

February 4, 2011

Contacts

[William F. Young](#)

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1684
byoung@hunton.com

[D. Bruce Hoffman](#)

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1619
bhoffman@hunton.com

[Patrick J. McCormick, III](#)

1900 K Street, NW
Washington, DC 20006-1109
(202) 778-2218
pmccormick@hunton.com

Federal Court Upholds Disgorgement as a Remedy in Government Antitrust Cases; Energy Company to Pay \$12 Million

Deciding an issue of first impression, the United States District Court for the Southern District of New York has held that “disgorgement is available to remedy a Sherman Act violation.” *United States v. KeySpan Corporation*, 10 Civ 1415 (WHP), Memorandum & Order (“Order”) at 13. The Order approved a settlement of an antitrust case brought by the Department of Justice as a result of a financial swap arrangement by KeySpan Corp. with a competing generator that assertedly affected prices in the New York City market for installed electric generating capacity. Other highlights include:

→ The Order adopts the assertion in the Complaint that: “Absent the Swap, Keyspan would have bid its capacity at lower prices in response to the entry of additional capacity into the market, thereby causing capacity prices to decline.” *Id.* at 4. Left unresolved is the apparent conflict with economic testimony in connection with related Federal Energy Regulatory Commission proceedings stating that because of the size of its share of the supply of capacity, KeySpan had an incentive to bid at the regulated cap on its

bids during the relevant period even without the Swap.

- The Court accepted the calculation of a DOJ economist, Dr. Oliver M. Richard, that KeySpan earned net revenues of \$48,960,000 from the Swap. *Id.* 13.
- The Court rejected comments calling for disgorgement commensurate with the losses suffered by New York City ratepayers, holding that the primary purpose of disgorgement is not compensation of victims, but divesting a wrongdoer of ill-gotten proceeds. Order at 14. In this connection, the Court cites the DOJ theory that “Keyspan did not necessarily earn additional revenues by bidding its cap at auction – rather, absent the Swap, Keyspan’s competitive bidding could have earned the company greater revenues from the sale of increased volume.” *Id.* at 15.
- The Court rejected arguments that disgorged proceeds should be returned to New York City consumers, noting that providing the payments to the U.S. Treasury is within the ambit of the public interest, and that providing refunds

to ratepayers may raise problems under the filed-rate doctrine (which bars damages claims based on rates that have been approved by a government agency). *Id.* at 15-16.

Finally, the Court found that \$12 million in disgorgement is an adequate deterrent, representing 25% of KeySpan's net revenues under the

Swap, and in a holding that may capture the importance of this decision for antitrust enforcement stated that:

Future manipulators of electricity markets or those who seek to leverage derivative products in the restraint of trade now face the prospect of disgorgement in addition to other remedies. This case

is an important marker for enforcement agencies and utility regulators alike. Approving disgorgement as part of the Government's arsenal tilts incentives back in favor of competitive bidding and deters use of derivatives as tools to manipulate a market.

Id. 15.

©2011 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.

Atlanta • Austin • Bangkok • Beijing • Brussels • Charlotte • Dallas • Houston • London • Los Angeles • McLean • Miami • New York • Norfolk • Raleigh • Richmond • San Francisco • Washington