

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 12-cv-00395-RPM-MEH

UNITED STATES OF AMERICA

Plaintiff,

v.

SG INTERESTS I, LTD.,  
SG INTERESTS VII, LTD., and  
GUNNISON ENERGY CORPORATION

Defendants.

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**UNOPPOSED MOTION OF THE UNITED STATES TO AUTHORIZE AN ALTERNATIVE  
METHOD OF PUBLIC DISSEMINATION OF TUNNEY ACT COMMENTS AND  
SUPPORTING MEMORANDUM**

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The United States hereby moves this Court, pursuant to 15 U.S.C. § 16(d), to authorize an alternative method of public dissemination of the numerous public comments the United States has received in this case. Specifically, the United States seeks leave to excuse publication of the comments in the *Federal Register* as such publication would be prohibitively expensive. As an alternative, the United States proposes to post all public comments on the Antitrust Division website and publish in the *Federal Register* the website address at which the public comments may be viewed and downloaded. The United States believes this procedure will provide more convenient access to the comments by the general public at a fraction of the cost of *Federal Register* publication. In addition, the United States will file all public comments in this Court's docket at the time the United States files its Response to Public Comments.

The United States has conferred with all parties to this litigation and this motion is unopposed. The United States has attached as Exhibit 1 a proposed Order.

## I. BACKGROUND

The United States filed its Complaint in this case on February 15, 2012, along with a proposed Final Judgment with respect to Defendants Gunnison Energy Corporation (“GEC”) and SG Interests I, Ltd. and SG Interests VII, Ltd. (“SGI”). As required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § (b)-(h) (the “Tunney Act”), the United States caused notices to be published in the *Federal Register*, the *Washington Times* and the *Denver Post*, providing instructions for public comment on the proposed Final Judgment. The 60-day comment period closed on May 7, 2012, and the United States received seventy-nine public comments.

As required by the Tunney Act, the United States is preparing its response to the public comments, which will be filed with the Court along with all public comments. The comments must also be made available to the public, a requirement that typically is satisfied when United States publishes them in the *Federal Register*. However, *Federal Register* publication is costly and, at the current rate of \$522 per page, the United States estimates that *Federal Register* publication of the comments received would cost approximately \$83,000.

## II. ALTERNATIVE METHOD OF PUBLICATION INCREASES ACCESS TO PUBLIC COMMENTS WHILE AVOIDING UNNECESSARY COST

Under the Tunney Act, the United States is required to publish written comments it receives relating to the proposed Final Judgment, along with the response of the United States, in the *Federal Register*. 15 U.S.C. §§ 16 (b), (d). In 2004, the Tunney Act was amended in recognition of the benefits of electronic publication and the growing costs of publication in the *Federal Register*. The amendment authorizes courts to order an alternative publication method when the expense involved exceeds the public interest benefits to be gained:

Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments.

15 U.S.C. § 16 (d).

In this case, the United States estimates that the cost to publish the public comments in the *Federal Register* would be approximately \$83,000. In order to reproduce the public comments in the manner and format in which they were submitted to the Department of Justice, the *Federal Register* must photograph each of the approximately 160 individual pages of comments, at a cost to the United States of \$522 per page. See Government Printing Office Circular Letter No. 777 (July 2, 2010) (listing prices for fiscal year 2011).<sup>1</sup>

In contrast, it is not clear that publication in the *Federal Register* confers any significant public interest benefit that cannot be better served by electronic publication. Electronic publication is likely to make the comments more accessible to the public. Indeed, at the time of passage of the 2004 amendment authorizing alternative methods of publication, Senator Leahy of the Judiciary Committee noted that publication in the *Federal Register* can offer “little benefit, because those materials are, if anything, more accessible on the Web than in a library.” 150 CONG. REC. 6,328 (2004). Likewise, Senator Kohl opined that alternative procedures such as “posting the proposed decrees electronically, [] are sufficient to inform interested persons of the proposed consent decree.” 150 CONG. REC. 6,332 (2004).

Web-based, electronic publication has become even more pervasive since alternative publication was authorized in 2004. Recognizing the benefits of electronic publication, other courts have excused *Federal Register* publication of Tunney Act comments and attachments in favor of electronic publication in several recent cases. See *United States v. American Express Company, et. al.*, No. 10-CV-4496-NGG (E.D.N.Y. June 20, 2011) (order excusing publication of “the substance of the public comments in the Federal Register,” which would cost more than \$200,000, provided that the comments are available on the DOJ website) (attached as Exhibit 2);

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<sup>1</sup> Available at <http://www.gpo.gov/customers/letters/777.htm> (fiscal year 2011 runs from Oct. 1, 2011 through September 30, 2012).

*United States v. KeySpan Corp.*, No. 1:10-cv-01415-WHP (S.D.N.Y. June 28, 2010) (order granting motion to excuse publication of attachments to comments where cost would have been \$28,000) (attached as Exhibit 3).

Accordingly, given the likely greater accessibility to the public of electronically publishing the comments, the cost of publishing the comments in the *Federal Register*, the little, if any, benefit to the public interest that cannot be realized by electronic publication, the United States asks that *Federal Register* publication be excused. Instead, the United States proposes to post all public comments on the Antitrust Division website, and will publish the address at which public comments may be viewed and downloaded in the *Federal Register*. This alternative would save the expense of full *Federal Register* publication while preserving the public interest benefits associated with public access to the materials.

Dated: June 4, 2012

Respectfully submitted,

s/ Sarah L. Wagner  
Sarah L. Wagner  
U.S. Department of Justice  
Antitrust Division  
Transportation, Energy &  
Agriculture Section  
450 Fifth Street, NW, Suite 8000  
Washington, DC 20530  
Telephone: (202) 305-8915  
FAX: (202) 616-2441  
E-mail: sarah.wagner@usdoj.gov  
Attorney for Plaintiff United States

**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

L. Poe Leggette  
pleggette@fulbright.com

Timothy R. Beyer  
tbeyer@bhfs.com

s/ Sarah L. Wagner \_\_\_\_\_  
Sarah L. Wagner  
U.S. Department of Justice  
Antitrust Division  
Transportation, Energy &  
Agriculture Section  
450 Fifth Street, NW, Suite 8000  
Washington, DC 20530  
Telephone: (202) 305-8915  
FAX: (202) 616-2441  
E-mail: sarah.wagner@usdoj.gov  
Attorney for Plaintiff United States

**EXHIBIT 1**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 12-cv-00395-RPM-MEH

UNITED STATES OF AMERICA

Plaintiff,

v.

SG INTERESTS I, LTD.,  
SG INTERESTS VII, LTD., and  
GUNNISON ENERGY CORPORATION

Defendants.

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PROPOSED ORDER

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The Court, having considered the motion of the United States, finds that good cause exists pursuant to 15 U.S.C. § 16(d) to excuse the publication of the public comments in the *Federal Register*,

GRANTS the Unopposed Motion of the United States to Authorize an Alternative Method of Public Dissemination of Tunney Act Comments, and

AUTHORIZES, as an alternative method of public dissemination, the publication in the *Federal Register* of a statement providing the location on the United States Department of Justice website where the public comments may be viewed and downloaded.

SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_.

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**EXHIBIT 2**



**FILED**

IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

★ JUN 22 2011 ★

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, STATE OF  
CONNECTICUT, STATE OF IOWA, STATE OF  
MARYLAND, STATE OF MICHIGAN, STATE OF  
MISSOURI, STATE OF OHIO, STATE OF TEXAS,  
STATE OF ILLINOIS, STATE OF TENNESSEE,  
STATE OF MONTANA, STATE OF NEBRASKA,  
STATE OF IDAHO, STATE OF VERMONT,  
STATE OF UTAH, STATE OF ARIZONA, STATE  
OF RHODE ISLAND, STATE OF HAWAII, and  
STATE OF NEW HAMPSHIRE,

Plaintiffs,

-against-

AMERICAN EXPRESS COMPANY, AMERICAN  
EXPRESS TRAVEL RELATED SERVICES  
COMPANY, INC., MASTERCARD  
INTERNATIONAL INCORPORATED, and VISA  
INC.,

Defendants.

BROOKLYN OFFICE  
**ORDER**

**10-CV-4496 (NGG) (RER)**

-----X  
NICHOLAS G. GARAUFIS, United States District Judge.

On October 4, 2010, the United States of America and several states (the "State Plaintiffs") filed a Complaint against Defendants, alleging various violations of antitrust law under the Sherman Act, 15 U.S.C. § 1. (Compl. (Docket Entry # 1).) The same day, the United States and several State Plaintiffs filed a Notice of Settlement with respect to Defendants MasterCard International Incorporated and Visa Inc. ("MasterCard and Visa"), proposing a consent judgment. (Docket Entry # 4.) Pursuant to 15 U.S.C. § 16(d), the United States then solicited public comments regarding the proposed consent judgment against MasterCard and Visa. During this comment period, the United States received six comments, some with voluminous attachments, totaling over 400 pages. (Docket Entry # 119-1.) Under 15 U.S.C.

§ 16(d)(2), the United States is required to publish these comments in the Federal Register unless, “[u]pon application by the United States, the district court . . . find[s] that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication.”

The United States now seeks to excuse publication of the public comments in the Federal Register. (Docket Entry # 120.) The United States claims that it “would incur expenses of approximately \$200,000 to publish” all of the public comments in the Federal Register. (*Id.* at 2-3.) The United States has also stated that it “has filed all public comments, including the exhibits at issue, with this Court [and that the] United States will also post all comments and exhibits on the public website of the Antitrust Division of the United States Department of Justice.” (*Id.* at 2.) No party has objected to the United States’ request. (*Id.* at 1.)

Nonetheless, given the relative permanence of the Federal Register, it is desirable for the United States to at least identify the electronic location of the public comments by a notice in the Federal Register. Accordingly, the United States is excused from publishing the substance of the public comments in the Federal Register, see 15 U.S.C. § 16(d)(2), except for a notice stating that it received six public comments in this case, and that the comments and the United States’ responses are available on the DOJ’s website. In mentioning that this material is available on the DOJ’s website, the United States should also include an appropriate, permanent website address pointing to those comments online. The United States shall also certify to the court that it has published such notice by proof of publication filed on the court’s docket.

SO ORDERED.

Dated: Brooklyn, New York  
June 20, 2011

s/Nicholas G. Garaufis

NICHOLAS G. GARAUFIS  
United States District Judge

**EXHIBIT 3**

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 6/28/10

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

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UNITED STATES OF AMERICA, )  
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Plaintiff, )  
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v. )  
)  
)  
KEYSPAN CORPORATION, )  
)  
)  
Defendant. )  
\_\_\_\_\_

Civil Action No.: 1:10-cv-01415-WHP  
Hon. William H. Pauley III


**ORDER**

The Court, having considered the application of the United States, finds that good cause exists pursuant to 15 U.S.C. § 16(d)(2) to excuse the publication of the attachments to the Comments of Mr. Nelson M. Stewart in the *Federal Register*,

GRANTS the United States's Unopposed Motion to Excuse *Federal Register* Publication of Attachments to the Stewart Comments, and

AUTHORIZES, as an alternative method of public dissemination, the publication in the *Federal Register* of the Stewart Comments with a link to the United States Department of Justice website where the attachments to those comments can be viewed and downloaded.

IT IS SO ORDERED by the Court, this 28 day of June 2010.

  
Hon. William H. Pauley, III