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 OPPOSING EXCEPTIONS OF MULTIPLE INTERVENORS

Dated: July 3, 2008

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PRELIMINARY STATEMENT

In accordance with the Notice for Filing Exceptions and Notice of Revised Briefing Schedule, issued by the New York State Public Service Commission ("Commission") on June 16 and 18, 2008, respectively, Multiple Intervenors hereby submits its Brief Opposing 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 and Electric Corporation ("RG&E") service territories. Multiple Intervenors' Brief Opposing Exceptions responds to the exceptions advanced by other parties 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 in its Brief on Exceptions and herein, Multiple Intervenors urges the Commission to approve the proposed transaction,

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[1] Case 07-M-0906, <u>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.</u>

[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."; references to the exhibits admitted into evidence during the hearing are preceded by the notation, "Ex."; and parenthetical references to the Brief on Exceptions filed by a party are preceded by the party's name, as abbreviated herein (<u>e.g.</u>, MI at __.)

subject to numerous conditions intended to produce financial and other tangible benefits and enforceable 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.

In addition to Multiple Intervenors, the following parties submitted Briefs on Exceptions to the Recommended Decision: the Greater Rochester Enterprise; Iberdrola and Energy East (collectively, the "Petitioners"); the Independent Power Producers of New York, Inc.; the New York Association of Public Power and the New York State Rural Electric Cooperative Association; the New York State Consumer Protection Board; the New York State Department of Environmental Conservation; New York State Department of Public Service Staff ("Staff"); Nucor Steel Auburn, Inc.; and Strategic Power Management, LLC. Multiple Intervenors' Brief Opposing Exceptions responds to selected exceptions advanced herein by Petitioners and Staff.[3]

SUMMARY OF POSITION

Throughout this proceeding, Multiple Intervenors has advocated that the proposed transaction between Iberdrola and Energy East be approved, subject to numerous conditions designed to produce financial and other tangible benefits and enforceable protections for NYSEG and RG&E customers. Specifically, such conditions should include, at a minimum, Iberdrola's acceptance of: (a) substantial financial and rate-related benefits for

[3] Multiple Intervenors' positions in this proceeding are as set forth in its Initial Brief, Reply Brief, Brief on Exceptions, and this Brief Opposing Exceptions. Its decision to refrain from responding to a particular exception advanced by another party should not be construed as Multiple Intervenors' support for, or agreement with, such exception.

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 would mitigate vertical market power ("VMP") concerns in a manner that would not preclude Iberdrola's subsidiary, Iberdrola Renewables, from developing wind generation facilities. Absent such conditions, the proposed transaction would not be in the public interest.

Multiple Intervenors' Brief Opposing Exceptions is organized into six points.

In Point I, Multiple Intervenors responds to exceptions by Petitioners and Staff relating to Iberdrola's purported "commitment" to invest in New York.

In Point II, Multiple Intervenors responds to Petitioners' exceptions denying the existence of any risks inherent in the proposed transaction.

In Point III, Multiple Intervenors responds to Petitioners' exceptions relating to the recommended conditioning of merger approval upon Iberdrola's provision of substantial Positive Benefit Adjustments ("PBAs") to customers of NYSEG and RG&E.

In Point IV, Multiple Intervenors responds to Petitioners' exceptions relating to the recommended conditioning of merger approval upon Iberdrola's acceptance of comprehensive financial protections for customers.

In Point V, Multiple Intervenors responds to Petitioners' exceptions relating to the recommended conditioning of merger approval upon Iberdrola's acceptance of robust reporting requirements.

In Point VI, Multiple Intervenors responds to exceptions by Staff and Petitioners relating to the recommended procedural process for addressing the rate levels of NYSEG and RG&E in the event the proposed transaction is consummated.

ARGUMENT

POINT I

RELIANCE BY PETITIONERS AND STAFF ON IBERDROLA'S PURPORTED "COMMITMENT" TO INVEST IN NEW YORK IS OVERSTATED

In their Brief on Exceptions, Petitioners make much of Iberdrola's purported "commitment" to make sizeable investments in wind generation in New York State if the proposed transaction is approved. (See, e.g., Petitioners at 23-27.) Other parties, as well as certain politicians, similarly have fixated on Iberdrola's "commitment" as providing sufficient grounds for merger approval, in some cases without any apparent regard for other issues and concerns regarding the proposed transaction.

From its perspective, Staff disagrees that the "commitment" by Iberdrola to invest in wind generation development constitutes a benefit of the proposed transaction. (Staff at 11-14.) To the extent the Commission nevertheless wishes to recognize Iberdrola's "commitment" as a benefit, Staff advocates that such "commitment" somehow be made enforceable by linking it to the provision of PBAs to customers. (Staff at 36-39.)

For the reasons set forth below, while Multiple Intervenors supports the Iberdrola/Energy East merger subject to appropriate conditions, Petitioners' reliance on Iberdrola's "commitment" to invest in New York is overstated. Moreover, while Multiple Intervenors concurs with Staff's general premise that if the "commitment" is deemed a benefit it should be made enforceable, it disagrees strongly with any notion that customers should have to "pay" for the "commitment" through a reduction in the otherwise-appropriate amount of PBAs. Indeed, requiring customers to "pay" for the "commitment" through reduced PBAs would transform the alleged benefit of the "commitment" into a cost of the transaction.

A. A Description of Iberdrola's "Commitment"

Initially, prior to responding to exceptions related to Iberdrola's purported "commitment" to invest in wind generation in New York, it is necessary to clarify the extent of that "commitment," which has become confused by the proliferation of press conferences, press releases and statements in news reports pertaining to this proceeding.[4]

On March 14, 2008, Petitioners circulated to other parties the "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.) The Partial Acceptance provides, in pertinent part, that:

> 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).

(Id. at 2.)[5]

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[4] The integrity of this proceeding, and of the process itself, requires that contested issues be resolved based on the evidentiary record and the parties' briefs, without undue reliance on extraneous considerations.

[5] In the above passage, "PTCs" refer to Production Tax Credits; "RPS" refers to the Renewable Portfolio Standard; and "NYISO" refers to the New York Independent System Operator, Inc.

Thus, in evaluating the scope of Iberdrola's "commitment" to invest in New York, the Commission must consider the following caveats incorporated therein:

- the "commitment" apparently can be excused if the Commission imposes "any limitations" on Iberdrola Renewables' future development of renewable generation as a result of this proceeding (see Tr. 619);

- the "commitment" apparently can be excused if, notwithstanding Iberdrola's support and encouragement (through its upstream voting interest), Iberdrola Renewables – which "is an independent company" (Tr. 622) – does not or cannot make the anticipated investment;

- the "commitment" apparently can be excused if, for any reason, Iberdrola Renewables is unable to obtain "all necessary development permits and authorizations"; and

- the "commitment" apparently can be excused if there is a "material adverse change" (however that may be defined) to "the existing fundamental economics of wind generation development in New York State"; for instance, if: (a) the availability and/or magnitude of PTCs decline; (b) the availability and/or magnitude of RPS subsidies decline, or (c) the level of NYISO market prices decline (see Tr. 628-29).

As Judge Epstein noted, the "commitment" is "hedged with contingencies, related to economics and pricing, sufficient to raise doubts that it would be enforceable." (RD at 55; footnote omitted.)

With respect to the "commitment," the Recommended Decision also noted that:

> In subsequent press announcements by Iberdrola, the $100 million figure for New York wind generation investment has been restated as $2 billion over five years, and then restated again as $10 billion over an unspecified period. On this record, it is unclear whether these statements represent a commitment different from the $100 million originally promised or whether the revised figures would affect the parties' positions.

(RD at 35.) Based on this uncertainty, Judge Epstein solicited clarification from the parties on exceptions. (Id.) Notwithstanding this clear invitation, Petitioners' Brief on Exceptions references no "commitment" other than the initial $100 million proposed in the Partial Acceptance. (See, e.g., Petitioners at 23-27.) Given the detail in which Petitioners seemingly parsed every other line of the Recommended Decision, it is highly unlikely that their failure even to address or clarify the purported $2 billion (or $10 billion) "commitment" was inadvertent.

Thus, in determining the amount of weight, if any, to be accorded to Iberdrola's "commitment" when evaluating the proposed transaction, the Commission should disregard all statements that are inconsistent with the proposals, and the caveats, contained in the Partial Acceptance.

B. Petitioners' Reliance on Iberdrola's "Commitment" Is Overstated

As detailed above, Multiple Intervenors supports Iberdrola's acquisition of Energy East, subject to appropriate conditions. As large industrial, commercial and institutional energy consumers, the members of Multiple Intervenors are very concerned about economic development efforts in New York State. Thus, Multiple Intervenors generally views Iberdrola's "commitment" to invest in New York as favorable in evaluating the pros and cons of the proposed transaction. Significantly, however, the actual benefit inherent in the "commitment" is limited for numerous reasons.

First, the development of wind generation proposed in the Partial Acceptance would be owned not by Iberdrola, but by Iberdrola Renewables, an unregulated subsidiary. Such generation apparently only would be developed if, inter alia, Iberdrola Renewables is the beneficiary of federal tax credits (i.e., PTCs) and customer-funded subsidies under the RPS.[6] To the extent NYISO market prices remained high, and revenues from new wind generation facilities exceeded the cost of generation, all resulting profits would flow to Iberdrola Renewables; customers of NYSEG and RG&E would not share in such benefits.

Second, the proposed "commitment," in reality, represents only a very small piece of Iberdrola Renewables' current plans to develop wind generation in New York. During the evidentiary hearing, Iberdrola disclosed that it has 998 MW of renewable projects "that may become operational within the next five years" in New York. (Ex. 57.) Petitioners' witness, employed by Iberdrola, estimated that wind generation costs approximately $2 million per MW to develop in the United States. (Tr. 626.) Thus, by offering to invest $100 million in New York, Petitioners' Partial Acceptance can be characterized fairly as a "commitment," with numerous caveats, to develop approximately 50 MW of potential wind generation, or roughly 5 percent of the projects already on the "planning board."[7]

Third, the relationship between Iberdrola's "commitment" and its proposed acquisition of Energy East, if any, is unclear. As Judge Epstein noted, "Iberdrola's acquisition or non-acquisition of a distribution subsidiary has not determined whether the company considers itself to have the requisite marketing and regulatory expertise to achieve

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[6] See generally Case 03-E-0188, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard.

[7] While Multiple Intervenors favors economic development efforts within the NYSEG and RG&E service territories, the amount of permanent jobs likely to be created by an additional 50 MW of wind generation probably is very limited and should be kept in perspective in assessing the purported economic development benefits associated with the "commitment."

a 'comfort level' conducive to renewables investment in Pennsylvania, Oregon, Texas, or Maine." (RD at 43.) Thus, assuming, as is reasonable, that project economics are the primary consideration in the decision by Iberdrola Renewables – or any other business – to develop wind generation, there is no reason why investment consistent with Iberdrola's commitment would not proceed regardless of whether it acquired Energy East. Judge Epstein concluded similarly that "the prospect of wind development in New York … should be expected to depend … on whether wind development in New York is economically attractive." (RD at 44.) Therefore, given the relatively small amount of Iberdrola's "commitment," at least in percentage terms compared to the amount of wind generation projects already under development (i.e., roughly 5 percent), that level of investment is likely to take place irrespective of the outcome of this proceeding, and efforts to hold the possibility of future wind generation development "hostage" to merger approval should be met with skepticism and accorded little or no weight.

Fourth, Iberdrola's development of wind generation in New York, to the extent that it is interconnected to the NYSEG or RG&E transmission and distribution ("T&D") systems, raises VMP concerns that must be addressed. While Multiple Intervenors disagrees with Judge Epstein's recommendation that Iberdrola's affiliate forever be precluded from developing wind generation interconnected to the NYSEG or RG&E T&D systems (see MI at 19-24), Iberdrola's "commitment" clearly raises at least the possibility of heightened VMP concerns if any future wind projects are interconnected to the NYSEG or RG&E T&D systems. (See, e.g., RD at 60-71.)

Finally, it is not clear if, or how, Iberdrola's "commitment" can be enforced. What if a dispute arises as to the applicability of one or more of the caveats that can be used to excuse performance? Or, what if Iberdrola simply chooses not to honor its "commitment"? What recourse would customers have in that instance? Absent some ability to enforce the "commitment," any reliance placed thereon should be limited.

Thus, while Multiple Intervenors members desire investment in the NYSEG and RG&E service territories – by Iberdrola Renewables as well as other entities – the total benefits proffered by Iberdrola's conditional "commitment" should not be accorded excess weight in this proceeding. The "commitment" should be construed as a limited benefit, but as structured currently, it does not obviate the need for merger approval to be conditioned upon, at a minimum: (a) substantial financial and rate-related benefits for customers (i.e., well in excess of the PBAs proposed by Petitioners in the Partial Acceptance); (b) more stringent electric and gas reliability, service quality and safety performance standards and revenue adjustments; (c) comprehensive financial protections for customers; and (d) robust reporting requirements. Iberdrola's reliance on the "commitment" as a keystone to justifying merger approval, in and of itself, is overstated.

C. Staff's Proposed "Linkage" of Iberdrola's "Commitment" and PBAs Should Be Rejected

In its Brief on Exceptions, Staff attempts to forge a new link between Iberdrola's "commitment" to invest in renewable generation facilities in New York State and the appropriate amount of PBAs that should be awarded to NYSEG and RG&E customers as a condition of merger approval. (Staff at 36-39.) Specifically, Staff argues that:

> Staff opposes recognizing Iberdrola's potential investment of $2.0 billion in wind generation facilities in New York as a benefit in this proceeding, because the offer cannot be enforced and the benefit is consequently ephemeral. If, however, the Commission wishes to recognize the proposed $2.0 billion investment as a benefit, that benefit should be rendered concrete,

> through a binding obligation. This can be accomplished by tying the level of wind generation investment to the level of PBA adjustments required in this proceeding, with PBAs increasing if Iberdrola fails to make its promised investment.

(Staff at 36-37.) For the reasons set forth below, Staff's proposed linkage of Iberdrola's "commitment" and PBAs should be rejected.

Initially, as detailed, supra, Iberdrola's purported "commitment" to invest in wind generation projects in New York State is $100 million – not $2 billion – and contains numerous caveats. Thus, it would be difficult – if not impossible – to link a non-existent $2 billion "commitment" with PBAs.

Second, as also detailed, supra, Iberdrola's "commitment," even if honored following consummation of the proposed transaction, hardly constitutes a major benefit to customers. Iberdrola proposes to develop wind generation facilities, through an unregulated subsidiary, assuming the receipt of federal tax credits (i.e., PTCs) and RPS subsidies funded by customers. To the extent those facilities realize revenues in excess of costs, all such profits would be retained by shareholders. It is safe to assume that the greater the financial investment in New York by Iberdrola, the more profitable such investment must be to shareholders.[8] Under this reality, it makes little sense to have customers "pay" for Iberdrola's "commitment" through reduced PBAs when the investment undertaken already is

[8] VMP concerns related to a modest investment in new wind generation projects also could be exacerbated if such investment is more concentrated, depending on where constructed and the possible existence of transmission constraints. Additionally, increased reliance on wind power – while potentially beneficial to customers in terms of impacts on market prices and the environment, does raise concerns related to, inter alia, reliability and an upward pressure on the State's Installed Reserve Margin due to its intermittent nature. Moreover, to the extent wind power during off-peak hours would displace hydropower in certain regions, that clearly would not constitute a public benefit of any kind.

profitable in its own right and likely would have been undertaken regardless of whether Iberdrola acquires Energy East.

Staff's proposal is not entirely clear as to whether: (a) Iberdrola's failure to honor its purported "commitment" would result in increased PBAs to customers; or (b) the honoring of some "commitment" by Iberdrola would result in a reduction to the otherwise-appropriate amount of PBAs. The distinction, while somewhat fine, is extremely important. Multiple Intervenors objects strenuously to any proposal whereby customers would have to "pay" for Iberdrola's "commitment" through reduced PBAs. The otherwise appropriate amount of PBAs – which is some level well in excess of the $201.6 million proposed by Iberdrola (see Ex. 50 at 1-2) – is intended to produce necessary benefits for customers (in the form of much-needed rate reductions) and help compensate customers for the numerous risks inherent in the proposed transaction that cannot be mitigated completely. To make customers "pay" for the "commitment" by lowering PBAs would be highly inequitable, especially where the evidence is compelling that Iberdrola Renewables' decision to invest in wind generation facilities in New York State will turn on project economics irrespective of merger approval.

Finally, linking PBAs to Iberdrola's purported "commitment" creates an illogical mismatch between the intended beneficiaries of each instrument. As understood by Multiple Intervenors, Iberdrola's conditional "commitment" is to invest at least $100 million in new wind generation projects located in New York. Thus, such projects could be located anywhere in the State; for instance, in the Niagara Mohawk Power Corporation ("Niagara Mohawk") service territory. PBAs, on the other hand, are intended solely for the benefit of NYSEG and RG&E customers, because they are the ones exposed to the costs and the risks of the proposed transaction. It makes absolutely no sense for NYSEG and RG&E customers to realize less PBAs solely because Iberdrola Renewables finds it profitable to develop wind generation facilities in the Niagara Mohawk service territory.

For the foregoing reasons, Staff's proposal linking PBAs targeted to customers with the honoring of Iberdrola's "commitment" should be rejected.

POINT II

PETITIONERS' DENIAL OF THE EXISTENCE OF ANY RISKS INHERENT IN THE PROPOSED TRANSACTION IS WITHOUT MERIT

In their Brief on Exceptions, Petitioners assert that: "The Proposed Transaction presents no real risks to the State or its ratepayers." (Petitioners at 1, 4.) Petitioners also assert that they "have agreed to almost all of the conditions proposed by Staff in this proceeding, including bankruptcy protection, and have therefore neutralized all of Staff's alleged risks to ratepayers, even though the alleged risks were not specified, quantified or realistic." (Id. at 4.) For the reasons set forth below, Petitioners' denial of the existence of any risks inherent in the proposed transaction is without merit.

Initially, Multiple Intervenors agrees generally with Petitioners regarding the Recommended Decision's recitation of the appropriate standard of review in this proceeding:

> The RD begins with three correct recitations of the Commission's standard under Section 70. First, the RD states that, in order for the Proposed Transaction to be approved as "in the public interest" under Section 70 of the PSL, Joint Petitioners must demonstrate that the Proposed Transaction will provide positive net benefits to New York (RD at 23). Second, consistent with the Commission's general standard of balancing public interest costs against public interest benefits, the RD states that in order for the Proposed Transaction to meet the public

> interest standard, the Proposed Transaction's "identifiable benefits must outweigh its detriments" (RD at 23). Third, the RD explains that, in weighing the benefits and risks of the Proposed Transaction, risks that are mitigated need not be taken into account in this balancing function (RD at 113).

(Petitioners at 10.) Significantly, there are numerous, substantial risks related to the proposed transaction, all of which – to the extent not mitigated completely – must be deemed costs or detriments to be weighed against benefits. Substantial benefits – in the form of PBAs and other conditions – are needed to offset the costs and ensure positive net benefits.

In this proceeding, the Commission must evaluate the likely benefits of the proposed transaction (both quantitatively and qualitatively) against the likely costs and risks of the proposed transaction (again, both quantitatively and qualitatively). Multiple Intervenors continues to contend that subject to numerous conditions intended to produce financial and other benefits and protections for customers of NYSEG and RG&E, the proposed transaction would be in the public interest and should be approved. Significantly, however, the importance of the conditions on merger approval cannot be overstated.

In a recent proceeding involving a similar – but not identical – transaction, some (but not all) parties negotiated joint proposals that, if adopted, would have resulted in Commission approval of the acquisition, via merger, of KeySpan Corporation by National Grid plc. In ruling on the joint proposals, the Commission insisted upon numerous modifications that, in all respects, were intended to increase the benefits and/or the protections afforded to customers. Ultimately, merger approval was granted, subject to: (a) the provision of substantial and quantifiable financial benefits to customers; (b) the adoption of more stringent performance standards and revenue adjustments with respect to electric and gas reliability, service quality and safety; (c) the adoption of comprehensive financial protections for customers; (d) the adoption of robust reporting requirements; and (e) the adoption of provisions to address VMP concerns raised by the proposed transaction.[9] The same general approach should be followed in this proceeding.[10]

Contrary to Petitioners' assertions, the proposed transaction presents very real risks for customers of NYSEG and RG&E. (See, e.g., Tr. 1152-60, 1163-64, 1178-84, 1221-1364.) Those risks generally include, but are not limited to: (a) that utility performance will decline in the areas of electric and gas reliability, service quality and safety; (b) VMP risks associated with the proposed owner of two electric T&D utilities also owning existing and planned, future generation facilities; (c) financial risks created by the transaction, including Iberdrola's generally riskier business profile; (d) risks related to diminished financial transparency and reporting; (e) risks related to Iberdrola constituting a more complex business structure than Energy East, including the impact of such complexity on the regulation of affiliate transactions; and (f) risks related to the fact that the transaction will subject NYSEG and RG&E customers to the management of a much larger, multi-national,

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[9] See 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 Determinations for KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island (issued August 23, 2007) at 8-31, 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) at 110-55.

[10] For the reasons noted in the Recommended Decision, Petitioners' arguments attempting to minimize the precedential value of the Commission's line of decisions relating electric and gas utility mergers over the last decade, in favor of mergers involving small water utilities, properly were rejected. (RD at 24-27.)

vertically-integrated holding company over which the Commission's ability to influence behavior may be diminished substantially. (Id.)[11]

Those risks – identified by Staff and other parties, including Multiple Intervenors, and recognized by Judge Epstein in his Recommended Decision – are not imagined or illusory, nor have they been mitigated completely. While such risks are not insurmountable in the crafting of conditions upon which merger approval would be in the public interest, they must be recognized and addressed, preferably through a combination of PBAs, protections for customers, and limitations applicable to Petitioners following merger approval. Moreover, such conditions must be enforceable (see Staff at 12); as the Commission is aware, once the proposed transaction is approved, it cannot be undone. Thus, while Multiple Intervenors disagrees with Petitioners and contends that the risks related to the proposed transaction are quite substantial, it also asserts that such risks can be mitigated, in large part, by the establishment of meaningful conditions to merger approval. To the extent certain risks cannot be mitigated completely, customers can – and should – be compensated for those risks through PBAs or other financial benefits.

[11] Multiple Intervenors' response to Petitioners' numerous exceptions regarding financial protections and reporting requirements is set forth, infra, in Points IV and V, respectively.

POINT III

PETITIONERS' CLAIMS OF THE BENEFITS INHERENT IN THE PROPOSED TRANSACTION ARE OVERSTATED

In their Brief on Exceptions, Petitioners argue repeatedly that the proposed transaction provides public benefits well in excess of those acknowledged in the Recommended Decision. (See, e.g., Petitioners at 4-8, 17-28, 31-34.) While the proposed transaction does involve certain potential benefits (e.g., the PBAs offered in the Partial Acceptance, Iberdrola's currently-superior financial strength compared to Energy East), Petitioners overstate those benefits. Importantly, Multiple Intervenors does not challenge Petitioners' characterizations of the transaction's potential benefits in the hopes of defeating it, but, rather, to demonstrate that merger approval would be in the public interest only if customers are accorded, inter alia, substantial financial and rate-related benefits (i.e., well in excess of what has been proposed to date by Petitioners).

Initially, some of the "benefits" advanced by Petitioners should not be considered benefits at all by the Commission. For instance, Petitioners rely on "[t]he fact that jobs are not slated for elimination." (Petitioners at 5.) But, why, exactly, should Petitioners' representation concerning jobs be considered a positive benefit? If no jobs are eliminated as a result of the proposed transaction, then NYSEG and RG&E presumably would employ the exact same number of people as if Iberdrola had not acquired Energy East. Thus, in terms of employment levels, the proposed transaction should not be construed positively (as if jobs were being added) or negatively (as if jobs were being lost).

Additionally, the Commission should be cognizant of Iberdrola's precise representation. Petitioners Policy Panel testified that "Iberdrola has committed that existing employee compensation and benefits will remain substantially unchanged for a period of at least eighteen months after consummation of the Proposed Transaction." (Tr. 524.) That Panel also testified that no job losses were anticipated as a result of the merger. (Id.) When questioned as to the scope of the commitments being offered, the Panel acknowledged that manpower levels at NYSEG and RG&E could in fact change – either up or down – following merger approval. (Tr. 637-42.) For instance, the Panel agreed that, although inconsistent with expectations, Iberdrola would not be precluded from reducing manpower by, for example, 10 percent. (Tr. 639.) To Multiple Intervenors' knowledge, there presently is no enforceable agreement by Iberdrola that would preclude job reductions at NYSEG and RG&E following merger closing.

Petitioners also identify as a benefit of the proposed transaction their "commitment to divest certain fossil generation and provide up to 90% of above-book proceeds to ratepayers." (Petitioners at 5.) For several reasons, such commitment also should not be construed as a benefit by the Commission. First, the divestiture is necessitated, at least in the opinion of most parties, by VMP concerns raised by the proposed transaction. Second, customers currently receive the benefit of any above-market sales made by RG&E's existing fossil-fuel generating facilities. Whether the sale of those facilities and the loss of revenues from above-market sales would constitute a net benefit to customers cannot be ascertained until, at the earliest, the terms of the divestiture (e.g., amount of above-book proceeds, terms of any power purchase agreements) are known. Finally, for the reasons set forth in Multiple Intervenors' Brief on Exceptions, all – or almost all – of the above-book proceeds resulting from the divestiture of RG&E's existing fossil-fuel generating facilities should be allocated to customers, in accordance with established Commission precedent. (MI at 24-27.) Petitioners' position that customers be allocated only 90 percent of the above-book proceeds from divestiture is overly generous to shareholders and, consequently, should not be considered a benefit of the proposed transaction.

Petitioners accord great weight to Iberdrola's experience as a developer of renewable generation. (Petitioners at 6-8.) For purposes of this proceeding only, Multiple Intervenors perceives Iberdrola Renewables' planned development of wind generation as potentially beneficial for the NYSEG and RG&E service territories. For that reason, Multiple Intervenors has advocated that the Commission should seek to limit Petitioners' ability to exercise VMP in a manner that does not preclude Iberdrola Renewables' future development of wind generation. (MI at 19-24.)[12]

Notwithstanding Multiple Intervenors' general agreement with Petitioners on that issue, for several reasons Iberdrola's renewable experience should not be construed as a substantial benefit of the proposed transaction. First, as detailed in Point I, supra, Iberdrola's "commitment" to invest in new wind generation facilities: (a) is for its own financial gain; (b) conditioned upon, among other things, publicly-funded subsidies and tax credits (Ex. 50 at 2); and (c) represents only a small percentage of the wind generation already under consideration for future development by Iberdrola Renewables (see also Tr. 628-29; Ex. 57).

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[12] The ability of the Commission to mitigate VMP concerns entirely is limited. Accordingly, to the extent the merger is approved and Iberdrola is not precluded from developing wind generation interconnected to the NYSEG and RG&E service territories, the amount of PBAs awarded to customers should be increased to compensate them for their continuing exposure to possible exercises of VMP.

Second, it is not at all clear that New York does "need assistance in meeting its renewable energy goals." (Petitioners at 7.) Upon information and belief, every solicitation for renewable generation under the RPS has been subscribed fully, and there currently is a large surplus of wind projects at various stages of development. (RD at 44.)[13] While it certainly is possible that Iberdrola Renewables can assist New York in satisfying its RPS goals – regardless of whether the proposed transaction is approved – there has been no demonstration that RPS goals cannot be satisfied without Iberdrola Renewables or absent the merger of Iberdrola and Energy East.

Next, Petitioners criticize the Recommended Decision based on their interpretation that Judge Epstein did not "count" the $201.6 million in PBAs offered in the Partial Acceptance as a benefit of the proposed transaction. (Petitioners at 20-21.) Initially, the issue pertaining to the PBAs proffered by Petitioners is not whether they should be construed as a benefit in isolation (they should), but, rather, whether the PBAs are sufficient to compensate customers for all of the costs and risks associated with the proposed transaction so as to ensure that merger approval truly would be in the public interest. Multiple Intervenors submits that this is the point that Judge Epstein was advancing when he recommended that:

> The main issue arising from this offer is the disparity among the $201.6 million in concessions by petitioners, Staff's proposed $646.4 million of PBAs and its rate adjustments, and the supposed $1.6 billion of potential benefits which Staff cites as a basis for the PBAs. For reasons discussed elsewhere, this recommended decision accepts Staff's position regarding the

[13] Judge Epstein notes that: (a) "New York's backlog of wind project proposals already exceeds the State's capacity to absorb those projects' projected output"; and (b) "[a]t year end 2007, there were about 7,000 MW of proposed wind generation projects in the New York Independent System Operator interconnection queue." (Id.)

> PBAs. The $201.6 million will be addressed in that context, except to note here that the shortfall relative to Staff's $646.4 million prevents the petitioners' proposed concessions from being counted as a net benefit of the transaction.

(RD at 54.) Petitioners' $201.6 million in PBAs were not considered a "net benefit" because they so clearly are inadequate given the facts and circumstances of this proceeding.

Petitioners also tout Iberdrola's utility experience and expertise as a benefit of the proposed transaction. (Petitioners at 31-34.) In support of their position, Petitioners rely on general representations of experiences in other countries that either are vague, unenforceable and/or are incapable of being verified independently. (Id.) In this proceeding, Petitioners were accorded an opportunity to apply Iberdrola's experience and expertise in a manner that would produce positive benefits. Specifically, Staff and Multiple Intervenors advocated that merger approval be conditioned upon the adoption of more stringent reliability, service quality and safety performance standards and revenue adjustments. (Staff at 50-61; MI at 13-19) Significantly, notwithstanding clear commission precedent on this issue, Petitioners opposed all such proposals. Consequently, the Commission should refrain from according much weight, if any, to Iberdrola's stated experience and expertise because Petitioners have not provided a single tangible or enforceable means of ensuring that customers actually benefit therefrom. Moreover, there has been no demonstration that Iberdrola's experience and expertise is any greater than that possessed currently by Energy East, NYSEG and RG&E, particularly with respect to providing electric and gas delivery service in Upstate New York.[14]

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[14] It would not be difficult to construct an incentive mechanism to ensure that NYSEG and RG&E customers realized a benefit from Iberdrola's claimed experience and expertise. For instance, for such experience and expertise to constitute a benefit, one would expect the

In their Brief on Exceptions, Petitioners argue that the $646.4 million in PBAs championed by Staff, and recommended by Judge Epstein, is excessive, particularly where there is an alleged absence of synergy savings. (See, e.g., Petitioners at 64-68.) Significantly, however, there is compelling evidence that the proposed transaction, if consummated, will in fact result in an indeterminate amount of synergy savings. Conditioning merger approval upon the payment of PBAs well in excess of what was proposed by Petitioners constitutes one way that the Commission can ensure that: (a) the benefits stemming from the transaction exceed the associated costs and risks; and (b) likely synergy savings are allocated fairly between customers and shareholders. In evaluating the PBAs proposed by Petitioners, the Staff Policy Panel concluded that "the dollar amount is entirely inadequate to compensate for costs and risks associated with this transaction." (Tr. 1456.) Multiple Intervenors concurs. The PBAs proffered by Petitioners should be increased materially as a condition of merger approval.

In evaluating the proposed transaction for synergy savings, the Commission should be mindful of the fact that Petitioners purposefully did not attempt to identify synergy savings or other financial benefits. For instance, Petitioners Policy Panel conceded that no study of potential synergy savings resulting from the proposed transaction ever was conducted. (Tr. 644.) Although the Panel acknowledged that the refinancing of certain debt could result in savings, such potential savings never were studied. (Tr. 631-36.) Petitioners witness Meehan, who testified on the issue of synergy savings, admitted that he did not

performance of NYSEG and RG&E with respect to electric and gas reliability, service quality and safety to improve following consummation of the merger. Thus, an incentive mechanism easily could be designed such that if objective improvements in performance were not demonstrated in those areas, customers would be entitled to meaningful financial penalties to compensate them for benefits promised but not provided.

conduct any study of potential synergy savings associated with the proposed transaction, nor did he ever have occasion to review such a study. (Tr. 1003-04.) Petitioners' failure even to examine the existence and possible magnitude of synergy savings and/or other financial benefits has placed other parties in the unenviable – if not impossible – position of having to identify and evaluate such savings absent Petitioners' active involvement. Consequently, Petitioners are solely responsible for the paucity of the record on this issue.

There are compelling reasons to question Petitioners' claim of no synergistic savings. As the Staff Policy Panel observed:

> One expects that large corporations merge because of opportunities for synergies. Otherwise, they could diversify simply by purchasing stock in other companies and avoid paying premiums above the prevailing market price of the stock. The location of corporate headquarters and operating subsidiaries in different companies has not been a barrier to synergy savings in other M&A transactions. For example, it was reported in the media that Iberdrola's recent acquisition of [Scottish Power] led to $374 ... million of synergies, which was double what was originally estimated in the merger. These synergies were achieved despite the language difference and the fact that Iberdrola's headquarters in Bilbao, Spain is over 1,000 miles from Glasgow, Scotland, headquarters of [Scottish Power].

(Tr. 1189-90.) In fact, in an October 24, 2007 presentation on Iberdrola's 2008-2010 Strategic Plan, the acquisition of Energy East is touted because, inter alia, it "[c]ompliments Iberdrola with a synergic business in its value chain."[15]

Additionally, the proposed transaction may result in the realization of financial benefits related to PTCs. (See Tr. 1212-14). Although Petitioners dispute the treatment of

[15] Petitioners' Responses to On-the-Record Requests and Items Subject to Check (dated April 4, 2008) (hereinafter, "April 4th Responses"), Attached Presentation, "Iberdrola: Strategic Plan 2008-2010" at 48 (slide 96).

PTCs as a source of synergy savings, the evidence indicates otherwise. (See, e.g., RD at 128-129.) In presentations on the proposed transaction, Iberdrola identified PTCs as one of the primary benefits and motivations to acquire Energy East. (Tr. 653-54.)[16] Perhaps most tellingly, in a February 2008 publication on Iberdrola, Moody's reported that Iberdrola's proposed acquisition of Energy East would "provide it with a taxable income which it can utilize in its US renewables business which is supported by certain tax incentives." (Ex. 70 at 10.)[17]

The proposed transaction also may result in the realization of financial benefits related to Spanish tax law provisions applicable to foreign investments. (See Tr. 1211-12.) Although Petitioners dispute reliance on Spanish tax credits in this proceeding, its Policy Panel acknowledged that: (a) it is possible that Iberdrola would realize Spanish tax benefits from the proposed transaction; and (b) Iberdrola affirmatively would seek favorable tax treatment from Spanish authorities. (Tr. 656-57.)[18]

The proposed transaction may result in the realization of financial benefits related to Iberdrola's higher ratings from credit agencies compared to Energy East. As a

[16] See also April 4th Responses, Attached Presentation, "Iberdrola: Strategic Plan 2008-2010" at 48 (slide 96) (touting that the acquisition of Energy East "[c]onsolidates the renewable position in the US providing a taxable income").

[17] Petitioners witness Ferrer testified that Iberdrola likely provided Moody's with the above information as to the motivation underlying its acquisition of Energy East, and that such information probably was reviewed with Iberdrola shortly before the publication was issued. (Tr. 789-91.)

[18] See also RD at 129 (concluding that: "Regarding the transaction's eligibility for the Spanish tax benefit related to goodwill amortization, there is no indication that petitioners have a specific reason for doubt on that point, other than the mere commonplace that regulatory approval by the Spanish authorities cannot be presumed until granted").

result of such higher ratings, merger approval likely would lead to the refinancing of certain debt at interest rates below levels embedded in the existing rates of NYSEG and RG&E. (Tr. 630-32.) Absent PBAs, such savings would not be shared with customers until rates are reset. (Tr. 633-35.)

Synergy savings also may be realized from the future consolidation of information technology ("IT") systems and/or entire companies. For instance, the Staff Policy Panel testified that "we believe that Iberdrola may be able to consolidate [IT] systems in use at various subsidiaries." (Tr. 1208.)[19] The Joint Petition indicates that Iberdrola also "may seek to eliminate certain Energy East intermediate holding companies, thereby causing one or more of Energy East's operating subsidiaries to become direct subsidiaries of I[berdrola]." (Ex. 41 at 9, n.2.) The Staff Policy Panel opined that: "Such consolidations could produce synergy savings." (Tr. 1210.)

Finally, Petitioners' characterization of the proposed transaction as a "non-synergy merger" (see, e.g., Petitioners at 68-69) does not obviate the possibility of synergy savings. Petitioners witness Meehan, for example, acknowledged that synergy savings could be achieved even where a merger does not involve contiguous service territories. (Tr. 1004.)[20] Mr. Meehan also conceded that it is possible for a merger to result in synergy

[19] That conclusion was based, in part, on confidential information provided to Staff by Iberdrola. (Id.)

[20] Iberdrola recently acquired Scottish Power in what also would qualify as a "first mover" transaction, and that acquisition resulted in significantly more synergy savings than first was estimated. (Tr. 644.)

savings even if the companies' operations are in different businesses. (Tr. 1005-06.)[21] The anticipated sharing of "best practices" presents another opportunity for synergy savings. Such sharing presumably would flow in both directions. Mr. Meehan acknowledged that it is possible that Iberdrola could adopt an Energy East practice as a "best practice" and, to the extent such adoption resulted in cost savings to Iberdrola, customers of NYSEG and RG&E ordinarily would not benefit from those savings. (Tr. 1016-17.)

Thus, the proposed transaction, if approved and consummated, would result in synergy savings and other financial benefits for Petitioners. Indeed, Petitioners witness Meehan conceded such synergies are expected and real, but not quantifiable at this time. (Tr. 994.) The present difficulty in quantifying synergy savings and other financial benefits is due, in large part, to Petitioners' failure to conduct any studies of the potential savings and benefits. Thus, Petitioners' arguments to minimize the amount of PBAs upon which merger approval is conditioned due to an alleged lack of synergy savings should be rejected.[22]

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[21] The Staff Policy Panel concluded that Iberdrola "owns significant operating energy businesses throughout the United States. *** The size, scale, and scope of these businesses suggest that some level of synergistic savings could be achieved after the acquisition of the Energy East companies." (Tr. 1189.)

[22] On a pure policy basis, allowing Petitioners to benefit from their own refusal to study or quantify likely synergy savings could establish an undesirable precedent for future merger proceedings.

POINT IV

PETITIONERS' EXCEPTIONS TO THE RECOMMENDED FINANCIAL PROTECTIONS FOR CUSTOMERS SHOULD BE REJECTED

Petitioners contend that Judge Epstein erred by applying a "burdensome" standard to the determination of whether a proposed financial protection should be adopted. (Petitioners at 49.) Instead, according to Petitioners, Commission precedent requires a two-step analysis: (a) assess the reasonableness and likelihood of an alleged risk; and (b) determine whether the protective measure is necessary to address the alleged risk. (Petitioners at 50.) The Petitioners contend, therefore, that the first step requires quantification of the risk, while the second step does not allow for the imposition of a protective measure that neutralizes part – but not all – of a risk. Significantly, however, when evaluating whether a proposed financial protection is "necessary," the Commission can and should evaluate and contrast the possible benefit to customers against the actual burden on the utility. When such an evaluation is made here, it is clear that Petitioners' exceptions generally should be rejected.

Petitioners offer examples from prior merger decisions in support of the standard they proffer. (Petitioners at 50.)[23] In the NIMO/NG Order, for example, Petitioners

[23] See Case 01-M-0075, Joint Petition of Niagara Mohawk Holdings, Inc., Niagara Mohawk Power Corporation, National Grid Group plc and National Grid USA for Approval of Merger and Stock Acquisition, Opinion and Order Authorizing Merger and Adopting Rate Plan (Issued December 3, 2001) at 62, 71 ("NIMO/NG Order"), and Case 97-M-0567, Joint Petition of Long Island Lighting Company and The Brooklyn Union Gas Company for Authorization Under Section 70 of the Public Service Law to Transfer Ownership to an Unregulated Holding Company and Other Related Approvals, Opinion and Order Adopting Terms of Settlement Subject to Conditions and Changes (issued April 14, 1998) at 28, 30.

cite two examples of the Commission rejecting certain remedial measures. In the first example, the Commission determined that financial protections contained in a Joint Proposal were sufficient to neutralize merger-related risks.[24] In the second example, the Commission rejected a request to adopt measures to protect against the raiding of Niagara Mohawk's pension or benefit funds because the claim was "groundless" and "rest[ed] on no evidence whatsoever."[25] In each example, the Commission engaged in a subjective assessment – not a quantification – of the alleged risk, and in each case the Commission determined whether the proposed protective measure was sufficient to neutralize the risk. The standard as framed by Petitioners would establish an excessively difficult threshold, because the risks of a merger transaction are difficult (if not impossible) to quantify, and no single protective measure may be able to neutralize a merger-related risk completely, although one or more measures may be sufficient to neutralize a portion of the risk.

Judge Epstein adhered to the cited precedent with the standard and analytical method that he employed to examine the indeterminate and/or unquantifiable nature of certain merger-related risks. Judge Epstein identified the risks, made a subjective assessment of their likelihood based on record evidence, and made a determination as to whether each proposed protective measure was sufficient to remedy a potential risk without burdening Petitioners unduly. In this manner, Judge Epstein concluded that the proposed transaction presented numerous identifiable, but not quantifiable, risks that required protective measures. (RD at 112.) Multiple Intervenors agrees with the conclusion of the Recommended Decision that many of the financial risks associated with this merger are identifiable but not

[24] Case 01-M-0075, supra, NIMO/NG Order at 62.

[25] Id., at 71.

quantifiable. According to Judge Epstein, this conclusion rests on an important observation – that the financial risks are relevant, in part, because the Petitioners failed to "overcome the opponents' demonstration that the alleged risks are, at least, realistic concerns." (Id.)

The Commission should reject Petitioners' argument that Judge Epstein erred in applying a "burdensome" standard to the analysis of proposed financial protections. Instead, Multiple Intervenors respectfully urges the Commission to adopt the analysis and recommendations of the Recommended Decision regarding the financial protections that should be applied as conditions of merger approval.

In the remainder of this section, Multiple Intervenors will respond to Petitioners' exceptions to the recommended financial protections for customers. In a number of instances, Petitioners' exceptions are puzzling because: (a) the proposed financial protections are not unduly burdensome (particularly if Petitioners' claims of Iberdrola's superior financial strength are true); and (b) extensive financial protections have the effect of mitigating more of the financial risks associated with the proposed transaction, thereby increasing the likelihood that it will in fact produce net public benefits.

A. Petitioners' Exception to Staff Condition 7 Regarding the Filing of a Plan to Remedy a Credit Downgrade Should Be Rejected

Petitioners except to the recommended imposition of Staff Condition 7, which would require Petitioners, in the event of a NYSEG or RG&E credit downgrade by S&P or Moody's, to file with the Commission a plan to remedy the downgrade. (Petitioners at 54.) Specifically, Petitioners object to the requirement that a filing would be triggered by a credit downgrade even if the rating remains investment grade. (Id.) According to Petitioners, application of this measure when the credit rating remains investment grade is overly-broad and, therefore, burdensome. Instead, Petitioners offer to accept the condition if it is modified to require a filing only when the downgrade results in a non-investment grade rating, or when the rating is at the lowest investment grade and has received either an outstanding negative watch or review downgrade notice by S&P or Moody's. (Petitioners at 54-55.)

Staff Condition 7 is neither overly-broad nor burdensome. Petitioners apparently construe this measure as overly-broad because they have a different risk tolerance than NYSEG and RG&E customers. This financial protection was proposed by Staff, supported by Multiple Intervenors, and recommended by Judge Epstein, because utility customers view most credit downgrades as a harm, regardless of the new rating. From this perspective, the potential increase in cost of capital and debt that would accompany a downgrade to an investment grade rating represents a merger-related financial risk that should be neutralized. If a credit downgrade is unlikely, as claimed by Petitioners, then the contested condition should not be burdensome. On the other hand, if the likelihood of a credit downgrade is substantial, then the condition beneficially would protect customers by ensuring that Petitioners develop and implement a plan to restore the affected credit rating. Multiple Intervenors, therefore, urges the Commission to adopt Staff Condition 7 as a condition of merger approval.

If, arguendo, the Commission determines Staff Condition 7 to be overly-broad with respect to its persistence, then Multiple Intervenors offers in the alternative one possible modification. Specifically, Multiple Intervenors recognizes that sufficient time eventually will pass such that the lingering effects of the proposed transaction would be remote and inconsequential to the daily business dealings of NYSEG and RG&E. Although Multiple Intervenors continues to believe that Staff Condition 7 should be adopted without modification, it proposes, in the alternative, that Staff Condition 7 be modified to expire four years after consummation of the proposed transaction.

B. Petitioners' Exceptions to Staff Condition 10 and 11 Regarding Dividends Should Be Rejected

Petitioners except to two of the five conditions recommended by Staff regarding restrictions to dividends paid by NYSEG and RG&E.[26] Specifically, Petitioners except to conditions that would prohibit either NYSEG or RG&E from paying any dividend when: (a) their least secure unsecured bond rating is at the lowest investment grade and a rating agency has issued outstanding negative watch or review downgrade notices (Staff Condition 10); and (b) if Iberdrola's least secure senior unsecured debt is rated below an investment grade by a rating agency (Staff Condition 11). (Petitioners at 55.)

Regarding Staff Condition 10, Petitioners contend that an "administratively mandated prohibition on dividends" when a utility maintains an investment grade rating is "unjustified and unduly restrictive." (Petitioners at 56.) Petitioners also contend that this condition is unwarranted because the Commission has ample authority "to ensure that the operating companies provide safe and reliable service." (Id.) Similarly, Petitioners contend that Staff Condition 11 is unnecessary because Iberdrola is financially strong, unlikely to experience a substantial credit downgrade, and, so long as NYSEG and RG&E remain financially sound, any downgrade of Iberdrola's credit would not interfere with the ability of NYSEG and RG&E to adhere to their current dividend policies. (Petitioners at 57.)

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[26] Petitioners accepted Staff Conditions 9, 12 and 13, which establish a formula to determine the amount of dividends that NYSEG and RG&E can send upstream, and also restrict dividends when their respective bond ratings are downgraded to non-investment grade. (Petitioners at 55.)

These arguments, however, overlook the fact that the conditions are intended, in large part, to counter customer harm from merger-related risks. The financial protections and other conditions advocated by Staff, Multiple Intervenors and other parties throughout this proceeding underscore the contention that a downgrade of NYSEG and/or RG&E credit ratings constitutes a risk of the proposed transaction that would harm customers, even if the downgrade is to an investment grade rating. The impact of a credit downgrade – including to a different investment grade rating – would be tangible. For example, the cost of capital likely would increase, thereby exerting upward rate pressure. Petitioners' argument that the Commission has broad regulatory authority to ensure safe and reliable service is inapt because this particular protection intends to shield customers from financial harm, not inadequate or unreliable service.

Also, Staff Condition 10 works in concert with Staff Condition 7 (described above). Together, Staff Conditions 7 and 10 would motivate Petitioners to proactively avoid a downgrade and develop and implement an effective plan to restore a downgraded credit rating. The proposed transaction hardly can be construed in the public interest if it leads to rating downgrades and higher costs without any recourse to customers, particularly with respect to the payment of dividends upstream.

Petitioners' arguments challenging Staff Condition 11 on the grounds of Iberdrola's financial strength are unavailing. Initially, this protection is important to protect NYSEG and RG&E customers from harm if a financially-weakened Iberdrola seeks to collect additional dividends from the utilities. The possibility of a deterioration in Iberdrola's financial circumstances is not speculative, and if the financial strength of Iberdrola properly is construed as a public benefit of the proposed transaction, then the converse also must be true – i.e., a deterioration in Iberdrola's financial stability, without adequate financial protections in place, would be harmful to customers. Even if such possibility is unlikely, that does not mean customers should be exposed unduly if it occurs. As noted in the Recommended Decision, financial fortunes can change rapidly: "[A]n enterprise such as Iberdrola can abruptly lose its dominant size, for reasons that have not been examined on this record and probably are too varied to identify or predict." (RD at 47.)

Second, the current dividend policies may change, whereas a condition of merger approval imposed by the Commission presumably would be enforceable. Assuming, arguendo, that the current dividend policies provide protection equivalent to Staff Condition 11, there does not appear to be any enforceable prohibition against Iberdrola, Energy East, NYSEG and/or RG&E from changing those policies following consummation of the proposed transaction. Such a change, if implemented, could leave NYSEG and RG&E customers exposed to the financial risk sought to be mitigated by Staff Condition 11.

Third, Petitioners have noted repeatedly throughout this proceeding that Iberdrola's superior credit rating offers NYSEG and RG&E benefits including, inter alia, access to lower-cost capital and the potential for a credit upgrade. (See generally Ex. 41 at 15; Petitioners Initial Brief at 28-29.) If Iberdrola experienced a credit downgrade or weakened financial strength, however, the effects likely would flow through to NYSEG and RG&E. Staff Condition 11 is tailored narrowly to act only under circumstances in which NYSEG and RG&E may be vulnerable; for example, if a financially-weakened Iberdrola sought to drain capital from its subsidiaries.

Finally, the Recommended Decision concluded accurately that Staff Condition 11 was not burdensome. (See, e.g., RD at 113-17.) The condition would apply only under narrow circumstances that, according to Petitioners, are unlikely to occur. The "burden," therefore, is negligible. The financial risks associated with the proposed transaction must be minimized as much as practicable in order to sustain a finding that it is in the public interest. Staff Conditions 10 and 11, therefore, should be approved without modification as a condition of merger approval.

C. Petitioners' Exception to a Potential Dividend Restriction if Iberdrola Is Acquired Should Be Rejected

Petitioners except to a determination in the Recommended Decision that Multiple Intervenors' proposal regarding dividend restrictions should be adopted. Under Multiple Intervenors' proposal, Energy East, NYSEG and RG&E would be barred from transmitting any dividends upstream if and when any agreement to acquire Iberdrola – either hostile or friendly – becomes public. Importantly, the dividend restriction would cease once Commission authorization of the transaction is sought, and in no way would pre-judge the outcome of the future proceeding. (MI Initial Brief at 70-71.) This proposal was advanced in response to numerous reports that Iberdrola is a target for takeover by several European companies and recognizes that any such acquirer may not consent to Commission jurisdiction. Although the Commission seemingly would possess authority to review and rule on a proposed takeover of Iberdrola, there may be legal and practical issues as to whether the Commission's jurisdiction over such a transaction is enforceable in Europe. Therefore, Multiple Intervenors' condition on dividend payments is limited in scope to mitigating the risk of an Iberdrola takeover for which Commission jurisdiction is not recognized or otherwise is contested. (See RD at 111.)

Petitioners except to this condition on the grounds that it is speculative that such a transaction will occur, and, if it does, the Commission retains its full regulatory authority to compel compliance. (Petitioners at 57.) However, the likelihood of a takeover relates only to whether the condition is burdensome. If Petitioners are correct in their assertion that any potential takeover is "based on pure conjecture," then it is unlikely that the condition ever would be activated and certainly cannot be characterized as burdensome. Although Multiple Intervenors does not suggest that a takeover of Iberdrola is imminent, the amount and frequency of news reports discussing potential takeover scenarios suggest that the possibility certainly exists, perhaps more so than in any other merger proceeding previously before the Commission. The proposed condition may never be triggered and, if it is, the impact is limited and temporary, while still providing meaningful protection.

Moreover, if an acquirer withheld its consent to Commission jurisdiction, the Commission may find itself limited in its ability to effectively respond in the context of a Europe-based transaction, notwithstanding its "full panoply of regulatory compliance and enforcement powers under the PSL." (See id.) Multiple Intervenors' proposed dividend restriction, as adopted by the Recommended Decision, would establish an incentive for any acquirer of Iberdrola to seek Commission approval, but would not impact customers in a negative way. The financial protection advanced by Multiple Intervenors is not burdensome. Absent the attempted acquisition of Iberdrola and a subsequent decision not to seek, or to contest, Commission jurisdiction of that transaction (an event that Petitioners believe is unlikely to occur), the protection would have neither impact nor consequences.

For the reasons described above, the Commission should adopt Judge Epstein's recommendation that Multiple Intervenors' proposed financial protection regarding a dividend restriction in the event of an attempted acquisition of Iberdrola should be adopted as a condition of merger approval.

D. Petitioners' Proposed Modification to the Independent Bankruptcy Consent Right Should Be Rejected and Staff Condition 19 Should Be Approved as Recommended by Staff

The Recommended Decision adopted Staff Condition 19 requiring Iberdrola to implement the "Independent Bankruptcy Consent Right" or "Golden Share." (RD at 101-13.) If implemented, the Golden Share would require Iberdrola to create a new class of preferred stock holding a bankruptcy veto right. Controlled by an independent party, the Golden Share would prevent NYSEG or RG&E from being forced into bankruptcy as a result of Iberdrola's financial condition. Petitioners agree to accept the Golden Share condition subject to one, material change – if NYSEG and RG&E are unable to fulfill this requirement within six weeks of merger closing, then each utility is required to petition for relief from the condition. (Petitioners at 59.) The Golden Share condition should be adopted as proposed by Staff, and Petitioners' proposed modification should be rejected.

The modification proposed by Petitioners would gut the effectiveness of the Golden Share condition. Implementation requires a change in the corporate by-laws and reaching agreement with the Commission on an appropriate independent shareholder. Petitioners neither explain nor describe any circumstances under which NYSEG and RG&E might not be able to fulfill this requirement, and it is not clear what difficulties might prevent either of those utilities from fulfilling these requirements. The modification proposed by Iberdrola seemingly is useful only to provide the company with a means of escaping a condition it repeatedly has opposed.

The changes in corporate rules and establishment of the holder of the Golden Share are not burdensome requirements. Regardless, any potential burden is limited because the required actions must be completed within six weeks of merger closing and no further activity is necessary unless and until Iberdrola seeks bankruptcy protection. The very small burden imposed by this condition is vastly outweighed by the substantial protection it provides to NYSEG and RG&E customers. Staff Condition 19 regarding the Golden Share, therefore, should be adopted as proposed by Staff and without the modification proposed by Petitioners.

POINT V

PETITIONERS' EXCEPTIONS TO THE RECOMMENDED REPORTING REQUIREMENTS SHOULD BE REJECTED

A. Petitioners' Exception to Staff Condition 26 Regarding the Format of Audited Financial Information Should Be Rejected

Petitioners state that they already have committed to provide most of the information required by Staff Condition 26 (i.e., consolidated balance sheets, income statements and cash flow statements) in English and in New York. Petitioners, however, except to this condition on the grounds that it is "unnecessary, not required, overly burdensome and unreasonable" to require audited U.S. Generally Accepted Accounting Principles ("GAAP") financial statements stated in U.S. dollars. (Petitioners at 61.) According to Petitioners, compliance with this condition would require Iberdrola to maintain additional staff to produce audited statements under both the International Financial Reporting Standards ("IFRS") and the GAAP. (Id.) Petitioners also contend that the

Securities and Exchange Commission ("SEC") has determined that the two accounting standards are similar to each other, and the Commission should defer to the SEC's expertise in this area. (Id.) For the reasons set forth below, Petitioners' exception should be denied.

Importantly, the informational filings at issue would be submitted to and evaluated by the Commission, not the SEC. To Multiple Intervenors' knowledge, the familiarity and expertise of the Commission and Staff lies with the U.S. GAAP, not the IFRS. The modification requested by Iberdrola would require the Commission and Staff to become expert in an unfamiliar accounting system in order to accommodate a single entity. On the other hand, Staff Condition 26 would require Energy East and its regulated subsidiaries to continue reporting financial information in the same format that it has been using for years. If Iberdrola intends to honor its commitment to maintain current job levels following merger approval, then the handful of employees that have been preparing the relevant information in accordance with U.S. GAAP should remain available to continue in that function. To the extent the Commission elects to rely primarily on IFRS in the future, this reporting requirement can be modified or eliminated at that time.

On balance, it is the Commission and Staff that would be burdened unreasonably if Iberdrola refuses to conform its business practices to the standards and customs of New York State. Importantly, if the Commission and Staff lack complete familiarity with Iberdrola's financial information and reports, customers could be exposed to substantial harm in future rate proceedings solely as a result of the proposed transaction. That risk must be mitigated as part of any merger approval. Accordingly, Staff Condition 26 should be approved as proposed by Staff and recommended by Judge Epstein, and Petitioners' exception thereto should be rejected.

B. Petitioners' Exception to Staff Condition 28 Regarding the Provision of Information in All Future Rate Proceedings Should Be Rejected

Staff Condition 28 would require Iberdrola to file consolidated balance sheets, income statements and cash flow statements for Energy East and its direct subsidiaries, in English and pursuant to the U.S. GAAP, in all future rate proceedings. Petitioners except to Staff Condition 28 on the grounds that it allegedly is unnecessary and inconsistent with Commission precedent and policy. (Petitioners at 63.) Petitioners' exception should be rejected.

First, Petitioners contend that the condition is unnecessary because they already have committed to providing the requested information. Staff Condition 28, however, specifically regards the information to be provided in support of a rate filing. It is reasonable for Staff, Multiple Intervenors and other parties to tailor one or more customer protections to the specific needs of a rate proceeding. The Commission and Staff share a responsibility to protect customers that would be abdicated if they failed to specify and require the filing of the information necessary for future rate proceedings. Similarly, for the reasons described in the preceding section, all information submitted for a rate filing must be provided according to the U.S. GAAP.

Regarding statutory requirements for the information to be submitted in a rate proceeding, New York Public Service Law ("PSL") section 66(4) authorizes the Commission "in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations and electric corporations." Iberdrola and its subsidiaries undoubtedly are gas and/or electric corporations within meaning of the PSL.[27] Interpreting PSL section 66(4) to authorize the Commission to prescribe a system of accounts that, as a practical matter, cannot also be used in support of a rate filing would be inconsistent with that statute and the remainder of the PSL generally.

Petitioners also argue that the Commission lacks authority to impose the requirements of Staff Condition 28 because the information contained therein was not included in the Commission's 1977 Statement of Policy on Test Periods in Major Rate Proceedings (the "1977 Policy Statement"). (Petitioners at 63.) Although Multiple Intervenors does not dispute the continued validity of the 1977 Policy Statement, it respectfully submits that the Commission possesses ample authority to establish additional filing requirements whenever its ability to regulate utility rates otherwise would be impaired as a result of a proposed merger involving a multi-national utility. Moreover, Staff Condition 28 was advanced as a proposed condition of merger approval, thereby according Iberdrola the opportunity to accept that condition, which presumably would eliminate any legal objection thereto.

The ability of the Commission and Staff to examine and evaluate a utility's financial information adequately during a rate proceeding is absolutely critical to its role of protecting customers from unjust and unreasonable rates. Staff Condition 28 ensures that the Commission and Staff will have access to the necessary information, and in the optimal format, to execute their statutory duties. Multiple Intervenors, therefore, respectfully urges the Commission to adopt Staff Condition 28 as a condition of merger approval.

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[27] See PSL §§ 2(11), (13) (defining "gas corporation" and "electric corporation," respectively).

POINT VI

THE EXCEPTIONS OF STAFF AND PETITIONERS TO THE RECOMMENDED PROCEDURAL PROCESS SHOULD BE REJECTED

In the Recommended Decision, Judge Epstein recommends that if the Commission approves the proposed transaction, the following procedural process should be adopted: (a) implement immediately the $201.6 million in PBAs proposed by Petitioners in the Partial Acceptance; (b) make NYSEG and RG&E electric and gas rates temporary, at least with respect to other PBAs adopted by the Commission (e.g., Staff advocated, and Judge Epstein recommended, that PBAs be set at $646.4 million); and (c) institute NYSEG and RG&E electric and gas rate proceedings to set permanent rates, in accordance with the Commission's traditional 11-month schedule. (RD at 144-45.) Both Staff and Petitioners except to the recommended procedural process. (Staff at 43-49; Petitioners at 84-86.) For the reasons set forth below, the exceptions of Staff and Petitioners should be rejected.

Staff agrees with Judge Epstein's recommendation that NYSEG and RG&E's rates be made temporary. Staff points to its contention that both utilities are realizing excessive returns, and concurs that some additional time may be necessary to reflect all appropriate PBAs into rates. (Staff at 43-45.) Staff, however, asserts that major rate proceedings are distracting, and that new rates should be established on a more expedited basis. Accordingly, Staff proposes that: (a) the Commission adopt "streamlined filing requirements" applicable to NYSEG and RG&E that contain less information than a traditional rate filing; (b) an expedited schedule be established to implement new rates; (c) selected rate case issues be decided based on the record herein; and (d) the parties commence settlement negotiations on new rate plans for both utilities. (Staff at 46-48.)

Multiple Intervenors opposes that part of Staff's proposal calling for diminished filing requirements applicable to NYSEG and RG&E and an expedited schedule for the implementation of new rates. Intervener parties, such as Multiple Intervenors, simply do not have the same resources as Staff (or utilities), and would be prejudiced by having to prosecute electric and gas rate proceedings for NYSEG and RG&E in an abbreviated amount of time. Moreover, while Multiple Intervenors has no objections to attempting to negotiate multi-year rate plans for both utilities, an evidentiary record needs to be established in the event no settlement can be reached.[28] For this reason, Multiple Intervenors opposes proposals that would circumscribe the utilities' initial rate case filings, or responsive filings by Staff and intervener parties. It also is worth noting that it has been many years since NYSEG's last gas rate proceeding and RG&E's last electric and gas rate proceeding. Accordingly, the case for reducing the standard filing requirements and/or expediting the schedule is considerably weaker under these circumstances than if fully-litigated rate proceedings involving both utilities recently had been decided.

Petitioners, on the other hand, have no objection to implementing the proposed $201.6 million in PBAs upon merger closing, but except to, and oppose, making the resulting rates temporary or being required to conduct simultaneous rate proceedings involving NYSEG and RG&E. (Petitioners at 84-86.)

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[28] Multiple Intervenors also has no objections if certain rate case issues litigated extensively by Staff and Petitioners in this proceeding are resolved based on the evidentiary record developed herein. (See Staff at 49-93.)

Petitioners' objections to making NYSEG and RG&E's rates temporary following this proceeding should be rejected, particularly if the implementation of PBAs is limited as recommended in the Recommended Decision. In this proceeding, the Commission ultimately must resolve at least two major issues involving rates imposed on customers. First, the Commission must determine the appropriate amount of PBAs. Second, the Commission must determine whether to resolve numerous rate case issues litigated herein. If, arguendo, the Commission declines to implement the full amount of PBAs immediately and/or resolve the rate case issues identified originally by Staff, then customers would be prejudiced by any delay in the resetting of rates. That would be an untenable, and inequitable, outcome to this proceeding.

In its Initial Brief herein, Multiple Intervenors advocated that merger approval be conditioned upon, inter alia, two-year rate freezes applicable to NYSEG and RG&E. (MI Initial Brief at 26-28.) For the reasons set forth therein, Multiple Intervenors contended that the public interest would be served by rate stability and an absence of rate case litigation. Significantly, however, Multiple Intervenors' position was conditional in one important respect:

> Importantly, Multiple Intervenors' advocacy for a two-year rate freeze is conditioned upon financial and other rate-related benefits being flowed through to customers in the near-term. If, arguendo, the Commission were to approve the proposed transaction without ensuring that customers' financial benefits are realized upon merger closing, then it might be more advantageous to couple such approval with the issuance of an order requiring NYSEG and RG&E to show cause as to why existing rates should not be reduced.

(MI Initial Brief at 28.) Thus, if the full benefits of PBAs and other rate reductions are to be postponed, then rates should be made temporary to protect customers, with rate proceedings scheduled (but not expedited) to make future rates permanent.[29]

For purposes of establishing a process following (and assuming) consummation of the proposed transaction, the Commission's first priority should be to ensure that the full impact of PBAs and beneficial rate adjustments are implemented as expeditiously as possible. To the extent future rate proceedings need to be scheduled, the integrity of the rate-setting process also should be preserved in a way that does not diminish the development of the evidentiary record or prejudice the ability of intervener parties to participate meaningfully in the process. The exceptions of Staff and Petitioners fail to satisfy these priorities in certain respects and, therefore, should be rejected.

CONCLUSION

For all the foregoing reasons, the Commission should: (a) modify or reject Judge Epstein's recommendations in a manner consistent with Multiple Intervenors' Brief on Exceptions; and (b) reject other parties' exceptions to the Recommended Decision that are inconsistent with Multiple Intervenors' positions.

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

[29] If, on the other hand, the Commission were to reduce rates upon merger closing to reflect the full impact of all PBAs and certain other rate case adjustments, then: (a) temporary rates may not be necessary; and (b) immediate or simultaneous rate proceedings may not be required (in which case, rate freezes may be in the public interest).

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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Respectfully submitted,

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