

**Brennan v Power Auth. of the State of N.Y.**

2022 NY Slip Op 34567(U)

August 15, 2022

Supreme Court, Albany County

Docket Number: Index No. 908723-21

Judge: James H. Ferreira

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ALBANY

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WILLIAM H. BRENNAN,

Petitioner,

-against-

POWER AUTHORITY OF THE STATE OF  
NEW YORK,

Respondent.

**JUDGMENT**

Index No.: 908723-21

RJI No.: 01-21-ST-1984

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(Supreme Court, Albany County, Article 78 Term)

APPEARANCES:     Aaron Mark Zimmerman, Esq.  
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HON. JAMES H. FERREIRA, Acting Justice:

In this CPLR article 78 proceeding, petitioner seeks relief in the nature of a writ of mandamus (see CPLR 7803 [1]). In the petition, petitioner alleges that he is a resident of the Village of Skaneateles (hereinafter the Village) and has purchased Preference Hydropower generated by respondent from the Village's Municipal Electric Department continuously since at least 2010.<sup>1</sup>

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<sup>1</sup> Petitioner commenced this proceeding by filing a petition and proposed Order to Show Cause. The Court (O'Connor, J.) executed the Order to Show Cause on October 13, 2021. Among other things, the Court, in the Order to Show Cause, approved petitioner's request that the Village be considered a permissive party in this matter and directed that notice of these proceedings be provided to the Village. The Village appeared in this matter through counsel and, by stipulation dated November 4, 2021, petitioner and the Village agreed to an extension of time for the Village to serve an answer until 30 days after respondent serves a responsive pleading or, if respondent makes a motion, until the motion is finally disposed of by this Court or the Appellate Division. To date, the Village has not filed any substantive papers in this matter.

Petitioner alleges that, pursuant to Public Authorities Law § 1005 (5)(f), respondent is required to make periodic revisions of its Preference Hydropower rates and that respondent has violated Public Authorities Law § 1005 (5)(f) by failing to revise those rates for 10 years, with the last rates being set in 2011. Petitioner seeks an order compelling respondent to immediately revise its Preference Hydropower rates on the basis of accurate cost data. Respondent opposes the petition and petitioner has filed a reply.<sup>2</sup>

“The writ of mandamus is an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought” (Matter of Johnson v Fischer, 104 AD3d 1004, 1004-05 [3d Dept 2013], quoting Matter of Johnson v Corbitt, 87 AD3d 1214, 1215 [3d Dept 2011], lv denied 18 NY3d 802 [2011]; see Matter of Hunt v Annucci, 201 AD3d 1112, 1113 [3d Dept 2022], lv denied 38 NY3d 907 [2022]). Public Authorities Law § 1005 (5) authorizes and directs respondent to sell hydroelectric power to municipalities and political subdivisions “at prices representing cost of generation, plus capital and operating charges, plus a fair cost of transmission, all as determined by the trustees, and subject to conditions which shall assure the resale of such power at the lowest possible price.” Public Authorities Law § 1005 (5)(f) provides:

“Contracts for the sale, transmission and distribution of power generated by such projects shall provide for the effectuation of the foregoing policy and shall provide . . . [p]eriodic revisions of the service and rates to consumers on the basis of accurate cost data obtained by such accounting methods and systems as shall be approved by

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<sup>2</sup> Petitioner filed a number of documents after this matter was fully submitted, including a document entitled “Plaintiffs’-Petitioner’s Written Summation” which contains arguments relating to this matter and a separate, related matter that was then pending before this Court. Petitioner has also filed updates in this matter pertaining to the pending appeal from the related matter. The Court declines to consider the submissions made by petitioner after this matter was fully submitted. The Court notes that, in the related matter, entitled Lawrence Sloane et al v Power Authority of the State of New York et al (Index No. 907592-20), the Court dismissed, as untimely, the plaintiffs’ challenge to respondent’s 2011 rate revision. The Court does not find that its determination of the instant matter would be impacted by any determination with respect to that appeal.

the trustees and in furtherance and effectuation of the policy declared in this sub-paragraph.”

It has been held that “most of the directives in Public Authorities Law § 1005 (5) are discretionary and present nonjusticiable policy questions” (Matter of County of Westchester v Power Auth. of State of N.Y., 188 AD2d 432, 432 [1st Dept 1992], lv denied 82 NY2d 658 [1993]).

Upon review, the petition is dismissed. Petitioner’s argument is that respondent is in violation of Public Authorities Law § 1005 (5)(f) because it has failed to revise its rates for over 10 years. However, Public Authorities Law § 1005 (5)(f) requires only that respondent make “periodic” revisions of hydropower rates, and there is nothing in the statute that requires that rates be revised pursuant to a specific timetable, within a certain period of time, upon the occurrence of any event or under any specific circumstances. The statute, on its face, leaves it to respondent to determine the timing of its periodic rate revisions, and petitioner has failed to cite any authority for its position that respondent is required to revise its rates after 10 years have elapsed. As such, the Court finds that the timing of the periodic revisions is a matter that is within respondent’s discretion to determine and that mandamus does not lie to compel respondent to conduct a rate revision (see Matter of Hunt v Annucci, 201 AD3d at 1113). Therefore, the Court finds the petition must be dismissed.

Accordingly, based upon the foregoing, it is hereby

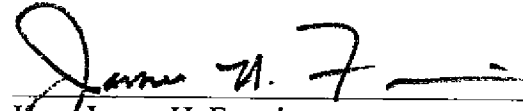
ORDERED that the petition is dismissed.

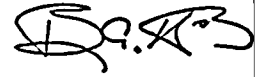
The foregoing constitutes the Judgment of the Court.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York  
August 15, 2022

  
Hon. James H. Ferreira  
Acting Justice of the Supreme Court



08/16/2022

Papers Considered:

1. Petition, sworn to October 7, 2021;
2. Order to Show Cause, dated October 13, 2021;
3. Affirmation in Opposition by Katherine A. Skeele, Esq., dated November 8, 2021, with attached exhibits;
4. "Affirmation" in Opposition by Scott Tetenman, sworn to November 8, 2021;
5. Memorandum of Law in Opposition by Katherine A. Skeele, Esq., dated November 8, 2021; and
6. Reply Affirmation by Aaron Zimmerman, Esq., dated November 10, 2021.