Matter of Standing for Truth About Radiation (STAR) Found. v Long Is. Power Auth.

2002 NY Slip Op 30151(U)

September 27, 2002

Sup Ct, Suffolk County

Docket Number: 24263-2001

Judge: Robert A. Lifson

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MEMORANDUM

Supreme Court of the State of New York,
County of Suffolk

Index No. 24263-2001

In the Matter of the Application of STANDING FOR TRUTH ABOUT RADIATION (STAR) FOUNDATION, NEW YORK STATE ASSEMBLY MEMBER FRED THIELE Jr., CITIZENS ADVISORY PANEL (CAP),

Petitioners,

By: Hon. Robert A. Lifson

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

Dated: September 27,2002

THE LONG ISLAND POWER AUTHORITY,

Respondent.

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In an article 78 proceeding wherein the petitioner sought to compel the respondent to divest itself of its interest in a nuclear powered generating facility (Nine Mile Point II Nuclear Reactor) located in Oswego County allegedly as was mandated by Public Authorities Law § 1020-ee, this court denied the respondent's motion to dismiss and granted the petition to the sole extent of ordering an evidentiary hearing to determine several questions pertaining to whether the actions of the respondent in not disposing of its interest were either in direct violation of a statutory mandate or were otherwise arbitrary and unreasonable. The court, by order dated January 14,2002, directed certain exhibits to be produced to assist the court in determining the legislative history and legislative intent to discern whether the Public Authorities Law § 1020-ee permitted the respondent to consider the potential negative economic impacts in determining the appropriate value to be accepted in disgorging its interest in the Nine Mile II nuclear generating facility. Public Authorities Law § 1020-ee provides as follows:

> The authority [LIPA] shall make every effort to convey its interest in the Nine Mile Point II nuclear generating facility through the sale of its interest in such facility to the power authority of the state of New York or to one or more of the co-tenants of

[* 2]

> **such plant, provided, however, that in any acquisition of such interest by the power authority of the state of New York or one or more of the co-tenants, the authority shall agree to remain responsible for the purchase of such share of the power generated by such facility as it is required to purchase under agreements entered into by LILCO and obligating the authority.**

Perhaps it is an over simplification of the issue, but it appears that the petitioner asserts that the legislative enactment of Public Authorities Law § 1020-ee left the respondent with no discretion and required an immediate disposition regardless of the economic consequences. The respondent takes the contrary position, that consideration of economic factors was explicitly, if not implicitly, mandated by the legislative grant and that, accordingly, the utilization of economic factors in deferring the sale of the asset in question was proper.

A hearing was held and concluded on May 31,2002. The petitioner called Mr. Rubins, an attorney who the court nonetheless deemed an expert on public utility rate analysis and the economics of the power industry. He testified that in 1986 Nine Mile II cost about 6 billion dollars but that it was anticipated it would only be capable of producing 1.5 billion dollars of power. In his expert opinion, in 1986 when the legislation at issue was passed, Nine Mile 11 had no value. Based on his analysis, 90 million dollars previously offered to LIPA was a fair value and should have been accepted. He testified that he believes that LIPA's position, to wit, that said offer is at least 100 million dollars below the value of its interest in the facility is untenable. The witness strongly contests the economic analysis undertaken by LIPA, the application of the facts found, and the conclusions reached.

On cross examination, the respondent put in question Mr. Rubin's expertise particularly as it might pertain to decommissioning a nuclear power facility. The witness stated that he believes the so called LIPA law (Article 5 of the Public Authorities Law) was intended to close the nuclear facility at Shoreham, New York, to promote energy conservation and to promote savings in rates. The respondents attempted to get this witness to concede that the LIPA law was enacted solely to promote savings in electric rates.

The court also heard from Mr. Hulkower, the chief operating officer of LIPA. He testified that the LIPA law was enacted to shut down Shoreham's nuclear facility and to promote economies in utility rates on Long Island. As a result, the conceded obligation to sell LIPA's interest in Nine Mile 11 must take into account LIPA's statutory mission to keep rates low. He stated that acceptance of an inadequate or insufficient offer to purchase LIPA's interest in Nine Mile 11 could only be rectified by an increase in utility rates. He also testified to the composition of the LIPA board. Since that body is in some fashion appointed by the Governor and the each of the respective houses of the State Legislature, the ability of these bodies to compel their will is self-evident. Mr. Hulkower stated that LIPA has an 18% interest in Nine Mile II and is therefore entitled to 18% of the power generated. Loss of this source of power must be made up by additional generating capacity on Long Island which is not existent or by purchasing such power elsewhere. This replacement of the lost

power has an attendant cost that also impacts the rates to be imposed.

Notwithstanding the foregoing, Mr. Hulkower stated that LIPA would accept any offer at or above LIPA's "break even" point which he fixed as 222 million dollars. The legislatively mandated lists of approved potential purchasers have never offered such sum.

On cross examination, the petitioner attempted to show that the "break even" number was grossly inflated. Petitioner also tried to get Mr. Hulkower to concede the potential risk of maintaining its interest in Nine Mile 11 should result in a substantial discount of the "break even" number. Ultimately, Mr. Hulkower conceded that there has never been a public hearing on this issue or a vote of the board to consider any offers because none were deemed to have sufficient merit to warrant board consideration. On redirect, Mr. Hulkower said LIPA would sell its interest, if it could, but that the prevailing economic circumstances do not make that possible.

The court also heard the testimony of **Mr.** Gillette, an employee of Keyspan, a witness the court deemed an expert on nuclear emergencies as well as utility cost analysis. He admitted that the so called "break even" number varied greatly. He testified that the price of power has been very volatile and that such volatility had a direct impact on the "break even" number. Basically, as the cost of power increases, the higher the cost in replacing the power generated by Nine Mile 11 that LIPA was supplying to its customers. He also reiterated that LIPA was ready to sell its interest, but not at any price.

Based on the foregoing testimony and the submissions made to the court, it would appear that the legislative intent was muddled and, to some extent, involved conflicting objectives (i.e., lower rates vs. decreasing dependency on nuclear generated power). However, the paramount purpose for the creation of LIPA ostensibly was to assure an adequate supply of gas and electricity in a reliable, efficient and economic manner in order to preserve the economic vitality of the region - a matter of state - wide import. See: *Long Island Lighting Co. v. Suffolk County*, 119 A.D.2d 128, 505 N.Y.S.2d 956 (Second Dept., 1986). As the Court of Appeals so aptly noted, although

> "...closure of Shoreham [nuclear generating facility on Long Island] was one of the overriding engines driving the emergency legislative initiative and package ... We emphasize that the recurring and unavoidable theme reflected in the legislative **history** is that the **intended sine qua non objective of the Act was to give LIPA the authority to save ratepayers money by controlling and reducing utility costs** (Bill Jacket, Assembly Mem., at 14; id., Budget Report, at 6; id., Executive Approval Mem., at 12; id., Executive Mem., at 15)." (emphasis added)

Citizens for an Orderlv Energy Policv. Inc. v. Cuomo, 78 N.Y.2d 398, 576 N.Y.S.2d 185 (1991). Since economics appears to be the justification for the passage of Article 5 of the Public Authorities Law, the section in question cannot be read outside the context of that ostensible legislative objective. Indeed, the language of Public Authorities Law § 1020-ee does not mandate an immediate sale, but only mandates efforts to convey; it then ominously states that LIPA is obligated to purchase

the power lost by such sale. Such obligation poses the question - where is LPA to acquire the power lost through such divestiture and at what cost? The legislature having declared what, at best, is a contradictory policy delegated its implementation to the public entity established, to wit, LIPA. This approach has expressly been judicially sanctioned. As the Court of Appeals explicitly held in ***Citizens for an Orderly Energy Policy, Inc. v. Cuomo, supra.:***

> "The Legislature may, however, declare its policy in general terms by statute, endow administrative agencies with the power and flexibility to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation ...[citations omitted]...The Legislature is not required in its enactments to supply agencies with rigid marching orders, especially in a field as complex as nuclear power regulation, which is "simply incapable of statutory completion" and "where flexibility in the adaptation of the legislative policy to infinitely variable conditions constitute[s] the very essence [of the Act]" (***Matter of Nicholas v. Kahn,*** 47 N.Y.2d 24, 31)... The intricate nuances of the policy determinations required under the LIPA Act deserve some respect from the Court. The specialized entity, LIPA, was created by the Legislature to concentrate on and resolve these matters within a reasonably defined and delegated range of expertise (see, ***Matter of Memorial Hosp. v. Axelrod,*** **68** N.Y.2d **958, 960;** ***Matter of Great Lakes-Dunbar-Rochester v. State Tax Commn.,*** **65** N.Y.2d 339,343). The wisdom and prudence of the Legislature's flexible approach are not ours to question."

Moreover, it has been a long established principle of administrative law that any agency's interpretation of its statutory mandate will not be judicially altered if it is supported by a rational basis or such interpretation is manifestly untenable or otherwise improper. ***Claim of Gruber,*** 89 N.Y.2d 225,652 N.Y.S.2d 589 (1996); ***Albano v. Board of Trustees of New York City Fire Dept.,*** 286 A.D.2d 734,730 N.Y.S.2d 159 (Second Dept., 2001). Here, the determination by LIPA that the legislature did not intend a "fire sale" of its interest in Nine Mile II has a reasonable basis in fact because, to effect a sale greatly below the fairly determined value of the asset, whether based on market value analysis or a replacement value analysis, would have a potential negative effect on the rate structure contrary to the primary objective of Article 5 of the Public Authorities Law.

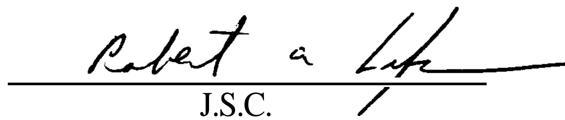
The facts adduced here shows that the action of the respondent did not violate the statutory mandate. The imposition of economic criteria was not arbitrary or unreasonable and fell well within the parameters of that which was required by the legislative scheme. The only possible impropriety that can be discerned is that the employees of the board either took it upon themselves to screen "unworthy" applications to purchase from the board's consideration or otherwise failed to place before the board consideration of the Nine Mile II divestiture before the board on a regular recurring basis (monthly, annually, biennially, etc.). Nonetheless, there is no indication that had they done so the board would have approved a sale of its Nine Mile II assets substantially below the " break even" number generated by these employees.

In the last analysis, if the Legislature intended otherwise, it can speedily remedy the misapplication of its desires by putting members on the LIPA Board who are more aggressive in

pursuing divestiture or even by enacting new legislation that dictates an immediate divestiture of **LIPA's** interest in any nuclear generating facility. The failure of the legislature to in any way take any action is telling.

For the reasons stated herein, the petition is dismissed provided the judgment to be entered provides for the respondent Board to entertain on a recurring basis the issue of divestiture of its interest in Nine Mile II.

Settle judgment.



J.S.C.