

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service.	Case 09-E-0082
Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Gas Service.	Case 09-G-0083
Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric Service.	Case 09-E-0084
Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Gas Service Cases.	Case 09-G-0085

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DEPARTMENT OF PUBLIC SERVICE STAFF  
MOTION TO DISMISS

Department of Public Service Staff (Staff) makes this motion to dismiss the above-captioned rate proceedings because New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E) (the Companies) failed to meet the threshold standard for rate review that the Public Service Commission (PSC, Commission) set in its Order Authorizing Acquisition Subject To Conditions (issued and effective September 9, 2008, “Order Authorizing Acquisition”) in Case 07-M-0906. In that Order, the Commission prohibited both NYSEG and RG&E from filing a rate application before September 16, 2009, unless certain conditions were met. The Commission stated, “neither company will be allowed to file a rate application before the target period [i.e., 12 months after the September 2008 closing date] except upon a showing that [the Companies’] financial performance otherwise would fall to levels that would jeopardize [their] ability to provide safe and reliable service.”<sup>1</sup>

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<sup>1</sup> Order Authorizing Acquisition at 12.

On September 10, 2008, Iberdrola, Energy East, NYSEG and RG&E completely and unconditionally accepted this condition.

Notwithstanding the express language of the Order Authorizing Acquisition, and only four months after Iberdrola, S.A. closed on its purchase of Energy East (on September 16, 2008), both of Energy East's New York-regulated utilities, NYSEG and RG&E, are seeking rate increases totaling more than \$278 million.<sup>2</sup> To justify their retreat from the commitments they made to the Commission, the Companies assert that they are in a "financial crisis."<sup>3</sup> The primary reason the Companies say they are in a "dire financial situation" is the nationwide financial crisis, which is the same crisis facing every other utility, business and customer. Recent credit assessments have put the Companies on a "credit watch;" however, those ratings were invited by NYSEG and RG&E's repeated claims that they are in a financial emergency as well as Iberdrola's public statements casting doubt on its support of the utilities as it promised the Commission it would before the merger.

Staff's investigation and its testimony analyzing the filings show that NYSEG and RG&E are currently earning a 10.3% return on shareholder equity; which is even higher than what the Commission determined was reasonable in its Order Authorizing Acquisition.<sup>4</sup> Those earnings, Iberdrola's continued liquidity, and the Companies' continued access to the public debt market, belie their position that their financial performance has fallen to levels that threaten service. The Companies' January 27, 2009 rate applications, therefore, must be dismissed with prejudice because they fail to meet the threshold burden required in the Commission's Order Authorizing Acquisition and to which the Companies and Iberdrola agreed to abide.

#### STATEMENT OF FACTS

On August 1, 2007, pursuant to Public Service Law (PSL) §70, Iberdrola, S.A. (Iberdrola), NYSEG, RG&E, Energy East Corporation (Energy East), RGS Energy Group, Inc., and Green Acquisition Capital, Inc. sought Commission approval for Iberdrola's acquisition of

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<sup>2</sup> Company January 27, 2009 cover letter to rate filing.

<sup>3</sup> Company Policy Panel testimony at 12, 13.

<sup>4</sup> Order Authorizing Acquisition at 13. Although the Companies agreed that 10.1% was an adequate multi-year return sharing mechanism at that time, they now seek a 12 to 12.2% return on equity. DPS Staff Financial Panel at 10.

NYSEG, RG&E and Energy East.<sup>5</sup> To develop a record in that case, the Commission held four days of evidentiary hearings to determine whether Iberdrola's acquisition met the public interest test set forth in Public Service Law §70. In their testimony supporting Iberdrola's acquisition of NYSEG and RG&E, the Companies stated, among other things, the following:

Iberdrola is a leading global utility and energy company with a market capitalization of approximately \$70 billion (utilizing an exchange rate of \$1.35/Euro). It has the financial, technological and managerial capabilities, honed by over 100 years of utility experience, to acquire control of Energy East while ensuring that NYSEG and RG&E continue to provide high quality, safe, and reliable service to their customers . . . Iberdrola is well-capitalized, has considerable liquidity, strong credit ratings, and ready access to international as well as domestic capital markets;<sup>6</sup>

Q. Will Iberdrola's financially strong position provide any additional benefits to Energy East? A. Yes. The Proposed Transaction will provide Energy East (and thus RG&E and NYSEG) with greater access to both U.S. and global financial markets than they would have in the absence of the Proposed Transaction. Iberdrola's ability to quickly sell 85 million new shares of common stock through a fully-subscribed accelerated private placement shows how access to capital can be a benefit of Iberdrola's financial strength. By providing enhanced access to capital, the Proposed Transaction will allow NYSEG and RG&E to continue to provide high quality, safe and reliable service.<sup>7</sup>

Q. Does the Proposed Transaction create gas safety and reliability issues? A. No, it does not. No changes to NYSEG's and RG&E's operations are anticipated as a result of the transaction, and therefore, the issue of gas safety and reliability is irrelevant in the context of this proceeding;”<sup>8</sup>

Based upon these representations of Iberdrola and the record before it, on September 9, 2008, the Commission authorized Iberdrola's acquisition of NYSEG and RG&E subject to conditions.<sup>9</sup> In general, such as when the Commission adopts a long-term rate joint proposal or, as in this case, grants a merger request, the Commission includes a clause prohibiting the utility from seeking a rate increase for a specified period of time unless service would be

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<sup>5</sup> NYSEG and RG&E both are wholly-owned subsidiaries of RGS, which is a wholly-owned subsidiary of Energy East. Green Acquisition Capital is a wholly-owned subsidiary of Iberdrola formed for the purpose of Iberdrola's acquisition of NYSEG and RG&E. Following the transaction, Green Acquisition Capital was merged into Energy East.

<sup>6</sup> Merger Transcript at 1776.

<sup>7</sup> Merger Transcript at 489.

<sup>8</sup> Merger Transcript at 204; see Merger Transcript at 147.

<sup>9</sup> The Commission later issued its longer Order Authorizing Acquisition Subject To Conditions (issued and effective January 6, 2009) (January Order Authorizing Acquisition).

compromised.<sup>10</sup> Stay-out provisions, as they have come to be known, benefit customers by stabilizing utility rates for an extended, and predictable, period of time. In that vein, the Commission conditioned the Iberdrola merger on a rate case stay-out of at least 12 months from September 16, 2008, the date of the Iberdrola closing. Specifically, the Commission stated, “neither company will be allowed to file a rate application before the [end of the 12-month stay-out] except upon a showing that its financial performance otherwise would fall to levels that would jeopardize its ability to provide safe and reliable service.”<sup>11</sup> The Companies and Iberdrola completely and unconditionally accepted these conditions in two letters dated September 10, 2008, one on behalf of Iberdrola and the other on behalf of Energy East, NYSEG, and RG&E.

To “mitigate the risk . . . that [the merger] will create incentives to degrade service by cutting costs,” the Commission adopted benchmark infrastructure investments “necessary to maintain safe and adequate service.”<sup>12</sup> The Commission established as its benchmark for the Companies’ capital expenditure budgets -- \$140 million annually for NYSEG’s electric infrastructure<sup>13</sup> and \$90 million annually for RG&E’s electric infrastructure.<sup>14</sup> For each of the Companies’ gas departments the Commission prescribed a level of infrastructure investments of \$20 million annually.<sup>15</sup>

In its Order Authorizing Acquisition, the Commission also instructed the Companies, when they did file for their next rate increase, to include in that filing, “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.”<sup>16</sup> No such studies are included in the rate filing.

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<sup>10</sup> See e.g. Case 90-C-0191, Case 28425, and Case 92-C-0665, wherein New York Telephone agreed not to seek a rate increase before 1987 unless it was experiencing “a financial downturn.” See also Case 01-M-0075, Joint Petition of Niagara Mohawk Holdings, Inc., Niagara Mohawk Power Corporation, National Grid Group plc and National Grid USA for Approval of Merger and Stock Acquisition, 2001 N.Y. PUC LEXIS 892 at 14.

<sup>11</sup> Order Authorizing Acquisition at 12. The Commission also set aside for customers \$275 million of positive benefit adjustments (PBAs).

<sup>12</sup> January Order Authorizing Acquisition at 58.

<sup>13</sup> January Order Authorizing Acquisition at 58.

<sup>14</sup> Order Authorizing Acquisition at 14.

<sup>15</sup> See Order Authorizing Acquisition, Appendix 2.

<sup>16</sup> January Order Authorizing Acquisition at 140-141.

The closing of Iberdrola's corporate purchase of Energy East, NYSEG and RG&E took place on September 16, 2008.<sup>17</sup> On January 27, 2009, four months after their merger with Iberdrola, NYSEG and RG&E filed with the Commission the rate requests at issue here. The Companies are seeking a total rate increase of \$278 million "in light of the Companies' urgent financial situation."<sup>18</sup>

To support their claim of financial calamity, the Companies allege that (1) their "BBB+" financial rating; (2) their need "over a two-year period to improve reliability, enhance/accelerate energy efficiency programs, help low-income ratepayers, increase renewable energy generation, ensure that safe and reliable service is not jeopardized, and (3) moving the Companies toward an "A' level credit rating" satisfy the standard set by the Commission to file this rate case.<sup>19</sup> The Companies included only cursory data to support their testimony claiming that a financial emergency exists.

#### ARGUMENT

##### POINT I. NYSEG And RG&E's Financial Performance Will Not Jeopardize Service.

##### A. The Companies' Credit Rating Does Not Jeopardize The Companies' Ability To Access Capital Markets.

NYSEG and RG&E's January 27, 2009 rate request seeks to "adjust rates on an expedited basis by July 1, 2009 so that the Companies can continue to provide safe and reliable service to their customers." The Companies claim that waiting eight months to file a rate case "...would jeopardize their ability to obtain capital needed to provide safe and reliable service."<sup>20</sup> The Companies suggest that their projected 7% return on equity and "BBB" credit ratings are not adequate in the current markets to obtain capital.<sup>21</sup>

Standard & Poor's and Moody's Financial Services rate the creditworthiness of Companies seeking credit in the capital investment markets. NYSEG and RG&E both actually have held an S&P "BBB+" rating for many years and a "Baa1" from Moody's. They had a BBB+ rating when the Commission authorized their merger with Iberdrola only four months ago

<sup>17</sup> See Letter from Pedro Azagra, Director of Corporate Development Iberdrola S.A., to Secretary Jaclyn A. Brilling in Case 07-M-0906.

<sup>18</sup> January 27, 2009 rate filing, cover letter.

<sup>19</sup> Company Policy Panel at 4, 5, 9 and 50.

<sup>20</sup> Company Policy Panel at 7.

<sup>21</sup> The legitimacy of the projected 7% rate of return is questioned in POINT I.B, *infra*.

and they have a BBB+ rating now. Moreover, in Standard and Poor's January 5, 2009 report, their parent company, Energy East, remained in the top 35% of all utilities for creditworthiness.<sup>22</sup>

While interest rates attainable with a "BBB+/Baa1" credit rating are currently higher than they have been in recent years, due to current market conditions, the rating does not foreclose the Companies' ability to obtain capital financing. In fact, as recently as December 23, 2008, RG&E issued \$150 million in first mortgage bonds at 8% interest, which is not high by historical standards.<sup>23</sup> Not only did RG&E access the markets, it did so at a traditionally difficult time of year (during the holidays); it accessed credit for a longer term; and it issued at an "A/A3" rating.<sup>24</sup>

### 1. The Companies Created Their So-Called "Crisis."

According to Barclays' Capital Reports, Standard & Poor's placed Energy East's BBB+ rating on "negative credit watch" specifically because of the Companies' rate request.<sup>25</sup> That new designation, therefore, is readily attributable to the Companies' public statements and other reports that Iberdrola does not intend to provide sufficient financial support to either company as well as the fact that the Companies filed for a rate increase due to their "dire financial situation." In their filing, the Companies repeatedly frame their financial condition as a "severe liquidity and credit crisis," "financial difficulties," "dire financial situation," and "urgent financial crisis."<sup>26</sup> In doing so, the Companies have created their own credit-worthiness standing. The Commission should not be swayed by the rating agencies' response to the Companies' exaggerated need for higher rates.

The Companies' January 27, 2009 filings, and the Companies' public statements lowered their credit rating.<sup>27</sup> The Commission should not find that the Companies satisfied the Commission's requirement that NYSEG and RG&E show that their financial performance jeopardizes service based upon a problem created by the Companies.

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<sup>22</sup> DPS Staff Financial Panel at 41-42.

<sup>23</sup> Company Policy Panel at 23.

<sup>24</sup> DPS Staff Financial Panel at 31-32.

<sup>25</sup> DPS Staff Financial Panel at 36-37.

<sup>26</sup> See e.g., Company Policy Panel at 4, 5, 6, 7, 9, 21, 27, 30, 31, 33, 37 and 38.

<sup>27</sup> The Companies also recently raised the specter about needing, but did not file for, temporary rates, to which the credit agencies also responded with stated concerns.

2. Had Iberdrola Not Placed Its Promised Financial Support In Doubt,  
Upon Which The Commission Relied In Approving The  
Merger, The Companies Would Likely  
Not Have Been Placed On A Credit Watch.

As Staff aptly observed during the merger hearings, “the cornerstone benefit [of the merger] alleged by Iberdrola [was] its financial strength relative to Energy East.”<sup>28</sup> Indeed, Iberdrola and the utilities led the Commission to believe that an infusion of parent-company financing would be forthcoming if either utility faced financial problems. Witness after witness made statements describing Iberdrola as having “the financial . . . capabilities . . . to acquire control of Energy East while ensuring that NYSEG and RG&E continue to provide high quality, safe, and reliable service to their customers.” The Companies added that Iberdrola’s “financially strong position” would provide Energy East (and thus RG&E and NYSEG) with greater access to both U.S. and global financial markets,” and that Iberdrola proved its ability to raise capital by its rapid success in sell 85 million new shares of common stock before the merger.<sup>29</sup>

Iberdrola lauded its ability to access capital markets more easily than either NYSEG or RG&E.<sup>30</sup> Indeed, as announced in a February 8, 2009 press release, Iberdrola issued €3 billion in bonds only recently and claims it “has increased its liquidity to more than €10 billion.”<sup>31</sup> While this demonstrates that Iberdrola is financially able to keep its commitments to the Commission (and invest in New York), Iberdrola is choosing not to do so.<sup>32</sup>

The Companies should be held to their testimony under oath that Iberdrola would step up financially when necessary, particularly when the obvious purpose of that testimony was to induce Commission authorization of the Iberdrola merger. Iberdrola’s about-face in failing to provide the Companies access to its readily available financial support during a worldwide economic downturn should be reason enough to dismiss these rate proceedings.

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<sup>28</sup> Merger Transcript at 1193.

<sup>29</sup> Merger Transcript at 489.

<sup>30</sup> DPS Staff Financial Panel at 48; see Merger Transcript at 147, 204, 489 and 1776.

<sup>31</sup> See February 8, 2009 Iberdrola Press release,  
[http://www.iberdrola.es/webibd/corporativa/iberdrola?IDPAG=ENMODULOPRENSA&URLPAG=/gc/prod/en/comunicacion/notasprensa/090208\\_NP\\_01\\_eleva liquidez.html](http://www.iberdrola.es/webibd/corporativa/iberdrola?IDPAG=ENMODULOPRENSA&URLPAG=/gc/prod/en/comunicacion/notasprensa/090208_NP_01_eleva liquidez.html)

<sup>32</sup> Company Policy Panel at 31.

B. The Companies' Cash Flow And Earnings Are Sufficient To Maintain Safe And Adequate Service.

The Companies project that for 2009, before adding additional expenditures above current levels, they will earn at or below a 7% return on equity for their distribution business under current rates.<sup>33</sup> NYSEG and RG&E are currently earning a 10.3% return on equity overall. After applying Staff's most basic corrections to the Companies' filings, it is more likely their 2009 return on equity for delivery operations will be maintained at 10%.<sup>34</sup>

Staff's investigation found that the Companies' claimed 7% return are based only on the delivery side of their businesses even though they earn revenues from commodity services.<sup>35</sup> Second, the utilities included costs, such as \$8 million in 2009 rate case legal fees (even though the Commission ordered that they not file a rate case until the end of 2009), employee bonuses and a 3% payroll increase to all employees.<sup>36</sup> Finally, there is no evidence that the Companies removed from their 2008 rate base the expenses accrued because of and associated with their 2008 merger with Iberdrola.<sup>37</sup> Simply put, by irresponsibly inflating the capital and operating expenses upon which a return on equity is calculated, the Companies made it appear that Iberdrola will earn only a 7% return on its investment.

While the Companies project cash flow deterioration, Staff found that Company cash flows remain neutral. The deterioration in cash flows shown by the Companies was driven by flawed assumptions and dubious transactions. For example, the Companies assume the payment of over \$200 million of dividends to Iberdrola at a time when they are allegedly facing financial crisis.<sup>38</sup> Further, they assume the near doubling of capital expenditures over the levels the Commission determined were adequate for the provision of safe and reliable service.

Similarly, they make no mention of the following measures, all of which would improve their projected cash flow: RG&E should show \$57 million in cash from the expiration of its Asset Sale Gain Account; NYSEG cash flows do not show the approximately \$19 million in NYPA-related 2008 forecast true ups, also allowed in its non-bypassable charge (NBC); and

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<sup>33</sup> Company Policy Panel at 27. Unbelievably, the Companies are requesting a 12-12.2% return on equity.

<sup>34</sup> DPS Staff Financial Panel at 60. NYSEG and RG&E are currently earning a more than 10% return on their investments. *Id.* at 65.

<sup>35</sup> DPS Staff Financial Panel at 56-58.

<sup>36</sup> NYSEG Revenue Requirement Panel at 17.

<sup>37</sup> DPS Staff Financial Panel at 58-59.

<sup>38</sup> Company Policy Panel at 40, Exhibit PP-4.



NYSEG's updated uncollectibles for its 2009 merchant function charge (MFC) shows a positive cash flow of \$5.7 million.<sup>39</sup>

Finally, RG&E claims that it needs added cash because it lost \$100 million in the purchase of a bond financing hedge. Other than its self-serving attempt to blame Commission "inaction" for the loss,<sup>40</sup> the Companies provide no information to detail or justify RG&E's investment decision here, including the extent to which ratepayers would have benefited if the hedge had in fact been a sound investment.<sup>41</sup> In any event, even with the \$100 million loss from RG&E's hedge investment, its electric and gas service are not in jeopardy under current rates because Staff's cash flow analysis demonstrates significantly lower cash needs than purported by RG&E. Furthermore, RGE's recent debt issue proves it has access to capital markets to address capital needs.<sup>42</sup>

C. The Commission Has Already Determined That Current Capital Budgets Are Sufficient To Maintain Safe And Adequate Service.

In its filing, NYSEG seeks approval for electric, gas, and common capital expenditure budgets of \$214 million for 2009 and \$235 million for 2010.<sup>43</sup> RG&E seeks rate recovery sufficient to finance electric, gas, and common capital expenditures of \$160 million for 2009 and \$205 million for 2010.<sup>44</sup> Specifically concerned that Iberdrola may attempt to reduce investments in NYSEG and RG&E's plant, the Commission established capital expenditure budgets as a "benchmark" to enforce "the parties' best judgment as to the expenditure level needed to maintain safe and adequate service."<sup>45</sup>

That is, current authorized capital electric and gas expenditure benchmarks for NYSEG are \$160 million in each of 2009 and 2010 and in RG&E, \$110 million in 2009 and 2010.<sup>46</sup>

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<sup>39</sup> DPS Staff Financial Panel at 71-72.

<sup>40</sup> Company Policy Panel at 21.

<sup>41</sup> DPS Staff Financial Panel at 90.

<sup>42</sup> DPS Staff Financial Panel at 23. Staff has asked for further information on RG&E's hedge loss in IRs and will need to evaluate RG&E's responses to determine if the hedge should legitimately be the responsibility of RG&E ratepayers or shareholders.

<sup>43</sup> NYSEG Capital Expenditures, Reliability and Operations Panel at 5, Exhibit PP-4.

<sup>44</sup> RG&E Capital Expenditures, Reliability and Operations Panel at 5.

<sup>45</sup> January Order Authorizing Acquisition at 55, 58, 62.

<sup>46</sup> NYSEG's electric and common capital expenditures total \$140 million; its gas, \$20 million. RG&E's electric and common capital expenditures total \$90 million; its gas, \$20 million. see January Order Authorizing Acquisition at 55, 58, 62.

NYSEG's claim that it needs an additional \$54 million in 2009 and \$75 million in 2010<sup>47</sup> and RG&E's claim that it needs an additional \$51 million in 2009 and \$96 million in 2010<sup>48</sup> to avoid harm to electric and gas service are a 51% increase, or more than \$276 million above the benchmark adopted by the Commission to maintain safe and adequate service. Rather than seek rate increases to meet new capital spending targets in the current economic environment, the Companies should plan and prioritize their capital expenditures to manage their businesses effectively to maintain safe and adequate service. They should not be seeking a rate increase for added capital spending at this time because it is not necessary to protect gas and electric service.

D. The Companies Have Failed To Implement Austerity Measures Expected Of Companies Whose Financial Condition Is Allegedly In Jeopardy.

Risk-reducing financial measures exist that would help the Companies improve their credit rating and cash flow without having to increase rates. Most notably, the Companies could choose not to pay the more than \$200 million in dividends proposed over the next two years to their parent company, Iberdrola (\$110 million would be paid in 2009 and \$90 million in 2010). They intend to pay these dividends even if they are not granted a rate increase.<sup>49</sup> If NYSEG and RG&E can afford to pay dividends to Iberdrola, they are not in a financial crisis.<sup>50</sup>

Moreover, the Companies have not requested that the Commission approve any deferrals or surcharges for one-time expenses, both of which would take pressure off of earnings and, therefore, improve their credit ratings.<sup>51</sup> Further, there is no evidence that the Companies withheld employee bonuses associated with their merger with Iberdrola, that they intend to withhold bonuses and pay raises in the future, or that they have reduced company contributions to 401(k) plans as austerity measures during the rate year.<sup>52</sup> Finally, NYSEG and RG&E plan to pay Iberdrola up to \$34 million for both 2009 and 2010 (\$68 million over two years) for federal taxes that Iberdrola will likely not even owe.<sup>53</sup> While other businesses and individuals all over the world take measures to reduce costs and improve their financial condition, and when good

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<sup>47</sup> DPS Staff Service Quality and Reliability Panel at 10.

<sup>48</sup> DPS Staff Service Quality and Reliability Panel at 24.

<sup>49</sup> Company Policy Panel, Exhibit PP-4.

<sup>50</sup> And if the Companies are found to be in danger of impending financial crisis, the Commission should order that all planned or projected dividend payments be stopped as an asset-saving measure.

<sup>51</sup> DPS Staff Financial Panel at 79-80.

<sup>52</sup> DPS Staff Financial Panel at 78-79.

<sup>53</sup> DPS Staff Financial Panel at 73-74.

management is quick to institute such measures during a challenging financial climate, the Companies have apparently disregarded these options. Instead, NYSEG and RG&E's primary response is to ask that their residential, commercial and industrial customers pay higher rates so NYSEG and RG&E can up their returns from 10% to 12%.

POINT II. Service And Reliability Are Not In Jeopardy.

A. Service Standards Are Currently Being Met.

The Commission prohibited NYSEG and RG&E from seeking any rate increases before September 16, 2009, unless service was in jeopardy. By their own admission, the Companies are providing safe and reliable service to their customers.<sup>54</sup> With the exception of 2007, NYSEG met its System Average Interruption Frequency Index (SAIFI) and its Customer Average Interruption Duration Index (CAIDI) in the last five years and appears to have done so again in 2008.<sup>55</sup> These electric reliability performance records show, in fact, that RG&E has one of the best reliability records of any New York utility and remained so as recently as December, 2008.<sup>56</sup> While NYSEG's reliability quotients are not as impressive as RG&E's, they nonetheless improved from 2007 to 2008.<sup>57</sup>

NYSEG has met or exceeded its leak prone pipe replacement and bare steel replacement targets every year.<sup>58</sup> Gas safety metrics show that both NYSEG and RG&E have the overall best safety performance of any large New York utility. They both met or exceeded gas safety targets in 2008; that performance raised the bar for all New York utilities.<sup>59</sup> The facts show that neither electric or gas safety or reliability are in jeopardy.

B. Consumer Services Reports On Service Quality  
Do Not Support A Finding That Service Is In Jeopardy.

The Office of Consumer Services collects monthly service quality reports. A review of that data shows there has been no substantial change in service quality reports for either NYSEG

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<sup>54</sup> NYSEG Capital Expenditures, Reliability and Operations Panel at 13 and RG&E Capital Expenditures, Reliability and Operations Panel at 14.

<sup>55</sup> DPS Staff Service Quality and Reliability Panel at 18, 29-31.

<sup>56</sup> DPS Staff Service Quality and Reliability Panel at 29.

<sup>57</sup> DPS Staff Service Quality and Reliability Panel at 18.

<sup>58</sup> Company Capital Expenditure, Reliability and Operations Panel Testimony at 37.

<sup>59</sup> DPS Staff Service Quality and Reliability Panel at 43.

or RG&E.<sup>60</sup> Based on Staff's review and analysis of the Companies' monthly service quality performance reports, NYSEG's overall performance for 2008, and the four most recent months in particular, has satisfied their threshold service quality performance. Not only has service not deteriorated, but two of the three measures of NYSEG's Consumer Service Performance Incentive (CSPI) program, have improved, with the other measure nearly unchanged. For RG&E, service quality performance has exceeded performance thresholds for all six of its CSPI measurements for 2008 as well as the last four months. In addition, it is likely that for the first time in three years RG&E will not incur any revenue adjustment for failing to meet a threshold performance level. For both Companies overall, there has been no apparent decline in service quality performance for 2008 or since the September 2008 merger.<sup>61</sup> By these measures, both Companies are meeting customers' service expectations in addition to other measures showing their service is safe and adequate.

POINT III. Other Bases The Companies Cite For Their Financial Problems Are Being Addressed In Other Commission Proceedings And, Therefore,  
Do Not Require A Rate Increase Here.

NYSEG and RG&E suggest that the costs of energy efficiency programs and an increase in uncollectible costs warrant rate relief.<sup>62</sup> Given that the costs of each of these items is being addressed in other Commission proceedings, they provide no basis here for new rate relief.

Without even mentioning the ongoing Energy Efficiency Portfolio Standard proceeding (Case 07-M-0548), the Companies claim they need emergency rate relief because they must finance "enhanced energy efficiency programs."<sup>63</sup> The Commission, in its June 23, 2008 Order Establishing Energy Efficiency Portfolio Standard and Approving Programs, specifically allowed all utilities to use Systems Benefits Charge (SBC) funds to pay for energy efficiency programs.<sup>64</sup>

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<sup>60</sup> DPS Staff Service Quality and Reliability Panel at 41.

<sup>61</sup> DPS Staff Service Quality and Reliability Panel at 47-48.

<sup>62</sup> Company Policy Panel at 17, 28, 37 and 50.

<sup>63</sup> Company Policy Panel at 50.

<sup>64</sup> Order Establishing Energy Efficiency Portfolio Standard and Approving Programs (issued and effective June 23, 2008), ordering clause 2. While the Companies state in testimony that their goal is to implement the newly-announced 45/15 initiative (Co. Policy Panel at 48), providing funding under a claimed emergency for new programs was never what the Commission had in mind when it required that an emergency exist to overturn its stay-out requirement. Moreover, while citing energy efficiency programs as a reason for needed emergency rate relief, the Companies have not even provided testimony on the programs they propose, indicating they will file the details of the request on May 26, 2009.

Energy efficiency programs already funded through the SBC should not be a reason to entertain rate relief.

Second, in its recent Order Instituting Proceeding And Seeking Comments (issued and effective December 16, 2008), in Case 08-M-1312, the Commission sought utility proposals on possible rate mechanisms that could be instituted to provide relief to utilities from increased uncollectibles, “including (1) quantifying and deferring the return that may be required on utilities’ increased working capital needs due to higher than normal 2008-9 arrearages and uncollectible expense and (2) ways utilities might defer uncollectible expense in excess of the level reflected in current rates.” It is anticipated that a final order will confirm procedures by which utilities may seek deferral treatment of uncollectibles. Given the Commission’s uncollectibles proceeding, NYSEG and RG&E uncollectibles are no reason to find that the Companies met their burden of showing extraordinary rate relief is necessary because safe and adequate service is in jeopardy.

POINT IV. Were The Companies Really In Dire Financial Circumstances,  
They Would Have Requested Temporary Rates.

Public Service Law §114 provides that utilities may request immediate temporary rates until permanent rates take effect. The very purpose of §114 is to provide emergency rate relief when necessary. The fact that the Companies did not seek temporary rates pending the outcome of a permanent rate request supports the fact that current rates do not place service in jeopardy.<sup>65</sup> Public Service Law §114 does not require a full hearing; therefore, the Companies could obtain rate relief even more quickly than from the expedited schedule they seek. If service in NYSEG and RG&E territories was truly in jeopardy, the Companies would have requested temporary rates.

Public Service Law §114 is also instructive on what constitutes a basis for extraordinary rate relief. The language of §114 sets as a minimum a 5% return when a utility needs immediate rate relief. Even if every fact offered by the company is true, their filing still projects for 2009 a 7% return on equity, a return on investment that is well-above §114’s instruction that 5% is a

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<sup>65</sup> In December letters between the Companies and the DPS Office of General Counsel, the Companies indicated they were considering seeking temporary rate relief.

high enough return to protect service pending a long term rate increase. The Companies are seeking a more than 12% return on equity.

Were NYSEG and RG&E's service jeopardized due to a financial emergency, they would have sought immediate relief through temporary rates. Dismissal of NYSEG and RG&E's rate requests is warranted because the numbers they provide fail to even hint at an emergency when held up to Public Service Law §114 standards.

**POINT V.     The Companies' Filing Is Deficient, Which Violates The Commission's Merger Order And Commission Rules Of Procedure For Major Rate Filings And Makes It Impossible To Enforce The Merger Order's Rate Increase Prohibition.**

In its Order Authorizing Acquisition, the Commission specifically required both utilities to include in their next rate filing, "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."<sup>66</sup> Further, the Commission's regulations require that every rate filing shall, for instance, "exactly set forth" all changes in rates<sup>67</sup> as well as comparative balance sheets, and three preceding years of earned surplus statements and "all assumptions of changes in price inputs because of inflation or other factors or changes in activity levels due to modified work practices (or other reasons should be separately developed). Staff and other parties in rate cases 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."<sup>68</sup> NYSEG and RG&E's filing is devoid of virtually all of these requirements. In addition, the Companies state that other related, and necessary, information for a complete filing will not be forthcoming until May 29, 2009.

It is particularly egregious that the Companies' testimony and exhibits are completely deficient of any supporting detail or justification under the circumstances. The Companies seek expedited rate treatment; they submitted a rate filing that contains none of the information they

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<sup>66</sup> January Order Authorizing Acquisition at 140-141.

<sup>67</sup> 16 NYCRR Part 61.3(3)(c)(3).

<sup>68</sup> See 16 NYCRR Part 61.

accepted unconditionally that they would provide; and what has been provided does not meet the threshold burden set by the Commission in its Order Authorizing Acquisition.

As for the alleged need for rate relief, the filings do nothing more than claim a threat to service. The testimony only generally discusses sample projects and the exhibits attached thereto list only a project's total cost.<sup>69</sup> Allowing NYSEG and RG&E to go forward with full rate cases based upon allegations alone would render superfluous the Commission's order prohibiting the utilities from filing for rate increases unless their finances are so poor that service is in jeopardy. It is the utilities' burden to substantiate even routine rate relief requests. Given that both utilities knew the Commission required a very high standard for future rate relief and they have utterly failed to substantiate their request, their January 27, 2009 filing should be dismissed.

POINT VI. If The Commission Denies Staff's Motion To Dismiss, The Rate Cases Should Be Dismissed Because The Filings Are Deficient.

If the Commission does not reject the NYSEG/RG&E rate filings because they fail to meet the standard that service be in jeopardy before rate relief is considered, they should be rejected because they are wholly deficient. The Companies have sought expedited rate review and yet, as described above, have failed to include both the specific information the Commission required in September 2008 and documents required by Commission rules, 16 NYCRR Part 61.

The Companies failed to provide project scopes, justifications, cost estimates, schedules, demand studies, reliability assessments, and project alternatives. While Staff is conducting extensive discovery to obtain this information, the opportunity for discovery is no substitute for the Companies' ignoring the legal requirements that it be included in the original filing. It is the Companies' burden to support the requested rates, not Staff's burden to run after the missing pieces. If the filings are not rejected for all of the reasons stated in this Motion, they should be rejected because they are deficient as a matter of law.

CONCLUSION

For the reasons set forth in this Motion, NYSEG and RG&E's January 27, 2009 rate filings should be rejected in their entirety because the Companies failed to meet the burden

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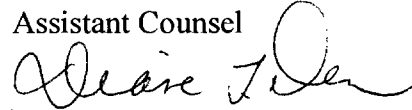
<sup>69</sup> DPS Staff Service Quality and Reliability Panel at 21-22.

established by the Commission's threshold requirement for PSC consideration of a rate request before October 2009. In the alternative, the rate filings should be dismissed because they are deficient as a matter of law.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Jane Cicerani".

Jane Cicerani  
Assistant Counsel

A handwritten signature in cursive script, appearing to read "Diane T. Dean".

Diane T. Dean  
Assistant Counsel

Dated: February 13, 2009  
Albany, New York