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

Civil Case No. 10-CIV-1415

United States of America,
Petitioner

v.

KeySpan Corporation,
Respondent.

COMMENTS OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Dated: **May 3, 2010**

COMMENTS OF
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

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

I. PRELIMINARY STATEMENT

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

Unfortunately, however, the consent judgment does not provide for any of these disgorged funds to go the persons ultimately harmed by KeySpan's illegal conduct – the consumers subjected to the artificially inflated prices. The Competitive Impact Statement ("CIS") does not appear to address this alternative or explain why it was

omitted. As a result of this shortcoming the proposed consent judgment does not acceptably satisfy the public interest standard as required by the Tunney Act. Indeed, it leaves the victims of KeySpan's antitrust violation without any remedy. This Court should not approve the proposed consent judgment until it is amended so that any monetary payments made by KeySpan are distributed to the New York City retail electricity consumers who were harmed by its antitrust violations.

II. BACKGROUND

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

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

III. THE PROPOSED CONSENT JUDGMENT FAILS TO SATISFY THE PUBLIC INTEREST BECAUSE IT FAILS TO PROVIDE FOR A REMEDY TO THE ELECTRIC CONSUMERS VICTIMIZED BY THE ANTITRUST VIOLATION

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

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, *anticipated effects of alternative remedies actually considered*, whether its terms are ambiguous, and *any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest*; and
>
> (B) *the impact of entry of such judgment upon* competition in the relevant market or markets, upon the public generally and *individuals alleging specific injury from the violations set forth in the complaint* including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 USCS § 16(e)(l)(A) & (B) (emphasis added).

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

The settlement is not in the public interest because it does not provide relief to the individuals that have been harmed by KeySpan's actions under the KeySpan Swap Agreement. The DOJ's CIS makes it explicit that the individuals ultimately harmed by

KeySpan's actions are New York City's electricity consumers who were subjected to higher prices for electricity by reason of KeySpan's illegal conduct. While the DOJ commendably condemned KeySpan's anticompetitive actions, which artificially raised New York City capacity prices, and sought an equitable remedy disgorging profits, its proposed remedy is inadequate in that it provides for KeySpan to pay the $12 million to the U.S. Treasury rather than to the individuals who ultimately were harmed.

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

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

raise capacity prices in New York City to the detriment of New York's retail electricity consumers.

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

Thus, unlike objectors to the remedies proposed in *United States v. Microsoft Corp.,* 56 F.3d 1448 (D.C. Cir. 1995), who argued that additional remedies should be imposed for injuries not pleaded in DOJ's Complaint, Con Edison's comments here focus on the fact that the proposed decree does not remedy the injury that DOJ specifically identifies in its Complaint and CIS. Nor does Con Edison in effect seek any change in

the Complaint as filed. All that Con Edison requests is that the Court exercise its powers in equity to modify a proposed decree whose "impact...upon the public generally and individuals alleging specific injury from the violations set forth in the complaint" is manifestly to fail to remedy those injuries. 15 USCS § 16(e)(l)(B).

Equity, along with the standards for reviewing this settlement, calls for those consumers that were the ultimate victims of the KeySpan Swap Agreement to be the beneficiaries of whatever relief is provided for in the consent judgment (the $12 million payment). DOJ acknowledges that there is no adequate remedy here at law for individuals harmed by KeySpan's antitrust violation. 75 Fed. Reg. at 9951. The reason is that private individuals could not bring an antitrust suit here due to the barrier of the filed rate doctrine. *See Arkansas La. Gas Co. v. Hall,* 453 U.S. 571, 577 (1981); *Keogh v. Chicago & N.W. Ry. Co.,* 260 U.S. 156 (1922). Where, as here, no remedy exists at law, courts have broad authority to design equitable relief that ensures fairness in light of the circumstances.

As the Supreme Court has made clear: "[t]he essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or *redress the injuries* caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision." *Freeman v. Pitts*, 503 U.S. 467, 487 (1992) (emphasis added). For example, when courts employ the "equitable remedy" of piercing the corporate veil, they are not "imposing [] liability" but rather "remedying the *fundamental unfairness* that would [otherwise] result." *Trustees of Nat'l Elevator Industry v. Lutyk*, 332 F.3d 188, 193 n.6 (3d Cir. 2003) (emphasis added, internal quotations omitted). "[T]hus, the theory of

harm alleged may affect the scope of the remedy that equity demands." *Id.*; *see also Taylor v. PTO*, 339 F. App'x. 995, 999 (Fed. Cir. 2009) ("district court's equity jurisdiction provides broad and flexible power to deliver justice in unique factual circumstances . . . to [the] court's best estimation").

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

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

145, 151-52 (D. Del. 2002) (citing *Pepper* and Chase in concluding that "the court should not employ a mechanical and formalistic" approach).

The DOJ does not explain in the CIS why it did not address the provision of relief to New York City consumers. Though it cites to the filed rate doctrine, DOJ appears to recognize that the filed rate doctrine does not apply to the disgorgement payments involved in the proposed consent judgment. Nor does the filed rate doctrine present any barrier to including in the judgment an equitable remedy in the form of payments to New York City consumers. The profits required to be disgorged by the proposed consent judgment are KeySpan's profits stemming from the KeySpan Swap Agreement, *not* from its sales of electric capacity under a filed rate. The KeySpan Swap Agreement is a private financial contract between KeySpan and the financial services company which was not filed with FERC. The KeySpan Swap Agreement is thus not part of the filed rate.[1] Accordingly, the filed rate doctrine is not a bar to providing relief to consumers in this case. Though the practical effects of restitution and disgorgement differ they are both equitable remedies. Restitution ultimately flows to the injured party, but it is neither a form of "damages" nor a means of providing "compensation for past injuries." *See Ellett Bros., Inc. v. U.S. Fidelity & Guaranty Co.*, 275 F.3d 384, 388 (4th Cir. 2001) ("Restitution and disgorgement require payment of defendant's ill-gotten gains, not compensation of the [injured party's] loss."). Moreover, courts have interpreted statutes in a manner that does not interfere with a court's traditional equity powers, unless Congress clearly makes that "desire plain." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30

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

(1944) ("The essence of equity jurisdiction has been the power . . . to do equity and to mould each decree to the necessities of the particular case."). The filed rate doctrine, in short, has no application to the equitable distribution of the disgorged funds as a remedy in this case.

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

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

IV. CONCLUSION

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

Dated: May 3, 2010
New York City

Respectfully submitted,
Consolidated Edison Company of New York, Inc.

By: _____

Neil H. Butterklee
Assistant General Counsel
Consolidated Edison Company
of New York, Inc.
4 Irving Place
Room 1815-s
New York, N.Y. 10003
(212) 460-1089
butterkleen@coned.com