STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of Fortis, Inc. et al. and CH Energy Group, Inc. et al. for Approval of the Acquisition of CH Energy Group, Inc. by Fortis, Inc. and Related Transactions

Case 12-M-0192

PETITION FOR REHEARING

AND PETITION FOR

RATE INVESTIGATION AND TEMPORARY RATES

The Public Utility Law Project of New York, Inc. ("PULP") submits this Petition for Rehearing of the Public Service Commission ("Commission" or "PSC") *Order Authorizing Acquisition Subject to Conditions* issued June 26, 2013 in Case 12-M-0192 (*"Order Authorizing Acquisition and Rate Plan"*), and also petitions for a rate investigation and temporary rates.[1] The *Order Authorizing Acquisition and Rate Plan* allows the acquisition of Central Hudson Gas & Electric Company ("Central Hudson") by Fortis, Inc., a Canadian holding company, largely on terms and conditions contained in a non unanimous "Joint Proposal" put forward by settling parties, including extension and modification of the current rate plan through June 30, 2014. After Administrative Law Judges recommended disapproval of the Joint Proposal in their Recommended Decision ("RD"), Central Hudson and Fortis Inc. proposed, in a letter to Commissioners, new and additional terms and conditions including extension and modification of the rate plan for a second year, through June 30, 2015. The Commission approved the Joint

[1] The June 26 Order is available in the DMM electronic case file for case 12-M-0192, at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A55ECCE9-C3B2-4076-A934-4F65AA7E79D1}.

Proposal with conditions, and modified and adopted without further notice and opportunity for public comment the proposal for extending the rate plan for another year in its *Order Authorizing Acquisition and Rate Plan*.

PULP is an active party in Case 12-M-0192 striving to represent the interests of low-income residential customers receiving natural gas or electric utility service from Central Hudson. PULP conducted discovery and submitted testimony, with recommendations for reforms of Central Hudson's low income rates and for reducing reliance upon threats of service interruption and actual termination of service as bill collection measures.[2] PULP did not submit rebuttal testimony or propose issues for determination at the evidentiary hearing, did not participate in confidential settlement negotiations, and did not join in the Joint Proposal.

PULP filed initial and reply comments opposing the "Joint Proposal," an agreement of settling parties filed January 28, 2013 which eventually was approved, with modifications, in the Commission's *Order Authorizing Acquisition and Rate Plan*. PULP objected to the merger arguing the risks do not outweigh putative benefits and the rate plan which does not sufficiently address low-income customer service issues raised in testimony for PULP.

PULP filed initial and reply comments regarding the May 3, 2013 Recommended Decision of the Administrative Law Judges ("ALJs"). PULP filed a response in opposition to Petitioners' May 30, 2013 Letter to Commissioners proposing revised terms and conditions and extension of the rate plan for another year beyond the extension provided for in the Joint Proposal, and PULP filed a response objecting to Central Hudson's nominee of GSS Holdings (CHEG) Inc. as the entity to vote a "Golden Share" intended by the Commission to protect

[2] Due to resource limitations, testimony for PULP focused on narrow consumer protection and low income issues. Testimony of Barbara R. Alexander for PULP, filed October 12, 2012, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={9E9E2E56-180F-488E-9154-A933D049005A}.

customers in any future decision by the Fortis-controlled Central Hudson Board of Directors regarding voluntary bankruptcy.

Based on information in the record of this case, PULP also petitions for commencement of an investigation of Central Hudson's rates, terms and conditions of service, and specifically for reduction of the 10% Return on Equity ("ROE") allowed under the rate plan to 8.9%, and for establishment of temporary rates pending a final decision after investigation. This relief is sought because the excessive 10% ROE lacks support in the record, there is no basis to reject the 8.9% ROE recommended by Department of Public Service expert staff based on accepted Commission methodology. The difference is approximately $8.52 million per year, or $17.04 million over the two-year rate plan extension. Central Hudson earned well above an ROE set in accordance with accepted Commission methodology, and exceeded 8.9% for the trailing four quarters in ten of the past 11 quarters. There is substantial risk to customers that Central Hudson will earn excessive returns unless temporary rates are set and an investigation conducted before modifying the rate plan to set a new, lower ROE of 8.9% as of the date of temporary rates. Also, because the rate plan extension and modifications were done without lawful SAPA Notices, temporary rates setting new conditions are necessary to reduce the allowed ROE. This investigation request is also based on evidence of Central Hudson's over reliance on harsh bill collection measures, which underutilize payment agreements and overuse threats of service interruption and actual service interruption, frustrating attainment of the statutory goal of continuous residential service to promote health, safety and the general welfare. Continuation of the rate plan without examination of these practices may create more hardship and risks to Central Hudson's financially vulnerable residential customers.

Rehearing of the *Order Authorizing Acquisition and Rate Plan* is requested pursuant to Section 22 of the New York Public Service Law and the Commission's regulations, 16 NYCRR § 3.7. The grounds for rehearing are that the Commission's *Order Authorizing Acquisition and Rate Plan* is based on errors of law and fact, as presented in detail below, and that new circumstances since issuance of the *Order Authorizing Acquisition and Rate Plan* warrant its reversal and remand for evidentiary hearings on the terms of the acquisition and rate plan extension.

I.

The Commission Erred when it Did Not Publish an Initial SAPA Notice Regarding Future Rates, and Did Not Publish Revised SAPA Notices When it Considered and Adopted a Revised Joint Proposal for Merger and Future Rates, and a Revised Proposal to Establish Rates, Terms and Conditions for Central Hudson Electric and Gas Service for the Year Beginning July 1, 2014.

proposed state agency rules:

> § 202. Rule making procedure. 1. Notice of proposed rule making. (a) Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule.

In its *Order Authorizing Acquisition and Rate Plan* the Commission indicates it is taking action under its May 23, 2012 initial SAPA Notice of Rulemaking, which states,

> PROPOSED RULE MAKING
> NO HEARING(S) SCHEDULED
>
> Acquisition by Fortis, Inc., Through Subsidiaries, of CHEG And, Indirectly, CHG&E
>
> I.D. No. PSC-21-12-00009-P
>
> PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:
>
> Proposed Action: The Commission is considering a joint petition for Fortis, Inc., of Newfoundland and Labrador, Canada, to acquire CH Energy Group, Inc. (CHEG) and its subsidiary, Central Hudson Gas & Electric Corporation (CHG&E).
> Statutory authority: Public Service Law, sections 4, 5 and 70
> Subject: Acquisition by Fortis, Inc., through subsidiaries, of CHEG and, indirectly, CHG&E.

Purpose: Transfer of 100% of outstanding stock of CHEG and, thus, indirectly, ownership of CHG&E to Fortis, Inc.

Substance of proposed rule: On April 20, 2012, Fortis Inc., a holding company based in St. Johns, Newfoundland and Labrador, Canada, its subsidiary FortisUS, Inc. a Delaware corporation, Cascade Acquisition Sub Inc. (Cascade), a New York corporation and wholly owned subsidiary of FortisUS Inc. (FortisUS), CH Energy Group, Inc., (CHEG), a New York corporation headquartered in Poughkeepsie, New York, and Central Hudson Gas & Electric Corporation (CHG&E), a New York gas and electric corporation and wholly-owned subsidiary of CHEG, filed a petition for approval, pursuant to Public Service Law § 70, of the sale of 100% of the outstanding stock of CHEG to FortisUS and an immediate merger, upon completion of the transaction, of CHEG and Cascade, with CHEG as the surviving corporation. By virtue of the proposed transaction, CHG&E would become, indirectly, a wholly-owned subsidiary of FortisUS and, effectively, of Fortis Inc.

CHG&E, also headquartered in Poughkeepsie, New York, serves about 300,000 electric and 75,000 natural gas customers in New York s mid-Hudson River area. CHG&E accounts for approximately 93% of the total assets of CHEG. CHEG also owns and operates Griffith Energy Services, Inc., an unregulated subsidiary comprising primarily a fuel delivery business serving about 56,000 customers in the Mid-Atlantic Region. CHEG also owns Central Hudson Enterprises Corporation.

The Public Service Commission may approve or reject the petition, in whole or in part, or modify the proposed terms and conditions of the proposed transaction.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.state.ny.us/f96dir.htm. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov Data, views or arguments maybe submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-M-0192SP1)

This SAPA Notice advising the public of the initiation of this proceeding references only proposed utility acquisition and transfer of ownership. Neither the "Proposed Action" nor the "Summary of proposed rule" disclose any proposal to set or modify Central Hudson's natural gas and electricity rate plan for the rate year beginning July 1, 2013. Yet that is what the April 20, 2012 Petition asks the Commission to do, and the Commission adopted a rule setting future rates. The text of the Proposed Rule is not published No one expects that the published summary of a Proposed Rule will contain all the information in the rule or a lengthy petition, but there is no mention at all in the Notice of any intention to fix future rates or modify the existing rate plan which expired June 30, 2013, even though the Summary of the Proposed Rule was accomplished in less than 100 words, well within the statutory limit of 2000 words.[3]

[3] The Notice of Proposed Rulemaking must " (v) contain the complete text of the proposed rule, provided, however,

The Commission declares at its website that rate cases are an example of the type of action requiring SAPA compliance.[4] While the petitioners did not start a major rate case, the petition proposed fixing of rates, terms and conditions on new terms for one year beginning July 1, 2013. The definition of "Rule" under SAPA directly applies:

> §102.2. (a) "Rule" means (i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval, **or prescription for the future of rates,** wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.

(*Emphasis added*). What was proposed in the petition, in addition to the acquisition of Central Hudson by Fortis, Inc., was clearly the "prescription for the future of rates" for which a SAPA Notice of Proposed Rulemaking is mandated. This was plainly stated in the petitioners' filing letter, which emphasized its so-called "rate freeze" rate plan proposal for the next year. Petitioners proposed modification of the earnings sharing provision to share earnings with customers beginning when the company realizes a 10% ROE instead of 10.5%, and proposed continuation of "virtually all" other provisions in the rate plan:

> Commitment to freeze rate year 3 rates for at least one additional year and to defer the filing of new electric and gas rate case applications so as to become effective no sooner than July 1, 2014;
>
> Eliminating a potential for "excessive earnings" pending the next general rate cases through reducing the threshold for earnings sharing to 10.0% as of the end of the current rate plan and freezing the rates

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if such text exceeds two thousand words, the notice shall contain only a description of the subject, purpose and substance of such rule in less than two thousand words and shall identify the address of the website, if any, on which the full text has been posted. . . ." SAPA 202.1(f_(v).

[4] "What Commission actions require SAPA? The PSC is obligated to follow prescribed SAPA procedures in the exercise of its decision making. **** Types of department matters requiring SAPA compliance: **** rate cases. Available at http://www.dps.ny.gov/new_psc_sapa.html.

> and virtually all other provisions of the current Central Hudson rate plan for at least a year[5]

The setting of future rates is not inherent in the transfer of utility ownership that was described in the Proposed Rulemaking Notice. Also, the statutory authority under which the Notice says the Commission is acting, PSL §§ 4, 5, and 70 are not the authority for Commission revision of rates, which PSL § 66. Therefore, it cannot be argued that actual or constructive notice of the rate plan extension and modifications was given when the Notice advised the public only of the proposed corporate takeover. Despite the lack of any SAPA notice of rate plan changes, the Commission considered and adopted a proposal to extend and modify the natural gas and electric rate plans of Central Hudson, which is the utility "serving approximately 300,000 electric and about 75,000 natural gas customers in eight counties of New York State's Mid-Hudson River Valley, and delivering electricity and natural gas in a 2,600 square-mile service territory that extends from the suburbs of metropolitan New York City north to the capital district at Albany."[6] Clearly the extension and modification of the rate plan was a rule of general applicability and a "prescription for the future of rates" and requiring SAPA notice under SAPA Section 202. The absence of notice of the rate plan extension and modification in the SAPA Notice was a violation of SAPA § 202.

During the progress of the case, on January 28, 2013, a non unanimous Joint Proposal was filed with the Commission in Case 12-M- 0192. It was supported by Central Hudson, Fortis, Inc., Department of Public Service Staff, (who appeared as a party in the case), and other parties. It was the announcement of this Joint Proposal that prompted the Secretary of the Commission on January 14, 2013 to issue a *Notice of Cancellation of Evidentiary Hearings* that was

[5] Central Hudson and Fortis, Inc. filing letter, April 20, 2012, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={E8335763-BF91-49C6-AE01-6EBCD9A4C66E}.

[6] Central Hudson website, at http://www.chenergygroup.com/ourbusiness.html.

previously scheduled to address conflicting evidence in the record regarding the originally noticed petition for merger. The Joint Proposal proposed the acquisition of Central Hudson by Fortis, Inc. on terms and conditions which modified those contained in the petitioners' original petition. The Joint Proposal also includes provisions to modify and establish natural gas and electric rates for the period ending June 30, 2014, on terms and conditions different from those contained in the original petition. The Joint Proposal is a Proposed Rule which is substantially different from the initial Rule (the initial Petition of Central Hudson and Fortis, Inc.).

No Revised SAPA notice was published regarding the Joint Proposal.

It might be argued that the SAPA Notice that was published says that "The Public Service Commission may approve or reject the petition, in whole or in part, or modify the proposed terms and conditions of the proposed transaction." But that verbiage cannot substitute for compliance with the SAPA procedure, which clearly requires publication of substantial revisions when there are significant changes to Proposed Rules under consideration:

> 202. 4-a. Notice of revised rule making. (a) * * * * prior to the adoption of a rule, an agency shall submit a notice of revised rule making to the secretary of state for publication in the state register for any proposed rule which contains a substantial revision. The public shall be afforded an opportunity to submit comments on the revised text of a proposed rule.

The Joint Proposal was a substantial revision of the intitially proposed rule. The Commission action taken was adoption of the rules in the Joint Proposal, and not adoption of the rules proposed in the petition that was the subject of the only SAPA Notice. The Commission decreed,

> the terms of the Joint Proposal dated January 25, 2013, which was filed in this proceeding on January 28, 2013, are adopted in their entirety except as otherwise noted, and are incorporated as part of this order.

Order Authorizing Acquisition and Rate Plan, p. 61. Accordingly, the Commission committed an error of law when it did not publish a Revised SAPA Notice under SAPA 202.4-a when a

substantially modified Joint Proposal was considered and adopted in lieu of the original petition that was the subject of the only SAPA Notice.

A Recommended Decision issued May 3, 2013 by the Administrative Law Judges recommended disapproval of the Joint Proposal. On May 30, 2013, after all briefs on exceptions and reply briefs on exceptions had been filed, Central Hudson and Fortis, Inc. filed a Letter to Commissioners proposing substantial additional modifications to the Joint Proposal, which was then *sub judice*. The Letter to Commissioners proposed new rate plan provisions to modify those contained in the Joint Proposal, and to extend the rate plan, with modifications, for yet another year ending June 30, 2015.

Again, no Revised SAPA Notice was issued regarding the revised proposal.

The Joint Proposal and the proposals in the petitioners' Letter to Commissioners regarding further extension and modification of the rate plan were considered, and approved as modified by the Commission in its *Order Authorizing Acquisition and Rate Plan*. In doing so, the Commission adopted rules that were not included in and that were substantial revisions of the proposed "rule" that was the subject of the only SAPA Notice.

In sum, the failure of the Commission's initial SAPA Notice to mention the proposed rate plan provisions for the year ending June 30, 2014, the failure to issue a revised notice that it was considering the January 28, 2013 Joint Proposal, and the failure to issue a revised SAPA Notice regarding the May 30 proposal of Petitioners regarding establishment of rate plan provisions for the year ending June 30, 2015, was in violation of SAPA § 202. Accordingly, rehearing should be granted, the Order reversed, new SAPA Notices issued regarding terms and conditions contained in the Joint Proposal and Letter to Commissioners, and new proceedings held to

review the January 28, 2013 Joint Proposal and May 30, 2013 Letter to Commissioners. As discussed below, temporary rates lowering the allowed ROE need to be set to protect consumers.

II.

The Commission Erred when it Approved the Settling Parties' Joint Proposal Without Resolving Conflicting Factual Matters in the Record Regarding Merger Risks and Benefits, Whether the Acquisition is in the Public Interest, and Whether the Rate Plan Modifications Are Just and Reasonable

In its *Order Authorizing Acquisition and Rate Plan* the Commission overlooked important facts, in its recapitulation of the procedural history of the case, and at page 52, *et seq*. where it considered and rejected requests for an evidentiary hearing. The Commission's history of the case at pages 2-3 of the *Order Authorizing Acquisition and Rate Plan* omits to mention that on December 4, 2012, parties filed lists of issues for a hearing that had been raised in the record. The Commission omits mention of the ALJs' December 5, 2012 determination that a hearing is needed. The Commission also overlooked in its decision the *Notice of Evidentiary Hearing* issued by the Secretary December 6, 2012, the *Notice of Rescheduled Evidentiary Hearing* issued January 9, 2013, and Secretary's *Notice of Cancellation of Evidentiary Hearing* when some parties announced a non unanimous agreement.[7] These oversights contributed to errors of fact and an incorrect decision to deny an evidentiary hearing requested by non settling parties who intervened after the confidentially negotiated Joint Proposal was filed. Even though parties in the case, including PULP, had not filed statements of facts in dispute, the state of the record when the intervenors filed their motion for a hearing was that facts in the record identifying the risks and benefits of the merger and terms and conditions for a future rate plan were in conflict.

[7] The RD issued May 3, 2013 similarly skips any mention of their prior ruling that a hearing is necessary to resolve the issues raised in the prefiled testimony, and omits mention of the Secretary's public Notices of Evidentiary Hearing, Rescheduled Evidentiary Hearing, and Cancellation of the Evidentiary Hearing.

The ALJ's ruling that these factual clashes require an evidentiary hearing, and that those issues were not exclusive, was the law of the case and had not been superceded. The Commission erroneously focused instead on the request of the judges for additional statements of facts in dispute after the Joint Proposal was filed by the settling parties. The clash of facts in the record existed even when settling parties decided not to pursue them. The Commisson's role must be to examine the record independently and not unduly rely on parties.

The position of the DPS expert witnesses, in their prefiled testimony, was that the putative positive benefits of the merger were seriously deficient in comparison with benefits in other mergers, specifically the Iberdrola merger, and extension of the rate plan without lowering the allowed Return on Equity ("ROE") was unreasonable:

> This testimony explains why Staff, after a comprehensive analysis of the transaction as proposed by the parties initiating this proceeding (we will refer to as the "Merger") has reached the conclusion that the acquisition of CH Energy Group Inc. (CH Energy) by Fortis Inc. (Fortis) (collectively along with Central Hudson Electric & Gas Corporation (Central Hudson or Company) we will refer to as the "Petitioners") does not meet the criteria required for the Commission to approve such a transaction absent the substantial modifications to the terms and conditions we recommend to those proposed by the Petitioners.

Staff Policy Panel Testimony at 8-9.[8] Staff proposed, *inter alia,* adjustments so that the positive benefits would total $85 million, and an ROE of 8.9% for any extension of the rate plan. *Id.* According to Central Hudson, whose witnesses' prefiled testimony supported continuation of a 10% ROE, the difference on the ROE issue alone amounts to $8.52 million.[9] The *Notice of Evidentiary Hearing* states that "the principal purposes of the hearing are to take into evidence the pre-filed testimony and exhibits submitted in this case and to permit parties to cross-examine

[8] Available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={2E6D4722-EEFB-40DF-B14F-6A953B9F49D4}.

[9] Rebuttal Testimony of Mosher and Brideau at 10, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={08AEB7D9-8854-45A8-B515-87C01A475835}

the sponsoring witnesses."[10] This is consistent with the Commission's regulation governing the procedure for considering transfers of utility ownership, which specify that at the evidentiary hearing on a petition for transfer of utility ownership:

> § 31.2 Evidence to be presented at hearing
>
> At the hearing, the applicant shall be prepared to show by competent evidence the facts upon which it relies to establish that the transaction is in the public interest, proof of the ability of the petitioner to render adequate service and that the statements in the petition are true.

As it turned out, however, there was never a hearing where "competent evidence" regarding the merits of the ownership transfer and the rate plan extension and modifications was received, where "proof of the ability" of the acquiring company to "render adequate service" was provided, and where the statements in the petition for acquisition and their proponents could be tested for their veracity. As a consequence, conflicting positions and statements of fact in the record, much of it in hotly contested prefiled testimony relating to the risks and benefits of the takeover, and merits of the rate plan provisions for the year ending June 30, 2014, were never subjected to cross examination by parties or judges. Staff's submission of issues for the hearing contains the following list:

> Issues
> Risks
> 1. Management and Governance
> • Will the use of Central Hudson resources for other Fortis affiliates be at Central Hudson ratepayer expense?
> • Are the rulings of the Canadian Securities Administrators equivalent to the provisions of the Sarbanes-Oxley Act (SOX)?
> • Does an independent audit of internal controls as contemplated under SOX provide a value of benefit to Central Hudson ratepayers?
> • In 2008, did Iberdrola or any of its affiliates provide shared services to its regulated U.S utilities?

[10] Notice of Evidentiary Hearing, Issued December 6, 2012, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={035C8440-23BE-4863-B5F5-EB2147FD1041}

2. Goodwill
• Is Fortis' goodwill post-merger a risk only to Fortis Shareholders?
• What was the level of goodwill on Iberdrola's books under US Generally Accepted Accounting Principles post merger?
• What would be the projected level of goodwill on Fortis's books post merger under Internal Financial Reporting Standards?

3. Excessive Rates
• Is there a risk that Central Hudson rates may be excessive post-Merger?
• If a rate increase is deemed " warranted" for a specific rate year based on additional costs and expenses, does that necessarily mean that there must be a corresponding rate increase during that rate year?
• If there is deferral treatment for many of the rate drivers for a specific rate year that would "warrant" a rate increase, do ratepayers remain responsible to pay for these drivers at some later point in time?

Benefits
4. "Identifiable" Monetary Benefits/Transaction Risks
• Are there transaction risks requiring Public Benefit Adjustments?
• Are risks requiring Public Benefit Adjustments fully neutralized or mitigated?
• Are the proposed benefits of the Merger fully responsive to the risks of the Merger?
• Are there risks associated with this Merger?
• Can all risks of this Merger be mitigated or neutralized?
• Do the risks of this Merger outweigh the alleged benefits?
• Was the "Reduction of Alternative Transaction" amount of $135 million in the Petitioners' Comparative Analysis (see Mosher Rebuttal Testimony, pg. 7) scaled to the delivery revenues of NYSEG and RGE as compared to KeySpan NY and LI?
• Are the alleged foregone carrying charges on capital expenditures a benefit to Central Hudson rate payers without considering an updated ROE for the time period of the rate freeze?
• Does maintaining the various performance mechanisms, targets and metrics provide a benefit to Central Hudson ratepayers?
• Is it proper to include alleged synergy savings into Petitioners' PBA comparative analysis?
• What is the age of the holding company Fortis Inc.?
• What were the various credit ratings of Iberdrola in 2008?

Other Issues
5. Natural Gas Capacity Panel
• Reliability Forecasts - Should reliability forecasts be developed independently from sales forecasts and be based on a minimum thirty years of weather data?
• Capacity Asset Management - Should shareholders benefit through a sharing mechanism from the release of excess capacity that is paid by ratepayers?
• Is there excess capacity?

> • Transportation and Balancing Procedures and Charges – Should the weighed cost of commodity for gas injected into storage during the non-winter season be utilized to more accurately estimate the actual storage price paid by all sales customers?

The ALJs recognized that the record developed by the prefiled testimony of parties contains many conflicting facts and that the issues then identified by the parties "support the need for an evidentiary hearing." *ALJs December 5, 2012 Prehearing Ruling*.[11] The ALJs also recognized that the issues parties had identified were not exclusive, i.e., that other issues could be raised at the then-scheduled evidentiary hearing.

> *The statements we received from the parties all support the need for an evidentiary hearing, but provide no reasonable basis for us to define or circumscribe the issues that may be addressed*. Therefore, subject to normal standards of relevance and materiality, the parties will be free to explore any issues they deem to be in dispute. ….

Id. The judges also indicated that the hearing schedule could be postponed for settlement negotiations. Their ruling contemplates that even if there were a settlement agreement, there would still be a hearing:

> Because *we are not constrained by a statutory deadline in this case*, we will be amenable to any postponement of this schedule that is agreed upon by all parties for the purpose of pursuing negotiations aimed at *reducing the number of issues requiring hearing*. An appropriate notice pursuant to Commission Rule 3.9 should be filed.

Id. (*Emphasis added*). Parties subsequently entered into confidential settlement negotiations under the Commission's settlement procedures established in 16 NYCRR § 3.9. While negotiations were underway, the Secretary postponed the Evidentiary Hearing to January 22. *Notice of Rescheduled Evidentiary Hearing*, Jan. 9, 2013. Some parties, including Staff and petitioners, agreed in confidential negotiations to settle the case. Based on a bare report of a non

[11] *Ruling that addresses several pending motions, sets a date for the commencement of evidentiary hearings, and defines procedures for establishing schedules both for the hearing and post-hearing phases of the litigation*. Available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={8F6C17B3-0327-4902-9527-180C98AE7C2C}.

unanimous agreement, and before a Joint Proposal was actually filed and its terms for the acquisition and rate plan extension made public, the Commission Secretary on January 14, 2013 issued a *Notice of Cancellation of Evidentiary Hearings.* The cancellation is merely based on "an announcement of an agreement in principle among a majority of parties on a comprehensive negotiated settlement of the issues pending in this proceeding…." *Id.* Two weeks later, on January 28, 2013, the Joint Proposal of the settling parties was filed.

It was error to cancel the evidentiary hearing based on a report from negotiating parties that a non-unanimous settlement was in the works. The agreement of some parties to stop litigating differences did not mean that facts and issues identified no longer exist for review by the ALJs and Commission, or that the need for an evidentiary hearing to reconcile conflicting factual issues in the record was wholly eliminated. The settlement Joint Proposal contains provisions utterly inconsistent with Staff witnesses' pre settlement testimony (*e.g.*, the level of public benefits necessary and the right allowed ROE), and the issues identified by these experts remain in the record, unresolved. There is no basis to for any reviewer of the record to reconcile their prefiled testimony supporting public benefits of $85 million and an ROE of 8.9% with the outcome of the Joint Proposal, with about half the public benefits and a 10% ROE for another rate year (later revised for a second additional rate year). The evidentiary hearing should have been the procedural means to address this clash of facts. It should have been postponed, not cancelled, and then held after filing of the Joint Proposal to receive new evidence regarding it, from its proponents and any opponents. At the hearing witnesses supporting the Joint Proposal would present testimony, subject to cross examination by parties and the judges, explaining their reasons for retreating from or modifying the recommendations they made in their prefiled testimony. Although other parties who had earlier identified issues in dispute did not pursue

them after the Joint Proposal was filed, eventually Citizens for Local Power and the Consortium in Opposition to the Acquisition, groups formed after the Joint Proposal was filed, intervened and filed a motion for evidentiary hearings and petition opposing the merger on May 1, 2013.[12] Their request for an evidentiary hearing questions the risks and benefits of the merger and reasonableness of the rate plan, and raises additional issues regarding qualifications of Fortis, Inc. The time set for responses to the motion was May 6, 2013. While their motion was pending, the RD was issued on May 3, 2013, which opined that an evidentiary hearing is not necessary. RD at 4 – 5.[13] In its *Order Authorizing Acquisition and Rate Plan*, the Commission followed the RD in denying a hearing on the grounds that the intervenors were too late in asking for a hearing. But under the record as developed prior to intervention of parties demanding a hearing, issues warranting a hearing had already been identified, as described above. And, under the record as developed, the ALJs had determined that the clash of prefiled testimony presented factual issues requiring a hearing. It was arbitrary to cancel the scheduled evidentiary hearings based upon the announcement of a confidential non unanimous agreement and then to deny the motion of new parties in the case for a hearing on the Joint Proposal after it became public because other parties in the case settled or, as in the case of PULP, opposed the Joint Proposal without asking to reschedule the cancelled evidentiary hearing. The clashing facts in the record still exist today: there is no testimony in support of the Joint Proposal, and there is no basis for the Commission to ascertain which is right, the prefiled testimony in the record or the settlement. The prefiled

[12] The motion of Citizens for Local Power and Consortium in Opposition to the Acquisition is available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={3BD3D3F3-A4F7-4977-9DB0-A60FC2E7A3A7}.

[13] The RD is available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={E49CB194-BF79-4F60-9E47-C15B84362D17}.

testimony was not withdrawn or corrected or supplemented to align with or support the terms and conditions established in the Joint Proposal.

As discussed, the law of the case is that the ALJs ruled that the facts placed in the record by the prefiled witness testimony is in conflict, requiring a hearing. That determination was never reversed. The decision of settling parties to abandon their positions did not moot the need for a hearing or change the facts to which the expert witnesses testified. By omitting the prior identification of disputed facts in the record, the *Order Authorizing Acquisition and Rate Plan* essentially treats the proceeding, for hearing purposes, as if a new case began with the filing of the Joint Proposal, and finds the intervenors, who had not even formed or existed as a group or intervened before the Joint Proposal was filed, to be in default of the additional issue identification process after the Joint Proposal was filed. In fact, the state of the record when they joined the case was that conflicting facts going to the heart of the merger and rate plan existed in the record, and the law of the case was that such conflicting facts required a hearing where those and other issues could be explored. The cancellation of the hearing based on a report from settling parties that an agreement was forthcoming was erroneous, did not resolve the truth of the facts in dispute, and did not alter the correctness of the ALJ's prior decision that a hearing is needed to resolve the facts. Accordingly, even accepting the record as of the time of intervention, the intervenors' request for a hearing should have been granted.

The Commission's alternative procedures for settlement of litigated cases relies on robust participation of adequately resourced parties empowered to engage fully and to develop a factual record for review and ultimate decision. In this case, the Commission appears to have relied heavily on the judgment of settling parties regarding the substance of the Joint Proposal and the procedure in the case, notably the jettisoning of the scheduled evidentiary hearing upon the mere

report that a non unanimous settlement was in the works. There is no support for the Joint Proposal from any independent organization representing the interests of residential or low-income customers. PULP lacked resources to participate fully and did not seek an evidentiary hearing. The UIU, formed last year after dissolution of the New York Consumer Protection Board ("CPB"), is now a subordinate group within a conventional executive branch state agency, the Department of State. UIU lacks the indicia of necessary independence for state utility consumer advocates, including, for example, the express statutory power to take legal positions different from those of the PSC in judicial review proceedings. The UIU initial testimony and rebuttal testimony catalogs the inadequacy of consumer benefits and defects in the proposed merger and rate plan extension, and UIU proposed meritorious reforms, including improvement of low-income rates and programs. UIU's subsequent support for the Joint Proposal cannot with confidence be deemed to be representative of focused and independent residential consumer interests due to the UIU state agency structure, the limited resources available to UIU, and the limited issues UIU pursued. When new community groups largely comprised of residential customers emerged in reaction to the Joint Proposal, and filed a petition in opposition to it and requested evidentiary hearings, the Commission should not have limited their participation and should have granted the motion for hearings, even if late. Furthermore, as previously discussed, there was no SAPA notice regarding the Joint Proposal.

Even if the new intervenors had not joined the case to seek a hearing, and even if no one had asked for a hearing, it was necessary for the Commission to schedule and hold a hearing to address the issues identified through prefiled expert witness testimony and exhibits. There still exists in the record a set of issues for resolution: those previously identified in the clashing prefiled testimony of parties who agreed to settle (e.g., Staff and Central Hudson and Fortis,

Inc.). Those issues (enumerated in point (i) above) were not properly resolved in the Joint Proposal, the RD or in the *Order Authorizing Acquisition and Rate Plan* because there was no hearing. After the Joint Proposal was filed, testimony of those who previously filed testimony could have been received to explain, for example,

- how a 10% ROE is reasonable when Staff and the Commission are allowing much less in other cases and the Staff expert witness testimony in this case shows that application of Commission-approved methodology yields an ROE of 8.9%, or
- how the benefits of the merger outweigh the specific risks identified in the prefiled testimony, or
- how a settlement with roughly half the $85 million in positive public benefits calculated to be necessary under Commission precedent by expert Staff witnesses in their prefiled testimony is in the public interest.

A consequence of there being no sworn testimony to support the Joint Proposal is that the clash between the detailed prefiled witness testimony and supporting exhibits supporting, for example, $85 million in positive benefits and an ROE of 8.9% stands in sharp contrast to the terms of the Joint Proposal. In comments submitted by its lawyers to support the Joint Proposal, Staff attempted in vain to paper over the clashing facts raised in the prefiled testimony of Staff's expert witnesses. That submission, however, had no supporting expert witness testimony of those who previously testified in detail as to the level of benefits and ROE required, or exhibits or actual evidence to support those and other retreats from their prefiled testimony. A hearing with questioning by the intervenors – or the ALJs -- could have developed the record on this point and shed light on the Staff decision to settle for far less than their expert witnesses said was right.

III.

The Ten Percent Allowed Return on Equity (ROE) for Two Additional Years is Excessive and is Arbitrary, Unsupported by the Expert Testimony in the Record, Inconsistent with ROEs Recently Established by the Commission for Other Utilities, and Unreasonable.

The Commission approved the one year rate plan extension contained in the Joint Proposal and then extended the rate plan yet another year based on a last minute submission, a Letter to Commissioners from the petitioners, without issuing a public notice and without any public comment period. Both extension provisions allow Central Hudson to earn a ROE of 10% before any sharing of overearnings with customers begins. The record contains detailed expert witness testimony of DPS which does not support a ten percent level of allowed earnings.[14] The *Order Authorizing Acquisition and Rate Plan* acknowledges as much, yet unjustifiably approves it:

> The additional year of a rate freeze represents only a commitment on the part of Central Hudson not to file for a rate increase to take effect prior to July 1, 2015. In no way does it represent a guarantee that we would not institute a proceeding to lower rates if such an action appeared to be warranted at any time during the next two years. Consequently, the assertions by PULP and CLP/COA that this promise by Central Hudson would entitle it to overearn during the period are inaccurate and unfounded. Our experience leads us to conclude that Central Hudson's expenses and capital investments during the next two years, even taking into consideration a more current cost of capital, would likely entitle it to some rate relief, such that Central Hudson's forgoing a rate increase has value for

[14] DPS Staff testified:
"A. We recommend . . . 8.90% for the return on common equity (ROE).... The ROE of 8.9% is the current unadjusted result using the Commission's standard methodology …. It is also the ROE that is being recommended by Staff in the current Niagara Mohawk electric and gas rate cases, 12-E-0201 18 and 12-G-0202. .
Q: Why is the ROE recommended by Staff in the Niagara Mohawk rate cases appropriate for valuing the rate freeze proposed in this proceeding for the TME June 30, 2014?
A. Central Hudson used an ROE of 10.0%, which is from the Rate Plan approved over two years ago, and the Petitioners did not attempt to justify why that ROE is still appropriate. Given the changed circumstances since the Commission approved the Rate Plan, primarily lower interest rates, using a 10.0% ROE is inappropriate. The 8.9% ROE Staff is recommending for Niagara Mohawk is the current unadjusted ROE using the Commission's standard methodology for determining the ROE in rate cases *and provides a reasonable estimate of the ROE the Commission would allow Central Hudson at this time* as the companies are similar of risk." (Emphasis added).
Staff Policy Panel Testimony, 93-94, Filed Nov. 5, 2013, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={2E6D4722-EEFB-40DF-B14F-6A953B9F49D4}

> consumers. Consequently, we will accept the offered enhancements and add them as additional conditions to our approval of the acquisition.

There is no actual evidence, however, to support the speculation by the Commission that Central Hudson could file a rate case and win "some rate relief." According to testimony of Central Hudson's witnesses, the difference between earning the 8.9% ROE in Staff's testimony and the 10% requested by Central Hudson and allowed by the Commission would $8.52 million. Rebuttal Testimony of Mosher-Brideau for Petitioners, Nov. 27, 2012, p. 10. For the two years of extension, it would be $17.04 million. None of that would be shared with customers under the plan.

The possibility that Central Hudson will benefit from the ROE being higher than 8.9 is not remote. The record shows that in ten of the most recent eleven quarters, Central Hudson's Trailing Four Quarters earnings were actually more than the 8.9% ROE that is currently correct based on the Commission's standard methodology.[15] The Commission's recent Order regarding Central Hudson's request for extra storm damage recovery relating to tropical storm Irene denied part of it because the company was making a ROE 10.24%. As stated in that order:

> The third criterion that must be met for deferred accounting treatment is that the utility cannot be over-earning. The Company provided a calculation of its rate year two electric regulatory return on common equity, which showed a calculated ROE of 10.00%....
>
> After making these adjustments, **Central Hudson's resulting ROE is 10.24%....** A rate plan provides a balance of interests with protections for both the utility and its customers, by including provisions such as an earnings sharing mechanism and prospective Commission authority to reconcile certain expenses. **While costs from unexpected events may occur that reduce earnings, other unexpected events may occur that result in savings, and therefore increase earnings.** In the absence of such a balancing of interests, should costs related to an unexpected event, such as an extraordinary storm, lower earnings in a material way, the

[15] See calculation of quarterly ROEs for Central Hudson attached to PULP's Opposition to Central Hudson's letter proposal to Commissioners, filed June 6, 2013, and available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={8B916507-1C00-4BB3-96D1-18CFC3A8090F}. A copy is also attached to this Rehearing Petition as Attachment A.

> expenses can be deferred but only up to the point where the Company is allowed to earn its allowed return. Central Hudson's Rate Plan allows it to earn an ROE of 10.0%, and therefore, Central Hudson would be over-earning with allowed deferral treatment of all Irene costs. As previously discussed, since the Commission's third criterion that must be met for deferred accounting treatment is that the utility cannot be over-earning, Staff proposes an additional adjustment of $1,368,000 to eliminate the over-earnings.[16]

The quotation above recognizes that sometimes unanticipated events can cause savings that reduce costs and enhance earnings. The bare invocation of "experience" and prediction the company would have a basis to ask for more without reference to any real evidence to support the assertion that Central Hudson would win "some" relief if it filed a rate case stands in contrast to the actual facts in the record of the case, put forward by the Commission's own expert witnesses, the actual ROEs earned in recent times, and the Commission's own finding in the Tropical Storm Irene cost deferral case.

In an analogous situation, the North Carolina Supreme Court recently issued an opinion nullifying a Duke Power rate settlement approved by that state's Public Service Commission (PSC). Duke Power in its initial rate case filing had asked for an 11.5% ROE. A witness for the PSC's Public Staff had testified that the ROE should be 9.25%. A non unanimous settlement agreement was eventually reached, including the utility and the PSC's Public Staff, for an agreed upon ROE of 10.5%, which was within the range of litigated positions. In its opinion, the North Carolina Supreme Court reversed the PSC order approving the rates, and remanded the case to the PSC for further proceedings. *State of North Carolina ex Rel. Utilities Commission; Duke Energy Carolinas, etc. v. Attorney General Roy Cooper, etc*., (Sup. Ct. N. Carolina No. 268A12

[16] *Order Approving Staff Recommendation*, at 9 – 11. (*Emphasis added*), CASE 11-E-0651 - Petition of Central Hudson Gas & Electric Corporation for Commission Approval to Defer Storm Restoration Expenses for the Rate Year Ended June 30, 2012, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={AD7ADC99-44EA-480C-BEF2-00524EC7674D}.

April 12, 2013).[17] The Court faulted the North Carolina PSC's approval of the settlement because it lacked any independent findings of fact for determination of the allowed ROE:

> Without sufficient findings of fact as to these issues, we cannot say that the Commission ma[de] its own independent conclusion . . . that the propos[ed] [ROE] [wa]s just and reasonable to all parties in light of all the evidence presented.* * * * Instead, it appears that the Commission adopted wholesale, without analysis or deduction, the 10.5% stipulated ROE, as opposed to considering it as one piece of evidence to be weighed in making an otherwise independent determination.* * * * Accordingly, the Commission>s order must be reversed and this case remanded to the Commission so that it can make an independent determination regarding the proper ROE based upon appropriate findings of fact that balance all the available evidence.

Id. Similarly, in this case, the testimony does not support the 10% ROE. Staff witnesses testified that under the approved Commission methodology it should by 8.9%. Central Hudson did not attempt to justify it following the Commission's methodology, and simply agreed to lower the sharing threshold from 10.5% to the 10% ROE level set years ago. Accordingly, the matter should be remanded for an evidentiary hearing to determine the proper ROE.

IV.

There is No Evidence that Central Hudson's Private "Golden Share" Nominee Would Prevent the Placement of Central Hudson in Voluntary Bankruptcy by a Fortis-Dominated Central Hudson Board

A utility's assets and formidable cash generating capabilities from providing essential energy services to captive customers makes it a valuable prize in a holding company structure.[18] As the lessons of other insolvent holding companies with regulated utility subsidiaries (e.g., Enron and Constellation) has shown, an essential element of risk protection when considering a takeover of a local utility by a holding company is the effort to "ring fence" the utility and protect its

[17] Available at http://appellate.nccourts.org/opinions/

[18] Indeed, Central Hudson was once part of a large holding company, the Niagara Hudson Power Company, until it was divested at the direction of federal regulators. See Lisa Gayle Bradley, *On The Acquisition Of Upstream Interests In New York Energy Operating Companies – An Uncharted Area?*, 31 Energy Law Journal 509, 531 (2010).

customers from the errors of its holding company parent and siblings if they have a financial reversal leading to insolvency.

> Courts have found that it might be "sound business practice for [the parent] to seek Chapter 11 protection for its wholly-owned subsidiaries when those subsidiaries [are] crucial to its own reorganization plan." 17 A parent holding company typically can order a wholly-owned utility subsidiary to file a voluntary petition for bankruptcy together with the parent's own filing. While the utility articles of incorporation or by-laws likely would require board of director approval for such action, the parent company likely would control the board of directors of a utility subsidiary. Consistent with the concept of owner-control, the utility vote to file is thus a foregone conclusion.
>
> The creation of a golden vote and/or golden share is a measure for addressing this issue ****
>
> The golden vote mechanism is not a guarantee that the subsidiary utility will choose to forego filing a petition for bankruptcy. *There does not appear to be a recognized requirement that an independent director or golden shareholder must vote against the utility's filing a voluntary petition for bankruptcy.*

Scott Strauss and Peter Hopkins, *The Constellation Experience, Ring-fencing after the subprime meltdown*, Fortnightly, August 2010.[19] (*Emphasis added*). The *Order Authorizing Acquisition and Rate Plan* approves a "Golden Share" provision the Commission intends to protect customers from a future voluntary bankruptcy decision made by a Fortis-controlled Central Hudson board of directors. The Commission unequivocally declared: "The 'golden share' requirement will prevent the placement of Central Hudson in voluntary bankruptcy."[20] In response to PULP's questioning of the sufficiency of the proposed "Golden Share" scheme, the Commission set out its understanding, which as will be shown, is not accurate and not supported by the record:

> The holder of the "golden share" to be appointed under the terms of the Joint Proposal, by contrast, will have no such conflict [that a board member would have]. It will represent a special class of preferred stock *whose only interest is in*

[19] Available at http://www.fortnightly.com/fortnightly/2010/08/constellation-experience?page=0%2C2.
[20] *Order Authorizing Acquisition and Rate Plan* at 42.

> *avoiding voluntary bankruptcy*. There are no other fiduciary responsibilities for this trustee to balance.[21]

That is not what the Golden Share provisions newly created by Central Hudson in its amended corporate certificate say.

After the Commission issued its *Order Authorizing Acquisition and Rate Plan*, Central Hudson revised its corporate certificate to create the "Golden Share", making it a junior preferred class of stock consisting of one share to be voted only if there is a Central Hudson Board vote on whether to file for voluntary bankruptcy.[22] The certificate language authorizing the newly created share, however, does not require its holder to vote against voluntary bankruptcy and does not require the holder to cast her vote to protect the interests of customers. Rather, the Golden Share language in the certificate says the holder is to protect "interests of the State of New York, including legal and other interests arising under the Public Service Law."

What interests of the State? What interests "arising under the Public Service Law? Whatever the meaning of those terms, as written in the Central Hudson certificate, the Golden Share holder would have no explicit duty to protect customers and no duty to vote against a bankruptcy. Rather, the broad wording of the Golden Share created by Central Hudson gives unfettered discretion for the Golden Share holder to take virtually any position on a bankruptcy vote under the claim of protecting the state and "interests arising under the Public Service Law."

Central Hudson and Fortis, Inc., have "interests arising under the Public Service Law." Might it be in the interests of the state to let Central Hudson go bankrupt and shift additional burdens upon its customers? What if the State Pension Fund owns many shares or bonds of Fortis, (as it did with Enron), and the value of Fortis bonds or shares would go down less if

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[21] *Order Authorizing Acquisition and Rate Plan* at 40.

[22] The amended certificate was filed June 14, 2013, and is available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={BE49FF5A-6EAE-47D1-8514-31A4ECE38DFC}.

Central Hudson's assets were thrown into the bankruptcy arena, with new rates set in bankruptcy that would rescue creditors but disadvantage consumers who would bear new rate burdens? This scenario conceivably could allow the Golden Share holder to invoke "interests of the state" and the interests of Central Hudson "arising under the Public Service Law." There is simply no assurance in these impossibly vague words that the holder would actually perceive any duty or direction to protect consumer interests and actually vote against bankruptcy.

The Commission should also reject the Golden Share nominee. Central Hudson's recent submission proposes that the Golden Share will be held by an entity known as "GSS Holdings (CHGE) Inc."

> On June 27, 2013, the Junior Preferred Share was issued to GSS Holdings (CHGE), Inc., a wholly owned subsidiary of Global Securitization Services, LLC. *As outlined in previous discussions with Staff, the Company believes GSS Holdings (CHGE), Inc. will act faithfully to protect the interests of New York and will be independent of the ultimate parent company, Fortis, Inc., and its subsidiaries.*

The substance of Central Hudson's *ex parte* "discussions with Staff" are not revealed.[23] What assurances were made? If some promises were made to vote against bankruptcy, who made them and are they binding on GSS Holdings (CHGE), Inc. or its owners, described as unnamed "senior management" of Global Securitization Services, LLC? Whatever off the record *ex parte*

[23] The recent Moreland Commission Report criticizes such *ex parte* practice at the Commission: "The Commission learned during the course of its investigation that it is statutorily permissible and common practice for utility company executives, lobbyists and other paid representatives of interested parties to have unfettered access to the PSC Chair and Commissioners without having to disclose details of these conversations, presentation materials or other specifics to the other parties participating in cases before the PSC ex parte communications consist of evidence, arguments or other information related to a disputed issue pending before a decision-maker or in advance of such submission. *Such communications are made in a manner that makes that information insufficiently available to challenge and counter by the adversely affected party or those with differing viewpoints. Since ex parte communications enable one party to influence a decision-maker off-the-record and outside the presence of the other interested parties, it effectively skirts procedural due process. Ex parte communications have the effect of undermining the indispensable fairness and unbiased attributes of decision-makers in judicial and administrative proceedings*." Moreland Commission Final Report, June 22, 2013 at 42, available at http://moreland.ny.gov/sites/default/files/MACfinalreportjune22.pdf.

discussions Central Hudson may have had, there is no evidence or assurance in the record of this case that the Golden Share holder "will act faithfully to protect the interests of New York" as Central Hudson claims, or how those general interests are to be defined in the event of a vote on bankruptcy.

It is true that government relies often on private entities to effectuate state objectives, but there must be some standard for the private entity to follow and ultimately be accountable to government. *8200 Realty Corp. v Lindsay*, 27 NY2d 124, 131-132 (1970), ("That members of a complex industry play a part in guiding government to a fair regulation of the industry is an obvious advantage as long as government keeps the ultimate controls in its own hands"). The Commission should not approve this "Golden Share" arrangement, where a private party would be charged with the undefined general duty to vote in the "interests of the State of New York" and vague "interests arising under the Public Service Law," with no guidance as to how whose interests are to be considered and how those interests would be ascertained and no accountability for following that guidance. The nominated company has no privity with the state of New York or the Public Service Commission, and no explicit responsibility to protect consumers or vote against voluntary bankruptcy. Accordingly, one cannot assume that this private entity controlled by unnamed persons would act to vindicate the intended public interests, as would be presumed if the nominee were a state official or were acting at the direction of a state official.

The Commission is charged with the duty to enforce the New York State Public Service Law and protect interests under it, not "GSS Holdings (CHGE) Inc." Accordingly, either the Commission Chairman or the Commission Secretary should hold the Golden Share, or if that is

not feasible,[24] some other state official such as the Secretary of State, State Controller, or Attorney General should hold the share with instructions to protect the interests of consumers.

Alternatively, the Commission should issue an order which establishes clear guidance for "GSS Holdings (CHGE) Inc." to follow in the event of a vote on Central Hudson's bankruptcy, imposing a legal and fiduciary duty on the Golden Share holder to vote against voluntary bankruptcy under penalty of PSL Section 25 fines if he or she does not so vote.

There is no evidence in the record at this time to support the Commission's statement at page 42 of its *Order Authorizing Acquisition and Rate Plan* that this arrangement, without modification, "will prevent the placement of Central Hudson in voluntary bankruptcy." If the Commission does not reject the proposed Golden Share holder or provide a clear mandate requiring the holder to vote against bankruptcy, then its finding that the Golden Share scheme is protection against voluntary bankruptcy is utterly baseless. Accordingly, the risks of the acquisition are not mitigated and do not outweigh the putative benefits.

V.

THE COMMISSION SHOULD COMMENCE AN INVESTIGATION TO DETERMINE WHETHER THE ROE APPROVED IN THE JUNE 26 ORDER IS EXCESSIVE, SET TEMPORARY RATES, AND DETERMINE WHETHER THE ROE SHOULD BE LOWERED EFFECTIVE ON THE DATE TEMPORARY RATES ARE SET

PULP also petitions the Commission to open an investigation and conduct evidentiary hearings on the reasonableness of rates established by its *Order Authorizing Acquisition and Rate Plan*, which allows a Return on Equity ("ROE") of 10% before earnings above that amount are split with customers. As discussed above, the defective SAPA noice published, and the lack of SAPA notice regarding rate plan extensions, renders the Commission's action a nullity. The

[24] Public Service Law § 9 provides: "No person shall be eligible for appointment or shall hold the office of commissioner or be appointed to, or hold, any office or position under the commission, who holds any official relation to any person or corporation subject to the supervision of the commission, or who owns stocks or bonds of any such corporation."

evidence in the record put forward by Department of Public Service expert witnesses in their prefiled testimony convincingly shows that applying the Commission's standard methodology for determining ROE, Central Hudson's ROE should be limited to 8.9%, not 10%, as provided in the last rate plan and in the Joint Proposal.[25] The difference amounts to approximately $8.52 million per year, or $17.04 million over the two year rate plan extension. Central Hudson customers should not pay higher rates due to an excessive allowed ROE, and so temporary rates should be set to reduce it now.

The record shows that many Central Hudson customers are having financial difficulty meeting their obligations to pay utility bills on time and are threatened with shutoff.[26] Even as Central Hudson reaped high ROEs, the number of customers whose service is interrupted for bill collection purposes has risen from 4,688 in 2005 to 13,687 in 2012. The percentage of customers shut off has risen from 1.89% in 2005 to 5.99% in 2012. Central Hudson provides fewer deferred payment plans, and more shutoffs as a percentage of customers, than any of the major investor owned utilities in the state.[27] Continuation of the current rate plan with its excessive allowed ROE increases the risk that Central Hudson will divert resources from negotiating payment plans and continue to rely on harsh service interruption practices, causing undue hardship to Central Hudson customers at risk of losing service because they are behind in their payments.

The Commission promised at page 50 of its *Order Authorizing Acquisition and Rate Plan* that "In no way does it represent a guarantee that we would not institute a proceeding to lower rates if such an action appeared to be warranted at any time during the next two years." As

[25] The Commission should also review and revise the earnings sharing mechanism, which allows Central Hudson to keep half the earnings in excess of the ROE limit.
[26] See Testimony of Barbara R. Alexander, October 12, 2012, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={9E9E2E56-180F-488E-9154-A933D049005A}.
[27] See Attachment B to this petition based on collection activity routinely filed by utilities with the PSC.

discussed, the record contains sufficient information regarding Central Hudson's earnings: In ten of the past eleven quarters, the four quarter trailing ROE for Central Hudson exceeded 8.9%.[28] Also, the Commission recently found that CentraI Hudson had been making more than a 10.24% ROE, and that it would overearn if customers paid additional amounts to reimburse certain storm expenses.[29]

This history of actually earned consistent ROEs above 8.9% in the record and in a prior recent determination militates against acceptance of unsupported, speculative predictions that Central Hudson would actually earn less in the next two years, or would win relief if it filed a rate case. It is more likely that if Central Hudson could win relief in a rate case greater than the incremental cost of pursuing it, it would have filed one.

There is real and imminent risk to customers that Central Hudson will rely on shutoffs to collect overdue bills, and earn super normal returns unless temporary rates are set now and an investigation conducted to revise the rate plan as of the date of temporary rates. In that investigation, the Commission should scrutinize Central Hudson's harsh collection practices and take strong steps to reduce shutoffs and make bills affordable to low income customers, as proposed in the testimony for PULP, in order to promote the state policy in Section 30 of the Public Service Law to promote continuous service to residential customers and to protect the public health, safety and welfare.

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[28] See Attachment to PULP June 6, 2013 Response to the Letter to Commissioners regarding extension of the current rates for one year, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={8B916507-1C00-4BB3-96D1-18CFC3A8090F}. A copy of the ROE summary is Attachment A to this petition.

[29] *Order Approving Staff Recommendation*, at 9 – 11. CASE 11-E-0651 - Petition of Central Hudson Gas & Electric Corporation for Commission Approval to Defer Storm Restoration Expenses for the Rate Year Ended June 30, 2012, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={AD7ADC99-44EA-480C-BEF2-00524EC7674D}.

CONCLUSION

The Commission should grant the petition for rehearing for the reasons stated above, and vacate the *Order Authorizing Acquisition and Rate Plan*. The matter should be remanded to the ALJs for further proceedings, including an evidentiary hearing.

The Commission should commence an investigation whether the 10% ROE set in the June 26 Order is excessive and whether Central Hudson's gas and electric rates should be reduced, and promptly set temporary rates to modify the rate plan setting an allowed ROE of 8.9% to protect consumers during the investigation and pending a final determination of reasonable rates, terms and conditions of service. In the course of that investigation, the Commission should investigate the apparent over reliance on service interruption as a bill collection measure, and improve low income rates and customer service as proposed in testimony submitted for PULP.

Dated: July 26, 2013

Respectfully submitted,

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of Fortis, Inc. et al.
and CH Energy Group, Inc. et al.
for Approval of the Acquisition of **Case 12-M-0192**
CH Energy Group, Inc. by
Fortis, Inc. and Related Transactions

PETITION FOR REHEARING

AND PETITION FOR

RATE INVESTIGATION AND TEMPORARY RATES

ATTACHMENT A

Central Hudson Trailing Four Quarter Return on Equity (ROE)

as of Quarters Ending July 1 2010 thru March 31 2013

Public Utility Law Project of New York, Inc.

Central Hudson Trailing Four Quarter Return on Equity (ROE)
as of Quarters Ending July 1 2010 thru March 31 2013

2013	Quarter Ended:
	03/31/13
Earnings Available for Common Stock	13,513
Same, Trailing Four Quarters as of Quarter End	43,226
Beginning Equity	461,786
Ending Equity	478,312
Average Equity	470,049
ROE	9.2% *

* 9.7% if deferral of storm costs of $3.7M ($2.3M net of tax) had been allowed.

2012	Quarter Ended:			
	12/31/12	09/30/12	06/30/12	03/31/12
Earnings Available for Common Stock	11,304	12,256	6,153	16,491
Same, Trailing Four Quarters as of Quarter End	46,204	48,018	47,185	48,161
Beginning Equity	445,295	442,177	441,754	445,625
Ending Equity	469,661	458,357	455,101	461,786
Average Equity	457,478	450,267	448,428	453,706
ROE	10.1%	10.7%	10.5%	10.6%

2011	Quarter Ended:			
	12/31/11	09/30/11	06/30/11	03/31/11
Earnings Available for Common Stock	13,118	11,423	7,129	12,397
Same, Trailing Four Quarters as of Quarter End	44,067	40,449	38,524	41,142
Beginning Equity	444,228	439,727	456,229	446,483
Ending Equity	445,295	442,177	441,754	445,625
Average Equity	444,762	440,952	448,992	446,054
ROE	9.9%	9.2%	8.6%	9.2%

2010	Quarter Ended:	
	12/31/10	09/30/10
Earnings Available for Common Stock	9,500	9,498
Same, Trailing Four Quarters as of Quarter End	45,148	45,499
Beginning Equity	430,080	420,229
Ending Equity	444,228	439,727
Average Equity	437,154	429,978
ROE	10.3%	10.6%

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of Fortis, Inc. et al.
and CH Energy Group, Inc. et al.
for Approval of the Acquisition of **Case 12-M-0192**
CH Energy Group, Inc. by
Fortis, Inc. and Related Transactions

PETITION FOR REHEARING
AND PETITION FOR
RATE INVESTIGATION AND TEMPORARY RATES

ATTACHMENT B

SUMMARY OF UTILITY COLLECTION ACTIVITY REPORTS

Year	Residential Customers	Arrears > 60 Days	% of accts arrears	FTN's Issued	% of accts FTN's	Accounts Terminated	% of accts terminated	Active DPA's	% of accts DPA's	Uncollectibles	% of accts Uncollectibles
Summary											
2005	6,500,005	735,085	11.31%	4,752,572	73.12%	232,448	3.58%	297,139	4.57%	302,723	4.66%
2006	7,431,358	879,769	11.84%	4,990,971	67.16%	246,973	3.32%	355,521	4.78%	347,912	4.68%
2007	7,865,478	927,904	11.80%	5,510,452	70.06%	259,881	3.30%	371,322	4.72%	369,515	4.70%
2008	8,050,631	982,542	12.20%	6,172,405	76.67%	312,274	3.88%	389,686	4.84%	375,384	4.66%
2009	8,235,975	1,005,542	12.21%	6,550,506	79.54%	329,377	4.00%	421,662	5.12%	344,906	4.19%
2010	8,028,801	907,904	11.31%	6,857,810	85.42%	303,831	3.78%	430,758	5.37%	341,230	4.25%
2011	8,285,648	960,069	11.59%	7,267,456	87.71%	259,546	3.13%	433,509	5.23%	326,773	3.94%
2012	8,271,669	915,821	11.07%	6,695,746	80.95%	263,001	3.18%	395,825	4.79%	314,498	3.80%
Central Hudson											
2005	247,858	18,826	7.60%	237,379	95.77%	**4,688**	**1.89%**	**2,608**	**1.05%**	10,921	4.41%
2006	249,921	19,408	7.77%	235,200	94.11%	**7,164**	**2.87%**	**2,885**	**1.15%**	11,713	4.69%
2007	251,363	20,335	8.09%	248,325	98.79%	**6,851**	**2.73%**	**2,615**	**1.04%**	11,494	4.57%
2008	247,568	23,907	9.66%	267,609	108.10%	**9,182**	**3.71%**	**3,053**	**1.23%**	12,256	4.95%
2009	243,727	26,279	10.78%	265,805	109.06%	**10,719**	**4.40%**	**4,161**	**1.71%**	13,615	5.59%
2010	240,815	24,939	10.36%	271,587	112.78%	**11,886**	**4.94%**	**3,948**	**1.64%**	12,795	5.31%
2011	239,315	24,390	10.19%	290,720	121.48%	**12,704**	**5.31%**	**3,500**	**1.46%**	11,676	4.88%
2012	228,438	21,176	9.27%	292,137	127.88%	**13,687**	**5.99%**	**2,771**	**1.21%**	11,573	5.07%
Orange and Rockland											
2005	299,724	13,113	4.37%	135,240	45.12%	5,373	1.79%	5,366	1.79%	6,154	2.05%
2006	302,116	13,800	4.57%	145,680	48.22%	8,022	2.66%	5,282	1.75%	6,543	2.17%
2007	304,638	13,535	4.44%	165,629	54.37%	7,131	2.34%	4,939	1.62%	6,517	2.14%
2008	297,212	15,068	5.07%	178,162	59.94%	8,881	2.99%	5,722	1.93%	4,919	1.66%
2009	194,031	16,734	8.62%	177,875	91.67%	9,720	5.01%	7,097	3.66%	1,303	0.67%
2010	194,544	16,975	8.73%	196,168	100.83%	9,176	4.72%	7,809	4.01%	1,029	0.53%
2011	180,489	17,807	9.87%	195,778	108.47%	6,283	3.48%	7,521	4.17%	910	0.50%
2012	195,592	16,622	8.50%	195,872	100.14%	8,070	4.13%	6,855	3.50%	1,177	0.60%

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National Fuel Gas											
2005	477,910	28,424	5.95%	255,200	53.40%	22,564	4.72%	39,975	8.36%	27,075	5.67%
2006	418,898	30,236	7.22%	307,958	73.52%	24,977	5.96%	42,579	10.16%	26,967	6.44%
2007	457,127	29,834	6.53%	271,249	59.34%	23,466	5.13%	37,028	8.10%	33,308	7.29%
2008	459,278	32,861	7.16%	266,592	58.05%	23,662	5.15%	35,444	7.72%	34,022	7.41%
2009	459,728	32,545	7.08%	245,823	53.47%	23,940	5.21%	32,611	7.09%	27,373	5.95%
2010	461,142	27,675	6.00%	208,912	45.30%	21,289	4.62%	23,923	5.19%	24,150	5.24%
2011	463,139	28,207	6.09%	240,388	51.90%	26,182	5.65%	23,725	5.12%	21,902	4.73%
2012	463,948	21,139	4.56%	197,616	42.59%	18,710	4.03%	16,804	3.62%	22,432	4.84%
KSP-LI											
2005	477,050	43,457	9.11%	19,228	4.03%	5,296	1.11%	16,929	3.55%	30,002	6.29%
2006	482,019	49,361	10.24%	21,394	4.44%	7,228	1.50%	18,104	3.76%	16,179	3.36%
2007	487,101	50,962	10.46%	20,743	4.26%	7,836	1.61%	16,549	3.40%	10,471	2.15%
2008	492,533	56,143	11.40%	24,222	4.92%	8,309	1.69%	19,113	3.88%	10,008	2.03%
2009	499,594	64,630	12.94%	28,051	5.61%	9,981	2.00%	23,433	4.69%	11,858	2.37%
2010	503,973	65,564	13.01%	29,446	5.84%	9,733	1.93%	23,107	4.58%	12,990	2.58%
2011	508,672	64,396	12.66%	25,605	5.03%	8,839	1.74%	21,337	4.19%	12,008	2.36%
2012	513,370	63,229	12.32%	21,763	4.24%	7,944	1.55%	19,566	3.81%	11,026	2.15%
RG&E											
2005	493,311	27,919	5.66%	250,252	50.73%	15,898	3.22%	17,818	3.61%	14,950	3.03%
2006	469,585	28,185	6.00%	275,656	58.70%	15,516	3.30%	19,923	4.24%	19,841	4.23%
2007	585,794	52,423	8.95%	425,194	72.58%	9,934	1.70%	27,922	4.77%	29,025	4.95%
2008	596,045	54,364	9.12%	482,809	81.00%	16,677	2.80%	27,309	4.58%	34,498	5.79%
2009	599,000	57,760	9.64%	474,710	79.25%	25,913	4.33%	31,464	5.25%	30,358	5.07%
2010	603,824	54,207	8.98%	495,418	82.05%	24,233	4.01%	32,606	5.40%	30,774	5.10%
2011	607,240	60,419	9.95%	536,202	88.30%	13,844	2.28%	39,349	6.48%	25,863	4.26%
2012	605,532	57,313	9.46%	515,810	85.18%	19,039	3.14%	35,978	5.94%	28,319	4.68%

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KSP-NY											
2005	1,046,182	118,651	11.34%	689,580	65.91%	21,911	2.09%	20,559	1.97%	59,571	5.69%
2006	556,591	133,054	23.91%	541,161	97.23%	31,390	5.64%	20,075	3.61%	67,105	12.06%
2007	546,779	133,820	24.47%	559,929	102.40%	35,233	6.44%	19,301	3.53%	67,620	12.37%
2008	760,093	146,694	19.30%	601,262	79.10%	40,745	5.36%	22,526	2.96%	71,321	9.38%
2009	987,869	158,872	16.08%	669,754	67.80%	36,057	3.65%	30,472	3.08%	68,152	6.90%
2010	977,810	157,531	16.11%	721,263	73.76%	44,961	4.60%	31,896	3.26%	69,742	7.13%
2011	961,795	157,592	16.39%	859,199	89.33%	42,050	4.37%	29,449	3.06%	62,673	6.52%
2012	930,237	151,049	16.24%	741,039	79.66%	35,712	3.84%	23,991	2.58%	59,335	6.38%
NYSEG											
2005	956,252	49,407	5.17%	365,481	38.22%	25,215	2.64%	40,336	4.22%	39,355	4.12%
2006	924,580	73,801	7.98%	633,315	68.50%	16,320	1.77%	49,753	5.38%	49,538	5.36%
2007	980,030	93,568	9.55%	803,570	81.99%	28,397	2.90%	53,304	5.44%	61,246	6.25%
2008	983,030	90,225	9.18%	954,660	97.11%	38,623	3.93%	46,290	4.71%	60,005	6.10%
2009	985,645	84,434	8.57%	915,308	92.86%	46,298	4.70%	39,903	4.05%	41,480	4.21%
2010	990,160	82,119	8.29%	947,266	95.67%	35,112	3.55%	43,330	4.38%	40,154	4.06%
2011	992,029	96,197	9.70%	960,686	96.84%	17,858	1.80%	55,557	5.60%	37,198	3.75%
2012	991,782	106,082	10.70%	905,537	91.30%	26,902	2.71%	61,251	6.18%	40,070	4.04%
National Grid											
2005	1,469,439	221,493	15.07%	499,967	34.02%	39,970	2.72%	88,333	6.01%	76,559	5.21%
2006	1,472,144	240,110	16.31%	644,253	43.76%	52,807	3.59%	90,976	6.18%	86,001	5.84%
2007	1,476,125	246,346	16.69%	654,852	44.36%	52,565	3.56%	94,759	6.42%	83,973	5.69%
2008	1,473,842	253,871	17.23%	836,387	56.75%	60,617	4.11%	100,717	6.83%	84,678	5.75%
2009	1,454,878	240,286	16.52%	1,075,640	73.93%	56,984	3.92%	102,819	7.07%	85,525	5.88%
2010	1,463,448	241,249	16.48%	1,144,715	78.22%	53,972	3.69%	101,106	6.91%	84,532	5.78%
2011	1,470,085	237,468	16.15%	1,226,254	83.41%	50,639	3.44%	89,417	6.08%	86,699	5.90%
2012	1,464,305	219,434	14.99%	1,222,875	83.51%	48,524	3.31%	75,057	5.13%	79,784	5.45%

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Con Ed											
2005	2,738,130	265,986	9.71%	2,300,245	84.01%	91,533	3.34%	90,003	3.29%	38,136	1.39%
2006	2,757,199	305,010	11.06%	2,186,354	79.30%	83,549	3.03%	120,043	4.35%	64,025	2.32%
2007	2,776,521	291,450	10.50%	2,360,961	85.03%	88,468	3.19%	114,906	4.14%	65,861	2.37%
2008	2,790,700	309,409	11.09%	2,560,702	91.76%	105,578	3.78%	129,513	4.64%	63,677	2.28%
2009	2,811,504	324,003	11.52%	2,697,540	95.95%	109,765	3.90%	149,702	5.32%	65,242	2.32%
2010	2,833,900	245,960	8.68%	2,843,035	100.32%	93,469	3.30%	163,033	5.75%	65,064	2.30%
2011	2,862,884	273,593	9.56%	2,932,625	102.44%	81,148	2.83%	163,654	5.72%	67,844	2.37%
2012	2,878,465	259,776	9.02%	2,603,097	90.43%	84,413	2.93%	153,552	5.33%	60,783	2.11%