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

SIMON V. KINSELLA, PAMELA I. MAHONEY and MICHAEL P. MAHONEY,

Plaintiffs,

- against -

LONG ISLAND POWER AUTHORITY and SOUTH FORK WIND LLC fka DEEPWATER WIND SOUTH FORK LLC,

Defendants.

Index No.: 621109/2021
RJI No.:

Hon. Carmen St. George

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SOUTH FORK WIND, LLC'S MOTION UNDER CPLR 3211(A) TO DISMISS THE COMPLAINT IN ITS ENTIRETY, WITH PREJUDICE

Dated: January 20, 2022

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Defendant South Fork Wind, LLC ("SFW") submits this reply memorandum of law in support of its motion, filed December 1, 2021, under CPLR 3211(a) to dismiss the Complaint filed by Plaintiffs Simon Kinsella, Michael P. Mahoney, and Pamela I. Mahoney ("Plaintiffs") on November 9, 2021 ("Complaint") in its entirety, with prejudice ("SFW Motion to Dismiss"). Defendant Long Island Power Authority ("LIPA") also filed a motion to dismiss the Complaint on December 1, 2021 ("LIPA Motion to Dismiss").[1] The Motions to Dismiss established that both of the claims set forth in the Complaint are barred by the applicable four month statute of limitations under CPLR Article 78 and that the Plaintiffs do not have standing to challenge the actions of LIPA set forth in the Complaint.

In their memorandums of law opposing SFW's and LIPA's motions, filed on January 14, 2022, Plaintiffs offer no plausible reasons to deny the motions.[2] Plaintiffs fail to rebut well-established caselaw showing that the statute of limitations applicable to their claims challenging LIPA's action of entering into a Power Purchase Agreement ("2017 PPA") with SFW—an action that occurred almost five years ago – is subject to the four month statute of limitations under CPLR Article 78. Nor do Plaintiffs rebut the well-established caselaw demonstrating that, in order to have standing, they must fall within the zone of interest to be protected by the statutes under which their claims have been asserted, and that they must show actual injury distinct from that of the general public. The Court, therefore, should dismiss the Complaint.

[1] The SFW Motion to Dismiss and the LIPA Motion to Dismiss are referred to collectively herein as the "Motions to Dismiss."

[2] Plaintiffs' Memorandum of Law in Opposition to SFW is referred to herein as the "Plaintiffs' SFW MOL." Plaintiffs' Memorandum of Law in Opposition to LIPA is referred to herein as the "Plaintiffs' LIPA MOL." They are referred to collectively as the "Plaintiffs' MOLs."

STATEMENT OF FACTS

SFW provided the facts relevant to the actions addressed in the Complaint in its Memorandum of Law in Support of Motion to Dismiss filed December 1, 2021 ("SFW MOL" at 7), as well as in the accompanying Affidavit of Kenneth Bowes filed December 1, 2021. Plaintiffs' "counter statement of facts" included in the Plaintiffs' MOLs fail to address facts relevant to the Motions to Dismiss. Plaintiffs fail to provide any facts showing that this action was commenced within the applicable statute of limitations. Nor do they offer any facts addressing whether they are within the zone of interest to be protected under the statutes they claim were violated or that they suffered an injury in fact different from the general public.

ARGUMENT

POINT I

PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE LIPA'S ACTIONS REGARDING THE PPA

In the SFW MOL, SFW established that Plaintiffs do not have standing under State Finance Law section 163 or General Municipal Law sections 51 or 103. Specifically, Plaintiffs failed to "demonstrate that the injury claimed falls within the zone of interests to be protected by the statute challenged" (*Transactive Corp. v. N.Y. State Dep't of Soc. Servs.*, 92 N.Y.2d 579, 587 (1998) (citing *Soc'y of Plastics Indus. v. Cty. of Suffolk*, 77 N.Y.2d 761, 774 (1991))). Plaintiffs similarly failed to establish that, "they have suffered an injury in fact, distinct from that of the general public (*Transactive Corp.*, 92 N.Y.2d at 587 (citing *Soc'y of Plastics Indus.*, 77 N.Y.2d at 771-74); *Tilcon N.Y., Inc. v. Town of New Windsor*, 172 A.D.3d 942 (2d Dep't 2019)).

In the Plaintiffs' MOLs, , Plaintiffs fail to substantiate their claims that they have met the requirements for standing. Indeed, Plaintiffs' entire injury argument is that, "Plaintiffs will suffer injuries in fact in the higher electricity prices on their utility bills" (Plaintiffs' LIPA MOL at 13).

This argument is wholly insufficient to establish standing. Instead of providing any additional illumination on what types of injuries Plaintiffs have (allegedly) suffered or will suffer as a result of LIPA entering into a PPA with SFW, Plaintiffs ignore the relevant holdings in the cases and instead make the erroneous observation that the cases upon which SFW relied in its MOL do not detail the types of injuries sustained by the plaintiffs in those proceedings(Plaintiffs' SFW MOL at 2).

For example, in *Matter of East End Property Co. # 1, LLC v. Kessel*, the Court determined that, because the appellants' affidavits, "simply state[d] that they are 'New York State citizen taxpayers and Long Island Power Authority customers and ratepayers,'" there was an "absence of some injury in fact" (46 A.D.3d 817, 819 (2d Dep't 2007)). The Court also found that, the "zone of interest" test "will not confer standing on the individual appellants merely because they are customers of the utility" (*Id.* at 819). This set of facts is analogous to the present proceeding, where Plaintiffs are relying solely upon their status as taxpayers and LIPA ratepayers to demonstrate their injuries for the purposes of establishing standing. However, Plaintiffs make no attempt to distinguish their status from those of the plaintiffs in *Matter of East End*. As in *Matter of East End*, Plaintiffs' tax- and ratepayer status, with no demonstration of injury, is insufficient to establish standing.

Plaintiffs similarly fail to address the facts of *Initiative for Competitive Energy v. Long Island Power Authority*, 178 Misc. 2d 979 (1998), wherein a group of business and electric ratepayers challenged a series of LIPA decisions related to its acquisition of another utility company, including associated changes to its rate structure. The plaintiffs unsuccessfully argued that their injuries were within the "zone of interest" of the statute as they would be disproportionately impacted by higher rates than other ratepayers. In denying the challenge, the

Court determined that such a showing failed to "make any proffer that [Plaintiffs' group members] have sustained an injury in fact or that any alleged injury differs from that suffered by the community at large" (*Id.* at 991). Even if the Plaintiffs had argued in this proceeding that the PPA would result in higher rates than other ratepayers, the argument would still be insufficient to confer standing. However, Plaintiffs have not made any arguments with respect to standing beyond the allegation that they will suffer harm as a result of their status as taxpayers and LIPA ratepayers.

Importantly, in Plaintiffs' the LIPA MOL, Plaintiffs have misconstrued the holding in *AEP Resources Services Co. v. Long Island Power Authority*, 179 Misc. 2d 639 (Sup. Ct. Nassau Cty. 1999). In that proceeding, AEP Resources ("AEP") challenged LIPA's contract award to another entity that had a more expensive bid than AEP Resources. It was AEP's status as an "unsuccessful bidder alleging irregularities" that afforded it standing – not the fact that AEP Resources was a tax- or ratepayer (*Id.* at 649). While the court noted that the selection of a more expensive bidder than AEP had the potential to impact ratepayers, such observation was not a factor in the Court's decision with respect to whether AEP had standing. The present set of facts are distinguishable from those in the AEP case. Plaintiffs have not alleged any particularized injuries other than their claims regarding utility rates, and as such, Plaintiffs' reliance on that case to support their position is wholly misplaced.

Indeed, Plaintiffs' MOLs in opposition underscore the fact that Plaintiffs have failed to allege any injuries distinguishable from that of other tax- or ratepayers. For example, in the introduction in the Plaintiffs' SFW MOL, Plaintiffs state, "[t]his proceeding . . . is about . . .protecting Plaintiffs pocketbooks from an illegal contract that will cost *Plaintiffs and their fellow ratepayers* more than $1 billion in excessive cost to LIPA . . ." (emphasis supplied) (Plaintiffs' SFW MOL at 2). Plaintiffs further argue:

> [Plaintiffs] are taxpayer [*sic*] 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 [*sic*] other consumers in the affected service area, including businesses that will pass those higher costs along to Plaintiffs as consumers.

(Plaintiffs' SFW MOL at 3). Similarly, in Plaintiffs' LIPA MOL, Plaintiffs state:

> 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 . . . Accordingly, they brought this declaratory judgment action to have the illegal PPA declared void."

(Plaintiffs' LIPA MOL at 7).

These statements by Plaintiffs demonstrate that not only are Plaintiffs' allegations of harm to them based solely on their status as tax- and ratepayers, but also that other ratepayers will face the same impacts from LIPA's actions. The caselaw cited in the SFW Motion to Dismiss amply demonstrates that Plaintiff's non-particularized purported injuries that are indistinguishable from those of the general public are wholly insufficient to confer standing, and the Court's inquiry should end there.

POINT II

PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs do not argue that their claims were commenced within the four month statute of limitations applicable to proceedings under CPLR Article 78. In its motion, SFW established that Plaintiffs' first cause of action alleging that the process that resulted in the 2017 PPA violated General Municipal Law section 103 and State Finance Law section 163 was commenced well after the expiration of the applicable four-month statute of limitations and, as such, should be dismissed. Similarly, Plaintiffs' second cause of action alleging that LIPA violated Public Authorities Law section 1020-f (aa) because it executed the 2017 PPA without obtaining the approval of the Public

Authorities Control Board ("PACB") should be dismissed because this action was commenced more than four months after the 2017 PPA was executed and also because Plaintiffs failed to make a demand that LIPA submit the 2017 PPA to the PACB within the applicable four-month statute of limitations.

Plaintiffs' simply assert that their claims are for a declaratory judgement under CPLR 3001, and that the four-month statute of limitations governing Article 78 proceedings set forth in CPLR 217 is not applicable to their claims. However, it is well settled that "where a declaratory judgment action involves claims that *could have* been made in another proceeding for which a specific limitation period is provided, the action is subject to the shorter limitations period" (*Save the View Now v. Brooklyn Bridge Park Corp.*, 156 A.D.3d 928, 931 (2d Dep't 2017) (emphasis supplied)). Moreover, "[w]here an action could have been brought pursuant to CPLR article 78, the four-month statute of limitations applicable to such proceedings applies" (*Id.* at 928; CPLR 217(1)). If a proceeding pursuant to CPLR Article 78 would have been appropriate to settle a dispute with a governmental entity, the four-month period of limitations governing Article 78 proceedings is applicable (*See* CPLR 217(1); *Lenihan v. City of New York,* 58 N.Y.2d 695 (1980)*; Windsor v. New York,* 26 Misc. 3d 1233(A) (Sup. Ct. Albany Cty. 2010)). As this proceeding is a challenge to an action taken by LIPA, a state authority, it falls squarely under CPLR Article 78. Therefore, the applicable statute of limitations in this instance is set by CPLR 217(1), which requires that a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final.

Plaintiffs fail to address this precedent. They do not argue that their causes of action are inappropriate to have been brought under Article 78. Indeed, their causes of action not only could have, but indeed should have, been brought under Article 78. Plaintiffs characterize their first

cause of action as challenging LIPA's award of "a contract to a bidder who submitted a non-responsive bid" (Plaintiffs' LIPA MOL at 11). This cause of action asserts that LIPA's action in executing the 2017 PPA was "made in violation of lawful procedure" or was an abuse of discretion and, as such, falls squarely under CPLR 7803. To the extent Plaintiffs are claiming that LIPA's actions in awarding the PPA violated State Finance Law section 163 and/or General Municipal Law section 103, this also is a claim that LIPA violated lawful procedure and, therefore, is cognizable under CPLR 7803(3).

CPLR Article 78 is also applicable to the extent that Plaintiffs are claiming that LIPA violated General Municipal Law section 51 (Plaintiffs' LIPA MOL at 8-10). However, LIPA is not even subject to General Municipal Law section 51 (*See N.Y. Post Corp. v. Moses*, 10 N.Y. 2d 199, 204 (1961) ("Section 51 of the General Municipal Law having been clearly construed as not giving a right of action against officers or agents of the State") (citing *Bull v. Stichman*, 298 N.Y. 516 (1948); *Schieffelin v. Komfort*, 212 N.Y. 520 (1914); *Albany Cty. v. Hooker*, 204 N.Y. 1 (1911)).

Similarly, Plaintiffs' second cause of action alleging that the 2017 PPA should be annulled because the PPA was not approved by the PACB also is time barred. This claim also could have and should have been brought pursuant to Article 78. Plaintiffs' claim that LIPA "failed to perform a duty enjoined upon it by law" by not submitting the 2017 PPA to the PACB for approval before execution is a claim cognizable under CPLR 7803(1), and that by failing to do so LIPA's determination to enter into the 2017 PPA "was made in violation of lawful procedure" which is a claim cognizable under CPLR 7803(3). As such, Plaintiffs' attempts to cast this claim as anything other than a claim subject to CPLR Article 78 are specious.

Contrary to Plaintiffs' position, applying the four month statute of limitations under CPLR Article 78 is appropriate as a matter of public policy. In *Solnick v. Whyalen*, 49 N.Y.2d 224 (1980), the Court of Appeals rejected a claim that the statute of limitations for a declaratory judgement action was applicable to a claim that could have been brought under CPLR Article 78 and instead applied the four month statute of limitations for Article 78 actions. In so doing, the Court of Appeals stated:

> This result is consonant with sound public policy, particularly where the action sought to be reviewed is that of a regulatory governmental agency. 'The reason for the short statute is the strong policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations'

(*Id*. at 233 (citations omitted)).

Plaintiffs' readily admit that the 2017 PPA was entered into approximately 5 years ago, on February 6, 2017 (Plaintiffs' LIPA MOL at 12). That is when their causes of action accrued. Allowing Plaintiffs, who have sat on their rights for the last 5 years, to now challenge the PPA that was entered into by LIPA to serve the needs of its customers would have a severe negative impact on the ability of LIPA, a governmental entity, to conduct its business affairs. This court should not allow Plaintiffs to upset the settled expectations of LIPA and its customers, as well as SFW, and should find that the causes of action are time barred.

CONCLUSION

For the reasons set forth herein, this Court should grant SFW's and LIPA's Motions to Dismiss and dismiss the Complaint in its entirety, with prejudice, along with such other and further relief as this Court may deem just and proper.

Dated: January 20, 2022
Albany, New York

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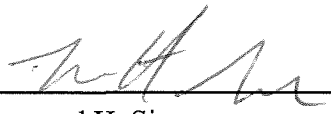
WORD COUNT CERTIFICATION

The undersigned counsel for Respondent-Defendant South Fork Wind, LLC, hereby certifies that pursuant to Rule 17 of subdivision (g) of section 202.70 of the Uniform Rules for the Supreme Court and County Court, the total number of words in this Reply Memorandum of Law is 2,556 inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities and signature block.

Dated: Albany, New York
January 20, 2022



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