

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
New York on December 13, 2006

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman  
Maureen F. Harris  
Robert E. Curry, Jr.  
Cheryl A. Buley

CASE 05-E-0934 - Proceeding on Motion of the Commission as to  
the Rates, Charges, Rules and Regulations of  
Central Hudson Gas & Electric Corporation for  
Electric Service.

CASE 05-G-0935 - Proceeding on Motion of the Commission as to  
the Rates, Charges, Rules and Regulations of  
Central Hudson Gas & Electric Corporation for  
Gas Service.

ORDER DENYING REHEARING PETITIONS AND MOTION TO STRIKE

(Issued and Effective December 20, 2006)

BY THE COMMISSION:

INTRODUCTION AND PROCEDURAL HISTORY

By order issued July 24, 2006, we established a three-year rate plan for electric and gas service provided by Central Hudson Gas & Electric Corporation (Central Hudson, the Company).<sup>1</sup> The rate plan is generally consistent with terms and conditions that were set forth in a contested Joint Proposal submitted by Central Hudson, New York State Department of Public Service Staff (Staff), Multiple Intervenors and the United States Department of Defense and all other Federal Executive Agencies.<sup>2</sup>

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<sup>1</sup> Order Establishing Rate Plan (issued July 24, 2006) ("Rate Order").

<sup>2</sup> The Joint Proposal was opposed by the New York State Consumer Protection Board (CPB), Public Utility Law Project (PULP), Small Customer Marketer Coalition/Retail Energy Supply Association (SCMC/RESA) and Select Energy New York, Inc.

Petitions for Rehearing were filed by Central Hudson and CPB on August 30, 2006.<sup>3</sup> Central Hudson requests reconsideration of its allowed return on common equity (ROE). CPB seeks rehearing on decisions regarding the disposition of electric depreciation reserve account funds and the offering of utility-provided fixed price options. Responses were filed by Multiple Intervenors, SCMC/RESA, Direct Energy Services, LLC (Direct Energy), CPB, Staff, PULP, and Central Hudson. Multiple Intervenors, CPB, Staff, and PULP<sup>4</sup> urge the denial of Central Hudson's petition, while SCMC/RESA, Direct Energy, Staff, and Central Hudson advocate denial of CPB's petition.

On September 20, 2006, Central Hudson filed an Objection and Motion to Strike all of Points I and II of PULP's response and the first full paragraph on page six of Staff's response. PULP and Staff responded that the Company's motion should be denied, with Staff adding, in the alternative, that the motion should be dismissed, in part, as an impermissible reply.

We will separately discuss below the Petitions for Rehearing and the Company's Motion to Strike.

#### PETITIONS FOR REHEARING

##### Central Hudson Petition

Central Hudson argues that the August 23, 2006 Order in Case 05-E-1222<sup>5</sup> constitutes a "new circumstance" and warrants

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<sup>3</sup> The deadline for filing such petitions was extended to August 30, 2006 for all parties. Notice Extending Time to File Petitions for Reconsideration (issued August 18, 2006). Notices of proposed rulemaking announcing the consideration of the rehearing petitions were published in the September 27, 2006 State Register.

<sup>4</sup> In addition to opposing Central Hudson's petition, PULP expressly requests that we grant the CPB petition.

<sup>5</sup> Case 05-E-1222, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service, Order Adopting Recommended Decision With Modifications (Issued and Effective August 23, 2006) ("NYSEG Order").

a different determination on its allowed ROE. Specifically, Central Hudson claims that the NYSEG Order "specified that the Generic Finance Methodology, updated 'for the most recent six-month period for which financial information is available' should be used 'to determine the allowed return on equity...'"<sup>6</sup>

Central Hudson notes that it had consented to an extension of the statutory period through August and adds there was no statutory requirement to decide its rate proceedings in July. The Company therefore concludes that the effect of deciding its rate proceedings in July, instead of August, was to force "the utility that was prepared to accept a three-year stay-out to have the same ROE as the utility [that] is unconstrained by a Commission Order from filing new rate increase requests."<sup>7</sup> Central Hudson asserts that such a result is "inconsistent with the Generic Finance Case Methodology because it imposes a three-year stay-out without the remuneration ... provided for in the Generic Finance Case, and is prejudicial to Central Hudson."<sup>8</sup>

Central Hudson also claims that the various procedural paths for it and NYSEG are "irrelevant to the Commission's obligation to treat utilities fairly and consistently..."<sup>9</sup> Central Hudson argues that the Commission must update its ROE to avoid prejudice and to ensure that it is provided the opportunity to earn a compensatory return, particularly in times of expected future interest rate increases and inflation, as currently. Central Hudson requests that its allowed ROE be revised to 9.9%.

Responses to Central Hudson's Petition  
Multiple Intervenors

Multiple Intervenors states that the Company's petition is a belated and prejudicial attempt to get "a second bite at the apple" and is, to their knowledge, unprecedented

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<sup>6</sup> Central Hudson Petition at 4.

<sup>7</sup> Id. at 5.

<sup>8</sup> Id.

<sup>9</sup> Id.

when the provision at is issue was negotiated, incorporated into a settlement executed by the utility and other parties, and adopted by the Commission. Multiple Intervenors asserts that, since the Company filed a written acceptance of the Rate Order, its Rate Order challenge should be precluded. Multiple Intervenors argues that granting a petition under these circumstances would eliminate any reason for Staff and intervenors to expend resources engaging in negotiations with a utility and would be prejudicial to the other Joint Proposal signatories.<sup>10</sup>

Multiple Intervenors argues that Central Hudson's reliance on the NYSEG Order is "sorely misplaced" because the two proceedings are entirely different rate proceedings, involving different utilities, facts, circumstances and procedural schedules. Most notably, the Central Hudson proceedings were resolved through negotiations that resulted in a Joint Proposal and approval of an ROE that was exactly what the signatories negotiated. In contrast, there was no settlement in the NYSEG electric proceeding and therefore the Commission followed its longstanding practice of updating ROE in fully litigated proceedings. Multiple Intervenors also highlights that the Joint Proposal contained no provision for updating the ROE but was instead predicated upon a fixed 9.6% ROE for all three years.<sup>11</sup>

Multiple Intervenors contends that the Company's complaint as to the timing of the Central Hudson and NYSEG rate decisions is correct but irrelevant. Multiple Intervenors states that there was nothing irrational or unreasonable about the decision when to issue the Rate Order, noting that Central Hudson negotiated and accepted its 9.6% ROE prior to April 19, 2006, while the Commission's decision regarding NYSEG's ROE was

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<sup>10</sup> Multiple Intervenors Petition at 4-5. Multiple Intervenors argues that, should the Commission grant the petition, in whole or in part, the other signatories should be afforded the same opportunity to abandon their support for various aspects of the Joint Proposal. Id. at 4, n. 8.

<sup>11</sup> Id. at 5-6.

made on August 23, 2006, over four months later. Multiple Intervenors concludes, therefore, that even if the utilities were deemed identical for ROE calculation purposes - an assumption made by Central Hudson without any support or justification - one should expect different ROE results from the timing difference.<sup>12</sup>

Multiple Intervenors states that the Company's argument that it was prejudiced by essentially having the same ROE as NYSEG is "unreasonable" because it ignores all other factors and circumstances, most critically that Central Hudson was granted "over \$107 million in electric increases and over \$36 million in gas increases," while NYSEG was directed to reduce its electric rates by \$36 million. Multiple Intervenors also disagrees with the Company's allegations that it was denied a stay-out premium, asserting that the 9.6% ROE reflects a sizable premium and is considerably higher than the likely result of a one-year litigated case.<sup>13</sup>

Reiterating that the Joint Proposal contains no update provision, Multiple Intervenors asserts that Central Hudson "now is seeking consideration for which it did not bargain." It argues that all parties involved in negotiating the Joint Proposal were "well aware" of expectations regarding future interest rates and inflation and that the Commission should not assume such expectations were ignored by the signatories. Multiple Intervenors states that Central Hudson has entered into many negotiated rate plans during time of declining interests and inflation and, to their recollection, has never before requested that the Commission update a negotiated ROE.<sup>14</sup>

CPB

CPB asserts that when Central Hudson advised the Commission in writing that it accepted the Rate Order in accordance with ordering clause 2, it waived its right to

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<sup>12</sup> Id. at 6-7.

<sup>13</sup> Id. at 7-8.

<sup>14</sup> Id. at 8-9.

petition for rehearing or to contest the terms of the Joint Proposal as modified and approved by the Commission. According to CPB, the Company's claim that it can accept an order and turn around and challenge that order is belied by the very case upon which the Company relies.<sup>15</sup> CPB argues that the Company could either decide to accept or reject the order, or seek more time to make its decision,<sup>16</sup> but it could not, without frustrating the intent of Public Service Law (PSL) section 23, accept the order and then claim a month later that it "had its fingers crossed."<sup>17</sup>

CPB asserts that there is no legal or factual basis for approving the Company's request to revise its ROE as the Company's ROE was established through negotiations and no methodology for deriving or modifying the ROE is identified in the Joint Proposal.<sup>18</sup>

There also is no basis, according to CPB, for asserting that the ROE should have been updated to reflect the latest available data. CPB contends that the Commission typically updates ROE and certain forecasts in litigated cases, but not in proceedings involving a Joint Proposal because the signatories have indicated their acceptance of the Joint Proposal's terms. CPB argues that Central Hudson could have pursued a litigated resolution of the ROE issue or negotiated an agreement to update the ROE, but having failed to do either, it chose to bear the risk that financial costs would increase after the Joint Proposal was signed.<sup>19</sup>

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<sup>15</sup> People v. Penn Central Company, 34 A.D.2d 278, 311 N.Y.S.2d 150 (3<sup>rd</sup> Dep't 1970).

<sup>16</sup> CPB Response at 3, citing to Penn, 311 N.Y.S.2d at 153.

<sup>17</sup> CPB Response at 2-4. CPB notes that the Company did not request rehearing on its discount rate for pension and OPEB expense (5.5%) based on different outcome in the NYSEG Order (6.25%) even though, according to CPB, the Company's rehearing petition arguments could apply with equal force. Id. at 4, n. 13.

<sup>18</sup> Id. at 4.

<sup>19</sup> Id. at 4-5.

Even if updating the ROE were appropriate, CPB states there is no factual basis for increasing the ROE here. CPB cites to its arguments that inclusion of a stay-out premium is inappropriate for Central Hudson because the premium is only for multi-year rate freezes. It states that the Rate Order does not endorse the notion that a 36 basis point stay-out premium is an inherent requirement of the approved rate plan, and even if one is implicit therein, the NYSEG Order offers no basis for adjustment as the Generic Finance Case prescribes a consistent methodology for calculating ROE on a company specific basis, not a generic statewide basis. Finally, based on the differences in credit standing and based on the return approved in the NYSEG Order, CPB calculates the ROE for Central Hudson, if updated, should be 9.58%, not 9.9%.<sup>20</sup>

PULP

PULP asserts that the Company's petition for rehearing is "barely credible, much less persuasive." PULP states that the Company agreed to an ROE of 9.6% and the Commission approved it over the objections of CPB, which sought a lower figure. PULP notes that the Joint Proposal (which was signed and supported by the Company) along with the Company's supporting testimony and briefs contain no request or suggestion that the Commission update, increase or otherwise modify the jointly proposed ROE. PULP adds that there is no record basis to suggest how such an update would be calculated. In addition, PULP observes that the Company filed a letter accepting the Rate Order, which included the establishment of the 9.6% ROE. PULP states that the Company is seeking "relief it never sought before, based on a methodology no party has had the opportunity to review and which would produce results for which there is no record support."<sup>21</sup>

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<sup>20</sup> Id. at 5-6.

<sup>21</sup> PULP Response at 2-3.

Staff

Staff asserts that Central Hudson is precluded from seeking rehearing on any issue decided in the Rate Order because it filed an unconditional acceptance of the Rate Order, which included acceptance of all of its terms and conditions. Staff adds that PSL §23(1) provides that a utility making an acceptance is obligated to "obey" the order it has accepted.<sup>22</sup>

With respect to the Company's reliance on the NYSEG Order, Staff contends that disrupting a rate order based on a subsequent rate order would engulf the Commission in a series of requests to modify orders "whenever a party perceives a subsequent decision is beneficial to its interests." Staff states that this result would effectively render all Commission decisions "non-final, raising the prospect of endless administrative reconsiderations that would disadvantage ratepayers and consume administrative resources."<sup>23</sup>

Staff adds that Central Hudson's attempts to use the NYSEG Order as a precedent for a "new circumstance" within the meaning of 16 NYCRR 3.7(b) must fail. It argues that a subsequent decision does not constitute new circumstances and that Central Hudson's circumstances remain exactly as they were when the Rate Order was issued.<sup>24</sup>

Staff dismisses the Company's arguments that the Rate Order and the NYSEG Order should have been treated as contemporaneous, noting that the original schedule contemplated a decision in June 2006, but was extended to allow more time for negotiations.<sup>25</sup>

Staff states that the Generic Finance methodology provides for ROE to be regularly updated to reflect recent information, but notes that the times for last updates for Central Hudson and for NYSEG, respectively, were April 19, 2006 (the Joint Proposal date) and August 23, 2006 (the date the

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<sup>22</sup> Staff Response at 2-4.

<sup>23</sup> Id. at 4.

<sup>24</sup> Id. at 5.

<sup>25</sup> Id. at 5-6.

NYSEG Order was issued). Staff asserts that the paths followed by Central Hudson and NYSEG to arrive at new rates were fundamentally different in that Central Hudson chose the stability of negotiated multi-year rate proposal with a fixed ROE for three years, while NYSEG took the litigated route, where it accepted the risk that its ROE could change between the issuance of a Recommended Decision and Commission decision and could change again, possibly one-year from now. Staff also observes that Central Hudson failed to cite any decision where an ROE was updated between the filing of a Joint Proposal and the Commission decision thereon.

Staff finally argues that Central Hudson is bound by the Joint Proposal's 9.6% ROE because the Rate Order decided it was an "essential component" to the balancing of benefits and detriments under the Joint Proposal's interrelated provisions that all the signatories accepted.

#### Discussion

We find that the Company's petition, in addition to lacking merit, is precluded by its previous acceptance of the Rate Order. When Central Hudson filed its July 27, 2006 letter advising the Commission that it accepted the Rate Order, it did so unconditionally and without reservation. Having informed the Commission and the active parties of its ultimate decision to obey the order, the Company cannot now claim that its acceptance was subject to later "amendment" without potentially violating section 23 of the Public Service Law or prejudicing and misleading the other signatories, specifically, and the active parties, generally.

Even if one assumes the petition could not be precluded by the Company's prior acceptance letter, we find that the Company failed to offer any credible support for its assertion that the subsequent NYSEG Order constitutes a "new circumstance" within the meaning of 16 NYCRR 3.7. Central Hudson cites no precedent for its position. It does not argue that it and NYSEG are similarly situated in any respect, let alone for purposes of calculating ROE. Additionally, the

Company fails to support its claim that the ROE should be updated because it does not allege that expected future rate increases and inflation were not already factored into the calculation of the ROE that it negotiated, advocated and unconditionally accepted. Instead, the Company acknowledges, indeed stresses, in its petition that these are times where "expectations of future increases in interest and inflation" exist.<sup>26</sup> The Company's acknowledgment, especially when coupled with Multiple Intervenors' assertion that all parties involved in negotiating the Joint Proposal were "well aware" of expectations regarding future interest rates and inflation, are persuasive additional reasons not to assume that expectations of future increases in interest and inflation were ignored by the signatories when they advocated the 9.6% ROE.

Finally, we note that the Company's request for rehearing lacks merit for several additional reasons, including: 1) the Joint Proposal's ROE provisions do not mention a particular methodology, 2) the Joint Proposal set forth a fixed ROE for the three years and did not request an update, and 3) the NYSEG Order is a utility-specific, and fact-specific determination that did not, contrary to Central Hudson's assertions, specify that the allowed ROE would be updated even in rate proceedings where the ROE was negotiated and set forth as a fixed percentage, with no request for update.

In short, Central Hudson received approval of the allowed ROE that it negotiated and accepted. The Rate Order noted Central Hudson's claims that the ROE was on the lower end of the range of reasonableness.<sup>27</sup> It recognized that the ROE was one of a number of interrelated elements in a reasonable balance.<sup>28</sup> Central Hudson has failed to demonstrate any error of law or fact or new circumstance that warrants rehearing of that ROE. In light of all of the foregoing, we therefore deny the

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<sup>26</sup> Central Hudson Petition at 6.

<sup>27</sup> Rate Order at 18, 70.

<sup>28</sup> Id. at 70.

Company's request to modify an ROE that it negotiated and supported and which we approved without modification.

CPB Petition

CPB asserts that the Commission should rehear its determinations regarding the disposition of the electric depreciation reserve and the imposition of a utility-sponsored fixed price option, claiming they are not supported by the evidence.

CPB had proposed that the Commission modify the Joint Proposal to require that the balance of the electric depreciation reserve be used to further moderate Central Hudson's electric rates. CPB claims that the Rate Order incorrectly characterized and rejected its proposal, asserting there was no witness testimony or evidence produced to prove the Rate Order's assertion that the amount of rate mitigation resulting from the proposal would have a "minimal" impact.<sup>29</sup>

CPB continues that the Order erred in citing a concern about large future deferrals as a basis for rejecting the CPB proposal, again claiming the Rate Order produced no record evidence that such deferrals were likely. CPB asserts that the record instead shows that future ratepayer credits are likely.<sup>30</sup>

CPB also asserts that the Rate Order's reliance on policies favoring rate stability as a basis for its determination is an unsupported error of fact and "expresses more concern about a rate increase that may occur four years in the future, than known rate increases that will occur in the present." CPB opines that the Rate Order ignored fundamental principles of equity and ratemaking by increasing the potential for a mismatch between the customers who contributed to the electric depreciation reserve and those who receive its benefits and by ignoring that the funds at issue belong to ratepayers.<sup>31</sup>

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<sup>29</sup> CPB Petition at 3-4.

<sup>30</sup> Id. at 4-5.

<sup>31</sup> Id. at 6.

With respect to rejecting its proposal to mandate the reinstatement of a utility-provided fixed price offer, CPB claims that the Rate Order "inaccurately" reflected extensive facts and rejected evidence that fixed price options "must be available from the utility in these circumstances."<sup>32</sup> CPB argues that the bases for rejecting its proposal - budget billing as an alternative, existence of a competitive market for fixed price products, the CPB proposal's lack of sufficient detail and the lack of adequate time to remedy the insufficiencies, and "other factors" - were each erroneous in fact.

CPB asserts that "a fundamental difference"<sup>33</sup> between budget billing and fixed price products was ignored.<sup>34</sup> CPB claims the record evidence conclusively demonstrates that ESCOs are not offering just and reasonable fixed price products.<sup>35</sup> CPB contends that its proposal did not lack sufficient detail because it "has all the detail that the Commission itself designed for Central Hudson in 2005."<sup>36</sup> CPB argues that, since there is no lack of detail, there also was no shortage of time to implement its proposal, especially since the amount of time that was then available was equivalent to the time that was available to the Company under the July 2005 Order.<sup>37</sup> CPB finally contends that consideration of concerns that were raised by Staff, the Company and SCMC/RESA "did not merit mention" because they are not supported by the record.<sup>38</sup>

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<sup>32</sup> Id. at 7.

<sup>33</sup> According to CPB, budget billing does not protect customers from the risk of commodity price fluctuations and a fixed price option does.

<sup>34</sup> CPB Petition at 8.

<sup>35</sup> Id. at 9.

<sup>36</sup> Id. at 10.

<sup>37</sup> Id. at 11. The "July 2005 Order" refers to Case 05-G-0311, Small Customer Marketer Coalition, Order Directing the Future Termination, Subject to Conditions, of a Fixed Price Offer (issued July 22, 2005).

<sup>38</sup> Id. at 12.

CPB asserts that record evidence of customers' strong preference for fixed price options was not mentioned in the Rate Order.<sup>39</sup> It adds that the events of the past heating season - namely, increases in the average prices for gas and electricity and increased exposure to spot market purchases due to changes in the Company's electric supply portfolio - demonstrate customers' need to have the opportunity to purchase electricity and gas at a fixed price.<sup>40</sup>

CPB asserts that new information, like the NYSEG Order authorizing the utility to provide fixed price electricity products, should be considered.<sup>41</sup> CPB argues that the need for a utility provided fixed price electricity product is even more compelling for Central Hudson's customers than for NYSEG's because Central Hudson's territory has fewer authorized ESCOs serving a smaller percentage of customers than does NYSEG's service territory. CPB further argues that the "uniquely" high customer demand and dependence upon fixed price offerings in NYSEG's service territory cannot justify denying Central Hudson customers the same opportunity.

CPB claims that new information, like Direct Energy's recently announced plans to offer electric and gas service to residential customers, "does not affect the need for Central Hudson to offer fixed price products" because 1) it's not certain Direct Energy will offer fixed price products, 2) Direct Energy did not, as of August 21, 2006, offer gas service and 3) the addition of one ESCO offering an "alleged" fixed price product will not result in a competitive market for such products for residential and small business customers.<sup>42</sup>

Responses to CPB's Petition  
Direct Energy

Direct Energy argues that the CPB Petition should be denied because the CPB's "alleged errors of fact are actually

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<sup>39</sup> Id. at 12-13.

<sup>40</sup> Id. at 13-14.

<sup>41</sup> Id. at 14-16.

<sup>42</sup> Id. at 16.

all policy differences that the Commission has already thoughtfully and carefully considered when it decided not to require Central Hudson to offer a fixed price product."<sup>43</sup>

Direct Energy points out that "rehearing may only be sought on grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination" and that the petitioner must "separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing."<sup>44</sup> Direct Energy asserts that, instead of identifying errors of facts, CPB "attempts to mischaracterize settled policy differences as errors of fact."<sup>45</sup>

Direct Energy describes CPB's claim that it was factually incorrect for the Commission to conclude that utility fixed price products are unnecessary as "a thinly veiled attempt to attack a conclusion with which it disagrees."<sup>46</sup> Direct Energy next states that CPB's premise - that a fixed price offering eliminates all risk of commodity fluctuation - is incorrect and inconsistent with CPB's own recognition of the fact that customers who enroll in a fixed price offering run the risk of paying above-market prices for their commodity supply, particularly in a falling price environment.<sup>47</sup>

Direct Energy characterizes CPB's claim that the Commission erred in concluding that "the record shows there is a competitive market in Central Hudson's territory, which includes the provision of fixed price offers from competitive suppliers" as a policy difference. It asserts that "since CPB is merely restating its original arguments, without any new or different information" and without identifying any errors, its request for rehearing, to the extent based on this claim, must be denied.<sup>48</sup>

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<sup>43</sup> Direct Energy Response at 1-2.

<sup>44</sup> Id. at 2, citing 16 NYCRR 3.7(b).

<sup>45</sup> Id. at 3.

<sup>46</sup> Id.

<sup>47</sup> Id. at 3-4.

<sup>48</sup> Id. at 4.

Direct Energy notes that, though CPB claims that its proposal was essentially identical to the Commission's July 2005 proposal, CPB also admits that its proposal was different in that it could not be subsidized through the gas adjustment clause. Direct Energy further asserts that the Commission's conclusions as to the insufficiency of detail and time for implementation did not rise to an error of fact and cannot provide grounds for rehearing.<sup>49</sup>

With respect to CPB's claim that the Commission failed to consider evidence of customers' preference for a fixed price offering, Direct Energy argues that CPB offered no evidence to support its claim. Direct Energy also takes issue with CPB's repeated cites to evidence from NYSEG's territory, stating that such evidence is "wholly irrelevant to this proceeding where the Commission has found retail markets to be workably competitive." It adds that CPB never considers that there may be a link between NYSEG's "excessive" earnings on its program and the effect such earnings may have creating a program that is "artificially ... more attractive to customers than would be the case in a properly functioning competitive market."<sup>50</sup>

Direct Energy argues that CPB's reliance on the NYSEG Order as a "new circumstance" warranting rehearing is misplaced and unpersuasive because the NYSEG Order expressly states that approval of a NYSEG-provided fixed price service is "transitional" in nature and for a "limited period of time" and reiterates the Commission's belief that "customers will ultimately best be served by a competitive market for retail electricity service, in which fixed price offerings are provided exclusively by ESCOs..."<sup>51</sup> Direct Energy argues that the Commission also recognized other differences between NYSEG and other utilities, namely that NYSEG had been offering fixed price service for the last four years, ending the program now would be too abrupt for residential customers, and the market for

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<sup>49</sup> Id. at 5.

<sup>50</sup> Id. at 5-7.

<sup>51</sup> Id. at 7, citing NYSEG Order at 8.

residential retail commodity service in NYSEG's territory was not fully competitive. In contrast, the Commission reached "the opposite conclusion for Central Hudson" which was not currently offering a fixed price option.<sup>52</sup>

With respect to CPB's attempt to downplay Direct Energy's announcement of its intention to enter the competitive market in Central Hudson's territory, Direct Energy asks that if CPB prevails with its contention that new circumstances warrant rehearing in case, the Commission should recognize those new circumstances that support the decisions as they currently stand, including the fact that "a well-capitalized marketer plans on entering Central Hudson's territory to offer electric and gas fixed price products to residential customers."<sup>53</sup>

SCMC/RESA

SCMC/RESA highlight that, in rejecting the CPB's proposed fixed price offering, the Commission found that the proposal lacked sufficient detail and time for successful implementation for the 2006-07 heating season. They add that, even if such deficiencies could be remedied, the Commission was not convinced of its necessity, particularly in light of CPB's acknowledgment that the proposal may not be better for customers than the currently available variable price offerings or budget or levelized plans. SCMA/RESA also note the Commission's finding that a competitive market exists in Central Hudson's service territory, which includes the provision of fixed price offers. They conclude that these factors, as well as the concerns raised by Staff, the Company, and SCMC/RESA, properly resulted in the Commission's conclusion that utility-provided fixed price options were not necessary.<sup>54</sup>

SCMC/RESA argue that rational assessment of CPB's assertions demonstrate that the Commission's determination was reasonable and that CPB's arguments in support of rehearing are

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<sup>52</sup> Id. at 7-8.

<sup>53</sup> Id. at 8-9.

<sup>54</sup> SCMC/RESA Response at 2-3.

unpersuasive. SCMC/RESA argue that in raising an assertion that the CPB proposal was similar to what the Commission required in its July 2005 Order, CPB is trying to shift the burden of proof from itself to the Commission.<sup>55</sup>

They argue that the Commission correctly discerned that critical cost issues were left unaddressed by the CPB proposal. With respect to the timing issue, SCMC/RESA argue that the Commission correctly observe that insufficient time was available for successful implementation of the CPB proposal as implementation usually involves the announcement of the offer, receipt of responses, and assessment of the required volume of hedging instruments and fixed-price purchases, all of which were ignored by the CPB in its proposal.<sup>56</sup>

SCMC/RESA further argue that CPB's constant reliance on the July 2005 Order as an excuse for its failure to properly flesh out the details of its proposal is entirely misguided. They note that in the July 2005 Order, the Commission was considering whether to continue an existing offering, but here, there is no existing utility offering to be considered.<sup>57</sup>

SCMC/RESA argue that the Commission appropriately relied on the CPB's acknowledgement that there was no guarantee that the fixed price offering would be better for customers than the variable price. They point out that CPB admitted that its primary purpose for proposing a fixed price option to "provide customers a tool for dealing with price volatility" and argue that budget billing or levelized payment plans, as noted by the Commission, fully address this concern because they allow customers to smooth over their charges on an annual basis.<sup>58</sup>

SCMC/RESA also argue that, in taking issue with the Commission's view of the state of the competitive market in Central Hudson's territory, CPB merely refers to its own witness and ignores other facts, specifically, existing ESCO-provided

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<sup>55</sup> Id. at 3.

<sup>56</sup> Id. at 3-4.

<sup>57</sup> Id. at 4.

<sup>58</sup> Id. at 4-5.

fixed price options and the entry of another ESCO into the Central Hudson market.<sup>59</sup>

In response to the CPB's repeated assertions that the Commission ignored the public's preference for fixed price offerings, SCMC/RESA state that CPB's analysis "simplistic and unrealistic." They argue that, an implied underpinning of CPB's approach (i.e., a fixed price shields customers from rising energy prices more economically than variable rate service) is not supported by historical data. They note that under the existing NYSEG rate plan, the utility's variable rate has generally been lower than the fixed price offerings. Using numbers provided by CPB, they assert that if a customer had purchased a fixed price product in the November 2005 time frame, the fixed price would have reflected an anomalously high price and would have been precisely the wrong action for a customer to employ in response to market prices.<sup>60</sup>

SCMC/RESA states that CPB's reliance on the NYSEG Order is misplaced and offers arguments similar to those made by Direct Energy and summarized above.<sup>61</sup>

#### PULP Response

PULP asserts that budget billing was intended to and is capable of addressing fluctuations in the customer's usage, but was not intended to and is ineffective in eliminating bill fluctuations associated with month-to-month price changes. It contends that both the statutory and tariff language concerning budget or levelized billing make it clear that such plans were not intended to allow the customer to smooth or moderate the bill effects of price variability. Since the Company expressly reserves the right to make changes in the budget billing schedule based on known or projected changes in the price of

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<sup>59</sup> Id. at 5.

<sup>60</sup> Id. at 6-7.

<sup>61</sup> See SCMC/RESA Response at 7-8. Since such arguments have already been generally summarized above, they will not be repeated here.

commodity, PULP argues that budget billing plans, by definition, are not providing a "fixed" price. According to PULP, such plans thus are no substitute for utility fixed price offers.<sup>62</sup>

PULP argues that, for the customer who is looking for bill stability and who can not get it from a fixed price offer, the choice of variable pricing under a budget billing regime may actually be worse than variable pricing alone. PULP claims that under budget billing, monthly price increases simply raise the amounts in excess of the billed amount that must be collected during the budget year. It adds that, when the budget billing is adjusted, all of the excess must be collected on top of the increase going forward, which raises the bill increase and leads to greater bill shock.<sup>63</sup>

PULP argues that implicit in any fixed price offer is a possibility, at some future time while the offer is in effect, the commodity price in the market will differ from the offer's commodity price. PULP claims that shifting this risk to the seller is a key element of a fixed price offer, but notes there usually is a premium in price as a result. PULP asserts that, since budget billing was not intended to and does not provide for such a shift, it is no substitute for a fixed price offer and is not a justification for failing to implement a utility fixed price offer for Central Hudson.<sup>64</sup>

PULP notes that it challenged the factual assumption that ESCOs would be making fixed price offers in the coming heating season by introducing into the record the form contracts used by each ESCOs operating in Central Hudson's territory. PULP states that there is no other or additional evidence in the record regarding ESCOs' provision of fixed price offers. PULP asserts that the record shows that these contracts provide ESCOs with one or sometimes multiple means of abandoning the fixed price offer when the fixed price bargained in the contract is "out of the market." PULP concludes that notwithstanding this

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<sup>62</sup> PULP Response at 3-5.

<sup>63</sup> Id. at 5-6.

<sup>64</sup> Id. at 6.

"clear" record that fixed price offers are not available to residential customers in the Central Hudson territory, the Rate Order states that the market in the Central Hudson territory includes the provision of fixed price offers from competitive suppliers and rejects CPB's proposal that a utility-provided fixed price offer be required.<sup>65</sup>

Central Hudson Response

Central Hudson argues that with respect to the disposition of excess electric depreciation reserve, the Rate Order is entirely consistent with Commission precedent and practice. It states that CPB cites no precedent for its position that there is "well established agency precedent in which ratepayer funds are used to mitigate large increases." Central Hudson asserts that there is a long standing Commission "rule of thumb" that differences between book and theoretical reserves up to about 10% are acceptable, and that consistent with this rule of thumb, the Rate Order reduces the difference between theoretical and book electric depreciation reserves to below 10%.<sup>66</sup>

Central Hudson states that the total depletion of the book to theoretical reserved demanded by CPB is contrary to Commission precedent. The Company argues that instead of recognizing actual precedent, CPB cites to the recent NYSEG Order. The Company, however, contends that the NYSEG Order contradicts and does not advance CPB's position, noting that there, the Commission directed that 70% of the current balance in the "Asset Sales Gain Account" be returned to customers (as compared to 62% in these proceedings). Central Hudson notes that neither in the NYSEG Order nor the present Rate Order, did the Commission totally deplete the accounts at issue.<sup>67</sup>

Central Hudson states that CPB repeatedly suggests that the electric rate moderation adopted by the Commission

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<sup>65</sup> Id. at 7-9.

<sup>66</sup> Central Hudson Response at 7-8.

<sup>67</sup> Id. at 9-10.

unjustifiably withheld funds that belong to customers. The Company argues that CPB's various referrals to "ratepayer funds," "ratepayer money," "customer funds" and "funds [that] belong to ratepayers" are misleading. It states that the rates customers have paid to Central Hudson have been and continue to be based on depreciation rates and practices specifically approved by the Commission. Central Hudson argues that it has not collected any more in rates than authorized by the Commission and that its revenues are not ratepayer funds but revenues it properly received for the provision of utility service.<sup>68</sup>

The Company counters CPB's assertion that there is no record evidence in opposition to its proposals by arguing that the Joint Proposal (Exhibit 41) specifically reflected the use of \$32 million in ratepayer moderation instead of the \$52 million sought by CPB. The Company further argues that the significant difference between the present estimate of the theoretical electric depreciation reserve and the immediately prior estimate utilized by the Commission in establishing rates in Case 00-E-1273 and the significant potential for the difference between book and theoretical electric reserves to shrink substantially or reverse as a result of the new depreciation studies called for in the Joint Proposals demonstrate that the \$20 million referred to by CPB is an "immutable," "illusory, soft, spot estimate."<sup>69</sup>

Central Hudson also argues that the CPB's position is "bad policy." The Company specifically states that, in its last rate proceeding, large refunds were given to customers over an extended period of time, while, more or less contemporaneously, significant stock market reversals occurred, leading to run-ups in the FAS expenses for pensions and OPEBs that were deferred and properly recovered in these proceedings. According to the Company, the Commission's approval of large refunds precluded use of that source of funding to avoid significant portions of

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<sup>68</sup> Id. at 10-11.

<sup>69</sup> Id. at 11.

the current rate increases and CPB's current position amounts to "an invitation to have history repeat itself."<sup>70</sup>

With respect to CPB's assertion and criticism that the Rate Order produced no record evidence that large future deferrals are likely, the Company argues that the record contains testimony showing that the present worth of manufactured gas plant (MGP) site investigation and remediation (SIR) required by the Department of Environmental Conservation for the Newburgh site alone was over \$22 million. It notes that the Joint Proposal provides an electric rate allowance commencing in rate year two of approximately \$1.4 million. According to the Company, the Rate Order created a need for future rate increases for the MGP/SIR costs for which the Commission did not provide current recovery. It states that, against this backdrop, CPB's assertion (that the company is more likely to owe ratepayers in the future) is "plainly incorrect hyperbole."<sup>71</sup>

The Company argues that CPB's position is contrary to consumers' true interest because the reported \$20 million amount of excess depreciation reserve is "impermanent." It asserts that adoption of CPB's position would assure future increases that customers will have to pay for with "real dollars from their pockets." According to the Company, the Commission has applied policies it has consistently applied in the past, policies that are sound and in the consumers' interests.<sup>72</sup>

The Company argues that the Commission policy applicable to fixed price offers is that "utilities should not file proposals to continue programs in which they offer fixed price commodity service at a profit." It notes that the Joint Proposal was submitted consistent with this policy.<sup>73</sup>

The Company specifically notes that the Commission's fixed price offering policy is that workably competitive markets

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<sup>70</sup> Id. at 12-13.

<sup>71</sup> Id. at 13-14.

<sup>72</sup> Id. at 15.

<sup>73</sup> Id.

determine whether and, if so, how to offer fixed price options. The Company argues that CPB presented no direct evidence from Central Hudson customers and instead principally relied on "conclusory assertions" derived from other places. It asserts that the Commission was therefore correct in finding CPB's "collections of assertions and generalizations to be uninformative" and not substantial. The Company adds that the record shows that there are fixed price offerings in Central Hudson's territory, and that CPB's beliefs as to their desirability are "not germane."<sup>74</sup>

The Company argues that CPB has basically advanced no new arguments and therefore fails to meet the standard for rehearing set forth in the Commission's rules. It further argues that CPB's efforts to create a basis for rehearing by referring to the NYSEG Order must fail.<sup>75</sup>

Central Hudson argues that CPB attempts to excuse its failure to propose reasonably developed fixed price offerings by claiming that Central Hudson could reestablish for gas (and establish for electric) the program that the Commission ordered it to cease in its July 2005 Order. The Company states that the fact that the NYSEG Order devotes 1/3 of its total length to the topic of fixed price offers shows that developing a real proposal requires much more effort than CPB was apparently prepared to undertake. The Company therefore asserts that the Commission was entirely correct in its conclusion that the development of fixed price offerings would be complex and require a significant amount of time.<sup>76</sup>

#### Staff Response

Staff asserts that CPB failed to show that ratepayers will benefit from its proposal to deplete the electric

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<sup>74</sup> Id. at 16-17, 19.

<sup>75</sup> See Central Hudson Response at 18. Since the Company offers arguments that similar to those proffered by Direct Energy and SCMC/RESA, and which have already been generally summarized above, they will not be repeated here.

<sup>76</sup> Id. at 19-20.

depreciation reserve. Staff notes that CPB has refined its proposal regarding use of the remaining reserve, but states that calculation of the revised proposal's effect indicates it still would be minimal (about \$1 less per month for the average residential customer<sup>77</sup>). In response to CPB's assertions that calculations amounting to \$1 or \$.80 do not carry evidentiary weight, Staff contends that CPB misunderstands applicable evidentiary requirements which require that the Commission's decisions be rationally based. Staff adds that while witnesses' qualifications, the length and detail of their testimony, and their performance on cross-examination are factors the Commission may consider in arriving at its decision, they are not dispositive as the Commission also may apply its own expertise to the evidence presented.<sup>78</sup>

Staff contradicts CPB's allegation that no other party presented evidence on rate moderators, stating that it submitted rate moderation testimony, including detailed information on the available amount and disposition of ratepayer credits, and that Joint Proposal Appendix B shows the rate increases' allocation. Staff argues that, under the rational basis test, the Commission is entitled to apply appropriate mathematical calculations to this data and arrive at a conclusion on the impact of CPB's proposal.<sup>79</sup>

Like the Company, Staff also contends that Central Hudson faces the prospect of incurring significant future costs to perform MGP site remediation. It adds that, since the exact

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<sup>77</sup> According to Staff, restricting the disposition of these ratepayer credits to only the residential, or any other class, would be improper because it has not been demonstrated that any particular class bore the burden of creating these credits, or that other circumstances justify benefiting one class at the expense of other classes. Staff Response at 11, n. 12.

<sup>78</sup> Staff Response at 10-12. Staff cites to ADT Company v. Public Service Commission 128 A.D.2d 1 (3rd Dept. 1987) to support its statement that the Commission may apply on its own expertise to evidence presented. Id. at 12.

<sup>79</sup> Id. at 12-13.

timing of the expenses was uncertain, the Joint Proposal provides for their limited rate recovery, with the balance of the actual expenditure deferred until known. Staff argues that the actual amounts could be considerably larger than the rate allowance, leading to large deferrals.<sup>80</sup>

Staff states that the Commission has the discretion, repeatedly exercised in recent years, to direct the disposition of ratepayer credits in the ratepayers' best long-term interests. It continues that the retention of the depreciation reserve credits for future use may enable Central Hudson's ratepayers to enjoy a long period of rate stability, as the credits are offset against expenses that arise in the future.<sup>81</sup>

With respect to CPB's arguments for imposition of utility-provided fixed price offers, Staff argues that, in searching for new circumstances warranting rehearing, CPB, like Central Hudson, improperly looks to the NYSEG Order. Staff observes that the NYSEG Order is based exclusively on the particular circumstances present within NYSEG's service territory, which justified a departure from otherwise applicable policies. Staff sees further confirmation that the NYSEG Order's analysis is confined to its facts and circumstances in that, contrary to CPB's position here, no one in the NYSEG proceeding proposed a gas fixed price offer, and none was required.<sup>82</sup>

Staff contends that CPB's reliance on the NYSEG Order as demonstrating that consumers prefer utility-provided fixed price offers is misplaced. Staff argues that the vast majority of NYSEG's residential customers defaulted to its fixed price service. Staff also states that NYSEG actively promoted its fixed price option, and thus concludes that customer acquiescence to fixed price service in NYSEG's territory is more attributable to utility efforts than to customer choice.<sup>83</sup>

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<sup>80</sup> Id. at 13-14.

<sup>81</sup> Id. at 14-15.

<sup>82</sup> Id. at 15-16.

<sup>83</sup> Id. at 16-17.

Staff also observes that a transition away from NYSEG's electric fixed price offer, rather than its abrupt cancellation, was necessary because 88% of NYSEG's residential electric customers had accepted that option at one time or another, mostly through default. Staff posits that no transition is necessary in Central Hudson's service territory because it never offered an electric fixed price offer and did not offer a gas fixed price offer during the most recent heating season.<sup>84</sup>

Staff asserts that the NYSEG Order establishes that customers can be adequately protected against price volatility by means other than a fixed price offer. Staff cites the Order's discussion that the management of commodity purchase portfolios by gas and electric utilities, with the objective of hedging against price volatility, will serve an increasingly important role in protecting vulnerable customers from price spikes. Staff also notes that the proceeding dedicated to further inquiry into hedging practices is now underway.<sup>85</sup>

Staff characterizes CPB's assertion that there is "uncontroverted evidence that fixed price options must be available from [Central Hudson] in these circumstances" as "both legally and factually meritless." Staff notes that the PSL requires establishment of "just and reasonable" rates in a decision that has a "rational basis" and argues that the Commission performed that function here by setting rates that establish the charges the utility shall bill its customers if they opt to take its commodity service. Staff asserts that there is no requirement that any other rate be offered, and that CPB's contrary "insinuation" "lacks any foundation whatsoever."<sup>86</sup>

Regarding CPB's declaration that there is no factual, record support for declining to require Central Hudson to offer a fixed price service, and that CPB's evidentiary presentation

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<sup>84</sup> Id. at 17.

<sup>85</sup> Id. at 18. Staff notes that the referenced proceeding was cited in the Rate Order.

<sup>86</sup> Id. at 19.

must be accepted, Staff contends that CPB again misinterprets applicable evidentiary requirements. Staff states that "trumpeting" your witnesses' qualifications does not countermand the legal requirement that the Commission need only show a rational basis for its decision.<sup>87</sup>

Like several parties, Staff also notes that the evidence in these proceedings demonstrates that, in Central Hudson's service territory, at least five ESCOs offer, or soon will offer, gas fixed price options, and at least two ESCOs offer, or soon will offer, electric fixed price options. It adds that 21% of the utility's former gas fixed price customers have opted to purchase their gas from alternative retail providers. Staff contends that these factors demonstrate that the competitive gas retail commodity market is viable and no more need be shown to meet the rational basis test. Staff adds that the market is more vigorous than CPB indicates, noting CPB's concession regarding Direct Energy's entry into the retail market in Central Hudson's territory.<sup>88</sup>

Staff argues that CPB bears a heavy burden in supporting its argument that utility fixed price offers should be required because such offers are "clearly extraordinary remedies that deviate from the policies established in the Retail Market Policy Statement." Staff states that the Commission has twice reiterated its policy that a fixed price option is a service best developed and offered through the competitive marketplace. It asserts that CPB has failed to countermand that policy's application here and, despite its concession that utilities retain residual market power in the emerging retail energy markets, it failed to propose any remedy for mitigating the exercise of that market power or addressing its proposal's adverse impact on the competitive markets' development.<sup>89</sup>

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<sup>87</sup> Id. at 19-20.

<sup>88</sup> Id. at 20-21.

<sup>89</sup> Id. at 21-22.

In response to CPB's praises of utility-offered fixed price products as tools to protect consumers against price volatility, Staff states that experience with such offerings has been rare, limited, and fraught with "enormous difficulties." Staff notes that parties often hotly contest the costs and procedures for such options, and that utility mark-ups can be sizable. Staff concludes that disagreements over the proper size of the mark-up, when combined with the extensive discussion of disputes over the terms and conditions of the fixed price offer, reinforce the conclusion that the design and implementation of a fixed price offer is difficult, time-consuming and prone to error. Staff argues that, in light of the history of utility-provided fixed price offers, none of CPB's arguments in their favor are sufficient to carry its burden of persuading the Commission that such offerings are necessary or appropriate for Central Hudson.<sup>90</sup>

Staff argues that CPB itself concedes that its proposed fixed priced offerings lacked "sufficient detail" when it candidly admitted that "the level of our proposal at this time hasn't addressed those kinds of details."<sup>91</sup> Staff asserts that the "details are legion," including the recovery of costs through the mark-up, whether to allow the utility to earn a profit margin, the size of that margin, the terms and conditions for enrolling in the program, and the means for informing the public of the risks attending participation. Staff contends that CPB's failure to make a comprehensive presentation on these details precludes adoption of its position and undermines arguments that the proposal could have been implemented for this heating season.<sup>92</sup>

With respect to budget billing as an alternative to CPB's proposal, Staff acknowledges that budget billing does not alter the commodity price itself or reduce the size of price spikes, but argues that it does smooth out bill fluctuations

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<sup>90</sup> Id. at 22-24.

<sup>91</sup> Id. at 24, citing Tr. 918.

<sup>92</sup> Id. at 24-25.

over time, offering consumers a degree of bill stability. Staff adds that, in the past, CPB has advocated the use of budget billing for this purpose, most notably, recommending in a January 3, 2005 press release, that customers use it to levelize monthly payments and keep heating costs down.<sup>93</sup>

Staff argues that the budget billing process also provides advantages that fixed price offers do not, such as allowing customers to make the same monthly payment throughout most of a year. Staff also argues that utility-provided fixed price offers can result in overstated rates for unwary residential consumers.

Staff points to the record, and to a CPB concession, as demonstrating that the hedging necessary to support a fixed price offer creates both volume and price risk (i.e., the utility incurs greater or lesser cost than actually furnishing the commodity at the fixed price than the costs that are reflected in the hedges). Staff contends that, with subsidies from other ratepayers eliminated as a source of cost recovery, the choices are limited to allowing either a ratepayer surcharge or a utility mark-up, both of which undermine the stability CPB purports to seek and make the proposal either ineffective or unduly expensive.<sup>94</sup>

Staff asserts that CPB has failed to support its claim that customers have a strong preference for purchasing fixed price products when they are available from utilities. Staff observes that when actual consumers' concerns were summarized in Rate Order, a preference for utility provided fixed price products was not mentioned, and that the CPB experts' testimony is devoid of information on actual consumer preferences, within Central Hudson's service territory itself, from statistically-persuasive surveys or sound evidentiary documentation. Staff adds that, at no time, did more than 13% of Central Hudson's gas customers participate in the utility fixed price option, an option which was often under-subscribed. Staff urges that, with

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<sup>93</sup> Id. at 25-26.

<sup>94</sup> Id. at 26-27.

retail access penetration in Central Hudson's service territory growing by 43% in the past year, customers should be allowed to pursue their best interests in that rapidly developing market.<sup>95</sup>

Observing that CPB's primary justification for a fixed price option is as a device that protects consumers from price volatility in the future, Staff argues that CPB offers no proof that price volatility will re-occur during the term of Central Hudson's Rate Plan. It adds that, if prices have stabilized, albeit at a higher level, then price volatility is not a problem. Staff also argues that CPB's apparent concern is not with price volatility itself, but with upward price spikes. Staff posits that, under rapidly declining prices, customers, if not CPB, would quickly retreat from fixed price offers.<sup>96</sup>

#### Discussion

Under our Rules of Procedure, 16 NYCRR 3.7(b), rehearing may be sought on the grounds that an error of law or fact has been made or that new circumstances warrant a different conclusion. CPB's Petition for Rehearing fails to establish that any of these grounds exist.

CPB's proposal to deplete the excess reserve account to provide additional rate moderation beyond what was already provided was rejected because the Commission was "not persuaded that the several disadvantages attending the complete depletion of excess depreciation reserve outweigh the one and only identified (and purportedly minimal) benefit."<sup>97</sup> The assertions in CPB's Petition for Rehearing do not warrant a different conclusion.

At the outset, CPB identified only one advantage to adopting its proposal -- additional moderation of electric rates; Staff argued that the additional rate moderation would be "minimal." As Staff notes, the Commission is permitted to apply its own expertise to the evidence presented and need only make a

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<sup>95</sup> Id. at 27-28.

<sup>96</sup> Id. at 29-30.

<sup>97</sup> Rate Order at 71.

rationally based decision. Based on the evidence presented in these proceedings (principally Exhibit 41), the Commission appropriately found that the impact of CPB's proposal was "purportedly minimal." It was also correct to conclude that this "one and only benefit" failed to outweigh the several identified disadvantages that would accompany its adoption.

The several disadvantages referred to in the Rate Order include, *inter alia*, difficulties associated with forecasting future deferrals and our policies favoring rate stability. CPB claims that the concern about large future deferrals is unsupported but, as is demonstrated by the record, and by Staff's and the Company's responses to CPB's petition, there is ample record support for such concern. Both the Company and Staff note that the Rate Order approved limited rate recovery for manufactured gas plant site investigation and remediation costs, with the balance of any actual expenditures deferred for future recovery. If actual expenditures exceed the rate allowances (a possibility that the Company argues is very likely), large deferrals will result.

CPB also appears to suggest that our policies favoring rate stability were not evidenced when we rejected its proposal. It is mistaken. The record shows that a substantial majority of the reserve account was dedicated to moderating electric rates, a provision which CPB supported. The record also shows that part of the reserve balance has been identified as a source against which to charge the approved one-month make whole (on the electric side), and, possibly, to fund an Automated Meter Reading Pilot or cover the cost of electric backout credits or offset future deferrals.

As demonstrated by the parties' arguments here and below, even agreement to the appropriate assessment of "excess" depreciation has been fraught with contention and discord. There is also the potential that the current assessment of the "excess" will change with the filing of a new depreciation study. By retaining some "excess" reserve, the impact of any of the foregoing occurrences could be offset using that "excess" as opposed to increasing (future) rates.

With respect to CPB's request for rehearing on the decision to reject its proposed utility-provided fixed price offerings, much of CPB's petition consists of merely restating arguments previously made, considered and rejected.<sup>98</sup> Direct Energy, SCMC/RESA, Central Hudson, Staff, and even CPB and PULP, have all either stated or conceded the record in these proceedings established there are competitive suppliers in the Central Hudson service territory that offer fixed price products. CPB and PULP, however, do not like the competitive providers' contract terms, and therefore claim that their offers can not be called "fixed" price offers. Their disapproval, however, does not negate the accuracy of the Rate Order's statement that "the record shows there is a competitive market in Central Hudson's territory, which includes provision of fixed-price offers from competitive suppliers." CPB's and PULP's arguments on this point have already been considered and rejected and merely reiterating the arguments in a rehearing petition fail to meet the regulatory requirements that would warrant rehearing.

Arguably, the only new circumstances or alleged errors offered by CPB are its arguments made in reliance on the NYSEG Order and its claims that rejecting its proposal due to lack of detail and time was an error. However, its reliance on the NYSEG Order is misplaced and its allegations of an error are

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<sup>98</sup> The arguments by CPB and PULP regarding the ESCOs' fixed price offers, ESCOs' contracts, the existence of a competitive market in Central Hudson's service territory, and the consumers' preference for utility-provided fixed price offers are not new, and they already were considered and rejected below. Mere reiteration of the same arguments does not render them more persuasive than before. Moreover, we note the apparent mismatch between the reasserted arguments on consumers' preference for utility-provided fixed price offers and CPB's petition (at 16) which states that "In Central Hudson's territory, residential and small business customers have not had the opportunity to purchase electricity at a fixed price that is just and reasonable from any provider for many years, so no quantitative evidence regarding their demand for and dependence upon a fixed price offering is available."

unsubstantiated. First, reliance on the NYSEG Order to assert that a utility-fixed price option must be imposed in these proceedings must fail. As noted by Direct Energy, SCMC/RESA, Central Hudson, and Staff, reliance on that Order is inappropriate because: 1) the NYSEG Order was based on different facts and circumstances, namely that NYSEG had been offering fixed price service for the last four years, ending the program now would be too abrupt for residential customers, and the market for residential retail commodity service in NYSEG's territory was not fully competitive; 2) the NYSEG Order expressly states that approval of a NYSEG-provided fixed price service is transitional in nature and for a limited period of time; 3) the NYSEG Order expressly reiterates the Commission's belief/policy that "customers will ultimately best be served by a competitive market for retail electricity service, in which fixed price offerings are provided exclusively by ESCOs...;" 4) unlike NYSEG, Central Hudson never offered an electric fixed price option; 5) unlike the situation in NYSEG's service territory, the Commission has determined that the market (with respect to gas service) is in fact competitive in Central Hudson's service territory; and 6) no one in the NYSEG proceeding proposed a gas fixed price offer, and none was required. In short, the NYSEG Order is a utility and fact specific determination that did not, contrary to CPB's assertions, constitute a new circumstance that warrants rehearing in these proceedings.

CPB relies almost exclusively on the July 2005 Order to substantiate its claims that the Commission erred when rejecting its proposal due to lack of detail and lack of

sufficient implementation time.<sup>99</sup> Its reliance on the July 2005 Order is misplaced. At the time that Order was issued, Central Hudson was currently offering a gas fixed price option, so it already had resources allocated and dedicated to providing that offering. When CPB proposed to reinstitute a utility-provided fixed price offering for gas and to establish a utility-provided fixed price offer for electricity, Central Hudson was not offering either service as a fixed price option. In addition, by then, the Commission had established policies favoring the development of competitive markets, generally, and, specifically, favoring the provision of fixed price offers by ESCOs. CPB acknowledged in its post-hearing brief that "it may face a difficult burden in overcoming recent precedent set by the Commission's decision" but stated that it was not precluded from trying.<sup>100</sup> Still, when CPB submitted its proposal, it did no more than argue that the utility should be required to create fixed price offerings for electricity and gas services and ensure that non-fixed price customers not subsidize the offerings;<sup>101</sup> it noted that its proposal did not address "cost"

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<sup>99</sup> Both CPB and PULP argue that budget billing cannot substitute for a utility-provided fixed price offer. Their arguments, however, do not rebut our finding that budget or levelized payment plans "are available" and "provide a tool by which customers can achieve certainty with respect to their monthly bills." We further note that, while, as PULP claims, budget or levelized bills are subject to periodic adjustment, to account for increases or decreases, such adjustment also was acknowledged by CPB to be a "possibility" under the CPB's proposed utility-provided fixed price offer (see Tr. 917). CPB and PULP's overall approach to such implementation issues as the need for any annual adjustments, is to not address these issues in their proposals, but to fault the Commission for requiring that the proposals address these issues. PULP unfavorably compares the adjustment issue for budget billing to the PULP/CPB approach of not addressing the adjustment issue at all; its comparison, however, does not address the reality that some periodic adjustment is required even for its fixed price proposal.

<sup>100</sup> CPB Post-Hearing Brief at 8.

<sup>101</sup> Tr. 714, 913, 914.

issues - both as to the price to be set for the option and the method of recovering any differences between estimates and actuals.<sup>102</sup>

CPB knew that, as a proponent of the offerings, it had to demonstrate sufficient justification for their adoption.<sup>103</sup> Such justification should include analysis of the outstanding costing and pricing issues, particularly given that fixed price options have been discontinued in Central Hudson's territory.<sup>104</sup> Against the obvious deficiencies in its proposals, which CPB itself acknowledged, and against the contrary Commission precedent and policies, CPB and PULP failed to convince the Commission that their incomplete and generalized proposal should be adopted.

In its rehearing petition, CPB does not address the differences between circumstances that existed when the July 2005 Order was issued and the circumstances existing when it made its proposal in 2006; does not grasp the significance of its acknowledgement<sup>105</sup> that, normally, a fixed price offer involves the announcement of such an offer and receipt of responses, which in turn permit determination of the required volume of hedging instruments and fixed price purchases; and is nonchalant about its failure to address such costing and pricing issues. Its basic approach is to claim that the Commission erred because it refused to ignore all of those factors when rejecting the proposal. Against this backdrop, CPB's claim that the decision rejecting its proposal constitutes an error of fact or law must fail.

In light of all of the foregoing, and for reasons stated in the responses filed by Direct Energy, SCMC/RESA,

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<sup>102</sup> Tr. 914-918.

<sup>103</sup> See, e.g., Rate Order at 72.

<sup>104</sup> Neither CPB nor PULP has justified assertions that a "premium" (PULP's term) fixed price service should be a required utility-provided service offering, when neither has addressed how to ensure against either subsidization by non-FPO customers or excessive payments by FPO customers.

<sup>105</sup> Tr. 915-916.

Central Hudson, and Staff, CPB's petition for rehearing is denied.

OBJECTION AND MOTION TO STRIKE

Central Hudson asserts that Points I and II of PULP's Response must be stricken as untimely. According to the Company, PULP concedes that its points are "additional arguments" and as such, the Company argues they should have been submitted by August 31, 2006, the time established by the Secretary for filings seeking rehearing or reconsideration.<sup>106</sup>

The Company characterizes the first full paragraph on page six of Staff's Response as "false," "without factual basis," and "irrelevant *ad hominem*" that attempts to improperly influence the Commission's decision on rehearing. Central argues that it has not tried to take advantage or cause delays. It adds that the schedule in these proceedings was not one it proposed. The Company contends that Staff resorted to improper and irrelevant extra-record assertions concerning settlement negotiations and two prior Central Hudson rate cases.<sup>107</sup>

PULP's Response to Motion

PULP states that, on its face, its response sought no independent relief and therefore can not be classified as a motion for rehearing or characterized as "untimely" under 16 NYCRR 3.7. PULP highlights that 16 NYCRR 3.7 calls for "responses" to a motion for rehearing to be filed within 15 days, and does not limit the scope of such responses by identifying them as "papers in opposition."<sup>108</sup>

PULP argues that the Company position would assure that the Commission receives a less complete record for its consideration on rehearing because, under Central Hudson's theory, if the moving papers on a motion for rehearing are incomplete, other parties who support the request are unable to

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<sup>106</sup> Company Objection and Motion to Strike at 2.

<sup>107</sup> Id. at 3-6.

<sup>108</sup> PULP Response to Motion at 3.

provide additional materials to complete the record. PULP asserts that, "in this way, an opponent of the motion prevails, not by voicing a better argument, but by silencing voices that might have caused the movant to prevail." It argues that such a result "plainly contradicts the Commission's longstanding policies seeking the most complete understanding of the facts and legal issues possible before any decision is taken."<sup>109</sup>

PULP contends that, if there is logic to the Company's motion to strike, it is that the PULP Response makes arguments the Company could not have anticipated from CPB's moving papers and to which the Company therefore has not had the chance to respond. PULP, however, asserts that there is no prejudice to the Company because the Commission's rule plainly allow parties to make replies to rehearing responses under extraordinary circumstances.<sup>110</sup>

#### Staff's Response to Motion

Staff asserts that Central Hudson's motion is "frivolous and meritless in all respects" and should be denied in its entirety. Staff argues that the motion is "nothing more than a thinly-disguised reply to the Staff Response" and therefore "should be viewed as an effort to circumvent the prohibition against such replies in the Commission's Rules..." Staff argues that since there are no "extraordinary circumstances" here, the Commission may summarily dismiss the motion, as an impermissible reply, or, if heard on the merits, deny it.<sup>111</sup>

Staff claims that its arguments about delays in Central Hudson proceedings was an appropriate response to Central Hudson's claim that these proceedings were contemporaneous with the NYSEG proceeding. Staff adds that each

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<sup>109</sup> Id. at 3-5.

<sup>110</sup> Id. at 5-6.

<sup>111</sup> Staff Response to Motion at 1-2.

of the delays it presented are "demonstrably true" and are facts that the Commission can consider.<sup>112</sup>

Staff asserts that the Company has falsely accused it of making arguments that do not appear in its response, namely, that Staff accused Central Hudson of causing the delay. Staff argues that it did not single out Central Hudson as the sole, or even the primary, cause of the delays here, but "merely noted the frequency of delays in proceedings involving this utility raised the expectation that yet another one would occur." Staff states that Central Hudson also falsely accuses it of revealing confidential information, allegedly related to the settlement negotiations, but responds that "unlike Central Hudson," it did not "even mention the negotiations, much less disclose confidential information about them."<sup>113</sup>

Staff argues that Central Hudson has failed to justify its request to strike Point I and II of PULP's Response, stating that its contention amounts to an argument that parties may not support others upon rehearing. Staff asserts that "Central Hudson cites no precedent for that contention, because there is none." Staff argues that the Commission rules permit all responses and that a response that supports another party's request for rehearing is proper, so long as it does not request additional relief beyond that identified in the instant rehearing petition and is not prejudicial. Notwithstanding its opposition to PULP's position, Staff asserts that there is no basis for striking PULP's response because it is not prejudicial and does not seek relief beyond that sought in CPB's Motion.<sup>114</sup>

### Discussion

The Company's Objection and Motion to Strike Points I and II of PULP's Response are denied. As both PULP and Staff correctly observe, 16 NYCRR 3.7 calls for "responses" to a motion for rehearing to be filed within 15 days and does not

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<sup>112</sup> Id. at 2-3.

<sup>113</sup> Id. at 3-5.

<sup>114</sup> Id. at 8-9.

limit the scope of such responses. The Company is not prejudiced by PULP's Response because it was timely and did not request additional relief beyond that identified in the rehearing petition that it supports.<sup>115</sup> Finally, the Company offers no precedent for its argument that parties may not support others upon rehearing.

The Company's Objection and Motion to Strike the first full paragraph on page six of Staff's Response is denied because the Company failed to demonstrate that the statements contained therein were false or prejudicial.

The Commission orders:

1. The Petition for Rehearing filed by Central Hudson Gas & Electric Corporation is denied.
2. The Petition for Rehearing filed by the New York State Consumer Protection Board is denied.
3. These proceedings are continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING  
Secretary

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<sup>115</sup> PULP correctly argues the Company had the option under Rule 3.7(c) to ask for a reply, but did not take it.