MARC S. ALESSI
Member of Assembly
1ST District

THE ASSEMBLY
STATE OF NEW YORK
ALBANY



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July 19, 2006

Hon. Jaclyn A. Brilling
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223

RE: **Case 06-M-0586** - Petition of Long Island Power Authority for a Declaratory Ruling Concerning 16 NYCRR Part 720-6; and
**Case 06-M-0587** – Petition of Long Island Power Authority for Commission Review of the Appropriateness of Long Island Power Authority's Recovery of Fuel, Purchased Power and Related Costs Through its Automatic Adjustment Clause.

Dear Secretary Brilling,

Please find attached an original and 25 copies of a Petition for Rehearing of the Declaratory Ruling and Order issued in the above-captioned cases. This Petition is filed pursuant to 16 NYCRR §3.7.

Copies of this petition have also been sent to the attached Service List.

Sincerely,

Marc Alessi

Marc Alessi
Member of Assembly

Enclosure

cc: Service List via regular mail

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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Petition for Rehearing of Declaratory Ruling in Case 06-M-0586 and Petition for Rehearing of Order Declining Request for Review of Adjustment Clause In Case 06-M-0587

CASE No. 06-M-0586
CASE No. 06-M-0587

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Pursuant to Rule 16 NYCRR § 3.7, Assemblyman Marc Alessi hereby petitions for a rehearing of the Declaratory Ruling in Case 06-M-0586 and rehearing of the Order Declining Request for Review of Adjustment Clause in Case 06-M-0587. This motion for rehearing is timely, as such is filed with the Secretary of the PSC within 30 days of the service of the Declaratory Ruling and Order, both dated June 20.

## BACKGROUND

In 1997, in its Resolution Approving Certain Specified Projects of the Long Island Power Authority, including the acquisition of assets and operations of the Long Island Lighting Company (LILCO) by the Long Island Power Authority (LIPA), the New York State Public Authorities Control Board (PACB) conditioned that approval subject to 5 Project Conditions. (See PACB Resolution No. 97-LI-1, pg. 6). Project Condition Number 5 states:

> LIPA will not implement an increase in average customer rates exceeding two and one half percent over a twelve month period, nor will LIPA extend or reestablish any portion of a temporary rate increase over two and one half percent, without approval of the Public Service Commission following a full evidentiary hearing.

(Id. at pg 8-9.)

In its petitions of May 3, 2006, LIPA admitted to changing the costs recovered through the Fuel and Purchased Power Cost Adjustment (FPPCA) clause, despite arguing the legitimacy of cost recovery through the FPPCA and use of similar "escalator" clauses by other electric corporations for the recovery of fuel and non-fuel related costs. (See, generally, Appendix 1, History of LIPA's FPPCA Decisions and Revisions.) Since 2001, LIPA has admitted to changing the components of the FPPCA, and has not only maintained a level of cost recovery through the FPPCA – which had not been used as a cost recovery mechanism prior to 2001 – but has also increased the level of cost recovery in the FPPCA a total of nine times through 2006, at a rate exceeding two and one half percent.

As an attachment to its petition seeking Declaratory Ruling, LIPA provided a letter dated April 21, 1998, signed by the former Chairman of the PSC, Maureen Helmer. That letter, addressed to LIPA Chairman Richard Kessel sets out a PSC response to Condition 5 of the PACB Resolution. That letter states that the PSC "will implement this condition…" (See Letter of PSC Chairman Helmer, dated April 21, 1998, pg. 1.) The letter then set out 3 conditions under which the PSC would review LIPA rates, pursuant to the PACB Resolution Condition 5. The PSC review would include the availability of "evidentiary hearing" and rendering of "a decision in an expedited manner." (Id. at pg.2.) The conditions also indicate that any rate increase must be exclusive of increases due to "automatic adjustment clauses" which include the FPPCA. (Id. at pg. 1.)

LIPA's petition attempted to narrow the scope of review of its rates by seeking determinations only regarding the appropriateness of cost recovery through the FPPCA.

On May 10, 2006, Assemblyman Marc Alessi, along with eight other members of the Assembly whose districts are served by LIPA, submitted a letter response to the LIPA petitions.

This letter sought review of LIPA's entire rate structure, and requested the PSC to avoid issuing any ruling on the LIPA petitions until an evidentiary hearing process was initiated. Prior to the LIPA petitions, Assemblyman Alessi had requested the New York State Comptroller to review and assess the rates and FPPCA of LIPA, and to recommend possible areas of review to the PSC. The Comptroller report of December 2005 urged PSC review of LIPA rates, in part stating a need for further transparency in overall rates and that LIPA had inappropriately used the FPPCA for cost recovery. In fact, the Comptroller stated that "[t]he potential for PSC review is a welcome development, since the [FPPCA] have been imposed without any form of regulatory oversight." (See Comptroller Report on Long Island Power Authority, dated December 2005, page 3.)

On June 20, 2006, the PSC denied both of LIPA's requests on the grounds that the PSC did not have statutory jurisdiction over LIPA. (See Declaratory Ruling in Case 06-M-0586, pg. 4; Order in Case 06-M-0587, pg. 5.) This lack of jurisdiction, given the exemption of LIPA from the Public Service Law as per the terms of Public Authorities Law 1020-s and the assertion that the PACB resolution does not confer jurisdictional authority, the PSC reasoned, prevents the PSC from exercising oversight of the operations and rate structures of LIPA. Further, the PSC claims that other issues, such as differences in accounting methods and the inability of the PSC to require the production of documents from LIPA, also interfere with the ability to initiate review of LIPA rates. (See Order in Case 06-M-0587, pg. 6.) The PSC also asserts that were it to provide any determinations or recommendations, they would be only advisory in nature, and that no mechanism exists for the issuance of such advisory opinions. (Id.) Finally, the PSC stated that the Department of Public Service would be available to LIPA in the procurement and overseeing of an independent consultant. (Id., footnote 14.)

## DISCUSSION

### The PSC Denial of Review Failed to Consider Previous PSC Agreement to Enforce the Terms of the PACB Resolution.

Both of the June 20 decisions by the PSC were founded on the reasoning that the PSC has never been provided statutory jurisdiction over LIPA. The PSC decision in Case 06-M-0587 makes this point clearly, that despite the imposition and existence of PACB Resolution Condition 5, "the Legislature did not amend §1020-s(1) of the Public Authorities Law to require LIPA to submit to our rate review or to otherwise expand our jurisdiction over LIPA." (See Order in Case 06-M-0587, pg. 3.)

While LIPA is provided general exemption from the provisions of the Public Service Law subject to specific exceptions through §1020-s(1) of the Public Authorities Law, the PSC reliance on this statutory provision fails to acknowledge that the PSC had already acceded to oversight responsibility over LIPA. The April 21, 1998 Letter from Chairman Helmer states clearly that "the [PSC] **will implement this condition**" (emphasis added). There were no additional conditions created in that letter stating that the PSC would accept jurisdictional responsibility only upon the Legislature's enactment of statutory provisions providing such jurisdiction. In neither of its June 20 decisions did the PSC address nor deny the existence of this accession to jurisdictional oversight or claim that such reach for jurisdiction was beyond the power and authority of the prior Chairman.

Given that a prior PSC Chairman had acceded to the provisions PACB Resolution Condition 5, and the PSC failure to address this agreement in either the June 20 Declaratory

Ruling or Order, such Declaratory Ruling and Order should be reversed. These proceedings should be re-opened to allow for the initiation of evidentiary hearings.

**To Provide Adequate Consumer Protections for LIPA Ratepayers, the PSC Should Request All Needed Information to Initiate a Full Review of LIPA's Rates.**

The PSC Order states that it does "not have the authority to compel production of LIPA's books or records, nor do we have the power to enforce or ensure implementation of any determination or recommendations." (See Order in Case 06-M-0587, pg. 6.)

While there exists no statutory authority to compel the production of documents, neither does there exist a prohibition on the ability to request documents. A refusal by LIPA to produce such documents at the request of the PSC would be a failure of that public authority. Such refusal could well be a demonstration that LIPA was always unwilling to participate in a public review process of its rates. However, failure of the PSC to seek information and to conduct a review on behalf of Long Island electric ratepayers cannot be rendered solely due to the lack of affirmative authority to compel production of documents. The power of subpoena may not be necessary if LIPA is a willing participant in the public review process. Also, the PSC's arguments that any decision it renders in these proceedings would be either unenforceable or merely advisory in nature should not impede the ability of the PSC to request, collect, review and render determinations on information submitted in the course of an evidentiary proceeding.

Compelling reasons exist for the PSC to seek information from LIPA and conduct a full review of LIPA's rates.

In the filing of its petitions, LIPA has acceded to the authority of the PSC for review of its records. Once the authority came to the PSC seeking review, it cannot tailor the scope of that

review to suit its own purposes. However, LIPA has attempted to limit the scope of PSC review by seeking only determinations concerning the appropriateness of the FPPCA. Considering the conditions of the April 1998 letter of Chairman Helmer which LIPA itself provided as evidence, LIPA was aware that the PSC exercise of jurisdiction and review would only review base rate increases exclusive of automatic adjustment clauses. Therefore, by seeking review of a portion of rates which it knew the PSC said it would not review, LIPA may have knowingly submitted a request upon which the PSC would not render a determination. This troubling possibility was the primary concern underlying the May 10 letter submission of the nine Members of the Assembly.

Despite the assertions made to the contrary, the language of PACB Resolution Condition 5 indicates that the PACB intended that the FPPCA and other automatic adjustment clauses were to be subject to PSC review, through the use of the term "temporary rate increase." That the identification of a "temporary rate increase" is made, distinguishing such increases as separate and distinct from "an increase in average customer rates," is evidence that automatic adjustment clauses were intended to be subject to the PSC review and determination, separately from what would otherwise be called a "base rate" increase. Semantics and nomenclature should not be used to avoid what is a clear intent that the FPPCA, by whatever name, was to be reviewable pursuant to the PACB Resolution Condition 5. Indeed in the documents submitted in these proceedings, the FPPCA has been called "an escalator clause," "a fuel adjustment clause," and "an automatic adjustment clause." By any other name, all these constitute, by their nature, "temporary rate increases."

The assertion that temporary cost recovery clauses are not generally reviewable by the PSC is also a fallacy. While utility companies retain permission to implement cost recovery of

certain costs through "escalator clauses," all such costs and the prudency of their recovery are ultimately subject to PSC review and approval in the next subsequent utility rate case. Continued recovery of such costs may be determined appropriate through escalator clauses, or they may be added to the base rates. In the alternative, the PSC may determine that all or a portion of such costs were incurred "imprudently" by the utility, and their recovery may be denied. No such review mechanism currently exists for LIPA.

In Attachment 1 to its petition in Case 06-M-0586, LIPA provided a history of the FPPCA. As can be gleaned from these documents, the items recovered by this clause have changed over time. These activities may be prudent and appropriate; they may not be. Currently, there is no expertise to assist the Long Island ratepayer to make that determination. In the course of shifting costs into and out of the FPPCA, costs previously collected in base rates may have been shifted to the FPPCA – thereby increasing the amount collected through the FPPCA, but without any equal or concurrent reduction in the base rate. This results in an effective increase in the base rate. The shifting of cost recovery from base rates to the FPPCA may have been done in order to avoid an increase in the base rates, and thereby avoiding the PACB Resolution Condition 5 requirements.

Further, as stated on page 9 of Attachment 1, and which was also discussed in the May 10 letter from the Members of the Assembly, LIPA has announced a plan to change its rate structure, and will now merge costs collected by the FPPCA with other base rate fuel and purchased power costs. By so doing, ratepayers will no longer be able to identify the "temporary" charges for energy supply purchases from those that are built into the base rate. In addition, it will also be near impossible to determine even whether base rates will increase, as any increase in cost recovery could be labeled an "FPPCA" charge and would not be readily

traceable. Furthermore, by merging the costs of the FPPCA into the supply costs of the base rate, a new question of whether those previous FPPCA costs have now become part of the base rate, and therefore reviewable by the PSC, is presented. The only state agency with the requisite expertise to review all of these matters is the PSC.

An additional issue which should raise concern, and thus trigger the need for PSC review, is LIPA's repeated assertion that the authority is "absorbing" a portion of the costs that would otherwise be recoverable through the FPPCA. LIPA has repeated these curious claims over the 5-year life of the FPPCA. What remains unspoken is how LIPA is "absorbing" these costs. Generally, when a corporation "absorbs" costs which have been incurred, this means it is not seeking recovery of those costs from its customers. Thus, the owners or shareholders of that corporation reduce their profits to meet those uncollected costs. "Absorbed" costs cannot be passed along to bondholders, as such would be a violation of bond restrictions and agreements. What makes the LIPA statements concerning "absorbed" costs so incomprehensible is that LIPA is financed 100% through debt instruments. That is, there exist no shareholders to "absorb" any uncollected costs. Rather than LIPA "absorbing" costs, it is either "deferring" cost recovery, or it is financing operating costs with borrowed money. Both scenarios result in accumulation of interest on those "absorbed" costs – which ultimately increases the costs of operations even more. Such practices are eminently reviewable by the PSC. As stated above, the PSC is the only state agency with the requisite expertise to conduct this review.

Finally, if there exists a need to retain consultants to effectuate a thorough review of LIPA's rates, whether due to differences in employed accounting methodologies or any other reason, such consultant should be retained by the PSC, not LIPA, and should be done in the context of a PSC docketed case. No doubt the circumstances of the review of LIPA's rates

constitute a special circumstance and may require a degree of deviation from standard processes used by the PSC. However, this does not diminish the need for such review and oversight. Also, it is essential that the PSC retain such consultant, rather than LIPA, in order to avoid any real or perceived conflict of interest.

Given the compelling arguments above, the denial of review by the PSC was made in error and should be reversed. The PSC should reopen these proceedings and request all information from LIPA which is necessary to complete a full review of LIPA's rates.

## CONCLUSION

The need for oversight of LIPA's rates by the PSC cannot be understated. The failure of such review demonstrates a failure of the State with respect to the ratepayers of Long Island. The LIPA takeover of LILCO was premised on and promised to provide sustained reductions in the rates and bills on Long Island, in light of the ever-escalating costs for electricity. LIPA ratepayers are now facing a new round of escalating costs through the imposition and escalation of the FPPCA, and possibly other reasons. LIPA promised to submit to a full review of rates in press statements as long ago as October 2005. The submittals which were finally made by LIPA on May 3, which were much less than the promised full rate review, represent a failure of the authority to the citizen ratepayers of Long Island.

The denial of a review of the recovery levels, appropriateness and prudency of LIPA's activities by the PSC represents another failure of a state agency to protect the ratepayer.

Admittedly, there has also been a degree of failure from the State Legislature to the Long Island ratepayers. Despite the Assembly's passage of Assembly Bill No. A.10073 in 2006, which would place the PACB Resolution Condition 5 language, verbatim, in statute, that bill, for

whatever political reason, has failed to move through the entire legislative process. Other Assembly bills providing for additional oversight have similarly been passed by the Assembly in previous years, yet never manage to be enacted into law.

Condition 5 was included in the overall PACB Resolution approving the LIPA acquisition of LILCO assets, in part, to ensure that a degree of regulatory oversight of Long Island electric utility rates was maintained. Certainly the creation and existence of PACB Resolution Condition 5 created an expectation on the part of Long Island ratepayers that regulatory oversight would not be forsaken as a result of the public authority acquisition of the utility system.

For the reasons stated above, the PSC should reverse its Declaratory Ruling and Order in these cases, reopen the cases for evidentiary hearings and request all required information from LIPA to conduct a full review of the entirety of LIPA's rates.

Respectfully submitted,

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Dated: July 19, 2006