# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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April 30, 2010

VIA OVERNIGHT MAIL
Donna N. Kooperstein, Chief
Transportation, Energy, and Agriculture Section
United States Department of Justice, Antitrust Division
450 Fifth Street, NW., Suite 8000
Washington, D.C. 20530

Re: *United States of America* v. *KeySpan Corp.,* Civil Case No. 10–CIV–1415;
Tunney Act Comments of the New York State Public Service Commission

Dear Ms. Kooperstein:

Pursuant to the Tunney Act, 15 U.S.C. § 16(e)(1), enclosed please find comments of the Public Service Commission of the State of New York, in response to the notice published in the Federal Register on March 4, 2010. *See* U.S. Dep't of Justice, Antitrust Div., *United States v. Keyspan Corporation*, Proposed Final Judgment and Competitive Impact Statement, 75 *Federal Register* 9946 (March 4, 2010).

An electronic copy of these comments will also be filed on Monday, May 3, 2010.

Please contact me at (518) 474-7663, if you have any questions. Thank you.

Very truly yours,

Sean Mullany
Assistant Counsel

Enclosure

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

Civil Case No. 10-CIV-1415

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United States of America,
Petitioner
v.

KeySpan Corporation,
Respondent.

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# COMMENTS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PURSUANT TO THE ANTITRUST PROCEDURES AND PENALTIES ACT, ON THE PROPOSED FINAL JUDGMENT

## SUMMARY

The Public Service Commission of the State of New York ("PSC") submits these comments pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), in response to the notice published in the *Federal Register* on March 4, 2010, in this matter. U.S. Dep't of Justice, Antitrust Div., *United States v. Keyspan Corporation*, Proposed Final Judgment and Competitive Impact Statement, 75 *Federal Register* 9946 (March 4, 2010).

DOJ is to be commended for its faithful enforcement of the antitrust law to protect the integrity of electricity markets in New York City. The electric capacity market for New York City is highly concentrated. The antitrust law is properly applied in this case to address wrongful anti-competitive practices of KeySpan Corporation ("KeySpan"). DOJ's enforcement of the antitrust law is critical to protect consumers against the harmful effects of KeySpan's anti-competitive conduct in this particular case and, more generally, to protect the public interest in the integrity of the newly-created competitive electricity markets.

DOJ proposes to settle this litigation by having KeySpan pay the United States government $12 million. DOJ asserts such a settlement will be in the public interest because KeySpan's payment of $12 million into the U.S. Treasury will prevent KeySpan's unjust enrichment, and deter others from agreeing not to compete in the future. However, because DOJ has not offered any information as to how much KeySpan profited from its unlawful conduct, the Court has no basis for evaluating

whether the proposed $12 million settlement will prevent KeySpan's unjust enrichment or is sufficient to deter such conduct in the future. Therefore, the Court should direct DOJ to supplement the record to show how much KeySpan gained by virtue of its anti-competitive conduct. Only in this way can the Court evaluate whether the proposed settlement would be in the public interest. POINT I, below.

As explained more fully below, it is highly probable that KeySpan's gains were well in excess of $12 million. Its net profits under the complained-of "swap" agreement amounted to nearly $68 million. The proposed $12 million settlement would not prevent KeySpan's unjust enrichment, and would not deter such conduct in the future. POINT II, below.

Finally, KeySpan's unlawful anti-competitive conduct harmed consumers to an extent far exceeding both the proposed $12 million settlement and KeySpan's nearly $68 million net profit under the swap. The costs to consumers, in the form of excessive electricity costs caused by KeySpan's unlawful agreement, may well exceed hundreds of millions of dollars over a two-year period. Proceeds from any settlement should be used to benefit ratepayers, who were greatly harmed by KeySpan's wrongful conduct. POINT III, below.

## BACKGROUND

In this civil antitrust action, brought by the United States Department of Justice ("DOJ") under Section 1 of the Sherman Act, 15 U.S.C. §1, the government seeks equitable and other relief against KeySpan for violating the antitrust law.

According to DOJ, KeySpan entered into an agreement (the "KeySpan Swap" or the "swap") with an unnamed financial services company (the "FSC") which, in purpose and effect, ensured that KeySpan would "withhold substantial output from the New York City electricity generating capacity market ...." 75 *Federal Register* at 9947. DOJ states that "[t]he 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." 75 *Federal Register* at 9947.

According to DOJ, the KeySpan Swap was an agreement that unlawfully restrained competition in New York City's electric capacity market. KeySpan entered into the swap agreement to protect itself against increased losses from its preferred bidding strategy, due to the entry of new competitors into the market. 75 *Federal Register* at 9947. Under the swap agreement, KeySpan, which already possessed substantial market power in the highly concentrated and constrained New York City capacity market, "enter[ed] into an agreement that gave it a financial interest in the capacity of Astoria – KeySpan's largest competitor." 75 *Federal Register* at 9947. By giving KeySpan revenues not only from its own sales, but also from the capacity sales of its largest competitor, the KeySpan Swap "effectively eliminated KeySpan's incentive to compete for sales" of capacity. 75 *Federal Register* at 9948. Thus, "[t]he clear tendency of the KeySpan Swap was to alter KeySpan's bidding in the NYC Capacity Market auctions." 75 *Federal Register* at 9948. After entering into the swap, KeySpan was able to continue bidding its capacity into the market at the highest level

allowed, knowing any losses from foregone sales would be more than offset by profits from the swap and from its remaining sales. 75 *Federal Register* at 9948.

As a result, electric capacity prices remained unlawfully inflated, and KeySpan was paid, under the terms of the swap agreement, as much as $67.8 million. Attached Affidavit of Thomas Paynter dated April 27, 2010 ("Paynter Affidavit") ¶ 15. In addition, the elimination of competitive pressures, due to KeySpan's anti-competitive agreement, imposed unnecessary costs on consumers which may total hundreds of millions of dollars.

DOJ's proposal, however, does not include enough information to allow the Court to find, as is required under the Tunney Act, 15 U.S.C. § 16(e)(1), that the settlement would be in the public interest. DOJ asserts the public interest will be served by preventing KeySpan's unjust enrichment, but DOJ has not offered any estimates of how much money KeySpan made by agreeing, with its biggest competitor, not to compete. For the same reason, DOJ has not offered enough information to assess its claim that the settlement will deter such unlawful conduct in the future. Finally, the proposed settlement will do nothing to address the substantial harm to competitiveness of the market that KeySpan caused. For these reasons, the Court should direct DOJ to supplement the record with information about how much KeySpan profited, and how much KeySpan harmed the integrity of the electricity markets. Finally the Court should require that proceeds of any settlement be used to

ameliorate the harm KeySpan caused to electric ratepayers in the downstate New York area.

## POINT I
## DOJ HAS NOT PROVIDED ENOUGH INFORMATION TO DETERMINE WHETHER THE PROPOSED SETTLEMENT IS IN THE PUBLIC INTEREST

Before entering any consent judgment proposed by the United States, the Court must first determine that entry of such a judgment "is in the public interest." 15 USCS § 16(e)(1). In doing so, "the court shall consider--

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such 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)(1)(A) &(B).

In seeking the Court's approval, DOJ has the burden to "provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *United States v. SBC Communs., Inc.*, 489 F. Supp. 2d 1, 17 (D.D.C. 2007). In this case, DOJ has not met this burden. Neither the competitive impact statement, nor the proposed consent decree provides the information needed to evaluate

whether this settlement would be a reasonably adequate remedy for the harm caused by KeySpan.

Under the proposed settlement, KeySpan would be required to pay the United States government $12 million dollars. United States v. Keyspan Corporation; Proposed Final Judgment and Competitive Impact Statement, 75 *Federal Register* 9946, 9949 (March 4, 2010). According to DOJ, this amount "remedies [KeySpan's] violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement." 75 *Federal Register* at 9949. DOJ asserts that "[d]isgorgement 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." 75 *Federal Register* at 9949. Thus, according to DOJ, the public interest is served because the proposed settlement will both prevent KeySpan's unjust enrichment, and will deter such wrongful conduct in the future.

Preventing any unjust enrichment on KeySpan's part is a legitimate purpose of any proposed settlement. In fashioning relief in response to a violation of the antitrust law, "[o]ne of [the] objectives ... is to 'deny to the defendant the fruits of its statutory violation.'" *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1232 (D.C. Cir. 2004) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir. 2001)). However, the unstated premise underlying DOJ's claims (*i.e.*, that disgorgement is necessary to prevent unjust enrichment and that a $12 million penalty is adequate), is

that KeySpan realized a gain of $12 million. Yet DOJ has not offered anything to support this. The Complaint, the Competitive Impact Statement, and the proposed Consent Judgment are silent on the critical question of how much KeySpan improperly gained by violating the antitrust law.

It is, of course, axiomatic that "the fruits of a violation must be identified before they may be denied." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1232 (D.C. Cir. 2004). The lack of any information as to how much KeySpan gained makes it virtually impossible for the Court to meaningfully evaluate whether $12 million "represents a reasonable method of eliminating the consequences of the illegal conduct." *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 698 (1978). This holds true both with respect to depriving KeySpan of any unjust enrichment, and with respect to evaluating whether the settlement will deter such wrongful conduct in the future. Thus, on the current record, the Court has no basis for finding the proposed settlement would be "in the public interest."

It is noteworthy that DOJ elsewhere implies KeySpan made more than $12 million as a result of its anti-competitive conduct. More specifically, DOJ indicates the $12 million settlement would effect only partial disgorgement of KeySpan's gains. 75 *Federal Register* at 9951 (claiming that "[r]equiring KeySpan to disgorge a portion of its ill-gotten gains ... is the only effective way of achieving relief against KeySpan ....")(emphasis added). If DOJ is actually seeking only partial disgorgement, then the settlement would not prevent KeySpan's unjust enrichment. Anything less

than full disgorgement would *a fortiori* not strip KeySpan of its wrongful gains. Moreover, if $12 million represents only a fraction of the total amount of KeySpan's unjust enrichment, such a penalty would not deter future violations of the antitrust law. Such a penalty may instead amount to nothing more than a "cost of doing business."[1] This possibility is not remote. As discussed below in POINT II, it is highly probable that the total amount of KeySpan's ill-gotten gains was much greater than $12 million.

Given that DOJ has not proffered enough information to enable the Court to determine whether the proposed settlement is in the public interest, DOJ should be directed to do so. Under the Tunney Act, "[t]he court may 'take testimony of Government officials or experts' as it deems appropriate, 15 U.S.C. § 16(f)(1); authorize participation by interested persons, including appearances by amici curiae, *id.* § 16(f)(3); review comments and objections filed with the Government concerning the proposed judgment, as well as the Government's response thereto, *id.* § 16(f)(4); and 'take such other action in the public interest as the court may deem appropriate,' *id.* § 16(f)(5)." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1206 (D.C. Cir. 2004). Requiring DOJ to adduce facts relating to how much KeySpan gained as a result of its

[1] Arguably, even total disgorgement would have only a limited deterrent effect. "[T]o 'limit the penalty ... to disgorgement is to tell a violator that he may [break the law] with virtual impunity; if he gets away undetected, he can keep the proceeds, but if caught, he simply has to be give back the profits of his wrong.'" *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 406 (S.D.N.Y. 2009) (quoting *S.E.C. v. Rabinovich & Assoc.*, 2008 U.S. Dist. LEXIS 93595, 2008 WL 4937360, at *6 (S.D.N.Y. Nov. 18, 2008)).

anti-competitive conduct will provide a record basis for any public interest determination made by the Court. *Cf. S.E.C. v. Bank Of America Corp.*, ___ F. Supp.2d ____, 2010 U.S. Dist. LEXIS 15460 (S.D.N.Y. Feb. 22, 2010) (approving a proposed consent judgment because, *inter alia*, after the court rejected an earlier proposed settlement, the parties conducted extensive discovery which established facts supporting the new proposal).

## POINT II
## THE PROPOSED CONSENT DECREE WOULD NOT DETER THE UNLAWFUL ANTICOMPETITIVE CONDUCT IDENTIFIED BY DOJ

KeySpan's swap, in both purpose and effect, violated the antitrust law. Its purpose was to "effectively eliminate[ ] 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." 75 *Federal Register* at 9948. Thus, regardless of its effect on the market, the KeySpan Swap violated the Sherman Act. *Cf. Summit Health v. Pinhas*, 500 U.S. 322, 330 (1991) ("[B]ecause the essence of any violation of § 1 [of the Sherman Act] is the illegal agreement itself[,] rather than the overt acts performed in furtherance of it, ... proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful").

The KeySpan Swap also violated the Sherman Act because of its effect on the market. Its "clear tendency" was to alter KeySpan's bidding, in order to prevent competition and keep prices high. 75 *Federal Register* at 9948 (col. 3). *Cf. United States v. Staszcuk*, 517 F.2d 53, 60 & n.17 (7th Cir. Ill. 1975)("The federal power to protect

the free market may be exercised to punish conduct which threatens to impair competition even when no actual harm results").

KeySpan's ill-gotten gains far exceeded the $12 million payment DOJ is seeking. DOJ alleges the KeySpan Swap was effective from January 16, 2006 until March, 2008.[2] Under the swap agreement, if the market price for capacity exceeded $7.57 per kW-month, the financial services company ("FSC") would pay KeySpan the difference between the market price and $7.57, times 1800 MW. 75 *Federal Register* at 9950.

The average spot market price for capacity during the period from May, 2006, through March, 2008, was $9.21/kW-month. After subtracting the $7.57 per kW-month amount specified under the swap agreement, KeySpan's average revenues under the swap agreement were $1.64/kW-month, times the 1800 MW covered by the swap agreement, for a period of 23 months. Multiplying these figures out yields a

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[2] DOJ asserts the swap agreement was effective from May, 2006, through April, 2009. 75 *Federal Register* at 9950-51. According to DOJ, the "effects" of the swap continued only "until" March, 2008, because the New York State Public Service Commission required KeySpan to bid its New York City capacity at zero from March 2008 until KeySpan sold its Ravenswood plant. 75 *Federal Register* at 9951 & n. 2. However, the analysis below assumes the swap remained "effective" between the parties during March, 2008, because the PSC's requirement that KeySpan bid at zero would not have triggered the agreement's "regulatory out" clause. This has bearing on the total amount of KeySpan's gain under the swap agreement. Including March, 2008, reduces KeySpan's total revenues under the swap because, during March, 2008, the market price of capacity was below the $7.57 per kW-month trigger in the swap agreement. Thus, for March, 2008, KeySpan would have paid moneys to the FSC.

total of $67.8 million. Thus, under the swap agreement alone, KeySpan received revenues of almost $68 million.[3] Paynter Affidavit ¶ 15.

The proposed $12 million payment would amount to only 17.7% of KeySpan's direct revenues/net profits under the swap agreement. Thus, if the Court approves this settlement, KeySpan would be able to retain more that $55 million in ill-gotten gains, and the FSC would be able to retain more that $20 million in additional ill-gotten gains. Such a settlement would clearly not materially prevent KeySpan's unjust enrichment. Moreover, under any reasonable measure, the proposed settlement would not deter KeySpan, or other market participants, from engaging in such anti-competitive conduct in the future. Thus, the proposed $12 million settlement would not satisfy either of DOJ's rationales (*i.e.*, preventing KeySpan's unjust enrichment, and deterring such wrongful conduct in the future) for a judicial finding that the settlement is in the public interest.

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[3] In addition, the FSC received $0.50/kW-month under the swap agreement. Multiplying this amount by the 1800 MW covered by the swap agreement, times the 23 month duration of the swap agreement, yields total revenues to the FSC of approximately $20.7 million. Paynter Affidavit ¶ 17. The FSC's profits are potentially relevant because Astoria could have directly entered into a swap agreement with a load-serving entity serving New York City. If such agreement had a "trigger" price of $7.07, the load-serving entity would have realized revenues of $89 million (*i.e.*, $67 million, plus $21 million), which would have inured to the benefit of consumers. Paynter Affidavit ¶ 18.

## POINT III
## THE PROPOSED SETTLEMENT WOULD NOT AMELIORATE THE RATEPAYER HARM CAUSED BY KEYSPAN

The Court Should Consider Ratepayer Harm

In determining whether the settlement is in "the public interest," the Court should also consider the impact of the proposed settlement on the ratepayers that were harmed by KeySpan's anti-competitive conduct. *See* 15 U.S.C. § 16(e)(1)(B) ("the court shall consider ... the impact of entry of such judgment upon ... the public generally ....").[4] DOJ acknowledges ratepayers were harmed, in the form of inflated capacity prices, because of KeySpan's conduct. According to DOJ, "[w]ithout 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." 75 *Federal Register* at 9948. Because KeySpan decided to withhold capacity rather than compete, it realized ill-gotten gains on all of the capacity it sold, in addition to the nearly $68 million KeySpan received directly under the terms of the swap agreement itself.

Yet DOJ also indicates that ratepayers may have no recourse under the antitrust law because of the "filed rate" doctrine. 75 *Federal Register* at 9951. Moreover, ratepayers may not be able to obtain any relief from FERC because, in early 2008, FERC's Staff concluded there was no evidence that KeySpan's bidding

[4] *Cf. United States v. SBC Communs., Inc.*, 489 F. Supp. 2d 1, 17 (D.D.C. 2007) ("the court should be concerned with any allegations that the proposed settlement will injure a third party").

behavior violated FERC's Anti-Manipulation Rule, 18 C.F.R. §1c2(a). FERC Docket Nos. IN08-2-000 & EL07-39-000, Enforcement Staff Report, Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market, p. 17 (February 28, 2008). Thus, in this case ratepayers harmed by KeySpan's anti-competitive conduct may have no meaningful recourse under either the antitrust law or the Federal Power Act.

This lack of a remedy for customers is highly significant, given the potential size of the harm to consumers caused by KeySpan's violation of the antitrust law. DOJ has not offered any factual information or analysis of how much KeySpan gained by maintaining prices at an artificially high level in violation of the antitrust laws, rather than choosing to bid at more competitive level. The measure of disgorgement should reflect the profits gained by KeySpan through the unlawfully higher price of capacity.[5] The Court should direct DOJ to address this defect in the settlement proposal. *Cf. Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 374 (3d Cir. 2005) ("[T]he standard method of measuring damages in price

[5] That is, the analysis in the Paynter Affidavit shows a total harm to ratepayers of $89 million from KeySpan's, and the FSC's, financial interest in the 1800 MW controlled by the swap, even without assuming any drop in spot market prices. However, KeySpan also controlled an additional 2400 MW of capacity in the New York City market. By continuing to bid at its cap (even after accounting for KeySpan's additional lost sales due to the entry of new generation into the market), KeySpan realized gains outside the swap that, roughly speaking, equaled or exceeded the nearly $68 million KeySpan received under the swap. The need for disgorgement of these additional wrongful gains is underscored by the even larger consumer harm KeySpan caused. If KeySpan had competed for sales, the resulting declines in prices could easily have saved ratepayers hundreds of millions of dollars.

enhancement cases is overcharge, [that is] the difference between the actual price and the presumed competitive price multiplied by the quantity purchased"); *New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 88-89 (2d Cir. 2000) ("Where ... there is a dearth of market information unaffected by the collusive action of the defendants, the plaintiff's burden of proving damages, is, to an extent, lightened[,] [and] the State need only provide the court with some relevant data from which the district court can make a reasonable estimated calculation of the harm suffered...."') (citations and internal quotations omitted); *id.*, 202 F.3d at 89 ("[T]o do otherwise would be a perversion of fundamental principles of justice [and would] deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts"); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1078 (2d Cir. 1988) (""The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"") (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 551 (7th Cir. Ill. 1986) ("The concept of a 'yardstick' measure of damages, that is, linking the plaintiff's experience in a hypothetical free market to the experience of a comparable firm in an actual free market, is also well accepted").

If KeySpan's illegal conduct harmed consumers by preventing price declines that could have totaled hundreds of millions of dollars, then the proposed $12 million settlement is so low it would not be fair, reasonable, adequate or in the public interest. *Cf. S.E.C. v. Bank Of America Corp.*, 653 F. Supp.2d 507 (S.D.N.Y. 2009) (disapproving

a proposed settlement in part because the proposed $33 million fine was "a trivial penalty for a false statement that materially infected a multi-billion-dollar merger"). *But cf. S.E.C. v. Bank Of America Corp.*, ___ F. Supp.2d ____, 2010 U.S. Dist. LEXIS 15460 (S.D.N.Y. Feb. 22, 2010) (approving a $150 million fine even though it would have only "a very modest impact on corporate practices or victim compensation").

Settlement Proceeds Should Be Used to Ameliorate The Ratepayer Harm

DOJ seeks disgorgement, through the exercise of the Court's "inherent equitable powers...." 75 *Federal Register* at 9951. DOJ maintains the public interest requires disgorgement to prevent KeySpan's unjust enrichment. 75 *Federal Register* at 9951. The legal doctrine of unjust enrichment "is an old equitable remedy permitting the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another." *Nimbus Techs., Inc. v. SunnData Prods.*, 2005 U.S. Dist. LEXIS 46509 (N.D. Ala. Dec. 7, 2005) (quoting *Battles v. Atchison*, 545 So. 2d 814, 815 (Ala. 1989)).

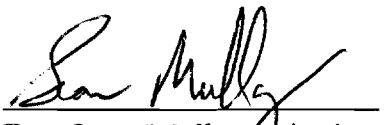
In this case, DOJ's proposed $12 million partial disgorgement of KeySpan's ill-gotten gains would be deposited in the United States Treasury, and will not inure to the benefit of the ratepayers directly harmed by KeySpan. KeySpan's wrongful conduct harmed consumers, and damaged the credibility of the markets, by wrongly inflating capacity prices. The cost may have totaled hundreds of millions of dollars. Given the high level of consumer harm, the proceeds of any settlement should be used to ameliorate the consumer harm KeySpan caused. Depositing the settlement

proceeds in the U.S. Treasury, as DOJ proposes, would be a manifestly unfair result. Accordingly, in the proper exercise of its equitable powers, the Court should direct that proceeds of the settlement be used to benefit the ratepayers that were directly and materially injured by KeySpan's anti-competitive conduct. The need for such relief is particularly acute in this case because consumers may not be able to obtain relief under Section 4 of the Sherman Act, and may not be able to obtain relief from FERC.

Accordingly, settlement proceeds should be credited to affected ratepayers (*i.e.*, ratepayers within the New York Independent System Operators' "Zone J"). This approach will directly address the harm KeySpan caused to consumers in New York City. If this approach is unworkable, either because it would not be cost-effective or would be unduly complex, then settlement proceeds should be used for energy efficiency programs within New York City administered by the New York State Energy Research and Development Authority. Promoting energy efficiency would reduce the demand for electricity. This, in turn, would both mitigate the market power of electric suppliers in New York City and help reduce electricity prices going forward. Such a use of settlement proceeds is particularly appropriate in this case, given the ratepayer harm KeySpan caused and the potential unavailability of other meaningful relief for those most directly affected by KeySpan's anti-competitive conduct.

Respectfully submitted,

Peter McGowan
General Counsel



By: Sean Mullany, Assistant Counsel
Of Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-7663

Dated: April 30, 2010
Albany, New York

Attachment: Affidavit of Thomas Paynter In Support of Comments of The Public Service Commission of The State of New York, (April 27, 2010).

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>PETITIONER<br><br>V.<br><br>KEYSPAN CORPORATION,<br><br>RESPONDENT. | AFFIDAVIT OF THOMAS PAYNTER IN SUPPORT OF COMMENTS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK<br><br>Civil Case No. 10-CIV-1415 |

STATE OF NEW YORK )
) ss.:
COUNTY OF ALBANY )

THOMAS PAYNTER, being duly sworn, deposes and says:

1. I am employed by the New York State Department of Public Service ("DPS" or "Department") as Supervisor of Regulatory Economics in the Office of Regulatory Economics.

2. I received a Ph.D. in Economics from the University of California at Berkeley (1985), with fields in econometrics and labor economics. I have a B.A. in Physical Science and a B.A. in Economics, also from the University of California at Berkeley (1975). I am a member of the American Economic Association.

3. From 1983 to 1986, I was an Assistant Professor of Economics at Northern Illinois University, where I taught graduate and undergraduate courses in economic theory. From 1986 to 1990, I was employed by the Illinois Commerce Commission as a Senior Economic Analyst in the Policy Analysis and Research Division; I was also a member of the Electricity Subcommittee of the National Association of Regulatory Utility Commissioners, and authored an article concerning coordination and efficient pricing for independent power producers, "Coordinating the Competitors," published by The Electricity Journal in November 1990. I joined the New York Department of Public Service in November of 1990.

4. My current responsibilities include analyzing competitive issues, efficient pricing, marginal costs, regulatory policies, and system planning. I am a member of a staff team responsible for analyzing and commenting upon the pricing rules of the New York Independent System Operator, Inc. (NYISO), which operates the New York transmission system. I have participated in numerous NYISO committee meetings related to energy and transmission pricing, system planning, and other issues.

5. I make this affidavit in support of the comments filed by the Public Service Commission of the State of New York ("PSC" or "Commission") pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), in response to the notice published in the *Federal Register* on March 4, 2010, in connection with this matter. U.S. Dep't of Justice, Antitrust Div., *United States v. Keyspan Corporation*,

Proposed Final Judgment and Competitive Impact Statement, 75 *Federal Register* 9946 (March 4, 2010).

6. DOJ states that the KeySpan Swap was executed on January 16, 2006, and was effective from May, 2006, through April, 2009. 75 Federal Register at 9950-51. According to DOJ, the effects of the swap continued only until March, 2008, because, as of March, 2008, the NYSPSC required KeySpan to bid its NYC capacity into the market at zero until KeySpan sold its Ravenswood plant. 75 Federal Register at 9951 & n. 2.

7. However, upon information and belief, the PSC's requirement that KeySpan bid its NYC capacity into the market at zero did not trigger the swap agreement's "regulatory out" clause. Therefore, upon information and belief, the swap continued in effect until April, 2008, when FERC lowered KeySpan's bid/price cap. Accordingly, the analysis below assumes the swap agreement remained in force during the Month of March, 2008. [Note that this assumption effectively reduces the estimate of the amount of KeySpan's net revenues/profits under the swap agreement because, during the month of March, 2008, the actual price of capacity was below the $7.57 per kW-month trigger under the swap agreement (discussed below). As a result, during the month of March, 2008, KeySpan would have been paying moneys to the financial services company ("FSC"), rather than receiving moneys from the FSC.

8. Under the KeySpan Swap, if the market price for capacity was above $7.57 per kW-month, the FSC would pay KeySpan the difference between the market

price and $7.57, times 1800 MW; ; if the market price for capacity was below $7.07, KeySpan would pay the FSC the difference, times 1800 MW. 75 Federal Register at 9950 (col. 3). Thus, a comparison of the actual market price for capacity during the period from May, 2006, through and including March, 2008, and the $7.57/kW-month "trigger" (or "strike") price for KeySpan, will reveal the total net revenues/profits KeySpan received from the FSC under the KeySpan Swap.[1]

9. Regarding the actual market prices of capacity during the period of the KeySpan Swap, KeySpan's bid caps were seasonally "shaped," in order to reflect higher summer prices, and lower winter prices, due to differences between summer and winter supply. For the summer 2006 period (*i.e.*, May-October 2006), the unforced capacity ("UCAP") spot price cleared at the level of KeySpan's bid cap of $12.71/kW-month.[2]

10. For the winter 2006-07 period (*i.e.*, November 2006-April 2007), the UCAP spot price cleared at KeySpan's bid cap of $5.84/kW-month.

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[1] KeySpan and the FSC likely incurred some costs in preparing the swap agreements (which would make their profits under the swap something less than their net revenues), but this analysis assumes those costs were not very significant.

[2] In describing the $7.57/kW-month and $7.07/kW-month "trigger" prices under the KeySpan and Astoria swap agreements, DOJ refers only to "the market price for capacity ...." *See, e.g.*, 75 Federal Register at 9950. More specifically, the "trigger" prices under the swap agreements referred to the actual "unforced capacity" spot market prices. Similarly, in describing actual market prices, my analysis refers to the actual unforced capacity ("UCAP") spot market clearing prices.

"[A] generator's unforced capacity (UCAP) is its installed capacity (ICAP) discounted or 'de-rated' by its forced outage rate (or equivalent forced outage rate demand (EFORd)). The forced outage rate equals the historical percentage of the generator's maximum output lost to forced outages when such output is demanded. The translation of installed into unforced capacity can be represented mathematically as follows: UCAP = ICAP x (1-EFORd) ...." *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 807 (D.C. Cir. 2007).

11. For the summer 2007 period (*i.e.*, May-October 2007), the UCAP spot price cleared at KeySpan's bid cap of $12.72/kW-month.

12. For the winter 2007-08 period, the spot price cleared at KeySpan's bid cap of $5.77/kW-month for 4 months (*i.e.*, November 2007-February 2008), and then cleared at the lower statewide prices of $1.05/kW-month during March, 2008, and at $0.75/kW-month during April, 2008.

13. The lower price during April, 2008 reflects the fact that FERC's new mitigation measures forced KeySpan and other New York City electricity suppliers to bid their capacity into the market at or near $0.

14. To compare the actual UCAP spot market prices to the swap prices of $7.57/kW-month (for KeySpan), and $7.07/kW-month (for the FSC), one can refer to the average spot price over the twenty-three month period of the KeySpan Swap (*i.e.*, May, 2006, through and including March, 2008). This consists of twenty-two months at KeySpan's bid cap, and one month (*i.e.*, March, 2008) at the lower statewide price of $1.05/kW-month.

15. Over those twenty-three months, the actual average UCAP spot price was $9.21/kW-month. Based on the difference between this amount and the threshold price specified under the swap agreement (*i.e.*, $7.57/kW-month), the revenues to KeySpan under the swap agreement were $1.64/kW-month, multiplied by the 1800 MW of UCAP covered by the swap agreement, and further multiplied by the

twenty-three month effective period of the swap agreement. This yields a total of revenues to KeySpan under the swap agreements of $67.8 million.

16. The FSC's corresponding agreement with Astoria specified that, if the market price for capacity was above $7.07 per kW-month, Astoria would pay the FSC the difference, times 1800 MW; if the market price was below $7.07, the FSC would pay Astoria the difference, times 1800 MW. 75 Federal Register at 9948.

17. The differential between the "trigger" prices under the two swap agreements (*i.e.*, $7.57/kW-month for KeySpan, and $7.07/kW-month for Astoria) represented the FSC's "stake" in the swap arrangement. Because the actual average UCAP spot market price (*i.e.*, $9.21/kW-month) exceeded both the "triggers" under the swap agreements, the FSC's total revenues can be calculated by multiplying that differential (*i.e.*, $0.50/kW-month) by 1800 MW, and further multiplying it by the twenty-three month effective period of the swap agreements. Multiplying these figures out yields total revenues to the FSC of $20.7 million.

18. The FSC's profits are potentially relevant because Astoria could have directly entered into a swap agreement with a load-serving entity serving New York City. If such agreement had a "trigger" price of $7.07, the load-serving entity would have realized revenues of $89M (*i.e.*, $67 million, plus $21 million). Such revenues would have inured to the benefit of ratepayers.

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Sworn to before me this
27th day of April, 2010.

Sean Mullany

Notary Public

SEAN MULLANY
Notary Public, State of New York
Regis. #02MU6180725
Qualified in Albany County
My Commission Expires January 14, 2012