

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
STEPHEN P. ROMINE,

Petitioner,

NOTICE OF ENTRY

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Index No. 902202-19

-against-

Walsh, J.


THE NEW YORK PUBLIC SERVICE COMMISSION,
CENTRAL HUDSON GAS & ELECTRIC CORP. and
THE STATE OF NEW YORK,

Respondents.

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order on
Motions in this action entered in the Office of the County Clerk of Albany County on December
13, 2019.

Dated: Albany, New York
January 6, 2020

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DECISION AND ORDER ON MOTIONS

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RJI No. 01-19-ST0287

-against-

THE NEW YORK PUBLIC SERVICE
COMMISSION, CENTRAL HUDSON GAS & ELECTRIC CORP.
and THE STATE OF NEW YORK,

Respondents.

(Supreme Court, Albany County, Special Term)
(Hon. Margaret Walsh, Presiding)

APPEARANCES:

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Walsh, J.:

This article 78 matter has its origins in certain administrative proceedings that took place before the Respondent Public Service Commission (“PSC”)(Case 14-M-0196). At this time before the Court are (1) a motion to dismiss filed by the Respondent, State of New York (“State”) and (2) a motion for leave to file a surreply filed by the Petitioner, Stephen Romine, relative to pending motions to strike filed on behalf of the PSC and the Respondent Central Hudson Gas and Electric Corporation (“Central Hudson”). The Court has carefully reviewed the motion record regarding these applications and makes the following determinations.

Motion to Dismiss by Respondent State of New York

The Respondent State seeks dismissal as it argues that it is not a proper party and that the facts alleged, even assuming their truth, fail to state a valid cause of action against it. Neither the Petitioner nor other party opposes the motion.

For the reasons set forth below, the Court agrees and grants the motion. The petition seeks relief pursuant to article 78. The State is not a proper party as an article 78 proceeding may not be maintained against it, but rather only a “body or officer” (CPLR 7802[a]; see *Cass v. State*, 58 NY2d 460, 462 [1983]; *Capruso v. N.Y. State Police*, 300 AD2d 27, 28 [1st Dept. 2002]; *Kirk v. Department of Motor Vehicles*, 22 AD3d 240, 241 [1st Dept. 2005]; *Matter of Vargas v. State of New York*, 95 AD3d 588, 589 [1st Dept. 2012]; *Matter of Zarco Contr., Inc. v. State of New York*, 2013 NY Misc. LEXIS 4903 [Supreme Ct, Albany County 2013]). Moreover, no cause of action for mandamus to compel lies to require the State to restructure the PSC, since relief in the form of mandamus is available “only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law” (*N.Y. Civ. Liberties Union v. State*, 4 NY3d 175, 183-184 [2005]; see also *Matter of Shaw v. King*, 123 AD3d 1317, 1318-1319 [3d Dept. 2014]). The PSC is a

creature of statute, established by the State Legislature, whose members are appointed by the Governor with the advice and consent of the State Senate for terms of six years (Public Service Law §4). Such appointments are entirely discretionary (*id.*) Further, the jurisdiction and powers of the PSC, in turn, are derived from applicable statutes enacted by the State Legislature (*id.* [1]). Any restructuring of the PSC would necessarily require legislative approval and amendment to the statutory framework by which the PSC functions. Inasmuch as the appointments are wholly discretionary and that the statutes express, from time to time, the public will, there is no clear legal right to the particular remedy sought by the Petitioner. Finally, the Court discerns no viable cause of action against the State in the absence of a claim seeking declaratory relief regarding the State Administrative Procedure Act (“SAPA”). In any event, the Court construes the petition as seeking relief against the PSC insofar as the alleged insufficiency of the hearing notice required by SAPA. Accordingly, as the State is not a proper party and no viable cause of action is stated against it, the Court grants its motion.

Motion for Leave to File a Sur-Reply

PSC and Central Hudson have moved to strike certain exhibits and allegations from the pleadings as being outside the scope of the official administrative record. The Petitioner opposes the motions, and, in turn, the Respondents filed replying papers. In the course of motion practice, the Petitioner attempted to file a surreply to which PSC and Central Hudson objected. Consequently, the Petitioner separately moves for leave of the Court to file a surreply. PSC and Central oppose the Petitioner’s request.

Upon careful review of the motion record, the Court grants in part and denies in part the Petitioner’s request for leave to file a surreply. The Court retains the discretion “to regulate the motion practice before it” which includes determining “whether to accept late papers or even