

Riverdale Jewish Ctr. v Brooklyn Union Gas Co.
2023 NY Slip Op 33034(U)
August 31, 2023
Supreme Court, New York County
Docket Number: Index No. 650048/2023
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW
YORK NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X
RIVERDALE JEWISH CENTER, UNITED METHODIST
CHURCH OF WESTMORELAND NEW YORK, KOREAN
METHODIST CHURCH & INSTITUTE, MAYIN TOHAR,
CONGREGATION BAIS YAAKOV NECHAMIA
D'SATMAR, ASSEMBLY OF PRAYER BAPTIST
CHURCH, GRACE BIBLE CHURCH, and SACRED HEART
CHURCH, on behalf of themselves and all others similarly
situated,

Plaintiffs,

- against -

THE BROOKLYN UNION GAS COMPANY d/b/a
NATIONAL GRID, NIAGARA MOHAWK POWER
CORPORATION d/b/a NATIONAL GRID, NEW YORK
STATE ELECTRIC & GAS CORPORATION, LONG
ISLAND POWER AUTHORITY, KEYSpan GAS EAST
CORPORATION d/b/a NATIONAL GRID, CENTRAL
HUDSON GAS & ELECTRIC CORPORATION,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., and ORANGE AND ROCKLAND UTILITIES, INC.,

Defendants.

INDEX NO.	650048/2023
MOTION DATE	
MOTION SEQ. NOS.	002, 003, 004, 005, 006

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

The Court heard oral argument on August 31, 2023, via Microsoft Teams, on the five pre-Answer motions by the various defendant utility service providers to dismiss in its entirety this putative class action filed by the various plaintiff religious organizations (“Plaintiffs”). Based on the extensive briefing and oral argument, the motions are granted to the extent of staying this action pending the filing by plaintiffs of complaints with the Public Service Commission (“the PSC”), or any other administrative agency Plaintiffs may choose, and the determination of those complaints by the PSC or other administrative agency.

Public Service Law § 76 allows utility service providers such as the named defendants here to charge religious organizations at residential utility rates even though the religious

organizations do not typically meet the utility companies' definition of a residential customer. Pursuant to New York Tax Law § 186-a, the State imposes a 2% tax on the utility companies based on "gross income derived from the transportation, transmission or distribution of gas or electricity," *except for* receipts from "nonresidential customers". The PSC has long permitted utilities to "pass through" 100% of this gross receipts tax ("the GRT") to customers in the form of surcharges on their utility bills, consistent with PSC-approved tariffs.

Plaintiffs in this action appear not to dispute the right of the utility companies to charge the religious institutions for services at the favorable residential rates for utilities. However, they claim that defendants have overbilled them for the GRT by charging them the higher "residential" GRT rather than the lower "nonresidential" rates. Plaintiffs in their Amended Complaint assert varying causes of action against the different defendants, including breach of contract, violation of Public Service Law § 65 which governs rate schedules and service classifications, deceptive practices in violation of General Business Law § 349, unjust enrichment, money had and received, and fraudulent concealment against Con Edison based on its conduct in processing certain refunds (NYSCEF Doc. No. 43).

While there are some differences in the arguments asserted by the various defendants, there is also substantial overlap. The central common argument is that the action should be dismissed under the primary jurisdiction doctrine, which provides that the courts should defer to an agency such as the Public Service Commission which has expertise in the matters at issue here. Pursuant to Public Service Law § 66(5), the PSC's jurisdiction extends broadly not just to tariffs but to utility rules and regulations and even to billing format. The PSC reviews and approves the tariffs set by nearly every major utility provider in New York, including the defendants, affecting hundreds of thousands of customers across the State, including Plaintiffs.

A related doctrine relied upon by defendants for their dismissal requests is the “filed-rate doctrine”. That doctrine provides that an attack such as the one at issue here based on the rates, service classifications, and other charges approved by the PSC or another regulatory body and confirmed in the published tariffs are not subject to attack in the courts.

Applying these doctrines, the Court grants the motions to the extent of staying this action until the Plaintiffs file their complaints with the PSC and the PSC determines those complaints. As the motions to dismiss demonstrate, each of the Plaintiffs and each of the utility companies is differently situated with respect to the GRT questions at issue, is subject to different tariffs, has taken different positions on the proper application of their respective tariffs, and has different corporate resources available to respond to any supposed errors. The PSC can best analyze the parties’ respective positions and craft appropriate remedies that account for the practical and regulatory issues in play. A determination by the PSC would also ensure consistency among all state utilities, including the many who are not named as defendants in this suit.

While defendants have made some persuasive arguments that at least some of the claims should be dismissed on the merits at this point in time for failure to state a cause of action, the most prudent course of action under these circumstances is to await a determination by the PSC of the claims that fall squarely within the PSC’s jurisdiction. The PSC not only has expertise in these issues but is also best positioned to determine the public policy issues and render determination that promote consistency among all the utilities state-wide.

A significant portion of the oral argument was devoted to discussion of PSC Case No. 10-G-0174, *In re Bishop Loughlin Memorial High School* [determination dated June 21, 2016], 2016 N.Y. PUC LEXIS 323 at *1-2. Defendants pointed to the case as evidence of the PSC’s expertise in determining matters such as those at issue here. In contrast, Plaintiffs pointed to the

case as evidence that the PSC would not entertain the issues in this case because an analysis of the New York Tax Law § 186-a is critical to a determination of the issues in this case.

According to Plaintiffs, the PSC lacks expertise, or even jurisdiction, to interpret the Tax Law. Plaintiffs insist that this Court is the most appropriate body to engage in statutory interpretation and construe the Tax Law under these circumstances.

Plaintiffs have failed to persuade the Court that it should determine the issues in this case without the benefit of agency expertise. The Tax Law cannot be construed in isolation but must be construed in the context of the extremely complex and highly detailed regulatory scheme applicable to utility service providers and the PSC-approved tariffs that include both utility charges and GRT tax surcharges. A determination by the administrative body in this case is particularly appropriate in light of the fact that Plaintiffs' causes of action turn primarily on claims of breach of the utility tariffs and breach of the Public Service Law. None of the causes of action asserts of breach of Tax Law § 186-a.

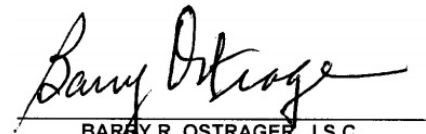
To the extent Plaintiffs argue that *Bishop Loughlin* stands for the proposition that the issues here are not within the jurisdiction of the PSC, the decision suggests that the issues may be "more appropriately decided by the New York State Department of Taxation and Finance". Nowhere does the decision indicate that the matter is one more appropriately decided by the courts. Although the full record of the administrative determination is not before the Court for a precise determination of the PSC's intent, Plaintiffs are certainly free to pursue their claims before the New York State Department of Taxation and Finance should they view that administrative agency as more appropriate than the PSC.

Accordingly, the Court stays this action pending a determination of Plaintiffs' claims by the PSC or some other administrative agency with the necessary expertise. The Court declines

Defendants' request to dismiss the action in its entirety, rather than stay it, because of the potential impact a dismissal would have on the scope of available relief should the Statute of Limitations become an issue. After the PSC, or the New York State Department of Taxation and Finance, or both agencies in tandem, renders a determination, the parties should confer to ascertain whether the PSC has disposed of all the claims asserted here, in which case the action should be discontinued, or whether plaintiffs should move to vacate the stay and restore this action to the calendar in whole or in part.

A Status Conference is scheduled for February 27, 2024 at 10:00 a.m.

Dated: August 31, 2023


 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION
	☐ GRANTED ☐ DENIED	☐ GRANTED IN PART ☒ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT ☐ REFERENCE