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MEMORANDUM

Supreme Court of the State of New York,
County of Suffolk

Index No. 24125-2002

COUNTY OF SUFFOLK, INDIVIDUALLY AND IN BEHALF OF THE RATE PAYERS OF THE COUNTY OF SUFFOLK,

Plaintiffs,

-against-

LONG ISLAND POWER AUTHORITY, RICHARD M. KESSEL, As Chairman of the Long Island Power Authority,

Defendants.

By: Hon. Robert A. Lifson

Dated: June 30,2003

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In a multi faceted lawsuit, the objective of which seeks the enforcement of a certain settlement agreement of the parties, a direction for an accounting of the payments made and to be made pursuant thereto, a declaration that the subject action is not an attack on the validity of the underlying agreement as well as a declaration that the various ratepayers be afforded parity in the assessment of electric utility rates, the defendant moves to dismiss the action. In response, the plaintiff cross moves for an order granting it partial *summary* judgment on those portions of the subject complaint which assert actions in the nature of declaratory relief, asserting that justiciable controversy is yet presented.

In order to understand the issues to be determined herein, a brief history of the never ending saga of LIPA's succession to LILCO needs to be set forth. In response to the intense political opposition to LILCO's proposed nuclear electrical generating facility and the public necessity of

providing a reliable and affordable flow of electrical power to the Long Island community, the Legislature in 1986 (effective January 15, 1987), created LIPA, a public utility to replace LILCO, a private corporation. In furtherance of this scheme for socialized electrical generation, the various assets of LILCO were transferred to LIPA. One of the assets which is the subject of the present lawsuit was the proceeds agreed to by the parties derived from the alleged overassessment of various properties formerly owned by LILCO which were the subject **of** various tax certiorari proceedings. The 2002 Shoreham Settlement Agreement (hereinafter the Settlement) entered into by the Long Island Power Authority (hereinafter LIPA), the Long Island Lighting Company (hereinafter LILCO), the County of Suffolk, the Town of Brookhaven, the Shoreham-Wading River School District, the Wading River Fire Department, and the North Shore Public Library District (collectively referred to as the Municipalities) and the County of Nassau resolved two property tax judgments obtained by LILCO against the Municipalities for the overassessment of the Shoreham Nuclear Power Plant and a myriad of other lawsuits and appeals involving the Shoreham plant by compromising the amount to be paid. The Settlement Agreement also resolved claims asserted by LIPA regarding the tax assessments on various non-Shoreham properties and the amount of payments in lieu of taxes (hereinafter PILOTS) paid by LIPA to the local taxing jurisdictions.' Briefly stated, LIPA agreed, among other things, to withdraw its claim for refunds of the PILOTS paid to the taxing jurisdictions and to reduce the amount of the property tax judgment it had obtained against the Municipalities. It also agreed to assist the Municipalities by issuing bonds to fund the settlement obligations and to withdraw all pending tax certiorari claims involving non-Shoreham properties. In retum, the Municipalities agreed to withdraw with prejudice the appeals on the actions challenging the assessment of the Shoreham plant and LIPA's purchase of LILCO and other actions and proceedings against LIPA ***(see, Matter of Town of Islip v Long Is. Power Auth., supra).*** The settlement agreement was "so-ordered" by the Supreme Court (Stark, J., retired) on May 2, 2000. The Court also so-ordered a "stipulation, amended judgment and order" incorporating the principal terms of the Settlement that same day *(see,* ***Matter of Town of Islip v Long Is. Power Auth., supra).***

As relevant to the instant action, the Settlement provides that the Municipalities aggregate obligation for the property tax judgments and for the overpaid PILOTS and the interest thereon shall be reduced to $620 million "or such lesser amount as may be rebated and/or credited to ratepayers pursuant to paragraph 6.1 of this Agreement * * * plus the Authority's debt service (excluding the portion of the principal applied to rebates and credits as described above) on any Tax Settlement

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'LIPA, created under the Long Island Power Authority Act, is a not-for-profit public corporation exempt from taxation ***(see,*** Public Authorities Law §§ 1020-a, 1020-p). In recognition of the substantial tax revenues that would be lost to local jurisdictions as a result of LIPA's acquisition of LILCO's property, the LIPA Act provides that LIPA will make payments in lieu of taxes (PILOTS) equal to the taxes and assessments LILCO would have made if it had not been acquired by LIPA ***(see,*** Public Authorities Law § 1020-q; ***Long Is. Power Auth. v Shoreham-Wading Riv. Cent. School Dist.,*** 88 NY2d 503, 647 NYS2d 135, ***rearg denied,*** 88 NY2d 1010, 649 NYS2d 375 [1996]; ***Matter of Town of Islip v Long Is. Power Auth.,*** 301 AD2d 1, 752 NYS2d 320 [2d Dept 20021, ***lv denied,*** 99 NY2d 506, 755 NYS2d 712 [2003]). After a decision by the Court of Appeals determined that LIPA could seek refunds for PILOTS it overpaid based upon the inflated assessed valuations of the Shoreham plant ***(see, Long Is. Power Auth. v Shoreham-Wading Riv. Cent. School Dist.,*** *supra),* LIPA commenced an action against the Municipalities for approximately $358 million, plus interest, in refunds.

Bonds and Related Obligations." The term "related obligations" is defined as "all costs and expenses (other than debt service) of the Authority incurred in connection [with the Agreement] of whatever nature or kind," including all costs associated with issuance of the bonds, fees of attorneys and other experts, "the Authority's foregone investment earnings on moneys advanced by the Authority for the purpose of funding rebates and credits * * * and all costs and expenses of the Authority in enforcing this Agreement." The Settlement further provides that the net proceeds of the bonds already issued, and of additional bonds issued by LIPA, collectively referred to as tax settlement bonds, shall be used to fund the settlement obligations, and that LIPA "in its sole discretion may elect from time to time to fund additional rebates and credits authorized pursuant to this Agreement with revenues received from operation of its electric system."

In connection with the funding of the settlement amount, the agreement provides that LIPA will remit or apply for the benefit of all ratepayers "the full amount received from the Authority on behalf of the Municipalities," and impose a surcharge on Suffolk ratepayers "at a level sufficient to generate such revenues as are needed to pay all debt service and related charges and obligations." More specifically, paragraph 6.1 of the Settlement states:

> LIPA shall provide rebates and credits to ratepayers located outside of Suffolk County totaling $310 million to be applied over five years and rebates and credits to ratepayers located within Suffolk County totaling $147.5 million to be applied over five years, commencing May 29, 1998. The timing and methodology to be employed in applying such rebates and credits shall be determined by the Authority, provided that an initial rebate of $104.5 million was provided in the form of checks transmitted to Nassau and certain Queens County ratepayers, an initial rebate of $43.7 million was provided in the form of checks transmitted to Suffolk County ratepayers, and the remaining rebates will be applied as credits against ratepayers statements or otherwise be applied for the benefit of such ratepayers as follows: (1) Nassau and certain Queens County ratepayers will receive credits totaling $205.5 million over five (5) years; and (2) Suffolk County ratepayers will receive credits totaling $103.8 million over five (5) years. These rebates and credits shall be attributable to both (1) the refund of the property taxes owed by the Municipalities to LIPA pursuant to the Property Tax Judgment and (2) the refund by the Authority to LIPA of the PILOTS being refunded by the Municipalities to the Authority pursuant to the PILOTS obligations.

Paragraph 6.2 of the Settlement states that LIPA, from its own funds, also will give all ratepayers additional credits totaling $5 million. Paragraph 7 provides that a surcharge shall be imposed by

LIPA on Suffolk County ratepayers "commencing May 30,2003, at such levels and over such period of time as the Authority in its sole discretion reasonably deems necessary and appropriate to fully satisfy the Settlement Obligations," that the Municipalities' settlement obligations shall be reduced as the debt service on the tax settlement bonds and related obligations are satisfied from surcharge revenues, and that the Chairman of LIPA will furnish the Municipalities with an annual written certificate evidencing the reductions. Paragraph 11.5 of the Settlement provides that the parties will not directly, or indirectly, challenge any provisions of the agreement and that LIPA shall have the discretion to declare the Agreement and the reduced property tax judgment null and void in the event that "the Suffolk County Legislature or any member acting in its behalf" commences an action or proceeding, or asserts a claim or argument in any action or proceeding commenced by another party, challenging the agreement or any provision thereof. Finally, to ensure payment of the settlement obligations by the Municipalities, the Settlement provides that the reduced property tax judgment of $620 million shall be held by LIPA and "shall remain enforceable until the settlement obligations are fully satisfied."

Stated in more simple terms, this agreement appeared to adjust the obligations of the Suffolk and non Suffolk ratepayers in such a fashion as to give the ratepayers specified credits for a period of five years. As far as the agreement pertained to the plaintiff, the ratepayers in Suffolk County would be charged a surcharge for five years commencing May of 2003, as a means of satisfying the bonds obtained to satisfy Suffolk County's obligations pursuant to the various tax certiorari judgments set forth above. In Suffolk County, the ratepayers thereby assumed the obligations of what would heretofore be obligations of the taxpayers of Suffolk County. While the political merits of spreading the cost of the bond payments to the larger base of ratepayers as opposed to taxpayers and avoiding an immediate devastating fiscal impact on the various municipalities are clear, the economic logic of the settlement is more difficult to fathom.

The political imperatives did not stop with the structure of the settlement set forth above. In addition to the approximately $312 million in rebates and credits to non-Suffolk County ratepayers authorized under the Settlement, LIPA, through a separate agreement to which Suffolk County was not a party, paid Nassau County $25 million purportedly for clean-energy programs and gave an extra $25 million in rebates to Nassau County ratepayers. The aforementioned side agreement between LIPA and Nassau County was the sweetener to get Nassau's approval of the overall agreement which was perceived as a bailout of the Suffolk County and its various municipal corporations. The defendant asserts that the parties to the Settlement were aware that Nassau County would be receiving a grant of at least $20 million from LIPA and that non-Suffolk County ratepayers would be receiving an additional $25 million in rebates. The resolution by LIPA's Board of Trustees approving the Shoreham Settlement Agreement, passed on February 3,2000, indicates that LIPA would issue approximately $457.5 million in bonds on behalf of Suffolk County to fund the settlement agreement and that it had already issued approximately $142.5 million in bonds for that purpose. Further, the resolution states that

...as part of the comprehensive settlement, the Authority and LIPA

> have also agreed with Nassau County to take the following actions: LIPA will issue rebate checks of $50 per customer metered account to all LIPA ratepayers in Nassau County and the Rockaways; LIPA will, from its Clean Energy Fund, make a grant to Nassau County of $20 million to be used by Nassau County for clean energy and conservation programs, and LIPA will increase that Fund by $20 million, so that provision of the grant to Nassau County will not reduce the funds otherwise available to implement LIPA's Clean Energy Initiative.

The remaining $5 million was paid by LIPA to Nassau County per a verbal agreement between LIPA Chairman Richard Kessel then and Nassau County Executive Thomas Gulotta. That additional sum was criticized by a subsequent audit of LIPA. It is undisputed that the additional $25 million from LIPA was used by Nassau County to reduce its budget deficit.

THE PRESENT LAWSUIT

On September 27, 2002, Suffolk County, on behalf of itself and all Suffolk County LIPA ratepayers, commenced this action against LIPA and Richard Kessel to recover damages for breach of contract and for injunctive and declaratory relief and an accounting. The crux of plaintiffs' argument is that LIPA anticipatorily breached the Settlement by providing excess bill credits to non-Suffolk County ratepayers, including the additional $25 million in rebates given to ratepayers in Nassau County and the Rockaways. The first cause of action is for breach of contract and alleges that by November, 2002, the total amount of rebates and credits given by LIPA to non-Suffolk County ratepayers will exceed the amount fixed in the settlement agreement and that LIPA's continuing practice of providing excess bill credits to non-Suffolk County ratepayers will exhaust the proceeds from the tax settlement bonds by January, 2003. It alleges that LIPA repudiated the Settlement by refusing Suffolk County's demands for an accounting and by giving bill credits to non-Suffolk County ratepayers in excess of the amount agreed upon in the Settlement.

The second cause of action in the complaint alleges that LIPA breached a duty imposed upon it by the LIPA Act "to administer the rebates and rate bill credits provided for in the settlement in a just, reasonable and nondiscriminatory (once the bill credit differential expired) manner." The third cause of action alleges that LIPA violated a duty imposed by the Public Services Law to fix and receive rates that are just, reasonable and nondiscriminatory. The fourth cause of action alleges that LIPA's actions deprived Suffolk County ratepayers of their property interests and denied them equal protection in violation of the federal and state constitutions. Similarly, the fifth cause of action asserts that LIPA violated the civil rights of Suffolk County ratepayers and seeks redress under 42 USC § 1983. The sixth cause of action, entitled "Abuse of Official Power", alleges that LIPA and Kessel "intentionally caused and continue to cause direct, immediate personal pecuniary injury to Suffolk rate payers, in the amount of over $2.4 million per month since February 2003." The seventh cause of action alleges that requests to provide certain financial information have been

rejected and seeks an accounting of the amount of bill credits LIPA has given as of the date the action was commenced, the amount of the balance, if any, of the remaining proceeds from the tax settlement bonds and the source of funds other the settlement bonds used to fund the credits. Lastly, the eighth cause of action seeks a declaratory judgment that the instant action does not constitute a challenge to the underlying agreement within the meaning of paragraph 11.5 of the Settlement.

Plaintiffs seek damages of approximately $40 million or "such other amount as may be determined by the Court after the Defendant's accounting, to compensate Suffolk ratepayers for the excess credits and unauthorized payments made by LIPA in breach of the Settlement.'' Plaintiff also seek a judgment declaring that they are entitled to an accounting of all rebates and credits provided to Suffolk County and non-Suffolk County ratepayers. Plaintiffs' other demands for relief include a declaration that LIPA is in breach of the Settlement, a declaration that LIPA lacks the authority to provide rebates and credits to ratepayers in excess of the amount authorized in the Settlement and a declaration that the action is appropriate to enforce the terms of the Settlement. In addition, plaintiffs seek a judgment enjoining LIPA from continuing its bill credit differential practice and from providing bill credits in excess of the Settlement amount.

MOTIONS

Defendants now move for an order dismissing the first and eighth causes of action for lack of a justiciable controversy *(see,* CPLR 3211[a][2]) and dismissing the remaining claims for failure to state a cause of action *(see,* CPLR 3211[a][7]). Although issue has not been joined, plaintiffs cross move for an order, *inter* ***alia,*** granting partial summary judgment in their favor on the issues of liability and injunctive and declaratory relief.

As to the first branch of the motion to dismiss, defendants argue that the breach of contract action is premature because the time set for LIPA's performance in connection with the rebates and credits does not expire until May 29,2003. Defendants also argue that the complaint fails to allege any facts showing that plaintiffs have been damaged as a consequence of the alleged excess credits, since the surcharge will not be imposed on Suffolk County ratepayers until May 30,2003, and that any surcharge amounts received from ratepayers in excess of what they are obligated to pay will be used either to retire additional portions of the tax settlement bonds or as a credit against future surcharges. In addition, defendants assert that LIPA has not repudiated the Settlement and that plaintiffs' claim regarding the additional $25 million in rebates paid to non-Suffolk County ratepayers actually is an attack upon an administrative determination and, therefore, is barred by the four-month Statute of Limitations *(see,* CPLR 217[1]).

Conversely, plaintiffs argue that LIPA's over-allocation of bill credits and rebates to non-Suffolk County ratepayers creates a present harm in that it improperly reduces the finite amount of bond proceeds available for Suffolk County ratepayers and that continuing this practice will result in a distribution of credits and rebates exceeding the **$462.5** million authorized by the Shoreham Settlement. Affidavits and documentary evidence presented by plaintiffs in opposition to the motion

and in support of the cross motion, including a spreadsheet prepared by Frederick Pollert, the Director of the Suffolk County Legislature's Budget Review Office, allegedly demonstrate that: based upon information provided by LIPA and forecasts of future credit payments, non-Suffolk County ratepayers will receive approximately $16 million more in bill credits and rebates than the amount fixed in the Settlement; that the estimated remaining bond revenues are $6,408,396 less than the amount of bill credits LIPA owes to Suffolk County ratepayers; and that LIPA will be unable to meet its obligation to provide $150 million in rebates and credits to Suffolk County ratepayers due to the over-allocation of bond proceeds to non-Suffolk County ratepayers. An affidavit by Mr. Pollert further alleges LIPA's Official Statement for the Series 2000A bonds issued by LIPA to help fund the Settlement indicates that the proceeds of such issuance would be used to fund the cost of the additional $25 million in rebates to non-Suffolk County ratepayers and, therefore, such money will be repaid through the surcharge imposed on Suffolk County ratepayers.

As to plaintiffs claim that LIPA's administration of the rebates and credits violated Public Authorities Law §§1020-h(1) and 1020-g(n), defendants assert that neither subsection involves LIPA's authority to impose rates or to provide rebates or bill credits to ratepayers. Defendants allege LIPA was authorized to enter the Settlement under Public Authorities Law §1020-f(h), which provides that LIPA may make and execute agreements with municipalities "necessary or convenient in the exercise of the powers and functions of the authority." They further contend that as Public Authorities Law §1020-f(u) grants LIPA the power "to fix rates and charges for the furnishing or rendition of gas or electric power or of any related service," the Settlement properly gave LIPA the authority to determine the timing and methodology for applying the rebates and credits. In opposition to this branch of defendant's motion, plaintiffs contend that when LIPA acquired LILCO's franchise, it also assumed LILCO's duty under the Public Service Law to treat ratepayers in a just, fair and nondiscriminatory manner.

Similarly, defendants seek dismissal of the third cause of action on the ground that Public Authorities Law § 1020-s specifically exempts LIPA from the provisions of the Public Service Law and from the jurisdiction and regulation of the Public Service Commission. **As** with the second cause of action, plaintiffs contend, among other things, that LIPA assumed LILCO's statutory duties under the Public Service Law when it acquired LILCO's franchise and that its alleged practice of providing bill credits to non-Suffolk County ratepayers in excess of the Settlement amount constitutes a breach of its duty to treat customers in a just and nondiscriminatory manner. In addition, plaintiffs allege that LIPA is a public service corporation and, as such, has a common law duty to charge its customers a reasonable and uniform price for the same services rendered under the same circumstances ***(see, New York Tele. Co. v Siegel-Cooper Co.,*** 202 ***N Y*** 502, 96 NE 109 [1911]).

The branches of defendants' motion seeking dismissal of the fourth and fifth causes of action are based primarily on the argument that LIPA's administration of the bill credits and rebates does not have constitutional implications or violate plaintiffs' civil rights because ratepayers do not have a constitutionally protected property interest in the rates charged by utilities. Further, defendants

assert that plaintiffs' equal protection claim must be dismissed as both Suffolk County and non-Suffolk County customers are charged the same rates for electric service. Plaintiffs, relying upon the holdings in ***County of Suffolk v Long Is. Light. Co.,*** 14 F Supp 2d 260 (EDNY, 1998), oppose these applications, arguing, in essence, that Suffolk County ratepayers are judgment creditors and, as such, have vested property rights in the rebates and credits established under the Settlement.[2] Thus, plaintiffs argue, LIPA's alleged excessive credits and rebates to non-Suffolk residents violates the state and federal constitutional proscriptions against uncompensated taking of property by a government entity, namely, LIPA. They contend that, as the rebates and bill credits are based on past energy usage, LIPA, in violation of the Contract Clause of the United States Constitution **(see,** U.S. Const. art. 1, §10), altered the Settlement in favor of non-Suffolk County ratepayers by giving them excess rebates and credits. Plaintiffs further allege that LIPA's act of providing excess credits and rebates violated their civil rights and their constitutional rights to due process and equal protection.

As to the sixth cause of action, defendants argue, among other things, that the complaint is insufficient to state a claim for *prima facie* tort as it fails to include an allegation of special damages. Plaintiffs contend that the pleadings and the evidentiary material submitted on the cross motion, particularly Mr. Pollert's affidavits and spreadsheet, sufficiently demonstrate the damages sustained by Suffolk County as a result of the excess bill credits, the unauthorized rebates to non-Suffolk County ratepayers, and the $25 million grant to Nassau County.

Defendants' application for dismissal of the cause of action for an accounting is based primarily on the argument that no fiduciary relationship exists between the parties because plaintiffs allegedly have not entrusted LIPA with any money or property and any money held by LIPA as a result of the bond issuances was entrusted by the investors, not by Suffolk County or the Suffolk County ratepayers. Defendants assert that since the Settlement expressly provides that LIPA will have sole discretion as to the timing and methodology used in computing rebates, credits and the surcharge and the timing of the issuance of the settlement bonds, Suffolk County has no right to an accounting. They further argue that because the Long Island Power Authority Act does not provide

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[2] In ***County of Suffolk v Long Is. Light.*** **Co.,** 710 F Supp 1487 (EDNY, 1989), ***affd in part, revd in part,*** 907 F2d 1295 (2d Cir, 1990), a class action racketeering lawsuit on behalf of past and future ratepayers of LILCO, the plaintiff class alleged that LILCO fraudulently obtained rate increases from the Public Service Commission by making deliberate misrepresentations regarding the Shoreham Nuclear Plant. A settlement agreement was reached between the class and LILCO wherein LILCO agreed, in relevant part, to pay ratepayers $390 million. All but $10 million of the settlement amount was to be paid over a period of 10 years in the form of credits on class members electric bills, with payments made "in proportion to the electric rates that would otherwise have been made by each ratepayer." In exchange, the plaintiff class agreed to release all of its rights to sue LILCO on RICO claims "which were or might have been brought from the beginning of time" to the date of the settlement. The settlement was approved and a judgment entered in the racketeering action. Thereafter, LILCO and LIPA petitioned for a modification of the settlement and judgment, seeking to reduce the amount of electric bill reductions due ratepayers by approximately $7 million and to substitute the per usage basis of repayment with a per customer basis. **As** part of its decision denying the petition for modification, the District Court determined that, in addition to the plaintiff class, LILCO and LIPA (as LILCO's successor in interest) were "judgment creditors" having vested rights in the settlement "in the sense that they remain entitled to the benefits bargained for in the settlement agreement."

ratepayers with the remedy of an accounting, plaintiffs have no right to request such relief in the instant litigation. In opposition, plaintiffs assert, in essence, that a fiduciary relationship was created by virtue of the provisions in the Settlement regarding the issuance of bonds to fund the Settlement, the payment of rebates and credits to ratepayers and the imposition of a surcharge to repay the bonds and LIPA's related expenses.

Defendants seek dismissal of the eighth cause of action on the ground that plaintiffs' declaratory action is not ripe for review. Specifically, defendants allege that because LIPA has not exercised its discretion under paragraph 11.5 of the Settlement by declaring the agreement null and void, the request for judicial declaration that the instant action does not constitute a "challenge" to the underlying agreement is premature. Defendants also allege that such declaratory relief is unnecessary as plaintiffs may file an Article 78 proceeding if LIPA declares the Settlement null and void. Conversely, plaintiffs argue that a judicial determination regarding their right to bring the instant claims for breach of contract and injunctive relief would have an immediate, practical impact on the parties. Specifically, plaintiffs allege that Mr. Kessel has sent letters to plaintiffs' counsel and members of the Suffolk County Legislature threatening that LIPA may declare the Settlement null and void if Suffolk County pursues its claims regarding the additional rebates to Nassau County ratepayers and the $25 million grant to Nassau County. They argue that a judicial determination as to whether the instant action constitutes a challenge within the meaning of paragraph 11.5 of the Settlement would have the immediate effect of "removing LIPA's unjustified and continuous threat of ruinous retaliation''by reinstatement of the original property tax judgments. Plaintiffs also allege that a declaratory judgment is appropriate since the case involves constitutional issues.

Finally, plaintiffs' cross motion seeks partial summary judgment in their favor on the issues of liability, injunctive relief and a declaratory judgment on the ground that LIPA effectively admitted in its moving papers: (1) that it paid more than $162.5 million in excess rebates and credits to non-Suffolk ratepayers; (2) that "it may not provide a total amount in rebates and credits exceeding $462.5 million" and; (3) that it made "an unauthorized gift of $25 million" to Nassau County. They allege that by submitting documentary evidence in support of the motion to dismiss, defendants deliberately charted a course for summary judgment. In addition, plaintiffs seek an order severing for trial any disputed issues regarding their claims for an accounting and for damages and awarding them counsel and expert fees, interest, costs and disbursements. Defendants oppose the motion, arguing that summary judgment may not be granted prior to the joinder of issue *(see,* CPLR 3212[a]).

DECISION

On a motion to dismiss a complaint pursuant to CPLR 3211, the court must "accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" ***(Leon v Martinez,*** 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; see, ***Sokoloff v Harriman Estates Dev. Corp.,*** 96 NY2d 409, 729 NYS2d 425 [2001]). Although the court initially looks to the factual allegations contained within the complaint to discern whether there is a cognizable cause of action,

it may also consider affidavits offered by the plaintiff to remedy defects in the complaint when assessing a motion to dismiss under CPLR 3211(a)(7) ***(see:Leon v Martinez***, *supra;* ***Guggenheimer v Ginzberg,*** 43 NY2d 268,275,401 NYS2d 182 [1977]; ***Rovello v Orofino Realty Co.,*** 40 NY2d 633,635, 389 NYS2d 314 [1976]). If such evidentiary material is considered on the motion, "the criterion is whether the proponent of the pleading has a cause of action, not whether [it] has stated one, and unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it," dismissal should be denied *(see,* ***Leon v Martinez,*** *supra;* ***Guggenheimer v Ginzberg,*** *supra;* ***Rovello v Orofino Realty Co.,*** *supra; see, e.g.*, ***Roth v Goldman***, 254 AD2d 405, 679 NYS2d 92 [2d Dept 19981). A complaint which contains bare legal conclusions or factual claims which are contradicted by documentary evidence, however, should be dismissed under CPLR 3212(a)(7) *(see:* ***Well v Rambam,*** 300 AD2d 580, 753 NYS2d 512 [2d Dept, 20021; ***Kenneth R. v Roman Catholic Diocese of Brooklyn,*** 229 AD2d 159,654NYS2d 791 [2d Dept, 19971,*cert denied,* 522 US 967,118 S Ct 413, *lv dismissed,* 91 NY2d 848,667 NYS2d 683 [19971).

Defendants' argument that plaintiffs' challenge to the amount of credits paid to ratepayers is premature, because it is "legally impossible for the Authority to be in breach of its obligations under the Agreement" until after the period for providing rebates and credits to ratepayers expires on May 29, 2003, does not address plaintiffs' allegations that LIPA has provided excess rebates, as well as credits, to non-Suffolk County ratepayers over the course of the five-year period for providing such rebates and credits. Defendants' memoranda of law indicate that the amount of credits provided to ratepayers is based on a revenue factor derived from projected electric usage for the coming year and that the credits then are adjusted yearly based on a reconciliation between the projected energy usage and the actual usage. Therefore, whether the amount of rebates and credits paid to ratepayers as of the commencement of this action exceeds the amounts specified in the Settlement is presently determinable. It is noted that defendants failed to offer any admissible evidence controverting plaintiffs' evidence that LIPA has provided credits and rebates to non-Suffolk County ratepayers in excess of the $312.5 million Settlement amount and that the additional $25 million in rebates to non-Suffolk County ratepayers were paid with income generated by the 2000A Series bonds. Further, defendants' argument that the first cause of action is premature since plaintiffs are not harmed by any miscalculation of rebates and credits until after the imposition of the surcharge ignores plaintiffs' allegations that Suffolk County ratepayers have received less credits than they were entitled to under the Settlement due to the excess distribution of bond proceeds to non-Suffolk County ratepayers. Accordingly, that branch of the defendants' motion must be denied.

As indicated earlier, defendants also seek dismissal of the breach of contract action on the ground that LIPA "has not demonstrated an unequivocal intent to repudiate performance of its obligations under the Agreement." This argument was raised in response to plaintiffs' assertion in the cross-moving papers that the first cause of action is based on the theory of anticipatory breach of contract. Under the doctrine of anticipatory breach, a wrongful repudiation of the contract by one party before the time for performance entitles the non-breaching party to immediately claim damages for total breach *(see:* ***American List Corp. v US News & World Report,*** 75 NY2d 38,550 NYS2d

590 [1989]; ***Long Is. R.R. Co. v Northville Indus. Corp.,*** 41 NY2d 455, 393 NYS2d 925 [1977]). However, before the doctrine may be invoked, there must a "definite and final communication of the intention to forego performance" ***(Rachmani Corp. v 9 East 96th St. Apt. Corp.,*** 211 AD2d 262, 629 NYS2d 382 [1st Dept, 19951). A party's untenable construction of a material contract provision and a refusal to perform unless such construction is adopted will be regarded as a repudiation of the contract *(see,**IBM Credit Fin. Corp. v Mazda Motor Mfg. (USA) Corp.,*** 92 NY2d 989, 684 NYS2d 162 [1998]). Although defendants' counsel asserts in the memoranda of law that LIPA has not repudiated the Settlement, defendants failed to meet their burden under 3211(a)(7) with admissible evidence showing LIPA has not renounced the contract and intends to comply with the agreement. Thus, the position advocated by defendants appears to be contrary to their obligations to the plaintiff under the agreement. Accordingly, that branch of the defendants' motion must be denied.

Dismissal of the second and third causes of action should be granted. There appears to be no duty imposed upon LIPA under the Public Authorities Law to treat ratepayers in a just, fair and nondiscriminatory manner. Both sides agree that LIPA is not subject to the provisions of the Public Service Law. Based on the foregoing the court must dismiss the plaintiffs' claims predicated on a violation of the either of the aforementioned provisions of State law. In so holding, the court is not thereby putting its judicial imprimatur on the unconscionable suggestion that LIPA, a governmental entity providing electric power to the residents of Suffolk County, is thereby empowered to treat the ratepayers in either county in an impermissibly discriminatory fashion, in violation of provision of the state and federal constitutions. The prohibition for such impermissible action is found elsewhere. Dismissal of the sixth cause of action also appears appropriate since the complaint lacks allegations of specific actual losses causally related to the alleged tortious conduct (see: ***Varela v Investors Ins. Holding Corp.,*** 185 AD2d 309, 586 NYS2d 272 [2d Dept 19921, *affd,* 81 NY2d 958, 598 NYS2d 761, *reargdenied,* 82 NY2d 706, 601 NYS2d 586 [1993]; ***Luciano v Handcock, 78*** AD2d 943, 433 NYS2d 257 [3d Dept 19801) and the affidavits by Mr. Pollert are insufficient to remedy this defect. Moreover, the evidence submitted by plaintiffs in opposition fails to demonstrate that LIPA's alleged tortious conduct was motivated by an intent to injure plaintiffs (see, ***Varela v Investors Ins. Holding Corp.,*** *supra).* Dismissal of the fourth and fifth causes of action should be denied as the allegations in support thereof are sufficient to state claims for violations of plaintiffs' constitutional and civil rights and defendants' evidentiary submissions failed to negate plaintiffs' allegation that they have vested rights under the Settlement.

The right to an accounting rests on the existence of a trust or fiduciary relationship with reference to the subject matter of the controversy and " a duty on the part of the defendant to account * * * or where special circumstances are present warranting equitable relief in the interest of justice"(***Grossman v Laurence Handprints - N.J.,*** 90 AD2d 95, 104, 455 NYS2d 852 [2d Dept, 19821; *see:* ***Purvin v Grey,*** 294 ***NY*** 282, 62 NE2d 72 [1945]; ***Chalasani v State Bank of India,*** 235 AD2d 449, 653 NYS2d 28 [2d Dept, 19971, *lv dismissed,* 90 NY2d 936, 664 NYS2d 273 [19971). Here, the terms of the Settlement arguably created a fiduciary relationship between the parties (see, ***El-Khoury v Karasik,*** 265 AD2d 372, 697 NYS2d 299 [2d Dept, 19991; ***Chalasani v State Bank of India,*** *supra; see, also,* ***Fur & Wool Trading Co. v George I. Fox, Inc.,*** 245 NY215, 156 NE 670

[19271). Specifically, in exchange for the Municipalities' promises to withdraw various legal claims against LILCO and LIPA and to pay the reduced property tax judgment, LIPA agreed to issue its own bonds to fund the settlement, to pay a certain amount of rebates and credits to ratepayers and to fix the surcharge imposed on Suffolk County ratepayers to repay the bonds and related settlement obligations. Furthermore, the amount of money subsequently owed by Suffolk County ratepayers is based upon the cost of repaying the bonds, the expenses associated with issuance of the bonds and various other "related obligations" incurred by LIPA. In addition, although the Settlement leaves the timing and methodology of calculating the rebates, credits and surcharge to LIPA's discretion, it fixes the amount of rebates and credits to be distributed to non-Suffolk County and Suffolk County ratepayers as a consequence of the settlement. Moreover, the nature of the settlement and the facts surrounding the agreement also present "special circumstances" justifying the requested equitable relief *(see, **Kaminsky v Kahn,*** 23 AD2d 231, 259 NYS2d 716 [1st Dept, 19651). Thus, if plaintiffs present credible evidence substantiating the allegations that LIPA improperly distributed the funds raised by the tax settlement bonds, it would be a proper exercise of the court's equitable power to compel LIPA to account for its distribution of the bond proceeds to ratepayers *(see: **Varick Homes Hous. & Dev. Fund Co. v Jones,*** 239 AD2d 491, 658 NYS2d 956 [2d Dept, 19971; ***Chalasani v State Bank of India,*** *supra; **Ordinary Guy v Juniper Releasing,*** 199 AD2d 251, 604 NYS2d 226 [2d Dept, 19931). Accordingly, that branch of the defendants' motion seeking dismissal of the accounting claims must be denied.

The application to dismiss the eighth cause of action should also be denied. ***An*** action for a declaratory judgment is premature if the issue presented for adjudication involves a future event beyond the control of the parties which may never occur *(see: **Cuomo v Long Is. Light. Co***, 71 NY2d 349, 525 NYS2d 828 [1988]; ***American Ins. Assn v Chu,*** 64 NY2d 379, 487 NYS2d 311, *app dismissed, cert. denied,* 474 US 803, 106 S Ct 36 [1985]; ***New York Pub. Interest Research Group v Carey,*** 42 NY2d 527, 531, 399 NYS2d 621 [1977]). The primary purpose of a declaratory judgment, however, is to determine the rights of the parties "before a 'wrong' actually occurs in the hope that later litigation will be unnecessary" ***(Klostermann v Cuomo,*** 61 NY2d 525, 475 NYS2d 247 [1984]; see, ***James v Alderton Dock Yards,*** 256 ***NY*** 298, 176 NE 401 [1931]). "The fact that the court may be required to determine the rights of parties upon the happening of a future event does not mean that the declaratory judgment will be merely advisory. In the typical case where the future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct'' ***(New York Pub. Interest Research Group v Carey,*** *supra,* at 530-531, 399 NYS2d 621). Accordingly, where the practical likelihood is that the future contingency will occur and cause injury to the plaintiff, the action may proceed ***(see, Prodell v State,*** 211 AD2d 966, 621 NYS2d 712 [3d Dept, 19951; *see also, **Hanigan v State,*** 213 AD2d 80, 629 NYS2d 509 [3d Dept, 19951). Here, plaintiffs' claim for a judicial declaration that the instant action does not constitute a challenge to the Settlement within the meaning of paragraph 11.5 involves a question of law on a matter within defendants' control. Further, it is undisputed that Mr. Kessel has warned that LIPA may invoke paragraph 11.5 of the Settlement if plaintiffs insist on pressing their claim that non-Suffolk County ratepayers were provided rebates and credits exceeding the Settlement amounts.

Those actions by a governmental official have had and will continue to have a chilling effect on the ability of the plaintiff to act on behalf of its residents to safeguard those rights secured by the very agreement in issue. Therefore, contrary to the conclusionary allegations by defendants' counsel that the cause of action is not ripe until LIPA declares the Settlement null and void, plaintiffs' claim for declaratory relief is justiciable *(see:* ***New York County Lawyers' Assn. v State,*** 294 AD2d 69, 742 NYS2d 16 [1st Dept, 20021; ***Klostermann v Cuomo,*** *supra; cf.*, ***United Water New Rochelle v City of New York,*** 275 AD2d 464, 712 NYS2d 637 [2d Dept, 20001).

Finally, plaintiffs' cross motion for partial summary judgment in its favor on the issues of liability and on its requests for injunctive and declaratory relief should be denied without prejudice to renew within 20 days after the joinder of issue. The defendant is directed to serve an answer within 20 days of the date of service of the order to be entered hereon. CPLR 3212(a) provides that a motion for summary judgment may be brought only after issue has been joined in the case. Although a court is empowered to treat a motion for summary judgment made prior to joinder of issue as a motion to dismiss under CPLR 3211 *(see,* CPLR 2001), plaintiffs' request for summary judgment is premature under the circumstances present in this case, Notwithstanding the foregoing, in view of the court's determination on the defendant's application to dismiss, there is little doubt at the likely outcome of at least a portion of such a motion should the parties fail to enter into an appropriate stipulation to obviate the necessity of such further application.

CONCLUSION

The plaintiff has set forth sufficient facts to constitute a cognizable cause of action. The plaintiff should not be precluded from asserting its claim to an accounting to the various credits, past, present and future. Nor should the plaintiff be precluded from seeking judicial intervention to prevent what it perceives to be an impermissible arbitrary preferential treatment of the various ratepayers serviced by LIPA. The parties shall appear for a special conference before the undersigned on **July 31, 2003, at 9:30 a.m.,** to schedule any discovery that may be needed or, alternatively, to provide the methodology to address the remaining issues by trial, special reference or otherwise.

Settle order.

J.S.C.