

**PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.**

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February 6, 2013

Hon. Jeffrey Cohen  
Acting Secretary to the Commission  
New York State Public Service Commission  
Agency Building 3  
Albany, New York 12223-1350

Re: 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, Central Hudson Gas & Electric Corporation's *Petition Requesting the New York State Public Service Commission's Approval to Recover Deferred Incremental Costs Associated with Tropical Storm Sandy.*

Dear Acting Secretary Cohen:

The Commission established the rates currently in force for Central Hudson Gas & Electric Corp. ("Central Hudson") on June 18, 2010. By petition dated February 6, 2013, Central Hudson seeks deferral for future recovery from customers of \$9.7 million of incremental costs, plus related carrying charges, allegedly incurred to repair damage due to Tropical Storm Sandy and restore service. The Public Utility Law Project of New York, Inc., opposes the petition for the reasons discussed below.

**The Commission's Standard for allowing deferral of costs**

Utility rates are set prospectively, based on items such as projected operation and maintenance expenses and the return allowed on capital investment. Once rates are set, recovery from customers when costs turn out to be higher than expected (or reducing rates when actual expenses are lower than projected) is normally not allowed under the filed rate doctrine and the general bar against retroactive ratemaking. Thus, recoupment of unanticipated losses, or

disgorgement of unexpected gains, is normally barred. These principles, however, are eased in limited, extraordinary situations. For example, the Commission allows utilities to petition for “deferral” of extraordinary costs incurred during the term of a multiyear rate plan, for recovery from customers at another time, typically when rates are reset in the next major rate case. The standard utilized by the Commission requires a utility to satisfy the following conditions for deferral of unanticipated costs:

1. The costs must be material.<sup>1</sup>
2. The costs must be unusual, and not reasonably forecast in a rate proceeding.
3. The deferral request must be incremental to the amount currently allowed in rates.
4. The utility cannot be over-earning its allowed return on equity, or overearn if the deferral is allowed.
5. The company must show it attempted to mitigate the expense to the extent possible.

Under revenue decoupling provisions in Central Hudson's rate plan, the utility's revenue from customers is not decreased when power is off and meters are not registering usage. Cutting maintenance to achieve savings and increased profits is a hazard recognized by the Regulatory Assistance Project, in a publication addressing common criticisms of revenue decoupling: "if a decoupling mechanism allows the utility to receive the revenues that it would have collected if the power were on, consumers both suffer an outage and pay for service they did not receive. The utility is made whole, and really does not suffer any penalty from slow service restoration." Regulatory Assistance Project, *Revenue Regulation and Decoupling: A Guide to Theory and Application*, p. 49 (June 2011). A solution to the problem suggested in the publication above, performance standards applicable to major storm event recovery, has not been adopted by the Commission. Accordingly, there is a real hazard that the multiyear rate plan encourages savings from cutting maintenance to directly improve profitability in the short run with no risk to the

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<sup>1</sup> “The Commission’s current policy on materiality is that an item must exceed 5% of the company’s net income to qualify for deferred accounting treatment.” Case 01-G-1821, *Petition of Central Hudson Gas & Electric Corporation for Approval for Environmental Site Investigation and Remediation Costs*, filed in C 9218, Issued Oct. 25, 2002.

company if subsequent costs from storm-harvested trees, limbs, poles and lines can be easily passed on to customers through petitions for deferral of storm costs such as this. This risk militates for heightened scrutiny by the Commission of storm cost deferral petitions.

## **CENTRAL HUDSON'S DEFERRAL PETITION SHOULD BE REJECTED**

### **1. Central Hudson failed to address all the elements of the relevant standard.**

Central Hudson did not address whether its current earnings are at or above the amount allowed in rates, or whether they would be above the allowed return if the petition were to be granted. According to the Commission order approving the current rate plan, "[t]he Joint Proposal's revenue requirements are designed to provide the company a reasonable opportunity of earning 7.4% on its overall capital...."<sup>2</sup> There is no evidence in the petition regarding the company's current earnings level. Thus, the fourth element of the deferral standard is not met.

Also, Central Hudson has not demonstrated that it has made or exhausted claims for reimbursement of storm damage costs from third parties through insurance or governmental aid. When Con Edison petitioned for deferral of certain costs incurred after the terrorist attack in lower Manhattan in 2001, the Commission did not allow blanket deferral of all costs for recovery from customers, because the fifth factor in the standard for deferral of unanticipated costs, cost mitigation, was incomplete:

Consideration of WTC-related expenses is premature because of the unsettled nature of such costs. Con Edison and the State of New York continue to pursue multiple avenues for recovery of those extraordinary costs, including, but not limited to, insurance claims, federal aid and other reimbursement programs, and possible state and federal tax deductions.<sup>3</sup>

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<sup>2</sup> CASE 09-E-0588 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Central Hudson Gas & Electric Corporation for Electric Service. CASE 09-G-0589 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Central Hudson Gas & Electric Corporation for Gas Service. ORDER ESTABLISHING RATE PLAN (Issued and Effective June 18, 2010), at p. 15.

<sup>3</sup> Case 01-M-1958, Petition of Consolidated Edison Company of New York, Inc. for Permission to Defer the Costs Related to Emergency Response and the Restoration of Service Related to the World Trade Center Disaster, filed in

Central Hudson's deferral petition does not even mention whether it is pursuing any storm damage recoveries from insurance or governmental aid. Consequently, the petition should be rejected, without prejudice to resubmission with evidence regarding its insurance coverage of items damaged or destroyed by the storm, along with justification of any decision to self-insure, and evidence that would demonstrate zealous pursuit of state and federal assistance for any uninsured storm recovery costs.

**3. Central Hudson has not proved the degree to which the storm costs were truly unusual or unavoidable.**

It appears from Central Hudson's brief summary of costs related to Tropical Storm Sandy that a large portion of costs involved downed lines and tree trimming. The petition alludes to 79 tree trimming crews in addition to its crews and 91 mutual aid crews, whose activities are not explained. Yet there is no assertion in the deferral petition that the company, prior to the storm, engaged in prudent vegetation management practices and pole replacement programs consistent with good utility practice, or even that maintenance schedules were consistent the utility's own historical level of maintenance prior to the advent of multiyear rate plans and performance regulation.

In addition, there is no evidence put forward that the strength of Tropical Storm Sandy winds experienced in the Central Hudson service territory was stronger than winds normally experienced from time to time in the service territory. Normal storms should have been anticipated with appropriately scheduled tree trimming, pole replacement, and reinforcement of lines.

There is an allowance already in Central Hudson's rates for normal storm restoration activity, \$5.157 million.<sup>4</sup> Notwithstanding Central Hudson's claim, it should be considered applicable in the absence of proof that the storm -- when it finally reached Central Hudson territory -- still had truly unanticipated force. It may be that most of the storm was in the range of normal storms, except for an area of damage that was quite localized, and so the incremental damage due to unanticipated storms might not satisfy the materiality requirement of the applicable standard.

Accordingly, the petition should be rejected, without prejudice to resubmission with proper documentation that damages were truly unusual and occurred despite sound utility practices that would normally reduce or eliminate damage from falling trees, limbs, and poles during ordinary storms, and that the storm was exceptional enough to allow consideration of its costs wholly separate from normal storm recovery costs already anticipated when rates were set.

**4. Central Hudson has not provided adequate detail and justification for all claimed expenses.**

There is no clear indication in the petition of the number of trees and limbs trimmed or removed, the number of fallen poles replaced, the number of power lines replaced or restrung, or the nature of other activities undertaken to restore service. Consequently, it is not possible for the Commission to assess whether the expenses claimed for these items was prudently incurred or reasonable.

Further, several other items of cost are unexplained or insufficiently explained, e.g., management storm compensation of \$453,969, "purchasing card" charges of \$425,581, and other

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<sup>4</sup> See Appendix A, Schedule 1, attached to the Commission's Order approving the current rate plan, *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={071F05E6-7DFB-4624-ACD8-1F0F3DDBE92F}>, Adobe p. 122.

contractors and temps \$547,317. The Commission should require greater specification of the cost items if it entertains the petition.

**5. The Commission has not approved the Joint Proposal for Merger relied upon in the deferral petition, and the petition should be considered by the judges now considering the Joint Proposal.**

The deferral petition refers to and relies upon provisions of the Joint Proposal for merger filed January 25, 2013 which relate to storm damage cost deferrals, and the intent of signatory parties to allocate the bulk of the \$36 million “public benefit” amount to erase storm damage cost deferrals. That Joint Proposal has not been approved by the Commission, and is under review by Administrative Law Judges now. If the petition is not denied for other reasons stated in this response, it should be referred to the Administrative Law Judges before whom the merits of the Joint Proposal is pending.

**6. Central Hudson has not met its burden of proof.**

In all proceedings affecting rates, the utility bears the burden of proof. PSL § 66(12). As shown above, Central Hudson has not addressed its earnings level, has not addressed whether recoveries from insurance or government aid have been pursued, has not demonstrated the degree to which the storm was stronger than those normally encountered, has not demonstrated it engaged in good utility practices to minimize damage, such as incurred from falling trees, limbs and poles, and has not provided adequate detail of the expenses and the work performed for which reimbursement from consumers is sought. Accordingly, Central Hudson has not satisfied its burden of proof.

**Conclusion**

For all of the forgoing reasons, the deferral petition should be rejected. Alternatively, it should be referred to the Administrative Law Judges for their review.

Respectfully submitted,



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cc: Via email to Active Parties and ALJs in Case 12-M-0192.