

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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.

PROCEDURAL RULING ON SCHEDULING

(Issued February 25, 2008)

RAFAEL A. EPSTEIN, Administrative Law Judge:

This ruling recounts various steps in adoption and modifications of the procedural schedule. Some of these have prompted numerous inquiries from the general public, while others have occurred only as recently as February 22, 2008. The relevant documents previously posted on the Department of Public Service (DPS) Web site (dps.state.ny.us) do not explain all aspects of these procedural developments, and may have contributed to a misperception that a ruling is imminent on whether to suspend the proceeding indefinitely.

A previous ruling established two possible schedules for this proceeding.¹ One schedule presupposed that settlement discussions would enable the parties to file a negotiated joint proposal, either contested or unanimous, offering the Commission terms it might adopt as a means of resolving the contested issues. The other was a litigation schedule, designed to take effect if the parties reached no comprehensive agreement in principle by November 28, 2007.

In a status conference on that date, the parties informed me of their agreement that the petitioners Iberdrola, S.A. et al. would file supplemental testimony on vertical integration issues, which in fact was filed later that day, and that the parties would further consider procedures to implement

¹ Case 07-M-0906, Procedural Ruling (issued October 4, 2007).

the Commission's directive reassigning to this proceeding the matter of an electric and gas revenue decoupling mechanism (RDM) for petitioner N.Y.S. Electric & Gas Corporation.² However, they reported that they had reached no agreement in principle on a global resolution of the issues beyond those two discrete topics.

As a result of the November 28, 2007 status report, the litigation schedule took effect as prescribed in the previous ruling. It included deadlines for testimony by staff of the Department of Public Service (Staff) and intervenors, and for rebuttal testimony, all of which has been filed accordingly; a February 25, 2008 starting date for evidentiary hearings; and dates for two rounds of post-hearing briefs, subject to adjustment at the close of hearings.

However, in response to recent developments involving other companies' possible attempts to acquire Iberdrola or its assets, Staff moved to suspend this proceeding on the theory that petitioners' testimony filed to date does not address the prospect of such involuntary acquisitions and that additional time therefore is needed for submittal and analysis of supplemental testimony. Petitioners opposed the request, arguing that the supposed takeover attempts are merely speculative and that, in any event, an acquisition of Iberdrola would require Commission review pursuant to Public Service Law §70.³

² Case 07-M-0906, Notice Consolidating Proceedings (issued October 22, 2007), closing Case 07-M-0996 (formerly Case 07-E-0996), NYS Elec. & Gas Corp. - Revenue Decoupling Mechanism. The RDM matter has since become a subject of testimony in this case.

³ Staff's Motion to Postpone Hearings (dated February 5, 2008); petitioners' Response (dated February 7, 2008).

In a telephone conference with petitioners' and Staff's representatives⁴ on February 14, 2008, I assented to their proposal that the February 25 commencement of hearings be postponed to February 27. A notice to that effect was issued, and it recited that any further postponement would be the subject of an additional notice.⁵ The purpose of the postponement was to enable parties to suspend their hearings preparation long enough to prepare for a confidential settlement conference potentially addressing all issues, which convened February 21 in Albany and continued the next day by telephone. These arrangements and rationales were communicated to the other active parties by e-mail February 15.⁶ It was further agreed that on February 22, the parties would report to me whether the settlement discussions appear productive enough to justify a further postponement of the hearings to March 3.

The February 22, 2008 report consists of a letter distributed electronically to all parties and me which proposes

⁴ David Schwartz, Esq., for Iberdrola (on behalf of itself and Energy East) and Leonard Van Ryn, Esq., for Staff.

⁵ Case 07-M-0906, Notice Changing Initial Date of Evidentiary Hearing (issued February 15, 2008). In fact an additional notice is being issued which postpones the start of hearings to March 17.

⁶ The e-mail transmitted a copy of a letter dated February 15, 2008 from Mr. Schwartz to me. During the February 14 conference, the parties and I intended that the February 15 letter would be posted on the DPS Web site in lieu of a ruling. However, this ruling is being issued and posted instead, for two reasons. First, neither the letter nor the February 15 notice adequately anticipated the public's continuing inquiries as to whether the notice would be supplemented by a ruling and to what extent Staff's February 5 motion remains pending in the aftermath of the postponement. Second, the February 15 letter of course did not describe the additional procedures proposed in Staff's February 22 letter.

a set of decision points at various dates. The schedule appears reasonable under the circumstances and is adopted as follows:⁷

February 27	Petitioners' comprehensive settlement proposal presented by e-mail at mid-day
February 29	Settlement conference at Commission's Albany offices commencing at 9:00 a.m.
March 4	Staff and intervenor counteroffers presented by e-mail by close of business
March 6	Settlement conference at Commission's Albany offices, time to be determined
March 12	Target date for agreement in principle
March 17	Evidentiary hearings commence at Commission's Albany offices at 10:00 a.m. if no agreement in principle reached by March 12
March 26	Progress check on development of joint proposal reducing the agreement in principle to writing (assuming agreement in principle by March 12 and therefore no evidentiary hearings starting March 17)
March 31	Target date for completion of joint proposal, or evidentiary hearings commence at Commission's Albany offices at 10:00 a.m. March 31 if progress check at March 26 reveals lack of satisfactory progress

Procedural steps that might follow the filing of a joint proposal remain to be determined. In accordance with the usual

⁷ One intervenor, Mark Corbett, opposes any further proceedings such as those described in the February 22 proposal, pending my ruling on his motion to compel discovery responses from petitioners. (E-mail from Mr. Corbett, February 22, 2008.) However, a ruling on his motion will be issued shortly and his objection to the schedule therefore will become moot.

procedures for confidential settlement negotiations, I will not participate in the settlement conferences and should not be provided copies of agreements, proposals, or counterproposals other than a final joint proposal, if any. As is customary, settlement discussions are limited to active parties and evidentiary hearings are open to the public.

During the February 14, 2008 conference, it was understood that Staff and petitioners supported limited postponement of the hearings only to facilitate negotiations, and without prejudice to the future reassertion of their respective arguments whether the proceeding should be suspended indefinitely for the reasons stated in Staff's February 5 motion regarding attempted acquisitions of Iberdrola. The same understanding presumably applies to the parties' February 22 rescheduling proposals. Accordingly, the present postponement, and any additional postponements pursuant to the schedule in the February 22 letter as adopted above, imply nothing about the merits of Staff's motion; and I intend not to rule on the motion, unless Staff renews it by opposing a resumption of hearings according to the above schedule.

The previously established schedule for post-hearing briefs is suspended pending further clarification of the hearing schedule.

(SIGNED)

RAFAEL A. EPSTEIN