DEPARTMENT OF JUSTICE

Antitrust Division

UNITED STATES v. MORGAN STANLEY

Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h), the United States hereby publishes below the comments received on the proposed Final Judgment in United States v. Morgan Stanley, Civil Action No. 1:11-CV-06875-WHP, which were filed in the United States District Court for the Southern District of New York on March 6, 2012, together with the response of the United States to the comments.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202-514-2481), on the Department of Justice's website 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, 500 Pearl Street, New York, New York 10007. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink
Director of Civil Enforcement

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

UNITED STATES OF AMERICA, Plaintiff,	Civil Action No.: 11-civ-6875 WHP
v.	Hon. William II. Pauley III
MORGAN STANLEY, Defendant.	

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

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), the United States files the public comments concerning the proposed Final Judgment in this case and the United States' response to those comments. After careful consideration, the United States continues to believe that the relief sought in the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the Federal Register, pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

The United States brought this lawsuit against Defendant Morgan Stanley on September 30, 2011, to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. In January 2006, Morgan Stanley Capital Group Inc. ("MSCG"), a subsidiary of defendant Morgan Stanley,\1\ executed agreements with KeySpan Corporation ("KeySpan") and Astoria Generating Company Acquisitions, L.L.C. ("Astoria") that would effectively combine the economic interests of the two largest competitors in the New York City electric capacity market. The likely effect of this combination was to increase capacity prices for the retail electricity suppliers who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity.

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

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

II. THE COMPLAINT AND THE PROPOSED FINAL JUDGMENT

A. Background

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

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

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

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

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

The revenues from Astoria's capacity sales that KeySpan obtained through the Morgan/KeySpan Swap effectively eliminated KeySpan's incentive to compete for sales in the same way a purchase of Astoria or a direct agreement between KeySpan and Astoria would have done. As a result, KeySpan consistently bid its capacity into the capacity auctions at the highest allowed price and, despite the addition of significant new generating capacity in New York City, the market price of capacity did not decline.\4\ This result would not have been achieved without Morgan's participation.

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

B. United States v. KeySpan

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

C. The Morgan Complaint and proposed Final Judgment

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

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

The Tunney Act calls for the Court, in making its public interest determination, to consider certain factors relating to the competitive impact of the judgment and whether it adequately remedies the harm alleged in the complaint. See 15 U.S.C. § 16(e)(1)(A) & (B) (listing factors to be considered).

This public interest inquiry is necessarily a limited one, as the United States is entitled to deference in crafting its antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy. See generally United States v. Microsoft Corp., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995); United States v. SBC Commc'ns, 489 F. Supp. 2d 1, 12-17 (D.D.C. 2007). Under the Tunney Act, the "Court's function is not to determine whether the proposed [d]ecree results in the balance of rights and liabilities that is the one that will best serve society, but only to ensure that the resulting settlement is within the reaches of the public interest." KeySpan, 763 F. Supp. 2d at 637 (quoting United States v. Alex Brown & Sons, 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (quoting Microsoft, 56 F.3d at 1460) (emphasis in original), aff'd sub nom, United States v. Bleznak, 153 F.3d 16 (2d Cir. 1998)).

With respect to the scope of the complaint, the Tunney Act review does not provide for an examination of possible competitive harms the United States did not allege. See, e.g., Microsoft, 56 F.3d at 1459 (holding that it is improper to reach beyond the complaint to evaluate claims that the government did not make).

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

III. SUMMARY OF COMMENTS

The United States received formal comments from the Public Service Commission of the State of New York ("PSC") and from AARP, a nonprofit organization that helps people over the age of fifty.\5\ At the outset, both comments commend the United States for enforcing the antitrust laws to protect the integrity of New York capacity markets.

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

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

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

IV. RESPONSE TO THE COMMENTS

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

A. The Proposed Remedy is Appropriate and Deters Anticompetitive Conduct

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

\6\ AARP requests access to the derivative agreements. AARP Cmts at 21. The agreement that the United States alleged violated the Sherman Act — the Morgan/KeySpan Swap — is publicly available as an attachment to KeySpan's January 18, 2006 Form 8-K filing with the SEC in which KeySpan announced that it had entered into the transaction, available at http://www.sec.gov/Archivesiedgar/data/1062379100010623790600004/ex101-8kjan2406.txt.

The proposed remedy constitutes significant and meaningful relief. In its action against KeySpan, the United States sought disgorgement under the Sherman Act for the first time. In approving that settlement, this Court recognized that the disgorgement by a power generator engaged in an alleged anticompetitive scheme would become "an important marker for enforcement agencies and utility regulators alike." KeySpan, 763 F. Supp. 2d at 642. In this case, the United States seeks disgorgement from the financial services firm that facilitated the transaction. Just as the KeySpan remedy created an important marker for disgorgement from the principal competitor in an anticompetitive scheme, the proposed remedy in this unprecedented case demonstrates the United States' resolve to pursue financial services firms that leverage derivative agreements for anticompetitive ends, and the antitrust liability that may result from such enforcement actions. Financial services firms contemplating the use of such anticompetitive agreements will now recognize the prospect of Sherman Act liability and disgorgement, thereby diminishing their appetite for and deterring this illegal conduct. Indeed, the filing of the proposed settlement has already prompted legal commentators to warn about the enforcement issues raised by this case, including the duty of financial services firms to consider the implications of their agreements on competition in the underlying markets.\7\

\7\ See, e.g., Mary Arm Mason & William Monts III, Morgan Stanley to Disgorge Profits Earned from Anticompetitive Derivative Agreements, Hogan Lovells (Dec. 9, 2011) (reporting that "[Ole key points from the Morgan Stanley case for financial services clients are: (1) the DOJ is prepared to use Section 1 to outlaw financial arrangements aimed at producing anticompetitive effects, (2) the DOJ will take enforcement action against the financial services companies that facilitate these arrangements, even though they do not participate in the underlying physical commodity market, and (3) pure financial players may have a duty to examine the competitive effects of their arrangements on the underlying markets"), available at http://emailcc.com/rv/ff000213bdac60e42b089aa3f84a8b12fdc2a196; Barry Nigro & Maria Cirincione, DOJ Orders Financial Services Firm to Disgorge Profits from Derivative Contract, Fried Frank Antitrust & Comp. L. (Oct. 17, 2011)(reporting that this case "puts firms on notice that any type of agreement facilitating anticompetitive conduct is subject to scrutiny and that the DOJ may seek penalties against indirect third party participants, as well as direct competitors"), available at http://www.friedfrank.com/siteFiles/Publications/Final%2010-17-11%20D0J%200rders%20Financial%20Services%20Firm%20to%20Disgorge%20Profits%20from%20Derivative%20Contract.pdf.

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

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

\9\ Though a legitimate off-setting counter-party would likely not have agreed to the strike price as high as the $7.57 per kW-month found in the Morgan/KeySpan Swap, Morgan would nonetheless have earned revenues from a legitimate off-setting transaction so long as it exceeded the $7.07 per KW-month price in the Astoria Hedge. In the alternative, Morgan would also dispute that the entire $21.6 million earned under both agreements is cognizable as ill-gotten gains. See CIS at note 4.

The United States recognizes that it has not proved its case at trial and that "a court considering a proposed settlement does not have actual findings that the defendant[] engaged in illegal practices, as would exist after a trial." SBC Commc'ns, 489 F. Supp. 2d at 15 (citing Microsoft, 56 F.3d at 1461). The $4.8 million disgorgement amount is the product of settlement negotiations and accounts for litigation risks and costs. It is appropriate to consider litigation risk and the context of a settlement when evaluating whether a proposed remedy is in the public interest.\10\ As this Court has recognized "Mlle adequacy of the disgorgement amount must be evaluated in view of the Government's decision to settle its claims and seek entry of the consent decree. When a litigant chooses to forgo discovery and trial in favor of settlement, full damages cannot be expected." \11\

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

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

Here, the litigation costs and risks are not insignificant. The United States would have had to establish at trial that the KeySpan Swap caused anticompetitive effects in the New York capacity market, a complex endeavor that would have required substantial fact and expert testimony and evidence. And, in the present case against Morgan Stanley, the United States would have had the additional burden of establishing the liability of a financial services firm for using a derivative agreement to facilitate an anticompetitive effect even though the company itself was not a participant in the underlying market. Assuming the United States prevailed on liability, there would be additional risk, as discussed above, in establishing the proper disgorgement amount. While the United States is confident that it could prevail on these issues at trial, the settlement obviates the risk — and significant cost — of litigation.

The PSC and AARP also argue that the reasonableness of the proposed remedy should be evaluated in light of the ratepayer harm caused by Morgan. PSC Cmts at 13-15; AARP Cmts at 5, 11, 16. In essence, they seek a disgorgement amount that takes into account the losses suffered by retail electricity consumers. As this Court recognized in KeySpan, such comments "fail to comprehend the nature of the disgorgement remedy. The 'primary purpose of disgorgement is not to compensate investors,' but rather to divest a wrongdoer of the proceeds of their misconduct." KeySpan, 763 F. Supp. 2d at 642 (quoting SEC v. Cavanaugh, 445 F. 3d 105, 117 (2d Cir. 2006)). Indeed, the extent of market harm is not relevant to the disgorgement calculation; once a violation has been established, a district court "possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by [the violation]." \12\

\12\ SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985). See also SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987) ("Whether or not [any victims] may be entitled to money damages is immaterial [to disgorgement].").

In this case, the source of Morgan's ill-gotten gains is the revenues it earned under the derivative agreements. Indeed, the derivative agreements represent Morgan's only source of revenue in this case. Morgan did not participate in the actual capacity market and thus it did not earn any auction revenues, much less pocket consumer overpayments. Moreover, as the United States explained in the KeySpan proceedings,\13\ an inquiry into consumer harm would require the Court to assess the price of capacity that would have prevailed absent the Swap, a problematic exercise given the uncertainty of determining market outcomes absent the Swap. Accordingly, given the difficulty of definitively estimating the harm to the market and its irrelevance to the questions relating to the adequacy of the disgorgement remedy, AARP's assertion that the United States is obligated to provide estimates of total economic harm and profits received by all market participants resulting from the alleged violation should be rejected.

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

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

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

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

Government antitrust suits are governed by a specialized statutory regime that provides no basis to require that consent decrees include either a finding or an admission of liability.\15\ Congress has designed the remedial provisions of the antitrust laws to encourage consent judgments, which allow the government to obtain relief without the "time, expense and inevitable risk of litigation." United States v. Armour and Co., 402 U.S. 673, 681 (1971). Thus, for nearly a century, the antitrust laws have expressly limited the ability of private plaintiffs seeking treble damages to rely on consent decrees entered in government cases. Section 5 of the Clayton Act, originally enacted in 1914,\16\ provides that litigated final judgments establishing a violation in civil or criminal cases "brought by or on behalf of the United States under the antitrust laws" shall be "prima facie evidence" against the defendant in subsequent private litigation, but the statute specifies that this provision does not apply to "consent judgments or decrees entered before any testimony has been taken." 15 U.S.C. § 16(a). Under this regime, a defendant can elect to accept a consent decree and avoid the risk of a litigated judgment that would seriously weaken its position in follow-on private litigation. Congress provided this exception to the Clayton Act's prima facie evidence provision "in order to encourage defendants to settle promptly government-initiated antitrust claims and thereby to save the government the time and expense of further litigation." United States v. National Ass 'n of Broadcasters, 553 F. Supp. 621, 623 (D.D.C. 1982) (collecting cases). Requiring admissions or findings of liability as a prerequisite to entering a consent decree would undercut Congress's purpose and contravene the public interest in allowing the government to obtain relief without the risk and delay of litigation.

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

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

Congress confirmed its continuing recognition of the importance of consent decrees when it amended the Clayton Act in 1974 to specify procedural requirements governing a district court's determination of whether entry of a proposed consent decree in a government antitrust case is in the public interest. Antitrust Procedures and Penalties Act, § 2, Pub. L. No. 93-528, 88 Stat 1706 (1974), codified at 15 U.S.C. § 16(b)-(h) ("Tunney Act"). The repeated references to the "alleged" violation in the language of the Tunney Act strongly suggest that Congress did not expect decrees arising under the antitrust laws to contain admissions of liability.\17\ And the legislative history unambiguously demonstrates Congress' understanding that government antitrust settlements typically occur without an admission or finding of liability. The Senate Report accompanying S. 782, the bill that became the Tunney Act, explains:

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

The corresponding House Report is equally clear on the point: "Ordinarily, defendants do not admit to having violated the antitrust or other laws alleged as violated in complaints that are settled."\19\ Moreover, both reports plainly reveal that Congress not only understood the practice of entering into such consent decrees, but encouraged it, considering them a "legitimate and integral part of antitrust enforcement" and urging that they be retained "as a substantial antitrust enforcement tool."\20\

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

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

\19\ H. Rep. No. 1463, 93 Cong., 2d Sess. (1974) ("H. Rep.") at 6, reprinted at 1974 U.S. Code Cong. & Admin. News 6535, 6536-37. See also id. ("Present law, 15 USC § 16(a), encourages settlement by consent decree as part of the legal policies expressed in the antitrust laws. . . . The bill preserves these legal and enforcement policies. . . .").

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

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

\21\ The proposed Final Judgment in this case states that the United States and defendant Morgan have "consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, for settlement purposes only, and without this Final Judgment constituting any evidence against or an admission by Morgan for any purpose with respect to any claim or allegation contained in the Complaint." PFJ at 1. Equivalent statements are conventional in government antitrust consent decrees negotiated pre-trial.

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

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

Following enactment of the Tunney Act, courts have expressly recognized the Congressional intent to preserve the policy of encouraging antitrust consent decree expressed in that legisilation.\24\ Only once, to our knowledge, has a district court objected to a proposed consent decree on the basis that a defendant had not admitted liability or wrongdoing, but this objection was specifically rejected on appeal. In United States v. Microsoft, the district court refused to enter the proposed consent decree in part because the defendant denied "that the conduct charged in the Government's complaint to which it has consented, violates the antitrust laws."\25\ The D.C. Circuit reversed, expressly holding "unjustified" the district court's criticism of the defendant "for declining to admit that the practices charged in the complaint actually violated the antitrust laws."\26\ The Court of Appeals emphasized that the "important question is whether [the defendant] will abide by the terms of the consent decree regardless of whether it is willing to admit wrongdoing.''\27\ We are aware of no government antitrust case in which a court refused to enter a consent decree because a defendant had failed to admit liability.

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

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

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

\27\ Id.

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

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

AARP argues that Morgan's $4.8 million disgorgement payment should be made to entities other than the U.S. Treasury in order to benefit the electricity customers in New York City who paid higher prices as a result of Morgan's conduct. The United States shares AARP's concern for the New York City ratepayers and, indeed, brought this case and sought disgorgement in order to deter financial services firms from entering into financial arrangements that cause anticompetitive effects. The United States has carefully considered the suggested alternative uses for the disgorgement proceeds but has determined that payment to the U.S. Treasury is the most appropriate result in this circumstance.

The alternative distribution plan proposed by AARP seeks, in effect, to restore funds to ratepayers. As this Court recognized in KeySpan, 763 F. Supp. 2d at 643. a remedy that seeks to reimburse funds to New York City ratepayers would raise questions relating to the filed rate doctrine, which bars remedies (such as damages) that result, in effect, in payment by customers and receipt by sellers of a rate different from that on file for the regulated service. See generally Square D Co. v. Niagara Frontier, 476 U.S. 409, 423 (1986). Indeed, a lawsuit filed by private plaintiffs seeking damages from KeySpan and Morgan based on the Swap has been dismissed on the ground that the action is barred as a matter of law under the filed rate doctrine.\28\

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

In this case, the United States specifically chose to seek disgorgement, rather than restitution, as a remedy for this violation. As discussed in the CIS, disgorgement is particularly appropriate on the facts of this case to fulfill the remedial goals of the Sherman Act. CIS at 9-10. Disgorgement also provides finality, certainty, avoidance of transaction costs, and potential to do the most good for the most people. As in KeySpan, the proposed remedy here is well within the reaches of the public interest.\29\

\29\ KeySpan, 763 F. Supp. 2d at 643. Moreover, the Miscellaneous Receipts Act ("MRA") provides that members of the Executive Branch (including employees of the Department of Justice) who receive money for the United States are to remit such funds directly to the Treasury. 31 U.S.C. § 3302(b) (2006). A purpose of the statute is to protect Congress' appropriations authority by ensuring that money collected from various sources cannot be used for programs not authorized by law. The proposed remedy avoids any issues of compliance with the MRA.

VI. CONCLUSION

After careful consideration of the public comments, the United States remains of the view that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and that its entry would therefore be in the public interest.

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

Dated: March 6, 2012

Respectfully submitted,

/s/

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AARP COMMENTS IN OPPOSITION TO PROPOSED SETTLEMENT AND IN SUPPORT OF FURTHER PROCEEDINGS

Preliminary Statement

On September 30, 2011, the United States Department of Justice Antitrust Division ("DOT') filed a Complaint commencing this civil antitrust action against defendant Morgan Stanley. On the same day, DOJ filed a proposed Final Judgment, agreed to by Morgan Stanley, which would settle the case subject to court review and approval, along with a Competition Impact Statement ("CIS") in support of the proposed settlement.\1\ A notice inviting public comment \2\ on the proposed settlement of this action has been issued, as is required by the Tunney Act.\3\ AARP submits these comments to DOJ in response to the notice.

\1\ The court papers are available at http://www.justice.gov/atr/cases/morgan.html.

\2\ 76 Federal Register, No. 196 (Tuesday, October 11, 2011).

\3\ The Antitrust Procedures and Penalties Act (the "Tunney Act"), 15 U.S.C. § 16(e)-(f), requires an opportunity for public comment prior to a court's review of any proposed settlement between the government and an alleged antitrust law violator.

AARP is a nonpartisan, nonprofit organization that helps people over the age of 50 to exercise independence, choice, and control in ways beneficial to them and to society as a whole.\4\ AARP has millions of members, including more than 2,500,000 members who reside in New York state. AARP is greatly concerned about the threats to health and safety of vulnerable citizens caused by New York's high electricity costs.\5\ Because the cost of utilities has skyrocketed, many low and middle-income families and older people must now choose between paying utility bills and paying for other essentials such as food and medicine. AARP works to protect consumers from excessive utility rates and charges.

\4\ For more information about AARP see http://www.aarp.org/.

\5\ New York residential electric rates are the highest in the continental United States. Energy Information Agency, Electric Power Monthly for August, 2011, Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State, table 5.6.A, (Nov. 2011). Available at http://www.eia.gov/electricity/monthly/index.cfm

Many AARP members Were adversely affected by the antitrust violations alleged in this action, which artificially increased prices in the electric capacity markets of the New York Independent System Operator ("NYISO"). Although the excessive charges were paid in the first instance by load-serving utilities such as Con Edison, they were directly passed on to utility customers. Utility customers had no way to escape payment of the inflated charges when their monthly electric bills were adjusted to include the costs.\6\

\6\ "Every Con Ed customer in the five boroughs overpaid an average total of at least $40 over two years during a price-fixing scheme set up by the owners of a giant Queens power plant, the feds charge in a court case that would let the alleged gougers get away with most of the gains." Bill Sanderson, $157 M Power Abuse,N. Y. Post, March 9, 2010, available at http://www.nypost.com/f/print/news/local/power_abuse_SgLN9psbhjopRMEGU68fgK

As consumers, AARP members depend upon the protection of the antitrust laws against the unlawful exercise of monopoly or market power, such as occurred in this case. They must also rely upon the vigorous enforcement of the antitrust laws by DOJ and the courts.

AARP commends DOJ for challenging Morgan Stanley's use of financial derivatives to facilitate gaming by Keyspan and Astoria in the NYISO electricity auctions. AARP urges, however, that the proposed settlement be withdrawn and revised, and that further proceedings be held.

The Complaint and the Proposed Settlement

The Complaint alleges that Morgan Stanley violated Section 1 of the Sherman Act \7\ by entering into separate financial derivative contracts with two major competing sellers in the NYISO electric capacity market, effectively combining their economic interests. The Morgan Stanley derivatives reduced the utilities' risk of bidding strategically to raise the clearing price in the

NYISO market, which is paid to all sellers. As a consequence, higher prices were paid for capacity by retail utilities, and the costs were passed through to consumers.

\7\ The Sherman Act provides that Ielvery contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

Under Morgan Stanley's derivative contract with the largest seller in the relevant market, Keyspan Corporation ("Keyspan"), Morgan Stanley paid Keyspan whenever NYISO auction prices exceeded a fixed level ($7.57/MW). This rewarded Keyspan when it set the NYISO clearing price at the maximum. Even if all of its capacity was not sold at its high price, Keyspan was assured of benefitting from it through the derivative contract. Under Morgan Stanley's parallel derivative contract with Astoria, Morgan Stanley guaranteed Astoria a fixed floor price for all its capacity sales, regardless of the prices established in the NYISO auctions, and Astoria agreed to pay Morgan Stanley whenever the NYISO auction price exceeded the floor price in the derivative contract. Morgan Stanley could take profits reaped by Astoria due to the artificially high price, and give them to Keyspan. The derivatives thus worked to insure Keyspan against lost profits if it lost some sales by bidding high, at the market rate cap. They assured Astoria that it would receive a known fixed price for all of its capacity, regardless of the outcome of the NYISO auctions.\8\ Morgan Stanley's net profit from the derivatives was $21.6 million.\9\

\8\ There was little risk of low prices that would require Keyspan to pay Morgan Stanley and Morgan Stanley to pay Astoria under the derivatives. Keyspan was able to set the clearing price because at least some of its capacity would be needed, and so it could confidently demand the ceiling price for all or most of it, confident that when some of its expensively priced capacity went unsold, it would receive payments from Morgan Stanley in accordance their derivative agreement. Keyspan "consistently bid its capacity at its cap even though a significant portion of its capacity went unsold." Complaint, p. 9, ¶ 32.

\9\ Complaint, p. 9, ¶ 35.

The NYISO pays the market clearing price to all sellers, including those who offered capacity at a lower price. As a result, the total economic damage to electric customers exceeds the ill-gotten gains of Morgan Stanley and the two utilities. There is no quantification or estimate of this damage to the public and to customers in the Complaint or other papers in the record. One major capacity buyer, Consolidated Edison Company of New York, Inc. ("Con Edison"), estimated the inflated capacity costs to be approximately $159 Million in 2006.\10\

\10\ Of that amount, approximately $119 million was paid by New York City area utilities, and $39 million was paid by utilities in the rest of the state. See Motion to Continent of Consolidated Edison Company of New York, Inc., etc., Re New York Independent System Operator, FERC Docket No. ER07-360 (Jan. 27, 2009), P. 2 and Affidavit of Stuart Nachmias, ¶¶ 13-14, available at http://elibrary.ferc.gov/idmws/common/opennatasp?filelD=11236060. The amount of capacity overcharges in 2007 and until NYISO capacity market rules were changed in early 2008 were not estimated.

Simultaneously with the filing of the complaint, and without further proceedings, DOJ and Morgan Stanley filed a proposed Final Judgment, which embodies their agreement to settle the case. Key provisions of the Final Judgment are:

• Morgan Stanley admits no wrongdoing and the lawsuit is terminated,

• Morgan Stanley agrees to disgorge to the government only $4.8 million of its $21.6 million profit from its derivative contracts.

Standard of Review

The Tunney Act establishes the procedure and standard of review applicable• to the proposed settlement of an antitrust case brought by DOJ:

(1) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, 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 U.S.C. § 16(e)(1). (Emphasis added). The Tunney Act standard was recently applied in the context of the DOJ settlement with Keyspan, involving the same derivative contract:

[T]he Tunney Act allows courts to weigh, among other things, the relationship between the allegations set forth in the government's complaint and the remedy imposed by the proposed final judgment, whether the proposed final judgment is overly ambiguous, whether the enforcement mechanisms it employs are adequate, and whether the proposed final judgment may affirmatively prejudice third parties. See United States v. Microsoft Corp., 56 F.3d 1448, 1461-62 (D.C.Cir.1995) (per curiam). The court may not, however, "make a de novo determination of facts and issues" in conducting its public interest inquiry. United States v. Western Elec. Co., 993 F.2d 1572, 1577 (D.C.Cir.), cert. denied, 510 U.S. 984, 114 S.Ct. 487, 126 L.Ed.2d 438 (1993) (internal quotation and citation omitted). Rather, "jtjhe balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." Id. (internal quotation and citation omitted). The court should therefore reject the proposed final judgment only if "it has exceptional confidence that adverse antitrust consequences will result - perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency." Microsoft, 56 F.3d at 1460 (internal quotations and citation omitted).

In conducting its inquiry, the court is not required to hold a hearing or conduct a trial. See 119 Cong.Rec. 24,598 (1973); United States v. Airline Tariff Pub. Co., 836 F.Supp. 9, 11 n. 2 (D.D.C. 1993). 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. A court may, in its discretion, invoke additional procedures when it determines such proceedings may assist in the resolution of issues raised by the comments. See H.R.Rep. No. 93-1463, at 8-9 (1974), reprinted in U.S.S.C.A.N. 6535, 6539.

United States v. Keyspan, 763 F.Supp.2d 633, 637 - 638 (S.D.N.Y. 2011) ("Keyspan"), quoting United States v. Enova Corp., 107 F.Supp.2d 10, 17 (D.D.C.2000) (emphasis added). It is not necessary for the relief proposed in a settlement to be a perfect remedy for the alleged antitrust violation, but there must be a factual basis to support any DOJ conclusions that the remedies proposed are reasonably adequate.\11\

\11\ There must be "a factual foundation for the government's decision such that its conclusions regarding the proposed settlement are reasonable." United States v. Keyspan Corp., 763 F. Supp. 2d 633,637-38 (S.D.N.Y. 2011) (quoting United States v. Abitibi-Consolidated Inc., 584 F. Supp. 2d 162, 165 (D.D.C. 2008).

The Keyspan decision, quoted above, misapprehends the standard of review. The Tunney Act not only "allows" courts to consider the listed factors in its review. It requires such consideration. The Tunney Act was amended in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 specifically to clarify that reviewing courts "shall" (instead of "may") take each of the *enumerated factors into account in their review of a proposed antitrust case settlement. 15 U.S.C. §§ 16(e)(1)(A) & (B).

AARP demonstrates below that the proposed settlement fails to pass muster under the standards for approval of DOJ antitrust settlements. DOJ should withdraw its consent to the settlement, and conduct further proceedings to develop the record and proceed to trial, if a renegotiated agreement which addresses the concerns in these comments cannot be made.

Argument

1. The Proposed Settlement is Not in the Public Interest Because it Provides No Benefit to Customers Harmed.

The Morgan Stanley/Keyspan/Astoria derivatives supported gaming of the NYISO market, causing very serious financial harm to customers by artificially inflating the NYISO market prices for electric capacity. The DOJ Complaint and Competitive Impact Statement ("CIS") very prominently state that the "likely effect" of the alleged antitrust violation "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." Complaint, p. 1 -2, CIS 1-2 (emphasis added). The prayer for relief in the DOJ Complaint includes a request for equitable relief to "dissipate the anticompetitive effects of the violation." Complaint If 40. The only "anticompetitive effects" identified in the record are the artificial increase in NYISO prices and the higher prices paid by consumers.

The record at this stage contains no evidence of the magnitude of the injury to consumers, including many AARP members living in the New York City area. As previously discussed, there are indications outside the record that the price of capacity was artificially raised by approximately $157 million in 2006 by the gambit supported by the Morgan Stanley derivatives, and the term of the agreements went beyond 2006. The New York State Public Service Commission stated in its comments on the settlement of the Keyspan case arising from the same transactions that the harm to consumers "could have totaled hundreds of millions of dollars. . . ."\12\ The CIS does not attempt to address the magnitude of this harm to customers, which far exceeded the total profits of the participants in the scheme to raise NYISO prices.\13\ As a consequence, the record is insufficiently developed for a reviewing court to test whether the remedy proposed is appropriate.

\12\ NYPSC Comments in United States v Keyspan, available at http://www.justice_gov/atr/cases/f259700/259704-5.htm

\13\ The total harm is greater than the profits because under NYISO market rules, artificially high prices achieved by participants in the scheme were paid to all sellers.

Under the proposed settlement there is not one penny for the injured consumers. Instead, the entire $4.8 million of monetary relief is to be paid to the United States Treasury. This does nothing to address the injury to those most directly harmed, the electric customers whose bills were artificially increased. There is no explanation in the CIS of why this is so.

The Tunney Act requires DOJ, in its CIS, to provide "a description and evaluation of alternatives to such proposal actually considered by the United States." 15 U.S.C. § 16(b)(6). The CIS, however, contains no description or evaluation of alternative relief that would provide at least some benefit to the injured customers. Any claim by DOJ that equitable relief for the benefit of injured consumers was never "actually considered" would not be credible. In the Keyspan case, involving the same derivative agreement, the settlement also provided no relief to consumers. The absence of any equitable relief for consumers drew vigorous protest in that case, in the comments of the New York State Public Service Commission, the New York State Consumer Protection Board, the City of New York, Con Edison, and AARP. Surely DOJ would at least have considered, however briefly, whether to seek some measure of relief for electric customers who suffered from the wrong.

AARP expects that DOJ, in its response to these comments, will cite the recent court approval of the Keyspan settlement, which lacked any relief to customers. That, however, does not bar inclusion of such relief in the settlement of this case.

In rejecting requests for equitable relief to consumers the court in the Keyspan case relied upon a perceived "filed rate" barrier and potential "transaction costs" of administering monetary relief to customers, stating:

Finally, this Court rejects the notion that the Consent Decree should only be approved if the disgorged proceeds are returned to New York City consumers. While such relief might be optimal, payment of the disgorged proceeds to the Treasury is nevertheless "within the reaches of the public interest." Alex. Brown, 963 F. Supp. at 238 (quotations omitted). It can be effectuated without incurring transaction costs and inures to the public benefit. See Sec. & Exchange Commin v. Bear, Steams & Co. Inc:, 626 F. Supp. 2d 402,419 (S.D.N.Y. 2009) (answering "the question of how [disgorged money] can be used to do 'the greatest good for the greatest number of people' by ordering its transfer to the "Treasury to be used by the Government for its operations").

Moreover, the Government raises valid concerns regarding potential violation of the filed-rate doctrine.

"The filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable. Simply stated, the doctrine holds that any 'filed rate' — that is, one approved by the governing regulatory agency is per se reasonable and unassailable in judicial proceedings brought by ratepayers." Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17,18-19 (2d Cir. 1994); see also Keogh v. Chi. & Northwestern Ry. Co., 260 U.S. 156, 163 (1922) (holding that the filed rate doctrine bars recovery for antitrust damages against carriers colluding to set artificially high shipment rates). In view of that prohibition, return of the disgorged proceeds to New York City electricity customers could circumvent the filed-rate doctrine. A court must extend "deference to the Government's evaluation of the case and the remedies available to it." Alex. Brown, 963 F. Supp. at 239.

United States v. Keyspan Corp., 763 F. Supp. 2d 633, 643 (S.D.N.Y. 2011) (S.D.N.Y 2011) (emphasis added).

This case does not involve any utility rate filed by Morgan Stanley. It involves profits extracted from large numbers of customers by sellers using Morgan Stanley's services and derivative instruments as tools. Thus the "filed rate" rationale for not providing any relief to customers, perceived by the court to be a barrier in Keyspan,\14\ clearly is not applicable here.

\14\ At issue was Keyspan's $48 million profit from its derivative contract with Morgan Stanley. As the contract was neither filed nor part of Keyspan's rates, which are set by the NYISO in its auctions, applicability of the "filed rate" doctrine to customer relief in that case is questionable.

The transaction cost issue perceived to be a barrier to customer relief in Keyspan is also easily hurdled. Just as utilities paid artificially inflated NYISO charges for capacity and passed those charges on to their customers, utilities can pass on equitable monetary relief intended for the benefit of their customers in the normal course of business without excessive transaction costs. For example, Con Edison passes on variations in capacity costs to its customers every month, in monthly rate adjustments, through its "Market Adjustment Clause." The Market Adjustment Clause takes into account 36 variable factors every month, including "(8) certain NYISO-related charges and credits. . . .\15\ is Equitable monetary relief from the inflated NYISO charges could be provided as a credit to customers in the normal course of making rate adjustments. Refunds to utility customers relating to past overcharges are also a well-established remedy. Section 113 of the New York Public Service Law provides:

\15\ Con Edison Electric ServiceTariff, General Information, Part VII, A(1)(a)(8), available at http://www.coned.com/documents/elec/159-164a.pdf.

2. Whenever any public utility company or municipality, whose rates are subject to the jurisdiction of the commission, shall receive any refund of amounts charged and collected from it by any source, the commission shall have power after a hearing, upon its own motion, upon complaint or upon the application of such public utility company or municipality, to determine whether or not such refund should be passed on, in whole or in part, to the consumers of such public utility company or municipality and to order such public utility company or municipality to pass such refunds on to its consumers, in the manner and to the extent determined just and reasonable by the commission.

The New York State Public Service Commission supported the return of overcharges as equitable relief to customers in Keyspan. Surely the Public Service Commission would cooperate, if necessary in the oversight of monetary relief intended for utility customers when a provision for such relief is contained in an antitrust case settlement.

In sum, unlike Keyspan, there is no "filed rate" barrier in this case, and AARP has demonstrated that consumer benefits could be efficiently administered without the speculative transaction costs feared in Keyspan.
The proposed remedy allowing the government to receive all the profits that Morgan Stanley agrees to cede, without consideration of the amount of harm suffered by customers and without any equitable relief to the customers, is not equitable and is not in the public interest.

2. The CIS Should be Withdrawn or Amended by DOJ to Support its Reasons for Termination of the Action with No Finding of Wrongdoing by Morgan Stanley.

As required by the Tunney Act, DOJ filed a Competitive Impact Statement ("CIS")\16\ in which it sets out the facts of the case, its reasoning and its conclusions in support of the settlement. The DOJ Antitrust Division Manual, 4th Ed., states that in a CIS, "[a]ll material provisions of the proposed judgment should be discussed." Id., at IV-57. Notably missing from the CIS in this case, however, is any discussion by DOJ of the critical provision which allows termination of the case with no admission of any wrongdoing by Morgan Stanley. The proposed final judgment states that Morgan Stanley:

\16\ The CIS is available at http://www.justice.gov/atr/cases/f275800/275857.pdf

consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, for settlement purposes only, and without this Final Judgment constituting any evidence against or an admission by Morgan for any purpose with respect to any claim or allegation contained in the Complaint...

Proposed Final Judgment, p. 1. The importance of this provision letting Morgan Stanley off the hook is underscored by the Complaint, in which DOJ demands "What the Court adjudge and decree that the Morgan/Keyspan Swap 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." Complaint, ¶39. Also, DOJ makes numerous references in the CIS to Morgan Stanley's conduct as having constituted a violation of the Sherman Act:

> The United States brought this lawsuit against Defendant Morgan Stanley ... to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. [CIS 1]
>
> The proposed Final Judgment remedies this violation. . . [CIS 2].
>
> Disgorgement will deter Morgan and others from future violations of the antitrust laws. [CIS 2]
>
> [D]isgorgement will effectively fulfill the remedial goals of the Sherman Act to "prevent and restrain" antitrust violations as it will send a message of deterrence to those in the financial services community considering the use of derivatives for anticompetitive ends. [CIS 9]

Despite these assertions by DOJ in its CIS that there were violations of the law, it is the Final Judgment that counts most. The Final Judgment affirmatively disavows any finding or admission that the law was violated by Morgan Stanley. There is no explanation or factual basis in the CIS to support DOJ's abandonment in the Final Judgment of the primary object of the action. It is incumbent upon DOJ to withdraw and amend its CIS to include its rationale for ending the case with no finding or admission that Morgan Stanley violated the antitrust laws, and with no commitment by Morgan Stanley that it will not engage in similar conduct in the future. The public should then be allowed an additional opportunity to respond to any amended or new CIS.

With no finding that Section 1 of the Sherman Act is violated by the use of financial derivatives to backstop risks when sellers game electricity markets, no one, including Morgan Stanley, really knows whether this gambit is actually illegal. As a result, Morgan Stanley and any other future wrongdoers will still lack scienter, an essential element for criminal sanctions under Section 2 of the Sherman Act. Thus, future wrongdoers can try the gambit again and need be concerned only about trivial civil sanctions.

3. DOJ Should Withdraw its Consent to the Settlement or Amend its CIS to Provide Support for its Conclusion that the Disgorgement Proposed in this Case will be a Deterrent.

Disgorgement of profits is one of the equitable remedies available to address violations of the Sherman Act. United States v. Keyspan Corp., 763 F. Supp. 2d 633, 638-641 (SDNY 2011). DOJ repeatedly emphasizes the settlement's requirement that Morgan Stanley disgorge $4.8 million of its profits from the derivatives, claiming this payment to the government would serve as a deterrent:

> Disgorgement will deter Morgan and others from future violations of the antitrust laws. [CIS 2]

The proposed Final Judgment requires Morgan to disgorge profits gained as a result of its unlawful agreement restraining trade. Morgan is to surrender $4.8 million to the Treasury of the United States. [CIS 8]

* * * *

Requiring disgorgement in these circumstances will thus protect the public interest by deterring Morgan and other parties from entering into similar financial agreements that result in anticompetitive effects in the underlying markets, or from otherwise engaging in similar anticompetitive conduct in the future. [CIS 8]

A disgorgement remedy should deter Morgan and others from engaging in similar conduct and thus achieves a significant portion of the relief the United States would have obtained through litigation . . . [CIS 11]

There is no evidence in the record, however, to support these broad claims that the settlement crafted by Morgan Stanley and DOJ would have any deterrent effect on anyone.

According to the CIS, "Morgan earned approximately $21.6 million in net revenues from the Morgan/Keyspan Swap and the Morgan/Astoria Hedge." CIS 6 DOJ acknowledges that only a portion of Morgan Stanley's profits would be disgorged if the proposed settlement is approved, attempting to put the best light on a small recovery:

While the disgorged sum represents less than all of Morgan's net transaction revenues under the two agreements,[fn. omitted] disgorgement will effectively fulfill the remedial goals of the Sherman Act to "prevent and restrain" antitrust violations as it will send a message of deterrence to those in the financial services community considering the use of derivatives for anticompetitive ends. [CIS 9] (emphasis added).

If the 21% to be disgorged under the proposed settlement is "less than all" of the $21.6 million profit, as DOJ puts it, perhaps the amount of ill-gotten gains retained by Morgan Stanley — $16.8 million, or 79% — might be said to be "nearly all" of the net profit.

The CIS fails to explain how disgorgement of only $4.8 million, and allowing Morgan Stanley to keep $16.8 million of its profits from the scheme would deter similar future conduct by Morgan Stanley or anyone. There is simply no evidence in the record to support DOJ's conclusion that the proposed settlement "will send a message of deterrence to those in the financial services community considering the use of derivatives for anticompetitive ends." Id. Given the minimal development of the record, no one can see the derivative instruments used by Morgan Stanley. If the offending derivative agreements are not disclosed, there is even less likelihood of deterring similar transactions by others. These should have been provided by DOJ with the CIS as "determinative documents.\17\

\17\ The DOJ Competitive Impact Statement asserts there are no "determinative" documents required to be submitted under the Tunney Act See United States v. Central Contracting Co., Inc., 537 F. Supp. 571 (E.D. Va. 1982).

DOJ is ordinarily entitled to deference in assessing the effectiveness of a remedy it agrees to, but here its conclusion that disgorgement of only $4.8 million is sufficient is refuted by every day common sense and arithmetic. The CIS does not explain in plain language how allowing a wrongdoer to keep 79% of its ill-gotten gains can be seen as any kind of "message of deterrent." Rather, the "message" to some may really be that large profits can still be made from gaming electricity markets using financial derivative agreements to support bidding strategies. If found out, there will probably be no criminal antitrust sanction, and at worst one may keep the majority of the profit in a settlement with DOJ. The real lesson taught by the proposed settlement to potential manipulators could actually encourage similar conduct and further harm competition. This is not a remote or speculative concern. "Manipulation is a potentially serious problem in all derivatives markets, energy included."\18\ The CIS does not consider this possibility and therefore does not sufficiently address the impact on competition as required by the Tunney Act. 15 U.S.C. § 16(e)(1)(A).

\18\ Craig Pirrong, Energy Market Manipulation: Definition, Diagnosis, and Deterrence, 31 Energy Law Journal 1-2 (2010) (emphasis added).

The $4.8 million disgorgement is probably well within the range of what Morgan Stanley's litigation expenses might be if the case is litigated. The real lesson of the disclaimer and the small disgorgement is that this is merely a nuisance settlement. As recently stated by Judge Rakoff in the course of rejecting a settlement proposed of the SEC:

> [A] consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed, particularly in the business community, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency, rather than as any indication of where the real truth lies.

SEC v Citigroup Global Markets, Inc., 11 Civ. 7387 (Nov. 28, 2011).

4. The CIS Fails to Support the Claim that the Settlement is Reasonable Because it Avoids Litigation Risk.

DOJ attempts to justify the proposed settlement by invoking its risk of litigation, i.e., that it might lose the case if it goes to trial:

> The $4.8 million disgorgement amount is the product of settlement and accounts for litigation risks and costs. [CIS 9]

> Had the case against Morgan proceeded to trial, the United States would have sought disgorgement of the $21.6 million in net transaction revenues Morgan earned under both the Morgan/Keyspan Swap and the Morgan/ Astoria Hedge. At trial, Morgan -in addition to raising arguments as to its lack of liability in general-would have disputed that the entire $21.6 million earned under both agreements would be cognizable as ill-gotten gains. [CIS 9, fn 4].

While DOJ is ordinarily given considerable deference to its assessment of the merits of its case, it does not cite any authority or facts to show that this case is difficult. Based on the CIS and the record, there are written derivative contracts evidencing the profit-sharing arrangement of the utility counterparties, facilitated by Morgan Stanley as middleman. The utilities' bidding records should be readily available from the NYISO. What is the problem with the case? DOJ gives no hint that its case is in any way doubtful.

This case is only a variation on classic bid-rigging and price fixing. Here, Keyspan bid high, in order to elevate the auction price paid to all sellers, Astoria paid Morgan Stanley some of the extra profits it made due to the elevated price, and Morgan Stanley paid Keyspan, keeping a net $21.6 million profit for its services in facilitating the price raising game. Had the utility sellers made an agreement bilaterally with the same results, it would be seen as a crystal clear antitrust violation. See Addyston Pipe & Steel Co. v. United States, 175 US 211, 243 (1899) ("the defendants enter, not in truth as competitors, but under an agreement or combination among themselves which eliminates all competition between them for the contract, and permits one of their number to make his own bid and requires the others to bid over him"). It should be equally clear that a middleman like Morgan Stanley, who effectuates the economic alignment of the sellers with its derivative agreements, is part of the "combination" and is also a Sherman Act violator.

The CIS makes an exaggerated claim that DOJ has won victory in the proposed settlement, stating:

> A disgorgement remedy should deter Morgan and others from engaging in similar conduct and thus achieves a significant portion of the relief the United States would have obtained through litigation.... [CIS 11] (emphasis added).

If the $4.8 million to be disgorged is "a significant portion" of the relief sought in the complaint, then the $16.8 million retained by Morgan Stanley could be said to be three times as "significant" because Morgan Stanley keeps the bulk of its profit from facilitating the scheme.

5. The Keyspan Case Is Not A Barrier to a Consumer Remedy in This Case.

DOJ relies heavily on the prior decision approving the settlement of its antitrust case against Keyspan, involving the same derivative contract, where $12 million of Keyspan's $48 million profit was disgorged, with no equitable relief for consumers:

> Keyspan, pursuant to a Final Judgment sought by the United States, has surrendered $12 million as a result of its role in the Morgan/Keyspan Swap.3 See United States v. Keyspan Corp., 763 T. Supp. 2d 633,637-38 (S.D.N.Y. 2011). Securing similar disgorgement from the other responsible party to the anticompetitive agreement will protect the public interest by depriving Morgan of a substantial portion of the fruits of the agreement. The effect of the swap agreement was to effectively combine the economic interests of Keyspan and Astoria, thereby permitting Keyspan to increase prices above competitive rates, and this result could not have been achieved without Morgan's participation in the swap agreement. Requiring disgorgement in these circumstances will thus protect the public interest by deterring Morgan and other parties from entering into similar financial agreements that result in anticompetitive effects in the underlying markets, or from otherwise engaging in similar anticompetitive conduct in the future.

CIS 8, (emphasis added). If disgorgement of $4.8 million constitutes a "substantial portion of the fruits of the agreement," then the amount of ill-gotten profits retained by Morgan Stanley is three times as "substantial."

As the emphasized language in the quotation above shows, the successful gaming of the NYISO market could not have been achieved by the utilities without Morgan Stanley acting as middleman. It was not something Keyspan and Astoria could have accomplished themselves in a bilateral agreement without flagrant and knowing violation of antitrust law, which might expose them to possible criminal charges and large fines under Section 2 of the Sherman Act. Because its role as middleman was crucial to the scheme, it is appropriate to require Morgan Stanley to disgorge proportionately more than Keyspan, not less.

The proposed settlement not only fails to "deprive the antitrust defendants of the benefits of their conspiracy." Intl Boxing Club v. United States, 358 U.S. 242 at 253 (1959). (quotation omitted), it does not even come close to that goal. Instead, it allows Morgan Stanley to retain the lion's share, 79%, of the benefits. "[A]dequate relief in a monopolization case should.. deprive the defendants of any of the benefits of the illegal conduct..." United States v. Grinnell Corp., 384 U.S. 563, 577 (1966). Accord, United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 368 (1961) ("Those who violate the Act may not reap the benefits of their violations. . . ." (quotations omitted)). In any settlement parties may obtain something less in the compromise than they initially sought when commencing the litigation, but the woefully trivial disgorgement by Morgan Stanley of only $4.8 million of its profits cannot possibly be an adequate equitable remedy or in the public interest.

AARP Recommendations

AARP recommends that DOJ withdraw from the proposed settlement and proceed in the litigation, or renegotiate with Morgan Stanley to include the following in any new or revised settlement agreement:

A. Allocation of profits made by Morgan Stanley to provide equitable relief to electric utility consumers harmed by the violation,

B. Admission by Morgan Stanley of its violation of the Sherman Act as described in the Complaint,

C. Quantification of the total harm to consumers and markets, and

D. Disgorgement by Morgan Stanley of all profits it realized from the derivatives used to implement the price raising scheme.

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December 30, 2011

VIA E-MAIL
William H. Stallings, Chief
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Re: United States of America v. Morgan Stanley, Civil Case No. 11-civ-6875
Comments of the Public Service Commission of the State of New York

Dear Chief Stallings:

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 October 11, 2011. See U.S. Dep't of Justice, Antitrust Div., United States v. Morgan Stanley, Proposed Final Judgment and Competitive Impact Statement, 76 Federal Register 62843 (October 11, 2011).

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. 11-civ-6875

United States of America,
Plaintiff
v.

Morgan Stanley,
Defendant.

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 October 11, 2011, in this matter. U.S. Dep't of Justice, Antitrust Div., United States v. Morgan Stanley, Proposed Final Judgment and Competitive Impact Statement, 76 Federal Register 62843 (October 11, 2011).

The Department of Justice ("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 Morgan Stanley. DOJ's enforcement of the antitrust law is critical to protect consumers against the harmful effects of Morgan Stanley's anti-competitive conduct in this 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 Morgan Stanley pay the United States government $4.8 million. DOJ asserts such a settlement will be in the public interest because Morgan Stanley's payment of this amount into the U.S. Treasury will deprive Morgan Stanley of "a substantial portion" of its unjust enrichment. Competitive Impact Statement, at 8. DOJ admits it seeks only partial disgorgement of Morgan Stanley's ill-gotten gains, saying that, if it proceeded to trial, it would have sought disgorgement of all of Morgan Stanley's net transaction revenues, which DOJ asserts were $21.6 million. Competitive Impact Statement, at 9 & n. 4. DOJ nonetheless claims the lesser amount of $4.8 million "will effectively fulfill the remedial goals of the Sherman Act" to "prevent and restrain" antitrust violations because the settlement will "send a message of deterrence" to the financial services community. Competitive Impact Statement, at 9. According to DOJ, the lesser amount of $4.8 million will still prevent market participants from using such financial agreements to manipulate the capacity markets in the future. Competitive Impact Statement, at 8-9.

These claims are central to DOJ's assertion that the settlement is in the public interest, a finding that the Court must make in order to approve DOJ's proposal. DOJ, however, has offered nothing to support its claims that this settlement, which would allow Morgan Stanley to retain almost 80 percent of its ill-gotten gains, will deter such anticompetitive conduct. Because of this, DOJ has not demonstrated that this settlement will achieve a central purpose of the Sherman Antitrust Act, namely preventing anticompetitive arrangements such as those facilitated by Morgan Stanley in this case. POINT I, below.

To remedy this, the Court should, under the authority of the Tunney Act, direct DOJ to supplement the record to show how and why the settlement will prevent such violations from recurring. POINT II, below.

DOJ has not shown that a settlement for $4.8 million would be reasonable. DOT alleges Morgan Stanley's net revenues were $21.6 million. It asserts that $4.8 million is reasonable given the risks and costs of fully litigating the case. However, DOJ has offered only a summary statement of Morgan Stanley's anticipated position at trial. Competitive Impact Statement, at 9 & n. 4. This statement does not shed light on the actual risks and costs of litigation. Moreover, in considering whether a $4.8 million settlement would be reasonable, the Court should weigh the nature of Morgan Stanley's wrongdoing, the impact of such a settlement on DOJ's enforcement role, and the overall efficacy of antitrust law as a mechanism for preventing such harmful market manipulation.

DOJ has already settled with KeySpan for $12 million, an amount equal to 24.5 percent of KeySpan's alleged wrongful gain. That settlement was approved by the court on February 2, 2011. United States v. KeySpan Corporation, 10 Civ. 1415 (WHP) Memorandum and Order, (S.D.N.Y. Feb. 2, 2011). Now DOJ proposes to settle with Morgan Stanley, the financial institution that allegedly actively facilitated KeySpan's wrongful manipulation of the capacity market. DOJ alleges that KeySpan, knowing it could not directly buy an interest in Astoria (its largest competitor), enlisted Morgan Stanley to act as an intermediary. Thus, Morgan Stanley's involvement was designed to allow KeySpan to do indirectly what it could not do directly. In effect, DOJ alleges that Morgan Stanley actively facilitated KeySpan's attempt to evade the law. Despite allegations of such egregious conduct, DOJ proposes to settle with Morgan Stanley for only 22.2 percent of Morgan Stanley's wrongful gain. Such an arrangement, however, is more akin to a tax than a penalty.

The settlement amount is particularly unreasonable given the fact that Morgan Stanley's illegal conduct had a much larger harmful impact. As the PSC noted in its comments on D0J's earlier settlement with KeySpan, the illegal market manipulation that KeySpan and Morgan Stanley orchestrated imposed unnecessary costs on consumers which may have totaled tens of millions of dollars. Even if DOJ could not recover all those damages under the Sherman Antitrust Act, the reasonableness of seeking only 22.2 percent of what DOJ can recover should be measured, in part at least, by the larger consumer harm KeySpan and Morgan Stanley caused. United States v. KeySpan Corporation, 10 Civ. 1415 (S.D.N.Y.) (WHP), Comments of the Public Service Commission of the State of New York, Pursuant To the Antitrust Procedures and Penalties Act, On the Proposed Finaljudgment, (Apr. 30, 2010). POINT III, below.

BACKGROUND

In this civil antitrust action, brought DOJ under Section 1 of the Sherman Act, 15 U.S.C. §1, the government seeks equitable and other relief against Morgan Stanley for violating the antitrust law. According to DOJ, in late 2005 and early 2006, Morgan Stanley entered into a "swap" agreement with KeySpan Corporation ("KeySpan"), then the largest electricity producer in the New York

City metropolitan area. DOJ asserts this agreement (the "Morgan/KeySpan Swap") ensured that KeySpan would withhold substantial output from the New York City electric generating capacity market, thereby discouraging competitive bidding and increasing capacity prices. On or about the same time, Morgan Stanley entered into an offsetting "swap" agreement with Astoria - KeySpan's largest competitor (the "Morgan/Astoria Swap"). Morgan Stanley, acting as the intermediary between KeySpan and Astoria, extracted revenues for its role. Thus, Morgan Stanley facilitated an arrangement "[t]he likely effect ... 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." 76 Federal Register, at 62844.

According to DOJ, the Morgan/KeySpan Swap unlawfully restrained competition in New York City's electric capacity market. KeySpan entered into that agreement to protect itself against increased losses from its preferred bidding strategy, due to the entry of new competitors into the capacity market. 76 Federal Register, at 62844. Under the Morgan/KeySpan Swap, 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." 76 Federal Register, at 62844. By giving KeySpan revenues not only from its own sales, but also from the capacity sales of its largest competitor, the Morgan/KeySpan Swap "effectively eliminated KeySpan's incentive to compete for sales" of capacity. 76 Federal Register, at 62846. Thus, "[t]he clear tendency of the Morgan/KeySpan Swap was to alter KeySpan's bidding in the NYC Capacity Market auctions." 76 Federal Register, at 62846.

As a result, electric capacity prices remained unlawfully inflated, and Morgan Stanley earned approximately $21.6 million in net revenues from the Morgan/KeySpan Swap and the Morgan/Astoria Swap. 76 Federal Register, at 62846. In addition, the elimination of competitive pressures, due to the anti-competitive Morgan/KeySpan Swap imposed unnecessary costs on consumers which may have totaled tens of millions of dollars.

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 U.S.C. § 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 U.S.C. § 16(e)(1)(A) &(B).

In seeking this 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, Morgan Stanley would be required to pay the United States government a total of $4.8 million dollars. United States v. Morgan Stanley, Proposed Final Judgment and Competitive Impact Statement, 76 Federal Register 62843, 9949 (October 11, 2011). According to DOJ, this amount "remedies [Morgan Stanley's] violation by requiring Morgan to disgorge profits obtained through the anticompetitive agreement." 76 Federal Register, at 62846. According to DOJ, "[d]isgorgement will deter Morgan and others from future violations of the antitrust laws." 76 Federal Register, at 62846. Thus, according to DOJ, the public interest is served because the proposed settlement will both prevent Morgan Stanley's unjust enrichment, and will deter such wrongful conduct in the future.

Preventing Morgan Stanley's unjust enrichment 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 (that disgorgement is necessary to prevent unjust enrichment, and a $4.8 million penalty is adequate) is that Morgan Stanley's unjust enrichment totaled only $4.8 million. Yet DOJ itself asserts that Morgan Stanley's net revenues totaled $21.6 million. 76 Federal Register, at 62847. Thus, DOJ itself acknowledges it is seeking only partial disgorgement.

DOJ nonetheless claims such partial disgorgement will "send a message of deterrence[,]'' thereby "deterring Morgan and other parties from entering into similar financial agreements ... or from otherwise engaging in similar anticompetitive conduct in the future." 76 Federal Register, at 62848. While these claims are central to DOJ's contention that the settlement would be in the public interest, DOJ has not offered any evidence to support the proposition that this settlement will act as a deterrent. This lack of evidence showing the settlement would prevent and deter such conduct is a critical omission. As DOJ acknowledges, preventing and restraining antitrust violations are "the remedial goals" of the Sherman Antitrust Act. 76 Federal Register; at 62848. Yet the absence of any evidence supporting these claims makes it virtually impossible for the Court to meaningfully evaluate whether a $4.8 million settlement "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 Morgan Stanley of its 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."

Given what DOJ has presented, the settlement would not be in the public interest. DOJ seeks only partial disgorgement, so the settlement would not prevent Morgan Stanley's unjust enrichment, since anything less than full disgorgement would not fully strip Morgan Stanley of its wrongful gains. The proposed settlement amount, however, is only a minor fraction (22.2%) of Morgan Stanley's unjust enrichment.\1\ Why would such a penalty deter similar violations of the antitrust law in the future? Common sense suggests that such an amount will instead be viewed as merely a cost of doing business. S.E.C. v. Citigroup Global Markets, Inc., Slip Op. at 10 (S.D.N.Y. Nov. 28, 2011) ("[A] consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed, particularly in the business community, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency ...."). Allowing Morgan Stanley to retain almost 80 percent of its ill-gotten gains can hardly be characterized as an effective deterrent without something more to support such a claim.\2\ Thus, the proposed $4.8 million settlement would not satisfy either of DOJ's rationales (i.e., preventing Morgan Stanley's unjust enrichment, and deterring such wrongful conduct in the future) for a judicial finding that the settlement is in the public interest.

\1\ In approving DOJ's earlier $12 million settlement with KeySpan, the court noted that, according to DOJ, KeySpan "did not necessarily earn additional revenues" by not competing. Instead, the swap offered greater revenue certainty even though "competing could have earned the company greater revenues...." United States v. KeySpan Corporation, 10 Civ. 1415 (WHP) Memorandum and Order, at 14-15 (S.D.N.Y. Feb. 2, 2011). Because of this, in part, the Court found the $12 million settlement with KeySpan to be reasonable. Here, Morgan Stanley's swap revenues (aside from transactional costs) were profits since it would have had no revenues if KeySpan competed instead of entering into the swap. Accordingly, the court's rationale for finding the KeySpan settlement amount reasonable does not support this proposed settlement with Morgan Stanley.

\2\ 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)).

POINT II
THE COURT SHOULD DIRECT DOJ TO SUPPLEMENT THE RECORD ON THE DETERRENT EFFECT(S) OF THE PROPOSED SETTLEMENT

The Morgan/KeySpan 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." 76 Federal Register, at 62848. Thus, regardless of its effect on the market, the Morgan/KeySpan Swap violated the Sherman Act. Cf. Summit Health v. Pinhas, 500 U.S. 322, 330 (1991) (1131ecause 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 Morgan/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. 76 Federal Register, at 62848. CI United States v. Stasztcuk, 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").

However, because, as discussed in POINT I, DOJ has not proffered evidence sufficient to enable the Court to evaluate 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 whether such a minimal penalty will prevent and deter such anti-competitive conduct will provide a record basis for any public interest determination made by the Court. Cf. S.E.0 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 III
THE REASONABLENESS OF THE PROPOSED SETTLEMENT SHOULD BE EVALUATED IN LIGHT OF THE RATEPAYER HARM CAUSED BY MORGAN STANLEY

In determining whether the settlement is in "the public interest," the Court should consider the impact of the proposed settlement on the ratepayers that were harmed by Morgan Stanley'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 ...").\3\ DOJ acknowledges ratepayers were harmed, in the form of inflated capacity prices, because of Morgan Stanley's conduct. According to DOJ, "[w]ithout the Morgan/KeySpan 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." 76 Federal Register; at 62846. Because KeySpan decided to withhold capacity rather than compete, ratepayers were harmed in amounts far exceeding Morgan Stanley's $21.6 million in wrongful profit.

\3\ 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").

Yet, in its earlier settlement with KeySpan, DOJ indicated ratepayers may have no recourse under the antitrust law because of the "filed rate" doctrine. See 75 Federal Register, at 9951. Moreover, ratepayers may not be able to obtain any relief from FERC because, in early 2008, well before DOJ brought its civil antitrust action against KeySpan, FERC's Staff concluded there was no evidence that KeySpan's bidding 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.

Even if DOJ could not recover damages under the Sherman Antitrust Act for harm suffered by ratepayers, and is limited to Morgan Stanley's $21.6 million total net revenues, the Court should, when weighing the reasonableness of settling for roughly 20 cents on the dollar, consider the larger consumer harm Morgan Stanley caused, and the apparent lack of any other effective remedy for consumers that were harmed. This lack of a remedy for customers is highly significant given the potential size of the consumer harm Morgan Stanley caused by violating the antitrust law. Yet DOJ has not offered any evidence of how much Morgan Stanley's alleged illegal conduct increased electricity capacity market prices.

If Morgan Stanley's illegal conduct harmed consumers by preventing price declines that could have totaled tens of millions of dollars, then the proposed $4.8 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 4: 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").

Accordingly, the Court should direct DOJ to address this defect in the settlement proposal. Although exactitude is not required, some evidence should be proffered on this point. See 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 rino 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 plaintiffs experience in a hypothetical free market to the experience of a comparable firm in an actual free market, is also well accepted").

CONCLUSION

For the reasons stated above, the Court should direct DOJ to supplement the record to demonstrate why this settlement will prevent such violations in the future.

Respectfully submitted,

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