

Docket #: 528147

TO BE SUBMITTED

STATE OF NEW YORK:
APPELLATE DIVISION:

SUPREME COURT
THIRD DEPARTMENT

STEPHEN PHILLIP ROMINE

Appellant,

-against-

JAMES P. LAURITO and STEVEN V. LANT,

Respondents.

RESPONDENTS' BRIEF

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II – PRELIMINARY STATEMENT

The defendants/respondents were granted summary judgment by the Honorable Christopher E. Cahill by decision dated February 14, 2018. The trial court properly found that plaintiff/appellant failed to exhaust his administrative remedies and was barred from bringing this action on that basis, as well as being collaterally estopped and barred by the applicable statute of limitations from bringing this action against the defendants/respondents and the granting of summary judgment was appropriate.

III – QUESTIONS PRESENTED

Point I - Whether the lower court prematurely granted summary judgment. This question should be answered in the negative.

Point II – Whether denying plaintiff/appellant’s demands for discovery violated his due process and equal protection rights. This question should be answered in the negative.

Point III – Whether the trial court was biased toward plaintiff/appellant. This question should be answered in the negative.

Point IV – Whether the lower court was touched by fraud when it granted summary judgment. This question should be answered in the negative.

Point V – Whether the lower court properly determined that primary jurisdiction for plaintiff/appellant’s claims was more properly before the Public Service Commission. This question should be answered in the affirmative.

Point VI – Whether the lower court properly found that plaintiff/appellant failed to exhaust his administrative remedies and is barred from raising these claims against the defendants/respondents. This question should be answered in the affirmative.

Point VII – Whether the lower court properly found that plaintiff/appellant was collaterally estopped from raising these claims against the defendants/respondents. This question should be answered in the affirmative.

Point VIII – Whether the lower court properly found that alleged breach of contract against the defendants/respondents was not an actionable claim. This question should be answered in the affirmative.

Point IX – Whether the trial court failed to take into account societal interests when granting summary judgment. This question should be answered in the negative.

Point X - Whether plaintiff/appellant was a victim of defendants/respondents alleged fraud upon the court. This question should be answered in the negative.

IV – COUNTER STATEMENT OF FACTS

This action revolves around the installation of a digital ERT utility meter that was installed by the non-party, Central Hudson Gas & Electric Corp., (hereinafter referred to as “Central Hudson”) on August 13, 2008 at plaintiff/appellant’s residence situate at 8 Fitzsimmons Lane, Woodstock, New York (R. 56, 106). At the time, plaintiff/appellant was a tenant of the premises and had made an application to Central Hudson to upgrade his existing electrical service (R. 48, 78). As a result, Central Hudson exchanged and installed a General Electric GE I-210 digital ERT equipped utility meter for the then existing analog meter (R. 48). That digital meter remained in use without objection until March, 2013 when plaintiff/appellant placed a demand by a writing that the digital meter be removed and that an analog meter be reinstalled. Plaintiff/appellant contended that the subject digital meter emitted harmful electromagnetic waves which caused harm to him and his partner, Raj Nevin, who was also residing at the residence (R. 660-668). Central Hudson denied his request to reinstall the analog meter (R.84-88). On May 16, 2013 plaintiff/appellant himself removed the subject digital meter and installed a remanufactured analog meter he purchased from Hialea Meter Company in Florida (R. 303-310). As a result, Central Hudson terminated his electric service on May 20, 2013 (R. 87-88). Central Hudson attempted to resolve this matter and provide a digital non-AMR meter, which plaintiff/appellant refused, and plaintiff/appellant has not had service with Central Hudson since that date (R. 430.5-432).

The two defendants/respondents, Laurito and Lant, who were officers of Central Hudson, were sued in their individual capacities. Plaintiff/appellant’s theories of liability asserted against both defendants/respondents are predicated upon their past employ and positions as executive officers of Central Hudson not due to any conduct by either defendants/respondents. (R. 52-62).

The causes of action contained in plaintiff/appellant's second amended complaint sound in breach of contract, negligence, trespass, fraud and claimed violations of his constitutional and statutory rights (R. 52-62).

Plaintiff/appellant also suggests that there is a contract between the parties as a result of his mailing a March 21, 2013 letter whereby he demanded a sworn response by a specific date (R. 303-310).

While plaintiff/appellant concedes he received a response to his writing, he was dissatisfied with the content of the response and suggests that the failure of the utility to respond in the manner he directed gives rise to a breach of contract claim (R. 315-316).

Plaintiff/appellant also made a complaint to the New York State Public Service Commission (hereinafter referred to as the "PSC"). Copies of the plaintiff/appellant's written submission to the PSC dated June 12, 2013, the PSC's response dated July 16, 2013 and plaintiff/appellant's reply dated July 18, 2013 are attached at pages 428-430, 430.5-433 of the record.

As can be seen from the July 16, 2013 response, the PSC found against the plaintiff/appellant and determined that the meter supplied by Central Hudson was approved by the PSC for use and that plaintiff/appellant illegally removed Central Hudson's meter and improperly connected his own refurbished analog meter. A copy of the PSC response is attached at page 430.5-433 of the Record.

Pursuant to the PSC response, "the type of meter that Central Hudson uses when an analog meter must be exchanged is an ERT meter which is a digital meter with a one-way communication device that allows Central Hudson to read meters without going to each individual premises" (R. 430.5-433).

As indicated in the May 16, 2017 letter from the PSC, the utility is responsible for selecting the meter that is most appropriate for the customer's service. The upgraded service requested by plaintiff/appellant prompted and required the new meter (R. 46-52).

Mistakenly, plaintiff/appellant points to what is being done in other states to argue that the same should be done in New York. Refurbished analog meters have not been approved by the PSC for use in New York State. The PSC determined that the meter supplied to plaintiff/appellant by Central Hudson was safe and approved its use.

The defendants/respondents seek affirmance of the dismissal of all of plaintiff/appellant's claims by virtue of the doctrines of primary jurisdiction; collateral estoppel; failure to exhaust administrative remedies; statute of limitations and the fact the defendants/respondents did not breach any duty to plaintiff/appellant.

POINT I

**WHETHER THE LOWER COURT PREMATURELY
GRANTED SUMMARY JUDGMENT**

The summary judgment decision was not premature as argued by plaintiff/appellant.

Defendants/respondents filed their motion for summary judgment in February, 2017. After the motion was served, in April, 2017, plaintiff/appellant served an interrogatory demand seeking responses to 152 questions (R. 705-749).

The defendants/respondents sent a letter to the court requesting that there be a stay on any additional discovery since the summary judgment motion had been filed necessitating a stay on any discovery (R. 687-689).

The trial court found that a stay of discovery was warranted pending a decision on the motion as the basis for the motion addressed questions of law and did not require “factual discovery”. Factual discovery could be completed for any claims that survived the motion (R. 687-689).

Plaintiff/appellant’s claim that he could not properly oppose the motion or prosecute the case without responses to his interrogatories is wholly without merit.

Plaintiff/appellant does not specifically set forth how further discovery would reveal the existence of essential and/or material facts currently within the exclusive knowledge of the defendants/respondents that are necessary to defend the action or motion (*In re Estate of Venner* (235 A.D.2d 805, 653 N.Y.S.2d 150 (3rd Dept., 1997)).

The claim that Central Hudson could supply an analog meter taken from another property is a mischaracterization. Central Hudson only installs new, not refurbished, meters and does not save “old” meters for reuse (R. 46-52, 87-88).

The meter supplied was approved for use by the PSC (R. 80-83). So, any of the radiation studies or affidavits and the paper written by Dr. Carpenter alleging dangers of the meter are not relevant to this motion and in this court. The PSC is a regulatory agency which has specialized knowledge and is the entity that determines what meters are approved for use in New York State as addressed in Points V and VI at length.

In fact, all of the arguments for summary judgment are based upon legal arguments revolving around failure to exhaust administrative remedies, primary jurisdiction, lack of jurisdiction and statute of limitations grounds. No amount of additional discovery would change the outcome of the motion and all claims were properly dismissed in their entirety.

POINT II

WHETHER DENYING PLAINTIFF/APPELLANT'S DEMANDS FOR DISCOVERY VIOLATED HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS

Plaintiff/appellant's rights to due process and equal protection under the law were not violated when the lower court held that further discovery was not warranted or required when he served a 152-part interrogatory demand after the summary judgment motion dismissing all claims on legal grounds was filed and stayed discovery.

The opposition papers do not raise any facts that exist that he could not address in his opposition papers without responses to the extensive interrogatories. That is because all claims sought to be dismissed were for legal reasons including failure to exhaust administrative remedies, statute of limitations or improper venue the likes of which will not change no matter how much factual discovery is or is not exchanged.

The lower court properly agreed to stay the responses to the interrogatories and any other discovery to determine what claims might survive the motion for summary judgment and to allow service of any appropriate demands at that stage. None of the claims survived ending the debate as to whether discovery was necessary or warranted.

This issue is addressed at length in Point I and will not be reiterated herein.

POINT III

WHETHER THE TRIAL COURT WAS BIASED TOWARD PLAINTIFF/APPELLANT

The lower court was not biased against the plaintiff/appellant in granting summary judgment to the defendants/respondents.

The PSC approved the meter that was provided to plaintiff/appellant after he requested a service upgrade (R. 48, 78). The PSC also determined that Central Hudson's denial of plaintiff/appellant's request for a refurbished analog meter was proper as they are not approved for use in New York (R. 430.5-432).

The fact that his neighbors still have analog meters does not change the result. If his neighbors upgraded their service, their meter would be changed too. The PSC has also confirmed that analog meters are not being manufactured (R. 673-676, 677-679). A similar decision from the PSC was issued after the decision on this motion, which reaffirms that all of the actions taken by Central Hudson were proper. Plaintiff/appellant participated in that hearing and provided comments on behalf of Stop Smart Meters of Woodstock. All the questions in this motion were addressed by the PSC in that decision and is further support that plaintiff/appellant's action should be dismissed and that the lower court's decision should be affirmed. A copy of the PSC decision is annexed as **Exhibit "A"** for the court's review.

By its determination dated July 16, 2013 (R. 430.5-432) and the more recent determination on similar grounds on December 13, 2018 (**Exhibit "A"**), the PSC held that available research shows that neither solid-state meters nor the AMR meters that they replace, pose a credible threat to the health and safety of Central Hudson customers. The Commission further found that electromechanical meter technology (analog meters) are obsolete and currently not in production by any major meter manufacturer and that offering customers an electromechanical meter (analog meter) as an alternative to an AMR meter is not an effective long-term solution (R. 677-679).

As addressed at length in Point VIII, there is no such discovery device as a “lawful notice demanding the removal of a utility meter” as stated by the plaintiff/appellant.

~~Further, no New York State utility has requested approval to install refurbished analog meters given the uncertainties surrounding their use (Exhibit “A”). The Commission does not permit utilities to install refurbished analog meters (Exhibit “A”).~~

Since the PSC has determined, on multiple occasions, that use of the meter in question is appropriate, plaintiff/appellant’s argument that defendants/respondents have committed fraud upon him and the court is without merit.

Plaintiff/appellant also alleges that fraud was perpetrated against him when Central Hudson advised him that analog meters were no longer manufactured. The fact that he located unused analog meters that were manufactured in 2003 and of which have not been approved by the PSC for use in New York, does not equate to analog meters are still being manufactured as suggest by plaintiff/appellant. ~~As the PSC confirms, analog meters are not being manufactured and this cannot be the basis for his allegations of fraud (Exhibit “A”).~~

Plaintiff/appellant also mischaracterizes the PSC determination that it does not have the authority to demand a utility provide its customers with analog meters to signify that he needs to obtain the requested relief elsewhere. ~~The utility cannot be directed by any entity to install an outdated analog meter on new or upgraded service because that meter has not been approved by the PSC and cannot be installed (Exhibit “A”).~~

POINT IV

**WHETHER THE LOWER COURT WAS TOUCHED BY FRAUD
WHEN IT GRANTED SUMMARY JUDGMENT**

The lower court was not touched by fraud when granting summary judgment to defendants/respondents as alleged by plaintiff/appellant.

Most of what is raised in Point IV has already been addressed, at length, in Point III and will not be repeated here. Suffice it to say there was no fraud committed against the plaintiff/appellant and/or the court and all claims were properly dismissed when the summary judgment motion was granted.

POINT V

WHETHER THE LOWER COURT PROPERLY DETERMINED THAT PRIMARY JURISDICTION FOR PLAINTIFF/APPELLANT'S CLAIMS WAS MORE PROPERLY BEFORE THE PUBLIC SERVICE COMMISSION

The PSC is an administrative agency vested with the authority to investigate and adjudicate disputes involving billing, service or termination of utility service (*Campbell v. National Grid*, 2013 NY Misc. Lexis 2252 [Sup. Ct. Queens County, 2013]; *Samuel Enters, Inc. v. Central Hudson Gas & Elec. Corp.*, 38 Misc.3d 1235(a), 2013 N.Y. Misc. Lexis 1088 [Poughkeepsie City Co., 2013], citing Public Service Law §66, 16 NYCRR Part 11; *Guglielmo v. Long Island Light Co.*, 83 A.D.2d 481 [2nd Dept., 1981]).

As a utility corporation, Central Hudson's operations are regulated by and are governed by the PSC, by its rules, regulations, orders, determinations and the Company's Tariff filed with said agency (*Rochester Gas & Electric Corp. v. Public Service Com.*, 66 A.D.2d 509 [3rd Dept., 1979]; Public Service Law §51(B)(2), 31, 32, 35 and 43).

Plaintiff/appellant concedes that he filed a complaint with the PSC (R. 428-430) and received an unfavorable determination (R. 430.5-432).

The PSC approved the GEI-210 meter on January 25, 2005, which was installed by Central Hudson as part of the service upgrade (R. 48, 78).

Plaintiff/appellant unilaterally removed the meter installed by Central Hudson and installed a refurbished analog meter that he purchased on his own (R. 422).

The PSC requires that the utility choose the type of meter it installs from an approved list. Customers do not have the right to choose their meter option (R 430.5-432).

Plaintiff/appellant was afforded the opportunity to have a digital non-EMR meter at his residence but rejected the same (R. 426). He only wanted an analog meter (R. 428-430). The PSC

advised if he did not accept the meters offered, he would not have service and plaintiff/appellant refused either meter and would only accept an analog meter (R.426).

Additionally, it has long been recognized in *Matter of Curto v. N.Y. Dept. of Pub. Serv.* (140 A.D.2d 1339 [3rd Dept., 2016]) that if a utility customer is not satisfied with a PSC determination, the remedy is to commence an Article 78 proceeding challenging the determination.

In *Allied Chemical v. Niagara Mohawk Power Corp.* (72 N.Y.2d 271 [1988]) it was held that an Article 78 proceeding following a PSC determination must be commenced within four months.

Here the Commission's decision was dated July 16, 2013, making that review long since time barred (R. 430.5-434).

Since administrative agencies have specialized knowledge in certain areas, courts have given deference to the agency (here the PSC) determinations and will not set the same aside unless they are unsupported by substantial evidence, are arbitrary and capricious or an abuse of discretion (*Consumer Protection Bd. v. Public Service Com.*, 97 A.D.2d 320 [3rd Dept., 1983]).

Where a highly technical matter is involved which is within the particular expertise of the PSC, due deference will be accorded its interpretation. *Consumer Protection*, supra.

Its judgment (The PSC or agency) should only be set aside if it can be shown that a rational basis or reasonable support is lacking from the record (*New York Tel. Co. v. Public Service Com.*, 98 A.D.2d 535, 538).

~~—Additionally, the fact that there was a later December 13, 2018 decision from the PSC, in—
—which plaintiff/appellant participated, affirming the use of this meter. All of these issues he raises—
—in this appeal are moot. The relief Mr. Romine wants, an analog meter, is not an available option
(Exhibit “A”).~~

POINT VI

WHETHER THE LOWER COURT PROPERLY FOUND THAT
PLAINTIFF/APPELLANT FAILED TO EXHAUST HIS ADMINISTRATIVE
REMEDIES AND IS BARRED FROM RAISING THESE CLAIMS
AGAINST THE S/RESPONDENTS

Plaintiff/appellant failed to exhaust his administrative remedies and should be precluded from bringing these claims now.

Plaintiff/appellant sought relief from the PSC and received a determination dated July 16, 2013 that Central Hudson's actions were in compliance with the regulations and its tariff (R. 430.5-432); that the meter was safe and if he disagreed, he should appeal the determination within four months (R. 677-679) and he failed to do so and should be precluded from doing so now (*East Sixties Prop. Owners Assn. v. Cohane*, 11 Misc.3d 1065(a), 2006 NY Sup. Op. 50387(u); *Allied*, supra; *Matter of Curto*, supra).

—Also as previously stated, the PSC issued a related decision on December 13, 2018 from a—
—petition and motions in which plaintiff/appellant participated, resolving and addressing all of these—
—issues and determined that the meter supplied by Central Hudson is safe and the relief Mr. Romine—
—wants, an analog meter, is not an available option (**Exhibit “A”**), warranting dismissal of this—
—action and affirming the lower court's decision in its entirety.—

POINT VII

WHETHER THE LOWER COURT PROPERLY FOUND THAT PLAINTIFF/APPELLANT WAS COLLATERALLY ESTOPPED FROM RAISING THESE CLAIMS AGAINST THE DEFENDANTS/RESPONDENTS

It is equally as well settled that the doctrine of collateral estoppel affords conclusive effects to the quasi-judicial determinations of an administrative agency when rendered pursuant to the adjudicatory authority of the agency (*Lee v. Jones*, 230 A.D.2d 435 [3rd Dept., 1997]; *Allied Chemical*, supra; *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494 [1984]).

Collateral estoppel applies not only to determination of issues of law but applies to issues of fact that have been reviewed and resolved by an administrative proceeding (*Ryan*, supra).

Once it has been determined that an agency has statutory authority to “adjudicate” a matter and if that determination is reasonably based, it must be upheld and followed.

Plaintiff/appellant is raising the same issues in this lawsuit that were raised before the PSC of (1) whether Central Hudson properly installed the GE-I-210 meter; (2) whether it was safe due to his health concerns; and (3) whether plaintiff/appellant had the right to remove the Central Hudson meter. These issues have all been “litigated” by the PSC and should not be “relitigated” herein.

The PSC determined that Central Hudson exchanged plaintiff/appellant’s and others analog meters in compliance with Public Service Law regulations (R. 430.5-434); that the meter was approved by the PSC; that the public was notified of the opportunity to address approval of the meter in question pursuant to the New York State Administrative Procedure Act and there were no objections (R. 677-678). Plaintiff/appellant’s assertions to the contrary, no other notice of the hearings was required (R. 677-678) and he is not entitled to the remedy he requests.

POINT VIII

**WHETHER THE LOWER COURT PROPERLY FOUND THAT ALLEGED BREACH
OF CONTRACT AGAINST THE DEFENDANTS/RESPONDENTS
WAS NOT AN ACTIONABLE CLAIM**

Plaintiff/appellant's claim that defendants/respondents breached a contract and are liable to him is wholly without support.

Plaintiff/appellant suggests that there is a contract between the parties as a result of his mailing of a March 21, 2013 letter he entitled a "Notice of Demand" and a later "Notice of Default" dated April 9, 2013. He argues that he did not receive a proper response to his demand and as such, defendants/respondents acquiesced to his unilateral removal and replacement of the meter. Nothing could be further from the truth.

First, there is no such discovery device as a Notice of Demand to remove a utility meter. Second, plaintiff/appellant received a response from Daniel Harkenrider, a service supervisor and Paul A. Colbert, Associate General Counsel (R. 87-89). There was no failure to respond.

Each advised plaintiff/appellant he could not choose his own meter (R. 87-89).

Plaintiff/appellant's attempt to argue that there was acceptance due to silence is equally unavailing. No such theory exists (*Gray v. Kaufman Dairy & Ice Cream Co.*, 162 N.Y. 388 [1900]).

Moreover, plaintiff/appellant concedes that he received a response to his writing. The fact that he did not like the response does not mean a response was not given, even though there was no obligation to do so (R. 87-89). There was no contract to breach and his claim should be dismissed.

POINT IX

WHETHER THE TRIAL COURT FAILED TO TAKE INTO ACCOUNT SOCIETAL INTERESTS WHEN GRANTING SUMMARY JUDGMENT

The lower court did not overlook societal interest by granting defendants/respondent's summary judgment. This is not the standard by which the decision should be reviewed.

The PSC which is the agency tasked with approving electrical meters for use in New York and it has determined that the meter in question is safe. The lower court must, and did, defer that determination when it found primary jurisdiction rests with the PSC, unless it is found that there is no basis for the determination, which the record evidences is not the case. The lower court's dismissal should be affirmed in its entirety.

POINT X

**WHETHER PLAINTIFF/APPELLANT WAS A VICTIM OF
DEFENDANTS/RESPONDENTS ALLEGED FRAUD UPON THE COURT**

For the same reasons that a fraud was not committed against the lower court, a fraud was not committed against the plaintiff/appellant and the lower court dismissal should be affirmed in its entirety.

The issue of fraud was addressed in Points III and IV and will not be repeated herein at length.

The meter was approved by the PSC. The PSC confirmed that analog meters are no longer manufactured and that no utility in New York State uses refurbished meters, making it impossible for those statements to be fraudulent as suggested by plaintiff/appellant.

CONCLUSION

The defendants/respondents have shown that the meter in question was approved by the PSC, was determined by the agency to be safe, that plaintiff/appellant cannot choose what meter will be supplied and that the option he wants is not available.

Triable issues of fact do not exist warranting summary judgment. The lower court's decision should be affirmed in its entirety.

Dated: January 22, 2020

Respectfully submitted,



CHRISTINA M. BOOKLESS

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8 (j)

The foregoing brief was prepared on a computer. A double spaced typeface was used, as follows:

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Dated: January 22, 2020

Signed: 

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
New York on December 13, 2018

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Gregg C. Sayre
Diane X. Burman
James S. Alesi

CASE 14-M-0196 - Tariff filing by Central Hudson Gas & Electric Corporation to Establish Fees For Residential Customers Who Choose to Opt Out of Using Automated Meter Reading Devices.

ORDER DENYING PETITIONS FOR REHEARING AND RECONSIDERATION

(Issued and Effective December 14, 2018)

BY THE COMMISSION:

INTRODUCTION

On November 17, 2017, Stop Smart Meters NY (SSMNY) filed a Petition for Rehearing of an Order granting, in part, and denying, in part, requests for certain modifications of Central Hudson Gas & Electric Corporation's (Central Hudson or the Company) opt-out tariffs.¹ On November 20, 2017, Stop Smart Meters Woodstock NY (SSMWNYS) filed a Petition for Rescission, In Part, And Modification of the Modification Order. By Notice issued December 1, 2017, the Secretary notified parties that the

¹ Case 14-M-0196, Central Hudson Opt-Out Tariffs, Order Granting, In Part, And Denying, In Part, Requests for Modifications of Opt-Out Tariff (issued October 20, 2017) (Modification Order).

SSMWNYP petition would be treated under the Commission's rules as a Petition for Reconsideration.²

In this Order, the Commission denies, in their entirety, the petitions for rehearing and reconsideration (Petitions) filed by SSMNY and SSMWNY (collectively referred to as "Petitioners").

BACKGROUND

On September 8, 2014, the Commission approved tariff amendments filed by Central Hudson establishing fees for residential customers who choose to opt-out of using Automated Meter Reading (AMR) devices.³ The tariffs allow residential customers to opt out of using AMR meters that are equipped with radio frequency (RF) transmitters and pay a monthly fee to reflect the costs of manually reading the meter. These tariffs also authorize the Company to replace the AMR meter with a standard (typically solid-state) non-communicating meter.

On May 29, 2015, and thereafter, various petitions were filed to amend the opt-out tariff (Modification Petitions) by various ratepayers, and others. The Modification Petitions requested that the Commission order Central Hudson to allow customers participating in the opt-out program to retain their installed electromechanical meters, and/or to offer electromechanical meters as a replacement for installed AMR meters. Additionally, these Modification Petitions asked the Commission to order that customers who opt-out will not be subject to the one-time meter change fee or the monthly non-AMR meter reading fee. The Modification Petitions alleged that RF and other

² Case 14-M-0196, supra., Notice with Respect to Petition Rescission, In Part, And Modification (issued December 1, 2017) (Secretary's Notice).

³ Case 14-M-0196, supra., Order Approving Proposed Tariff Amendments (issued September 8, 2014) (Opt-Out Order).

electromagnetic field (EMF) emissions from AMR meters, as well as the solid state or "digital" meters that would replace them, pose health and safety risks, which the Commission should have considered when establishing opt-out fees. The Modification Petitions further allege that the risks created by these meters can only be alleviated if the Company furnishes an electromechanical or "analog" meter.⁴

In the Modification Order, the Commission found that available research shows that neither solid-state meters nor the AMR meters they replace pose a credible threat to the health and safety of Central Hudson customers. The Commission further found that electromechanical meter technology is obsolete and currently not in production by any major meter manufacturer, and that offering customers an electromechanical meter as an alternative to an AMR meter is not an effective long-term solution. The Commission therefore declined to order Central Hudson to offer customers an electromechanical meter option.

The Commission also affirmed its conclusion in the Opt-Out Order that reasonable cost-based fees properly balance the concerns of customers who opt-out with other customers' interests in achieving optimally efficient utility operations. For customers who currently have an AMR meter installed at their premises, payment of a one-time meter change fee to cover the cost of replacing the meter with a non-AMR meter is appropriate; however, the Commission determined that the monthly non-AMR meter reading fees Central Hudson assessed on opt-out customers are not appropriate because the strategy the Company has employed to implement AMR generates little or no labor savings. Central Hudson

⁴ As in the Modification Order, this Order will use the terms "electromechanical" and "solid-state" when referring to the respective meter types, except when directly quoting a party's comments that refer to them as "analog" and "digital," respectively.

was directed to, and filed, amended tariffs that withdrew the monthly meter reading fees.

THE PETITIONS

Petition of SSMNY

In its petition, SSMNY contends that the Commission, in its Modification Order, committed errors both of fact and law. SSMNY states that the Commission ignored facts that were presented, including a petition signed by over 1,000 Woodstock residents. Further, SSMNY alleges that the Commission refused to consider certain comments, and claims that Michele Hertz, its principal, was verbally advised on March 24, 2017, that no more comments relating to health would be posted in this proceeding.

SSMNY further states that the Commission erred in making a public policy decision and not reaching a scientific conclusion, and thereby failed to examine scientific evidence, and further failed to investigate health and safety-related complaints.

Specifically, SSMNY states that the Modification Order:

- Refers to information and misinformation relating to AMI meters taken from the Electric Power Research Institute (EPRI), an organization funded by the electric utility industry, and government regulators from other states relating to utility meters that are not the same as those being installed by Central Hudson;
- Incorrectly states that electromechanical meters are not available;
- Incorrectly states that electromechanical meters do not comply with ANSI standards;
- Incorrectly states that electromechanical meters are difficult to fix;
- Fails to address the electrical fire hazards of transmitting and non-transmitting solid-state meters;

- Risks public health by not disclosing that solid-state meters have risks;
- Endangers public health by relying on 30-year-old Federal Communications Commission (or FCC) guidelines as a benchmark for RF radiation safety;
- Falsely suggests that studies show there is no harm from low level (non-thermal, non-ionizing) RF radiation exposure, and dismisses the BioInitiative Report based only on industry opinion and without any scientific analysis;⁵
- Fails to mention the United States government study released by the National Toxicology Program (NTP) in 2016;
- Fails to address the exposure to RF radiation by New York State residents who live with AMI/AMR meters inside their homes or residents who live near banks of transmitting utility meters in apartment buildings; and,
- Incorrectly concludes that solid-state meters are no different than other electronic devices used inside and outside the home such as electric razors, coffee makers, cameras, and cell phones, all of which have devices that convert AC to DC.

SSMNY asks the Commission to provide all testing that was required or performed on solid-state meters before the meters were approved, including testing for RF radiation emissions exposure, electrical fire safety and meter accuracy. SSMNY also asks that the Commission provide all cost analyses or cost studies relating to the installation of solid-state meters. Finally, SSMNY asks for rehearing of the Modification Order.⁶

⁵ David O. Carpenter, MD, and Cindy Sage, MA (eds.), BioInitiative 2012 (December 2012), available at <http://www.bioinitiative.org/table-of-contents/>.

⁶ Case 14-M-0196, Petition for Rehearing of Stop Smart Meters NY (filed November 17, 2017).

Petition of SSMWNY

SSMWNY's petition claims that the process leading to Commission approval of the Aclara (formerly GE) I-210 meters (among the types of AMR meters used by Central Hudson) was flawed because the Commission took no action to inform the public of the petition, other than publication in the State Register.⁷ Despite the petitions signed by over 1,000 people, and resolutions filed by two counties and four municipalities, SSMWNY states the Commission improperly approved installation of solid-state meters without the consent of customers.⁸

SSMWNY also states that the Commission ignored additional articles, independent of the utility industry, that discuss or posit potential impacts that may be associated with solid-state meters. SSMWNY states that solid-state meters produce alleged "dirty electricity," consisting of high voltage transients, which causes biological harm. SSMWNY cites several studies as supportive of its contention.

SSMWNY further refers to several studies purporting to show that low level EMF also cause adverse biological effects. Another set of studies cited by SSMWNY purports to document an emerging understanding of electro-hypersensitivity syndrome (EHS). SSMWNY states that the Commission erred in ignoring this body of literature. SSMWNY claims that there are no peer-reviewed studies documenting the safety of solid-state meters, and that the utility industry studies should be compared to

⁷ Case 04-E-1220, General Electric I-210 Electricity Meter, Untitled Order (issued February 14, 2005); Case 07-E-1503, GE I-210+ and I-210+c Electricity Meters, Untitled Order (issued June 26, 2008).

⁸ The resolutions were filed by Dutchess County, Ulster County, the Town of Woodstock, the Town of Gardiner, the City of Kingston, and the Town of Olive.

studies funded by the tobacco industry, promoting the safety of tobacco.

SSMWN Y also criticizes the Commission's reliance on three documents to support its conclusion that AMR/AMI meters have no adverse health effects. SSMWN Y offers a few articles that critique these documents.

SSMWN Y states that the Commission has ignored the findings of the World Health Organization (WHO) regarding the classification of RF EMF as a Class 2B possible carcinogen. SSMWN Y lists several articles critiquing the findings of several of the smart meter reports cited in the Modification Order, including the California Report, the Michigan Report, the Texas Report, and the Vermont Report.⁹

SSMWN Y states that the Commission ignored the fact that refurbished (SSMWN Y prefers the term "remanufactured") electromechanical meters are available from several vendors, and that such meters can meet American National Standards Institute (ANSI) C12 accuracy standards. SSMWN Y states that Central Hudson still has approximately 150,000 electromechanical meters in service, and that 13 other states allow electromechanical meters to be used by customers who opt-out of AMR/AMI meters. SSMWN Y states that the Commission inappropriately cited to studies from California, Texas and Vermont to support its decision because these states allow electromechanical meters to be used.

⁹ See, California Council on Science and Technology, "Health Impacts of Radio Frequency from Smart Meters (January 2011) (California Report); Case U-17000, Report to the [Michigan Public Service] Commission (June 29, 2012) (Michigan Report); Public Utility Commission of Texas, "Health and RF EMF from Advanced Meters" (December 2012) (Texas Report); and Vermont Department of Health, "Radio Frequency Radiation and Health: Smart Meters" (February 10, 2012) (Vermont Report) as cited in the Modification Order.

Further, SSMWNY contends that the Sacramento Municipal Utility District (SMUD) study cited by Central Hudson purporting to show that electromechanical meters emit more EMF than solid-state meters is flawed because the measurement device used in that study only measures magnetic fields, not EMF. Finally, SSMWNY states that telephone companies and their insurance carriers have taken measures to protect themselves from potential litigation due to the harm caused by wireless devices.

Based on the foregoing, SSMWNY demands that the Commission: (i) rescind the Modification Order and allow refurbished electromechanical meters to be used; (ii) direct Central Hudson to have all electromechanical meters it removes from service refurbished and stored for future use; (iii) allow customers to specify an electromechanical meter when opting out of the AMR meter program.¹⁰

In an addendum to its petition, filed on December 4, 2017, SSMWNY states that the Commission erred in approving the Aclara I-210 meter without extending the comment period, after no comments were received, and without consideration of the adverse health effects. SSMWNY states that the Commission committed an error of fact, collaborating with Central Hudson to identify the Aclara I-210 as an encoder/receiver/transmitter (ERT) meter, when it is in fact a "smart" meter.

SSMWNY states that the Commission lacked authority and engaged in "rogue" rulemaking when mandating that only solid-state meters may be used because such meters do not comply with the terms of the Company's tariff and the Commission's regulations. Specifically, SSMWNY argues that Central Hudson's tariff and the Commission's regulations refer to a "meter," which does not encompass the transmitting solid-state meters

¹⁰ Case 14-M-0196, Petition to Rescind Order of Stop Smart Meters Woodstock NY (filed November 20, 2017) (SSMWNY Petition).

being installed on customers' houses. SSMWNY claims that the Commission is negligent in allowing the Company to deliver "dirty electricity" and, further, that compelling customers to accept such meters violates the Fourth Amendment of the United States Constitution. SSMWNY states that the Commission further erred in requiring "conclusive" proof of public harm in order to adopt the Modification Petitions, and inappropriately used the FCC standard in determining whether solid-state meters are safe. In addition, it contends that the studies by the Michigan Public Service Commission, the Public Utility Commission of Texas and the British Columbia Utilities Commission, cited by the Commission in its Modification Order, did not investigate the effects of long term exposure to RF from smart meters. SSMWNY states that it is improper for the Commission to determine the acceptable level of risk from solid-state meters, which should be up to the homeowner or occupant.

SSMWNY alleges that the Commission further failed to note that the various studies it relied on in issuing the Modification Order cite the same reports, all industry-sponsored and written by individuals with questionable credentials to opine on public health matters. SSMWNY argues that it was an error for the Commission to conclude that the WHO classification of Class 2B applies only to cellular phones, and that the Commission further erred in determining that the radiation from smart meters originates outside the home, as the "dirty electricity" is pervasive throughout the home.

SSMWNY states that the Commission committed errors of fact in determining that research has not shown any negative health impacts from low level RF transmissions, and in failing to account for the information contained in the BioInitiative Report and other reports that document such harm. SSMWNY states

that, to the contrary, there are no studies that document the absence of such harm.

SSMWNYS contends that furnishing a solid-state meter to customers who opt-out is not a proper remedy because such meters still produce "dirty electricity." SSMWNYS further states that the Commission erred drastically in concluding that electromechanical meters emit more EMF than solid state meters, because electromechanical meters produce magnetic fields without an electric field, and further that solid state meters produce voltage transients and cannot be turned off like other common household appliances.

SSMWNYS also states that the Commission erred in stating that electromechanical meters need repair and replacement, and that the Commission misquotes 16 NYCRR §93.5 because that regulation states that a meter manufacturer may also apply for approval of a new meter type, which SSMWNYS states it has arranged. According to SSMWNYS, the Commission further erred in stating that customers may not supply their own meter, because SMUD states that it supports an individual's choice in selecting a meter, and that continuing to supply electromechanical meters is not a viable, long term solution, and is not in the public interest.¹¹

In a letter filed on February 15, 2018, SSMWNYS takes issue with the Secretary's Notice, which stated that the SSMWNYS petition "does not state an error of law or fact or new

¹¹ Case 14-M-0196, Addendum to Petition (filed December 4, 2017). Between October 31 and November 14, 2017, prior to filing its petition for reconsideration and addendum, SSMWNYS filed over a dozen documents, styled as comments on the Modification Order. These comments generally set forth the same arguments offered in the SSMWNYS petition for reconsideration and its addendum, and will not be summarized or discussed here.

circumstances warranting a rehearing."¹² Specifically, SSMWNY asserts that the Secretary's Notice did not account for SSMWNY's addendum to its petition, which purportedly identifies 25 errors of law and fact relating to the Modification Order.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), Notices of Proposed Rulemaking were published in the State Register on December 20, 2017 [SAPA Nos. 14-M-0196SP4 and 14-M-0196SP5]. The time for submission of comments pursuant to the Notices expired on February 5, 2018. The comments received are summarized below.

PUBLIC COMMENTS

More than 200 comments have been filed in support of the Petitions herein, although several parties posted multiple comments, and some were from individuals who either do not reside in Central Hudson's service territory or in New York State. Those posted include more than 40 comments containing the statement "I support Stop Smart Meters Woodstock NY's petition for rescinding the PSC Order in part, and have [sic] a reconsideration of using analog meters as an opt-out choice;"

¹² Secretary's Notice, p. 1. SSMWNY's initial submissions filed within the 30-day timeframe for serving petitions for rehearing failed to state errors of law or fact or new circumstances warranting rehearing. On November 17, 2017, the Secretary to the Commission granted SSMWNY a two-week extension of time to submit a discretionary "request for reconsideration," and cautioned SSMWNY that the extension would not toll the statute of limitations, as would a properly filed petition for rehearing. The Secretary did not extend SSMWNY's time to submit a petition for rehearing. Therefore, the "addendum" filing submitted pursuant to the Secretary's extension did not convert SSMWNY's original request for discretionary reconsideration into a properly-filed petition for rehearing.

and more than 60 with the statement "I support Stop Smart Meters NY's petition for a rehearing in Case 14-M-0196."

Comments in support of the petitions were filed by several public officials, although several also expressed appreciation for the Commission's careful review of the matter. These include comments filed by Michael P. Hein, Ulster County Executive; select members of the Ulster County Legislature; select members of the Dutchess County Legislature; George A. Amedore, Jr., New York State Senator, 46th District; Rich Parete, Supervisor, Town of Marbletown; and Mike Baden, Supervisor, Town of Rochester. Other comments in support of the petitions from public officials outside of Central Hudson's service territory were filed by James Seward, New York State Senator, 51st District; Andrea Stewart-Cousins, New York State Senator, 35th District, and Senate Democratic Conference Leader; Shelly Mayer, New York State Senator, 37th District; Thomas J. Abinanti, New York State Assemblyman, 92nd District; Nily Rozic, New York State Assemblywoman, 25th District; and Peter Swiderski, Mayor, City of Hastings-on-Hudson.

DISCUSSION

Pursuant to 16 NYCRR §3.7(b), rehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination. Although not specifically addressed in the Commission's regulations, reconsideration may be granted where the petitioner demonstrates that a modification to the prior order would serve the public interest.

The issues raised by SSMNY and SSMWNY were properly considered and rejected by the Commission in the Modification Order. Petitioners have not demonstrated any error of law or fact or any new circumstances that would warrant rehearing of

the Modification Order. Moreover, SSMWNY has failed to demonstrate that its proposed modifications are in the public interest such that the Commission should reconsider the Modification Order. Therefore, and for the reasons discussed herein, the Petitions are denied.

As a threshold matter, the Commission maintains that it carefully considered all the evidence previously presented in its Modification Order, including the additional signatures to the original petitions, and the various Town and County resolutions. Each of the more than 30 filings made by the parties was individually summarized and discussed. The Modification Order specifically notes the 125 public comments that were received through October 4, 2017.¹³ Any contention that the Commission ignored facts or information, or prematurely truncated the comment period, is contrary to the record and is incorrect.

Meter Safety

In the Modification Order, the Commission determined that research has not established any negative health impacts from low level RF transmissions; nor are there any scientific studies supporting a conclusion that RF transmissions from utility meters have negative health impacts. The evidence supporting this determination includes more than 100 peer-reviewed scientific studies, testimony in various proceedings in other jurisdictions offered by internationally renowned experts, and exposure regulations in the United States, and elsewhere. The Commission provided a detailed, thorough discussion of these matters in the Modification Order and will not repeat that discussion at length here.

¹³ Modification Order, p. 18.

The crux of the errors of fact alleged in the Petitions is that the Petitioners believe all research conducted by or for the utility industry is biased, and that various regulatory agencies, presumably including the Commission, are "captured" by the entities they regulate. As a result, the Petitioners question the legitimacy of evidence suggesting the safety of solid-state meters as suspect and give it little weight. Conversely, the Petitioners cite at length to a relatively small number of researchers, who posit a potential nexus between low level EMF exposure and health risks.¹⁴ For example, in arguing that voltage transients cause biological harm, SSMWNY cites seven studies, all authored or co-authored by two individuals, Sam Milham and Magda Havas.¹⁵

There is a significant body of literature addressing power quality issues as they pertain to sensitive electronic equipment (e.g., computers) and very little literature pertaining to alleged health effects. Power quality parameters include continuity of service (i.e., freedom from momentary interruptions), variations in voltage or current (whether transient or otherwise), and the degree of harmonic content (i.e., distortions) in AC waveforms. Power quality issues can have a demonstrable effect on sensitive electronic equipment; however, the concerns raised by SSMWNY relate to "dirty electricity" emanating from solid-state meters as an alleged additional source of low level EMF.

The Journal of Exposure Science & Environmental Epidemiology reviewed the available literature on "dirty electricity" in 2010. Notably, the review centered on the

¹⁴ Modification Order, p. 32.

¹⁵ SSMWNY Petition, pp. 5-6.

studies authored by Milham and Havas. The following provides the full abstract from that article:

Environmental exposure to high-frequency voltage transients (HFVT), also termed dirty electricity, has been advocated among electro(hyper)sensitive interest groups as an important biological active component of standard electromagnetic pollution. A literature search was conducted in PubMed, in which only seven articles were identified. Exposure to HFVT was associated with increased cancer risks, while preferential removal of 4-100 kHz HFVT from 50-60 Hz ELF circuits was linked to a variety of improvements in health (plasma glucose levels in diabetic patients, symptoms of multiple sclerosis, asthma and other respiratory illnesses, and insomnia), well-being (tiredness, frustration, general health, irritation, sense of satisfaction, mood), and student behavior. However, all these published studies were subject to significant methodological flaws in the design of the studies, the assessment of exposure, and the statistical analysis, which prevented valid assessment of a causal link between this exposure metric and adverse effects. Environmental exposure to HFVT is an interesting EMF exposure metric, which might explain the spurious results from epidemiological studies using 'standard' ELF and RF exposure metrics. However, at present, methodological problems in published studies prohibit the valid assessment of its biological activity.¹⁶

Contrary to the Petitioners' assertions, the Commission in the Modification Order extensively reviewed the WHO literature concerning low level EMF exposure, and the associated matter of EHS. The WHO currently offers the following information on its website:

Conclusions from Scientific Research

In the area of biological effects and medical applications of non-ionizing radiation approximately 25,000 articles have been published over the past 30

¹⁶ De Vocht, Frank, BSc, MSc, PhD., "'Dirty Electricity': What, Where, And Should We Care?" Journal of Exposure Science and Environmental Epidemiology (2010), Vol. 20, pp. 399-405, available at <https://www.nature.com/articles/jes20108>.

years. Despite the feeling of some people that more research needs to be done, scientific knowledge in this area is now more extensive than for most chemicals. Based on a recent in-depth review of the scientific literature, the WHO concluded that current evidence does not confirm the existence of any health consequences from exposure to low level electromagnetic fields. However, some gaps in knowledge about biological effects exist and need further research.

Effects on General Health

Some members of the public have attributed a diffuse collection of symptoms to low levels of exposure to electromagnetic fields at home. Reported symptoms include headaches, anxiety, suicide and depression, nausea, fatigue and loss of libido. To date, scientific evidence does not support a link between these symptoms and exposure to electromagnetic fields. At least some of these health problems may be caused by noise or other factors in the environment, or by anxiety related to the presence of new technologies.¹⁷

SSMNY states that the Commission improperly discounted the information contained in the BioInitiative Report and failed to mention the United States government study released by the NTP in 2016. The Modification Order noted that the BioInitiative Report has been widely criticized by government research agencies and subject matter experts on the basis that the report recommended safety limits that were not supported by the weight of scientific evidence, included selection bias in several research areas, and lacked objectivity and balance.¹⁸ Regarding the NTP study, the NTP 2016 Annual Report states:

In May 2016, NTP released preliminary study findings on cancer and cell phone radiofrequency radiation in rats. Previous human observational studies have found

¹⁷ World Health Organization, "Electromagnetic Fields - Summary of Health Effects," available at <http://www.who.int/peh-emf/about/WhatisEMF/en/index1.html>.

¹⁸ Modification Order, p. 32.

limited evidence for an increased risk of concern from cell phone use. In these new studies, NTP scientists found low incidences of tumors in the brains and hearts of male rats, but not in female rats. Mice studies are ongoing.¹⁹

The research overview indicates that, for the studies, rats were exposed to frequencies and modulations used in voice calls and texting. Specifically, the rats were exposed for ten-minute on, ten-minute off increments, totaling just over nine hours a day from before birth through two years of age.

As noted in the Modification Order, cell phone exposure to RF emissions is both higher than and different from exposures from a meter transmitter.²⁰ The exposure from cellular phones near the body and head exceed AMR meter exposures by two to four orders of magnitude. These relative exposure levels establish frames of reference and suggest that, even if there were a credible safety threat related to RF exposure from cellular phones, those concerns would be significantly reduced for RF exposures from AMR meters, and even more so for solid-state devices not equipped with RF transmitters.

It may be that some studies offered by the Petitioners suggest adverse health effects associated with low level exposures to RF/EMF; however, one must use caution when relying solely on the results of individual research studies because conflicts or inconsistencies may exist among the results of individual studies. Moreover, many of the studies suggesting adverse health effects suffer from serious methodological flaws, and the Commission therefore does not credit them.²¹ In this

¹⁹ National Toxicology Program, "Annual Report for Fiscal Year 2016," (2017), page 6. Available at <https://ntp.niehs.nih.gov/annualreport/2016>.

²⁰ Modification Order, p. 44.

²¹ See, e.g., De Vocht, supra, note **Error! Bookmark not defined.**

case, the weight of scientific evidence supports the Commission's conclusions.

Of the three documents SSMWNY alleges the Commission improperly relied upon in reaching its decision, two are not cited in the Modification Order, although that Order cites a different EPRI study, which SSMWNY may discount because the report was sponsored by EPRI.²² The third is an FCC bulletin regarding its RF/EMF exposure guidelines.

Petitioners state that the Commission erred in applying the FCC emissions standard, which they claim is outdated. The Modification Order extensively discussed the FCC standards, and noted that, while the FCC recently invited and received comments regarding whether its RF exposure limits and policies need to be reassessed, no updates or changes to the FCC exposure limits have been made.²³ In addition, Petitioners' main concern regarding the FCC standards is that they do not account for non-thermal effects. As discussed in the Modification Order, however, there is currently insufficient scientific evidence that would support a causal relationship between non-thermal levels of RF exposure and negative health effects. Given this lack of scientific evidence, there is no basis to determine that additional standards should be applied, nor that the absence of standards related to non-thermal effects renders the FCC standards inadequate.

SSMWNY claims that there are no peer-reviewed studies documenting the safety of solid-state meters; however, asking

²² The subject documents are an article in the Utilities Telecom Journal authored by Klaus Bender, PE; and an EPRI Journal article entitled "A Perspective on Radio-Frequency Exposure Associated with Residential Automatic Meter Reading Technology." Neither document was cited in the Modification Order.

²³ Modification Order, p. 21.

the utility to prove that such meters pose no risk at all under any exposure scenario is not reasonable. That there may be a very small quantum of articles positing a potential risk does not mean that solid-state meters are unsafe, especially given the quality and quantity of peer-reviewed articles pointing to the opposite conclusion. On balance, and in the exercise of our discretion here, the Commission concludes that the material cited by Petitioners in the Petitions does not compel a change in course by the Commission.

It further cannot be concluded that a zero-exposure level is the only reasonable level of risk to allow for a positive safety finding. Man-made forms of RF/EMF are omnipresent in modern society, from older radio/TV transmissions to modern wireless phones and Wi-Fi technologies. It is simply impossible for Central Hudson, or any other utility, to prove with the degree of certainty sought by SSMNY or SSMWNY that low level RF emissions have no potential to cause harm under all circumstances. Such a requirement or standard of proof logically would lead directly to the implication that all RF emitting devices should be banned and would also raise questions about other utility facilities and practices.

SSMWNY states that the Commission erred in finding that electromechanical meters emit more EMF than solid-state meters, because the measurement device used in the cited SMUD study only measures magnetic fields, not EMF.²⁴ Without engaging in a lengthy discussion of the physics of EMF, the Commission notes that electric and magnetic fields have been thought of as two parts of a greater whole, i.e., electromagnetic fields, for more than a century. In addition, while electric and magnetic

²⁴ Sacramento Municipal Utility District, "How Do We Measure Smart Meter Usage" Available at <https://www.smud.org/en/Rate-Information/How-do-we-Measure-Usage>.

field strength can be measured separately, magnetic fields are typically the focus of public health concerns related to EMF. Furthermore, while the SMUD measurements are furnished in milligauss (mG) - a measure of magnetic field strength - there is no reason to believe that measurements taken in millivolts per meter (mV/m) - the measure of electric field strength - would have produced a different result.

Finally, SSMWNY states that that the process leading to Commission approval of the Aclara I-210 meters, among the types of AMR meters used by Central Hudson, was flawed because the Commission took no action to inform the public of the petition, other than publication in the State Register. Among other things, SSMWNY states that the Commission should have extended the comment period and accuses the Commission of "collaborating with Central Hudson by calling the GE-I 210 meters an ERT meter and not a smart meter when in fact it is a smart meter."²⁵

SAPA defines the obligations and procedures of New York State agencies, including the Commission, in the development of rules and regulations, as well as how such agencies conduct hearings and proceedings. SAPA establishes standards for the conduct of rulemakings and requires the Commission to keep the public informed of rulemaking activities, and to provide an opportunity for public comment and participation in the rulemaking process. These steps are meticulously followed and documented in all Commission proceedings, including the proceedings leading to approval of Central Hudson's AMR meters.²⁶

²⁵ Case 14-M-0196, supra., Addendum to Petition, p. 1.

²⁶ Cases 04-E-1220 and 07-E-1503, supra.

The Commission therefore complied fully with all notice requirements under applicable law. Given that no comments were received, there would have been no reason to extend the comment period or hold further proceedings.²⁷ SSMWNY's objections are without merit.

The Commission has previously defined what it considers to be advanced metering infrastructure (AMI), the precise term for what is generally referred to as "smart" meters.²⁸ AMR meters such as those deployed by Central Hudson are lacking in many essential features of smart meters. The principal characteristic of Central Hudson's meters that distinguishes them from a standard solid-state meter is the inclusion of an ERT, which is what provides AMR functionality (and emits RF radiation). Regardless of the precise name, we understand that the Petitioners would prefer to be supplied electromechanical meters, and to avoid solid-state meters entirely, not just those, such as AMR or AMI meters, that are equipped with ERTs.

Availability of Electromechanical Meters

Major meter manufacturers have not produced new electromechanical meters for more than two decades. As noted in the Modification Order, utility meters have followed a similar path with other electrically-powered devices, moving from electromechanical technology to solid-state designs. While refurbished electromechanical meters are commercially available,

²⁷ The Commission issues many notices pursuant to SAPA and often no comments are received in response. Extending the comment period or holding further proceedings in such situations would be impractical and unreasonable.

²⁸ Case 09-M-0074, In the Matter of Advanced Metering Infrastructure, Order Adopting Minimum Functional Requirements For Advanced Metering Infrastructure Systems and Initiating an Inquiry Into Benefit-Cost Methodologies (issued February 13, 2009).

the fact that no new electromechanical meters are being produced necessarily means that refurbished devices will be in ever-dwindling supply, and no New York State utility company has chosen to utilize them. As noted in the Modification Order, the utility is responsible for reading, maintaining, and ensuring the accuracy of the meter. The Commission's regulations therefore require that utilities (and certain other authorized entities, such as a competitive meter service provider) apply for approval of a particular meter type. SSMWNY is correct that manufacturers may also apply; however, such applications must be accompanied by a statement of a utility confirming that it intends to use the specific meter.²⁹

In deciding whether it is cost-effective to use a given meter type, utilities must ensure that there is a reliable source and supply, not only of the meters themselves, but of the parts and manufacturer support needed to maintain and repair them. The utilities must ensure that their readers are trained to read the meters (and to identify tampering and other meter problems), and that their technicians are trained to repair any identified issues with the meters. If refurbished meters are deployed, and later found to be inaccurate or unreliable, the utility would be held responsible. Given the uncertainties surrounding the use of refurbished meters, Central Hudson and other New York State utilities have, to date, been unwilling to sponsor them and the Commission will not require Central Hudson to do so now.

CONCLUSION

The Petitions herein fail to demonstrate any errors of fact or law and have not identified any change of circumstances

²⁹ 16 NYCRR §93.5.

warranting a different outcome. Accordingly, the request for rehearing is denied.

In the Modification Order, and again herein, the Commission explicitly considered the evidence concerning the alleged health risks posed by AMR/AMI meters, and the availability of electromechanical meters in New York State. The Commission has reviewed the available studies and finds and determines that the best available scientific evidence - in terms of the quantity and quality of studies, both independently of each other and when considered together - supports a conclusion that the deployment of AMR by Central Hudson, and replacement of AMR meters with solid-state meters for customers who opt out, is consistent with the provision of safe and adequate utility service as that term is used in the Public Service Law. These matters were fully considered by the Commission in rendering the Modification Order decision, and Petitioners have failed to demonstrate that any modification thereto would serve the public interest. Therefore, reconsideration is not warranted in this case.

The Commission orders:

1. The petition for rehearing filed by Stop Smart Meters New York is denied in its entirety.
2. The petition for reconsideration filed by Stop Smart Meters Woodstock New York is denied in its entirety.
3. This proceeding is closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary