

SUPREME COURT - STATE OF **NEW** YORK  
I.A.S. PART30 - SUFFOLK COUNTY

***P R E S E N T :***

Hon. HARRY E. SEIDELL  
Justice of the Supreme Court

MOTION DATE 9-17-01  
ADJ. DATE 10-12-01  
Mot. Seq. # **001** - MD  
# **002** - **XMG**;  
CASEDISP

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JOSEPH SCALISE, EVELYN SCALISE and  
JOSEPH SCALISE, SR.,

Plaintiffs,

- against -

LONG ISLAND POWER AUTHORITY,

Defendants.

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Upon the following papers numbered 1 to 7 read on this motion for a preliminary injunction and cross motion to dismiss the complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers 4 - 5 ; Answering Affidavits and supporting papers 6 - 7 ; Replying Affidavits and supporting papers \_\_\_\_\_ ; Other \_\_\_\_\_ ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion (#001) by plaintiffs for a preliminary injunction is denied; and it is further

ORDERED that the cross motion (**#002**) by defendant Long Island Power Authority (hereafter, "LIPA"), for an order dismissing the complaint is granted.

This is an action for injunctive relief to restore electrical power to the premises located at 39 The Bayou, Oak Beach, New York. The uncontroverted facts are as follows. Plaintiffs Joseph Scalise, Jr. and Evelyn Scalise are the owners of the premises and residential customers of defendant Long Island Power Authority (hereafter "LIPA"). They have maintained an account for electric service from Long Island Lighting Company (hereafter "LILCO") since 1971 and more recently, from LIPA, its successor. Plaintiff Joseph Scalise, Sr. and his wife, Susan, reside on the premises in a separate apartment. Plaintiff Joseph Scalise, Sr. is the customer of record for Account No. [REDACTED] and plaintiff Joseph Scalise is the customer of record for Account No. [REDACTED]

A dispute has arisen out of LIPA's assertion of metered service claims against plaintiffs resulting in charges for additional electric consumption covering the period from January 23, 1997 to June 28, 2001, which consumption was not registered by the electric meter servicing the above electric accounts. LIPA contends that plaintiffs engaged in meter tampering. Plaintiffs argue that during electric outages due to storm activity, they are forced to use generators. They allege that they have been advised by LILCO employees to disconnect their electric meters during storms to prevent feedback and power surges from occurring when power is restored. Plaintiff Joseph Scalise states in his affidavit that once the storms end, the power company returns to reinstall and lock the meters. Plaintiff contends, however, that the meters have remained unlocked since 1997. Plaintiff also states that in or about August, 2000, a LIPA representative inspected the meters and advised plaintiffs to install a shut off switch. On or about August 6, 2001, plaintiff states that he received a bill for \$13,060.06 and his father's bill was for \$4,950.76. Finally, plaintiff states that on August 29, 2001, defendant's employees cut the wires from the electrical pole leading to the house. Plaintiffs' counsel affirms that on August 30, 2001, he called defendant to protest the termination of service to his clients, which is reflected in defendant's submission of a telephone complaint, Case Number 20010455. Nevertheless, plaintiffs allege that they have not made a formal complaint to defendant and instead, seek injunctive relief from the Court.

On or about June 28, 2001, LIPA Field Investigator Anthony Damico, Jr. states in his affidavit that he visited the premises to inspect the meters. Mr. Damico states that both meters showed evidence of tampering and were replaced with new meters. Two days later, Mr. Damico returned to the premises to read the meters which showed increased usage in comparison to the readings from the old meters. The first meter showed electric consumption of 20.50 kilowatt hours ("kwh") per day and the second showed consumption of 26 kwh per day, which were in sharp contrast to the prior recorded consumption which was 12.29 kwh per day and 2.25 kwh per day, respectively. Mr. Damico avers this new finding demonstrated that plaintiffs were using significantly more electric service than the meters were registering. LIPA then used the recordings from the two test days and calculated that plaintiffs received unrecorded electric consumption as stated above from January, 1997 through June, 2001.

Subsequently, plaintiffs commenced this action and moved for a preliminary injunction enjoining defendant from shutting off and refusing to supply electricity to plaintiffs. Defendant then cross-moved for an order dismissing the action on the ground that it is barred by the doctrine of primary jurisdiction.

In 1986, the Legislature enacted the Long Island Power Authority Act (Public Authorities Law, Article 5, Title 1-A). The LIPA Act created a public power authority having the prerogative to acquire all or part of LILCO's securities or assets through negotiated instrument, tender offer or eminent domain (see, Public Authorities Law 1020-h; *Matter of Citizens for an Orderly Energy Policy v Cuomo*, 78 NY2d 398, 408, 576 NYS2d 185 [1991]). Accordingly, LIPA was delegated

“all the powers necessary or convenient to carry out the purposes and provisions” of the Act, including the power to fix rates and charges for electric power (Public Authorities Law 1020-f). Further, “the rates, services and practices relating to the electricity generated by facilities owned or operated by the authority shall not be subject to the provisions of the public service law or to regulation by, or the jurisdiction of, the public service commission” (Public Authorities Law 1020-s). After years of negotiations and numerous lawsuits, LIPA acquired, through a stock acquisition, LILCO’s electric transmission and distribution facilities and retail operations in 1998 (*see, Matter of Suffolk County v Long Is. Power Auth.*, 258 AD2d 226, 694 NYS2d 91 [1999], *lv denied* 94 NY2d 759, 705 NYS2d 6 [2000]).

Prior to enactment of the LIPA Act, New York electric and gas utilities were generally subject to regulation by the Public Service Commission, as created by statute by the New York Legislature (N.Y. Pub. Serv. L. 5[1][b]). However, as a result of LIPA’s acquisition of the electric transmission and distribution system on Long Island, the Authority now has jurisdiction over claims concerning LIPA’s supply of electric service as a corporate municipal instrumentality and subdivision of the State of New York (Public Authorities Law 1020-cc). The Authority administers claims in accordance with LIPA’s tariff (defendant’s Exhibit A).

LIPA’s tariff provides that if a customer has a billing complaint, the customer must make a complaint to the Authority’s Manager and, if the complaint is not resolved by the Manager to the customer’s satisfaction, the customer may file a complaint with the Authority (Tariff for Electric Service, Original Leaf No. 159). The tariff provides that when handling complaints, the Authority’s staff may take any action reasonably necessary to fairly decide the complaint and “[w]ill not terminate service for nonpayment of disputed amounts while a complaint is pending before Authority staff and for twenty (20) days after a decision is mailed or personally communicated to the Customer or his or her representative, unless the Customer does not pay the undisputed part of any bill for service” (Tariff for Electric Service, Original Leaf No. 160).

The tariff further states that if a customer or the Authority’s Manager disagrees with the decision of the Authority’s staff on the complaint, a written appeal may be made to the Authority’s Chairman (Tariff for Electric Service, Original Leaf No. 163). When a complaint is being handled by the Authority’s staff, electric service will not be terminated for nonpayment while an appeal is pending before the Authority’s Chairman unless the customer fails to pay the undisputed part of any bill for service (Tariff for Electric Service, Original Leaf No. 164).

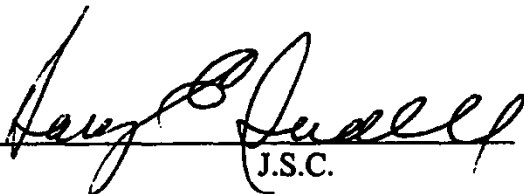
The doctrine of primary jurisdiction “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views” (*United States v Western Pac. R. R. Co.*, 352 US 59, 63-64, 77 S Ct 161 [1956]; *see, Matter of Donato v Board of Ed. of Plainview-Old Bethpage Cen. School*

**Dist., \_\_AD2d \_\_**, 729 NYS2d 187 [2d Dept 2001]; **Guglielmo v Long Is. Lighting Co.**, 83 AD2d 481, 445 NYS2d 177 [2d Dept 1981]). The doctrine is intended to ensure uniformity and regularity in the regulation of a business entrusted to a particular agency (*see, Far East Conference v United States*, 342 US 570, 72 S Ct 492 [1952]), and to recognize that certain matters should be considered first by those agencies "which are better equipped than the courts by reason of their specialized knowledge and experience" before resort to the courts is allowed (*Guglielmo v Long Is. Lighting Co., supra*).

The doctrine of primary jurisdiction mandates that **this** matter first be referred to LIPA for its assessment (*Brownsville Baptist Church v Consolidated Edison Co. of New York*, 272 AD2d 358, 707 NYS2d 493 [2000]). Contrary to plaintiffs' contention that defendant's application of its rules are unreasonable and discriminatory **as** to them, the evidence before the Court demonstrates that the instant action is a billing dispute in which questions of fact regarding meter tampering and **LIPA's** method for calculating metered electric usage predominate. Moreover, it is clear that LIPA was granted the authority to resolve such billing disputes pursuant to Public Authorities Law 1020-f.

Accordingly, LIPA's motion to dismiss the action is granted. In addition, plaintiffs motion for a preliminary injunction, therefore is denied **as** moot.

Dated: 12/21/01

  
J.S.C.

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION