
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of Iberdrola, SA, 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 BEHALF OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION

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June 26, 2008

INTRODUCTION

The New York State Department of Environmental Conservation (DEC) respectfully submits this brief pursuant to the above-captioned proceeding.

BACKGROUND

This proceeding arises during a time of rapid change in New York State's energy structure. New York has recognized, along with many other states, that global climate change has arrived as a challenge to our way of life, our health and our environment.

Global warming is a reality. It is caused by the inability of carbon dioxide ("CO₂") to leave the earth's atmosphere, causing the planet's temperature to warm in the same way as glass allows heat to build up in a greenhouse. (See DEC website at <http://www.dec.ny.gov/energy/rggi.html>, last visited June 27, 2008.) The potential impacts of global warming are significant. For example, among other impacts the Environmental Protection Agency has forecast that a one degree Fahrenheit increase in average temperature could more than double heat related fatalities in New York City from 300 to 700 a year. (See DEC website at <http://www.dec.state.ny.us/regulations/39156html>, last visited June 27, 2008.)

New York State has taken up the challenge directly through its leadership in the creation of the Regional Greenhouse Gas initiative ("RGGI"), a program with 9 other states to cap and gradually reduce the amount of greenhouse gases into the air. (*Id.*)

It is taking this step in concert with other major state energy initiatives, including the recommendations contained in the report of then Lieutenant Governor David Paterson, *Clean, Secure Energy and Economic*

Growth: A Commitment to Renewable Energy and Enhanced Energy Independence, February 2008: “Thus far, New York’s renewable resources have been the state’s primary vehicle of increasing the amount of renewable energy use. As other states across the nation enact their own renewable portfolio programs and ‘energy independence’ incentives, New York must keep pace. As we compete in regional energy markets, New York needs to continue attracting private investment dollars, the additional in-state energy infrastructure, environmental benefits and the economic boost that comes from clean-tech investment” (*Id.* at 4.)

The Public Service Commission (“PSC”) has helped to lead this effort through its Renewable Portfolio Standards program, where its goal is to have 25% of the state’s energy come from renewable resources by 2013. (See PSC press release, Renewable Energy Initiatives Gain Momentum, April 23, 2008.)

Governor David Paterson has bundled these and other initiatives together and created a process to develop a state energy plan: “WHEREAS, issues such as energy diversity, dependence on imported energy and fuels, the burning of fossil fuels, global climate change, acid rain and other airborne pollutants, ground-level ozone buildup, increased development, increased transportation demand, and waste generation and disposal from energy production are significant issues affecting New York and should be addressed in a comprehensive State energy plan.” (See Executive Order 2, April 9, 2008.)

It is against this background that Iberdrola has sought the approval of the Public Service Commission to buy Energy East Corp. (“Energy East”) and invest \$2 billion in wind energy projects in New York State.

IBERDROLA’S APPLICATION

Iberdrola, S.A. (Aiberdrola@), Energy East, RGS Energy Group, Inc.(ARGS@), New York State Electric and Gas Corporation (ANYSEG@) and Rochester Gas and Electric Corporation

(ARG&E@) have petitioned the New York State Public Service Commission (APSC@) , pursuant to ' 70 of the Public Service Law, for permission to allow Iberdrola to buy 100% of the common stock of Energy East, the parent holding company of NYSEG and RG&E. Iberdrola would then create Green Acquisition Capital, Inc. (AGreen Capital@) and merge it into Energy East. Energy East would become the surviving subsidiary corporation wholly owned by Iberdrola.

Iberdrola is a Spanish utility holding company with energy interests in 28 countries. NYSEG is a public utility that purchases, transmits, generates, distributes and sells electric power and natural gas. Under State law, NYSEG=s customers have the right to choose an alternate supplier. RG&E is a public utility that purchases, transmits, generates, distributes and sells electric power and natural gas. Under state law also, RG&E=s customers have the right to choose an alternate supplier. (*See* 121 FERC 61,236, Order Authorizing Merger and Disposition of Jurisdictional Facilities, Docket No. EC07-122-000, December 6, 2007.)

Iberdrola is the largest producer of wind energy in the world, with over 6,800 MW of wind capacity. (*See* PSC Case No. 07-M-06 Joint Petition for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A., August 1, 2007.) In 2006, Iberdrola invested more than \$1.3 billion in renewable technologies worldwide. In New York State, Iberdrola has ownership interests in Flat Rock wind power I and II, parent companies of a 231 MW wind power project in Lewis County; a 90.75 MW wind farm, also in Lewis County, and a 150 MW facility in the Towns of Warren and Stark, Herkimer County (*id.* and *See* Case 06-E-1424, Order Granting Certificate of Public Convenience and Necessity and Providing for Lightened Regulation, August 23, 2007).

Iberdrola will pay approximately \$4.5 billion to acquire all of the common stock of Energy East. It has already raised the equity needed to close the transaction (*See* 121 FERC 61,236, Order Authorizing Merger and Disposition of Jurisdictional Facilities, Docket No. EC07-122-000, December 6, 2007).

During the course of the merger approval process, DPS Staff has consistently taken the position that Iberdrola must divest itself of all renewable energy projects before the PSC should grant its approval. (*See* Case 07-M-0906, Staff Reply Brief, April 25, 2008, and Prepared Testimony of Policy Panel, January 2008.) The Administrative Law Judge (“ALJ”) has adopted Staff’s position (*See* Case No. 07-M-0906, Recommended Decision, June 16, 2008, at page 1.)

The DEC respectfully urges the Public Service Commission to reject the Recommended Decision because it is unresponsive to the stated energy needs and policies of New York State, and because it accepts virtually without question the flawed analysis of DPS Staff regarding the proposed merger.

POINT ONE

Iberdrola’s application is in the public interest and in furtherance of the State’s energy policy

A-In its briefings and testimony, Iberdrola set forth five areas where the merger would provide “intangible” benefits to its customers and the State: Global energy experience, a focus on energy and the environment, financial stability, commitment to customer service and reliability and commitment to local communities (*Id.* at 33,34,35.) In addition, Iberdrola stated that it would create tangible benefits and mitigate any possible harm by holding New York customers harmless by foregoing all rate recovery of the acquisition premium paid for Energy

East stock and other transaction costs, foregoing any change in the terms or conditions of service and not relocating NYSEG's or RG&E's central or branch offices. No jobs would be lost in the transaction, wages and benefits would remain unchanged for 18 months, and Iberdrola would divest itself of five fossil fueled generating plants and share the proceeds with its customers (*Id.*)

Iberdrola has also expressed a willingness to invest as much as \$2 billion in New York State to achieve these benefits.

Each of the benefits has been rejected by the decision of the ALJ, despite the fact that all parties except staff acknowledge the merger's benefits (*Id.* at 36), and that "[this] recommended decision accepts for argument's sake the consensus, that development of wind energy resources is a desirable State policy" (*Id.* at 41.) Remarkably, the decision recommends that Iberdrola's assets as a potential wind developer in New York should not be deemed benefits of the proposed transaction and therefore should not figure prominently in the Commission's determinations (*Id.* However, the decision is contradicted by the testimony in the record that Iberdrola's environmental "ethos" should be seen as creating a "climate of confidence" in its activities and that a "high value" should be set on Iberdrola's commitment to renewable energy (*Id.* at 39.) Nevertheless, the ALJ accepted almost without question the Staff proposition that environmental considerations are irrelevant to the decision: ("...it is doubtful that Iberdrola's environmentally beneficial philosophy, resources or expertise should be regarded as features linked to the proposed transaction" (*Id.* at 42.)

This logic separates the ALJ and Staff from every other party in this proceeding, including the Federal Energy Regulatory Commission ("FERC"). Moreover, it directly

contradicts the recommendation of DPS staff that PSC issue Jordanville Wind (JW) a Certificate of Public Convenience and Necessity on August 23, 2007, only 23 days **after** Iberdrola filed its merger application with the PSC. Although vertical market power was not an issue in that proceeding (*see* Order Granting Certificate of Public Convenience and Necessity and Providing for Lightened Regulation Case 06-E-1424, August 23, 2007), it must be assumed that DPS Staff gives careful scrutiny to each application before it. Significantly, in issuing the Certificate, the PSC relied on the importance of the project in furthering the State's compliance with Executive Order 111, and concluded that, based on Iberdrola's experience and financial viability, the project was in the public interest (*Id.* at 20, 21.)

B- FERC has examined the Iberdrola proposal under 16 U.S.C. '203 and has concluded that it is in the public interest and does not pose a threat to vertical or horizontal market power. (*See* 121 FERC § 61,236, Order Authorizing Merger and Disposition of Jurisdictional Facilities, Docket No. EC07-122-000, December 6, 2007.)

ASection 203 (a) (4) requires the Commission to approve a merger if it determines that the merger will be consistent with the public interest. The Commission's analysis of whether a transaction will be in the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation@ (*Id.* at 5.) FERC found that Iberdrola's proposal satisfied each of the three tests. It is persuasive for purposes of the instant review that FERC found that ISO-NE's and NYISO's control of Energy East's transmission over 10,000 miles of transmission lines, would forestall anti-competitive activity. (*Id.*)

C--Staff and the ALJ both conclude, without foundation, that "Iberdrola's pursuit of its

environmental ethos is unrelated to its status as owner or non-owner of transmission and distribution subsidiaries” (See Case No. 07-M-0906, Recommended Decision, June 16, 2008, at 42.) Iberdrola testified that its investment depends not on whether it owns a distribution company there, but on whether it is “familiar with market opportunities and regulatory frameworks in the territory and whether ‘regulators are receptive’ to such investment” (*Id.* at 42, 43.) As proof, Iberdrola says that it undertook major investments in the United Kingdom only after purchasing Scottish Power (*Id.*)

Without proof or evidence, the ALJ rejected this testimony and instead relied on the Staff’s conjecture that “...Iberdrola’s acquisition or non-acquisition of a distribution subsidiary has not determined whether the company considers itself to have the required marketing expertise to achieve a ‘comfort level’ conducive to renewables investment in Pennsylvania, Oregon, Texas or Maine” (*Id.*)

The ALJ adds: “As for regulatory receptivity to investment by Iberdrola, that concept implies that Iberdrola is sensitive to a jurisdiction’s regulatory climate. That may well be true, but it is not pertinent to the questions presented here, where the Commission is challenged not to maintain all the conditions of a friendly climate but only to make a discrete decision whether this specific transaction as proposed would be beneficial” (*Id.*)¹

This reasoning rejects testimony and replaces it with supposition.

POINT TWO

The Staff’s and ALJ’s positions are contrary to the current energy policy of New York

¹ Contrast this viewpoint with the ALJ’s statement that the Commission could send a “business friendly signal” by rejecting Iberdrola’s proposal. (See Case No. 07-M-0906, Recommended Decision, June 16, 2008, at page 62.)

State and the benefits it is meant to create

The Recommended Decision ignores the myriad Executive Orders, legislation, initiatives and policies currently underway to reduce greenhouse gas emissions in New York State. It also ignores the scientific conclusions identifying adverse public health and environmental impacts associated with greenhouse gas emissions and the State's (and Iberdrola's) commitment to lower them. We ask the PSC to rectify that omission.

As Jared Snyder, DEC's Assistant Commissioner for Air Resources, Climate Change and Energy at DEC testified in this proceeding:

AFighting climate change is without question the most substantial environmental challenge facing this State, this nation and the world today. [This administration has] made the fight against climate change a top priority. Taken together with our other initiatives, development of wind energy is vital to the reduction of greenhouse gases... (See Case No. 07-M-0906, Testimony of J. Jared Snyder, submitted January 11, 2008 at 4.)

In addition, the record is replete with well-founded references that establish the benefits of renewable energy sources and of identifying and reducing greenhouse gas emissions, as well as legislative directives to encourage renewable energy, including wind power. (See Executive Order 2 creating a framework to develop a state energy plan, April 9, 2008, The report of then Lieutenant Governor David Paterson, *Clean, Secure Energy and Economic Growth: A Commitment to Renewable Energy and Enhanced Energy Independence*, February 2008, Public Service Law (APSL@) ' 5-2, PSL '66-c-1, Case 03-E-0188, Order Regarding Retail Renewable Portfolio Standards, September 24, 2004, Executive Order 111, requiring all state agencies to purchase 20% of their electricity from renewable energy sources by 2010, issued June 10, 2001 and continued by Governor Paterson March 20, 2008, Status Report on Implementation of the Renewable Portfolio Standard Program, Case 03-E-0188, August 9, 2007, Smart Growth

Planning (*See* Executive Order 10, dated December 10, 2007.)

Rather than review and develop a rationale relying upon the clear and compelling links among existing statutes, orders and directives to reach a pragmatic and beneficial decision on the record, the ALJ has turned their intent upside down by saying that encouraging Iberdrola's participation in New York would be misconceived and premature. (*See* Case No. 07-M-0906, Recommended Decision, June 16, 2008, at page 45, 46.)

POINT THREE

The issue of Vertical Market Power is mitigated by safeguards spelled out clearly in the record

A-Iberdrola offered substantial testimony that Iberdrola's proposal for operating acquired transmission, its present wind generation assets, as well as potential wind assets, would not physically cause non-competitive activity; in fact, it would be constrained from doing so. (*See* Direct Testimony of William H. Hieronymus, Case No 07-M-0906, November 28, 2007, at 9 and (*See* 121 FERC 61,236, Order Authorizing Merger and Disposition of Jurisdictional Facilities, Docket No. EC07-122-000, December 6, 2007.)

The ALJ discounts this testimony arbitrarily, without fairly examining the merits of the limitations and constraints that Iberdrola is willing to operate within. In that context, the ALJ's reliance on the backlog of existing wind proposals in finding that Iberdrola's presence would not be considered an asset is wholly speculative. (*See* Case No. 07-M-0906, Recommended Decision, June 16, 2008, at page 44.)

At the same time, the ALJ argued, restricting the ability to generate wind energy in New York would send a “symbolic” message that the Commission is “business friendly” (*Id.* at 62, *emphasis added.*) This is too speculative and perhaps beyond the scope of this proceeding.

And, responding to the argument that Iberdrola will be under the scrutiny of FERC and NYSIO, the ALJ echoed Staff’s argument that Vertical Market Power may be “too subtle” to be detected by regulation and that just a “reliance on regulation” would create “preconditions for this type of mischief”. Thus, said the ALJ, regulation alone will not stop potential harm (*Id.* at 68.) Again, this appears to be conjecture on the possible inadequacies of PSC’s regulatory structure.

B- Notwithstanding that the testimony shows that safeguards would be in place, DPS staff=s position—and the Recommended Decision—would not allow Iberdrola to even make a case regarding Vertical Market Power. This position directly contradicts the PSC=s stated guidelines allowing aRebuttable presumption@ to exist in determining if vertical market power is created by a utility=s action. (*See Statement of Policy Regarding Vertical Market Power, PSC Case 96-E-0900 et al., July 17, 1998.*)

Staff seems to have ignored that test and has created an irrebuttable presumption and an absolute bar to merger because Iberdrola’s applications would be “too burdensome and administratively inefficient” (*See Case 07-M-0906, Staff Reply Brief, April 25, 2008 at 33.*) Iberdrola, on the other hand, presented compelling testimony that it had relied on the ability to make a case for rebuttable presumption. (*See Rebuttal Testimony of William H. Hieronymus before the Public Service Commission, January 31, 2008 at 12.*)

C-The DPS Staff position on vertical market power fails to note that the aforesaid policy position is nonbinding. Opinion No. 96-12 of the PSC, cited by the staff as creating explicit policy on vertical market power, is simply a statement of general policy. (See, *In the Matter of Energy Association of New York State et al v. Public Service Commission*, 169 Misc. 2d 924), ANonbinding statements of general policy are not rules@, (*Id.*, citing SAPA' 102(2) (b) (iv)). The Commission is free to use its discretion to find that the petition is in the public interest, and the DEC urges it to do so.

CONCLUSION

The record reflects that Iberdrola's proposal is in the public interest, conforms and enhances the State's energy policies, and does not create vertical market power.

DEC respectfully requests the Commission to take into account the Recommended Decision's inadequacies and view the merger application through a lens that takes into account both the merits of the application and its potential impact on the health and environment of New York State.

