

**Sutter Gardens Assoc., L.P. v New York State Dept. of  
Pub. Serv.**

2023 NY Slip Op 34641(U)

May 18, 2023

Supreme Court, Albany County

Docket Number: Index No. 904101-21

Judge: Jonathan D. Nichols

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY**

---

**SUTTER GARDENS ASSOCIATES, L.P.,**

Petitioner,

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

**DECISION & ORDER**  
Index No. 904101-21

-against-

**NEW YORK STATE DEPARTMENT OF PUBLIC  
SERVICE, NEW YORK STATE PUBLIC SERVICE  
COMMISSION, JOHN B. HOWARD, in his official  
capacity as Interim Chief Executive Officer of the New  
York State Department of Public Service and Interim  
Chair of the New York State Public Service  
Commission, and CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC.**

Respondents.

---

**Appearances:**

**COUCH WHITE, LLP**  
Robert M. Loughney, Esq.  
Elizabeth L. Callahan, Esq.  
540 Broadway, P.O. Box 22222  
Albany, New York 12201-2222  
*Attorneys for Petitioner*

Walter Hedeman  
James D. Wong  
Consolidated Edison Company of New York, Inc.  
4 Irving Place  
New York, New York 10003  
*Attorneys for Respondent Consolidated Edison  
Company of New York, Inc.*

Public Service Commission of the State of New York  
Robert Rosenthal, Esq.  
John J. Sipos, Esq.  
John C. Graham, Esq.  
Three Empire State Plaza  
Albany, New York 12223-1350  
*Attorneys for Respondent Public Service Commission  
of the State of New York*

**NICHOLS, A.J.S.C.**

Sutter Gardens Associates, L.P., (the “Petitioner”) commenced this CPLR Article 78 proceeding challenging the August 13, 2019, determination (the “PSC Determination”) of Respondent New York State Public Service Commission (the “PSC”) and the January 27, 2021, denial by the PSC of the Petitioner’s petition for rehearing of the PSC Determination (“Rehearing Determination”). The Petitioner seeks a reversal of the PSC Determination and a refund, plus interest, of all payments made by the Petitioner for all bills based on estimated meter readings subsequent to February 19, 2014 (*see* NYSCEF Doc No. 1 [“Petition”]). The Respondents oppose the petition.

The Petitioner owns an apartment building consisting of twelve apartments in the service area of Respondent Consolidated Edison Company Of New York, Inc. (“Con Ed”). The apartment building has multiple electric accounts that utilize automatic meter reading (“AMR”) devices to remotely read each meter, and the building also has two non-residential public light and power (“PLP”) accounts that are not equipped with AMR such that they must be manually read (*see* Petition, ¶ 10). These PLP meters record service to the common areas, including hallways and the basement (*see id.*).

From December 2013 through early January 2017, Con Ed did not obtain actual meter readings from the PLP accounts and instead used estimated meter readings to calculate the Petitioner’s monthly bills for those accounts (*see id.*, ¶ 12). Indeed, Con Ed admits that it “did

not attempt to obtain meter readings from the PLP accounts between December 2013 and January 2017” (NYSCEF Doc No. 24, Verified Answer, ¶ 13). On January 19, 2017, Con Ed obtained actual meter readings for the PLP accounts and billed the Petitioner \$281.57 for the difference between the estimated bills over the prior 36-month period and the actual usage (*see* Petition, ¶¶ 14-16).

The Petitioner paid this backbill while disputing the same (*see id.*, ¶ 17).<sup>1</sup> In disputing the backbill, the Petitioner took the position that (a) all bills after February 19, 2014 (after two months of estimated billing) were invalidly issued, such that all amounts paid by the Petitioner toward these bills should be refunded with interest and, in the alternative, (b) Con Ed’s ability to backbill should be limited to a shorter time period, in accordance with its tariff (*see id.*, ¶ 18).

Con Ed acknowledged that the extended period of estimated billing was due to its own neglect, but rather than canceling its bills after February 19, 2014, it limited its backbills to a 12-month period and issued the Petitioner a refund of \$408.09 plus \$0.80 in interest (*see id.*, ¶ 23).

The Petitioner then filed a consumer complaint with the New York State Department of Public Service’s Office of Consumer Services (“OCS”), seeking a refund of all amounts paid from February 2014 through December 2016, arguing that this extended period of estimated billing violated Con Ed’s tariff (*see id.*, ¶¶ 24-25).<sup>2</sup> OCS determined that Con Ed first became

---

<sup>1</sup> Pursuant to 16 NYCRR 13.1(b)(17), a “backbill” is defined as “that portion of any bill, other than a levelized bill, which represents charges not previously billed for service that was actually delivered to the customer during a period before the current billing cycle.”

<sup>2</sup> Pursuant to 16 NYCRR part 12, a multi-step complaint process is available to utility consumers. At the outset, a customer may file a complaint and receive a staff-level decision from OCS regarding the customer’s complaint (*see* 16 NYCRR 12.1-12.4). If a party disagrees with the staff-level decision, the party may request an informal hearing or review by OCS (*see* 16 NYCRR 12.5 [a]). An Informal Hearing Officer or an informal reviewer will issue a written decision pursuant to 16 NYCRR 12.12. Appeal can then be taken to the PSC, and, pursuant to 16 NYCRR 12.14, the PSC will determine the appeal. If a party is dissatisfied, they may request a rehearing pursuant to 16 NYCRR 3.7 (a). The Petitioner utilized this multi-step complaint process.

aware of its error in creating estimated meter readings for an extended period in December 2016, and OCS therefore limited Con Ed to backbilling for 12 months from that date (*see id.*, ¶¶ 26-27).

The Petitioner appealed this OCS determination and requested an informal hearing (*see id.*, ¶ 28). The informal hearing officer (“IHO”) issued a decision on February 14, 2019, determining that Con Ed’s estimated billing from February 2014 through December 2016 was permissible pursuant to the language of General Rule 10.7(a) of Con Ed’s tariff and 16 NYCRR 13.8(b), which permits estimated billing when a utility “has failed to obtain access to the” relevant meter or meters (*id.*, ¶ 28). The IHO determined that, pursuant to 16 NYCRR 13.9(c)(1), Con Ed is limited to backbilling up to twelve months prior to January 2017 because the underbilling was caused by a utility deficiency (*see id.*, ¶ 29).<sup>3</sup>

The decision of the IHO was appealed to the PSC, and, in that appeal, the Petitioner argued that the IHO misinterpreted General Rule 10.7 of Con Ed’s tariff by ignoring subpart (a), which provides that Con Ed may only render an estimated bill when it fails to gain access to the meter or meters (*see id.*, ¶ 31). The Petitioner argued that Con Ed did not “fail” to gain access to the PLP meters because Con Ed had not attempted to enter the Petitioner’s premises to read the PLP meters prior to sending the estimated bills. The Petitioner argued that the 36 consecutive estimated bills from Con Ed were therefore invalid (*see id.*, ¶ 31).

---

<sup>3</sup> 16 NYCRR 13.9 is titled “Backbilling,” and subsection (c)(1) of 16 NYCRR 13.9, titled “Limitations on backbilling period,” provides that:

When the failure to bill at an earlier time was due to utility deficiency, a utility shall not bill a customer for service rendered more than 12 months before the utility actually became aware of the circumstance, error or condition that caused the underbilling, unless the utility can demonstrate that the customer knew or reasonably should have known that the original billing was incorrect.

“Utility deficiency” is defined in 16 NYCRR 13.1 (b)(19) to mean “any action or inaction by a utility or one of its authorized agents that does not substantially conform to the rules and regulations of this Title, the utility’s tariff, or the utility’s written business procedures.”

The PSC issued a Commission Determination dated August 13, 2019 (“PSC Determination”), noting that the central issues in the matter were whether Con Ed was permitted to bill the Petitioner based on estimated meter readings from the PLP meters from December 18, 2013, through December 19, 2016, and whether the Petitioner was entitled to additional interest on any overpayments made (*see* Petition, Exhibit G, p. 4). The PSC concluded that the estimated billing was allowed and backbilling was properly limited to 12 months due to Con Ed’s admitted deficiency. The PSC directed, however, that Con Ed refund to the Petitioner additional interest calculated from the date the overpayment was made to the date when the overpayment was refunded (*see id.*, p. 5).<sup>4</sup>

The Petitioner filed with the PSC a petition for rehearing, which the PSC denied in a letter dated January 27, 2021 (*see* Petition, ¶¶ 35-36).

The Petitioner now brings this CPLR Article 78 proceeding. The Petitioner maintains that the PSC Determination ignores the plain language of Con Ed’s tariff, which provides that Con Ed may only issue an estimated bill when it has failed to obtain access to a meter (*see id.*, ¶ 39). According to the Petitioner, the word “fail” in the tariff implies that an attempt must be made to read the meter, and it is undisputed that no such attempt was made by Con Ed (*see id.*). The Petitioner maintains that its reading of Con Ed’s tariff is bolstered by the requirement in

---

<sup>4</sup> The PSC explained its reasoning as follows:

On February 6, 2017, the complainant paid the utility an additional \$281.57 that it owed after it received the thirty-six-month backbill, which was based on actual meter reads. The \$281.57 represented the billing period of December 18, 2013, to January 19, 2017, and the difference between an estimated reading of 87,761 kWh and an actual reading of 87,154 kWh. On February 10, 2017, after complainant objected to the accuracy of the thirty-six-month backbill period and the utility admitted its error, the utility recalculated the backbill for a 12-month period. That recalculation resulted in a refund to the complainant of \$408.89.

The PSC held that the Petitioner was due interest on \$126.52 ( $\$408.09 - \$281.57 = \$126.52$ ) dating back to the day each overpayment constituting that \$126.52 was made between December 18, 2013, and February 10, 2017 (Petition, Exhibit G, pp. 8-9).

General Rule 10.3 of Con Ed's tariff, which states that Con Ed "shall attempt to obtain an actual meter reading for each scheduled meter reading for each Customer account by a remote reading or a visit to the Customer's premises" (*id.*, ¶ 40). The Petitioner argues that the PSC Determination is arbitrary and capricious, contrary to law and fact, and not supported by the record, in that it found, in contravention of Con Ed's tariff, that Con Ed was entitled to issue estimated bills for a period of years (*see id.*, ¶ 41).

When a court is reviewing an administrative determination pursuant to CPLR Article 78, the court must consider whether the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803). The court must consider whether the agency's action was "taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009] [citation omitted]). This is a deferential standard, and an agency determination supported by a rational basis must be sustained "even if the court concludes that it would have reached a different result than the one reached by the agency" (*id.*). It is incumbent upon a reviewing court to defer to the agency's construction of the statutes and regulations that the agency administers, provided that the construction is not irrational or unreasonable (*Matter of 427 W. 51st St. Owners Corp. v Division of Housing and Community Renewal*, 3 NY3d 337, 342 [2004]). Indeed, a court "must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*Matter of Peckham*, 12 NY3d at 431 [citation omitted] [emphasis added]). Further, "it is well settled that considerable judicial deference is afforded determinations of the PSC requiring technical expertise," and this is "especially true with respect to the PSC's interpretation of tariffs" (*Glens Falls Communication Corp. v New York Pub. Serv. Comm'n*, 239 AD2d 47, 50 [3d Dept 1998] [citations and quotations omitted]).

As noted above, Con Ed admits that it “did not attempt to obtain meter readings from the PLP accounts between December 2013 and January 2017” (NYSCEF Doc No. 24, Verified Answer, ¶ 13). The PSC Determination concluded that Con Ed’s “tariff provision allows estimated billing where the utility failed to obtain access to the two PLP meters” (NYSCEF Doc No. 8, Petition, Exhibit G, p. 6). The Petitioner argues that PSC acted in an arbitrarily and capriciously, contrary to law and fact, by interpreting Con Ed’s failure to read the Petitioner’s PLP meters as fitting within the tariff and regulation’s language that permits estimated rate billing when Con Ed “has failed to obtain access to the meter(s).” The Petitioner maintains that the word “failed” in the tariff and in the regulation’s phrase “has failed to obtain access” must be read to require an attempt to obtain access to the meter, which Con Ed never made.

The Petitioner asserts that “the plain meaning of the term ‘fail’ necessarily implies that an attempt has been made” (NYSCEF Doc No. 12, Petitioner’s Memorandum of Law, p. 5). To support this proposition, the Petitioner notes that Merriam-Webster defines “failed” to mean “to miss performing an expected service or function for,” and failure “is synonymous with ‘malfeasance’ meaning, ‘failure to act,’ especially, ‘failure to do what ought to be done’” (*id.*). These definitions are consistent with the PSC Determination. These definitions are consistent with a reading of General Rule 10.7(a) of Con Ed’s tariff and 16 NYCRR 13.8(b) that does not require Con Ed to have attempted to read a meter before it is deemed to have “failed to obtain access to the meter(s)” such that an estimated bill can be sent. The PSC Determination is not irrational and unreasonable; it is consistent with the language of the tariff and relevant regulations.

The Petitioner argues that the PSC Determination “ignores the fact that General Rule 13.2 of Con Edison’s Tariff specifically sets forth the procedures that the utility must follow when it



is unable to access a non-residential customer's meter, including no-access notice and no-access charge provisions" (*id.*, p. 6). According to the Petitioner, "[a]ccepting the Commission's interpretation of General Rule 10.7(a) would render those no-access procedures moot" (*id.*). As the Petitioner's own submission acknowledges, however, these no-access procedures detail "the specific series of no access notices that shall be provided to the consumer *when access is denied*" (*id.*, p. 7 [emphasis added]). Nobody contends that Con Ed was denied access. Con Ed admits that it did not attempt to access the Petitioner's PLP meters for multiple years. Petitioner's argument is unavailing.

Finally, the Petitioner argues that a full refund with interest is in the public interest in part "to emphasize that utilities should not be allowed to engage in such egregious practices as issuing estimated bills for three years with little repercussions" (*id.*, p. 8). Rule 10.7 of Con Ed's tariff permits estimated bills for 36 months (or more), as does 16 NYCRR 13.8(b), with the backstop of limitations on backbilling. As noted in the PSC Determination, utility customers are protected by the backbilling regulations which limit to no more than 12 months the timeframe for which a utility can backbill when "the utility commits an error that caused the original billing to be underbilled" (NYSCEF Doc No. 8, Petition, Exhibit G, p. 7). Among other things, being unable to recover for an entire period that was underbilled due to estimated billing is a deterrent to unnecessary estimated billing. The PSC Determination's assessment of the relevant policy considerations will not be disturbed.

The PSC correctly determined that Con Ed failed to obtain access to the Petitioner's PLP meters, fitting within the language of Con Ed tariff Rule 10.7(a) and 16 NYCRR 13.8(b). The PSC determined that the penalty for this "utility deficiency" is a limitation to 12 months on the ability to backbill, consistent with the relevant regulations. The determinations of the PSC are

entitled to deference because they have a rational basis with support in the record and are not arbitrary and capricious.

In its Petition, the Petitioner notes that it is also challenging “the PSC’s subsequent ruling on January 27, 2021, denying Petitioner’s petition for rehearing of the PSC Determination” (Petition, ¶ 1). The Petitioner provides no further detail or arguments to support this statement, but, regardless, for the reasons set forth above, this challenge is without merit. Grounds for a rehearing are limited pursuant to 16 NYCRR 3.7(b), which provides that a rehearing may only be sought “on the grounds that the commission committed an error of law or fact or that new circumstances warrant a different determination.” The Petitioner has pointed to nothing to suggest that the PSC’s determination that a rehearing was not appropriate because there was no error in fact is arbitrary and capricious. In denying the Petitioner’s request for rehearing, the PSC opined that:

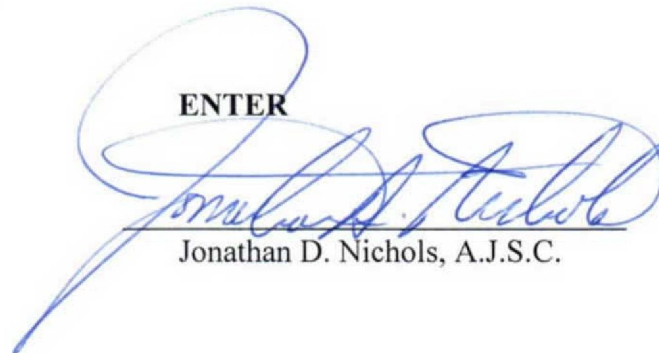
The Commission finds no factual error in the August 13, 2020, appeal determination, because the utility followed its tariffs and regulations. The Commission was correct to limit the complainant’s backbill to twelve months due to the utility deficiency. The utility did not obtain actual meter readings for the two PLP accounts and instead issued estimated bills for thirty-six months. This inaction by the utility was deemed a deficiency under the regulation and thus the bills were adjusted, and a refund was issued with interest. As stated in the determination, “[C]ommission regulations provide a remedy when a utility issues estimated readings in excess of the allowable timeframe... the utility committed an error in its billing practices....” Neither the utility tariff, regulations, or statute provides the remedy sought by complainant in this case, to give free service for the disputed period of time.

(NYSCEF Doc No. 10, Petition Exhibit I, p. 2). This explanation by the PSC for denying the petition is not arbitrary and capricious. It has a sound basis in reason and reflects the facts established by the record (*Matter of Peckham*, 12 NY3d at 431). Indeed, the PSC’s above-quoted articulation is fair synopsis of this Court’s review of this case.

Accordingly, the Verified Petition is **Denied**.

This constitutes the Decision and Order of the Court. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that section relating to, *inter alia*, filing, entry and notice of entry.

Dated: May 18, 2023  
Hudson, New York.

ENTER  
  
Jonathan D. Nichols, A.J.S.C.

**PAPERS CONSIDERED:**

NYSCEF Doc Nos. 1-12, 21-26



05/19/2023