STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 96-465

March 7, 1997

MID MAINE GAS UTILITIES INC.
Request for Approval to Furnish
Gas Service

ORDER

WELCH, Chairman; NUGENT and HUNT, Commissioners

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SUMMARY

Mid Maine Gas Utilities, Inc. requested authorization pursuant to 35-A M.R.S.A. § 2104 to provide gas service in and to the Towns of Bangor, Brewer, Veazie, Old Town and Orono, subject to Commission review of Mid Maine's project financing, construction and gas supply plans before it begins service. We grant Mid Maine's request. In addition, we discuss the appropriate standards of review for applications for service under § 2104 and § 2105. We underscore that § 2105 is not at issue in Mid Maine's application; any application of it is necessarily fact dependent.

INTRODUCTION

Mid Maine Gas Utilities, Inc. (Mid-Maine, the Company) is a Maine corporation pursuant to Title 13-A M.R.S.A. as evidenced by articles of incorporation filed with the Secretary of State on August 1, 1996. Mid Maine is capitalized by a $1,000,000 certificate of deposit, and reports no outstanding liabilities. The Company has 100 shares of outstanding common stock owned by two private individuals, William S. Price and Richard Zieren. It is not a subsidiary, parent or affiliate of any other corporation. Mid Maine requests the Commission to grant a certificate authorizing the Company to furnish gas utility service in the Towns of Bangor, Brewer, Orono, Old Town and Veazie, the only areas in the state where Northern Utilities, Inc. (NU, Northern) is not authorized to serve.

Mid Maine requests a "non-exclusive" franchise for these areas subject to subsequent Commission review of financing, gas supply and construction plans before the Company begins construction or commences service.

Mid Maine's petition raises several interrelated legal, policy and evidentiary questions:

- Does the Commission have statutory authority to condition a certificate, issued pursuant to 35-A M.R.S.A. § 2104 or § 2105, as "non-exclusive"? Does the Commission have authority to condition certificates for gas utility service in the manner proposed by Mid Maine in order to require review of financing, gas supply and construction plans before service commences?

- What are the legal standards and necessary findings the Commission must make in order to grant approval to an applicant wishing to provide gas utility service under § 2104?

- What evidentiary showing must be made by an applicant in order to support the necessary Commission findings? Subsidiary to this issue is whether the Commission has the discretion to require a greater or lesser evidentiary showing from an applicant on the basis of the conditions (if any) which the Commission attaches to the certificate.

- Is the evidence that has been provided by Mid Maine in this case sufficient, in light of the proposed conditions, to allow the Commission to make the relevant findings and issue a certificate? Would the public interest be served by issuing such a certificate?

These issues have been addressed by the parties through written and oral argument, and testimony. We address each of these questions in turn.

I. COMMISSION AUTHORITY TO CONDITION CERTIFICATES UNDER § 2104 AND § 2105 AS ""NON-EXCLUSIVE"

Some parties questioned the effect of a grant of authority pursuant to § 2104 on subsequent applications pursuant to § 2105, including questions regarding franchise exclusivity and whether the standard of review pursuant to § 2104 and § 2105 differ. We offer comment on those questions, but note that any decision pursuant to § 2105 will be fact dependent.

A. Analysis

35-A M.R.S.A. § 2104 provides:

> No gas utility organized under Title 13-A may furnish its service in or to any municipality within the State, without the approval of the commission, even if no other gas utility is

> furnishing or is authorized to furnish a similar service. A gas utility providing service on January 1, 1982, shall have until January 1, 1983, to obtain the commission's approval to continue to furnish service.
>
> Section 2105 provides:
>
> 1. **Approval only after hearing.** Except as provided in subsection 2, no approval required by section 2102, 2103, or 2104 and no license, permit or franchise may be granted to any person to operate, manage or control a public utility named in section 2102 in a municipality where there is in operation a public utility service or authorized to provide similar service, until the commission has made a declaration, after public hearing of all parties interested, that public convenience and necessity require a 2nd public utility.

The statutory scheme provides a right to "second utilities" to petition the Commission under § 2105 despite previous grants of authority to another utility under § 2104. The statutes do not permit the Commission to impose a condition on a § 2104 approval that removes any person's right under § 2105 to request that the Commission rule upon a petition to provide service.

Moreover, we fail to see how characterizing a certificate under § 2104 as "non-exclusive" could make any practical or legal difference for the subsequent processing of this or future applications to provide service. In considering a subsequent application under § 2105, for example, the Commission would be bound to consider the evidence and arguments presented in that application on their own merits.

A previous grant of "exclusive" or "non-exclusive" rights to some other applicant cannot alter the Commission's obligations.

For those reasons, we do not believe Mid Maine's certificate may be conditioned as "non-exclusive." The grant of authority to Mid Maine is indistinguishable from grants made to any other utility under section 2104 or 2105 with respect to the degree of "exclusivity" it confers.

II. COMMISSION AUTHORITY TO CONDITION CERTIFICATES GRANTED PURSUANT TO SECTION 2104 OR SECTION 2105 IN A MANNER WHICH REQUIRES SUBSEQUENT REVIEW OF FINANCING, GAS SUPPLY AND CONSTRUCTION PLANS AS REQUESTED BY MID MAINE.

Mid Maine requested that the Commission issue a conditional certificate requiring subsequent Commission review of the Company's financing, gas supply and construction plans before it may commerce service. Therefore, we must inquire whether the Commission has the authority to so condition a certificate granted under § 2104.

Under 35-A M.R.S.A. § 104 the Commission possesses the implied powers necessary to the efficient performance of its duties. As a general matter, these include the power to deny applications unless conditions specified by the Commission are met. However, this power is not unlimited: In *Maine Public Service Company et al v. Public Utilities Commission, 524 A.2d 1222 (Me. 1987),* for example, the Court found that, while the Commission had authority to condition rate orders, it "may not use its rate setting authority to attach conditions to the rates it sets if it could not have attached those conditions in reliance on statutory authority distinct from its rate setting authority." Id. *at 1226.*

In this case, we find ample authority to impose the conditions at issue here in specific legislative grants independent of § 2104. First, 35-A M.R.S.A. § 902 provides for Commission review and approval of stocks, bonds or other evidences of indebtedness payable at periods of more than 12 months after the date of issuance. Thus, even absent a condition attached to the certificate, statute would require Mid Maine to return to the Commission for approval of its specific financing plans when these are finalized. Further, 35-A M.R.S.A. § 1303 provides that the Commission may investigate "any matter relating to a public utility." Finally § 1306(2) provides:

> **2. Unjust term, condition, practice, act or service.** if after a public hearing the commission finds that a term, condition, practice, act or service complained of is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of this Title or if it finds that a service is inadequate or that reasonable service cannot be obtained, the commission may by order establish or change terms, conditions, measurement, practice, service or acts, as it finds to be just and reasonable.

Under these statutory provisions, the Commission possesses the authority to investigate, either in conjunction with or subsequent

to the current proceeding, almost any aspect of utility practice. Even if such future proceedings concerned the precise issues to be reviewed under § 2104, nothing in those sections forecloses the Commission from requiring such an investigation in the future. Nor do we believe that requiring a more thorough review later frustrates the legislative intent that the Commission review such matters prior to issuing a certificate. Provided the Commission has a rational basis for finding that granting a certificate at this time would be consistent with statute and in the public interest, it is within the Commission's discretion to issue or withhold a certificate conditioned upon subsequent review. Bangor *Hydro Electric Company v. Public Utilities Commission, 589 A.2d 38 (Me. 1991) at 43.*[1]

For these reasons we believe we have the authority to condition Mid Maine's certificate upon subsequent Commission review of financing, gas supply and construction plans before service commences.

III. LEGAL STANDARDS AND NECESSARY FINDINGS UNDER § 2104 AND § 2105

A. The Standard

There has been discussion among the parties as to whether the statutory scheme, specifically § 2104 and § 2105, provides a different standard for approval under each section. Mid Maine is

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[1] In *Bangor Hydro* , dealing with a statutory section similar to the two at issue in this proceeding in that it did not contain specific provisions authorizing conditional approval, the Court held:

> Pursuant to 35-A M.R.S.A. § 3132, the PUC must determine whether proposed major power generating facilities serve the public's needs. Before issuing a certificate of public convenience and necessity, it must make specific findings with regard to the need for the proposed facilities. 35-A M.R.S.A. §3132(6). Such findings are necessarily based on economic projections that are inherently uncertain. In cases such as this, when construction of a major facility is not due to begin for years, the PUC acts within its discretion in refusing to issue a certificate so far in advance. While the PUC could have issued a certificate conditioned on future review, it was not required by statute to do so.

589 A.2d 38 at 43, (emphasis added).

requesting that the Commission grant it authority pursuant to § 2104. Others question whether approval under section 2104 raises the evidentiary or policy hurdle for other applicants under § 2105 for the same service area and assert that if so, the Commission must consider that result in evaluating whether it was in the public interest to issue a certificate to Mid Maine. We find the standard for approval under either section is the same. Under both statutory sections, the Commission must determine that the grant of authority will promote "safe, reasonable and adequate service at rates which are just and reasonable to customers and public utilities." 35-A M.R.S.A. § 101.

Section 2104 does not provide a specific standard other than Commission approval. However, 35-A M.R.S.A. § 101, provides:

> The purpose of this Title is to ensure that there is a regulatory system for public utilities in the State which is consistent with the public interest and with other requirements of law. The basic purpose of this regulatory system is to assure safe, reasonable and adequate service at rates which are just and reasonable to customers and public utilities.

We therefore hold that § 2104 requires the Commission to find that a grant of authority to provide service will promote safe, reasonable and adequate service at rates which are just and reasonable to customers and public utilities.

Likewise, under § 2105, in determining what showing an applicant must make to demonstrate the public convenience and necessity would be served by the grant of a second utility certificate, the Commission must interpret that statute to consider the overall statutory scheme. In *Central Maine Power Co. v. Public Utilities Commission, 414 A.2d 1217 (Me. 1980),* the Court found that the Commission's authority to investigate and adjust rates under a fuel adjustment statute must be exercised in a manner consistent with the broad scheme of regulatory principles embodied in statute as a whole. Thus:

> With Section 311 construed in the context of the many other pertinent statutory provisions in Title 35, prevention of injury to the "interest of the people" emerges as a "primary principle" which is constitutionally sufficient. The "public interest" is shown by Title 35 to encompass those facets of the Commission's regulatory functions that are directed to ensuring that the public receives

> adequate service, delivered in a safe and reliable manner, at a charge just and reasonable in relation to the public utility's costs of providing the service. *See New England Telephone & Telegraph Co. v. Public Utilities Commission, ME. 376 A.2d 448, 454 (1977); Bangor & Aroostook R.R. Re: Application to Amend P.U.C. Certificate J #44, 159 Me. 86, 188 A.2d 485 (1963); In re Searsport Water Co., 118 Me. 882, 108 A. 452 (1919).*

Id. *at 1224.*

Similarly in response to the utility's argument that the fuel clause adjustment statute should be read in a way which foreclosed Commission authority to investigate "the justness and reasonableness of passing through to ratepayers all, or some, of" the costs arising from a Maine Yankee shut down, the Court rejected any such "blinkered" view of the Commission's authority, finding that:

> deeply embedded in the overall statutory scheme of regulation is the overarching responsibility, and correlative power, of the Commission to assure the justness and reasonableness of rates. For both of these reasons we could be persuaded that the legislature had singled out the area of fuel cost adjustments to take the radical step of depriving the Commission in that special context of its otherwise paramount, and extensive, authority to investigate and determine the justness and reasonableness of rates only were we to find legislative language expressly, affirmatively, directly and unequivocally requiring that conclusion.

Id. at *1229*.

The broad public-interest standard of § 101 must be considered when determining whether public convenience and necessity are served under § 2105 just as under § 2104. Thus, public convenience and necessity must be determined by inquiring whether the requested approval will promote safe, reasonable and adequate service at rates which are just and reasonable to customers and public utilities.

Though § 2104 lacks the "convenience and necessity" language of § 2105, this difference may be rationally explained by

the different factual circumstances that exist for initial and subsequent application. As the court observed in *Standish Tel. Co. v. Public Utilities Comm., 499 A.2d 458,* that "[t]o find that a public need for a particular type of service exists means that such particular service is not being provided." Id. at 462. Requiring a showing of "necessity" under § 2104 would be superfluous. We do not interpret this difference, however, as establishing a lower hurdle for meeting the § 101 standard.

The public interest requires careful consideration of a spectrum of issues. In ruling on such petitions this Commission will look to further the public policy objectives embodied in statute. Will granting a certificate promote the orderly and efficient development of infrastructure? Will the grant of a certificate adversely or beneficially affect economic development in other sectors of the economy? Other areas of the Commission mandate may be implicated as well, including oversight of affiliate transactions or the general supervisory authority under § 1302 and § 1303.

B. Necessary Findings - The Test

The Commission has established a 3-part test to evaluate whether a petition to provide service is in the public interest and should be approved. In *Standish Telephone Company v. Public Utilities Commission, 499 A.2d 458,* the Court described the test as follows:

> That test requires a showing that (1) public need for the proposed service exists; (2) the applicant has the technical ability to provide the service; and (3) the applicant possesses adequate financial resources to complete the project.

Id. *at 459.*

Each prong of this evidentiary test must be met in a manner consistent with the overall standard. For instance, an applicant must demonstrate he or she "'possesses adequate financial resources to complete the project" in a manner consistent with providing safe and reliable service at just and reasonable rates. "Completing the project" means doing so in a way that meets the public interest standard. Likewise, "technical ability" means the ability to provide safe and reliable service at reasonable rates.

We deal with each prong below.

IV. EVIDENTIARY SHOWING TO MEET THE TEST

It is an evidentiary matter whether a proposal to develop a project conforms with the objective of providing safe, adequate and reliable service at just and reasonable rates. This conclusion is supported by the expert testimony offered by Mid Maine's witness, Mr. Shute, and Northern's witnesses. All agreed that there is no preordained answer to the question of economies of scale in developing gas infrastructure. Similarly, questions of uneconomic duplication of facilities and safe and reliable operation are matters of project-specific analysis. Northern's witnesses emphasized that each project and area is a unique blend of circumstances and opportunities, and the only way to determine the best and most economical way to provide service is to do a careful and fairly detailed site-specific analysis. No party or witness contradicted this testimony.

Therefore, we find that the grant of a certificate, or the existence of service in an adjoining area by another utility, creates no presumption that specific area can be economically served only by the current service provider, certificate holder or the adjoining utility. While a certificate holder or existing utility may have an advantage because they are in a position to exploit economies of scale, those economies must be demonstrated in order to prevail over a competing proposal to provide service. There is no higher standard based upon a presumption of economies of scale. Evidence in this case indicates that such a presumption would not be justified.

Moreover, we believe the existence or perception of such a presumption could discourage proposals from qualified applicants to pursue innovative strategies to provide service to markets or submarkets that existing utilities are not serving or may be serving at higher overall cost.

Related to these issues is the question of whether, in reliance upon conditions attached to a certificate, the Commission has discretion to require a lesser or greater evidentiary showing from an applicant to justify approval.

The Commission's discretion in the respect is limited. Section 2104 and § 2105 provides that Commission must scrutinize potential gas service providers and make a determination of the public interest <u>before</u> granting authority. The prospect of a later opportunity to review an applicant's qualifications does not rely on a cursory review at this stage. As indicated below, we find the evidence in this case ample to support the grant of a certificate to Mid Maine.

A. <u>Need</u>

As noted previously, in *Standish supra,* the Court held that "to find that a public need for a particular type of service exists means that such a particular service is not being provided.' *Id. at 462 (emphasis in original).* We hold that an applicant seeking to serve an area which is unserved or to provide a type of service which is not being provided need make no further evidentiary showing to demonstrate that a need for the proposed service exists. Nor will such an applicant be required to demonstrate that existing service to the area is inadequate. This rule shall apply regardless of whether any other utility holds a franchise for the currently unserved area or has authority to provide the service not currently being provided.

A finding of need is not conclusive on the issue of whether or not an applicant should be granted authority to provide service. The Commission must also assess the technical and financial capability of the applicant and address issues such as uneconomic duplication of facilities, fairness to existing investors, and any other factor implicated by the Commission's broad public policy standard.

B. Technical Capability

Evidence relevant to demonstrating that an applicant is technically capable of providing safe and reliable service at just and reasonable rates includes:

1. Past experience of Company principals or employees in constructing facilities and providing service similar to that being proposed.

2. General and relevant educational and engineering qualifications.

3. Demonstrated competence in recognizing the need for and selecting consulting, engineering and construction assistance, or affiliation with competent and experienced providers of the same.

4. Demonstrated competence and knowledge as shown by responses to data requests or cross-examination questions or (just as importantly) the lack thereof.

5. General credibility and accuracy of answers on such subjects.

6. Knowledge of industry practice and understanding of local conditions and requirements.

7. Existence or development of Company standards of conduct or procedures to be implemented to assure safety or reliability.

The economics of any given project will be highly sensitive to site-specific factors, but we will not require in all cases that an applicant provide a detailed system diagram describing how each customer is to be served. Reasonable assumptions regarding cost of service and construction in a manner consistent with prevailing industry standards for safety and reliability, and cost data that adequately reflects the size and likely risks of the proposed service suffice. Requiring applicants to completely engineer a system and sign up all load before being permitted to request authorization may exclude too many potential competitors.

This ruling is consistent with past Commission findings. *In U. #2782, Northern Utilities, Inc., Re: Petition for Consent to Furnish Natural Gas Service in and to any City or Town of the State of Maine, June 27, 1969,* the Commission granted authority to Northern Utilities to serve unserved areas of the State without requiring site-specific financing or engineering analysis. In that case, the demonstrated competence of the applicant in serving other areas of the State justified an unconditioned grant of authority. A rule that would preclude such an applicant from resting its claim to financial and technical capability on past performance would be unreasonable. In each case, we will look to the particular circumstances and conditions surrounding an individual request.

C. Financial Capability

Evidence relevant to demonstrating an applicant is financially capable of providing safe and reliable service at just and reasonable rates includes:

1. Past experience of Company principals in financing projects of similar size and complexity.

2. Level of equity investment proposed.

3. Current assets and liabilities.

4. Existing commitments from lenders, suppliers, or jobbers to provide service or financing at reasonable rates.

5. Credit history where relevant.

Again, we do not require an applicant to show that it has already obtained financing and investment for the specific project. Because certificate holders will be public utilities, 35-A M.R.S.A. § 902 may require Commission review of the specific financing in any event.

V. THE EVIDENCE PRESENTED BY MID MAINE AND OTHER PARTIES

We conclude the evidence offered is sufficient to support a finding that a grant of authority to Mid Maine to provide service conditioned upon subsequent Commission review of financing, gas supply and construction plans would further the goal of providing safe and reliable service at just and reasonable rates.

A. Need

Consistent with our holding in IV(A) above, we find that the current absence of gas service in the areas subject to Mid Maine's petition establishes a need for such service.

B. Technical Capability

Resumes supplied by Company principals Richard Zieren, Jack Spinks and William Price, indicate that the corporate officers and directors of Mid Maine combined have more than 70 years of relevant professional experience in engineering, energy supply, legal and public utility matters. Together, they possess the following educational and professional qualifications: a Master of Business Administration, Bachelor of Science Degrees in Accounting and Agricultural Engineering, a Bachelor of Arts in political science, two Juris Doctoris degrees, certification as a registered engineer in two states and a license to practice law in another. Mid Maine has also retained Steven Shute, a professional engineer specializing in natural gas utilities, who possess directly relevant experience establishing "relatively small systems to serve communities and rural areas that have not been served by the more traditional gas utilities." *Shute Dir. Test. at 1, ln. 4-6.*

No party challenged the educational or professional qualifications of Mid Maine's principals or of its consultant Mr. Shute. We find Mid Maine's principals and employees are sufficiently qualified by education and relevant professional experience to offer the service they propose.

The parties and the Advisors examined the engineering and cost assumptions underlying Mid Maine's claim that the service it proposed was economically viable, and scrutinized the degree and

adequacy of the investigation undertaken by Mid Maine to support those assumptions. In several instances parties or Advisors questioned Mid Maine's estimates of construction costs, gas supply cost and availability, and projected customer conversion rates from other fuel sources. In some of these areas Mid Maine may have underestimated probable costs. For instance, for certain items of pipeline construction there were discrepancies, such as the disparity in assumptions regarding the cost of items such as "x-ray and padding, and cathodic protection." In other areas, however, Mr. Shute was able to adequately explain some of the variation between Mid Maine's cost assumptions and those derived from other reliable sources. In many areas Mr. Shute demonstrated detailed knowledge of specific facts and sound rationales for his positions and assumptions. His explanations of the derivation of such estimates as potential customer penetration rates were supported by reasonable assumptions regarding customer facilities, customer conversion, and the cost of alternative fuel sources.

In addition, Mr. Shute testified that he had developed an Operations and Maintenance Manual "'that includes all facets of construction, cathodic protection if there is any, jointing standards" and other procedures, and that the Company's plans included provisions "to hire inspectors to oversee [the] contractor."

We believe that the evidence supports a finding that Mid Maine has identified a project based on generally reasonable assumptions, and has conducted a reasonable preliminary analysis. This conclusion is confirmed by several other considerations. First, even absent subsequent Commission review, the risks of inaccurate projections of cost and marketability will largely be borne by Mid Maine's investors, not ratepayers. Mid Maine currently has no ratepayers to call upon, should it fail, to subsidize its attempt to establish an LDC. Moreover, given the inter-fuel competition for the end uses Mid Maine seeks to serve, we believe it is reasonable to assume that there is and will be a market-imposed limit on Mid Maine's ability to recover uneconomic costs from future ratepayers. That limit will be the comparative costs of current or potential alternatives.

There is a risk that some customers could make poorly informed choices or that marketers could misrepresent the value or reliability of their product to induce load. These concerns justify careful Commission or other oversight of utility customer relations and trade practices. There is currently an active market for the end uses Mid Maine seeks to provide. We believe that market, in conjunction with continued oversight of utility practices under 35-A, protects consumers adequately.

C. Financial Capability

Mid Maine is capitalized by a $1,000,000 certificate of deposit. While this is a small portion of the total equity needed for the project, Mr. Shute has a demonstrated track record in financing similar projects. His assumption of a 9.5 % interest rate, for example, is based on his experiences working on two other projects in Missouri and North Carolina with a similar debt to equity ratio. In addition, on the Pinedale project, Mr. Shute testified 7% financing had been obtained on the basis of "personal equity put up by the partners." Mid Maine's proposal to provide service in Maine will represent the fifth project that Mr. Shute has worked on. These projects include two small companies, one in Colorado and one in Wyoming, that had similar or less favorable start up debt/equity ratios than that proposed for Mid Maine and which are currently providing service to customers.

In light of this experience and the condition that will require Commission review of the financing for the project before it is constructed, we find that the applicant has demonstrated sufficient financial capability to successfully complete the size and type of project contemplated.

D. Other Considerations

We turn now to a discussion of several issues raised by the parties relevant to a determination of the merits of Mid Maine's request. Some or all of these issues could be categorized under one of the three prongs of the *Standish* test. However, particular classification is neither necessary nor necessarily helpful. The three-prong test is useful to structure an investigation and organize evidence, but it does not limit the Commission's obligation to make the inquiries and determinations necessary to protect the public interest. Where parties raise legitimate issues with regard to an application for service which are within our authority, Commission inquiry will not be foreclosed by the want of a pigeonhole under the test.[2] *Central Maine Power Company* v. *Public Utilities Commission, 414 A.2d 1217, (Me. 1980).*

1. Timing

CMP, NU and the Public Advocate expressed concerns that the award of a certificate to Mid Maine might be premature at this time. The Public Advocate questioned the need

[2] For example, questions of timing could be considered under both need and also as they affect the certainty of financial or technical projections.

to rule on Mid Maine's petition given the uncertainty surrounding the timing and availability of pipeline supplies.[3] CMP echoed similar concerns, noting that the FERC had not yet approved the Maritimes Project and that such approval was necessary "before really much can get going." NU questioned whether the grant of a certificate was necessary in order for Mid Maine to move ahead with financing and other plans. We find that Mid Maine's petition is not premature and that the grant of a certificate at this time is in the public interest.

We recognize that there is a series of regulatory hurdles that must be cleared before any gas supply option is available to serve the needs of Mid Maine's project. Nevertheless, we will not succumb to a procedural paralysis which would only exacerbate the uncertainties and delays inherent in the regulatory process. Where regulatory uncertainty, without more, becomes a pretext for regulatory inaction, the public may justly complain of a government which cannot get out of its own way. The risk of an adverse ruling from the FERC on the Maritimes Project may justify

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[3] At the Public Advocate's request, the Commission took judicial notice of its findings in docket No. 96-558 that there was substantial uncertainty surrounding the timing and availability of various gas supply projects, including Maritimes. In that Order we stated:

> We disagree with Maritimes assertions that Northern has manufactured "an emergency atmosphere" in order to gain approval for its Precedent Agreement. The evidence clearly demonstrates that a replacement supply must be identified quickly in order to avoid severe service disruptions. Recent actions by the FERC have exacerbated this situation and there is no guarantee that either Maritimes, PNGTS or any other project will be on-line in time to avoid the economic injury to this state which could result from significant gas supply shortages. From the evidence we have seen we are convinced that both proposed pipelines could provide significant benefits to the Maine economy and ratepayers. We encourage and support the development of the Maritimes project, but we recognize (and Maritimes acknowledges) that its completion will depend on political and economic contingencies which cannot be predicted with certainty.

Northern Utilities, Inc., Proposed Precedent Agreement with Portland Natural Gs Transmission System for Transportation Service, Docket No. 96-55@, Order, December 19, 1996 at 9-10.

caution on the part of investors, but it does not provide a basis for this Commission to impede the development (or attempted development) of a project with the potential to benefit Maine's consumers and economy. There is always risk involved in the development of such projects. In this instance we are persuaded that the risk of failure to obtain gas supply will fall almost entirely on investors. Here, where risks are not borne by ratepayers, we agree with the sentiments expressed by Northern's witness Mr. Simpson that neither NU, Mid Maine or any other group of investors should be foreclosed from investing the resources necessary to pursue analysis or development of projects in the time frame they believe offers the best chance of success.

The second argument advanced for delay is that Mid Maine does not "need" a certificate to pursue further development of its project because: 1) discussions with lenders and investors, project engineering, marketing and further negotiations for gas supply can all go forward without such a ruling, or 2) because the availability of a pipeline supply is so distant in time that it is not in the public interest to have such further development undertaken now. These propositions are problematic. To the extent these propositions are different from the rejected argument that the Commission should attempt to second guess investor's management of their own risk, accepting such arguments would impede the development of needed infrastructure by increasing investor risks to unreasonable levels. Under such a standard, even the most financially sound investor might hesitate to enter the Maine market. Investors or financial institutions might decline to spend the significant sums necessary to complete design, engineering and market analysis, and pipelines or gas suppliers might be unwilling to risk tying up otherwise marketable capacity, without some form of assurance that Mid Maine will be permitted to provide service. As to the second proposition, the expert testimony in this case is unanimous on the reasonableness of Mid Maine's estimates of necessary lead time for its project. In response to the detailed rationale given by Mr. Shute for the "substantial lead time" Mid Maine believed necessary; NU witness Simpson agreed that "they would start doing advance work two years ahead of when the pipeline goes in," *Tr. C-55, ln. 6-8;* NU witness Cote stated "I agree with Mr. Shute's analysis in that you could certainly start construction if you had contracts that locked people in to providing you service,' *Tr. C-55-56* and finally; NU witness Poulin stated that from a marketing perspective "I'm not sure that I think he [Mr. Shute] is that far off either." *Tr. 56 ln.* 10-11. The evidence indicates it is necessary and reasonable for Mid Maine to begin development under its proposed schedule.

To the extent that this extended lead time creates possible uncertainties as to the final economics of the project,

the grant to Mid Maine is conditioned upon subsequent review of project-specific factors. For all of these reasons we hold Mid Maine's petition is timely and that the public interest would not be served by delaying approval.

2. Orderly Development of Infrastructure and the Risk of Duplication of Facilities

Several parties expressed concerns that authorizing two utilities to serve the same service territory could lead to uneconomic duplication of facilities. Alternatively parties argued that competition could delay the development of needed infrastructure by creating a situation in which neither of two competing utilities would be able to secure enough load to warrant expansion. Nothing in this record evidences that the grant of certificate to Mid Maine creates any serious risk in this regard. On the contrary, the evidence indicates that the risk of uneconomic duplication is slight, and that any attempt by the Commission to establish preordained economies of scale would be unreasonable.

We have discussed previously our findings with respect to the specific nature of economic gas project development. (See Section IV, above). It follows that a Commission attempt to dictate *a priori* "spheres of development" would be economically misguided and largely arbitrary. The alleged risk in not doing so is that two competitors will unnecessarily duplicate facilities. However, all of the expert testimony presented in this case indicates that the risk of such duplication is relatively low. Mr. Shute, for instance, in response to OPA Data Req. 1-25 indicated "It's very unlikely that two or more separate utility piping systems could be justified economically in each town. The high sunk cost of underground pipe requires a threshold of about ten customers per mile. If a second competing utility system is built, both will have difficulty competing with other energy alternatives." *Tr. B-99, ln. 4-11.* Since we believe the market for other energy alternatives will effectively cap the rates charged by any new LDC, this indicates that it is very unlikely that two separate systems would ever be built. Mr. Shute indicated that he was aware of one situation in Texas where two competing utilities had mains down a single street, but observed "I am not sure that the economics now in the 90's would allow that to happen, that happened in the 40's and *50's." Tr. B-100, ln. 2-4.* And finally, Mr. Shute concluded:

> So, it's entirely feasible that Augusta could be broken up into two or four pieces and those could be served by separate utilities. It's a little bit impractical, though, to expect that two companies could or even would

> want to run mains down the same streets to compete against the same company -- customers.

Tr. B-100, ln. 15-21.

NU's witness, Mr. Simpson, indicated that he had no knowledge or experience of two gas mains going down the same street. And further, in response to questioning from the Examiner, offered these observations:

Examiner Sipe: Knowing what you know about the economics of gas supply, do you think it's likely that there will be two mains down any one street?

Mr. Simpson: Knowing what I know about the economics of local transportation and the distribution system, no, I don't think it will be economically viable for there to be two mains down this street.

Tr. C-3 7, ln. 8-15

> Without knowing the specifics of the situation, I would think that unless utility one, the first utility in the area, was horribly mismanaged that they would have all the attractive loads in that possible region of overlap locked up, served and charged appropriate cost of service based rates so that it would not be feasible for utility two to come in and to compete away any viable loads from utility one. So I would say that the possibility of a second utility actually having any sort of economic incentive to run a main down the same road, down the same street is very small.

Tr. C-38, ln. 11-23.

Based upon this evidence we believe that there is little risk of large-scale duplication of facilities. We believe knowledgeable investors will act rationally in determining which projects to pursue and that, absent specific evidence of uneconomic duplication, the economies of scale inherent in the industry can be relied upon to make themselves felt without extensive Commission oversight.

There is a potential risk that permitting two or more utilities to compete for load in the same area may delay the development of infrastructure by making it more difficult to recruit a critical mass of load. However, this risk must be balanced against the potential benefits to consumers of having two or more entrepreneurs competing on the bases of price and service quality to serve their needs. Moreover, it is possible that the threat of competition may accelerate the development of gas infrastructure as each party strives to foreclose others by being the first to provide service in a given area. We do not believe it is merely fortuitous that Mid Maine's petition should have triggered requests by others, notably CMP, for similar authority,[4] and prompted less formal expressions of interest by NU in not being foreclosed from petitioning the Commission to serve these areas in the future. Weighing these factors, we conclude that the public interest would best be served by encouraging competition in the provision of this service and intervening in the operations of the market only where there is evidence, rather than speculation, that consumers and investors would benefit from such action. We do not at this time foreclose the possibility that the public interest may demand such intervention in the future. Nothing in this record, however, persuades us that it would be beneficial at this time.

VI. REQUEST FOR COMMENTS

We request comments on whether the Commission should impose reporting requirements on utilities seeking to provide gas, service in unserved areas to minimize uncertainty which may arise from the existence of multiple franchises in various areas. Our concern is to assure that, as supply options become available, certificate holders are diligent in developing and implementing plans to provide LDC services to the areas for which they have been granted .a franchise. Requiring franchise holders to file specific plans for financing and service availability on a timetable related to the availability of gas supply options may be one way to accomplish this. We request comment from the parties on the proposed structure for such reporting requirements. In particular we request suggestions for keying such reporting to specific milestones in the certification or construction of gas supply options or other industry developments.

We request comments from the parties within thirty days of the issuance of this Order.

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[4] *See Docket No. 96-786, Central Maine Power Company, Petition for Approval to Furnish Gas Service and to Areas Not Currently Receiving Natural Gas Service*

CONCLUSION

For all of the reasons stated above we,

0 R D E R

1. That Mid Maine is granted authority to furnish gas service in the towns of Bangor, Veazie, Old Town, Orono and Brewer pursuant to 35-A M.R.S.A. § 2104 subject to the following condition:

   Prior to providing service to any customer, commencing construction or obtaining financing, Mid Maine shall file for Commission review and approval:

   A. Its proposed financing for the project pursuant to 35-A M.R.S.A. § 902.

   B. Construction plans and cost estimates for its proposed facilities.

   C. A resource plan indicating its source(s) of supply or the availability of unbundled service and demonstrating such source or unbundled supply option is adequate to serve the needs of its proposed customers.

Dated at Augusta, Maine, this 7th day of March, 1997.

BY ORDER OF THE COMMISSION

Dennis Keschl
Acting Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Hunt

APPENDIX

On August 16, 1996, Mid Maine Gas Utilities, Inc. filed a petition pursuant to 35-A M.R.S.A. § 2104-2105 to furnish service

in and to the cities of Augusta, Bangor, Brewer, Hallowell, Old Town, Gardiner and Waterville and the Towns of Oakland, Skowhegan, Orrington, Clinton, Milford, Fairfield, Hampden, Bucksport, Madison, Orono, Veazie and Winslow.

On August 29, 1996, the Commission issued a Notice of Investigation and Procedural Order initiating its investigation of Mid Maine Gas Utilities request. On October 11, 1996, a Procedural Order was issued scheduling a preheating conference for Thursday, October 17, 1996. On October 17, 1996, this preheating conference was held and intervention was granted to the Office of the Public Advocate and Northern Utilities, Inc. Requests to intervene from Maritimes and Central Maine Power were taken under advisement pending review of memoranda more fully explaining the interests of these parties in this proceeding. On October 21, 1996, a Procedural Order was issued scheduling hearings for January 8 and 9, 1997. On November 26, 1996, a Procedural Order was issued granting intervention to Maritimes and Central Maine Power. On December 30, 1996, a Procedural Order was issued informing the parties that Bangor Hydro Electric had filed a late petition to intervene and that the petition would be granted unless some party objected by January 6, 1997. No party objected and Bangor Hydro was granted intervenor status.

On January 2, 1997, the Public Advocate filed a motion to consolidate this proceeding with Docket No. 96-786, Central Maine Power's Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas Service. In addition, the Public Advocate requested that hearings be postponed. On January 3, 1996, a Procedural Order was issued setting oral argument on the Public Advocate's motion to consolidate and denying its request to postpone hearings.

A hearing was held on January 8, 1996. At hearing the Public Advocate withdrew its motion to consolidate and Mid Maine Gas Utilities, Inc. modified its application to provide gas service to only Bangor, Brewer, Veazie, Old Town and Orono.

On January 10, 1996, a Procedural Order was issued in which the Examiner established law of the case and made findings for the purpose of settlement. The Order requested that the parties report back to the Examiner by January 17, 1997, on the prospects for settlement. The parties subsequently reported that they were not able to settle, and requested that the Examiner issue a Report consistent with the legal and evidentiary findings suggested as the basis for settlement in the January 10, 1997 Procedural Order.

The Examiner's Report was issued on January 30, 1997. Exceptions were filed February 7, 1997 by Northern Utilities, Central Maine Power Company and the Office of the Public Advocate. The Commission considered the Examiners' Report and Exceptions thereto at its regularly scheduled deliberative session on February 18, 1997.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceedings are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R. 110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which a reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (l)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note:

The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.