STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 09-E-0082 - New York State Electric & Gas Corporation for Electric Service - Rates.

CASE 09-G-0083 - New York State Electric & Gas Corporation for Gas Service - Rates.

CASE 09-E-0084 - Rochester Gas and Electric Corporation for Electric Service - Rates.

CASE 09-G-0085 - Rochester Gas and Electric Corporation for Gas Service - Rates.

CONSUMER PROTECTION BOARD POST-HEARING BRIEF ON DPS STAFF'S MOTION TO DISMISS

Mindy A. Bockstein
Chairperson and
Executive Director

Tariq N. Niazi
Acting Director of
Utility Intervention

Saul A. Rigberg
Intervenor Attorney

John M. Walters
Intervenor Attorney

Dated: March 13, 2009
Albany, New York

NYS CONSUMER PROTECTION BOARD
5 EMPIRE STATE PLAZA
SUITE 2101
ALBANY, NEW YORK 12223-1556
http://www.nysconsumer.state.ny.us

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 09-E-0082 - New York State Electric & Gas Corporation for Electric Service - Rates.

CASE 09-G-0083 - New York State Electric & Gas Corporation for Gas Service - Rates.

CASE 09-E-0084 - Rochester Gas and Electric Corporation for Electric Service - Rates.

CASE 09-G-0085 - Rochester Gas and Electric Corporation for Gas Service - Rates.

CONSUMER PROTECTION BOARD
POST-HEARING BRIEF ON DPS STAFF'S MOTION TO DISMISS

I. INTRODUCTION

The New York State Consumer Protection Board ("CPB") submits this post-hearing brief pursuant to a ruling by Administrative Law Judges ("ALJs") Elizabeth H. Liebschutz and William L. Bouteiller.[1] Based upon our analysis of the testimony and exhibits, the CPB urges the ALJs to recommend to the Public Service Commission ("PSC" or "Commission") that it grant the Motion to Dismiss filed by the Department of Public Service Staff ("DPS Staff") on February 11, 2009 ("DPS Staff Motion"). Granting the DPS Staff Motion would be consistent with the PSC's responsibility to ensure that rates are just and reasonable and that service is safe and adequate. It would also advance the integrity of the Commission and its orders and serve the public interest.

---

[1] Cases 09-E-0082 et al., supra, Ruling on Schedule to Address Preliminary Motion (issued February 20, 2009).

The CPB agrees with the DPS Staff that the PSC should dismiss, with prejudice, on two (2) independent grounds, the rate filings of New York State Electric & Gas Corporation ("NYSEG") and Rochester Gas and Electric Corporation ("RG&E") (together, "the Companies") for failure to satisfy the filing requirements established by the Commission. First, the PSC conditioned its approval of the acquisition by Iberdrola, S.A. ("Iberdrola") of Energy East Corporation ("EEC") and its subsidiaries, RG&E and NYSEG, on the Companies agreeing not to file rate cases for at least 12 months from the date of the closing, which occurred on September 16, 2008.[2] The condition contained one (1) specific exception, however. The Commission explained that RG&E and NYSEG would be allowed to file rate applications before the end of the 12-month stay-out period "upon a showing [for each utility separately] that its financial performance otherwise would fall to levels that would jeopardize its ability to provide safe and reliable service."[3]

The filings are fatally flawed because the record unequivocally demonstrates that no liquidity crisis exists or is imminent for either RG&E or NYSEG that would jeopardize the ability of either utility to continue to provide safe and reliable service over the next several years. It is the opinion of the CPB that, at the request of Iberdrola, its Spanish corporate grandparent, and with full knowledge and intention, EEC and the Companies used the widespread anxiety about the current financial crisis to mask the primary motivation for filing the request for $417 million in new cumulative rates in

[2] Case 07-M-0906, Iberdrola, S.A. et al. - Acquisition of Energy East, Order Authorizing Acquisition Subject To Conditions (issued September 9, 2008) ("September 2008 Acquisition Order"), at 12. The PSC later issued a longer Order Authorizing Acquisition Subject To Conditions on January 6, 2009 ("January 2009 Acquisition Order").

[3] Id.

2009-2010. That motivation was to transfer from their New York ratepayers over those two years $400 million in the form of dividends to Iberdrola.[4]

As the CPB stated at the February 11, 2009 Procedural Conference, the Companies' "sky-is-falling" alarm is an example of the now familiar trend of claiming the need for urgent action to avoid dire consequences. The strategy is to convince policy-makers that an emergency exists, and, consequently, that there is no time for a comprehensive analysis of the situation or for developing carefully crafted solutions. Rather than risk a catastrophe, however remote, the tendency is to go along with the request just in case there is a sliver of merit to it. The CPB urges the ALJs and the Commission to resist this approach.

Second, from a procedural perspective, the filings should be dismissed because they do not include the material required by the January 2009 Acquisition Order and Commission regulations for major rate filings. The PSC directed the Companies to include in their next rate filings "all studies, analyses and related work papers prepared by Iberdrola, its subsidiaries, affiliates, or agents that identify or quantify the costs and savings related to merger synergies, efficiency gains, and the adoption of utility best practices that in any way affect the management, operation and underlying costs of NYSEG's and RG&E's utility business."[5] This they did not do. Additionally, missing from the Companies' filings is information required by Commission regulations and policies for major rate filings, such as embedded cost of service studies, which allow for the development of a record that is legally adequate on which to base a decision.

---

[4] Exh. 10, at 1, 2.

[5] January 2009 Acquisition Order, at 140-141.

II. BACKGROUND

Analyzing the instant filings is aided by an appreciation of the context in which the filings were made.

A. Iberdrola's Assurances

During the Acquisition Proceeding Iberdrola, EEC and the Companies repeatedly told the Commission and the interested parties what they wanted to hear, namely, that with Iberdrola, a leading global utility and energy company, on the scene, the Companies and their ratepayers would benefit from easier and cheaper access to global capital markets and by Iberdrola sharing with the Companies its knowledge of utility best practices. Indeed, the Acquisition Proceeding Record is replete with assurances that Iberdrola would infuse capital into the New York utilities whenever the situation warranted.[6] Based on these and other assurances, the PSC approved the acquisition with conditions in September 2008. The Companies promptly accepted all of the conditions imposed by the PSC, including the stay-out provision that is the subject of the DPS Staff Motion.

Unfortunately, just four (4) months later, the Companies seem to have gone back on their word by violating an important condition established by the PSC in approving the Iberdrola acquisition. Rather than pruning waste and excess spending from their operations and/or adopting best practices to maintain manageable rates for their customers suffering from the worsening economy, the Companies are tapping into the anxiety caused by the current economic situation to raise rates that they claim would impress credit rating agencies. The resulting revenue increase, if approved by the Commission, would allow the

[6] See, for example, Acquisition Proceeding Record, at Tr. 476, 489-90, 507, 509, 553, 766-767, and 1776.

Companies to transfer $400 million of ratepayers' money to Iberdrola, the very same global corporation that asserted its access to global markets and its expertise would benefit the Companies' customers.[7]

The Companies' filings provide evidence that multi-national corporations have little interest in the health and welfare of local communities. Indeed, Iberdrola's CEO, Ignacio S. Galan, candidly suggested that individual utility commissions can easily be manipulated. Mr. Galan explained that Iberdrola would invest in only those subsidiaries among its many global holdings that provide the highest returns. In a January 29, 2008, Reuters article entitled "Energy Chiefs Debate the Cost of Energy," he is quoted as saying: "We can be part of the solution or **we can make more problems**. If we will not get a proper return, **we will not make the investment**."[8]

B. The Filings

On January 27, 2009, the Companies filed tariff amendments to increase their combined electric and gas rates by $417 million over the eighteen (18) months beginning July 1, 2009, and ending December 31, 2010.[9] According to the Companies, this important decision for emergency rate treatment was made by the NYSEG and RG&E Boards of Directors based upon an oral rather

---

[7] See, for example, Acquisition Proceeding Record, at Tr. 489-90.

[8] Exh. 33; emphasis added. Had Mr. Galan made this comment during the Acquisition Proceeding, it is possible that the Commission's decision would have been different.

[9] Perhaps responding to pressure from the CPB and the other parties, in responses to interrogatories and cross-examination, the Companies stated that they will remove from the cost of service expenses related to incentive compensation (approximately $17 million in both 2009 and 2010). Exh. 18 at 19; Tr. 451. The Companies also stated that they will be removing the 3% salary increase for non-union employees from the rate request. Tr. 318.

than a written report from management.[10] This suggests a lack of care for their ratepayers and an absence of serious consideration of the complicated issues raised by the filings.

The Companies' Policy Panel testified that the "vast majority" of the rate request is needed to recover costs related to four (4) categories.[11] These are: (1) previous deferrals and adjustments[12]; (2) operations and reliability ($104.9 million in 2009; $171.2 million in 2010[13]);(3) pension expense ($12.2 million in 2009; $11.5 million in 2010[14]); and, (4) low-income assistance ($20 million each year[15]).

A multitude of contortions, which had the effect of deflating revenue and inflating expenses, were pursued by the Companies to arrive at the urgent pronouncement of the necessity of a quick rate increase. For example, the Companies did not include in the list of major rate increase drivers: (1) dividend payments, which are budgeted at $211.7 million in 2009 and $189.3 million in 2010[16]; (2) discretionary pay off in 2009 to

---

[10] Exh. 20 at 15; Tr. 446.

[11] Tr. 233.

[12] The dollar amounts the Companies assigned to previous deferrals are unclear on the record; regarding future deferrals, the Companies budgeted $76.3 million for 2009 and $78.8 million for 2010. Tr. 826-27; Exh. 43.

[13] Exh. 43. The CPB is particularly troubled by the Companies' statement that without rate relief they could not even fund the $540 million in capital projects previously required by the Commission in the Acquisition Orders and agreed to by the Companies just a short time ago. Tr. 299; Exh. 11.

[14] Exh. 43.

[15] Tr. 760.

[16] These figures are derived from Exh. 10, which shows the Companies' understanding of its funding requirements *with* rate relief. According to Exh. 8, which shows the Companies' understanding of its funding requirements *without* rate relief, the 2009 dividend figure is $111.8 million and the 2010 dividend figure is $90.0 million. This 2009 dividend figure differs from the figure that appears on Exh. 43, which the Companies prepared, in conjunction with DPS Staff, to compare the Companies' cash flow projections *without* rate relief to DPS Staff's. On Exhibit 43, the Companies included commodity

EEC of a loan, amounting to $110.5 million[17]; (3) discretionary reimbursement in 2009 in the amount of $84 million to free up a credit facility; (4) future deferrals of $76.3 million in 2009 and $78.8 million in 2010[18]; and, (5) $46 million to support an increase in the Return on Equity ("ROE") from the authorized 10.1%[19] to 12.0% for NYSEG and 12.2% for RG&E.[20]

Occasionally, the effort required to put the filings together in a manner that they would appear cohesive resulted in a confused presentation. For instance, it is sometimes not clear when the Companies are referring to *past* expenses or *future* expenses, or to expenses that would be incurred *with* a rate increase or those that would be incurred *without* a rate increase.

Another example of a less than clear presentation based on nuanced statements by the Companies involves payment of incentive compensation related to work on the Iberdrola acquisition transaction. During cross-examination, the Companies' witness Robert Kump stated: "As part of the change in control there were certain required payments that certain executives had with respect to incentive compensation."[21] Another witness of the Companies, Joseph Syta, clarified that statement shortly thereafter, stating:

---

revenues of $7.5 million for 2009, which they had ignored in their pre-filed cash flow analysis, resulting in a 2009 dividend figure of $119.3 million; the two-year total is $209.3 million.

[17] Exh. 43.

[18] Exh. 43.

[19] January 2009 Acquisition Order, at 141.

[20] Exh. 1, Pre-filed Direct Testimony of the NYSEG Revenue Requirements Panel, at 12, Pre-filed Direct Testimony of the RG&E Revenue Requirements Panel, at 12; Tr. 415-16, 706.

[21] Tr. 425.

> And because the merger occurred, there was a number of incentive payments that were related to the period prior to the merger that became due and payable as a result of the merger consummating. Not incentives or bonuses earned because the merger consummated, but incentives and bonuses earned for the period up through December 16, 2008."[22]

These statements contrast with the Companies' response to interrogatory CPB-3, which states: "There have been no NYSEG, RGE (sic) or Energy East employees who have received severance compensation upon the consummation of the merger of Iberdrola and EEC."[23]

C. Effect of Increased Rates

For RG&E, the proposed amendments would produce for the twelve-month period from July 1, 2009 to June 30, 2010, an increase in rates of about $65.5 million (excluding revenue taxes) or 11.1% of total electric revenues (24.2% of total electric delivery revenues) and about $32.8 million (excluding revenue taxes) or 5.0% of total gas revenues (23.8% of total gas delivery revenues).[24]

For NYSEG, the proposed amendments would produce for the twelve-month period from July 1, 2009 to June 30, 2010, an increase in rates of about $133 million (excluding revenue taxes) or 7.3% of total electric revenues (22.3% of total electric delivery revenues) and about $42 million excluding

---

[22] Tr. 426.

[23] This response, which the Companies designated NYRGE-0286, is not part of the record. The CPB does not refer to the response to advance any particular substantive position, but, rather, to illustrate the type of problems created by overly nuanced presentations.

[24] Cases 09-E-0084 and 09-G-0085, <u>RG&E - Electric and Gas Rates</u>, Order Suspending Major Rate Filings (issued February 12, 2009).

revenue taxes) or 6.0% of total gas revenues (26.0% of total gas delivery revenues).[25]

According to DPS Staff: "Typical residential customers using 600 kWh of electricity and 100 therms of gas could see increases amounting to $211-254 per year should the filings be approved."[26] Such a significant increase should not be considered lightly. New York's upstate economy is in distress and the State's economy overall is in a downturn. In 2007, the median household income was less than $45,000 and 20 to 30 percent of the population across the region earned below the poverty level.[27] Increasing utility rates at this stressful time will exacerbate the economic problems facing the upstate region.

The Companies suggest the eventual possibility of gas explosions, curtailments and blackouts if their demands are not met. Despite their stated concern about preserving safety and reliability, the Companies insist that it would be "confiscatory"[28] not to transfer virtually the entire amount of the rate increase borne by upstate ratepayers—some $400 million—to its corporate grandparent located in Spain.

III. FINANCIAL HEALTH OF THE COMPANIES

The Companies claim that without a revenue increase the rating agencies will downgrade the Companies' investment rating, resulting in their inability to borrow money on reasonable terms for necessary capital projects. This, in turn, they continue,

---

[25] Cases 09-E-0082 and 09-G-0083, NYSEG - Electric and Gas Rates, Order Suspending Major Rate Filings (issued February 12, 2009).

[26] Tr. 705-06.

[27] See www.factfinder.census.gov.

[28] Tr. 315.

would jeopardize their ability to provide safe and reliable service. While the CPB asserts that the Companies have not provided compelling evidence that this scenario is likely, an examination of the Companies' budget projections reveals a more fundamental finding, namely, the absence of a real liquidity problem. The critical question, accordingly, is not whether the Companies are able to borrow money on reasonable terms absent a rate increase, but whether the Companies need the money in the first place. It is the opinion of the CPB that, during a deep recession, it is not prudent to raise rates to pay dividends and embark upon expensive discretionary capital projects and other non-essential activities.

A. Cash Flow

The record testimony and exhibits show that the Companies have sufficient cash to fund their reasonable needs.

1. Exhibit 43

This exhibit, prepared by the Companies and reviewed by DPS Staff, compares the cash flow figures *without* rate relief developed by the Companies to the comparable figures developed by DPS Staff. According to DPS Staff, the Companies will experience a negative cash flow of $34.5 million in 2009 and a positive cash flow of $117.0 million in 2010, resulting in a *positive* cash flow over the two (2)years of $82.6 million. The Companies project a *negative* cash flow of $571.6 million in 2009 and a negative cash flow of $277.5 in 2010, for a two-year total of negative $931.7 million. The CPB discusses seven (7)of the primary components of this substantial difference.

a. Commodity Income

In their original filings, the Companies did not include commodity revenues in their cash flow analysis.[29] DPS Staff used an historical five-year average to arrive at commodity revenues of $17.5 million for 2009 and 2010.[30] The Companies disputed that figure for 2009, offering $7.5 million instead due to projected reductions in commodity prices and sales.[31] For 2010, the Companies stated that there would be no commodity income because they recently filed with the PSC to end the fixed price option.[32] DPS Staff witness Thomas D'Ambrosia testified that the Companies did not explain why they think it is a good idea to forego this risk-free income when they claim they have a negative cash flow, and intimated he would advise the Commission to deny the Companies' request.[33]

b. Pension

The Companies assert that their pension and other post-employment benefits ("OPEBs") cost categories are traditionally over funded but with the recent turmoil in the markets, pension and OPEB plans "are currently in a net underfunded position".[34] The Company claims that if further deterioration in funding levels occurs, they run the risk of having to put more money in the pension and OPEB funds to offset these potential shortfalls, which they contend would further exacerbate the Companies

---

[29] Tr. 819.

[30] Id.; Exh. 43.

[31] Tr. 324; Exh. 43.

[32] Tr. 820.

[33] Tr. 821-24.

[34] Tr. 256

alleged cash flow and liquidity issues as described in the Company's testimony.

According to DPS Staff testimony, the Company proposes to offset the pension deferrals by utilizing a new surcharge.[35] Staff contends that use of a surcharge would not affect earnings and therefore would increase revenues. Staff contends that it would remove the corresponding revenues associated with the surcharge resulting in a revenue neutral transaction because pension expenses are reflected as a reduction in income but that they are not a cash flow item and should be added into cash flow.[36]

Pursuant to the PSC's policy statement on pensions and OBEBs,[37] utilities must account for all pension and OPEB expenses by deferring any difference between the amount of the costs it experiences and the expense it is allowed to recover in its rates. The Company is proposing to offset the pension deferrals mandated by the policy statement through use of a surcharge, not base rates. Mr. D'Ambrosia stated that if the proposed surcharge were eliminated, the deferral would not be allowed to be amortized and would be dealt with as a rate item in the next rate case, which is in accord with what was prescribed in the Acquisition Orders.[38]

---

[35] Tr. 877

[36] Tr. 768, 878

[37] See Case 91-M-0890, Accounting and Ratemaking Treatment for Pensions and Post-Retirement Benefits Other than Pensions, Statement of Policy and Order Concerning the Accounting and Ratemaking for Pensions and Post-Retirement Benefits Other than Pensions (issued September 7, 1993).

[38] Tr. 880.

c. Deferrals

The major deferral items in contention relate to pensions, environmental remediation and storm recovery.[39] The Company Panel testified: "Assuming continuation of the types of costs that have been deferred over the last two (2) years, the Companies could well experience an ongoing annual shortfall in cash collections of over $70 million for costs associated with storms, environmental testing, Stray Voltage, Pipeline Integrity and Property Taxes."[40]

DPS Staff explained that the Companies assumed a large increase in those spending categories with little supporting analysis. For instance, DPS Staff testified, "the Companies are expediting funding on environmental remediation programs (to $51 million) whose timing appears to be discretionary."[41] Mr. D'Ambrosia further stated that he was "not going to speculate as to whether or not the Company will incur hypothetical storm cost…"[42] He explained that he assumed that the allowances built into rates for these items by the Commission were at "just and reasonable" levels, and that no increase was warranted.[43]

d. Capital Expenditures

The Companies assert that rate relief is needed to fund $276 million of capital projects necessary for the continued

---

[39] Tr. 320.

[40] Tr. 321.

[41] Tr. 760.

[42] Tr. 824.

[43] Tr. 824-25, 830-31.

provision of safe and reliable service.[44] This is in addition to the $540 million previously authorized by the Commission. DPS Staff does not agree that the incremental spending is needed, noting that almost all of the supposedly new projects discussed by the Companies were known to the parties during the Iberdrola Acquisition Proceeding and were part of the previously-approved $540 million for capital projects.[45] The most costly of the new activities discussed by the Companies ($51.7 million in 2009; $73.0 million in 2010) are potential federal regulatory mandates.

i. ERO Projects[46]

The Federal Energy Regulatory Commission ("FERC") is considering changing the way in which New York and other northeastern utilities define the Bulk Electric System ("BES") to achieve uniformity nationwide. This initiative resulted from an amendment to Section 15 of the Federal Power Act that is contained in the Energy Policy Act of 2005. The amendment directed FERC to adopt mandatory and enforceable reliability standards for the Bulk Power System ("BPS"), of which the BES is a subset. The CPB disagrees with the Companies that the costs associated with this potential change should be included in the cash flow analysis because the FERC proceeding is pending, the potential projects have not been defined. The costs, therefore, are unknown, and it is doubtful that these projects would actually enhance reliability.

[44] The Company Panel reduced the sense of urgency somewhat in stating: The Companies have identified other key infrastructure projects that **may** be needed…" Tr. 330; emphasis added.

[45] Tr. 152-53.

[46] This section is drawn from the testimonies of the Companies' two Capital Expenditures, Reliability and Operations Panels (Tr. 593-98, 636-40) and DPS Staff's Service Quality and Reliability Panel. Tr. 155-61, 171-72.

The BPS consists of power plants, transmission lines and substations, and related equipment and controls that generate and move bulk electricity to points from which local companies distribute the electricity to customers. The North American Electric Reliability Corporation ("NERC"), the electric reliability organization ("ERO") that FERC assigned the task of developing and enforcing reliability standards, defines the BES as including the electrical generation resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100kV or higher.

NERC, however, has allowed regional reliability organizations to define the BPS and the BES in their own way. The Northeast Power Coordinating Council ("NPCC") is the regional reliability organization in which New York participates. Unique among the nation's regional reliability organizations, the NPCC's approach to defining the BES is related more to function rather than to any particular voltage level. Utilities in the northeast consider the BES as consisting of transmission facilities 230kV and above, but lower voltage facilities on which faults and disturbances can have a significant adverse impact outside of the local control area are also included.

FERC is considering requiring a change to the NPCC's definition of the BES to include all facilities at the 100kV level and above. The Companies are seeking funding of the so-called ERO projects in anticipation of FERC deciding to have the NPCC impose the new definition on facilities that had been exempt under the 230kV/functional definition.

The Companies do not claim that without the ERO Projects, safety and reliability would be jeopardized. Indeed, the RG&E and NYSEG Capital Expenditures, Reliability and Operations Panels downplayed this item, explaining that the purpose of

their testimony about the ERO Projects "is to make the Commission aware of the significant impact that the potential expansion of the NERC ERO Standards will have on … customers, and define the total estimated cost of compliance."[47] Neither the Companies nor DPS Staff point to any shortcomings of the current and long-established 230kV/functional standard. In fact, the testimony suggests that the Companies are pleased with the service quality they have been providing to their customers.

The ERO Projects are not thought of as providing enhanced reliability. In their testimony, the Companies place them in the category of "Regulatory Mandates" and not in the category of "Costs That Are Necessary to Provide Safe and Reliable Service."[48] DPS Staff, moreover, notes that several of the parties in the FERC proceeding are concerned that the cost of complying with the new definition may outweigh negligible gains in reliability.[49] The New York State Reliability Council, which establishes the reliability criteria for the operation of the New York bulk power system, has suggested that the 100kV threshold may actually compromise reliability.[50]

Not only are the ERO Projects of questionable value to reliability, but it is unknown if, and when, FERC will change the definition of the BES and require full compliance. DPS Staff discussed some of the hurdles that must be overcome before implementation could even begin, including studying hundreds of facilities within New York to determine what upgrades are required.[51] Increasing rates now to fund possible future ERO

---

[47] Tr. 598, 641.

[48] Tr. 583, 586, 628, 637.

[49] Tr. 158-59.

[50] Id. at 159.

[51] Id. at 158.

Projects, budgeted in the aggregate at more than $124 million in 2009-10, is unnecessary, will not enhance reliability, and would be irresponsible at this time.

ii. Other Electric and Gas Capital Projects

DPS Staff explained that almost all of the projects listed by the Companies have been known for some time and are part of the capital plan that led the Commission to establish the $540 million aggregated capital budget for the four (4) companies.[52] It further states that the Companies have provided insufficient detail, such as scope of work and schedule, to support their claims.[53] The CPB agrees with DPS Staff that the Companies should manage their operations so as to fund these known projects.

The Companies' Transmission and Distribution Infrastructure Reliability Program (TDIRP) is designed to replace aging infrastructure and ensure continued delivery of safe and reliable electric service to customers.[54] DPS Staff rejected the Companies' bid to include these projects in the cash flow analysis because they were approved in previous rate cases and are part of the $540 million capital budget approved by the PSC. The Companies tacitly admitted this when they removed the word "incremental" before the words "capital investment" at the time it requested that the pertinent pre-filed testimony be entered into the record.[55] Accordingly, the $36 million projected for NYSEG's TDIRP in 2009-10[56] and the $23 million projected for

[52] Tr. 179-80, 223, 758-59.

[53] Tr. 165-66, 183.

[54] Tr. 161, 172.

[55] Tr. 581, 628.

[56] Tr. 581

RG&E's TDIRP in 2009-10[57] should be removed as an expense from the cash flow analysis.

Regarding gas capital projects, similar to the situation regarding TDIRP, the Companies fail to specify the individual projects critical for reliability that are not already part of the funding amounts determined adequate by the Commission ($20 million for each company annually in 2009 and 2010). In addition, no attempt has been made to sift through the projects to determine which must be done in the next two (2) years to preserve reliability and which can be deferred so as to stay within the allowed level of capital expense. Instead, the Companies just make the claim that without an additional $23.1 million ($13.3 million for NYSEG[58] and $9.8 million for RG&E[59] in 2009-10) for gas capital projects they would be unable to provide safe and reliable service. The Companies fail to note that expansion of subdivisions and commercial endeavors, one reason given for increased gas spending,[60] have slowed due to the recession.

Quickly forgotten, apparently, is the sworn testimony in the Acquisition Proceeding:

> Iberdrola seeks no changes to the planned transmission and distribution improvements being undertaken by NYSEG and RG&E. With respect to new infrastructure projects, the Proposed Transaction will provide NYSEG and RG&E with additional financial stability and a greater ability to access capital.[61]

---

[57] Tr. 628

[58] Tr. 609-10.

[59] Tr. 663-64.

[60] See, for example, Tr. 609.

[61] Acquisition Proceeding Record, at 491.

Significantly, both of the Companies' Capital Expenditures, Reliability and Operations Panels admit that their lists of reliability-related projects contain projects that can be deferred without jeopardizing service.
They testified:

> If funding is reduced, the Company would be compelled to explore all reasonable and available options to reduce the costs of particular projects, without jeopardizing safe and reliable service and while continuing to comply with applicable regulations. Such options could include, determining an order of priority for completion of planned and pending projects, areas where cost can be reduced, or whether to delay components of certain projects.[62]

These projected costs should be removed from the cash flow analysis.

e. Revolving Credit Facilities

The Companies' Policy Panel testified that the Companies have fully utilized their available revolving credit facilities.[63] They claim that they have virtually no "liquidity cushion" to allow them to respond properly to emergency situations such as major storms.[64] The current credit facilities expire in 2012.[65] The Companies failed to advise the parties and the ALJs of a critical fact, however. DPS Staff witness Craig Henry testified:

---

[62] Tr. 582, 628-29. See, also, Tr. 271. Of course, a prudent utility would perform this exercise before filing for a rate increase during a recession.

[63] Tr. 248, 359.

[64] Tr. 265, 359.

[65] Tr. 358.

> One of the attributes of the revolving credit agreement that the Companies have is the ability—it's an **accordion feature** where the Companies can increase the amount they borrow under the revolving credit agreement by an **additional hundred million**. To my knowledge, the Companies have not availed themselves of that option. And we believe if a storm were to be—if there were to be a storm, that the Companies would avail themselves of that.[66]

After the close of the hearing, the Companies submitted "Response to On-the-Record Request Exhibit A." This document indicates that each of the two credit facilities may be increased by $100 million. There is, therefore, no compelling reason to reimburse the credit facility at this time.

f. Reimbursing EEC

The Companies propose to repay in 2009 a $110.5 million loan from EEC.[67] The Companies' witness Robert Kump further testified that EEC "has its own liquidity needs so that [it] needs to get repaid…"[68] This discretionary decision makes no sense at this time because, according to the Companies' witness, the loan has no fixed term.[69] The Companies testified that doing this would improve its credit ratings and, therefore, makes it easier to borrow capital on reasonable terms.[70] This is circuitous logic. It is much more efficient and certain to

---

[66] Tr. 862.

[67] Exh.8, at 1; Exh. 43.

[68] Tr. 359.

[69] Id.

[70] Tr.

maintain the status quo because it cannot be known how credit rating companies will react or when the economy will recover.

g. Dividends

The Companies' point to $209 million in dividends it "owes" Iberdrola in 2009 as an example of why rate relief is needed. In its direct testimony, the Companies stated that Iberdrola and EEC should recover dividends because they "have their own liquidity needs"[71] and not to provide dividends would be "confiscatory."[72] Yet, perhaps in response to the strong negative reaction of the other parties regarding the payment of dividends, on cross-examination Mr. Kump softened the Companies' claims. He testified: "No. I wouldn't say it's a need to resume [dividends]."[73] Mr. Kump later testified that paying dividends was not the only way to pay investors; it "could mean dividends" and it "could mean interest expense."[74]

The almost 25% increase in delivery rates that the Companies seek to fund this massive transfer of wealth from New Yorkers to the Spanish corporation would have a significant financial impact on ratepayers in the Companies' service territories. The Companies acknowledged the difficult economic circumstances of their customers while explaining the need to offset declining sales and higher uncollectibles and why their low-income programs should be expanded.[75]

---

[71] Tr. 740.

[72] Tr. 315,

[73] Tr. 345; see, also, Tr. 380-81.

[74] Tr. 393.

[75] Tr. 245, 472.

In this tumultuous economic climate, no investor, even Iberdrola, should expect dividends. The CPB understands that Iberdrola acquired the Companies to make a profit, but like any business transaction, this one was not risk-free. Moreover, the Companies understand at a visceral level that sometimes dividends have been withheld, stating: "It is highly unusual for public utilities not to provide dividends for their shareholder(s)."[76]

The CPB agrees with DPS Staff that the PSC has the authority on its own motion under the Public Service Law to restrict a utility's issuance of dividends if necessary to protect the public interest.[77] Iberdrola and the Companies understand this concept. During the briefing stage of the Acquisition Proceeding, these parties stated: "Staff's speculation that Iberdrola will drain the capital of NYSEG and RG&E is unwarranted, and disregards not only Iberdrola's intentions, integrity and historic practice globally, but also the Commission's ongoing ability to utilize its regulatory powers to ensure that the operating companies provide safe and reliable service."[78] Sworn testimony in the Acquisition Proceeding provided similar assurances that Iberdrola would not permit a payout of dividends to jeopardize the financial standing or operational integrity of the Companies.[79]

The Commission has imposed restrictions on dividends when the financial health of a utility appears so weak as to

[76] Tr. 308.

[77] Tr. 944.

[78] Petitioners' Reply Brief, Acquisition Proceeding, at 67.

[79] See, for example, Acquisition Proceeding Record at Tr. 476, 489-90, 507, 509, 553, 766-767, and 1776.

jeopardize service[80] and when it is approving a merger or acquisition to ensure that the new parent does not jeopardize service by draining cash from the utility.[81] Presciently, it appears, the PSC explained in the January 2009 Acquisition Order that:

> [D]ividend restrictions are a key mechanism for ensuring that utilities are not stripped of cash when events negatively affect either the holding company parent or the utility itself. These mechanisms are required to ensure the utility's continuing financial viability, and thus its provision of safe and adequate service, as well as to provide insulation from events adversely affecting the holding company.[82]

In this regard, the CPB finds merit in Multiple Intervenors' suggestion that even if the Commission were to find that the Companies' financial health did not meet the required standard for filing early rate cases, then the Commission may nevertheless decide to impose dividend restrictions in order to prevent the Companies' financial health from declining to an unacceptable level.[83] Certainly, these are unusual times; if the Companies are having a cash flow problem, Iberdrola is not entitled to dividends as a matter of right during a severe recession.

---

[80] See, for example, Case 29232, Wanakah Water Company - Water Treatment Facility, Opinion No. 87-9, Opinion and Order Concerning Water Treatment Facility (issued May 11, 1987).

[81] See, for example, Case 06-M-0878, Grid-Keyspan Merger, Order Authorizing Acquisition Subject to Conditions (issued September 17, 2007), at 125.

[82] Page 40.

[83] Tr. 947.

2. Austerity Measures/Best Practices

The Companies' Policy Panel testified that the Companies are taking "aggressive measures" to conserve liquidity, including restricting hiring, reducing operating expenses, and delaying vendor payments.[84] The Companies did not quantify the dollar value of these measures in pre-filed testimony,[85] but suggested at the hearing the measures saved $6 million during the last quarter of 2008.[86] Nevertheless, Mr. Syta testified during cross-examination that the Companies' filing "does not assume continued austerity because it assumes appropriate levels of rate relief."[87] Thus, there seems to be no concern about squandering ratepayers' money. The following question and answer is revealing:

> Q. Judge Bouteiller: "Might we say business as usual for your statement of operations for 2009?"
>
> A. Mr. Syta: "That's a fair statement."[88]

The Companies' witness James Laurito testified that no single synergy saving, single efficiency gain, or single best practice has been identified.[89] This conclusion is disappointing considering that the Companies' witness in the Acquisition

[84] Tr. 258.

[85] Tr. 772.

[86] Tr. 434-35.

[87] Tr. 435.

[88] Id.

[89] Tr. 436-38.

Proceeding testified that best practice savings and, perhaps, synergy savings could be achieved.[90]

3. Rate Case Expense

The Companies budgeted $8 million for preparation and prosecution of this proceeding.[91] The Companies' witness Steven Adams suggested this was a bargain price because the previous NYSEG electric case cost $6.5 million whereas this proceeding involves four companies.[92] The $8 million figure may well be inadequate because, Mr. Adams explained: "We didn't anticipate this level of activity for a motion."[93] Additional costs would be incurred if the proceeding lasted beyond the contemplated expedited period.[94]

From the CPB's perspective, it is somewhat perverse for ratepayers to fund teams of lawyers and consultants whose job is to convince the PSC to raise rates. Certainly, shareholders (*i.e.*, Iberdrola) should bear the burden of this expense regardless how the Commission rules on the DPS Staff Motion. If it is found that no financial crisis exists such that reliability is jeopardized, then the Boards of Directors and management erred in making the filings. If it is found that the filings have merit, then one must inquire how the Companies ended up in that position so soon after having been acquired by Iberdrola; ratepayers should not bear the burden of mismanagement.

---

[90] Acquisition Proceeding Record, at 957.

[91] Tr. 475.

[92] Tr. 475, 478.

[93] Tr. 477.

[94] Tr. 477-78.

4. Parent Company Support

The Companies' Policy Panel testified:

> [B]eing indirect subsidiaries of a strong parent company does not mean that the parent company can or should subsidize its operating utility subsidiaries, particularly when equity returns are below reasonable levels and at times approximating the after-tax cost of debt. Like any potential investor, decisions by a parent company to invest equity in its subsidiaries are based upon available capital and the merits of balancing risk and return.[95]

These comments are consistent with the views of Mr. Galan, cited earlier. But, they are patently contrary to the assurances made by the Companies during the Iberdrola Acquisition Proceeding. The Companies' witness Steven Fetter, who also testified on behalf of the petitioners in the Iberdrola Acquisition Proceeding, apparently believed Iberdrola's assurances. He stated in that proceeding that "Iberdrola has indicated its intent to take the necessary steps to maintain both the financial standing and operational reliability of NYSEG and RG&E on a going forward basis after the merger has been consummated."[96] He gave as an example of such support the foregoing of dividends by the parent when the subsidiary is in distress.[97]

C. Earnings

The Companies claim that without rate relief their ROE would fall to a "confiscatory" 7% and their credit ratings would

---

[95] Tr. 269.

[96] Tr. 555.

[97] Tr. 556.

be downgraded.[98] This, they assert, would jeopardize their ability to borrow money at reasonable rates in order to fund capital projects, which, in turn, would jeopardize their ability to provide safe and reliable service. In fact, the Companies' current return is higher than the 10.1% recently authorized by the Commission.[99] The Company Panel testified that higher ROEs in the 12.0-12.2% range are required because "Staff's (sic) 10.1% is significantly below the cost of capital."[100]

The Companies referred to *Bluefield Water Works & Improvement Company v. Public Service Commission of The State Of West Virginia et al.*,[101] a decision of the United States Supreme Court, in support of its claim that its ROE (absent a rate increase) would be "confiscatory."[102] On cross-examination, Mr. Kump agreed that what he would consider "confiscatory" depends upon economic circumstances.[103] This quotation from the Supreme Court's decision in *Bluefield* explains that how one defines "confiscatory" should vary according to what is going on in the world.

> The company contends that the rate of return is too low and confiscatory. What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public

---

[98] Tr. 255.

[99] January 2009 Order Authorizing Acquisitions, at 141.

[100] Tr. 324-25.

[101] 262 U.S. 679; 43 S. Ct. 675; 67 L. Ed. 1176; 1923 U.S. LEXIS 2676 (1923).

[102] Tr. 311.

[103] Tr. 453-54.

> equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.[104]

It is disappointing that the Companies are seeking a higher ROE than they recently agreed to at a time when the global economy is under extreme stress.

D. Credit Ratings and Capital Markets Matters

The Companies argue that without a rate increase, their credit ratings will decline. Mr. Henry summarized a useful approach to understanding the credit ratings issue. He testified:

> Well, clearly Staff would not be advocating a downgrade for the companies. And we've already suggested that we think that the Company plays a large part and should be responsible for its credit ratings. That said, the fact that the companies are not—to our knowledge, there's no planned issuance for NYSEG for all of 2009, and that there is a planned issuance for RG&E for the end of the year to refund debt that is somewhere—it's currently they have a hundred million

[104] *Bluefield*, 262 U.S. at 693; 67 L. Ed. at 1183.

> at about 7.8 percent. So if we assume that a downgrade would cause the Company to issue debt at—perhaps let's just say that they were able to issue 8 percent before a downgrade, perhaps it would be 8.5, certainly we're not—the cost—the incremental cost of interest would be—would be undesirable if the Company weren't to step up and protect their credit rating. However, it would be—it would not be a very long period of time until rates would be reset, and the entire cost of capital could be reviewed and adjusted to current market conditions.[105]

Perhaps the most important statement on this issue was expressed by Mr. Fetter, who has experience as a regulator and a credit rater. He testified: "Regulators should act within their jurisdiction to provide the best decision from a public policy basis, and the credit rating agency would then make an assessment of how that best decision, based on public policy grounds, impact the credit profile of a regulated utility."[106] In this regard, it is important to remember that companies pay the rating companies to perform the rating analysis. Accordingly, the rating companies have a tendency to conclude what they believe their clients want them to. Witness the debacle of the credit rating companies assigning high ratings to companies that soon thereafter went bankrupt or received government bailout money.

[105] Tr. 855-56.

[106] Tr. 563.

IV. RELIABILITY AND SERVICE QUALITY[107]

The Companies accepted unconditionally in September of 2008 the Commission's determination that, for NYSEG electric, an annual capital allowance of $140 million for 2009 and 2010, and for RG&E electric, $90 million for 2009 and 2010, is sufficient to maintain safe and adequate service. The same was the case regarding the $20 million annually for each gas company. On page 1 of both RG&E's and NYSEG's December 8, 2008 Condition Assessment Report appears the assurance that the overall electrical system is in sound condition. Service and reliability, moreover, are up to Commission standards for both electric and gas.[108] Mr. Laureto was unable to state how quickly service would degrade in the absence of rate increase.[109] He agreed, however, there has not been a degradation of service to date.[110] If a critical situation were to develop, it is management's responsibility to manage the capital budget by directing resources to projects that have the greatest need.[111]

V. SUFFICIENCY OF THE RATE CASES

The Companies failed to satisfy their burden of going forward because the filings do not include information required by the PSC in its September 2008 and January 2009 Acquisition Orders. As a condition of Commission approval of the Iberdrola acquisition of EEC, the Commission ordered several items to be included in the Companies' next rate case filings. Specifically, the Commission ordered the Companies to include:

---

[107] The earlier part of this brief that addressed capital projects covered much of this topic.

[108] Tr. 153.

[109] Tr.442.

[110] Tr.441.

[111] Tr.163-64, 181-82, 190.

> in prefiled testimony as part of its next general rate case filings (whether within or outside the target period), all studies, analyses and related work papers prepared by Iberdrola, its subsidiaries, affiliates, or agents that identify or quantify the costs and savings related to merger synergies, efficiency gains, and the adoption of utility best practices that in any way affect the management operation and underlying costs of NYSEG's and RG&E's utility business.[112]

It is noteworthy that the Companies' rate filings contain none of these documents, nor have the Companies prepared any such documents. According to the Companies' testimony:

> Iberdrola did offer to share information about best practices. We don't have any plans at this point in time to perform those studies or analyses. There are none that exist today, but I think, as we have said in our proceedings, we always look to reduce costs.[113]

Additionally, as DPS Staff noted,[114] the Companies failed to file documents required by the Commission's August 30, 2007 Order on Capacity Release Programs in Case 07-G-0299, which *inter alia* required NYSEG and RG&E each to "file in its next major rate application, a plan for use of local gas production connected directly to its distribution facilities as upstream capacity and its continuing availability as a replacement for capacity provided by local distribution companies."[115] Neither

---

[112] September 2008 Acquisition Order at 13-14; January Acquisition 2009 Order, at 140-141.

[113] Tr. 469

[114] Tr. 166, 183-84.

[115] Case 07-G-0299, In the Matter of Issues Associated with the Future of the Natural Gas Industry and the Role of Natural Gas Distribution Companies -

NYSEG nor RG&E met this requirement in their gas filings; such an omission constitutes "a major deficiency" in their filings.[116]

The filings are also inadequate because they missing required information and support necessary for the Commission to render a legally defensible decision. The Companies have failed to include items in their rate case filings that traditionally are required by the Commission in rate case matters. The missing items include: (1) up-to-date embedded electric and gas cost of service studies ("Gas and Electric ECOS"); (2) decoupling proposals;[117] revenue class allocations; and (4) rate design allocations.

The Companies argued that:

> The Companies' rate filings complied with all applicable Commission rules, regulations and orders regarding rate case submissions. The few factual deficiencies alleged by Staff were included in the filing and overlooked by Staff, have been cured as part of the normal rate case process or are easily remedied.[118]

The Companies also have claimed it is appropriate that certain "non-revenue requirement" items will be filed in a subsequent supplemental filing in May, after revenue requirement determinations have been made. In support of their assertions, the Companies referenced the approach used in a recent Consolidated Edison Electric Rate Case (Case 08-E-0539), in which the ALJs determined that they would produce two (2)

Capacity Planning and Reliability, Order on Capacity Release Programs (issued August 30, 2007), at 15.

[116] Tr. 166, 183-84.

[117] The Commission required all four utilities to file such proposals in their next rate case filings.

[118] Answer of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation to Staff's Motion to Dismiss, at 22.

separate and distinct Recommended Decisions, one (1) addressing revenue requirement issues and the second dealing with non-revenue requirement issues. The underlying reasoning behind this bifurcated approach was identified by the ALJs as simply the direct result of the amount of material to be organized and considered and the amount of resources available to do that work.[119]

The Companies cite the process in the Consolidated Edison case in an attempt to legitimize its insufficient filing. However, these are two (2) completely distinct situations. In the Con Edison proceeding, both revenue requirement issues and non-revenue requirement issues were addressed simultaneously in the filing, hearing, and briefing stages. Thus, the Con Edison approach results in a "comprehensive" two-part decision, whereas the Companies' suggested approach in the instant case would result in a disjointed process, in which parties would be unnecessarily compromised on certain issues. Positions that parties advocate for or against with regard to the so-called revenue requirement issues of a rate case often have great impact on positions taken regarding the non-revenue requirement issues.

The Companies have additionally been derelict with regard to the PSC regulations requiring the inclusion of all material needed to properly analyze the rate case presented. As stated succinctly in the DPS Staff's Motion to Dismiss, the Commission's regulations require that every rate filing shall exactly set forth all changes in rates.[120]

> The Commission's regulations also require that every rate filing shall allow for

---

[119] Case 08-E-0539, <u>Consolidated Edison Company of New York, Inc. - Electric Rates</u>, Recommended Decision (issued January 7, 2009), at 1.

[120] 16 NYCRR Part 61.3 (3)(c).

> intervening parties to be able to trace back proposed changes in rates involving comparative balance sheets, three preceding years of earned surplus statements, all assumptions of changes in price inputs because of inflation or other factors or changes in activity levels due to modified work practices Intervening parties should be able to retrace projections back to their historical source. All assumptions, escalation factors, contingency provisions and changes in activity levels should be quantified and properly supported.[121]

The CPB contends that the Companies' filings are decidedly lacking in almost all of these requirements.

The Companies also claim that any inadequacies in its initial January filing can and should be afforded a period in which the Companies would be allowed to cure or fix their filings to comply with Commission standards.[122] The Companies assert that the ratemaking process affords them the opportunity to continue to update the filing in an ongoing manner.[123] To a certain extent we agree; however the updating and supplanting needs to be performed on what is initially a legitimately full filing. To do otherwise would compromise parties' due process rights under the Commission's prescribed eleven-month suspension period approach to full rate case filings. Both the burden of going forward and the burden of persuasion in the ratemaking process are placed clearly on the shoulders of the utility. The integrity of the process is compromised when DPS Staff and the intervening parties are forced to make requests for the missing information to create a complete and full rate case filing. The

---

[121] Staff's Motion to Dismiss at 14.

[122] Answer of the New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation to Motion to Dismiss, at 22-23.

[123] Id.

Companies' preferred approach is a process neither intended nor contemplated by the legislature and the PSC.

VI. BURDEN OF PROOF/STANDARD OF PROOF

The Companies argue that the standard of proof pertinent to the disposition of the DPS Staff Motion should be one similar to that set forth in the New York State Civil Practice Laws and Rules ("CPLR") §3211(a)(7) for failure to state a cause of action.[124] Under this standard, all facts alleged in the Companies' filings and answering testimony must necessarily be assumed to be true. Under these circumstances, the DPS Staff Motion would be viewed in a light most favorable to the Companies, hence shifting the burden of persuasion from the Companies to DPS Staff.

From the CPB's perspective, arguments about the meaning of this CPLR section has little significance for PSC proceedings because the Commission's burden of persuasion standard is not "beyond a reasonable doubt," or "clear and convincing," or "preponderance of the evidence." It is, rather, the lower "public interest" standard. This standard makes sense because ratepayers should not pay higher rates simply because the utilities have superior resources (paid for, incidentally, by those same ratepayers) to prosecute a rate case.

This concept was explained in a 1978 New York Supreme Court decision:

> The Commission is not bound to entertain or ignore any particular factor in discharging its primary responsibility to determine rates that are just and reasonable… Nor must the Commission's determination need not be "wholly free from error in the process, or

---

[124] Answer of the New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation to Motion to Dismiss, at 32. The Companies also note that the PSC is not obligated to follow the CPLR. Id.

> quite in accord with a judicial view of how the procedure before the Commission should be managed in detail..."[125]

This means that the PSC has considerable discretion in addressing such matters as the DPS Staff Motion and may make a decision based upon less than a preponderance of the evidence as long as the decision is not arbitrary or capricious. It is the CPB's position that the Commission, in making this determination, is essentially acting in its function as a ratemaking body whose duties are primarily legislative in nature. That is to say, the burden of persuasion in any ratemaking proceeding necessarily belongs with the utility. Therefore, the burden of persuasion that the requested rate making treatment is just and reasonable within the context of the Acquisition Orders lies with the Companies.[126]

---

[125] New York Tel Co. v. Public Service Com., 64 A.D.2d 232, 237 (Sup. Ct. 3rd. Dept. 1978).

[126] See NYCRR §61.1, which establishes that the burden of persuasion is upon the utility whose rates, rules and regulations relating thereto, charged or proposed to be charged, are being considered.

VII. CONCLUSION

For the reasons discussed above, the Commission should dismiss the Companies' filings with prejudice and take measures, such as restricting dividends, to protect scarce ratepayer resources. The Commission should protect and promote the public interest by holding the Companies to their assurances and promises, which they embraced without coercion just a short time ago in September 2008.

Respectfully submitted,

Mindy A. Bockstein
Chairperson and
Executive Director

Tariq N. Niazi
Acting Director of
Utility Intervention

Saul A. Rigberg
Intervenor Attorney

John M. Walters
Intervenor Attorney

Dated: March 13, 2009
Albany, New York