SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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HUNTINGTON TOWN COUNCIL MEMBER
EUGENE COOK,

Plaintiff,

Index No.: 604663/2020

-against-

Assigned Justice:

LONG ISLAND POWER AUTHORITY,
NATIONAL GRID GENERATION LLC,
TOWN OF HUNTINGTON,

Defendants.

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DEFENDANTS LONG ISLAND POWER AUTHORITY AND NATIONAL GRID GENERATION LLC'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

In this declaratory judgment action, Defendants Long Island Power Authority ("LIPA") and National Grid Generation LLC ("National Grid") (collectively "Defendants") submit this memorandum of law in support of their motion for an Order pursuant to N.Y. C.P.L.R. 3211(a)(1), (5), and/or (7) dismissing Plaintiff Huntington Town Council Member Eugene Cook's ("Plaintiff") Verified Complaint (the "Complaint") in its entirety because: (i) Plaintiff lacks standing to maintain this action; (ii) Plaintiff's claims are barred by the statute of limitations; (iii) Plaintiff's claims substantively lack merit as a matter of law; and (iv) Plaintiff's claims are barred by the doctrines of res judicata and/or collateral estoppel.

This action is an improper collateral attack on Defendants' ability to challenge property taxes on the Northport power plant in the Town of Huntington. Plaintiff seeks a declaration that LIPA was purportedly required to submit certain of its agreements with National Grid – namely the 2007 Agreement and Waiver ("A&W") and the 2013 Amended and Restated Power Supply Agreement ("A&R PSA") – to the New York State Public Authorities Control Board ("PACB") for review and approval, and that LIPA's failure to do so allegedly violated N.Y. Public Authorities Law § 1020-f(aa), and resulted in illegal, void, and unenforceable contracts, and thus invalidates Defendants' standing and/or authority to initiate property tax challenges on the Northport power plant. For the reasons discussed below, Plaintiff's action cannot be sustained as a matter of law.

First, Plaintiff lacks standing to allege a violation of Public Authorities Law § 1020-f(aa) and, thus, to challenge LIPA's authority to enter into contracts without PACB approval. Plaintiff has not alleged that he suffered an injury in fact that is within the zone of interests protected by the statute or that he has suffered any alleged injury that is different from the general public. In addition, Plaintiff's status as a Town Council Member does not confer standing.

Second, Plaintiff's claims are time barred. Plaintiff's claims for declaratory judgment are subject to the four-month statute of limitations because they are most closely analogous to an Article 78 claim, and because the action is challenging an agency action or determination. All of Plaintiff's claims are predicated on LIPA's alleged failure to submit the A&W and the A&R PSA to the PACB for review and approval. These agreements were executed more than 13 and seven years ago, respectively. As such, Plaintiff's challenges are barred by the statute of limitations.

Third, Plaintiff's claims lack substantive merit because the A&W and the A&R PSA did not require PACB approval. Under the LIPA Act, LIPA must seek PACB approval before it undertakes a "project." N.Y. Pub. Auth. L. § 1020-f(aa). The term "project" is narrowly defined to include any action undertaken by LIPA that, inter alia, "significantly modifies the use of an asset valued at more than one million dollars owned by [LIPA] or involves the sale, lease or other disposition of such an asset," or "commits [LIPA] to a contract or agreement with a total consideration of greater than one million dollars and does not involve the day to day operations of [LIPA]." Pub. Auth. L. § 1020-b(12-a). Neither the A&W nor the A&R PSA constitutes a "project" under the LIPA Act. Indeed, contrary to Plaintiff's allegations, the A&W did not significantly modify or dispose of an asset valued at more than one million dollars. And the A&R PSA is a contract for the purchase of power, which involves LIPA's day-to-day operations, and LIPA has never submitted such contracts to the PACB for approval, because such approval is not required.

Lastly, Defendants' standing and/or authority to file property tax challenges on the Northport power plant involve claims and issues that already have been decided against the Town of Huntington (the "Town") in other actions between the parties. Although Plaintiff

challenges Defendants' standing and authority under the guise of a novel legal theory, he brings this suit in his capacity as "Huntington Town Council Member" for the benefit of the Town. As such, he is barred from re-litigating the claims in his Complaint under the doctrines of res judicata and/or collateral estoppel.

Accordingly, this Court should grant Defendants' motion and dismiss Plaintiff's Complaint in its entirety.

STATEMENT OF FACTS

This action has its genesis in LIPA's acquisition of the Long Island Lighting Company ("LILCO") in 1997 and subsequent filing of tax certiorari proceedings challenging the property taxes on the Northport power plant located in the Town.

Plaintiff challenges Defendants' standing and/or authority to initiate tax certiorari proceedings on the Northport power plant – beginning in 2010 – because LIPA did not submit certain agreements to the PACB for approval in 2007 and 2013.

The relevant factual background is contained in Justice Emerson's comprehensive decision and order in Town of Huntington v. Long Is. Power Auth., 2018 N.Y. Slip. Op. 51206(U), 60 Misc. 3d 1222(A), 110 N.Y.S.3d 497, 2018 N.Y. Misc. LEXIS 3469 (Sup. Ct. Suffolk Cnty. 2018). See also Affirmation of Evan H. Krinick, dated July 15, 2020 ("Krinick Aff."), Ex. G.

A. Relevant Factual Background

In 1986, the New York State Legislature enacted the Long Island Power Authority Act (N.Y. Public Authorities Law, art 5, tit 1-A (hereinafter the "LIPA Act")). The LIPA Act created LIPA, a not-for-profit public authority with broad powers to effectuate the legislation's purposes, which were primarily to close the Shoreham Nuclear Power Plant, to replace investor-owned LILCO as the provider of electric power on Long Island, and to reduce power costs for

Long Island ratepayers. See Pub. Auth. L. §§ 1020-a, 1020-c, 1020-f, 1020-g, 1020-h; Citizens for Orderly Energy Policy, Inc. v. Cuomo, 78 N.Y.2d 398, 414, 576 N.Y.S.2d 185 (1991). As a public authority, LIPA could acquire LILCO's taxable debt and equity and refinance the debt with lower cost, tax-exempt financing. Moreover, LIPA was not obligated to pay federal income taxes. It was, therefore, believed that LIPA could achieve significant cost savings for Long Island's ratepayers.

On February 28, 1996, LIPA's Board of Trustees passed a resolution authorizing LIPA's Chairman and his designees to enter into negotiations for the acquisition of LILCO. See Town of Huntington, 2018 N.Y. Misc. LEXIS 3469, at *3. The negotiations were predicated on a transaction structure in which certain assets of LILCO, including its gas, generating, and common plant assets, would be distributed to a new company owned by the shareholders of LILCO and the Brooklyn Union Gas Company ("BUG") immediately prior to a cash merger of LILCO with an acquisition subsidiary to be formed by LIPA. As a result, LILCO would become a wholly-owned subsidiary of LIPA. The principal issues during the negotiations were the identification of the cash assets to be distributed by LILCO; the price to be paid by LIPA; the treatment of LILCO's preferred stock and debt; the terms and conditions of the service agreements to be entered into by LILCO with the new company; and the rights LIPA would have to acquire LILCO's generating facilities and to develop certain real estate parcels for future generating, transmission, and distribution facilities. See id. at *3-4.

The negotiations culminated in a non-binding Agreement in Principle dated March 19, 1997, among LIPA, LILCO, and BUG. See id. at *4. Pursuant to the terms of the Agreement in Principle, LIPA would, among other things, acquire LILCO's common and preferred stock for $2.5 billion and $4 million, respectively; assume $3.7 billion of LILCO's pre-existing debt; and

become the owner of LILCO's electric transmission and distribution facilities. LILCO's generating plants would be transferred to the new entity (referred to as "Newco" or "GENCO") created under the merger with BUG, which became KeySpan. The Agreement in Principle required the future execution of three separate agreements, including a power supply agreement. Pursuant to a resolution dated March 21, 1997, LIPA's Board of Trustees approved and ratified execution of the Agreement in Principle and authorized LIPA's Chairman and his designees "to negotiate the terms of the definitive acquisition agreement, management services agreement and power supply agreement, and all other agreements necessary or appropriate to implement the Agreement in Principle." Id. at *4-5. Extensive negotiations for the drafting of those agreements ensued.

One of the issues that arose during the negotiations was the amount of the property taxes that LILCO paid on its power generating facilities, including the Northport power plant. See id. at *5. By March 1997, LILCO had obtained two judgments for $81 million and $868 million, respectively, against the Town of Brookhaven in tax certiorari proceedings challenging the property tax assessments on the Shoreham Nuclear Power Plant (Town of Islip v. Long. Is. Power Auth., 301 A.D.2d 1, 4, 752 N.Y.S.2d 320 (2d Dep't 2002), appeal denied, 99 N.Y.2d 506, 755 N.Y.S.2d 712 (2003)). Moreover, LILCO had commenced numerous other tax certiorari proceedings challenging the assessments on its power generating facilities that were still pending at the time. Consequently, the towns and school districts where LILCO's power plants were located were concerned about their tax revenues. They sought assurances that the takeover plan would not hurt them financially, that tax revenues would not decrease after the takeover, that the pending tax certiorari proceedings would be discontinued, and that LILCO

would not be able to institute any new tax certiorari proceedings in the future. See Town of Huntington, 2018 N.Y. Misc. LEXIS 3469, at *5.

The negotiations culminated in the execution of the definitive agreements in June 1997, which implemented the Agreement in Principle. See id. at *11-12. Among the various agreements negotiated and entered into by LIPA was the Power Supply Agreement, which was dated as of June 26, 1997 (the "PSA"). See id.

Under the terms of the PSA, GENCO agreed to sell and deliver to LIPA all of the capacity from its generating facilities and generating facility sites, including the Northport power plant, and all of the energy produced from those facilities and other generating facilities located on Long Island for 15 years. See id. at *12. At the end of the 15-year term, Section 12.1 of the PSA provided that "LIPA may renew this Agreement for all capacity upon which it has not exercised its Ramp Down Option, under substantially the same terms and conditions as set forth herein, including but not limited to the continuation of a Ramp Down Option." Id. at *13.

In Article 8 of the PSA, LIPA agreed to make monthly payments to GENCO for the electricity delivered pursuant to the PSA (Section 8.1). One of the monthly payments that LIPA was required to make was the Monthly Capacity Charge, which compensated GENCO for the fixed costs of generating electricity, including income taxes, property taxes, and all other taxes (Section 8.1.1). GENCO continued to own the generating facilities and generating-facility sites and, as the owner, was the entity that was ultimately responsible for the property taxes thereon. The Monthly Capacity Charge transferred the burden of paying the taxes from GENCO to LIPA. See id.

As part of the acquisition, LIPA also acquired LILCO's pending tax certiorari lawsuits. See id. at *11. As to future tax certiorari challenges, LIPA got the plants' owner, GENCO, to

relinquish control of its right to challenge property tax assessments on the generating facilities. Section 21.16 of the PSA allowed GENCO to challenge the property taxes on the generating facilities and generating-facility sites in its sole discretion under certain limited circumstances. See id. at *13. Section 21.16 provided, in pertinent part, as follows:

> After the Contract Date, GENCO, in its sole discretion, may challenge any property tax assessment on its Generating Facilities or Generating Facility Sites only if the assessment on any such challenged facilities is increased not in an appropriate proportion to the increase in value related to taxable capital additions affixed to the tax parcel between the last two tax status dates. If the tax attributable to the assessment on the Generating Facilities or Generating Facilities Sites is not included in the costs paid by LIPA or its Affiliates (e.g., gas facility located on Generating Facility site) then GENCO, in its sole discretion, may pursue tax challenges on such assessments. This provision shall expire upon the termination of this Agreement.

Id. at *13-14.

Nothing in the PSA restricted or placed any limitation on LIPA. As the entity responsible for the payment of property taxes, LIPA retained the right to direct GENCO to initiate property tax challenges or to bring tax certiorari proceedings on its own behalf if it believed that it was in the best interest of LIPA's ratepayers to do so. See id. at *29-31, 46.

The LIPA Board of Trustees approved and authorized execution of the definitive agreements, including the PSA, in a resolution dated June 16, 1997. See id. at *12.

The transaction contemplated in the Agreement in Principle was subject to federal and state regulatory approvals from the Internal Revenue Service, Federal Energy Regulatory Commission, the PACB, the New York State Attorney General, and the New York State Comptroller, among others. See id. at *12, n.6.

Generally, the PACB has the power to review "projects" undertaken by LIPA. See Pub. Auth. L. § 1020-f(aa). The PACB may only approve those LIPA projects which it determines

are financially feasible; will not materially adversely affect overall real property taxes in the service area; are anticipated to result in generally lower utility rates in the service area; and, will not materially adversely affect overall real property taxes or utility rates in other areas of the State. See Pub. Auth. L. § 1020-f(aa).

On July 16, 1997, the PACB approved the "project" under Pub. Auth. L. § 1020-f(aa) subject to five conditions. See Krinick Aff., Ex. B. Condition one required LIPA to establish a plan for open access to the electric system, including a plan to provide an option to customers to receive service from other power suppliers within 10 years. Condition two committed LIPA to paying no more than book value for the generating assets if it exercised its right to purchase the generating assets. Third, GENCO (or Newco, as it is referred to in the PACB resolution) had to agree with LIPA to invest at least $1.3 billion in energy-related and economic development projects and natural gas infrastructure projects in Nassau, Suffolk, and Queens. As the fourth condition, LIPA had to guarantee a 14% rate reduction over a 10-year period, excluding reductions attributable to Shoreham's property tax settlement. Lastly, as a fifth condition, LIPA agreed not to implement a rate increase of more than 2.5% over a 12-month period absent approval by the Public Service Commission after a full evidentiary hearing. See Suffolk County v. Long Is. Power Auth., 177 Misc. 2d 208, 215, 673 N.Y.S.2d 545, 550 (Sup. Ct. Nassau Cnty.. 1998). The PACB did not impose any condition related to limiting challenges of the assessments for property taxes on the generating facilities. See Krinick Aff., Ex. B.

On August 21, 1997, the LIPA Board of Trustees voted to accept the PACB conditions and again ratified the definitive agreements.

Following additional regulatory approvals, the transaction contemplated in the Agreement in Principle was consummated on May 28, 1998. See Town of Huntington, 2018 N.Y. Misc. LEXIS 3469, at *12, n.6.

Several years later, in 2004, LIPA withdrew all of the tax certiorari proceedings that were pending at the time of LIPA's acquisition of LILCO. See id. at *17. Then, in 2007, LIPA entered into the A&W with various KeySpan companies and National Grid USA in connection with the merger of KeySpan and National Grid. Section 11 of the A&W provided as follows:

> Notwithstanding any provisions to the contrary in the PSA or the June 26, 1997 Agreement and Plan of Merger, between the KeySpan parties and LIPA, for the term of the PSA National Grid and Genco hereby agree that unless directed to do so by LIPA, they shall not initiate any tax certiorari proceedings with respect to any Genco "Generating Facilities", as such term is defined in the PSA.

Id.; Krinick Aff., Ex C.

Pursuant to this provision, National Grid and GENCO, at LIPA's request, relinquished to LIPA all control over property tax challenges on the generating facilities. Unlike the original PSA, following execution of the A&W, there were no circumstances under which GENCO had the right—or discretion—to initiate tax certiorari proceedings on the generating facilities without LIPA's consent. This was negotiated as part of National Grid's assumption of KeySpan's obligations under the management services, power supply, and energy management agreements. See Town of Huntington, 2018 N.Y. Misc. LEXIS 3469, at *46; see also Krinick Aff., Ex. C.

Several months before the PSA expired, on or about October 10, 2012, LIPA and National Grid entered into the A&R PSA. See Town of Huntington, 2018 N.Y. Misc. LEXIS 3469, at *20; Krinick Aff., Ex. D. The A&R PSA took effect after the PSA expired and ran for another 15 years, or until 2028. As relevant here, it eliminated the restrictions on commencing

tax challenges contained in Section 21.16 of the original PSA and allowed GENCO to initiate such challenges "where appropriate." Section 12.2 of the A&R PSA provided, in pertinent part, as follows:

> Genco shall, where appropriate, file challenges to the property tax assessments for each Generating Facility as of the commencement of the Term of this Agreement and shall prosecute such challenges diligently and in good faith. Genco shall consult with LIPA prior to entering into any settlement of a property tax challenge which may reasonably be expected to affect LIPA property tax payment obligations hereunder.

2018 N.Y. Misc. LEXIS 3469, at *20; Krinick Aff., Ex. D.

The A&R PSA also added a provision (Section 24.10) that neither party shall have any obligation to any third party as a result of the agreement (i.e., no-third-party beneficiaries). See id.

Beginning in 2010, and for every year thereafter up to and including 2019, LIPA and National Grid commenced separate special proceedings in the Supreme Court, Suffolk County, against, inter alia, the Assessor of the Town, under Article 7 of the Real Property Tax Law to review the real property tax assessments on, inter alia, the Northport power plant (the Huntington tax certiorari proceedings"). See Town of Huntington, 2018 N.Y. Misc. LEXIS 3469, at *19.

B. Appellate Division Decision On LIPA's Standing To Challenge Property Taxes On Northport Power Plant

In the tax certiorari proceedings commenced by LIPA for the 2010-2014 tax years, the Town maintained that, although LIPA was paying the property taxes, it lacked standing to initiate tax certiorari proceedings because it was not the owner of the properties. The Town thus moved to dismiss LIPA's tax certiorari proceedings. In a decision and order dated September 16, 2015, the Supreme Court, Suffolk County (Bivona, J.) dismissed the proceedings commenced by LIPA. See Long Is. Power Auth. v. Assessor of the Town of Huntington, No.

35298/2010, 2015 N.Y. Misc. LEXIS 3420, 2105 N.Y. Slip Op. 31779(U) (Sup. Ct. Suffolk Cnty. Sep't 16, 2015), rev'd, 164 A.D.3d 591, 81 N.Y.S.3d 189 (2d Dep't 2018). LIPA appealed. In a decision and order dated August 8, 2018, the Appellate Division, Second Department reversed and held that, since the PSA required LIPA to pay all of the taxes levied against the properties, the tax assessments directly affected LIPA's pecuniary interest. Thus, LIPA has standing to challenge the assessments. See Matter of Long Is. Power Auth. v. Assessor of the Town of Huntington, 164 A.D.3d 591, 81 N.Y.S.3d 189 (2d Dep't 2018).

C. Supreme Court Judgment Declaring That Defendants Are Not Barred From Challenging Property Taxes On The Northport Power Plant

In 2011, the Town, among others, commenced an action against Defendants to recover damages for breach of contract and promissory estoppel, and for declaratory and injunctive relief in connection with Defendants' initiation of tax challenges on the Northport power plant. The gravamen of the Town's complaint was that Defendants were precluded from commencing tax certiorari proceedings on the Northport power plant because the condition contained in Section 21.16 of the PSA had not been met, i.e., taxes had not been disproportionately increased. The Town alleged that it was a third-party beneficiary of the PSA, that Defendants breached the PSA by commencing tax certiorari proceedings in violation of Section 21.16, and that Defendants breached the PSA by failing to renew it on substantially the same terms and conditions in violation of Section 12.1. The Town further alleged that Defendants were estopped from commencing tax certiorari proceedings because the Town relied to its detriment on promises made by LIPA's former Chairman, Richard Kessel, and others in letters, statements, and press releases. See Town of Huntington, 2018 N.Y. Misc. LEXIS 3489, at *21.

After issue was joined, the parties engaged in extensive discovery. Following the completion of discovery, Defendants moved for summary judgment. The Town cross moved for summary judgment.

After properly evaluating the PSA's language and considering all the pertinent evidence, the Supreme Court, Suffolk County (Emerson, J.) held that the Town is not an intended third-party beneficiary, but only an incidental beneficiary of Section 21.16, with no right to enforce it. See id. at *45. The court further held that even if the Town were an intended third-party beneficiary of Section 21.16, there was no breach of Section 21.16 by either LIPA or GENCO (i.e. National Grid). The court noted that all promises in Section 21.16 ran from GENCO to LIPA. The court further noted that LIPA made no promises in Section 21.16, and it imposed no limits or conditions on LIPA vis-à-vis property tax challenges. Further, there was no evidence that GENCO had commenced tax certiorari proceedings without LIPA's consent. See id. at *46-47.

The court held that Mr. Kessel's promises could not be used to vary, contradict, or modify the unambiguous terms of the PSA. Moreover, they were too vague and indefinite to be enforceable, and any reliance on them by the Town was unreasonable. They also could not bind GENCO or National Grid since Mr. Kessel was not authorized to act or speak for those entities. The court stated that at best, they were statements of policy which were not contractually binding on the Defendants. See id. at *42-45.

The court also concluded that the PSA expired on May 28, 2013 and was replaced with an entirely new agreement (the A&R PSA) with entirely renegotiated terms that, inter alia, allowed GENCO to challenge the plants' property tax assessments where appropriate. See id. at *47-48.

The Supreme Court thus granted Defendants summary judgment dismissing the Town's amended complaint and declaring that the Town "is not an intended third-party beneficiary of the Power Supply Agreement and that the [D]efendants may challenge the real-property tax assessments on the power-plant properties situated in the Town of Huntington." Id. at *54.

The Town has appealed the Supreme Court's decision. The appeal is fully perfected and awaits the scheduling of oral argument.

D. Plaintiff's Complaint

Plaintiff commenced this action by filing a Summons and Verified Complaint on March 10, 2020. See Krinick Aff., Ex. A (the "Complaint").

The lawsuit is an improper collateral attack on Defendants' ability to challenge property taxes on the Northport power plant.

Plaintiff's Complaint seeks a declaration that LIPA was required to obtain PACB review and approval for certain actions, namely LIPA's commitment to contracts which significantly modified the use of an asset (i.e. the 2007 A&W[1]) or were valued at more than one million dollars (i.e. the 2013 A&R PSA), and that LIPA's failure to do so allegedly resulted in illegal, void, and unenforceable contracts, which cannot support LIPA's standing and/or authority to initiate tax challenges on the Northport power plant. See Complaint at ¶ 18. Thus, according to Plaintiff, LIPA's tax certiorari proceedings should be dismissed. See id. As for National Grid, Plaintiff likewise seeks a declaratory judgment that National Grid's tax challenges are illegal to the extent they are based on the "unratified" agreements, and because the only contract purportedly approved by the PACB, to wit, the 1997 PSA, governs, which restricted National Grid's ability file tax challenges unless certain conditions were met or "unless directed to do so

[1] The Complaint erroneously refers to the A&W as the "2007 Power Supply Agreement." There is no 2007 Power Supply Agreement. The 1997 PSA expired by its terms in May 2013, and was thereafter replaced by the A&R PSA.

by LIPA." See id. at ¶¶ 18, 26. Plaintiff alleges that LIPA could not "grant direction to proceed to National Grid annually to go ahead with a tax challenge without annual PACB review and approval." Id. at ¶ 26.

The Complaint identifies nine "issues" that purportedly require judicial review and for which Plaintiff seeks declaratory relief. See Complaint at ¶¶ 19-27. Notably, all of Plaintiff's claims and challenges are predicated on LIPA's failure to submit either the 2007 A&W or the 2013 A&R PSA to the PACB for review and approval. See id. The Complaint further alleges that all tax certiorari proceedings initiated by Defendants from 2010 to 2019 are illegal. See id. at ¶¶ 21-26.

Plaintiff contends that, as a voting member of the Town Council, he has standing to maintain this action. See Complaint at ¶¶ 16-17. Specifically, Plaintiff alleges that in order to execute his duties and consider a proposed resolution of the Huntington tax certiorari proceedings, a declaratory judgment is required. See id. at ¶ 16. Plaintiff alleges that he is unable to consider and vote on the proposed settlement and resolution until the issues identified in paragraphs 19 through 27 of the Complaint are decided. See id. at ¶ 17.

This motion ensued.

STANDARD OF LAW

"A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted if 'documentary evidence utterly refutes [the] plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law.'" Greenberg v. Blake, 117 A.D.3d 683, 685, 985 N.Y.S.2d 279, 281 (2d Dep't 2014) (citation omitted).

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact

as to whether the statute of limitations is tolled or is otherwise inapplicable." Shah v. Exxis, Inc., 138 A.D.3d 970, 971, 31 N.Y.S.3d 512, 514 (2d Dep't 2016) (citation omitted).

In addition, a motion to dismiss pursuant to N.Y. C.P.L.R. 3211(a)(5) may be granted where, inter alia, an action is not maintainable on the grounds of collateral estoppel and/or res judicata. See Brooklyn Hospital-Caledonian Hospital v. Medical Liab. Mut. Ins. Co., 198 A.D.2d 318, 319, 603 N.Y.S.2d 182, 184 (2d Dep't 1993).

In determining a motion to dismiss pursuant to N.Y. C.P.L.R. 3211(a)(7), "[t]he sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Dinerman v. Jewish Bd. of Family & Children's Servs., Inc., 55 A.D.3d 530, 531, 865 N.Y.S.2d 133, 134 (2d Dep't 2008). Although "the pleading is to be afforded a liberal construction," a motion to dismiss will be granted where "even viewing the allegations as true, the plaintiff still cannot establish a cause of action." McGuire v. Sterling Doubleday Enters., L.P., 19 A.D.3d 660, 661, 799 N.Y.S.2d 65, 66 (2d Dep't 2005), appeal denied, 7 N.Y.3d 701, 818 N.Y.S.2d 191 (2006).

ARGUMENT

I. PLAINTIFF LACKS STANDING TO MAINTAIN THIS ACTION

Plaintiff's claims against Defendants are premised upon LIPA's purported violation of Public Authorities Law § 1020-f(aa), which provides that LIPA "shall not undertake any project without the approval of the [PACB][.]" Specifically, Plaintiff alleges that LIPA violated Public Authorities Law § 1020-f(aa) when it executed the A&W and the A&R PSA without submitting the agreements to the PACB for review and approval. Plaintiff, however, does not have standing to allege a violation of Public Authorities Law § 1020-f(aa) and, thus, to challenge LIPA's authority to enter into the A&W and A&R PSA without PACB approval.

To establish standing, a plaintiff must show that it has suffered an injury in fact that is distinct from that of the general public, and that the injury claimed falls within the zone of interests to be protected by the statute challenged. See Matter of Schwartz v Morgenthau, 7 N.Y.3d 427, 432, 823 N.Y.S.2d 761, 763-764 (2006); Rudder v. Pataki, 93 N.Y.2d 273, 280, 681 N.Y.S.2d 701, 705 (1999). In Matter of East End Prop. Co. # 1, LLC v. Kessel, 46 A.D.3d 817, 819, 851 N.Y.S.2d 565, 568 (2d Dep't 2007), appeal denied, 10 N.Y.3d 926, 862 N.Y.S.2d 328 (2008), the Appellate Division, Second Department explained that when challenging LIPA's authority to enter into contracts, a plaintiff must "demonstrate sufficient potential injury in fact to sustain their burden of establishing standing," and that "[i]n the absence of some injury in fact, the 'zone of interest' test [does] not confer standing . . . merely because [a plaintiff is a] customer[] of the utility."

Plaintiff alleges that he is "unable to fulfill his duties as a Town Council member" because he cannot "consider and vote on [the] proposed settlement proposals and resolutions" until the various "issues" he complains of are decided by this Court. See Complaint at ¶ 17. Plaintiff has not established that he has suffered any injury in fact that is within the zone of interests protected by the Public Authorities Law, or that he has suffered any alleged injury that is different from the general public. As noted above, Public Authorities Law § 1020-f(aa) mandates that, "[n]otwithstanding any other provision of law to the contrary," LIPA "shall not undertake any project without the approval of the [PACB]." Plaintiff cannot establish that his purported injury – that is, the inability to vote or consider a settlement – falls within the zone of interests protected by Section 1020-f of the Public Authorities Law. See East End Prop. Co. #1, LLC, 46 A.D.3d at 819, 851 N.Y.S.2d at 568.

The Appellate Division, Second Department's decision in East End Prop. Co. #1, LLC v. Kessel, supra, is instructive. There, appellants, civic associations, challenged, inter alia, LIPA's authority to enter into a power purchase agreement and other related agreements to construct and operate a dual-fuel, combined-cycle combustion turbine generator on a 15-acre parcel of land in the Town of Brookhaven. Appellants alleged that LIPA's failure to submit the agreements to the PACB violated Public Authorities Law § 1020-f. The Appellate Division held that appellants did not have standing to maintain a cause of action alleging violations of Public Authorities Law § 1020-f(aa). 46 A.D.3d at 819, 851 N.Y.S.2d at 568. The individual appellants' statements that they were New York State citizen taxpayers and LIPA ratepayers were insufficient to confer standing. The court held "the individual appellants failed to demonstrate sufficient potential injury in fact to sustain their burden of establishing standing to challenge the power of [LIPA] to enter into a contract without approval from the Public Authorities Control Board." Id. The court noted that, in the absence of some injury in fact, the "zone of interest" test will not confer standing on the individual appellants merely because they were customers of LIPA. Id. Similarly, the civic associations failed to allege a sufficient injury in fact in regard to LIPA's failure to obtain PACB approval. See id.

Analogously here, Plaintiff has not sufficiently alleged or demonstrated that he suffered an injury in fact that is within the zone of interests to be protected by the statute, or that is distinct from the general public.

Plaintiff relies on his status as a Town Council Member and Silver v. Pataki, 96 N.Y.2d 532, 730 N.Y.S.2d 482 (2001) to aver that he has standing to commence this action. Such reliance is unavailing, however, as Plaintiff's status as councilman does not confer standing. Plaintiff has failed to provide any support for the contention that his status as a Town Council

Member confers some special standing, and the case law provides the contrary – namely, that he must demonstrate an injury in fact notwithstanding his status as Town Council Member. See, e.g., Chatham Towers, Inc. v. Bloomberg, 6 Misc. 3d 814, 828, 793 N.Y.S.2d 670 (Sup. Ct. New York Cnty. 2004), aff'd as modified, 18 A.D.3d 395, 795 N.Y.S.2d 577 (1st Dep't 2005), appeal denied, 6 N.Y.3d 704, 811 N.Y.S.2d 337 (2006) (holding that petitioners, a congresswoman, a New York State senator, a House speaker, and a councilman lacked standing to sue, among others, the New York City Police Department after 9/11 because they could not "demonstrate that they suffer[ed] injury from the actions of the NYPD[]").

Moreover, Plaintiff conflates the issue of whether he has standing to maintain this action with the question of whether he has capacity to bring suit. As explained in the very same case relied on by Plaintiff, Silver v. Pataki, "[c]apacity to sue is a threshold matter . . . conceptually distinct from, the question of standing." 96 N.Y.2d at 537, 730 N.Y.S.2d at 486. Capacity concerns a party's "power to appear and bring its grievance before the court," and usually depends on a party's "status or . . . authority to sue or be sued." Id. However, whether a litigant has the capacity to bring a lawsuit is "related, but not identical to, the traditional 'zone of interest' analysis employed in determining standing." Id.

In Silver, the New York State Court of Appeals held that the plaintiff, a member of the New York State Assembly, who had the responsibility to consider and vote on legislation, had the capacity to bring an action to "to vindicate the effectiveness of his vote" based upon his allegation that his vote was being usurped or nullified. See 96 N.Y.2d at 537-538, 730 N.Y.S.2d at 485. The Court further concluded that the plaintiff had standing to commence the action because he had suffered an injury in fact with respect to the alleged unconstitutional nullification of his vote. See id., 96 N.Y.2d at 539, 730 N.Y.S.2d at 488. Silver is entirely distinguishable

from the case at bar and, at best, demonstrates that an injury in fact must be shown in order to demonstrate standing. Whether Plaintiff has the legal capacity to bring this action is separate from the question of whether he has standing to maintain this action, and Plaintiff has failed to demonstrate the requisite injury in fact to give rise to standing.

II. PLAINTIFF'S CLAIMS ARE BARRED BY THE FOUR-MONTH STATUTE OF LIMITATIONS

Even if Plaintiff had standing to assert his claims against Defendants – he does not – Plaintiff's claims against Defendants are nonetheless time barred and must be dismissed. The four-month statute of limitations contained in N.Y. C.P.L.R. § 217 is strictly construed. See Loon Lake Estates, Inc. v. Adirondack Park Agency, 83 Misc. 2d 686, 691, 372 N.Y.S.2d 865, 870 (Sup. Ct. Essex Cnty. 1975), mod. by, 85 Misc. 2d 929, 380 N.Y.S.2d 464 (Sup. Ct. Essex Cnty. 1975) ("[C.P.L.R. § 217] clearly express[es] a strong legislative intent and policy: administrative determinations must be reviewed promptly"). Plaintiff's claims for declaratory judgment are subject to the four-month statute of limitations imposed by N.Y. C.P.L.R. § 217 because they are most closely analogous to an Article 78 claim, and because the action is challenging an agency action or determination. See, e.g., In re Long Is. Power Auth. Ratepayer Litig., 47 A.D.3d 899, 900, 850 N.Y.S.2d 609, 610 (2d Dep't 2008) ("Although the plaintiffs cloaked their causes of action in terms of breach of contract, . . . , the gravamen of their complaint was that LIPA's rate increases were made in violation of lawful procedure, affected by an error of law, or were arbitrary and capricious or an abuse of discretion . . . . Accordingly, the proper procedural vehicle by which to challenge the rate increases was a proceeding pursuant to CPLR article 78, which is governed by the four-month statute of limitations set forth in C.P.L.R. 217"); County of Suffolk v. Long Is. Power Auth., 38 Misc. 3d 1232(A), 969 N.Y.S.2d 802 (Sup. Ct. Suffolk Cnty. 2010), aff'd, 100 A.D.3d 944, 954 N.Y.S.2d 619 (2d Dep't 2012), lv. denied,

20 N.Y.3d 1030, 960 N.Y.S.2d 344 (2013) (holding that where claims for, among other things, declaratory relief "sound[] as an Article 78 proceeding, the [plaintiff] will be held to the four-month limitations period even though he does not assert his claim in the form of such a proceeding").

Plaintiff's Complaint seeks a declaratory judgment that LIPA's purported failure to obtain PACB review and approval for the A&W and the A&R PSA resulted in illegal or unenforceable contracts, which cannot support Defendants' standing and/or authority to initiate the Huntington tax certiorari proceedings. As such, Plaintiff claims that the Huntington tax certiorari proceedings initiated by Defendants from 2010 to 2019 are illegal.

Plaintiff's claim that LIPA improperly failed to submit either the A&W or the A&R PSA to the PACB for review and approval is time barred. LIPA entered into the A&W with National Grid approximately 13 years ago on March 22, 2007. Similarly, LIPA and National Grid entered into the A&R PSA on or about October 10, 2012, more than seven years ago. The A&R PSA took effect on May 28, 2013, more than seven years ago. Accordingly, any challenge to LIPA's ability to enter into these agreements is clearly time barred.

III. PLAINTIFF'S CLAIMS ARE DEVOID OF MERIT AS A MATTER OF LAW

Although far from a model of clarity, the allegations in the Complaint against Defendants boil down to the following erroneous argument: (i) LIPA did not obtain PACB approval of either the A&W or the A&R PSA; (ii) absent PACB approval, the A&W and the A&R PSA are void and unenforceable; (iii) because the A&W and the A&R PSA are void and unenforceable, they cannot provide Defendants with standing and/or authority to file property tax challenges; and (iv) Defendants' standing and/or authority to file property tax challenges is derived exclusively from the void and unenforceable A&W and A&R PSA and, as such, the tax challenges that Defendants filed from 2010 through 2019 are illegal.

There is no dispute that LIPA did not submit either the A&W or the A&R PSA to the PACB for review and approval. No such approval was required because neither the A&W nor the A&R PSA constitutes a "project" under the LIPA Act. Even if the A&W and the A&R PSA were subject to PACB approval, however, Plaintiff's Complaint is nonetheless barred by the doctrines of res judicata and/or collateral estoppel. Indeed, the instant action amounts to nothing more than an impermissible attempt to challenge Defendants' standing and/or authority to file property tax challenges, claims and/or issues that have already been decided against the Town and by extension Plaintiff – who commenced the instant action as a member of the Huntington Town Council and, thus, for the benefit of the Town.

A. Plaintiff's Claims Fail Because Neither The A&R PSA Nor The A&W Are Subject To Pacb Approval

Pursuant to the LIPA Act, LIPA must seek PACB approval before it undertakes a "project." Pub. Auth. L. § 1020-f(aa). The term "project" is narrowly defined in the LIPA Act as follows:

> [A]n action undertaken by [LIPA] that: (i) Causes [LIPA] to issue bonds, notes or other obligations, or shares in any subsidiary corporation, or (ii) Significantly modifies the use of an asset valued at more than one million dollars owned by [LIPA] or involves the sale, lease or other disposition of such an asset, or (iii) Commits [LIPA] to a contract or agreement with a total consideration of greater than one million dollars and does not involve the day to day operations of [LIPA].

Pub. Auth. L. § 1020-b(12-a) (emphasis added).

Plaintiff seeks a declaration that "the failure of [LIPA] under the Public Authorities Law to obtain [PACB] review and approval mandated under Public Authorities Law for actions including committing to contracts valued at over a million dollars without PACB review and approval resulted in illegal and void and unenforceable contracts." Complaint at ¶ 18. More specifically, Plaintiff seeks a declaration that the A&R PSA and the A&W are "illegal" because

they were not submitted to the PACB for approval and committed LIPA to purchases of over $1 billion and $5 billion, respectively. See id. at ¶¶ 19-20. Plaintiff also seeks a declaration that the A&W is "illegal" because it was not submitted to the PACB for approval and constitutes an "unlawful disposition" of an asset valued at more than a million dollars, namely, the PSA. See id. at ¶ 23.

Plaintiff, however, is not entitled to the relief sought because neither the A&R PSA nor the A&W is a "project" subject to PACB approval.

1. The Statutory Intent And Plain Meaning Of The LIPA Act

"It is fundamental that a court, in interpreting a statute should attempt to effectuate the intent of the Legislature." Anonymous v. Molik, 32 N.Y.3d 30, 37, 84 N.Y.S.3d 414, 419 (2018) (citation omitted). Generally, "[t]he statutory text is the clearest indicator of legislative intent" and a court "should construe unambiguous language to give effect to its plain meaning." Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Group LLC, 34 N.Y.3d 1, 7, 108 N.Y.S.3d 375, 378 (2019) (citation omitted). Where the statutory language is ambiguous, New York courts may examine the statute's legislative history. Matter of Shannon, 25 N.Y.3d 345, 351, 12 N.Y.S.3d 600, 604 (2015). "Legislative purpose, not linguistic perfection, guide's [the court's] determination" and thus the court "must seek to give meaning to the (ambiguous) term . . . in the context of the statute's over-all objective." Gevorkyan v. Judelson, 29 N.Y.3d 452, 460, 58 N.Y.S.3d 253, 257-258 (2017) (citation omitted).

"In interpreting statutory language, 'all parts of a statute are intended to be given effect' and a 'statutory construction which renders one part meaningless should be avoided.'" Molik, 32 N.Y.3d at 37, 84 N.Y.S.3d at 419 (citation omitted). Further, "a statute . . . must be construed as a whole" and "its various sections must be considered together and with reference to each other." Matter of N.Y. County Lawyers' Ass'n v. Bloomberg, 19 N.Y.3d 712, 721, 955 N.Y.S.2d 835,

841 (2012) (citation omitted). Notably, "[w]henever a word is used in a statute in one sense and with one meaning, and subsequently the same word is used in a statute on the same subject matter, it is understood as having been used in the same sense." Benesowitz v. Metropolitan Life Ins. Co., 8 N.Y.3d 661, 668, 839 N.Y.S.2d 706, 710 (2007) (citation omitted); see also Bankers Trust Corp. v. New York City, 301 A.D.2d 321, 332, 750 N.Y.S.2d 29, 38 (1st Dep't 2002), aff'd in part, mod. in part, 1 N.Y.3d 315, 773 N.Y.S.2d 1 (2003) ("In the absence of anything in the statute indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or a related statute") (citation omitted). "In the absence of a statutory definition, courts in New York 'construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase.'" Yaniveth R. v. LTD Realty Co., 27 N.Y.3d 186, 192, 32 N.Y.S.3d 10, 13 (2016) (citation omitted).

Here, although the LIPA Act does not define the phrase "involve the day to day operations," when considered in the context of the Legislature's purpose in creating LIPA and the regular course of LIPA's business, it is clear that the phrase includes LIPA's execution of the A&R PSA and the A&W. In addition, the various provisions of the LIPA Act, when construed as a whole, establish that the term "asset" does not include a contract or agreement such as the PSA.

a. The A&R PSA Is Not A "Project"

LIPA's primary mission is to effectuate the legislative policy of "assuring provision of an adequate supply of electricity in a reliable, efficient and economic manner, and retaining existing commerce and industry in and attracting new commerce and industry to the service area." Pub.

Auth. L. § 1020-a. LIPA has broad powers to accomplish its statutory objectives. See Pub. Auth. L. §§ 1020-a, 1020-c, 1020-f, 1020-g, 1020-h; Citizens for an Orderly Energy Policy, 78 N.Y.2d at 414, 576 N.Y.S.2d at 185. Moreover, the LIPA Act must be liberally construed to effectuate its purposes. See Pub. Auth. L. § 1020-kk.

The Legislature recognized that LIPA would necessarily need to enter into contracts exceeding $1,000,000 that "involve the day to day operations" of a utility company. In order to avoid effectively paralyzing LIPA's ability to meet its statutory obligations, the Legislature expressly exempted such contracts from the definition of "project" and, thus, from the requirement of PACB approval.

Notably, although LIPA generally has the power "[t]o make and execute agreements, contracts and other instruments necessary or convenient in the exercise of the powers and functions of the authority[,]" Pub. Auth. L. § 1020-f(h), LIPA is also expressly authorized "[t]o enter into agreements to purchase power from the power authority of the state of New York, the state, any state agency, any municipality, any private entity, or any other available source at such price or prices as may be negotiated[.]" Pub. Auth. L. § 1020-f(r).

LIPA does not and has never owned any fossil fuel power plants. As such, in order to fulfill its statutory purpose to provide electricity to its customers, LIPA must enter into power supply agreements and/or power purchase agreements (collectively, "Power Agreements") to purchase that electricity, which it then resells to residents and businesses. Indeed, LIPA's routine execution of Power Agreements to purchase electricity from private energy suppliers is the essence of LIPA's day-to-day energy operations and is done in the regular course of LIPA's business. See, e.g., Palmer v. Hoffman, 318 U.S. 109, 115 (1943) (noting that the "'regular

course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business").

On or about October 10, 2012, LIPA and National Grid entered into such an agreement for the purchase of power when they executed the A&R PSA. See Krinick Aff, Ex. D. The A&R PSA took effect upon the expiration of the PSA on May 28, 2013 and provides for LIPA's purchase of power from National Grid-owned generating facilities on improved terms and conditions. See id. Based upon the foregoing, the A&R PSA involves the day-to-day operations of LIPA and is not a "project" under the LIPA Act. Accordingly, the A&R PSA was not subject to PACB approval.

b. The A&W Is Not A "Project"

In 2007, prior to the expiration of the PSA and the execution of the A&R PSA, LIPA and the National Grid/KeySpan Companies executed the A&W. The merger of KeySpan and National Grid resulted in a change of control under various documents, including the PSA (collectively, the "Affected Agreements"). As a result of this change in control, LIPA was entitled to declare an event of default under the Affected Agreements and terminate the Affected Agreements. Rather than declare an event of default and terminate the Affected Agreements, however, LIPA negotiated and executed the A&W. See Krinick Aff., Ex. C.[2]

Contrary to Plaintiff's contentions, the A&W did not dispose of the PSA (or any of the Affected Agreements for that matter). Instead, the A&W modified the PSA and the Affected

[2] LIPA acted within its authority in deciding against declaring an event of default under the Affected Agreements. See, e.g., Pub. Auth. L. § 1020-f(a) (LIPA is authorized to "sue and be sued in all courts and to participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise"); Pub. Auth L. § 1020-f(h) (LIPA has the power "[t]o make and execute agreements, contracts and other instruments necessary or convenient in the exercise of the powers and functions of the authority, . . . including contracts with any person, firm, corporation, municipality, state agency or other entity"). LIPA's decision as to whether to declare an event of default under the Affected Agreements does not constitute a "project" under any subsection of Section1020-b(12-a) of the LIPA Act.

Agreements, all of which otherwise remained in full force and effect. See id. at p.10, 11. Since the PSA, like the A&R PSA, is a contract for the purchase of power, it involves LIPA's day-to-day operations and is not a "project" under the LIPA Act. Accordingly, the A&W – which modified the PSA – is likewise not a "project" subject to PACB review and approval.

Perhaps recognizing this inescapable conclusion, Plaintiff seeks a declaration that the A&W is "illegal" because it unlawfully disposed of an asset valued at more than one million dollars – the PSA – without PACB approval. Plaintiff's attempt to characterize the PSA as an "asset" under the LIPA Act must fail.

Although the term "asset" is not defined in the LIPA Act, when the statute is read as a whole, as it must be, it is clear that the term does not include an agreement or contract such as the A&W or PSA. First, the definition of "project" already contains a specific provision that addresses contracts and agreements (Section 1020-b(12-a)(iii)) that is separate from the provision relating to assets (Section 1020-b(12-a)(ii)). As such, at best, the A&W modified the PSA – a contract or agreement with a total consideration of greater than one million dollars that involves LIPA's day-to-day operations and is not subject to PACB approval.

Second, the term "asset" is also used in Section 1020-f of the LIPA Act, which provides that LIPA has the power "[t]o sell, convey, lease, exchange, transfer, abandon or otherwise dispose of, or mortgage, pledge or create a security interest in, all or any of its assets, properties or any interest therein, wherever situated[.]" Pub. Auth. L. § 1020-f(f). To interpret the term "asset" to include a contract or agreement would render provisions of Section 1020-f(f) meaningless (i.e. how would one "lease" or "exchange" a contract or agreement, and where would a contract or agreement be "situated"?) Accordingly, the language utilized in this provision supports LIPA's interpretation that the term "asset" in the LIPA Act does not include a

contract or written agreement. In addition, it bears noting that Section 1020-f of the LIPA Act, like the provision defining the term "project," contains a separate provision addressing LIPA's rights with respect to contracts and agreements. See Pub. Auth. L. §§1020-f(h), 1020-f(r).

Based upon the foregoing, the A&W is not a "project" under the LIPA Act. As such, the A&W was not subject to PACB approval. [3]

2. The Practical Interpretation And Past Practices By LIPA And The PACB Are Entitled To Deference

It is well-settled that the "construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." Barenboim v. Starbucks Corp., 21 N.Y.3d 460, 972 N.Y.S.2d 191 (2013) (quoting Chesterfield Assocs. v. N.Y. State Dep't of Labor, 4 N.Y.3d 597, 797 N.Y.S.3d 389 (2005)). Indeed, "[i]t is well established that when 'the interpretation of a statute involves specialized knowledge and understanding of underlying operational practices . . . the courts should defer to the administrative agency's interpretation." Int'l Union of Painters & Allied Trades, District Council No. 4 v. N.Y. State Dep't of Labor, 32 N.Y.3d 198, 208, 88 N.Y.S.3d 136, 142 (2018); see also N.Y. State Ass'n of Life Underwriters, Inc. v. N.Y. State Banking Dep't, 83 N.Y.2d 353, 360, 610 N.Y.S.2d 470, 473 (1994) (same). Although courts will not generally defer to administrative agencies in matters of "pure statutory interpretation," deference is appropriate "where the question is one of specific application of a broad statutory term." O'Brien v. Spitzer, 7 N.Y.3d 239, 242, 818 N.Y.S.2d 844, 845 (2006); see also Kolb v. Holling, 285 N.Y. 104, 32 N.E.2d 811 (1941) (noting that the practical construction put upon a statute by the Legislature or by departments of State government is entitled to great weight, if not controlling influence, when

[3] It bears noting that New York State Attorney General and the State Comptroller approved the A&W and the A&R PSA in accordance with Pub. Auth. L. § 1020-cc(a) and New York State Fin. L. § 112(2)(a). See Krinick Aff., Exs. C, D.

such practical construction has continued in operation over a long period of time). The foregoing principles establish that no PACB approval was required for either the A&W or the A&R PSA.

As an initial matter, Plaintiff erroneously alleges that the PACB approved the PSA. See Complaint at ¶¶ 18, 24, 26. In or around 1997, LIPA executed several agreements, including the PSA, in connection with its acquisition of LILCO. LIPA's acquisition of LILCO indisputably constituted a "project" under the LIPA Act and LIPA therefore submitted the Acquisition Agreement – along with other ancillary agreements designed to implement the acquisition, including the PSA – to the PACB as part of that "project." The PACB approved the "project" – not the PSA – subject to five conditions, none of which related to the terms and conditions of the PSA. See Krinick Aff., Ex. B.

Since May 1998, LIPA has sought PACB approval in connection with various "projects," as defined under Public Authorities Law § 1020-b (12-a), including financings, real property leases, asset acquisitions and more. See Krinick Aff. at ¶ 11. None have included a request for approval of a Power Agreement. Indeed, since its inception, LIPA has entered into numerous Power Agreements with developers and power suppliers, all of which have been in excess of $1,000,000. See id. These agreements are part of LIPA's day-to-day obligation to secure safe and affordable electricity for its customers, and, thus, expressly excluded from the "projects" defined under Public Authorities Law § 1020-b(12-a). Accordingly, LIPA has never submitted a Power Agreement to the PACB for approval, because such approval is not required.

Likewise, the PACB has never sought to review any Power Agreement entered into by LIPA. The A&R PSA, however, was submitted to and approved by the New York Attorney General and New York State Comptroller. See id., Ex. D.

In sum, the A&R PSA and A&W did not require PACB review and approval and therefore, there is no substantive merit to Plaintiff's claims as a matter of law.

IV. PLAINTIFF IS PRECLUDED FROM ASSERTING HIS CLAIMS AND/OR IS NOT ENTITLED TO THE RELIEF SOUGHT

Even assuming, arguendo, that Plaintiff had standing to assert his claims (he does not) and that Plaintiff's claims were not time-barred (which they are) and that LIPA was somehow obligated to submit the A&W and A&R PSA to the PACB for approval (it was not), Plaintiff's Complaint is nonetheless barred by the doctrines of res judicata and/or collateral estoppel.

As explained below, the Town already has vigorously litigated claims and/or issues concerning (i) Defendants' authority to file property tax challenges under the PSA; (ii) LIPA's authority to prosecute tax challenges as National Grid's assignee; and (iii) LIPA's standing to file property tax challenges (the "Prior Decisions"). Despite the Town's efforts, its attempts to create a scenario in which neither LIPA nor National Grid could file and maintain property tax challenges on the Northport power plant have failed.

In an attempted end-run around these Prior Decisions, Plaintiff commenced the instant action in which he seeks the same relief unsuccessfully sought by the Town, namely, a finding that the tax certiorari proceedings filed by Defendants are "illegal." Although Plaintiff seeks this relief under the guise of a novel legal theory (PACB approval), not only does Plaintiff's "theory" lack merit for the reasons set forth herein, but Plaintiff – who sues in his capacity as "Huntington Town Council Member" for the benefit of the Town – is precluded from re-litigating the claims in his Complaint under the doctrines of res judicata and/or collateral estoppel.

A. Plaintiff's Claims Regarding Defendants' Authority To File Property Tax Challenges Under The PSA Are Barred By Res Judicata

"Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same

transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding." Bayer v. City of New York, 115 A.D.3d 897, 898, 983 N.Y.S.2d 61, 63 (2d Dep't 2014). "In determining whether a factual grouping constitutes a transaction for res judicata purposes, a court must apply a pragmatic test and analyze how the facts are related as to time, space, origin or motivation, whether they form a convenient trial unit and whether treating them as a unit conforms to the parties' expectations or business understanding." Matter of Haberman v. Zoning Bd. of Appeals of City of Long Beach, 119 A.D.3d 789, 791-792, 990 N.Y.S.2d 245, 247 (2d Dep't 2014) (affirming the lower court's conclusion that proposed counterclaims were barred by the doctrine of res judicata where said counterclaims sought "to recover what is essentially the same relief for [the same alleged] harm arising out of the same or related facts such as would constitute a single 'factual grouping'") (citation omitted); see also Schwartzreich v. E.P.C. Carting Co., Inc., 246 A.D.2d 439, 441, 668 N.Y.S.2d 370, 372 (1st Dep't 1998) ("Generally a set of facts will be deemed a single 'transaction' for res judicata purposes if the facts are closely related in time, space, motivation, or origin, such that treating them as a unit would be convenient for trial and would conform to the parties' expectations.")

Notably, "[t]he fact that causes of action may be stated separately, invoke different legal theories, or seek different relief will not permit relitigation of claims." Pondview Corp. v. Blatt, 95 A.D.3d 980, 980, 943 N.Y.S.2d 754, 755 (2d Dep't 2012) (internal quotation marks and citation omitted); see also Union St. Tower, LLC. v. Richmond, 84 A.D.3d 784, 785, 922 N.Y.S.2d 503, 505 (2d Dep't 2011), lv. dismissed, 18 N.Y.3d 946, 944 N.Y.S.2d 469 (2012) ("The doctrine of res judicata 'operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same

factual grouping or transaction and which should have or could have been resolved in the prior proceeding.'")

"Generally, to establish privity the interests of the nonparty must have been represented by a party in the prior proceeding." Bayer, 115 A.D.3d at 898, 983 N.Y.S.2d at 63; see also Bayshore Family Partners, L.P. v. Foundation of Jewish Philanthropies of the Jewish Federation of Greater Fort Lauderdale, 270 A.D.2d 374, 375, 704 N.Y.S.2d 631, 633 (2d Dep't), appeal denied, 95 N.Y.2d 756, 712 N.Y.S.2d 447 (2000) (noting that the term privity denominates a rule whereby a person may be bound by a prior judgment to which he was not a party of record and includes those whose interests are represented by a party to the action).

"For the doctrine of res judicata to apply, there must have been, in the prior proceeding, a final judgment on the merits." Bayer, 115 A.D.3d at 899, 983 N.Y.S.2d at 64. "An order granting a summary judgment motion is on the merits and has a preclusive effect." Methal v. City of New York, 50 A.D.3d 654, 656, 855 N.Y.S.2d 588, 589 (2d Dep't 2008). A pending appeal does not alter the applicability of the doctrine of res judicata. See Plaza PH2001 LLC v. Plaza Residential Owner LP, 98 A.D.3d 89, 98, 947 N.Y.S.2d 498, 505 (1st Dep't 2012); see also People ex rel. McGoldrick v. Baldwin Gardens, Inc., 283 A.D. 897, 898, 130 N.Y.S.2d 166, 167-168 (2d Dep't), appeal denied, 283 A.D. 1058, 131 N.Y.S.2d 449 (1954) ("[T]he final order in the article 78 proceeding . . . is res judicata and conclusive upon the parties . . . notwithstanding that an appeal has been taken from that order.")

As explained herein, in 2011, the Town commenced an action (the "Town Action") against LIPA and National Grid in which it asserted claims for breach of the PSA, promissory estoppel, and for declaratory and injunctive relief based upon Defendants' filing of property tax challenges on the Northport power plant. More specifically, the Town alleged that Defendants

were precluded from filing property tax challenges on the Northport power plant because there was a condition precedent to filing such tax challenges in Section 21.16 of the PSA that never occurred (i.e., taxes had not been disproportionately increased). The Town also alleged that it was a third-party beneficiary of the PSA and that Defendants breached the PSA by filing property tax challenges in violation of Section 21.16 and by failing to renew the PSA on substantially the same terms and conditions in contravention of Section 12.1 of the PSA. The Town further alleged that Defendants were estopped from filing property tax challenges because the Town relied to its detriment on promises made by Richard Kessel, LIPA's former Chairman, and others in letters, statements, and press releases.

In response to motions for summary judgment filed by the Town and Defendants, the Supreme Court, Suffolk County (Emerson, J.) issued a twenty-four (24) page decision (the "2018 Decision"). See Town of Huntington, 2018 N.Y. Misc. LEXIS 3469; Krinick Aff., Ex. G. In the 2018 Decision, the Supreme Court expressly held that the Town is not an intended third-party beneficiary of Section 21.16 of the PSA and does not have any right to enforce it. See Town of Huntington, 2018 N.Y. Misc. LEXIS 3469, at *45. The Supreme Court further held that even if the Town were an intended third-party beneficiary of Section 21.16, LIPA, GENCO, and National Grid did not breach Section 21.16. See id. at *45-*46. The Supreme Court noted that Section 21.16 did not impose any limitation on LIPA vis-à-vis property tax challenges, and there was no evidence that GENCO or National Grid filed property tax challenges without LIPA's consent. See id. at *46-*47.

The Supreme Court further held that Mr. Kessel's promises could not be used to vary, contradict, or modify the unambiguous terms of the PSA. See id. at *53. They also could not bind GENCO or National Grid since Mr. Kessel was not authorized to act or speak for those

entities. See id. at *45. In addition, the Supreme Court noted that Mr. Kessel's promises were too vague and indefinite to be enforceable, and any reliance upon them by the Town was unreasonable. See id. at *53.

In the 2018 Decision, the Supreme Court also concluded that the PSA expired on May 28, 2013 and was replaced with an entirely new agreement (the A&R PSA) with renegotiated terms that, inter alia, allowed GENCO to challenge property assessments on its generating facilities where appropriate. See id. at *47-48.

Based upon the foregoing, the Supreme Court awarded summary judgment to Defendants and dismissed the Town's amended complaint declaring that the Town "is not an intended third-party beneficiary of the Power Supply Agreement and that the [D]efendants may challenge the real-property tax assessments on the power-plant properties situated in the Town[.]" See id. at *53-*54. The Town appealed the 2018 Decision and its appeal has been fully perfected and the parties await the scheduling of oral argument.

Now, in an obvious attempt to re-litigate the very claims concerning Defendants' authority to file property tax challenges under the PSA, which have already been decided against the Town and are subject to a final judgment on the merits, Plaintiff has commenced the instant action. In the Complaint, for example, Plaintiff alleges that he is "entitled to [a] [d]eclaratory [j]udgment that . . . National Grid Generation LLC's status as a plaintiff [in the property tax challenges] is limited by the absence of National Grid Generation LLC from the last PACB approved [PSA] in 1997, the restrictions on any filing by National Grid Generation LLC in the 1997 [PSA], and the illegal termination of the 1997 [PSA] by the defendants National Grid Generation LLC and [LIPA] in 2007." Complaint at ¶ 18. More specifically, Plaintiff alleges the following:

> Under Public Authorities Law, are National Grid Generation LLC and LIPA tax challenges in 2010, 211, 2012 and 2013 governed by the 1997 PACB approved [PSA], and, if so, would National Grid have to provide evidence of Town action in violation of the 1997 PACB approved [PSA] reflecting an increase in assessment in violation of Section 21.16 of the 1997 PSA? Was LIPA mandated to submit to PACB the issue of whether they had authority under the "unless directed to do so by LIPA" language of the 1997 [PSA] limiting National Grid's ability to file a tax challenge before providing "direction" to National Grid to file any tax challenges? Plaintiff seeks [a] declaratory judgment that National Grid['s] tax challenges are unsupported. Plaintiff notes that . . . the 1997 PSA approved by [the] PACB imposed limitations on National Grid filing a tax challenge which involve LIPA action. LIPA could not "grant direction to proceed" to National Grid annually to go ahead with a tax challenge without annual PACB review and approval. The underlying condition in the [PSA] required Town . . . action triggering LIPA's direction to National Grid. Such action by the Town never occurred. The lack of any PACB review and approval for LIPA to provide "direction" to National Grid Generation LLC to file a tax challenge renders National Grid tax challeng[e] filings illegal.

Id. at ¶ 26 (emphasis added).

Plaintiff's attempt to assert the same claims decided against the Town concerning Defendants' right to file property tax challenges under the PSA fails. Plaintiff seeks the same relief (a finding that Defendants were not permitted to file property tax challenges) for the same alleged harm (Defendants' filing of property tax challenges) arising out of the same or related facts (Defendants' rights under the PSA).

Moreover, Plaintiff's claims alleging that the A&W and the A&R PSA should have been submitted to the PACB for approval are barred because they arise out of the same transactions that were raised or could have been raised in the Town Action. Indeed, Plaintiff's claims relate to the same agreements addressed in the Town Action, the same time period addressed in the Town Action, and the motivation behind the instant action – to obtain the dismissal of Defendants' property tax challenges – is the same as the motivation behind the Town Action.

Finally, it is incontrovertible that the interests of Plaintiff, who commenced this action as "Huntington Town Council Member," were represented by the Town in the Town Action. Indeed, Plaintiff expressly alleges that the instant action relates to his "duties as an elected legislator as Town of Huntington Town Council Member." See Complaint at ¶ 15. More specifically, Plaintiff alleges that he requires the relief sought in the Complaint "in order to execute his duties as a Huntington Town Council Member" and "to fulfill his duties as a Town Council member to consider and vote on proposed settlement proposals and resolutions." See Complaint at ¶¶ 16-17. Thus, there can be no doubt that Plaintiff has brought the instant action for the benefit of the Town. Plaintiff who, as Town Council Member, stands in the shoes of the Town and is in privity with the Town, is barred from litigating claims that were decided against the Town and/or that should or could have been raised by the Town.

Based upon the foregoing, Plaintiff's Complaint is barred by the doctrine of res judicata.

B. Any Claims By Plaintiff Concerning LIPA's Standing To File Property Tax Challenges And/Or LIPA's Right To File Property Tax Challenges As An Assignee Are Barred By Collateral Estoppel

"Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity." Buechel v. Bain, 97 N.Y.2d 295, 303, 740 N.Y.S.2d 252, 257 (2001), cert. denied, 535 U.S. 1096, 122 S. Ct. 2293 (2002). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party against whom the issue was decided] had a full and fair opportunity to litigate the issue in the earlier action." River View at Patchogue, LLC v. Hudson Ins. Co., 122 A.D.3d 824, 825, 998 N.Y.S.2d 55, 57 (2d Dep't 2014).

"The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of issues in the present litigation and the prior determination, whereas the party

attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action." Suter v. Ross, 179 A.D.3d 1127, 1127, 118 N.Y.S.3d 188, 190 (2d Dep't 2020).

"Generally, a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation." D'Arata v. New York Central Mut. Fire Ins. Co., 76 N.Y.2d 659, 664, 563 N.Y.S.2d 24, 27 (1990).

1. The Appellate Division Decision

In or around 2015, the Town moved to dismiss the tax certiorari proceedings that LIPA commenced for the 2010-2014 tax years on the ground that LIPA did not have standing to file property tax challenges because, although it paid the property taxes, it was not the property owner. In a decision and order dated September 16, 2015 (the "Bivona Decision"), the Supreme Court, Suffolk County (Bivona, J.) dismissed the tax certiorari proceedings commenced by LIPA. Long Is. Power Auth. v. Assessor of the Town of Huntington, No. 35298/2010, 2015 N.Y. Misc. LEXIS 3420, at *5, 2015 N.Y. Slip Op. 31779(U) (Sup. Ct. Suffolk Cnty. Sep't 16, 2015), rev'd, 164 A.D.3d 591, 81 N.Y.S.3d 189 (2d Dep't 2018). LIPA appealed, and in a decision and order dated August 8, 2018 (the "Appellate Division Decision"), the Appellate Division, Second Department reversed and held that, since the PSA required LIPA to pay all of the taxes levied against the properties, the tax assessments directly affected LIPA's pecuniary interest. Thus, the Appellate Division concluded that LIPA has standing to challenge the assessments. Matter of Long Is. Power Auth. v. Assessor of the Town of Huntington, 164 A.D.3d 591, 81 N.Y.S.3d 189 (2d Dep't 2018).

In the present case, Plaintiff is precluded from re-litigating the issue of whether LIPA has

standing to file property tax challenges since that issue already has been decided against the Town in the Appellate Division Decision. It is incontrovertible that the Town had a full and fair opportunity to litigate the issue of LIPA's standing as it was an issue that was the subject of a motion filed by the Town. Moreover, for the reasons explained herein, it is plain that Plaintiff's rights, as "Huntington Town Council Member," are identical to the rights of the Town. Therefore, any attempt by Plaintiff to re-litigate the issue of LIPA's standing to file property tax challenges is barred by the doctrine of collateral estoppel.

2. The 2017 Supreme Court Decision

After the Bivona Decision (which dismissed the property tax challenges filed by LIPA on the ground of lack of standing), but before the Appellate Division Decision (which reversed the Bivona Decision and expressly held that LIPA had standing to file property tax challenges), on January 11, 2017, National Grid, the owner of the Northport power plant who had commenced property tax challenges in its own name for the same tax years as LIPA, assigned all of its own property tax challenges to LIPA. The Assessor of the Town of Huntington, the Board of Assessment Review of the Town of Huntington, and the Town (collectively, the "Respondents") moved to invalidate the assignments in the Huntington tax certiorari proceedings. By Order dated December 12, 2017 (the "2017 Supreme Court Decision"), the Supreme Court, noting that National Grid, as the owner of the Northport power plant, was presumptively an aggrieved party and that Respondents were not challenging National Grid's standing to file property tax challenges, expressly held that "LIPA may prosecute the tax certiorari proceeding as National Grid's assignee." See Krinick Aff., Ex E.

Here, Plaintiff is precluded from re-litigating the issue of whether LIPA may prosecute property tax challenges as National Grid's assignee since that issue already has been decided against the Town in the 2017 Supreme Court Decision. It is indisputable that the Town had a

full and fair opportunity to litigate the issue as the Town expressly moved to invalidate the foregoing assignments. Moreover, as noted above, Plaintiff's rights, as "Huntington Town Council Member," are identical to the rights of the Town. Accordingly, any attempt by Plaintiff to re-litigate the issue of whether LIPA may prosecute tax challenges as National Grid's assignee is barred by the doctrine of collateral estoppel.

C. Plaintiff Is Not Entitled To The Relief Sought

Even assuming, arguendo, that Plaintiff is correct (he is not) and the A&W and the A&R PSA are subject to PACB approval, Plaintiff's contention that the A&W and the A&R PSA are "void and unenforceable" is wrong. There is simply no basis in the LIPA Act, or otherwise, that would support Plaintiff's misguided conclusion. Rather, the available remedy would be for LIPA to submit the A&W and the A&R PSA to the PACB for review and approval. In fact, it bears noting that LIPA has the authority to "initiate suit, or to apply to any legislative body for legislation, or to take such other action as it may deem necessary or advisable in the furtherance of the purposes of this title and for the protection of its rights, if for any reason [LIPA] shall fail to secure any such license, permit or approval as it may deem necessary or advisable[.]" Pub. Auth. L. § 1020-g(f). As such, even if the A&W and the A&R PSA had been submitted to the PACB and the PACB had not approved them, this would not automatically render the agreements "void and unenforceable."

Nevertheless, neither LIPA nor National Grid must rely upon the A&W and/or the A&R PSA for authorization to file property tax challenges. As such, even assuming, arguendo, that Plaintiff were correct and the A&W and the A&R PSA are void and unenforceable for want of PACB approval (they are not), Plaintiff is not entitled to a declaration that the property tax challenges filed by Defendants are "illegal." Defendants' standing and/or authority to maintain the property tax challenges are independently based.

First, if the A&W and the A&R PSA were deemed void and unenforceable and the PSA were the operative document, as Plaintiff contends, any claims or issues raised by Plaintiff concerning Defendants' rights under the PSA are barred by the 2018 Decision, including Plaintiff's claim that National Grid is prohibited from commencing tax certiorari proceedings because of the limiting condition in the PSA and/or that LIPA is not authorized to file property tax challenges under the PSA.

Second, in the absence of the PSA, there is nothing that prohibits or limits National Grid, as the owner of the Northport power plant, from filing tax challenges on its property or assigning its tax certiorari proceedings to LIPA. Any argument by Plaintiff to the contrary would be barred by the 2017 Supreme Court Decision.

Accordingly, there is no scenario in which Plaintiff can obtain the remedy he is seeking in the Complaint, namely, a declaration that Defendants' property tax challenges are illegal and void, even if Plaintiff's arguments are taken to their logical and untenable conclusion.

CONCLUSION

For the reasons set forth herein, this Court should grant Defendants' motion and dismiss Plaintiff's Complaint in its entirety, with costs pursuant to 22 N.Y.C.R.R. § 130-1.1, along with such other and further relief as this Court may deem just and proper.

Dated: July 16, 2020

Respectfully submitted,

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