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In the Matter

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Case 04-G-1047 - Proceeding on Motion of the
Commission as to the Rates, Charges, Rules and
Regulations of National Fuel Gas Distribution
Corporation for Gas Service.

3rd Floor Hearing Room
Public Service Commission
Agency Building Three
Albany, New York

Tuesday, May 24, 2005
10:30 a.m.

PRESIDING:

ELIZABETH LIEBSCHUTZ

Administrative Law Judge

**DISK
ENCLOSED**

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22 For Energetix:

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1 JUDGE LIEBSCHUTZ: Good morning. I call
2 case 04-G-1047, Proceeding on Motion of the
3 Commission as to the Rates, Charges, Rules and
4 Regulations of National Fuel Gas Distribution
5 Corporation for Gas Service.

6 We are here pursuant to a notice issued May
7 9, 2005 setting today as the date for
8 evidentiary hearings in this proceeding.

9 I note that a substantial number of the
10 parties have submitted a Joint Proposal in this
11 case, and as a consequence we are following a
12 procedure to allow for that Joint Proposal and
13 not engaging in full blown evidentiary hearings
14 today. We will mainly be admitting exhibits on
15 to the record today, and I may have a few
16 limited questions for witnesses today.

17 Let's begin by taking appearances, please.

18 MR. MILLER: For National Fuel Gas
19 Distribution Corporation, Bruce V. Miller and
20 Michael W. Reville, and with us Eric Meinl,
21 general manager of the rates and regulatory
22 affairs department, who will answer the judge's
23 questions.

24 MR. WALTERS: Consumer Protection Board,
25 John Walters.

1 MR. BATES: For the Department of Public
2 Service Staff, Justyn P. Bates, staff counsel.
3 With me is Peter Catalano, staff counsel, Linda
4 Horlbeck, John Sano and Alan Mostek.

5 MR. FOGEL: On behalf of Small Customer
6 Marketer Coalition, Usher Fogel.

7 MR. WILES: Ben Wiles on behalf of the
8 Public Utility Law Project.

9 MR. MAGER: On behalf of Multiple
10 Intervenors, the law firm of Couch White by
11 Michael Mager and Moshe Bonder.

12 MR. MUELLER: On behalf of New York State
13 Electric and Gas Corporation and Rochester Gas
14 and Electric Corporation, Jeffrey A. Rosenbloom
15 and Scott Mueller.

16 MR. HOBDAY: Robert Hobday, Managing
17 Director of Energetix, Inc.

18 JUDGE LIEBSCHUTZ: Is there anyone else who
19 wants to enter an appearance this morning?

20 MR. BATES: One extra staff. That's Michael
21 Saloney and also Leonard Silverstein.

22 JUDGE LIEBSCHUTZ: Very good. Thank you.

23 Let's begin actually with the admission as
24 exhibits into the record of the prefiled
25 testimony that was submitted in this proceeding.

1 As we have discussed in various procedural
2 conference calls with the parties, the
3 understanding here is that this particular
4 material is being admitted as an exhibit or as a
5 series of exhibits. It is not considered sworn
6 testimony. It does not necessarily represent
7 the testimony that would be given by the
8 witnesses or adopted by the parties if they were
9 testifying here today.

10 Rather, it's evidence of the initially filed
11 presentations of the parties, and as such, forms
12 the backdrop against which settlement
13 negotiations took place in this proceeding.

14 If we could begin with the company, please,
15 since obviously the company initially filed
16 testimony.

17 Mr. Miller.

18 MR. MILLER: One other point. This
19 settlement, this Joint Proposal, has the
20 provision that provides if the Commission were
21 to disapprove it or disapprove it in large part,
22 parties could go back to litigation.

23 And my understanding, based on what your
24 Honor says, is that no party would be deemed to
25 have foregone their right to cross-examine or

1 any other procedural rights if we end up back
2 into litigation as a result of the exercise of
3 that provision were the Commission not to
4 approve or disapprove substantial portions of
5 the Joint Proposal.

6 JUDGE LIEBSCHUTZ: That is correct.

7 MR. MILLER: We have a number of different
8 volumes the company put in with its initial
9 filing testimony and exhibits. We then made a
10 supplemental filing and also have a rebuttal
11 filing.

12 I guess because we are going first, it might
13 make sense to put all those volumes into the
14 record instead of waiting for our rebuttal to go
15 after other parties.

16 JUDGE LIEBSCHUTZ: Actually I guess I would
17 prefer we keep it in strict chronological order,
18 so that if perhaps Exhibit 1 could represent
19 your initial filing, if that's amenable to you,
20 followed by a separately numbered exhibit for
21 the supplemental.

22 MR. MILLER: Then we have three volumes.
23 The first volume is the testimony that was filed
24 with the case, and then we have volume II and
25 volume III, which were the exhibits that were

1 filed initially.

2 JUDGE LIEBSCHUTZ: Okay, so, let's mark
3 those as Exhibit 1 collectively consisting of
4 three volumes. The first volume representing
5 prefiled testimony and the second and third
6 volumes representing prefiled exhibits
7 accompanying that testimony.

8 I should note this was all prefiled on
9 August 26th, I think.

10 (Exhibit 1 marked for identification.)

11 MR. CATALANO: 27th, your Honor.

12 JUDGE LIEBSCHUTZ: 27th, thank you, 2004.

13 And then the next exhibit, I think Mr.
14 Miller, would be supplemental testimony.

15 MR. MILLER: Yes. We filed the supplemental
16 in response to the Commission's policy
17 statements.

18 JUDGE LIEBSCHUTZ: Do you have the date of
19 that filing?

20 MR. MILLER: We are checking, your Honor.
21 The policy statements came out August 25th.

22 JUDGE LIEBSCHUTZ: It's not essential if no
23 one has it. I confess I have rearranged all of
24 mine, as apparently everyone else has as well.

25 We will leave it that Exhibit 2 represents

1 the supplemental testimony filed by the company
2 in response to the Commission's retail markets
3 policy statement.

4 (Exhibit 2 marked for identification.)

5 Mr. Miller, this is a single volume?

6 MR. MILLER: Single volume contains the
7 testimony of three witnesses, all prefiled, and
8 exhibits.

9 JUDGE LIEBSCHUTZ: And actually it might
10 help to--that was the testimony of Mr. Mehl.

11 MR. MILLER: Ms. Friedrich-Alf and Mr.
12 Heine.

13 JUDGE LIEBSCHUTZ: I think, then, if we
14 continue to proceed chronologically, then we
15 move to the staff and the intervenors who
16 prefiled testimony in December of 2004 in
17 response to these filings by the company.

18 Mr. Bates.

19 MR. BATES: Thank you, Your Honor.

20 Your Honor, the Department of Public Service
21 staff also prefiled the testimony on December
22 31st. It's a collection of an exhibit, which I
23 would represent is the collection of staff
24 testimony and exhibits.

25 Would it be helpful if I ran--it's not a

1 single bound volume, would it be helpful if I
2 identified the different portions?

3 JUDGE LIEBSCHUTZ: If you would identify the
4 witnesses whose testimony and exhibits make up
5 the exhibit and the order that you intend to
6 present them that would be helpful.

7 MR. BATES: First, there is prepared
8 testimony of Steven D. Blaney, Christopher R.
9 Stolicky and Richard T. Lepkowski.

10 JUDGE LIEBSCHUTZ: That's joint testimony as
11 a panel?

12 MR. BATES: That's joint testimony as a
13 panel. That was offered together with exhibits
14 referred to in that prepared testimony, the same
15 names.

16 Also the prepared testimony of Audrey L.
17 Capers and exhibits referred to in the prepared
18 testimony of Audrey L. Capers.

19 For the retail access panel there is the
20 prepared testimony of Paul C. Emerson, Sue
21 Herlands and Lea Ann Rosenthal. Accompanying
22 that testimony is prepared exhibits of the
23 retail access panel, also by Paul Emerson, Sue
24 Herlands and Lea Ann Rosenthal.

25 Prepared testimony of Gregory R. Luthringer

1 and the accompanying exhibits referred to in the
2 testimony, prepared testimony, of Gregory R.
3 Luthringer.

4 There is the prepared testimony of the
5 Consumer Services Panel, which consists of
6 William Mills and Leonard Silverstein.
7 Accompanying the Consumer Services Panel
8 testimony is the prepared exhibits of the
9 Consumer Services Panel.

10 It's also the prepared testimony of Alan F.
11 Mostek and accompanying that testimony is the
12 exhibits referred to in the prepared testimony
13 of Alan Mostek. Also the work papers
14 accompanying staff witness Mostek's testimony.

15 There is the prepared testimony of Valerica
16 Oreifej. There is the prepared testimony of
17 Sandra D. Reulet, and the exhibits referred to
18 in the prepared testimony of Sandra D. Reulet.

19 Prepared testimony of Michael Saloney.
20 There is the prepared testimony of John P. Sano
21 and the exhibits referred to in the prepared
22 testimony of John P. Sano. The prepared
23 testimony of William D. Wade and the prepared
24 exhibits of William D. Wade.

25 The prepared testimony of Daniel J. Wheeler

1 and the prepared exhibit of Daniel J. Wheeler.
2 The prepared testimony of Gerald R. Wojcinski
3 and prepared exhibits referred to in the
4 prepared testimony of Gerald R. Wojcinski.

5 And that completes the filing made by staff
6 on December 31, 2004.

7 JUDGE LIEBSCHUTZ: And the sum total of all
8 those documents will be marked as Exhibit 3.

9 (Exhibit 3 marked for identification.)

10 MR. BATES: Thank you, Your Honor. I am
11 handing them up to the reporter now.

12 JUDGE LIEBSCHUTZ: Thank you. Mr. Walters.

13 MR. WALTERS: Your Honor, the CPB will
14 submit as prefiled testimony, also filed on
15 December 31, 2004, the direct testimony and
16 referenced exhibits of Donna M. Deviot and
17 direct testimony and exhibit of Tariq Niazi.
18 Mr. Niazi is one exhibit with three schedules.

19 JUDGE LIEBSCHUTZ: Thank you. That
20 collectively will be marked as Exhibit 4.

21 (Exhibit 4 marked for identification.)

22 JUDGE LIEBSCHUTZ: Mr. Roland.

23 MR. ROLAND: On behalf of the Small Customer
24 Marketer Coalition, testimony of one Usher Fogel
25 submitted on December 31, 2004. One document.

1 JUDGE LIEBSCHUTZ: That will be marked as
2 Exhibit 5.

3 (Exhibit 5 marked for identification.)

4 Mr. Mager.

5 MR. MAGER: On behalf of Multiple
6 Intervenors, the direct testimony of Dr. Alan
7 Rosenberg. Also includes a separate exhibit of
8 Dr. Alan Rosenberg.

9 JUDGE LIEBSCHUTZ: Dr. Rosenberg's testimony
10 and exhibit will be marked collectively as
11 Exhibit 6.

12 (Exhibit 6 marked for identification.)

13 JUDGE LIEBSCHUTZ: Is there anyone here on
14 behalf of the National Energy Marketers
15 Coalition? I believe that that organization
16 also submitted prefiled testimony, which
17 certainly exists in the file room of our agency,
18 but no one is here today to enter it as an
19 exhibit.

20 Is there anyone else that had--any other
21 intervenor testimony in December of 2004? I
22 think we have it all.

23 I think we then move to the company's
24 rebuttal filing.

25 MR. FOGEL: Are you going to reserve an

1 exhibit for NEMA? I don't know if they knew the
2 testimony would actually be introduced as an
3 exhibit today. It may be worthwhile to reserve
4 the number and a letter can go around to the
5 parties.

6 JUDGE LIEBSCHUTZ: Does anyone have a view
7 as to whether we should put that on the record
8 today or not? I think its existence is
9 represented in our agency's files and if they
10 haven't come today to enter it, why, we don't
11 need to go through that today.

12 JUDGE LIEBSCHUTZ: Mr. Miller.

13 MR. MILLER: The next filing that was made
14 was the company's rebuttal testimony and
15 exhibits. They are contained in one volume
16 which I will bring up.

17 JUDGE LIEBSCHUTZ: Mr. Miller, we probably
18 should have, just for the benefit of clarity,
19 run through the list of witnesses last time
20 around, but I take some comfort in the fact they
21 are bound in a single volume, but now that I
22 realized I should have done that before.

23 Maybe I will ask you to run through the
24 names of the witnesses whose testimony and
25 exhibits are contained in the volume you are

1 holding.

2 MR. MILLER: The rebuttal witnesses were
3 Bauer, Fiorella, Frank, Friedrich-Alf, Gruchala,
4 Hanley, Hart, Heine, Meinl, Michalski, Mugel,
5 Pijacki, Spanos, Sprague, and Truitt.

6 JUDGE LIEBSCHUTZ: Thank you. Am I correct
7 to the extent there are exhibits they are also
8 contained together with the testimony in that
9 one volume?

10 MR. MILLER: Yes. They follow the
11 testimony.

12 JUDGE LIEBSCHUTZ: Exhibit 7, representing
13 the company's rebuttal filing in January 2005.

14 (Exhibit 7 marked for identification.)

15 Next, I think we just, for the ease of
16 having everything in one place and for the
17 reference of witnesses to the extent anyone is
18 answering questions today, why don't we admit as
19 an exhibit the Joint Proposal that was filed by
20 the parties on April 15, 2005.

21 We can reserve a number for that. I
22 certainly have an extra copy I can provide to
23 the reporter at a break, but it's understood
24 that the company is going to be providing as
25 Exhibit 8 a copy of the Joint Proposal,

1 containing all of the signatures obtained to
2 date, together with there is a short supplement
3 or addendum, if you will, that was submitted
4 shortly thereafter, which has also been signed
5 by the proponents of the Joint Proposal, so that
6 the proposal as signed and the supplemental on
7 April 22, 2005 will together represent Exhibit
8 8.

9 (Exhibit 8 reserved.)

10 Next, as we had previously discussed, there
11 is a series of discovery questions, if you will,
12 that were promulgated by me to the parties which
13 have been numbered by the parties as questions
14 ALJ 1 through ALJ 60, and I would like to admit
15 those into the record at this time as exhibits.

16 I think we can number them each sequentially
17 so that since we are now on Exhibit 9, ALJ 1
18 would be Exhibit 9 and so forth. I don't know
19 who on behalf of the parties is prepared to
20 submit those.

21 MR. MILLER: We have those, Your Honor.

22 MR. MAGER: Are you assigning each
23 interrogatory response a separate exhibit number
24 or are they all collectively 9?

25 JUDGE LIEBSCHUTZ: I think I would assign

1 them each a number.

2 I am not sure we have any additional records
3 or other exhibits a party wanted to proffer here
4 today. I will note for the record that the
5 record, as maintained by the Commission's
6 Secretary, of course also includes the
7 description--I should say at the moment to
8 date--includes the description of opposition
9 filed by NYSEG and RG&E on April 22, 2005, as
10 well as the parties' statements in support or
11 opposition that were filed on May 6, 2005.

12 That would include statements in support
13 filed by the Department of Public Service,
14 National Fuel Gas Distribution Corporation,
15 Multiple Intervenors, New York State Consumer
16 Protection Board, the Small Customer Marketer
17 Coalition, as well as a statement of opposition
18 that was filed jointly by New York State
19 Electric & Gas and Rochester Gas & Electric
20 Company jointly.

21 The opposition of NYSEG and RG&E is
22 currently the subject of a motion filed by the
23 company objecting to the admission of that
24 opposition into the record in this proceeding,
25 which is pending a ruling by me.

1 Mr. Catalano, was there something you wanted
2 to say?

3 MR. CATALANO: Yes, Your Honor.

4 Can I ask you if you will reconsider your
5 decision to number each question sequentially.
6 It's going to make it very difficult for the
7 witnesses to keep track of what we are talking
8 about. The way they have it now, they know what
9 question 46 is and now question 46 is going to
10 be a different number. I think it's going to be
11 a little more difficult than it needs to be.

12 JUDGE LIEBSCHUTZ: You think we should
13 simply acknowledge it going in as Exhibit 9 and
14 refer to them by ALJ number? I think that's
15 workable and probably makes life easier for our
16 reporter. So we will amend the record to note
17 that Exhibit 9 will consist of sequentially
18 numbered responses to questions that I have
19 promulgated to the parties, which have been
20 denominated ALJ 1 and so forth all the way
21 through ALJ 60.

22 (Exhibit 9 marked for identification.)

23 MR. WILES: The Public Utility Law Project
24 filed a statement in support and you didn't call
25 it out. I have a copy if I could hand it up.

1 JUDGE LIEBSCHUTZ: I apologize, Mr. Wiles,
2 and for some reason I do not have a copy right
3 before me anyway, so if you have an extra I
4 would happily take it. We don't need to admit
5 it as an exhibit today. Thank you.

6 I guess it would be helpful if we explain a
7 little bit about Exhibit 9, the responses to my
8 questions. And perhaps someone on behalf of the
9 company can explain.

10 I gather there is a slightly different
11 procedure that's been followed as to which of
12 these responses represents the consensus
13 response of the proponents of the proposal.

14 MR. REVILLE: Yes, Your Honor. We had
15 e-mail messages distributed to the parties and
16 to your Honor that described a procedure for
17 development of the first and second set.

18 We used a procedure that was designed to
19 achieve, as best as we could, consensus on the
20 responses to the questions, and that applied to
21 ALJ numbers 1 through 45.

22 The numbers 46 through 60, which were
23 distributed yesterday by e-mail, were developed
24 under a slightly different procedure. We have
25 the consensus of company and staff and

1 potentially one other party, but we sent
2 those--the responses out to the parties
3 yesterday and asked those parties to reply to
4 the company if there were any objections.

5 We received only one. We made a
6 modification, so to that extent I suppose we
7 have somewhat of a consensus, but it was not as
8 thorough because of the time constraints as the
9 prior process.

10 I suppose with the parties here today, if we
11 could poll the parties and see if they have any
12 objection. If there are no objections, we would
13 have a consensus on those as well.

14 JUDGE LIEBSCHUTZ: Are there parties here
15 today that have had an opportunity to review the
16 answers that were supplied to ALJ 46 through 60
17 that are in a position to comment as to whether
18 they have any objection or are comfortable
19 having the consensus of the proponents?

20 Mr. Mager.

21 MR. MAGER: Multiple Intervenors reviewed
22 the responses and with one modification, which
23 we requested and the company made, we don't have
24 any objections to any of the responses.

25 JUDGE LIEBSCHUTZ: So am I right the answer

1 that has been submitted as part of Exhibit 9
2 already reflects the modification you requested?

3 MR. MAGER: Yes, it does, Your Honor.

4 JUDGE LIEBSCHUTZ: Thank you.

5 Anyone else?

6 MR. WALTERS: We have no objection to the
7 submitted amendments.

8 JUDGE LIEBSCHUTZ: On behalf of CPB?

9 MR. WALTERS: Yes.

10 JUDGE LIEBSCHUTZ: Any of the other
11 proponents of the Joint Proposal that are in a
12 position to comment on the responses to those
13 questions that were submitted?

14 MR. FOGEL: I am okay with them, Your Honor.

15 JUDGE LIEBSCHUTZ: That's Mr. Fogel on
16 behalf of the Small Customer Marketer Coalition?

17 MR. FOGEL: Yes.

18 JUDGE LIEBSCHUTZ: Mr. Wiles, has PULP had
19 an opportunity to review the answers that were
20 submitted to ALJ questions 46 through 60?

21 MR. WILES: Yes. We read them yesterday
22 afternoon, Your Honor. I have no objection to
23 the answers.

24 JUDGE LIEBSCHUTZ: And Mr. Hobday, do I
25 understand Energetix is a proponent of the Joint

1 Proposal?

2 MR. HOBDAV: We are not.

3 JUDGE LIEBSCHUTZ: Very well. We don't have
4 to check with you.

5 I have just a couple brief follow up
6 questions that I would like to ask regarding ALJ
7 47, 48 and 49.

8 I suspect it would be most efficient
9 if I could direct my questions regarding ALJ 47
10 and 49, initially at least, to a witness on
11 behalf of the company, and then my remaining
12 question may really be more of a legal question
13 to address to the lawyers.

14 If that's amenable with the company, could
15 you call your witness, please.

16 MR. MILLER: We call Eric H. Meinl.

17 ERIC H. MEINL,
18 after first having been duly sworn, was examined
19 and testified as follows:

20 JUDGE LIEBSCHUTZ: Thank you. Please be
21 seated.

22 If you would state your name for the record,
23 please.

24 THE WITNESS: Eric H. Meinl.

25 JUDGE LIEBSCHUTZ: Mr. Meinl, if I could

1 draw your attention to the response to ALJ 47,
2 which has been marked as part of Exhibit 9.
3 This question asked for some discussion of the
4 refund that is being proposed to pass back an
5 overcollection of state income tax and asked how
6 that related to the way that the state income
7 tax was previously collected from customers.

8 And the second sentence of the answer says
9 that the SIT or state income tax surcharge was
10 collected as a percentage of revenues. And I
11 just want to clarify.

12 Does that mean, for example, on an
13 individual customer's bill the entire bill
14 consisting of both delivery charges and
15 commodity charges was totaled and then the SIT
16 surcharge was calculated as a total percentage
17 of the bill?

18 THE WITNESS: Yes, Your Honor. The SIT
19 surcharge was built into what is referred to in
20 the tariff as the tariff surcharge, which was
21 composed of the GRT piece and the state income
22 tax piece. Those pieces were summed and applied
23 to the total amount of the bill, delivery charge
24 plus gas supply charges, if any.

25 JUDGE LIEBSCHUTZ: It wasn't strictly

1 volumetric, but the combination of the
2 components charged as either volumetric charge
3 or individual charge?

4 THE WITNESS: Yes.

5 JUDGE LIEBSCHUTZ: If I could also turn your
6 attention to the response to ALJ 49 also
7 included as part of Exhibit 9. I had asked
8 about the sort of cost/benefit analysis that a
9 customer might engage in, a large transportation
10 company customer, in deciding whether to take
11 monthly metered service or daily metered service
12 in the company. And I also asked about the
13 costs and benefits to National Fuel Gas
14 Distribution of that choice by the customer.

15 The bottom of the first page of the response
16 there is a paragraph that begins "This change
17 will not produce additional non-gas cost
18 revenues or delivery rate cost savings for NFG".
19 Does this change refer to a customer switching
20 from monthly metered service to daily metered
21 service?

22 THE WITNESS: Yes, Your Honor.

23 JUDGE LIEBSCHUTZ: When you say it does not
24 produce additional non-gas cost revenues or
25 delivery rate cost savings, am I right that it

1 actually would reduce the non-gas cost revenues
2 to the company?

3 THE WITNESS: No, Your Honor. The company
4 is, in effect, indifferent as far as to what
5 service the customer would choose, because the
6 non-gas cost revenues that the company would
7 collect, assuming that the volume stayed the
8 same, would be the same. All that would change
9 would be the amount of gas cost revenues that
10 the company would collect or avoid.

11 And since those costs are perfectly matched
12 within our gas adjustment clause or gas
13 reconciliation mechanism, the company is in
14 effect indifferent to what service the customer
15 chooses.

16 JUDGE LIEBSCHUTZ: Thank you. As this
17 answer explains, the daily transportation
18 service did not include a charge for balancing;
19 is that correct?

20 THE WITNESS: It's a lower charge for
21 balancing, Your Honor.

22 JUDGE LIEBSCHUTZ: But there is some
23 balancing charge?

24 THE WITNESS: Yes. I believe--let me refer
25 you to the exhibit in the JPO.

1 JUDGE LIEBSCHUTZ: I think it would be--

2 THE WITNESS: I think it's K.

3 JUDGE LIEBSCHUTZ: K, yes. Exhibit K of the
4 Joint Proposal I do have in front of me.

5 THE WITNESS: There is two sections.
6 Section two is the determination of the gas cost
7 included in monthly metered rate, and section
8 three is the gas cost that's built into the
9 daily metered rate, in effect, the cost of
10 balancing charges.

11 And as you can see from that exhibit, the
12 daily metered charges are lower than the monthly
13 metered charges, but there is a small balancing
14 charge associated with daily metered service
15 also.

16 JUDGE LIEBSCHUTZ: Okay. Is the company
17 similarly indifferent as to which balancing
18 charge is assessed against the customers in the
19 monthly service versus the daily service?

20 THE WITNESS: Yes. From the company's
21 perspective, again, it's all treated as gas cost
22 revenue. It has no impact on the earnings of
23 the company, so we would be indifferent.

24 JUDGE LIEBSCHUTZ: Okay. Great. Thank you.
25 Those were my only two questions that I wanted

1 to follow up on.

2 Is there anyone else here that has any
3 questions for Mr. Meini? Thank you, then, Mr.
4 Meini. You may step down.

5 (Witness excused.)

6 JUDGE LIEBSCHUTZ: I had also asked of the
7 proponents of the Joint Proposal a question that
8 has been numbered ALJ 48. This question refers
9 to two provisions of the Joint Proposal, one
10 relating to safety and the other relating to
11 service quality.

12 There are two performance plans in the Joint
13 Proposal and as to both of them the Joint
14 Proposal provides their provisions will extend
15 for a number of years, even if there is an
16 intervening rate case which would result in a
17 Commission Decision.

18 And I had asked whether those provisions
19 were enforceable and if so how. Clearly the
20 response that is included as part of Exhibit 9
21 reflects the fact that the parties do not have
22 much of a consensus view on this issue, but I
23 would like to hear I guess at least from the
24 company and from staff and any other proponent
25 who would like to be heard as to your view as to

1 the legal enforceability of these provisions.
2 And if you would like to make any policy
3 statement as to the wisdom of these provisions I
4 would be eager to hear it.

5 Can we hear from the company first.

6 MR. MILLER: Sure. In the past when a rate
7 plan expired, the provisions such as these would
8 expire with the rate plan, and that was what we
9 were trying to remedy.

10 The parties were going back and forth as to
11 what would happen on the expiration of the rate
12 plan. That's why these provisions do extend
13 beyond the two year time of the rate plan.

14 We believe if the Commission adopts the
15 Joint Proposal that it becomes an Order of the
16 Commission, and it is the Commission--to the
17 extent any Order is binding on the Commission,
18 that Order would be binding on the Commission.
19 It wouldn't necessarily be ironclad if
20 conditions changed, but that our view is that if
21 the Commission adopts that provision of the
22 settlement with the extension of those terms
23 that those terms should be in place until their
24 expiration.

25 JUDGE LIEBSCHUTZ: Let me clarify, Mr.

1 Miller.

2 I am familiar with provisions of rate plans
3 that might set rates for, let's say, two years,
4 such as this plan does, and have a service
5 quality plan that extends for a longer period of
6 time, such as four or five years or until the
7 next Commission rate case, whichever comes
8 sooner; but in this case the parties have
9 provided that the service quality plans and the
10 safety performance plans will extend for a
11 certain number of years or until the next
12 Commission rate case, whichever comes later,
13 which would suggest if there is a
14 Commission--let's say, for example, there is a
15 full blown litigated National Fuel Gas
16 Distribution Corporation rate case in the year
17 2008, that the parties by this provision, as I
18 understand it, intend to preclude the parties in
19 that proceeding, and the Commission in that
20 proceeding, from reopening the issue of a safety
21 performance plan or a service quality plan by
22 virtue of what would be contained in an order
23 issued by the Commission in 2005 in this case.

24 What I am trying to explore is, furthermore,
25 I think it is unlikely that the Commission would

1 want to do such a thing in an order this year in
2 this case. I am a little unclear as why the
3 parties themselves would want to tie their hands
4 in the future as well, so I am looking for some
5 comment on both why the Commission would want to
6 do this or why the parties would want to do
7 this.

8 MR. MILLER: As to why the parties would
9 want to do it, I think various parties might
10 have varying ideas as to why they agreed to do
11 it. We would view it certainly as being
12 enforcement against--the parties would agree to
13 the extension of these terms or these plans for
14 a definite term. Whether or not it would bind
15 the Commission would be a matter for the
16 Commission and various parties to argue about in
17 the future, and I can see arguments on both
18 sides whether the Commission would be bound or
19 not.

20 I mean there is a recognition in this
21 agreement that the Commission retains its right
22 should circumstances change dramatically to take
23 action. So, as far as the Commission is
24 concerned, I am not going to argue the
25 Commission's case because we often argue against

1 the Commission's position. The give and take
2 was they wanted some period of repose on these
3 provisions and that's what the parties agreed
4 to.

5 JUDGE LIEBSCHUTZ: Okay. Thank you.

6 Staff, can you add anything to what the
7 company has said?

8 MR. BATES: These particular programs and
9 their extension beyond the term of the Joint
10 Proposal is something--is an element of staff's
11 litigated case. I think it's also fair to say
12 that staff recognizes the company has a good--a
13 relatively good history in terms of both of
14 these types of programs, the safety and the
15 service quality program.

16 In the culmination of the documents, the
17 Joint Proposal, staff also recognizes it's a
18 relative term when compared to some other
19 utilities, and extending these two particular
20 programs offers the benefit of stability, while
21 it's also increasing targets I believe under
22 both programs.

23 I would let my staff witnesses correct me if
24 I am making any misstatement there. As far as
25 whether this binds the Commission, I would agree

1 with Mr. Miller that that's probably something
2 that parties would have to argue in the specific
3 circumstances that could arise in the event
4 there was a need to amend those programs earlier
5 than the proposed periods, but we don't perceive
6 it as necessarily binding upon what the
7 Commission does in this proceeding or what it
8 would have to do, but it's difficult to say
9 without specific factual underpinnings of why
10 the Commission would need to change it.

11 MR. CATALANO: Your Honor, we don't see it
12 as tying our hands, your phrase. We see it as
13 providing significant additional benefits to
14 customers that we otherwise wouldn't have for
15 the extension period. So it's something that we
16 want and we think benefits New Yorkers. It's
17 not a question of limiting our discretion, as
18 you seemed to imply.

19 JUDGE LIEBSCHUTZ: My only concern is in the
20 precise situation where there is an intervening
21 proceeding that occurs before the designated
22 expiration of these plans, and it's in that
23 limited circumstance where the parties seem to
24 be--one could argue that perhaps this merely
25 represents a commitment by the parties not to

1 propose either in litigation or negotiations any
2 changes to these plans, but it further purports
3 to forbid the Commission from tinkering with
4 them, if you will, even in the context of an
5 otherwise fully litigated case on National Fuel
6 Gas Distribution's rates and service, before the
7 expiration of these plans.

8 MR. CATALANO: Even in that instance the bar
9 is higher than it would otherwise have been, so
10 we stand only to gain and not to lose.

11 JUDGE LIEBSCHUTZ: Thank you.

12 Any other party wish to be heard on this
13 question? Seeing none, that concludes the
14 questions that I specifically wanted to address
15 at today's hearing. Is there any other matter
16 that any party wishes to raise this morning? If
17 not, then, thank you all very much for coming
18 and we are adjourned.

19 (Proceedings adjourned.)
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