STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

Case 12-M-0 192 — Joint Petition of Fortis Inc., FortisUS Inc., Cascade Acquisition Sub Inc., CH Energy Group, Inc., and Central Hudson Gas & Electric Corporation for Approval of the Acquisition of CH Energy Group, Inc. by Fortis Inc. and Related Transactions	:	Case 12-M-0192

BRIEF ON EXCEPTIONS

ON BEHALF OF

CITIZENS FOR LOCAL POWER

AND

CONSORTIUM IN OPPOSITION TO THE ACQUISITION

May 17, 2013

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INTRODUCTION

This Brief on Exceptions to the Recommended Decision ("Rec Dec"), issued May 3, 2013, is submitted by the Citizens for Local Power ("CLP"), an ad hoc group of Central Hudson Gas & Electric Corporation ("Central Hudson") ratepayers who became concerned about the impact that the acquisition by Fortis, Inc. ("Fortis") will have on the long-run sustainability of the region and by the Consortium in Opposition to the Acquisition ("Consortium"), an ever-growing group of municipalities and non-

governmental organizations that are banding together to give voice to their opposition in this consolidated filing.[1]

There is no need to recite the procedural history since that is accurately and comprehensively covered in the Rec Dec.

CLP and the Consortium agree with the ALJs conclusion presented in the Rec Dec. "We find it relatively easy to conclude that the benefits of the merger trransaction purusant to the Joint Proposal are outweighed by the detriments remaining after mitigation." [2]

However, the Rec Dec did not completely identify all of the detriments of the proposed transaction that in some cases, standing alone, are sufficient to defeat the proposal. Together, the detriments and risks paint an overwhelming picture of a bad deal for Central Hudson's electric and gas customers, Central Hudson's employees (both union and non-union), the mid-Hudson Valley Region and the Department of Public Service Staff that will have to supervise and set rates within a hopelessly complex holding company structure that will insure inaccurate cost allocation, even if deliberate manipulation is not present. This complex structure is shown on Appendix A to this Brief on Exceptions and was submitted by the Petitioners in their original filing. Appendix B shows where Central Hudson will fit in way down at the bottom, if the acquisition is approved.

[1] Much is made of the late arrival of CLP and the Consortium by Petitioners, Staff and Multiple Intervenors in their opposition to the Motion for an Evidentiary Hearing. That is simply a fact of the late

[2] Rec Dec at page 66.

The main concerns that were not addressed in the Rec Dec but are crucial to consider are: (1) the risk of a credit downgrade to Central Hudson is so significant as to be probable; (2) the risk of the adverse effect of creating $444 million of "goodwill" that is likely to be considered instantly impaired; (3) the risk that the majority of mergers fail; (4) the risk that NAFTA can and will be used by Fortis has not been adequatedly appreciated; (5) Fortis corporate behavior demonstrates it is not qualified to own Central Hudson; (6) the adverse impact that an acquisition by Fortis will have on environmental and energy policy concerns.

EXCEPTION NO. 1

THE REC DEC DOES NOT ADEQUATELY ADDRESS ALL OF THE RISKS OF THE ACQUISITION, PARTICULARLY OF A CREDIT DOWNRATING TO CENTRAL HUDSON

After describing the various provisions that "are reasonably designed to mitigate the concerns to which they are addressed," the Rec Dec observes, under the sub-heading, "G. Financial Concerns":

> Again, however, they have no inherent value in the absence of the merger. They exist only to reduce risk. Only if they are entirely successful will the financial risk to Central Hudson be completely eliminated. [3]

The reality is that these mitigation measures are largely in place for only three years and there is no empirical evidence in the "record"[4] demonstrating that financial risk will be entirely eliminated even if these mitigation measures work as advertised. The financial debacle of the last decade and a half starting with Long Term Capital Management's

[3] Rec Dec at pages 53 to 54.

[4] Here the "record" refers to all of the documents posted on the Commission's DMM website and should not be construed as an abandonment of the request for an evidentiary hearing.

implosion and ending with the Great Recession, instruct that there is always the perfect storm or the financial Black Swan that no one has seen before.

However, with Fortis there are some additional business risks that have not been adequatedly identified in the Rec Dec. There is the risk of losing money on its $104 million investment in Belize that the government expropriated. As reported in the Fortis, Inc., 2012 Annual Report:

> Fortis continues to challenge the constitutionality of the Government of Belize's expropriation of Belize Electricity and has a strong, well-positioned case before the Belize Courts. In June 2011 the Government of Belize enacted legislation expropriating the Corporation's 70% controlling ownership investment in the utility. At December 31, 2012, the book value of the expropriated investment was $104 million.[5]

There is the risk that the $900 million, 335-megawatt Waneta Hydroelectric Expansion Project will not go into service as predicted. While it was reported to be on schedule and within budget at the Fortis Annual Shareholders Meeting, it was also reported that it was two years from completion scheduled for the Spring of 2015.[6] Fortis owns a 51% share ($459 million) of that project and is the largest capital project Fortis is presently developing.

Fortis also has ownership interests in risky commercial and retail office space as well as 23 hotels in Canada with a value of about $700 million[7].

Fortis dividend payout ratio is 72.3% as of December 31, 2012--up 4.5% from December 31, 2011. The Edison Electric Insitute reveals that the EEI Index Companies average a 62.3% dividend payout ratio.[8] Fortis has a high payout ratio by industry norms

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[5] Fortis Inc., 2012 Annual Report, p. 5.
[6] Here is the link to the audio recording of the meeting: http://www.fortisinc.com/InvestorCentre/InvestorPresentations/AGM/Details.aspx?id=75
[7] Fortis, 2012 Annual Report at page 3.
[8] http://www.eei.org/whatwedo/DataAnalysis/IndusFinanAnalysis/Documents/2012_Q4_Dividends.pdf

and that may not be sustainable, adding further risk.

Over the next five years (2013 to 2017) Fortis expects to invest approximately $6 billion in its CAPEX program (optimistically including Central Hudson).[9]

Fortis' attempted to acquire Central Vermont Public Service ("Central Vermont") in a deal announced on May 30, 2011 that was valued at $470.3 million or $35.10 per share. But the Central Vermont Board of Directors decided to accept an offer from Gaz Metro of Canada, the owner of Green Mountain Power Corporation, that also provides electric service in Vermont for a slightly ($0.15) superior share price of $35.25 per share. The deal would combine Vermont's two largest electric utilities and provide savings to customers estimated at $144 million over ten years, acccording to a joint statement from the CEOs of Green Mountain and Gaz Metro: "the companies said that other than some executive officers, they did not plan to layoff employees."[10] Central Vermont had to pay Fortis a $17.5 million termination fee and $2.0 million in expenses. So it appears that the Central Vermont Board of Directors, despite the steep price of cancelling the wedding, was looking out for its shareholders, customers and employees while Fortis was looking to add another operating company to grow its business faster. Growth through acquisition is part of Fortis's plan and adds risk to the overall enterprise since most mergers fail, a point to be discussed later.

Finally, it must be observed with a certain amount of irony that Fortis received $22 million ($0.12 per share) in the first quarter of 2013 to settle expropriation of non-regulated hydroelectric generating assets and water rights in central Newfoundland. While Fortis did not initiate the NAFTA claim, it certainly benefited from it.

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[9] Fortis, 2012 Annual Report at page 6.

[10] http://dealbook.nytimes.com/2011/07/12/gaz-metro-bests-fortis-to-buy- vermont-utility/

Accordingly, it is well aware of the power of NAFTA.[11]

Aside from these unrecognized business and financial risks, the Rec Dec did not address the lower credit quality of Fortis compared to Central Hudson. Here is a qualitative and quantitative analysis that is offered for illustrative purposes for the Commission's review.

Credit Rating Downgrade[12]

One of the biggest risks is the potential down grade of Central Hudson's credit, notwithstanding the ring-fencing provisions that have been proposed that are comparable to, and arguably superior to, the conditions required in other mergers, particularly the National Grid acquisition of KeySpan and Iberdrola's acquisition of Energy East.

Central Hudson's Credit Ratings (Senior Unsecured Debt) are as follows:

S&P	A/Credit Watch Negative
Moody's	A3/Stable
Fitch	A/Stable[13]

Capital Structure of Central Hudson is as follows:

Long-term debt	50.6%
Short-term debt	-%
Preferred common stock	0.9%
Common equity	48.5%
Total	100.0%

[11] Abitibibowater Inc., v. Government of Canada, Notice of Arbitration and Statement of Claim, February 25, 2010.

[12] This information was presented to the ALJs in CLP's and the Consortium's Motion for an Evidentiary Hearing and Opposition to the Acquisition on May 1, 2013. It was not addressed in the May 3, 2013 Rec Dec and so is repeated here for the Commission's review.

[13] Source: http://www.chenergygroup.com/corporateprofile/index.html

Fortis Credit Ratings[14] are as follows:

S&P	A-
Moody's	Baa1 (Fortis BC, Fortis largest subsidiary) Fortis, Inc. not rated
Fitch	No ratings for parent or subs

Fortis, Inc. Capital Structure is more leveraged than Central Hudson:

Long-term debt	56%
Preferred equity	8%
Common equity	36%
Total	100%

The thinner equity ratio of Fortis (36%) to Central Hudson (48.5%) implies higher financial risk due to the lower equity buffer.

As can be seen, Fortis's credit is a notch below that of Central Hudson according to the only rating agency that rated Fortis, Inc. The notch difference is also revealed in the rating of Fortis BC, a large Fortis' subsidiary. From a credit perspective, Central Hudson is marrying beneath its station. A notch is worth at least 48 basis points as of April 26, 2013.[15]

The next table will provide the yield and basis spread for public utility issues from 2000 to 2013 to date.

[14] Fortis, Inc. is not rated by Moody's. Fitch does not rate the parent or any subs.

[15] Moody's Analytics, April 26, 2013 Daily Bond Yields for Utilities; http://credittrends.moodys.com/sr/bond_yield.asp?status=1&script_name=/sr/bond_yield.asp. This is a single day of data and represents a snap shot. The actual basis point yield difference could be larger or smaller depending on market conditions at the time of issuance. However, it is safe to say that lower rated debt is always more expensive than higher rated debt.

Public Utility Bond Yields

	A	Baa	Baa-A
2013	4.18	4.71	0.53
2012	4.13	4.86	0.73
2011	5.04	5.56	0.52
2010	5.45	5.95	0.5
2009	6.05	7.06	1.01
2008	6.52	7.23	0.71
2007	6.07	6.33	0.26
2006	6.07	6.32	0.25
2005	5.65	5.92	0.27
2004	6.16	6.4	0.24
2003	6.58	6.84	0.26
2002	7.37	8.02	0.65
2001	7.76	8.03	0.27
2000	8.24	8.36	0.12

Compliments of Moody's

What becomes clear is that the risk premium range between A and Baa is from 12 to 101 basis points using annual averages since 2000, so the April 26, 2013, data point is within the median of the data. One can see that the spread has widened considerably starting in 2008 compared to the earlier years, except for 2002, reflecting investor's appetite for credit quality with the onset of the financial crisis.

If all of the anticipated CAPEX budget of $660 million[16] over the next five years is financed by debt, then the additional cost will be $3.168 million per year (using a 48 point basis spread) and that additional cost will be built into rates at some point, probably sooner than later. This cost would not be accrued. Rather, this is cash out the door that would not be incurred but for the acquisition. Since it is highly unlikely that the CAPEX will be financed with all debt, then the equity component of Central Hudson's capital structure will require even more costly funds to compensate for the

[16] http://midhudsonnews.com/News/2012/September/11/CH_infra_inv-11Sep12.html

increased risk. If the cost of equity is 9% for an A rating then it is not unreasonable to assume that the cost of equity would increase at least proportionately for a one notch difference in credit rating. Thus, the cost of equity for the lower rated company would be 4.41% (Baa)/3.93% (A) x 9% = 10.10%. Assuming that the CAPEX is financed 50% debt and 50% equity--a realistic assumption--then the cost is as follows:

$330 million at 4.41% = $14,553,000

$330 million at 10.10% =$33,330,000

Total annual financing $47,885,000

Compared to the same 50 – 50 financing at the lower cost of debt and equity:

$330 million at 3.93% = $12,969,000

$330 million at 9.0% = $29,700,000

Total annual financing $42,669,000

Thus, it can be seen that only a one notch down rating will be quite costly to the ratepayers and will result in increased annual capital cost of money of $5,216,000 annually. This is presented as an example of the negative impact Fortis will have on Central Hudson. One can quibble with the assumptions in the example, but the impact from a qualitative and order of magnitude perspective is without debate.

In this section it needs to be noted that the measures in the JP that seek to protect Central Hudson against lowering of credit status due to a downgrade of Fortis' debt are limited to three years:

> IV.A.1) (e) "If , as a direct result of a downgrade of Fortis Inc.'s debt within three years following the closing of this transaction, Central Hudson is downgraded to either S&P's or Fitch's BBB category (BBB+ or lower), or the equivalent for moody's (Baa1 or lower) or DNRS's (BBB(high) or lower), and Central Hudson incurs increased costs of debt, the incremental cost of debt incurred by Central Hudson in comparison to the cost of debt which would otherwise have been

> incurred by Central Hudson under its pre-downgrade credit rating will not be reflected in Central Hudson's cost of capital or the detremination of Central Hudson's rates in subsequent rate cases," etc.

This provision, while explicitly acknowledging the real danger that the merger could result in lowering Central Hudson's debt rating, at the same time *limits the mitigation measures to just three years*.

On the other hand, after the acquisition, Central Hudson will not be obligated to file reports with the Securities and Exchange Commission. This will make Central Hudson's financial performance more opaque and further withdrawn from public and regulatory scrutiny. This is not a benefit, but rather a significant additional detriment.

EXCEPTION NO. 2

THE RATEPAYERS CANNOT BE INSULATED FROM THE COST OF GOODWILL IN THE LONG RUN

The Rec Dec looks to the financial protections built into the JP as protecting the ratepayers of Central Hudson from the future financial difficulties of the parent for the next three years.[17] On the other hand, the Rec Dec notes that the "merger will be an expensive undertaking" when "the stock premium, transaction costs and positive benefit adjustments are totaled."[18] The Rec Dec failed to note the potential cost of goodwill and the potential impact the identified expenses will have on the merged enterprise since

> none of those costs can be recovered directly from ratepayers. There will, therefore, be considerable pressure on management to recover them in areas over which they retain control. Recent experience with substantial reductions in force

[17] These measures, it should be noted, are largely and thankfully untested.
[18] Rec Dec at page 42.

> following other utility mergers in this State clearly demonstrate that labor is one of, and perhaps the most important, of those areas.[19]

This statement is obviously an acknowledgment of the legitimacy of Local 320's concerns.

The Rec Dec, while noting that the Commission never allows goodwill to be included in setting rates, does not follow that concept to its ultimate conclusion. Goodwill, if it becomes impaired, will have to be written down or written off. And that will have an adverse effect on earnings and will put further downward pressure on credit ratings and will result in a redoubling of management's efforts to cut costs. It is abundantly clear that if the goodwill is pushed down to the operating company level, it will not earn a return. And it is likely that the goodwill created in the proposed acquisition will be pushed down to Central Hudson, the reporting unit for Financial Accounting Standards Board ("FASB") purposes. At the very least, it is clear that the annual impairment test is conducted at the operating company level. The Rec Dec, however, does not reveal the size of the goodwill that will be created by this acquisition.

In response to Staff's Intergatory DPS-M273, Fortis notes that $444 million of goodwill will be created. Central Hudson currently has $38 million of goodwill sitting on its books already. So the total is $482 million of goodwill that is by regulatory fiat, a non-performing asset. It does not generate cash or earnings. In fact, some commentators of accounting practices have stated that goodwill should not even be recognized as an asset since it has none of the characteristics of an asset. Appendix C elucidates on this issue by presenting an excerpt from: "Accounting for Goodwill and Testing for

[19] Id.

Subsequent Impairment: A History, Comparison, and Analysis" Willis, Holt, Sompayrac and Hampton (2011).

Nevertheless, FASB recognizes goodwill as an asset, but requires that it be assessed for impairment annually.

> 350-20-35-3C In evaluating whether it is more likely than not that the fair value of a reporting unit is less than its carrying amount, an entity shall assess relevant events and circumstances. Examples of such events and circumstances include the following:
>
> > a. Macroeconomic conditions such as a deterioration in general economic conditions, limitations on accessing capital, fluctuations in foreign exchange rates, or other developments in equity and credit markets
> >
> > b. Industry and market considerations such as a deterioration in the environment in which an entity operates, an increased competitive environment, a decline in market-dependent multiples or metrics (consider in both absolute terms and relative to peers), a change in the market for an entity's products or services, or a regulatory or political development
> >
> > c. Cost factors such as increases in raw materials, labor, or other costs that have a negative effect on earnings and cash flows
> >
> > d. Overall financial performance such as negative or declining cash flows or a decline in actual or planned revenue or earnings compared with actual and projected results of relevant prior periods
> >
> > e. Other relevant entity-specific events such as changes in management, key personnel, strategy, or customers; contemplation of bankruptcy; or litigation
> >
> > f. Events affecting a reporting unit such as a change in the composition or carrying amount of its net assets, a more-likely-than-not expectation of selling or disposing all, or a portion, of a reporting unit, the testing for recoverability of a significant asset group within a reporting unit, or recognition of a goodwill impairment loss in the financial statements of a subsidiary that is a component of a reporting unit
> >
> > g. If applicable, a sustained decrease in share price (consider in both absolute terms and relative to peers).
>
> 350-20-35-3D If, after assessing the totality of events or circumstances such as those described in the preceding paragraph, an entity determines that it is not more likely than not that the fair value of a reporting unit is less than its carrying

amount, then the first and second steps of the goodwill impairment test are unnecessary.

350-20-35-3E If, after assessing the totality of events or circumstances such as those described in paragraph 350-20-35-3C(a) through (g), an entity determines that it is more likely than not that the fair value of a reporting unit is less than its carrying amount, then the entity shall perform the first step of the two-step goodwill impairment test.

50-20-35-3F The examples included in paragraph 350-20-35-3C(a) through (g) are not all-inclusive, and an entity shall consider other relevant events and circumstances that affect the fair value or carrying amount of a reporting unit in determining whether to perform the first step of the goodwill impairment test. An entity shall consider the extent to which each of the adverse events and circumstances identified could affect the comparison of a reporting unit's fair value with its carrying amount. An entity should place more weight on the events and circumstances that most affect a reporting unit's fair value or the carrying amount of its net assets. An entity also should consider positive and mitigating events and circumstances that may affect its determination of whether it is more likely than not that the fair value of a reporting unit is less than its carrying amount. If an entity has a recent fair value calculation for a reporting unit, it also should include as a factor in its consideration the difference between the fair value and the carrying amount in reaching its conclusion about whether to perform the first step of the goodwill impairment test.

350-20-35-3G An entity shall evaluate, on the basis of the weight of evidence, the significance of all identified events and circumstances in the context of determining whether it is more likely than not that the fair value of a reporting unit is less than its carrying amount. None of the individual examples of events and circumstances included in paragraph 350-20-35-3C(a) through (g) are intended to represent standalone events or circumstances that necessarily require an entity to perform the first step of the goodwill impairment test. Also, the existence of positive and mitigating events and circumstances is not intended to represent a rebuttable presumption that an entity should not perform the first step of the goodwill impairment test.[20]

As of December 31, 2012, Fortis reported consolidated goodwill of **$1.6 billion**.

Adding the goodwill from Central Hudson's acquisition, one arrives at a staggering figure of over **$2 billion** of goodwill out of a $15 billion (in assets) company—a total of almost 14% of its assets. That is a very large non-performing asset. Ultimately it would

[20] FASB Acounting Standards Codificaton, Topic 350. This standard adopted by FASB in September 2011, was adopted by Fortis, Inc., effective January 1, 1012. Fortis 2012 Annual Report at page 67.

seem that the accountants would have to declare that there was an impairment, particularly since the vast majority of Fortis revenue comes from regulated utilities where the rates are set on a cost of service basis, unless Fortis can continue to make acquisitions, (which seems to be the plan) that would push off the day of such recognition while simultaneously increasing risk. Of course, if such an amount were pushed down to Central Hudson, it is likely that it would be declared immediately as impaired. This amount of a non-performing asset and the associated write-off is a huge risk and one that has not yet been acknowledged.

Fortis reports that it does an annual impairment testing as of October 1 at the unit reporting level (aka operating utility) and uses both an internal qualitative and quantitative approach, and every three years uses the services of an independent external consultant for each of its reporting units. Here is how Fortis's 2012 Annual Report describes the methodolgy:

> The primary method for estimating fair market value of the reporting units is the income approach, whereby net cash flow projections for the reporting units are discounted using an enterprise value approach. Under the enterprise value approach, sustainable cash flow is determined on an after-tax basis, prior to the deduction of interest expense, and is then discounted at the weighted average cost of capital to yield the value of the enterprise. An enterprise value approach does not assess the appropriateness of the reporting unit's existing debt level. The estimated fair value of the reporting unit is then determined by subtracting the fair value of the reporting unit's interest-bearing debt from the enterprise value of the reporting unit. A secondary valuation method, the market approach, is also performed by an independent external consultant as a check on the conclusions reached under the income approach. The market approach includes comparing various valuation multiples underlying the discounted cash flow analysis of the applicable reporting units to trading multiples of guideline entities and recent transactions involving guideline entities, recognizing differences in growth expectations, product mix and risks of those guideline entities with the applicable reporting units.
>
> No impairment provisions were required in either 2012 or 2011 with respect to

goodwill or indefinite-lived intangible assets.[21]

What this is saying is that the income approach uses the sustainable cash flows (not including one-time items such as its NAFTA claim) before deducting interest expense from the operating companies that are dependent on the rates set by the respective regulatory jurisdiction. Those cash flows are the after-tax cash flows and that makes sense, since taxes must be paid. The cash flows are discounted using the after-tax overall rate of return and then the debt is subtracted from that to determine the estimated fair value of the reporting unit. As long as the fair value is equal to or greated than the purchase price, then there is no impairment.

So lets show what that looks like by way of an example. Say we have a $1 million (original cost less depreciation) utility that has just been acquired for $1.4 million. Thus, there is good will of $400,000. Further assume the utility is financed 50% debt and 50% equity and the after-tax rate of return is 6%.

	Pre-Merger	Post-Merger	Req't expense reduction
Revenues	$2,000,000	$2,000,000	
Expenses	$1,940,000	$1,940,000	-$24,000
Net Utility Operating Income	$60,000	$60,000	$84,000
Asset Base	$1,000,000	$1,400,000	
Debt	$500,000	$700,000	
Equity	$500,000	$700,000	
Debt Rate	5%	5%	
Equity Rate (aft. Tax)	7%	7%	
Cash Flow - Debt	$25,000	$25,000	
- Equity	$35,000	$35,000	
Total	$60,000	$60,000	$84,000
Return on Investment	6%	4%	6%

As can be seen in this simple example, the pre-merger utility is making a 6% return on

[21] Fortis 2012 Annual Report, pages 70 to 71

its asset base. Post merger that return drops to 4% because goodwill is not allowed in rates and, therefore, the cash flow which is assumed in this example to equal net utilty operating income does not change. But the asset base has increased by $400,000. So the only way to make the 6% return and avoid potential impairment is to reduce expenses.

The other observation is that the utility business is essentially a business about two large numbers; revenues and expenses. Many utility expenses are not directly controllable by management, e.g., the cost of electric and gas supply, financing costs, insurance costs, etc. There are some costs that can be reduced: labor and tree trimming are two examples that come to mind.

The overall return on the $1.4 million is now less than that desired by the shareholders. So to keep the shareholders happy while management is slashing costs, one has to increase the dividend payout ratio, as can be seen from Fortis's own Annual Report.

The second method or market approach is somewhat circular. The market approach simply compares other deals that have been consumated. Those deals presumably reflect premiums over net book value. Thus, included in the comparables are levels of the non-performing assets one is trying to determine are impaired. Using the market approach, one will never see impairment unless the purchase price was grossly inflated compared to the comparables.

EXCEPTION NO. 3

THE REC DEC DOES NOT ADDRESS THE FACT THAT MOST MERGERS FAIL

The business literature from books to scholarly articles to technical papers

consistently points to this fact that more than half of all mergers and acquisitions fail. Most mergers do not achieve the desired goals set forth by management. "Only 25 to 50 percent of deals create shareholder value."[22]

In New York State, as mentioned already, there are several foreign owned holding companies, the latest being Iberdrola's acquisition of Energy East the parent of NYSEG and RG&E and National Grid, the parent of Niagara Mohawk Power Corporation and KeySpan. As part of an audit it was found

> Iberdrola executives to be 'focused inordinately' on reducing head count in the U.S., a policy the audit asserts that has 'taken a toll' on its New York operations. To fill the void, NYSEG has become overly reliant on using outside contractors without conducting a proper analysis of the potential costs or risks to the company, the audit found.

One of the first things cut are jobs and this contributes to the high failure rate of mergers[23] and, incidentally, poor communications with regulators and customers.

While Generally Accepted Accounting Principles ("GAAP") is a good set of accounting principles, standards and procedures followed world-wide, it still leaves room for accounting manipulation to distort or pamper figures.

> The line between reflecting the true value of a company and exaggerating it is a blurry one for some GAAP techniques. One-time charges and investment gains are examples of such techniques, as they are legal ways to represent figures, but can still have a tendency to fool investors into thinking things are better than they really are.

Again, this would undermine the success of mergers.[24]

This is particularly easy to see in the case of New York because the premium paid over book to acquire an operating company cannot ever be reflected in rates, and this

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[22] Orit Gadiesh, Charles Ormiston, Sam Rovit, (2003) "Achieving an M&A's strategic goals at maximum speed for maximum value", Strategy & Leadership, Vol. 31 Iss: 3, pp.35 – 41.
[23] www.timesunion.com/business/article/Alternating-currents-4189541.php
[24] www.investopedia.com/articles/01/053001.asp

"asset" as discussed above can never earn a return – not one penny. Therefore, the goodwill can be of no value and, hence, when it is declared to be impaired, then it will reduce net income when it is written off. That in turn reduces the value of the business. So the only question is when will the write down occur. In non-regulated settings, the goodwill can be supported by the increased revenues and reduced expenses from the synergies of the merged company. Not so here, since there are no significant synergies. This is not Fortis' business model that seeks to acquire well run utilities and then leave them alone or not as circumstances dictate.

EXCEPTION NO. 4

NAFTA IS A POTENTIAL RISK

PULP was the first to indentify the North American Free Trade Agreement (NAFTA) as a potential trump card that Fortis could use to defeat Commission regulation. At first, PULP was told by Petitioners, Staff and MI that NAFTA did not apply to the Commission pursing its regulatory role in a reasonable way. The Administrative Law Judges could not find any precedent that support's PULP's concern and suggested that the cases cited by PULP "tend to point in the opposite direction."[25] But the fact that no case has been found does not mean that the use of NAFTA by Fortis is not an additional risk of this transaction.

Fortis' Vice President Barry Perry, unseen in the territory until only recently, pointedly refused to rule out using NAFTA. Fortis knows how to use NAFTA since it reported a $22 million one-time extraordinay income gain as a result of compensation

[25] Rec Dec at page 43.

won by the use of NAFTA in the first quarter of 2013. While not the prime mover, Fortis benefited from the claim of Abitibibowater Inc. v. Canada brought under the NAFTA, Article 1121.[26]

And to show how flexible NAFTA is, on November 8, 2012, Lone Pine Resources, Inc. ("Lone Pine") has filed a Notice of Claim[27] against the Province of Quebec and The Government of Canada. In that case, Lone Pine is seeking to take the government to court for blocking its quest to recover natural gas from the Utica Shale Gas Play beneath the St. Lawrence River using the controversial hydraulic fracturing technology, popularly known as "fracking."[28]

> 38. Lone Pine, the Enterprise [Lone Pine's wholly owned subsidiary], and their predecessors invested substantial capital and more than five years of their time and resources to obtain the River Permit to explore for and develop the oil and gas resources beneath the St. Lawrence River. That investment of time and resources was expunged arbitrarily and capriciously in less than a month. No notice was given, no explanation was provided, and no compensation was offered. Lone Pine's efforts to engage the Government of Quebec were systematically rebuffed and without any explanation or justification - scientific or otherwise - the Government of Quebec arbitrarily revoked what Lone Pine, the Enterprise, and their predecessors invested so much to obtain. Lone Pine respectfully submits that this constitutes a clear violation of Articles 1110 and 1105 of the NAFTA.
>
> 39. Canada, through the actions of Quebec, is responsible for measures inconsistent with its commitments under Chapter Eleven of the NAFTA. The

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[26] Abitibowater Inc. v. Government of Canada, Notice of Arbitration and Statement of Claim, February 25, 2010.

[27] More accurately, "Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement."

[28] The Notice of Claim described the process as follows:

> 13. In this process, a vertical well is drilled to a predetermined depth above a shale gas reservoir, and then drilled at an increasing angle until it meets the reservoir depth. Once it reaches reservoir depth, the wellbore is then drilled horizontally, to a pre-determined length. The shale surrounding the wellbore is then fractured to either intersect and open existing natural fractures in the shale, or to create a new fracture network. This creates pathways by which the natural gas can flow to the wellbore for extraction.

particular breaches of Chapter Eleven of the NAFTA are set forth in greater detail below.

The Notice of Claim went on to explain how Quebec's action constituted a breach of Article 1110 of the NAFTA,

> 40. Article 1110 of the NAFTA prohibits Canada from directly or indirectly nationalizing or expropriating the investments of a U.S. company in its territory or to take measures tantamount to nationalization or expropriation of such investments, except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and the minimum standard of treatment under international law; and (d) on the payment of compensation.

The Notice of Claim also invoked Article 1105 as follows:

> 45. Article 1105(1) of the NAFTA obliges Canada to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

Lone Pine seeks in excess of $250 million in damages.

The mere threat of a NAFTA an action would likely influence even the tenaciously independent Commission and so it must not be discounted as it has been by the Rec Dec. Indeed, the ALJs must think that there is some possibility that Fortis would use NAFTA since they recommended "…as a condition of approval that Petitioners certify that no express promises have been made, extrinsic to this proceeding, that any particular regulatory treatment will be accorded Central Hudson or is parent company in the future."[29]

EXCEPTION NO. 5

THE RECOMMENDED DECISION DID NOT ADDRESS FORTIS CORPORATE BEHAVIOUR IN BELIZE

Whether the proposed acquisition is in the public interest must also involve an

[29] Rec Dec at pages 46 – 47.

inquiry into the corporate character of the acquiring company, and Fortis's role in the Central American country of Belize merits close attention. The fact that the Belize case involves generation and distribution, as opposed to the case currently before the PSC, which involves only transmission and distribution, is irrelevant: Fortis's record in Belize speaks volumes about the company's behavior, whether the investment is in generation, distribution, or anything else. This behaviour goes beyond the obvious environmental damage to the tropical rain forest, the Macal River and the upstream and downstream flora, fauna, residents and businesses. Some people can debate whether the ruination of a unique habitat is worth the trade-off for what was considered to be less expensive renewable power.[30] Of even greater concern (if that is possible) is the deliberate withholding of evidence from the environmental and judicial review processes. Fortis took advantage of an opaque system of governance. Its calebrated participation in that process served Fortis's end-game to boost profits no matter the consequences to the safety and health of the community. It is this behavior that must be examined and will be discussed in greater detail.

The Rec Dec very sensibly builds on the record of experience with New York public utility acquisitions by companies based outside the state and country. This record has shown that access to full and timely information needed by the PSC to carry out its regulatory functions has historically proven very difficult. What is missing from the Rec Dec is consideration of the record of the petitioner in this case. Once Fortis' record is taken into account, it becomes quite clear that the proposed

[30] Ironically, the decision to dam the river achieved nothing of benefit, unless one believes that a ruined environment, continuing health hazards and higher power rates are of benefit to anyone but Fortis' financial position.

transaction's flaws are in fact "inherently unsusceptible to effective remediation by means of supplemental PBAs."[31]

Fortis has a track record of information suppression. In its operations in Belize, under the active leadership of then and current management, Fortis engaged in deceptive behavior to prevent economic and environmental information from coming to light that might have stood in the way of Fortis' proposed hydroelectric dam—the Chalillo dam in the Macal River. This behavior included suppression of evidence, misrepresentation and outright faleshood, along with repeated failures to comply with environmental and public health regulations even when these failures had severe and even life-threatening implications for the local population.

Representatives publicly stated that a study commissioned by the Fortis subsidiary, Belize Electricity Limited (BEL), "proved it was economically viable," but Fortis refused to release the study on the grounds that it was "proprietary information."[32] A local environmental engineer who was shown three of eight sections of the study, reported that the study had in fact stated that the dam would not bring electricity rates down and would never be competitive with the price of Mexican power (which Belize also sourced, however under the government's agreement with Fortis, all power from Fortis-owned operations would have to be purchased before less expensive off-peak electricity could be purchased from Mexico). This key report, which had been commissioned from General Electric, was

[31] Rec Dec, at page 67.
[32] Bruce Barcott, *The Last Flight of the Scarlet Macaw: One Woman's Fight to Save the World's Most Beautiful Bird* (New York: Random House, 2008): p. 180.

never made publicly available.[33] Fortis instead consistently stated that "the increased energy production from Chalillo is the least-cost energy alternative in Belize," and "will enable more stable electricity costs due to reduced reliance on fossil fuels" [34]—statements the company knew to be false.

And in fact, the cost of electricity was anything but consistent, going up substantially after the dam's completion in 2005: Fortis/BEL raised rates by 12% in mid-2005, and another 13% in January 2006.[35] Belizean residents paid about twice as much for their home electricity as did neighbors in Guatemala and Mexico.[36] When the company tried to raise rates by 25% in 2008, the newly elected Belize government rejected the request and the subsequent dispute resulted in the government's expropriation of the company.[37] Had Fortis's hydroelectric project been a model of low-impact hydrolectric power--well-sited and properly constructed—it would have ultimately been cheaper, since the project would have been fuel-free, and would have been more protective of human health, safety, and the environment. Unfortunately, the opposite was true of Fortis's high-impact dam project in Belize. And the company suppressed the true costs of this project to get it through the approval process.

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[33] Email communication with Candy Gonzalez, Vice President of the Belize Institute for Environmental Law and Policy and former member of the National Environmental Assessment Committee, charged with reviewing and approving the dam's environmental impact assessment. According to an affidavit of Gonzalez, the GE report was routinely cited as demonstrating the economic feasibility of the dam but was not provided as part of the company's Enviornmental Impact Assessment.
[34] Fortis Inc., *2001 Annual Report*: p. 16; *2002 Annual Report:* p. 22; *2003 Annual Report:* p. 24.
[35] Belize Institute of Environmental Law and Policy, Chalillo Dam Report Card: May 1, 2006.
[36] The Court of Appeals of Belize, Judgment of the Lords of the Judicial Committee of the Privy Council, (Privy Council Appeal No. 47 of 2003,) Jan. 2004: p. 2
[37] Mark Chadiak, "Fortis Loses Stake in Belize Company in Government Takeover," Bloomberg.com (6/21/11), http://www.bloomberg.com/news/2011-06-21/fortis-loses-stake-in-belize-company-in-government-takeover-1-.html.

In what was perhaps the most egregious instance of information manipulation, Fortis suppressed the results of an independent geology report, prepared in May 2002, which found major mistakes in Fortis's geotechnical assessment, and concluded that the dam needed to be changed to reflect actual geological conditions and seismic risk.[38] The geologist who prepared the independent report, Brian Holland, observed that the seismic lines had been erased from the geological map submitted by Fortis's consultant, AMEC, for the Environmental Impact Assessment. The report, as well as information about the erasure of fault lines from the map, was not disclosed until shortly before the hearing of the third and final appeal to the Judicial Committee of the Privy Council ("Privy Council"), after the project was approved by Belize's National Environmental Appraisal Committee ("NEAC") and the Belize Department of the Environment ("DOE") and work had begun.[39] The Director Chief Environmental Officer of the DOE also served as chair of the NEAC that was comprised of 10 governmental department heads and had only two non-governmental members.

Throughout the entire environmental review process, Fortis-BECOL consistently maintained that the bedrock underlying the dam was granite and that there were no geological faults near the dam—claims that conflicted with the independent study it was suppressing. Following approval of the project by the NEAC, the decision to approve the EIA was challenged in court by the Belize Alliance of Conservation NGOs. According to an affidavit in the Court of Appeal on this case,

[38] Belize Institute of Environmental Law and Policy, Chalillo Dam Report Card: May 1, 2006.
[39] The Court of Appeals of Belize, Judgment of the Lords of the Judicial Committee of the Privy Council, (Privy Council Appeal No. 47 of 2003,) Jan. 2003: p. 13.

signed by Richard Goodman, a geological engineer and Professor of Geological Engineering at the University of California-Berkeley, misclassifying the bedrock type underlying the dam "is a major, and potentially disastrous mistake."[40] Goodman, who had nearly 40 years of experience examining the safety and reliability of proposed dam projects for leading private companies and for the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers, reviewed the geological information in the EIA and concluded that it was "inadequate to ensure the safety and viability of the Chailillo dam project."[41] As he stated:

> In my research and experience, an essential part of ensuring the safety and viability of any large-scale infrastructure project is the opportunity for a public review of the essential geological and engineering data. That appears to be missing in this case, and could lead to dangerous consequences.[42]

Fortis demonstrated a willingness in Belize to do whatever was necessary to push its project through the regulatory process, including suppressing information vital to ensuring public safety.

The biological assessment commissioned by Fortis was also the victim of obfuscation by the company. Fortis's consultant, AMEC, sought to downplay and muddle the findings of London's Natural History Museum when it prepared the Environmental Impact Assessment for the proposed dam by burying it in the Appendices of the 1,500 page report and not mentioning it in the body of the report.

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[40] Afidavit of Richard Goodman, 6/16/2003, filed in the Court of Appeal of Belize, Civil Appeal No. 1 of 2003, in the case between BACONGO and the Belize Department of the Environment and Belize Electric Company Limited: p. 7.
[41] Ibid.: p. 3.
[42] Ibid.

Fortis failed to provide information required as part of Environmental Compliance Plan ("ECP") for the Chalillo dam—information that was critical to the health and safety of residents in the area. The Belize Meteorology Department stated in July 2006 that Fortis/BECOL had still not finalized an Emergency Management Response Plan—which was to include a warning system to alert people downstream in the event of an emergency--a year after the dam became operational.[43] The company's Dam Simulation Failure report, required as part of the ECP, was not finished until November of 2006, nor was it complete. The report failed to consider that the other Fortis-owned dam on the Macal river, the Mollejon dam, could also fail. This was an important scenario to consider, particularly given that the proper design of Mollejon dam was in question. According to the affidavit of Luis Godoy, Deputy Mayor of the towns of San Ignacio and Santa Elena on the Macal River, the construction of the Mollejon dam was based on hydrological studies that underestimated flash flooding, and heavy rains occurring soon after the dam went on line caused its concrete foundation to physically shift, requiring reinforcement by BECOL.[44]

The soundness of the Chalillo dam design was also in question, and not just because of the flawed geotechnical assessments upon which it was based. Dr. Chris Bowles, a hydraulic and hydrological engineer that reviewed the hydrological studies assessing the Chalillo dam's feasibility, testified in an affidavit that the

[43] Second Affidavit of Candy Gonzalez, Filed with the Supreme Court of Belize, Claim No. 302 of 2007, between Belize Institute for Environmental Law and Policy and Department of Environment, Attorney General of Belize, Director of Health Services, National Emergency Management Organization, National Meteorological Service, Belize Electric Company Limited.
[44] Affidavit of Luis Godoy, 7/16/2003, submitted to the Privy Council on Appeal from the Court of Appeal of Belize.

hydrological data was "highly deficient and by no means sufficient to make a sound decision concerning the construction of the project." Bowles observed that there were "severe deficiencies in the period of record of the hydrological data, and the data which does exist is highly suspect due to data gaps and flawed gauging methods." These deficiencies, he concluded, "result in large uncertainties in the flow estimate"[45] upon which the dam's design was based. The company's failure to do due diligence for the dam and its design, together with its failure to examine plausible emergency scenarios and to prepare for the possibility of dam failure, illustrates a callous disregard for the welfare of people in the communities in which it invests.

Indeed, when the people living in these communities expressed safety concerns to Fortis/BECOL, they were ignored. According to the 7/17/2003 affidavit of Daniel Sosa, a resident of Cristo Rey village on the Macal River who was also the Vice Secretary of the Village Council and the Chairman of the village's water system, Fortis-BEL representatives came to his village to give a presentation on the Chalillo dam in 2001, and when villagers asked questions about the possibilities of flash floods, dam breaks, and other concerns, they were told that Fortis-BEL representatives would return with answers. No responses ever came.[46]

As Deputy Mayor Luis Godoy explained, "failure of the nearly 50 meter high Chalillo dam would send a tsunami-like wave of water rushing toward San Ignacio and

[45] Affidiavit of Dr. Chris Bowles, 7/21/2003, on behalf of the Appellant in the case between BECANGO and the Department of the Environment (1st Respondent) and Belize Electric Company Limited (2nd Respondent).
[46] Affidavit of Daniel Sosa, 7/17/2003, submitted to the Privy Council on Appeal from the Court of Appeal of Belize, Case No. 47 of 2003.

Santa Elena and would inundate the towns, putting the lives of the residents at risk, as well as causing great property damage."[47] This was apparently of little concern to Fortis.

Fortis/BECOL also failed to establish a monitoring program to test the water, record changes and make the information public, as required by the ECP.[48] The people of the Macal River Valley depend on river water as a source of drinking water and fish, as well as a source of income from tourism. The river provides the only source of drinking water for many of the residents of the area, according to the Deputy Mayor of the towns of San Ignacio/Santa Elena on the Macal River.[49] Information on the dam's impacts on water quality was therefore potentially critical to their health, welfare, and livelihood. Candy Gonzalez, Vice President of the Belize Institute for Environmental Law and Policy and a member of Belize's National Environmental Appraisal Committee that reviewed the Chalillo dam's environmental impact assessment, spent an enormous amount of time and energy attempting to obtain needed information to evaluate the dam's impacts and its compliance with regulatory requirements—including its water quality impacts--and was frustrated at every turn. In one example, documented on pages 5-6 of Gonzalez's second affidavit (provided as Appendix D) she repeatedly requested water quality information required under the ECP, including water sample reports and testing on mercury levels in fish, and faced consistent stone-walling by Fortis/BECOL representatives.[50]

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[47] Affidavit of Luis Godoy, 7/16/2003, submitted to the Privy Council on Appeal from the Court of Appeal of Belize, Case No. 47 of 2003.
[48] Ibid.
[49] Affidavit of Luis Godoy, 7/16/2003, submitted to the Privy Council on Appeal from the Court of Appeal of Belize, Case No. Case No. 47 of 2003.
[50] 2nd Affidavit of Candy Gonzalez signed on 8/27/2007 and filed with the Supreme Court of Belize, Claim No. 302 of 2007. When she requested the information from the Department of Environment, she was told

It turned out that, in fact, the Fortis-BECOL knew that the mercury levels in the Macal river were already high due to the Mollejon dam, which was constructed earlier and purchased by Fortis, along with the right to build the Chalillo dam.[51] A mercury study was undertaken in January 2005, before the Chalillo dam came on line, which determined that fish were unsafe to eat as a consequence of the Mollejon dam. This study was not released until August 2006—a year *after* the Chalillo dam became operational—and no monitoring had been undertaken by the company during that time period to determine the additional impacts of the Chalillo dam. Moreover, during that time, no effort was made to inform people in the area about the safety of eating fish and drinking water from the Macal river, or about the harm posed by mercury consumption, demonstrating a complete lack of concern and regard on the part of Fortis-owned subsidiaries.[52]

The five Lords serving on the Privy Council in a three to two Judgment upheld the government's decision to build the Challillo Dam, basically saying that the Environmental Impact Assessment while not transparent, was not so procedurally defective as to render the process illegal. The majority also noted it was not their role to opine on the wisdom of the government's decision to build, but rather to review the procedures followed to ensure compliance with the law. The dissenting Lords obviously

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to request it from the company. Both Fortis/BECOL and the Department of Environment were taken to court by the The Belize Institute of Environmental Law and Policy for ECP compliance failures

[51] Mercury can be a harmful by-product of large-scale hydroelectric dams. When forests are flooded by the reservoir created by a dam, consumption of the decaying plants by bacteria transforms inorganic mercury into methyl mercury, a harmful neurotoxin, and works its way up the food chain and becomes concentrated in fish. This is what has occurred in Belize.

[52] First Affidavit by Candy Gonzalez in Claim No. 302 of 2007 in the Supreme Court of Belize between BELPO and the Department of the Environment, Belize.

disagreed. The dam was built and the information suppression campaign continued, along with non-compliance with the ECP.

However, the dissent to the Judgment of the Lords of the Judicial Committee of the Privy Council, delivered January 29, 2004, reflected the unsatisfactory state of disclosure to the prior judicial tribunal:

> It is now apparent that the respondents failed in their duty of disclosure to the Chief Justice of Belize at a prolonged hearing which began in April 2002 (with a preliminary ruling on 22 April) and continued during the last fortnight of July 2002 (with judgment given on 19 December 2002); to the Court of Appeal of Belize at a hearing which took place during the last week of March 2003 (with judgment given on 24 April 2003); and to the Board at the hearing which took place on 30 July 2003 (with judgment given on 13 August 2003). I must at once add, and emphasise, that I apportion no blame whatsoever to the English counsel and solicitors who appeared for the respondents before the Board. On the contrary, it is clear that it was their decision (possibly unwelcome to their lay clients) to disclose documents (in particular, the Cornec Report and the Core Labs Report) which had previously been withheld. [53] (emphasis added).

As it turned out, the Cornec report was commissioned to settle the dispute between BECOL's Environmental Impact Analysis (which characterized the underlying site as granite) and the findings of the other geologists, including Mr. Andre Cho, the NEAC representative from the Belize Geology and Petroleum Department (concluding that the underlying bedrock was sandstone). Despite BECOL's continuing instance that the site was granite, it was concluded by the team working under Mr. Jean Conec, a consulting geologist from Denver that:

> There is no granite intrusive at the Proposed Chalillo dam site.
>
> The rocks are generally hard, silicified sandstones, siltstones and conglomerates with minor amounts of shales (average: 6.3%). Some of those shales are graphitic and could cause structural weakness in the right abutment of the dam.

[53] The entire Judgment is attached as Appendix E.

The dissenters went on to note that the

> Proposed dam site is geologically suitable for dam construction assuming that the presence of the graphic shales and the close proximity to a major fault are taken into account in th eengineering design and construction of the dam.

The dissenters also noted BECOL's attempt to propose changes to the Cornec Report. BECOL sought to remove the sentence "Some of those shales are graphitic and could cause structural weakness in the right abutment of the dam," arguing that the presence of graphiitic shales has been factored into the design. BECOL also proposed to modify "major fault,"[54] arguing that the fault has not shown any movement for 65 million years.

The dissenters also found that the evidence submitted by the DOE, specifically the affidavit of its head, and also the chair of the NAEC, Mr. Fabro, is "simply incredible" regarding the timing and even the existence of the Cornec Report.

> 118. In this most unsatisfactory state of affairs a few essential points are clear. The geology in the EIA was seriously wrong, as both Mr Fabro and Dr Merritt now accept. The predominantly sandstone bedrock is probably capable of providing a satisfactory foundation for a dam but only if the new geological information is taken into account in the design. Under the EPA and the Regulations the design of such an important public works project was required to be included in the EIA, and should have been the subject of public consultation and public debate before approval, and before work started on the project. Instead there are to be changes in the design (a fact recently acknowledged by Dr Merritt and deposed to by the Inspector of Mines) but the nature of the changes has been withheld from the public. The appellant's case is, as Mr Clayton submitted and as I would accept, stronger than that of the successful appellant in Berkeley v Secretary of State for the Environment [2001] 2 AC 603. In that case all the relevant information was (one way or another) in the public domain, but only if the public embarked on a "paper chase" (see at page 617). Here not even the most protracted and determined paper chase could have got at the true facts.
>
> 119. I would therefore have allowed the appeal and quashed the DoE's decision (embodied in the decision letter of 5 April 2002) to grant environmental clearance for the project. I would have done so on the ground that the EIA was so flawed by

[54] The EIA submitted by BECOL did not mention or map the 550 meter proximity of the dam site to the major fault referenced in the Cornec Report.

> important errors about the geology of the site as to be incapable of satisfying the requirements of the EPA and the Regulations. These flaws were, on Mr Fabro's own evidence, known to him at the time of the decision. I would in the absence of a satisfactory undertaking grant an injunction restraining BECOL from continuing work on the project unless and until a corrected EIA is prepared for public consultation, and secures recommendation by NEAC and approval by the DoE.

Even the Attorney General recognized that Mr. Fabro's affidavit was inconsistent with prior correspondence. The point here is not to focus on Mr. Fabro's mendacity, but rather to focus on BECOL's failure to come forward with the Cornec Report in a timely manner. As observed, it was only when counsel to BECOL insisted on disclosure was such disclosure made.

As previously mentioned, in 2007, Belize's Institute of Environmental Law and Policy ("BELPO") filed a case with the Supreme Court alleging the Belize government had failed to monitor and enforce the ECP that the Belize Electric Company Limited ("BECOL") was supposed to follow. The Supreme Court agreed and ruled in 2008 that the ECP was a binding agreement between BECOL and the government of Belize and ordered DOE to enforce the ECP, specifically with respect to preparing a catastrophic dam failure plan, water quality testing, testing fish for mercury levels and a system for information sharing and public input. BELPO v. DOE, et. al., Claim No. 302 of 2007, Supreme Court of Belize, A.D. 2008 (hereinafter "BELPO Judgment")[55].

The Supreme Court found that an Emergency Prepareness Plan ("EPP") had been developed along with an early warning system but it was only posted on the internet by the National Emergency Management Organization. The Court, noted "that not everyone is a traveler on the information super-highway" and required the EPP to be available in

[55] That Judgment is attached hereto as Appendix F.

Town Halls and libraries in the vicinity of the Chalillo Dam, specifically in San Ignacio, Santa Elena and Cristo Rey. The Court further ordered that the early warning system be routinely tested particularly during the rainy season from June to November.[56] One must wonder why BECOL did not disseminate such an important document itself. Or why it took an action by BELPO to get the Supreme Court to look at the situation and order that the EPP be made available beyond the internet.

With respect to testing fish for mercury, the Supreme Court found that that "there has not been consistent and reliable information on this [level of mercury in fish] made available to the people in the vicinity of the Chalillo Dam and the Macal River who consume fish. They have a right to this information through advisories issued by the Department of Health."[57] The Court accordingly ordered DOE to require "that BECOL carry out the public information programme explaining to the local population the health risks associated with high levels of mercury in fish." Again, one has to wonder why it took a court order to get BECOL to do what it had agreed to in the ECP, particularly where the public health is involved.

With respect to water quality testing, the Supreme Court concluded "that there was non-compliance with the ECP in this respect." BECOL did not take weekly water quality samples, but only monthly and did not test for radiation and iron.[58] Furthermore, BECOL did not provide any data about biological parameters of water quality. Dr. Chernaik stated in his affidavit that the "single most relevant parameter for water quality in a river is the taxa richness found by benthic microinvertebrate surveys that characterize

[56] BELPO Judgment, Paragraphs 31 and 32, pages 13 to 14.
[57] Id., Paragraph 39, page 14.
[58] Id., Paragraphs 49 and 50, page 21.

the source." The Court noted that this point was unchallenged and so ordered BECOL to add this data to the water quality testing to achieve compliance with the ECP.[59] Once more, one is left to wonder why BECOL took short cuts monitoring water quality. Should this Commission welcome a company into New York that deliberately breached the requirements of the ECP, potentially risking the health of the residents and businesses that rely on the Macal River?

With respect to Public Awareness and Education, the Supreme Court noted that BECOL had not prepared a plan, did not hold the requiste meeting, did not provide advertising on the radio, all as required by the ECP.[60]

The Supreme Court concluded its Judgment as follows:

> 78. Accordingly, in light of my findings and conclusions in this judgment,
>
> > i) I order and declare that the ECP imports duties on BECOL the fourth respondent which the defendant the DOE is lawfully bound to see implemented and fulfilled;
> >
> > ii) I order that copies of the EPP for the Chalillo Dam be placed and displayed in Town Halls and libraries in San Ignacio/Santa Elena and Cristo Rey and these be updated as necessary;
> >
> > iii) I order that the Dam Break Early Warning System and the communications system to relay a possible dam break flash flood be routinely tested or simulated for effectiveness, particularly between June and November each year;
> >
> > iv) I order the DOE to require BECOL to carry out public information programme explaining to the local population along the Macal River in the vicinity of the Chalillo Dam, the health risks associated with high levels of mercury in fish;
> >
> > v) I order that the taxa richness of benthic communities be included as a relevant parameter in monitoring and testing the water quality in Chalillo;

[59] Id., Paragraph 53, page 23.
[60] Id., Paragraphs 67, page 29 to 69, page 31.

> vi) I order that a programme for public information sessions informing the general public of the EIA for Chalillo and its ECP be prepared and developed by BECOL for the approval of the DOE and that such public information session be held in San Ignacio, Cayo District. I also order that BECOL in accordance with condition 8.25 of the ECP constitute or reconstitute the PPC so as to promote the purposes set out in the said condition. I realize of course that Chalillo is now operational, but it is never late to get the necessary information about it to the public, especially the local population.
>
> DATED: 30th June 2008.
>
> A. O. CONTEH Chief Justice[61]

A year later in 2009, BELPO was again back to the Supreme Court seeking an injunction to stop the sediment discharges from the Chalillo Dam that were hundreds, if not thousands, of times higher the World Health Organization and US EPA standards. BELPO's request for injunctive relief also noted that compliance with the ECP had yet to be attained despite the Supreme Court's 2008 Order. The critical water quality tests had not been released even though BELPO sought that informaton pursuant to the Belize Freedom of Information Act before BELPO went to the Supreme Court. BECOL claims it sent the water quality tests to DOE.[62] And BECOL's stonewalling and foot dragging apparently continue to this day.

Fortis' behavior in Belize must be considered in the evaluation of the risks and benefits of the proposed acquisition of Central Hudson because it has direct bearing on 1) the truth-value of the statements and commitments made by Fortis in the JP; and 2) whether it is even possible to modify the JP to adequately address the concerns with this proposed merger. The lack of discussion of Fortis's past behavior

[61] Id, Paragraphs 70, page 31 to 78, pages 33-34.
[62] Article by Probe International dated October 16, 2009: http://journal.probeinternational.org/2009/10/16/environmentalists-ask-belize-supreme-court-injunction-stop-pollution-canadian-dam/

in the Rec Dec therefore constitutes a major and significant omission. Regarding the first point, above, the following example is illustrative: The JP states that "Fortis agrees to provide equity support to the extent required by Central Hudson" for state infrastructure enhancements,[63] yet investor information on Fortis's website demonstrates a preference by the company to rely on its subsidiaries to raise their own capital.[64] Based on Fortis's behavior in Belize, there is good reason to doubt whether the company's stated commitments are genuine. Fortis has a record of making claims to further its own objectives that have no bearing on the truth.

Regarding the second point, above, the company's record of obfuscation in the Belize case makes clear that effective regulation of this company would be exceedingly challenging. While Fortis' operations in New York do not involve large hydroelectric facilties, they do involve compliance with regulations and orders that could seriously affect public health and safety. It would simply not be possible to build into the JP enough monitoring and oversight to mitigate the risk to the PSC of receiving poor and inadequate information, to say nothing of misinformation, without undue costs to the PSC in time and resources.

More fundamentally, a company with a corporate culture and value set that is dismissive of local concerns is not a company that should be allowed to own a New York public utility. Fortis's willingness to downplay and hide likely environmental and economic impacts of its hydroelectric dam in Belize in the pursuit of its own

[63] "Joint Proposal for Commission Approval of the Acquisition of CH Energy Group, Inc. by Fortis Inc. and Related Transactions," 1/29/13: p. 44.
[64] Fortis Inc., *Forward Looking Statements,* fortisinc.com/InvestorCentre/. On its website, Fortis states that it expects "the Corporation's subsidiaries will be able to source the cash required to fund their 2012 capital expenditure programs."

profit goals shows an utter disregard for the communities in which it invests. And we have already seen signs of a similar disregard for communities the Central Hudson service area, evidenced by Fortis's failure to attend a single public hearing on the proposed acquisition. The company's track record speaks poorly of the quality of service Central Hudson customers can expect with Fortis ownership, as well as of the company's likely approach to other local concerns, including local jobs and investment, and support for community programs (long provided by Central Hudson). These qualitative risks cannot be effectively mitigated by amending the JP.

Petitioners have attempted to argue that the management and operation of Central Hudson will be unaffected by the merger, implying that Fortis, as the parent company, will be hands-off and Central Hudson's culture and value set will remain unchanged. In the "Additional Comments of Joint Petetioners," submitted to the PSC on 5/1/2013, petitioners claim that "requiring its local distribution utilities to be locally managed is the cornerstone of Fortis' business approach," and that "the Fortis business philosophy and deomonstrated track record of "stand-alone" management of select, well-run, locally-managed utilities is the perfect match for Central Hudson and Fortis is the perfect acquirer for Central Hudson."[65]

This claim is directly contradicted by Fortis's record in Belize: Fortis was highly interventionist in its operations there, and its subsidiaries were only "stand alone" when it served Fortis' interests. As demonstrated earlier in this brief, Fortis management knowingly made false public claims about the likely impacts of the

[65] "Additional Comment of Joint Petitiioners" at page 29.

dam on electricity rates in Belize in an effort to push the project through, and it was Fortis that hired AMEC to prepare the EIA for the project and who is ultimately responsible for the falsehoods and information suppression and manipulation evident in that environmental assessment. Fortis' active involvement is further substantiated in the following quote from Fortis President and CEO Stanley Marshall, in an interview for Channel 5 News, Belize, on 5/21/2008:

> ....The government of Belize...denied our application for a fifteen percent increase in rates, which is needed to recover the higher costs of purchase from Mexico and From B.E.L.'s own diesal generation....Now I must say that on a personal basis, Belize has been the most rewarding jurisdictions of any place that Fortis serves. Through our investment, B.E.L. has become a leading company in this country and has made significant progress towards becoming the best utility in the whole region....But on a corporate level, Belize has been the most frustrating jurisidiction I've ever experienced in my almost thirty years in the business. There have been repeated failures to deliver on what has been committed to the company as a strategic investor in the country. I'm saying to you tonight regulatory issues must now be resolved and electricity prices must be increased to reflct the true cost power before Fortis will make any additional investment in B.E.L....I also will highlight for you, highlight the gravity of the situation if this is not done, B.E.L. will not have the cash to purchase power from Mexico in the coming months. Without power from Mexico, B.E.L. will be forced into rotating blackouts. Immediate action is required.[66]

It is apparent from this quote that Fortis/BEL is only "stand-alone" when it comes to being "forced" to cut power off to Belizians. The push for higher rates--and the leverage that the company sought to use in this push--was clearly coming from the parent company, Fortis, which threatened both to hold back investment and to cut off power. Given the company's actual track record in Belize, there is no reason to believe that Central Hudson under Fortis ownership will be any more "stand alone" in its operations

[66] *Channel 5 News, Belize*, "BEL's Big Boss Warns of Blackouts if They Don't Get Rate Increase," 5/21/08, http://www.7newsbelize.com/sstory.php?nid=11265.

and management, or in its regulatory dealings with the PSC. Contrary to petitioners' claim in their "Additional Comments,"[67] Fortis' actions in Belize makes the company a very poor match for Central Hudson.

EXCEPTION NO. 6

THE RECOMMENDED DECISION DID NOT ADEQUATELY ADDRESS ENVIRONMENTAL AND ENERGY POLICY CONCERNS

The Rec Dec wrongly dismisses the environmental concerns raised by many commenters--including Citizens for Local Power, the Consortium, private citizens, elected officials and many municipalities--as "fundamentally misplaced" simply because Central Hudson is a distribution company and does not own its own generating capacity.[68] Distribution and generation of electricity are very much linked. Investment in infrastructure to facilitate micro-grids and distributed generation, which allow for an increase in renewable energy use and contribute to grid reliability during major storms, will depend on Fortis. The Rec Dec mistakenly concludes that "Accordingly, we do not see any significant environmental risk arising from the proposed transaction."[69]

While it is the case that the PSC may at some point seek to require such investment, the company can do one of two things: It can support the effort or it can fight the effort, causing unnecessary problems for the PSC and perhaps delaying or compromising the needed investment. As Fortis states on its website, its profitability is contingent on, among other things, "no significant changes in government energy plans and environmental laws that may materially affect the

[67] "Additional Comment of Joint Petitiioners" at page 29.
[68] Rec Dec at page 54.
[69] Id.

operations and cash flows of the Corporation and its subsidiaries."[70] And there is no reason to assume that a Central Hudson under Fortis ownership will be unaffected by the parent company's perspective, as demonstrated in the previous section (Exception #5). And as the ALJs also observe, "strategic decisions concerning the direction of the utility and its involvement with the community will come from, or be strongly influenced by, Fortis."[71]

Finally, the concerns raised by many commenters on this case about the inconsistency between Fortis's energy and environmental values and their own is in fact very consequential to the decision on whether or not to approve this merger. Fortis's support for an energy future reliant on shale gas extraction at the expense of clean, renewable energy sources[72] strongly conflicts with the public sentiment in many towns in the Central Hudson service area,[73] as well as with the Mid-Hudson Regional Sustainability Plan. Many rate-payers (both municipal and residential) do not want to support a company that promotes an energy future based on shale-gas extraction, whether here or elsewhere. Fortis is heavily invested in natural gas distribution in British Columbia, Canada, for home heating, serving close to a million customers by 2009, [74] and Fortis President and CEO Stanley Marshall has called shale gas "a game changer not only for the gas industry [sic] for the electricity

[70] Fortis Inc., *Forward Looking Statements,* fortisinc.com/InvestorCentre/.
[71] Rec Dec at page 52.
[72] Fortis's profitability forecast is contingent upon, among other things, "the current environment of low natural gas prices and an abundance of shale gas [which] should help maintain the competitiveness of natural gas *versus alternative energy sources in North America*" (emphasis added). Fortis Inc., *Forward Looking Statements,* fortisinc.com/InvestorCentre/.
[73] A number of towns in the Central Hudson service area have adopted bans on hydro-fracturing.
[74] Terasen Inc., 2009 Annual Report. (Terasen, a Fortis-owned subsidiary, later came to be called FortisBC.)

industry as well."[75] Commenters from the service area have been very clear that they do not want a company with this perspective acquiring their local utility, Central Hudson, which has long established roots in the community and a good relationship with its customer base. As the ALJs conclude in the Recommended Decision, the perspective of the citizens in the Central Hudson service area do, indeed, matter, in part because their concerns will have an important qualitative impact on the relationship between a Fortis-owned Central Hudson and the rate-payers of the mid-Hudson region. Fortis' attitude and perspective on energy and the environment therefore has a very direct bearing on evaluation of this proposed agreement, and should be considered as part of the risk assessment.

CONCLUSION

The acquisition of Central Hudson by Fortis is not in the public interest as the Rec Dec has found. The risks to the ratepayers are simply too high and the behavior of Fortis in Belize leaves much to be desired. Most of the risks addressed in the Rec Dec do not even come close to balancing, no less exceeding as is necessary, the ratepayer benefits the Commission has found were required in prior mergers.

However, as pointed out in the preceding analysis, the Rec Dec did not identify all of the risks that this Brief on Exceptions addresses. Moreover, the alleged positive benefits are only one time events and, as PULP has observed, are contingent and illusory. In the final analysis and after a review of the shameless record of Fortis in Belize, this

[75] Speech by H. Stanley Marshall, President and CEO of Fortis Inc., to Toronto Board of Trade, 11/6/12: p. 6

corporation should not be allowed to acquire an excellent and well-respected New York utility.

Respectfully submitted,

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and the

Consortium in Opposition to the Acquisition

May 17, 2013