STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held in the City of
Albany on January 19, 2012

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr., dissenting
James L. Larocca

CASE 07-M-0906 - Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Greene Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation – Petition For Approval of the Acquisition of Energy East Corporation By Iberdrola, S.A. WIND CONDITION COMPLIANCE.

ORDER ON COMPLIANCE WITH
WIND INVESTMENT CONDITION

(Issued and Effective February 24, 2012)

BY THE COMMISSION:

BACKGROUND

In the IBE Merger Order,[1] the merger and indirect acquisition of New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E) by Iberdrola, S.A. (Iberdrola) was approved subject to conditions. Under one of those conditions, Iberdrola was obligated to make capital investments in New York, amounting to at least $200 million, on

[1] Case 07-M-0906, supra, Order Authorizing Acquisition Subject to Conditions (issued January 6, 2009); see also Case 07-M-0906, supra, Abbreviated Order Authorizing Acquisition Subject to Conditions (issued September 9, 2009).

the development of wind generation facilities. The period for making the $200 million investment was set at two years following the date on which Iberdrola consummated its merger, subject, however, to a modest extension of time that could be granted upon a petition from Iberdrola requesting that relief. The obligation to make the investment was contingent upon "no material adverse change to the existing fundamental economics of wind generation development in New York State."[2]

Because, as that contingency indicates, bringing wind projects to fruition was subject to uncertainties, it was decided that, notwithstanding the contingency, obtaining some value from Iberdrola that demonstrated its commitment to New York's economic vitality was necessary. Therefore, it was required that, if, for whatever reason, Iberdrola did not invest at least $200 million on the development of wind generation in New York, it would instead set aside an economic development fund for NYSEG and RG&E equal to 25% of the difference between the $200 million target and the amount actually expended, up to a maximum of $25 million. The disposition of any funds so assessed against Iberdrola would be decided following submittal of an economic development spending proposal arrived at after consultation among Iberdrola and interested stakeholders.

The two-year period for satisfying the $200 million investment condition expired on September 16, 2010. On that date, Iberdrola made a request for an extension of time to comply with the condition, until December 31, 2010. It subsequently supplemented its September 16, 2010 filing on January 31 and October 17, 2011, requesting additional relief and identifying the investments it believes should be counted towards meeting the $200 million target.

[2] IBE Merger Order, p. 98.

Moreover, Department of Public Service Staff (DPS Staff) conducted a review of Iberdrola's spending on wind development within New York. Iberdrola submitted extensive compilations of data and other information during the course of the DPS Staff examination. No other party sought to participate in the proceedings conducted on Iberdrola's compliance efforts, and no responses to Iberdrola's compliance filing, as supplemented, have been received.

THE IBERDROLA FILINGS

In its September 16, 2010 filing, Iberdrola reported that it had invested significant amounts of capital on the development of wind projects in New York, and had commenced construction of the 74 MW Hardscrabble Wind Project (Hardscrabble) in Herkimer County, New York. Iberdrola reported that it expected to reach the $200 million investment target by the end of 2010. It estimated that investment in Hardscrabble would total $198.5 million, of which $196.5 million would have been incurred since the commencement of the two-year period for compliance with the condition on September 16, 2008. In addition to that capital investment, Iberdrola explained that it had invested $3.2 million in developing other projects in New York within the period besides Hardscrabble.

In justifying a request for an extension of time to comply with the $200 million condition, Iberdrola pointed out that making the investment was subject to the contingency that no material change in wind generation development economics would occur in New York. Iberdrola argues that at least two material changes in development economics have occurred -- a lapse in the availability of renewable portfolio standard (RPS) incentives and a sharp drop in New York Independent System Operator (NYISO) wholesale prices for electricity. Detailing these adverse contingencies, Iberdrola explains that no RPS solicitation was issued following the initiation of the two-year compliance period until September 8, 2009, almost a full year into the period. It was not selected as a winning bidder in that solicitation, Iberdrola recounts, until April 9, 2010, when most of the two-year period had already passed. Iberdrola also reports that prices in NYISO markets dropped nearly 50% between 2008 and 2009. Notwithstanding these adverse circumstances, Iberdrola stresses, it proceeded with construction of the Hardscrabble project.

Iberdrola asserts that other wind developers were adversely affected by changes in economic circumstances during the 2008 through 2010 time period. It reports that Hardscrabble is the only wind farm project in New York whose construction commenced in 2010, and that the only wind farm projects brought online in New York during 2009 had already been under construction prior to the decline in NYISO prices. As a result, Iberdrola maintains that an extension of time until December 31, 2010 to meet the $200 million condition is justified.

In its supplemental filing of January 31, 2011, Iberdrola reported that completion of construction at Hardscrabble had been delayed, and that commercial operation had not yet been achieved. As a result of the delay, investment in Hardscrabble had reached only $192.6 million by the end of 2010. Iberdrola, however, explained that it expected to invest about another $7.1 million in additional funds to complete Hardscrabble, bringing the total investment in the wind facility to $199.7 million. When coupled with investments made in other wind projects during the compliance period as extended, Iberdrola claimed total investment would reach $203 million.

Iberdrola submitted an additional supplemental filing on October 17, 2011. Iberdrola reported that Hardscrabble had in fact achieved operation on January 31, 2011, and that 200 jobs had been created for its construction. As of the date of the filing, Iberdrola continued, the facility had generated over 100,000 MWh of clean energy for the benefit of New York.

Refining its request for an extension of time to comply with the $200 million condition, Iberdrola reiterates that delays in the RPS solicitation process hindered its ability to develop Hardscrabble. It notes that, besides a delay until April 2010 in awarding the RPS solicitation, the solicitation provided that no electricity would be purchased under it until January 1, 2011. Recounting that it experienced unanticipated delays in completing construction of Hardscrabble due to harsh winter conditions and the discovery, not detected until late Fall 2010, of deficiencies in the concrete poured for several of the wind turbine foundations. Iberdrola stresses that it nonetheless achieved operation at Hardscrabble by January 31, 2011, less than one month after the RPS incentives took effect.

Revisiting the 50% decline in NYISO market prices it says occurred between 2008 and 2009, Iberdrola claims the effect of the price decline and other adverse economic conditions that were experienced at the same time was to substantially impede wind generation development in New York. Besides a handful of projects that were already substantially completed by the time the IBE Merger Order was issued, Iberdrola continues, wind generation development in New York, other than the construction of Hardscrabble, ceased during the period from September 2009 to the October 17, 2011 date of its filing. During that time, Iberdrola emphasizes, Hardscrabble was the only wind farm that achieved commercial operation in New York.

Iberdrola also argues that its investment in Hardscrabble achieved the economic development objectives that the $200 million condition was intended to foster. Despite uncertainties and adverse conditions it experienced, Iberdrola relates, it brought the 74 MW Hardscrabble project to fruition and created the requisite number of jobs expected of such an economic development effort. As a result, Iberdrola maintains, the IBE Merger Order’s mechanism for funding economic development, in the event of a failure to reach the $200 million target, should not be triggered.

Detailing its accounting for complying with the $200 million condition, Iberdrola reports that since the closing of its acquisition and merger, it has spent $201,222,081 in developing wind generation within New York. While conceding that some of those funds either were not paid out until well after January 1, 2011, and that payment on others still remained outstanding as of the October 17, 2011 date of its filing, Iberdrola argues that all of the costs it submitted are fully committed, in particular to funding the completion of the construction of the Hardscrabble Project.

Any delays in actually making payment on Hardscrabble costs, Iberdrola explains, are attributable to payment schedules its contractors agreed to, ensuring that payment was not made until it was demonstrated that the goods and services they provided were satisfactory. Iberdrola maintains that this lag between the completion and commercial operation of a wind project and final resolution of all billing and accounting issues with contractors is typical of the wind project development process. As a result, it asserts that all of the capital investments it made in Hardscrabble should be recognized in meeting the $200 million condition.

Iberdrola notes that it submitted with its October 17, 2011 filing updated accounting information from the general ledger of its wind development affiliate demonstrating it had made the requisite expenditures. It emphasizes that it has submitted for DPS Staff review approximately 430 pages of back-up accounting detail, reflecting approximately 15,427 line entries. It believes that its accounting is sufficient to demonstrate that it has actually made the approximately $201 million investment it claims.

DISCUSSION AND CONCLUSION

Iberdrola has justified extending the period for compliance with the $200 million wind generation facility investment condition to December 31, 2010 for all wind development expenditures, and recognizing the entire capital expenditure it made on the Hardscrabble project in meeting the condition. Once these extensions to the period for compliance are recognized, we find that Iberdrola has achieved substantial compliance with the wind investment condition and that no assessment of funds against it for disbursement to NYSEG and RG&E need be required.

The two modifications that Iberdrola proposes to the period for achieving compliance with the $200 million target -- an extension for all development expenses to December 31, 2010 and recognition of all Hardscrabble capital investment -- are reasonable. Iberdrola was invited to apply for an extension of the compliance period if circumstances warranted. The less than four month length of the extension requested, to December 31, 2010, is modest, and is granted.

Recognizing all of Iberdrola's capital investment in Hardscrabble is also appropriate. Iberdrola successfully brought Hardscrabble online as of January 31, 2011, soon after the end of the compliance period as extended, notwithstanding delays encountered when the timing of RPS solicitations did not dovetail conveniently with the timing of its commitment to meet the $200 million condition and the foundations for several wind turbines had to be replaced or reinforced because the initially-laid concrete proved deficient. The resulting investment in and construction of Hardscrabble were directed towards achievement of the goals intended in devising the $200 million investment target. Jobs were created and New York’s economic development and renewable energy development policies were furthered. In addition, Hardscrabble was the only commercially-sized wind facility to enter service in New York during the period between January 2010 and October 2011. Therefore, Iberdrola’s efforts justify recognition of the entire Hardscrabble investment in meeting the $200 million condition.

While in many instances payments Iberdrola would count towards meeting the $200 million condition were delayed beyond the time of Hardscrabble’s in-service date, as Iberdrola explains, the timing of the payments does not affect its commitment to compensate contractors for the work they performed in constructing the facility. The lag in payment to the contractors is attributable to ensuring that they, and the generation facility equipment they installed, performed properly. Since Hardscrabble could not have been built without the committed expenditures, whatever their time of payment, they are properly recognized as capital expended on the project, and properly counted towards meeting the $200 million condition.

Iberdrola also includes in the expenditures it would count towards meeting the $200 million condition those expenses it incurred in exploring the potential to develop at least seven New York projects other than Hardscrabble during the compliance period as extended, from September 16, 2008 through December 31, 2010. Those expenses are capital invested on the development of wind projects and so are properly recognized in calculating compliance with the $200 million condition.

A review of Iberdrola's other accounting information, however, shows that, if appropriate adjustments were subtracted from the $201,222,081 figure Iberdrola submitted, the result would fall short of the $200 million target by approximately $.6 million. This minimal shortfall, of less than .5% of the $200 million target, does not warrant imposing an assessment against Iberdrola for failure to meet the wind investment condition. There is no suggestion that the benefits attending Iberdrola's actual level of wind investment in New York were diminished in any way by the $.6 million difference between its accounting, as adjusted, and the $200 million target set in the IBE Merger Order.

Instead, Iberdrola achieved all of the benefits expected when the wind investment condition was required. Its investment contributed substantially to economic development in New York, created construction jobs in the building of the Hardscrabble facility, and promoted wind project development in New York in accordance with State policies. It also had the added benefit of bringing the Hardscrabble facility into service during a period when otherwise no commercially-sized wind project would have been completed. As a result, an assessment need not be imposed on Iberdrola to fulfill the purposes of the IBE Merger Order.

The Commission orders:

1. Iberdrola, S.A. shall not be required to disburse funds to New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation, having achieved compliance with the $200 million wind investment requirement adopted in the Order Authorizing Acquisition Subject to Conditions issued January 6, 2009 in this proceeding without the disbursements.

2. This proceeding is continued.

By the Commission,

Jaclyn A. Brilling
Digitally Signed by Secretary
New York Public Service Commission

(SIGNED)

JACLYN A. BRILLING
Secretary

Robert E. Curry, Jr., Commissioner, dissenting statement:

The Iberdrola companies (Iberdrola) discharged their obligation to invest $200 million in wind generation in New York, 13 months after the Commission's 24 month deadline for doing so expired. The promise to invest $200 million in 24 months was a material element the Commission considered in deciding whether the "public interest" test was met by Iberdrola's proposed purchase of Energy East with its two New York State utilities.

Iberdrola had initially offered to spend $100 million. The Commission doubled that amount and required the spending be completed within 24 months. Based in part on this promise, we approved the acquisition. The Order provided that any shortfall in this expenditure "for whatever reason" would result in Iberdrola's mandatory contribution of up to ". . . $25 million towards economic development projects in the NYSEG and RG&E service territories . . ."[1]

The order also contemplated "a modest extension" of the 24 month deadline.[2] The granting of Iberdrola's first request for an extension of two and one half months is consistent with this language. However, Iberdrola's second request, for nine and one half months more, should not have been approved, and the required contribution to economic development -- likely amounting to millions of dollars --should have been made as originally contemplated by the Commission.

Accordingly, I respectfully dissent.

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[1] Case 07-M-0906, Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A., Order Authorizing Acquisition Subject to Conditions (issued January 6, 2009) p. 99.

[2] Id.