

DE 03-086

UNITIL ENERGY SYSTEMS, INC.

Petition for Adjustment to Stranded Cost Charge and Increase in
Short Term Debt Limit

Order Approving Stipulation and Agreement Regarding
UES' Request for Approval of a Capital Contribution
and Increase in Short-Term Debt

O R D E R N O. 24,212

September 25, 2003

APPEARANCES: Scott J. Mueller, Esq., of LeBoeuf, Lamb, Greene & MacRae, L.L.P., for Unitil Energy Systems, Inc.; F. Anne Ross, Esq., for the Office of Consumer Advocate; Alan Linder, Esq., of New Hampshire Legal Assistance on behalf of Wendy Page; and Edward N. Damon, Esq., for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

The procedural history set forth below includes a summary of the proceedings through July 2, 2003, the date of the Commission's last order in this docket, as well as a complete procedural history after that date. Additional details about the proceedings through July 2 are included in the orders described below.

On April 1, 2003, Unitil Energy Systems, Inc. (UES or the Company), filed with the New Hampshire Public Utilities Commission (Commission) a Petition for Authority to Adjust the UES Stranded Cost Charge and to Issue Short-Term Debt. Pursuant

to an Order of Notice, a technical session and prehearing conference was held at the Commission on April 21, 2003.

Following the prehearing conference, the Commission issued Order No. 24,168 on May 2, 2003, granting an increase in UES' short term debt limit on a temporary basis from \$16 million to \$22 million for a period not to exceed six months, pending a hearing and a decision on UES' request regarding a permanent increase in UES' short term debt limit. The Commission conditioned the temporary increase on UES not making any further dividend payments to UES' corporate parent, Unitil Corporation (collectively UES and Unitil Corporation are sometimes referred to as Unitil), from and after the date of the Order, until further notice. In addition, the Order scheduled a hearing on UES' request for an adjustment to its stranded cost charge¹ to be held on May 21, 2003 and a separate hearing regarding UES' request to increase its short term debt limit to be held on August 12, 2003.

On May 7, 2003, UES and Unitil Corporation filed with the Commission a Motion for Stay, Rehearing, and Modification of Order No. 24,168 (Motion for Stay), together with the supporting Affidavit of Samuel C. Hadaway.

¹ The focus of this hearing was to be on the under-collection by Unitil Power Corp. (UPC) and UES of their fuel and purchased power balances for the period ending on April 30, 2003.

On May 9, 2003, the Commission issued a secretarial letter stating in part that pursuant to RSA 541:5, the Commission was suspending, pending further consideration of the matters raised in the Motion for Stay, that portion of Order No. 24,168, which conditioned the Commission's approval of UES' short term debt limit upon UES not making any further dividend payments to Unitil Corporation from and after the date of that order, until further notice. The letter also stated that an order addressing the manner in which the Commission intended to consider the Motion for Stay would be issued in the near future.

On May 16, 2003, the Commission issued the order referred to in the secretarial letter, *Unitil Energy Systems, Inc.*, Order No. 24,174. In this Order, the Commission suspended UES' proposed tariff pages included in its April 1, 2003 filing pursuant to RSA 378:6, I(b), pending the May 21, 2003 hearing and the Commission's decision thereon. The Commission also set forth a revised procedural schedule requiring UES to submit its plan to increase its equity ratio. In addition, the Commission announced its expectation that

"the level of any quarterly dividends paid by UES in the period prior to the August 12, 2003 hearing would not exceed a quarter of the annual limitation agreed to in DE 01-247 while at the same time remaining consistent with the overall goal of increasing the equity component of UES' capital structure over time."

On May 21, 2003, the Commission held a hearing regarding the under-collection recovery request and three motions for protective order filed by UES.

On June 30, 2003, UES filed the supplemental testimony of Mark H. Collin, including the UES 2003 Financing Plan, and the testimony of Samuel C. Hadaway, together with a motion for protective order requesting confidentiality for certain portions of Mr. Collin's testimony and an exhibit related to the UES 2003 Financing Plan.

On July 2, 2003, the Commission issued Order No. 24,188, authorizing UES to recover a fuel and purchased power under-collection of \$8,555,838 over a twenty-two month period on a service rendered basis beginning on July 1, 2003, with interest at 1.85 percent per year on the unrecovered portion of the \$8,555,838 under-collection beginning on July 1, 2003.

On July 3, 2003, UES filed with the Commission tariff pages in compliance with Order No. 24,188. On July 8, 2003, the Commission issued a secretarial letter stating that UES' July 3, 2003 filing complied with N.H. Code Admin. Rules Puc 1603 filing requirements.

On August 1, 2003, UES filed with the Commission a motion for protective order regarding certain information provided in response to Staff's information request number 5 made at a technical session held on July 9, 2003.

On August 8, 2003, Staff filed a request for a modification of the procedural schedule to allow a one week postponement of the hearing, until August 19, 2003, with the agreement of all the parties. On August 11, 2003, the Commission issued a secretarial letter approving the postponement.

On August 12, 2003, Unutil filed with the Commission its supplemental response to Staff's confidential data request number 8. UES stated it understood that the confidentiality of the response would be treated as coming within its pending or previously granted motions for protective order.

On August 14, 2003, Staff filed a Stipulation and Agreement Regarding UES' Request For Approval Of a Capital Contribution and Increase In Short-Term Debt (Agreement) in connection with the hearing scheduled for August 19, 2003. Staff requested a waiver of N.H. Code Admin. Rules Puc 203.09(d)² requiring that settlements be filed no less than five days prior to hearing.

On August 18, 2003, New Hampshire Legal Assistance (NHLA),³ filed a letter with the Commission stating that it was unable to concur in that portion of the Agreement which would

² The waiver request is now moot by virtue of the fact that the hearing was rescheduled to September 4, 2003.

³ NHLA represented Wendy Page, an intervenor in Phase II of the Unutil Restructuring docket, DE 01-247.

remove the dividend restriction required by section 3.3.3.1 of the Phase II Settlement Agreement.⁴

On August 20, 2003, the Commission issued a supplemental order of notice pursuant to RSA 365:28, providing notice to the public and the parties in DE 01-247 of a public hearing to be held on September 4, 2003 regarding the Agreement, including the issue, among others, of whether to approve the Agreement and thus modify *Concord Electric Company and Exeter & Hampton Electric Company*, Order No. 24,072 (October 25, 2002) (Phase II Order), which approved the Phase II Settlement Agreement.

On September 2, 2003, the Office of State Planning and Energy Programs (OSPE) (formerly known as the Governor's Office of Energy and Community Services),⁵ filed a letter with the Commission stating that although it could not actively participate in the present docket, it appreciated the opportunity afforded by the Commission to respond to the proposed settlement. OSPE noted that the proposed settlement requested the Commission to lift the current restriction on dividends imposed in DE 01-247 to accommodate a \$5 million cash infusion to UES by Unitil Corporation. According to OSPE, while

⁴ The dividend restriction required Unitil to limit the cash dividends paid by UES on an annual basis to an amount no higher than the cash dividends paid by UES' predecessors in the 2001 test year. See section 3.3.3.1.

⁵ The Governor's Office of Energy and Community Services was an intervenor in DE 01-247.

the \$5 million infusion could benefit the Company if retained, passing it through to shareholders would diminish, if not eliminate, any such public benefit. Further, according to OSPE, the Agreement also included a commitment by UES not to issue any additional dividends for the remaining four months of 2003 but does not otherwise restrict UES' use of the \$5 million. For these reasons and because of the rate increases that UES customers have recently experienced, OSPE stated that it did not concur in the proposed settlement.

On September 4, 2003, the Commission held the hearing regarding the Agreement. An affidavit of publication was filed, showing that the supplemental order of notice had been published in the *Union Leader* on August 25, 2003.

On September 5, 2003, Staff filed a revised Agreement reflecting the modified language described by the parties at the hearing.

On September 10, 2003, UES filed a motion for protective order for certain information provided in response to a record request by the Office of Consumer Advocate (OCA) record request pre-marked as Exhibit No. 41-C.

On September 12, 2003, UES filed its response to a record request which had been pre-marked as Exhibit No. 43.

On September 16, 2003, OSPE filed a letter with the Commission stating that it had reviewed the revised Agreement and did not object to it.

II. SUMMARY OF REVISED AGREEMENT

At the conclusion of the hearing on September 4, 2003, the parties presented three revisions to the Agreement:

(i) in section 2.2, specification of the equity capital to be received by UES was changed from "up to \$6 million" to "approximately \$5-6 million" in order not to limit the amount of the equity capital contribution in the event the public offering is more successful than expected;

(ii) also in section 2.2, a clause was added specifying that the amount of the equity capital contribution would be used in its entirety to pay down short term debt.

(iii) section 3.1 was modified to add notification to the parties and the Commission of the disposition of the proceeds of the equity contribution to the other notifications to be made by the Company.

The revised Agreement, executed by UES, OCA and Staff and supported by NHLA and, according to Unitil, the Business and Industry Association of New Hampshire, an intervenor in DE 01-247,⁶ resolves all remaining issues in this docket.

⁶ In addition, OSPE does not object to the revised Agreement, as indicated in its letter filed on September 16, 2003.

As provided in the revised Agreement, based upon UES' 2003 Financing Plan, UES intends to: 1) refinance short term debt with permanent long-term financing; 2) provide funding for UES' capital expenditure program; 3) rebalance UES' permanent capital structure to improve financial flexibility and credit quality; and 4) address regulatory compliance issues and concerns.

The parties request that the Commission grant certain approvals, authorizations or orders, namely:

(i) approve the continuation of the temporary increase in UES' short-term debt limit until April 30, 2004,⁷ after which UES will be subject to its existing short-term debt limit of \$16 million until such time as the Commission may authorize a change in UES' short-term debt limit;

(ii) allow the receipt by UES of approximately \$5-6 million of additional equity capital based upon a capital contribution from Unitil Corporation, on or before December 31, 2003, which amounts in their entirety will be used to pay down existing short-term debt of UES;

(iii) remove the prohibition on the payment of dividends by UES originally included in Order No. 24,168 and subsequently stayed by secretarial letter; and

⁷ The increase is from \$16 million, its currently authorized level, to \$22 million.

(iv) based upon Unitil Corporation's planned equity contribution and UES' agreement to limit its dividend payments in 2003 to the amount paid to date (\$1,563,882), remove the dividend payment restriction, authorized pursuant to the second sentence of Section 3.3.3.1 of the settlement approved in the Phase II Order. In the event an equity infusion from Unitil Corporation to UES of at least \$5 million does not occur by December 31, 2003, such dividend limitation will be reinstated and the parties recommend that the Commission expeditiously conduct a hearing addressing the appropriate dividend level for UES.

Finally, in order to keep the parties and the Commission informed of the implementation of the UES 2003 Financing Plan, UES agrees to provide the following information:

(i) notification of Unitil Corporation's capital contribution to UES within five days following the capital contribution, with such notification to include a statement showing the exact dollar amount of the capital contribution, UES' resulting capitalization ratio and the disposition of proceeds; and

(ii) until the filing of the Company's next base rate case, an annual financing report to be filed on or before December 1 showing the projected sources of capital and capital

structure for a five year period, which reports the parties agree should be treated as confidential.

III. POSITIONS OF THE PARTIES AND STAFF

A. UES

Under the 2003 Financing Plan presented by the Company, Unitil Corporation will make an equity capital contribution to UES by the end of 2003. In addition, UES will also issue up to \$15 million of first mortgage bonds in the winter or spring of 2004 to refinance short term debt and for other general corporate purposes; UES will separately request the Commission's approval for refinancing of its long term debt.

As described in a Form S-3 filed by Unitil Corporation with the Securities and Exchange Commission (SEC) on August 29, 2003, the equity capital contribution to UES will be made from the net proceeds of a public offering of Unitil Corporation common stock, to be divided between UES and Unitil Corporation's other utility subsidiary, Fitchburg Gas & Electric Company.⁸ RBC Capital Markets and Edward D. Jones & Co. L.P. have been named as the primary underwriters for the offering. After review by the SEC, a "red herring" prospectus will be developed, which

⁸ The planned offering is for 520,000 shares, with an over-allotment percentage of 15%, which, if exercised, could result in up to 598,000 shares being issued. Net proceeds from the offering, after deducting underwriting discounts and commissions and offering expenses, are expected to be approximately \$12.5 million (approximately \$14.4 million if the underwriters' over-allotment option is exercised in full), based on an assumed offering price of \$25.84, the closing price of Unitil Corporation common stock on August 27, 2003.

will be sent to the brokers as the first step of the marketing stage. Shortly before the public offering is made, final pricing will be determined and the prospectus will be issued. Unitil expects this process to be accomplished by December 31, 2003.

The Form S-3 lists a number of risk factors, among which is the Chapter 11 bankruptcy filing by Mirant Americas Energy Marketing, LP (Mirant Americas) and its parent, Mirant Corporation (collectively, Mirant), on July 14, 2003. UPC, UES and Mirant Americas entered into an agreement dated February 25, 2003 (Portfolio Sale and Transition-Default Service Supply Agreement) under which Mirant Americas is obligated to purchase the power supply entitlements to UPC's long term power supply portfolio and provide the electricity necessary for UES to meet its obligations to provide transition and default service for its retail customers.⁹

Unitil's Form S-3 describes the Mirant situation as follows: Mirant has indicated that it will continue to operate in the normal course of business, notwithstanding the bankruptcy petition, and will continue to honor its obligations under the Portfolio Sale and Transition-Default Service Supply Agreement

⁹ The Commission approved the Portfolio Sale and Transition-Default Service Supply Agreement in Phase III of DE 01-247. See *Unitil Energy Systems, Inc. and Unitil Power Corp.*, Order No. 24,139 (March 14, 2003). In connection with the Portfolio Sale and Transition-Default Service Supply Agreement, Mirant Corporation issued a limited, unsecured corporate guarantee for Mirant Americas' obligation to provide transition and default service.

until such time as Mirant decides to either assume or reject the agreement.¹⁰ As of July 14, 2003, the pre-petition amount owed by Mirant under the agreement to UPC was approximately \$5.3 million. UES and UPC have elected to hold back pre-petition amounts due Mirant totaling \$5.3 million against the amount due from Mirant. Also according to Unitil, Mirant is expected to dispute its right to hold back all or a portion of such amounts. If Mirant does not assume the Portfolio Sale and Transition-Default Service Supply Agreement, Unitil plans to sell the electricity under its power supply portfolio entitlements into the New England markets on a short term basis and to seek to resell the entire portfolio on a long term basis.

As indicated at the hearing, Unitil recognizes that the Mirant bankruptcy poses some uncertainties for the planned equity offering at this time, but nevertheless asserts that under all the circumstances, it is an opportune time to proceed with an equity offering. For example, Unitil points out that, from a marketing perspective, a utility stock paying a solid and regular dividend should be attractive, especially given the recent Federal tax legislation reducing the income taxes payable on dividends.

Based on UES' current projections for its debt outstanding at the time of the equity capital contribution, UES

¹⁰ To date that decision has not been made.

expects to have a total equity ratio of approximately 38 percent, with the contribution accounted for as an addition to paid-in capital.

Regarding the rationale for requesting modification of the dividend limitation approved in the Phase II Order, UES asserts the equity capital contribution called for by the UES 2003 Financing Plan accelerates by a number of years the improvement in its equity ratio that was the reason for the dividend limitation in the first instance. In addition, by going to the capital markets, Unitil wants to present its offering in the most favorable light possible. According to Unitil, the limitation would result in an unfavorable marketing environment for the stock offering.

In response to the concern initially expressed by NHLA, *infra*, that because the Agreement contained no limitation on UES' use of the capital contribution, UES could use the contribution to pay dividends back to Unitil Corporation, Unitil stated that the capital contribution would be used to pay down short term debt and make a permanent investment in UES to improve its capital ratio. In addition, Unitil pointed out that the Agreement allowed the capital structure of UES to be monitored through regular reporting to the Commission.

UES agrees that the planned equity capital contribution does not affect UES' general commitment, expressed

in the Phase II Settlement Agreement, to improve the equity component of its capital structure over time in order to insure that it has continued financial flexibility and continued access to capital at reasonable rates. Other than by accepting the planned equity capital contribution, UES said it expects to work to develop its equity base by improving its cash flow outside of the rate case in Phase II of DE 01-247 and by continuing to take advantage of certain stock plans, such as Unitil Corporation's dividend reinvestment plan and its 401(k) plan.¹¹ UES said it believes a range of equity ratios are reasonable and a ratio of approximately 40 percent is an optimal number as a target.

UES explained that its agreement to limit its dividend payments in 2003 to the amount paid to date resolves an issue raised by Staff about whether in 2002 UES violated a term of the Phase II Settlement Agreement and the Commission's order in the Phase II Order, which required Unitil to limit the cash dividends paid by UES on an annual basis to no more than the 2001 test year cash dividends. According to the Company, this issue is effectively resolved by taking into account the three dividends paid by UES in 2003 with the four paid in 2002, with the result that through 2003 UES will have paid dividends approximately equal to the annual limitation agreed to in the Phase II Settlement Agreement.

¹¹ Unitil stated that Unitil Corporation has made capital contributions to it of approximately \$3 million pursuant to such plans over the past five years.

B. OCA

OCA expressed its general support for Staff's position set forth below. OCA pointed out two important factors leading to its support for the Agreement (and the revised Agreement): first, the increase in the equity component of UES' balance sheet, which is especially critical with the potential risks presented by the Mirant bankruptcy and the obvious stress that this could create on the cash flow and finances of UES, and second, the importance of lifting the dividend limitation to achieve a successful equity offering.

C. NHLA

NHLA was permitted to be an intervenor in this docket pursuant to the supplemental order of notice. At the commencement of the hearing, NHLA stated its concern that there was nothing in the proposed Agreement that would limit UES' ability to pay out a higher dividend from the capital contribution and that would limit the use of the capital contribution. However, as a result of the revisions incorporated in the Agreement described in section II above, NHLA expressed support for the Agreement as revised.

D. Staff

Staff stated that the Agreement (and the revised Agreement) offers several distinct benefits.

First, according to Staff, the equity infusion required by the Agreement will improve UES' capital structure. UES' capital structure during Phase II, the rate case portion of DE 01-247, was approximately 37% equity and 63% debt. By December 31, 2003, after an infusion of \$5 million, UES' equity component is projected to be approximately 38%. During the hearings on the Phase II Settlement Agreement, Staff highlighted its concerns with UES' current capital structure, which relied excessively on debt. To encourage movement towards a more optimal capital structure, the Phase II Settlement Agreement set UES' revenue requirement based on a hypothetical, more equity based capital structure and restricted the Company's annual dividend payments to its parent to an amount no more than it paid in 2001. Staff said that the equity infusion called for under the Agreement is consistent with the goal of the Phase II Settlement Agreement that UES increase its equity component in order to ensure that the Company has continued financial flexibility and continued access to capital at reasonable rates.

Second, according to Staff, this Agreement requires UES to cure, in effect, what Staff viewed as a violation of the DE 01-247 Settlement Agreement. Section 3.3.3.1 of that Agreement required that, until a decision in its next rate case, UES limit the cash dividends paid by UES on an annual basis to an amount no higher than the cash dividends paid by Concord

Electric Company and Exeter & Hampton Electric Company in the 2001 test year. Staff said it learned during this docket that UES' dividend payments to its parent in calendar year 2002 exceeded the amount paid in 2001 by almost \$250,000, violating, in Staff's view, the Phase II Settlement Agreement. Staff said the Company disputed Staff's view, arguing, among other things, that it interpreted the Phase II Settlement Agreement obligation regarding the dividend limitation as applying only after it had made its last dividend payment in 2002. In effect, then, according to Staff, the Agreement requires UES to honor its Phase II obligations by limiting the cash paid to its parent to the amount paid to date and results in an average level of dividends paid during calendar years 2002 and 2003 of an amount approximately equivalent to the annual dividend cap set forth in the Phase II Settlement Agreement. Consequently, Staff said it agreed this is a reasonable resolution of this issue.

Third, according to Staff, the Agreement asks the Commission to extend UES' authorized short-term debt cap of \$22 million until April 30, 2004. After that time, UES' short-term debt cap will revert to its previously authorized limit of \$16 million. Staff believes this will allow UES ample financial flexibility to conduct its operations responsibly and to successfully perform the objectives in its 2003 Financing Plan.

Fourth, according to Staff, until UES files its next rate case, the Agreement requires UES to file on an annual basis its five year plan showing its projected sources of capital and capital structure. Staff said this helps to alleviate its concerns with respect to UES' financial management and its level of candor with the Commission by allowing the Staff to more closely monitor UES' plans regarding its capital structure.

Finally, according to Staff, the Agreement is balanced. Staff believes it offers the Company the flexibility it needs to accomplish its objectives, while continuing to protect ratepayers by promoting corporate financial responsibility. It does this by automatically reinstating the dividend limitation negotiated and approved in DE 01-247, in the event that the equity capital contribution is not made as envisioned by the Agreement.

IV. CONFIDENTIALITY REQUESTS

UES filed three motions for protective order which are still pending, one on June 30, 2003, in connection with the submission of Mark H. Collin's testimony and an exhibit related to the UES 2003 Financing Plan, one on August 1, 2003 in connection with Staff's information request number 5 made at the technical session on July 9, 2003, and one on September 10, 2003 in connection with Unitil's estimate of the cost or savings UES might incur in the event Mirant rejects the Portfolio Sale and

Transition-Default Service Supply Agreement. In addition, on August 12, 2003, UES filed with the Commission its supplemental response to Staff's confidential data request number 8, stating it understood that the confidentiality of the response would be treated as coming within its previous motions for protective order.

At the hearing, UES clarified its pending confidentiality requests by identifying the documents for which it has withdrawn its requests for confidential treatment and those for which it continues to seek confidential treatment. As a result of the filing of the Form S-3, UES explained that its motion filed on June 30, 2003 is now moot. Exhibit 36 contains the unredacted supplemental testimony of Mark H. Collin for which UES no longer seeks confidential treatment.

Exhibit 38-C contains the Staff information request and data request responses for which UES continues to seek confidential treatment. These materials consist of certain financial forecasts related to projected financing requirements and short term debt balances of UES during the period 2003-2006 and certain information presented to Unitil's board of directors addressing the planned equity and debt issuances, including financial forecasts and projections, as well as certain votes taken by the board in connection with the equity offering. As indicated in its motion for protective order filed on August 1,

2003, Unitil asserts that its financial forecasts constitute confidential and proprietary information which is not disclosed to anyone except senior company officials and advisors; it seeks protection from public disclosure of these documents in order to protect its proprietary information and competitive position.

Exhibit 41-C contains the information for which UES seeks confidentiality pursuant to its motion for protective order filed on September 10, 2003. According to UES, this exhibit contains confidential and proprietary pricing estimates and other market information, including information regarding the results of Unitil's power supply solicitation that was afforded confidential treatment in DE 01-247. Unitil asserts that it has not and does not intend to disclose this information in any other forum and that public disclosure of this information could compromise UES' bargaining position in securing a replacement contract in the event Mirant rejects the Portfolio Sale and Transition-Default Service Supply Agreement, to the detriment of UES and its customers.

V. COMMISSION ANALYSIS

A. The Revised Agreement

In *Unitil Energy Systems, Inc.*, Order No. 24,174 (May 16, 2003), due to our concerns over the substantial and increasing short term cash needs projected by the Company, driven in part by the large under-collection of fuel and

purchased power balances, and in view of our stay of the prohibition on UES making any further dividend payments until further order, we required the Company to submit a plan specifying how it intended to increase its equity ratio consistent with the recently approved Phase II Settlement Agreement.

The revised Agreement before us incorporates key features of the Company's plan and resolves the Company's request to increase its short term debt limit. The plan calls for an equity capital contribution to UES by its corporate parent of approximately \$5-\$6 million, which amount will be used in its entirety for paying down existing short term debt; the revised Agreement specifies that in the event an equity infusion of at least \$5 million does not occur by the end of 2003, the dividend limitation included in the Phase II Settlement Agreement will be reinstated and we will have the opportunity to hold a hearing to address the appropriate dividend level of UES. In addition, until the Company files its next base rate case, the revised Agreement requires the Company to submit an annual financing report to be filed on or before December 1 of each year showing the projected sources of capital and capital structure over a five year period. With regard to UES' short term debt limit, the revised Agreement contemplates the continuation of the temporary, \$22 million limit until April 30,

2004, after which UES will be subject to its previously authorized short term debt limit of \$16 million until such time as UES may request and receive approval of a different limit in the future.

Exhibit No. 43, submitted after the hearing in response to a record request, shows that UES' actual short term debt balances outstanding through August 31, 2003, are less than those forecast when the Company last submitted such information as part of Exhibit 34 on June 3, 2003. UES explains that these lower balances primarily reflect certain favorable cash timing differences compared to the previous forecast related to certain subsequent events, namely:

(i) UES withholding approximately \$4.8 million of power supply payments to Mirant as an offset to amounts UPC is obligated to pay third party vendors, which are projected to reverse by year end as these costs are incurred by UPC and billed to UES;

(ii) a \$1.8 million refund of 2002 estimated Federal income tax payments due to recent tax law changes and the preparation of the Company's tax return;

(iii) the delay in UES' payment of approximately \$1 million to NEPOOL under its Financial Assurance Policy (FAP) due to a third party reporting error which resulted in UPC being

billed the FAP obligation of UES (the error is expected to be corrected and billed to UES by year end); and

(iv) the net additional positive cash flow from other favorable changes in working capital cash flow and capital expenditures, compared to forecast.¹²

The circumstances described above, combined with the potential impact on UES' cash needs resulting from the financial risks posed by the Mirant bankruptcy, lead us to conclude that continuation of the temporary increase in UES' short term debt limit provided for in the revised Agreement is appropriate. We believe the equity capital contribution to UES contemplated by the revised Agreement for purposes of paying down short term debt will help to bolster the Company's capital structure at a time of increased financial risk. Although the equity capital contribution was not set forth in the Phase II Settlement Agreement as a means of improving the Company's equity ratio, it is consistent with the objectives of the Phase II Settlement Agreement.

We recognize that the equity capital contribution is not yet a *fait accompli* and that it is possible that, for one reason or another, the public stock offering may not be successful. In such event, the revised Agreement provides that the Phase II dividend limitation will be reinstated; further, we

¹² One of the changes results from UES not paying a fourth dividend in 2003 pursuant to the Agreement.

will have an opportunity to hold a hearing on UES' dividend policy. Whether or not the offering is successful, we will have the ability in the future to monitor the Company's annual financing reports and thus satisfy ourselves that the Company's management of its balance sheet is being conducted in an appropriate fashion.

Finally, we note that the revised Agreement is supported by all the parties to this docket and is either supported or not opposed by all parties to DE 01-247. Although we must nevertheless independently determine whether the revised Agreement comports with applicable standards, we recognize that our approval of the revised Agreement will allow the parties to reach a result more in line with their expectations. See *Concord Electric Company and Exeter & Hampton Electric Company*, Order No. 24,072 (October 25, 2002), slip op. at 37.

For all these reasons, we believe the revised Agreement is reasonable and we will therefore approve it.

B. Pending Confidentiality Requests

UES has now made public the information for which confidentiality was sought in its motion filed on June 30, 2003 and it agrees that its request is now moot. Therefore, we will treat the confidentiality request in this motion as having been withdrawn by the Company.

At the hearing, the Company said it was still seeking confidential treatment for the information contained in Exhibit No. 38-C. Its request for confidential treatment of such information is supported in part by its motion for protective order filed on August 1, 2003; in addition, in view of its supplemental response to Staff's confidential data request number 8 filed on August 12, 2003, we deem its request to be supported by our prior rulings in this docket regarding information of a similar nature, *see Unitil Energy Systems, Inc.*, Order No. 24,188 (July 2, 2003), slip op. at 32-34.¹³ This confidentiality request is still pending and we will proceed to rule on it; we must also rule on UES' motion for protective order filed on September 10, 2003, requesting confidential treatment for the information contained in Exhibit No. 41-C.

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. *See* RSA 91-A:4, I. The statute contains an exception for "confidential, commercial or financial information." RSA 91-A:5, IV. The case law interpreting whether information is considered confidential requires an

¹³ Section 3.2 of the revised Agreement similarly provides for the confidentiality of UES' annual financial report. We expect that these reports will contain commercially sensitive forecast information. We do not assume this provision to be a requirement of absolute confidentiality; rather, we understand that this provision is subject to our customary caveat, included in our rulings granting motions for protective order, that the Commission, on its own motion or on the motion of Staff, any party or any other member of the public, to reconsider confidential treatment in light of RSA 91-A, should circumstances so warrant.

objective test; it is not based on the subjective expectations of the party generating the information. See *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997).

We have reviewed the two pending requests for confidential treatment and find that UES has provided credible arguments as to the strategic and commercial sensitivity of the information for which protection is sought. We also note that no party has objected to confidential treatment.

In balancing the interests for and against public disclosure of the information, we are persuaded, based on the information before us, that the interest of Unitil and Unitil ratepayers in non-disclosure outweighs the public's interest in obtaining access to the information. We will therefore grant the two pending confidentiality requests of UES at this time. Consistent with our practice, the protective treatment provisions of this Order are subject to the on-going authority of the Commission, on its own motion or on the motion of Staff, any party or any other member of the public, to reconsider the protective treatment in light of RSA 91-A, should circumstances so warrant.

Based upon the foregoing, it is hereby

ORDERED, that in accordance with the foregoing, the revised Agreement is approved; and it is

FURTHER ORDERED, that UES' request for confidential treatment of the information contained in Exhibit 38-C and its motion for protective order filed on September 10, 2003 are granted, subject to the on-going rights of the Commission, on its own motion or on the motion of Staff, any party or any other member of the public, to reconsider in light of RSA 91-A, should circumstances so warrant.

By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of September, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary