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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

SRG PROPERTIES, LLC, individually, and on behalf of all others similarly situated,

Petitioner,

INDEX NO.: 019866/2008
MOTION DATE: 03/06/2009
MOTION SEQUENCE: 001 and 002

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

X X X

-against-

LONG ISLAND POWER AUTHORITY,

Respondent.

The following papers read on this motion:

Notice of Petition	1
Verified Petition	2
Notice of Motion, Affirmation & Exhibits Annexed	3
Respondent's Memorandum of Law in Support of Motion to Dismiss Amended Petition	4
Petitioner's Memorandum of Law in Opposition to Long Island Power Authority's Motion to Dismiss	5
Respondent's Reply Memorandum of Law	6
Letter of Evan H. Krinick, Esq. dated May 5, 2009 (not considered by the Court)	7

This motion by the defendant Long Island Power Authority ("LIPA") for an order pursuant to CPLR 3211(a)(1), (3), (5), (7) and CPLR 7803(f) dismissing the Amended Petition of SRG Properties, LLC, is granted as provided herein.

The petitioner SRG Properties, LLC, has brought this proceeding as a LIPA ratepayer on its own behalf as well as others similarly situated challenging LIPA's imposition of a "Power

Supply Surcharge" beginning July 1, 2008. It seeks to enjoin LIPA from continuing to impose that charge, to compel LIPA to seek approval of that rate increase by the Public Service Commission and to recover monetary damages it has suffered as a result.

In its Amended Complaint, the petitioner alleges that LIPA has historically charged its customers a "Power Supply Charge" which includes the cost of petroleum and natural gas that LIPA buys for use at power plants on Long Island to produce electricity. It alleges that as a result of oil and gas costs rising to record rates, LIPA levied an additional 3% "Power Supply Surcharge" on its customers effective July 1, 2008, and that although those prices "declined precipitously" beginning in July 2008 and continuing through December 2008 and thereafter, LIPA has continued to impose that surcharge on its customers and has not stopped, decreased, revoked or refunded it. The petitioner additionally alleges that this Power Supply Surcharge is in fact a rate increase and that by failing to seek the Public Service Commission's ("PSC") approval of it, LIPA has violated the Public Authorities Control Board ("PACB") Resolution 97-LI-1, which was accepted by LIPA via Resolution. See, Public Authorities Law § 1020-f[aa]. The petitioner alleges that pursuant to PACB's Resolution whereby LIPA's acquisition of Long Island Lighting Company ("LILCO") assets was approved, the PACB decreed that "LIPA [may] not implement an increase in average customer rates exceeding two and one half percent over a twelve month period, nor will LIPA extend or reestablish any portion of a temporary rate increase over two and one half percent **without approval of the Public Service Commission** (PSC) following a full evidentiary hearing [emphasis added]." The petitioners allege that the Power Supply Charge is based on the price of oil and natural gas, and that it was imposed only because of skyrocketing fuel costs. They further argue that when the cost of oil and natural gas decreased, so should have the Power Supply Charge. Instead, even in the face of precipitous declines in fuel costs, there has been no reduction, and the surcharge continues to appear on the customers' monthly bills.

The petitioner alleges that Mississippi's Public Service Commission, Oklahoma Gas & Electric and Vero Beach Municipal Utilities have in fact all announced rate reductions as a result of the falling cost of fuel but LIPA has not. It further alleges that the "filed rate" doctrine does not apply here because LIPA's "Power Supply Surcharge" has not been approved by a governing

regulatory agency and in any event, that doctrine does not bar injunctive relief.

As and for Count 1, the petitioner alleges breach of contract insofar as LIPA has imposed a de facto average customer rate increase over two and one half percent without the PSC's approval, in violation of the PACB's Resolution
97-LI-1.

As and for Count 2, the petitioner alleges that by imposing the de facto average customer rate increase without the PSC's approval, LIPA violated and remains in violation of CPLR 7803(a) which prohibits a body from failing to perform a duty enjoined by law.

As and for Counts 3, 4 and 5, the petitioner alleges that by imposing the de facto average customer rate increase without the PSC's approval, LIPA violated and remains in violation of CPLR 7803(3) which prohibits a body from making a determination in violation of lawful procedure, from making a determination that is arbitrary and capricious, and from making a determination that constitutes an abuse of discretion.

In its Prayer for Relief, the petitioner seeks, *inter alia*, to enjoin LIPA from charging the "Power Supply Surcharge;" to compel LIPA to comply with the PACB's Resolution which requires the PSC's approval of this rate increase; and, a refund of monies collected thus far pursuant to the "Power Supply Surcharge" as of July 1, 2008 and thereafter.

LIPA seeks dismissal of the Petition pursuant to CPLR 3211(a)(1), (3), (5), (7) and CPLR 7803(f) on the grounds that: review is barred by the "filed rate doctrine;" as barred by the Statute of Limitations; because the petitioner lacks standing; and, because any monetary award would be paid by its ratepayers.

"In determining motions to dismiss in the context of a [CPLR] Article 78 proceeding, a court may not look beyond the petition and must accept all allegations in the petition as true, where, as here, no answer or return has been filed." Matter of Scott v Commissioner of Correctional Servs., 194 AD2d 1042, 1043 (3rd Dept. 1993); see also, Ball v City of Syracuse, 60 AD3d 1312 (4th Dept. 2009). Only if "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer," may the court decide the petition. Timmons v Green, 57 AD3d 1393 (4th Dept. 2009), quoting Matter of Nassau BOCES Cent. Council of Teachers v

Board of Coop. Educ. Servs. of Nassau County, 63 NY2d 100, 102 (1984). Otherwise, the respondent must be afforded an opportunity serve and file an Answer. Timmons v Green, supra, citing Bethelite Community Church v Department of Environmental Protection of City of New York, 8 NY3d 1001 (2007); Matter of Julicher v Town of Tonawanda, 34 AD3d 1217 (4th Dept. 2006).

The New York State Legislature created LIPA, "a corporate municipal instrumentality of the state" (Public Authorities Law § 1020-c[1]) in 1986 to provide electric service to Nassau, Suffolk and part of Queens County. The Legislature granted LIPA the power to "fix rates and charges for the furnishing or rendition of gas or electric power or of any related service at the lowest level consistent with sound fiscal and operating practices of the authority and which provide for safe and adequate service after holding public hearings upon reasonable notice to the public." (Public Authorities Law § 1020-f[u]). LIPA must comply with certain procedural requirements in setting rates. Pursuant to Public Authorities Law § 1020-f(u), public hearings must be held on notice, rate tariffs must be filed in accordance with Section 202 of the State Administrative Procedure Act and the tariff and any amendments thereto must be approved by LIPA's Board of Trustees. With limited exceptions not applicable here, Public Authorities Law § 1020-s(1) provides that "the rate, services and practices relating to the electricity generated or operated by [LIPA] shall not be subject to the provisions of the Public Service Law or to regulation by, or the jurisdiction of, the Public Service Commission." Nevertheless, again, to the contrary, in allowing LIPA to acquire LILCO's assets, the PACB adopted the Resolution which provides that "LIPA [may] not implement an increase in average customer rates exceeding two and one half percent over a twelve month period, nor will LIPA extend or reestablish any portion of a temporary rate increase over two and one half percent, **without approval of the Public Service Commission (PSC)** following a full evidentiary hearing."

LIPA recovers its cost of providing electric power to its customers pursuant to its Tariff. LIPA's Tariff enables it to recover its costs by charging a base rate, plus certain charges as specified in the Tariff. LIPA's initial electric Tariff which was enacted on April 9, 1998 included a Fuel and Purchased Power Cost Adjustment ("FPPCA"). LIPA's FPPCA specified the base cost of fuel and purchased power (in cents per KWH) included in LIPA's base rate, and provided

for a calculation of actual fuel and purchased power costs (also in cents per KWH). The FPPCA originally also specified an initial Fuel Cost Tolerance Band ("Tolerance Band") between 1% above the base cost of fuel and purchased power. The Tolerance Band was implemented beginning with the first 12 months from January 1, 1999. Under the FPPCA, each year thereafter, the Tolerance Band would be expanded an additional 1% in both directions. The FPPCA provided for bills to customers to be adjusted automatically, up or down, on a one-year lag basis to reflect any difference between actual fuel and purchased power costs and the base cost of fuel and purchased power for the preceding year that fell outside the Tolerance Band. While the original FPPCA was retrospective, in 2003, LIPA modified the FPPCA to recover excess fuel costs in the same year in which they are incurred, thus making the FPPCA prospective and to provide for LIPA to collect less than 100% of excess fuel costs in a given year, so long as it achieves a financial target of $20 million of revenues in excess of expenses. Commencing January 1, 2004, the revised FPPCA authorized LIPA to add a charge to its customers' bills equal to the amount of projected fuel and purchased power related costs which were anticipated to be in excess of the amounts recovered through the base rate. The Tariff further authorized LIPA to limit the FPPCA to an amount sufficient to recover $20 million of excess revenues on an annual basis but in no event may the FPPCA recover greater than 100% of actual fuel and purchased power related costs. LIPA is required to monitor the receipts and costs throughout the year and to modify the FPPCA, as necessary.

LIPA adopted a resolution further revising the FPPCA effective April 27, 2006. The $20 million excess target was increased to $75 million, plus or minus a Tolerance Band of $50 million and the categories of fuel and purchased power related costs were clarified and updated to improve the transparency of the FPPCA. The Tariff authorized LIPA to monitor, and if necessary modify, the FPPCA rate to achieve no less than $25 million and no more than $125 million in excess revenues. If excess revenues are projected to fall below $25 million for the year, LIPA is required without any ratemaking proceedings or action by the LIPA Board of Trustees to increase the FPPCA to a level sufficient to produce between $25 million and $75 million in excess revenues for the year and if excess revenues are projected to rise above $125 million for the year, the FPPCA must be decreased to a level sufficient to produce between $75

million and $125 million for the year. In no event may LIPA recover more than actual and incurred fuel costs.

In response to criticism of its rates and procedures, in May, 2006 LIPA petitioned the PSC for review of its FCPPA and the costs that it has recovered pursuant thereto in order to verify their reasonableness and appropriateness. It also sought a comparison of the compensation paid its senior management to that paid by other utilities. By decision dated June 20, 2006, the PSC declined review. The PSC noted that pursuant to Public Authorities Law § 51(1)(k) the PACB has the power and duty "to receive applications for approval of the financing and construction of any project proposed by . . . LIPA" and that despite the PACB's Resolution, the New York State Legislature has not amended Public Authorities Law § 1020-s(1) to require LIPA to submit to its review nor has the Legislature expanded its jurisdiction over LIPA. The PSC noted that it normally performs "a comprehensive review of a utilities' revenue requirement needs and associated rates and practice" and that LIPA's request for review was far more limited. It also noted that it lacked jurisdiction to initiate a comprehensive review on its own; that LIPA's accounting practices differed significantly from other utilities thereby complicating its review and posing the possibility that an independent entity may be better suited to conduct such a review; and, that, in any event, it did not have the authority to compel production of LIPA's book and records or to enforce or ensure LIPA's implementation of its determination.

After notice and public hearings, the FPPCA was further amended effective July 5, 2006. That Tariff is presently in effect. That amendment reorganized the charges and reformatted the bill to make it more understandable to customers and conform more closely to the bill presentation used by other electric utilities in New York. The fuel and purchased power costs that were embedded in LIPA's base rate were consolidated in the FPPCA. The remaining base rate charge was re-named the "delivery" component of the rate. All of the fuel and purchased power related costs are now combined in the "commodity" component of the charge.

Pursuant to these various tariffs, the FPPCA has been modified on multiple occasions. It was decreased in January 2006, decreased in October 2006, decreased in February 2007, increased in January 2008, increased in July 2008, and increased again in January 2009. Petitioner herein is challenging the 2008 adjustment.

By decision dated November 10, 2008, the PSC denied Assemblyman Marc Alessi's application for a re-hearing, which was supported by numerous public officials. It noted that it lacked jurisdiction to conduct the requested review under Public Authorities Law § 1020-s and that the PACB's Resolution was not binding on it since the PACB lacked jurisdiction over it. It held that "the [PACB]'s resolution cannot and does not create or confer [it] jurisdiction over LIPA's rates and practices." The PSC noted that the State Comptroller could review LIPA's books and records and that LIPA's accounting practices could be reviewed in such an audit. Public Authorities Law § 1020-f[aa]-1020-w.

A petition pursuant to CPLR Article 78 brought by Alessi seeking to annul the PSC's determination refusing LIPA's requested review was denied. Alessi v Acampora (Index No. 2098-07, S.F.O. September 14, 2007, Supreme Court Albany County). The Court held that the plain language of Public Authorities Law § 1020-s precluded the PSC's review of LIPA's rates, services and practices and that that statute is not superseded by the PACB's regulation or by recommendations of the State Comptroller or the former chairman of the Public Service Commission.

Contrary to LIPA's argument, the prior proceedings are not determinative of the Petition. There is a crucial difference between LIPA's former request for the PSC's review and the review that the petitioner seeks to compel here. LIPA's former request was a request for review of its FCPPA and its senior management's compensation. That request was not pursuant to the PACB's Resolution and was, in any event, only advisory. While the PSC previously concluded and the Albany County Supreme Court agreed that the PSC lacked jurisdiction, the review sought to be compelled here is markedly different. Here, pursuant to the PACB's Resolution, the petitioner seeks to compel LIPA to seek approval by the PSC of its rate increases. Moreover, it is not for this court to decide whether the rate increase(s) that the petitioner seeks to have reviewed by the PSC are in fact "average customer rates," for which the PSC's approval is required by the PACB's Resolution or exempt as a "Power Supply Surcharge": That is for the PSC to decide. See, 150 Greenway Terrace, LLC v Gole, 37 AD3d 792 (2nd Dept. 2007); see also, Davis v Waterside Housing Co., Inc., 274 AD2d 318 (1st Dept. 2000), lv den. 95 NY2d 770 (2000).

Petitioner maintains that the Filed Rate Doctrine does not apply here because pursuant to

Public Authorities Law § 1020-f(a), LIPA sets its own rates: They are not subject to review and therefore LIPA rates are not approved by a governing regulatory agency. Coincidentally, the Filed Rate Doctrine would apply were the PSC's approval required pursuant to the PACB's Resolution, which is precisely what the petitioner alleges is required here. In any event, while pursuant to the Filed Rate Doctrine, damages may not be recoverable here, contrary to LIPA's argument, all of the relief sought is not barred by the Filed Rate Doctrine. Petitioner seeks to compel review of LIPA's rates by the body designated by the PACB to review them, the PSC, not this court and therefore, this court would not become enmeshed in rate making. Compare, Long Island Power Authority Ratepayer Litigation, Index No. 003149/06, SFO September 27, 2006, Supreme Court Nassau County 2006), aff'd. 47 AD3d 899 (2nd Dept. 2008).

Nor has the Statute of Limitations expired. This Petition was filed on October 31, 2008 and the rate challenged took effect July 1, 2008. In any event, assuming, *arguendo*, that the Tariff which was passed in 2006 is what is really being challenged, the Petition would still be timely. The petitioner seeks to compel LIPA to seek the PSC's approval of the rates. The PSC has not refused jurisdiction over the matter at hand. Only if and when it refuses jurisdiction or exercises it does the determination at stake here become "final and binding" (CPLR 217[1]) and the Statute of Limitations begin to run. Walton v New York State Dept. of Correctional Services, 8 NY3d 186, 195 (2007). While "courts must take a pragmatic approach" when deciding when a petitioner's administrative remedies have been exhausted and "when it is plain that 'resort to an administrative remedy would be futile,' [so that] an Article 78 proceeding should be held ripe, and the statute of limitations will begin to run," (Walton v New York State Dept. of Correctional Services, supra, at p. 196, quoting Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57 [1978]), here, it is far from clear whether the PSC would exercise jurisdiction when review of the rate increase at issue here is sought. See, Walton v New York State Dept. of Correctional Services, supra, at p. 196.

And, while petitioner certainly appears to fall within the zone of interest of the PACB's Resolution, "[a] party seeking to challenge governmental or administrative action must demonstrate an 'injury in fact' distinct from that of the general public which falls within the 'zone of interest' that the relevant statute seeks to promote or protect." Town of Islip v Long

Island Power Authority, 301 AD2d 1, 8 (2nd Dept. 2002), citing Silver v Pataki, 96 NY2d 532, 539 (2001), rearg. den. 96 NY2d 938 (2001); Matter of Colella v Board of Assessors of County of Nassau, 95 NY2d 401, 409-410 (2000); Matter of Transactive Corp. v New York State Dept. of Social Services, 92 NY2d 579, 587 (1998); Society of Plastics Indus., Inc. v County of Suffolk, 77 NY2d 761, 773 (1991); see also, East End Property Co. #1, LLC v Kessel, 46 AD3d 817 (2nd Dept. 2007), app den. 10 NY3d 926 (2008); Initiative for Competitive Energy v Long Is. Power Auth., 178 Misc2d 979 (Supreme Court Suffolk County 1998). "In the absence of some injury in fact, the 'zone of interest test' will not confer standing on [a] petitioner merely because it is a customer of the utility." Lederle Laboratories Division of American Cynamid Company v Public Service Commission, 84 AD2d 900 (3rd Dept. 1981); see also, East End Property Company #1, LLC v Kessel, supra, at p. 819. The petitioner's status as a customer of LIPA does not meet the "zone of interest" test needed to confer standing on it to challenge LIPA's rate adjustments as procedurally violative of the PACB's Resolution. It has failed to allege that their injury differs from any other LIPA ratepayer's. Compare, Town of Islip v Long Island Power Authority, supra, at p. 89.

This petition must be dismissed.

Dated: May 20, 2009

J.S.C

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