SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

SIMON V. KINSELLA, et al.,

Plaintiffs,

-against-

LONG ISLAND POWER AUTHORITY, et al.,

Defendants.

Index No. 621109/2021

Motion No. 1

Hon. Carmen Victoria St. George

MEMORANDUM OF LAW IN OPPOSITION TO LONG ISLAND POWER AUTHORITY'S MOTION TO DISMISS

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Introduction

LIPA's award of a PPA to South Fork Wind cries out for a review on the merits by this Court. Long hidden from public scrutiny, LIPA's procurement of the South Fork Wind PPA violated fundamental principles of competitive bidding under New York law.

The result was a PPA looking nothing like what LIPA sought in the request for proposals it put out to bidders. Rather than obtain dispatchable power that could be used to meet peak demand during the summers on Long Island's South Fork, LIPA contracted for offshore wind power least likely to be reliably available to meet that demand.

In public documents and administrative filings, LIPA and South Fork Wind misrepresent what LIPA sought in its RFP. They describe the 2015-2016 procurement as LIPA seeking new sources of power generation to meet South Fork's power load requirements. They leave out that the LIPA RFP requested *local* power sources that could be *turned on and off as needed* to meet *peak* demand in the summer. LIPA manipulating the bidding to ignore those significant criteria and award the PPA to South Fork Wind.

In support of their motions to dismiss LIPA and South Fork Wind continue to deceive the public before this court describing the PPA procurement as soliciting "proposals to purchase generation and/or load reduction resources to meet load growth on the South Fork of Long Island" and claiming LIPA "established the South Fork Supply and Load Relief Project to defer new transmission needed on the South Fork of Long Island." That's not what the LIPA sought, and that's not what prospective bidders would have brought to the table.

No one who read the RFP would have concluded that a wind power project would be responsive. Regardless, LIPA and South Fork Wind proceed apace with a $1.6 billion PPA for offshore wind not designed to meet the South Fork's need for dispatchable

power to meet peak demand without adding new transmission. To add insult to injury, LIPA ratepayers will be paying a price premium for this power that won't meet their needs in an amount exceeding $1 billion.

Plaintiffs stepped up to stop this abuse and brought this declaratory judgment action because the $1.6 billion PPA award to a non-responsive bidder violated the state's procurement laws. Moreover, the PPA was not approved by the Public Authorities Control Board (PACB), which the Legislature tasked with protecting the interests of LIPA ratepayers and taxpayers in New York.

Counterstatement of Facts

A. The Request for Proposals.

LIPA provides an incomplete description of what was sought in the RFP, "to solicit proposals to purchase generation and/or load reduction resources to meet load growth on the South Fork of Long Island." LIPA intentionally omits that the RFP sought local power production resources located on Long Island that would be dispatchable to meet peak load (or peak electrical demand), without adding new transmission lines, and operational by May 1, 2019.

In the RFP, LIPA described electrical load growth on the South Fork of Long Island as increasing faster than the rest of Long Island.[1] The South Fork has a unique load profile where summer, weekend, and holiday activity in the Hamptons and surrounding towns cause electricity demand to peak at a different time than the rest of Long Island.[2]

[1] Complaint, ¶12.
[2] *Id*., ¶13.

According to LIPA, residential customers drive peak electricity demand on the South Fork, with 60 percent of that demand coming from air conditioning.[3]

The RFP requested proposals for "local resources" "located on Long Island" to meet "peak load" or peak electrical demand as an alternative to adding new transmission lines.[4] Local resources could be load reduction[5] or power production or a combination of the two.[6] Instead, LIPA selected a proposal from Defendant Deepwater Wind[7] for a 90 MW offshore wind project.

Contrary to the RFP criteria, offshore wind-generated power is unreliable and non-dispatchable because it depends on an intermittent resource to generate electricity.[8] Off-shore wind turbines cannot be switched "on" if the wind is not blowing.[9] Wind is least likely to be blowing during hot summer months–the precise time when LIPA required a power resource to meet peak loads from air conditioning use.[10]

The Deepwater Wind offshore wind project is not a local power generation resource, is not dispatchable, would not be operational until the end of 2022, and requires a new 60-mile offshore transmission line plus an onshore interconnection facility and substantial local transmission upgrades.[11]

Deepwater Wind submitted a bid proposing to install 15 six-megawatt wind turbines, with an aggregate nameplate capacity of 90 MW, approximately 30 miles off Montauk

[3] *Id*., ¶14.
[4] *Id*., ¶20.
[5] Load reduction typically includes behind-the-meter resources, meaning products or services that help the customer reduce power usage, especially during times of peak demand.
[6] *Id*., ¶21.
[7] South Fork Wind LLC fka Deepwater Wind South Fork LLC.
[8] *Id*., ¶5.
[9] *Id*., ¶6.
[10] *Id*., ¶7.
[11] *Id*., ¶33.

Point on eastern Long Island. Deepwater Wind proposed a commercial operating date of December 31, 2022 (later negotiated to December 1, 2022).

LIPA ignored its own criteria for peak demand power production resources and entered into a $1.625 billion power purchase agreement with bidder Deepwater Wind for an offshore wind project.

LIPA selected Deepwater Wind's proposal despite many deficiencies:

- It is not a "local resource" that is "located on Long Island;"
- It is not an alternative to adding new transmission lines;
- It does not defer the need for new transmission lines, but instead requires substantial transmission upgrades;
- It cannot reliably supply power to satisfy peak demand for electricity in response to air conditioner usage on the South Fork in the hotter months from June to September;
- The project cannot be a source of power until at least 2023 with a proposed commercial operating date of December 31, 2022; and
- It cannot supply a dispatchable resource capable of functioning in Operating Modes that require power to be turned on in response to a "trigger signal" (because turbines that depend on the wind cannot be turned on as demand requires.[12]

Contrary to state procurement law, LIPA awarded a power purchase agreement to a bidder whose proposal did *not* meet the minimum specifications or requirements as prescribed in the South Fork RFP and its Evaluation Guide.[13]

Moreover, Deepwater Wind's bid did not meet four mandatory criteria. Deepwater Wind proposed a December 31, 2022, commercial operating date–three and a half years later than the required date.[14] Deepwater Wind did not meet the requirement for a pricing

[12] 33.
[13] 34.
[14] 39.

mechanism for delay.[15] Deepwater Wind's proposed commercial operating date was two and half years later than any delay that could still meet the RFP's requirements.[16]

Further, mandatory criteria included the RFP requirement that any "[p]roposal must contain the location of any proposed facility requiring construction and/or permitting" by the submittal deadline (of December 2, 2015).[17] Deepwater Wind did not have locations for proposed facilities until one and a half years *after* the submittal deadline.[18] Deepwater Wind's proposal did not qualify as a stand-alone solution and could only qualify, in theory, in conjunction with separate battery storage proposals from other bidders.[19]

Further, the project requires a new 60-mile-long transmission line to connect the offshore wind turbines and offshore substation to a new onshore interconnection facility (substation). Deepwater Wind's proposed new transmission line includes substantial onshore infrastructure to accommodate high-voltage cables, such as duct-banks and splicing vaults.[20]

Deepwater Wind's proposed offshore wind project and 60-mile-long transmission system did not comply with either the mandatory criteria or the material specifications according to the RFP and Evaluation Guide.

B. The LIPA/Deepwater Wind Power Purchase Agreement.

On January 25, 2017, LIPA awarded Deepwater Wind a twenty-year power purchase agreement ("PPA") that the New York Office of the State Comptroller ("OSC") approved

[15] *Id*., ¶40.
[16] *Id*., ¶41.
[17] *Id*., ¶42.
[18] *Id*., ¶43.
[19] *Id*., ¶44-46.
[20] *Id*., ¶72.

on March 29, 2017.[21] LIPA agreed to purchase electricity from Deepwater Wind at an average price of *22 cents* per kilowatt-hour over the twenty-year life of the contract.[22]

In 2019, the New York State Energy Research and Development Agency finalized a contract for an adjacent offshore wind project, Sunrise Wind, only two miles away from Deepwater Wind's project, and Sunrise Wind's cost of electricity is *just 8 cents* per kilowatt-hour.[23] OSC valued Deepwater Wind's PPA at $1.625 billion, yet the cost for the same amount of renewable energy from Sunrise Wind will be only $595 million.[24]

Around the same time that LIPA was evaluating the South Fork RFP responses, it was also developing the Long Island Community Microgrid Project (the "LI Solar Microgrid").[25] The LI Solar Microgrid was planned for the Town of East Hampton and included 15 megawatts (MW) of new solar photovoltaic generation.[26]

The US National Renewable Energy Laboratory ("NREL") estimated the cost of constructing and installing the 15 MW solar facility to be $38.5 million.[27] NREL estimated that it would cost $4.4 million in total operational expenses over twenty years to run the 15 MW solar facility.[28]

NREL also provided an estimate of the amount of energy the facility would generate per month.[29] Based on NREL's independent analysis, the cost of power from LI Solar Microgrid's 15 MW solar facility would be half the price of power from South Fork

[21] *Id*., ¶48.
[22] *Id*., ¶49.
[23] *Id*., ¶50.
[24] *Id*., ¶51.
[25] *Id*., ¶55.
[26] *Id*., ¶56.
[27] *Id*., ¶57.
[28] *Id*., ¶58.
[29] *Id*., ¶59.

Wind.[30] NREL's analysis factors in periods of no generation at night and low generation on cloudy days.[31]

The LI Solar Microgrid proposal would supply power most efficiently as needed on hot sunny summer days when air conditioning usage peaks demand–the problem the South Fork RFP sought to solve.[32] During the summer peak demand period, the cost of energy from LI Solar Microgrid's 15 MW solar facility would have been one-third the price of power from South Fork Wind.[33]

Rather than find a way to make a sensible renewable energy project work, LIPA went forward with a project located 30 miles offshore, using technology that is least likely to provide power to meet peak demand as specified in the RFP.[34]

Plaintiffs are ratepayers in the affected service area who will be expected to bear the cost of higher rates resulting from the exorbitant price LIPA agreed to pay Deepwater Wind and endure insufficient power supplied from an unreliable power generating source at times of peak demand. Accordingly, they brought this declaratory judgment action to have the illegal PPA declared void.

Argument

A. Plaintiffs' Causes of Action Are Not Time-Barred.

Plaintiffs' requests to have the PPA declared void for violating state laws are subject to the six-year limitations period under CPLR 213(1).

[30] *Id*., ¶60.
[31] *Id*., ¶61.
[32] *Id*., ¶62.
[33] *Id*., ¶63.
[34] *Id*., ¶64.

1. Plaintiffs' Claims for Violations of the Procurement Laws Are Not Time-Barred.

A declaratory judgment action under CPLR § 3001 does not have a specified statute of limitations. Thus, "it is necessary to examine the nature of the underlying relief sought, and to apply the period of limitations applicable to that cause of action. If the underlying cause of action does not fall within any specific limitations period, the six-year 'catch all' provision of CPLR 213 (1) applies." *145 Kisco Ave. Corp. v. Dufner Enterprises, Inc.*, 198 A.D.2d 482, 483 (2d Dept. 1993)(citing *Solnick v. Whalen,* 49 N.Y.2d 224 (1980).

Plaintiffs are challenging an illegal procurement wherein LIPA accepted a proposal that was not responsive to its RFP. As alleged in the complaint, Deepwater Wind's bid was not responsive to the RFP and LIPA took steps to preclude true competitive bidding in Deepwater Wind's favor.

"The declaratory judgment action, which was created in 1921, can be legal or equitable in nature." *State Farm Mut. Auto. Ins. Co. v. Sparacio*, 25 A.D.3d 777, 778 (2d Dept. 2006). Their procurement law challenge is in the nature of the equitable relief that can be sought under General Municipal Law § 51 to stop illegal waste or injury. Under General Municipal Law § 51, an equitable action may be brought "to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation." General Municipal Law § 51.

General Municipal Law § 51 derives from an equitable cause of action first authorized by the Legislature in chapter 161 of the Laws of 1872. *Talcott v. City of Buffalo*, 125 N.Y. 280, 285 (1891). Prior to then, at common law, a taxpayer could not maintain an action against public officers "to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation." *Id*. "The terms 'waste' and 'injury' used in this statute comprehended only illegal, wrongful

or dishonest official acts." *Id*. at 286. "Full force and effect can be given to the statute by confining it to a case where the acts complained of are without power, or where corruption, fraud or bad faith, amounting to fraud, is charged." *Id*. at 288.

"An action for a declaratory judgment is not necessarily incompatible with an action under section 51 of the General Municipal Law. To the contrary, a declaratory judgment action is preferred where the legality and construction of statutes, constitutional infirmities and *the propriety of official acts* are the points of inquiry …" *Bloom v. Mayor of City of N.Y*, 35 A.D.2d 92, 96-97 (2d Dept. 1970), affd, 28 N.Y.2d 952 (1971)(citing *Bradford v. County of Suffolk*, 257 App. Div. 777, 779-780 (2d Dept. 1939). In an Article 78 proceeding where a non-bidder challenging the legality of a competitive bidding process "it seems clear that the petitioner could seek a review of the bidding process, and nullification of the contract if found to be illegal, in a taxpayer's action." *Matter of McArdle v. Board of Estimate of City of Mt. Vernon*, 74 Misc. 2d 1014, 1015 (Sup. Ct. Westchester County 1973), affd, 45 A.D.2d 822 (2d Dept. 1974).

Plaintiffs' procurement law cause of action is not in the nature of disputes in cases LIPA cites regarding regulations (*Lenihan v. City of New York*, 58 N.Y.2d 679 (1982)), ratemaking (*Long Is. Power Auth. Ratepayer Litig.*, 47 A.D.3d 899 (2d Dept. 2008)), or adjudications (*Matter of Simon v. New York City Tr. Auth.*, 34 A.D.3d 823 (2d Dept. 2006)) typically subject to Article 78 proceedings. There, in each the petitioners are parties to proceedings or parties on notice of the public body's actions by operation of law. In each, the public body's decision was final and binding and "had its impact" on the petitioner who was aggrieved. *Matter of Edmead v. McGuire*, 67 N.Y.2d 714, 716 (1986).

Plaintiffs' cause of action more closely resembles an equitable action under General Municipal Law § 51 to stop waste and injury arising from corruption and bad faith—

including by lack of notice to the public—amounting to fraud, than a writ of certiorari to review the propriety of a decision under Article 78 on notice to the affected parties.

Further, cases LIPA cites for the proposition that disputes regarding bidding under State Finance Law § 163 and General Municipal Law § 103 are subject to Article 78 are inapposite. In *Matter of Fawcett v. City of Buffalo*, 275 A.D.2d 954 (2000), the petitioner chose to commence an Article 78 proceeding alleging that a contract should have been competitively bid. The Fourth Department Appellate Division affirmed Supreme Court's determination that the petition failed to state a cause of action. In *dicta* the court added that the petition was filed after the four-month limitations period had ended. There being no claim to consider, there was no need for the court to discuss whether an Article 78 proceeding was appropriate, or whether the matter should be converted to a declaratory judgment action under CPLR 103.

In *Matter of Fishman v. Mills*, 294 A.D.2d 764 (3d Dept. 2002), the Article 78 petitioner represented aggrieved parties in an award of a preferred source provider awarded a cleaning contract without complying with competitive bidding provisions of State Finance Law § 163. The court dismissed the petition as time-barred because there was no doubt that the petitioner, who represented parties against whom the decision was final and binding and had an impact, was well aware of the decision more than a year before filing the petition, at the time the decision was made known.

In *Matter of Tufaro Tr. Co. v. Board of Educ. of City of N.Y.*, 79 A.D.2d 376 (2d Dept. 1981), the petitioners commenced their Article 78 proceeding withing the limitations period of CPLR 217. The aggrieved bidders challenged the respondent's decision replace buses from disqualified bidders without turning to the next lowest bidders. The remedy in that instance was asking a court to determine whether the decision made was

arbitrary and capricious or in error of law, i.e., grounds that are most appropriate for an Article 78 proceeding.

Here, on the other hand, the complaint contains allegations asserting corruption or bad faith, amounting to fraud. LIPA awarded a contract to a bidder who submitted a non-responsive bid. Plaintiffs' declaratory action is not about an abuse of discretion or an act that is arbitrary or capricious or an error of law. See CPLR 7803. It's about corruption and bad faith, amounting to fraud, by a public authority. A six-year limitations period is appropriate, and Plaintiffs procurement law cause of action is not time-barred.

2. Plaintiffs' Claim for Violation of the Public Authorities Law Is Not Time-Barred.

Plaintiffs are seeking a declaration annulling the PPA because it was not approved by the Public Authorities Control Board before the parties entered it. This is not a mandamus claim. Plaintiffs are not seeking to compel LIPA to perform a ministerial act. LIPA already chose to miss that deadline.

The LIPA Act is clear that PACB approval is a condition precedent to LIPA undertaking certain projects. Under Public Authorities Law § 1020-f(aa) "Notwithstanding any other provision of law to the contrary the authority shall not undertake any project without the approval of the public authorities control board created pursuant to article one-A of this chapter." "Project" means an action undertaken by the authority that:

* * *

> (iii) Commits the authority 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 the authority.

Public Authorities Law § 1020-b(12-a).

LIPA and Deepwater Wind entered the PPA on February 6, 2017.[35] LIPA did not obtain PACB approval before undertaking the project that is the PPA.[36] The Legislature, however, has forbidden LIPA from undertaking projects like the PPA and the South Fork Wind project without prior approval by the PACB. "LIPA, by statute, was required to obtain the PACB's approval and could not proceed without it." *Suffolk County v. Long Is. Power Auth.*, 177 Misc. 2d 208, 216 (Sup. Ct. Nassau County 1998).

LIPA contends that the PPA was not a "project" within the meaning of the Public Authorities Law. That contention is specious. As alleged in the complaint, LIPA has committed to more than $1 million in infrastructure projects to facilitate the interconnection of the project's undersea cable. Nassau County Supreme Court has held that while transmission infrastructure, in that case an undersea cable, may operate daily "it does not follow that the award of the contract in issue involves LIPA's day-to-day operations." *Matter of AEP Resources Serv. Co. v. Long Is. Power Auth.*, 179 Misc. 2d 639, 647 (Sup. Ct. Nassau County 1999)("Clearly, the awarding of a $200 million construction contract is not something LIPA does day-to-day nor does it constitute part of such day-to-day operations of LIPA so as to be excluded from the statutory definition of "Project" and thus be exempt from PACB review.").

Regardless, LIPA and Deepwater Wind assumed the risk that the Public Authorities Law would be enforced against them to annul the PPA (or to convince a court that LIPA's obligations under a $1.6 million PPA do not comprise a "project"). LIPA is not above the law. It is not entitled to ignore its legislative mandate to seek PACB approval

[35] *Id.*, ¶48.
[36] *Id.*, ¶68.

for a project and then get a "do over" if someone notices and makes a demand and then seeks a writ of mandamus. That idea is absurd on its face.

Taxpayers and ratepayers like the Plaintiffs are not under any obligation to seek mandamus to compel LIPA to do what the Legislature mandated LIPA to do as a condition precedent to entering the PPA. Moreover, there is no evidence Plaintiffs had knowledge of LIPA's intent to enter the PPA to seek mandamus prior to February 6, 2017, when any such right expired. The PPA should be declared void because LIPA did not have authority from the PACB when it signed it.

B. Plaintiffs Have Standing Under All Counts of This Declaratory Judgment Action.

Plaintiffs are taxpayers and ratepayers in the service area affected by the PPA who have standing to obtain a declaration annulling the PPA. The complaint establishes that the LIPA has agreed to a purchase price for offshore wind generated power under the PPA at a price far more than that from an adjacent project. It further establishes that the PPA price markedly exceeds the price of electricity from a comparable renewable source. In both cases, Plaintiffs will suffer injuries in fact in the higher electricity prices on their utility bills. Moreover, Plaintiffs have been harmed by LIPA failing to obtain the peak electrical demand solution it purportedly sought under the RFP. According to LIPA, Plaintiffs currently do not have a reliable source of electricity through LIPA at times of peak demand, and the South Fork Wind project will not solve that problem.

There is no dispute that to have standing, a party must demonstrate an "injury in fact." There must be a legal stake in the litigation which is within the "zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which

the agency has acted." *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991).

The Court of Appeals clarified that requiring a litigant's "injury to fall within the concerns the Legislature sought to advance or protect by the statute assures that groups whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Id*. at 774.

The state's competitive bidding statutes are designed by the Legislature to protect the interests of the taxpayers and ratepayers who pay the bills. LIPA customers are in the zone of interests protected by the procurement laws the Legislative purposefully applied to LIPA. Public Authorities Law § 1020-cc. Similarly, LIPA must obtain approval for certain contracts from the PACB, which must determine whether they are financially feasible and will result in lower utility costs to customers in the service area, among other things.

1. Plaintiffs Have Standing Under the State Finance Law and General Municipal Law.

In their complaint Plaintiffs demonstrate that they are within the zone of interests the state procurement laws and the PACB are in place to protect. They are taxpayer and ratepayers in the service area affected by the PPA. The PPA is priced at an amount that will increase the Plaintiffs utility bills. Moreover, the exorbitant cost of the PPA to LIPA will other consumers in the affected service area, including businesses that will pass those higher costs along to Plaintiffs as consumers. Further, the PPA has not solved the peak electrical demand problem the affected service area in the South Fork faces and Plaintiffs are aggrieved by facing a future of unreliable power.

In addition to having standing under the common law, Plaintiffs have standing under state law. Under Public Authorities Law § 1020-cc "All contracts of [LIPA] shall be subject to the provisions of the state finance law relating to contracts made by the state." Provisions relating to contracts made by the state include citizen taxpayer actions under State Finance Law § 123-b. Under that section, citizen taxpayers "whether or not such person is or may be affected or specially aggrieved" may seek declaratory judgment relief to stop "wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property." State Finance Law § 123-b.

State Finance Law § 163, governing procurement, only makes sense if the reader substitutes "LIPA" for "state" as appropriate in that provision. Similarly, State Finance Law § 123-b as it applies to LIPA should be read to permit a citizen taxpayer to stop "disbursement of [LIPA] funds or [LIPA] property. Thus, although they are parties who are affected and specially aggrieved, Plaintiffs have standing under the State Finance Law to challenge LIPA's award of the PPA as citizen taxpayers (and ratepayers in the affected service area).

LIPA's argument that Plaintiffs cannot have standing because LIPA does not handle public funds, only ratepayer funds. It's obvious, however, that the Legislature believes that the public has an interest in LIPA's contracts and what it does with those contracts. Otherwise, it would not be necessary to make LIPA's contracts subject to the State Finance Law and General Municipal Law § 103 under Public Authorities Law § 1020-cc. Nor would certain projects, like the PPA, require approval by the PACB before LIPA undertakes them.

Further, the cases LIPA cites limiting standing to unsuccessful bidders do not provide the complete picture. Under the common law, Plaintiffs do not need to be unsuccessful

bidders to have standing to assert their procurement law claims. Under the analogous relief of General Municipal Law § 51, "once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds is presumed and a taxpayer is entitled to have the contract set aside without showing that the municipality suffered any actual injury. *Gerzof v. Sweeney*, 16 N.Y.2d 206, 208 (1965).

A party's standing to challenge a violation of the state's procurement laws similarly does not depend on being an unsuccessful bidder. In *General Bldg. Contrs. of N.Y. State v. State of New York* (89 Misc.2d 279 (1977)), a general contractor membership organization challenged a public building contract award by the state to a contractor without advertising for competitive bidding. The court rejected respondents' contention that the petitioner did not have standing and annulled the contract. It further determined that rather than forfeit the entire amount of the contract, the contractor would refund the amount of the bargain the state lost in not competitively bidding the contract. *Id*. at 282.

2. Plaintiffs Have Standing Under the Public Authorities Law.

Under New York law, LIPA cannot undertake any project without approval from the PACB. The purpose of the PACB is to act as a mechanism to check LIPA's extensive authority. And "the recurring and unavoidable theme reflected in the legislative history is that the intended *sine qua non* objective of the [LIPA] Act was to give LIPA the authority to save ratepayers money by controlling and reducing utility costs." *Matter of Citizens For An Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 414 (1991).

The South Fork wind project is the precise type of project the Legislature intended the PACB to evaluate and decide whether the action (1) is financially feasible; (2) does not materially adversely affect overall real property taxes; (3) will result in lower utility costs to customers in the service area; and (4) will not materially adversely affect real property

taxes and utility rates outside the service area. The South Fork wind project is not financially feasible and will increase utility costs to customers in LIPA's service area.

In *AEP Resources Serv. Co.*, the petitioner contended its bid was millions of dollars lower than the LIPA award. If so, the court concluded, "the selection of the higher bid would clearly affect the financial feasibility of the project and would have an effect on the utility rates in the service area." The court found that "additional expenditures of $22,000,000 to $46,000,000, based on a potentially higher bid, whether in the form of a merchant contract or capitalized by LIPA, will ultimately affect the ratepayers." *Matter of AEP Resources Serv. Co.,* 179 Misc. 2d at 647.

Plaintiffs are ratepayers affected and injured by the South Fork wind project raising, as opposed to lowering, utility costs to customers in the service area. Plaintiffs will pay a substantial premium for electrical power generated from the South Fork win project compared to the adjacent Sunrise Wind project—more than $1 billion over 20 years—and any other currently know source of power for the South Fork. As taxpayers and ratepayers in the LIPA service area, Plaintiffs have a vested interest in LIPA's financial health, which is jeopardized by the financial infeasibility of the PPA. They also have a vested interest and standing to have declared void a contract that is not approved by the PACB.

Conclusion

Plaintiffs commenced this declaratory judgment action within the six-year statute of limitations period that is appropriate for their causes of action. They are parties who have

standing to challenge LIPA's illegal procurement of the PPA and to have the PPA annulled because it was not approved by the Public Authorities Control Board before LIPA entered it. LIPA's motion to dismiss should be denied.

Dated: Albany, New York
January 14, 2022

Respectfully submitted,

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CERTIFICATION

I, Cameron J. Macdonald, affirm under CPLR 2106 that:

This document is being filed by me. I certify under Court Rule 202.8-b that this document has 4,873 words as defined by the rule and complies with the word count.

Dated: Albany, New York
January 14, 2022

/s/ Cameron J. Macdonald
Cameron J. Macdonald