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October 25, 2006

Via Overnight Courier

Hon. Jaclyn A. Brilling
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Albany, New York 12223-1350

Re: *Joint Petition of National Grid plc and KeySpan Corporation for Approval of Stock Acquisition and Other Regulatory Authorizations, Case No. 06-M-0878*

Dear Secretary Brilling:

Enclosed please find five (5) copies of an "Answer of Utility Workers Union of America, AFL-CIO and UWUA Local Union Nos. 310, 317, 318, 322, 329, 330, 343, 350, 362, and 369 in Partial Opposition to Supplemental Motion for Confidential Treatment and Protective Order of National Grid," the original of which is being filed concurrently with Presiding Administrative Law Judge Lynch. Copies of this filing are being served upon the active parties indicated as of October 20, 2006, in accordance with the preferences they have expressed as to service method, as shown on the enclosed Certificate of Service.

In addition, please date-stamp the two additional copies of the filing that have been provided, and return them to me in the enclosed, self-addressed and stamped envelope.

Thank you for your assistance.

Sincerely,



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October 25, 2006

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Re: *Joint Petition of National Grid plc and KeySpan Corporation for Approval of Stock Acquisition and Other Regulatory Authorizations, Case No. 06-M-0878*

Dear Judge Lynch:

Enclosed for filing in the above-referenced proceeding please find the original of an "Answer of Utility Workers Union of America, AFL-CIO and UWUA Local Union Nos. 310, 317, 318, 322, 329, 330, 343, 350, 362, and 369 in Partial Opposition to Supplemental Motion for Confidential Treatment and Protective Order of National Grid." Five (5) copies of this filing are being submitted concurrently to the Secretary of the Commission. Copies of this filing are being served upon the active parties indicated as of October 20, 2006, in accordance with the preferences they have expressed as to service method, as shown on the enclosed Certificate of Service.

Sincerely,



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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of National Grid plc and
KeySpan Corporation for Approval of
Stock Acquisition and Other
Regulatory Authorizations

Case No. 06-M-0878

**ANSWER OF UTILITY WORKERS UNION OF
AMERICA, AFL-CIO, AND UWUA LOCAL UNION
NOS. 310, 317, 318, 322, 329, 330, 343, 350, 362, AND
369 IN PARTIAL OPPOSITION TO
SUPPLEMENTAL MOTION FOR CONFIDENTIAL
TREATMENT AND PROTECTIVE ORDER OF
NATIONAL GRID**

Pursuant to N.Y. Comp. Codes R. & Regs. Tit. 16 § 3.6 (2006), the Utility Workers Union of America, AFL-CIO and UWUA Local Union Nos. 310, 317, 318, 322, 329, 330, 343, 350, 362, and 369 (collectively, "UWUA" or "UWUA Intervenors") respond in partial opposition to National Grid's October 18, 2006 "Supplemental Motion for Confidential Treatment and Protective Order" ("Supplemental Motion"). UWUA Intervenors continue to seek the data sought through discovery that is the subject of National Grid's Supplemental Motion, and object to National Grid's continued effort to prohibit access to these data. Furthermore, UWUA Intervenors share the Presiding Judge's concern, expressed in an October 19, 2006 email to Colin Owyang, counsel for National Grid, that the Supplemental Motion may attempt to shift to requesting parties the burden to show that they need the information requested.

Although National Grid claims protection under New York Public Officers Law § 87(2)(c) (McKinney's 2001 & Supp. 2006), which protects information whose release would "impair present or imminent contract awards or collective bargaining negotiations," it fails to demonstrate or even allege the necessary precondition to the

application of that statutory provision: that National Grid is currently involved or will imminently be involved in collective bargaining negotiations with UWUA. Conclusory allegations that information falls within an exemption to Freedom of Information Law ("FOIL") are insufficient to sustain a refusal to provide the requested information. *See Church of Scientology v. State*, 46 N.Y.2d 906, 907-08 (1979) (citations omitted) ("In support of the denial of access the State officials have tendered only references to sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld. There is no tender of any factual basis on which to determine whether the materials sought... come within the exceptions specified in subdivision 2 of present section 87 of the Public Officers Law.").

As discussed in UWUA's October 10, 2006 Answer in Partial Opposition to National Grid's October 2, 2006 Motion for Confidential Treatment and Protective Order, UWUA is not a competitor of National Grid or of KeySpan; most of the cases cited by National Grid in its Supplemental Motion are therefore inapplicable to UWUA. The union-specific cases cited by National Grid in its Supplemental Motion are also inapposite, as explained below. Finally, the other reasons advanced by National Grid for refusing to provide requested information to UWUA do not stand up to scrutiny.

A. The cases cited by National Grid do not support its contentions with regard to UWUA

In its discussion of UWUA-1, parts 2 and 3 (documents provided to Mercer for its use in preparing the Mercer Analysis and documents prepared by Mercer with respect to the proposed acquisition), National Grid supports its position through citation to a New York Supreme Court case and attempts to bolster its position by distinguishing a New York Court of Appeals case. Neither effort is successful.

National Grid's citation to *Trauernicht v. Bd. of Coop. Educ. Servs. of Nassau County*, 407 N.Y.S.2d 398 (Sup. Ct. Nassau Cty 1978) (Supplemental Motion at 27) involved materially different facts from those at issue in this case. To the extent it is concluded that *Trauernicht* is relevant to the instant proceeding, the case should not control the outcome here. Instead, the court should look to the slightly more recent result reached by the Court of Appeals in *Doolan v. Bd. of Coop. Educ. Servs.*, 48 N.Y.2d 341 (1979).

In *Trauernicht*, the executive director of a Local of the American Federation of School Administrators sought disclosure of a document entitled the "Negotiations Information Service" report, apparently in its entirety. This report, according to *Trauernicht*, contained both factual information and analysis involving, among other things, "provisions of collective bargaining agreements, including grievance procedures, insurance, retirement benefits, job protection rights, and other contractual provisions," and was "designed to assist participating school districts in their collective bargaining negotiations with their respective public employee unions." *Trauernicht* at 399. Although the decision is quite brief, it does not appear that the petitioner had any reason for seeking the report aside from "serv[ing] an inequitable one-sided negotiating ploy." *Id.* By contrast, UWUA is not seeking information "designed to assist... in... collective bargaining negotiations with... unions." It is simply seeking information about the fate of its members if this acquisition is approved. Some of this information is merely factual and some likely consists of analysis that was not prepared with collective bargaining negotiations in mind. Either way, the information is presumably highly relevant to the preparation of testimony concerning the potential impact of the proposed acquisition

upon the workforce and, by direct extension, the impact upon the adequacy of services provided to consumers of the merged company.

Like the petitioner in *Trauernicht*, the petitioner in *Doolan* (the president-elect of the School Administrators Association of New York State) sought disclosure of the Negotiations Information Service report. However, the *Doolan* petitioner sought only “the factual compilation referred to as the ‘NIS Salary Study for Administrators.’” *Doolan* at 347. The New York Court of Appeals concluded on that basis that “[t]here is, therefore, no substance to respondent’s section 87 argument.” *Id.* National Grid claims (Supplemental Motion at 27 n.45) that *Doolan* “[holds] narrowly that respondent had not, as a matter of fact, met its burden of establishing applicability of the § 87(2)(c) exemption.” Even if correct, this statement does not help National Grid, which likewise has failed to make the showing needed to invoke the exemption. Absent that showing, there is no basis to invoke the Section 87(c)(2) exemption, and no basis on which to withhold the data from the UWUA.

B. National Grid’s other arguments against providing requested information to UWUA do not hold water

The other reasons advanced by National Grid for withholding information from UWUA include: (1) further discussions of the “competitive” harm to National Grid if UWUA obtains the information it has requested in this proceeding (Supplemental Motion at 23, 29 and 16: responses to UWUA-1 parts 2 and 3, 4, and 5, respectively); (2) the concern that release of the data will somehow “add[] to employee uncertainty” (Supplemental Motion at 16: response to UWUA-1 part 5); and (3) the assertion that National Grid “ha[s] already begun conversations with the UWUA to determine whether [National Grid] could produce the information to them in a form acceptable to both of us”

(Supplemental Motion at 27, 31 and 17: responses to UWUA-1 parts 2 and 3, 4 and 5, respectively).

UWUA has already rebutted National Grid's argument that it will suffer "competitive harm" if a union representing its workforce receives information relevant to the staffing impacts of this acquisition. UWUA's Answer in Partial Opposition to National Grid's October 2, 2006 Motion for Confidential Treatment and Protective Order at 4-8. While UWUA shares concerns about "employee uncertainty," there has been no showing that producing the information will increase that uncertainty; it could easily be the other way around. Even more important, an unspecified concern about "uncertainty" is not a basis on which to preclude legitimate discovery.¹

Finally, while it is true that National Grid began conversations with UWUA about providing the requested information to UWUA in a mutually acceptable form, National Grid has yet to respond to a suggestion offered by counsel for UWUA in a telephone conversation with counsel for National Grid on October 13, 2006. As such, UWUA is not certain that it is correct to imply that "conversations" (Supplemental Motion at 17) about this subject are ongoing. The existence of these "conversations" did not stop National Grid from filing the instant Supplemental Motion, and should not stop this Commission from denying National Grid's request (at least as concerns the UWUA).

CONCLUSION

National Grid has failed to demonstrate that the information requested by UWUA should not be provided, and its Supplemental Motion as to the UWUA should be denied.

¹ National Grid notes (at 16) that the confidentiality of the information at issue "has been well preserved for many years." We are uncertain what this comment is intended to convey. The information at issue – which concerns, at least in part, the staffing impacts associated with the proposed transaction is presumably of

WHEREFORE, for the foregoing reasons, UWUA asks that the Commission require National Grid to provide the information requested by UWUA, under an appropriate protective order if necessary, and otherwise make findings and take actions in accordance with the positions asserted herein.

Respectfully submitted,



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October 25, 2006

recent vintage.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 25th day of October, 2006, caused the foregoing document to be sent to all parties on the current active parties list compiled for use in this proceeding and attached hereto.

A handwritten signature in black ink, appearing to read "Rebecca J. Baldwin", with a long horizontal flourish extending to the right.

Rebecca J. Baldwin

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Case 06-M-0878
National Grid and KeySpan - Merger Petition
Cases 06-G-1185 and 06-G-1186
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