Matter of Clean Air Coalition of W. N.Y., Inc. v New York State Pub. Serv. Commn.
2023 NY Slip Op 34636(U)
March 20, 2023
Supreme Court, Albany County
Docket Number: Index No. 900457-23
Judge: Richard M. Platkin

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

CLEAN AIR COALITION OF WESTERN NEW YORK, INC. and SIERRA CLUB,

Petitioners-Plaintiffs,

DECISION, ORDER & JUDGMENT

For a Judgment Under Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK STATE PUBLIC SERVICE COMMISSION, FORTISTAR NORTH TONAWANDA, LLC, NORTH TONAWANDA HOLDINGS, LLC and DIGIHOST INTERNATIONAL, INC.,

Respondents-Defendants.

Index No.: 900457-23

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Petitioners Clean Air Coalition of Western New York, Inc. ("CAC-WNY") and Sierra Club bring this combined CPLR article 78 proceeding/action for declaratory and injunctive relief, challenging a declaratory ruling rendered by respondent New York State Public Service Commission ("PSC") (*see* NYSCEF Doc No. 1 ["Petition"]; NYSCEF Doc No. 10 ["Declaratory Ruling"]).

In the challenged ruling, the PSC declared that the proposed transfer of ownership interests in respondent Fortistar North Tonawanda LLC ("Fortistar") from respondent North Tonawanda Holdings, LLC ("NTH") to respondent Digihost International, Inc. ("Digihost") did not require further review under Public Service Law ("PSL") §§ 70 and 83 (*see* Declaratory Ruling).

Pending before the Court are three applications: (1) petitioners' motion for a preliminary injunction restraining Digihost from acquiring NTH's ownership interests in Fortistar (*see* NYSCEF Doc No. 43); (2) the PSC's motion to dismiss the Petition for lack of a ripe controversy (*see* NYSCEF Doc No. 67); and (3) the motion of Fortistar, Digihost and NTH to dismiss the Petition for mootness and lack of standing (*see* NYSCEF Doc No. 71).

BACKGROUND

A. Proceedings Before the PSC

Fortistar is the owner and operator of a 55-megawatt gas-fired electrical cogeneration facility in North Tonawanda, New York (*see* Petition, ¶¶ 41, 68-69). NTH is the sole owner of Fortistar (*see id.*, ¶ 42).

Digihost is a wholly owned subsidiary of Digihost Technology, Inc., "a publicly traded Canadian company primarily focused on cryptocurrency mining" (*id.*, ¶ 43).

"In March 2021, Digihost announced that it had signed an agreement to purchase the gas plant in order to power its cryptocurrency mining operations" (*id.*, ¶ 74).

"On April 15, 2021, Fortistar and Digihost jointly filed a petition with the PSC requesting a declaratory ruling under Sections 70 and 83 of the Public Service Law, authorizing Digihost to purchase Fortistar" (*id.*, ¶ 81). Petitioners submitted comments in opposition to the declaration sought by respondents (*see id.*, ¶¶ 82-83; *see also id.*, ¶¶ 84-89).

"On September 15, 2022, the PSC issued a declaratory ruling granting Fortistar's and Digihost's petition, allowing Digihost to purchase the gas plant" (*id.*, ¶ 90), determining that the environmental concerns raised by petitioners (*see id.*, ¶¶ 83, 85-86) were "beyond the scope of the limited review undertaken" by the PSC in connection with the transfer of upstream ownership interests in a generating facility (Declaratory Ruling, p. 8).

"On October 14, 2022, Sierra Club and [CAC-WNY] requested that the PSC rehear the petition [under PSL § 22]. The PSC did not rule on the request" (Petition, ¶ 98).

B. This Litigation

CAC-WNY and Sierra Club commenced this combined CPLR article 78 proceeding/action for declaratory and injunctive relief on January 13, 2023, challenging the PSC's alleged failure to adequately consider their environmental concerns (*see id.*, ¶¶ 99-110). The Petition was noticed for hearing on February 17, 2023 (*see* NYSCEF Doc No. 2).

Although petitioners did not seek temporary relief when they commenced the case, they moved on January 24, 2023 for a preliminary injunction restraining Digihost from acquiring NTH's ownership interests in Fortistar (*see* NYSCEF Doc No. 43).

In lieu of answering, the PSC moved to dismiss the Petition under CPLR 3211 (a) (2) for lack of subject matter jurisdiction (*see* NYSCEF Doc No. 67), arguing that the Declaratory

Ruling is unripe for judicial review due to the pendency of petitioners' application for rehearing under PSL § 22 (*see* NYSCEF Doc No. 64 ["MOL"], p. 1).

Fortistar, Digihost and NTH (collectively, "Private Respondents") also moved to dismiss the Petition in lieu of answering (*see* NYSCEF Doc No. 71). They argue that the Petition was rendered moot by the closing of the transaction that is the subject of the Declaratory Ruling: Digihost's acquisition of NTH's ownership interests in Fortistar on February 7, 2023 (*see* NYSCEF Doc No. 81, pp. 3-4). The Private Respondents further contend that petitioners lack standing to challenge the Declaratory Ruling (*see id.*, pp. 5-10).

All three motions were fully submitted as of February 17, 2023, and this Decision, Order & Judgment follows.

ANALYSIS

The Court begins with the PSC's motion to dismiss the Petition for failing to present a justiciable controversy.

"To challenge an administrative determination, the agency action must be 'final and binding upon the petitioner'" (*Matter of Ranco Sand & Stone Corp. v Vecchio*, 27 NY3d 92, 98 [2016], quoting *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007], quoting CPLR 217 [1]; *see* CPLR 7801 [1]). "The finality requirement draw[s] from case law on ripeness for judicial review," and the two doctrines are "closely related" (*Ranco*, 27 NY3d at 98 [internal quotation marks and citation omitted]; *compare Weingarten v Town of Lewisboro*, 77 NY2d 926, 928 [1991] ["For a challenge to administrative action to be ripe, the administrative action sought to be reviewed must be final, and the anticipated harm caused by the action must be direct and immediate" (citations omitted)], *with Ranco*, 27 NY3d at 98 ["for an administrative determination to be final, and thus justiciable, it must be ripe for judicial review"]).

"A determination is final when 'the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . [that] may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party'" (*Matter of Alterra Healthcare Corp. v Novello*, 306 AD2d 787, 788 [3d Dept 2003], quoting *Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]).

Similarly, an administrative determination is ripe for judicial review when: (1) the agency has "arrived at a definitive position on the issue that inflicts an actual, concrete injury"; and (2) "the apparent harm inflicted by the [agency] action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Ranco*, 27 NY3d at 98-99 [internal quotation marks and citation omitted]).

Under PSL § 22, an interested party "shall have the right to apply for a rehearing" of a PSC order. "[A]ny such application must be made within thirty days of service of the order, unless the commission for good cause shown shall otherwise direct; and the commission shall grant and hold such a rehearing if in its judgment sufficient reason therefore be made to appear. The decision of the commission granting or refusing the application for a rehearing shall be made within thirty days after the making of such application" (PSL § 22).[1]

Petitioners specifically allege that they applied to the PSC for rehearing within thirty days of issuance of the Declaratory Ruling, and the PSC has not ruled on their application (*see* Petition, ¶ 98). Additionally, the PSC supports its dismissal motion with a copy of the petition for rehearing filed by CAC-WNY and Sierra Club (*see* NYSCEF Doc No. 63), as well as proof that the rehearing petition remains pending before the agency (*see* NYSCEF Doc No. 62, ¶ 6).

[1] The thirty-day period for the PSC to rule on a rehearing application is discretionary, not mandatory, and "[i]f the commission is dilatory in rendering its decision on the application for a rehearing, the party aggrieved may resort to a mandamus order to compel a decision" (*Matter of Rochester Gas & Elec. Corp. v Maltbie*, 272 App Div 162, 166 [3d Dept 1947]).

A proceeding under CPLR article 78 "shall not be used to challenge a determination . . . where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed" (CPLR 7801 [1]).

Each of the elements of CPLR 7801 (1) is present here. PSL § 22 is a statute that authorizes the PSC to rehear the Declaratory Ruling upon petitioners' application; petitioners timely applied for rehearing under the statute; the Declaratory Ruling was not made on rehearing; and the PSC has not denied the rehearing application. Accordingly, the plain terms of CPLR 7801 (1) render the Declaratory Ruling unripe for judicial review.

In opposing dismissal, petitioners argue: (1) binding judicial precedents establish that the possibility of discretionary agency reconsideration does not affect finality or ripeness; (2) the PSC has, in the past, disclaimed the possibility of conducting a rehearing for declaratory rulings; and (3) acceptance of the PSC's position would insulate administrative determinations from judicial review.

First and foremost, petitioners maintain that "neither the PSC's discretionary power to rehear or reopen its rulings, nor a timely request for such an exercise of discretion, affects the finality of the PSC's decision or its ripeness for judicial review" (NYSCEF Doc No. 90 ["Opp Mem"], p. 5).

> The crux of the PSC's motion is that the Declaratory Ruling is not final because the PSC may, at some future point and purely in its own discretion, "agree with [petitioners] and abrogate the Declaratory Ruling." Mem. of Law at 9, NYSCEF No. 64. But the law is clear that the mere possibility of reconsideration has no impact on a decision's finality. The Appellate Division has instructed for more than four decades that "the discretionary power to rehear or reopen matters . . . is not sufficient to render an

> otherwise final order nonfinal." *Seidner v. Town of Colonie*, 79 AD2d 751, 752 (3d Dept 1980), *aff'd*, 55 NY2d 613 (1981); *see also, e.g., City Sch. Dist. Of Tonawanda v. Ambach*, 86 AD2d 726, 726 (3d Dept 1982) ("The discretionary power of the Commissioner to rehear or reopen these determinations does not render an otherwise final order nonfinal.") (*id.*, pp. 5-6).

"There is nothing unique about the PSC's own discretionary rehearing power that would render its decisions somehow less final than those of other agencies" (*id.*, p. 6).

As petitioners correctly observe, the prospect of discretionary reconsideration ordinarily does not deprive an administrative determination of finality or render it unripe for judicial review (*see Seidner*, 79 AD2d 751 ["the discretionary power to rehear or reopen matters which exists in nearly all administrative agencies, is not sufficient to render an otherwise final order nonfinal"]).

However, CPLR 7801 (1), drawn from Civil Practice Act § 1286 (*see Matter of New York Cent. R.R. Co. v Public Serv. Commn.*, 238 NY 132, 135 [1924]), carves out an important exception for matters where a *statute* authorizes the agency to rehear a determination *upon application*, and the rehearing application is *timely made*. None of the "[d]ecades of controlling precedent" relied upon by petitioners (Opp Mem, p. 5) authorizes review of an agency determination in these circumstances.

In some of the non-PSC precedents relied upon by petitioners, there was "no express statutory authorization for a rehearing upon the petitioner's application" (*Seidner*, 79 AD2d 751; *see also Matter of Saraf v Vacanti*, 223 AD2d 836, 838 [3d Dept 1996]). In other cases, the rehearing process was the product of agency regulations or administrative grace, rather than a statutory right (*see Matter of Miller v Ambach*, 124 AD2d 882, 883 [3d Dept 1986]; *Matter of City School Dist. of City of Tonawanda v Ambach*, 86 AD2d 726, 726 [3d Dept 1982]).

As to petitioners' PSC precedents, one case involved the agency's discretionary "power to modify or reverse [determinations] on its own," separate and apart from PSL § 22 (*Matter of*

Abrams v Public Serv. Commn., 96 AD2d 701, 702 [3d Dept 1983], *affd* 61 NY2d 718 [1984]), and another involved an *untimely* application under PSL § 22 (*see Matter of MCI Telecom. Corp. v Public Serv. Commn. of State of N.Y.*, 231 AD2d 284, 289-290 [3d Dept 1997]; *see also Matter of Gross v State of N.Y. Pub. Serv. Commn.*, 195 AD2d 866, 867 [3d Dept 1993], *lv denied* 82 NY2d 660 [1993]).

Thus, none of the cases relied upon by petitioners involved a timely application for rehearing made under statute expressly authorizing such an application.

Petitioners observe, and the Court recognizes, that "the Declaratory Ruling is currently binding" (Opp Mem, p. 6 [emphasis omitted]; *see* PSL § 22). But the fact that the PSC arrived at a definitive position that allegedly inflicted harm upon petitioners is only one element of the ripeness inquiry. Through the enactment of CPLR 7801 (1), the Legislature has determined that the statutory rehearing process of PSL § 22 may prevent or significantly ameliorate the harm alleged by petitioners, thereby negating the second element of the ripeness inquiry (*see Ranco*, 27 NY3d at 98-99).[2]

Petitioners further contend that under the PSC's own precedents, the Declaratory Ruling is not an "order" subject to rehearing under PSL § 22, leaving only the possibility of discretionary reconsideration. The Court does not find this argument to be persuasive. Petitioners' application for rehearing under PSL § 22 is pending before the agency (*see* NYSCEF Doc No. 63), and it is for the agency to determine in the first instance whether to "grant and hold such a rehearing if *in its judgment* sufficient reason therefore be made to appear" (PSL § 22 [emphasis added]). The precedents cited by petitioners are not so clear and beyond dispute as

[2] In any event, given that the State Legislature has declared judicial review unavailable in the circumstances presented herein (*see* CPLR 7801 [1]), petitioners' resort to common-law principles and precedents is unavailing.

would warrant the Court short-circuiting the administrative process and substituting its judgment for that of the agency charged with interpreting and implementing PSL § 22.

Finally, petitioners complain that giving effect to CPLR 7801 (1) would insulate agency determinations from judicial review under CPLR 217. Even if the allied concepts of ripeness and finality were divorced in the manner feared by petitioners (*see* Opp Mem, pp. 12-13),[3] this Court has no jurisdiction to undertake judicial review of an administrative determination in circumstances where the Legislature has declared that "a proceeding under [CPLR article 78] shall not be used" (CPLR 7801 [1]).[4]

Based on the foregoing, the Court concludes that the Petition fails to present a ripe controversy, and this proceeding must therefore be dismissed.

In view of the foregoing, petitioners' motion for a preliminary injunction is denied, and the Court need not reach the alternative grounds for dismissal tendered by the Private Respondents.

CONCLUSION

Accordingly, it is

ORDERED that the PSC's motion to dismiss is granted; and it is further

ORDERED that petitioners' motion for a preliminary injunction is denied; and it is further

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[3] The Court declines to pass on a hypothetical statute-of-limitations defense that the PSC may or may not interpose in a future lawsuit that petitioners may or may not commence.

[4] CPLR 7801 (1) and its predecessor statute have been in place for more than a century, and there does not appear to be any issue with litigants obtaining judicial review of agency determinations subject to statutory rehearing process (*see e.g. Matter of Broome County Concerned Residents v New York State Bd. on Elec. Generation Siting & the Envt.*, 200 AD3d 26, 32 [3d Dept 2021]; *Matter of MCI Telecommunications Corp. v Public Serv. Commn. of State of N.Y.*, 108 AD2d 289, 295 [3d Dept 1985]). Nonetheless, if CPLR 7801 (1) inappropriately curtails judicial review or is subject to abuse, the remedy lies in the hands of the State Legislature, which is free to repeal or amend the statute.

ORDERED that the Private Respondents' motion to dismiss is denied as academic; and finally it is

ADJUDGED that the Petition is dismissed in accordance with the foregoing.

This constitutes the Decision, Order & Judgment of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for the PSC shall promptly serve notice of entry on all parties entitled to such notice.

Dated: Albany, New York
March 20, 2023

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 1-39, 43-54, 61-64, 67-81, 83-100.

03/20/2023