

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

In the Matter of the Application of

STEPHEN P. ROMINE,  
Petitioner,

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

**DECISION/ORDER/JUDGMENT**

Index No. 902202-19

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:

Stephen P. Romine  
*Self-Represented Petitioner*  
8 Fitzsimmons Lane  
P.O. Box 657  
Woodstock, New York 12498

John J. Sipos, Acting General Counsel  
Peter V. Black, Esq., Assistant Counsel, Of Counsel  
*Attorney for the Respondent New York State  
Public Service Commission*  
Three Empire Plaza, 17<sup>th</sup> Fl.  
Albany, New York 12223

Christina Bookless, Esq.  
Rizzo & Kelley, PLLC  
*Attorneys for the Respondent  
Central Hudson Gas and Electric Corp.*  
272 Mill Street  
Poughkeepsie, New York 12601

Walsh, J.:

Beginning in 1990, the Respondent Central Hudson Gas and Electric (“Central Hudson”) started replacing electromechanical, or “analog,” meters in ratepayers’ residences and places of business with what are known as automated meter reading (“AMR”) devices.<sup>1</sup> The AMR devices or meters transfer consumption data through radio frequency transmission, thereby allowing the utility to collect this data without having to enter the ratepayer’s residence or place of business. As of 2017, approximately 41% of residential customers within Central Hudson’s service territory were equipped with AMR devices.

Not all of Central Hudson’s customers, however, wanted AMR devices. On September 8, 2014, the Respondent Public Service Commission (“Commission”) approved tariff amendments proposed by Central Hudson permitting it to replace AMR meters with a standard solid-state or digital, non-communicating meter for customers declining the AMR meters. The opt-out order also established monthly fees to reflect the utility’s costs incurred for having to manually read the solid state meters for customers participating in the opt-out program.<sup>2</sup>

Thereafter, in 2015, petitions to amend the opt-out tariff were filed by customers desiring to retain their analog meters. These petitioners requested the Commission to order that Central Hudson offer analog meters on demand, to permit customers in the opt-out program to retain their existing analog meters, and to eliminate the one-time meter change fee or monthly non-AMR meter reading fee. Further comments received during the pendency of the proceeding asserted that both the AMR

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<sup>1</sup>For ease of reference herein, the Court will refer to electromechanical meters as “analog” meters, and to “digital” meters as “solid state” meters.

<sup>2</sup>See *Order Approving Proposed Tariff Amendments* issued by the Commission and effective September 8, 2014, Case 14-M-0196 (R. 590-614).

and solid state meters generate harmful emissions which the Commission should have considered when establishing the opt-out order and that these risks may be alleviated or eliminated only with the use of analog meters. Notice of proposed rulemaking and request for submission of comments was published; by additional notices, the Commission extended the deadline for receipt of comments and receipt of reply comments. In its October 20, 2017 Modification Order, the Commission denied the petitions to the extent seeking analog meters (including refurbished analog meters) be furnished upon demand and retained by Central Hudson customers who desired to opt-out, but granted the request to direct Central Hudson to eliminate the monthly opting-out fees.

On November 20, 2017, the organization *Stop Smart Meters Woodstock NY* (“SSMWNY”) by its principal, the Petitioner Stephen P. Romine (“the Petitioner”), filed a petition seeking the rescission of a portion of the Commission’s Modification Order (R. 53-87).<sup>3</sup> On December 3, 2017, SSMWNY filed an “addendum” to its petition with exhibits A and B. On December 17, 2017, the Commission issued a notice that SSMWNY’s petition would be treated as one for reconsideration, as opposed to one for a rehearing. The Commission issued a public notice of proposed rule making dated December 1, 2017 and requested the submission of comments by February 5, 2018 (*see State Administrative Procedure Act §202[1]*). On December 14, 2018, the Commission by order denied SSMWNY’s petition in its entirety.<sup>4</sup>

The Petitioner initiated this article 78 proceeding seeking judgment, among other things, (1) annulling a portion of the October 20, 2017 Modification Order denying customers’ requests that

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<sup>3</sup>A petition for a rehearing was filed on November 17, 2017 by *Stop Smart Meters New York* (“SSMNY”) (R. 90-95). The Court does not construe that the Petitioner is seeking relief on behalf of SSMNY, and, in any event, the Petitioner would lack standing to do so.

<sup>4</sup>The Commission considered both petitions filed by SSMWNY and SSMNY in its decision. The Court is not aware of an article 78 challenge filed by SSMNY.

Central Hudson be required to provide customers with analog meters on demand, and (2) annulling the December 14, 2018 Commission Order denying the petition filed by the Petitioner on behalf of SSMWNY and directing the Commission to hold a new hearing.<sup>5</sup> The Commission has filed a *Verified Answer* together with a certified record of the administrative proceedings below. Central Hudson Gas and Electric Corporation has also filed a *Verified Answer*. The Petitioner filed a Reply to the Respondents' answers and memoranda of law.

Motions to Strike and Request to Take Judicial Notice

As an initial matter, the Commission and Central Hudson both move to strike certain exhibits attached to the petition as well as certain allegations set forth in the petition and affidavit in support, contending that they are outside the scope of the official administrative record. The Court previously granted the Petitioner the opportunity to file a sur-reply, which he has done. Article 78 review of an agency's decision is "confined to the facts and record adduced before the agency" and relied upon by the agency in reaching its determination (*Matter of Featherstone v. Franco*, 95 NY2d 550, 554 [2000], quoting *Matter of Yarbough v. Franco*, 95 NY2d 342, 347 [internal quotations and citations omitted]; see *Matter of N.Y. State Corr. Officers & Police Benevolent Ass'n v. N.Y. State Pub. Empl. Rels. Bd.*, 309 AD2d 1118, 1119 [3d Dept. 2003]; *Matter of Fanelli v. New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1<sup>st</sup> Dept. 1982], *affirmed for reasons stated below* 58 NY2d 952 [1983]). A court's consideration of facts outside of or beyond the administrative record is improper (see *Matter of Evans v. New York City*, 94 AD3d 885, 887 [2d Dept. 2012]; *Matter of Van Antwerp v. Board of Educ.*, 247 AD2d 676, 678 [3d Dept. 1998]). The Commission and Central Hudson seek to strike exhibits F, G, H, I-1, I-2, I-3, J, K, L-1, L-2, N, O, R, Y, Z, CC, DD, EE, FF, GG and HH.

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<sup>5</sup>By decision and order on motion dated December 13, 2019, the Court dismissed the petition to the extent asserted against the State of New York.