

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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Case 12-M-0192 — Joint Petition of Fortis Inc., FortisUS Inc., :
Cascade Acquisition Sub Inc., CH Energy Group, Inc., and :
Central Hudson Gas & Electric Corporation for Approval of : Case 12-M-0192
the Acquisition of CH Energy Group, Inc. by Fortis Inc. and :
Related Transactions :
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PETITIONS FOR REHEARING
AND
THE IMMEDIATE SETTING OF TEMPORARY RATES

ON BEHALF OF
CITIZENS FOR LOCAL POWER
AND
CONSORTIUM IN OPPOSITION TO THE ACQUISITION

July 26, 2013

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INTRODUCTION

The written decision in this case, the Order Authorizing Acquisition Subject to Conditions (Issued and Effective June 26, 2013) (“Order”) was fraught with numerous errors of fact and law. These Petitions for Rehearing and the Immediate Setting of Temporary Rates are filed pursuant to Section 22 of the Public Service Law and 16 NYCRR § 3.7 on behalf of the Citizens for Local Power (“CLP”) and the Consortium in Opposition to the Acquisition (“Consortium”). The Petition for Rehearing will focus on three significant legal errors:

1. The failure to hold evidentiary hearings to accept the Parties testimony and exhibits into evidence to create a traditional case record and the failure to

hold evidentiary hearings on the Joint Proposal and subsequent “enhancements” that was opposed by several Parties.

2. The failure to provide evidentiary hearings or a SAPA or any notice for the new Rate Plan for Central Hudson.
3. The failure of the Commission to even consider the corporate behavior of Fortis in other jurisdictions is a total abdication of the Commission’s legal responsibilities in the determination of the public interest.

The factual errors are also numerous, but the most glaring is the Commission’s finding that the eleventh hour “support” for the transaction was equally balanced with the opposition.

The Petition for the Immediate Setting of Temporary Rates is based on Central Hudson’s current earnings that exceed reasonable levels as found by this Commission in other recent cases and the expert recommendations of Department of Public Staff (“Staff”) and the Utility Intervention Unit of the Department of State (“UIU”) in the pending Con Ed rate cases. Consequently, the Order has perpetuated unjust and unreasonable rates. As was done in the very same Session as this case was decided with respect to National Fuel Gas, the Commission should make Central Hudson’s rates temporary and subject to refund while it investigates the level of refunds due ratepayers and the proper level of rates going forward. The Commission in the Order acknowledges that it has the power to review Central Hudson’s rates. It should use that power immediately as it has done in the National Fuel Gas case.

PETITION FOR REHEARING

The Commission's failure to hold evidentiary hearings to accept the Parties pre-filed testimony and exhibits into evidence constitutes an error of law, not to mention a violation of the Commission's own precedent in prior merger cases. While the Public Service Law does not require a hearing, the Commission's regulations do:

16 NYCRR § 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.

Note: As the Public Service Law prohibits the capitalization of franchises, consents or rights to engage in utility business except as provided in the Public Service Law, the commission will not approve a transfer or lease where it appears that the transferee or the lessee is paying for a franchise, consent or right to engage in utility business in excess of legitimate original cost less proper amortization. Where the amount authorized to be paid exceeds the original cost less accrued depreciation of the physical property transferred or leased, together with the unamortized portion of the actual cost incurred in securing said franchise, consent or right, the commission may refuse to approve the application unless the applicant will amortize immediately said excess through charges to surplus.

The Commission has held evidentiary hearings in all prior merger cases in the 21st century. Here it has decided that an unsworn "record" compiled on the Commission's DMM website does not need further vetting for the Commission to make a decision. In the Order, CLP and the Consortium are told that to hold an evidentiary hearing would be unfair to the other parties who signed the Joint Proposal. The Commission states that it tailors its procedures "to the nature of the facts and the issues to be determined [footnote omitted]". Order at 58. The Commission goes on to note:

For example, among the merger cases cited by CLP/COA to show that evidentiary hearings are customary, three differed from this case in that each

included establishment of a detailed rate plan,[footnote omitted] and the fourth differed in that the parties did not negotiate a Joint Proposal.[footnote omitted]. And in none of the other cases was the evidentiary hearing proposed belatedly as here.

Yet this flies in the face of the fact that the Commission has included in its Order a detailed Rate Plan – continue the existing rates until June 30, 2015.

Finally, we are conditioning our approval of the transaction on Petitioners’ providing the “enhancements” outlined above, namely: an extension of the originally proposed rate freeze through June 30, 2015;

Order at 60-61. So there is nothing to distinguish this case from the others. “A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious.” In the Matter of Field Delivery Service (Roberts), 66 N.Y. 2d 516; 488 N.E.2d 1223; 408 N.Y.S.2d 111; 1985 N.Y. LEXIS 17937 (1985).

From the policy considerations embodied in administrative law, it follows that when an agency determines to alter its prior stated course it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision (Kramer, *op. cit.*, at 68-70). Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made (*Matter of Howard Johnson Co. v State Tax Commn.*, 65 NY2d, at p 727, *supra*; *Matter of New York Tel. Co. v Public Serv. Commn.*, 62 NY2d 57, 62; *Matter of Dresher [Lubin]*, 286 App Div, at p 594, *supra*; *Matter of Fitzgerald v State Div. of Dept. of Public Serv.*, 262 App Div 393, 397; *see, Atchison, Topeka & Santa Fe Ry. Co. v Wichita Bd. of Trade*, 412 U.S. 800, 807-808 [plurality opn]; *Greater Boston Tel. Corp. v Federal Communications Commn.*, 444 F2d 841, 852, *cert denied* 403 U.S. 923; 4 Davis, *Administrative Law* § 20:11, at 37 [2d ed]; Kaufman, *Judicial Review of Agency Action: A Judge’s Unburdening*, 45 NYU L Rev 201, 204, 209). (emphasis added).

Id. at 520. Here there is no question that even after failing to distinguish the Fortis case from the others since a rate plan is in fact part of the conditions of the Order like the

majority of the others, the Commission refused to hold an evidentiary hearing not only violating its own precedents, but its regulations as well.

Finally, there was no need for a “belated” request for an evidentiary hearing in the other cases. Evidentiary hearings were scheduled in all cases by the Secretary in the normal course of the proceeding to allow the Parties to litigate their positions on the record as in *Iberdrola* or to test the sufficiency of the Joint Proposal as in the other cases by accepting the pre-filed testimonies and exhibits into evidence and allowing the Administrative Law Judges to ask questions and/or cross examine witnesses on the sufficiency of the Joint Proposals and to obtain clarifications, as necessary. Here evidentiary hearings were scheduled and were not just postponed but cancelled when some of the parties announced that an agreement in principle was reached and without the benefit of a written Joint Proposal.

Thus, there was never any opportunity for the applicants that bear the burden of proof

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.

One wonders why the companies did not insist on such legal formalities as an evidentiary hearing. Certainly, counsel for both companies were well-versed in the Commission’s precedent, custom, practice and the Commission’s regulations. The only conclusion that can be drawn is that the companies’ executives did not want to testify under oath and withstand cross examination since they knew that the deal was ill-advised for the ratepayers and was made even worse by the unilateral enhancements locking in rates that were unjust and unreasonable for an additional year.

This rate lock amounted to an approximate \$17 million ratepayer penalty over the two-year rate freeze in accordance with the *unsworn* rebuttal testimony of Central Hudson witnesses Mosher and Brideau at page 10. This \$8.5 million a year ratepayer penalty was calculated off the Staff recommendation that the Return on Equity should be 8.9% if the Rate Plan is to be extended. It should be noted that the Staff ROE is even higher than currently recommended in the three Con Edison rate cases where Staff has set forth an 8.7% ROE and UIU set forth a 7.87%¹ ROE recommendation.

Finally, as but one example of a contested fact, the Commission ignored the issue of goodwill as a potential problem as found by Staff and as was further developed by CLP and the Consortium. All that the Commission did was repeat the well established principle followed in this jurisdiction and in others that goodwill is not included in rates. Nowhere does the Commission address the likelihood and its consequent impact that the enormous amount of goodwill carried on Fortis' books will be considered impaired since it cannot earn a single cent of return. So the Commission gets five days notice that good will has been found to be impaired. Then what? Why does the Commission not address Staff's concerns:

Q. Would you please elaborate on the serious impact a significant impairment and subsequent write-off of Goodwill by Fortis could have on Central Hudson and its customers?

A. If Fortis had a significant impairment of Goodwill, this could potentially affect Central Hudson's ability to receive equity infusions from Fortis. In addition, impairment of goodwill at Fortis's level could cause its credit rating to drop, which more than likely would cause Central Hudson's rating to drop and

¹ See for example, Basil Copeland, Jr.'s Rebuttal Testimony in Con Ed Cases 13-E-0030, 0031 and 0032 and Rebuttal Exhibit ____ (BLC-11) page 1 of 1 (using Staff's Recommended Capital Structure with a 48% common equity component.

² Corrected Staff Policy Panel Testimony at page 62.

this could deter Central Hudson's access to the debt markets at reasonable terms.²

A NOTICE IS REQUIRED WHEN SETTING RATES AND THE COMMISSION ERRED WHEN IT DID NOT PROVIDE FOR ONE

The State Administrative Procedure Act ("SAPA") § 202(1) requires notice in the State Register "[p]rior to the adoption of a rule" so as to "afford the public an opportunity to submit comments on the proposed rule." There was no notice provided before the Commission adopted the "enhanced" Joint Petition, and the original SAPA notice that appeared in the State Register on April 20, 2012, did not advise that Central Hudson's rates could be extended or modified so as to continue an over-earnings situation.

The *unsworn* Staff testimony indicated that Central Hudson's current rates included returns considered excessive. So at the very least, the Commission should have issued a notice and comment on the enhancements that would further harm ratepayers by extending the rate freeze by another year. Not to do so, especially when the current rate plan reflects a ROE that is clearly well above today's market rates, is error that requires rehearing.

THE COMMISSION FAILED TO CONSIDER THE CORPORATE BEHAVIOR OF FORTIS

During the course of this case, three separate situations came to the attention of CLP and the Consortium. Two were reported to the Commission in previous submissions -- Fortis misrepresentations and poor environmental performance in Belize

² Corrected Staff Policy Panel Testimony at page 62.

and British Columbia. These disclosures were not even mentioned in the Order, no less considered by the Commission in determining whether Fortis was a worthy owner of Central Hudson. This is another error of law since the public interest must include whether the new owner is qualified to own vital infrastructure. CLP and the Consortium provided evidence of the concealment and misrepresentations of Fortis in Belize and in British Columbia and this evidence was ignored.

Now a third situation is reported to exist in the Caicos – Turks Islands involving significant air pollution coming from a Fortis fossil fueled generating station. Here is the e-mail received from Mila Schukin sent to Jennifer Metzger, a founding member of CLP:

Hello Jennifer,

My husband and I bought a retirement home on the island of Providenciales in 2005. Providenciales ('Provo') is the chief and most developed island in the Turks & Caicos Islands, which are a British Protectorate just south of the Bahamas. Its current population is 40,000 and there are 450,000+ visitors per year. Our area is Turtle Cove - a charming community around a harbor in the very center of the island, from where development took off in the 70's. In 2006 an antique, defunct power plant uphill from us was re-licensed by the government. Our home is 400' downwind from this plant. Fortis Power Co. (originally incorporated as PPC/Provo Power Co.) is wholly owned by Fortis.

A small, local engineering firm by the name of Redmond Assoc. did a rudimentary EIR on the plant in 2006. Redmond also constructed generator housing for the plant. We later learned there were outraged objections by the public to the licensing, but PPC/Fortis was insistent on doing business precisely at that location, in the heart of a residential area, and refused pleas to relocate. One copy of the EIR is available at the planning department but cannot be borrowed or xeroxed.

In 2007-2008 we started noticing fumes. We learned the following: the plant runs on 12 30-MWh engines. It operates on diesel fuel. Its 12 stacks are 40' high. There are NO emission controls at the power plant whatsoever except scrubbers in the stacks. According to CARMA, Fortis emitted 134,550 tons of CO2 into the atmosphere in 2009, and future predictions were for 202,770

tons. PR materials for the plant make the claim that the stacks are 175' above sea level, but as a matter of fact the stacks are 40' on a 125' hillside. The plant is not ISO 14001 certified, and last I heard - certification has been postponed another year.

The street that Fortis Power Plant fronts on is the main road on the island, right at a central intersection, and is zoned commercial. Shops, a cable company, cafes, a car dealership and the largest church on the island are within feet of the plant. On both sides of this road behind the narrow commercial strip are private homes on single-family-zoned land. There is NO industry of any kind for miles around, aside from this plant. Downwind homeowners keep their doors and windows permanently shut and the conditioner on as far as 5 miles away. At times the stench is gagging. People complain about black soot on their furniture across the entire island. Development in Turtle Cove has come to a halt.

We spoke to numerous attorneys on the island, but although we heard many expressions of outright hatred for PPC/Fortis, we had to face the fact that a lawsuit would have to be a new self-funded EIR using attorneys with no experience or knowledge of environmental law, preferably buttressed by a vocal public campaign. The island had been in political turmoil over major corruption until 2009 when the British took back control after a period of independence, and there were no effective public bodies. We gave up the attempt (we were both ill at that point), put our house up for sale and left the island.

Fortis now has a monopoly over power provision in the entire country (it provides power to neighboring islands). There have been loud complaints about its tariffs, and the company did do some noise remediation. There have never been any hearings on pollution, or on reviewing its 50-year license. People seem to feel their hands are tied. Eddington Powell, the man who started the business with Fortis' help and now runs it for Fortis, is probably the most powerful man on the island and relishes his location stage front. When we complained to him about the pollution he laughed in our face. The situation is incredible, destructive and disgraceful: aside from the homeowners and business people being poisoned, there are children in constant attendance at the church a block away. The Turks & Caicos in 2001 when we first saw it celebrated the pristine condition of its environment; now it's painful to think what those emissions are doing to the crystalline water and the land. The island, however, depends on tourists who visit Grace Bay beach at the other end, and they would be surprised to see 150' smokestacks in the middle of town as they fly in, so Mr. Marshall gets a free ride.

I still think a lawsuit is necessary, both on our behalf and on behalf of these lovely, helpless islands. I am looking for an attorney again -if you know of one who might be interested I would appreciate a note. In the meantime, I've read articles on the web about your hearings and decided to give you some additional information on this company.

Best wishes,

Mila Schukin

All three of these situations were communicated to CLP and the Consortium by unsolicited contacts revealing the deep feelings of animosity engendered by Fortis' operations and its approach to its customers welfare and concerns and the environment.

The Commission did not consider any of these allegations of inappropriate corporate behavior that go to the heart of whether Fortis is a trustworthy owner of Central Hudson. And such evidence should be considered. The Commission's failure to address such corporate misbehavior was error. There is a clear pattern to Fortis' disregard for the communities it serves and for the environment.

The courts in New York have long recognized that the suitability of the entity to receive a license or approval from a state agency is subject to the qualifications of the recipient. The denial of a license to expand a landfill was upheld by the Appellate Division, Second Department in Al Turi Landfill v. NYS Department of Environmental Conservation, 289 A.D.2d 231; 735 N.Y.S.2d 61; 2001 N.Y. App. Div. LEXIS 11794 (2001)

Here, the elements inherent in the criminal conduct for which the petitioner [***4] and its principals were convicted, to wit, dishonesty, lack of integrity in conducting business, and a willingness to mislead the government, have a direct relationship to the duties and responsibilities inherent in the license sought, including accurate record keeping, effective self-policing, and honest self-reporting to the government (*see, Correction Law* § 750 [3]; *see also, Stewart v Civil Serv. Commn.*, 84 AD2d 491).

While it is not clear if Fortis behavior in the three ongoing situations noted is criminal in any of the host jurisdictions, it would likely be criminal in New York, but even if such behavior is not criminal it is certainly far below the norms this Commission expects of

its regulated public utilities. The fact that this information was not addressed by the Commission is another error.

THE COMMISSION COMMITTED ERROR IN INTERPRETING THE COERCED “SUPPORT” FOR THE ACQUISITION

The factual errors are also numerous, but the most glaring is the Commission’s finding that the eleventh hour “support” for the transaction was equally balanced with the opposition. The Order states that “we do not observe the monolithic opposition among the general public that the judges found so unusual” Order at 30. The Order describes a large up-tick in comments supporting the merger following the notice announcing the preparation of a Recommended Decision, with a total of 400 supportive comments received by June 13. What the Order fails to mention is evidence submitted by IBEW Local 320 that Central Hudson’s management engineered many of these supporting comments. While the Order does note that about half of these comments came from Central Hudson employees, the Order otherwise makes no effort to qualitatively assess the support for this merger. Based largely on a numerical count of comments submitted for and against the merger, the Order concluded that sufficient public support exists for the merger so as not to pose a significant risk to customer relations, and therefore to the management performance of Central Hudson under Fortis ownership.

This conclusion is not warranted by the facts³.

³ This section and underlying statistics were prepared by CLP members Dr. Jennifer Metzger, Susan Gillespie and Dawn Meola.

Just based on the numbers, alone, individuals who took the time to submit a written comment, speak at a public hearing, or sign a petition opposing the merger totaled 1,479, compared to the 442 comments in support of the merger—a ratio of well over 3 to 1.⁴ When one looks more closely at the comments supporting the merger, it is clear that many of these comments cannot be considered to credibly represent ratepayers in the service area. CLP did a quantitative and qualitative analysis of comments submitted to the PSC website, *and found that of the 442 comments submitted in support of the merger, nearly half of them (48%) were form letters*. On April 29, 2013, just days before the ALJs issued their Recommended Decision, Central Hudson’s Corporate Secretary and Vice President Denise Doring VanBuren sent an email to all employees providing them with two template letters of support for the merger—one from a “Central Hudson employee” and one from a “Central Hudson customer.” The email urged employees to submit one of these letters to the PSC and to encourage family, friends, and others to do the same. VanBuren explained in the email that employees’ “assistance was needed” as part of the company’s “extensive advertising outreach campaign in support of the Fortis transaction this weekend.”⁵

The majority of supportive comments submitted to the PSC—about 51%-- were submitted between April 29 and May 1 in response to VanBuren’s email. A

⁴ The total for opponents to the merger include: the 913 Sign-On petition signers and a second petition submitted to the PSC by Brandon Valdez (5/6/2013) and signed by 19 people (one duplicate signature was removed from the final total); 64 people that spoke in opposition to the merger at the public hearings; and a total of 484 individuals comments on the PSC website opposed to the merger (this total excludes the resolutions of opposition by municipalities and non-profits, which will be discussed separately.)

⁵ A copy of this email was provided to the Commission by IBEW Local 320 in Supplemental Comments on Case 12-M-0192 on 5/1/2013.

second surge in supportive comments from Central Hudson employees occurred on June 3-4 (14%), which was also likely engineered from within the company. (By this time, IBEW Local 320 had reversed its position and expressed support for the merger after receiving additional concessions from management; however, it is not known whether commenters in this surge were union or non-union employees.) These two letter-writing campaigns by employees and their relatives and friends accounted for at least 65% of all comments supportive of the merger.

It is not surprising that VanBuren's email elicited such a strong response from employees, given that top management would know from the postings on the PSC's website which of its employees would support management's merger campaign and which would not. The pressure on employees to cooperate must have been enormous. It is not accurate nor reasonable to consider these submissions as the spontaneous and voluntary expression of opinion by employees. Indeed, family members no doubt felt pressure to lend their support to this effort, as well, as the following submission by Liz Canfield to the PSC on April 29th suggests:

"To whom it may concern, I am writing this is response to your email. I approve of the merger and ask you keep all of your good loyal employees. Kevin Burton is a family member, loves his job and is good at it, so please allow him to continue. Thank you, Gary and Liz Canfield"

The letter-writing campaign orchestrated by Central Hudson included businesses, as well. Of the 68 individuals expressing support for the merger who identified themselves with businesses or business organizations, 41 of them—61%--

submitted a form letter to the PSC as a “business leader” and/or “community leader.”

The number of individuals submitting comments as ratepayers in support of the merger and not part of an orchestrated campaign is undoubtedly small, though it is impossible to know the exact total since employees as well as relatives and friends of employees did not necessarily identify themselves as such.⁶ The maximum is no more than 49 commenters (about 3% of all written comments), and most likely less.⁷ This number is dwarfed by the number of individuals who submitted comments or signed petitions in opposition to the merger—1,415 in all, excluding organizations, municipalities, and elected officials. This figure does not even include the approximately 170 citizens who attended the four public hearings, including 64 speakers. As the ALJs noted in the Recommended Decision, not a single person at any of the hearings spoke in favor of the Joint Proposal.⁸

Of greatest significance were the views expressed by municipalities on the proposed merger. These submissions to the PSC and their particular importance were entirely ignored by Commissioners in the final order. “Public” utilities are

⁶ In on-line searches of the names of commenters it was discovered that many were Central Hudson employees even though they did not identify themselves as such in their comments to the PSC.

⁷ The figure of 49 was arrived at by eliminating from the total number of supportive comments (442) any commenters who submitted form letters or who could not be determined from the comments or from on-line searches to be any of the following: a Central Hudson employee, a family member of a CH employee, a stockholder, a business owner or representative, an elected official, or non-profit representative.

⁸ Another error of fact in the Commission’s findings is that Commissioners only included the total number of speakers and attendees at the second set of public hearings on April 17-18 in Poughkeepsie and Kingston (47 speakers and approximately 130 attendees) and did not include the total number of speakers and attendees at the first set of public hearings on February 21, 2013 (17 speakers and approximately 40 attendees). See the Recommended Decision by Administrative Law Judges Rafael A. Epstein and David L. Prestemon, Case 12-M-0192, p. 5.

monopolies that are permitted to exist because they perform an essential role in society. In this special capacity, no matter what vocabulary is used, they serve a society's citizens, not its "customers." There is a crucial difference between citizens and customers, which is based on the belief that the worth of an individual is determined not by his or her purchasing capacity or access to influence, but by membership in good standing in a political community. Municipalities hold town meetings and make their decisions only following open, public debate and discussion. Like the PSC, they and their committees exist to act in the public interest—with the difference that if the municipalities fail to satisfy the citizens they serve they run the risk of being run out of office. Unlike the manufactured support of the merger, which could be engineered in a few days by pressuring employees, suppliers, business contacts, and grant recipients, the support of municipalities takes time to come together. Typically, several months are required before the necessary committee meetings and town meetings can be held.

The 13 municipalities⁹ that voted unanimously to oppose the merger, including Ulster County (latest census 276,526), and Newburgh in Orange County (29,026) represent (in the full, democratic sense of the word) a total of 305,552 individuals, or **45%** of 675,000, the approximate population of the CH service area. Notably, the City of Kingston (population 23,887) passed its resolution opposing the merger after the companies announced their final "enhancements" on May 30. Several other towns were in the process of considering resolutions in opposition

⁹ Three other municipalities, the City of Beacon, the Village of Ellenville and the Village of Red Hook passed resolutions calling on the PSC to make process changes such as holding an evidentiary hearing and providing more time for comment.

when the PSC made its determination on the case at its June 13, 2013, meeting. Also many elected officials opposed the acquisition including US Senator Schumer, New York Senate Members Gipson and Tkaczyk; New York Assembly Members Cahill, Gipson and Skoufis and numerous Mayors and Town Supervisors. These elected representatives were reflecting their constituents' views on the acquisition.

In contrast to this outpouring of legitimate and fully public opposition, the “support” that the companies claimed for the proposal was largely manufactured and does not stand the test of public scrutiny. It likely does not stand the test of each organization’s internal governance structure. The companies did not produce a single board resolution of support from the “supporting” organizations. It should also be noted that the AARP of New York, which represents 2,500,000 residents-- many of whom are on fixed incomes—also formally opposed the merger.

The unprecedented outpouring of opposition to the merger from within the service area was the primary reason why the ALJs concluded in their Recommended Decision that the benefits of the proposed merger were outweighed by the detriments remaining after mitigation. The ALJs observed that “the breadth and depth of this concern among the residents of Central Hudson’s service territory and their elected officials at the town, village, city and state levels is remarkable.” Rec Dec at 52. This level of concern did not significantly change after April 29, 2013. What changed was the strategy of Central Hudson and Fortis, which sought to engineer a groundswell of support for the proposed merger. The companies succeeded in pressuring their employees to register support with the PSC, and in

garnering expressions of support from some businesses and business organizations. However, a massive public relations campaign that included full-page ads in newspapers, broadcast ads, and a mailing to customers failed to elicit significant support from the public-at-large. The ALJ's conclusion thus remains valid:

In our view, one of the proposed transaction's unquantifiable but highly material risks or detriments is that the traditional functions of a utility company, as well as emergent changes in the nature of utility service, are likely to be managed more successfully by Central Hudson in its present form as contrasted with a new corporate regime that already has produced the fierce public hostility evidenced in hearings and comments.

Rec Dec at 66. If fact, the Commission agreed:

We agree with the judges that any deterioration in customer relations because of the merger would be detrimental insofar as it might impede management performance in these areas.

Order at 38. Consequently, the Order reflects a significant factual error in regard to the actual support that requires rehearing.

PETITION FOR THE IMMEDIATE SETTING OF TEMPORARY RATES

The pre-filed testimony of Staff and the analyses submitted by PULP show the high probability that Central Hudson is over-earning. Staff's Policy Panel in corrected pre-filed testimony in November of 2012 notes that the Staff was recommending an 8.9% return on equity in the then pending Niagara Mohawk Power Corporation (doing business as National Grid) electric and gas rate cases. Subsequently, the Commission authorized in March 2013 a 9.3% return on equity for a three year rate plan that typically commands a 30 basis point premium for the utility's agreement to stay out for three years. So the implied single year ROE is 9%. As noted earlier, Staff is recommending

8.7% in the Con Ed rate cases, currently pending while UIU is recommending an even lower ROE of 7.87% in those cases. The market rates, as these expert opinions reveal, do not and cannot support the continuation of a rate plan put in place over three years ago that used a 10% ROE. So it is probable that Central Hudson is over-charging its customer just due to the change in market rates \$8.5 million a year.

Accordingly, the Commission is urged to set Central Hudson's rates temporary subject to refund and begin an accelerated investigation into what are the just and reasonable level of rates as the Commission did recently in the National Fuel Gas case decided at the very same Session as this case. The Commission's failure to follow the evidence that Central Hudson is likely over-earning to the same degree as National Fuel Gas is arbitrary and capricious decision-making that justifies rehearing and the immediate setting of temporary rates while the Commission goes about the task of serving the public interest.

Respectfully submitted,

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On behalf of the Citizens
for Local Power and
the Consortium in
Opposition.

July 26, 2013