

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 CPLR Article 78

– against –

THE NEW YORK PUBLIC SERVICE
COMMISSION, CENTRAL HUDSON GAS AND
ELECTRIC CORP., and THE STATE OF NEW
YORK,

Respondents.

VERIFIED ANSWER

Index No. 902202-19

Respondent New York State Public Service Commission (“Commission,” “PSC,” or “Respondent”), by John J. Sipos, Acting General Counsel, Peter V. Black, Assistant Counsel, of Counsel, as and for its Verified Answer to the Verified Petition in the above-captioned special proceeding, states as follows:

Overview

As an initial matter, the Commission affirmatively alleges that Co-Respondent Central Hudson Gas and Electric Corp. (“Central Hudson”) has deployed Automated Meter Reading (“AMR”) meters to measure electrical service and gas service to residential customers since 1990. The underlying administrative proceeding concerned the design of an opt-out program for customers who did not wish to use AMR meters. The underlying proceeding did not involve permission to deploy AMR meters. As set out in more detail in this Verified Answer, the

Commission objects to Petitioner Stephen P. Romine's ("Petitioner" or "Mr. Romine") use of extra-record documents, untimely petition, lack of injury, and failure to state a viable cause of action.

Response to Petitioner's Allegations and Legal Arguments

1. Denies the allegations in paragraph 1 (p. 1)¹ of the Verified Petition, except admits that Petitioner has commenced a special proceeding in Supreme Court, Albany County pursuant to CPLR Article 78 seeking certain relief, as set forth in the Verified Petition, and denies that Petitioner is entitled to any such relief, except admits that the Commission issued orders in Commission Case 14-M-0196 on October 20, 2017 and December 14, 2018, and respectfully refers the Court to those Orders [R. 0001-23, 0235-82]² for a complete and accurate description of their contents.

2. Denies the allegations in paragraph 2 (p. 2) of the Verified Petition, except admits the allegation that Stephen P. Romine is the named petitioner in this special proceeding, admits that Petitioner filed a Petition with respect to the Commission's October 20, 2017 Order in Commission Case 14-M-0196, admits that, in an order issued and effective December 14, 2018, the Commission denied that Petition, admits that Stephen P. Romine is a principal of the group "Stop Smart Meters Woodstock New York" ("Stop Woodstock"); and denies knowledge or

¹ The Petition includes paragraphs numbered 1 through 6 on pages 1 through 5, and then restarts its paragraph numbering at paragraph 1 on page 5. To avoid ambiguity, where the Commission refers to paragraphs 1 through 6 of the Petition, the Commission will specify the page number in parentheses.

² The citation "R. ____" refers to the indicated page within the Commission's "certified transcript of the record of the proceedings under consideration, filed concurrently herewith.

information sufficient to form a belief as to the truth of the allegations in footnote 1 of paragraph 2 (p. 2) of the Verified Petition, except admits the allegation that Petitioner removed Central Hudson's metering device from his residence and personally installed a customer-supplied device which Petitioner alleged to be an "analog meter," and admits the allegation that Central Hudson subsequently terminated electric utility service to Petitioner's residence.

3. Denies the allegations in paragraph 3 (p. 3) of the Verified Petition, and particularly denies that Central Hudson filed any "Petition" in Commission Case 14-M-0196, except admits the allegation that the Commission, Central Hudson, and the State of New York are named as respondents in this proceeding, admits that the Commission issued orders in Commission Case 14-M-0196, admits that Central Hudson is a public utility company subject to the Commission's regulatory jurisdiction as such jurisdiction is defined in the Public Service Law ("PSL"), admits that Central Hudson's service territory encompasses parts of Orange, Sullivan, Columbia, Putnam, Dutchess, Greene, Albany, and Ulster Counties, admits that Petitioner resides in Ulster County, admits that the State of New York is represented here by the Attorney General of the State of New York; affirmatively alleges that the Commission is represented here by attorneys employed by the New York State Department of Public Service ("Department" or "DPS"), and affirmatively alleges that Central Hudson filed proposed tariff amendments with the Commission which were docketed as Commission Case 14-M-0196.

4. Admits the allegation in paragraph 4 (p. 3) of the Verified Petition that the Commission issued an order in Commission Case 14-M-0196 on October 20, 2017 in the County of Albany, admits the allegation that the Commission maintains offices in the County of Albany, denies the allegation that that the Commission issued an order in Commission Case 14-M-0196 on December 14, 2018 in the County of Albany, affirmatively alleges that the Commission issued an order in Commission Case 14-M-0196 on December 14, 2018 in the County of New York, affirmatively alleges that the Commission maintains offices in the Counties of Erie, New York, and Nassau in addition to its primary office in the County of Albany, except avers that the remaining allegations in paragraph 4 (p. 3) set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies that the Verified Petition was timely filed, admits that the Court has subject matter jurisdiction over this proceeding and may exercise personal jurisdiction over the Commission, and admits that venue in Albany County is proper.

5. Avers that the allegations contained in paragraph 5 (p. 4) of the Verified Petition set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies each and every allegation in paragraph 5 (p. 4) of the Verified Petition.

6. Denies the allegations contained in paragraph 6 (p. 5) (including footnote 2) of the Verified Petition, except admits that Petitioner requested an extension of time to “respond” to the Commission’s October 20, 2017 Order on

November 16, 2017, admits that the Secretary to the Commission issued a ruling on the extension request on November 17, 2017, admits that Petitioner filed a “Petition for Rescinding New York Public Service Commission Decision on Order Denying, In [P]art, Requests For Modification of Opt-Out Tariff” on November 20, 2017, admits that the Commission issued a Notice with Respect to Petition Rescission, in Part, and Modification on December 1, 2017, admits that Petitioner submitted a document styled as an “Addendum to Petition To The NewYork [sic] Public Service Commission (PSC) to Rescind Part of Order” on December 4, 2017, and respectfully refers the Court to Petitioner’s November 16, 2017 extension request [R. 0108-10], the Secretary’s November 17, 2017 ruling on extension request [R. 0088-89], Petitioner’s November 20, 2017 Petition [R. 0052-87], the Commission’s December 1, 2017 Notice with Respect to Petition [R. 0050-51], and Petitioner’s December 4, 2017 “Addendum” [R. 0032-47], for a complete and accurate description of their contents.

7. Denies the allegations and legal arguments contained in paragraph 1 (p. 5) of the Verified Petition, except admits that Central Hudson had deployed AMR meters in its service territory, admits that the AMR meters presently used by Central Hudson are capable of communication via wireless transmissions, and respectfully refers the Court to the Commission’s October 20, 2017 and December 14, 2018 Orders [R. 0001-23, 0235-82] and Central Hudson’s May 22, 2014 tariff filing [R. 0600-29] for a complete and accurate description of their contents; and, further, affirmative alleges that Petitioner did not introduce specific evidence in the

underlying administrative proceeding concerning the specific mode of operation of the meter models deployed by Central Hudson.

8. Denies the allegations contained in paragraph 2 (p. 6) of the Verified Petition, except admits that Petitioner requested that Central Hudson provide utility service through an electromechanical meter, admits that Central Hudson declined to deliver utility service through an electromechanical meter, and respectfully refers the Court to the “[Stop Woodstock] circulated petition” and the town resolutions of various town governments [R. 0333-36, 0365-68, 0491-572] for a complete and accurate description of their contents.

9. Denies the allegations contained in paragraph 3 (p. 6) of the Verified Petition, except admits that Jane Valand filed a petition with the Commission in Commission Case 14-M-0196, admits that the Town of Woodstock filed a town resolution with the Commission in Commission Case 14-M-0196, admits that the Commission issued orders in Commission Case 14-M-0196 on October 20, 2017 and December 14, 2018, admits that Stop Smart Meters New York (“Stop NY”) and Stop Woodstock filed separate petitions in response to the Commission’s October 20, 2017 Order, and respectfully refers the Court to the petitions of Jane Valand [R. 0567-72], Stop NY [R. 0090-95], and Stop Woodstock [R. 0052-87], the town resolutions of the Town of Woodstock [R. 0491-566], and the Commission’s October 20, 2017 and December 14, 2018 Orders [R. 0001-23, 0235-82] for a complete and accurate description of their contents.

10. Denies the allegations contained in paragraph 4 (p. 6) (including footnotes 3 and 4) of the Verified Petition, and respectfully refers the Court to the issuance by the United States Access Board of Americans with Disabilities Act guidelines, 67 Fed. Reg. 56,352 (Sep. 3, 2002), and the 2005 Indoor Environmental Quality Report, for a complete and accurate description of their contents, and denies knowledge or information sufficient to form a belief as to the truth of the allegation that an “opt-out is routinely requested by people who are sensitive to the microwave radiation emissions.”

11. Denies any allegation contained in paragraph 5 (p. 7) of the Verified Petition that the so-called “digital opt-out meter” is not safe and adequate, except denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein, and respectfully refers the Court to the Commission’s October 20, 2017 and December 14, 2018 Orders [R. 0001-23, 0235-82] and Stop Woodstock’s November 20, 2017 petition [R. 0052-87] for a complete and accurate description of their contents, except admits that Central Hudson has offered, and continues to offer, an “opt-out” option by which ratepayers may request a meter which does not communicate via wireless transmissions, and admits that, during normal operation, electric utility meters may not be switched off and must remain situated in the meter socket (which condition Petitioner inaccurately describes as “plugged in”).

12. Denies the allegations contained in paragraph 6 (p. 8) of the Verified Petition, and respectfully refers the Court to the Commission’s October 20, 2017

and December 14, 2018 Orders [R. 0001-23, 0235-82] for a complete and accurate description of their contents, except denies knowledge or information sufficient to form a truth as to the allegations to the extent they discuss material beyond the administrative record upon which the Commission's Orders were based, and avers that the legal conclusions and arguments about the Commission Orders in paragraph 6 (p. 8) set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies the aforementioned allegations.

13. Denies the allegations contained in paragraph 7 of the Verified Petition, and respectfully refers the Court to the Commission's October 20, 2017 and December 14, 2018 Orders [R. 0001-23, 0235-82], and the various sources cited within those Orders, and the various sources cited and/or quoted by Petitioner, for a complete and accurate description of their contents.

14. Denies the allegations contained in paragraph 8 of the Verified Petition, and respectfully refers the Court to the Commission's October 20, 2017 and December 14, 2018 Orders [R. 0001-23, 0235-82] and the various sources cited by Petitioner for a complete and accurate description of their contents, except denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in footnote 9 of paragraph 8 of the Verified Petition, except admits the allegation that the Commission has determined that electromechanical (inaccurately termed "analog") meters are obsolete, and affirmatively alleges that events occurring after the issuance of the challenged orders are legally irrelevant to

the question of whether the orders had a rational basis, and that the decisions of the public utility commissions of other states do not bind the Commission.

15. Denies the allegations contained in paragraph 9 of the Verified Petition, and respectfully refers the Court to the Commission's October 20, 2017 and December 14, 2018 Orders [R. 0001-23, 0235-82] and the various sources cited by Petitioner for a complete and accurate description of their contents, affirmatively alleges that events occurring after the issuance of the challenged orders are legally irrelevant to the question of whether the orders had a rational basis, and that the decisions of the public utility commissions of other states do not bind the Commission; except denies knowledge or information sufficient to form a belief as to the truth of the allegations to the extent they discuss material beyond the administrative record upon which the Commission's Orders were based; and, further, admits the allegation that the Federal Communications Commission ("FCC") has not yet issued a final decision in FCC Docket No. 13-84, and that various parties have filed submittals in FCC Docket No. 13-84, admits the allegation that Petitioner disagrees with certain of the Commission's factual findings; and avers that Petitioner's statements concerning the application of the Federal Rules of Evidence and the Civil Practice Law and Rules or that the Commission's Orders are lacking in record support sets forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies the aforementioned allegations, and respectfully refers the Court to the legal authorities cited therein for a complete and accurate description

of their contents, and, further, affirmatively alleges that the Commission's determinations are not within the scope of the Federal Rules of Evidence or Article 45 of the Civil Practice Law and Rules, and that the standard of judicial review is rational basis.

16. Denies the allegations contained in paragraph 10 of the Verified Petition, and also denies knowledge or information sufficient to form a belief as to the accuracy of the allegation regarding what unidentified "concerned ratepayers/residents" understood; denies other statements as legal arguments and conclusions as to which no response is required, and, to the extent a response may be required, denies the statements and their relevance; and affirmatively alleges that events occurring after the issuance of the challenged orders are legally irrelevant to the question of whether the orders had a rational basis, and that the decisions of other states do not bind the Commission.

17. Denies the allegations contained in paragraph 11 of the Verified Petition, and respectfully refers the Court to the Commission's October 20, 2017 and December 14, 2018 Orders [R. 0001-23, 0235-82] and the various sources cited and/or quoted by Petitioner for a complete and accurate description of their contents, and affirmatively alleges that the decisions referenced by Petitioner are not applicable here, except denies knowledge or information sufficient to form a belief as to the accuracy of the statements concerning the alleged qualifications of David O. Carpenter as an expert testifying witness.

18. Denies the allegations contained in paragraph 12 of the Verified Petition, and respectfully refers the Court to the Commission's October 20, 2017 and December 14, 2018 Orders [R. 0001-23, 0235-82] and the various sources cited and/or quoted by Petitioner for a complete and accurate description of their contents, except admits the allegation that utility meters are (at least in some instances) installed upon the property at which utility service is delivered, admits the allegation that Petitioner refers to wireless AMR meters as "smart meters," and affirmatively alleges that it is inaccurate to describe the AMR metering devices in use by Central Hudson as "smart meters" because they lack certain functionality characteristic of "smart meters" (as that term is commonly understood in the utility industry), and avers that the statements regarding the legal sufficiency of the notice procedure prescribed by the State Administrative Procedure Act ("SAPA") and the statements that this matter implicates "fundamental rights and property rights" set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies each and every one of the aforementioned allegations.

19. Avers that the allegations contained in paragraph 13 of the Verified Petition set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies each and every one of the aforementioned allegations, and respectfully refers the Court to the Commission's October 20, 2017 and December 14, 2018 Orders [R. 0001-23, 0235-82], and to the various sources cited and/or quoted by Petitioner for a complete and

accurate description of their contents; and, further, affirmatively alleges that events occurring after the issuance of the challenged orders are legally irrelevant to the question of whether the orders had a rational basis, and that the decisions of the public utility commissions of other states do not bind the Commission.

20. Avers that the allegations contained in paragraph 14 of the Verified Petition set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies the allegations contained in paragraph 14.

21. Avers that the allegations contained in paragraph 15 of the Verified Petition set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies the allegations contained in paragraph 15.

22. Avers that the allegations contained in paragraph 16 of the Verified Petition set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies the allegations contained in paragraph 16.

23. Avers that the allegations contained in paragraph 17 of the Verified Petition set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies the allegations contained in paragraph 17.

24. Avers that the allegations contained in paragraph 18 of the Verified Petition set forth legal conclusions as to which no response is required. To the

extent a response may be required, the Commission denies the allegations contained in paragraph 18.

25. Avers that the allegations contained in paragraph 19 of the Verified Petition set forth legal conclusions as to which no response is required. To the extent a response may be required, the Commission denies the allegations contained in paragraph 19.

26. Denies any and all allegations not heretofore previously admitted or denied.

27. Respondent Commission sets forth the following objections in point of law that support this Court issuing an order striking the extra-record evidence and dismissing the Verified Petition:

AS AND FOR A FIRST OBJECTION IN POINT OF LAW

28. Petitioner has submitted impermissible extra-record evidence and arguments as more fully set forth in the Commission's Motion to Strike Extra-Record Evidence; and this Court may not consider any such extra-record matter. This Court should strike all such extra-record matter from the record of this CPLR Article 78 special proceeding.

AS AND FOR A SECOND OBJECTION IN POINT OF LAW

29. The Commission is entitled to weigh conflicting evidence however it sees fit, and to reach any rational conclusion. The Commission's findings of fact are conclusive as a matter of law. Petitioner's disagreement with the relative weight

the Commission afforded conflicting evidence in the record fails to state a cause of action upon which relief may be granted.

AS AND FOR A THIRD OBJECTION IN POINT OF LAW

30. This proceeding is time-barred.

AS AND FOR A FOURTH OBJECTION IN POINT OF LAW

31. Commission Case 14-M-0196 was a quasi-legislative rulemaking action of broad applicability; therefore, Petitioner has no unconditional vested constitutional due process rights with respect to the Commission's action. Petitioner has no constitutional right to notice in a rulemaking proceeding, or to utility service delivered using any particular equipment. The Commission complied, in all relevant respects, with the State Administrative Procedure Act ("SAPA") and with the newspaper notice requirements of Public Service Law ("PSL") § 66(12), and the Commission was not, in this context, subject to any public notification requirements beyond those explicitly specified by SAPA and PSL § 66(12). Therefore, Petitioner received sufficient process, and he cannot state any viable cause of action arising under the constitutions of the United States or of the State of New York against the Commission.

AS AND FOR A FIFTH OBJECTION IN POINT OF LAW

32. Petitioner lacks standing to challenge any portion of the Commission's October 20, 2017 and December 14, 2018 Orders except the portion declining to order Central Hudson to offer an electromechanical opt-out metering option. In particular, Petitioner has not credibly alleged (1) that he has personally paid any

opt-out fees, (2) that he is in imminent risk of being compelled personally to pay any opt-out fees, or (3) that he personally has a qualifying “disability” within the meaning of the Americans with Disabilities Act. Petitioner is not an attorney, and he therefore lacks the ability or authority to represent the interests of any person or entity other than himself.

**AS AND FOR A STATEMENT OF THE GROUNDS FOR THE ACTION
TAKEN BY RESPONDENT PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK**

33. This CPLR Article 78 proceeding challenges the October 20, 2017 and December 14, 2018 Orders issued by the Commission in Commission Case 14-M-0196. The Record upon which the Commission based the challenged Orders is attached to this Verified Answer. The Record before the Commission shows that the Commission’s Orders are in no way arbitrary, capricious, an abuse of discretion, or affected by an error of law. On the contrary, the Commission’s Orders are just and reasonable and in all respects rationally based and in conformity with the law.

WHEREFORE, Respondent respectfully requests that this Court enter judgment pursuant to Article 78 of the Civil Practice Law and Rules (1) dismissing the above-captioned Verified Petition, (2) confirming the October 20, 2017 and December 14, 2018 Commission Orders, and (3) granting such other and further relief as this Court may deem just and proper.

Dated: August 9, 2019
Albany, New York

Respectfully submitted,

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