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 ("DOJ") 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.

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

[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.

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

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.

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]

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[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

[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.

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

[7] The Sherman Act provides that "[e]very 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.

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]

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,

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[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.

Consolidated Edison Company of New York, Inc. ("Con Edison"), estimated the inflated capacity costs to be approximately $159 Million in 2006.[10]

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.

[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 Comment 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/opennat.asp?fileID=11236060.
The amount of capacity overcharges in 2007 and until NYISO capacity market rules were changed in early 2008 were not estimated.

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—
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> > (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, "[t]he 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]

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).

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[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).

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 ¶ 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.

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

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[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.

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 Comm'n 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.
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> "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.

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

[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.

Adjustment Clause takes into account 36 variable factors every month, including "(8) certain NYISO-related charges and credits. . . ."[15] 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:

> 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.

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

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

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

judgment states that Morgan Stanley:

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

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

[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).

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).

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).

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

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 F. 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." *Int'l 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.