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

INITIAL COMMENTS OF PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC. (PULP) IN OPPOSITION TO JOINT PROPOSAL

February 8, 2012

Public Utility Law Project of New York, Inc.

P.O. Box 10787

Albany, NY 12201

TABLE OF CONTENTS

PRELIMINARY STATEMENT **1**

ARGUMENT **5**

POINT I 5

THE BURDEN OF PROOF IS ON THE PETITIONERS TO SHOW THAT THE PROPOSED MERGER MEETS THE PUBLIC INTEREST STANDARD AND MINIMIZES SOCIAL COSTS AND IMPACT ON VULNERABLE POPULATIONS *5*

POINT II 7

THIS MERGER AS CURRENTLY STRUCTURED DOES NOT MEET THE PUBLIC INTEREST TEST *7*

POINT III 14

IF THIS MERGER IS APPROVED THE COMMISSION SHOULD REQUIRE POSITIVE BENEFIT ADJUSTMENTS TO PROTECT LOW-INCOME CUSTOMERS *14*

CONCLUSION **16**

PRELIMINARY STATEMENT

The Public Utility Law Project of New York, Inc. (PULP) is a not-for-profit organization dedicated to advancing the interests of New Yorkers in utility and energy related matters and representing the special needs of low-income consumers, including residential customers in the Central Hudson Gas & Electric Corporation ("Central Hudson") service territory. PULP intervened as an active party in this proceeding[1] and filed initial testimony questioning the putative benefits of the merger proposed by Petitioners CH Energy Group, Inc. ("CHEG"), parent of Central Hudson, by Fortis, Inc. ("Fortis"), a Canadian holding company, including their proposal for continuation of the current multi-year rate plan which otherwise expires June 30, 2013. This particular proceeding adds to the number of prior New York electric and gas utility restructurings and mergers with foreign entities, but is the first one involving a distribution company merger with a Canadian company.[2]

PULP's expert witness, Barbara R. Alexander, reviewed in her testimony the hollow claims of merger benefits.[3] She recommended, *inter alia*, enhancement of low-income rate reductions including a per-therm rate reduction for low-income gas heating customers, expanded eligibility for the reduced rates, formalization of a low-income rate classification; reform of collection practices, including goals to reduce the reliance upon service interruption as a bill collection measure, and improved call center performance metrics.

PULP did not file rebuttal testimony or participate in settlement negotiations. This was not due to acquiescence, but due a lack of available resources, caused by delay in its receipt of

---

[1] Case 12-M-0192, *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*. Fortis, CHEG and Central Hudson collectively (herein referred to as Petitioners)

[2] *See* Case 01-M-0075, *Joint Petition of Niagara Mohawk Power Holdings, Inc., Niagara Mohawk Power Corporation, National Grid Group plc and National Grid USA for Approval of Merger and Stock Acquisition*, Opinion No. 01-6, Opinion and Order Authorizing Merger and Adopting Rate Plan (issued December 3, 2001); Case 06-M-0878, *Joint Petition of National Grid PLC and KeySpan Corporation for Approval of Stock Acquisition and other Regulatory Authorizations*, Abbreviated Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations for KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island (issued August 23, 2007); Case 07-M-0906, *Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.*, Abbreviated Order Authorizing Acquisition Subject to Conditions (issued September 9, 2008) and Order Authorizing Acquisition Subject to Conditions (issued January 6, 2009).

[3] Case 12-M-0192, Testimony of Barbara R. Alexander, (submitted October 12, 2012), publicly available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={9E9E2E56-180F-488E-9154-A933D049005A}

funds appropriated by the legislature in the 2012 state budget to restart PULP, which had closed abruptly in 2010 after nearly 30 years of operation.[4]

A description of the Petitioners' original proposal for merger, and characterization of its ample flaws and insufficient benefits, is contained in the initial and rebuttal testimony of the parties, and will not be recounted at length here. The total customer benefits originally claimed by Petitioners was about $20 million. Notably, on Nov. 5, 2012, the New York Public Service Commission ("PSC") Staff, in its testimony, recommended that a total of $85 million be allocated for customer benefits as a condition of approval. Similarly, the initial testimony of Multiple Intervenors sought approximately $80 million in customer benefits.

Subsequent to the filing of testimony, and prior to scheduled hearings, a number of active parties eventually agreed to the merger, filing a Joint Proposal on January 25, 2013 seeking Commission review and approval of its provisions which modify those put forward initially by Petitioners. The Joint Proposal now under review, purporting to provide close to $50 million in putative customer benefits, is supported by Central Hudson and Fortis, New York State Department of Public Service Staff, Multiple Intervenors; the Counties of Dutchess, Orange and Ulster; and the New York State Department of State Utility Intervention Unit ("UIU").

Notably, there is no support from any independent organization representing the interests of residential or low-income customers. 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,[5] including, for example, the express statutory power to take legal positions different from those of the PSC in judicial review proceedings.[6] 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

[4] See PULP Network Blog, Good News... Bad News..., http://pulpnetwork.blogspot.com/2010/08/good-news-bad-news.html, (August 6, 2010).

[5] The Constitution of the National Association of State Utility Consumer Advocates ("NASUCA") requires its members to be independent with respect to "policy determination, hiring and firing of personnel, and fiscal control," to be separate from the regulatory commission, and capable of seeking judicial review of regulatory decisions. NASUCA Constitution, Art. III, Sec. 1, available at http://www.nasuca.org/archive/NASUCA%20Constitution.pdf.

[6] In its early days, the former CPB, like today's UIU, similarly lacked any express statutory power to question rate orders of the PSC. *Pooler v. PSC*, 89 Misc.2d 700, 58 A.D.2d 940, *aff'd* 43 N.Y.2d 750 (1977). That deficiency of CPB was subsequently addressed by the legislature, which authorized the CPB director, on his own motion, to commence litigation questioning PSC rate orders. In the transfer of the legacy utility intervention functions of CPB to the Department of State in Section 94-A of the New York Executive Law, however, no authority was given to UIU, on its own motion, to question in court a state or federal regulatory decision affecting New York utility consumers.

Joint Proposal cannot with confidence be deemed to be representative of focused and independent residential consumer interests due to the UIU state agency structure and its direct line of accountability to the Governor. While it is possible that the UIU support for the Joint Proposal may indirectly reflect the Governor's wisdom and broader balancing of multiple constituency interests, that is not necessarily the best interest of residential customers, and it is ultimately the role of the Commission, in the independent exercise of its quasi-legislative, adjudicative, and discretionary powers, to decide, based on the record and fair consideration of all interests, whether the proposal for merger and extension of the rate plan is in the public interest or just and reasonable.

According to the Joint Proposal,

> Petitioners have agreed to provide quantified economic benefits comprised of the following synergy and positive benefit adjustments: (i) synergy savings which are guaranteed for a period of 5 years and which will provide for future rate mitigation of $9.25 million over the 5 years; (ii) a total of $35 million of combined write-offs of deferred regulatory assets and future rate mitigation funds; and, (iii) one-time funding of $5 million for a Community Benefit Fund for economic development and low income purposes.[7]

In their Notice regarding comments on the Joint Proposal, the ALJs stated:

> Initial comments should focus on the central question of whether the proposed transaction, as delineated by the Joint Proposal, will be in the public interest. They should not be organized around the factors listed in the Commission's settlement guidelines.... Initial comments by Staff and Petitioners must describe every drawback or detriment of the transaction that has been asserted in comments or testimony; explain how the Joint Proposal addresses the alleged concern or why the signatories determined that it is not a concern; describe and evaluate, quantitatively where possible as well as qualitatively, any additional public benefits provided by adoption of the Joint Proposal's terms that would not have been realized at all, or to the same extent, in the absence of the transaction; and discuss the resulting net benefit to the public interest. Signatory parties whose interests are confined to specific areas obviously need not address every issue but should follow a similar approach in discussing the matters of concern to them. Opponents of the Joint Proposal, of course, will be discussing why adoption of the proposed terms will produce a net detriment or will not yield the net benefit asserted by the proponents.

PULP contends that the Joint Proposal presents foreseeable negative risks to utility customers in Central Hudson's service territory that are not offset by the putative benefits of the transaction and extension of the current rate plan. Although the "sweeteners" in the Joint Proposal do provide more benefits to customers than Petitioners originally proposed, that is not the test. The claimed benefits are mainly intangible and possibly illusory, materially inadequate,

[7] Joint Proposal, p. 48.

and inequitably targeted, and so do not satisfy the "public interest" requirement of Public Service Law (PSL) §70. For example, the proposed one-year rate freeze is not a positive benefit as Central Hudson did not file any rate case seeking to change existing rates when the current rate plan expires and there is no showing that continuation of all existing rates, terms and conditions of service is just and reasonable or in the public interest. The amount of Positive Benefit Adjustments ("PBAs") in the Joint Proposal, $35 million, falls short of calculations based on prior Commission approval of a merger with little synergy benefits that could arrive at more than $80 million in material benefit, providing an undue windfall to the Petitioners as well as setting precedent that could hinder the public interest in future merger cases. Out of the asserted synergy savings of $9.25 million, $35 million of combined write-offs of deferred regulatory assets and future rate mitigation funds, and the one-time funding of $5 million for economic development and low-income purposes, only $500,000 is allocated directly towards low-income customer assistance, comprising 1% of the total award. This is a paltry sum considering 12,704 service terminations in 2011, up 170% since 2005, [8] and that more than 20,000 Central Hudson residential customers are behind more than 60 days on payments.[9]

Much of the proposed benefits in the Joint Proposal[10] consists of intangible accounting credits to offset large unscrutinized claims for deferred storm damage costs, for which customer liability has not been determined. Risks include unreliable service due to flaws in the existing performance regulation system that should be corrected now and not be continued for yet another year, and aggressive debt collection tactics that rely too much upon the interruption of service to collect bills.

Potential negative externalities include uncertainties due to (i) ownership of a New York utility by a Canadian holding company and (ii) jurisdiction over possible follow-on mergers. While foreign ownership is not undesirable *per se*, there are unmitigatable risks to customers and to the sovereignty of the utility consumer protection and regulatory regime in New York, through foreign investor protections contained in the North American Free Trade Agreement ("NAFTA"), to which the United States and Canada are signatories, which could trump or constrain future Commission regulatory action. In a follow-on upstream merger scenario, it is unclear whether Fortis could transfer the U.S. holding company which would own Central Hudson to yet another entity, perhaps another foreign holding company, without changing ownership of Central Hudson by the upstream entity, all without PSC approval, increasing risk to consumers without providing

---

[8] Testimony of Barbara R. Alexander, p. 35.
[9] Based on 2011 collection activity data filed by Central Hudson with the Public Service Commission.
[10] Case 12-M-0192, *Joint Proposal for Commission Approval of the Acquisition of CH Energy Group, Inc. by Fortis Inc. and Related Transactions* (submitted January 25, 2013) (herein referred to as Joint Proposal)

any public benefits and possible increasing risk to consumers. See Lisa Gayle Bradley, *On The Acquisition Of Upstream Interests In New York Energy Operating Companies – An Uncharted Area?*, 31 Energy Law Journal 509 (2010).[11]

In sum, the proponents' claim that approval of the Joint Proposal holds tangible benefits for consumers is exaggerated and any benefits that may arise are inequitably allocated. The proposed customer protections are insufficient to compensate consumers for the downside risks, including those posed by NAFTA foreign investor protection rules which could be invoked by Fortis. PULP urges the Commission to: (a) conclude that Fortis's acquisition of CHEG and Central Hudson, as proposed, is not in the public interest; (b) alternatively condition approval of the transaction on the Petitioners' supplementation of proposed tangible customer benefits and protections, targeting PBA awards progressively to provide increased benefits and protection for low-income consumers.

ARGUMENT

POINT I

THE BURDEN OF PROOF IS ON THE PETITIONERS TO SHOW THAT THE PROPOSED MERGER MEETS THE PUBLIC INTEREST STANDARD AND MINIMIZES SOCIAL COSTS AND IMPACT ON VULNERABLE POPULATIONS

On June 16, 2008, Administrative Law Judge ("ALJ") Raphael A. Epstein issued a Recommended Decision ("RD")[12] concerning Case 07-M-0906, involving the acquisition of Energy East Corporation ("Energy East"), parent of New York State Electric & Gas Corporation ("NYSEG") and Rochester Gas & Electric Corporation ("RG&E"), by Iberdrola, S.A. ("Iberdrola") a Spanish private multinational electric utility company. In defining the "public interest" requirement of Public Service Law ("PSL") §70 the ALJ emphasized that the burden is on the petitioners to meet the public interest criterion, following the Appellate Division's formulation:

We think it is plain enough that the term "public interest" is directly related to

[11] "This Article undertakes a long overdue examination of the history of New York Public Service Law and documents the absence of legal support for the Commission's assertions of jurisdiction where upstream transactions are undertaken by entities which are not also operating companies." *Id.* at 510.

[12] Case 07-M-0906, *Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.*, (issued June 16, 2008) (herein referred to as Iberdrola Recommended Decision).

> and limited by the main purposes of the Public Service Law. These purposes, so the Legislature has once said, are "to guarantee to the public safe and adequate service at just and reasonable rates, to the stockholders of public service corporations, a fair return upon their investments, and to bondholders and other creditors, protection against impairment of the security of their loans.[13]

The standard put forth in the Commission's *Iberdrola* ruling[14] (the *Iberdrola* Test) shows that a proper analysis in determining the public interest (a) identifies tangible benefits contained in the proposed transaction, (b) considers the magnitude of the transaction's residual risks or detriments that remain after applying whatever mitigation measures may be identified as reasonable and practical (c) compares the asserted benefits with any residual, unmitigated detriments and provide for Public Benefit Adjustments (PBAs), if needed, to arrive at a "net" public benefit. In short, the *Iberdrola* Test requires a searching inquiry whether the transaction, on balance, is worthwhile for those beyond the petitioning parties, placing the burden of proof on them.

When divining something as amorphous and debatable as what constitutes a public benefit in keeping within the spirit of the legislative intent to safeguard the interests of the general public the Commission in its quasi-legislative role should also consider the unequal power dynamics within society. Naturally, each stakeholder will tend to zealously advocate their vision of public benefit according to their inherent bias or interests, and somewhere in the middle may rest the common ground between those privileged parties. But what opportunities do the more voiceless members of the public have in influencing the process and the outcome?

Although their ultimate conclusions differed, both the Recommended Decision and the Commission's Order[15] in deciding *Iberdrola* relied on inherent subjectivity clothed as objectivity in arriving at what is in fact a "tangible benefit" and "detrimental risk" in calculating a "net" public benefit. The hazard that a seemingly objective analytical approach creates is that all stakeholders may appear to receive equitable treatment, but in reality some are more equal than others in that their ability to both influence the process and handle any potential negative consequences resulting from the action is not evenly distributed. Low and fixed income residents

---

[13] International Railway Company v. PSC, 264 A.D. 506 (3rd Dept. 1942) (citing Laws of 1929, chap. 673, §3).

[14] The Commission in providing its order on the *Iberdrola* case disagreed with the RD's substantive findings on what constituted a "benefit" and thus relied on a different methodology in computing Public Benefit Adjustments ("PBAs"), but did not alter the general principle that an assessment of the transaction's benefits and detriments may mandate some level of PBAs. Case 07-M-0906, *Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.*, Order Authorizing Acquisition Subject to Conditions (issued January 6, 2009) at 16-17.

[15] *See* Case 07-M-0906, *supra,* Iberdrola Recommended Decision and Iberdrola Commission Order

living from check to check are not resistant to increased rates that could endanger not only their standards of living, but also their health and safety. Approximately 12,000 Central Hudson residential customers experience the hardship of termination of service for bill collection purposes each year, and approximately 23,000 are more than 60 days behind in paying their bills, owing more than $12 million. A "freeze" of existing rates, terms and conditions of service for yet another year for those already deeply in arrears or facing termination due to harsh bill collection tactics is of little benefit or solace, especially when rates will remain frozen anyway, without the Joint Proposal, when the current rate plan expires on June 30, 2013.

In *Iberdrola*, the Commission admitted that to arrive at monetized equilibrium in deducing a positive net public benefit the exercise of informed judgment is required, as there exists no strict objective mathematical formula on which to base such a decision.[16] Thus, if it is to be conceded that there is some unavoidable subjectivity, be it informed, to these calculations, then to ensure that all of the public's interests are being properly balanced in a inherently subjective and biased public benefit analysis under PSL §70 the Commission should take utmost care in fortifying the weakest members of society from foreseeable and tangible detriments, and if needed, give their considerations special weight when considering the magnitude of the transaction's residual risks or detriments that remain after applying whatever mitigation measures may be identified as reasonable and practical. This should be done to insulate them from potential miscalculation that would lead to irreparable financial harm and hardship. Erring in the other direction would tend to have less devastating results as well capitalized corporations and other customer classes are more capable of withstanding or diverting the impact of financial blows. Therefore, any downside risks that would negatively impact economically vulnerable populations should receive a heightened review and greater weight should be given to proposals to protect their interests. The proponents of the Joint Proposal should have to meet this heightened burden if they are to succeed in gaining approval of the merger petition.

POINT II

THIS MERGER AS CURRENTLY STRUCTURED DOES NOT MEET THE PUBLIC INTEREST TEST

As currently structured, Fortis's purchase of CHEG does not satisfy the public interest standard because the tangible benefits for ratepayers of Central Hudson, especially those aiding

16 Case 07-M-0906, *supra*, Iberdrola Commission Order at 136

low-income customers, are substantively exaggerated and below the benefit levels in comparative prior mergers in New York. Also, the significant risks emanating from potential NAFTA legal liability or follow on upstream holding company mergers are not addressed and thusthe Petitioner's mitigation proposals fail to fully offset the potential economic and legal detriments.

A. The Claimed Customer Benefits Are Illusory, Materially Inadequate, and Inequitably Targeted

As part of the proposed acquisition by Fortis, Central Hudson proposes to freeze its rates and extend its current rate plan for another year. The PSC Staff Rates Panel Testimony[17] states that this offer "does not represent any value or benefit to ratepayers." The Utility Intervention Unit ("UIU") of the New York State Department of State's Division of Consumer Protection noted in its comments concern for the merger, citing auditing problems from the *Iberdrola* transaction that it would like to see avoided. The UIU clarified that "New York's experience with other utility acquisitions has not always been satisfactory in terms of system controls and reliability, consumer benefits and ratepayer protections."[18] To protect consumers, the UIU advocated for a longer extension of the third year rates and substantial increases in the proposed customer-related benefit funds. Both UIU and PULP urged enhancement of the low income rates beyond what the settlement would provide.[19]

In the January 25, 2013 Joint Proposal, Petitioners modified the original proposal and offered the following benefits to ratepayers.[20] These include: (1) freezing rates through July 1, 2014, as a one-year extension of the current rate plan's third year rates; (2) synergy savings which are guaranteed for a period of 5 years and which will provide for future rate mitigation of $9.25 million over 5 years; (3) a total of $35 million of combined write-offs of notional deferred regulatory assets and future rate mitigation funds; and, (4) one-time funding of $5 million for a Community Benefit Fund for economic development, $500,000 of which would be used for low-income consumer assistance purposes.

The "Rate Freeze". The rate freeze promise is mainly illusory. Petitioners do not deny themselves the ability to file another rate case until July 1, 2014, but instead only to not file one

---

[17] Case 12-M-0192, Prepared Testimony of the Office of Accounting and Finance at 7, (submitted October 12, 2012), publicly available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B74C38014-B243-4EF3-9317-E3834B18187E%7D

[18] Case 12-M-0192, UIU Comments at 1, (submitted on October 12, 2012), publicly available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={BB83846A-1B59-4E24-9AF6-F298097B1605}

[19] *Id.* at 2

[20] Case 12-M-0192, *supra,* Petitioners Proposal at 48

earlier than a date that would result in new rates becoming effective on or after July 1, 2014.[21] This is not the same as a year's worth of reprieve from a rate case filing as Central Hudson did not timely file for a rate increase to take effect after expiration of the current plan on June 30, 2013. As no rate case has yet been filed the rates are currently effectively frozen, indefinitely, until new rates are filed, suspended and reviewed in the normal process, regardless whether this merger is approved or rejected. It is unknown when or if at all a future rate case will be filed so it is impossible to quantify the benefit of the "freeze" to consumers. In the unlikely event that a new case were filed at the end of this month, the normal suspension and review process would leave the existing rates in force for eight months after the expiration of the current rate plan. Therefore, the claimed benefit of a one-year rate freeze is greatly overblown, fails the tangibility requirement of the *Iberdrola* Test, and thus should be removed from any public net benefit calculation.

There is a serious problem with continuation of the current rate plan, which exposes customers to unreliable service and costly storm damage. This is illustrated by Central Hudson's petition filed February 6, 2013 seeking expedited approval of its unaudited request to recover $9.7 million in Tropical Storm Sandy related costs from ratepayers. In an effort to protect the interest of consumers from an increase in rates and to ensure that ineffective storm preparation and response is not needlessly recompensed PULP filed an immediate response in opposition.[22] The $9.7 million deferral request is questioned on several grounds which identify serious flaws in the merger proposal provisions relating to storm cost deferrals and defective performance regulation embodied in the current rate plan:

- the rate plan may have created financial incentives for CH to trim maintenance budgets (instead of trees), to glean short term profits, and then later request additional funds to be paid by ratepayers, (in addition to the more than $5 million for storm damage costs covered by current rates), when the lack of adequate preparation for storms results in foreseeable damage to utility lines.
- "revenue decoupling" features of the current plan weaken the incentive to restore power quickly, because they guarantee CH the same revenue whether meters are spinning or not.

[21] *Id.* at 47

[22] See Comments of PULP in Opposition to Central Hudson Storm Cost Deferral Petition, *available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BC4BEA440-96A2-4013-96A0-0B5F55327716%7D, Case 13-E-0048, *Petition of Central Hudson Gas & Electric Corporation for Approval to Recover Deferred Incremental Costs, available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BC4BEA440-96A2-4013-96A0-0B5F55327716%7D

- the PSC's "performance regulation" metrics in the current plan have no measurement or economic sanction for inadequate prophylactic measures to avoid or reduce storm damage or for slow recovery from major storms, thus removing any financial disincentive for poor performance when storms knock down untrimmed trees and weak poles, which can in part be a result of skimping on maintenance,
- the PSC approves deferral of 100% of storm costs, placing the burden of poor maintenance and inadequate hardening of utility systems on ratepayers and possibly rewarding poor utility practices.

PULP argues in opposition to the deferral petition that Central Hudson should be required to demonstrate that the damage was not foreseeable and not included in the $5 million allowance for storm costs when existing rates were set, that the utility has not met its burden to show that the costs and outages could not have been avoided or reduced by trimming more trees before lines came down instead of after, that Central Hudson has not addressed whether or why costs cannot be defrayed by insurance or government assistance, and that Central Hudson has not shown that it is earning less than its allowed return on investment.

The Joint Proposal basically allows Petitioners to count the write down of its unaudited and possibly unjustified claims for blanket customer responsibility for all storm costs as merger benefits. This should not be accepted.

The "Synergy Savings". As a practical matter, little is promised in the way of operational synergies, nor could there be, as this case does not involve consolidation of utilities with contiguous service territories.[23] A "guarantee" of $9.25 million in synergy savings to ratepayers over five years is touted as a major benefit of the deal. Over five years, this amounts to $1.85 million per year. In a company with combined revenues from electric and gas customers of more than $700 million, this is not much. Nor is there really a "guaranteed" rate reduction. The reality is that when rates are next set, probably by negotiation, there will be a notional credit to customers for the $9.25 million, but the revenue requirement or allowed return on equity might be higher by the same amount, negating the entire effect of the notional credit. If there were a *real* rate reduction, (and not merely a possibly phantom credit to be applied in future negotiated rates), current rates would actually be reduced *immediately* by $1.85 million upon approval of the proposal.

[23] Regulated holdings of Fortis include electric utilities in five Canadian provinces and two Caribbean countries and a natural gas utility in British Columbia.

In other New York utility merger cases, utilities have agreed to pass on real or anticipated synergy savings immediately, "front-loading" a concrete merger benefit for consumers, even before the synergy savings are fully realized by the utility over time. The inability of Petitioners to propose any concrete merger synergy benefits to customers, and the reliance on accounting credits even for such a small sum as is promised in this case, bespeaks a lack of confidence that any real synergy savings in utility operating costs will occur from the merger.[24]

The $35 Million Accounting Adjustment. The Joint Proposal promises a $35 million benefit to customers. However, this consists only of accounting adjustments to write off questionable amounts claimed by Central Hudson to be due from customers for storm damage costs and creation of a new regulatory accounting credit for customers to be applied to defray future rate case demands for higher rates. There will be no discernible change in rates and charges paid by customers to reflect these accounting adjustments. They may simply be given notional allocation within the context of horse-trading over larger sums at issue in the next rate case.

The $5 million "Community Benefit Fund". The Joint Proposal promises establishment of a $5 million "Community Benefit Fund" for economic development and low-income customer assistance programs. Actually, Petitioners are offering only $4.5 million and the $500,000 balance is being reallocated from unused *ratepayer* funds previously collected for Central Hudson's competition education fund.[25] PULP supports the reallocation of these funds, but it should be recognized that this could be accomplished whether or not there is a merger, and that only $500,000 is being allocated to alleviate the affordability problems of Central Hudson's hard-pressed low-income customers.

Low Income Measures. The Joint Proposal does not adequately respond to the need of low-income customers for more affordable rates. It merely tweaks the existing low-income rate reductions by prospectively reducing them for non-heating customers and by providing a small increase in the benefit for heating customers.[26] There is no reduction in the per Therm charges for gas, as PULP recommended,[27] there is no commitment to roll the benefits out to all eligible customers in the service area. The estimated additional benefit is only $1,662,672, which the

[24] "Utility mergers are especially unlikely to deliver the same benefits achieved in other industries. Expected synergies seldom materialize, and companies may not recover their initial investment. These financially risky transactions can end up harming the credit rating of the acquiring company, and in turn both stockholders and customers feel the pinch as the utility seeks to compensate for its overvalued investment." APPA, *The Post-Merger Experience*, October 2005, p. 1, *available at* http://www.publicpower.org/files/PDFs/APPAreportPost-MergerExperience.pdf.

[25] Joint Proposal, P. 42.

[26] Joint Proposal at 38-39.

[27] See Testimony of Barbara R. Alexander.

Joint Proposal refers to as a "cost." There is, however, no incremental cost outlay or increase of the total revenue requirement, and the utility will receive the same overall revenue through its revenue decoupling mechanism. All that is involved is a very small reallocation of revenue responsibility, amounting to $1.6 million of the total $700 million in revenue received from customers. This slight benefit is not the kind of comprehensive action needed to address the affordability problems of Central Hudson's low-income customers who are burdened with large bills and increasingly aggressive termination practices to collect them.

B. NAFTA's Investor Rules Risk A Loss of Sovereignty by the New York Public Service Commission to Regulate A Canadian Owned Utility; Endangering Central Hudson Ratepayers

The New York State Public Service Commission currently has authority to regulate increases in revenues for electric and gas delivery service under its statutory Public Service Law jurisdiction founded upon U.S. federalism and New York's police powers. The Commission also controls entry of gas and electric corporations into the New York market, approves major capital projects such as new power plants, and has steered power production away from distribution companies. Chapter 11 of the North American Free Trade Agreement (NAFTA),[28] which is a trilateral trade agreement between the United States, Canada, and Mexico, affords extraordinary protection to foreign investors from one signatory state investing in enterprises in another. Allowing Fortis, a Canadian holding company to purchase Central Hudson would confer to Fortis those rights under NAFTA, entailing great potential risks and detriment, which are neither addressed nor mitigated in the joint Proposal.

Future rate requests, if and when they are filed by Fortis to the Commission, could end up with rate increases more meager than the capital shareholders of Fortis would desire in optimizing their return on investment. Or, Commission limitations on large capital investment projects, upon which Fortis would seek a return, may not be to the liking of Fortis. As a remedy not afforded to purely domestically owned corporations, Fortis being a Canadian holding company controlling what would be a U.S. subsidiary corporation, might then in turn argue the Commission's determinations to be a regulatory taking, tantamount to partial expropriation. Within the NAFTA dispute resolution framework claims have arisen when state government enacts regulation or legislation that negatively impacts, or is perceived to negatively impact, the value of a foreign

[28] North American Free Trade Agreement, U.S.-Ca.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (hereinafter NAFTA)

investment to the extent that it allegedly violates NAFTA.[29]

Under NAFTA, foreign investors, including parent holding companies,[30] can bring such claims to binding international arbitration panels even under the theory that the state regulation incidentally diminishes the value of property, even if such a claim would not hold water under New York or federal constitutional law. A NAFTA tribunal could use their authority to overturn a PSC rate case determination or rejection of a capital investment project and thus the Commission jurisdiction over rates and utilities could be weakened if this deal is approved. Furthermore, the Commission would have to rely on the federal government to defend their interests and those of ratepayers in Central Hudson's territory in a closed arbitration tribunal that is not bound by U.S. or New York law.

Under NAFTA Chapter 11, foreign investors are eligible to receive monetary damages if they meet an evidentiary burden, which they may overcome by proving both that the government has violated NAFTA and that the harm to the investment arose from that violation.[31] While NAFTA specifies that investors receive compensation equivalent to the "fair market value" of the investment,[32] the arbitral tribunal has complete discretion to determine what constitutes fair market value, and this may not be congruent with a future Commission determination regarding the allowed return on equity, depreciation, write-off, or write-down of capital investments, or just and reasonable rates, or denial of permission to construct power plants. Actual awards rendered under the NAFTA dispute settlement scheme have measured in the millions of dollars.[33]

Approval of this merger could expose the PSC to face potential damage awards under NAFTA, thereby discouraging the PSC from exerting its regulatory functions and favored regulatory paradigms or from enforcing consumer protection measures in the future. This is a serious potential downside risk that needs to be balanced against other benefits in determining if this merger has a net positive effect and ultimately passes the "public interest" requirement of

---

[29] *See* Metalclad Corporation v. The United Mexican States (ICSID Case No. ARB(AB)/97/1); Methanex Corporation v U.S.A., Final Award (UNCITRAL, 3 Aug. 2008)
[30] NAFTA Article 1117(1) establishes standing for an investor of a State Party to bring a claim for harm done to its subsidiary in the territory of another State Party under the investment provisions of Chapter 11.
[31] Under Article 1110 of NAFTA, an investor is eligible for compensation if a participating government "directly or indirectly nationalize[s] or expropriate[s] an investment of an investor of another [participating country] in its territory or take[s] a measure tantamount to nationalization or expropriation of such an investment. *See* NAFTA, *supra* note 8, arts. 1116-17, 1121
[32] *Id.* art. 1110 (requiring the payment of compensation "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place").
[33] *See, e.g.,* Judith Wallace, Note, *Corporate Nationality, Investment Protection Agreements, and Challenges to Domestic Natural Resources Law: The Implications of Glamis Gold's NAFTA Chapter 11 Claim*, 17 Geo. Int'l Envtl. L. Rev. 365, 372 (2005) (noting the $16 million award rendered in favor of one claimant, Metalclad, in its suit against Mexico for "denial of its application to build a waste disposal facility").

PSL §70. Under the positive benefits test the tangible monetary benefits supplied must be sufficient to offset the risks involved. As NAFTA rules present a potential grave risk to Central Hudson ratepayers this added risk should be either mitigated, fully compensated for, or lead to the Commission rejecting this merger outright. Because these issues are not addressed at all in the Joint Proposal, this transaction fails the "public interest" requirement of PSL §70.

POINT III

IF THIS MERGER IS APPROVED THE COMMISSION SHOULD REQUIRE POSITIVE BENEFIT ADJUSTMENTS TO PROTECT LOW-INCOME CUSTOMERS

If the Commission proceeds forward to approve the proposed acquisition certain "positive benefit adjustments" ("PBAs") should be made to safeguard the interests of vulnerable populations beyond what is already proposed. One way to reduce energy burdens on low-income customers is through low-income rates. Initially opposed by utilities, one by one, often through advocacy of PULP and settlement agreements, all the major utilities now have some form of low-income rates.

As previously discussed, the Joint Proposal's minor modification of the low-income rates, while an improvement, involving only $1.6 million in incremental rate relief, is not what is needed to address the affordability problem of Central Hudson's low income customers. Out of the $9.25 million over a period of 5 years from synergy savings for future rate mitigation, $35 million of combined write-offs of deferred regulatory assets and future rate mitigation funds, and the one-time funding of $5 million for economic development and low-income purposes, only $500,000 is allocated directly towards low-income assistance, comprising 1% of the total award. This is a paltry sum considering that there were 12,704 service terminations in 2011 and approximately 24,000 customers are threatened each month with service termination due to unaffordable bills.[34]

When deciding an adequate level of PBAs the Commission's rationale in Iberdrola modifying the PBAs awarded in the RD suggests the optimal aim is to top up any net negative impact to the point that the public is made whole plus a *de minimus* net benefit, therefore satisfying the minimum threshold for a non-punitive positive benefit adjustment.[35] Under this analysis PBAs will be rationed up to the limit that a "public interest" deficit is avoided. Nonetheless the Commission noted the need for PBAs to be targeted to best ameliorate negative

[34] Based on 2011 collection activity data from the Public Service Commission.
[35] *See* Case 07-M-0906, *supra*, *Iberdrola* Order at 132.

externalities arising from a proposed transaction.[36]

Risks are weighed against their potential impact, which in this case could come in the form of a future rate increase that would be disruptive to the lives of all ratepayers, but disproportionally people of low and fixed income. It might not be possible to quantify the exact rate increases from this moment in time to calculate a net present value figure that would offset these gains to tilt the public benefit calculation positively. Still, it is said that an ounce of prevention is worth a pound of cure, and there are reasonable and practical mechanisms that can be strengthened to mitigate and ameliorate foreseeable negative collateral damage. The write-off of regulatory assets and creation of a credit for customers to be applied in future rate cases, while not without value, is also not tangible, and is not the same as cash. It is not difficult to imagine a scenario in which the deferred storm costs are wiped out and a credit is applied, but the bottom line rate increase is not affected due to offsetting adjustments in the larger ratemaking process.

Some of the risks of the proposed merger are unquantifiable, despite being real and significant.[37] Thus, it may be impossible to conduct a meaningful cost/benefit analysis that would arrive at the perfect PBA ratio. The Commission in the *Iberdrola* case admitted that to arrive at monetized equilibrium in deducing a positive net public benefit the "determination requires an exercise of informed judgment rather than a purely mathematical calculation...."[38] Based on PBAs awarded in previous utility mergers the amount calculated by Multiple Intervenors would arrive at around $80 million in material benefit, which is similar to staff's litigation position.[39] Although there are different risks and benefits involved in every transaction, providing less than this amount could be viewed by the public, who are supposed to be the net recipients of any derived benefit, an undue windfall to the Petitioners as well as setting precedent that could harm the public interest in future merger negotiations.

Furthermore, parties to this proceeding representing the "public" are mostly comprised of local and state government entities. Local governments are tasked with improving the quality of life in their communities, which in turn requires money to spend, derived usually in the form of taxes. Therefore, it should not be a surprise that an opportunity to receive community

[36] *Id.*
[37] PULP has not done an independent analysis of Central Hudson's likely future costs and revenues. PULP's expert witness, Barbara R. Alexander, reviewed in her testimony Central Hudson's existing rates, and proposes they be changed; she advocated for improved call center performance, which she finds to be below average, increased low-income rate assistance through commitment to substantial low-income rates, expanded eligibility for customers and widening the scope of assistance to all forms of energy consumed.
[38] Case 07-M-0906, *supra*, Iberdrola Commission Order at 136
[39] Case 12-M-0192, Corrective Comments of Multiple Intervenors at 5, (submitted November 5, 2012), publicly available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={EBAF5FF7-8C42-4040-8E33-DC8431BC58F9}

enhancement funds as part of a PBA package would be attractive to a local community. Consent to a merger that dazzles with once-in-a-lifetime[40] windfalls to a locality should, however, not be confused with the interest of residential ratepayers, and the public at large in other communities who are not seeking or receiving similar benefits and who are not acquiescing to the same transaction.

CONCLUSION

Absent material enlargement of the tangible benefits to customers and bolstered consumer protections, the proposed acquisition does not overcome the public interest burden and the Commission should reject this transaction outright. Alternatively, if the Commission were to approve this transaction, PULP urges substantially increased positive tangible public interest adjustments to cushion against risks, and improved benefits and protection for low-income customers.

February 8, 2013

Respectfully submitted,

Public Utility Law Project of New York, Inc.
Gerald A. Norlander, Esq.
Marc Liberati, Esq.
P.O. Box 10787,
Albany, NY 12201
Tel. (518) 281-5991
Fax (518) 286-2392
Email gnorland44@gmail.com

[40] *See* Case 12-M-0192, Comments of Eugene J. Hatton, Deputy Town Supervisor, Town of Athens, NY on behalf of the Joint Task Force of the Town and Village of Athens, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={8BA646CE-401F-43EE-8D06-D703529D7B42}