DG 04-133
DG 04-175

ENERGYNORTH NATURAL GAS, INC. D/B/A
KEYSPAN ENERGY DELIVERY NEW ENGLAND

Gas Dispatch Investigation and
Integrated Resource Plan for November 1, 2004 through October 31, 2009

Order Approving Settlement Agreement

O R D E R N O. 24,531

October 21, 2005

APPEARANCES: Steven V. Camerino, Esq., of McLane, Graf, Raulerson & Middleton, for EnergyNorth Natural Gas, Inc., d/b/a KeySpan Energy Delivery New England; F. Anne Ross, Esq., of the Office of Consumer Advocate, on behalf of residential ratepayers; and Edward N. Damon, Esq., for Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On August 2, 2004, EnergyNorth Natural Gas, Inc. d/b/a KeySpan Energy Delivery New England (KeySpan or the Company), filed with the New Hampshire Public Utilities Commission (Commission) an Integrated Resource Plan (IRP) for November 1, 2004 through October 31, 2009, pursuant to Order No. 24,323 (May 7, 2004) in Docket No. DG 03-160. The IRP filing was docketed as Docket No. DG 04-133. On September 20, 2004, Commission Staff filed with the Commission a Status Report regarding Staff's investigation of 2003 summer period gas costs pursuant to Order No. 24,317 (April 30, 2004) in Docket No. DG 04-040. The Status Report noted ongoing Staff concerns regarding KeySpan's gas dispatch and recommended that the Commission open a new docket to address open gas dispatch issues. This matter was docketed as Docket No. DG 04-175.

On September 24, 2004, the Commission issued an Order of Notice consolidating Docket Nos. DG 04-133 and DG 04-175 for procedural purposes and establishing a procedural schedule for the two dockets.[1] On September 28, 2004, the Office of Consumer Advocate (OCA) filed with the Commission its notice of intent to participate in this docket on behalf of residential ratepayers consistent with RSA 363:28. On October 15, 2004, the Commission held a prehearing conference in accordance with the Order of Notice.

On November 15, 2004, KeySpan filed with the Commission a Motion for Protective Order and Confidential Treatment regarding its response to Staff's Data Request 1-43 (1-43 Motion). On November 23, 2004, KeySpan filed with the Commission a Motion for Protective Order and Confidential Treatment regarding its response to Staff's Data Request 1-44 (1-44 Motion).

By Order No. 24,408 (December 3, 2004), the Commission granted KeySpan's 1-43 Motion and its 1-44 Motion with respect to financial terms and details of the proposal. However, the Commission denied the portion of the 1-44 Motion that requested protection of the identities of the unsuccessful bidders.

On December 9, 2004, KeySpan filed with the Commission further Motions for Protective Order and Confidential Treatment, regarding responses to Staff's Data Requests 1-1 and 1-9 (1-1 Motion and 1-9 Motion, respectively). On January 3, 2005, KeySpan filed with the Commission a Motion for Protective Order and Confidential Treatment regarding its responses to Staff's follow-up Data Request 1-43, and responses to Staff's Data Requests 2-2, 2-7, and 2-8 (Follow-up 1-43, 2-2, 2-7 and 2-8 Motion). On January 20, 2005, KeySpan filed with the Commission a Motion for Protective Order and Confidential Treatment regarding a report from PriceWaterhouseCoopers (PWC Report Motion).

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[1] The procedural schedule was amended over the course of the next twelve months, details of which need not be recounted here.

On January 24, 2005, Staff filed with the Commission the Joint Testimony of John Adger and Yavuz Arik of Liberty Consulting Group, on behalf of Staff. On March 23, 2005, KeySpan filed with the Commission a Motion for Protective Order and Confidential Treatment of information regarding its ongoing negotiations with Merrill Lynch Commodities, Inc. (MCLI) (Ongoing MCLI Negotiations Motion).

On August 12, 2005, Staff filed with the Commission a report prepared by Liberty Consulting Group entitled, "Final Report – Review of Supply Planning and Asset Management Agreements of EnergyNorth Natural Gas, Inc." (Final Report), and a Settlement Agreement (Settlement Agreement) to be presented at hearing. Also on August 12, 2005, KeySpan filed the Direct Testimony of Leo Silvestrini. The Commission held a hearing on August 18, 2005, regarding the Final Report and Settlement Agreement. On September 1, 2005, KeySpan filed with the Commission a Motion for Protective Order and Confidential Treatment regarding the profit-sharing report form developed by MCLI (Profit Sharing Report Form Motion).

II. LIBERTY FINAL REPORT

The Liberty Report covers three main subjects: (i) long term gas supply planning and the IRP; (ii) short term planning, including dispatch and balancing; and (iii) KeySpan's asset management agreement (AMA).[2]

Regarding long term planning and the IRP, Liberty concluded that KeySpan's load forecasts should reflect current data and as much New Hampshire specific data as is reasonably available. In Liberty's view, KeySpan's IRP may be under-forecasting customer load over the next few years, perhaps because it is using outdated use per customer data or data that is not specific to New Hampshire. Liberty stated that it believes that under-forecasting is more of a

[2] The currently effective AMA, dated April 1, 2005, is titled, Amended and Restated Gas Resource Portfolio Management and Gas Sales Agreement Between EnergyNorth Natural Gas, Inc. as Buyer and Merrill Lynch Commodities, Inc. as Seller. As the context requires, the term AMA also refers to predecessor agreements.

problem than over-forecasting in KeySpan's case because of its relatively isolated service territory and long lead times associated with most supply projects. Liberty recommended that if KeySpan's end-use forecasting model is retained,[3] the Company should update the energy related input factors[4] and recalibrate the model.

Liberty also concluded that KeySpan's design-day and design-year evaluations reach acceptable results in terms of the probabilities of their occurrence. However, Liberty expressed its support for updates to KeySpan's methods and analysis, including weather analysis incorporating Liberty's suggested improvements. In particular, Liberty commented that design criteria should be developed from weather analysis and not from a cost/benefit analysis.[5] Liberty stated that for load conditions with a probability of greater than three to five percent,[6] a local distribution company (LDC) commonly has on-system supply resources sufficient to supply all firm customers, while for load conditions with a lower probability of occurrence, an LDC would expect to go to the markets for additional supply resources. Recognizing that LDCs must be prepared to meet their firm customers' requirements even under low probability conditions, Liberty recommended that the Company prepare a peak period contingency plan and file it with its revised curtailment plan. Liberty stated that the Company's contingency plan should address, among other things, possible resource failures such as occurred during the January 2004 "cold

[3] The end use model uses economic, demographic and energy price inputs to determine total energy demand, then determines the natural gas share of the energy market using fuel choice algorithms. IRP, p. ES-2. KeySpan's end-use demand forecasting is a three step process that: (i) identifies service territory base-year energy demand by region, building type, end-use and fuel type; (ii) forecasts annual incremental demand beyond the test year under normal weather based on economic and demographic growth forecasts and other factors, and (iii) converts forecasted levels of annual incremental demand over the forecast period to incremental sendout requirements. IRP p. III-6-7. By contrast, the econometric model preferred by Liberty uses a set of equations, developed through regression analysis and other quantitative techniques, that mathematically represents relationships among data and is based on intensive analysis of a utility's most recent sendout and customer use records. Final Report p. 25.
[4] Liberty pointed out that KeySpan's use per customer information is based on energy use surveys done in Massachusetts and date from the mid-1990s.
[5] KeySpan uses a cost/benefit analysis which takes into account the estimated benefit of avoiding curtailment of an average firm customer to determine the design criteria for its capacity portfolio.
[6] According to Liberty, load conditions with a three and five percent probability are expected to occur once in 33 1/3 and 20 years, respectively.

snap" and emergency-sharing measures. Given the available time and budget, Liberty stated it was unable to conclude that the Company's planning for extreme load conditions was adequate.

In addition, Liberty stated that the IRP does not include an analysis identifying the combination of resources that minimizes the gas costs of firm customers over the long term. Liberty concluded that the IRP should include an analysis that (i) identifies all available and potentially available supply-capacity resources and their costs, including variable demand costs; (ii) identifies each existing resource that can be varied and at what times; (iii) uses the planning model to evaluate various resource configurations under different load and gas price scenarios; and (iv) evaluates the model results.

Finally, Liberty concluded that KeySpan's access to additional storage in Haverhill, Massachusetts, together with the effect of the storage "rule curve"[7] recently adopted by KeySpan with Staff's support, allow a fresh look at whether relaxation of the Commission's on-site storage rule, N.H. Code Admin. Rules Puc 506.03, is warranted in KeySpan's case. Liberty's concern is that the rule may prevent the Company from using its available peaking capacity and encourage it to buy expensive spot market gas on peak demand days.

Regarding short term planning, Liberty concluded that the performance of KeySpan's on-system supplemental supplies during the January 2004 cold snap was disappointing. Liberty noted that although KeySpan's forecasted need for such supplies has greatly increased in the recent past, the availability of those supplies during the cold snap was severely constrained. Liberty noted that KeySpan had purchased higher cost spot market gas when its peaking, i.e., liquefied natural gas (LNG) and propane/air plants, were not being used to

[7] Commission Order No. 24,388 (October 29, 2004) approved the use of "rule curves" to govern the dispatch of underground storage, whereby KeySpan is to have a specific level of natural gas in underground storage at the end of each winter month.

capacity[8] and one of its peaking plants, actually failed. Liberty encouraged KeySpan to undertake a careful review of the performance of its gas supply systems during the cold snap and share the results with Commission Staff. Liberty noted that very limited on-site storage is a complicating factor for the Company's peaking plants and encouraged the Company and Commission Staff to study the possibility of increased storage at the peaking plants.

Liberty recommended that KeySpan perform a realistic assessment of what it can expect from its peaking plants and identify any changes to their operation, maintenance and re-supply logistics, including additional on-site storage, necessary to make them reliable sources of supply when they are needed. Liberty stated that this was especially important because the Company cannot count on obtaining re-vaporized, displaced LNG supply from Massachusetts due to the Tennessee Gas Pipeline's ability to limit the Company's use of its joint operational balancing agreement under peak demand conditions. Liberty observed that the cold snap further reinforces the need for detailed contingency planning. Finally, Liberty stated that the Company's assets can and should be more intensively managed, by improving the accuracy of sendout and weather forecast analysis and adjusting the output of the Company's peaking plants to match system requirements.

Regarding AMAs, Liberty concluded that the Company's continued use of an asset management type of relationship would be imprudent, at least without performing an analysis of the risks of higher gas costs that such agreements pose to customers. Liberty stated that, in its experience, Entergy-Koch Trading, LP (EKT),[9] which was selected as the asset manager, often proposed higher asset management fee payments although the higher payments

[8] According to KeySpan, given the anticipated extreme cold weather, it needed to reserve the capacity of its peaking facilities for swing and on-system reliability purposes. KeySpan also reported that trucking was unable to keep the plants re-supplied during this period.
[9] Subsequently, EKT was succeeded by MLCI.

come with more severe restrictions on dispatch.[10] According to Liberty, the Company reported that it was primarily the Company's willingness to agree to the dispatch restrictions that generated value from the AMA. Liberty stated that it understands EKT is willing to adjust its proposed constraints on dispatch in return for a reduced fee but the client would have to seek negotiations on this point. Liberty could find no evidence that the Company identified the dispatch restrictions as a concern or sought negotiations.

Liberty reviewed the financial impact of the dispatch restrictions on the Company's customers. It concluded that for the period November 1, 2003 through October 31, 2004, the restrictions had no adverse consequences, noting that the winter of 2003-2004 was one of 15 out of the last 23 years for which the dispatch restrictions did not cause premature depletion of storage gas. It also concluded that the restrictions on the use of the DOMAC FCS supplies were eased somewhat after the controversy in DG 03-160. Overall, Liberty stated that the Company had insufficient information to know whether the current AMA relationship is providing a net benefit to customers.

Finally, Liberty expressed some concern that the Company's rate structure may no longer reflect the costs that the Company incurs in conducting the gas supply function. Liberty mentioned in particular that if use of KeySpan's peaking plants to meet supply needs has changed, then the allowance for recovery of those costs included in "indirect" gas costs may not reflect the actual costs the Company is incurring.

III. KEYSPAN RESPONSE TO LIBERTY REPORT

Leo Silvestrini, responsible for preparing the short- and long-term demand forecasts that feed the Company's supply planning operations, distribution system planning, and

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[10] The dispatch restrictions which have particularly concerned Commission Staff relate to restrictions on the use of the Company's DOMAC FCS supplies. This issue was contested in DG 03-160, the 2002-2003 winter period Cost of Gas (COG) docket, and in succeeding COG dockets.

sales and budget forecasting, presented the Company's response to the Liberty Report. Mr. Silvestrini discussed four areas of disagreement: (i) use of an econometric model versus an end-use model; (ii) use of a cost/benefit analysis; (iii) the Company's gas dispatch and balancing practices and, in particular, its performance during the January 2004 cold snap; and (iv) the current AMA and its historical value to the Company. Mr. Silvestrini stated that he did not seek to reopen areas reviewed by Liberty; rather, his testimony was intended to demonstrate that the Company has valid, professionally sound reasons for its current practices. Mr. Silvestrini stated that despite the areas of disagreement, the Company believes that the Settlement Agreement is in the public interest and it has no reservations recommending Commission approval of the Settlement Agreement.

According to Mr. Silvestrini, KeySpan has used an end-use model to forecast load because end-use models have the ability to capture more accurately than econometric models the current relationship between demand and the significant determinants of demand. He explained that if one determined the relationship between prices and consumption during a period of relatively stable prices, such as occurred between 1985 and 1991, the econometric model's use of that relationship to predict consumption during a time of widely fluctuating prices, as has occurred over the past several years, might tend to under-predict the demand response to those prices.

In addition, Mr. Silvestrini stated that the way the Company has used an end-use model creates a smaller range of potential error than relying solely on an econometric model. He explained that, given a certain percentage error, the range of error in estimating load for an econometric model would be greater than for the end-use model because in an econometric model the percentage error would be applied to the entire load being forecasted rather than to the incremental load being forecasted in the case of the end-use model. Mr. Silvestrini indicated that the Company's agreement to begin using an econometric model does not mean that it would abandon the end-use model, but instead would blend both the end-use and econometric models in load forecasting.

Mr. Silvestrini testified that the design-day and design-year standards by which KeySpan establishes its supply portfolio are based on a cost/benefit analysis that determines a reasonable level of service reliability taking account of the costs of providing that service. The Company first performs a weather analysis, compares the probabilities of occurrence of different cold weather scenarios and considers a range of resources with various cost levels that can be used to satisfy customers' needs. According to Mr. Silvestrini, such an approach is used by KeySpan's Massachusetts LDC affiliates and is required by the Massachusetts regulators. The Company has agreed, however, to expand its weather analysis to include the Monte Carlo simulation[11] recommended by Liberty and also to incorporate a contingency analysis of additional low probability weather events. Mr. Silvestrini testified that the Company has not performed such an analysis in the past because it would have effectively required the Company to plan for conditions that exceeded the Company's specified design conditions.

Mr. Silvestrini testified that the Company continues to believe that its decision to enter into an AMA was prudent and has produced benefits for its customers. According to Mr. Silvestrini, the Company understands Liberty's concerns regarding the profit sharing reports provided by the asset manager and is working with Commission Staff and the asset manager to address them. However, because the kind of reporting requirements Liberty recommends is burdensome for an asset manager to provide to an LDC of this size, KeySpan has agreed not to

[11] Monte Carlo simulation is an analytical method meant to imitate a real-life system by randomly generating values for uncertain variables over and over to quickly generate and analyze many results. It is used when other analyses are too mathematically complex or too difficult to reproduce.

renew the AMA when it expires at the end of March 2006. KeySpan disagrees with Liberty's analysis of other aspects of the AMA and believes that the AMA has brought about "very real" financial benefits to customers.

IV. SETTLEMENT AGREEMENT

Under the terms of the Settlement Agreement, KeySpan will undertake four major studies: (i) a new IRP, covering the period November 1, 2006 through October 31, 2011, due August 1, 2006; (ii) a detailed contingency plan that will be part of the IRP, also due August 1, 2006; (iii) an updated curtailment plan, which provides details on how curtailment would be implemented and establishes a curtailment priority strategy, due November 1, 2005; and (iv) as a result of KeySpan's decision not to renew its current AMA, a detailed plan of how KeySpan will manage its gas resources, due December 1, 2005, to become effective April 1, 2006.

Under the Settlement Agreement, the IRP is required to include an econometric demand forecasting model for use in the IRP in place of the end-use forecasting model now in use; a Monte Carlo weather forecasting analysis for purposes of establishing design planning standards; a section setting forth the Company's planning practices regarding longer term portfolio optimization; a section discussing the extent to which the Company's supply or capacity plans take into account the potential migration of sales service customers to transportation service; a section describing the Company's hedging strategies; and a section discussing the purpose of the Company's curtailment plan and the implications of that plan for supply and/or capacity planning. The contingency plan is required to address, among other things, displacement of gas from KeySpan's Massachusetts affiliates to New Hampshire to the extent feasible under the combined Operational Balancing Agreement (OBA); the potential for and related cost if the Company were to increase the level of dedicated trucking to deliver liquid supplies to New Hampshire when vaporized LNG from its Massachusetts facilities cannot be displaced via pipeline from Massachusetts to New Hampshire; and a reasonable range of potential supply or capacity disruptions under design day weather conditions and KeySpan's response to each specified situation, including a loss of pipeline and LNG or propane supplies.

The Settlement Agreement confirms the Commission Staff's and OCA's support for the decision not to renew the current AMA and to bring the management of its gas resources in-house as of April 1, 2006. In addition, the Settlement Agreement provides that Commission Staff and the parties will continue to work together to develop a recommendation to the Commission regarding a possible waiver or modification of the seven-day rule, N.H. Code Admin. Rules Puc 506.03. Lastly, the parties and Commission Staff agree that there be no disallowance of costs that were incurred in connection with the summer 2003, winter 2003-2004, or summer 2004 Cost of Gas (COG) periods.

V. POSITIONS OF THE PARTIES AND STAFF

Order No. 24,408 (December 3, 2004) set forth detailed preliminary positions of the parties and Commission Staff. Since the issuance of that order, negotiations among the parties resulted in the settlement described above. Ultimately, KeySpan, the OCA, and Commission Staff all support the Commission's approval of the Settlement Agreement.

A. KeySpan

KeySpan stated that there were a number of areas of contention regarding the Liberty Report. It indicated that, because the parties and Commission Staff believed a settlement was possible, KeySpan found it unnecessary to conduct discovery regarding the Liberty Report. KeySpan stated that it believes the Final Report should not be precedential in any way in terms of the Commission taking further action without benefit of a separate proceeding. KeySpan urged that these areas of disagreement with the Final Report should not affect the Commission's decision to approve the Settlement Agreement because the nature of a settlement is that parties begin with differences and find a way to resolve them. KeySpan affirmed that the resolution provides significant value in terms of confidence-building between the Company, the OCA, and the Commission. KeySpan believes that resolving issues, reaching a settlement, and improving the relationship with the OCA and Staff is important and is in the public interest.

B. OCA

The OCA stated that it supports the Settlement Agreement. It believes that the Settlement is an appropriate format for moving forward; that it will improve relations among the parties; that it will improve KeySpan's focus on its New Hampshire customers, operations and dispatch; and that it will improve the IRP process. The OCA also believes that replacing the asset manager concept is appropriate, given the small load in New Hampshire.

C. Staff

Staff commented that the parties have spent much time working on these dockets and related cost of gas dockets involving similar issues. Staff concurs with the OCA that the benefits of the Settlement Agreement include providing the parties a solid foundation to meet the challenges of the future.

VI. COMMISSION ANALYSIS

The Settlement Agreement before us seeks to resolve outstanding gas dispatch issues from Docket No. DG 03-160 and in subsequent COG proceedings. In addition, the IRP is the last open item from the settlement agreement in Docket No. DG 03-160 and this Settlement Agreement is intended to resolve issues related to that as well.

Each of the signatories expressed support for the Settlement Agreement as a means of resolving the contested issues and laying the foundation for the parties to work together effectively to meet current and future challenges. A summary of the parties' positions on key issues, how those issues are resolved through the Settlement Agreement and our conclusions are presented below.

A. Integrated Resource Planning

The IRP is the last open item from the Docket No. DG 03-160, which focused in part on KeySpan's gas dispatch decisions related to the Company's 2002-2003 winter period gas costs. Staff questioned the prudence of KeySpan's dispatch practices, a position KeySpan challenged. In order to fully resolve the dispute, the Commission consolidated the on-going gas dispatch investigations from several COG proceedings into the instant docket.

In accordance with the settlement agreement approved in Docket No. DG 03-160, KeySpan filed an IRP for the period November 1, 2004 through October 31, 2009. In that settlement agreement, Staff and the Parties agreed that an IRP process is important in ensuring that KeySpan and Staff understand the differing views regarding gas supply needs and gas resource decisions. In that docket, Staff testified that IRPs are valuable communication mechanisms as they provide information relative to expected growth and demand, how the Company is planning to meet forecasted supply needs, and whether long term contracts, such as the DOMAC FCS contract, are needed.

In its evaluation of KeySpan's IRP, Liberty concluded (Final Report p. 23) that while KeySpan's design-day and design-year evaluations reached acceptable results under the circumstances, the "end-use" modeling used by KeySpan needed to be updated and noted that some of the input data required by the end-use model is not available for New Hampshire.

Liberty favored the use of econometric modeling primarily driven by intensive analysis of the Company's own most recent sendout and customer use records. Liberty also noted that KeySpan's IRP does not include an analysis to identify the combination of resources that minimize gas costs to firm customers over the long term, thus ensuring that the existing resource portfolio is optimal. Liberty recommended that such an analysis be included in KeySpan's IRP, along with both contingency and curtailment plans.

KeySpan testified that, while there are pros and cons related to each model, it has used both end-use and econometric modeling in the past and found that the end-use methodology improved the accuracy of KeySpan's forecasts over time. KeySpan went on to explain that while it felt the end-use methodology produced a smaller margin of error than the econometric model, applying the same incremental type of analysis to both models will result in an acceptable margin of error under either method.

Based on the record before us, it appears both the end-use and econometric models are capable of producing useful demand forecast results. Given the limited time KeySpan has operated in New Hampshire and the fact that this is the first IRP it filed with the Commission, we find that use of the econometric model favored by Liberty and required under the terms of the Settlement Agreement is appropriate. Furthermore, the fact that some of the inputs required by the end-use model do not exist for New Hampshire and that the econometric model requires an intensive analysis of the Company's own experience suggest that use of the econometric model may improve New Hampshire-specific demand forecasts.

The Settlement Agreement calls for KeySpan to file an IRP with a detailed contingency plan. The January 2004 cold snap demonstrated the need for such planning and the lessons learned from the event should provide invaluable insights into the strengths and weaknesses of the contingency plan in effect at that time as it related to Company demand, gas supply assets and changes in the gas market. Some of the scenarios to be addressed in the contingency plan, such as supply/capacity interruptions, are particularly important in light of the recent hurricanes in the Gulf of Mexico. The supply restrictions in the Gulf of Mexico also demonstrate the need for curtailment planning and the Settlement Agreement requires KeySpan to update its curtailment plan on or before November 1, 2005 in conjunction with the New Hampshire Emergency Plan.

Most important, effective least cost planning is transparent. In other words, it is essential that the IRP describe how that analysis is performed and present the results of its analysis. Under the terms of the Settlement Agreement, KeySpan will set forth its planning practices relating to longer-term portfolio optimization, identifying resource mix and the timing of changes in the resource mix expected to minimize costs over the long-term. KeySpan will also address the role of its peaking plants in its overall portfolio, an issue of concern for both Staff and Liberty.

B. Outsourcing of Gas Resource Management

The parties agree that an asset manager can provide value to a gas utility in a number of ways, but that dispatch restrictions imposed by the asset manager can have consequences. The determination of how an asset manager brings value to a utility requires detailed reporting of how profits from each type of transaction are computed, and in the Company’s case, how those profits are then allocated between the Company and its Massachusetts utility affiliates. To perform that risk/benefit analysis requires certain information that is not readily available.

Under the terms of the current AMA, KeySpan receives certain guaranteed payments and profit sharing payments. In return, certain restrictions were placed on the order in which gas supplies were dispatched. A point of contention since the 2002-2003 Winter has been the dispatch of DOMAC FCS volumes, which have been priced on a "look back" basis. Staff has contended that those supplies could have been dispatched on a more economic basis absent the AMA, as those supplies have been very favorably priced compared to alternative gas supplies. KeySpan has testified that the AMA has resulted in net benefits to its customers, by way of guaranteed payments and shared profits that exceeded those guaranteed payments.

Liberty's review of the Company's supply planning contracts and AMAs found that dispatch restrictions under the terms of the AMA would have been binding under the weather conditions experienced in eight of the 23 years for which weather data was provided. Liberty testified (Pre-filed Testimony of John B. Adger, Jr. and Yavuz Arik, Exhibit 2, p. 8) that the AMA's constraints on dispatch could have adverse consequences for the Company's customers and stated its belief (Exhibit 2, p. 10) that the potential harm to customers offset any benefits customers might obtain from allowing the restrictions to remain in place.

KeySpan testified there were several limitations regarding Liberty's analysis, arguing that KeySpan actually had more flexibility to take the DOMAC FCS volumes than was reflected, that Liberty did not take into account that KeySpan's decision to take alternative supplies is not based solely on price, but also considers reliability and that Liberty did not really consider the relative prices of the DOMAC FCS volumes and alternative supplies.

We agree that the determination of how an asset manager brings value to a utility requires detailed reporting of how profits from each type of transaction are computed and, in the Company's case, how those profits are then allocated between the Company and its

Massachusetts utility affiliates. To capture and report that information requires additional work and expense on behalf of the asset manager, an effort and expense the current asset manager is apparently unwilling to undertake on the Company's behalf. Moreover, despite KeySpan's contention that the current AMA has provided a net benefit for its customers, it is unclear from the record whether the AMA has produced a net benefit or, if it did, whether the benefit is worth the risk imposed on KeySpan by the dispatch restrictions contained in the AMA.

Absent an AMA that includes reporting requirements necessary to determine if the AMA produces net benefits, we find that the Settlement Agreement, insofar as it provides for bringing the gas supply function back in-house at the expiration of the current agreement, is justified. The Settlement Agreement requires KeySpan to describe how it will manage the Company's gas supply portfolio, which should lead to more focused management of the Company's assets in New Hampshire than may have been the case under the current AMA. Also, KeySpan should still be able to realize some of the same profits generated under the AMA, from such activities as off-system sales and capacity releases, and will not have to share those profits. And most important, KeySpan will no longer have dispatch restrictions, thereby providing KeySpan greater flexibility in how it is able to utilize the Company's assets in response to changing conditions, such as changes in demand and pricing. Further, the Settlement Agreement does not preclude KeySpan from entering a full or limited AMA at some future time, based on a thorough cost/risk analysis indicating a clear benefit and reporting and auditing requirements that help demonstrate and confirm the benefits.

C. Seven-Day Rule

The "seven-day" rule requires on-site storage capability sufficient for seven consecutive days of peak shaving between December 1 and February 14 of each winter.

KeySpan's analysis indicates the seven-day rule puts unnecessary constraints on its ability to manage its liquids inventory in the most cost-effective manner, as the rule may prevent it from using its available peaking capacity and force the purchase of more expensive spot market gas. Liberty recommended that the seven-day rule be re-evaluated in light of KeySpan's implementation of the storage-inventory rule curves, which dictate minimum pipeline (natural gas) storage inventory requirements, and the expiration and renegotiation of KeySpan's current LNG contracts.

We believe the purpose of the rule, to assure adequate on-site liquid gas inventories to cover all anticipated LNG and propane peak shaving demand during the coldest consecutive seven-day period, is of critical concern. Nevertheless, if there is a more cost efficient means to provide a high level of supply reliability, then that should be explored, which the Settlement Agreement accomplishes.

D. Treatment of Gas Costs

The gas dispatch investigation was a continuation of Staff's investigation into gas costs incurred in connection with the 2003 summer, 2003-2004 winter and 2004 summer COG periods. Staff testimony in the related COG hearings focused primarily on whether KeySpan incurred additional costs during those periods due to restrictions on the DOMAC FCS volumes under the terms of the AMA.

Liberty testified that the AMA constraints on dispatch can have adverse consequences for the Company's customers under certain weather conditions. (Exhibit 2, p. 8, lines 7-8). Liberty explained that those dispatch restrictions can cause changes to the optimal gas-supply mix, by preventing KeySpan from using the DOMAC FCS volumes at times it might otherwise do so, thereby forcing KeySpan to utilize spot market gas that is often more expensive.

As previously noted, Liberty found the weather conditions that would cause the restrictions to be binding occurred in eight of 23 years. Liberty testified that (Exhibit 2, p. 9, lines 9-17) the winter of 2002-2003 was such a winter, but that the 2003-2004 winter was not, concluding that the constraints on access to the DOMAC FCS volumes had no consequences for the Company's customers during the 2003-2004 winter period.

The Final Report (p. 39) expressed concerns regarding the performance of KeySpan's on-system supplemental supplies during January, 2004, a month 25% colder than normal and encompassing one of the most extreme cold snaps in the last 100 years. Both Liberty and KeySpan testified that the demand forecasts leading up to, and during the cold snap, exceeded design day planning, although actual weather equaled design criteria. Liberty pointed out that KeySpan failed to utilize its peaking plants to the greatest extent possible during that period and that those supplies were less costly than the alternative supplies utilized by KeySpan. Liberty testified at hearing (Transcript, p. 22, lines 12-15) that while KeySpan had commitments for LNG and propane that were sufficient to cover the conditions that were actually experienced, some of those arrangements did not work out. Liberty concluded (Final Report p. 41) that KeySpan should perform a realistic assessment of what it can expect from the peaking plants as currently configured and identify any changes to the operation, maintenance or logistics of re-supply that would be required to make them into reliable sources of supply when needed.

KeySpan testified that the weather forecast, which predicted colder temperatures than its design-day planning, forced the Company to purchase additional supplies in advance of actual dispatch, and that those supplies must be utilized as scheduled. Due to actual weather conditions below forecast, KeySpan cut back on peaking supplies.

Both Liberty and KeySpan expressed the need for and benefit of contingency planning based on KeySpan's experience during the January 2004 cold snap. This experience is particularly valuable because the cold snap was a low probability weather occurrence and the customer mix and use patterns are current and reflect the conflict with electric power generators for gas supplies in New England. In addition, according to Liberty, the cold snap demonstrated the value of the flexibility offered by LNG and LPG peaking plants.

The Settlement Agreement adequately addresses this issue, as it calls for KeySpan to prepare a contingency plan for low probability weather scenarios to be filed with the Commission no later than August 1, 2006. The contingency plan is to include a cost/benefit analysis of increasing the deliverability of LNG and propane supplies to run the Company's peaking plants during periods of constrained pipeline supply. As we read the Settlement Agreement, it should not be interpreted as an admission that KeySpan has been imprudent in its gas dispatch decisions, and Staff and the OCA recommend that there be no disallowances of gas costs for the 2003 summer, 2003-2004 winter and 2004 summer COG periods.

We believe the terms of the Settlement Agreement requiring contingency planning as described above, incorporating recent experience gained during the January 2004 cold snap, will serve to address the concerns raised by Liberty and help ensure a sufficient level of reliability at least cost. Furthermore, we concur that KeySpan was not imprudent in its gas dispatch and therefore there should be no disallowance of gas costs.

E. Conclusion

There are a number of areas in the Final Report with which KeySpan does not agree, testifying on four issues in particular. Although KeySpan does not agree with Liberty on those issues, KeySpan testified that the disagreements arise from philosophical differences and are matters about which reasonable people can differ. Significantly, Staff and the parties found a way to resolve those differences through the Settlement Agreement, which all assert is in the public interest.

We conclude that the Settlement Agreement, along with steps taken since this docket was first opened, such as KeySpan's use of the rule curve in its dispatch of underground storage and amendments to the AMA, resolve a number of contentious issues and will enable the parties and Staff to better identify and address areas of concern going forward. The Settlement Agreement requires KeySpan to file detailed, specific planning information in certain areas with the Commission for its review, creating greater transparency as to how KeySpan is providing reliable service in a cost effective manner. For the reasons set forth above, we find the Settlement Agreement to be in the public interest and, accordingly, we approve the agreement.

VII. OUTSTANDING MOTIONS

We turn now to KeySpan's requests for protective treatment. KeySpan's 1-1 Motion seeks protective treatment for (i) a bid analysis document relating to the AMA dated April 1, 2003 and summarizing the bids received, on the same grounds as those accepted by the Commission in Order No. 24,408 with respect to the response to Staff Data Request 1-44; (ii) an internal email summarizing its analysis of the bids; and (iii) a page from a transcript of a hearing before the Massachusetts Department of Telecommunications and Energy which discloses the profit sharing terms between the asset manager and KeySpan's Massachusetts utility affiliates. KeySpan's 1-9 Motion seeks protective treatment for certain 2003 and 2004 marketing plans applicable to the entirety of KeySpan Corporation. KeySpan asserts that the information contained in the documents is highly sensitive commercial information which if disclosed could be used by competitive energy suppliers to the detriment of KeySpan Corporation and its subsidiaries and that redaction is not feasible. Specifically, KeySpan asserts that public release of the information is likely to result in a competitive disadvantage for KeySpan in the form of loss of load or diminished load growth and increased costs of doing business.

KeySpan's Follow up 1-43, 2-2, 2-7 and 2-8 Motion seeks protective treatment for (i) EKT's RFP response dated January 22, 2003 and Appendix 1 to the then-effective AMA on the same grounds accepted by the Commission in Order No. 24,408 with respect to the response to Staff Data Request 1-43; (ii) the amount of money that the Tennessee Gas Pipeline Company has agreed to contribute toward upgrades made by KeySpan on the distribution system serving the Tilton area; (iii) the names of customers served by KeySpan's DOMAC FCS supplies and the volumes and prices for each customer; and (iv) schedules showing the profit from, and profit sharing between EKT and KeySpan of, off-system sales profits on grounds that the same type of information has been granted protective treatment in numerous prior orders.

KeySpan's PWC Report Motion seeks protective treatment for PriceWaterhouseCooper's final audit report regarding the results of its review of implementation of the AMA, on grounds that KeySpan is contractually obligated to seek protective treatment for the audit report and disclosure could lead to additional liability to KeySpan, additional expense to KeySpan's customers and long term damage to KeySpan's relationship with an important national consulting firm that provides important services to KeySpan.

KeySpan's Ongoing MCLI Negotiations Motion seeks protective treatment for copies of proposed terms for the amendment of the AMA dated April 1, 2003, including proposals and counterproposals and KeySpan's analysis of the costs and benefits of those terms. KeySpan stated that the information was expected to be provided to the Staff on multiple occasions and in various formats. KeySpan asserted that the information for which protective treatment is sought is “confidential commercial or financial information” protected by RSA 91-A:5, IV and “preliminary drafts” protected by RSA 91-A:5, IX. KeySpan further contended that disclosure of such competitively sensitive information could significantly harm its future bargaining power and thus result in more expensive service to the public. KeySpan also urged that because the Motion seeks protective treatment of documents that did not yet exist, it was not possible to provide physical documents or information with the Motion for Commission review. Accordingly, KeySpan requested a waiver of N.H. Code Admin. Rules Puc 204.06(b) which requires that a motion for confidentiality contain the “documents, specific portions of documents, or types of information” for which confidentiality is sought.

KeySpan’s Profit Sharing Report Form Motion seeks protective treatment for (i) extensive financial information that KeySpan asserts would enable a reader to determine the terms of the profit sharing arrangement which have been previously granted protective treatment by the Commission and (ii) confidential information of MCLI regarding prices and profits relating to various transactions which KeySpan has agreed to keep confidential. According to KeySpan, release of this information is likely to result in competitive disadvantage for KeySpan in the form of less advantageous or more expensive gas supply and gas supply portfolio management contracts and may expose KeySpan to liability to MCLI regarding release of information that MCLI seeks to keep confidential.

As we have pointed out on many prior occasions, 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 . . . and other files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. Our applicable rule, N.H. Code Admin. Rules Puc

204.06, is designed to facilitate the implementation of RSA 91-A as it has been interpreted by the courts.

The case law addressing the issue of whether information is considered confidential, commercial or financial information indicates that “analysis of both whether the information sought is ‘confidential, commercial or financial information’ *and* whether disclosure would constitute an invasion of privacy” is required. *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 552 (1997). Whether information is “confidential” is an objective test; it is not based on the subjective expectations of the party generating the information. *Id*. at 553. Under one frequently used test, in order to show that the information is sufficiently confidential to justify nondisclosure, “the party resisting disclosure must prove that the disclosure is likely to (1) impair the [State’s] ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id*. at 554 (citation omitted). This test illustrates that the emphasis is on the potential harm that results from disclosure, rather than on promises of confidentiality or whether the information has customarily been regarded as confidential. *Id*. at 554. These precepts were reaffirmed in *Goode v. N.H. Legislative Budget Assistant*, 148 N.H. 551, 554-555 (2002).

When exemption from disclosure is claimed on privacy grounds, “the nature of the requested document and its relationship to the basic purpose of the Right-to-Know Law” must be examined. *Union Leader Corp. v. New Hampshire Housing Finance Authority*, *supra* at 554 (citation omitted). Such a review focuses on whether the party seeking confidential treatment has shown that the information would not inform the public about the state agency’s activities or that a valid privacy interest, on balance, outweighs the public interest in disclosure.

Id. at 555. A three step analytical approach is employed. First, the issue of whether there is a privacy interest at stake that would be invaded by disclosure" is evaluated. *N.H. Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 440. If not, RSA 91-A mandates disclosure. Second, the public interest in disclosure is assessed. Disclosure "should serve the purpose of informing the public about the conduct and activities of their government." *Id*. Finally, the public interest in disclosure is balanced against "the government interest in nondisclosure and the individual's privacy interest in nondisclosure." *Id*. We have carefully reviewed the above described motions for confidentiality and we conclude that they should be granted under the applicable standards for protective treatment.

A number of the documents for which KeySpan seeks confidentiality contain information that is the same as or similar to information protected by the Commission in the past. The 1-1 Motion, part of the Follow up 1-43, 2-2, 2-7 and 2-8 Motion and part of the Profit Sharing Report Form Motion request confidentiality of information that falls in this category.

Regarding the PWC Report Motion, KeySpan argues that the PWC report should be protected because it entered into a confidentiality agreement with PriceWaterhouseCooper. We do not agree that disclosure would put KeySpan into breach of that agreement. Based on the information provided in the Motion, KeySpan's obligation was to seek confidential treatment for the PWC Report, which KeySpan has satisfied by filing the Motion. We also disagree with KeySpan's assertion that entry into a confidentiality agreement with a third party in and of itself constitutes sufficient grounds for granting a motion for protection from disclosure. Under the Right to Know Law and the Commission's rules, the Commission is not necessarily bound by the agreement and KeySpan is not authorized to limit the exercise of the Commission's discretion to rule on the Motion in this way. The Commission should, however, consider the existence of the confidentiality agreement within the analysis of the nature of the material and the steps the Company has taken to protect it. In this case we find the information contained within the PWC report to warrant protection, as it contains financially and commercially sensitive information regarding the AMA and its implementation.

In its Ongoing MCLI Negotiations Motion, KeySpan has described the type of information for which confidentiality is sought even though the documents were not in existence at the time the Motion was filed. We note that our applicable rule, N.H. Code Admin. Rules Puc 204.06 does not expressly or unequivocally require that a document be in existence before a motion for protective treatment can be filed, though that is certainly the usual situation. In this case, we will waive any requirement that the document(s) be attached to the motion. The type of information for which protection is sought is the kind of information for which protection is justified. We will therefore grant this motion with respect to the information described in the motion, i.e., copies of proposed terms for the amendment of the AMA, including proposals and counterproposals. Because our ruling is predicated on the assumed existence of such documents, we will condition our approval of the Motion on KeySpan’s identification in a letter to the Executive Director of the specific documents, if any, falling within the description provided in the Motion and the specific statutory basis for protection. Our approval will of course also be subject to our usual caveat regarding the Commission’s ongoing authority to reconsider these determinations, should circumstances warrant.

Based upon the foregoing, it is hereby

ORDERED, that the Settlement Agreement proposed by KeySpan, the OCA, and Staff is hereby APPROVED; and it is

FURTHER ORDERED, that KeySpan will file with the Commission a new Integrated Resource Plan on or before August 1, 2006, which shall include a Contingency Plan, to cover the period November 1, 2006 through October 31, 2011; and it is

FURTHER ORDERED, that KeySpan will file an updated Curtailment Plan with the Commission on or before November 1, 2005; and it is

FURTHER ORDERED, that KeySpan will file with the Commission, by December 1, 2005, a detailed plan of how the Company will manage its gas resources which, if accepted by the Commission, will become effective April 1, 2006; and it is

FURTHER ORDERED, that there be no disallowance of costs that were incurred in connection with the summer 2003, winter 2003-2004 or summer 2004 COG periods; and it is

FURTHER ORDERED, that the outstanding motions for confidential treatment, described above, are hereby GRANTED subject to the on-going authority of the Commission, on its own motion, or on the motion of Staff, any party, or any member of the public, to reconsider these determinations should circumstances so warrant.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of October, 2005.

Thomas B. Getz	Graham J. Morrison	Michael D. Harrington
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary