

June 26, 2008

VIA HAND DELIVERY & E-MAIL

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

Re: Case 07-M-0906 – Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.

Dear Secretary Brillling:

Multiple Intervenors, an unincorporated association of over 50 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, including the New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation service territories, hereby submits the original and five copies of its Brief on Exceptions in the above-referenced proceeding.

Copies of the enclosed Brief on Exceptions are being served on all active parties via e-mail and, where requested, also by U.S. Mail.

Respectfully submitted,

COUCH WHITE, LLP



Michael B. Mager

MBM/cgw
Enclosures

cc: Judge Rafael A. Epstein (via Hand Delivery and E-Mail; w/enc.)
Active Parties (via E-Mail and/or U.S. Mail; w/enc.)

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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Joint Petition of Iberdrola, S.A., Energy East Corporation,
RGS Energy Group, Inc., Green Acquisition Capital, Inc.,
New York State Electric & Gas Corporation and Rochester
Gas and Electric Corporation for Approval of the
Acquisition of Energy East Corporation by Iberdrola, S.A.**

Case 07-M-0906

**BRIEF ON EXCEPTIONS
OF
MULTIPLE INTERVENORS**

Dated: June 26, 2008

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PRELIMINARY STATEMENT

In accordance with the Notice for Filing Exceptions, issued by the New York State Public Service Commission (“Commission”) on May 23, 2008, Multiple Intervenors hereby submits its Brief on Exceptions in Case 07-M-0906.¹ Multiple Intervenors is an unincorporated association of over 50 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, including the New York State Electric & Gas Corporation (“NYSEG”) and Rochester Gas & Electric Corporation (“RG&E”) service territories. Multiple Intervenors’ Brief on Exceptions responds to the Recommended Decision issued herein on June 16, 2008 by Administrative Law Judge Rafael A. Epstein.²

This proceeding was instituted to examine whether Iberdrola, S.A. (“Iberdrola”) should be authorized to acquire, via merger, Energy East Corporation (“Energy East”), parent of NYSEG and RG&E. For the reasons set forth herein, Multiple Intervenors urges the Commission to approve the proposed transaction, subject to numerous conditions intended to produce financial and other benefits and protections for electric and gas customers of NYSEG and RG&E. The imposition of such conditions is absolutely essential to ensure that the proposed transaction is in the public interest.

¹ Case 07-M-0906, Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.

² Parenthetical references to the Recommended Decision are preceded by the notation, “RD”; parenthetical references to the transcript of the evidentiary hearing conducted in this proceeding are preceded by the notation “Tr.”; and references to the exhibits admitted into evidence during the hearing are preceded by the notation, “Ex.”

PROCEDURAL BACKGROUND

The procedural background is summarized in the Recommended Decision. (RD at 12-14.) Briefly, on or about August 1, 2007, Iberdrola, Energy East, NYSEG, RG&E, RGS Energy Group, Inc., and Green Acquisition Capital, Inc. (collectively, “Petitioners”) filed with the Commission a “Joint Petition for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.” (“Joint Petition”). (Ex. 41.)

On September 10, 2007, a prehearing conference was conducted by Judge Epstein. At that conference, the parties agreed upon a litigation schedule for the remainder of the proceeding, which was adopted by Judge Epstein and then memorialized in a ruling.³ The schedule addressed the possibility that settlement negotiations might – or might not – result in a joint proposal for the Commission’s consideration.⁴

Subsequent to the September 10th conference, the parties engaged in settlement negotiations but were not able to achieve an agreement in principle. Thus, in accordance with the litigation schedule: (a) Petitioners supplemented the Joint Petition with testimony and exhibits on November 28, 2007; (b) New York State Department of Public Service Staff (“Staff”) and intervener parties filed responsive testimony and exhibits on January 11, 2008; and (c) Petitioners filed rebuttal testimony and exhibits on January 31, 2008.

Thereafter, the parties resumed settlement negotiations, but still were not able to achieve an agreement in principle. The negotiations did, however, necessitate a

³ See Case 07-M-0906, supra, Procedural Ruling (issued October 4, 2007) at 1-3.

⁴ Id. at 2.

modification to the litigation schedule, which was agreed upon by the parties, and adopted by Judge Epstein and then memorialized in a ruling.⁵

On March 14, 2008, Petitioners circulated “Joint Petitioners’ Partial Acceptance Document” (“Partial Acceptance”), which purportedly was intended “to narrow the issues raised in this proceeding prior to the commencement of evidentiary hearings” (Ex. 50.)⁶ In the Partial Acceptance, Petitioners conceded unilaterally to certain conditions of merger approval relating to: (a) vertical market power (“VMP”); (b) positive benefit adjustments (“PBAs”);⁷ (c) future development of renewable generation by Iberdrola Renewables, an unregulated company in which Iberdrola owns a controlling share (see Tr. 625); (d) reliability concerns expressed by electric cooperatives and the Village of Sherburne; and (e) environmental concerns expressed by the City of Rochester. (Ex. 50.)

An evidentiary hearing on the proposed transaction was conducted by Judge Epstein on March 17-20, 2008. The record compiled during the hearing is comprised of 1,908 pages of transcript and 136 exhibits. At the conclusion of the hearing, the parties agreed upon, and Judge Epstein adopted and then memorialized, deadlines for initial and reply briefs of April 11 and 25, 2008, respectively. (Tr. 1896-99.)⁸

⁵ See Case 07-M-0906, supra, Procedural Ruling on Scheduling (issued February 25, 2008) at 3-4.

⁶ The Partial Acceptance was circulated in the afternoon of the business day prior to commencement of the evidentiary hearing.

⁷ PBAs refer to financial benefits to be provided to NYSEG and RG&E customers if the proposed transaction is consummated. (See, e.g., Tr. 1367, 1676-77, 1737-38.)

⁸ See also Case 07-M-0906, supra, Procedural Ruling on Scheduling (issued April 2, 2008).

SUMMARY OF POSITION

Multiple Intervenors supports the proposed transaction between Iberdrola and Energy East, provided that merger approval is subject to numerous conditions designed to produce financial and other tangible benefits and enforceable protections for customers of NYSEG and RG&E. Specifically, such conditions should include, but need not be limited to, Iberdrola's acceptance of: (a) substantial financial and rate-related benefits for customers; (b) more stringent electric and gas reliability, service quality and safety performance standards and revenue adjustments;⁹ (c) comprehensive financial protections for customers; (d) robust reporting requirements; and (e) measures that would mitigate VMP concerns in a manner that would not preclude Iberdrola Renewables' future development of wind generation. Absent such conditions, the proposed transaction would not be in the public interest.

In the Recommended Decision, Judge Epstein's primary recommendation is that the Commission reject the proposed transaction because it purportedly does not satisfy the "public interest" standard embodied in New York Public Service Law section 70. (RD at 1.) Alternatively, Judge Epstein recommends that if the Commission approves the proposed transaction, that it do so subject to the following conditions: (a) customers are accorded PBAs totaling \$646.4 million; (b) \$201.6 million in PBAs are credited to customers immediately upon consummation of the transaction; (c) NYSEG and RG&E are directed to commence delivery rate cases to address the utilities' overall revenue requirements and related matters, including crediting the remaining \$444.8 million in PBAs to customers; (d)

⁹ In this context, more stringent revenue adjustments refers to a higher level of potential negative revenue adjustments imposed on the utility in the event of unsatisfactory performance in the areas of reliability, service quality and safety.

Iberdrola is subjected to comprehensive financial protections for the benefit of customers; (e) Iberdrola is subjected to robust reporting requirements; and (f) Iberdrola is precluded from owning electric generation facilities that are interconnected to the NYSEG or RG&E transmission and distribution (“T&D”) systems. (RD at 1-2.)

Multiple Intervenors agrees with most – but not all – of the recommendations advanced in the Recommended Decision. Significantly, however, Multiple Intervenors disagrees with Judge Epstein’s primary recommendation that the proposed transaction be rejected. With the conditions recommended by Judge Epstein, or different yet comparable conditions (such as those championed by Multiple Intervenors), the proposed transaction would be in the public interest. The Commission should approve the transaction, subject to numerous conditions intended to produce financial and other benefits and protections for customers of NYSEG and RG&E.

Multiple Intervenors also takes issue with several aspects of the conditions recommended by Judge Epstein in the event of merger approval. First, approval of the proposed transaction should be conditioned upon the implementation of more stringent electric and gas reliability, service quality and safety performance standards and revenue adjustments. The Recommended Decision does not appear to address this issue, although Judge Epstein notes that “where service and reliability are concerned, the Commission has ample authority to impose appropriate standards in rate cases regardless of whether it approves the proposed transaction.” (RD at 49.) For the reasons set forth herein, reliability, service quality and safety matters should be addressed in conjunction with the proposed merger, and not ignored until further rate proceedings.

Second, while Multiple Intervenors supports conditions requiring Iberdrola's divestiture of fossil-fuel generation, it disagrees with the recommended condition that Iberdrola be precluded from owning any electric generation facilities interconnected to the NYSEG or RG&E T&D systems. (RD at 59-71, 73.) Rather, based solely on the facts and circumstances presented herein, Multiple Intervenors recommends that merger approval be conditioned upon the adoption of measures that mitigate VMP concerns in a manner that would not preclude Iberdrola Renewables' future development of wind generation in any region of the State. Additionally, Multiple Intervenors disagrees with the recommendation that Iberdrola be directed to divest existing hydropower facilities (see RD at 78-81) absent some demonstration that such divestiture truly is in the public interest.

Multiple Intervenors' Brief on Exceptions is organized into seven points.

In Point I, Multiple Intervenors urges the Commission to approve the proposed transaction – subject to numerous conditions intended to produce financial and other benefits and protections for customers of NYSEG and RG&E – rather than rejecting the transaction outright, as suggested in the Recommended Decision.

In Point II, Multiple Intervenors disagrees with Judge Epstein's finding that Iberdrola's financial strength does not constitute a benefit of the proposed transaction.

In Point III, Multiple Intervenors takes issue with the Recommended Decision's failure to recommend more stringent electric and gas reliability, service quality and safety performance standards and revenue adjustments in the event the Commission elects to approve the proposed transaction.

In Point IV, Multiple Intervenors urges the Commission to condition merger approval upon the adoption of measures that would mitigate VMP concerns in a manner that

would not preclude Iberdrola Renewables' future development of wind generation that is interconnected to the NYSEG or RG&E T&D systems.

In Point V, Multiple Intervenors urges the Commission to condition merger approval upon: (a) the proposed divestiture of RG&E's fossil-fuel generation facilities; and (b) an allocation of all – or almost all – of the above-book proceeds to customers, with any allocation to shareholders capped at the lesser of five percent or \$3 million.

In Point VI, Multiple Intervenors urges the Commission to refrain from conditioning merger approval upon the divestiture of existing hydropower facilities absent further analyses demonstrating that such divestiture truly is in the public interest.

Finally, in Point VII, Multiple Intervenors urges the Commission to adopt as a condition of merger approval that Iberdrola hold NYSEG and RG&E customers harmless from the financial impacts of any credit rating downgrade.

ARGUMENT

POINT I

THE COMMISSION SHOULD APPROVE THE PROPOSED TRANSACTION SUBJECT TO NUMEROUS CONDITIONS INTENDED TO PRODUCE FINANCIAL AND OTHER BENEFITS AND PROTECTIONS FOR CUSTOMERS OF NYSEG AND RG&E

In the Recommended Decision, “the primary recommendation is that the Commission disapprove the transaction” because it purportedly does not satisfy the public interest standard. (RD at 1.) Multiple Intervenors agrees generally with Judge Epstein’s analysis of the standard of review appropriate for this proceeding. (See RD at 20-32.) Significantly, however, Multiple Intervenors disagrees with Judge Epstein’s primary

recommendation that the transaction be rejected. Rather, the Commission should approve the transaction subject to numerous conditions intended to produce financial and other tangible benefits and enforceable protections for customers of NYSEG and RG&E. Those conditions should resemble, or be comparable to, the conditions advanced in the Recommended Decision in the event the Commission elects to approve the transaction, subject to the modifications advocated herein.¹⁰

In the event the Commission is inclined to approve the proposed transaction, Judge Epstein recommends that:

... approval be subject to the following preconditions: (1) Iberdrola and its affiliates should not be allowed to own electric generating plants (whether wind powered, fossil fueled, or hydropower) interconnected with NYSEG's or RG&E's transmission or distribution systems; (2) corporate relations among Iberdrola and its New York affiliates should be subject to most of the financial and structural safeguards that have been proposed by Staff of the Department of Public Service and other parties; (3) NYSEG and RG&E customers should be credited with "positive benefit adjustments" (PBAs) of \$646.4 million, including \$201.6 million initially upon completion of the merger transaction (resulting in NYSEG and RG&E delivery rate reductions of \$54.8 million or 4.4%, initially); and (4) at the conclusion of this case, an 11-month general rate proceeding should commence to consider NYSEG's and RG&E's overall revenue requirements and related matters, including implementation of the remaining \$444.8 million of PBAs, terms of retail access by independent energy service companies, and

¹⁰ Multiple Intervenors continues to refrain from advancing a specific, recommended amount of PBAs, or other financial benefits, that should be insisted upon by the Commission as a condition of merger approval. From Multiple Intervenors' perspective, the amount of PBAs necessary to justify a finding that the proposed transaction is in the public interest cannot be made in a vacuum, and depends to a large extent on how other issues raised herein (e.g., the timing of PBAs; reliability, service quality and safety performance standards and revenue adjustments; financial protections for customers; reporting requirements; VMP issues) are resolved. Suffice it to say, however, that Multiple Intervenors contends that the \$201.642 million in PBAs proffered by Petitioners (Ex. 50 at 1) is inadequate by a substantial amount, a conclusion obviously shared by Judge Epstein.

revenue decoupling mechanisms to mitigate the financial impacts that might otherwise bias of NYSEG and RG&E against energy efficiency and conservation measures.

(RD at 1-2.) Although Multiple Intervenors disagrees with some of the recommendations advanced in the Recommended Decision, Iberdrola's acceptance of conditions that produce material financial and other benefits and protections for customers of NYSEG and RG&E should result in a transaction that is in the public interest.

Judge Epstein recommends that the Commission apply a "net benefits" standard to the proposed transaction. (RD at 31.) Multiple Intervenors concurs. Where Multiple Intervenors differs with the Recommended Decision is whether the standard can be satisfied, under any scenario, in this proceeding. By recommending that the transaction be rejected outright, Judge Epstein essentially has concluded that no combination of conditions could result in a merger that satisfies the public interest standard. Multiple Intervenors respectfully disagrees with that conclusion.

Multiple Intervenors advocates that merger approval be conditioned upon, inter alia: (a) a material amount of PBAs being awarded to customers, well in excess of what Petitioners have proffered to date; (b) more stringent reliability, service quality and safety performance standards and revenue adjustments to ensure that customers are protected against degradation of performance by NYSEG and/or RG&E in these important areas; (c) comprehensive financial protections for customers, similar to those recommended by Judge Epstein in the alternative, as modified herein; (d) robust reporting requirements, similar to those recommended by Judge Epstein in the alternative; and (e) measures that would mitigate VMP concerns in a manner that would not preclude Iberdrola Renewables' future development of wind generation. With the adoption of such conditions by the Commission,

and their acceptance by Iberdrola, the transaction would produce net benefits and satisfy the public interest standard.

Multiple Intervenors agrees generally with Judge Epstein's interpretation of the applicable standard of review in this proceeding. With some notable exceptions addressed herein, Multiple Intervenors also supports the vast majority of conditions for merger approval advanced in the Recommended Decision. For the foregoing reasons, however, Multiple Intervenors disagrees with the primary recommendation that the transaction be rejected, and, instead, asserts that with the appropriate conditions, the proposed transaction does satisfy the applicable standard of review and should be approved.

POINT II

THE COMMISSION SHOULD CONCLUDE THAT IBERDROLA'S FINANCIAL STRENGTH REPRESENTS A BENEFIT OF THE PROPOSED TRANSACTION

For the reasons set forth in Point I, supra, Multiple Intervenors urges the Commission to approve the proposed transaction subject to numerous conditions intended to produce financial and other benefits and protections for customers of NYSEG and RG&E. Multiple Intervenors' position is based on its judgment that with appropriate conditions, the transaction would be in the public interest. Absent adequate and appropriate customer benefits and protections, however, Multiple Intervenors would agree with Judge Epstein's primary recommendation that the transaction be rejected. In fact, with one exception, Multiple Intervenors agrees with Judge Epstein's analysis that the benefits touted by Petitioners in the Joint Petition generally are illusory, unenforceable and/or do not constitute a benefit of the transaction itself. (RD at 38-50.) The exception pertains to Iberdrola's

financial strength, which should be recognized by the Commission as a benefit of the proposed transaction.

Initially, the proposed transaction would expose customers of NYSEG and RG&E to a myriad of financial risks. (See generally Tr. 1221-25, 1277-1325, 1400-19.) For this reason, it is imperative that merger approval be conditioned upon Iberdrola's acceptance of comprehensive financial protections, as recommended in the alternative by Judge Epstein and modified by Multiple Intervenors. (RD at 94-103, 108-09, 111-14; see also Point VII, infra.) Such financial protections should address, inter alia, goodwill and acquisition costs, credit quality, dividend restrictions, money pool arrangements and ring fencing, including issuance of a "golden share." (See id.)

Addressing financial risks as extensively as is reasonable to protect customers, the question remains as to whether Iberdrola's financial strength should be construed as a benefit of the proposed transaction. Contrary to the Recommended Decision (see RD at 47-48), Multiple Intervenors contends this question should be resolved in the affirmative.

Iberdrola currently possesses an "A" credit rating, which is higher than that of Energy East (and, by extension, NYSEG and RG&E). (RD at 47.) Iberdrola also is one of the largest utilities in the world, with the fourth highest market capitalization. (Id.) Such financial strength – while grossly inadequate to justify the proposed transaction in isolation – should be construed as a benefit. For instance, the evidence indicates that as a result of a higher credit rating, merger approval likely would lead to the financing of certain debt at interest rates below levels embedded in the existing rates of NYSEG and RG&E. (Tr. 630-

32.) Iberdrola also presumably would have greater access to capital markets, and at more favorable terms, than Energy East.¹¹

In the Recommended Decision, Judge Epstein discounts any advantage of Iberdrola's superior financial strength by focusing on situations that are purely speculative. For instance, the Recommended Decision notes that: (a) the fact that Iberdrola's size grew so quickly also demonstrates that an entity can lose its dominant size abruptly; (b) any number of developments could change the credit rating differential between Iberdrola and Energy East; (c) there is an unknown likelihood that Iberdrola's and the acquired companies' relative creditworthiness will change; and (d) Iberdrola's rating itself is susceptible to decreases not adequately foreseeable by rating agencies. (RD at 47-48.)

Thus, the Recommended Decision discounts entirely the benefit associated with Iberdrola's financial superiority over Energy East – which is a known fact as of this time – by raising nonspecific, hypothetical considerations that could impact Iberdrola's existing credit rating. As stated above, Multiple Intervenors agrees that the proposed transaction presents certain financial risks, and it has attempted to address those risks by advocating for merger approval to be conditioned upon the adoption of comprehensive financial protections for the benefit of customers.¹² It is worth noting, however, that unknown factors similarly could cause Iberdrola's credit ratings to improve further and/or Energy East's existing ratings to decline. Thus, there are risks on both sides of the equation.

¹¹ Absent an award of PBAs to customers, it is not clear that such potential cost savings would inure to the benefit of customers prior to the time that rates are reset. (Tr. 633-35.)

¹² For the reasons set forth in Point VII, *infra*, such financial protections should include a requirement that Iberdrola hold NYSEG and RG&E customers harmless from the financial impacts of any credit rating downgrade.

Importantly, at this time all of the major credit rating agencies agree that Iberdrola is a financially-stronger entity than Energy East, and such condition should be construed as a benefit of the transaction.

POINT III

THE COMMISSION SHOULD CONDITION MERGER APPROVAL UPON THE ADOPTION OF MORE STRINGENT ELECTRIC AND GAS RELIABILITY, SERVICE QUALITY AND SAFETY PERFORMANCE STANDARDS AND REVENUE ADJUSTMENTS

Reliability, service quality and safety are extremely important to customers. Due to the energy-intensive nature of their respective businesses, Multiple Intervenors members are particularly dependent upon very reliable electric and gas service. The proposed transaction, if approved, would result in a new corporate parent for NYSEG and RG&E. During the proceeding, numerous concerns were raised regarding future reliability, service quality and safety performance. (See, e.g., Tr. 1205-06.) Accordingly, for the reasons set forth below, the Commission should condition merger approval upon the adoption of more stringent electric and gas reliability, service quality and safety performance standards and revenue adjustments.

In the Recommended Decision, Judge Epstein recommended that the proposed transaction be rejected but, alternatively, if the Commission is inclined to approve the transaction, that such approval be subject to numerous conditions. (See, e.g., RD at 1-2.) The conditions recommended by Judge Epstein included, but were not limited to, requirements relating to the divestiture of generation facilities, financial protections for customers, reporting requirements, and affiliate transactions. (See, e.g., RD at 60-61, 76-81,

94-107, 111-17.) Notably absent from the discussion of possible conditions in the Recommended Decision, however, are the critically-important topics of reliability, service quality and safety. Thus, it is possible that the omission of conditions relating to those topics may have been accidental.¹³ Regardless, Multiple Intervenors asserts that the transaction should be approved, but conditioned upon, inter alia, more stringent reliability, service quality and safety performance standards and revenue adjustments.

As support for the proposed transaction, Petitioners have touted Iberdrola's claimed experience and expertise in terms of reliability and service quality – particularly electric reliability – as a purported benefit. (See, e.g., Tr. 145, 253, 490-91, 505; Ex. 41 at 15-16.) Significantly, however, Petitioners also have: (a) refrained from committing to any quantifiable improvements in electric or gas reliability, service quality, or safety performance (see Tr. 636); and (b) opposed all proposals to implement more stringent performance standards and/or revenue adjustments relating to reliability, service quality and safety.¹⁴

In the Recommended Decision, Judge Epstein concluded that Petitioners' claimed benefit – i.e., "Iberdrola's 'commitment to excellence' in service and reliability" (RD at 48) – either is "not real" or "insignificant." (RD at 38.) Judge Epstein found that any prospect that Iberdrola would impart best practices related to reliability and service quality "is clouded by the ambiguity of Iberdrola's policies regarding local managerial autonomy, its

¹³ In the Recommended Decision, Judge Epstein does reference service-related concerns raised by staff and Multiple Intervenors (RD at § 2, 91) but does not advance specific recommendations or conditions with respect thereto.

¹⁴ As the Staff Policy Panel observed: "There are no terms and conditions in the acquisition that ensure increased or enhanced service quality, safety or reliability in the future. More troubling is that [P]etitioners did not put forward any provisions to prevent backsliding after the rate plans/orders expire." (Tr. 1205-06.)

remoteness from the subsidiaries, and the impossibility of enforcing such an intangible, ill-defined commitment.” (RD at 48.) The Recommended Decision also notes that the Commission possesses ample authority to impose appropriate standards in this area as part of rate proceedings, regardless of whether the proposed transaction is approved. (RD at 49.)

Judge Epstein erred by failing to recommend that if the Commission approves the proposed transaction, such approval should be conditioned upon more stringent reliability, service quality and safety performance standards and revenue adjustments. Although the Commission conceivably could address performance standards and revenue adjustments applicable to NYSEG and RG&E as part of the utilities’ next rate proceedings, such proceedings may not be concluded until more than a year following consummation of the proposed transaction.¹⁵ More stringent performance standards and revenue adjustments should be adopted contemporaneous with merger closing, however, to ensure that the proposed transaction does not lead to declining performance by NYSEG and/or RG&E in the important areas of reliability, service quality and safety.

Multiple Intervenors supports the positions of certain parties in this proceeding – particularly Staff – advocating for the implementation of more stringent reliability, service quality and safety performance standards and revenue adjustments as a condition of merger approval. (See RD at 91.) As the Staff Policy Panel testified:

The existing rate plans [of NYSEG and RG&E] should be further modified to ameliorate the potential for increased risk to electric system and gas system reliability. Additional changes are also

¹⁵ Judge Epstein recommended that rate proceedings be commenced for NYSEG and RG&E within some unspecified period of time following resolution of this proceeding, and progress in accordance with a conventional 11-month schedule. (See RD 143-45.)

needed to ensure that gas safety and customer service quality are maintained going forward.

(Tr. 1366.) Staff sponsored testimony advocating for more stringent performance standards and/or revenue adjustments in the areas of electric and gas reliability, service quality and safety. (See, e.g., Tr. 1799-1839, 1856-62, 1871-84.)¹⁶

Importantly, the performance standards and revenue adjustments advanced by Staff, if adopted, would qualify as customer benefits, thereby bolstering the contentions that the proposed transaction is in the public interest. For instance, the Staff Gas Safety Panel testified that:

The purpose of our testimony is to recommend safety performance targets which become incentives for NYSEG and RG&E to maintain and improve specific areas regarding the safety of each gas distribution system. The targets also focus the company's attention to areas widely accepted as of high importance, and help ensure service reliability.

(Tr. 1799.) The Panel advanced numerous reasons why increased revenue adjustments should be adopted. (Tr. 1836-38.)¹⁷

Similarly, the Staff Electric Reliability and Safety Panel testified that based on prior Commission decisions, in a transaction involving New York electric and gas utilities, maintaining reliability of service subsequent to the transaction is of paramount concern. (Tr. 1858-59.)

¹⁶ Multiple Intervenors advocates no position on the specific performance standards and revenue adjustments that should be adopted as conditions in this proceeding. Generally, Multiple Intervenors supports Staff's efforts to make existing performance standards and revenue adjustments more stringent to promote improved performance and discourage backsliding following the merger, as has been experienced by other utilities.

¹⁷ The Panel testified that current safety-related performance targets for NYSEG and RG&E are not adequate. (Tr. 1800.) A number of those standards were established many years ago and have not been updated. (See, e.g., Tr. 244.)

The Staff Consumer Services Panel also testified that:

We recommend certain measures that if adopted could provide enhanced consumer benefits and protections should Iberdrola acquire Energy East and its affiliated local distribution companies (LDCs) NYSEG and RG&E. Specifically, the Commission should direct the continuation and expansion of customer service performance incentives for NYSEG and RG&E

(Tr. 1871.) The Panel explained that the purpose of performance standards and revenue adjustments are to “align shareholder and ratepayer interests by providing earnings consequences to shareholders for the quality of service provided by a utility to its customers.” (Tr. 1872.)

Importantly, Petitioners’ own witnesses acknowledge the potential benefits of more stringent performance standards and revenue adjustments. For instance, Petitioners Gas Safety and Reliability Panel testified that performance standards, coupled with revenue adjustments, have the following effect: “you make sure you don’t miss your performance targets.” (Tr. 246.) The Panel acknowledged that if potential revenue adjustments are increased, that would provide an additional incentive not to “miss” performance standards. (Id.) Finally, the Panel conceded that at least some of the more stringent performance standards recommended by Staff, if adopted, could be interpreted as a benefit of the proposed merger. (Tr. 252.)

In evaluating whether the proposed transaction should be conditioned upon more stringent reliability, service quality and safety performance standards and revenue adjustments, the Commission should follow the precedents established and/or reaffirmed

only last year in Case 06-M-0878, involving the acquisition, via merger, of KeySpan Corporation (“KeySpan”) by National Grid plc (“Niagara Mohawk”).¹⁸

The Staff Electric Reliability and Safety Panel recommended that Commission decisions in the National Grid/KeySpan merger proceeding increasing potential revenue adjustments when utility performance is unsatisfactory, and imposing additional, reliability-related reporting requirements, also be applied to NYSEG and RG&E. (Tr. 1859-62.) In his Recommended Decision, Judge Epstein accords due weight to the Commission’s rulings in the National Grid/KeySpan merger proceeding. (See, e.g., RD at 28-32, 131-35.) Significantly, however, Judge Epstein neglected to follow the Commission’s rulings in that proceeding with respect to performance standards and revenue adjustments.

During this proceeding, Petitioners attempted repeatedly to distinguish the performance of NYSEG and RG&E with that of Niagara Mohawk Power Corporation d/b/a National Grid (“Niagara Mohawk”), particularly with respect to electric reliability. (See, e.g., Tr. 130-31, 148-49, 203-04.) While the performance of NYSEG and RG&E with respect to reliability, service quality and safety admittedly is different from that of Niagara Mohawk, the significance of the comparison is that Niagara Mohawk’s performance – particularly with respect to electric reliability – declined following its acquisition by another

¹⁸ See generally Case 06-M-0878, Joint Petition of National Grid plc and KeySpan Corporation for Approval of Stock Acquisition and other Regulatory Authorizations, Abbreviated Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Decisions for KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island (issued August 23, 2007), and Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations for KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island (issued September 17, 2007) (“National Grid Order”).

company (i.e., National Grid). Indeed, Petitioners even acknowledged that Niagara Mohawk's quality of service has declined since it was acquired by National Grid. (Tr. 131.)

Based on its concerns regarding the impact of a merger on reliability, service quality and safety, the Commission imposed more stringent performance standards and revenue adjustments on Niagara Mohawk, and KeySpan's two gas utilities, as a condition of approval for the National Grid/KeySpan merger.¹⁹ More stringent performance standards and revenue adjustments similarly are needed here to ensure that Iberdrola's acquisition of Energy East, if approved, does not lead to declining performance by NYSEG and/or RG&E in the important areas of reliability, service quality and safety.²⁰

POINT IV

THE COMMISSION SHOULD CONDITION MERGER APPROVAL UPON THE ADOPTION OF MEASURES THAT MITIGATE VMP CONCERNS IN A MANNER THAT WOULD NOT PRECLUDE IBERDROLA RENEWABLES' FUTURE DEVELOPMENT OF WIND GENERATION INTERCONNECTED TO THE NYSEG OR RG&E T&D SYSTEMS

In the Recommended Decision, Judge Epstein recommends that in the event the proposed transaction is approved, Iberdrola and its affiliates should be precluded from developing wind generation interconnected to the NYSEG or RG&E T&D systems. (RD at 60-76.) Multiple Intervenors recognizes that the possible simultaneous ownership of electric

¹⁹ Case 06-M-0878, supra, National Grid Order at 143-49.

²⁰ The Commission would be subject to intense criticism if, for example, the proposed transaction was approved without being conditioned on more stringent reliability, service quality and safety performance standards and revenue adjustments and, subsequently, the performance of NYSEG and/or RG&E declined in one or more of those areas without additional recourse to customers.

T&D assets and generation assets raises VMP concerns. (See, e.g., Tr. 910-23, 1247-54.)

While Multiple Intervenors supports the proposed divestiture of Energy East’s fossil-fuel generating facilities (see Point V, infra), it urges the Commission to grant merger approval subject to Iberdrola’s acceptance of conditions that limit Petitioners’ ability to exercise VMP in a manner that would not preclude Iberdrola Renewables’ future development of wind generation in New York.²¹

The Partial Acceptance submitted by Petitioners contains the following proposal:

So long as the Commission does not impose any limitations on the ability of Iberdrola Renewables to develop renewable generation in New York State as a result of this proceeding, Iberdrola will support and encourage investments by Iberdrola Renewables (through its upstream voting interest in Iberdrola Renewables) in excess of \$100 million in the development of wind generation in New York State within the next 3 years, subject to all necessary development permits and authorizations, and provided that there is no material adverse change to the existing fundamental economics of wind generation development in New York State (*e.g.*, values associated with PTCs, RPS and NYISO market pricing).

(Ex. 50 at 2.) Petitioners also proposed that “all renewable generation ownership and development will be accomplished through an unregulated affiliate of Iberdrola that is not a direct or indirect subsidiary of NYSEG or RG&E.” (Id.)²²

²¹ Importantly, Multiple Intervenors’ position reflects, inter alia, certain unique characteristics pertaining to wind generation and the proposed transaction in general. Accordingly, Multiple Intervenors’ position herein should not be construed as indicative of its general position with respect to VMP issues.

²² There are questions as to whether Iberdrola’s \$100 million “commitment” has been increased to \$2 billion or \$10 billion. (See RD at 35.) In evaluating any modifications to the proposals advanced in the Partial Acceptance, upon which Multiple Intervenors reserves the right to address in its Brief Opposing Exceptions, the Commission should focus not only on

Although much has been made in the press about Iberdrola's "commitment" to invest in New York, for several reasons Multiple Intervenors does not consider Petitioners' proposal to be a particularly large public benefit. Initially, the "commitment" to develop additional wind generation is weakened by numerous caveats and conditions that would obviate any obligation if: (a) the value of Production Tax Credits (i.e., PTCs) changed materially; (b) the value of customer-funded subsidies available under Case 03-E-0188, the Renewable Portfolio Standard (i.e., RPS) proceeding, changed materially; and (c) prices in New York's wholesale electricity market changed materially. (Tr. 628-29; see also Ex. 50 at 2.) Second, given Petitioners' estimate that wind generation costs approximately \$2 million per MW to develop, the entire commitment is roughly equivalent to 50 MW, which represents only a small fraction of the 998 MW of wind projects currently under consideration by Iberdrola Renewables. (See Ex. 57.) Third, Multiple Intervenors recognizes that it may be difficult to design conditions that mitigate all VMP issues.²³

Where Multiple Intervenors differs with the Recommended Decision is that whereas Judge Epstein recommends an outright prohibition on wind generation development by Iberdrola (and its subsidiaries) that is interconnected to the NYSEG or RG&E T&D systems, Multiple Intervenors would allow for the possibility of such development, subject to conditions that would mitigate VMP concerns to the extent practicable. In this regard,

the size of the investment in New York, but also on any caveats that could be used to excuse performance.

²³ Inasmuch as Multiple Intervenors' position on VMP issues is not quite as restrictive as that advanced by other parties in this proceeding, the resolution of such issues in a manner that would not preclude Iberdrola Renewables' future development of wind generation should, if anything, warrant a greater amount of financial and rate-related benefits to customers (i.e., because customers still would be subject to certain risks related to VMP that would not be present absent Iberdrola's proposed acquisition of Energy East).

Petitioners' proposal that Iberdrola Renewables be allowed to develop wind generation without "any limitations" (Ex. 50 at 2) goes too far and should be rejected.

Judge Epstein's recommended prohibition on Iberdrola's development of wind generation is based, in large part, on an interpretation of the Commission's VMP policy. (See RD at 63-66.)²⁴ Upon information and belief, however, the VMP Policy Statement has never before been applied to preclude development of renewable resources, which are favored as a matter of State policy.²⁵ More importantly, the VMP Policy Statement does not mandate a prohibition on all future generation development; rather, it establishes a rebuttable presumption.²⁶ Such rebuttable presumption could be overcome, for example, by a showing of "substantial ratepayer benefits, together with mitigation measures."²⁷ While mandated divestiture of generation assets may be appropriate in certain circumstances (e.g., National Grid's proposed acquisition of the KeySpan-Ravenswood facility), the issue presented here is whether, as a condition to merger approval, Iberdrola should forever be banned from developing wind generation through an affiliate that is interconnected to the NYSEG or RG&E T&D systems.²⁸

²⁴ See also Cases 96-E-0900, *et seq.*, Statement of Policy Regarding Vertical Market Power (issued July 17, 1998), Appendix I ("VMP Policy Statement").

²⁵ While Multiple Intervenors excepts to the Recommended Decision on this issue, it agrees with Judge Epstein's rejection of Petitioners' argument that the VMP Policy Statement has been superseded and/or rendered irrelevant. (RD at 64-66, 70-71.)

²⁶ Cases 96-E-0900, *et seq.*, VMP Policy statement at 1-2.

²⁷ *Id.*

²⁸ One alternate approach would be to require Iberdrola to overcome the rebuttable presumptions, if possible, whenever it proposed a wind generation project interconnection to the NYSEG or RG&E T&D system.

In making this determination, the Commission should recognize that there are certain characteristics of wind generation that may warrant a different treatment than more traditional, fossil-fuel generation. For instance, Petitioners witness Hieronymus points out that: (a) wind is “energy limited,” in that its energy and capacity value is much less than its nameplate capacity; (b) “wind resources have unpredictable and rapidly variable output levels,” thereby causing most wind generation to participate in real-time energy markets, as opposed to day-ahead energy markets; and (c) wind facilities have zero fuel costs, thereby causing them to be bid into competitive markets as “price takers.” (Tr. 863-64.) To the extent the Commission questions whether future proposed projects are in the public interest notwithstanding these distinctions, project-specific mitigation measures (e.g., requiring any wind project owned by Iberdrola to bid as a “price taker” in the market) can be developed on a case-by-case basis, if and when needed.

In recommending that the Commission at least leave open the possibility of Iberdrola Renewables’ future development of wind generation interconnected to the NYSEG or RG&E T&D systems, Multiple Intervenors notes that: (a) as detailed above, wind generation possesses certain characteristics that are materially different from fossil-fuel generation; (b) depending on the circumstances, infrastructure investment could result in customer benefits (e.g., increased generation that helps mitigate extremely high market prices); (c) to date, no other wind developer has intervened in this proceeding, let alone raised concerns about the potential impact of Iberdrola Renewables’ plans on their own ability to develop wind generation; and (d) as a condition of merger approval, the Commission can require certain mitigation measures, including continuing jurisdiction, that would lessen substantially, if not eliminate, VMP concerns.

For the foregoing reasons, Multiple Intervenors recommends that the Commission grant merger approval subject to Iberdrola's acceptance of conditions that limit Petitioners' ability to exercise VMP in a manner that would not preclude Iberdrola Renewables' future development of wind generation in New York.

POINT V

THE COMMISSION SHOULD CONDITION MERGER APPROVAL UPON PETITIONERS' DIVESTITURE OF FOSSIL-FUEL GENERATION ASSETS WITH AN ALLOCATION OF ALL – OR ALMOST ALL – OF THE ABOVE-BOOK PROCEEDS TO CUSTOMERS

Petitioners proposed in the Partial Acceptance to competitively bid and auction Russell Station, the 63 MW Allegany Station, the 14 MW Peaker Station 3, and the 14 MW Peaker Station 9, all of which are owned by RG&E. (Ex. 50 at 1.) For the reasons set forth below, the Commission should condition merger approval on Petitioners' proposed divestiture of generation assets with an allocation of all – or almost all – of the above-book proceeds to customers. The Recommended Decision's treatment of this issue – calling for a resolution of the allocation of above-book proceeds between customers and shareholders during some subsequent phase of the proceeding (RD at 76-78) – should not be adopted herein.

Initially, upon information and belief, there is no controversy that as a condition of merger approval, Petitioners should divest their existing fossil-fuel generation facilities, as proposed in the Partial Acceptance. No party has opposed the divestiture of those facilities, which also is supported by Judge Epstein. (See RD at 76.)

In its Initial Brief, Multiple Intervenors advocated that all – or almost all – of the above-book proceeds from the sale of RG&E’s generation assets be allocated to customers.²⁹ Specifically, Multiple Intervenors asserted that the maximum amount allocable to Petitioners’ shareholders should be limited both in percentage terms (5 percent) and nominal dollars (\$3 million maximum).³⁰ In response, Petitioners subsequently proposed that shareholders would retain as little as 10 percent of the net proceeds if the Commission so directs. (See RD at 77.) The Recommended Decision does not attempt to resolve this issue, recommending instead that “the parties more likely can identify the optimum percentage incentive and dollar cap by means of an auction planning collaborative at the close of this proceeding than through litigation on exceptions.” (RD at 78.) Multiple Intervenors disagrees.

Petitioners currently are seeking merger approval, and have indicated a willingness to accept certain conditions if such approval is granted. (See, e.g., Ex. 50.) In order to justify the proposed transaction, and demonstrate that it produces net positive benefits (see RD at 23), Petitioners need to provide customers an appropriate amount of financial and rate-related benefits. A favorable allocation of net proceeds from the auction of fossil-fuel generation facilities provides an opportunity to increase the pool of financial benefits available to customers if the transaction is consummated. Thus, Petitioners seemingly are prepared to be flexible on the allocation of net proceeds, as indicated by their belated (and inadequate) proposal to retain no more than a 10 percent share.

²⁹ Case 07-M-0906, supra, Initial Brief of Multiple Intervenors (dated April 11, 2008) at 53-55.

³⁰ Id. at 55.

If, however, merger approval is granted without resolving this issue, and the allocation of net proceeds is postponed until a subsequent phase of the proceeding, at that time Petitioners' financial interests presumably would be focused on maximizing the allocation of net proceeds to shareholders. Thus, contrary to the reasoning in the Recommended Decision, now (i.e., when conditions to merger approval are being considered) represents the optimal time to resolve the allocation issue.

In this case, the allocation of 100 percent of the above-book auction proceeds to customers is justified upon several grounds. First, the above-market value of the energy produced by the subject generation facilities currently is allocated to RG&E's customers. (Tr. 609.) If customers are to lose this benefit, they should receive the auction proceeds in return. Second, as acknowledged by Petitioners Policy Panel, customers paid for the construction, operation and maintenance of those facilities through rates. (Tr. 608.) Third, the allocation of all above-book auction proceeds to customers can be characterized, in some sense, as a benefit of the proposed transaction. As such, an allocation favorable to customers simply would increase the benefits against which the costs and the risks of the transaction must be evaluated. Finally, it also should be considered that the timing of the proposed divestiture – which may or may not prove optimal to customers – is related to Energy East's decision to be acquired by Iberdrola.

The only justification for allocating something less than 100 percent of the above-book auction proceeds to customers would be if the Commission considered some financial incentive to Petitioners to be necessary for a successful auction. In other instances, where utilities divested generation assets, the Commission has allowed a small – and often capped – allocation of above-book proceeds to shareholders. For instance, RG&E's

shareholders were accorded approximately 5 percent of the above-book proceeds from the sale of the Ginna Nuclear Power Plant (“Ginna”), capped at \$10 million.³¹ If the Commission elects to follow that practice in this proceeding, Multiple Intervenors asserts that the maximum amount allocable to shareholders should be limited both in percentage terms (5 percent) and nominal dollars (\$3 million maximum).

In the Recommended Decision, Judge Epstein notes that: “This record offers little support for adopting one incentive or cap rather than another, because, for example, it does not suggest whether divestiture of Energy East’s fossil generation would be more or less complex than the Ginna sale.” (RD at 78.) As detailed above, however, there are compelling reasons why it would be far preferable for the Commission to resolve the allocation issue now, as a condition of merger approval, than in some subsequent phase of the proceeding after the transaction has been consummated. Moreover, the allocation issue involves an exercise of judgment from the Commission – there is no “evidence” missing from the record that would identify a single “right” allocation. Furthermore, the Commission can – and should – take official notice that auctioning a few, relatively small, generation facilities should be far less complex than divesting a major nuclear power facility such as Ginna. Thus, under the circumstances presented, any allocation of above-book proceeds awarded to Petitioners’ shareholders should be capped, on a percentage and nominal dollar basis, at levels less than those applicable to the sale of Ginna.

³¹ See Cases 03-E-0765, 03-G-0766, 02-E-0198, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric and Gas Service, Order Adopting Provisions of Joint Proposals with Conditions (issued May 20, 2004) at 21.

POINT VI

THE COMMISSION SHOULD REFRAIN FROM CONDITIONING MERGER APPROVAL UPON THE DIVESTITURE OF EXISTING HYDROPOWER FACILITIES ABSENT A DEMONSTRATION THAT SUCH DIVESTITURE TRULY IS IN THE PUBLIC INTEREST

NYSEG and RG&E collectively own approximately 118 MW of hydropower generation at eight locations. (RD at 78.) In the Recommended Decision, Judge Epstein recommends that if the Commission is inclined to approve the proposed transaction, that such approval be conditioned upon the divestiture of Energy East's existing hydropower facilities. (RD at 78-81.) Multiple Intervenors excepts to that recommendation. Instead, Multiple Intervenors urges the Commission to refrain from conditioning merger approval upon the divestiture of hydropower facilities absent a demonstration that such divestiture truly is in the public interest.

Initially, Judge Epstein reasons that Commission-mandated divestiture is needed "in furtherance of its policies against ownership of generation interconnected with the owner's T&D system." (RD at 78.) Significantly, however, the Commission heretofore has allowed Energy East to own the subject hydropower facilities for many years, even after NYSEG and RG&E were encouraged to divest other generation assets. Thus, for the last decade and longer, the Commission has allowed the T&D system owner – in this case, both NYSEG and RG&E – to simultaneously own hydropower assets.³²

³² The characteristics that differentiate wind generation facilities from fossil-fuel generation facilities, which are discussed in Point IV, supra, generally also apply to hydropower facilities.

The Recommended Decision dismisses Energy East's longstanding ownership of hydropower facilities, even well after divestiture, by noting that prior orders involving NYSEG and RG&E can be interpreted "as decisions by the Commission to proceed incrementally, as it commonly does, by dealing with non-hydro units first without foreclosing additional measures to further implement the policy of separating generation from T&D ownership in the future." (RD at 79-80.) However, since the Commission's orders a decade ago encouraging divestiture of certain generation facilities by NYSEG and RG&E, there has been no explicit direction, or even implicit indication, that divestiture of the existing hydropower facilities were on the horizon, much less imminent.

In response to arguments that Energy East's continuing ownership of the hydropower facilities would confer a benefit on customers, the Recommended Decision opines that "it is not clear that retention would be economically more beneficial for customers than divestiture." (RD at 80.) Multiple Intervenors concurs. Significantly, however, the record also is devoid of any evidence that divestiture "would be economically more beneficial for customers" than retention. For this reason, additional analyses should be undertaken, rather than blindly mandating the divestiture of the hydropower facilities.

Energy East's existing hydropower facilities represent substantial assets. Upon information and belief, the facilities: (a) generate electricity at a cost well below current and projected future market prices; (b) produce financial benefits for customers of NYSEG and RG&E; (c) are environmentally clean; and (d) presumably participate in competitive markets as "price takers" and, consequently, may raise fewer VMP issues than other forms of generation. It may be that divestiture of the hydropower facilities would produce financial benefits to customers (depending, in part, on how any above-book

proceeds are allocated between customers and shareholders – see Point V, supra). On the other hand, there is no evidence on this issue and, unlike the proposed divestiture of fossil-fuel generating facilities which seemingly is unopposed, there is much less support for divesting the hydropower facilities at this time, particularly among customers (for whose benefit the facilities were constructed and are operated and maintained).

Accordingly, the Commission should refrain from conditioning merger approval upon the divestiture of hydropower facilities absent a demonstration that such divestiture truly is in the public interest.

POINT VII

THE COMMISSION SHOULD CONDITION MERGER APPROVAL UPON IBERDROLA'S AGREEMENT TO HOLD NYSEG AND RG&E CUSTOMERS HARMLESS FROM THE FINANCIAL IMPACTS OF ANY CREDIT RATING DOWNGRADE

During this proceeding, Staff recommended – and Multiple Intervenors supported – that merger approval be conditioned upon Iberdrola's agreement that customers be held harmless from the effect of any rating downgrade below NYSEG and RG&E's present debt ratings. (RD at 96.) In response, "Petitioners agree that ratepayers should be held harmless from Iberdrola actions but they are unwilling to provide ratepayers protection from a downgrade related to actions taken by the Commission." (RD at 98.) In the Recommended Decision, Judge Epstein recommends that if the Commission elects to approve the proposed transaction subject to conditions, that Iberdrola not be required to hold customers harmless from the consequences of a ratings downgrade. (RD at 115-16.) For the

reasons set forth below, the Commission should reject Judge Epstein's recommendation on this issue.

Initially, Judge Epstein appears to recognize the significance of the proposed credit rating protection: "Whether customers are granted such protection certainly is important." (RD at 115.) Significantly, however, Judge Epstein then recommends that the proposed protection be rejected, in its entirety, because of potential conflicts over the entities responsible for the downgrading:

If the subsidiaries could not exclude Iberdrola as a cause of the derating, as petitioners correctly observe, they could become caught in a vicious circle of rate disallowances pursuant to the hold harmless measure – in effect, caused not by the transaction but by the Commission – followed by further derating. If anything, the rating agencies' potentially negative reactions to a hold harmless provision demonstrate not that the provision should be adopted, but that the transaction is contrary to the public interest because some of the risks are beyond the reach of practical remedies.

(RD at 116.) The Commission should reject this reasoning – it is inconsistent with prior merger decisions and relies far too heavily on speculation that the Commission somehow may be responsible for future credit downgrades, or that any downgrade would trigger some type of "death spiral."

In the National Grid/KeySpan merger proceeding, the Commission addressed (and then approved), a financial protection for customers that: "If [KeySpan's gas utilities] bond rating falls below A- or A3, then any long-term debt will be 'priced' as if it has been sold by an A-/A3 utility."³³

³³ Case 06-M-0878, supra, National Grid Order at 32; see also id. at 122-27.

The Commission subsequently approved a similar financial protection for Niagara Mohawk's customers. After discussing the aforementioned protection pertaining to KeySpan, the Commission concluded as follows:

Similarly, Appendix 1 proposes Niagara Mohawk ratepayers to experience a cost of debt no greater than the cost associated with a debt rating of BBB+ and Baal. The BBB+/Baal debt rating was Niagara Mohawk's bond rating when the National Grid plc/KeySpan merger was approved. If Niagara Mohawk's bond rating falls below BBB+/Baal prior to the Company's next electric rate filing, the price of any long-term debt issued will be deemed to be at the market price that would have been incurred had the debt been issued by a BBB+ or Baal debt rated utility. The excess actual interest expense will be credited to Niagara Mohawk's deferral account while the Niagara Mohawk MJP earnings sharing measurement will reflect the actual interest expense. While the actual debt rating floors are not identical to the [KeySpan gas utilities'] rating triggers, the principle that the ratings in existence at the time of the [National Grid Order] be maintained is the same, and is, therefore, acceptable.³⁴

Thus, on at least two prior occasions, the Commission has acted to protect customers against the financial consequences of ratings downgrades. The Commission did not – as Judge Epstein recommends – reject the opportunity to protect captive delivery customers due to a concern that the future cause of downgrades may result in controversy, or trigger some type of “death spiral” for the utility. The Commission also should not forsake an important and justifiable customer protection for fear of possible reactions from the rating agencies – to do so would constitute an abrogation of its responsibilities in this proceeding.

Petitioners have touted Iberdrola's purported financial strength, including higher ratings than Energy East, as a benefit of the proposed transaction. For the reasons

³⁴ Cases 01-M-0075, Joint Petition of Niagara Mohawk Holdings, Inc., Niagara Mohawk Power Corporation, National Grid plc and National Grid USA for Approval of Merger and Stock Acquisition, and 06-M-0878, supra, Order Adopting Financial Protections for Niagara Mohawk Power Corporation (issued March 28, 2008) at 4-5.

detailed in Point II, supra, Multiple Intervenors agrees that Iberdrola's higher credit ratings, in and of themselves, do represent a benefit of the transaction. If, however, the ratings applicable to NYSEG and RG&E decline below existing levels following the transaction, resulting in higher costs for the utilities, then customers hardly can be said to have realized a benefit from Iberdrola's purported financial strength. Thus, in order to protect customers, they should be held harmless from the financial impacts of any rating downgrades. In this respect, Multiple Intervenors perceives no reason why NYSEG and RG&E customers should be accorded less protection than customers of KeySpan and Niagara Mohawk.

CONCLUSION

For all the foregoing reasons, the Commission should modify or reject Judge Epstein's recommendations in a manner consistent with this Brief on Exceptions. To the extent recommendations advanced in the Recommended Decision are not referenced herein, the Commission may conclude that Multiple Intervenors either supports, or does not oppose, the adoption of those recommendations.

The Commission should approve the proposed transaction, subject to numerous conditions designed to produce financial and other tangible benefits and enforceable protections for customers of NYSEG and RG&E. Specifically, such conditions should include, but need not be limited to, Iberdrola's acceptance of: (a) substantial financial and rate-related benefits for customers; (b) more stringent electric and gas reliability, service quality and safety performance standards and revenue adjustments; (c) comprehensive financial protections for customers; (d) robust reporting requirements; and (e) measures that

mitigate VMP concerns in a manner that would not preclude Iberdrola Renewables' future development of wind generation interconnected to the NYSEG or RG&E T&D systems.

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