Matter of Romine v New York Pub. Serv. Commn.
2020 NY Slip Op 30938(U)
March 9, 2020
Supreme Court, Albany County
Docket Number: 902202-19
Judge: Margaret T. Walsh
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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:

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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.[1] 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.[2]

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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[1]For ease of reference herein, the Court will refer to electromechanical meters as "analog" meters, and to "digital" meters as "solid state" meters.

[2]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).[3] 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.[4]

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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[3]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.

[4]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.[5] 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 [1st 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.

[5]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.

The Court has thoroughly reviewed the administrative record as well as the exhibits offered by the Petitioner, Exhibits G, H, I-1, I-2, I-3, J and O (medical records, a FOIL response dated May 16, 2017, a 2019 opt-out chart and affidavits from a judicial case) were not part of the administrative record before the Commission and are accordingly stricken.

The balance of exhibits filed by the Petitioner consists of copies of scientific abstracts, studies and a letter appeal. The issue raised is whether these documents were included in or part of the administrative record, where they may have been made available via "active links," or hyperlinks[6], in the Petitioner's filings before the Commission. Neither the Petitioner's opposition nor sur-reply to the motions to strike indicates exactly whether these particular documents at Exhibits F, K, L-1, L-2, N, R, Y, Z, CC, DD, EE, GG and HH were available via the hyperlinks. Even assuming that they were, and putting aside any lack of objection by Commission and Central Hudson to the Petitioner's administrative filings setting forth "active links," the Court finds that such records were not properly made part of the administrative record. The applicable regulations at 16 NYCRR §3.5 direct that, with certain exceptions, all *documents* must be filed electronically (emphasis added). The regulations do not explicitly authorize the use or inclusion of hyperlinks in lieu of actual documents to be filed by parties to an administrative proceeding before the Commission. Rather, the regulations specify that only documents for consideration by the agency are to be filed. A hyperlink "'identifies the *location* of an existing publication'" (*Mirage Entm't, Inc. v. FEG Entretenimientos S.A.*, 326 F. Supp. 3d 26, 39 [SDNY 2018], quoting *Doctor's Data, Inc. v. Barrett*, 170 F.Supp. 3d

[6]A hyperlink is described as an "'electronic link providing direct access from one distinctively marked place in a hypertext or hypermedia document to another in the same or a different document'" (*Biro v. Conde Nast*, 2018 NY Slip Op 31181[U][n. 2, quoting Merriam-Webster Dictionary][Supreme Ct, New York Cty 2018], *affirmed* 171 AD3d 463 [1st Dept. 2019].

1087, 1137 [ND Ill. 2016])(emphasis added) but is not the actual document itself.[7] Moreover, the Petitioner never sought permission from the Commission to include links to other documents in lieu of filing the actual documents. While the Petitioner sought to include hyperlinks to other content and information as a convenience[8], the materials located via these hyperlinks were not properly filed and therefore outside of the administrative record.

The Court has reviewed the motions to strike certain allegations and statements set forth in the petition as well as in the Petitioner's affidavit in support. These allegations include, *inter alia*, references to termination of electrical service to the Petitioner's residence, particular medical issues of both the Petitioner and the Petitioner's paramour, the Americans with Disabilities Act, excerpted materials from exhibits outside the scope of the administrative record (see *infra*), and information cited from materials via hyperlinks outside the scope of the administrative record (see *infra*).[9] The Court upon careful and thorough review of the administrative record does not discern that any of these allegations, statements or materials were part of the record. Accordingly, the Court grants the motions to strike.

The Petitioner in his opposing affidavit asks the Court to take judicial notice (pursuant to CPLR 4511) of the opt-out chart (exhibit J), three scientific studies (referenced as an active link at chapter 5, paragraphs 2, 3 and 4 in exhibit M and via an active link in "Addendum Links"), an

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[7]Indeed, the reliability of a document found via hyperlink may readily be called into question, as it may be removed or "not found," edited, revised or subject to other changes at any time.

[8]According to his sur-reply, the Petitioner acknowledges that he "in fact actually submitted links to 5,067 peer-reviewed scientific medical studies via active links in his original petition (doc. #4) and in the 11/14/17 'Addendum Links' doc. #32 in DPS case 14-M-0196" (*Romine Sur-Reply*, ¶2). It was not unreasonable for the Commission to have declined to review such number of studies.

[9]See *Black Affirmation in Support of Motion to Strike* with Exhibits 1 and 2.

exhibit R (referenced in Exhibit M and via an active link in "Addendum Links"), and other studies referenced in his petition for rescission at Item III, pages 4, 5 and 6. To the extent not originally requested, the Petitioner also asks the Court to take judicial notice of various peer-reviewed research referenced or cited in governmental publications (United States and Brazil). The Petitioner states that he provided the materials via the "Addendum Links" document filed on November 14, 2017, in item 3 referenced as the "Pall Study" as well as on pages 17-18 of his affidavit in support. The Court declines the Petitioner's requests. "'[A] court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy'" (*Hamilton v. Miller*, 23 NY3d 592, 603 [2014], quoting *People v. Jones*, 73 NY2d 427, 431 [1989]). An example of such fact which may be properly judicially noticed is what day a certain date falls on (see *Deutsche Bank Natl. Trust Co. v. Sewdial*, 173 AD3d 685, 686 [2d Dept. 2019]). "But general causation, at least in scientifically complex cases, is not such a fact" (*id.*). Here, the Petitioner has failed to meet his burden showing that the information in these materials are "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." Rather, these studies and reviews ostensibly contain theories, hypotheses, and conclusions about effects of, e.g., low-level electromagnetic radiation ("EMR") exposure and "dirty electricity"–in other words, what that EMR exposure and dirty electricity allegedly cause. Because these studies and reviews present the authors' views and conclusions about causes and effects, they are not "facts" and therefore not proper for judicial notice.

Challenge to the Commission Orders

(a) *Timeliness of the Petitioner's Article 78 Petition*

The Petitioner seeks to annul the portion of the October 20, 2017 Modification Order denying customers' requests that Central Hudson furnish analog meters in lieu of AMR and solid state meters

in the opt-out program. The Petitioner commenced this proceeding for judicial review on April 15, 2019. An article 78 proceeding is subject to a four month statute of limitations from the time an agency decision or determination becomes final and binding (CPLR 217[1]). This abbreviated limitations period is tolled, however, where the determination to be reviewed is subject to a petition for a rehearing (CPLR 7801[1]; Public Service Law §22).

A petition for a rehearing must be filed within thirty (30) days of the Commission's order (Public Service Law §22; 16 NYCRR §3.7[a]); here, such petition was required to have been filed on or before Monday, November 20, 2017.[10] In response to his written request for an extension of time, the Commission advised the Petitioner that it would provide him an additional two weeks to file a "request for consideration" and that such filing would have to state "errors of law and fact (or new circumstances) under Public Service Law §22 and 16 NYCRR §3.7" (R. 88-89). The Commission further cautioned the Petitioner that the applicable statute of limitations would not be tolled (*id.*). However, at that point the Commission could not restrict what type of petition the Petitioner could file, and its letter in any event was unfortunately confusing: while the Commission would accept a petition for reconsideration two weeks after the 30 day deadline, such petition would nevertheless have to comply with elements required for a petition for a rehearing. The letter also did not explicitly deny the Petitioner an extension of time to file a petition for a rehearing. The Petitioner filed his petition on November 20, 2017 setting forth his particular contentions about the alleged lack of safety of solid state meters and continued availability and usefulness of analog meters (including refurbished analog meters) as an alternative for the opt-out program. Moreover, in its December 14,

[10]The Court notes that the Commission proceedings did not entail adjudicatory or evidentiary hearings, but instead proceedings characterized as quasi-legislative which are subject to the State Administrative Procedure Law ("SAPA")(*see United States v. Fla. E. Coast Ry. Co.*, 410 US 224, 245 [1973]). The regulations at 16 NYCRR §3.7 for a rehearing apply to either type of proceeding held by the Commission.

2018 the Commission addressed at length the arguments presented in the Petitioner's petition. The Court finds in these particular circumstances that the petition filed on November 20, 2017 was one for a rehearing which, in turn, tolled the statute of limitations for purposes of these proceedings challenging portions of the October 20, 2017 order (see *Matter of New York C. R. Co. v. Public Service Com.*, 238 NY 132, 136-137 [1924]; *Matter of Davis v. Kingsbury*, 27 NY2d 567, 569 [1970]; cf. *Western New York Water Co. v. Public Service Com.*, 204 Misc. 548, 550-551 [Supreme Ct, Albany Cty 1953]).

(b) *The Petitioner's Article 78 Petition*

In an article 78 proceeding challenging final and binding orders made by an agency, a petitioner must demonstrate that the determinations are arbitrary, capricious or are otherwise irrational or unreasonable to be entitled to relief (CPLR 7803[3]; *Matter of Glenwyck Dev., LLC v. New York Pub. Serv. Commn.*, 167 AD3d 1375, 1376 [3d Dept. 2018]; *Sch. of Language & Commun. Dev. v. Long Island Power Auth.*, 283 AD2d 506, 506 [2d Dept. 2001]). It is not the function of the Court in this proceeding to engage in a *de novo* review by opening the record to "marshall the facts," as urged by the Petitioner (see *Matter of Eastern Niagara Project Power Alliance v. New York State Dept. of Envtl. Conservation*, 42 AD3d 857, 861 [3d Dept. 2007]["in reviewing an administrative determination [a court's] role is not to reweigh the factors and substitute its own judgment for that of the agency"]). Rather, the sole question before the Court is whether, based upon the administrative record, the Commission's determinations had a rational basis and were not arbitrary, capricious or contrary to law.

1. Adequacy of Notices of Rulemaking Proceedings

The Petitioner asserts that the determinations should be voided because the Commission's notices were contrary to law. He argues that the notices failed to comply with SAPA; he also argues

that the notices were constitutionally defective.

The subject proceedings before the Commission were quasi-legislative in nature whereby notice of proposed rulemaking and comments were received concerning whether Central Hudson's tariff should be amended to eliminate certain charges and to direct the utility to provide analog meters as part of its opt-out program. The Commission issued notices of proposed rulemaking that were published in the *State Register* and established a proper deadline for receipt of comments. The Petitioner, however, fails to specify how or in what ways the Commission failed to comply with SAPA or the notices were defective. The Petitioner further asserts that the "SAPA notice is insufficient and true notification of proceedings could easily occur if the CenHud bill notified people since every ratepayer gets a bill in the mail" (*Verified Petition*, ¶12; *Verified Affidavit in Support*, ¶27). Again, the assertion is merely conclusory and fails to give specific, factual allegations demonstrating how notice pursuant to SAPA was wholly insufficient. Indeed, the Petitioner's argument is belied by the fact that over 200 comments were submitted by the public in response to the Petitioner's petition and the petition filed by SSMNY (R. 11).[11]

The Court also finds no merit to the Petitioner's contention that the notices were constitutionally inadequate. Public Service Law sections 65(1) and 66(5) delegates to the Commission the responsibility to ensure that all utilities provide "instrumentalities" that are "safe and adequate" for the public, including the meters deployed by a utility. This statutory duty obligates the Commission to make policy decisions regarding the safety and adequacy of utilities' equipment in furnishing services to the public (R. 17-18; see *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 US 129, 138-139 [1968][question of safety "is essentially a matter

[11]The Court notes that the Commission publishes notices on its public website, in addition to being published in the *State Register*.

of public policy"]). In this regard, in general "[t]he Constitution does not grant to members of the public a right to be heard by public bodies making decisions of policy" (*Minn. State Bd. for Cmty. Colleges v. Knight*, 465 US 271, 283 [1984]; *New York Coalition of Recycling Enters. v. City of New York*, 158 Misc.2d 1, 9 [Supreme Ct, New York County 1992]).[12] Here, the notice and comment procedure undertaken by the Commission to review proposed rulemaking and render policy decisions about meter safety nevertheless permitted members of the public, including the Petitioner and other customers of Central Hudson, to be heard. An evidentiary hearing that would otherwise implicate heightened due process protections was not required as the issue of meter safety for the public did not involve an adjudication of any individual party's rights (Public Service Law §§66[5], [12]; *Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of State of N.Y.*, 8 Misc.3d 584, 590 [Supreme Ct, Albany Cty 2004]). Rather, the publication of notice of the proceedings in accordance with the Public Service Law and SAPA was all that was needed, and the Petitioner in any event fully participated in the proceedings by filing comments and a petition. The Court also finds lacking in merit the Petitioner's argument that the Commission should order utilities to include notices of proposed rulemaking in ratepayers' bills. The Legislature has not directed any such additional notice in either statute (see *Matter of Rodgers v. New York City Fire Dept.*, 80 AD3d 1091, 1094 [3d Dept. 2011], citing *Matter of Alonzo M. v. New York City Dept. of Probation*, 72 NY2d 662, 665 [1988]), and the existing procedures for publication of notice of proposed rulemaking are reasonable and sufficient under the circumstances (see *Zaccaro v. Cahill*, 100 NY2d 884, 891 [2003][due process, as a flexible concept, does not always require actual notice; rather, "the key consideration is whether the notification procedures employed are reasonable in view of all the

[12]There is no recognized constitutional right to the provision of a particular meter desired by a ratepayer, or even to one that may be deemed to be "safer," so as to trigger greater notice than what was provided by the Commission.

circumstances"]).

2. Merits of the Commission's Determinations

As discussed above, the Commission is duty-bound to ensure that all gas and electric utilities under its jurisdiction furnishes safe and adequate "services, instrumentalities and facilities" (Public Service Law §§65[1]; 66[5]). The Legislature has specifically vested the Commission with statutory and regulatory authority to "determine and prescribe the safe, efficient and adequate property, equipment and appliances...to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law...." (Public Service Law §66[5]). Clearly, issues of the safety, efficiency and adequacy of meters used by utilities to measure consumption by the ratepaying public are technical matters delegated by the Legislature to the Commission. Where such issues of a highly technical nature are presented, "'the solutions...in general have been left by the Legislature to the expertise of the Public Service Commission'" (*Oil Heat Institute, Inc. v. Public Service Com.*, 72 AD2d 829, 830 [3d Dept. 1979], quoting *Matter of New York State Council of Retail Merchants v. Public Serv. Comm. of State of N.Y.*, 45 NY2d 661, 672). Thus, judicial deference is warranted to determinations about meter safety made by the Commission (see *New York Tel. Co. v. PSC*, 95 NY2d 40, 48 [2000]). "It is only when it can be shown that the exercise of judgment [by the Commission] was without any rational basis or without any reasonable support in the record that the determination of the commission may be set aside" (*Matter of New York State Council of Retail Merchants v. Public Serv. Comm. of State of N.Y.*, 45 NY2d at 672).

The October 17, 2017 Modification Order took into account staff investigation–undertaken in response to SSMWNY and other customers' concerns about meter safety–of the types of meters employed by Central Hudson, the radio frequency (RF) and other electromagnetic frequency (EMF) emissions levels of meters as well as other common household appliances including cellular phones,

and standards promulgated by the Federal Communications Commission (FCC) regarding exposure limits considered safe for public health and welfare. The Commission further considered numerous, detailed investigations and information about meter safety conducted in other states and jurisdictions as cited in the order. The Court agrees that "[t]he question of safety in this context is a public policy consideration and not a scientific conclusion" and that the safety of electricity, "which by its very nature has inherent risks, is determined not only by an understanding of the scientific evidence and potential risks, but also by a policy judgment as to the acceptability of those risks given the benefits (including safety benefits) of the technology " (R. 277-278). While the Petitioner alleges the existence of scientific and other studies offering differing opinions and conclusions, the Commission nevertheless set forth a rational basis for its findings that neither AMR nor solid state meters pose a credible threat to the health and safety of the public, including Central Hudson's customers. A disagreement among scientists and others about the effects of radio frequency and electromagnetic radiation emissions "is not evidence that the [Commission's] acceptance of one set of conclusions was arbitrary" (*Matter of Med. Malpractice Ins. Ass'n v. Superintendent of Ins.*, 72 NY2d 753, 763-764 [1988]), and annulment of the Commission's decision is not required even where a different conclusion could be reached when presented with same evidence (see *Matter of Clapes v. Tax Appeals Trib. of State of N.Y.*, 34 AD3d 1092, 1094 [3d Dept. 2006], *appeal dismissed* 8 NY3d 975 [2007]). Indeed, "'[t]he PSC is free to entertain or ignore any particular factor, or to assign whatever weight it deems appropriate'" (*New York Tel. Co. v. PSC*, 95 NY2d at 49, quoting *Matter of Abrams v. Public Serv. Commn.*, 67 NY2d 205, 212 [1986]).

The Court also finds that the Commission set forth a rational basis for declining to require Central Hudson to furnish analog meters (including refurbished analog meters) to customers participating in the opt-out program. The Commission noted, *inter alia*, that analog meters are

becoming obsolete, are no longer the industry standard in view of advancing technology (particularly as to accuracy of measuring consumption and usage) and are unlikely to meet all standards for Commission approval.[13] That analog meters continue being offered in a handful of other jurisdictions does not, again, mean that the Commission's determination was without any basis; nor does the availability of refurbished meters mean that the Commission's order was irrational. Rather, the Court, in deference to the Commission's expertise in its regulation and approval of meters, finds that its conclusions are supported by the record (see *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]).

Turning to the December 14, 2018 order, the Court finds that the Commission's decision to deny the Petitioner's petition for a rehearing had a rational basis. As referenced above, a request for a rehearing must set forth "an error of law or fact or that new circumstances warrant a different determination" (16 NYCRR §3.7; see also Public Service Law §22). The Petitioner, arguing that the Commission erred in its factual findings and ultimate conclusions, pointed to various studies concerning harmful electromagnetic radiation and emissions and dirty electricity generated by AMR and solid-state meters, as well as the availability and usage of refurbished analog meters in other jurisdictions. It appears from the hyperlinks set forth in SSMWNY's 2016 filings that many of these same studies, as well as authors of studies, are the same as what is set forth in the petition for rehearing, including the hyperlink to the over 5,000 studies. To the extent the Petitioner asserts the existence of additional studies regarding generally hypothesized effects of such emissions, such additional information do not constitute new facts but are instead cumulative information of what

[13]The Joint Utilities' filing opposing analog meters noted that refurbished meters, even if compliant for accuracy, do not and cannot test for compliance with other required standards (R. 361-362).

was already presented to and considered by the Commission.[14] Notwithstanding, the Commission took into account all arguments presented, noting, for example, that the Petitioner's seven cited studies were all authored or co-authored by the same two individuals; that two documents the Petitioner alleged the Commission improperly relied upon were not cited in the October 20, 2017 Modification Order; and that its reliance on existing FCC standards regarding radio frequency exposure was proper in the absence of any further changes or updates by the Federal agency to its standards. Notably, as the Commission observed, the Petitioner did not adduce any particular scientific testing of the meters utilized by Central Hudson demonstrating the existence of high frequency voltage transients or other unacceptably high emissions[15], instead relying upon seven articles which, from their very titles, do not even refer specifically to the meters at issue here. Again, the Commission relied upon studies that, in its judgment and expertise, it deemed credible in support of its ultimate conclusions that neither the AMR nor solid-state meters present a credible threat to the health and safety of the public, including Central Hudson's customers. As stated above, that studies or information yielding differing conclusions about the effects of EMR emissions and dirty electricity were available for consideration by the Commission does not mean that the Commission's findings and conclusions were erroneous, given the Commission's prerogative in determining what weight to accord when presented with conflicting evidence *(Matter of Lefkowitz v. Public Serv. Commn. of the State of N.Y.*, 77 AD3d 1043, 1045 [3d Dept. 2010], citing *Matter of Gansevoort Holding Corp. v. Consolidated Edison Co. of N.Y.*, 167 AD2d 648, 650 [1990]). Based upon the

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[14]Many of the studies set forth in the Petitioner's rehearing petition concern such effects asserted to be caused by mobile phone use.

[15]In its October 20, 2017 order, the Commission set forth details concerning the RF emissions of the meters at issue, noting that testing of the equipment by certified laboratories is required to ensure compliance with FCC standards prior to Commission approval for their use (R. 253-256).

record, the Commission rationally concluded that the Petitioner failed to establish an error of fact or conclusion of law or new circumstances justifying a new hearing.

Those arguments not specifically addressed herein were found to be unpersuasive or without merit, or were otherwise rendered academic.

For the reasons set forth herein, it is hereby

ORDERED, that the Respondents' *Motions to Strike* are granted; and it is further

ORDERED, that the Petitioner's request that the Court take judicial notice is denied; and it is further

ORDERED and ADJUDGED, that the *Petition* is denied and dismissed.

This constitutes the *Decision/Order/Judgment* of the Court. The Court has uploaded the Original *Decision/Order/Judgment* to the case record in this matter maintained on the NYSCEF website whereupon it is to be entered and filed by the Office of the Albany County Clerk.

Counsel for the Respondent Public Service Commission is not relieved from the applicable provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party. (Please note that section 202.5b(b)(2)(I) of the Uniform Rules of Supreme and County Courts directs that service upon non-participating parties must be made in hard copy.)

SO ORDERED.

ENTER.

Dated: March 9, 2020
Albany, New York

Margaret Walsh
Supreme Court Justice

16 03/16/2020

Papers Considered:

1. *Notice of Petition and Petition*, filed on April 15, 2019 by Stephen P. Romine; *Affidavit* of Facts* sworn to on April 15, 2019, with Exhibits A through HH*; *Affidavit of Service*;

2. *Notice of Motion to Strike* filed on behalf of the Public Service Commission on June 12, 2019 by Peter V. Black, Esq., Assistant Counsel; *Affirmation in Support* with Exhibits 1 and 2 annexed; *Memorandum of Law in Support*; ;

3. *Notice of Motion to Strike* filed on behalf of Central Hudson Gas & Electric Corporation on June 12, 2019 by Christina M. Bookless, Esq.; *Affirmation in Support* of Christina M. Bookless, Esq;

4. *Affidavits in Opposition to Motion* filed by Stephen P. Romine on June 20, 2019;

5. *Stipulation–Briefing Schedule* filed on June 21, 2019;

6. *Verified Answer* of Central Hudson Gas & Electric Corporation filed on August 9, 2019; *Memorandum of Law*;

7. *Verified Answer* of Public Service Commission of the State of New York, with Certified Transcript (Record)(Volumes I and II); *Memorandum of Law*;

8. *Scheduling Stipulation* entered on August 29, 2019

9. *Reply Memorandum of Law* of Respondent Public Service Commission, filed on October 10, 2019;

10. *Affirmation in Further Support of Motion to Strike* by Christina M. .Bookless, Esq., filed on October 10, 2019;

11. Petitioner's Reply to Respondents' Memorandum and Answer filed by Stephen P. Romine on October 10, 2019;

12. *Sur-Reply* filed by Stephen P. Romine on December 20, 2019.

*excepting those exhibits and statements stricken by the Court as outside the administrative record.