STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on May 30, 2013

COMMISSIONER PRESENT:

Garry A. Brown, Chairman

CASE 13-M-0028 - RED-Rochester LLC and Eastman Kodak Company - Petition for Approval to Transfer Regulated Utility Assets at Eastman Kodak Park, Approval to Transfer Certificates of Public Convenience and Necessity, for Continued Lightened and Incidental Regulation, Approval of Financing, and Authorization, to the Extent Necessary, for Submetering.

ORDER APPROVING TRANSFER SUBJECT TO CONDITIONS, PROVIDING FOR LIGHTENED RATEMAKING REGULATION, AND MAKING OTHER FINDINGS

(Issued and Effective May 30, 2013)

BACKGROUND

In a petition filed on February 4, 2013, Eastman Kodak Company (Kodak) and RED-Rochester LLC (RED)(collectively, the Petitioners) request approval, pursuant to Public Service Law (PSL) §70, of the transfer of Kodak's electric, gas, steam and water utility facilities at the Eastman Business Park (Eastman Park) to RED. The Petitioners also ask that: the Certificates of Public Convenience and Necessity (CPCN) authorizing Kodak to provide services regulated under the PSL within the Eastman Park be transferred to RED;[1] the incidental and lightened regulation applied to Kodak as the owner and operator of the PSL services

[1] The CPCNs were granted in Case 04-M-0388, Eastman Kodak Company, Order Granting Certificates of Public Convenience and Necessity and Providing For Lightened and Incidental Regulation (issued August 2, 2004)(Kodak Order).

be continued for RED; a proposed financing RED plans to obtain be approved; and, to the extent necessary, Kodak be authorized to engage in the submetering of electricity and gas to certain of its tenants. The Petitioners point out that the sale of the utility facilities to RED has been approved by the U.S. Bankruptcy Court for the Southern District of New York in Kodak's ongoing Chapter 11 bankruptcy proceedings.

In conformance with State Administrative Procedure Act (SAPA) §202(1), notice of the petition was published in the State Register on February 13, 2013. The SAPA §202(1)(a) period for submitting comments in response to the notice expired on April 1, 2013. By that date, comments were received from customers at the Park, including Acquest South Park LLC (Acquest), Carestream Health, Inc. (Carestream), E.I. DuPontdeNemours & Company (Dupont) (through its subsidiary, Danisco U.S., Inc.), Exelis, Inc. (Exelis) (through its subsidiary, ITT Space Systems LLC), Khuri Enterprises LLC (Khuri), and Rochester Silver Works LLC (RSW). Comments were also received from several governmental entities, including the City of Rochester, the Town of Greece, and the Monroe County Executive (Monroe County). On April 2, 2013, filings were received from another customer, Truesense Imaging, Inc. (Truesense) and the Petitioners, who responded to the customers' filings.[2]

Moreover, RED moved in the Petition, pursuant to 16 NYCRR §21.10, to expedite the process for considering its request that the CPCNs held by Kodak be transferred to it. RED filed proof that it had made the requisite newspaper publication of notice of the motion on January 25, 2013. Comments on the

[2] The unauthorized filings will be considered because they contribute to the development of a complete record in this proceeding and are not prejudicial.

motion were due ten days following publication, on February 4, 2013. No comments were received.

Following receipt of the comments in response to the SAPA notice, a Notice of Technical Conference (the Notice) was issued April 10, 2013 in this proceeding. To guide the discussion at the Technical Conference, the Notice set forth proposals for modifying the relief Kodak and RED had requested, and revising the standard contract they had presented. The proposals addressed the Coordination Committee provided for in the standard contract that RED described as the means for communicating between it and its customers and for considering changes to the blanket provisions of the standard contract applicable to all customers; the weighting of the voting on the Committee; the profit-sharing mechanism established in the standard contract; the transition from the variable usage charges currently in effect at the Park to charges set using both demand and variable components; Kodak's assignment of its beneficial rate to successors; and, designation of RED as the exclusive service provider within the Park.

Parties were invited to submit comments on the issues raised at the Technical Conference, which was conducted on April 16, 2013, by April 23, 2013. By that date, the Petitioners, the customers submitting initial comments, other than Khuri, and an additional customer, Johnson & Johnson, Inc. (J&J)(through its subsidiary, Ortho Clinical Diagnostics, Inc.), and the City of Rochester filed comments addressing the Technical Conference issues.

Following the filing of the Technical Conference Comments, the Petitioners supplemented their petition in a filing made on May 22, 2013. In a Notice Soliciting Comments issued May 23, 2013 in this proceeding, parties were invited to respond to the supplemental filing by 1:00 p.m. on May 29, 2013.

LiDestri Foods, Inc. (LiDestri), another Park customer, and RSW filed comments by that deadline. The Initial Comments, the Technical Conference Comments, and the Supplemental Filing Comments are summarized at Appendix A.

THE PETITIONERS' FILINGS

The Petition

Describing the Eastman Park, the Petitioners explain it is comprised of real estate and facilities located on a site that extends roughly four miles long by one mile wide, partly in the City of Rochester and partly in the Town of Greece. Kodak, the Petitioners continue, developed over time extensive electric generation and utility distribution systems within the Park to meet its own needs for natural gas, electricity, steam, potable water and other services.[3]

As Kodak's manufacturing commitment to the Park diminished in recent years, the Petitioners explain, it divested some of its manufacturing operations to independent businesses. As a result of those and other transactions, the Petitioners elaborate, 35 independent businesses with 4,000 employees now occupy purchased or leased property, facilities, and space at the Park. Twelve of the independent businesses own their own property, and would, along with Kodak, contract directly with RED for utility services following the transfer. These twelve customers other than Kodak are projected to consume approximately 36% of the utility services provided in the Park in 2013, with Kodak and its tenants consuming the remainder.

[3] These services include fire protection water, untreated non-potable industrial water, chilled water, processed water, nitrogen, compressed air, waste water treatment and solid waste disposal.

The source of the energy powering most of the utility services, the Petitioners state, is a steam and electric plant consisting of four boilers fueled with coal, four back-up boilers fueled with oil, and generation facilities with a nameplate capacity of 203 MW. This power plant, the Petitioners relate, is currently managed by DTE Rochester LLC (DTE) under contract with Kodak. One of the Principals to RED's parent company, RED Parent LLC (RED Parent), the Petitioners note, participated in the negotiation of the contract under which DTE provides services, when it was first executed with a predecessor to DTE in 1999. DTE currently deploys about 50 employees; Kodak retains approximately 60 employees that are involved in activities related to the provision of utility services at the Park.

Describing the Kodak Order, the Petitioners relate that it authorized Kodak to furnish retail gas, electric and steam service within the Eastman Park subject to CPCNs and also authorized the provision of water service for which a CPCN was not required. Moreover, Kodak was granted incidental regulation, under PSL §§66(13), 80(11) and 89-c(11) and lightened regulation, as a matter of discretion, exempting it from keeping accounts, records and books, from making annual reports, and from filing rate schedules and tariffs. Kodak also received the incidental regulation exemption delineated at PSL §66(13) pertaining to gas service provided to fewer than twenty customers.

The terms of a Joint Proposal between Kodak and Rochester Gas and Electric Corporation (RG&E), the Petitioners elaborate, were also adopted in the Order. The Petitioners interpret those terms as providing that: the gas and electric CPCNs issued to Kodak were non-exclusive; Kodak must make its electric and gas distribution facilities available to

competitive commodity suppliers on a non-discriminatory basis and, if necessary, develop and file rates it would charge for delivery service; Kodak would not provide gas or electric service outside the Eastman Park; and, Kodak would not serve residential customers.

Kodak, the Petitioners announce, does not desire to continue owning the Park's utility operations following its emergence from bankruptcy, because the businesses independent of Kodak that occupy increasing proportions of the space at the Park also consume increasing proportions of the utility services there, and it would prefer to focus on its core businesses rather than operate a utility business. The Bankruptcy Court, the Petitioners report, has approved the transfer of the utility systems to RED, subject to an approval of the transfer under the PSL that also provides for: incidental and lightened regulation without materially increasing regulatory requirements as compared to those imposed on Kodak; obtaining approvals from the Department of Environmental Conservation (DEC); and, entry into utility services sales agreements based on the standard contract format with each of the twelve existing customers. That contract's provisions follow for the most part the utility services agreement governing RED's sales of those services to Kodak after the transaction is consummated.

The Petitioners maintain RED is qualified to operate the Park, given the experience of the Principals in RED Parent in developing, financing, building, owning and operating various utility, combined heat and power, and waste energy operations throughout the U.S. Describing RED's plans for providing utility services within the Park, the Petitioners indicate RED will furnish a total of fourteen services, including those not subject to PSL regulation, through the standard contract utility sales agreements with Kodak and the other 12 customers.

Like Kodak, the Petitioners continue, RED will interconnect with and take gas and stand by electric service from RG&E, and redistribute the electricity and gas throughout the Eastman Park. The electricity, they explain, supplements the primary source of generation that is produced on-site from an existing generation plant. RED will also take delivery of potable water from the Monroe County Water Authority (MCWA) and the City of Rochester Water Department (City of Rochester), as Kodak does now, and distribute the water within the Eastman Park.

According to the Petitioners, Kodak currently owns, and RED will own, the distribution facilities between the points of service with RG&E, MCWA and the City of Rochester, and the customers, and no other persons provide gas, electric, steam or potable water service within the Park. RED notes, however, that RG&E provides direct gas service to three customers within the Park but located near edges of its boundaries.

Describing the arrangements made in the proposed standard contract, the Petitioners claim that customers will continue to find Eastman Park utilities attractively priced. The Petitioners note, however, that the rates are also intended to support a return on capital sufficient to create an incentive for RED to invest in enhancing efficiency, reducing emissions, and expanding services at the Park. The Petitioners assert that new rate mechanisms are needed to achieve these objectives, since Kodak historically operated the Park utilities and set charges on the basis of recovering no more than its costs.

The Petitioners describe RED’s ratemaking methodology as beginning with actual usages and costs at the Park for 2011 as the base. RED would then continue Kodak’s practice of adjusting the base period costs for factors outside of the utility provider’s control, such as the purchase prices of

utility commodities, the volumes of the commodities and services used in the Park, and inflation. RED, the Petitioners emphasize, would then credit the customers and Kodak with 50% of any gain or profit above actual costs, debt service, and a fixed return on RED's equity capital. But, the Petitioners continue, no adjustments would be made to RED's rates to reflect changes in fuel or operating efficiency, impelling RED to shoulder the risk of maintaining or increasing efficiency.

This new rate-setting method, the Petitioners explain, differs from Kodak's current methodology, under which rates are set at the sum of the base rate, as adjusted, and a customer-specific overhead charge, set at a selected percentage mark-up on the base rate that varies from customer to customer. Kodak, the Petitioners relate, did not pay an overhead charge, because it was the service provider responsible for managing the overhead costs. The outcome of the new pricing is that, while prices for each individual regulated utility and non-regulated service has been set to match historic pricing, the match is not perfect, with pricing for processed water and industrial sewer service increasing slightly compared to other services and pricing for those other services declining concomitantly.

RED's objective in the near term, the Petitioners declare, is to preserve prices consistent with past practice and retain existing utility service volumes consumed at the Park. To that end, RED will offer each customer the option to continue its current pricing arrangement at its existing overhead charge through the term of the existing contract. Customers that agree to extend the term of their contracts, however, will be afforded the option to convert to a block-based overhead charge, which will reduce pricing for large customers. In the longer term, the Petitioners state, RED intends to standardize rates, while providing for the variable overhead charge that will allow those

customers creating the most long-term economic value for the Park to obtain pricing commensurate with that value.

In addition, the Petitioners indicate RED intends to convert the current variable rates, based entirely on usage, to rates consisting of demand and variable components. That change, the Petitioners note, cannot be implemented until upgraded meters capable of measuring demand are installed, a process RED anticipates could be completed within approximately a year following the closing of the transaction.

Another new arrangement RED will bring to the Park, the Petitioners explain, is the creation of a Coordination Committee, composed of at least one representative from each customer, including Kodak. As the Petitioners describe it, the Coordination Committee will serve as the forum for discussing potential changes to the utility systems at the Park, giving notice of planned outages, and discussing other system issues. In addition, the Petitioners continue, approval of the Coordination Committee will be required before RED may commence furnishing any service not already provided for; adopting or amending the schedule for shedding load in emergencies; entering into any contract to provide services at EBP other than under a standard contract providing for the proposed rate methodology; or, making certain investments. The Petitioners also point out that the proposed contracts with customers affords customers and Kodak the right to avail themselves of the Commission's complaint procedures.

RED's proposed pricing formula, the Petitioners concede, advantages Kodak in comparison to the other customers because Kodak does not pay an overhead charge. This outcome, the Petitioners claim, is justified, because it preserves historic pricing practice at the Park and assists in assuring that Kodak's operations will be viable when it emerges from

bankruptcy. Kodak's viability, the Petitioners point out, is necessary to preserve existing volumes of consumption at the Park to the benefit of all customers. Finally, the Petitioners note that Kodak will provide submetered electric and gas services to businesses that are its tenants and do not own their own property within the Park, in conformance with the evolving regulatory requirements for commercial submetering under consideration in Case 12-E-0381.

Pointing out that Kodak's utility operations are subject to incidental and lightened ratemaking regulation because Kodak was deemed to operate in a competitive environment, the Petitioners believe that a review of the proposed transaction should focus on any potential detriments to consumer interests and that conducting a broader investigation is not needed. According to the Petitioners, the other proceedings involving industrial and commercial parks establish that the promotion of economic development within a business park is a feature justifying findings that prompt and pragmatic approvals are appropriate to further the public interest.[4] The Petitioners also contend that RED's continued operation of the utilities in the Park will take place in a competitive environment, where it must competitively price utility services to retain existing customers and attract new customers. Moreover, the Petitioners assert, RED is willing and able to provide safe, adequate, reliable and financially viable service.

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[4] Case 07-M-0363, Continental Industrial Capital LLC and Colby Housing Corporation, Order Granting Certificate of Public Convenience and Necessity, Providing For Lightened and Incidental Regulation, and Approving Transfers (issued June 25, 2007); Case 06-E-0287, Griffis Local Development Corporation, Order Approving Economic Development Rate and Transfer of a Certificate and Providing For Lightenend Regulation (issued July 20, 2006).

RED, they add, will also retain the Kodak employees involved in the operation of the Park services.

Turning to financial viability, the Petitioners assert that RED is committed to investing $16.0 million of equity into the Park utility operations, and has obtained financial backing for that pledge from investors with substantial financial resources. The Petitioners state, however, that the obligation to proceed with the transaction is conditioned upon the receipt of $7.1 million in financial support in the form of loans and grants from New York State.

The Petitioners believe that RED can operate the Eastman Park successfully into over the long term. To ensure compliance with tightening State and federal air quality standards that will require upgrades in pollution control equipment at the existing coal-fired boilers by 2017, the Petitioners indicate RED will replace those facilities by installing gas turbine and other facilities sized to meet the thermal needs of the Park. The steam produced would be used to meet steam load, to support many of the non-regulated services, and also to generate more electricity. This approach, the Petitioners assert, would meet evolving pollution control requirements at costs that would result in reasonable rates within the Park. The Petitioners note, however, that the exact size and configuration of the new gas-fired facilities should be determined at a subsequent time, once RED has obtained more experience with needs at the Park through actual operation of the utility systems.

The Petitioners argue that RED should be granted both incidental and lightened ratemaking regulation. While conceding that incidental regulation is available under PSL §66(13) only when a utility service is provided incidental to the primary purpose of the enterprise that provides the service, the

Petitioners argue that RED nonetheless can qualify. They point out that RED is a subsidiary of RED Parent, which operates a number of combined heat and power and other energy facilities. If, the Petitioners contend, the operations of the parent economic entity were considered as a whole making a comparison to RED's operations at the Park, then RED's operations are not a substantial component of the RED Parent's operations.

Moreover, the Petitioners assert RED Parent's primary purpose is to operate recycled energy projects, increase industrial efficiency and reduce greenhouse gas emissions, and that providing regulated utility service at the Park is only a subsidiary purpose. The Petitioners also suggest that the $61.1 million in revenues forecast from the provision of regulated utility services at the Park are a very small fraction when compared to the assets of the investors pledging support for RED's plans at the Park. The Petitioners assert that RED continues to qualify for the incidental regulation applicable to providers of gas service to less than twenty customers.

The Petitioners believe that granting incidental regulation would surmount practical difficulties that would be present at the Park if incidental regulation were not in place. In its absence, the Petitioners contend, costly reporting obligations would be imposed on RED, which could result in the harmful disclosure of sensitive information to the public. Moreover, they assert, there is no objective method for separating the costs of regulated utility operations from the costs of the unregulated services, because the re-use of the steam that drives many of the unregulated services makes the cost incurred in providing any one service difficult to determine. The costs associated with labor, insurance, maintenance, capital recovery and profits, the Petitioners add, cannot be objectively allocated among the individual services.

As a result, the Petitioners assert that granting incidental regulation is necessary to provide for the efficient operation of the Park.

The Petitioners also request that the lightened ratemaking regulation granted to Kodak be continued for RED, which, they say, will be a competitive provider of utility services just as Kodak was. Those regulatory provisions, they note, are detailed in the Kodak Regulation Order.

In addressing other issues raised by RED's proposal to purchase Kodak's utility services, the Petitioners point out that once the transaction is consummated, Kodak will become a customer. As a result, Kodak will also become a landlord submetering gas and electricity service to tenants. To the extent that evolving regulatory policies require it to obtain approval for that submetering, the Petitioners state, Kodak will request the necessary permissions.

The Petitioners note that RED must obtain approval under PSL §69 for the long-term financings it will enter into to fund improvements at the Eastman Park. The Petitioners explain that RED is seeking a $3.5 million loan from the State of New York, through the Empire State Development Corporation (ESD). Petitioners asks that RED be authorized to enter into that financial arrangement, and be afforded the flexibility to change the financing entities, payment terms, and amount financed, up to the $3.5 million limit, in conformance with precedents granting these authorizations to other lightly regulated companies.[5]

[5] See, e.g., Case 10-E-0405, NRG Energy, Inc., Order Approving Financing (issued November 18, 2010).

The Supplemental Filing

Reporting on RED's ongoing negotiations with the customers at the Eastman Park following the Technical Conference, the Petitioners state contract negotiations are now substantially complete with six to eight of the twelve customers. The Petitioners anticipate that contracts with these customers will be finalized and executed by a May 31, 2013 deadline Kodak and RED set in their contract for the sale to RED of the Park's utility assets and facilities. The Petitioners also believe that contracts could be reached with three to four other customers, but concede that it is likely one or two customers will not complete negotiations and execute a contract by their May 31, 2013 deadline. Even without those two customers, the Petitioners assert, it will have contracted for utility sales to customers representing 95% of the revenues paid for utilities services at the Park, with a total employment of 5,650, when Kodak is included.

According to the Petitioners, they have offered customers two options for service since the Technical Conference. The first, they continue, is the standard contract option based on the utility services contract between RED and Kodak, which provides for broadly consistent pricing, profit sharing, and Coordination Committee governance as described in their petition and as modified in their Technical Conference Comment (which is summarized at Appendix A). The latter modifications include defining a majority vote at the Coordinating Committee as greater of a majority or five percent more than the voting power of the largest customer; a three-year phase in schedule for moving from exclusively variable rates to demand and variable rates; and requiring that a successor to Kodak represent at least 1.5% of its consumption to obtain an assignment of Kodak's favorable rate. Customers could also

elect to either extend their current overhead charge through the remainder of the contract term with Kodak, or convert to the standard contract overheads in exchange for committing to that contract's 20-year term.

In response to customer concerns that potential declines in usage volumes at the Park could translate into rate increases under the standard contract pricing formula, the Petitioners present a second option, based on market prices. Under that market price option, the rate they offer customers for electricity will be set by reference to the price RG&E charges under its S.C. 8 tariff, and rate for steam is calculated by reference to prices charged by the Rochester District Heating Cooperative (RDHC). Customers selecting that second market rate option, the Petitioners explain, may revert to the first standard pricing option at the end of a five-year term, or if their load increases by 25%. The Petitioners assert the market rate option insulates customers from volume risk as they requested.

The Petitioners warn, however, that to the extent a customer does not finalize a contract by their deadline of May 31, 2013, Kodak will no longer be obligated to honor the terms of its contracts with those customers and RED will not have entered into contracts for service to them. Emphasizing that they do not wish to leave a customer without service, but protesting that objecting customers should not be permitted to delay or prevent the closing of the transaction, the Petitioners describe a third option for those customers that do not accept one of the two other options by their May 31, 2013 deadline.

The third default option will not bind a customer for a set time period, and instead may be cancelled by the customer on 60 days' notice, while RED may terminate service if payments are overdue by more than 30 days. Service would be limited to

the lesser of the customers' existing requirements or RED's ability to supply the service, albeit RED will endeavor to honor current Kodak load-shedding protocols. The customers would also be excluded from participation in profit sharing and in Coordination Committee governance. The price will be set at a 5% mark-up to RED's otherwise applicable charges. The default option, however, will allow the customer to seek out alternatives to service from RED through self-service or through obtaining service from competing providers. Reiterating that neither RED nor Kodak is obligated to close on the utility asset sale transaction if their May 31, 2013 deadline is not met, the Petitioners assert that offering this default option avoids missing the deadline.

Responding to concerns customers have expressed over the load-shedding schedule, the Petitioners point out that Kodak never promulgated formal load-shedding protocols, but did establish informal load-shedding priorities. The Petitioners state that RED will attempt to continue the existing informal practices, until a load-shedding schedule is adopted through action of the Coordination Committee in conformance with its standard contract. That Coordination Committee, the Petitioners elaborate, will operate subject to bylaws that are under preparation. The bylaws will include notice requirements for scheduling meetings, quorum requirements for taking action, and other provisions typical of bylaws governing such organizations.

The Petitioners also supply additional information in support of RED's request that it be issued CPCNs. They note that RED will acquire from Kodak three water lines running in public rights-of-way, and report that all required permits related to the lines have been obtained. They also supply a copy of RED's articles of organization as a limited liability

company, which do not restrict RED to engaging in any particular type of business.

Customer Responses to the Filings

In their comments as summarized at Appendix A, various customers object to various features of RED's proposals, albeit customers generally support approval of the transfer because it brings RED to the Eastman Park as an experienced operator of utility services. Nonetheless, the customers protest that they have not been given sufficient time to analyze contract proposals; that those proposals are unduly complex; and that RED's stance in negotiations either unduly shifts risks to them or results in utility rates that are excessive and more expensive than alternatives while restricting their ability to access those alternatives; and that RED has not sufficiently recognized the individual characteristics of their businesses in negotiating with them.

The customers also complain that RED's treatment of Kodak is unduly favorable, in that Kodak is not charged any overhead under its rate formula while other customers bear varying overheads; that Kodak may freely assign that rate benefit to successors to the detriment of other customers competing with those successors; and, that Kodak can exercise undue influence under the weighted voting system in effect at the Coordination Committee. While, as negotiations have evolved, many of the customers have moved towards entering into contracts with RED because they believe their concerns have been satisfactorily addressed, some customers continue to maintain that RED's proposals threaten their economic viability or are otherwise unfair or unreasonable.

DISCUSSION AND CONCLUSION

The sale of the utility assets and facilities located at the Eastman Park presents unique circumstances that differ substantially from those present at other business parks where lightened ratemaking regulation has been granted and transfers of utility assets to new owners have been approved upon reduced scrutiny. In those other instances, business park owners and customers have agreed, without regulatory intervention, to arrangements that retained existing customers and attracted additional new load.

At the Eastman Park, however, one especially large customer –- Kodak –- is dominant, comprising over 60% of the utility revenues expended at the Park. Continuing utility operation under Kodak's ownership is not viable, because, as it emerges from bankruptcy, it must concentrate its efforts on its own competitive market performance and it is neither interested in continuing to bear the responsibility of managing utility operations at the Park nor well-positioned to undertake that responsibility. Nonetheless, preserving Kodak's load at the Park as it emerges from bankruptcy is crucial to restraining rates charged for utility services at the Park to competitive levels. If Kodak or its immediate successors were to depart from the Park, the costs of owning and operating the existing utility assets would be shouldered by fewer customers, compelling those customers to pay higher rates to sustain operations. RED, as the new owner of the utility facilities at the Park, is willing to confront these difficult circumstances, but asks that regulatory treatment be configured to assist it in overcoming obstacles to successful operation of the Park.

Kodak's 12 existing customers vary widely in the revenues they expend on utility services, in the number of employees they retain, and in the character of the businesses

they operate. As the Petitioners concede, at least a few of these customers vigorously oppose the arrangements RED proposes for providing utility services. On the other hand, some customers find those arrangements acceptable, while still others are uncertain. Whatever other positions the customers take, however, all agree that a new operator of utility services at the Eastman Park is needed, and that RED appears capable of performing that role. For its part, RED maintains that it cannot successfully operate the Park unless it obtains lightened regulation in substantially the same form as adhered to Kodak.

Resolving these competing considerations is best addressed by beginning with an analysis of the Kodak Orders, pursuant to which Kodak operated the Eastman Park under incidental and lightened ratemaking regulation. Once those principles underpinning the regulation that adhered to Kodak are explicated, those principles may be applied in arriving at a regulatory regime for RED. In establishing that regime, the contractual arrangements RED has proposed, and customer opposition to those arrangements, must be considered. Findings also must be made on whether the transfer of the Park's gas, electric, steam and water facilities to RED is in the public interest, taking into account the same competing considerations.

Environmental Quality Review

Under the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law, and its implementing regulations (6 NYCRR §617 and 16 NYCRR §7), we must determine whether the actions we are authorized to approve may have a significant impact on the environment. Other than our approval of the action proposed here, no additional state or local permits are required, so a coordinated review under SEQRA is not needed. We will assume Lead Agency status under SEQRA and conduct an environmental review.

SEQRA, at 16 NYCRR §617.6(a)(3), requires applicants to submit a complete EAF describing and disclosing the likely impacts of the actions they propose. The Petitioners submitted a narrative and short-form EAF Part 1 that substantially comply with this requirement.

The proposed actions over which we have jurisdiction are the transfer of gas, electric, steam and water utility facilities located at the Eastman Business Park from Kodak to RED, and certification of RED to provide utility services to customers located at the Park. The proposed actions do not meet the definitions of Type 1 or Type 2 actions listed in 6 NYCRR §§617.4, 617.5 and 16 NYCRR §7.2, so they are classified as an "unlisted" action, as defined at 6 NYCRR §617.2(ak), requiring SEQRA review. After review of the petition, we conclude, based on the criteria for determining significance listed in 6 NYCRR §617.7(c), that there will be no changes to utility operations upon the transfer to a new owner of the existing gas, electric, steam and water facilities located at the Eastman Park, or the certification of that owner to furnish utility services, that will result in adverse environmental impacts. Our Staff has completed the short-form EAF Part 2.

As Lead Agency, we determine that the proposed action will not have a significant impact on the environment and adopt a negative declaration pursuant to SEQRA. Because no adverse environmental impacts were found, no public notice requesting comments is required or will be issued. A negative declaration concerning this unlisted action is attached. The completed EAF will be retained in our files.

The Kodak Orders

RED's request that the regulatory regime in place as the Eastman Park for Kodak be extended to it and that the transfer to it of the utility facilities located there be

approved, requires a detailed analysis of the regulatory requirements applicable to Kodak. In the Kodak Regulation Order, it was decided that Kodak was entitled to incidental regulation pursuant to PSL §66(13), §80(11), §89(c)(11), as applicable to gas and electric, steam and water service, respectively. Kodak met the test for obtaining incidental regulation because it could show that revenues it would earn from its gas, electric, steam and water businesses were incidental and subsidiary to earnings from its primary manufacturing business. Kodak's utility business differed in character from its primary manufacturing business, and the utility revenues it earned were minor in comparison to the revenues from the primary business.

Kodak was also granted lightened ratemaking regulation of its gas, electric and steam businesses, but not its water business. Lightened regulation of the former was appropriate because Kodak could show it operated in competitive retail markets, where customers could avail themselves of alternatives to taking service from Kodak. Those alternatives included relocating outside of the Park, self-supplying service through installation of customer-owned facilities, and taking gas and electric commodity service from competitive suppliers over Kodak distribution facilities under distribution rates that Kodak would charge. Those rates, however, were never developed, because no customer ever requested competitive commodity service.

Moreover, RG&E, pursuant to a Joint Proposal between it and Kodak that was adopted in the Kodak Order, was authorized to extend its electric and gas facilities into the Park if Kodak failed to perform its obligations under its CPCN. We note, however, that RG&E's authorization and obligation to extend services under other circumstances was not stated clearly.

As to regulation of the water services Kodak provided, the Kodak Regulation Order noted that the lightened ratemaking regulation that adhered to enterprises supplying gas, electric and steam retail utility services in competitive markets did not include within its ambit the provision of water at retail. Unlike the other forms of utility service, no finding had been made that water service could or did take place in competitive markets or environments. Nonetheless, the §89-c(11) incidental regulation granted to Kodak was sufficient to free it from most regulatory filings and rate supervision requirements, including the filing of an annual report pursuant to §89-c(5), regarding water service.

The extent of regulation over water service was further explicated in the Kodak Clarification Order.[6] There, it was explained that Kodak's water operations were not subject to the same lightened application of PSL Article 6 that adhered to its gas, electric and steam operations. The incidental regulation that did adhere to water operations was insufficient to carry with it a broad exemption from PSL Article 6. Nonetheless, it was noted in the Kodak Clarification Order that certain provisions of Article 6, such as §110(1), on disclosure regarding ownership of stocks, and PSL §115, on bidding of contracts, would not adhere. It was also decided that compliance with those additional Article 6 provisions that were applicable should not raise any more difficulty than compliance with the retail provisions of Article 6 that, in any event, remain in effect for the gas, electric and steam operations as well as the water operations.

[6] Case 04-M-0388, supra, Order Granting Clarification in Part and Making a Finding (issued February 16, 2005).

Subsequently, in the Kodak Water Order, a transfer of a portion of Kodak's water system to the Monroe County Water Authority (MCWA) was approved. After the transfer, MCWA would pipe untreated industrial water from Lake Ontario to the Kodak distribution system, where Kodak would assume ownership of the water and distribute it as before through its existing non-potable water system. Because the terms of the arrangement were arrived at through arms-length negotiations between Kodak and MCWA, a sophisticated entity fully capable of protecting its own interests, and the water service was provided to industrial and commercial customers similarly able to advance their own interests, the transfer was approved without inquiring into the detail that would be necessary to warrant approval of the transfer of a fully rate-regulated water system.[7] Moreover, it should be noted that, contrary to the Petitioners' assumption, the water regulation asserted in the Kodak Orders is not limited to the provision of potable water, but also extends to untreated water and fire protection water.[8]

The Contractual Arrangements

The contractual arrangements for utility service that RED proposes are crucial to justifying its request for approval of the transfer of the Eastman Park utility facilities to it, and to determining the extent of PSL regulation that should adhere to its operations at the Park. Generally, under lightened regulation, it is expected that the customers and RED would work out their differences without regulatory involvement,

[7] Case 09-M-0659, Eastman Kodak Company and Monroe County Water Authority, Order Approving Transfer and Making Other Findings (issued December 22, 2009).

[8] The scope of regulation, however, does not reach to specially treated water products, such as brine and distilled water, because those products are manufactured for special uses rather than provided as a use of the water itself.

so that the transfer to RED may be reviewed with scrutiny reduced to the level applicable to other owners of business parks, and RED could qualify for the lightened ratemaking regulation applicable to them. Indeed, RED has been successful in obtaining the support of at least some of these customers, including Khuri and LiDestri, by taking the approach typical under lightened regulation. But other customers, including RSW, continue to express dissatisfaction with the contract options, and so contract issues must be addressed here.

A. RED's Contract Options

An analysis of RED's contract options is needed to evaluate the extent to which customers may avail themselves of competitive alternatives to service from RED, so that the extent of the scrutiny that will be applied to review of the transfer, and the level of regulation that would adhere to RED if the transfer is consummated, can be determined. A showing that the contractual arrangements for utility service at the Park are economically viable and will enable the Park owner to retain existing customers and attract new customers to the Park is also relevant to deciding if and to what extent lightened regulation adheres. The questions the customers raise concerning the contract options are similarly relevant to arriving at these determinations.

In seeking to demonstrate that it is operating in a competitive environment, RED details three contract options it would offer customers. The first is its standard contract, providing for rates set at a formula that reflects loss of load by reallocating costs to the remaining customers while providing for various overhead charge arrangements, profit sharing, the Coordination Committee, and Kodak's assignment of its favorable rate to successors subject to the 1.5% limitation. Under the market price second option, electric and steam prices are set by

comparison to RG&E and RDHC prices. Both of these options are premised upon customers taking full requirement service from RED as long as they remain at the Park. Under the default third option, customers may avail themselves freely of competitive alternatives, but are charged a premium rate and are subjected to other restrictions on service. Kodak and RED propose to compel customers that do not enter into a contract under the first or second option by May 31, 2013 to accept the default third option.

Some customers object to RED's standard contract, criticizing the allocation of costs among services and setting the rates for those services, the inclusion of certain costs in those rates, the voting structure of the Coordination Committee, the rate benefits directed to Kodak, Kodak's privilege to freely assign those rate benefits to others, and additional matters, including some that are customer-specific. Those customers persistently oppose shouldering the risk that loss of load at the Park will increase rates beyond the cost of alternative sources of supply even though the standard contract restricts access to those sources.

As the customers point out, RED's contractual formula shifts risks of loss of load directly to the customers because upward adjustments that reflect the effect of loss of load are made automatically to the standard contract rates. Moreover, the standard contract restricts customers' choices in the event rates do rise as a result, because it is a full requirements contract that runs for a term of 20 years, preventing customers from self-supplying or moving to alternative service providers.

Recognizing that some customers found shouldering the risk of loss of load objectionable, RED has twice adjusted its proposal. First, it allowed customers to reduce their standard contract term from 20 years to the lesser of the term under the

existing Kodak contract or five years, if they accepted a higher overhead charge. When customers continued to resist entry into such a contract, RED offered a new arrangement under its second market price option, where electric and steam rates would be set by reference to the costs of RG&E and RDHC. The reference price shifts risk of loss of load to RED, but enhances the revenues it will receive since the reference prices are higher than the rates the standard contract formula would yield, as of the inception of RED's operations at the Park. After some customers remained dissatisfied with the pricing of that option, RED developed the default option, which opens access to all competitive alternatives and provides for continuation of service, but is priced and limits the scope of service concomitantly.

B. Competition Under RED's Options

Taken together, RED's three contract options demonstrate that it will operate in a competitive environment, justifying reduced scrutiny in reviewing its acquisition transaction with Kodak and in deciding the degree of regulation that will be imposed on it. Any customer that finds RED's first two options deficient in some respect as competitive alternatives can avail itself of alternative means for obtaining service through the default option, but at a price and under conditions commensurate with the enhanced competitive opportunities. Offering that option adequately demonstrates that RED faces full competition, and answers Acquest's anti-trust concerns. In contrast, imposing excessive regulation instead of treating RED as a competitive provider would create additional costs and erect barriers to operation of the Park that would adversely affect its viability. Consequently, RED's proposals will be reviewed with the regulatory flexibility

necessary to ensure the Park can operate as an economically viable enterprise.

As a result of this reduced scrutiny, many of the customers' objections to ratemaking need not be addressed in great detail. RED's approach of allocating costs by beginning with Kodak's allocations is reasonable and it is unlikely that a more accurate allocation could be achieved even if an expensive and time-consuming study of the costs were conducted. Leaving to RED and the customers the choice to mark out an initial allocation of costs, even if it were to deviate somewhat from the starting point of the Kodak allocations, is more likely to result in rates that achieve the economic objectives of the Park than could be accomplished through more heavy-handed regulation. Otherwise, deferring the allocation of costs to review in the future by the Coordination Committee also results in the retention of the flexibility needed to meet changing circumstances.

Nor does it appear that any of the costs that were included in rates are clearly unreasonable. Artificially inflating rates would be against RED's interests, because it must constrain overall rates to levels that are consistent with the overall economic viability of the Park, or it will not earn a profit or recover its equity. Consequently, a detailed cost-by-cost analysis of costs would not be productive. As to the specific complaints customers direct related to their individual circumstances, such as the objection Exelis raises to substitution of hot water for steam at RED's discretion, Acquest's objection to fire protection rates, and RSW's complaint that its unique circumstances have not been recognized in setting rates, it is expected that RED will negotiate over those issues in good faith and avoid onerous results.

C. Kodak's Benefits and Limiting Conditions

The rates and other arrangements RED has made at the Park, many customers protest, are unduly favorable to Kodak. While the rates benefits directed to Kodak can be justified, restrictions are needed on its role in the Coordination Committee and in the assignment of those favorable rates to others.

A rate formula that benefits Kodak redounds to the benefit of all customers at the Park. As the largest customer at the Park facing the challenge of successfully emerging from bankruptcy, lower rates for Kodak enhance its economic viability and assist in preserving its presence and the presence of its loads at the Park. Without those loads, rates for other customers would rise and the economic viability of the Park as a whole would be threatened.

Moreover, RED's rate structure allocates overheads among customers based on utility volumes consumed, so that the larger customers that more significantly benefit the Park see lower overheads and concomitantly reduced per unit rates. This feature of the rate formula promotes the success of the Park, because larger customers that contribute more to that success obtain the lower rates necessary to retain and attract them. As the largest customer at the Park by far, Kodak would be entitled to a lower overhead in any event. As a result, the customers' objections to Kodak's rates lack merit.

The weighting of the votes in the Coordination Committee, however, would enable Kodak to exercise undue influence there. Since Kodak will constitute approximately 60% of the load at the inception of RED's operations at the Park, under the weighted voting system, it will already have a majority on the Coordination Committee. While, as the Petitioners point out, many actions of the Committee on

important issues already require a super majority vote, where matters are subject to a majority vote only, Kodak could direct the action of the Committee, even if every other customer were opposed to it. Therefore, the voting structure of the Committee shall be revised so that a majority is achieved when the greater of a majority or 15% of the votes beyond the vote of the largest customer are in favor of a proposal.

Although justified initially upon its emergence from bankruptcy, Kodak's and its successors' rights to freely assign favorable rates to subsequent successors in perpetuity could be unduly disadvantageous to other customers. The limitation that the Petitioners propose to restrict that right, presented in their Technical Conference comments, is inadequate in part. Under that proposal, Kodak is prevented from assigning its beneficial rate only to a successor that would consume less than 1.5% of the load that Kodak consumes. This would enable Kodak to assign its rate to all but the smallest customers, while other new customers assigned the favorable rate might compete on unfairly advantageous terms with existing customers at the Park.

These considerations, however, must be balanced with assuring the economic viability of the Park as a whole, which would be enhanced if a troubled Kodak enterprise can transfer its favorable rate to a more viable successor. It must be remembered that, because Kodak is emerging from bankruptcy, its viability, and the consequences if its operations cannot be conducted successfully at the Park, warrant special consideration. Therefore, Kodak, after its emergence, or the emergence of its successor, from bankruptcy, may freely assign the favorable rate to any second tier successor subject to its 1.5% limitation. But that favorable assignment opportunity should not continue in perpetuity. Consequently, after an initial assignment, from Kodak or a successor that has emerged

from bankruptcy to a second tier successor, another limitation is needed.

A limitation on assignment to third tier successors that would assume at least 25% of Kodak's load at the time it or its successors emerge from bankruptcy accomplishes the appropriate goals. This limitation will prevent second tier successors to Kodak from assigning favorable rates to a third tier successor to the disadvantage of other Park occupants. To the extent that attracting a successor to the Park of a size smaller than 25% of Kodak's load could enhance overall economic viability, the Coordinating Committee may vote that an exception be made permitting assignment to such a customer.

D. Condition Limiting Expiration of the Options

RED would leave open the standard and market rate options only until May 31, 2013. After that date, customers would be compelled to accept the default option. But the date comes only nine days after RED first proposed the default option, two days after comments on its proposal were due, and one day after the date of this Order. That time is insufficient for customers to select between these three options, each of which presents complexities that customers could be expected to carefully analyze and consider. To give customers a reasonable opportunity to select an option and negotiate other contract terms, RED shall leave the first two options open until June 17, 2013. Only after that date may it restrict continued service to the third option.

This approach is reasonable to RED and the customers. It affords customers sufficient time to examine their options and finalize contract details with RED. RED is not disadvantaged, because it is unlikely it could have arranged for a closing on the transaction with Kodak in the first half of June in any event. Moreover, RED must await action at the June

13, 2013 Session, because its request that it be granted gas, electric and steam CPCNs cannot be acted upon until then, for the reasons discussed below. Therefore, for the above reasons, the transfer of the Eastman Park utilities from RED to Kodak may be approved, subject to the conditions imposed here, and RED may be granted lightened ratemaking regulation.

The Transfer

Under PSL §70, our approval is required before gas, electric, steam and water corporations may transfer ownership interests in utility facilities. In conducting a review under §70 that pertains to a lightly-regulated gas, electric and steam corporations operating in competitive markets, we examine any affiliations that might afford opportunities for the exercise of market power and the potential the transaction poses for other actions detrimental to captive ratepayer interests. Kodak's proposal to transfer ownership of the utility facilities at the Eastman Park to RED may be reviewed with reduced scrutiny appropriate to these circumstances, which will extend to the transfer of water plant as well for the reasons discussed below.

When reviewed with the reduced scrutiny applicable to Kodak and RED under lightened ratemaking regulation, the transfer of ownership interests in gas, electric steam and water facilities at the Eastman Park that the Petitioners propose is in the public interest. The customers, under any of RED's three contract options, may still freely leave the Park for alternative locations, a consequence RED would seek to avoid because, if the Park is not economically viable, it has lost its opportunity to earn a profit and recover its equity. The third default contract option the Petitioners offer enables customers to avail themselves of the full range of competitive alternatives to service from RED, including self-supply options and seeking out alternative providers, such as taking electric

and gas service from RG&E. The default option therefore counterbalances the competitive restrictions in place under RED's standard and market price contract options, which require that customers situated in the Park purchase all their utility services from RED during the term of the contract. As a result, the existing customers at the Park can find alternatives to service from RED, and competitive market forces remain in balance at the Park. Consequently, the transfer does not raise market power concerns.

Moreover, under these circumstances, RED's ownership will promote the economic viability of the Park so that it can enhance economic development opportunities in the Rochester region. Since continued operation by Kodak under its prior arrangements is not viable, authorizing RED to purchase the utility facilities is the best available means for continuing the successful operation of the utility services at the Park. In this case, those operations will take place under circumstances where RED's largest proposed customer, Kodak, is of questionable economic viability following its emergence from bankruptcy. The risk that Kodak load will be lost must be shared among RED and the remaining customers, in a manner that best promotes the economic vitality of the Park on an overall basis. RED's standard and market price options are intended to achieve those goals.

RED's operations at the Park will be managed by experienced gas, electric, steam and water facility operators, appears sufficiently capitalized, and will continue the existing arrangements for maintaining the utility facilities. As the customers concede, RED should be a capable owner of the utility facilities at the Park. Moreover, RED is well positioned to address compliance with imminent environmental regulations that are likely to end coal fueling of the Park's utility facilities,

because RED is experienced in developing and operating the gas-fired facilities that would be an alternative to continued fueling with coal. The ownership transfer transaction that the Petitioners propose is therefore approved.

Regulation Of RED's Operations

While RED does not qualify for incidental regulation, it is granted lightened regulation, subject to the conditions discussed above. Lightened regulation will enable RED to furnish services at the Eastman Park as a supplier operating in competitive markets under its contract options, rather than as a fully regulated utility service provider.

A. Incidental Regulation

RED cannot qualify for incidental regulation under PSL §66(13), §80(11) and §89-c(11), because its primary business is the provision of utility services within the Park, and it is not otherwise tied to the Eastman Park's operations. As a result, RED has no incidental connection to a larger enterprise.

Instead of resembling circumstances where incidental regulation has been granted, RED's circumstances resemble those of the Griffiss Utility Services Corporation (GUSC), which provides utility service at Griffiss Business and Technology Park (the Griffiss Park). There, the owner of the Griffiss Park arranged to spin off utility operations to GUSC, a not-for-profit corporation independent of the Griffiss Park's owner. Even though both GUSC and that owner were not-for-profit corporations, and the owner could appoint two members to GUSC's seven-member Board of Directors, the connection between the two was insufficient to show that a single enterprise existed, with a primary business of operating the Griffiss Park and a subsidiary business of providing utility services there, that fell within the ambit of §66(13). Since RED is even less connected to the ownership of the Eastman Business Park than

GUSC is to the ownership of the Griffiss Park, RED cannot qualify for incidental regulation either.

Nor does RED's affiliation with RED Parent as a larger overall entity create a single enterprise engaged in both a primary and an incidental activity. Instead, RED's circumstances resemble those at issue in the Inergy Order and the Gateway Delmar Order. In those circumstances, a subsidiary providing gas services within New York could not claim the incidental regulation exemption by asserting its connection to a larger parent created the single entity divided into the two enterprises needed to sustain a primary and a subsidiary purpose.[9] In both those cases, the parent was itself engaged in utility businesses subject to PSL regulation under some circumstances. RED's relationship to RED Parent is similar to the relationships at issue in those Orders because RED Parent is also engaged in utility businesses such as energy efficiency, waste energy production, and cogeneration that can fall within the ambit of PSL regulation. As a result, there is no primary non-utility enterprise and subsidiary utility enterprise that could form the basis for incidental regulation here.

B. Regulation of Gas, Electric and Steam Service

Nonetheless, RED is entitled to lightened ratemaking regulation. RED shares most of the features of the existing of the relationship between Kodak and its customers, because it will provide utility services under contract to customers that

[9] Case 10-G-0146, Inergy Pipeline East LLC, Order Approving Transfers Upon Modifications and Conditions and Providing For Lightened Ratemaking Regulation (issued March 4, 2011); Case 11-G-0361, Gateway Delmar LLC, Declaratory Ruling on the Application of Public Service Law §66(13) and §68 and Order Granting Certificate of Public Convenience and Necessity (issued September 19, 2011) and Order Providing For Lightened Ratemaking Regulation (issued November 22, 2011).

are sophisticated business entities and can access competitive alternatives.

As discussed in the Kodak Regulation Order, in interpreting the PSL,[10] we have examined what reading best carries out the Legislature's intent and advances the public interest. We may then make a realistic appraisal of the approach to regulation that best accomplishes those goals. Those principles may be applied here to RED.

Under lightened regulation, PSL Article 1 adheres to RED because it meets the definitions of gas, electric, and steam corporations under PSL §2(22), §2(11) §2(13) and respectively, and is engaged in the manufacture or furnishing of gas, electricity and steam under PSL §5(1)(b) and (c). RED is therefore subject to provisions, such as PSL §§11, 19, 24, 25 and 26, that prevent electric and steam corporations from taking actions that are contrary to the public interest.[11] Article 2, however, is restricted by its terms to the provision of service to retail residential customers, and so it is not applicable to RED, which serves only industrial and commercial customers.[12]

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[10] Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing For Lightened Regulation (issued April 23, 1999); Case 99-E-0148, AES Eastern Energy, L.P., Order Providing For Lightened Regulation (issued April 23, 1999); Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994)(Wallkill Order).

[11] The PSL §18-a assessment will be applied against RED's regulated utility revenues to the same extent as it adhered to Kodak's revenues.

[12] Jurisdiction is retained, however, over disputes between RED and its customers concerning billing and termination of service, as it was retained for Kodak. See, e.g., Case 10-M-0186, et al., Alliance Energy Renewables LLC, Order Approving Transfers Upon Conditions and Making Other Findings (issued July 23, 2010.

RED remains subject to Articles 4 and 4-A generally,[13] including PSL §69 and §82, and §70 and §83, which provide for approval of, respectively, security and debt issuance and ownership interest transfer transactions. Application of these provisions is deemed necessary to protect the public interest. Any required filings, however, will be reviewed with the extent of scrutiny reduced to the level that the public interest requires be applied upon review of its competitive operations.[14]

Regarding PSL §69 and §82, prompt regulatory action is possible through reliance on representations concerning proposed financing transactions.[15] Additional scrutiny is not required to protect captive New York ratepayers, who cannot be harmed by the terms arrived at for these financings because lightly-regulated participants in competitive markets bear the financial risk associated with their financial arrangements.

Regarding PSL §70 and §83, it was presumed in the Carr Street and Wallkill Orders that regulation would not adhere to the transfer of ownership interests in entities upstream from the parent of a New York competitive subsidiary, "unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption."[16] RED may avail itself of this presumption. Under PSL §66(8) and (9) and

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[13] Pursuant to the Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation issued January 23, 2013 in Case 11-M-0294, RED is required to file an Annual Report under PSL 66(6), §80(5) and §89-c(5).

[14] PSL §80(10), which provides for the filing of tariffs required at our option, will not be imposed on RED.

[15] See, e.g., Case 10-E-0405, NRG Energy, Inc., Order Approving Financing (issued November 18, 2010); Case 01-E-0816, Athens Generating Company, L.P., Order Authorizing Issuance of Debt (issued July 30, 2001).

[16] Carr Street Order, p. 8; Wallkill Order, p. 9.

§80(7) and (8), we may require access to records sufficient to ascertain whether the presumption remains valid.[17]

Turning to PSL Article 6, application of PSL §115, on requirements for the competitive bidding of utility purchases, is discretionary and will not be imposed on RED. Those provisions of Article 6 regarding the rendition of service to customers of utility companies, however, pertain to RED to the extent relevant.

PSL §119-b, on the protection of underground facilities from damage by excavators, adheres to all persons, including RED when it acts as an excavator pursuant to PSL §119-b(1)(e). In addition to potentially acting as an excavator, however, RED could also be a one-call system operator, as defined PSL §119-b(1)(f), which must register with the one-call notification system for protecting underground facilities in conformance with §119(b)(2)-(5). While most, if not all, of the Eastman Park's gas, electric and steam lines are above ground, some may be underground and it is likely some water lines are underground as well. As a one-call operator for those lines that are underground, RED will mark the location of such gas, electric, steam or water lines as are underground when notified of proposed excavation work near them.[18] It is noted, however, that to the extent RED's distribution facilities are above

[17] Case 03-E-1136, Sithe Energies, Inc., et al., Declaratory Ruling on Review of Ownership Transactions (issued October 20, 2003).

[18] See Cases 12-G-0214 and 11-G-0401, Bluestone Gas Corporation of New York, Inc., Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need and Certificate of Public Convenience and Necessity (issued September 21, 2012).

ground, those facilities will not fall within the scope of the one call system.[19]

The remaining provisions of Article 6 need not be imposed generally on gas, electric and steam service providers operating in markets where customers can select a competitive alternative, because these provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely affect rates monopoly providers charge captive retail customers.[20] Since RED furnishes its gas, electric and steam services in a primarily competitive market to its sophisticated customers, these provisions do not pertain to its operations.

As to safety, the Eastman Park steam system has long operated at its existing site without raising safety concerns. Other than the requirements of PSL §119-b(2)-(5) discussed above, no additional steam safety conditions need be imposed on RED. It is reminded, however, that it is subject to the steam safety jurisdiction provided for in PSL §§80(1) and (2). Consequently, Department of Public Service Staff (DPS Staff) may inspect RED's steam facilities,[21] and RED is expected to maintain

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[19] If RED can show that none of its lines are underground, it is not required to register as a one-call operator.

[20] These requirements include approval of: loans under §106; the use of utility revenues for non-utility purposes under §107; corporate merger and dissolution certificates under §108; contracts between affiliated interests under §110(3); and, water, gas and electric purchase contracts under §110(4); supervision of affiliated interests under §§110(1) and (2) will be exercised only conditionally to the extent an inquiry into those relationships becomes necessary.

[21] Cf. Case 00-M-2231, Indeck-Olean, L.P., Order Providing For Lightened Regulation and Granting a Certificate of Public Convenience and Necessity to Produce and Deliver Steam (issued May 2, 2001) (right to impose specific safety conditions reserved due to unusual circumstances).

its safety procedures in writing for DPS Staff review. Nothing in this Order shall be construed as relieving RED from compliance with any otherwise-applicable PSL safety or reliability requirement.

C. Regulation of Water Service

In the Kodak Clarification Order and the Kodak Water Order, it was decided that lightened regulation would not be extended to Kodak's water utility operations. Unlike, gas, electric and steam service, it had not been shown that water service was subject to the competitive market forces that justified extending lightened regulation to the other regulated utility services. Since Kodak was subject to incidental regulation, however, most of the lightened regulatory regime adhered to it in any event, that it was exempted from most reporting and filing requirements.

While the provision of water service is not subject to competition generally, under these circumstances the reasoning of the prior Orders, preventing lightened ratemaking regulation of water service unless it is shown there is competition, is no longer persuasive. Lightened regulation of that service may be extended to RED without a finding that competition exists generally. The water service that RED will provide is one component of a suite of regulated services furnished to the same customers. It is therefore subject to the same competitive forces as the other services. Since the water service is provided to those customers along with a bundle of other regulated services, treating it the same as those services is reasonable.

Therefore, RED's provision of water service shall be subject to the same lightened ratemaking regulation as applies to the other regulated services it provides. It will be treated

the same under PSL Articles 1, 2 and 6 for water service as it is for the other services.

While RED will remain subject to Article 4-b generally, it will receive the same treatment under that Article as it does under Articles 4 and 4-a. Therefore, approvals of its securities and debt issuances under §89-f will follow the treatment under PSL §69 and §82, and approvals of transfers under §89-h will attach to approvals under §70 and §83. As with approvals of transfers under those latter provisions, we may require access to records sufficient to ascertain whether the §70 and §83 presumption remains valid under §89-c(7) and (8).[22]

Gas, Electric and Steam Certification

The Petitioners' request that RED be certified under PSL §§68 and 82 to provide gas, electric and steam service within the Park through the expedited process provided for under our regulations, at 16 NYCRR §21.10. That regulation, however, requires that certification issues be decided at a hearing held at a scheduled and noticed meeting where a quorum of Commissioners are present. As a result, the relief RED requests cannot be granted until the next such meeting, which is the Session scheduled for June 13, 2013. Certification issues will be decided then.

The Financing

Approval of RED's financing plans is appropriate under lightened regulation.[23] The scrutiny applicable to monopoly utilities may be reduced for lightly-regulated companies like

[22] PSL §89-c(10), which provides for the filing of tariffs at our option, will not be imposed on RED.

[23] Because PSL §69 approval of a securities issuance is a Type 2 action under the State Environmental Quality Review Act, 16 NYCRR §§7.2(a) and 7.2(b)(2)(v), no further review of the financing is required under that statute.

RED that operate in a competitive environment. As a result, we need not make an in-depth analysis of the proposed financing transactions. Instead, by relying on the representations the Petitioner makes in their filing, prompt regulatory action is possible.

The proposed financing appears to be for a statutory purpose and does not appear contrary to the public interest. It is approved up to maximum amount of $3.5 million in credit facilities.

Given that RED is regulated lightly, it is afforded the flexibility to modify, without our prior approval, the identity of the financing entities, payment terms, and the amount financed, up to the maximum amount of $3.5 million.[24] The exercise of this financing flexibility will allow RED to avoid disruption of its financing arrangements and enable it to operate more effectively in competitive gas transportation markets. Additional scrutiny is not required to protect captive New York ratepayers, who cannot be harmed by the terms arrived at for this financing because RED bears the financial risk associated with its financial arrangements.

Submetering by Kodak

Noting that, following the transfer, Kodak will submeter gas and electricity to its tenants, the Petitioners ask that any necessary submetering approvals be granted. It was recently decided, in the Submetering Deregulation Order,[25] that industrial and commercial customers of electric corporations may

[24] See, e.g., Case 10-E-0593, Mirant Bowline LLC, Order Approving Financing (issued February 23, 2011); Case 01-E-0816, Athens Generating Company, L.P., Order Authorizing Issuance of Debt (issued July 30, 2001).

[25] Case 12-E-0381, Deregulation of Commercial Submetering, Order Authorizing Commercial Submetering and Requiring Rate Cap Bill Calculator (issued February 20, 2013).

submeter electricity to their non-residential tenants without obtaining our approval, when the submetering takes place in new construction or conversions from master metering. Here, Kodak will master meter electricity it purchases from RED and submeter that electricity to its tenants, but will not convert tenants directly metered by RED into submetered arrangements. As a result, Kodak's electric redistribution practices fall within the ambit of those arrangements that do not require approval pursuant to the Submetering Deregulation Order. Therefore, no further action need be taken on the Petitioners' request regarding electric submetering.

The submetering of gas service, however, remains subject to our approval, as decided in the Gas Submetering Order.[26] As explained there, customers desiring to obtain approval for the submetering of gas service to industrial commercial tenants must submit a petition and application addressing the requirements identified in the Order, and must reiterate those requirements in leases with the submetered tenants. If no action is taken on the petition within 75 days of its submission, however, the application is deemed approved, albeit the time for review may be extended within the 75-day period.[27] Kodak is therefore directed to file a petition in conformance with the requirements of the Gas Submetering Order

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[26] Case 96-G-0454, Commercial and Industrial Gas Submetering, Order Establishing Requirements For Submetering of Gas Service to Industrial and Commercial Customers (issued December 19, 1997).

[27] Instances where a review was instituted within the 75-day period and approval was granted may be found at the Untitled Order issued November 12, 2004 in Case 03-G-1157 and the Untitled Order issued July 28, 2005 in Case 04-G-1457.

within 30 days of the date of the closing of its transaction with RED.

It is ordered:

1. The transfer of gas, electric, steam and water utility facilities sited as the Eastman Business Park, from Kodak Corporation to RED Rochester LLC, as described in the petition filed in this proceeding and in the body of this Order, is approved, subject to the conditions set forth in the body of this Order.

2. RED Rochester LLC shall comply with the Public Service Law by conducting its gas, electric, steam and water operations in conformance with the requirements set forth in the body of this Order.

3. Kodak Corporation shall file a petition on the submetering of gas service to its tenants in conformance with the requirements in the body of this Order within 30 days of the closing of the transaction described in Ordering Clause No. 1.

4. The deadline provided for in Ordering Clause No. 4 may be extended as the Secretary may require.

5. This proceeding is continued.

(SIGNED) _____
Commissioner

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 13-M-0028 - RED-Rochester LLC and Eastman Kodak Company - Petition for Approval to Transfer Regulated Utility Assets at Eastman Kodak Park, Approval to Transfer Certificates of Public Convenience and Necessity, for Continued Lightened and Incidental Regulation, Approval of Financing, and Authorization, to the Extent Necessary, for Submetering.

NOTICE OF DETERMINATION OF NON-SIGNIFICANCE

NOTICE is hereby given that an Environmental Impact Statement will not be prepared in connection with the approval by the Public Service Commission of transfer of gas, electric, steam and water utility facilities located at the Eastman Business Park from Kodak Corporation to RED-Rochester LLC (RED), and the certification of RED to provide utility services to customers located at the Park, based on our determination, in accordance with Article VIII of the Environmental Conservation Law, that such action will not have a significant adverse affect on the environment. The exercise of this approval constitutes an "unlisted" action, as is defined in 6 NYCRR §617.2(ak).

Based on our review of the record, we find that the proposed action, which will lead to the ownership and control of electric, gas, steam and water facilities located at the Eastman Business Park by RED instead of the prior owner, will not have a significant adverse environmental impact. A change in the identity of the owner of the electric, gas, steam and water plant will not otherwise cause any physical alterations to that plant or its surroundings.

The address of the Public Service Commission, the Lead Agency for the purposes of the environmental quality review of

this project, is Three Empire State Plaza, Albany, New York 12223-1350. Questions may be directed to Leonard Van Ryn at (518) 473-7136 or at the address above.

Jeffrey C. Cohen
Acting Secretary

SUMMARY OF THE COMMENTS

Initial Comments

A. The Customers

1. Acquest

Describing itself as the owner of a 2.0 million square foot building and 104 acres at the Park, Acquest states that it supports bringing RED, as an experienced operator of utility services, to the Park. Nonetheless, Acquest cautions, some concerns should be resolved before the transfer from Kodak to RED is consummated.

Characterizing RED's standard contract pricing model as incomplete and unpredictable, Acquest complains that it is unable at this time to ascertain the amounts it will be billed for each utility service. Acquest also points out that, under the pricing structure as RED has outline it, decreases in demand at the Park will be translated into potentially large increases in utility costs for remaining customers. As a result, it asks that ceilings be set at local market rates on RED's charges, and that if a ceiling is exceeded, customers would be permitted to find alternative service providers without compensating RED. In the event that declines in load nonetheless undermine RED's economic viability, Acquest requests that regulatory oversight of RED's utility rates be continued and for assurances that New York State will support the development of service alternatives that will enable Acquest to remain in business at the Park.

Addressing further the issue of taking service from providers other than RED, Acquest asks if Rochester Gas and Electric Corporation (RG&E) is authorized to provide delivery service within the Eastman Park. Acquest sees no alternative to delivery of electricity from RED other than service provided by RG&E.

Objecting to a number of RED's proposed ratemaking methods, Acquest advocates for regulatory review of any new

demand charges RED might impose, where services were previously billed at variable rates based exclusively on usage, after new demand metering is installed. Acquest also argues that the severance costs incurred when Kodak utility employees depart service that are included in RED's rates should instead be excluded. Acquest questions the effect on its rates of the rate of return it believes has been promised to RED's investors, and complains that RED would obligate it to support the costs of upgrades made to any utility service at the Park, even if it does not take that service. Acquest would also translate any release of environmental liabilities granted to Kodak or RED as Kodak's successor into a release granted to the customers at the Park.

Acquest finds unduly favorable the treatment RED would accord to Kodak and its successors, and claims that Kodak should not be exempted from paying overhead charges that are imposed on other customers. Acquest also objects to Kodak's right to assign its favorable rates to successors purchasing Kodak property at the Park. Acquest would also restrict the rate benefits Kodak may extend to its tenants.

Turning to the Coordination Committee, Acquest discerns that the voting methodology RED proposes will enable Kodak to exercise undue influence over the Committee. Acquest also fears that as a result of this arrangement, the load-shedding schedule that is subject to Committee approval will be unduly discriminatory in favor of Kodak and against the other customers.

Addressing the proposed contract RED would have each customer execute, Acquire criticizes the proposed term of the agreement, at 20 years, as unduly long, and the termination provisions as unduly complicated. Acquest asks that additional flexibility be introduced into the contract termination

provisions, to counteract the effect of the length of the term RED proposes. The contract, Acquest believes, should also provide for an annual independent audit, with the results reported to all customers and tenants at the Park. Finally, Acquest requests that it be given at least 60 days after an Order is issued in this proceeding to negotiate and execute a contract with RED.

2. Carestream

While Carestream joins Acquest in support of bringing RED into the Park as the utility services provider, and understands that RED must make changes to succeed in making a profit where Kodak was only concerned with recovering its costs, Carestream presents several concerns regarding the transaction. Carestream believes that Kodak carefully optimized costs in operating a system that essentially depends upon conversion from one form of energy into another, as steam and electricity production supplant each other depending upon the cost of fuel, purchased power, and other variables, and steam is used to drive many of the other services. Carestream interprets RED's approach to that system as static because based on 2011 costs, instead of Kodak's more dynamic approach. Moreover, Carestream believes that RED would spread annual electric costs evenly among months, even though, under Kodak's approach, monthly costs vary widely.

As a result of these factors, Carestream sees deficiencies in RED's ratemaking. RED, it complains, retains control over a model rate formula that is complex and novel. Acquest also argues the model may cause cross-subsidization of some services by others to increase RED's profit and that RED's standard contract profit sharing mechanism is insufficiently transparent. As a result, Carestream asks that the Commission retain jurisdiction over the rates that result from RED's model

if the model yields rates that are not competitive, allow customers to opt for service from RG&E service instead of from RED.

3. Dupont

Dupont joins in many of the criticisms posed by Acquest. Like Acquest, Dupont seeks continued and active Commission oversight over RED's rates and that it be allowed to access alternative service providers like RG&E. It seeks the same exclusion from rates of employee severance, environmental remediation and other costs that Acquest points to.

RED's standard contract, Dupont protests, unduly benefits Kodak, including affording it undue influence within the Coordinating Committee. Dupont would replace RED's weighted vote structure at the Committee with a super-majority structure that it says would protect the rights of the customers other than Kodak.

4. Exelis

Describing itself as a diversified aerospace, defense, information and technical services company, Exelis reports that it employs nearly 1,200 workers in the Rochester area. Exelis also notes that it operates facilities in other states besides New York, and that energy costs are an important factor in its decision where to make investments and expand.

Complaining that it sought to obtain electric service from RG&E but the utility refused, Exelis maintains that it should be afforded the option to obtain utility services from providers other than RED. Access to competitive supply is essential, Exelis claims, because RED has announced plans for investing $40 million to $80 million to upgrade utility facilities and meet environmental requirements at the Park and if those costs are flowed through to rates, the resulting increases could render those rates uneconomic.

Exelis insists that, for regulated steam service in particular, and perhaps other regulated services as well, there are no competitive alternative service providers to RED within the Park. Further exacerbating its concern over steam service, Exelis relates, is what it sees as RED's reservation of a right to substitute for steam service hot water service, which, Exelis claims, is not an adequate substitute. As a result, Exelis asks that RED be required to continue Kodak's existing contract for providing services to Exelis.

Exelis also contends that RED should be subject to more extensive regulatory oversight than Kodak was, because Kodak operated the utility services on the basis of recovering its costs, while RED is a profit-motivated provider that cannot be distinguished from other fully-regulated profit-making utilities. As a result, Exelis opposes granting RED incidental regulation under PSL §66(13); unlike other entities granted incidental regulation whose primary business is the operation of a business park, Exelis asserts, RED's exclusive business is providing utility services.

Exelis joins in other customers in questioning RED's allocation of costs, among and between the various regulated and non-regulated services; its profit-sharing arrangement; the workings of its standard contract model; and, its planned conversion to from variable usage rates to fixed demand rates. Exelis adds a call for a closer examination of property tax costs. Exelis also discerns that significant capital expenditures in addition to variable rate may be required to upgrade the industrial sewer system at the Park. Exelis does not believe it should bear any of those costs because it does not avail itself of the sewer service.

Turning to overhead charges, Exelis notes that Kodak at present consumes 64% of the Park's utility services. Under

the overhead charge mechanism, however, Exelis complains, all of the fixed capital charges of $7.5 million are allocated to customers other than Kodak. Nor does Exelis believe that Kodak should be permitted to recoup any losses it experienced in selling the utility system to RED through reduced overhead charges.

Exelis also advocates restructuring of the Coordinating Committee. Exelis believes that Kodak, as the largest utility customer, would dominate the Committee and could solely dictate its decisions. Exelis therefore claims that revision of the vote weighting mechanism the Committee will use is necessary.

Exelis concludes by asking for Commission review and approval of the rates RED charges, and a longer period of time after the transaction is approved to finalize contract terms. It also opposes expediting the proceeding as RED requests, because it believes more extensive analysis and consideration of the transfer is needed.

5. Khuri

Khuri states it has a great interest in the long-term viability of the Park. It asks that the review process be expedited so that uncertainties affecting the Park can be resolved.

6. RSW

While RSW joins with Khuri in asking that expedition of the transfer review process be expedited, it raises concerns directed to the long-term viability of the Park. RSW opposes favorable treatment of Kodak through its exemption from overhead charges, and joins in other customer complaints.

Turning to the term and termination provisions of the proposed customer contract, RSW opposes the 20-year term. It proposes a shorter term, such as 5 years, with 5 year renewals,

and expanding the flexibility of the provisions for terminating the contract.

The profit-sharing RED proposes, RSW maintains, would be useful only if the sharing calculation is understandable and readily forecasted, and where RED, as the utility provider, both bears the risks of losses as well as enjoying the benefit of profits. RSW asserts that a profit-sharing mechanism that is not transparent and is outside of customer control has little or no value.

While RSW believes that RED would be a capable steward of utility service, RSW maintains as well that the rate and contract issues it raises should be addressed before RED assumes ownership of the utility services at the Park. Only after its issues are resolved, RSW concludes, will stable, uniform, objective and equitably priced utility services and pricing be available to all Park ratepayers.

7. Truesense

Like Khuri, Truesense states that it has a great interest in the long-term viability of the Park. While Truesense supports bringing an experienced utility services operator in the Park who is dedicated to its successful long-term operation, it requests an extension of the public comment period so that it may evaluate information that RED has not yet supplied on the terms and costs of the utility services it will provide.

C. The Governmental Entities

Monroe County and the Town of Greece support granting the petition, and ask that the review process be expedited. They believe RED is capable of continuing utility services at the Park in a manner that will enhance the Park’s long-term economic viability and promote economic development in the region.

The City of Rochester points out that the future of the Park is inextricably linked to ongoing environmental remediation efforts, and that the continued provision of utility services at the Park is essential to supporting those efforts. Since utility rates will be a crucial factor in the success of the Park, the City asserts that they should be carefully examined to ensure that they are reasonable and equitable. Greater regulation than was imposed on Kodak could be necessary, the City believes, to ensure that goal is achieved once RED becomes the owner of the utilities. As a result, the City asserts that RED should be required to provide information sufficient to document the reasonableness of its rates, and should be required to provide reports detailing and justifying changes in demands for services, major maintenance costs, and plans for capital improvements.

D. The Petitioners' Response

In their response, the Petitioners reiterate their claim that they are entitled to the same incidental and light regulation that Kodak received. Addressing the customers' complaints that they have not adequately defined or specified the rates RED will charge for utility services, the Petitioners report that RED has met with the customers, provided them with proposed contract terms and developed a spreadsheet which customers can use to analyze their rates. Addressing other contentions, the Petitioners characterize the environmental remediation costs that customers might bear as narrowly constrained and tied to provisions necessary for Kodak to emerge from bankruptcy and that the inflation of demand rates is not of concern because it will not impose those rates until it has properly installed the necessary metering. The Petitioners add that RED is entitled to incidental regulation, since its operations are incidental to its parent's economic activities,

which are focused on recycled energy production and industrial energy efficiencies.

Opposing the request that the process in this proceeding be extended, the Petitioners maintain that such an extension would create uncertainty detrimental to the future of the Park. They also characterize the request as motivated by attempts to gain leverage in ongoing contract negotiations and as untimely. The Petitioners also assert that no additional time is needed to address environmental or other issues, which are not relevant to the proposed transfer.

Pointing to limitations on RED's status as the service provider in the Park, the Petitioners affirm that Kodak's existing CPCNs are not exclusive, and RED would inherit that status. They also note that the customers may avail themselves of competitive alternatives to utility service from RED by relocating outside of the Park, although they insist RED has every incentive to avoid that outcome.

Technical Conference Comments

A. The Petitioners

In general, the Petitioners state their opposition to the proposals set forth in the Notice. The proposal providing for Commission review of RED's rate changes, the Petitioners insist, would like frustrate RED's ability to close the transfer transaction. Preservation of the current regulatory status, they note, is a condition precedent to that closing.

The Petitioners argue that Commission review of rate changes is unnecessary and counterproductive. They interpret the standard contract formula as providing for rate increases only if RED invests more than $45 million that "does not have an inherent economic return (but for the resulting rate

increase),"[28] or to reflect variances in exogenous factors outside of RED's control, such as inflation or changes in the volumes of services consumed at the Park. Limiting the former, the Petitioners insist, would severely constrain RED's ability to raise capital while limiting the latter unreasonably shifts uncontrollable risks to RED. The Petitioners also criticize the rate review proposal as creating an incentive to improperly allocate costs away from regulated services to the unregulated services.

Nor, the Petitioners maintain, are revisions to the Coordinating Committee structure needed. They assert that 90% of the weighted votes in the Committee are already required to approve any changes to the standard contract, including changes to rates or contract terms, in the first five years of operation or before an additional $30 million has been invested, whichever is sooner, and a two-thirds majority thereafter. Weighting votes by customer revenue, the Petitioners continue, is appropriate, because it reflects the relative value a customer brings to the Park. The Petitioners, however, propose one modification to the weighted vote system, to provide for a vote equal to the greater of a majority or 5% more than the voting power of the largest customer to approve changes to the load-shedding priority schedule.

To address the issue of rate shock that might attend sudden implementation of demand rates, RED would adopt a three-year phase-in schedule to move more slowly to the demand rate. RED opposes, however, any changes to the profit sharing mechanism, because it would unacceptably disturb the underlying economics of the transaction they propose.

[28] Petitioners Supplemental Comment (April 23, 2013), p. 2.

The Petitioners would make a modification to the provisions governing Kodak's assignability of its favorable pricing to successors. The Standard contract, the Petitioners note, limits Kodak's assignability of its rate to the load in place at existing delivery points. The Petitioners present an additional limitation, limiting assignability to circumstances where the delivery points transferred to new ownership represent at least 1.5% of Kodak's consumption.

In addressing RED's role as the service provider within the Park, the Petitioners declare that customers must be required to purchase all their requirements from RED in order to enable RED to attract capital. Consequently, the Petitioners assert that the standard contract properly prevents customers from procuring utility services from providers other than RED, except for the purchase of gas and electric commodity supply as provided for in the Kodak Order. The Petitioners complain that even that exception adversely affects financeability, and that Kodak agreed to forego that option in its contract with RED, by agreeing to make-whole payments if it were to avail itself of such an opportunity. The Petitioners assert that the all requirements limitation properly results in the sharing of risk between it and the customers, particularly given the equity risk RED is shouldering by investing in a location where two-thirds of the load, represented by Kodak, is in bankruptcy, and where the load of that customer may decline further.

Given the resistance of some customers sharing the risks of declining load, however, the Petitioners propose what they believe is a solution. RED would offer customers the option to either extend their current overhead charge through the remainder of their current contract term with Kodak or convert to the standard contract block schedule overhead margin in exchange for committing to the 20-year term of the standard

contract. For most Kodak customers, the Petitioners point out, the current contract expires in two to five years. As a result, the Petitioners assert, customers could avoid the 20-year term while they gain experience with RED as the Park's utility service provider, in exchange for forgoing the benefits of the lower overheads. For the few customers whose terms under their Kodak contract expires at more than five years from now, RED would offer the extension for a five-year term.

The Petitioners, however, strenuously oppose extending the period for negotiating the contracts. They argue that an extension of time would not necessarily result in customer acquiescence to the contract terms to a greater extent than exists currently. They also point out that delays would permit RED to withdraw from the transaction.

B. The Customers

1. Acquest

Contradicting RED's claim that it will offer utility services at the Park at competitive rates, Acquest asserts RED has stripped protections from the contract Acquest negotiated with Kodak. Acquest complains that, absent PSL regulation, it has no alternative to service from RED even though RED's actions have been anti-competitive.

Its existing agreement with Kodak, Acquest explains, requires Kodak to provide service through the end of 2019, and to give at least one year's notice of termination. In contrast, Acquest asserts, RED's standard contract would leave no alternative but to pay whatever RED charges for utility service, and even the provision providing for unbundled gas and electric delivery and commodity rates is illusory because of the contractual provision naming RED as the exclusive service provider.

Moreover, Acquest asserts, RED's actions constitute an illegal tying arrangement under U.S. and New York anti-trust laws. The tie, Acquest asserts, is the requirement that it must purchase both PSL-regulated and unregulated services from RED. While acquiescing to RED's contention that fire protection water service is unregulated, Acquest nonetheless complains that RED would increase the cost of that service to it by nearly 400%. When it informed RED that it preferred to purchase the service elsewhere, Acquest complains, RED rejoined that it would not provide any services to Acquest unless it also took fire protection service.

Acquest asks that RED be prohibited from engaging in tying arrangements and that it be stated explicitly that RED is not exempted from anti-trust liability through the state action immunity. Acquest also maintains that RED's proposed exclusivity arrangements run counter to the Commission's expressed policy of encouraging competition in the provision of utility services wherever feasible.[29]

Objecting further to many of the provisions in the standard contract, Acquest sees as unreasonable the provisions preferential to Kodak on Coordinating Committee voting and rate treatment. If complete and full PSL regulation is not applied, Acquest would free customers to seek out alternative service providers if they cannot agree with RED.

2. Carestream

According to Carestream, regulatory oversight should be exercised over RED beyond the lightened ratemaking regulation currently applied to Kodak. Carestream complains that RED desires to bind the customers to a 20-year contract without

[29] Case 00-M-0504, Competitive Energy Markets, Statement of Policy on Further Steps Toward Competition in Retail Energy Markets (issued August 25, 2004).

demonstrating that the contract results in rates fair and equitable to all customers as usage of utility services within the Park changes over time. Carestream continues to maintain that the Coordination Committee structure is overly favorable to Kodak and would enable Kodak to dominate the Committee.

Carestream states it is less concerned with the level of profit-sharing RED proposes than with the profit-sharing mechanism itself. It believes that, as currently formulated, the mechanism is amenable to manipulation by RED to the disadvantage of the customers. Carestream also maintains that additional limitations are needed on Kodak's authority to assign its beneficial rate to others.

Pointing out that, under the standard contract, RED will be the exclusive provider of utility services at the Park notwithstanding the CPCNs, Carestream explains that nonetheless it understands some exclusivity is needed to enable RED to show that the revenues it will obtain from customers will be sufficient to support financing of needed improvements at the Park. Nonetheless, Carestream continues, a customer's right under an existing contract with Kodak to access alternative service providers should be affirmed. Moreover, if RED's model yields rates that are uncompetitive, Carestream would allow customers to exercise the right to terminate the contract with RED.

3. Dupont

While joining with RED in opposing full PSL regulation, Dupont nonetheless argues that RED should be subject to additional regulatory requirements beyond those imposed on Kodak. Dupont remains concerned that the standard contract exposes it to unreasonable and uncontrollable price increases. As a remedy to that deficiency, Dupont proposes that it be allowed to seek out alternative utility service providers,

including self-supply if it is subjected to unreasonable or uncompetitive rates through RED's contractual formula.

Dupont warns that RED's current proposal to require entry into 20-year contracts naming RED as the exclusive provider clouds the prospect for the long-term success and viability of the businesses at the Park. Requiring it to accept whatever rate increases RED may impose under those contracts, Dupont protests, is unfair, when customers located just outside the Park can enjoy public utility rates at a potentially lower cost.

Objecting to Kodak's right to assign its favorable utility rates to successors. Dupont would limit that right to a one-time exercise of an assignment to a new owner that purchases the Park in its entirety. Any other assignment, Dupont asserts, should be subject to approval by the Coordination Committee. Dupont would also subject RED's proposed demand charges to a just and reasonableness test.

4. Exelis

Joining in the objections of the other customers to the standard contract, Exelis protests that, even with the concessions RED makes in its supplemental Comment, the contract remains unreasonable. Addressing each proposal made in the Notice of Technical Conference, Exelis would expand upon the types of rate increases that require Commission review. Exelis also seeks measures that would limit RED's reallocation of costs between regulated and unregulated services, and recovery of revenue shortfalls in one service by increasing charges for another service.

Exelis continues to believe that Kodak can exercise undue influence in the Coordination Committee. It would weight voting within the Committee by requiring that at least four or more unrelated customers are needed to constitute a majority.

According to Exelis, a more searching inquiry into RED's proposed profit-sharing mechanism is needed. Because Kodak already enjoys a favorable rate, Exelis contends, it should be allocated a smaller share of the profits. Exelis also objects to any assignment by Kodak of its favorable rate without Coordinating Committee approval, and joins with other customers in arguing that termination rights under the contract should be loosened, to enable customers to seek out alternatives to service from RED. Where an alternative is not available, Exelis would require RED to bear the cost of conversion to self-service.

5. J&J

Supporting Exelis, J&J asserts that RED intends to operate the Park's utilities under a different business model than that currently in place under Kodak. J&J raises many of the objections to the rate provisions of the standard contract as Exelis presented in its initial comments, including criticisms of rate calculations, the implementation of demand charges and the recognition of environmental liability and employee severance costs in those rates. J&J would also continue, in any new contract with RED, provisions from its existing contract with Kodak, including its right to audit rate calculations and to terminate the contract upon reasonable notification.

Pointing out that RED proposes a 20-year term in its standard contract, J&J asserts that preservation of reasonable termination privileges is crucial to customers. Asserting that it pays a premium under the existing Kodak contract for a priority under the load-shedding schedule, because it cannot accept disruptions to its business as a sole supplier of certain medical services critical to patient survival, J&J would aso continue that contract provision.

Turning to the proposals set forth in the Notice of Technical Conference, J&J supports most of the proposals with minor adjustments, opposing only the proposal to name RED as the exclusive provider of utility services at the Park. J&J, however, would limit Kodak's beneficial rate to a term of no more than 5 years, and prohibit assignment of the rate.

6. RSW

Reiterating the concerns stated in its initial comments, RSW joins J&J in generally supporting the proposals made in the Notice, except that it also opposes the proposal to name RED as the exclusive utility service provider at the Park. Customers, RSW asserts, should be free to obtain utility services from alternative providers. In general, RSW would expand upon the other proposals to provide for greater customer rights and more regulatory review. RSW continues to oppose preferential rate treatment of Kodak on any basis, even if approved by the Coordinating Committee.

7. Truesense

If RED's rates become uncompetitive, Truesense argues, more extensive rate regulation is needed and its customers should be able to seek alternative sources of supply. Truesense does not oppose naming RED as the exclusive service provider in the Park.

Moreover, while Truesense would clarify the operation of the profit-sharing model, it would not alter the profit-sharing percentages RED proposes. Truesense joins with other customers, however, in opposing preferential rate treatment for Kodak and would deny Kodak the right to assign that rate if it is allowed to retain it in the first instance.

C. The City of Rochester

While stressing that the successful operation of utilities at the Park is crucial to its success and to the

regions overall economy, the City asks that reasonable oversight over utility operations at the Park be continued during the transition to RED ownership and for a reasonable time thereafter. That oversight, the City continues, could be exercised through requiring RED to document its means for providing safe, reliable and financial stable operation of the utilities at the Park, subject to review of that documentation.

Supplemental Filing Comments

A. LiDestri

In a comment filed on May 13, 2013, LiDestri states that uncertainty concerning the future of the provision of utility services at the Eastman Park would be eliminated if RED can close on its transaction with Kodak. LiDestri reports that it has made significant progress in negotiating a contract for utility services with RED, and that, given its interest in the long term viability of the Park, it supports approval of the petition.

B. RSW

In a comment filed by the may 29, 2013 deadline, RSW complains that the rates RED proposes threaten its viability as a sustainable business in the Eastman Park. According to RSW, service under any of RED's options would substantially increase the overall charges it must pay for utility service with the magnitude of the increases ranging from 10.8% to 38.8% under the various options. Stressing that utility costs make up over 30% of its total cost, and that it cannot pass through utility cost increases to its customers, RSW asserts it cannot sustain the rate increases of the size RED proposes given its already thin profit margins.

RSW believes that the rate impacts it confronts differ from those that other customers in the Park are expected to experience. It asks that, at a minimum, it be permitted to

phase in the rate increases over a time frame of two to five years.

RSW also objects to restrictions under RED's standard and market price options on pursuing self-supply, and complains that there were no such restrictions in its current contract with Kodak. The restrictions, RSW protests, limit its ability to operate its business in the most energy efficient manner. RSW concludes by asking for assistance in negotiating its utility services contract with RED.