STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 09-E-0082 - New York State Electric & Gas Corporation for Electric Service - Rates.

CASE 09-G-0083 - New York State Electric & Gas Corporation for Gas Service - Rates.

CASE 09-E-0084 - Rochester Gas and Electric Corporation for Electric Service - Rates.

CASE 09-G-0085 - Rochester Gas and Electric Corporation for Gas Service – Rates.

CONSUMER PROTECTION BOARD RESPONSE TO DPS STAFF'S MOTION TO DISMISS AND MOTION FOR INSTITUTION OF PROCEEDINGS

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AND MOTION FOR INSITITUTION OF PROCEEDINGS

INTRODUCTION

The New York State Consumer Protection Board ("CPB") fully supports the motion filed by Department of Public Service Staff ("DPS Staff") on February 11, 2009, to dismiss with prejudice, on two (2) independent grounds, the rate filings of New York State Electric & Gas Corporation ("NYSEG") and Rochester Gas and Electric Corporation ("RG&E") ("the Companies") for abject failure to satisfy the filing requirements established by the Public Service Commission ("PSC, Commission")[1] ("DPS Staff Motion"). First, from a substantive perspective, the Companies failed dismally in their attempt to show a looming liquidity

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[1] Case 07-M-0906, Iberdrola, S.A. et al. - Acquisition of Energy East, Order Authorizing Acquisition Subject To Conditions (issued September 9, 2008) ("September 2008 Order Authorizing Acquisition"). The PSC later issued a longer Order Authorizing Acquisition Subject To Conditions on January 6, 2009 ("January 2009 Order Authorizing Acquisitions").

crisis that would impair their ability to provide safe and reliable service. Second, from a procedural perspective, the filings are inadequate because they do not include the material required for major rate filings.

As the CPB stated at the February 11, 2009 Procedural Conference, the Companies' "sky-is-falling" approach is part of the now familiar trend of claiming the need for urgent action to avoid dire consequences. The strategy is to convince policy-makers that an emergency exists, and, consequently, there is no time for a comprehensive analysis of the situation or for developing carefully crafted solutions. The crisis environment has the effect of eliminating thoughtful deliberation and introducing bias and haste in the decision-making to go along with the request just in case there is an imminent catastrophe.

In fact, DPS Staff testimony filed in support of its motion paints a vivid picture of disingenuousness on the part of the Companies that should not be tolerated by the Commission. Just a cursory glance at pages 1 and 2 of Exhibit PP-6 of the Companies' Policy Panel reveals that the major purpose of the filings is to provide Iberdrola with $400 million in dividends, approximately $200 million in each of the years 2009 and 2010.[2] This pay off would absorb most of the Companies' requested rate increase, leaving little for the supposedly critical capital projects it alleges need addressing. As DPS Staff observed: "Conjuring a liquidity crisis at the Companies in an

[2] The cover letter sent with the filing states: "Failing to permit returns [to Iberdrola] at reasonable levels would be confiscatory…."

attempt to generate an expedited rate increase is unconscionable."[3]

Not only should the PSC dismiss the rate filings with prejudice, but it should institute three (3) proceedings to: (1) prevent the Companies from paying dividends to Iberdrola; (2) begin a management audit of the Companies; and, (3) investigate the prudence of the Companies' behavior in regards to the rate filings.

ARGUMENT

I. DPS STAFF'S MOTION SHOULD BE GRANTED

A. No Financial Crisis Exists

In its September 2008 Order Authorizing Acquisition, the PSC stated that neither NYSEG nor RG&E is allowed to file a rate application before September 16, 2009, except upon a showing that the Utility's financial performance otherwise would fall to levels that would jeopardize its ability to provide safe and reliable service.[4] The Companies did not even come close to satisfying this requirement.

In their filings, they make the claim that their Return on Equity (ROE) is now 7% and that, without rate relief, their equity returns would fall to a "confiscatory" 4%. This would jeopardize their ability to fund capital projects, which, in turn, would jeopardize their ability to provide safe and reliable service. In fact, the Companies'

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[3] DPS Staff Financial Panel at 51.

[4] September 2008 Order Authorizing Acquisition at 12. Iberdrola, Energy East Corporation, which is the corporate parent of the Companies, NYSEG and RG&E unconditionally accepted this condition in a letter dated September 10, 2008.

current return is closer to 10.3%,[5] which is higher than the 10.1% authorized by the Commission.[6] The requested rate relief would result in an improperly generous 12.0-12.2% ROE.[7] Service and reliability, moreover, are up to Commission standards.[8]

B. <u>The Companies' Testimony Is Deceptive</u>

A multitude of contortions, which deflated revenue and inflated expenses including the level of critical capital projects, were pursued by the Companies to arrive at the breathless pronouncement that a rate increase is needed quickly. Illustrative among these are the following actions taken by the Companies:[9]

- Failing to implement any austerity measures;
- Failing to include commodity revenues in their calculations;
- Adding to expenses increases in discretionary program spending such as depreciation changes ($4 million), low-income programs ($20 million), and rate case expense ($8 million);
- Adding to expenses management bonuses;

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[5] The ROE is 11.0% if revenues from commodity sales are included.

[6] January 2009 Order Authorizing Acquisitions at 141.

[7] DPS Staff Motion at 8; DPS Staff Financial Panel at 56, 58-60, 65.

[8] See, generally, the pre-filed testimony of the DPS Staff Service Quality and Reliability Panel.

[9] See, generally, the pre-filed testimony of the DPS Staff Financial Panel at 52-75.

- Adding to expenses a 3% raise to management employees that was not required by contract;
- Continuing a supplemental retirement plan for executives;
- Failing, apparently, to remove from the 2008 rate base the expenses accrued due to the 2008 acquisition by Iberdrola;
- Assuming payment of over $200 million in dividends to Iberdrola in 2008 and 2009;
- Assuming an additional $68 million payment to Iberdrola to cover federal taxes that Iberdrola will not pay because of its eligibility to receive Production Tax Credits;
- Insisting on increasing capital expenditures by $276 million, or 51%, over the $540 million the Commission determined are adequate for the provision of safe and reliable service;
- Disregard $57 million in cash from the expiration of RG&E's its Asset Sale Gain Account; and,
- Disregard approximately $19 million in NYPA-related 2008 forecast true-ups by NYSEG.

Further, NYSEG did not update the merchant function charge, which shows a positive cash flow of $5.7 million. Additionally, NYSEG and RG&E did not take into account that any energy efficiency programs implemented by the Companies would be fully funded by the System Benefits Charge.

The omissions, in some cases, and the unnecessary inclusion, in other cases, of expenses and program costs are breathtaking in scope and consequence. It is certainly possible that a small water company could put together a filing such as the Companies'. But, Energy East, Iberdrola, and the Companies are large, experienced, sophisticated entities. Based on the number and obviousness of the flaws contained in the list above, it is difficult to conclude that the flaws in the filing were inadvertent.

B. <u>The Filings Are Seriously Incomplete</u>

It is the CPB's position that the statutory suspension period should not commence because the filings are incomplete. The PSC directed the Companies to include in their next rate filing:

> [A]ll studies, analyses and related work papers prepared by Iberdrola, its subsidiaries, affiliates, or agents that identify or quantify the costs and savings related to merger synergies, efficiency gains, and the adoption of utility best practices that in any way affect the management, operation and underlying costs of NYSEG's and RG&E's utility business.[10]

Once again, the Companies have completely failed to comply with Commission orders. The material required for major rate filings is not included in the Companies' submission.

Further, as DPS Staff highlights, the Companies' filings are "devoid of virtually all" of the material required in PSC regulations, which state that every rate filing shall set forth all changes in rates in exact detail and include comparative balance sheets, three (3) preceding years of earned surplus statements, and all assumptions of

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[10] January 2009 Order Authorizing Acquisition at 140-141.

changes in price inputs.[11] For instance, the Companies stated at the February 11, 2009 Procedural Conference that their cost of service studies would not be available for inspection by the parties until sometime in April. The CPB agrees with DPS Staff that, under the color of alleged impending catastrophe, "[i]t is particularly egregious that the Companies' testimony and exhibits are completely deficient of any supporting detail or justification…."[12] This failure presents a second, independent reason for dismissing the filings.

II. Iberdrola Has Caused The Problem: Multi-National Corporations Have Little Interest In The Health of Local Communities

Iberdrola and the other Companies involved in the Acquisition Proceeding repeatedly told the Commission and the interested parties what they wanted to hear, namely, that with Iberdrola, a leading global utility and energy company, on the scene, the Companies and their ratepayers would benefit from easier and cheaper access to global capital markets. Indeed, the Acquisition Proceeding Record is replete with assurances that Iberdrola would infuse capital into the New York utilities whenever the situation warranted.[13] This was welcome news.

New York's upstate economy is in distress and the State's economy overall is in a downturn. According to 2007 figures, the median household income is less than $45,000

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[11] DPS Staff Motion at 14, citing 16 NYCRR Part 61.

[12] Id.

[13] See, for example, Acquisition Proceeding Record at Tr. 476, 489-90, 507, 509, 553, 766-767, and 1776.

and 20 to 30 percent of the population across the region is below the poverty level.[14] Increasing utility rates at this stressful time will contribute to the economic problems facing the upstate region.

Iberdrola recently boasted about its robust liquidity,[15] but this proceeding evidences the exact opposite. Rather than pruning waste and excess spending from their operations to maintain manageable rates for their customers suffering from the worsening economy, the Companies have concocted a scheme to raise rates in order to transfer $400 million of ratepayers' money to Iberdrola, the company which asserted its access to global markets and its expertise would benefit the Companies' customers.[16]

Indeed, Iberdrola's CEO, who, incidentally, is the Spain-U.S. Chamber of Commerce 2008 Business Leader of the Year, candidly suggested that individual utility commissions are easily toyed with. Mr. Galan explained that Iberdrola would invest in only those subsidiaries among its global holdings that provide the highest returns. He is quoted as saying: "We can be part of the solution or we

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[14] See www.factfinder.census.gov. These figures are in sharp contrast to the compensation paid to Iberdrola's CEO, Ignacio S. Galan, who received a $12.5 million bonus in addition to his $8 million salary for 2008. See the attached article, which suggests that the size of the CEO's compensation is controversial in Spain.

[15] DPS Staff Financial Panel at 50.

[16] See, for example, Acquisition Proceeding Record at Tr. 489-90.

can make more problems. If we will not get a proper return, we will not make the investment."[17]

III. MOTION TO INSTITUTE PROCEEDINGS

Given this background, it is the CPB's position that merely dismissing the filings is not adequate. First, as DPS Staff notes, the Commission has the authority to order that all planned or projected dividend payments be stopped as an asset-savings measure.[18] In consideration of the Companies' claims in their filings, the Commission should institute a proceeding immediately to ensure that the Companies do not induce a real financial problem by transferring upstate New York ratepayer dollars to their foreign parent.

Second, the Companies' irresponsible quest to secure a $400 million pay off for Iberdrola should compel the PSC to protect ratepayer interests by instituting two (2) additional proceedings, a management audit and a prudence investigation. The management audit would address such issues as utility best practices and merger savings, discussed in the September and January Acquisition Orders, with particular emphasis on the management structure of the Companies and Energy East including compensation and the decision-making process.

The third proceeding would examine the prudence of the actions of Energy East and the Companies regarding the

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[17] Emphasis added. "Energy Chiefs Debate the Cost of Energy," Barbara Lewis, Davos, Switzerland (Reuters, January 29, 2009), attached hereto.

[18] DPS Staff Motion at 10, fn. 50.

instant filings. The prudence proceeding should address such issues as: (1) the timing and process of making these filings and what the filings claim; (2) the size and reasonableness of providing severance packages and bonuses to officers and executives upon the closing of the acquisition; (3) the size and reasonableness of officers' compensation supported by New York ratepayers; (4) whether all or part of the budgeted $8 million rate case expense should be disallowed and, instead, recovered below the line; (5) the circumstances surrounding RG&E's loss of $100 million in the purchase of a bond financing hedge; (6) whether the filings violated PSC orders or the Public Service Law, and, if so, what is the appropriate penalty; and, (7) whether any other penalties or sanctions should be imposed as a partial acknowledgment that the "unconscionable"[19] claims of the Companies have wasted intervener and ratepayer resources.

[19] Staff Financial Panel at 51 (line 18).

CONCLUSION

For the reasons discussed above, the Commission should dismiss the Companies' filings with prejudice. Equally important is the need on the part of the PSC to preserve the integrity of the rate-making process by granting the CPB's motion to institute the three (3) proceedings described above.

Respectfully submitted,

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From typicallyspanish.com

Spain Business

Spain Business Brief - Wednesday February 18 2009

By h.b.
Feb 18, 2009 - 1:23 PM

The European Commission has, for the first time, started the process to sanction Spain for breaking through the 3% limit for the public deficit with respect to the G.D.P. predicted in the Pact for Stability and Growth.
This year the deficit is expected to be more than 6% of G.D.P, having reached 3.4% last year. Procedures have also been started against Ireland, Greece, France, Latvia and Malta.

Investment and consumer spending are both down according to the latest numbers. Consumer spending is down 2.3%, blamed mostly on the increase in unemployment, and sales of white electrical items and cars have been hard hit as a consequence. Investment fell by 9.3% year on year. Spending on housing is also 20% down according to the numbers for the last quarter of last year, published by the National Statistics Institute. It means the largest reduction in investment seen in Spain at the end of 2008 for some 15 years.
Spain is also leading the slowdown in the construction sector in Europe according to Eurostat which has published a 23.7% fall in December year on year. Following Spain are Sweden and Portugal.

The Financial Times has commented today that the recession is putting at risk the advances seen in Spain since the arrival of the Euro. The paper uses the example of Valencia football club to warn that the Spanish economy is one of those most affected by the recession.

One area of the Spanish economy hard hit by the slowdown is the transport sector, with many lorry drivers having no option but to declare themselves bankrupt.
In six months more than 6,000 transport companies have closed and others have lost everything facing large unpaid factures and a closed door when they ask for credit.
An estimated 200,000 lorries, 40% of the total in Spain are now parked. Now an indefinite strike has been called by the Platform for the Defence of the Mercantile Transport Sector to start on February 27.

As the row over the new monthly bills for electricity in Spain continues, the FACUA consumers group has opened a web site where, entering the data from your two monthly bills they can tell you whether you have been over-charged. The simulator is at https://www.facua.org/es/simuladores.php
Meanwhile a row has broken out over the wages of the President of Iberdrola, Ignacio Sánchez Galán. Despite the crisis he has picked up a wage of 6.3 million € and a bonus of a further 10.2 million. The bonus, although paid now is for the progress of the company in previous years, according to the company's annual report.

Unicaja is asking for 1 billion € of state funding to take over and absorb the Caja de Castilla-La Mancha, CCM. Unicaja Chairman, Braulio Medel, said it did not want to carry out an operation which could contaminate its accounts. Of the 20 billion credit with CCM, about 8.5 billion is linked to the construction sector.

And finally
Minister for the Economy, Pedro Solbes, has now admitted that there will be more difficulties in 2010 than he saw before. Speaking to the Economy Commission in Congress on Tuesday, he said that the recession could continue well into 2010, although after that recovery would have a 'certain vigour' especially in 2011.

REUTERS

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DAVOS-UPDATE 1-Energy chiefs debate the cost of energy

Thu Jan 29, 2009 3:56pm EST

(Updates throughout)

By Barbara Lewis

DAVOS, Switzerland, Jan 29 (Reuters) - Energy leaders at the World Economic Forum debated the true cost of fuel on Thursday as they grappled with the implications of world recession and how to navigate out of it.

Record-high oil prices close to $150 a barrel in July last year added to the pain of economic slowdown, and now much cheaper prices of near $40 a barrel could help the global economy to rally.

But for consumers, producers and the planet, oil at that level could be too cheap as it slows investment in new supplies of fossil fuel as well as in alternative energy.

Saudi Arabia, the world's leading oil exporter, said late last year $75 was a fair price for crude -- at the top end of the $60-$80 a barrel many in the industry consider a desirable level.

"That seems to be what you need to get investment," BP Chief Executive Tony Hayward on Thursday told the forum in Davos, with reference to the $60-$80 range.

To help push prices back to that level, the Organization of the Petroleum Exporting Countries has agreed to cut 4.2 million barrels per day (bpd) from September output levels.

Supplier of roughly a third of the world's oil, the producer group has strictly enforced those curbs and said it was ready to cut more if the price remained low. OPEC ministers next meet to assess output policy on March 15 in Vienna.

"OPEC will not hesitate ... we are still reviewing," the group's Secretary-General, Abdullah al-Badri, said. "Even with $50, we cannot have a decent income for our members."

Nobuo Tanaka, executive director of the International Energy Agency, which advises 28 industrialised countries, agreed consumers would eventually have to pay more.

But low prices could aid a world economy that the International Monetary Fund has said will be near a standstill this year.

"To stimulate the economy, you need a low price, but to stimulate investment long-term the price should be higher," Tanaka said on the sidelines of the forum.

"In the mid to long term, oil prices will go up."

ENVIRONMENTALLY FRIENDLY

Many attending the Davos forum have strived to maintain the momentum to couple economic recovery with green policies, and Tanaka said any financial stimulus package should be as environmentally friendly as possible.

"If governments are spending ... for a stimulus package, why not spend it on renewables?" he asked.

"It stimulates the economy short-term and in the long-term is sustainable. You kill two birds with one stone."

But, in times of financial crisis, it is a huge challenge to switch the focus from short-sighted survival, which can mean using the cheapest, most polluting fuel.

The IEA is studying the implications of economic recession for energy and the agency's chief economist Fatih Birol said he was worried.

In the short-term, fuel use in general has fallen, but the risk was that would be offset by greater use of highly polluting coal -- because it is cheap -- and by lower investment, he said.

"It's bad news for the long term. Many renewable, nuclear and efficiency projects are being postponed," he said.

"The long-term impact is that emissions will go up if governments don't do something."

Industry executives also said investment in the cleaner kinds of energy, as well as in oil, was bound to decrease.

Nuclear power has many detractors because of the toxic waste it generates, but it can provide huge amounts of energy without producing carbon emissions.

The high cost of bringing on new reactors means nuclear energy is only competitive when oil costs about $70 a barrel, analysts have said.

"We can be part of the solution or we can make more problems. If we will not get a proper return, we will not make the investment," said Ignacio Galan, chief executive of Spanish utility Iberdrola, which has announced reduced capital expenditure plans for 2009 compared with 2008.

"If the price of oil is low, nuclear cannot compete. It's the same thing with hydro," he told Reuters. (Editing by Jim Marshall)