

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
New York on March 19, 2008

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

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.

ORDER DENYING IN PART AND GRANTING IN PART
STAFF INTERLOCUTORY APPEAL

(Issued and Effective March 19, 2008)

BY THE COMMISSION:

INTRODUCTION

In a pending case regarding the proposed merger of Energy East Corporation (Energy East or the Company) and Iberdrola, S.A. (Iberdrola), Staff sought the discovery of information relating to the potential acquisitions of Energy East operating companies by certain entities (alternative transactions) that Energy East declined to pursue in favor of the proposed transaction. Furthermore, Staff sought information relating to financial forecasts for Energy East and its subsidiaries, New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E).

Energy East initially refused to provide information related to the alternative transactions based upon confidentiality grounds, and later supplemented its

objection based upon an assertion that the information sought was not relevant to the determination of whether the proposed merger with Iberdrola was in the public interest. The Company also claims that forecasts of earnings-per-share, dividends-per-share and other financial information for the 12 month period leading up to the announcement of the Iberdrola acquisition and for the period after the announcement are irrelevant to this proceeding.

Staff moved to compel production of the aforementioned information. The Company responded to the motion and maintained its objection to the disclosure of details relating to the alternative transactions. Moreover, the Company refused to provide all forecasts of earnings for Energy East and earning forecasts for non-jurisdictional subsidiaries of the Company.

The Administrative Law Judge (ALJ) assigned to this proceeding granted Staff's request that the Company be required to identify the operating subsidiaries of Energy East that were the subject of the alternative transactions. Moreover, the ALJ determined that the Company must produce all material presented to the Board for its deliberations with respect to the alternative transactions and Iberdrola's acquisition and, absent such material, any written summaries or notes recounting the Board's discussions. The ALJ, however, denied Staff's request that the Company be required to identify the entities (proposed purchasers) involved in each of the alternative transactions. The ALJ also determined that, while the financial forecast for Energy East before and after the announcement of the Iberdrola acquisition is relevant, the Company had provided Staff with sufficient information regarding the forecast of earnings and outstanding shares, and thus, denied Staff's request that the Company provide its forecast of earnings-per-share, dividend per-share and earnings before interest, taxes and depreciation and amortization (EBITDA). On February 5, 2008, Staff filed an interlocutory appeal with the Commission, appealing the Judge's January 22, 2008 discovery ruling.¹ The Company replied to the interlocutory appeal on February 13, 2008.

¹ Staff Interlocutory Appeal filed February 5, 2008 (Staff Appeal).

BACKGROUND

Energy East filed a petition with the Commission on August 1, 2007 seeking approval, pursuant to Section 70 of the Public Service Law (PSL), of its acquisition by Iberdrola. Section 70 of the PSL requires that a proposal for the acquisition of stock in a jurisdictional utility must first obtain the consent of the Commission, and such consent shall only be given if the transactions have been shown to be in the public interest.

Staff's Appeal, addressed herein, involves a discovery dispute between it and the Company. As discussed above, the Company refused to provide Staff with certain information involving alternative transactions and certain financial information, and, consequently, Staff moved to compel production of such information, received a ruling from the ALJ, granting in part and denying in part its motion, and ultimately appealed the ALJ's ruling, which is now the subject of this order.

Staff Motion to Compel & Company Response

Staff filed with the ALJ a motion to compel seeking information related to: (1) the possible sale of certain operating subsidiaries of Energy East; (2) two other "pending strategic transactions" considered by the Board of Directors of Energy East (e.g. alternative transactions); and (3) forecasts of earnings levels at NYSEG and RG&E before and after announcement of the proposed acquisition by Iberdrola.²

In the Staff Motion, Staff states that the Company's September Proxy Statement indicated that the management of Energy East was approached about alternative transactions.³ The Proxy Statement, according to Staff, reveals that the Board of Directors of Energy East discussed the potential benefits of the alternative transactions and determined that the benefits of the Iberdrola acquisition outweighed the benefits of these alternative transactions.⁴

² Staff Motion to Compel filed December 14, 2007 at pp. 1-2 (Staff Motion).

³ Id. at p. 2.

⁴ Id. at p. 3.

In Information Request DPS-81 (Responses IBER-0141 and IBER-0143 revised) Staff sought the identity of the entities that approached the Company about the possible sale of the operating subsidiaries of Energy East, and the identity of the operating subsidiaries that were contemplated for sale.⁵ Furthermore, Staff sought (DPS-83) any written materials or notes pertaining to the Board's discussion regarding the alternative transactions.⁶

In response, Energy East refused to provide the requested information on the grounds that such information was subject to a third party confidentiality agreement and that the information was irrelevant to the proceeding.⁷

Staff, in its Motion, also sought "any presentations or analysis prepared for the Board of Directors of Energy East, NYSEG or RG&E during the 12 months prior to the announcement of the acquisition by Iberdrola (DPS-93), and subsequent to that announcement (DPS-110), that referenced forecasts of future earnings levels at NYSEG and RG&E."⁸

Energy East responded to Staff on this point by claiming that the "information relating to Energy East's non-jurisdictional companies sought by Staff will be of no use in evaluating whether the Proposed Transaction is in the public interest," and thus such information is irrelevant to the proceeding.⁹

⁵ Staff Motion at p. 3.

⁶ Id. (citing Responses IBER-0143 and IBER-0143 Revised).

⁷ Staff Motion at p. 3.

⁸ Staff Motion at p. 3 (citing DPS-83, Responses IBER-0143 and IBER-0143 Revised).

⁹ Energy East Response to Staff Motion to Compel filed December 24, 2007 (Response to Motion) at p. 10.

ALJ Ruling

By discovery ruling issued January 22, 2008, the ALJ granted in part and denied in part Staff's Motion to Compel.¹⁰ The ALJ noted that Discovery Rule 5.1(a) (16 NYCRR §5.1(a)) describes a broad scope for permissible discovery, and thus, "an interrogatory [that] may lead to relevant and material information should be construed so that any reasonable doubts are resolved in the claimant's favor."¹¹

The ALJ determined that Staff satisfied the requirements of Rule 5.1(a) with respect to its request for identification of the operating subsidiaries that were the subject of the alternative transaction. Moreover, the ALJ ruled that the written material regarding the Board's deliberation on the alternative transactions and the Iberdrola acquisition was relevant and material to the proceeding. The ALJ specifically found that the information is relevant and material to the proceeding "because the merits of the Board of Directors preference for the Iberdrola transaction, as compared with alternative transactions available contemporaneously, are likely to be relevant in addressing whether the Iberdrola merger transaction is consistent with the 'public interest' criteria the Commission can be expected to apply under PSL §70".¹² The ALJ rejected Energy East's claim that the alternative transactions are not relevant to the proposed Iberdrola acquisition by stating that "the Directors' decision to forgo the subsidiaries transaction was an integral part of its determination to pursue the Iberdrola transaction,"¹³ and therefore, the subsidiaries transaction is relevant to the evaluation of the merits of the Iberdrola transaction and "cannot be dismissed as merely an untimely detour into the

¹⁰ Case 07-M-0906, Iberdrola/Energy East Merger, Procedural Ruling (issued January 22, 2008) (Ruling). The ruling was provided informally to the parties on that date; it was formally issued as part of a longer ruling on February 29, 2008. Citations herein are to the January 22, 2008 informal ruling.

¹¹ Ruling at p. 2.

¹² Id.

¹³ Id. at p. 3.

issue whether Energy East's value in an Iberdrola merger has been impaired by the Directors' past imprudence in unrelated matters."¹⁴ The ALJ also determined that the disagreement between the Staff and the Company regarding whether the proposed transactions and Iberdrola acquisition were mutually exclusive rendered the issue relevant.¹⁵

Regarding the identity of the entity proposing to acquire the operating subsidiaries of Energy East, however, the ALJ found that "Staff has provided no argument as to how this [information] ... , specifically, satisfies the 5.1(a) test; nor is the purpose of the interrogatory so readily apparent that a rationale can be imputed where [S]taff has supplied none."¹⁶

The ALJ also granted Staff's motion with respect to the Company's disclosure of earnings forecasts for its non-New York affiliates. In rendering his findings, the ALJ determined that "[t]he Iberdrola transaction's impacts on Energy East's projected earnings, returns or capital structure could be material considerations in a public interest analysis under PSL §70."¹⁷ The ALJ, however, ruled that "it is not apparent how growth in earnings available for distribution, or dividend growth, would be relevant to any of the material issues suggested above if presented on a per-share basis."¹⁸

Furthermore, the ALJ determined that:

[p]rojections of per-share growth may be inferable from projected earnings and projected shares outstanding, which in turn must be disclosed because of their relevance to earnings and capital structure as discussed above. But, given the disclosures already required by this ruling, neither inferences nor disclosures regarding projected per-share earnings or per-

¹⁴ Id.

¹⁵ Ruling at p. 3.

¹⁶ Ruling at p. 5.

¹⁷ Id. at p. 11.

¹⁸ Id. at p. 12.

share dividend growth would provide valuable incremental evidence.¹⁹

The ALJ also determined that forecasted earnings for 2007 and 2008 EBITDA were not relevant because, although such information is a part of projected earnings, such information is not “generally useful in setting rates because their deliberate nonrecognition of substantial costs tends to obscure the firm’s operating results and thus interfere with regulatory efforts to accurately project earned returns in a manner that would be meaningful in setting rates.”²⁰ Consequently, the ALJ determined that EBITDA was not relevant and material to the issue identified by Staff, “such as financial integrity, cross-subsidization among affiliates, or the propriety of imputed capital structures or other rate adjustments to remove subsidies.”²¹

Staff’s Interlocutory Appeal & Company’s Response

In its appeal, Staff requests that the Commission direct Energy East to provide “the identity of the parties that approached Energy East about the possible sale of its subsidiaries, and all information referencing forecasts of future earnings levels at NYSEG and RG&E,” including forecasts of earnings-per-share, dividends-per-share and EBITDA of Energy East.²² The Staff advocates that “the discovery dispute presents exceptional circumstances warranting interlocutory review because the information Staff seeks is integral to building a full and complete record in the proceeding.”²³

Extraordinary Circumstances

According to Staff, an interlocutory review of a discovery ruling by an ALJ is available under 16 NYCRR §4.7(a) “if the information sought is needed to develop the

¹⁹ Id. at p. 12.

²⁰ Ruling at pp. 12-13.

²¹ Id. at p. 13.

²² Staff Appeal at p. 3.

²³ Id. at p. 3.

full and complete record upon which a Commission decision must be based.”²⁴ Quoting the Commission’s ruling in Case 07-G-0141, Staff argues that extraordinary circumstances exist where “denial of the appeal would have the effect of precluding staff, and ultimately the Commission, from reviewing [the] supposed basis for [the relief sought by Petitions and require the Commission] to decide the case...without seeing the underlying evidence.”²⁵

Staff contends that this issue – the development of a full and complete record – is present in this case. Staff states that the information it seeks is vital to its “evaluation of Iberdrola’s proposed purchase of Energy East and is essential to developing a full and complete record for any Commission decision” and that denial of its appeal will prevent “the Commission from deciding this case based on a review of the underlying evidence.”²⁶

Energy East responds that Staff has not demonstrated “extraordinary circumstances” and, thus, that the Commission should deny its interlocutory appeal.²⁷ According to the Company, extraordinary circumstances are present only when the “record would benefit from the additional information” and Staff would be unduly prejudiced if it did not have the information.²⁸ Energy East argues that Staff has failed to demonstrate that it would either be prejudiced or the “public interest would be frustrated if it did not receive the requested information.”²⁹ The Company thus contends that

²⁴ Id. at p. 8.

²⁵ Staff Appeal at p. 8, quoting Case 07-G-0141, National Fuel Gas Corporation, Order Granting Appeal (issued September 25, 2007) pp. 3-4 (NFG Order).

²⁶ Staff Appeal at pp. 8-9.

²⁷ Energy East Opposition to Staff Appeal, filed February 13, 2008 (Energy East Opposition) at pp. 5-8.

²⁸ Energy East Opposition at p. 6.

²⁹ Id.

interlocutory appeals based on the need to develop a full and complete record or where the information sought is not directly related to the proposed transaction are simply a waste of the Commission's time and resources.³⁰

Identification of Entities

Staff objects to the ALJ's conclusion that it failed to provide a rationale for how the identities of the entities involved in the alternative transactions are relevant to the proceeding. Staff asserts that the ALJ's conclusion is in error because "Staff explained that 'any sale of an affiliate or merger opportunity necessarily affects the common expenses of the Energy East holding company that are allocated to NYSEG and RG&E; and that potential merger transactions which Energy East chose not to pursue may have afforded opportunities to realize synergy savings,' or could have reduced the holding company allocations or other costs borne by regulated New York ratepayers."³¹ Furthermore, Staff cited to the ALJ's ruling in Case 06-M-0878 as support for its request for the identity of the entities involved in the alternative transactions because the ALJ there determined that alternative transactions were relevant and material when assessing the reasonableness of a merger proposal and the terms of any rate plans.³²

In addition, Staff argues that the identity of the entities involved in the alternative transactions directly relates to the merits "of the declined transactions as compared to the transaction with Iberdrola that was accepted."³³ Staff asserts that, by refusing to direct the Company to disclose the identity of the entities involved in the alternative transactions "the ALJ has prevented an inquiry into whether the proposed transactions were a 'real alternative,' by allowing the companies to withhold from Staff

³⁰ Id.

³¹ Staff Appeal at p. 10 (citing, in part, Staff Motion to Compel at pp. 5-6).

³² Staff Appeal at pp. 10-11, citing Case 06-M-0878, National Grid PLC and KeySpan Corporation, E-mail Ruling, at p. 2 (October 16, 2006).

³³ Staff Appeal at p. 11.

nearly all information on those transactions.”³⁴ To perform a comparative analysis between the alternative transactions and the Iberdrola acquisition requires that Staff examine all the parties to such transactions. Being unable to perform such analysis inevitably means, according to Staff, that it will be unable to fully evaluate the relative merits of Energy East’s decision to decline the alternative transactions.³⁵

Furthermore, Staff asserts that the proper investigation of the entities involved in the alternative transactions is directly related to the ability of Staff and the Commission to weigh the merits of the alternative transaction.³⁶ Staff argues, for example, that an examination, when the identity of the entities involved in the alternative transactions are provided, would include an examination of the entities’ “size, capital structure, corporate organization and management structure, lines of business, service territories, and past and anticipated future business practices.”³⁷ Without knowledge of the identities of the entities involved in the alternative transactions, Staff argues that it and the Commission will be unable to analyze whether “alternatives to the Iberdrola transaction would have been of superior benefit to New York’s ratepayers.”³⁸ The Staff contends that the ALJ’s ruling ultimately prevents the Commission from making the public interest evaluation required by Section 70 of the Public Service Law.

In response to the Staff Appeal, Energy East contends that the alternative transactions are of a hypothetical nature and that any benefit that may have been derived from such transactions is highly speculative and would not aid the Commission in making a public interest determination regarding the Iberdrola acquisition.³⁹ Because the

³⁴ Id. at p. 12.

³⁵ Id. at p. 12.

³⁶ Id. at pp. 12.

³⁷ Staff Appeal at pp. 12-13.

³⁸ Id. at p. 14.

³⁹ Energy East Opposition at p. 12.

alternative transactions involve the sale of only two operating subsidiaries, Energy East argues that the transactions are not comparable to the Iberdrola acquisition, which is for the sale of the Company as a whole.⁴⁰ Given its conclusion, Energy East argues that the merits of the alternative transaction are, therefore, not an issue in the Section 70 review because only the merits of the Iberdrola acquisition are before the Commission for consideration.⁴¹ Moreover, Energy East asserts that it should not be forced to violate “the confidentiality provision or litigat[e] to seek a release or waiver” from the confidentiality agreement it has with the entities involved in the alternative transactions.⁴² Staff, according to the Company, already possess sufficient information to determine whether the Iberdrola acquisition is in the public interest.⁴³

In addition, Energy East contends that Staff incorrectly relies on the ALJ’s ruling in the KeySpan-National Grid merger case to support disclosure of the identity of the entities involved in the alternative transactions, because the aforementioned ruling is inapposite to and distinguishable from this proceeding. Energy East argues that the transactions considered in the KeySpan-National Grid case involved the sale of the same jurisdictional utilities, whereas, in this proceeding, the alternative transactions involve “a completely different and far more limited set of transactions involving not the sale of the parent company, Energy East, but solely two Energy East operating companies.”⁴⁴ The Company concludes that, even if the alternative transactions can be found relevant, Staff need not know the identity of the entities involved in the alternative transactions to conduct its comparison.⁴⁵

⁴⁰ Id.

⁴¹ Energy East Opposition at p. 13.

⁴² Id. at p. 12.

⁴³ Id.

⁴⁴ Id. at p. 13.

⁴⁵ Energy East Opposition at p. 13.

Financial Forecasts

According to Staff, forecasts of earnings-per-share, dividends-per-share and EBITDA are directly relevant to its assessment of the capital structures of Energy East, NYSEG and RG&E and, in turn the financial strength, including the creditworthiness and credit ratings of NYSEG and RG&E.⁴⁶ Staff argues that the ALJ's determination – that earnings-per-share do not offer any valuable incremental evidence – is erroneous because “even information that can be inferred from other discoverable information is itself discoverable if it is otherwise relevant and material.”⁴⁷ Staff goes on to argue that the Commission's rules on discovery allow the discovery of information that is duplicative “if it is otherwise material and relevant, if for no other reason than because disclosure allows information to be cross-checked and verified during the preliminary stages before the requesting party puts in its case.”⁴⁸

Staff applies the aforementioned argument to its contention that forecasts of EBITDA, earnings-per-share and dividends-per-share are relevant and material because “forecasts of the earnings at a holding company like Energy East dictate its credit ratings and capital structure...[which are]...inextricably intertwined with the subsidiaries' credit ratings and capital structures.”⁴⁹ Staff thus asserts that failure to have this information will prevent it from “fully analyzing the creditworthiness and capital structure of the regulated subsidiaries,” which in turn, will prevent Staff from assessing the subsidiaries' rates and the effect of the Iberdrola acquisition on those rates.⁵⁰

⁴⁶ Staff Appeal at pp. 14-15.

⁴⁷ Id. at p.16.

⁴⁸ Id. at pp. 16-17.

⁴⁹ Id. at p. 17.

⁵⁰ Staff Appeal at p. 17.

In response, Energy East first argues that the ALJ should not have required the Company to disclose forecasts of earnings for non-New York subsidiaries.⁵¹ The Company notes that it provided Staff, pursuant to the ALJ's ruling, information regarding forecasts of earnings, returns and capital structure for Energy East and all of its subsidiaries, including non-New York subsidiaries, but it takes exception to being required to disclose future earnings projections for entities other than NYSEG and RG&E.⁵²

Furthermore, Energy East agrees with the ALJ's ruling, that "disclosure of forecasts of future earnings and/or dividends on a per-share basis is not necessary."⁵³ The Company rejects Staff's position that evidence incremental in nature is discoverable under Rule 5.1(a) if it is relevant and material or likely to lead to such information.⁵⁴ The Company points out that Rule 5.1(a) is not without limitation: "Notably, §5.8(a) provides that, '[d]iscovery requests should be tailored to the particular proceeding and commensurate with the importance of the issues to which they relate. They should be limited to material or information that: 1) the requesting party expects to use in cross-examination or in preparing its case; 2) are not already possessed by or readily available to that party; and 3) are not conveniently obtainable elsewhere'."⁵⁵

Energy East equally rejects Staff's contention that the subsidiaries' current rates and the effect on those rates of the Iberdrola acquisition are relevant to the proceeding, and thus serves as the basis for requiring the Company to disclose its

⁵¹ Energy East Opposition at p. 9.

⁵² Id. at pp. 9-10.

⁵³ Id. at p. 10.

⁵⁴ Id. at p. 10.

⁵⁵ Energy East Opposition at p. 11, quoting 16 NYCRR §5.8(a)(emphasis in original).

forecasts of earnings and dividends on a per-share basis.⁵⁶ According to the Company, “rates of the regulated utilities are not at issue in this proceeding.”⁵⁷

Regardless of the foregoing, Energy East contends that it has provided Staff with “all the information they need to fully analyze the creditworthiness and capital structure of Energy East and its regulated subsidiaries” and, therefore, no basis exists for requiring the Company to provide forecasts of earnings and/or dividends on a per-share basis.⁵⁸

DISCUSSION AND CONCLUSION

Extraordinary Circumstances

The threshold for bringing an interlocutory appeal regarding discovery disputes under 16 NYCRR §4.7(a) requires a showing of extraordinary circumstances. In determining whether extraordinary circumstances are present the Commission examines the information being sought to determine if exclusion of the information from the record would render the Staff and the Commission unable to conduct the analysis called for by the relevant provision of the PSL or whether the information may serve as the basis for the Commission’s decision in the proceeding. Ultimately, the determination of whether extraordinary circumstances exist is fact specific, and should be done on a case by case basis.

We find that extraordinary circumstances exist with respect to the portion of Staff’s interlocutory appeal related to the identification of the entities involved in the alternative transactions. The disclosure of this information could directly bear upon our ability to assess whether or not the Iberdrola transaction is in the public interest, and therefore, Staff’s appeal is proper and shall be considered on the merits.

⁵⁶ Energy East Opposition at p. 11.

⁵⁷ Id. at p. 11.

⁵⁸ Id. at pp. 11-12.

With respect to the portion of Staff's interlocutory appeal related to the disclosure of financial information, as described above, we do not find that extraordinary circumstances exist.

Identification of Entities

Consideration of the Iberdrola acquisition and whether that acquisition is in the public interest requires both an assessment of the merits of the acquisition and the merits of available alternatives that were considered at the time and rejected in favor of the proposed transaction. In this case, the Board of Directors of Energy East indicated that two alternative transactions were considered and rejected in favor of the Iberdrola acquisition. We find, in general, that consideration of the alternative transactions considered by the Company's Board of Directors is relevant to evaluating whether the Iberdrola acquisition is in the public interest. This is true, even if those alternatives are not identical in nature to the proposed transaction. The impact on ratepayers of the alternative transactions versus the Iberdrola acquisition may be considered when determining if the Iberdrola acquisition is in the public interest. Therefore, this information is relevant and material and could assist us in the performance of our statutory obligation under PSL §70.

We find unpersuasive the Company's argument that a third-party confidentiality agreement limits our consideration of the alternative transactions. Our authority to review information that is relevant and material to the proceeding cannot be usurped by a contractual arrangement entered into by the Company and third parties. Therefore, any conflict that may arise between the third-party agreement and our statutory authority is resolved in favor of preserving our authority. Consequently the Company must take whatever action it deems necessary or appropriate to ensure that we are provided with this information when we are to consider its petition.

Turning specifically to the merits of Staff's appeal and the Company's opposition, we find that full consideration of the alternative transactions requires the disclosure of the identity of the entities involved in the transaction. The identities of the

entities involved in the alternative transactions provide more than a litmus test for the credibility of the alternative transactions. Such information will, as Staff states, enable Staff, and ultimately the Commission, to review the relevant financial information about the entities, which will aid in the assessment of the merits of the alternative transactions. Without this information the Staff and the Commission are left only with a portion of the analysis of the alternative transactions – identity of the operating subsidiaries and disclosure of the material provided to and developed during the Board meeting. This limited picture undermines the assessment of the merits of the alternative transactions and compromises the value of a comparative analysis that may be made with the Iberdrola acquisition.

Financial Forecasts

The Commission may appropriately consider in rendering its public interest determination the Iberdrola acquisition's impact on the earnings, returns and capital structure of Energy East and the financial impact in general on RG&E and NYSEG. Furthermore, we agree with Staff that the rates of Energy East's New York subsidiaries before and after the Iberdrola acquisition are relevant to this proceeding. We do not find, however, that Staff has shown the basis for how the specifically requested forecasts of earnings-per-share or dividends-per-share provided to the Company's Board of Directors are relevant in light of the financial information already required to be disclosed by the Company and the information that is publically available. Therefore, we do not find that extraordinary circumstances exist with respect to Staff's interlocutory appeal of the ALJ's discovery ruling regarding forecasts for earnings-per-share or dividends-per-share.

Even if extraordinary circumstances were present and we were deciding the Staff's request on the merits, we would not grant Staff's appeal given the record before us. Staff's argument, that duplicative information or information that can be inferred from other sources, in this case, forecasts of earnings-per-share or dividends-per-share, is discoverable if it is material and relevant, is unpersuasive. To the requested discovery must still fall within 16 NYCRR §5.8, which defines the scope of permissible discovery. Staff has not demonstrated that the forecasts provided to the Company's Board of

Directors for earnings-per-share or dividends-per-share are solely within the possession of the Company or that Staff is unable to perform the analysis necessary to derive the forecasts from information already provided by the Company. Should Staff seek, as it states in the appeal, to have the Company cross-check and verify Staff's calculation of earnings-per-share or dividends-per-share, then Staff can accomplish this task through a variety of other means, including a request for the Company to admit, pursuant to 16 NYCRR §5. 5, to the accuracy of Staff's calculation. Should the Company decline to make such admission then Staff has the basis to demand production of the Company's calculation in order to perform its cross-check.

With respect to Staff's request to compel the disclosure of a forecast of EBITDA, although we do not find the presence of extraordinary circumstances, we believe that such information, under certain circumstances, could be relevant and material in a proceeding such as this. Based on the record thus far, however, we accept the ALJ's conclusion that a demonstration of relevance of this information to this proceeding has not been made. We note that Staff may renew its request for this information. If, at that point, Staff is able to demonstrate that EBITDA is relevant to a review of the pre-and-post acquisition forecasts of earnings, returns or capital structure of Energy East, RG&E or NYSEG, such information may properly be provided in response to Staff's request or an ALJ ruling.

The Commission orders:

1. Energy East Corporation, New York State Gas & Electric Corporation and Rochester Gas and Electric Corporation are directed to disclose the identity of the entities involved in the alternative transactions, as discussed within the body of this Order, to Staff within ten days of this Order, subject to the protective order issued by the Administrative Law Judge in this proceeding.

2. The other issues raised by Staff in its Interlocutory Appeal are denied, consistent with the discussion in this Order.

3. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary