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STATE OF NEW YORK : COUNTY OF NIAGARA  
SUPREME COURT

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In the Matter of the Proceeding  
of the BARKER CENTRAL SCHOOL DISTRICT,  
BOARD OF EDUCATION OF THE BARKER CENTRAL SCHOOL DISTRICT  
and LOUIS MEAD, ET AL,  
Plaintiffs,

-vs- INDEX # 128478

NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY,  
AES SOMERSET, LLC, AES EASTERN ENERGY, LP,  
AES, NY, LLC, THE AES CORPORATION,  
COUNTY OF NIAGARA and TOWN OF SOMERSET,  
Defendants.

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COUNTY OF NIAGARA and JOHN SYRACUSE,  
Individually and as a Resident and Taxpayer  
of the County of Niagara,  
Plaintiffs,

-vs- INDEX # 128812

NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY,  
HENRY SLOMA, as Chairperson of the NCIDA,  
AES SOMERSET, LLC, AES EASTERN ENERGY, LP, ET AL,  
Defendants.

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THE TOWN OF SOMERSET, NEW YORK, a Municipal Corporation,  
and DUDLEY A. CHAFFEE, RICHARD N. RAY, JR.,  
RANDALL J. WAYNER and APRIL C. GOW,  
as Members of the Somerset Town Board  
and in their Individual Capacities,  
Plaintiffs,

-vs- INDEX # 128811

NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY,  
a Public Benefit Corporation,  
HENRY M. SLOMA, as Chairperson of the NCIDA,  
AES SOMERSET, LLC, and EASTERN ENERGY, LP  
Defendants.

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175 Hawley Street  
Lockport, New York  
March 22, 2007

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B E F O R E:

HONORABLE RICHARD C. KLOCH, SR.  
Acting Supreme Court Justice

A P P E A R A N C E S:

RICHARD JAMES, ESQ.,  
Appearing for Barker CSD,  
the Board of Ed. of Barker CSD and Louis Mead.

RICHARD T. SULLIVAN, ESQ.,  
Appearing for NCIDA and Henry Sloma.

MARK R. McNAMARA, ESQ.,  
and NICHOLAS J. DiCESARE, ESQ.,  
Appearing for AES Somerset,  
AES Eastern Energy, AES NY.

CRAIG A. LESLIE, ESQ.,  
and JOANNA DICKINSON, ESQ.,  
Appearing for the County of Niagara  
and John Syracuse.

ROBERT S. ROBERSON, ESQ.,  
THOMAS H. BRANDT, ESQ.,  
and EDWIN J. SHOEMAKER, ESQ.,  
Appearing for the Town of Somerset.

ROBERT M. PUSATERI, ESQ.,  
Appearing for Barker CSD.

CLAUDE A. JOERG, ESQ.,  
Niagara County Attorney.

1  
2 THE CLERK: In the matter of the Proceeding of  
3 the Barker Central School District, Board of  
4 Education of the Barker Central School District and  
5 Louis Mead, et al, versus the Niagara County  
6 Industrial Development Agency, AES Somerset, AES  
7 Eastern Energy and the Town of Somerset and County  
8 of Niagara. There's County of Niagara and John  
9 Syracuse, Individually, and as a Resident and  
10 Taxpayer of the County of Niagara versus Niagara  
11 County Industrial Development Agency, Henry Sloma,  
12 as Chairperson of the NCIDA, AES Somerset, AES  
13 Eastern Energy, et al. And the Town of Somerset,  
14 New York, a Municipal Corporation and Dudley A.  
15 Chaffee, Richard N. Ray, Junior, Randall J. Wayner  
16 and April C. Gow, as Members of the Somerset Town  
17 Board and in their Individual Capacities versus  
18 Niagara County Industrial Development Agency, a  
19 Public Benefit Corporation, Henry M. Sloma, as  
20 Chairperson of the Niagara County Industrial  
21 Development Agency, AES Somerset and Eastern Energy,  
22 LP.

23 Please note your appearances for the record,  
24 starting with the Petitioners.

25 MR. JAMES: Rick James on behalf of Barker

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Central School District, its Board and Mr. Mead.

THE COURT: Mr. James.

MR. ROBERSON: Robert Roberson on behalf of the  
Town of Somerset, its board members.

MR. BRANDT: Tom Brandt on behalf of the Town  
of Somerset.

MR. SHOEMAKER: Ed Shoemaker on behalf of Town  
of Somerset.

MR. LESLIE: Craig Leslie and Joanna Dickinson  
on behalf of the County of Niagara and Mr. Syracuse.

MR. McNAMARA: Mark McNamara on behalf of the  
various AES entities that are named in the three  
petitions with Nick DiCesare, my associate from  
Hiscock and Barclay.

MR. SULLIVAN: Richard Sullivan on behalf of  
the Niagara County Industrial Development Agency and  
Mr. Sloma, Individually.

MR. PUSATERI: Robert Pusateri, Barker Central  
School.

MR. LESLIE: Judge, also the record should  
reflect Claude Joerg, the County Attorney, is here  
on behalf of the county today.

THE COURT: Noted. Who did we have from the  
teachers? We don't?

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THE CLERK: Sandner?

THE COURT: Well, as indicated by the number of attorneys, very qualified, fabulous attorneys, I don't think we need another fabulous attorney in the mix. This will be well litigated. And I'm going to deny the motion to intervene.

I got a call from the Amazon Desert saying -- please, you're supposed to say, you mean the Amazon Forest. Sure, now.

MR. SULLIVAN: I would never interrupt the Court.

THE COURT: Sure, now. They're cutting down trees to provide for all this paperwork. And we don't need them in, so I'm going to deny the motion to intervene. Also, I have not gone through their petition and I have gone through the various other petitions and I'm ready to rule on those.

I note for the record that, you know, the last time we were together, I tried to kick start settlement discussions. I find that settlement is always the best way to go on any litigation. Unfortunately, it takes two partners to dance. And we don't have that. So, that being, to my mind, foreclosed at least for now, we're going to move on

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to the petitions themselves.

I have taken the three petitions from the school district, the town and the county. And although they are laid out in differing manners, with different numbered causes of action, I think I have consolidated them to what they really are and lumped them together. And I provide for the following rulings:

First of all, in regard to the general claim of ultra vires, I dismiss those causes of action. Those being thirteen and fifteen in the school district's petition, twelve and eighteen in the town's and twelve in the county.

In regard to the failure to comply with SEQRA, I dismiss those causes of action, as well. Those being three and twenty-three from the school district's petitions, sixteen in the town, seventeen and eighteen in the county.

Regarding any alleged <sup>inferiorly</sup>affirmity regarding the stipulation of discontinuance -- discontinuance in regard to the Article Seven proceedings, I dismiss those causes of action, those being numbered twenty-four and twenty-five in the school district petition, nineteen in the town, twenty-one in the

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county.

In regard to the failure to abide by the UTEP procedure for appraisals, I dismiss those causes of action, six in the school, eleven and eighteen in the town. I already provided for eighteen in the town because it covered a couple items. Eleven in the county.

In regard to the alleged failure of the IDA to respond to correspondence from taxing entities, I dismiss those causes of action being numbered nine in the school district papers, six in the town.

Regarding the causes of action that claim that the actions of the IDA interfere with the responsibility of the assessor and with the provisions of Article Seven regarding review, certiorari review, I provide for dismissal of same.

I, for the record, note that I rely upon a Third Department case where the Appellate Division has given its imprimatur to exactly the type of action here by the IDA. And the case is *Minerva versus Essex County Industrial Development Agency*, 173 AD 2d 1054. So, with that I dismiss paragraphs -- I should note that that, also, would support my prior ruling in regard to the ultra vires claim. (No)

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So, in regard to the interference with Article Seven, I dismiss the school's number sixteen and twenty causes of action. Town, twenty. County, twenty-two and twenty-three.

In regard to the failure to abide by notice requirements generally, I provide -- I mean, obviously, I think that there's been more than enough notice, more than enough opportunity for people to contest and to object to what the IDA did, to be notified, to prepare a vigorous defense. This ton of paper over here and the ones that are on the floor support that.

So, I dismiss the following causes of action: School's eleven, twelve, eight, which alleges, by the way, that because of the change in the terms, that it was a new PILOT, which just doesn't comport with reality. And one, an alleged violation of the Open Meeting Law, all those actions are dismissed. Town numbered five and three. County four, six and thirteen. Again, thirteen dealing with the allegations of a new PILOT.

In regard to the allegations that this IDA PILOT agreement should have somehow been linked and intermeshed with the Clean Coal RFP, it's clear from

1  
2 my review of all of the material that they were two  
3 separate applications. Unfortunately for the County  
4 of Niagara and the people in the town and the School  
5 District of Barker and Somerset, that was not acted  
6 on favorably by the state. Hopefully, some day  
7 there will be a new clean coal plant, you know,  
8 along the lake there. But that's going to take a  
9 lot of other hurdles to cross.

10 Anyway, in regard to this particular PILOT and  
11 its being linked, I don't see any linkage. I  
12 dismiss the school seventeen, town seventeen, county  
13 nineteen and twenty.

14 However, the county also has provided in their  
15 first cause of action that it was a fraudulent  
16 scheme on the part of AES. Fraud is a tortious  
17 cause of action. The appellate courts have been  
18 clear to say when you have a tortious cause of  
19 action, you have a lot of facts, you have questions  
20 of fact. And that should be determined by a more  
21 arduous review of the facts. So, I do not dismiss  
22 that particular cause of action, number one, dealing  
23 with the allegations of fraud in regard to the  
24 presentation of the new clean coal plant as an  
25 inducement for entering into the instant PILOT.

1  
2           There's one other cause of action that I seek  
3 to dismiss here, and that would be the school's  
4 number twenty-two, dealing with the tax impact. You  
5 know, the last time this Court passed upon the  
6 assessment for that plant, it was set at four  
7 hundred thousand dollars -- four hundred million  
8 dollars, I'm sorry. That was three years ago. If  
9 it were to be returned from the seven seventy-five  
10 million back to four hundred million, if the Article  
11 Sevens were to proceed, I did some arithmetic, that  
12 would trigger a nineteen million dollar tax <sup>refund</sup> reform.  
13 About six of it would be county taxpayers'.  
14 Undoubtedly, there would be a tax impact if we were  
15 to return to that assessment. That was considered  
16 as one of the rationales for the IDA taking the  
17 action they did. So, I dismiss that cause of  
18 action, number twenty-two in the school district  
19 petition.

20           That being said, the following causes of  
21 action, I believe, should be further explored  
22 through a fact-finding hearing. It is clear that no  
23 matter what this Court does, parties will seek  
24 review at the appellate level and it's incumbent  
25 upon me to provide for as full as possible factual

1  
2 record for the appellate court to have when they  
3 pass upon this issue. So, accordingly, the  
4 following, just so that I have it clear with all  
5 counsel and any concerned public, excuse me, what  
6 issues remain and I will leave, for counsel's  
7 edification, the ones that I find most interesting  
8 for the end.

9 First of all, remaining for hearing will be  
10 whether or not a proper cost and benefit analysis 7  
11 was made. Those are school's eighteen, fourteen.  
12 Town two. County three.

13 In regard to whether or not a financial 2  
14 statement was properly provided, I'll provide --  
15 although I don't know what type of factual dispute  
16 there is on that particular cause of action, but I'm  
17 going to allow -- again, to expand upon any record  
18 for review, I'm going to allow those to maintain --  
19 be maintained. Those are school's two. Town one.  
20 County two.

21 In regard to the IDA's compliance with its own 3  
22 Uniform Tax Exemption Policy, in regard to the issue  
23 of financial assistance that was to be provided, I'm  
24 going to generally, even though there's been multi  
25 causes of action laid out by each party, those are

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2 what the following causes of action or the parties  
3 deal with, and I'm going to provide for proof on  
4 that. School four, ten, twenty-one. Town four,  
5 fifteen. County five, sixteen, twenty-four.

6 In regard to whether or not -- and this is --  
7 now we get to the issues that are most -- will  
8 provide for the most interest in regard to the  
9 Court's review, whether or not the IDA followed the  
10 IDA's own UTEP policy in regard to whether or not  
11 the project qualified, meeting those standards,  
12 school's five and seven. Town's seven, eight, nine  
13 and ten. County seven, eight, nine, ten and  
14 twenty-five.

15 One interesting issue, again, I don't know how  
16 much factual dispute is on there, but I leave this  
17 cause of action for later determination, town's  
18 twenty-one, what if there's new improvements. I'm 5  
19 concerned with the application of that, how that  
20 would be applied. I may have to have some factual  
21 clarification of that to be provided at a hearing.

22 And lastly, whether or not the PILOT payments  
23 comply with the provisions of the General Municipal  
24 Law in regard to the <sup>allocations</sup> allegations of the various 6  
25 parties. Frankly, I don't understand. I think that

1  
2 if it's factually laid out for me, maybe I will  
3 understand and then I can make a determination on  
4 that. School's nineteen. Town thirteen, fourteen.  
5 County fourteen, fifteen.

6 That should cover the full petition --  
7 petitions. Now, we need a hearing date. You know,  
8 with this number of counsel, I think it's going to  
9 be problematic. Mr. Sullivan, you've got a jury  
10 waiting for you in Erie County. So, we're not going  
11 to ask you to pull out your book and call your  
12 office and try to settle with these other attorneys  
13 on a hearing date.

14 MR. SULLIVAN: I have my book with me, your  
15 Honor.

16 THE COURT: Well, then go across the hall,  
17 gentlemen, and talk to Beverly and get a date. My  
18 thoughts would be June, early June.

19 Who's going to prepare an order? Why don't we  
20 have the various petitioning entities prepare the  
21 order for their -- the relief that I ordered in  
22 regard to their petitions. Did everybody get -- did  
23 everybody copy that down? Did everybody get the  
24 enumerations as far as the causes of action? If you  
25 don't, you can copy off my notes here.

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MR. LESLIE: Or we can order a transcript.

THE COURT: Better yet.

MR. LESLIE: May I be heard on an issue, Judge?

THE COURT: Yes.

MR. LESLIE: I apologize but there was one issue that occurred to us as we approached this date today and with the hearing being scheduled it is also important in that respect; that is, the notion that all of these three petitions and proceedings should be considered joined or consolidated for purposes of both the hearing and then any resulting appeals, since there is some indication there may be appellate practice.

THE COURT: Why don't we provide for that in order form.

MR. LESLIE: That's what I'd request, Judge.

MR. McNAMARA: I have a question, Judge. How much time should we set aside for this hearing?

THE COURT: I don't know. A week or two? Two? Two weeks? I'm going to move it along, so it's not going to drag. It's going to be me. We're not going to bore them. I'll say I'm bored, let's move on. But I want to provide a more adequate record

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2 for -- it's going to go up on appeal whether I rule  
3 in your favor or their favor, it's going to go up on  
4 appeal. There's no question about that. And we  
5 want the appellate court to have a full record as  
6 far as the proceedings.

7 MR. McNAMARA: Thank you.

8 THE COURT: So, two weeks probably. I'll try  
9 to move it along. When it drags on, you know, we'll  
10 kick it along. Maybe rational people will take a  
11 look at, you know, what happened in Rockland County  
12 where the Bowl Line case resulted in almost fifty  
13 million dollars in tax refunds.

14 I spoke to the judge who proceeded through the  
15 course of that fifty-two-trial-day trial in regard  
16 to the Article Seven proceeding itself. And Judge  
17 Dickerson was very informative, shared much with me,  
18 gave me much material. You know, I've sort of  
19 become a little addicted to it, keep going to the  
20 computer and pulling out more and more of what --  
21 what's happening to the people in the Town of  
22 Rockland and in North Rockland School District.

23 The one -- one line that really was sobering to  
24 me was a news article that quoted the school  
25 superintendent down in North Rockland School

1  
2 District, a Brian Monahan, that says certainly  
3 Mirant, which was the utility involved, is a major  
4 factor in the situation, he said. Perhaps the most  
5 frightening statistic is for the next thirty years  
6 -- I'll be gone in thirty years. How many of us in  
7 this room are still going to be around thirty years  
8 from now? For the next -- you'll be here. Good for  
9 you. I'm going to be gone. You've got those little  
10 kids you've got to take care of. Thirty years, the  
11 Mirant debt payment will be the third largest item  
12 in our budget right behind salaries and benefits.

13           Amazing. For thirty years the debt payment on  
14 the Article Seven refunds are going to be the third  
15 largest item. Third largest item is not going to  
16 buy one pencil, one eraser, one sheet of paper, not  
17 going to pay for one teacher, not going to pay for  
18 any health insurance benefits, not going to provide  
19 for any field trips, nothing. Third largest item.  
20 Those people played with fire and they got burned.  
21 That's why IDAs -- the state proposed that IDAs take  
22 on the obligation of trying to find a more rational  
23 taxing entity.

24           Now, that doesn't resolve the question as to  
25 this particular PILOT and the items that I want to

1  
2 take a look at. The last three that I left, what  
3 happened with new improvements, the allegations of  
4 PILOT payments and whether or not this particular  
5 project qualified, you know, are -- still have to be  
6 resolved, as the others do. But those three are the  
7 most interesting.

8 But I would, again, urge the parties to try to  
9 resolve it by discussion. I was able to receive  
10 further money from AES. And frankly, they were  
11 forthcoming, they were rational, they were  
12 reasonable. I think people are taking a hard-line  
13 position. And they mouth that they care about the  
14 kids. I don't think they do. I don't think they  
15 do.

16 So, please, gentlemen, submit an order --  
17 orders and get a date across the hall in June for --  
18 the only thing we have to work around is my  
19 daughter's tonsil operation. Other than that, we'll  
20 get a date. All right. Good luck in your trial.

21 MR. SULLIVAN: Thank you, Judge. I appreciate  
22 your accommodations.

23 MR. LESLIE: Thank you, your Honor.

24 MR. McNAMARA: Thank you, your Honor.

25 THE COURT: No problem.

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(PROCEEDINGS CONCLUDED.)

\* \* \*

Certified to be a true and accurate transcript of  
the above-entitled matter.

*Lisa Mullane*  
LISA A. MULLANE, RPR  
Official Court Reporter