SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
---X

HUNTINGTON TOWN COUNCIL MEMBER
EUGENE COOK,

Index 604663/2020

Plaintiff,

Justice Emerson

V

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

Defendants
---X

PLAINTIFF MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS LONG ISLAND POWER AUTHORITY AND NATIONAL GRID GENERATION LLC. MOTION TO DISMISS

LAWRENCE E. KELLY
Attorney for Plaintiff
Huntington Town Council
Member Eugene Cook
11 Cedar Bay Court
Bayport New York. 11705
631 965 6213
Email: iraqprtkelly@yahoo.co

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LIPA has been engaged in a continuing pattern of illegal conduct in not submitting LIPA "projects" to the Public Authorities Control Board (PACB) for review and approval. In this way, LIPA has acted ultra vires, violating clearly established state law which created and constrains LIPA (Public Authorities Law) and in a manner which has caused continuous harm.

It is black letter law that a contract entered into in violation of a statute is an unlawful undertaking and such an illegal contract cannot give rise to a viable cause of action. Carmine v Murphy 285 NY 413, 416 ; cited in Scott v Mei 219 AD 2d 181 (First Department 1996).

RPAPL 741 (4) requires a petition in a special proceeding state the facts upon which the special proceeding is based. Where a petitioner is not authorized to act, or the petition is not accompanied by proof of the latter's authority, the petition is legally insufficient to obtain relief. Siegal v Kentucky Fried Chicken of Long Island 108 AD 2d 218 (Second Department 1985) affirmed 67 NY 2d 792 (1986)

"The Power Supply Agreement terminated on May 28, 2013, at the end of its 15 year term, and the Amended PSA took effect for another 15 years. The Amended PSA was not merely an extension of the terms of the original Power Supply Agreement, but an entirely new agreement with entirely renegotiated terms...." Decision of Justice Emerson August 15, 2018 Board of Education of Northport-East Northport Union Free

School District et al., v Long Island Power Authority et. al., (Suffolk Supreme Court)

Illegal LIPA "projects" have included :

1) The 2013 Power Supply Agreement never submitted to PACB for review and approval;
2) The 2013 Agreement if viewed as a "Renewal" or "Amendment" of the 1997 Power Supply Agreement which was approved as originally presented to PACB in 1997 with LIPA removing Section 21.16 without PACB review and approval in 2007 and 2013;
3) The 2007 Power Supply Agreement never submitted to PACB for review and approval;
4) The 2007 Power Supply Agreement if viewed as a "Renewal" or "Amendment" of the 1997 Power Supply Agreement which was approved as originally presented to PACB in 1997 ; in LIPA removing Section 21.16 and replacing same without PACB approval in 2007;
5) LIPA/National Grid "Assignment of a claim for damages" of "rights, title, interest and obligation" in litigation under Index numbers 35300/2010, 30975/2011, 03116/2012, 063223/2013, 068404/2014 and others involving Town of Huntington without PACB review and approval;
6) The filing of tax certiorari actions in Suffolk Supreme Court as against Huntington Town Assessor by LIPA and National Grid without PACB review or approval of the filings or PACB review or approval of the "amended" agreements or PACB review or approval of the purportedly ratified agreements supposedly justifying the filings ;
7) The LIPA appeals of State Supreme Court decisions adverse to LIPA's interest in 35300/2010, 15186/2011 and other Suffolk Supreme Court matters involving Town of

Huntington tax assessments on the Northport power plant including appeal of Justice Bivona's decision removing LIPA from the tax certiorari action, such LIPA appeals arising without PACB approval of appeal bond applications or other obligations undertaken by LIPA on the appeal for LIPA as appellant including prospective imposition of costs where PACB review and approval prior to using the power supply agreement as an asset to Initiate the tax certiorari action is statutorily mandated. Under Connolly v Long Island Power Authority 2018 NY Slip Op. February 20, 2018 (NY Court of Appeals) , LIPA's real property tax litigation is a proprietary function and not that of a governmental entity. An appeal bond is required for appeals by appellants in tax challenges.

THE AEP DECISION AND RIVKIN RADLER'S DUTY
TO PROVIDE THE COURT WITH THE LAW

Nassau Supreme Court Justice Winslow made his finding on the PACB/ Power Supply points in the AEP Resources Services v Long Island Power Authority 179 Misc. 2d 639 (1999) decision. The AEP decision is absent from LIPA's motion to dismiss despite the same law firm having argued and lost in that AEP matter on the same argument made by LIPA and National Grid herein. Plaintiff notes that LIPA did not appeal Justice Winslow's decision. Plaintiff notes that such Nassau Supreme Court decision on the key point in this matter is precedent in the State of New York and in the Tenth Judicial District encompassing Nassau and Suffolk Supreme Courts.

This declaratory judgment by Town Council Member Cook asks the court to recognize the ongoing fraud the defendants have now enlarged by dint of this motion. In cases where there is no factual issue presented by the pleadings or where the facts are undisputed, a court

may award judgment to the appropriate party. Cohen v Employers Reins. Corp. 117 AD435 (1st Dept. 1986) . Plaintiff should be granted judgment based upon the defendants admission to illegal conduct, ultra vires activities which are acts beyond the restrictions imposed on Long Island Power Authority under Public Authorities Law.

There is no dispute now that LIPA did not obtain PACB review and approval for power supply agreements in 2007 or 2013, nor did LIPA obtain PACB review and approval for what they characterize as "amendments" to the 1997 agreement. The 1997 agreement, under the original 1997 Section 21.16, restricted GENCO challenges to tax assessments "...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 status dates." . These power supply agreements are all valued individually in excess of a million dollars.

The 1997 Power Supply Agreement submitted to PACB stated at

Section 21.6. Amendments:

"No amendments or modifications of this Agreement shall be valid unless evidenced in writing and signed by duly authorized representatives of both parties."

Any LIPA signature to any amendment to the 1997 Power Supply Agreement would have to be signed off on and approved by PACB before any LIPA officer was "duly authorized" to sign the amendment removing restrictions on filing tax assessment challenges. Matter of Suffolk County v Long Island Power Authority 177 Misc. 2d 208 (1998).

Tenth District caselaw in New York State Supreme Court and Public Authorities Law mandates LIPA submit and obtain approval from PACB for power supply agreements valued at

over a million dollars. AEP Resources Service Co. v Long Island Power Authority 179 Misc. 2d 639 (1999)

The PACB Board may approve applications and may consider collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities proposed to be undertaken (Public Authorities Law Section 51).

The "projects" left unreviewed, unapproved and with no limiting conditions imposed by PACB include (A) two power supply agreements (2007 and 2013) upon which LIPA has paid out over $450 million a year , (B) the 2007 asset transfer with LIPA where National Grid and Keyspan exchanged a LIPA authority asset ($69 million asset = existing contractual rights under the 1997 existing power purchase agreement) with Keyspan and National Grid paying LIPA $69 million to have LIPA waive its contractual right to declare a default (United States Securities and Exchange Commission Form 8-K . Keyspan Corporation July 19, 2007), (C) the 2013 power supply agreement and (D) "assignment" of the asset of rights and obligation in litigation by National Grid to LIPA where litigants seek hundreds of millions of dollars. Defendants allege that PACB never "approved" the 1997 power supply agreement despite LIPA submitting the power supply agreement to PACB. If that is the case, defendants are in violation of the PACB review and approval requirement for all the power supply agreements, and all the power supply agreements are void and unenforceable under the Nassau Supreme Court cases cited below. It is up to LIPA to seek PACB review and approval under Public Authorities Law.

1998 AND 1999 NASSAU SUPREME CASES ESTABLISHED PACB REVIEW AND APPROVAL MANDATE IN CASELAW AS WELL AS PUBLIC AUTHORITIES LAW

Two Nassau Supreme Court cases litigated in 1998 and 1999 by LIPA's present counsel (Rivkin Radler) for LIPA affirmed these PACB mandates enshrined in Public Authorities Law.

In Matter of Suffolk County v Long Island Power Authority 177 Misc.2d 208 (1998), Supreme Court Justice Winick outlined the compulsory nature of PACB review and approval prior to any legitimate ratification of a LIPA contract valued at over a million dollars which did not involve the day to day operations of LIPA.

LIPA, in that case, encouraged the Supreme Court's broad view of the powers of PACB (and took a position seeming in conflict with their present contention that PACB had no oversight of the 1997 power supply agreement). With that broad view of PACB powers of oversight winning the day (encouraged by LIPA and their counsel), the Supreme Court decided in LIPA's favor, upholding the LIPA Board ratification of the directions of the PACB Board after the submission of the 1997 power supply agreement to PACB.

In AEP Resources Service Co. v Long Island Power Authority 179 Misc. 2d 639 (1999), LIPA's attorney, again Rivkin Radler, took a different tack. LIPA argued it had no obligation to seek PACB review and approval for a $200 million contract for underwater cable power supply. LIPA argued it had no obligation to submit the proposed power supply contract to PACB because it was a day to day obligation of LIPA to provide power. The Supreme Court rejected LIPA's argument, and stated in its decision:

"The Court rejects this contention. The contract is clearly a "project" within the meaning of the statute. While this court does not dispute that an undersea cable system will operate daily, it does not follow that the award of the contract in issue involves LIPA's day-to-day operations. Clearly, the awarding of a $200 million construction contract is not something

LIPA does day-to-day nor does it constitute a part of such day-to-day operation of LIPA so as to be excluded from the statutory definition of "project" and thus be exempt from PACB review. Were LIPA's interpretation of Public Authorities Law Section 1020-b Pub Auth. accurate, then few, if any contracts would be reviewable by the PACB, clearly an unintended result."

Supreme Court Justice Winslow opinion
AEP Resource Service Co v LIPA
179 Misc. 2d 639 (1999)

LIPA did not appeal Justice Winslow's decision. Plaintiff notes that Public Authority Law 1020 b (12-a) i, requires PACB review and approval for an action which causes LIPA to issue bonds or other obligations. In 1999, LIPA did not initiate an appeal of a decision denying their contention LIPA did not have to obtain PACB consent for a power supply agreement. Plaintiff is uncertain as to whether LIPA filing an appeal may have required a bond or initiated some "obligation" which required separate PACB approval under Public Authorities Law 1020 b (12-a) i.

In their Memorandum of Law in the motion to dismiss, the Cook Declaratory Judgment, Defendants LIPA and National Grid Generation LLC counsel acknowledge that ;

"There is no dispute that LIPA did not submit the (2007 transition of LIPA power supply agreement from Keyspan to National Grid Generation LLC) or the (2013 LIPA power supply agreement with National Grid Generation LLC) to the PACB for review and approval."
Defendants LIPA and National Grid Generation LLC Memorandum of Law at page 21

Despite Rivkin Radler being LIPA counsel on the AEP Supreme Court matter and decision, LIPA and its counsel did not provide this court with that case, a summary of the court's decision or make any attempt to distinguish the opinion.

Instead, LIPA and Rivkin Radler merely repeat the same discredited assertion submitted and rejected in the AEP matter by the State Supreme Court. Moreover, they repeat the assertion without advising this court of the previous ruling.

In the defendants' 2020 Memorandum of Law, LIPA and National Grid Generation LLC argue;

"Since the (2007 Power Supply Agreement) like the (2013 Power Supply Agreement) 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 (2013 Power Supply Agreement) is not a "project" subject to PACB review and approval."

Defendants LIPA and National Grid Generation LLC Memorandum of Law at page 26.

In addition to the Nassau Supreme Court caselaw left undisclosed by LIPA, there is also the reality of LIPA's structure which discredits their argument.

"LIPA is unlike any typical utility...It has to operate its utility business ....within the confines and constraints of its enabling statute. Core functions that are normally central to a utility, such as operations, maintenance and construction work, are executed by National Grid and LIPA has minimal direct involvement in the day to day operations. "

Executive Summary page 1-2 : "The Comprehensive Management and Operations Audit of Long Island Power Authority" submitted upon the direction of the New York Public Service Commission Department of Public Service 2013 by Northstar Consulting Group, Inc. The report continued : "LIPA's day to day power supply management (PSM functions-bidding and scheduling of all LIPA Generating Facilities and purchases and sales of energy capacity and ancillary services – are provided by CEE and PACE. CEE provides "front" and "back" office PSM

services...PACE provides middle office PSM services, which includes the monitoring of the performance of CEE's PSM activities." Northstar Report at page 18-7.

Under Public Authorities Law, TOWN COUNCIL MEMBER EUGENE COOK's asserts herein that clear language of the Public Authorities Law renders the LIPA and National Grid tax challenges illegal, and their case filings fraudulent. Under clearly established statutory and caselaw within the Tenth Judicial District, a power supply agreement valued at over a million dollars is a LIPA project which requires PACB review and approval. Amendments to such a power supply agreement require PACB review and approval.

ULTRA VIRES ACTS AND CONTINUOUS HARM

Since Bronx Borough President Abrams filed action against the New York City Transit Authority, the New York Court of Appeals has made the distinction between standing by a public official to correct illegality of official action (where standing exists) and standing in order to interpose litigating plaintiffs into the management and operation of public enterprises (where standing does not exist (Matter of Abrams v New York City Transit Authority 39 NY2d 990,992). A court may prevent a member of the executive branch from acting ultra vires, in bad faith, or arbitrarily. Roberts v Health and Hospitals Corporation 87 AD3d 311 (2011) . In failing to request and obtain PACB approval for decade long power supply agreements valued at hundreds of millions of dollars in annual expenditures, LIPA is acting ultra vires and in bad faith. The Court of Appeals held that "We are now prepared to recognize standing where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action. Boryszewski v Brydges 37

NY2d 361, 364

Where the meaning of a statute is in question, an action for declaratory judgment is appropriate. Dun & Bradstreet Inc. v City of New York 276 NY 198, 206 (1937). While generally the statute of limitations for a declaratory judgment action is six years as prescribed by CPLR 213(1) (Saratoga County Chamber of Commerce v Pataki 100 NY2d 801, 815 (2003), no period of limitation is applicable to an action for declaratory judgment in cases involving a continuing harm, such as the application of an invalid statute. Amerada Hess v Acampora 100 AD2d 719, 722 (Second Department 1985), Davis v Rosenblatt 159 AD2d 163, 168 (Third Department 1990). Such government actions are in the nature of a continuing trespass. The Amerada court adopted the holding in MacEwan v City of New Rochelle 149 Misc. 251 (1933) which held that an unconstitutional ordinance until its repeal or a judicial declaration of its invalidity constitutes at least the equivalent of a continuing invasion of plaintiff's property rights akin to a continuing trespass. As a consequence, a new cause of action arises in plaintiff's favor against the defendants each day.

THE AEP DECISION AND COLLATERAL ESTOPPEL

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. Ryan v New York Telephone Company 62 NY2d 494, 500 (1984), Ripley v Storer 309 NY 506, 517. Collateral estoppel allows the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided. Gramatan Home Investors Corp. v Lopez

46 NY2d 481, 485. The issue must have been material to the first action or proceeding and essential to the decision rendered therein. Silberstein v Silberstein 218 NY 525, 528 and it must be the point actually to be determined in the second action or proceeding. The AEP decision merits collateral estoppel as against the defendants on the issue presented herein for declaratory judgment as to the definition of project , PACB oversight under Public Authorities Law, and the relationship of that oversight function to the power supply agreements, amendments to power supply agreements and assignment of rights in litigation.

As to defendants' position that, having kept the AEP decision from the court, they are entitled to res judicata or collateral estoppel , it needs to be pointed out that a sole Town Council member is not the entirety of the Town Board, and does not act as a Town Board acts. Moreover, there is no collateral estoppel or res judicata impact as against an individual town council member's filing on matters which concern ultra vires acts of a rogue entity. The collateral estoppel and/or judicial estoppel balance is , rather, an aid to Plaintiff Huntington Town Council Member Eugene Cook. A case directly on point litigated by LIPA's counsel has only been disclosed by plaintiff in this plaintiff's memorandum in opposition while left undisclosed by moving defendants wide ranging memorandum of law which cites 48 other cases. Collateral estoppel bars the defense argument that a power supply agreement is outside PACB oversight as allegedly involving day-to-day activities of LIPA. Judicial estoppel is also available to the court to keep litigants from playing fast and loose with the court.

Plaintiff files this declaratory judgment action when the initiating trigger for the

defendants illegal tax challenge actions , a series of contracts and purported obligations and assignments, are nullities under Public Authorities Law and Tenth Judicial District caselaw in the absence of PACB review and approval.

As defendants have continued this illegal course of conduct throughout a decade of court cases, failing to disclose relevant caselaw and failing to seek to distinguish same in applications to the court, they are properly barred by the court's equitable and legal powers from obtaining relief from those same courts.

LIPA IS A CREATION OF STATUTE AND LIMITED BY THAT STATUTE, PUBLIC AUTHORITIES LAW

In addition to the "project" definitions outlined herein and in the Complaint for Declaratory Judgment, the law in the State of New York has been updated as to the impact of paying real property taxes as a purported basis for standing in a tax challenge. It is no longer arguable that paying taxes pursuant to a presumably valid contract is a basis for standing Larchmont Pancake House v Board of Assessors 2019 NY Slip Op 02441. This tenet is even more on point when the purported contracts are disclosed to be , as to 2007 and 2013, nullities and void as a matter of law in the absence of PACB review and approval.

Giving credence to those contracts at any time was a malign imposition on the courts as the agreements and contracts and assignments used by LIPA and National Grid Generation LLC to argue for standing are a nullity under Public Authorities Law. By skirting the Public Authorities Control Board (PACB) mandated review and approval process for "projects" made a part of the LIPA Act creating LIPA (Public Authorities Law), LIPA engaged in corrupt activity.

In providing LIPA Board of Trustees approval to power supply contracts in excess of a million dollars and in filing the tax challenges on the basis of the power supply agreements without PACB review and approval, LIPA moved beyond the boundaries imposed on LIPA by Public Authorities Law. As a creature of statute, LIPA lacks powers not granted it by express or necessarily implicated legislative delegation. Abiele Contracting Inc. v New York City School Construction Authority 91 NY 2d 1, 2 (1997) .

In addition to being a violation of the Public Authorities Law at its inception as a power supply agreement valued at over a million dollars without PACB review and approval, the LIPA amendment of the use of the obligation by LIPA to file tax challenges is a separate violation of the restrictions of the Public Authorities Law. This requirement of PACB review and approval prior to "duly authorized" LIPA action exists at the time LIPA committed to paying the assessed taxes as part of the costs of a power supply agreement valued at over a million dollars in 1997. LIPA's initiation of a tax challenge without PACB review and approval of the anticipated tax challenge filing is ultra vires under Public Authorities Law

LIPA shed its legitimacy in avoiding PACB review and approval, in initiating unauthorized tax challenges and in conducting a campaign to intimidate elected officials and the news media with fears of a tax Armageddon brought about by LIPA's misconduct.

LIPA was created to remedy the shipwreck created by LILCO. LIPA was not created to go off on its own and find another iceberg. PACB was designated to prevent that harm.

As a Huntington Town Council member, Eugene Cook's zone of interest includes standing to halt ultra vires government actions. The majority in Silver v Pataki noted the "The capacity and standing of an individual legislator to seek judicial redress in these

circumstances is essential to protect the separation of powers and rights of the legislative branch." 96 NY 2d 532. Even the dissent in Silver v Pataki 96 NY 2d 532 (2001) concluded that cases very much on point to Council Member Cook's circumstances fit into Judge Graffeo's more limited view of legislator capacity to seek judicial redress. Citing Matter of Sullivan v Seibert 70 AD2d 975 (failure of executive agencies to comply with statutory requirement for the filing of annual reports with the legislature) and Winner v Cuomo 176 AD 2d 60 (Governor's failure to submit budget bills to Legislature within constitutionally prescribed time period); Where "...defendant impinges upon the Legislature's opportunity to timely review his proposals and hampers the ability to question Executive Department heads regarding the budget...plaintiff suffer injury within their zone of interest....Silver v Pataki 96 NY2d 532 (2001).

LIPA skipped applying to PACB for specific review and failed to provide permissions an outline reviewing the lack of impact on real estate taxes, review by PACB, veto decisions or approval decisions, all depriving Town Council Member Cook of important and statutorily mandated PACB data meant to supplement an authority application to PACB and to the court and to be available to the individual Town Council Member.

The lack of data impairs plaintiff Cook's legislative abilities to act on a set of facts with certain data hidden or, illegally, never made available.

Huntington Town Council Member Cook now has to decide whether to vote to accept whether illegal, unratified and unapproved contracts as the basis for illegal and unauthorized tax challenges can continue to harm the citizens who elect him..

Once the criminal activity is disclosed, as it has in the declaratory judgment action, Town Council Member Cook seeks a determination as to whether the defendants

criminal behavior harms him in his role as an elected Town Council Member in the Town of Huntington, whether the criminal conduct is acceptable to the court, a court of law and equity which has been misled throughout litigation as to the supposed legal efficacy, ratification and legal existence of the power supply agreements and "assignments" of rights and obligations without PACB review and approval.

THE LARCHMONT DECISION IN THE COURT OF APPEALS
AND LIPA'S MISLEADING THE COURT

In the Defendants Memorandum of Law, defense counsel states that "Plaintiff erroneously alleges that the PACB approved the PSA...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...". Since May 1998, LIPA has sought approval in connection with various "projects" as defined under Public Authorities Law Section 1020-b (12-a)...None have included a request for approval of a Power Agreement. Indeed, since its inception, LIPA had 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 Section 1020 -b (12-a). Accordingly, LIPA has never submitted a Power Agreement to the PACB for approval, because such approval is not required....Although Plaintiff seeks this relief under the guise of a novel legal theory (PACB approval)...Defendants' Memorandum of Law numbered pages 28 and

29 NYS Doc. Number 12 pages 35 and 36 of 47 The 2019 Court of Appeals

Defendants Memorandum of Law describes plaintiff's theory as "novel" , Defendants felt confident enough in their fraud that they assert they have never submitted any PSA to PACB, that PSAs are part of LIPA's day-to-day obligations, and plaintiff's allegations have no substantive merit as a matter of law (pages 28 and 29).

In describing PACB approval as a "novel legal theory", the counsel for LIPA would have had the court believe such a theory had never been litigated in a Supreme Court courthouse on Long Island. In describing PACB approval as having "no substantive merit" , counsel for the defense would have the court believe that no Supreme Court Justice would have ever entertained such a concept.

The AEP decision smashes that deceptive posturing.

Just as the AEP decision eliminates the defendants ability to continue to deceive on the "projects" definition, the decision in Larchmont Pancake House v Board of Assessors 2019 NY Slip Op 02441 undermines the argument that paying taxes on a property , even under a properly authorized power supply agreement, makes that party an aggrieved party within the meaning of RPTL Article 7. The absence of a PACB ratified contract, indeed the reliance on a void and unenforceable contract (now disclosed to be a nullity) , leaves defendants with no theory of standing sufficient under Article 7's aggrievement procedures either before or following the Larchmont Pancake House decision. The failure to submit the proposed tax challenges to PACB for review and approval or the imposition of conditions in the first instance is, in and of itself, a separate violation of Public Authorities Law rendering the tax challenges illegal. These aspects of the fraud were not made known to the court in the Huntington

matters.

If LIPA were the owner of the property, LIPA would be mandated to make payments in lieu of taxes (hereinafter "PILOTs ") at the full assessment tax levels created by town tax assessors (Public Authorities Law 1020-q). LIPA claimed that their payment of taxes through LIPA Board ratified contracts provided a basis for their presence in the tax challenge actions. The law of New York State , even as to legally PACB reviewed, approved and ratified contracts is now to the contrary. Payment of the taxes by LIPA for 2014 arising from a 2013 LIPA agreement not provided to for review , approval or ratified by PACB does not aid LIPA. That contractual agreement is, in terms of a basis for jurisdiction for the benefit of LIPA, a nullity.

PROJECTS AND THE VARIOUS DEFINITIONS OF SAME
IN PUBLIC AUTHORITIES LAW

Under Public Authorities Law there are a variety of definitions for a "project" which comes under PACB review and approval responsibility.

" An action taken by (LIPA) that causes (LIPA) to issue bonds, notes or other obligations is a "project". (Public Authorities Law 1020-b (12-a) i.

"An action taken" "that causes" "to issue bonds" "notes" "or other obligations" are all separate actions which can come under PACB review.

The "obligation" to purchase billions of dollars of power from National Grid Generation LLC independently qualified as a "project" under the "obligations" language of that section of Public Authorities Law. Public Authorities Law 1020-f (aa) and Public Authorities Law 1020-b (12-a) (i) requires PACB review and approval. (1020-b (12-a) (i) for an action undertaken

that (i) causes (LIPA)...to issue bonds, notes or other obligations ...) .

Further, under Public Authorities Law 1020-b (12-a) ii ; any LIPA action which significantly modifies the use of an asset (such as the asset valued at the $69 million paid by Keyspan and National Grid) as a basis for a tax challenge comes under the definition of "project" in Public Authorities Law 1020-f (aa) (ii).

The filing of tax challenges as to the Northport power plant was not reviewed or approved by PACB at any time despite the impact on real property taxes in the service area (one of the considerations set out in the Public Authorities Law statute).

Finally, under Public Authorities Law 1020-b (12-a) iii comes the point made in the AEP v LIPA Nassau Supreme Court case in 1999 still abides, as a separate definition of "project", any LIPA action which commits LIPA to a contract or agreement with consideration of more than one million dollars and does not involve "day to day operations" comes under the definition of "project" (Public Authorities Law 1020-b (12-a)(iii).

Day to day day operations of LIPA are, by Management Services Agreement and the provisions of the LIPA Act, provided by PSEG Long Island. A 2013/2014 audit of LIPA submitted to the Department of Public Service confirmed that LIPA was not involved in day to day operations, having outsourced such core functions.

LIPA now argues, in order to deflect from the actual project definition in Public Authorities Law 1020-b (12-a)(iii), that their 2013 Power Supply Agreements are the result of the multi billion dollar obligation enshrined in the contracts being "day to day" operations. That defense , while unavailing and part of a fraudulent concealment of precedent from the court, would not excuse the illegal decision to abrogate or eliminate the contractual obligation

to pay tens of millions of assessed real property taxes without first obtaining PACB review and approval of such change.

PACB review must be requested and PACB approval granted prior to (A) issuing obligations to pay for the billions of dollars of power supply (Public Authorities Law subdivision 1020-b(12-a)(i) , (B) prior to using the agreement as the basis for filing tax challenges (Public Authorities Law subdivision 1020-b (12-a) ii) and C) prior to entering into an agreement or contract with a consideration of greater than a million dollars which does not involve day to day operations (Public Authorities Law Subdivision 1020-b (12-a iii). These requirements exist every time LIPA and/or National Grid Generation LLC filed any tax challenge under the power supply contracts or assignments of rights, title, interest and obligation" in litigation and every day they continue those tax challenges in violation of clearly established law.

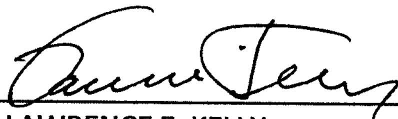
Neither LIPA nor National Grid Generation LLC obtained review or approval from PACB for the 2007 and 2013 agreements which serve as the alleged basis for their claims to rights to challenge the assessed taxes for the Northport power plant. The 2007 and 2013 agreements are a legal nullity under each of the three separate categories defining projects requiring review and approval. The 2007 and 2013 agreements are purported obligations never properly submitted for review and approval by the only state entity which could ratify the agreements and provide a sine qua non to creating a legally binding contract , PACB.

Town Council Member Cook has standing and an actual legal stake in the matter being litigated as a result of his elected position and the ultra vires actions of the defendants.

CONCLUSION

The Public Authorities Control Board passed a resolution in 1997 as part of the State's approval of the LIPA-LILCO disposition. PACB Resolution 97-LI-1 "Approving Certain Specified Projects of the Long Island Power Authority. , Project Identification, Project Condition " July 16, 1997. The term "projects" used by the PACB mirrors the language of the Public Authorities Law sections cited in the Request for Declaratory Judgment . "Project" was fully and finally defined as against LIPA's position in the decision of Justice Winslow in the AEP v LIPA Nassau Supreme Court case outlined herein. A "project" requires PACB review and approval. The only valid PACB approved power supply agreement as to the Northport power plant contains paragraph 21.16 restricting any tax challenges to a circumstance which has never occurred and paragraph 21.6 Amendments declaring that "No amendments or modification of this Agreement shall be valid unless evidenced in writing and signed by duly authorized representatives of both parties." The only "duly authorized" LIPA signature amending the 1997 PACB approved language would follow a separate PACB review and approval of the amended power purchase agreement. Declaratory Judgment should be granted for Town Council Member Eugene Cook on the instant application.

August 2, 2020



LAWRENCE E. KELLY
Attorney for Plaintiff Huntington
Town Council Member Eugene Cook
11 Cedar Bay Court
Bayport New York. 11705
631 965 6213
Email: iraqprtkelly@yahoo.com

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