

**Matter of Li Clean Air Water & Soil, Ltd. v New York  
State Pub. Serv. Commn.**

2019 NY Slip Op 33950(U)

May 20, 2019

Supreme Court, Albany County

Docket Number: Index No. 906077-17

Judge: Margaret T. Walsh

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

In the Matter of the Application of

LI CLEAN AIR WATER AND SOIL, LTD.,  
NORTH AND CENTRAL MERRICK CIVIL  
ASSOCIATION, AGATHA NADEL, AMADEO  
MATTHEW GAETA, MICHAEL COTTELL,  
AUDREY CIUFFO, LAWRENCE RUISI, and  
ADAM GREENBERG,

Petitioners,

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

**DECISION/ORDER ON MOTION**

Index No. 906077-17

RJI No. 01-17-ST9035

-against-

NEW YORK STATE PUBLIC SERVICE  
COMMISSION, NEW YORK STATE  
DEPARTMENT OF PUBLIC SERVICE, and  
NEW YORK AMERICAN WATER COMPANY, INC.,

Respondents.

(Supreme Court, Albany County, Special Term)

(Hon. Margaret Walsh, Presiding)

APPEARANCES:

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Cullen and Dykman, LLP  
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Walsh, J.:

The New York American Water Company, Inc. (“NYAW”) is a private, investor-owned water supplier whose service territory encompasses twelve districts—including Lynbrook, Merrick and Sea Cliff—located in Nassau County, New York. In total, NYAW provides water service to approximately 120,000 customers or ratepayers within these districts. Among these ratepayers are special districts such as fire protection districts and school districts as well as utilities and not-for-profit organizations. The Public Service Commission (“PSC”) is the agency charged with regulating utilities such as the NYAW and ensuring, among other things, that rates charged by NYAW to its customers are just and reasonable (*see* Public Service Law §89-b[1]). The rates and charges for water supplied to NYAW’s customers are set forth in tariffs filed with and approved by the PSC (*see Matter of Crescent Estates Water Co. v. Public Service Com.*, 77 NY2d 611, 613 [1991]).

On April 29, 2016, NYAW filed proposed tariff revisions—i.e., rate increases—with the goal of increasing its revenues, establishing two service areas encompassing the twelve districts (Service District 1 and Service District 2), and consolidating existing tariffs in order to maximize administrative efficiency, reduce confusion to ratepayers and blend the rate effect of necessary capital investments across multiple service areas (*Order Establishing Rates for Water Service*, May 18, 2017, pp. 5-6). Because the rate change proposed constituted a “major rate change,” the

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<sup>1</sup>On September 13, 2018, a Consent to Substitution of Counsel was filed wherein DLA Piper LLP (US) was substituted as counsel for NYAW.

requirement for a formal evidentiary hearing was triggered (Public Service Law §§89-c[10][c], [f]). The PSC suspended NYAW's rate filing and initiated its own proceeding "to examine the merits of the Company's proposals" (*id.*, p. 6; Public Service Law §89-c[10][f]). The administrative proceeding involved the submission of testimony and exhibits from NYAW, Department of Public Service staff ("Staff"), and the Petitioners in this proceeding, LI Clean Air Water and Soil, LTD ("CAWS") and North and Central Merrick Civic Association ("NMCA") (*id.*). During the administrative proceedings and following extensive negotiations, NYAW and Staff entered into a Joint Proposal on or about January 9, 2017.<sup>2</sup> An evidentiary hearing was then held on March 8, 2017 before two Administrative Law Judges on the propriety of the terms of the Joint Proposal. During this hearing, witnesses testified and were cross-examined and numerous exhibits received. In accordance with 16 NYCRR §3.9(c), the Petitioners were notified and invited to participate in the settlement negotiations leading to the Joint Proposal; additionally, Petitioners' representatives participated in the March 8<sup>th</sup> evidentiary hearing and filed pre-hearing and post-hearing briefs. Upon consideration of the Joint Proposal, testimony, exhibits and briefing of issues and arguments, the PSC rendered a comprehensive *Order Establishing Rates for Water Service* ("Order" or "May 18, 2017 Order") adopting, with certain exceptions, the rates, terms, conditions and provisions set forth in the Joint Proposal (*id.*, pp. 100-101). Sources of the grounds for the rate adjustments included anticipated property tax increases, requested revenue increases and capital expenditures (*id.*).

During the administrative proceedings, the Petitioners opposed the Joint Proposal and, following the issuance of the May 18, 2017 *Order*, initiated this article 78 proceeding seeking its annulment as well as judgment enjoining the NYAW from collecting from ratepayers the portion of

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<sup>2</sup>Appendix B details the proposed rate changes for each service district for each year (i.e., rate year) during the four-year rate plan; appendix C sets forth the proposed revised tariff Leaves which set forth terms, conditions and rates of service (*Joint Proposal*, January 7, 2017)

the charges that represent property taxes. Before the Court is the motion by Respondent PSC requesting an order transferring to the Appellate Division. The motion is opposed by the Petitioners. The Court has thoroughly reviewed the pleadings as well as the *Order*, the *Joint Proposal*, and the record from the underlying administrative proceedings and makes the following determination.

Questions that may be raised in an article 78 proceeding include “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed,” or “whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence” (CPLR 7803[3],[4]). CPLR 7804(g) provides that, where an issue of substantial evidence is raised, the court where the proceeding is commenced must make an order directing the transfer of the matter to the appellate division for disposition. The Petitioners contend that the only question raised by their pleading is whether the determination by PSC was arbitrary, capricious and in violation of lawful procedure; the Petitioners maintain that “[a] substantial evidence question is tangential to Petitioners’ allegations” (*Butler Aff. in Opp.*, ¶3).<sup>3</sup>

“The mere fact that the petition alleges the lack of substantial evidence supporting the determination is not dispositive” (*Matter of Bonded Concrete v. Town Bd. of Rotterdam*, 176 AD2d 1137, 1138 [3d Dept. 1991]). Rather, whether the proceeding should be transferred “turns upon Supreme Court’s independent assessment of the type of hearing held preceding the administrative determination and whether the substantial evidence test is actually applicable, and not on a petitioner’s characterization of the standard of review or issues to be raised” (*Matter of Cornelius v. City of Oneonta*, 71 AD3d 1282, 1284 [3d Dept. 2010], citing Alexander, Practice Commentaries,

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<sup>3</sup>But see, e.g., *Verified Petition*, ¶¶15, 26, 28, 34, 41, 57, 59, 64-67, 72, 74-78, 81-84.

McKinney's Cons Laws of NY, Book 7B, CPLR C7804:8, at 679). As pointed out by the Respondents, the *Order* was rendered following a statutorily required evidentiary hearing (Public Service Law §89-10[c]). Prior to entry of the Joint Proposal, testimonial and documentary evidence was received; following the signing of the agreement, an evidentiary hearing was held on March 8, 2017 before two administrative law judges during which witnesses were examined and cross-examined under oath regarding the terms of the Joint Proposal as well as on the same issues raised in the *Verified Petition*.

The Court also considers the applicable legal standard in addition to the type of hearing held. In rate-setting matters, "the Commission has broad discretion to review and determine the reasonableness of any rates or charges sought to be imposed by any water-works corporation (Public Service Law §89-c[10]), and "unless it is shown that the judgment of the PSC [in the exercise of this discretion] was \* \* \* without any rational basis or without any reasonable support in the record,' its determination will not be set aside'" (*Matter of Crescent Estates Water Co. v. Public Service Com.*, 77 NY2d at 616, quoting *Matter of Abrams v. Public Serv. Commn.*, 67 NY2d 205, 212). To be sure, the Commission's rate-making powers are broad and necessarily permit the agency "to assess the prudence of a utility's actions as those actions impact upon the ratepayers" given the Commission's obligation to protect ratepayers (*id.* at 617, citing *Matter of Niagara Mohawk Power Corp. v. Public Serv. Commn.*, 69 NY2d 365, 369). Implicit in its rate-making powers is the authority of the Commission to examine the manner by which the rates are derived and surcharges requested by the utility (*see Matter of General Tel. Co. v. Lundy*, 17 NY2d 373, 377-379 [1966]); further, in setting rates the Commission may act to ensure that a utility is prudently utilizing its assets for the benefit of ratepayers who "have borne the costs for creating" such assets (*see Matter of Rochester Tel. Corp. v. PSC*, 87 NY2d 17, 28-29 [1995]). Because orders establishing utility rates

involve highly technical matters for which the Commission “possesses specialized knowledge and expertise..., [j]udicial review is therefore limited to determining whether record evidence provides a rational basis for a PSC order” (*Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011], citing *Matter of Abrams v. Public Serv. Commn.*, 67 NY2d at 211-212; *Matter of New York Tel. Co. v. Public Serv. Commn. Of State of N.Y.*, 95 NY2d 40, 48 [2000]; *Matter of Rochester Tel. Corp. v. PSC*, 87 NY2d at 28-29 [1995]).

The Petitioners in the matter at bar frame their petition as one for a judgment invalidating the *Order* because it is alleged to be arbitrary and capricious, an abuse of discretion and affected by errors of law (*Verified Petition*, p. 20). According to their pleading, the Petitioners allege that the PSC refused to consider, or otherwise ignored, evidence adduced during the administrative hearing that the Petitioners assert would not have justified or supported increases in NYAW’s rates. This evidence includes the alleged failure by PSC to consider New York State’s 2% Tax Cap (insofar as relating to property tax forecasts by NYAW); the alleged availability of streamlined processes to which NYAW may avail itself to challenge property tax assessments; the alleged ability of NYAW to seek reimbursement or recoupment of property taxes previously paid to school districts by NYAW and/or its predecessors but which are no longer paid because these districts are outside of NYAW’s service area and do not contain NYAW property; and the alleged failure by NYAW in the past to implement capital projects for which it previously sought and obtained rate increases. The Petitioners also take issue with PSC’s approval of the division of *ad valorem* and property tax refunds which were paid fully by ratepayers, allowing NYAW to retain a percentage for legal fees and administrative costs, and which, according to the Petitioners, allegedly improperly incentivizes NYAW to litigate tax certiorari proceedings over extended periods of time rather than settle them.

The essence of the Petitioners’ challenges goes to whether the PSC’s *Order* adopting (with

some exceptions) the Joint Proposal and tariff revisions was “just and reasonable” in view of the record (Public Service Law §89-b[1]).<sup>4</sup> That the PSC allegedly ignored proof, made certain factual findings allegedly against weight of the record, or allegedly accorded more weight to certain facts than to others, all go to the heart of whether the *Order* setting rates is supported by “substantial evidence” from the underlying evidentiary hearing. Stated differently, to evaluate the Petitioners’ claims of whether the *Order* of the PSC setting rates was allegedly “arbitrary, capricious, an abuse of discretion or affected by errors of law” would necessarily require the Court to delve into and pass upon the sufficiency of the administrative evidentiary record to ascertain whether a rational basis exists to support the *Order* (see *Matter of Pell v. Board of Education*, 34 NY2d 222, 231 [1974])—an action which the court is unauthorized to take (see *Matter of Halperin v. City of New Rochelle*, 24 AD3d 768 [2d Dept. 2005][“[s]ubstantial evidence ‘is related to the charge or controversy and involves a weighing of the quality and quantity of the proof....’”]).

Moreover, transfer of cases to the Appellate Division involving rate-setting matters following an evidentiary hearing before the Commission is well-established (see, e.g., *Matter of Abrams v. Public Service Com.*, 67 NY2d at 208; *Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y.*, 16 NY3d at 360; *Matter of Rochester Tel. Corp. v. PSC*, 87 NY2d at 25; *Matter of Crescent Estates Water Co. v. Public Service Com.*, 77 NY2d at 615; *Matter of Niagara Mohawk Power Corp. v. Public Service Com.*, 69 NY2d 365 [1987]; *Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y.*, 169 AD3d 1334, 1334-1335 [3d Dept. 2019]). The case cited by the Petitioners in support of their opposition to a transfer, *Matter of Cornelius v. City of Oneonta*, supra, is inapposite. In that case, the city denied the petitioner’s application for a special use permit following informal yet required public hearings. The Appellate

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<sup>4</sup>See also *Butler Affirmation in Support of Verified Petition*, ¶¶2-17.



Division, Third Department held that the case should not have been transferred because the public hearings were not quasi-judicial hearings during which sworn testimony was taken and other evidence received; thus, the issue of whether the denial of the permit was supported by "substantial evidence" was not raised or implicated (*id.*) In contrast, the underlying administrative hearing before the Commission was evidentiary in nature and included the submission and taking of sworn testimony and receipt of other proof.

For the foregoing reasons, the Court grants the motion by the Respondent Public Service Commission for transfer of these proceedings to the Appellate Division, Third Department.

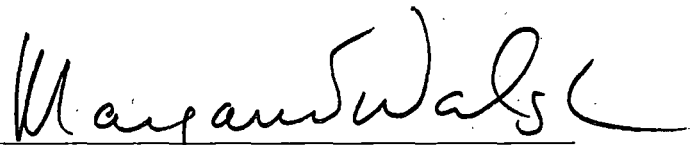
It is hereby

**ORDERED**, that this proceeding be and hereby is transferred, pursuant to CPLR 7804(g), to the Appellate Division, Third Department for disposition.

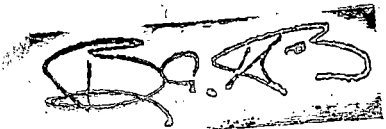
This constitutes the *Decision and Order* of the Court. The original *Decision and Order* shall be delivered to the Albany County Clerk's Office for filing and uploading to the NYSCEF system. Any original papers are being forwarded to the County Clerk for filing. The signing of this *Decision and Order* and delivery of the copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original *Decision and Order*

**ENTER.**

Dated: Albany, New York  
May 20, 2019



Hon. Margaret Walsh  
Supreme Court Justice



5-21-19 B

ENTER:

Papers considered:

- (1) *Notice of Petition* and *Verified Petition*, dated September 14, 2017, filed by Teresa Butler, Esq., on behalf of Petitioners LI Clean Air Water and Soil, Ltd. et al, with Exhibits A through D annexed; *Affirmation in Support of Verified Petition* by Teresa Butler, Esq., dated September 14, 2017 with exhibits annexed;
- (2) *Verified Answer* of the New York State Public Service Commission, dated November 17, 2017, filed by Paul Agresta, Esq., General Counsel (by Salomon T. Menyeng, Esq., Assistant Counsel), with schedule of record annexed;
- (3) *Verified Answer* of New York American Water, dated November 17, 2017; filed by Cullen and Dykman LLP (Brian T. Fitzgerald, Esq., Bruce V. Miller, Esq., Christopher E. Buckey, Esq.); *Affirmation* of Brian T. Fitzgerald, Esq., in support of NYAW's *Verified Answer*;
- (4) *Notice of Motion for Transfer to the Appellate Division* by Respondent New York State Public Service Commission dated November 17, 2017, with *Affirmation in Support of Motion for Transfer to the Appellate Division* by Salomon T. Menyeng, Esq., dated November 17, 2017, with Exhibits A through E annexed; *Memorandum of Law*;
- (5) *Affirmation in Opposition* to Respondent's Motion to Transfer of Teresa Butler, Esq., dated December 8, 2017;
- (6) *Affirmation in Support of Motion for Transfer* of Brian T. Fitzgerald, Esq., dated December 21, 2017;
- (7) *Reply Memorandum of Law* of Respondent New York State Public Service Commission, dated December 21, 2017;
- (8) *Letter* by Salomon T. Menyeng, Esq., dated December 29, 2017, adjourning return date on consent to January 12, 2018;
- (9) *Schedule of Record* filed on behalf of the New York State Public Service Commission, received May 13, 2019.