STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
In the Matter of the Application of

AG-ENERGY, LP,

Petitioner,

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

-against-

DECISION and ORDER
INDEX NO. 10184-09
RJI NO. 01-09-ST0958

NEW YORK STATE PUBLIC SERVICE COMMISSION and GARY A. BROWN, as Chairman and PATRICIA L. ACAMPORA, MAUREEN F. HARRIS, ROBERT E. CURRY, JR., and JAMES L. LAROCCA, as Commissioners of the New York State Public Service Commission, and ST. LAWRENCE GAS COMPANY, INC.,

Respondents.

Supreme Court Albany County All Purpose Term, March 26, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

AG-Energy, LP (hereinafter "Petitioner") commenced this Article 78 proceeding challenging the New York State Public Service Commission's (hereinafter "PSC") September 21, 2009 Order (hereinafter "PSC's Order"), which granted, in part, its Complaint and Petition, dated February 20, 2009 (hereinafter "Complaint"). Issue has been joined by Respondents, with respondent St. Lawrence Gas Company, Inc. (hereinafter "St. Lawrence") asserting a breach of contract counterclaim against Petitioner. Petitioner answered the counterclaim, seeking its dismissal. Because Petitioner failed to demonstrate that the PSC Order is irrational, the petition is dismissed. Additionally, because St. Lawrence's counterclaim is not relevant to the PSC's Order, it is denied without prejudice.

The PSC's "determinations may not be set aside unless they are without rational basis or without reasonable support in the record." (National Fuel Gas Distribution Corp. v. Public Service Com'n of State, 71 AD3d 62 [3d Dept. 2009], quoting Matter of New York Tel. Co. v. Public Serv. Commn. of State of N.Y., 95 NY2d 40 [2000], quoting Matter of Rochester Tel. Corp. v. Public Serv. Commn. of State of N.Y., 87 NY2d 17 [1995]). "Judicial deference is warranted because setting utility rates presents problems of a highly technical nature, the solutions to which in general have been left by the Legislature to the expertise of the Public Service Commission." (Matter of New York Tel. Co., supra at 48, quoting Matter of Abrams v. Public Serv. Commn., 67 NY2d 205 [1986][internal quotes omitted]).

This record establishes that Petitioner and St. Lawrence entered into a "Natural Gas Transportation Agreement", dated April 20, 1992 (hereinafter "Agreement"). Such Agreement, with a term of twenty years, set forth the terms and conditions upon which Petitioner was to

purchase natural gas from St. Lawrence as a large volume user of natural gas. Two of the Agreement's price terms, as characterized in the Complaint, are a "main extension cost" term and a "minimum take charge". The Complaint's "main extension cost" term provides St. Lawrence a monthly payment to recoup its cost, with profit, for installing a 12.5 mile - 8 inch diameter gas line, to service Petitioner's facility. The Complaint's "minimum take charge" guarantees St. Lawrence, on a yearly basis, a minimum payment from Petitioner, even if Petitioner fails to consume a minimum amount of natural gas. At issue in this proceeding, as limited by the arguments raised in Petitioner's Complaint, are the above two price terms.

The parties' Agreement was entered for the stated purpose of supplying Petitioner with natural gas for the "79 megawatt (MW)(approximate net) natural gas fired cogeneration facility" it was planning to construct. Pursuant to the agreement, St. Lawrence constructed the gas pipeline and Petitioner operated its planned cogeneration facility. Such operation, however, ceased by 2007. Petitioner has now removed and sold its main gas-fired generating turbines. It currently maintains only a steam generation facility, to service a New York State Office of Mental Health Psychiatric Center. On this record it is uncontested that Petitioner's natural gas demand is far less than it was when it operated a cogeneration facility. Nor is it contested that Petitioner has been obligated to pay the "minimum take charge" since at least 2007, while not consuming the minimum level of natural gas.

The PSC's Order recognized these changed circumstances, and deleted from the Agreement the "minimum take charge" but left intact the "main extension cost" term. The PSC's basis for termination of the "minimum take charge" recognized that it was an allocation of the risk of Petitioner's frequency of use and distinguished frequency of use from cessation of use.

The PSC found that the "minimum take provision" no longer serves its purpose, because of Petitioner's cessation of its cogeneration use. As no party has challenged this portion of the PSC's Order, it is not at issue in this proceeding.

Rather, at issue is that portion of the PSC's Order upholding the Agreement's "main extension cost" term. The PSC justified such term by examining the Agreement. It found that the "main extension cost" term was designed to allow St. Lawrence to recover, over the life of the contract, its investment (with profit) in constructing the gas line for Petitioner. Such cost was borne by St. Lawrence initially, and is being recovered by St. Lawrence over the twenty year term of the Agreement. As such, Petitioner's reduced use of the gas line (the above changed circumstances) is irrelevant to the line's construction cost and related profit margin. Moreover, the PSC correctly recognized that Petitioner's initial agreement to pay for the gas line's cost of construction (with profit) over the term of the Agreement was not unreasonable. Accordingly, the PSC's Order was rational and supported by the record.

To the extent that Petitioner argues that it overpaid St. Lawrence and that such overpayment must be applied to its future obligations, Petitioner failed to exhaust such argument at the administrative level precluding its consideration herein. (KLCR Land Corp. v. Public Service Com'n of State of New York, 20 AD3d 849 [3d Dept. 2005]). Moreover, even if such argument was considered, it is still unavailing. Petitioner offers no excuse for its own failure to commence this proceeding sooner, thereby obviating the alleged overpayment it now seeks a credit for; and, the filed rate doctrine precludes such argument. (Matter of Concord Assoc. v Public Serv. Commn. of State of N.Y., 301 AD2d 828 [3d Dept. 2003]; Porr v. NYNEX Corp., 230 AD2d 564 [2d Dept. 1997]).

Similarly, to the extent that Petitioner seeks termination of the Agreement, it failed to raise the arguments it propounds in this proceeding at the administrative level, and as such they are not considered herein. (KLCR Land Corp., supra). As framed by Petitioner's Reply Papers, Petitioner's Complaint sought the Agreement's termination by alleging: "[t]o the extent that St. Lawrence has not cured its breach [i.e. failure to provide proper credit for third party use of the gas line] by March 22, 2009, [Petitioner] may avail itself of this contractual remedy and declare the Agreement terminated." Such allegation fails to seek the PSC's termination of the Agreement. Rather, by its own terms, Petitioner alleges that it may terminate the Agreement itself. Moreover, Petitioner offers no proof demonstrating St. Lawrence's failure to provide it with a proper credit for third party use of the gas line. As such, Petitioner's arguments seeking termination of the Agreement are unavailing.

Additionally, to the extent that Petitioner challenges the PSC's "transportation rate" holding, it neither exhausted its administrative remedies for such challenge nor demonstrated, with any proof, the irrationality of such holding.

Turning to St. Lawrence's counterclaim, "[w]hile a counterclaim may be raised in an Article 78 proceeding (CPLR 7804(d)), the issue should be relevant to the issues of the administrative proceeding under review." (Johnson v. Popolizio, 153 AD2d 546 [1st Dept. 1989]). Here, this Article 78 proceeding was brought to challenge the PSC's Order. St. Lawrence's counterclaim, however, seeks redress from Petitioner's alleged breach of contract. While the PSC's Order did review the contract allegedly breached, the claimed breach is irrelevant to the administrative proceeding. As such, St. Lawrence's "counterclaim should be dismissed without prejudice." (Id.) If St. Lawrence wishes to pursue its breach of contract claim

against the Petitioner, it may do so in an appropriate independent action, if so advised.

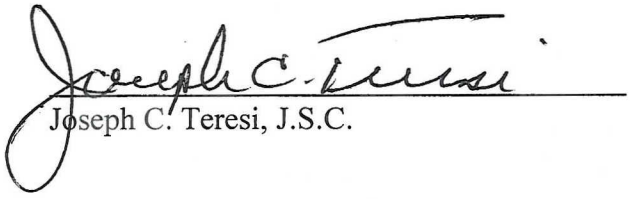
To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit.

Accordingly, the petition and counterclaim are dismissed.

This Decision and Order is being returned to the attorneys for the PSC. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 16, 2010
Albany, New York



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated November 30, 2009, Verified Petition, dated November 23, 2009, with attached "Exhibit 1" - "Exhibit "3", Affidavit of Joseph Klimaszewski, dated November 24, 2009.
2. Verified Answer, dated January 14, 2010, Affidavit of James Ward, dated January 14, 2010l.
3. Verified Answer, dated January 13, 2010, with attached Record of the Public Service Commission of the State of New York".
4. Verified Answer, dated January 28, 2010.