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Via E-mail

The Honorable Jaclyn A. Brillling
Secretary
State of New York Public Service Commission
3 Empire State Plaza
Albany, New York 12223

**Re: Notification of Receipt of Tax Refund Pursuant to P.S.L. § 113(2) and
16 NYCRR 89.3
Case 12-W-_____**

Dear Secretary Brillling:

Enclosed for filing is a Notice of Tax Refund and Proposed Disposition of Long Island Water Corporation d/b/a Long Island American Water. This filing provides notice of tax refund in accordance with Section 89.3 of the Commission's regulations and requests Commission approval of the Company's proposed method of disposition pursuant to Section 113(2) of the Public Service Law.

Respectfully submitted,

/s/ Suzana Duby

Suzana Duby

SD:dlc
Enc.

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Long Island Water Corporation d/b/a Long Island American Water Notification of Tax Refund Pursuant to Section 89.3 of the Commission's Regulations

Case 12-W_____

Long Island Water Corporation d/b/a Long Island American Water (“LIAW”, the “Company” or “Petitioner”) hereby notifies the New York State Public Service Commission (“PSC” or “Commission”), pursuant to Public Service Law Section 113(2) and 16 NYCRR 89.3, of LIAW’s receipt of a tax refund resulting from its complaint against the Town of Hempstead¹ (the “Town”) and the various garbage and refuse districts within the Town challenging the taxes levied for garbage and refuse services (also known as “*ad valorem*” levies), and requests Commission approval of the Company’s proposed method of disposition of such refund. Appended to this filing as Attachment B is a Draft form of Notice of Proposed Agency Action for publication in the State Register pursuant to the State Administrative Procedure Act and 16 NYCRR 3.5(j).

¹ Supervisor of the Town of Hempstead, the Town of Hempstead, the Town of Hempstead Refuse/Disposal District, the Town of Hempstead Refuse/Garbage District, the Lido Beach-Point Lookout Refuse/Garbage District, the Town Board of the Town of Hempstead as Commissioners of: Town of Hempstead Refuse/Disposal District, Town of Hempstead Refuse/Garbage District and Lido Beach-Point Lookout Refuse/Garbage District, the Board of Commissioners and Commissioners of the Town of Hempstead Refuse/Disposal District, Town of Hempstead Refuse/Garbage District and the Lido Beach-Point Lookout Refuse/Garbage District, the Receiver of Taxes of the Town of Hempstead, and the Controller of the Town of Hempstead (collectively “the Town”).

BACKGROUND

The tax refund received from Town of Hempstead totals \$1,642,838.95, including interest. This payment represents the refund payment to LIAW from the Town arising out of a judgment obtained in a series of actions commenced by the Company, as discussed herein.

In April, 1999, LIAW commenced an action against the Town of Hempstead and various garbage districts located in Hempstead in the Supreme Court, Nassau County (Nassau Co. Index No. 11436/99)(the “Action”) which alleged, among other things, that the Town’s imposition of special *ad valorem* levies for garbage and refuse services on the Company’s special franchise and public utility property (collectively “mass property”) is illegal, that continued imposition of such levies should be enjoined, and that judgment should be rendered in LIAW’s favor with interest from the date of each tax payment. A new action has been commenced by LIAW every April since 1999.

The theory for the challenges is that the taxes levied for garbage and refuse services may only be levied on real property that is benefitted by such services. LIAW has substantial property within the Town, including property known as Class 3 special franchise property and Class 3 public utility property. Class 3 property is commonly referred to as “mass property” and consists of mains, valves, hydrants and other appurtenances of the water utility system; the differentiation between special franchise and public utility property is due to its physical location, with special franchise property being located in a public right of way and public utility property being located in property owned in fee simple by a private third party. This property neither generates garbage or refuse, nor benefits from the collection services provided by the

County and the various garbage and refuse districts. Therefore, we have argued that the remittances to the various entities are unlawful and must be refunded.

In 2004, because of certain developments in other cases, LIAW dropped its actions against the independent garbage and refuse districts. The action against the County remained, however, and in 2005, the Court of Appeals (New York's highest state court) affirmed the lower court holdings that the Real Property Tax Law did not authorize the imposition of the *ad valorem* levies for garbage and refuse services. Based on the Court of Appeals ruling, LIAW succeeded with a motion in Supreme Court (the trial court level in NY) for consolidation and summary judgment for the tax years 1999-2002.² A decision was issued on July 8, 2008 and a judgment in favor of LIAW was entered by the Nassau County Clerk on October 10, 2008, in the amount of \$1,454,774.50, including interest at the statutory rate of 9% from the date of each tax payment to the date of the judgment ("the Judgment"), September 10, 2008.

The defendants appealed to the Appellate Division, Second Department. On October 19, 2010, the Appellate Division affirmed the Supreme Court decision. The defendants then moved for leave to appeal to the Court of Appeals (New York's highest court) from the Appellate Division, which appeal was denied on January 11, 2011. The defendants filed an appeal of the Appellate Division's decision denying leave to appeal. The Company filed its response on February 25, 2011, and on May 5, 2011, the Court of Appeals denied motion for leave to appeal. Payment in part or in full satisfaction of the Judgment was withheld by the Town until all rights to appeal said Judgment were exhausted.

² The motion did not include tax years 2003 through 2007 as discovery had not yet been completed for those cases.

LIAW and the Town, in an effort to avoid unnecessary further litigation and expenses associated with enforcement of the Judgment³, entered into an agreement whereby the Town tendered payment with interest from the date of judgment through December 6, 2011 at the rate of 6%, or a total of \$188,064.45 in post judgment interest, without prejudice to the Town's indemnification action against the County of Nassau and without prejudice or precedent for any other actions by LIAW for similar relief. As a result of the agreement, payment for the total amount due and owing to LIAW, inclusive of the agreed upon 6% statutory interest from the date of judgment through December 6, 2011, was \$1,642,838.95 (\$1,454,774.50 + \$188,064.45). Please see Attachment A for further details regarding this refund.

LIAW is and always has been extremely aggressive in pursuing tax challenges, where appropriate, since that is the only strategy for containing an expense that is otherwise completely outside the control of the Company. The actions that eventually resulted in the refund were commenced in 1999 and the Company pursued them to a successful conclusion twelve years later. The litigation of the claims against the Town has been complicated, extended and contentious. The Town and the defendant districts vigorously pursued their litigation positions at the three levels of the New York state court system and conducted extensive discovery against LIAW over an extended period of time. The successful result in this case was the product of extensive work by the Company and its outside tax certiorari counsel. Each year the Company was required to identify all of the utility properties that were wrongfully assessed in each district. Moreover, the Company was required to prepare and submit papers in both the Nassau County Supreme Court and

³ The Town has commenced an action for indemnification against the County of Nassau and other related County defendants under the County Guaranty and common law indemnification seeking, among other things, indemnification from the County for the Town's liability under the Judgment.

the Appellate Division before obtaining a final judgment. These efforts support permitting LIAW to retain a meaningful share of the refund.

The successful completion of this litigation and the subsequent settlement has provided LIAW with immediate and substantial tax relief, both in the form of the refund, with both pre- and post-judgment interest, of past due amounts, and in the form of the prospective reduction of its tax payments to the Town going forward.

The Company took considerable risks in pursuing the refunds, expending over \$215,835.63 in legal fees and costs during the course of these proceedings without any certainty about the result; LIAW paid the expenses of pursuing these matters without any certainty about the result or even its share of the recovery, if any.

ADDITIONAL POTENTIAL BENEFITS OF THE REFUND SETTLEMENT

In addition to obtaining a significant, up-front monetary benefit in the form of the Refund set out above and on Attachment A, LIAW, in conjunction with its outside tax certiorari counsel, is in the process of preparing a motion for summary judgment on the challenges to the taxes levied for garbage and refuse services for the 2003 – 2006 tax years. With the current decision affirmed on appeal, the Judgment not only permitted the Company to recover a substantial refund in excess of \$1.5 million (including post judgment interest), but also created a precedent that may support a similar favorable ruling in the proceeding that was filed by the Company in a separate complaint last year against the Town and its garbage districts for the period 2007 – 2011, which is likely to result in additional refunds.

PROPOSED OFFSETS TO REFUNDS

Legal Fees and Expenses

Within the instant petition, the Company proposes to deduct the legal disbursements and other expenses incurred in its efforts to obtain the Refund. As with its previous tax refund proceedings concerning property tax refunds received from Nassau County (*see e.g.*, Cases 08-W-1251, 09-W-0581, 10-W-0449 and 11-W-0484), the Company respectfully requests that its actual legal and other expenses be deducted from the overall refund amounts presented herein for the purpose of determining the appropriate allocation. The proposed offsets regarding legal fees and associated legal expenses (or disbursements) to the Refund total \$215,835.63. Please see Attachment A for further information regarding same.

PROPOSED DISPOSITION OF THE REFUNDS

LIAW respectfully submits that consideration of all of the relevant circumstances, particularly the level of effort undertaken by the Company in pursuing the judgment, including securing an agreement with the Town to include post-judgment interest in the refund in an amount of over \$188,000, supports an 82%/18% sharing proposal in this case. Commission approval of the proposed sharing formula will provide an incentive to the Company to pursue other, similar cases to their final conclusion in an effort to obtain further refunds, and continue to be diligent and resourceful in finding ways to reduce its tax liabilities.

Pursuant to 16 NYCRR 89.3(f), the Company proposes the following distribution method for final refunds: of the total Refund received (\$1,642,838.95), and not otherwise offset, eighty-two (82) percent of the net proceeds (currently totaling \$1,427,003.32 [\$1,642,838.95 total refund less \$215,835.63 in legal fees and costs]) plus interest, should be refunded to its

residential, commercial, and Other Public Authority customers, and LIAW should retain eighteen (18) percent. Thus, the Company proposes that customers be refunded \$1,170,142.72, while the Company retains \$256,860.60.

It is LIAW's position that the proposed distribution method described above is equitable to both the Company and its customers, given the size of the refund and LIAW's extraordinary, 10-year, litigation efforts to pursue it and the attainment of post-judgment interest through agreement with the Town. This result is the latest successful example of how the Company has consistently and successfully challenged property taxes for many years, resulting in significantly reduced property tax levels for the Company.

The Company should be permitted to net the legal fees and expenses of \$215,835.63 paid to its outside counsel, a key contributor to LIAW's successful efforts to secure these tax refunds. Furthermore, the Commission has acknowledged the Company's aggressive and consistent efforts in minimizing property taxes.⁴ Finally, this allocation of property tax refund monies is consistent with the recent allocations approved by the PSC under Cases 08-W-1251 and 09-W-

⁴ See Case 08-W-1251 *Petition for Approval Pursuant to Public Service Law Section 113(2), of a Proposed Allocation of Certain Tax Refunds between Long Island Water Corporation d/b/a Long Island American Water and Ratepayers*, at 7 ("Although the general standard for sharing of property tax refunds for Long Island Water is 15%, the Joint Proposal's recommendation for 18% retention of the refund by shareholders recognizes the company's efforts to contain its legal expenses and its aggressive stance. We find that the proposed allocation recommended in the Joint Proposal is reasonable. We authorize Long Island Water to retain for shareholders the equivalent of about 18% of property tax refunds, as calculated by Staff. The company avoided significant costs and potential litigation risks to warrant the sharing of the refund proceeds at a level above the baseline established for other Long Island Water property refunds.); Case 09-W-0581, *Petition for Approval Pursuant to Public Service Law Section 113(2), of a Proposed Allocation of Certain Tax Refunds between Long Island Water Corporation d/b/a Long Island American Water and Ratepayers*, at 8 ("...the 18% allowance recognized the Company's aggressive pursuit of refunds and its successful measures over recent years to reduce the proportion of property taxes in its revenue requirement. The same rationale continues to apply here. Allowing the Company to recover its actual legal fees and expenses also is reasonable in light of its efforts to minimize the costs of litigation. The Company has realized a substantial reduction in property taxes through its challenges to the County, while holding down the costs of achieving that result").

0581. Within those proceedings, the PSC found that an 82%/18% sharing of the tax refund money between LIAW's customers and LIAW was reasonable. Furthermore, the proposed 82%/18% sharing between the customers and the Company is well within the range that has been approved by the Commission, serves to reward the Company for its persistence in obtaining such consistently positive results and incents the Company to continue its aggressive efforts to reduce its tax burden, thereby continuing to benefit its customers.⁵ See Attachment A for more information.

CONCLUSION

Within the instant petition LIAW is proposing that eighty-two (82) percent of the net settlement proceeds should be refunded to customers and eighteen (18) percent should be retained by LIAW as was approved by the PSC under Cases 09-W-0581 and 08-W-1251 and for the reasons set forth herein. With regard to the legal fees and expenses incurred in obtaining these property tax refunds, LIAW believes it has shown and will show, in good faith, reasonable legal fees and costs as described above that should be considered for recovery in accordance with Commission precedent. The customers have substantial protection built into the rate plan (as set forth in the PSC's March 5, 2008 Order in Case No. 07-W-0508), including the property tax reconciliation mechanism that work to ensure that they pay only their PSC-allotted share of LIAW's property

⁵ See Cases 90-E-1185 *et al.*, *Long Island Lighting Co.*, Op. No. 91-25 (November 26, 1991), p. 35; Cases 88-W-016 *et al.*, *Citizens Water Supply Co.*, Op. No. 88-31 (December 23, 1988), p. 3; Case 27260, *Spring Valley Water Company, Inc.*, Op. No. 78-25 (October 12, 1978), pp. 11-12. See Case 29484, *Long Island Lighting Co.*, Recommended Decision (September 2, 1987), p. 26 ("LILCO should be allowed to retain 25 percent of the refunds because of its extensive efforts in the tax certiorari area and as an incentive to continue those efforts."); *aff'd*, Op. No. 87-26 (December 3, 1987); Cases 27774 *et al.*, *Long Island Lighting Co.*, Op. No. 81-9 (May 26, 1981), p. 62; Case 26958, *Brooklyn Union Gas Co.*, Op. No. 76-25 (December 7, 1976), p. 12; Case 26780, *Brooklyn Union Gas Co.*, Op. No. 75-26 (October 20, 1975), pp. 31-33. The Commission has even approved a settlement providing for the utility to retain 50 percent of a tax refund in a case where the utility's efforts to obtain a tax refund were considered "truly extraordinary." Cases 29327 *et al.*, *Niagara Mohawk Power Corporation*, Recommended Decision (May 31, 1991), pp. 45-46; adopted by Op. No. 89-37(D) (June 28, 1991).

taxes. Shareholders should be rewarded for the extraordinary efforts put forth by the Company in securing these refunds.

Finally, within this refund proceeding, LIAW would like to discuss its proposals with the PSC Staff and work out a mutually acceptable settlement that benefits both its ratepayers and the Company.

Attachment A

Garbage Tax Refund

Interest Rate Assumption
3.35% for 2011

	Distribution Received by Co.	Expenses (1)	Net Refund	Shareholders Portion 18%	Ratepayers Distribution	Distribution	Interest	Cumulative
December 8, 2011	\$1,642,838.95	\$209,993.28	\$1,432,845.67	\$257,912.22	\$1,174,933.45		\$1,438.00	\$1,176,371.45
December 30, 2011		1,044.90	(1,044.90)	(188.08)	(856.82)		-	1,175,514.63
January 31, 2012		-	-	-	-		853.00	1,176,367.63
February 3, 2012		4,797.45	(4,797.45)	(863.54)	(3,933.91)		(6.00)	1,172,427.72
February 29, 2012			-	-	-		853.00	1,173,280.72
March 31, 2012				-			851.00	1,174,131.72
	\$1,642,838.95	\$215,835.63	\$1,427,003.32	\$256,860.60	\$1,170,142.72		\$3,989.00	\$1,174,131.72

Note (1): The Company will update its legal expenses should it determine that such an update is necessary.

	credits due ratepayers	AccDefIncTax	Interest Rate Assumption		monthly refund	credits due ratepayers end of month
			for 2011	for 2011		
			interest bearing	interest		
December 8, 2011	(\$1,174,933)	\$469,973	3.35%	0.002749699	\$0	(\$1,176,371)
December 30, 2011	857	(343)	3.40%	0.002790116	0	857
January 31, 2012	(1,175,515)	470,206		(853)	0	(1,176,368)
February 3, 2012	3,934	(1,574)		6	0	3,940
February 28, 2012	(1,176,368)	470,547		(853)	0	(1,177,221)
March 31, 2012	(1,173,281)	469,312		(851)	0	(1,174,132)
April 30, 2012	(1,174,132)	469,653		(852)	0	(1,174,984)
May 31, 2012	(1,174,984)	469,993		(852)	0	(1,175,836)
June 30, 2012	(1,175,836)	470,334		(853)	0	(1,176,689)
July 31, 2012	(1,176,689)	470,675		(854)	0	(1,177,543)
August 31, 2012	(1,177,543)	471,017		(854)	0	(1,178,397)
September 30, 2012	(1,178,397)	471,359		(855)	0	(1,179,252)

Notice of Proposed Agency Action**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****Disposition of Property Tax Refunds Received by Utilities****I.D. No.** PSC-

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Commission is considering the petition of Long Island Water Corporation regarding the disposition of a tax refund received from the Town of Hempstead after successful challenges to the taxes levied for garbage and refuse services.

Statutory authority: Public Service Law Section 113 (2) and 16 NYCRR 89.3

Subject: Disposition of tax refunds received by utilities.

Purpose: To determine the disposition of tax refunds.

Substance of proposed rule: The Commission is considering whether to approve, reject or modify the request of Long Island Water Corporation d/b/a Long Island American Water (company) for the disposition of a tax refund it has received as settlement of challenges to taxes levied by the Town of Hempstead. The company challenged its levy for several years of taxes and the \$1,642,838.95, inclusive of interest, represents the payment by the Town to the company. The company proposes that certain costs related to these tax challenges be deducted and that its shareholders retain a percentage of the net amount as reward for the company's efforts in obtaining the refund. The remainder of the refund would be returned to ratepayers in a manner to be determined.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website

<http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:

Notice of Proposed Agency Action

Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY
12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service
Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530.

Public comment will be received until: 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility
Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within
the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-G-0708SA1)