Antitrust Alert

Justice Department Obtains Disgorgement of $12 Million in Profits in Civil Antitrust Settlement with New York Electricity Generator

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On February 22, 2010, KeySpan Corporation agreed to disgorge $12 million in profits as part of a settlement with the Department of Justice (DOJ) of claims that KeySpan violated the antitrust laws by entering into an agreement restraining competition in the New York City electricity generating capacity market.[1] The DOJ's unprecedented use of disgorgement as an equitable antitrust remedy against KeySpan may signal a change in the DOJ's approach to remedies in civil antitrust enforcement actions and raises the possibility that the DOJ will be more likely to use disgorgement as an equitable remedy in future civil antitrust cases. However, unique circumstances present in the KeySpan case caution against reading too much into the DOJ's addition of this arrow to its usual quiver of remedies.

Background

In January 2006, KeySpan, the largest seller of electricity generating capacity in the New York City market at that time, entered into an agreement (the "KeySpan Swap") with a financial services company that effectively gave KeySpan a financial interest in the electricity generating capacity sales of its competitor, Astoria Generating Company Acquisitions, LLC. The DOJ's complaint alleges that the KeySpan Swap violated § 1 of the Sherman Act. In particular, the complaint alleges that, because the KeySpan Swap provided KeySpan with revenues from its competitor's sales, it had the effect of eliminating KeySpan's incentive to sell its electricity generating capacity at lower, more competitive prices. Thus, according to the DOJ, the agreement resulted in retail electricity prices in New York City that were likely higher than they would have been absent the anticompetitive agreement.

Interestingly, based, in part, on allegations that KeySpan was engaging in anticompetitive conduct, the Federal Energy Regulatory Commission (FERC) previously had conducted an investigation into whether market manipulation was occurring in the New York City capacity market. FERC's Enforcement Staff Report, issued in 2008, concluded that KeySpan, Astoria and the financial services company involved in the matter had not violated any relevant tariff provisions or FERC's market manipulation regulations. The report also found that the KeySpan Swap did not affect KeySpan's electricity capacity bidding in the New York City market.

Significance of Disgorgement Remedy

The DOJ has obtained disgorgement in the past in at least two antitrust matters involving violations of consent decrees.[2] The KeySpan settlement, however, marks the first time the DOJ has used this remedy in an initial antitrust enforcement action. Prior to announcing the KeySpan settlement, the DOJ had not made any public statements suggesting that it was poised to depart from its prior practice and seek disgorgement in such an action.

Nonetheless, the DOJ's Competitive Impact Statement supporting the KeySpan settlement declares that, under the Sherman Act, the DOJ has the authority to seek—and the district courts have the authority to order—a disgorgement remedy.[3] In support of this position, the DOJ cites the holding in *Porter v. Warner Holding Co.,* 328 U.S. 395 (1946), that unless a statute explicitly or implicitly restricts a court's jurisdiction in equity, the full scope of equitable relief is to be recognized and applied. The Competitive

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[1] *See* Press Release, U.S. Department of Justice, Justice Department Requires KeySpan to Disgorge $12 Million in Profits from Anticompetitive Agreement (Feb. 22, 2010), *available at* www.justice.gov/atr/public/press_releases/2010/255503.pdf.

[2] *See* Press Release, U.S. Department of Justice, Justice Department Settles Civil Contempt Claim Against Cal Dive International Inc. and Helix Energy Solutions Group Inc. (Nov. 26, 2007), *available at* www.justice.gov/atr/public/press_releases/2007/227959.pdf; Press Release, U.S. Department of Justice, Court Finds Smith International and Schlumberger Ltd. Guilty of Criminal Contempt for Violating Consent Decree (Dec. 9, 1999), *available at* www.justice.gov/atr/public/press_releases/1999/3948.htm.

[3] *See* U.S. Department of Justice, Competitive Impact Statement: U.S. v. KeySpan Corporation, No. 10-cv-1415 (Feb. 23, 2010), *available at* http://www.justice.gov/atr/cases/f255500/255578.htm.

Impact Statement explains that, because the filed rate doctrine under *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), precludes challenges to rates filed with administrative bodies such as the FERC, a private antitrust lawsuit for damages against KeySpan would face significant hurdles. Disgorgement, the DOJ concludes, therefore is necessary to protect the public interest. Additionally, the DOJ notes that injunctive relief would not be an effective remedy due to the expiration of the KeySpan Swap and because KeySpan no longer owns its Ravenswood generation assets, which made up 2,400 megawatts of KeySpan's electricity generating capacity in New York City. According to the DOJ, disgorgement affords the most effective relief against KeySpan while also deterring KeySpan and others from engaging in similar anticompetitive conduct in the future.

The DOJ's competitive impact statement does not discuss what the United States plans to do with the $12 million in disgorged profits.

Disgorgement as a Future Antitrust Remedy

The DOJ's use and justification of disgorgement as a remedy in the KeySpan case indicate that the DOJ views disgorgement as a viable antitrust remedy; they also signal that the DOJ may be more willing to seek this remedy in the future than it has been in the past. However, the KeySpan case presented a situation in which there were significant hurdles to private antitrust damages claims and in which injunctive relief would be ineffective. Therefore, it is premature to conclude that the DOJ is likely to pursue disgorgement remedies with any frequency. DOJ may take an approach similar to that adopted by the Federal Trade Commission. Although the FTC has occasionally sought disgorgement, it has issued a policy statement limiting that remedy only to "exceptional cases."[4] According to the policy statement, before the FTC seeks equitable monetary remedies, including disgorgement: 1) there must be a clear violation; 2) there must be a reasonable basis for calculating the remedy amount; and 3) the Commission will consider the value of seeking monetary relief in light of other available remedies.[5]

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[4] *See* FTC, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45820 (Aug. 3, 2003).
[5] *See id.*