product from generators known as "installed capacity." Installed capacity is a product created by the New York Independent System Operator ("NYISO") to ensure that sufficient generation capacity exists to meet expected electricity needs. Companies selling electricity to consumers in New York City are required to make installed capacity payments that relate to their expected peak demand plus a share of reserve capacity (to cover extra facilities needed in case a generating facility breaks down). These payments assure that retail electric companies do not sell more electricity than the system can deliver and also encourage electric generating companies to build new facilities as needed.

13. The price for installed capacity has been set through auctions administered by the NYISO. The rules under which these auctions are conducted have changed from time to time. Unless otherwise noted, the description of the installed capacity market in the following paragraphs relates to the period May 2003 through March 2008.

14. Because transmission constraints limit the amount of energy that can be imported into the New York City area from the power grid, the NYISO requires retail providers of electricity to customers in New York City to purchase 80% of their capacity from generators in that region. The NYISO operates separate capacity auctions for the New York City region (also known as "In-City" and "Zone J"). The NYISO organizes the auctions to serve two distinct seasonal periods, summer (May through October) and winter (November through April). For each season, the NYISO conducts seasonal, monthly and spot auctions in which capacity can be acquired for all or some of the seasonal period.

15. In each of the types of auctions, capacity suppliers offer price and quantity bids. Supplier bids are "stacked" from lowest-priced to highest, and compared to the total amount of demand being satisfied in the auction. The offering price of the last bid in the "stack" needed to meet requisite demand establishes the market price for all capacity bid into that auction. Capacity bid at higher than this price is unsold, as is any excess capacity bid at what becomes the market price.

16. The New York City Installed Capacity ("NYC Capacity") Market constitutes a relevant geographic and product market.

17. The NYC Capacity Market is highly concentrated, with three firms—KeySpan, NRG Energy, Inc. ("NRG") and Astoria Generating Company (a joint venture of Madison Dearborn Partners, LLC and US Power Generating Company, which purchased the Astoria generating assets from Reliant Energy,

Inc. in February 2006)—controlling a substantial portion of generating capacity in the market. Because purchasers of capacity require at least some of each of these three suppliers' output to meet expected demand, the firms are subject to a bid and price cap for nearly all of their generating capacity in New York City and are not allowed to sell that capacity outside of the NYISO auction process. The NYISO-set bid cap for KeySpan is the highest of the three firms, followed by NRG and Astoria.

18. KeySpan possessed market power in the NYC Capacity Market.

19. It is difficult and time-consuming to build or expand generating facilities within the NYC Capacity Market given limited undeveloped space for building or expanding generating facilities and extensive regulatory obligations.

V. Keyspan's Plan To Avoid Competition

20. From June 2003 through December 2005, KeySpan set the market price in the New York City spot auction by bidding its capacity at its cap. Given extremely tight supply and demand conditions, KeySpan needed to withhold only a small amount of capacity to ensure that the market cleared at its cap.

21. KeySpan anticipated that the tight supply and demand conditions in the NYC Capacity Market would change in 2006, due to the entry of approximately 1000 MW of new generation. Because of the addition of this new capacity, KeySpan would have to withhold significantly more capacity from the market and would earn substantially lower revenues if it continued to bid all of its capacity at its bid cap. KeySpan anticipated that demand growth and retirement of old generation units would restore tight supply and demand conditions in 2009.

22. KeySpan could no longer be confident that "bidding the cap" would remain its best strategy during the 2006–2009 period. It considered various competitive bidding strategies under which KeySpan would compete with its rivals for sales by bidding more capacity at lower prices. These strategies could potentially produce much higher returns for KeySpan but carried the risk that competitors would undercut its price and take sales away, making the strategy less profitable than "bidding the cap."

23. KeySpan also considered acquiring Astoria's generating assets, which were for sale. This 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 the cap" its best strategy. KeySpan consulted with a financial services company about acquiring the assets. But KeySpan soon concluded that its acquisition of its largest competitor would raise serious market power issues.

24. Instead of purchasing the Astoria assets, KeySpan decided to acquire a financial interest in substantially all of 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.

25. KeySpan did not approach Astoria directly and instead sought a counterparty to enter into a financial agreement providing KeySpan with payments derived from the market clearing price for an amount of capacity essentially equivalent to what Astoria owned. KeySpan recognized the counterparty would need simultaneously to enter into an agreement with another capacity supplier that would offset the counterparty's payments to KeySpan, and KeySpan knew that Astoria was the only supplier with sufficient capacity to do so. KeySpan turned to the same financial services company that it had consulted about the potential acquisition of Astoria's assets. The financial services company agreed to serve as the counterparty but, as expected, informed KeySpan that the agreement was contingent on the financial services company also entering into an offsetting agreement with the owner of the Astoria generating assets.

VI. The Agreements

26. On or about January 9, 2006, KeySpan and the financial services company finalized the terms of the KeySpan Swap. Under the agreement, if the market price for capacity was above $7.57 per kW-month, the financial services company 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 the financial services company the difference times 1800 MW.

27. The KeySpan Swap was executed on January 18, 2006. The term of the KeySpan Swap ran from May 2006 through April 2009.

28. On or about January 9, 2006, the financial services company and Astoria finalized the terms of the Astoria Hedge. Under that agreement, if the market price for capacity was above $7.07 per kW-month, Astoria would pay the financial services company the difference times 1800 MW; if the market price was below $7.07, Astoria would be paid the difference times 1800 MW.

29. The Astoria Hedge was executed on January 11, 2006. The term of the Astoria Hedge ran from May 2006 through April 2009, matching the duration of the KeySpan Swap.

VII. The Competitive Effect of the Keyspan Swap

30. The clear tendency of the KeySpan Swap was to alter KeySpan's bidding in the NYC Capacity Market auctions.

31. Without 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. By transferring a financial interest in Astoria's capacity to KeySpan, however, the 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. By providing KeySpan 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.

32. After the KeySpan Swap went into effect in May 2006, KeySpan consistently bid its capacity at its cap even though a significant portion of its capacity went unsold. Despite the addition of significant new generating capacity in New York City, the market price of capacity did not decline.

33. In August 2007, the State of New York conditioned the sale of KeySpan to a new owner on the divestiture of KeySpan's Ravenswood generating assets and required KeySpan to bid its New York City capacity at zero from March 2008 until the divestiture was completed. Since March 2008, the market price for capacity has declined.

34. But for the KeySpan Swap, installed capacity likely would have been procured at a lower price in New York City from May 2006 through February 2008.

35. The KeySpan Swap produced no countervailing efficiencies.

VIII. Violation Alleged

36. Plaintiff incorporates the allegations of paragraphs 1 through 35 above.

37. KeySpan entered into an agreement the likely effect of which has been to increase prices in the NYC Capacity Market, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

IX. Prayer for Relief

Wherefore, Plaintiff prays:

1. That the Court adjudge and decree that the KeySpan Swap agreement constitutes an illegal restraint in the sale of installed capacity in the New York City market in violation of Section 1 of the Sherman Act;

2. That plaintiff shall have such other relief, including equitable monetary relief, as the nature of this case may require and as is just and proper to prevent the recurrence of the alleged violation and to dissipate the anticompetitive effects of the violation; and

3. That plaintiff recover the costs of this action.

Dated this 22nd day of February 2010.

Respectfully Submitted,

Christine A. Varney,
Assistant Attorney General.

Molly S. Boast,
Deputy Assistant Attorney General.

William F. Cavanaugh, Jr.,
Deputy Assistant Attorney General.

Donna N. Kooperstein,
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William H. Stalling,
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Transportation, Energy & Agriculture Section Suite 8000.

Patricia A. Brink,
Deputy Director of Operations.

Jade Alice Eaton,
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John W. Elias,
Trial Attorneys.

U.S. Department of Justice, Antitrust Division, Transportation, Energy & Agriculture Section, 450 5th Street, NW., Suite 8000, Washington, DC 20530, Telephone: (202) 353–1560, Facsimilie (202) 616–2441, jade.eaton@usdoj.gov.

United States District Court for the Southern District of New York

ECF Case

Civil Action No. 10–cv–1415 (WHP)

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

Received: February 22, 2010

Final Judgment

Whereas plaintiff United States of America filed its Complaint alleging that Defendant KeySpan Corporation (“KeySpan”) violated Section 1 of the Sherman Act, 15 U.S.C. 1, and 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:

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby ordered, adjudged, and decreed:

1. Jurisdiction

This Court has jurisdiction of the subject matter herein and of each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against KeySpan under Sections 1 and 4 of the Sherman Act, 15 U.S.C. 1 and 4.

2. Applicability

This Final Judgment applies to KeySpan and each of its successors, assigns, and to all other persons in active concert or participation with it who shall have received actual notice of the Settlement Agreement and Order by personal service or otherwise.

3. Relief

A. Within thirty (30) days of the entry of this Final Judgment, KeySpan shall pay to the United States the sum of twelve million dollars ($12,000,000.00).

B. The payment specified above shall be made by wire transfer. Before making the transfer, KeySpan shall contact Janie Ingalls, of the Antitrust Division’s Antitrust Documents Group, at (202) 514–2481 for wire transfer instructions.

C. In the event of a default in payment, interest at the rate of eighteen (18) percent per annum shall accrue thereon from the date of default to the date of payment.

4. Retention of Jurisdiction

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

5. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and plaintiff’s responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated:

United States District Judge.

United States District Court for the Southern District of New York

ECF Case

Civil Action No. 10–cv–1415 (WHP)

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

Filed 02/23/2010

Competitive Impact Statement

Plaintiff United States of America (“United States”), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceedings

The United States brought this lawsuit against Defendant KeySpan Corporation (“KeySpan”) on February 22, 2010, 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”) essentially transferring 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 who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity.

The proposed Final Judgment remedies this violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement. Under the terms of the proposed Final Judgment, KeySpan will surrender $12 million to the Treasury of the United States. Disgorgement will deter KeySpan and others from future violations of the antitrust laws.

The United States and KeySpan have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation of the Antitrust Laws

A. The Defendant

KeySpan Corporation is a New York corporation with its principal place of business in New York City. During the relevant period of the allegations in this Complaint, KeySpan owned approximately 2400 megawatts of electricity generating capacity at its Ravenswood electrical generation facility, which is located in New York City. 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.

B. The Market

In the state of New York, sellers of retail electricity must purchase a product from generators known as installed capacity ("capacity").[1] 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 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 customers in New York City to purchase 80% of their capacity from generators in that region. Thus, the New York City Installed Capacity ("NYC Capacity") Market constitutes a relevant geographic and product market.

The price for installed capacity 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 can be acquired for all or some of the seasonal period. Capacity suppliers offer price and quantity bids in each of these three auctions. 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 excess capacity bid at what becomes the market price.

The NYC Capacity Market was highly concentrated during the relevant period, with three firms—Astoria, NRG Energy, Inc., and KeySpan—controlling a substantial portion of the market's generating capacity. These three were designated as pivotal suppliers by the Federal Energy Regulatory Commission, 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 Alleged Violation

1. KeySpan Assesses Plans for Changed Market Conditions

From June 2003 through December 2005, almost all installed capacity in the market was needed to meet demand. With these tight market conditions, KeySpan could sell almost 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.

KeySpan anticipated that the tight supply and demand conditions in the NYC Capacity Market would end in 2006 due to the entry into the market of approximately 1000 MW of generation capacity, and would not return until 2009 with the retirement of old generation units and demand growth.

KeySpan could no longer be confident that "bid the cap" would remain its best strategy during the 2006–2009 period. The "bid the cap" strategy would keep market prices high, but at a significant cost. KeySpan would have to withhold a significant additional amount of capacity to account for the new entry. The additional withholding would 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. KeySpan considered various competitive bidding strategies. These 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, making the strategy potentially less profitable than bidding the cap.

KeySpan also considered acquiring Astoria's generating assets, which were for sale. This 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 consulted with a financial services company about acquiring the assets, but soon concluded that its acquisition of its largest competitor would raise market power issues.

2. KeySpan Pursues an Anticompetitive and Unlawful Agreement

Instead of purchasing the Astoria assets, KeySpan decided 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. The competitive effect of doing so would be similar to that of actually purchasing Astoria's capacity.

KeySpan did not approach Astoria directly and instead sought a counterparty to enter into a financial agreement providing KeySpan with payments derived from the market clearing price for an amount of capacity essentially equivalent to what Astoria owned. KeySpan recognized the counterparty would need simultaneously to enter into an agreement with another capacity supplier that would offset the counterparty's payments to Keyspan, and KeySpan knew that Astoria was the only supplier with sufficient capacity to do so. KeySpan turned to the same financial services company that it had consulted about the potential acquisition of Astoria's assets. The financial services company agreed to serve as the counterparty, but, as expected, informed KeySpan that the agreement was contingent on the financial services company also entering into an offsetting agreement with the owner of the Astoria generating assets (the "Astoria Hedge").

On or about January 9, 2006, KeySpan and the financial services company finalized the terms of the KeySpan Swap. Under the agreement, if the market price for capacity was above $7.57 per kW-month, the financial services company 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 the financial services company the difference times 1800 MW. The KeySpan Swap was executed on January 18, 2006. The term of the KeySpan

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

Swap ran from May 2006 through April 2009.

On or about January 9, 2006, the financial services company and Astoria finalized terms to the Astoria Hedge. Under that agreement, if the market price for capacity was above $7.07 per kW-month, Astoria would pay the financial services company the difference times 1800 MW; if the market price was below $7.07, Astoria would be paid the difference times 1800 MW. The Astoria Hedge was executed on January 11, 2006. The term of the Astoria Hedge ran from May 2006 through April 2009, matching the duration of the KeySpan Swap.

3. The Effect of the KeySpan Swap

The clear tendency of the KeySpan Swap was to alter KeySpan's bidding in the NYC Capacity Market auctions.

Without 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 would have declined. The swap, however, effectively eliminated KeySpan's incentive to compete for sales. By adding revenues from Astoria's capacity to KeySpan's own, the KeySpan Swap made bidding the cap KeySpan's most profitable strategy regardless of its rivals' bids.

After the KeySpan Swap went into effect in May 2006, KeySpan consistently bid its capacity into the capacity auctions at its cap even though a significant portion of its capacity went unsold. Despite the addition of significant new generating capacity in New York City, the market price of capacity did not decline.

By transferring a financial interest in Astoria's capacity to KeySpan, the 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. 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.[2] The Swap produced no countervailing efficiencies.

III. Explanation of the Proposed Final Judgment

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

A. Disgorgement Is Available Under the Sherman Act

Although the Antitrust Division has not previously sought disgorgement as a remedy under the Sherman Act, district courts have the authority to order such equitable relief. The Supreme Court has held that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291 (1960). Nothing in the Sherman Act negates this inherent authority. Section 4 of the Sherman Act invests district courts with broad equitable power to "prevent and restrain" violations of the antitrust laws and provides that such violations may be "enjoined or otherwise prohibited." 15 U.S.C. 4. *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,'" quoting *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 128 (1948)); *United States* v. *U.S. Steel Corp.*, 251 U.S. 417, 452 (1920) (Sherman Act's "command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions"). 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). *See* also *SEC* v. *Fischbach*, 133 F.3d 170, 175 (2d Cir. 1997); *SEC* v. *Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) (Friendly, J.).[3]

B. Disgorgement Is Appropriate in This Case

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. A private lawsuit for damages against KeySpan would face significant obstacles imposed by the filed rate doctrine. *See Keogh* v. *Chicago* & *N.W. Ry. Co.*, 260 U.S. 156 (1922). The filed rate doctrine also makes it unlikely that disgorgement will lead to duplicative monetary remedies.

Furthermore, no other remedy would be as effective to fulfill the remedial goals of the Sherman Act to "prevent and restrain" antitrust violations. Injunctive relief would not be meaningful, given the facts in this case. The specific agreement at issue—the KeySpan Swap—has, by its terms, expired and the anticompetitive conduct is unlikely to reoccur as KeySpan no longer owns the Ravenswood generation assets.

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

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in

[2] The effects of the 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 City capacity at zero from March 2008 until the divestiture was completed. Since then, the market price for capacity has declined.

[3] The Second Circuit has also permitted disgorgement under civil RICO, which confers jurisdiction to "prevent and restrain violations," 18 U.S.C. 1964(a). *See United States* v. *Carson,* 52 F.3d 1173, 1181 (2d Cir. 1995) ("As a general rule, disgorgement is among the equitable powers available to the district court by virtue of * * * § 1964"). The DC Circuit, however, has held that disgorgement categorically is unavailable under civil RICO. *See United States* v. *Philip Morris*, 396 F.3d 1190, 1192, 1202 (DC Cir. 2005) (interlocutory appeal) (Philip Morris I); *United States* v. *Philip Morris*, 566 F.3d 1095, 1108 (DC Cir. 2009) (appeal after final judgment) *(Philip Morris II*). The Supreme Court denied the government's petition to review the interlocutory decision in *Philip Morris I*, 126 S. Ct. 478 (2005), but on February 19, 2010, the United States asked the Supreme Court to review *Philip Morris II.* In *United States* v. *Loew's, Inc.*, 189 F. Supp. 373 (S.D.N.Y. 1960), this Court declined to order defendants to renegotiate contracts with third parties, or to refund money to third parties under those renegotiated contracts. *Id.* at 398–99 & n.13.

any subsequent private lawsuit that may be brought against KeySpan.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Donna N. Kooperstein, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendant. The United States is satisfied, however, that the disgorgement of profits is an appropriate remedy in this matter. A disgorgement remedy should deter Keyspan and others from engaging in similar conduct. Given the facts of this case, the proposed Final Judgment would protect competition as effectively as would any other equitable remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, 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 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.*, 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[4]

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[5] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

[4] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[5] *Cf. BNS,* 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d. at 1459–60. Courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[6]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that the United States considered in formulating the proposed Final Judgment.

Dated: February 22, 2010.

Respectfully submitted,

For Plaintiff The United States of America

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[FR Doc. 2010–4545 Filed 3–3–10; 8:45 am]

BILLING CODE 4410–11–P

[6] *See United States* v. *Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0007]

Definition and Requirements for a Nationally Recognized Testing Laboratory (NRTL); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for comment.

SUMMARY: OSHA requests comment concerning its proposed extension of the information collection requirements specified by its Regulation on the Definition and Requirements for a Nationally Recognized Testing Laboratory (29 CFR 1910.7). The Regulation specifies procedures that organizations must follow to apply for, and to maintain, OSHA's recognition to test and certify equipment, products, or material.

DATES: Comments must be submitted (postmarked, sent, or received) by May 3, 2010.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2010–0007, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for the Information Collection Request (ICR) (OSHA–2010–0007). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.*