STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

Case 12-M-0192

PETITION FOR REHEARING OF
NEW YORK STATE ASSEMBLY MEMBER KEVIN A. CAHILL
AND FOR INVESTIGATION OF RATES

New York State Assembly Member Kevin A. Cahill submits this Petition for Rehearing of the Public Service Commission ("Commission" or "PSC") *Order Authorizing Acquisition Subject to Conditions* issued in Case 12-M-0192 in June 26, 2013 (*"June 26 Order"*).[1] He represents constituents of the 103rd Assembly District including most who are residential customers receiving natural gas or electric utility service from Central Hudson Gas & Electric Company ("Central Hudson"). He and his constituents are directly affected by the *June 26 Order* allowing the takeover of Central Hudson by Fortis, Inc., a Canadian holding company, on terms and conditions contained in a non unanimous "Joint Proposal" put forward by settling parties in the case. Parties to the Joint Proposal agreed to the acquisition of Central Hudson by Fortis, Inc., and to extend, with modifications, the current rate plan for natural gas and electric service for another year, through June 30, 2014. After a Recommended Decision of Administrative Law Judges recommended disapproval of the Joint Proposal, Central Hudson and Fortis Inc. proposed, in a letter to Commissioners, additional terms and conditions including extension of the rate plan for another year, which the Commission adopted in its *June 26 Order.*

Rehearing of the *June 26 Order* is requested pursuant to Section 22 of the New York Public Service Law and the Commission's regulations, 16 NYCRR § 3.7. Cognizant that on a rehearing motion the Commission does not entertain repetition of arguments previously made and considered, prior

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

arguments in opposition to the Joint Proposal,[2] though not abandoned, will not be reiterated here. The grounds for rehearing are that the Commission's *June 26 Order* is based on errors of law and fact, and new circumstances warrant its reversal and remand for evidentiary hearings on the terms of the acquisition and rate plan extension.

Assemblyman Cahill also petitions the Commission to open investigation and conduct evidentiary hearings on the reasonableness of rates established by its approval of the *June 26 Order*, which allows a Return on Equity ("ROE") of 10% before earnings above that amount are split with customers. The evidence in the record put forward by Department of Public Service expert witnesses in their prefiled testimony shows that applying the Commission's standard methodology for determining ROE, it should be 8.9%, not 10%. The difference is approximately $8.52 million per year, or $17.4 million. The evidence in the record also shows that in ten of the past eleven quarters, the four quarter trailing ROE for Central Hudson exceeded 8.9%, indicating that there is imminent risk to customers that Central Hudson will be allowed to earn super normal returns unless temporary rates are set and an investigation conducted before setting new rates as of the date of temporary rates.

I. GROUNDS FOR REHEARING

A. **The Commission Erred when it (i) Overlooked that an Evidentiary Hearing was Scheduled, (ii) Overlooked that Material Issues of Fact Requiring a Hearing Were Identified, (iii) Cancelled Rather than Postponed the Scheduled Evidentiary Hearings When Settling Parties Announced a Non Unanimous Settlement Proposal, (iv) Denied Requests for Evidentiary Hearings After the Joint Proposal of Settling Parties was Filed, and (v) Approved the Settling Parties Proposal without Resolving Conflicting Factual Matters Relevant to Whether the Acquisition is in the Public Interest and Whether the Extension of the Rate Plan Establishes Just and Reasonable Rates.**

The Commission overlooked the critical elements of the procedural history of the case that bear upon its decision at page 52, *et seq.* of its *June 26 Order* to reject requests for an evidentiary hearing. The Commission's recitation of the history of the case at pages 2-3 of the *June 26 Order*

[2] See, e.g., Letter of Assemblyman Cahill, then Chairman of the New York State Assembly Committee on Energy, to PSC Chairman Garry A. Brown, April 26, 2012, filed April 30, 2012 at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={53B4CE93-BF01-4C3E-93FC-E337939B934D} (criticizing Fortis acquisition of Central Hudson, insufficient public benefits, and urging close Commission scrutiny in light of attenuated residential utility consumer advocate offices).

- omits mention of the filing by parties of issues requiring a hearing on December 4, 2012,
- omits mention of the ALJs' December 5, 2012 determination that a hearing is needed,
- omits mention of the *Notice of Evidentiary Hearing* issued by the Secretary December 6, 2012,
- omits mention of the *Notice of Rescheduled Evidentiary Hearing* issued January 9, 2013, and
- omits mention of the Secretary's *Notice of Cancellation of Evidentiary Hearing* when some parties announced a non unanimous agreement.[3]

These omissions contributed to the incorrect decision to deny an evidentiary hearing requested by non settling parties. Accordingly, they are discussed in detail below.

1. **The Commission Overlooked that an Evidentiary Hearing was Scheduled.**

In its discussion regarding whether an evidentiary hearing should have been held, the Commission's *June 26 Order* does not mention or address the fact that an evidentiary hearing actually was scheduled. On December 6, 2012, the Commission Secretary issued a "*Notice of Evidentiary Hearing*," to review the petition for acquisition of Central Hudson by Fortis, Inc. The date for the evidentiary hearing was initially set for January 14, 2013.

The December 6, 2012 *Notice of an Evidentiary Hearing* was issued by the Commission Secretary after Department of Public Service (DPS) trial staff and other intervenor parties submitted conflicting prefiled direct testimony challenging the proposed acquisition of Central Hudson by Fortis, Inc., and an accompanying rate plan proposal for the rate year beginning July 1, 2013.[4] Significantly, in December 2012, the publicly filed position of the DPS witnesses, in their prefiled testimony, was that the putative positive benefits of the merger were seriously deficient in comparison with benefits in other

[3] The Recommended Decision ("RD") of the Administrative Law Judges ("ALJs"), issued May 3, 2013 while a motion for evidentiary hearings was pending, similarly omits any mention of the issues previously identified for hearing, omits mention of their ruling that a hearing is necessary to resolve them, omits mention of the Secretary's public Notices of Evidentiary Hearing, Rescheduled Evidentiary Hearing, and Cancellation of the Evidentiary Hearing.

[4] Commission hearings are expedited by having parties prefile their direct testimony. At the hearings, the prefiled written testimony is introduced, the witnesses swear to the truth of it as if presented orally, and are then subject to oral cross examination. The prefiled testimony in this case was never sworn to and witnesses never subjected to questioning. As a consequence, the unsworn testimony had no more weight than mere comments, and there was never any reconciliation of conflicting statements or testing of their credibility.

mergers, and extension of the rate plan without lowering the allowed Return on Equity ("ROE") was unreasonable:

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

Staff Policy Panel Testimony at 8-9.[5] Staff's testimony was that the "positive benefits" of the acquisition claimed by petitioners are insufficient, and that the proposed continuation of the rate plan, with its 10% ROE is unreasonable. Staff proposed, *inter alia,* adjustments so that the positive benefits would total $85 million, and an ROE of 8.9% for any extension of the rate plan. According to Central Hudson, whose witnesses' prefiled testimony supported continuation of a 10% ROE, the difference on the ROE issue alone amounted to $8.5 million.[6]

The *Notice of Evidentiary Hearing* states that "the principal purposes of the hearing are to take into evidence the pre-filed testimony and exhibits submitted in this case and to permit parties to cross-examine the sponsoring witnesses."[7] This is consistent with the Commission's regulation governing the procedure for considering transfers of utility ownership, which specify that at the evidentiary hearing on a petition for transfer of utility ownership:

> § 31.2 Evidence to be presented at hearing
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> 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.

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

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

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

As it turned out, however, there was never a hearing where "competent evidence" regarding the merits of the ownership transfer and rate plan modifications was received, where "proof of the ability" of the acquiring company to "render adequate service" was provided, and where the statements in the petition for acquisition could be tested for their veracity. As a consequence, conflicting positions and statements of fact in the record, much of it in hotly contested prefiled testimony relating to the risks and benefits of the takeover, and merits of the rate plan provisions for the year ending June 30, 2014, were never actually sworn to as true and subjected to cross examination by parties or judges. It was error not to hold the hearing on the acquisition contemplated by the Commission's regulation and initially scheduled in the *Notice of Evidentiary Hearing.*

ii. The Commission Overlooked that the Record Includes Identified Material Issues of Fact Requiring a Hearing.

The Commission, in rejecting requests for an evidentiary hearing, pointed out that before the parties requesting a hearing had entered the case, the ALJs asked parties to submit what they believed were material issues of fact to be addressed at the evidentiary hearing. The Commission basically faulted the late entrants into the case for not having identified factual issues.[8] The Commission overlooked, however, that substantial issues for the hearing were previously identified, before the parties now requesting a hearing had entered the case. Staff's submission of issues for the hearing contains the following list:

> Issues
> Risks
> 1. Management and Governance
> • Will the use of Central Hudson resources for other Fortis affiliates be at Central Hudson ratepayer expense?
> • Are the rulings of the Canadian Securities Administrators equivalent to the provisions of the Sarbanes-Oxley Act (SOX)?

[8] The Commission said "all previous intervenors had to meet a much earlier deadline for identifying issues allegedly requiring evidentiary hearings." *June 26 Order* at 53, referring to deadlines previously set by the ALJs for October 5, 2012 and then November 16, 2012 to identify factual issues. The Commission did not, however, resolve those issues, as there was no hearing where witnesses in support of the Joint Proposal could be questioned regarding their retreat from prior inconsistent positions taken in their prefiled testimony, and no sworn testimony was received to support the varying terms of the settlement agreement.

• Does an independent audit of internal controls as contemplated under SOX provide a value of benefit to Central Hudson ratepayers?
• In 2008, did Iberdrola or any of its affiliates provide shared services to its regulated U.S utilities?

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

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

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

Other Issues
5. Natural Gas Capacity Panel
• Reliability Forecasts - Should reliability forecasts be developed independently from sales forecasts and be based on a minimum thirty years of weather data?
• Capacity Asset Management - Should shareholders benefit through a sharing mechanism from the release of excess capacity that is paid by ratepayers?
• Is there excess capacity?
• Transportation and Balancing Procedures and Charges – Should the weighed cost of commodity for gas injected into storage during the non-winter season be utilized to more accurately estimate the actual storage price paid by all sales customers?

Despite the subsequent partial settlement joined in by Staff, containing terms and conditions inconsistent with Staff's pre settlement testimony (e.g., the level of public benefits and ROE), the issues identified by Staff remain in the record, unresolved.

Petitioners Central Hudson and Fortis also identified factual issues requiring resolution at the evidentiary hearing. Theirs is a much shorter list, but nonetheless a recognition of the need for a hearing to resolve conflicting information in the record and prefiled testimony:

> 1. Whether Petitioners' proposed rate freeze has no value, as Staff urges, or substantial value, as Petitioners urge?
>
> 2. Whether Petitioners' proposed corporate governance and financial protection conditions, efficiency savings, benefit funds, proposed voluntary change to the Earnings Sharing provision, and the value of Petitioners' proposed rate freeze, produce positive net benefits?
>
> 3. Whether Fortis is more risky than Iberdrola, as Staff urges on the basis of Staff's three reasons, or less risky as Petitioners urge?

After receiving these and other issue lists, the ALJs recognized that the record developed at that point by the prefiled testimony of parties contained many conflicting facts and that the issues identified by the parties "support the need for an evidentiary hearing." *ALJs December 5, 2012 Prehearing Ruling.*[9] The ALJs also recognized that the issues parties had identified were not exclusive, i.e., that other issues could be raised at the then-scheduled evidentiary hearing.

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

Id. The judges also indicated that the hearing schedule could be postponed for settlement negotiations:

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

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

Id. Parties subsequently entered into confidential settlement negotiations under the Commission's settlement procedures established in 16 NYCRR § 3.9. While negotiations were underway, the Secretary postponed the Evidentiary Hearing to January 22. *Notice of Rescheduled Evidentiary Hearing*, Jan. 9, 2013. A non unanimous agreement of some parties agreed to settle the case ensued, but as discussed below, that did not mean that facts and issues identified no longer exist or that the need for an evidentiary hearing to reconcile conflicting factual issues was eliminated. Accordingly, it was error for the Commission to overlook that issues for a hearing were identified based on conflicting assertions of fact in the record, and that the ALJs ruled that an evidentiary hearing is needed.

iii. It was Error to Cancel Instead of Postpone the Scheduled Evidentiary Hearings Upon the Report that a Non Unanimous Settlement Agreement was Forthcoming.

Based on a bare report of a non unanimous agreement, and before a Joint Proposal was actually filed and its terms for the acquisition and rate plan extension made public,[10] the Commission Secretary on January 14, 2013 issued a *Notice of Cancellation of Evidentiary Hearings*, stating:

> PLEASE TAKE NOTICE that, in light of an announcement of an agreement in principle among a majority of parties on a comprehensive negotiated settlement of the issues pending in this proceeding, the evidentiary hearing scheduled to commence on Tuesday, January 22, 2013, at the Commission's offices in Albany, New York, has been cancelled.

Two weeks later, on January 28, 2013, the Joint Proposal of the settling parties was filed. It was an error to cancel the evidentiary hearing based on a report from negotiating parties that a non-unanimous settlement was in the works. The process in this case stands in sharp contrast to Commission practice in other merger and rate plan cases where evidentiary hearings were conducted to test the soundness of settlement proposals and reconcile new testimony in support of the provisions of the settlements with the previously filed testimony. The evidentiary hearing should have been postponed, not cancelled, and then

[10] The order of events is confirmed by Staff: "[o]n January 11, 2013, the parties reached an agreement in principle and evidentiary hearings were canceled by Notice of Cancellation of Evidentiary Hearing issued January 14, 2013 *pending the filing of the Joint Proposal.*" Staff Statement in Support of Joint Proposal, Feb. 8, 2012, *emphasis added*, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={DF88FCB4-E984-432E-99B3-7588D24CF352}.

held after filing of the Joint Proposal to receive new evidence regarding it, from its proponents and any opponents.

iv. The Commission Erroneously Denied Requests for an Evidentiary Hearing After the Joint Proposal of Settling Parties was Filed Because it Overlooked the Ruling that an Evidentiary Hearing is Needed and the Issues for Hearing Identified Prior to Intervention of Parties Seeking to Pursue Hearings.

After the Joint Proposal was filed on January 28, 2013, information began to spread regarding the takeover of Central Hudson by Fortis, Inc., and opposition from customers, elected officials, towns, cities, and advocacy groups grew.[11] Up until that time, the public had no knowledge whatsoever of the details of the alternative proposals for the takeover and rate plan that were reached in confidential settlement discussions and manifested only when the Joint Proposal was filed. [12] In response to the outpouring of public opposition, on March 22, 2013 the Commission extended the time for comments to May 1, 2013, on April 2, 2013 announced additional public statement hearings held April 17 and 18, and on April 24, 2013 directed the issuance of a public Recommended Decision.

The previously scheduled evidentiary hearing, however, was not rescheduled, and public requests for evidentiary hearings went unanswered. No proponent of the Joint Proposal ever testified under oath regarding its terms or why the Joint Proposal contains provisions which vary from prior terms and conditions set out in the pre-filed testimony.

Although other parties who had earlier identified issues in dispute did not pursue them after the Joint Proposal was filed, eventually Citizens for Local Power and the Consortium, groups formed after the Joint Proposal was filed, intervened and filed a motion for evidentiary hearings and petition opposing

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[11] Prior to issuance of the Joint Proposal, there were only seven public comments (all negative) lodged in the Commission's DMM system. After the Joint Proposal was filed more than 900 comments were filed, mostly negative.

[12] Until the Joint Proposal was filed, the publicly known Staff position in prefiled testimony of Staff expert witnesses was that there should be public benefits of $85 million, and an ROE of 8.9%, close to the 9.3% ROE the then pending settlement of the Niagara Mohawk/dba National Grid rate case, where the "recommended authorized Return on Equity (ROE) of 9.3% per year, is well below the 10.22% ROE requested by Niagara Mohawk in its rebuttal filing and much closer to the 8.9% ROE set forth in Staff's pre-filed testimony." Staff Statement in Support of Joint Proposal in Cases 12-E-0201 & 12-G-0202, at 6, filed December 21, 2012. In the Niagara Mohawk cases, scheduled evidentiary hearings were held to receive testimony regarding the Joint Proposal there and the parties' compromises.

the merger on May 1, 2013.[13] Their request for an evidentiary hearing questioned the risks and benefits of the merger and reasonableness of the rate plan. The time set for responses to the motion was May 6, 2013. While their motion was pending, a Recommended Decision (RD) was issued on May 3, 2013, which opined that an evidentiary hearing is not necessary. RD at 4 – 5.[14] In its *June 26 Order*, the Commission followed the RD in denying a hearing, stating:

> In their January 29, 2013, ruling, the judges also required that any party advocating an evidentiary hearing on the Joint Proposal must specify in its initial comments a material issue of fact that could not be resolved without the cross examination of witnesses. No party's initial comments attempted to make such a showing and, accordingly, no evidentiary hearing was held. ****
>
> MOTION FOR EVIDENTIARY HEARINGS
>
> Shortly before the RD was issued, CLP/COA was admitted as a party to the proceeding, and it filed a motion requesting evidentiary hearings. The RD was issued before responses opposing the motion were due.... Nevertheless, the judges reviewed the motion standing alone and recommended that we deny
> it. From a procedural standpoint, considering fairness and efficiency, the judges found the motion inconsistent with the rule that *parties joining a proceeding already underway must accept the record as developed prior to their intervention,* .... inasmuch as all previous intervenors had to meet a much earlier deadline for identifying issues allegedly requiring evidentiary hearings.... Moreover, the judges observed, the pre-filed testimony and exhibits could be incorporated into the record (as advocated by CLP/COA) without evidentiary hearings.... Meanwhile, in terms of substantive issues, the judges found 'no factual questions that could be clarified by confrontation of witnesses and could materially affect the Commission's decision....' **** *The parties that intervened earlier than CLP/COA did not identify issues even arguably suitable for such procedures despite three formal invitations to do so, as described above.*[15]

The emphasized language highlights the error of the Commission. Under the "record as developed" prior to intervention of parties demanding a hearing, issues warranting a hearing had been identified, as described above. And, under the record as developed, the ALJs had determined that the clash of prefiled testimony presented factual issues requiring a hearing. It was arbitrary and without justification to cancel the scheduled evidentiary hearings based upon the announcement of a non unanimous agreement and then to deny the motion of new parties in the case for a hearing on the Joint Proposal because other parties in

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

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

[15] June 26 Order at 4 and 56 (*Emphasis added*).

the case settled. The clashing facts in the record still existed when the hearing was cancelled. See Points (i), (ii), and (iii) above. It is for the Commission, not some of the parties, to determine issues such as those listed above, including whether "risks of this Merger outweigh the alleged benefits," or whether "Central Hudson rates may be excessive post-Merger?" The state of the record is that the facts in the record were and still are in conflict on these and other issues.[16] The prefiled testimony in the record was not withdrawn or corrected or supplemented to align with the terms of the Joint Proposal.

Also, the law of the case is that the ALJ ruled that the facts placed in the record by the prefiled witness testimony is in conflict, requiring a hearing. That determination was never reversed. The decision of settling parties to abandon their positions did not change the facts to which the expert witnesses testified. By omitting the prior identification of disputed facts in the record, the *June 26 Order* essentially treats the proceeding, for hearing purposes, as if a new case began with the filing of the Joint Proposal, and finds the intervenors, who had not even formed or existed as a group or intervened before the Joint Proposal was filed, to be in default of the additional issue identification process after the Joint Proposal was filed. In fact, the state of the record when they joined the case was that conflicting facts going to the heart of the merger and rate plan existed in the record, and the law of the case was that such conflicting facts required a hearing. As discussed above, the cancellation of the hearing based on a report from settling parties that an agreement was forthcoming was erroneous, did not resolve the truth of the facts in dispute, and did not alter the correctness of the ALJ's prior decision that a hearing is needed to resolve the facts. Accordingly, even accepting the record as of the time of intervention, the intervenors' request for a hearing should have been granted.

(v). The Commission Erred in Denying the Motion for a Hearing Because there was No Participation in the Settlement Process by a Residential Consumer Advocate with Adequate

[16] It appears that in addition to the Commission oversight, some of the parties, including PULP and Multiple Intervenors, also erroneously assumed that the triggering event for identifying factual conflicts was the filing of the Joint Proposal on January 28, 2013, which modified the terms of the initial Petition. In actuality, issues requiring a hearing were previously identified with respect to the core provisions of the Petition, many of which were unchanged in the Joint Proposal, and the law of the case was that a hearing is required to resolve the factual conflicts. The partial settlement agreement could not eliminate the factual conflicts, it only meant that some parties agreed not to seek to resolve them.

Resources to Scrutinize the Proposed Acquisition and Legal Capacity to Challenge the Result.

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

Significantly, there is no support for the Joint Proposal 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, including, for example, the express statutory power to take legal positions different from those of the PSC in judicial review proceedings. The UIU initial testimony and rebuttal testimony catalogs the inadequacy of consumer benefits and defects in the proposed merger and rate plan extension, and UIU proposed meritorious reforms, including improvement of low-income rates and programs. UIU's subsequent support for the Joint Proposal cannot with confidence be deemed to be representative of focused and independent residential consumer interests due to the UIU state agency structure, the limited resources available to UIU, and the limited issues UIU pursued. When new community groups largely comprised of residential customers emerged in reaction to the Joint Proposal, and filed a petition in opposition to it and requested evidentiary hearings, the Commission should not have limited their participation and should have granted the motion for hearings, even if late.

vi. The Commission Erred when it Approved the Settling Parties Proposal without Resolving Conflicting Factual Matters Relevant to Whether the Acquisition is in the Public Interest and Whether the Extension of the Rate Plan Establishes Just and Reasonable Rates.

Even if the new intervenors had not joined the case to seek a hearing, it was necessary for the Commission to hold a hearing to resolve the issues identified through prefiled expert witness testimony and exhibits. There still exists in the record a set of issues for resolution: those previously identified in the clashing prefiled testimony of parties who agreed to settle (e.g., Staff and Central Hudson and Fortis, Inc.). Those issues (enumerated in point (i) above) were not properly resolved in the Joint Proposal, the RD or in the *June 26 Order* because there was no hearing.

After the Joint Proposal was filed, testimony of those who previously filed testimony could have been received to explain, for example,

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

A consequence of there being no sworn testimony to support the Joint Proposal is that the clash between the detailed prefiled witness testimony and supporting exhibits supporting, for example, $85 million in positive benefits and an ROE of 8.9% stands in sharp contrast to the terms of the Joint Proposal. Staff attempted in vain to paper over the clashing facts in comments submitted by its lawyers to support the Joint Proposal. In the comments, Staff retreated from the positions in the prefiled expert witness testimony, but that submission had no expert witness testimony of those who previously testified in detail as to the level of benefits and ROE, or exhibits or actual evidence to support those and other retreats from the prefiled Staff expert witness testimony. A hearing would also have offered more

transparency by shedding more light on the Staff decision to settle for much less than expert witnesses said was right in their testimony.

B. The Commission Erred when it Considered and Approved a New, Unilaterally Modified Proposal to Establish Rates, Terms and Conditions for Central Hudson Electric and Gas Service for the Year Beginning July 1, 2014 after the Recommended Decision and Briefs on Exceptions were Filed, without Notice to Parties and the Public Inviting Comment on the New Proposal, and without a SAPA Notice, in violation of law.

Article IV section 8 of the State Constitution says, in relevant part:

> No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations, by appropriate laws.

The New York State Administrative Procedure Act (SAPA) § 202 (1) implements and further augments the constitutional requirement, and says, in relevant part:

> Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule.

These required procedures are a prerequisite to agency action, and a failure to follow them renders the action invalid. Scrutiny of the facts in this case shows that SAPA was violated due to the Commission's inadequate notice of rulemaking, lack of a new or revised Notice when a substantially modified Joint Proposal was considered and adopted by the Commission in lieu of the original petition that was the subject of the initial SAPA Notice, and the lack of any new or revised SAPA Notice when the Commission considered and adopted a rate plan for yet another additional year without proper notice to the public and an opportunity to comment.

In its *June 26 Order* the Commission took action under its State Administrative Procedure Act (SAPA) Notice of Rulemaking previously published in the New York State Register on May 23, 2012, p. 15.[17] The Notice of Rulemaking states that on April 20, 2012, petitioners Central Hudson and Fortis, Inc., filed a petition for approval of the sale of Central Hudson to Fortis, Inc. pursuant to Public Service Law §

[17] *June 26 Order*, p. 1, fn. 1.

70. which requires Commission approval. This SAPA Notice advising the public of the initiation of this proceeding references the petition regarding the utility acquisition and transfer of ownership. The SAPA Notice filed, however, omits any mention of the proposal in the Petition to establish or modify Central Hudson's natural gas or electric rates for the period ending June 30, 2014.

On January 28, 2013, the non unanimous Joint Proposal was filed with the Commission in Case 12-M- 0192 by Central Hudson, Fortis, Inc., Staff and other parties supporting it. The Joint Proposal proposed the acquisition of Central Hudson by Fortis, Inc. on terms and conditions which modified those contained in the petitioners' original petition, which was the subject of the Commission's SAPA Notice. The Joint Proposal also includes provisions to modify and establish natural gas and electric rates for the period ending June 30, 2014, on different terms and conditions than those contained in the original petition (which in turn were not mentioned or described in the Commission's SAPA Notice). The Joint Proposal was considered and approved by the Commission in its *June 26 Order*.[18] In doing so, the Commission adopted a modified plan that was not the same as the proposed "rule" that was the subject of the initial SAPA Notice. No Revised SAPA Notice was filed relating to the consideration and eventual adoption by the Commission of the rate plan changes or the revisions to the rule originally proposed.

On May 30, 2013, after all briefs had been submitted to the Commission regarding its consideration of a Recommended Decision which recommended disapproval of the Joint Proposal, Central Hudson and Fortis, Inc. filed a letter to Commissioners proposing additional modifications to the Joint Proposal that was under consideration, including new rate plan provisions for yet another year ending June 30, 2015. No new or revised SAPA Notice was issued.

The failure of the Commission's initial SAPA Notice to mention the proposed rate plan provisions for the year ending June 30, 2014, the failure to issue a new or revised notice that it was considering the January 28 Joint Proposal, and the failure to issue a new or revised SAPA Notice regarding the May 30 proposal of Petitioners regarding establishment of rate plan provisions for the year ending June 30m

[18] *June 26 Order*, p. 61 ("the terms of the Joint Proposal dated January 25, 2013, which was filed in this proceeding on January 28, 2013, are adopted in their entirety except as otherwise noted, and are incorporated as part of this order").

2015, was in violation of SAPA. Accordingly, rehearing should be granted, the Order reversed, new SAPA Notices issued regarding terms and conditions contained in the Joint Proposal and Letter to Commissioners, and new proceedings, including evidentiary hearings, held to review the January 29, 2013 Joint Proposal and May 30, 2013 Letter to Commissioners.

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

The Commission approved the one year rate plan extension contained in the Joint Proposal and then extended the rate plan yet another year based on a last minute submission, a letter to Commissioners from the petitioners, without issuing a public notice and without any public comment period. Both extension provisions allow Central Hudson to earn a ROE of 10% before any sharing of over earnings with customers begins. The record contains detailed expert witness testimony of DPS which does not support a ten percent level of allowed earnings.[19] The *June 26 Order* acknowledges as much, yet unjustifiably approves it:

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

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

There is no actual evidence, however, to support the speculation by the Commission that without continuation of the rate plan with an excessive allowed 10% ROE Central Hudson could file a rate case and win "some rate relief." That presupposes they could carry their burden of proof. In contrast, the Commission is giving the utility a lot of "rate relief" now with no proof it is appropriate. According to testimony of Central Hudson's witnesses, the difference between earning the 8.9% ROE in Staff's testimony and the 10% requested by Central Hudson and allowed by the Commission would $8.5 2 million. Rebuttal Testimony of Mosher-Brideau for Petitioners, Nov. 27, 2012, p. 10. For the two years of extension, it would be $17.4 million. None of that would be shared with customers under the plan.

The possibility that Central Hudson will benefit from the ROE being higher than 8.9% is not remote. The record shows that in ten of the most recent eleven quarters, Central Hudson's Trailing Four Quarters earnings were actually more than the 8.9% ROE that is currently correct based on the Commission's standard methodology.[20] The Commission's recent Order regarding Central Hudson's request for extra storm damage recovery relating to tropical storm Irene denied part of it because the company was making a ROE 10.24%. As stated in a recent Commission order:

> The third criterion that must be met for deferred accounting treatment is that the utility cannot be over-earning. The Company provided a calculation of its rate year two electric regulatory return on common equity, which showed a calculated ROE of 10.00%....
>
> After making these adjustments, **Central Hudson's resulting ROE is 10.24%....** A rate plan provides a balance of interests with protections for both the utility and its customers, by including provisions such as an earnings sharing mechanism and prospective Commission authority to reconcile certain expenses. **While costs from unexpected events may occur that reduce earnings, other unexpected events may occur that result in savings, and therefore increase earnings.** In the absence of such a balancing of interests, should costs related to an unexpected event, such as an extraordinary storm, lower earnings in a material way, the expenses can be deferred but only up to the point where the Company is allowed to earn its allowed return. Central Hudson's Rate Plan allows it to earn an ROE of 10.0%, and therefore, Central Hudson would be over-earning with allowed deferral treatment of all Irene costs. As previously discussed, since the Commission's third criterion that must be met for deferred

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

> accounting treatment is that the utility cannot be over-earning, Staff proposes an additional adjustment of $1,368,000 to eliminate the over-earnings.[21]

The Commission's assertion that Central Hudson would qualify for rate relief in the next two years without the stayout provision is in glaring conflict with evidence the company has been earning more than the normally allowed ROE. The quotation from the recent order recognizes that sometimes unanticipated events can cause savings that reduce costs and enhance earnings. The bare invocation of "experience" and prediction the company would have a basis to ask for more without any real evidence to support the assertion that they would win "some" relief it stands in contrast to the actual facts in the record of the case, put forward by the Commission's own expert witnesses, the actual ROEs earned in recent times, and the Commission's own finding in the Irene cost deferral case.

In an analogous situation, the North Carolina Supreme Court on April 12, 2013 issued an opinion nullifying a Duke Power rate settlement approved by that state's Public Service Commission (PSC). Duke Power in its initial rate case filing had asked for an 11.5% ROE. A witness for the PSC's Public Staff had testified that the ROE should be 9.25%. A non unanimous settlement agreement was eventually reached, including the utility and the PSC's Public Staff, for an agreed upon ROE of 10.5%. In its opinion, the North Carolina Supreme Court reversed the PSC order approving the rates, and remanded the case to the PSC for further proceedings. State of North Carolina ex Rel. Utilities Commission; Duke Energy Carolinas, etc. v. Attorney General Roy Cooper, etc., (Sup. Ct. N. Carolina No. 268A12 April 12, 2013).[22] The Court faulted the North Carolina PSC approval of the settlement because it lacked any independent determination of ROE:

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

[21] *Order Approving Staff Recommendation*, at 9 – 11. CASE 11-E-0651 - Petition of Central Hudson Gas & Electric Corporation for Commission Approval to Defer Storm Restoration Expenses for the Rate Year Ended June 30, 2012, available at .

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

> independent determination regarding the proper ROE based upon appropriate findings of fact that balance all the available evidence.

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

D. **Central Hudson's Private "Golden Share" Nominee Should be Rejected Because (i) It Has No Legal Obligation to Effectuate the Commission's Objective to Prevent Voluntary Bankruptcy of a Fortis-Controlled Central Hudson, (ii) there are No Discernible Standards for the Nominated Private Golden Share Holder to Determine and Protect the Interests of New York State and Interests Under the Public Service Law, and (iii) the Commission Lacks Power to Subdelegate its duties to Protect the Public and Enforce Interests Under the Public Service Law to a Private Entity.**

The *June 26 Order* confidently invokes a "Golden Share" provision as being a bulwark of protection for customers from a future voluntary bankruptcy decision made by a Fortis-controlled Central Hudson board of directors: "The "golden share" requirement will prevent the placement of Central Hudson in voluntary bankruptcy."[23] After the Commission issued its *June 26 Order*, Central Hudson revised its corporate certificate to create the "Golden Share", making it a junior preferred class of stock consisting of one share to be voted only if there is a Central Hudson Board vote on whether to file for voluntary bankruptcy. Contrary to expectations that the Golden Share holder would have an explicit duty to protect customers, the holder of the stock is supposed to protect the "interests of the State of New York, including legal and other interests arising under the Public Service Law." Central Hudson as well as consumers have "interests arising under the public service law" so the wording of the certificate and the parameters allowed for the Golden Share holder are no assurance that the holder would vote against bankruptcy. Contrary to expectations that the Golden Share Holder would be a person and possibly a state official, the Golden Share holder proposed by Central Hudson will be held by a corporation known as "GSS Holdings (CHGE) Inc." That company is in turn controlled by unnamed persons.

[23] June 26 Order at 42.

Assemblyman Cahill agrees with PULP's objection that this arrangement lacks accountability to customers and to the Commission to protect their interests in any Central Hudson decision regarding bankruptcy. Even in situations where reliance is placed on private entities to effectuate state objectives, there must be some standard for the private entity to follow and ultimate accountability to government. *8200 Realty Corp. v Lindsay*, 27 NY2d 124, 131-132 (1970), ("That members of a complex industry play a part in guiding government to a fair regulation of the industry is an obvious advantage as long as government keeps the ultimate controls in its own hands"). The Commission should not approve this arrangement, where a private party would be charged with the general duty to vote in the interests of the State of New York and vague "interests arising under the Public Service law, with no guidance as to how those interests would be ascertained. The nominated company has no formal duty to the state or interests under the Public Service Law, and so there can be no assumption that this private entity would act to vindicate these public interests, as there would be if the nominee were a state official or acting at the direction or following the guidance of a state official.

The Commission is charged with the duty to effectuate the New York State Public Service Law and protect interests under it, not "GSS Holdings (CHGE) Inc." Accordingly, either the Commission Chairman or the Commission Secretary should hold the Golden Share, or if that is not feasible, some other state official such as the Secretary of State, State Comptroller, or Attorney General should hold it. Alternatively, the Commission should issue an order which establishes guidance for "GSS Holdings (CHGE) Inc." to follow in the event of a vote on Central Hudson's bankruptcy.

II. GROUNDS FOR RATE INVESTIGATION AND SETTING TEMPORARY RATES

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

Assemblyman Cahill also petitions the Commission to open an investigation and conduct evidentiary hearings on the reasonableness of rates established by its *June 26 Order*, which allows a

Return on Equity ("ROE") of 10% before earnings above that amount are split with customers. As discussed above, the evidence in the record put forward by Department of Public Service expert witnesses in their pre-filed testimony convincingly shows that applying the Commission's standard methodology for determining ROE, Central Hudson's ROE should be limited to 8.9%, not 10%.[24] The difference amounts to approximately $8.52 million per year, or $17.04 million over the two year rate plan extension.

In deflecting criticism of the rate plan with a 10% ROE it approved for two more years, the Commission gave an assurance at page 50 of its *June 26 Order* that "In no way does it represent a guarantee that we would not institute a proceeding to lower rates if such an action appeared to be warranted at any time during the next two years." Such action is warranted now. Central Hudson customers should not pay higher rates due to an excessive ROE. The evidence in the record shows that many Central Hudson customers are having financial difficulty meeting their obligations to pay utility bills on time and are threatened with shutoff. Central Hudson also has the highest rate of shutoffs for collection purposes of any utility in the state.[25] Continuation of the current rate plan with its excessive ROE increases hardship to Central Hudson customers.

The Commission opined, citing no evidence, that maybe Central Hudson would have filed for higher rates without the "stayout" provision inherent in the rate plan extension. Of course they would stay out and not file for new rates with a sweet 10% ROE.

In ten of the past eleven quarters, the four quarter trailing ROE for Central Hudson exceeded 8.9%.[26] Also, as discussed previously under the grounds for rehearing, the Commission recently found that Central Hudson had been making more than a 10.24% ROE, and disallowed a portion of claims for reimbursement of Tropical Storm Irene related expenses because the company was earning more than

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[24] The Commission should also review and revise the earnings sharing mechanism, which allows Central Hudson to keep half the earnings in excess of the ROE limit.

[25] See Testimony of Barbara R. Alexander, October 12, 2012, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={9E9E2E56-180F-488E-9154-A933D049005A}

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

10%. This indicates that there is real and imminent risk to customers that Central Hudson will be allowed to earn super normal returns unless temporary rates are set now and an investigation conducted before setting new rates as of the date of temporary rates. In that investigation, the Commission should also scrutinize Central Hudson's harsh collection practices and take stronger steps to reduce shutoffs and make bills affordable to low income customers, in order to promote the state policy in Section 30 of the Public Service Law to promote continuous service to residential customers.

CONCLUSION

The Commission should grant the petition for rehearing for the reasons stated above. The matter should be remanded to the ALJs for further proceedings, including an evidentiary hearing.

The Commission should commence an investigation whether the 10% ROE set in the June 26 Order is excessive and whether Central Hudson's gas and electric rates should be reduced, and promptly set temporary rates to protect consumers during the investigation and pending a final determination of reasonable rates, terms and conditions of service.

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Respectfully submitted,

Kevin A. Cahill
Governor Clinton Bldg. Suite G-4
1 Albany Ave
Kingston, NY 12401
845-338-9610