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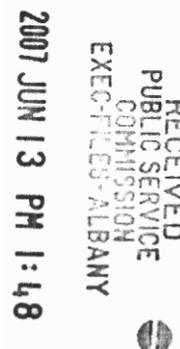


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June 13, 2007

Hon. Jaclyn A. Brillling
Secretary
Public Service Commission
3 Empire State Plaza
Albany, New York 12223-1350



Re: Case 06-M-0878 -Joint Petition of National Grid PLC and KeySpan Corporation for Approval of Stock Acquisition and other Regulatory Authorizations.

Dear Secretary Brillling:

Enclosed for filing are an original and five copies of Staff's Response to National Grid plc's Objection to DPS-390. Copies have been served on the presiding administrative law judges and on all active parties listed on the attached service list.

Very truly yours,

Danielle C. Rathbun

Danielle C. Rathbun
Assistant Counsel

Encl.

cc.: Administrative Law Judge Lynch
Administrative Law Judge Phillips
All Active Parties

**Case 06-M-0878
National Grid and KeySpan - Merger Petition
Cases 06-G-1185 and 06-G-1186
KeySpan Energy Delivery New York and Long Island - Gas Rates
Active Parties List As Of:**

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION



CASE 06-M-0878 - Joint Petition of National Grid plc and
KeySpan Corporation for Approval of Stock
Acquisition and other Regulatory
Authorizations

**STAFF RESPONSE TO NATIONAL
GRID'S OBJECTION TO DPS-390**

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June 13, 2007

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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STAFF RESPONSE TO NATIONAL GRID'S OBJECTION TO DPS-390

INTRODUCTION

By this response, staff of the Department of Public Service (Staff) opposes National Grid plc's (National Grid) objection to DPS-390. The information sought in DPS-390 is necessary for Staff to continue to evaluate the proposed merger between National Grid and KeySpan Corporation (KeySpan) and Staff has no alternate means of obtaining the requested information.

ARGUMENT

By an electronic message transmitted by KeySpan dated June 11, 2007, National Grid objected to Staff's discovery request DPS-390. The objected to requests are as follows:

Regarding the response to DPS-151:

- a) Provide all studies and analyses performed by or on behalf of National Grid and/or its Board of Directors which consider the current value of the KeySpan transaction to National Grid shareholders in light of changes in gas utility stock market conditions since February 2006.
- b) To the extent the work requested in 1a has not been performed, explain why.

- c) Is it National Grid's position that the proposed transaction is more, less or equally beneficial to its shareholders as it was when initially proposed? Provide the basis for the response.

In its objection to DPS-390, National Grid asserts that "the studies and analyses requested in question 1(a) and which in part form the response to 1(b) and the conclusion in question 1(c) were prepared in anticipation of litigation and for the sole purpose of evaluating settlement and litigation positions in this proceeding." (pages 1-2) Based on this assertion, National Grid claims that the requested information is privileged pursuant the Public Service Commission's (Commission) procedural rules contained in Rule 5.8 of the New York Codes, Rules and Regulations (NYCRR).

Pursuant to Rule 5.8, when the Presiding Officer evaluates a party's claim of privilege as an objection to a data request, the Presiding Officer is guided but not bound by the Civil Practice Law and Rules (CPLR) and by relevant case law National Grid relies on CPLR §3101(d)(2) as support for its objection to DPS-390. CPLR §3101(d)(2) provides that:

"materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Based on the language contained in CPLR §3101(d)(2), National Grid asserts that all of the elements necessary to protect the studies and analyses requested in DPS-390 are present. Initially, National Grid states that the materials were prepared in anticipation of litigation and to evaluate settlement positions in this proceeding and that disclosure of this material would prejudice National Grid's ability to develop and implement its litigation and settlement strategies. In relation to the 2 prong test contained in CPLR §3101(d)(2), National Grid claims that "Staff has made no showing that it (i) has a substantial need for the information when presenting its case and (ii) is unable without undue hardship to obtain the information by equivalent means." (page 3)

Staff asserts that National Grid has proven none of the elements necessary to protect the materials requested in DPS-390 and respectfully requests that National Grid be ordered to produce the requested materials.

National Grid has not demonstrated that the requested material was prepared solely in anticipation of litigation and/or settlement. The courts have held that "[to] be immune from discovery, defendant must demonstrate that the material sought was prepared *exclusively* for litigation. Multipurpose reports are not free from disclosure," (Carden v. Allstate Ins.

Co., 91 A.D.2d 710, 711 (3d Dept. 1984) (emphasis original),
Hawley v. Travelers Ind. Co., 90 A.D.2d 684 (4th Dept. 1982),
Oppedisano v. New York Mutual Underwriters, 111 A.D.2d 452, 453
(3d Dept. 1985).¹ Other than alleging that "the studies and
analyses requested in question 1(a) and which in part form the
response to 1(b) and the conclusion in question 1(c) were
prepared in anticipation of litigation and for the sole purpose
of evaluating settlement and litigation positions in this
proceeding," National Grid has not demonstrated that the
requested material was prepared exclusively for litigation
and/or settlement. Staff asserts that, without such a
demonstration, National Grid cannot claim that this material is
protected.

Even if it is demonstrated that this material was prepared
exclusively for litigation and/or settlement, National Grid's
arguments that "Staff has made no showing that it (i) has a
substantial need for the information when presenting its case
and (ii) is unable without undue hardship to obtain the
information by equivalent means" are incorrect. As an initial
point, Staff is not required, pursuant to the discovery
procedures set out in the NYCRR, to provide a justification for
its requests, nor is it appropriate to include such

¹ The courts have also extended protection to analyses prepared for
settlement as well as litigation. See Hicksville Props. v. Board of
Assessors, 116 A.D.2d 717 (1986).

justification in an interrogatory or document request. Such justification becomes necessary and appropriate only when the party to which the request was directed objects to providing information, documents, etc. Thus, National Grid's statement above is inaccurate.

As to the two prong test contained in CPLR §3101(d)(2), Staff has a substantial need for the information when presenting its case, and is unable, without undue hardship, to obtain the information by equivalent means. National Grid suggests that Staff has no need for the information and that "short term stock price fluctuations" have no bearing on this case. The company additionally notes that the terms of the transaction are not affected by stock price swings. These arguments ignore the rationale behind Staff's requests in DPS-390 and Staff's overall responsibilities in evaluating the proposed merger. The terms of the transaction may not change, but the "winners and losers" in the transaction will change with fluctuations in stock market prices. One of the most significant issues in this proceeding concerns the value of the proposed transaction to ratepayers and shareholders and possible alternatives and attendant ratepayer and shareholder benefits to the transaction. Staff requested, in DPS-26, DPS-104 and DPS-190, that National Grid provide and respond to questions concerning its analysis of the proposed transaction at the time it was making its bid for KeySpan, and

National Grid provided its analysis and responded to Staff's inquiries.

Since that initial request, the stock prices of companies involved in the distribution of natural gas have increased substantially while KeySpan's price has remained near the \$42 per share purchase offer.² Based on these changes in the stock market, Staff is now requesting that National Grid provide its analysis of the proposed transaction in light of the latest market conditions. Essentially, Staff is asking National Grid to explain how its view of the proposed transaction has changed since February 2006. National Grid's statements that this information is not necessary for Staff's analysis of the proposed merger seem to be premised on the belief that the value of the stock is irrelevant to the overall merger. Such a premise is implausible at best.

Staff asserts that the requested information is critical to determining whether the allocation of risks and benefits from the proposed transaction has changed markedly since originally announced and, if so, the magnitude and significance of this change. Given the content of the confidential information about the alternative bid, Staff believes that it is important for the

² For example, based on data from Yahoo Finance, it can be shown that since February 1, 2006 the price of KeySpan stock has risen by about 13.5% while the price of similar utilities such as AGL Resources, Atmos Energy, Laclede Group, New Jersey Resources, NICOR, Northwest Natural Gas, Piedmont Natural Gas, SEMCO, South Jersey Utilities, Southern Union, Southwest Gas, UGI, and WGL Holdings have increased on average by over 32%.

Commission to know if Grid now anticipates greater shareholder benefits from the transaction but no concurrent change in ratepayer benefits. The analyses requested in DPS-390 will provide Staff, and ultimately the Commission, with this information.

Additionally, National Grid has updated its position on the proposed merger in a number of other areas, such as synergy savings and the terms of the merger rate plan, to reflect changing circumstances. DPS-390 merely asks National Grid to address how the recent changes in stock market conditions have affected other information, specifically how National Grid valued the proposed merger, previously provided by the company.

As to the second prong of the test under CPLR§3101(d)(2), National Grid also notes that Staff has not shown that it could not, without undue hardship, obtain the information from other sources. As an initial point, National Grid states that the information about changes in natural gas utilities' stock prices is publicly available and that "National Grid's view of this value is not necessary for the Staff to develop its position."

(page 4) These statements deliberately ignore the overall intent behind the requests made in DPS-390. Staff is capable of tracking stock market prices and has done so in preparation of this statement and in its evaluation of the proposed merger.

What National Grid chooses not to address is the fact that the

dollar amounts associated with individual companies' stock are only one quantitative component that goes into the overall evaluation of the value of KeySpan's stock relative to the proposed merger.

The actual language of DPS-390 illustrates this point. Question 1(c) asks whether it is "National Grid's position that the proposed transaction is more, less or equally beneficial to its shareholders as it was when initially proposed." National Grid's position is based on more subjective factors than the dollar value accorded to shares of stock. Its position as to the benefits of the proposed merger to its shareholders must also take into account risks associated with the proposed merger in light of changing market conditions, i.e. the potential for KeySpan shareholder lawsuits. Such an analysis is subjective and Staff, despite its ability to "run the numbers," cannot provide National Grid's insight into these additional factors. Only National Grid can provide its insight into the subjective aspects of the evaluation contemplated by DPS-390(1)(c). Thus, it is impossible, not merely "unduly burdensome," for Staff to obtain the requested information as required under the second prong of the test under CPLR§3101(d)(2).

Although Staff believes National Grid must produce the information requested in DPS-390 based on the arguments above, it is well settled that the Commission's procedural rules,

specifically Rule 5.8, provide Presiding Officers with discretion that goes beyond the dictates of CPLR§3101(d) (2). Rule 5.8 states that "the presiding officer shall be guided but not bound by the Civil Practice Law and Rules and case law pursuant to it." National Grid urges that this discretion be exercised to protect the materials requested in DPS-390. Specifically, National Grid states that "the Commission favors settlements, when they can be reasonably reached." (page 4) As further support for this statement, National Grid asserts that "requiring production of materials developed in anticipation of litigation and for settlement purposes would undermine the settlement process, and the Commission's policies, which support alternative dispute resolution." (page 4)

Staff is confused by the references to evaluating settlement positions and undermining the settlement process as a basis for National Grid not providing the requested information because settlement discussions on the proposed merger ended approximately one month ago. National Grid's statement that requiring it to produce the requested materials would negatively impact settlement negotiations on the proposed merger is without merit as, per the procedural ruling in the abovementioned case on May 24, 2007, the merger is now proceeding along a litigation track.

CONCLUSION

For the reasons stated, Staff opposes National Grid's objection to DPS-390 and respectfully requests Your Honors to overrule the objection and require National Grid to produce the requested materials in accordance with the procedural rules set out in the NYCRR.

Respectfully submitted,

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Dated: Albany, New York
June 13, 2007