

April 25, 2008

VIA HAND DELIVERY

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

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

Dear Secretary Brillling:

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

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

Respectfully submitted,

COUCH WHITE, LLP



Michael B. Mager

MBM/cgw

Enclosures

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

J:\DATA\Client4 11825-12199\11900\Correspondence\mbm054.doc

**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

**REPLY BRIEF
OF
MULTIPLE INTERVENORS**

Dated: April 25, 2008

**COUCH WHITE, LLP
540 BROADWAY
P.O. BOX 22222
ALBANY, NEW YORK 12201-2222
(518) 426-4600**

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT.....	1
ARGUMENT	3
POINT I	
PETITIONERS' EXCLUSIVE RELIANCE ON MERGER PROCEEDINGS INVOLVING WATER UTILITIES IS MISPLACED	3
POINT II	
COMPARISONS WITH NATIONAL GRID ARE APPROPRIATE.....	7
POINT III	
THE COMMISSION SHOULD ENSURE THAT NYSEG AND RG&E CUSTOMERS DO NOT HAVE TO PAY FOR ANY OF THE GOODWILL ASSOCIATED WITH THE PROPOSED TRANSACTION AND/OR ON IBERDROLA'S BOOKS	10
POINT IV	
THE PROPOSED FINANCIAL PROTECTIONS FOR CUSTOMERS SHOULD HAVE NO IMPACT ON PETITIONERS UNLESS THE CONCERNS UNDERLYING THOSE PROTECTIONS ARE REALIZED	12
POINT V	
PETITIONERS' POSITION ON FINANCIAL TRANSPARENCY AND REPORTING SHOULD BE REJECTED	13
POINT VI	
IBERDROLA'S COMMITMENT TO RENEWABLE GENERATION, WHILE LAUDABLE, IS DISTINGUISHABLE FROM THE PROPOSED ACQUISITION OF ENERGY EAST.....	15

POINT VII

PROPOSED ADJUSTMENTS TO NYSEG AND RG&E
ELECTRIC AND GAS RATES DO NOT CONSTITUTE
UNILATERAL MODIFICATIONS OF EXISTING RATE
PLANS 17

POINT VIII

PETITIONERS' ARGUMENTS THAT THE POSSIBLE
TAKEOVER OF IBERDROLA RAISES NO CONCERNS
LARGELY ARE WITHOUT MERIT 19

CONCLUSION 22

PRELIMINARY STATEMENT

Multiple Intervenors hereby submits its Reply Brief in Case 07-M-0906.¹ This proceeding is examining whether, and under what conditions, the New York State Public Service Commission (“Commission”) should authorize Iberdrola, S.A. (“Iberdrola”) to acquire, via merger, Energy East Corporation (“Energy East”), parent of New York State Electric & Gas Corporation (“NYSEG”) and Rochester Gas and Electric Corporation (“RG&E”). The procedural background relevant to this proceeding is summarized in Multiple Intervenors’ Initial Brief. (MI at 1-4.)²

In addition to Multiple Intervenors, the following parties submitted initial briefs in this proceeding: Independent Power Producers of New York, Inc.; Natural Resources Defense Council; New York Association of Public Power and New York State Rural Electric Cooperative Association (jointly); New York State Consumer Protection Board; New York State Department of Economic Development; New York State Department of Public Service Staff (“Staff”); Nucor Steel Auburn, Inc.; Petitioners; and Strategic Power Management, LLC.

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

² Parenthetical references to parties’ initial briefs are preceded by the sponsoring party’s name, as abbreviated herein (e.g., MI at ____). Iberdrola, Energy East, NYSEG, RG&E, RGS Energy Group, Inc. and Green Acquisition Capital, Inc. collectively are referred to as “Petitioners.” 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.”

In its Initial Brief, Multiple Intervenors addressed the issues raised by the proposed transaction in a comprehensive manner and, in so doing, anticipated many of the positions advanced by other parties. Accordingly, Multiple Intervenors' Reply Brief is limited, and arguments advanced in its Initial Brief will not be repeated herein. Importantly, Multiple Intervenors' silence on any position raised herein by another party should not be construed as support or acceptance of that position. Multiple Intervenors stands by all positions advanced in its Initial Brief.

Multiple Intervenors' Reply Brief is limited to responding to the following arguments advanced by Petitioners:

1. arguments that the Commission should rely exclusively on merger proceedings involving water utilities;
2. arguments opposing comparisons between Iberdrola and National Grid;
3. arguments that NYSEG and RG&E customers would be insulated from the goodwill associated with the proposed transaction and/or on Iberdrola's books;
4. arguments in opposition to proposed financial protections for customers;
5. arguments in opposition to robust reporting requirements;
6. arguments linking Iberdrola's commitment to renewable generation and merger approval;
7. arguments that adoption of certain one-time rate adjustments proposed by Staff, and supported by Multiple Intervenors, would constitute unilateral modifications of existing rate plans; and
8. arguments that the possible takeover of Iberdrola raises no concerns.

ARGUMENT

POINT I

PETITIONERS' EXCLUSIVE RELIANCE ON MERGER PROCEEDINGS INVOLVING WATER UTILITIES IS MISPLACED

In its Initial Brief, Multiple Intervenors addressed the standard of review and the burden of proof that should be applied in this proceeding. (MI at 5-12.) Multiple Intervenors contends that the appropriate standard of review is informed by Commission's most recent decision involving the acquisition of a New York electric and/or gas utility – *i.e.*, the National Grid plc (“National Grid”)/KeySpan Corporation (“KeySpan”) merger, which was approved, subject to numerous conditions, less than one year ago.³ While Multiple Intervenors recognizes that the proposed transaction between Iberdrola and Energy East is not identical to the National Grid/KeySpan merger, Petitioners' strenuous efforts to undermine and obfuscate the import of recent Commission precedent, in favor of exclusive reliance on a string of decisions involving the merger of water utilities (Petitioners at 13-18), cannot withstand scrutiny.

³ 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) (“Abbreviated National Grid Order”), and Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations for KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island (issued September 17, 2007) (“National Grid Order”).

Petitioners argue that:

A critical distinction between the Proposed Transaction and some of the more recent electric and gas utility mergers in New York is the fact that Iberdrola does not currently own any U.S. regulated utility assets, and therefore this is not a synergy merger which results in immediately quantifiable synergy savings as a result of combining utility operations. This is Iberdrola's first proposed acquisition in the regulated utility area in North America and, therefore, the Proposed Transaction is properly viewed as a first-mover, non-synergy merger.

(Petitioners at 14.) Petitioners' reasoning is flawed in several material respects.

First, the Commission has never ruled that there are two different "public interest" standards for evaluating proposed mergers: one for "synergy" mergers and another for "non-synergy" mergers. Net positive benefits (i.e., in excess of costs and risks) must be established, by Petitioners, to satisfy the burden of proof in this proceeding. Despite Petitioners' repeated attempts to distinguish the proposed transaction from every recent merger proceeding involving New York electric and/or gas utilities, pointing continuously to an alleged legal distinction does not somehow make the distinction spring into existence.

Second, Petitioners' characterizations of the proposed transaction as a "non-synergy" merger disregards the following salient facts: (a) Petitioners purposefully did not attempt to identify synergy savings or other financial benefits; and (b) the evidence demonstrates that synergy savings and other financial benefits are likely to be realized. (See MI at 15-21; see also Staff at 112-14.)⁴

⁴ The Staff Policy Panel testified that: "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." (Tr. 1189-90.)

Third, while Iberdrola currently may not own other regulated utilities in North America, synergy savings still may be realized: (a) arising from Iberdrola's ownership of substantial energy-related assets in North America, including asset types also owned by Energy East (e.g., gas storage assets) (see Tr. 1169-71; see also Petitioners at 72 [referring to Iberdrola's "significant existing operations in the U.S."]; Tr. 1005-06 [wherein Petitioners witness Meehan conceded that it is possible for a merger or acquisition to result in synergy savings even if the companies' operations are in different businesses]); and (b) due to the fact that so-called "first mover" transactions – such as Iberdrola's acquisition of Scottish Power – can result in synergy savings (see Tr. 644, 1189-90; see also Tr. 644 [wherein Petitioners Policy Panel acknowledged that Iberdrola's acquisition of Scottish Power – which was a first-mover transaction – has produced twice the synergy savings that were estimated], Tr. 1004 [wherein Petitioners witness Meehan conceded that synergy savings could be achieved even where a merger does not involve contiguous service territories]).

Petitioners then argue that the Commission has approved mergers without tangible, financial benefits for customers. (Petitioners at 15.) In support of that argument, Petitioners cite to five proceedings, all involving water utilities. (Id., n.6.) Significantly, however, Petitioners do not cite to a single proceeding involving electric and/or gas utilities in support of their position. (See id.) The differences between electric and gas utilities and water utilities should be patently obvious. Indeed, as Staff notes, "the facts and circumstances confronting the water industry, and the character of water utilities, are completely different from the facts and circumstances confronting the electric and gas industry, and the character of electric and gas utilities." (Staff at 14.) Those differences include, but are not limited to: (a) energy costs comprise a much higher percentage of a

business's operating costs, or a household's budget, than water costs; (b) electric and gas prices in New York are extremely high and not competitive with other regions, thereby hurting the State's economy, whereas similar issues do not arise for water; (c) the vertical market power ("VMP") issues raised herein are not applicable to the water industry; (d) short-term disruptions in service are much more critical for electric and gas utilities and their customers; (e) many water utilities are very small and have difficulty raising capital, whereas New York energy utilities in general, and NYSEG and RG&E in particular, have not experienced difficulties accessing capital markets; and (f) consumers have more contacts and interactions with electric and gas utilities than water utilities and, in Multiple Intervenors' opinion, issues such as electric and gas reliability, service quality and safety are more important with respect to energy service.

The Commission should reject Petitioners' argument that the precedents established in the National Grid/KeySpan merger proceeding, and prior merger proceedings involving New York electric and/or gas utilities, should be forsaken in favor of decisions involving the acquisition of small and/or financially-troubled water utilities. Additionally, Petitioners' efforts to diminish the significance of the Commission's rulings in the National Grid/KeySpan merger proceeding overlook the fact that the vast majority of those rulings did not turn on whether that transaction was a "synergy" or "non-synergy" merger. For instance, the merging companies in that proceeding provided substantial rate relief to KeySpan gas customers unrelated to synergy savings. Moreover, the Commission established extensive conditions in that proceeding which were not related to whether or not the transaction was a synergy or non-synergy merger, such as, inter alia, the adoption of more stringent performance standards and revenue adjustments pertaining to reliability, service quality and

safety; the adoption of financial protections for customers; the adoption of robust reporting requirements; and the adoption of measures intended to address vertical market power (“VMP”) concerns.⁵

Multiple Intervenors supports the proposed transaction between Iberdrola and Energy East, provided that merger approval is subject to numerous conditions designed to produce financial and other tangible benefits and enforceable protections for customers of NYSEG and RG&E. While the Commission should recognize material differences between this proceeding and the National Grid/KeySpan merger proceeding, it should not abandon the standard of review and slew of precedents established over the last decade governing the acquisition of New York electric and/or gas utilities.

POINT II

COMPARISONS WITH NATIONAL GRID ARE APPROPRIATE

There has been extensive litigation, and briefing, regarding the applicability of the precedents established in the National Grid/KeySpan merger proceeding. For instance, Petitioners argue that such precedents are irrelevant to this proceeding (Petitioners at 57-61), a position with which Multiple Intervenors disagrees (MI at 7-11 and Point I, supra). The arguments on both sides do not require repetition here. Importantly, however, comparisons to a prior transaction involving National Grid also are appropriate in understanding why financial benefits and customer protections should be an integral component of every merger approval involving a New York electric and gas utility.

⁵ See generally Case 06-M-0878, supra, Abbreviated National Grid Order and National Grid Order.

In 2001, the Commission was called upon to authorize the acquisition of Niagara Mohawk Power Corporation (“Niagara Mohawk”), via merger, by National Grid.⁶ At that time, Niagara Mohawk was experiencing financial difficulties, and National Grid held itself out as a financially-stronger entity, with considerable experience and expertise in providing electric transmission and distribution service. Unlike this proceeding, a large majority of the parties in the National Grid/Niagara Mohawk proceeding succeeded in negotiating a joint proposal resolving merger- and rate-related issues.

In adopting that joint proposal, which provided for meaningful rate relief, the Commission also accorded substantial weight to the financial and other customer protections that were negotiated:

The Joint Proposal presented here provides for a full array of protections analogous to those in PowerChoice; these include rules governing affiliate transactions (including a ban on Niagara Mohawk providing financial assistance to an affiliate), extensive cost allocation procedures to ensure that Niagara Mohawk’s expenses are reasonable, standards of competitive conduct, and limitations on the dividends that may be paid to the parent entity (designed to ensure that Niagara Mohawk’s capital structure remains appropriate to its business risk and including a requirement for our approval of any dividend payments if Niagara Mohawk’s credit rating falls below investment grade). More specifically, National Grid is a reputable organization with extensive utility holdings and experience in providing retail service. Any concerns that might be raised about merging a New York utility into an out-of-state corporation are allayed by the commitments in the Joint Proposal to maintain Niagara Mohawk’s in-state work force (including management responsible for New York operations) and headquarters.⁷

⁶ 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.

⁷ Case 01-M-0075, supra, Opinion and Order Authorizing Merger and Adopting Rate Plan (issued December 3, 2001) at 62 (footnote omitted).

Thus, even though the acquiring entity was stronger financially than the acquired entity, the Commission nevertheless concluded that financial and other customer protections were warranted. Ironically, many of the “benefits” claimed herein by Iberdrola – financial strength, commitment to reliability and service quality, manpower commitments, local management – were touted previously by National Grid and now are considered areas of concern from which Petitioners seek to distance themselves.

A merger, once consummated, cannot be undone if the future reality does not live up to expectations. Therefore, now is the appropriate time to condition merger approval on financial and other tangible benefits, and enforceable protections, for customers of NYSEG and RG&E. In evaluating the proposed transaction between Iberdrola and Energy East, the Commission generally should follow the precedents established, and lessons learned, from the National Grid merger proceedings involving KeySpan and Niagara Mohawk, while recognizing that every transaction involves unique facts and circumstances that may warrant different regulatory approaches, where justified.⁸

⁸ For instance, in light of certain unique characteristics pertaining to wind generation and the proposed transaction in general, Multiple Intervenors’ position in this proceeding is that the Commission should grant merger approval subject to Iberdrola’s acceptance of conditions that limit Petitioners’ ability to exercise VMP in a manner that would not preclude Iberdrola Renewables’ future development of wind generation. (See MI at 55-59.)

POINT III

THE COMMISSION SHOULD ENSURE THAT NYSEG AND RG&E CUSTOMERS DO NOT HAVE TO PAY FOR ANY OF THE GOODWILL ASSOCIATED WITH THE PROPOSED TRANSACTION AND/OR ON IBERDROLA'S BOOKS

In their Initial Brief, Petitioners “commit that there will be no recovery in rates from NYSEG’s or RG&E’s ratepayers of the acquisition premium associated with the Proposed Transaction.” (Petitioners at 32.) The acquisition premium, representing the value paid for Energy East in excess of book value, typically is referred to as goodwill. (*Id.* at 9.) With respect thereto, Petitioners further commit that “there is no possibility that Goodwill associated with the Proposed Transaction will be recorded on the books of NYSEG or RG&E and it therefore can have no rate impact on their ratepayers.” (*Id.* at 69.) Petitioners also argue that there is not “any proof that Goodwill will have an adverse rate ... impact on ratepayers of NYSEG and RG&E.” (*Id.* at 70.) The Commission should adopt Petitioners’ commitments as conditions of merger approval and, in so doing, also clarify that customers will not be required to pay, through increased rates, for equity ratios that are inflated artificially by goodwill.

The rate of return on equity (“ROE”) accorded to regulated utilities typically is much higher than the interest rate on utility debt. Therefore, equity costs more than debt. In rate proceedings, the Commission often is called upon to establish a utility’s authorized ROE and its capital structure, including its equity ratio. The higher the equity ratio, the more expensive it is for customers. This is not to say that equity ratios should be kept

unreasonably low, but compelling reasons exist as to why they also should not be inflated artificially.

In certain circumstances, the Commission has used the capital structure of a utility's parent to establish the utility's capital structure, including equity ratio.⁹ For capital structure purposes, goodwill sometimes is considered equity. Multiple Intervenors is concerned that if the proposed transaction is approved, Iberdrola may attempt to use its capital structure, including goodwill, to justify a higher (and more expensive to customers) equity ratio for NYSEG and/or RG&E. Such efforts should be rejected now; if not, the prospect of customers funding higher equity ratios in rates for NYSEG and/or RG&E should be treated as a cost of the proposed transaction for which additional financial benefits are needed to offset.

As detailed above, Petitioners have committed that: (a) NYSEG and RG&E customers will not have to pay any of the acquisition premium in rates associated with the proposed transaction; and (b) the goodwill associated with the proposed transaction will have no rate impact on customers. Petitioners also dispute that any of the goodwill on Iberdrola's books will have adverse rate impacts on NYSEG and RG&E customers. (Petitioners at 32, 69-70.) Such commitments and arguments would be hollow and misleading, however, if goodwill subsequently is used to inflate the equity ratio reflected in the future rates of NYSEG and RG&E. Accordingly, the Commission should ensure that customers will not be forced to pay for any of the goodwill associated with the proposed transaction, or goodwill

⁹ See, e.g., Case 05-E-1222, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service, Order Adopting Recommended Decision with Modifications (issued August 23, 2006) at 81-90.

existing on Iberdrola's books, through the use of higher equity ratios for rate-making purposes.

POINT IV

THE PROPOSED FINANCIAL PROTECTIONS FOR CUSTOMERS SHOULD HAVE NO IMPACT ON PETITIONERS UNLESS THE CONCERNS UNDERLYING THOSE PROTECTIONS ARE REALIZED

In its Initial Brief, Multiple Intervenors advocated that merger approval should be conditioned upon the adoption of financial protections for customers. (MI at 35-45.) Those protections, advanced initially by Staff, are intended to protect customers from the myriad of financial risks to which NYSEG and RG&E customers would be exposed if the proposed transaction is consummated. (See generally Tr. 1221-25, 1277-1325, 1400-19; see also Staff at 32-89, 135-52.) Petitioners, on the other hand, assert that the proposed financial protections have not been justified. (Petitioners at 59-79.) Significantly, however, the financial protections proposed herein should have no impact on Petitioners unless the concerns underlying those protections are realized (which, in effect, would legitimize those concerns).

Arguments as to the financial risks raised by the proposed transaction have been litigated fully and briefed, and need not be repeated here. Importantly, however, all or most of the financial protections for customers proposed herein only would become effective if Iberdrola's financial condition weakens materially. (See, e.g., Staff at 135-52.) For instance: (a) certain protections related to credit quality would become effective only if NYSEG or RG&E is subject to a credit downgrade (Tr. 1405); (b) certain protections related

to dividend restrictions would become effective only if NYSEG and RG&E's credit rating is at the lowest investment grade and also is subject to negative watch or review downgrade notices (Tr. 1407); and (c) certain protections related to a "golden share" would impact Iberdrola only if, due to its financial condition, plans were put in place to force NYSEG and/or RG&E into bankruptcy (Tr. 1411-14).

Thus, the financial protections for customers proposed in this proceeding should not have any detrimental impact on Petitioners unless, of course, the concerns underlying those protections are realized, in which case the protections were more than justified. This issue springs to mind the Benjamin Franklin quotation, "An ounce of prevention is worth a pound of cure." In this proceeding, the benefits provided by the financial protections, if needed, far outweigh the burden on Petitioners if such protections ultimately prove unnecessary. Accordingly, the Commission should condition merger approval on acceptance of extensive, meaningful and enforceable financial protections for customers.

POINT V

PETITIONERS' POSITION ON FINANCIAL TRANSPARENCY AND REPORTING SHOULD BE REJECTED

In their Initial Brief, Petitioners take issue with the reporting requirements proposed herein by Staff. (Petitioners at 71-73.) While Petitioners have accepted certain reporting requirements in an effort to address concerns raised by Staff and other parties, issues still remain. For the reasons detailed in its Initial Brief, Multiple Intervenors contends

that merger approval should be conditioned upon the adoption of robust reporting requirements, such as those proposed by the Staff Policy Panel. (MI at 45-52.)

Petitioners contend that “Staff’s concerns about the alleged financial transparency and reporting issues that could potentially arise from the Proposed Transaction are without merit.” (Petitioners at 72.) Multiple Intervenors disagrees. The specific reporting requirements proposed by Staff, and the adequacy of the specific measures proffered by Petitioners, already have been briefed by Multiple Intervenors and need not be repeated here. Importantly, however, in evaluating this issue, it is critical that the Commission not lose sight of the “big picture.”

The Commission and Staff currently have access to the books and records of Energy East, NYSEG and RG&E. Those books and records are maintained in English, and in accordance with familiar accounting principles. The Commission and Staff presumably are able to track and verify, for reasonableness, the allocation of all costs to NYSEG and RG&E customers. The proposed transaction, if consummated, could change the status quo. Iberdrola is a foreign corporation, with a much more complicated corporate structure, and follows different accounting principles. Staff’s timely access to documents in English also has been raised as an issue.

Multiple Intervenors does not believe that the proposed transaction should be rejected due to, inter alia, Iberdrola’s headquarters being outside of the United States, its more complicated corporate structure, or the fact that it follows different accounting principles. Importantly, however, it should be beyond dispute that the Commission and Staff – and, where appropriate, intervenors – need to have adequate access to the books and records of NYSEG and RG&E and, to the extent warranted, Iberdrola, Energy East, and

possibly other Iberdrola subsidiaries. Inasmuch as Petitioners are responsible for possible changes to the status quo as a result of the proposed transaction, Petitioners should be required to ensure, at a minimum, that the Commission, Staff and interveners are not prejudiced, or disadvantaged, by any detrimental changes with respect to reporting requirements and/or access to books and records.

From the perspective of customers, robust reporting requirements are critically important – the resolution of this issue is likely to impact the future ability of the Commission to set rates for NYSEG and RG&E that are just and reasonable. Accordingly, for the reasons set forth herein and in Multiple Intervenors’ Initial Brief, merger approval should be conditioned upon the Iberdrola’s acceptance of robust reporting requirements.

POINT VI

IBERDROLA’S COMMITMENT TO RENEWABLE GENERATION, WHILE LAUDABLE, IS DISTINGUISHABLE FROM THE PROPOSED ACQUISITION OF ENERGY EAST

Petitioners argue that the proposed transaction would provide benefits to New York as a result of “Iberdrola’s vast experience in successful renewables development, and commitment to support and encourage investments by Iberdrola Renewables, S.A.” (Petitioners at 25.) For the reasons set forth below, Iberdrola’s commitment to renewable generation, while laudable, is distinguishable from its proposed acquisition of Energy East.

Initially, it is important to point out that Iberdrola is not proposing to develop any renewable (e.g., wind) generation for the benefit of NYSEG and RG&E customers. Rather, Iberdrola plans to develop wind generation projects through Iberdrola Renewables,

an unregulated subsidiary, for its own financial gain. Toward that end, Iberdrola intends to take full advantage of federal tax credits and customer-funded subsidies made available by the Commission in Case 03-E-0188, the Renewable Portfolio Standard proceeding. (See Tr. 629.)¹⁰ Moreover, Iberdrola’s “commitment” to develop additional wind generation (see Ex. 50 at 2) is weakened by numerous caveats and conditions, and also represents only a very small percentage of the wind generation already under consideration for future development by Iberdrola Renewables. (MI at 58; see also Tr. 628-29; Ex. 57.)

Furthermore, Iberdrola’s development of new wind generation in New York is – or should be – unrelated to its acquisition of Energy East. Iberdrola, through subsidiaries and other arrangements, already has invested and developed substantial wind generation in the State without owning a regulated utility. Going forward, one would suspect that Iberdrola’s future development of wind generation would depend on project economics, and not on whether it owns the local electric transmission and distribution utility. Indeed, Iberdrola intends to develop substantial wind generation in other regions of the country where it is not attempting to acquire regulated utilities. (See Staff at 21-24.)¹¹

¹⁰ Case 03-E-0188, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard.

¹¹ Multiple Intervenors does not agree with Staff’s conclusion that Iberdrola’s plans to develop wind generation is a detriment of the proposed transaction, provided that adequate safeguards are in place to protect against the exercise of VMP. Multiple Intervenors generally is supportive of proposals to invest in New York’s energy infrastructure, and Iberdrola’s plans may increase generating capacity Upstate in a manner that also would contribute positively to the environment. Multiple Intervenors does, however, share Staff’s skepticism regarding Petitioners’ attempts to argue that Iberdrola’s interest and experience in wind generation – which it can be expected to pursue through an unregulated subsidiary for its own profit – constitutes a material, positive benefit of the merger where there is no evidence that the transaction truly is necessary to realize such benefit.

Multiple Intervenors believes Iberdrola's commitment to renewable generation is laudable. Multiple Intervenors favors merger approval upon conditions that address and mitigate VMP concerns, but which also would not preclude Iberdrola Renewables' future development of wind generation in New York. (MI at 55-59.) Significantly, however, Iberdrola's planned development of wind generation in New York through an unregulated subsidiary for its own profit is distinguishable from its proposal to acquire Energy East. While Iberdrola's indirect ownership of wind generation, subject to conditions that mitigate VMP concerns, should not constitute a bar to merger approval, it also should not be construed as a large benefit to customers alleviating the need for financial and other tangible benefits to compensate for the costs and risks of the proposed transaction.

POINT VII

PROPOSED ADJUSTMENTS TO NYSEG AND RG&E ELECTRIC AND GAS RATES DO NOT CONSTITUTE UNILATERAL MODIFICATIONS OF EXISTING RATE PLANS

In its Initial Brief, Multiple Intervenors demonstrated that merger approval should be conditioned upon, *inter alia*, substantial financial and rate-related benefits to customers. (MI at 12-28.) Multiple Intervenors also advocated that in addition to a substantial amount of positive benefit adjustments ("PBAs"),¹² the Commission should consider adopting all or most of the one-time rate adjustments proposed by Staff in this

¹² PBAs refer to financial benefits to be provided to NYSEG and RG&E customers if the proposed transaction is consummated. (See, e.g., Tr. 1367, 1676-77, 1737-38.)

proceeding. (*Id.* at 23-24.)¹³ Petitioners, however, argue that the one-time rate adjustments are beyond the scope of this proceeding because they collectively would constitute a “unilateral modification” of existing rate plan provisions. (Petitioners at 83-84.) For the reasons set forth below, Petitioners’ argument is without merit.

Initially, Multiple Intervenors submits that it is wholly appropriate for the Commission to address existing rate levels in this proceeding. Indeed, virtually every merger authorized by the Commission involving a New York electric and/or gas utility during the last decade has addressed rate levels in some manner (predominantly through negotiated rate plans).¹⁴ Addressing existing rate levels – for instance, by reducing them by a material amount – also serves the dual purpose of providing positive, tangible benefits to customers and offsetting potential costs and risks related to the proposed transaction.

Moreover, Petitioners simply are wrong when they characterize Staff’s proposed one-time rate adjustments as unilateral modifications of existing rate plan provisions. Staff’s position is that the proposed transaction should be rejected, but, if, arguendo, the Commission is inclined to approve it, such approval should be subject to numerous conditions, including the adoption of the one-time rate adjustments. (*See, e.g.*, Tr. 1147.) Thus, the one-time adjustments proposed by Staff would require acceptance from Iberdrola to be implemented as part of this proceeding. In fact, on cross-examination, Petitioners Rate Adjustments Panel conceded that because the one-time rate adjustments are

¹³ Multiple Intervenors’ advocated further that if, arguendo, the Commission is not inclined to approve the one-time adjustments at this time, such adjustments should be preserved for consideration in future rate proceedings. (*See id.* at 24.)

¹⁴ *See, e.g.*, Case 06-M-0878, supra, Abbreviated National Grid Order and National Grid Order.

premised upon acceptance by Iberdrola, their adoption would not violate existing rate plans applicable to NYSEG and RG&E. (Tr. 449.)

None of the one-time rate adjustments proposed by Staff in this proceeding would constitute a unilateral modification of an existing rate plan. Rather, the rate adjustments have been advanced as conditions of merger approval, thereby requiring acceptance by Iberdrola as a prerequisite to implementation.¹⁵ Accordingly, they should be considered, and adopted, for use as conditions of merger approval.

POINT VIII

PETITIONERS' ARGUMENTS THAT THE POSSIBLE TAKEOVER OF IBERDROLA RAISES NO CONCERNS LARGELY ARE WITHOUT MERIT

At the conclusion of the evidentiary hearing, Administrative Law Judge Rafael A. Epstein informed the active parties that he intended to present to the Commission issues relating to the potential takeover of Iberdrola. (Tr. 1898-1903.)¹⁶ In its Initial Brief, Multiple Intervenors demonstrated that the possible takeover of Iberdrola increases the risks associated with the proposed transaction. (MI at 66-71.) Petitioners, on the other hand, argue that concerns over potential future changes in control of Energy East (e.g., if Iberdrola

¹⁵ Of course, if Iberdrola declines to accept whatever conditions are imposed on merger approval, Staff and other parties would be eligible to advance the same or similar rate adjustments in future proceedings. Additionally, the Commission retains the authority to modify rate plan provisions where necessary to ensure that rates are just and reasonable.

¹⁶ See also Case 07-M-0906, supra, Letter from Judge Epstein to Active Parties (dated April 4, 2008).

is acquired in a subsequent transaction) are unwarranted. (Petitioners at 81-83.) For the reasons set forth below, Petitioners' arguments on this issue are without merit.

Initially, Petitioners argue that: (a) "no party has indicated that this should be of concern to the Commission at this stage"; and (b) they "are aware of no prior Commission proceeding under Section 70 or any similar law in which speculation as to possible future transactions has been made an issue." (*Id.* at 81, n.69.) With respect to the first statement, Multiple Intervenors notes that Staff filed a motion, dated February 5, 2008, seeking a change in the schedule "in response to recent developments involving other companies' possible attempts to acquire Iberdrola or its assets."¹⁷ The possible takeover of Iberdrola also was the subject of testimony and an exhibit during the evidentiary hearing. (Tr. 603-04; Ex. 58.) The fact that the hearing was allowed to proceed – and that Petitioners effectively squelched cross-examination on the issue by declining to comment on published reports regarding a possible takeover (Tr. 604) – does not indicate a lack of concern among the active parties regarding the future ownership of Iberdrola (and, by extension, Energy East, NYSEG and RG&E).

With respect to the latter statement, Multiple Intervenors asserts that the reason for Petitioners' lack of familiarity with other Commission proceedings addressing this issue is that the proposed transaction probably is the first time the issue has arisen. While not unprecedented, there simply have not been many occasions where a foreign corporation has sought to acquire a New York regulated utility or its parent. To Multiple Intervenors' knowledge, no foreign corporation has sought to acquire a New York regulated utility or its

¹⁷ See Case 07-M-0906, *supra*, Procedural Ruling on Scheduling (issued February 25, 2008) at 2.

parent while itself being the subject of intense takeover speculation.¹⁸ The Commission is being asked to authorize a Spanish utility to acquire Energy East, NYSEG and RG&E amidst reports that said Spanish utility may be the subject of an imminent takeover attempt by multiple European corporations. To even imply that the Commission need not concern itself with that prospect is preposterous.

Next, Petitioners acknowledge that a change in control of Energy East would be subject to Commission jurisdiction and approval pursuant to New York Public Service Law (“PSL”) section 70. (Petitioners at 82-83.) While its legal analysis is different in some respects, Multiple Intervenors agrees with Petitioners’ conclusion regarding the scope of the Commission’s jurisdiction. (MI at 67-69.) Significantly, however, Petitioners failed to address either of the two significant risks raised by Iberdrola’s uncertain status.

First, Energy East currently owns NYSEG and RG&E. While the Commission may conclude that Iberdrola’s acquisition of Energy East, with conditions, is in the public interest, there is a chance that a different conclusion would be reached with respect to one or more potential suitors for Iberdrola. Thus, NYSEG and RG&E customers would be exposed to risks related to possible attempts to acquire Iberdrola and that company’s responses thereto.

Second, there is a risk that suitors for Iberdrola may not recognize – or may contest – Commission jurisdiction. For instance, one rumor regarding Iberdrola involves a potential joint takeover attempt by Electricite de France S.A. (“EDF”), a French company, and Actividades de Construcción y Servicios S.A. (“ACS”), a Spanish company. (See Ex. 58

¹⁸ See, e.g., Ex. 58; see also Matthew Karnitschnig, *et al.*, *\$100 Billion Power Deal Moves Closer in Europe*, WALL STREET JOURNAL, March 21, 2008, at A1 (reporting that “French and Spanish companies are in advanced discussions about pursuing” Iberdrola).

at 2.) Under that scenario, would EDF and ACS consent to Commission jurisdiction? Would they abandon their efforts to acquire Iberdrola if, for instance, the Commission concluded that such a transaction was not in the public interest? Given the size of any potential transaction involving ownership of Iberdrola, the lack of nexus to the United States, and rumors that EDF and ACS would seek to “spin off” Iberdrola’s non-European assets, it would be naïve simply to assume that the Commission will have the last word on the future fate of Iberdrola.

Thus, while Multiple Intervenors does not disagree with the thrust of Petitioners’ legal analysis, the potential takeover of Iberdrola does raise certain risks to NYSEG and RG&E customers. Importantly, Multiple Intervenors does not contend that such risks warrant the rejection of proposed transaction. As detailed throughout its Initial Brief, Multiple Intervenors supports the proposed transaction between Iberdrola and Energy East, provided that merger approval is subject to numerous conditions designed to produce financial and other tangible benefits and enforceable protections for customers. (See, e.g., MI at 4-5.) Accordingly, regarding the possible takeover of Iberdrola, Multiple Intervenors asserts that the circumstances presented herein warrant the adoption of additional protections that provide a strong incentive – or compulsion – for one or more foreign corporations to seek Commission approval before acquiring Iberdrola. (See id. at 70-71.)

CONCLUSION

For all the foregoing reasons, as well as the reasons advanced in its Initial Brief, Multiple Intervenors urges the Commission to approve the proposed transaction

between Iberdrola and Energy East, subject to numerous conditions intended to benefit and protect customers of NYSEG and RG&E.

Dated: April 25, 2008
Albany, New York

Respectfully submitted,



Michael B. Mager, Esq.
COUCH WHITE, LLP
Attorneys for Multiple Intervenors
540 Broadway, P.O. Box 22222
Albany, New York 12201-2222
(518) 426-4600

J:\DATA\Client4 11825-12199\11900\replybrief-04-25-08.doc