

**Matter of Eden Rock Owners, Inc. v New York City  
Water Bd.**

2017 NY Slip Op 31844(U)

August 14, 2017

Supreme Court, Queens County

Docket Number: 637/17

Judge: Howard G. Lane

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## MEMORANDUM

SUPREME COURT - QUEENS COUNTY  
IA PART 6

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In the Matter of EDEN ROCK OWNERS, INC.,

**By: Lane, J.**

Petitioner,

Index No. 637/17

for a Judgment under Article 78 of the Civil  
Practice Law and Rules

Dated August 14, 2017

-against-

Motion Date April 18, 2017

NEW YORK CITY WATER BOARD, et al.,

Motion Cal. No. 45

Respondents.

Motion Seq. No. 1

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In this Article 78 proceeding, petitioner Eden Rock Owners. Inc. (Eden Rock) seeks a judgment vacating and reversing the determination of respondent New York City Water Board (Water Board) dated September 22, 2016 which denied petitioner's appeal, and affirmed New York City Department of Environmental Protection's (DEP) determination of June 8, 2016, denying petitioner's request for a bill adjustment.

Petitioner Eden Rock is the owner of the premises known as 84-01 Main Street, Jamaica, New York (Block 9718, Lot 2). The subject property is a residential cooperative with 203 apartments. Respondent New York City Water Board is an autonomous public benefit corporation empowered to set water and sewer rates sufficient to support New York City's water and sewer systems (Public Authorities Law §§ 1045-f,

1045-j). Pursuant to an agreement between the City and the Board, respondent DEP acts as the Board's agent, responsible for billing and collecting water and sewer charges, and maintaining accounts.

A single water main supplies water service to the subject premises. In 2000, a compound meter, K10299384 (K9384), was installed at the subject real property. Petitioner's agent, in a letter dated November 16, 2000, requested that the subject real property be billed on a metered basis, rather than the previous frontage rate. In letters dated March 31, 2011 and April 8, 2011, the DEP informed Eden Rock that the current telephone based Automatic Meter Reading (AMR) was being phased out for billing purposes; that petitioner would need to convert to a radio based AMR; and that an AMR-Meter Transmittal Unit (AMR-MTU) would have to be installed on its meter in September 2011. DEP advised petitioner to contact a DEP AMR Installation Contractor to schedule an appointment in order to update to the new AMR system, and for the installation of the AMR-MTU device.

On September 23, 2011, a DEP AMR contractor visited the subject premises and changed the register head on Meter K9384, and installed the AMR-MTU device. The register head determines the amount of water being consumed. It was later determined that the register head was either not installed properly, or was damaged, so that the DEP was unable to obtain readings from said register head. In November 2011, the DEP began to issue estimated bills for the subject real property. Said estimated bills were based upon the Average Daily Flow (ADF), a calculated per day water usage of the

property, for the period of June 2010 to June 2011, resulting in an ADF of 46.1.

On February 22, 2014, the DEP created a work order with a contractor for the replacement or upgrading of Meter K9384, as it was not compatible with the new AMR-MTU device. An inspection was performed on March 24, 2014, at which time Meter K9384 was removed and replaced with Meter E5813. The DEP also installed an AMR-MTU device at said time. After the installation was verified and approved by the DEP via an inspection on May 7, 2014, the DEP resumed billing Eden Rock based upon actual meter reads.

On October 23, 2015, Eden Rock's agent Halstead Management Company (Halstead) contacted the DEP and requested a copy of the subject property's water consumption history. The DEP informed Halstead that it needed to provide an authorization from the property owner in order to obtain said information. Eden Rock, in a letter addressed to the DEP dated October 29, 2015, named Halstead as its agent and requested its consumption history from November 2009 through November 2011. The DEP, in a letter dated November 2, 2015, provided the requested billing and payment history for the subject real property.

Metropolitan Refunds, in a letter dated January 20, 2016 and addressed to the DEP, stated that it had been retained by Eden Rock, and requested that the DEP cancel and rebill Eden Rock for the estimated bills issued between January 20, 2012 and March 28, 2014. Metropolitan Refunds stated that Meter K9384 was not registering and had been replaced with Meter E5813 on March 28, 2014; that usage for Meter K9384

was estimated at 45.56 hundred cubic foot (HCF) of water per day; that actual usage for Meter E5813 for the period of March 28, 2014 through November 13, 2015 was 32.13 HCF per day; that based upon the actual usage recorded by the new meter the property did not average 45.56 HFC per day and was over-estimated; and requested that the property be re-billed at 32.13 HFC per day.

The DEP, in a letter dated April 1, 2016, stated that the estimated charges issued for the prior meter (Meter K9384) from January 2012 through March 2014 were based on historical water usage recorded for the property, and denied the request to adjust the water and sewer charges.

On April 20, 2016, Metropolitan Refunds, on behalf of Eden Rock, timely appealed the DEP's determination of April 1, 2016. Metropolitan Refunds argued that the estimated bills should be adjusted as Meter 9384 was "NR" as of June 1, 2011; that the billing from June 2011 through March 2014 was issued using an estimated rate of 45 HCF per day or higher; that reading for the Meter E5813 for the period of March 29, 2014 to April 23, 2015 was 32.21 HCF, and the reading for said meter for the period of March 28, 2014 to January 24, 2016 was 31.60 HCF; that the historical ADF for the old meter prior to June 2011, was 40.74 HCF for the period of May 1, 2011 to June 1, 2011, 38.43 HCF for the period of April 1, 2011 to May 1, 2011 and 37.38 HCF for the period of March 1, 2011 to April 1, 2011; that the determination that the estimated bills were based on historical readings was incorrect; and that the use of the current ADF, should be preferable to looking back over three (3) years to a historical ADF. It was asserted that

the account should be adjusted for the period of June 1, 2011 to March 28, 2014, either using the new ADF or the ADF prior to the meter becoming NR.

The DEP, in a letter dated June 8, 2016, denied the appeal and affirmed its determination of April 1, 2016, stating as follows:

“On September 23, 2011, the register heads for compound meter K10299384 were replaced to make the meter compatible with the Automated Meter Reading (AMR) system. Your appeal contends that the meter was no longer registering consumption as of June 1, 2011. This is not the case. The problems with the meter occurred after the new heads were installed.”

“The estimated charges issued to your client’s account, covering service from June 1, 2011 to March 28, 2014 (when the meter was replaced), are consistent with the actual usage recorded on meter K10299384 between June 1, 2010 and June 1, 2011. When a meter stops functioning, DEP issues estimated bills based on historical information. The estimated charges billed to your client’s account were valid when issued and there is no cause to adjust them based upon the subsequent usage recorded at the property.”

In a letter dated July 28, 2016, Metropolitan Refunds, on behalf of Eden Rock, appealed the DEP’s determination of June 8, 2016, and argued that Meter K9384 became non-functioning in mid-2011; that the estimated charges based on ADF for June 2010 to June 2011, which utilized a 46.10 HCF per day should not be used, since it was the period immediately before said meter became non-functioning. It was asserted that the most accurate period was the period immediately after the installation of the new

meter, which resulted in an ADF of 32.21 HCF per day for the period of March 28, 2014 to April 23, 2015, and a current reading of 31.24 HCF per day, as of July 22, 2016. It was also stated that the ADF for the old meter was 34.65 HCF per day for the period of June 1, 2009 to June 1, 2010. The appellant contended that the use of the ADF from the period right before the meter became non-functioning was incorrect and resulted in over-billing of the property owner, and that based upon the usage of the new meter and the historical usage of the old meter, a re-billing of the estimated billing period is warranted.

The Water Board's Executive Director, in a final determination dated September 22, 2016, denied the appeal and affirmed the DEP's June 8, 2016 determination, and stated as follows:

"Your appeal is in reference to bills based on estimated consumption for compound meter #10299384, which DEP replaced on March 24, 2014. Prior to the meter change-out, the last bill based on actual recorded consumption was for service through June 1, 2011. After this date, regular quarterly bills were issued based on estimated consumption levels averaging 45.82 hundred cubic feet (HFC) per day for the aggregate consumption of the main-line and bypass sides of the meter. This estimate was based on the property's consumption level prior to June 2011."

"Pursuant to the Water Board Rate Schedule, Part II, Section 1.E, "If DEP cannot read the meter or if the meter reading appears questionable, DEP may issue estimated bills based on previous consumption of other reasonable criteria". As a result of a questionable final reading in this case, DEP chose to let the previously issued estimated bills stand. The

estimated level of consumption of 45.82 HCF per day is consistent with historical levels of consumption measured by the meter; overall consumption since the installation of the meter in 2000 to June 1, 2011 was 46.10 HCF per day. Your appeal provides no compelling evidence that the estimated level of consumption was not accurate for the period of estimated charges.”

“In summary, all charges have been thoroughly reviewed and found to be consistent with DEP and Water Board policies. There is neither an indication of error in billing nor a basis for reduction in charges.”

Petitioner Eden Rock thereafter commenced the within Article 78 proceeding and asserts that the DEP’s determination of September 22, 2016 is arbitrary and capricious, an abuse of discretion and constitutes conduct that is inconsistent with the Water Board’s Rate Schedules and the manner in which respondents treat other New York City residents.

Petitioner asserts that Meter K9384 stopped functioning and became a non-registering meter on June 1, 2011. It is asserted that the DEP and the Water Board failed to maintain said meter and ignored its failure to register consumption and simply utilized estimated billing for the period of June 1, 2011 to March 28, 2014, during which time petitioner received over ten (10) bills based upon estimated readings. Petitioner claims that said estimated billing resulted in over billing in excess of \$120,000.00.

Petitioner asserts that lower ADF of the new meter installed on March 28, 2014 should have been used to rebill the estimated billing. With respect to the ADF

relied upon by the respondents, petitioner asserts that as the old meter ceased to function on June 1, 2011, it is impossible to know if said meter was functioning properly prior to that date; that the billing for April 1, 2011 and May 1, 2011 was below the estimated rate of 45.5 CCF; and that it appears that they may have been a leak from June 1, 2010 to March 1, 2011, when the old meter was in place and apparently working, as water consumption prior to and after this period supports an ADF in the 30s CCF range, which is consistent with the new meter.

Petitioner further asserts that although the Rate Schedule provides that the respondents can use the ADF of a water meter either after or prior to the meter malfunction, the normal practice is to use the ADF of a newly installed meter, unless the property's occupancy or use has changed. In support of this claim, petitioner has identified three (3) properties, and submits three (3) spreadsheets detailing adjustments made to the water bills for said properties.

Respondents, in opposition, assert that the DEP's determination of September 22, 2016 is neither arbitrary nor capricious nor an abuse of discretion and that has a rational basis and is supported by evidence in the record and the law. It is further asserted that the applicable Rate Schedule explicitly permits the DEP to calculate estimated bills based on a period of time prior to a meter not properly transmitting and that the DEP properly and rationally billed petitioner estimated bills based upon the ADF averages for the year before Meter K9384 stopped properly transmitting. Respondents assert that there is no evidence that the ADF for this period was inaccurate or that it was

not in accordance with the DEP's rules; that Meter K9384 was properly transmitting between June 2010 and June 2011, and continued to properly transmit until September 23, 2011, when the register head was replaced; and that the ADF recorded at the subject property for June 2010 to June 2011 is consistent with the overall ADF for the property. It is asserted that although petitioner is seeking to use the ADF based upon either readings from Meter E5813 or from Meter K9384 for the period of June 2009 through June 2010, as such readings resulted in the lowest ADF and thus would result in a lower water bill, no basis exists for utilizing said readings.

Finally, with respect to the three (3) properties petitioner claims the DEP recalculated estimated bills based upon new meter readings, respondents assert that petitioner failed to present any such claim in its administrative proceedings, and have failed to establish that respondents' actions were arbitrary or inconsistent with respect to the manner in which DEP billed other properties.

“The courts have the power to review the [New York City] Water Board's determinations and may overturn determinations if the action is arbitrary and capricious, i.e., lacks a rational basis” (*Matter of Westmoreland Apt. Corp. v New York City Water Bd.*, 294 AD2d 587, 588 [2d Dept 2002]; *see CPLR 7803 [3]*; *see also Matter of Citylights at Queens Landing, Inc. v. New York City Dept. of Env'tl. Protection*, 62 AD3d 871, 871-872 [2d Dept 2009]; *Matter of Amalgamated Warbasse Houses, Inc. v Tweedy*, 33 AD3d 794, 795 [2d Dept 2006]; *Matter of Village of Scarsdale v New York City Water Bd.*, 15 AD3d 590, 591 [2d Dept 2005]). “In applying the ‘arbitrary and capricious’

standard, a court inquires whether the determination under review had a rational basis.” (*Halperin v City of New Rochelle*, 24 AD3d 768, 770 [2d Dept 2005]; *see Pell v Board, of Educ. of Union Free School Dist.*, 34 NY2d, 222, 231 [1974]). Here, the Water Board’s determination confirming the decision of the DEP was neither arbitrary and capricious, and has a rational basis, as the estimated bills were based upon actual readings of the old meter prior to its becoming non-functional.

Part II, Section 1, subdivision D of the Water and Wastewater Rate Schedule, effective July 1, 2015, provides as follows:

“If a water meter registers incorrectly, stops registering, or is removed or bypassed for any cause or reason, a charge for water will be imposed for water consumed during that period of time based upon the consumption measured by an accurately functioning meter for a representative period of time either prior to or subsequent to the period of meter failure as reasonably determined by the DEP, at the appropriate rates in effect for that period, except for accounts subject to Attributed Consumption Charges pursuant to Part V-Section 3.”

Part II, section 1, subdivision E of said Rate Schedule provides, in pertinent part, as follows: “If the DEP cannot read the meter or if the meter reading appears questionable, DEP may issue estimated bills based on previous consumption or other reasonable criteria...”.

Here, although petitioner asserts that Meter K9384 was not functioning as of June 1, 2011, it presented no evidence to this effect in the proceedings before the DEP

and Water Board. Petitioner's present assertion in this regard is unsupported by any documentary evidence.

The DEP acknowledged that after the register head was replaced on September 23, 2011, Meter K9384 stopped transmitting meter readings to the DEP. Petitioner was sent estimated bills for the subject property for the period of November 2011 through March 2014, the period of time Meter K9384 was not functioning properly. The DEP calculated the estimated bills based upon the average ADF of the subject property, utilizing a year long period prior to the time Meter K9384 stopped functioning, in accordance with the provisions of the Rate Schedule. In calculating the estimated bill, the Rate Schedule does not express any preference as to whether the representative period of time occurs prior to or subsequent to the meter failure, nor is the DEP required to select a representative period which would result in a lower bill. Although the Rate Schedule does not state the length of the representative period, this court finds that respondent's application of a year long representative period prior to the malfunction of Meter K9384, was neither arbitrary and capricious nor an abuse of discretion.

“ ‘Judicial review of administrative determinations is confined to the ‘facts and record adduced before the agency’ ” (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1st Dept 1982], *affd for reasons stated below* 58 NY2d 952 [1983]; see also *Featherstone v Franco*, 95 NY2d 550, 554-555 [2000]; *Mott v NY State Div. of Hous. & Community Renewal*, 191 AD2d 566 [2d Dept 1993]; *Welch v NY State Div. of*

*Hous. & Community Renewal*, 287 AD2d 725, 726 [2d Dept 2001]). Here, petitioner's claims that Meter K9384 may not have been functioning properly prior to June 1, 2011, and that the ADF for the period of June 1, 2010 to March 1, 2011, may have been due to a leak, were not presented in the proceedings before the DEP or the Water Board. In addition, petitioner's claim that other properties in the "exact same" situation had their water bills recalculated before the DEP or Water Board were not presented in the proceedings before the DEP or the Water Board. These claims therefore may not be considered by this court.

In view of the foregoing, petitioner's request to vacate and annul the Water Board's determination of September 22, 2016, is denied and the petition is dismissed.

Settle judgment and submit judgment to the Motion Support Office, Room 140.

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**Howard G. Lane, J.S.C.**