

**NEW YORK STATE
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission as to the Rates, Charges,
Rules and Regulations of Central Hudson Gas & Electric for Electric Service 23-E-0418**

**Proceeding on Motion of the Commission as to the Rates, Charges,
Rules and Regulations of Central Hudson Gas & Electric for Gas Service 23-G-0419**

REPLY BRIEF OF THE PUBLIC UTILITY LAW PROJECT

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I. INTRODUCTION

A. Overview

The Public Utility Law Project (“PULP”) hereby submits our Reply Brief in these proceedings. As stated by PULP throughout the rate case, we remain concerned about Central Hudson Gas & Electric Corporation’s (“Company” or “Central Hudson”) failed SAP customer information system (“CIS”) upgrade and the billing issues that followed. PULP maintains that the various investigations and proceedings should be completed prior to the issuance of any rate increases.¹ On March 6, 2024, PULP submitted a letter in Matter No. 22-00666 and Matter No. 22-M-0645 directed to Chair Christian requesting an update on the status of the public release of the independent monitor's final report, in accordance with the timeline outlined in the terms of the executed Interim Agreement.² As of the filing of this brief, there has been no update on when this final report will be released to the public.

Again, PULP urges the Administrative Law Judges (“ALJs”) to review the entire record with great scrutiny as the public should not be expected to pay more for their electric and gas service to the extent that such costs are due to the Company’s failure to properly implement its billing system. Further, PULP encourages the ALJs to deny the Company’s overall rate increase request. PULP’s reply brief is not inclusive of all our concerns, but we maintain our positions from previous filed testimony and briefs, and we reserve the right to address any issues in the future.

- i. *PULP’s testimony is properly prospective in nature.*

In its Initial Brief, Central Hudson alleged that the testimony of the other parties was primarily retrospective in nature.³ PULP’s testimony is not retrospective but addresses concerns with the historical data used by the company to justify its initial filing.⁴ In its Initial Brief, Central Hudson states that “parties’ overall approach to these rate cases has in many ways been both overtly and implicitly focused on the past, rather than looking forward to the Rate Year.”⁵

¹ Evidentiary Hearing Transcript (hereinafter “Transcript”), Transcript, January 24, 2024 (hereinafter “Day 1”), at 597, (lines 4-7); *Id.* at 599, (lines 20-23).

² PULP's letter has been filed under Public Comments in both Matter No. 22-00666 and 22-M-0645.

³ Central Hudson Initial Brief at 4.

⁴ *See generally*, PULP Motion to Deny.

⁵ Central Hudson Initial Brief, at 4.

While rate setting is prospective in nature, it is impossible to ignore the Company's history and current operating status when determining whether a rate increase is just and reasonable. As articulated by the New York State Court of Appeals,

[t]hus, the rate-making process is a forum for determining, among other things, whether the utility's operating expenses were prudently and reasonably incurred in the past such that they may properly be used as a basis for projection of operating expenses in the upcoming rate year.⁶ (emphasis added).

Many parties, including PULP, have raised this issue since the filing of the rate cases.⁷ The core concern for PULP in our Motion to Deny was whether the baseline data Central Hudson relied upon to support its initial filing was accurate, due to the company's historical issues and the need for a conclusion in the ongoing Public Service Commission ("Commission") investigation.⁸ Further, beyond the effects of historical data on the rate making procedure, the testimony of the Company, Staff and other parties are bound to be colored by past experiences and lessons learned.⁹ Since the nature of ratemaking is impossible to separate from the Company's history, it is reasonable, responsible, and prudent to inquire whether the Company's projection of operating expenses is based on historically accurate data.

B. Procedural History

Central Hudson filed for a new rate plan on July 31, 2023. The protective order was adopted on August 9, 2023. Following that, a notice soliciting comments and announcing Virtual Public Statement Hearings was published on September 05, 2023. Virtual Public Statement Hearings were then held on September 12, 2023, and September 20, 2023. On September 26, 2023, a notice was published announcing additional, in-person Public Statement Hearings. Those

⁶ *Niagara Mohawk Power Corp. v. Pub. Serv. Com.*, 69 N.Y.2d 365, 370 (1987).

⁷ *See generally*, PULP Motion to Deny.

⁸ *Id.*

⁹ *See*, Transcript, Day 2 at 1305-1306. Central Hudson is requesting additional funding for its technology capital and operations expenditures due to "lessons learned" from the SIP CIS transition.

hearings were held on October 17, 2023, and October 18, 2023. On October 31, 2023, PULP filed a Motion to Deny the rate case. Over the next eight days, parties responded to the motion. On November 21, 2023, parties other than the Company filed their direct testimonies. On December 19, 2023, the Public Service Commission denied PULP's motion.

On December 19, 2023, Rebuttal Testimony became due. On December 21, 2023, a procedural conference was held where parties indicated that many issues at play in the proceeding would need to be litigated. On January 5, 2024, a notice of impending settlement was filed to discuss the issues that could be negotiated. On January 16, 2024, Corrected Testimony became due. On January 19, the Company filed four motions to strike portions of other parties' testimony. On January 24, the evidentiary hearing began, and continued for ten days, until February 6, 2024. At the conclusion of the evidentiary hearing, a briefing schedule was set, with parties to file Initial Post Hearing Briefs by March 1, 2024, and Reply Briefs by March 11, 2024.

D. Compliance with CLCPA

- i. *It would not be "Just and Reasonable" to approve the Company's proposed methods for mapping disadvantaged communities.*

PULP believes that the Public Service Law and Climate Leadership and Community Protection Act ("CLCPA") § 7(3) should be read together, in harmony, when considering whether Central Hudson's rate case will have a disproportionate burden on Disadvantaged Communities ("DACs"). However, Central Hudson's initial brief, states "[t]he requirements of CLCPA § 7(3) should not be read to override the Commission's obligation to ensure just and reasonable rates among all customers."¹⁰ While this is ostensibly true, the Commission can no sooner ignore their obligation to ensure just and reasonable rates than it can CLCPA § 7(3)'s requirement that state agencies assess the impacts of its actions to determine whether those actions create a disproportionate burden on Disadvantaged Communities.¹¹ The influence of the CLCPA on the Commission's decision making process is consistent with this State's body of case law, which has held that when an agency is specially mentioned in a law, it must obey it,

¹⁰ Central Hudson Initial Brief, at 20.

¹¹ See, Case 22-E-0317, et. al., New York State Electric and Gas Corporation ("NYSEG") and Rochester Gas & Electric Corporation ("RG&E") Commission Order at 57-58.

even though laws of general applicability would not generally apply to a sovereign.¹² Here, this burden is met by the reference in CLCPA § 7(3) to New York State agencies.¹³ The applicability of § 7(3) to the Commission is further clarified by § 12 of the CLCPA. Section 12 provides a cause of action against any state agency whose actions fail to adhere to the mandates established by the CLCPA.¹⁴ Therefore, the Commission cannot simply ignore the requirements of CLCPA § 7(3), but must balance the CLCPA’s requirements against the legal mandates of the Public Service Law, which requires safe and reliable service at just and reasonable rates.¹⁵

Essentially, the “just and reasonable” standard requires an understanding of how, if at all, disadvantaged communities will be burdened by the rate plan.¹⁶ This is also consistent with how the “just and reasonable” standard has been viewed by New York courts throughout the State’s history. For example, in *Abrams v. Public Service Com.*, the court held that the Commission has wide discretion when determining what is just and reasonable. A Commission determination will only be overturned if there is no rational basis or reasonable support in the record for the Commission’s conclusion.¹⁷ Further, the Commission’s methodology need not be free of errors or rely on or reject any one factor.¹⁸ Instead, a rate plan is considered just and reasonable when there is a rational basis for the Commission’s conclusion that is supported by the record.¹⁹ Here, the rate plan cannot be considered just and reasonable because the Company has not put forth an adequate record to support a determination that the rate plan does not disproportionately increase the energy burden experienced by disadvantaged communities.

During cross examination, PULP discovered several troubling aspects of the Company’s Climate Leadership and Sustainability Panel testimony. First, the Company could not state how many disadvantaged communities were in its service territory.²⁰ Without this necessary information, the Commission cannot conduct the analysis required by CLCPA § 7(3) to

¹² See, e.g., *Denton v New York*, 72 AD 248, 251-252 (3d Dept 1902). “The laws are supposed to be made for the subjects or citizens of the State, not for the sovereign power. Hence if the government is not expressly referred to in a given statute, it is presumed that it was not intended to be affected thereby, and this presumption in any case where the rights or interests of the State would be involved can be overcome only by clear and irresistible implications from the statute itself.”

¹³ See, CLCPA § 7(3).

¹⁴ See, *id.* at § 12.

¹⁵ See, NYSEG/RG&E Commission order, at 55.

¹⁶ See, Central Hudson Initial Brief at 20.

¹⁷ *Abrams v Pub. Serv. Com.*, 67 NY2d 205, 212 [1986].

¹⁸ *Kessel v Pub. Serv. Commn.*, 136 AD2d 86, 92 [3d Dept 1988].

¹⁹ *Id.* at 100.

²⁰ Transcript, Day 5 at 2867 (lines 12-15).

determine whether its action will disproportionately burden disadvantaged communities.²¹ Further, the Company's lack of foundational knowledge related to the methodologies that it used to map the disadvantaged communities within its service territory will impede the Commission's ability to comply with the reporting requirements established by Environmental Conservation Law § 75-0117.²² Without a strong foundational knowledge of the disadvantaged communities they aim to serve,²³ it will be difficult for Central Hudson to report on and properly document how expenditures directed toward clean energy and energy efficiency programs are furthering the state's disadvantage community goals.²⁴

Additionally, the Climate Leadership and Sustainability Panel's testimony contained contradictory statements. For example, the panel discusses the Climate Action Council's scoping plan in its direct testimony.²⁵ Also, in the panel's rebuttal testimony, it states that it used the scoping plan to aide in the preparation of certain cost analysis.²⁶ However, during cross examination the company stated that it did not utilize the scoping plan in the preparation of its testimony.²⁷ Further, the company could not answer basic questions surrounding the criteria highlighted in exhibit 98 that the Company used to map disadvantaged communities.²⁸

Finally, the Commission's statements in the past that the Energy Affordability Program ("EAP") will help eliminate any disproportionate burden to disadvantaged communities do not hold much weight for several reasons.²⁹ On the whole, EAP does not adequately offset the disproportionate energy burden experienced by individuals residing in disadvantaged communities because it does not, nor is it designed to, properly identify individuals residing in these communities.³⁰ The program only identifies members automatically if they are in certain benefit qualifying programs, or if an eligible individual self-certifies for enrollment.³¹ It does not identify individuals who do not self-certify or would otherwise be eligible for benefits by virtue

²¹ See, NYSEG/RG&E Commission Order at 57-58.

²² See, Case 22-E-0064, et. al, Consolidated Edison Company of New York, Inc. ("Con Ed") Commission Order at 144.

²³ See, PULP Initial Brief at 13-16.

²⁴ See, Con Ed Commission Order at 144.

²⁵ Transcript, Day 5 at 2788 (lines 1-19).

²⁶ *Id.* at 2827 (lines 1-14).

²⁷ *Id.* at 2879 (lines 5-11).

²⁸ *Id.* at 2877.

²⁹ NYSEG/RG&E order at 57-58; Con Ed. Commission Order at 145.

³⁰ See, Transcript, Day 6, at 3133.

³¹ See, Transcript, Day 1, at 627.

of their residency in a disadvantaged community. Moreover, as the Central Hudson EAP is approaching the budgetary cap of 2%, applying EAP to every eligible member in a disadvantaged community would push the Company past this threshold.³² Therefore, EAP cannot be considered an adequate answer to the disproportionate energy burden experienced by disadvantaged communities, because it does not properly identify deserving individuals, and even if it did, it would not be able to provide benefits to all eligible households within disadvantaged communities.

When taken as a whole, the panel's testimony has troubling flaws. As such, it should not be used by the Commission to support a rational basis that the rate plan is just and reasonable. Therefore, the ALJ's should recommend that Central Hudson review the process it has for mapping disadvantaged communities to ensure that both the benefits and burdens these communities experience are well documented and understood.

VI. RATE OF RETURN / FINANCIAL ISSUES

A. Overview

- i. *Staff's 9.2% return on equity and 48% equity ratio can be and should be accepted.*

The United States Constitution does not require the Commission to approve a rate plan that protects the Company's ability to raise capital at competitive costs when the increase in the cost of capital results from economic forces, not government regulation. The Company asserts, quoting *Hope Natural Gas Co.*, that they are entitled a return that is sufficient to attract and maintain capital.³³ However, as noted in subsequent cases, the due process clause prevents the government destruction of economic value.³⁴ It does not ensure values or restore values that have been lost by virtue of economic forces.³⁵ Further, the New York State Court of Appeals has held that "[n]either justice nor the Constitution obliges consumers to ensure a profitable return on an unprofitable enterprise."³⁶

³² *Id.* at 594.

³³ Central Hudson Initial Brief, at 159 (*citing Fed. Power Com. v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)).

³⁴ *Market St. R. Co. v. Railroad Comm. Of Ca.*, 324 U.S. 548, 567 (1945).

³⁵ *Id.*

³⁶ *Abrams v. Pub. Serv. Comm.* 67 N.Y.2d 205, 217 (1986) (*quoting San Diego Land & Town Co v. Jasper*, 189 U.S. 439, 446-447, (1903)).

The Company contends that a return on equity of 9.2% and a 48% equity ratio, in combination with other elements of Staff’s proposal, would fall below the credit metrics of credit rating agencies and Central Hudson’s credit rating would be downgraded as a result.³⁷ The Company, however, did not provide any citations that support that contention.³⁸ As such it should be given limited evidentiary value. Further, to the extent that Central Hudson states that such a return on equity and equity ratio would degrade the Company’s credit rating, Staff has stated that the Company’s credit rating would instead remain at their current levels.³⁹

Staff’s proposal regarding a return on equity and equity ratio, does not violate the Fourteenth Amendment of the United States Constitution.⁴⁰ The Company’s initial credit rating downgrade was not the result of regulatory measures taken by the Commission, but increased expenses incurred in response to the billing issues that plagued the Company.⁴¹ Therefore, Staff’s proposal, does not violate the Constitution, because the Company’s downgraded credit rating was the result of economic forces that were not the result of government regulation.

X. CUSTOMER SERVICE

F. Extreme Heat Protections

- i. *PULP urges the inclusion of our extreme heat proposal in the Recommended Decision.*

As discussed in our initial brief, PULP’s direct testimony included a proposal to halt residential service terminations for nonpayment where the heat index would be forecast to hit 90 degrees (including not terminating one calendar day before and two calendar days after 90-degree days).⁴² Additionally, in communities within the Company’s service areas impacted by “Heat Island” effects, PULP advocates for lowering the threshold temperature for extreme heat protections to 85 degrees.⁴³ Staff mentions our proposal in their initial brief and states that while they agree “with the intent of PULP’s recommendations to increase the number of days of

³⁷ Central Hudson Initial Brief at 159.

³⁸ *Id.*

³⁹ *See*, Transcript, Day 4, at 2487.

⁴⁰ *See generally*, e.g., *Abrams*, at 217; *see also*; *Market St. R. Co.*, at 567.

⁴¹ *See*, PULP initial Testimony at 17-18. The S&P Global Ratings reports acknowledged the billing issues faced by Central Hudson.

⁴² Transcript, Day 1 at 656, (lines 17-26).

⁴³ *Id.*

ceasing terminations during extreme heat,” they believe it is not warranted at this time due to the level of arrears at the Company and asked “the Commission consider postponing adopting the changes until a future rate case proceeding.”⁴⁴

While PULP is appreciative of Staff’s acknowledgment that they agree with the intent of our proposal, we disagree that the Commission should postpone adopting the proposal until a future rate proceeding as it is a matter of public health and safety. We do not believe that the level of arrears that the Company is experiencing, which Staff points out several times has been caused by the Company’s own actions,⁴⁵ should be considered higher priority over the health and safety of Central Hudson's customers. Therefore, PULP again urges the inclusion of our original extreme heat protections proposal in the Recommended Decision, as it will provide vital public health and safety protection against service termination on days over 90 degrees Fahrenheit.

XV. CONCLUSION

PULP hereby submits this Reply Brief for the purposes discussed above. We once again urge the denial of Central Hudson’s rate increase request and maintain that the totality of proposals PULP has presented throughout the course of these proceedings be considered when issuing the recommended decision.

Respectfully submitted,

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⁴⁴ Department of Public Service Staff Initial Brief (“Staff Initial Brief”), at 240.

⁴⁵ *Id.* at 202, 236-237.

