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Here We Go Again: Another Attempt at Recovery for Ratepayers Resulting from KeySpan-Morgan Stanley Swap

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Another class action lawsuit has been filed against KeySpan Corporation (KeySpan) and Morgan Stanley Capital Group Inc. (Morgan Stanley), claiming damages for antitrust violations resulting from an allegedly illegal swap agreement that allowed KeySpan to manipulate energy prices in the New York City electric generating capacity market (NYC Capacity Market), see *Konefsky et al. v. KeySpan Corp., et al*., Case No. 1:12-cv-00017. The ***complaint*** was filed on January 6, 2012 in the U.S. District Court for the Western District of New York on behalf of electric customers of National Grid, which purchased electric energy and capacity in the NYC Capacity Market from 2006 through 2009. The plaintiffs, two law professors, are seeking on behalf of the class millions in damages and disgorgement of unlawfully obtained profits for alleged violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, as well as analogous New York state laws. As described in previous blog entries in ***February 2010*** and ***February 2011***, the underlying actions that led to this complaint involve a 2006 financial swap agreement between KeySpan and Morgan Stanley, which gave KeySpan an indirect financial interest in the sale of generating capacity by its largest competitor, Astoria Generating Company, in the NYC Capacity Market. At that time, approximately 1000 MW of new generation was poised to come online in that market. Previously, due to tight supply conditions, KeySpan, as the largest seller of installed capacity in the market, had been able to bid at or near the applicable bid cap without risking loss of sales. The anticipated addition of new generating capacity threatened to upset the status quo and put downward pressure on prices. In February 2010, the Department of Justice (DOJ) brought an action against KeySpan alleging that the swap resulted in a violation of Section 1 of the Sherman Act. The DOJ claimed that KeySpan's financial interest in Astoria's capacity reduced KeySpan's incentive to competitively bid its capacity, enabling KeySpan to profitably bid capacity at the price cap, despite the addition of significant new generating capacity that otherwise likely would have caused prices to drop. According to the DOJ, this arrangement led to higher capacity prices in New York City and, in turn, higher electricity prices for consumers than would have prevailed otherwise, thereby violating Section 1 of the Sherman Act. KeySpan agreed to pay $12 million in disgorgement of profits to the U.S. Treasury to settle the matter. The DOJ subsequently also took action against Morgan Stanley, simultaneously filing a complaint and proposed settlement on September 30, 2011 pursuant to which Morgan Stanley agreed to pay $4.8 million in disgorgement. The latest class action complaint is similar

to another class action brought against KeySpan and Morgan Stanley, in the U.S. District Court for the Southern District of New York, see *Simon v. KeySpan Corp., et al*., Case No. 1:10-cv-05437. That attempt to obtain a judgment on behalf of ratepayers was rejected by the district court in March 2011. In dismissing the *Simon* complaint, the court explained in its ***opinion*** that (i) because the class members were indirect purchasers of electric generation capacity, they had not suffered antitrust injury and therefore lacked antitrust standing to bring the case; (ii) the filed rate doctrine, which bars private actions where a rate has been previously approved by FERC, applied in that case; and (iii) plaintiff's state law claims were barred by the doctrine of federal preemption. That case is currently being appealed to the Second Circuit.