

**Matter of Central Hudson Gas & Elec. Corp. v
State of N.Y. Pub. Serv. Commn.**

2023 NY Slip Op 34934(U)

December 1, 2023

Supreme Court, Rensselaer County

Docket Number: Index No. 908545

Judge: Richard J. McNally, Jr.

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At a IAS Term of the Rensselaer County
Supreme Court, held in and for the County
of Rensselaer, in the City of Troy, New
York, on the 1st day of December, 2023.

PRESENT: HON. RICHARD J. MCNALLY, JR.
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC
CORPORATION, CONSOLIDATED
EDISON COMPANY OF NEW YORK,
INC., et al.,

Petitioners,

-against-

STATE OF NEW YORK PUBLIC SERVICE
COMMISSION,

Respondent.

DECISION & ORDER
Index No. 908545

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MCNALLY, J.

Petitioners, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, The Brooklyn Union Gas Company d/b/a National Grid NY, KeySpan Gas East Corporation d/b/a National Grid, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (hereinafter “the Utilities”) have commenced the instant article 78 proceeding and declaratory judgment action to challenge an order of respondent New York State Public Service Commission (hereinafter “the Commission”). The Utilities claim an implementation order by the Commission contravenes plain statutory language and is unconstitutional. Pending before this Court is the Commission’s motion to dismiss pursuant to CPLR 3211 [a] [2], or in the alternative, a motion to dismiss pursuant to CPLR 3212 granting summary judgment in favor the Commission. For the reasons set forth below, the Commission’s CPLR 3211 [a] [2] motion is granted, and petitioners’ Verified Petition and Complaint are dismissed.

On July 14, 2022, the Commission issued an order titled “Order Implementing Public Service Law Section 73.” (*NYS Public Service Commission, Order Implementing Public Service Law Section 73, Case 22-M-0159, issued on July 14, 2022*). This order was issued by the Commission on the basis of Senate Bill 4824-A, which was enacted to provide compensation to utility customers who experienced outages lasting 72 consecutive hours or more. (Public Service Law § 73 [1], as added by L 2021, ch 786, pt B, § 1). Forms of compensation determined by the legislature include a \$25 credit which utility companies must pay to customers for every 24 hours an outage lasts beyond 72 consecutive hours. Other forms of compensation include reimbursement up to \$235 if the residential customer provides an itemized list or up to \$540 if

the customer provides proof of loss for any food that spoils due to a service outage that lasts longer than 72 consecutive hours, and reimbursement for prescription medications that have spoiled up to the amount of the actual loss (*see* Public Service Law 73 § [1]). Additionally, the Utilities may not recover compensation paid to customers through rate increases. (*see* Public Service Law § 73 [1], [2]).

The bill also includes a provision in which the Utilities may petition the Commission for a waiver of credits and reimbursements if the petition is made within 14 days after an outage. (*see* Public Service Law § 73 [3]). A utility company has the burden of demonstrating that granting the waiver is fair, reasonable and in the public interest (*Id.*). In determining whether to grant such waiver, the commission must consider several different equitable factors (*Id.*).

The Commission determined that the waiver provision in § 73 [3] of 4824-A only applies to § 73 [1] of the bill, and the waiver provision does not extend to § 73 [2]. The Commission stated, “Although subdivision (3) authorizes a utility to ‘petition the Commission for a waiver of the requirements of this section,’ the Commission does not read the phrase ‘requirements of this section’ to apply to subdivision (2), which contains language that is unconditionally prohibitory” (quoting *Order Implementing Public Service Law Section 73* at 29, 30). The Utilities filed the instant action challenging this conclusion.

The Utilities’ First Cause of Action

The Utilities’ first cause of action is not ripe. In determining whether an administrative action is ripe for review, the court must consider whether it is final and whether the controversy may be determined as a purely legal question (*Adirondack Council, Inc. v. Adirondack Park Agency*, 92 AD3d 188, 191 [3d Dept 2012]). An action will be deemed final if a pragmatic evaluation reveals the decision-maker has arrived at a definitive position on the issue that inflicts

actual and concrete injury (*Id.*). The court must consider the significance of the anticipated harm, and if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party, the matter is not ripe (*Id.*).

Here, the Utilities have not been involved in a situation that could be deemed “final.” A petitioner may not bring an article 78 action in which potential costs imposed upon petitioner have yet to be determined [*see Town of Brunswick v. Cnty. of Rensselaer*, 152 AD3d 1108, 1112 [3d Dept 2017] citing *Adirondack Council, Inc. v. Adirondack Park Agency*, *supra* at 191). It could very well be the case that the Utilities never experience a situation in which they would require a waiver for rate increases; i.e. they always have an opportunity to receive a waiver for the cost of reimbursements under Public Service Law § 73 [3].

The Utilities’ Second Cause of Action

The Utilities assert the contested statute is unconstitutional because it denies their due process rights and takes their property without just compensation by not allowing for a waiver of rate increases. Due process in the ratemaking context requires a utility to be heard prior to the deprivation of property, but if no property interest exists there is no due process requirement (*see RR Village Ass’n, Inc. v. Denver Sewer Corp.*, 826 F2d 1197, 1202-04 [2d Cir. 1987]). Where a statute or regulation provides a state with significant discretionary authority over the bestowal of a government benefit, rarely will the recipient be able to establish a property interest in that benefit. (*Niagara Mohawk Power Corp. v. New York State Dept of Transp.*, 637 NY2d 505, 507 [3d Dept 1996]). Because the establishment of prospective rates is a function involving the exercise of judgment and discretion, ratepayers have no property interest in such rates (*Id.*). A prime function of the Commission is to engage in the highly technical nature of determining which costs are to be borne by ratepayers (*Matter of Consolidated Edison Co. of N.Y., Inc. v.*

Public Serv. Commn. Of State of N.Y., 66 N.Y.2d 369, 372 [1985]; *Matter of Rochester Gas & Elec. Corp. v. Public Serv. Commn of State of N.Y.*, 135 A.D.2d 4, 8 [3d Dept 1987]).

Public Service Law § 73 has given the Commission significant discretionary authority over the technical ratemaking process, making the establishment of prospective rates a function of their judgment and discretion. The Utilities, therefore, have no constitutionally protected interest in rates that could hypothetically be impacted by a future Commission proceeding, and have not been deprived of due process.

Accordingly, it is

ORDERED that the Verified Petition and Complaint is dismissed.

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

Counsel for the respondents are not relieved from the applicable provisions of CPLR 2220 or the Uniform Rules of Supreme and County Courts § 202.5b (h) (2), insofar as it relates to service and notice of entry of the filed document upon all other parties to this special proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

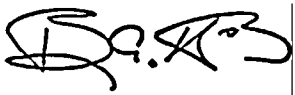
SO ORDERED!
ENTER

Dated: December 1, 2023
Troy, New York


RICHARD J. McNALLY, JR.
Supreme Court Justice

Papers Considered:

NYSCEF Docketed Nos. 1-31.



12/04/2023