

ECONOMIC DEVELOPMENT
HIGHER EDUCATION
and
ENERGY COMMITTEE
of the
SUFFOLK COUNTY LEGISLATURE
Minutes

A regular meeting of the Economic Development, Higher Education & Energy Committee of the Suffolk County Legislature was held in the Rose Y. Caracappa Legislative Auditorium of the William H. Rogers Legislature Building, Veterans Memorial Highway, Smithtown, New York, on Wednesday, November 10, 2010.

MEMBERS PRESENT:

Legislator Wayne Horsley - Chairman
Legislator Steve Stern - Vice-Chair
Legislator Thomas Cilmi
Legislator Lynne Nowick

MEMBER NOT PRESENT:

Legislator Rick Montano - Excused Absence

ALSO IN ATTENDANCE:

George Nolan - Counsel to the Legislature
Joe Schroeder - Budget Review Office
Joe Muncey - Budget Review Office
Renee Ortiz - Chief Deputy Clerk of the Legislature
Ben Zwirn - County Executive's Office
Yves Michel - Commissioner - Economic Development
Carolyn Fahey - Economic Development
Linda Bay - Aide to Minority Caucus
Paul Perillie - Aide to Majority Caucus
Bob Martinez - Aide to Legislator Montano
Irving Like - Special Counsel to SC Legislature/LIPA Case
Dot Kerrigan - AME
All other interested parties

MINUTES TAKEN BY:

Donna Catalano - Court Stenographer

(*THE MEETING WAS CALLED TO ORDER AT 2:05 P.M.*)

CHAIRMAN HORSLEY:

May we all stand for the Pledge of Allegiance.

SALUTATION

And may we all stand for a moment of silence for the men and women who protect our freedoms both home and abroad.

MOMENT OF SILENCE

Please be seated. Good afternoon, everybody. Welcome to the Economic Development, Higher Education and Energy Committee meeting of November 10th. Thank you for being here today. And we will commence with the meeting. Now, Ms. Nowick has asked that we take the agenda upfront, if there's no objections. Shouldn't take more than a few minutes. Legislator Montano, by the way, has an excused absence. He is out of town. All right.

So why don't we move to the Introductory Resolutions. As you see here, we have presentations; Irving Like, Special Counsel to the Suffolk County Legislature in the case of Suffolk County V. LIPA. Let us move through the Introductory Resolutions.

1980, Establishing a Long Island Power Authority Legislative Oversight Committee. (Romaine)

Now, I've had -- before we get into this, I have had discussions with Legislator Romaine over this issue, and it's an interesting issue. I have told him what I'm going to do at this point is we are going to talk about this resolution over the next several weeks, which he has no objections to. He may even come down and discuss it with us of what his intentions are, where he wants to go with it, and I said that's fine. So we decide that we are going to put a motion to table today with the understanding that we will take up this issue at the next EEE Meeting if that's all right. So motion to table by Legislator Nowick, I will second the motion with the understanding that we will come back to this at a later time. All those in favor? Opposed? So moved. All right. **TABLED (VOTE: 4-0-0-1; Not Present - Legis. Montano).**

1999, Appropriating funds in connection with security notification - College wide (CP 2140). (Co. Exec.)

Do I have a motion on that?

LEG. NOWICK:

Motion.

CHAIRMAN HORSLEY:

Motion to approve by Legislator Nowick, seconded by Legislator Stern. All in favor? Opposed? So moved. **APPROVED (VOTE: 4-0-0-1; Not Present - Legis. Montano).**

2000, Appropriating funds in connection with infrastructure - College wide (CP 2149). (Co. Exec.)

Any motion on that. I will make a motion to approve.

LEG. STERN:

Second.

CHAIRMAN HORSLEY:

Seconded by Legislator Stern. Any comments from the college? Anything you'd like to let us know about these?

AUDIENCE MEMBER:

We are available if there are any questions.

CHAIRMAN HORSLEY:

This is all part the Capital Budget, and we're just appropriating, moving it along. Good. We like to see movement in the College. All in favor? Opposed? So moved. **APPROVED (VOTE: 4-0-0-1; Not Present - Legis. Montano).**

2014, Authorizing Phase II of energy assessment of the William H. Rogers Legislative Building. (Pres. Off.)

CHAIRMAN HORSLEY:

Ms. Nowick is concerned with our energy consumption here. Mr. Schroeder, do you have anything to comment on this?

MR. SCHROEDER:

This is a natural extension of the initial assessment that's being conducted now. We are completing that assessment now. We have identified a number of avenues where we can improve the energy profile of this building and reduce expenditures for energy. And this next phase would be measurement and verification, which would actually measure whether or not we are saving energy by implementing the measures that are recommended. And it's one of the things that's recommended by the Federal Government, USGBC and others to document savings.

CHAIRMAN HORSLEY:

We are losing energy.

LEG. CILMI:

At the risk of offending Legislator Nowick, I'll make the motion.

CHAIRMAN HORSLEY:

Motion to approve by Legislator Cilmi, seconded by Legislator Stern. All those in favor? Opposed? So moved. **APPROVED (VOTE: 4-0-0-1; Not Present - Legis. Montano).**

(*The following testimony was taken by Donna Catalano & transcribed by Alison Mahoney - Court Reporters*)

CHAIRMAN HORSLEY:

All right. We will move to -- I don't have any cards, right? I'd like to move to the presentation, Irving Like, Special Counsel to the Suffolk County Legislature in the case of Suffolk County v. LIPA. As we all know, Irving Like is a legend in Suffolk County who represents us on this issue but has in the so many issues before going back to Shoreham and manufactured gas plant issues and all sorts of other things that he is renowned for. Welcome, Irving. It's good to see you.

MR. LIKE:

Thank you. Good afternoon.

CHAIRMAN HORSLEY:

You're going to update us on the status of this issue, where we're at, where it's at in the courts, is it a dead issue; all those types of things that we're hoping to hear that you could enlighten us.

MR. LIKE:

Thank you very much. I want to first tell you that this matter is still before the court. We have a very capable Judge who is going to be making a decision on whether or not to grant reargument on two findings that she made that we've challenged. LIPA is represented by very capable counsel. And my reporting to you should not in any way be interpreted as any disrespect either for the Court or for LIPA's counsel. Okay?

Here's the situation. If you were going to put a headline on this, I think it would be fair to say that LIPA has ripped off the Suffolk County ratepayers, and I'll tell you how it was done. In the Year 2000, a Shoreham settlement agreement was signed by the County of Suffolk, the County of Nassau and a number of districts, school districts, fire districts, and that argument settled the Shoreham tax judgment for a specific amount. It also provided for an allocation of rebates and credits between Suffolk County and non-Suffolk ratepayers. The overwhelming amount of the rebates and credits were given to the non-Suffolk ratepayers in order to compensate them for the years that they were paying too many taxes on the Shoreham plant.

Mr. Kessel entered into a side agreement with Nassau County to give them an additional \$25 million in rebates that were not authorized by the agreement which all of them had signed. He also agreed to give them \$25 million which ostensibly was to be used for Clean Energy Programs knowing, however, that Nassau County had no intent to use it for that purpose but was going to use it, and it did, to reduce its Shoreham -- it's budget deficit. So you have a total of \$50 million in what we regard as illegal gifts to Nassau County. Kessel justifies these deals by saying he had to do that in order to get Nassau County to agree to the settlement. Now, how are they going to pay this? LIPA decided in May of 2000 to sell bonds that would be used to fund the authorized credits that were specified in the Shoreham settle agreement which total I think 462.5 million; 350 million of that was to go to the non-Suffolk ratepayers and 125 or 150 were to go to the Suffolk ratepayers.

At the same time, it was agreed that a Shoreham surcharge percentage would be imposed on the rates paid by Suffolk County ratepayers over the term of years until the Shoreham debt was paid off, and at that time, I think they were looking for like a 20 to 25 year amortization period. So every year Shoreham -- Suffolk ratepayers would see that a surcharge of a couple of percentage points was added to their rate bill and this would go on for years. Now, if you have a piece of paper in front of you, I'd like you to write out an equation, because what I say will be graphically illustrated by the equation. Use as the denominator of the equation LIPA's total electric revenue and use as the numerator the Shoreham debt that's owed by the Suffolk County ratepayers. When you divide the Shoreham debt by the denominator, you will come out with a percentage which is the surcharge. Now, whether that surcharge is accurate or whether it's excessive depends upon whether the numerator and the denominator are correct. If the numerator is less then the surcharge is less; if the denominator is more then the surcharge is less. That's the equation.

What happened was -- and this probably was the result of the analysis that Fred Pollert did when he was in the Budget Office. When he started looking at the information coming from LIPA, he realized there was something wrong. They were making payments of credits or rebates that did not seem accurate. And when we dug into it further, we found that the rebates and credits that were authorized by the Shoreham settlement agreement were not sufficient to also cover the additional 25 million. Now, that did not come about, that information did not come about until we started a lawsuit and we engaged in discovery and were able to extract internal documents and to conduct depositions of the Chief Financial Officer of LIPA and Mr. Kessel himself. They then admitted, under oath, that the amount of proceeds of that sale were insufficient; insufficient to pay the authorized

amount and the additional 25 million.

We then questioned them as to what did they use to make the payments of the additional 25 million to Nassau County. At first they denied that they used the bond proceeds. We then confronted them with the official statement accompanying the bond issue and the arbitrage certificates which has sworn statements by LIPA's officers and its counsel. That document showed that they actually used, they took \$25 million out of the Shoreham settlement agreement proceeds and used it in the Year 2000 to pay the Nassau ratepayers the additional 25 million. When we sent the transcript of the Examination Before Trial to be signed by the LIPA officer who testified, they altered the testimony, it's called *irata*, to indicate that, no, they didn't pay it out of the bond proceeds, they paid it out of the investment earnings on the bond proceeds. In other words, they said, "We took the bond proceeds, we invested it in what's called a repurchase agreement with the Bank of America and we earned enough on that investment to pay the additional 25 million.

They then did something else that led us to become suspicious as to whether they were cooking the books. When our forensic experts looked at their records, they said, "We can't see where they were able to find enough money in the investment earnings to pay the additional 25 million." According to our calculations, looking at their schedules, they only earned three and a half million. Okay?

LIPA then presented testimony, and they had some very high powered consultants that they brought in, in which they said that over the years from 2000-2003, they earned about \$19 million which they used as a credit to the account to offset what they spent in the Year 2000 to come up with 19 million of the 25, and the remaining six million they used cash reserves to pay. So the back crediting was the way they said, "We didn't have the money when we paid it in 2000, but we had it by 2003 and we established on our books the appropriate credits to match and to offset."

Now, I'll give you an example. Let's say you're an attorney and you have an escrow account. Your client gives you a thousand dollars, you put it in your escrow account and you steal that money, you use it for an unauthorized purpose. However, two years afterwards you come upon a thousand dollars and you put it back in the account; that doesn't work. You do not exonerate yourself from having committed that unethical act by raiding the escrow account and then claiming that you were able to cover it with money that you earned later on; that, however, is what we think is happening here.

So the next question was where do they get the 19 million? We can only account for three and a half million. They said that the other 14 million came from a non Shoreham settlement agreement bond issue. The non-Shoreham settlement agreement bond issue was the 1998 LILCO acquisition bond issue when LIPA took over LILCO and they sold bonds to enable them to pay the purchase price. So what they're claiming essentially is that they took either interest or investment earnings from a previous bond issue and added it to what they earned on the Shoreham settlement bonds.

Our motion for reargument, because the Court agreed with LIPA, well, if you had enough earnings to pay for it and you used that -- there was one sentence in the Shoreham settlement agreement, one sentence which said that LIPA, at its discretion, could use the investment earnings on the tax settlement bonds for whatever purpose. It didn't say it could use it pay an additional rebate, just one sentence. The Court said that sentence relieved LIPA of any liability for doing that and we've moved to reargue saying that that can't be the case because they haven't shown us how they earned the remaining 14 million, all we could figure out was a few million.

We also said at the very worst, even if we lose on everything, LIPA owes the Suffolk ratepayers six million, because they said that in 2003 they back-credited 19 million of investment earnings to pay the 25 million and they took the remaining six million out of their cash reserves. Well, if they took it out of cash, that cash belongs also to Suffolk County. They can't take all the cash and give it to

Nassau. So we've also called that to the attention of the Court, that even if the Court decides against us on the big bucks, there's still a \$6 million item which did not come out of investment earnings.

The other argument we made, and this was based upon the arbitrage transaction which was something LIPA had to do in order to be able to use the investment earnings. They had to comply with the IRS and with the SEC regulations as to arbitrage. And we have those certificates because they were produced in discovery, and lo and behold, the arbitrage papers say that they're supposed to use the investment earnings to pay down the Shoreham debt. They didn't do that. They took the investment earnings, the amount of which we still don't know for sure, and they used it to pay the additional rebate. We pointed that out to the Court also; how do you justify allowing them to do this when they swore that they would use the investment earnings to reduce the Shoreham debt.

Now, if you look at your equations, if they were obligated, as we claim, to use the investment earnings to pay the Shoreham debt, it would decrease the numerator and would, therefore, reduce the Shoreham surcharge equation. With regard to denominator we raised another issue. We found a letter that Kessel had written to Maxine Postal when she was the Presiding Officer in which he explained how they would be calculating the Shoreham surcharge equation factor. And he said to her they would divide the Shoreham debt by the retail electric revenue of LIPA, retail. We say that based on the Shoreham settlement agreement, he should have had as a denominator the total electric revenue which would include pole revenue, negotiated revenue, revenue that is in a non-retail category. Again, if you look at your equation, if the denominator is understated, as we believe it is, then if it's increased that, too, reduces the Shoreham surcharge.

Now, in the decision of the Court -- which, as I say, we're asking be reconsidered -- the Court did say that an audit was necessary to resolve some of these issues, and I'll tell you what the scope of the audit should be. It should first be to determine how do they come up with the amount of investment earnings, what were the sources, was the number accurate, and how did they come up with the denominator, the total electric revenue? We asked the Court to request that the State Comptroller assist the County in this matter, because it's expensive, you have to have experts do it. LIPA can spend everything they want because they event -- they charge it all back to us as ratepayers, the County doesn't have that option. So I've urged the Court to request the State Comptroller to come into the picture and to do the audit. And one of the things I recommended very strongly to your committee is that the Suffolk County Legislature formally adopt a resolution requesting the State Comptroller to come into the picture and to do the necessary audit that has to be done.

A couple of things that are very interesting which I think cast further doubt on this whole argument, "Well, we use the investment earnings." Kessel signed the agreement with Nassau County on January 13th of 2000; how could he know on January 13th, 2000, what he was going to get as investment earnings because he hadn't sold the bonds yet? And yet their argument is, "Well, we didn't harm Suffolk County. We took the investment earnings." How could he know that? How could the board know that? And if you look at the resolution that was adopted, there's no disclosure at all that they're going to use investment earnings to pay the additional rebate to Nassau County. That's what makes me suspicious as to this whole idea of finding an excuse after you did something wrong to justify doing the wrong thing, and that's what -- to be less charitable to me sounds like you're cooking the books to cover up illegal transactions.

And incidentally, Judge Emerson who wrote the decision did not, in our judgment, give sufficient weight to the earlier decision by Judge Lifson who went off the case when he was promoted to the Appellate Division. He wrote a very scholarly opinion early in the case denying LIPA's motion to dismiss the County's claims. And in that, for the first time that any court has ever said so, he said LIPA is a fiduciary, and if what the County says is true, then they breach their fiduciary obligations.

As a fiduciary, they have a duty to account to the ratepayers in a very transparent way. And we say that cooking the books is not transparency and it's not accounting. And thirdly, and I think most importantly, he said that as a fiduciary, LIPA cannot discriminate between classes of ratepayers. And that's what it did here, it favored Nassau County because Kessel said, "Well, I need them in order to make the deal." Now, however well intentioned Kessel might have been, and I certainly applaud what he did in helping get rid of LILCO and helping get rid of Shoreham, he could not do it at the expense of the Suffolk ratepayers and the way it was done; that was improper, I think.

The last thing I want to mention as a recommendation, apart from the audit, is that the County should now give very serious consideration to requesting that LIPA go back to the original statute which called for an elected ratepayer board consisting of ratepayers from 21 ratepayer districts who would become the Board of Directors of LIPA instead of the appointed board which is there now. That is particularly important when you consider what would have been avoid had there been an elected board. I can't conceive of LIPA getting away with what it did here with regard to the additional rebate if at that time there was an elected board representing all the ratepayer districts. Because you would then have the kind of scrutiny that only an elected board, which holds hearings and meetings the way you do, would be able to keep tabs on what LIPA was doing.

Here's another reason I think an elected board is important. When LIPA acquired LILCO, it signed a side agreement with KeySpan pursuant to which KeySpan would undertake the obligation of cleaning up all the manufactured gas plants in Suffolk and Nassau; 1998 they signed that agreement. 1999, KeySpan signed a consent order with the DEC to clean up in particular Bay Shore and another one; they didn't do it. And LIPA did not ride herd upon them because if they were an elected board they would never have gotten away with that. The representatives from the various ratepayer districts would want to know why the manufactured gas plant in their district was not being cleaned up.

Finally, in I think it was 2007, LIPA commissioned {Lazat Frayer} to do a review of strategic options going forth in the future. And {Lazat Frayer} reported to them, in a report which we have, in which they looked at various issues -- repowering, should they sell the generating facilities -- and in every instance they said no. But there was one particular option that they paused and said this is an option that needs to be further studied, and that full municipalization. Full municipalization would call for an elected board. And I think that this is the appropriate time, because of the decisions that LIPA will be making in the future, including what I read in today's papers, that they're going to be looking to challenge the assessments on a number of plants in various parts of the County claiming that they're paying too much. Again, the decision that an elected board would make on an issue of that kind as compared to an appointed board could be the difference between day and night. I'm available for questions now.

CHAIRMAN HORSLEY:

Thank you very much, Mr. Like. That was enlightening and also detailed. So you guys got all that? I do have a question. You're talking about -- and if I understand this correct, that analogy of the escrow really kind of summed it up where you take money, taking the money and you've spent it and you replace it a couple of years later, that that is incorrect accounting. I understand that, that's a good analogy.

But in your opinion, that being the case, the three and a half million and whatever monies they put in later on to Suffolk ratepayers from this paying back method, were the ratepayers of Suffolk County short-changed?

MR. LIKE:

Of course.

CHAIRMAN HORSLEY:

And to what degree?

MR. LIKE:

Okay. The short-change -- the Suffolk County ratepayers pay 52% of LIPA's revenue. So if you take the 50 million, the 25 million to Nassau County and the \$25 million gift to reduce the budget deficit, you take 52% of that, there's damage to the extent of 26 million. That's on -- if you accept the fact that the two \$25 million transactions were illegal.

On the excessive charges, that remains to be determined with an audit, because that's when you're going to get involved in mathematics, what should the numerator, what should the denominator be?

CHAIRMAN HORSLEY:

So what you're saying is the dollars that were short-changed to Suffolk were in damages, less so than in actual dollars to the ratepayers on their bills.

MR. LIKE:

Well, the ratepayers have been -- the ratepayers have not been -- the ratepayers have conferred an involuntary subsidy --

CHAIRMAN HORSLEY:

Okay.

MR. LIKE:

-- of 50 million.

CHAIRMAN HORSLEY:

Right. I see what you're saying. How are you guys with this; do you guys have any questions? Mr. Stern.

LEG. STERN:

So going forward to determine what those damages, not in terms of the fixed dollar amount but what the effect would be on Suffolk County ratepayers because of what was done, ultimately how would that be determined? Are you suggesting that the only way to really determine what that number would be is through this audit, perhaps done by the New York State Comptroller's office, or is there another procedure that could be followed to determine that number?

MR. LIKE:

The audit would confirm the accuracy of the surcharge and would confirm whether or not they had the investment earnings that they claim. How that would be used to compensate the ratepayers I think would require what you call financial engineering; for example, you could reduce the surcharge going forward. Or, I don't know if you were on the board at the time, there was actually a settlement reached of this case, and it was reached right here in this building, under way LIPA agreed to pay to Suffolk County ratepayers in the form of energy conservation, retrofitting, and it was quantified at like \$18 million. Kessel agreed to it, he said he had to get the board's approval; he then claims he never got the board's approval and he went on to another position with the power authority. But we actually got to the point where there was an agreement. Kevin Law was part of the negotiations, LIPA was here with their counsel, their internal counsel, their outside counsel. There were a number of Legislators I think that were also present at the time, and it fell apart because he said he couldn't get the board to go along.

Now, what he did in term of selling it to his board we don't know, we don't know. But that's another example of an elected board. Can you imagine an elected board not supporting a

settlement of that kind? I can't. Because it was an eminently good settlement, it didn't raid LIPA's money, it was a matter of them going forth in the future and giving credits where credits were deserving and doing energy conservation, energy efficiency.

CHAIRMAN HORSLEY:

So basically what you're saying is, and I was there for those negotiations and those discussions -- is that the Chairman of LIPA at that time did agree to the settlement and it was just rejected by the board itself, so there was an agreement. But that happens, though, and you know, the board is the final say as far as settlement negotiations. How do we take that further at this point? I mean, is that something that we're looking to do? What is our next step, other than asking the Comptroller to take a look-see at the steps that were taken back in those days -- as you say, cooking the books. What is -- what do you think that the Legislature should do?

MR. LIKE:

I've always recommended a settlement, and I recommended the \$18 million settlement as well, because a settlement is better than a lawsuit, in my experience. And that was an honorable settlement. We were looking for 26 million and they were willing to come up with 18 million, that's a good settlement. If that's the path that LIPA is interested in pursuing, I would be wholeheartedly in favor of negotiations looking for a settlement.

CHAIRMAN HORSLEY:

I don't see any heads going, "Yeah, that's a good idea," in the background here, but what do you think, guys? Is that a good idea?

*(*Laughter*)*

No, they're not agreeing. Irving, continue. I'm sorry, I didn't mean to interrupt. Oh, we have a question from Legislator Cilmi.

LEG. CILMI:

Thank you. How are you, Mr. Like? Could you just summarize succinctly what proceedings then at this point remain outstanding and what are the possible outcomes of those proceedings and how those outcomes would -- could potentially effect Suffolk County and/or the ratepayers here?

MR. LIKE:

Okay. One outcome of the proceeding, which would be a very happy outcome although it's infrequent and rare that it occurs, is for the Court on reargument to reconsider and withdraw its decision; that would produce possibly a summary judgment in the amount we claimed.

A more likely outcome is for the Court to stick to its decision. Okay? If that's the case, then our resource would be to take an appeal. And I believe when I appeared before the Legislature in Executive Session, I recommended that you be prepared to take an appeal on these questions of law, because they're questions of law.

Another outcome would be for the Court to proceed on the issues that were not resolved, the factual issues, having to do with the equation as to the revenue and so forth. In that situation, there might be further discovery, further testimony, probably a need for expert testimony, okay, and that's where I'd like the Comptroller to come in because they have the capability and the resources to do that. And if they came in, we would at least know that somebody with the resources and the qualifications would be looking at that issue. If the outcome of that issue is that the Shoreham equation was excessive, then there would be a calculation and the County would be entitled to judgement in the amount of the excess.

LEG. CILMI:

Now, would a Judge have to order -- sorry. Would a Judge have to order that the Comptroller get involved?

MR. LIKE:

The Judge can't order him but it can request him.

LEG. CILMI:

Can request it.

MR. LIKE:

And we did ask the Court to request the Comptroller to come in.

LEG. CILMI:

Now, lets assume for a moment that at some point, whether it's currently or through an appeal, we win. I guess the possibilities are somewhat ambiguous at that point as to what would happen; correct? I mean, you don't know what they would order at that point, right?

MR. LIKE:

That's correct, right. If you won on an appeal there would be a reversal and then the Appellate Court might direct the lower court to enter judgement or might direct the lower Court to engage in further proceedings.

LEG. CILMI:

Ultimately at some point the intention being a reduction in rates or a refund to the ratepayers in the form of a reduction in rates or some other remedy.

MR. LIKE:

Correct.

LEG. CILMI:

If we go to appeal and we lose at the Appellate level, what happens at that point?

MR. LIKE:

Then the judgment of the Court below would become final, the County would no longer have a claim for the two \$25 million gifts. And depending upon what happens on the audit on the equation, if the Court decided that there wasn't an excessive surcharge, that would be the end of the case.

LEG. CILMI:

What's the timeframe would you expect that all this will occur?

MR. LIKE:

An appeal could take at least nine months, that's about -- usually you're given six months to perfect the record on appeal and then oral argument is scheduled, and it varies but I would say nine months is not an unusual amount to expect it to take.

LEG. CILMI:

And again, I'm sorry, but this is sort of complicated, the -- we're still waiting for the final decision?

MR. LIKE:

We're waiting for the Court to decide the motion for reargument.

LEG. CILMI:

Okay. Okay. And if they decide against the motion for reargument then we appeal; if they decide for the motion for reargument then we reargue, obviously.

MR. LIKE:

Well, the Court, in its decision, will tell us whether or not she wants to hear further argument or whether she's going to withdraw her decision.

LEG. CILMI:

I see. Okay. Thanks.

CHAIRMAN HORSLEY:

Irving, a motion to reconsider, as you've put it before the Court, what is the likelihood that, you know, a Judge is actually going to reconsider? I mean, is that something that you could speak to?

MR. LIKE:

Odds are against it.

CHAIRMAN HORSLEY:

Uh-huh.

MR. LIKE:

Odds are against it. That's why I think you should be prepared to seek a non-judicial remedy of getting the Comptroller involved, because the Comptroller can do things to rectify situations that you might not get from a Court. And I think as a Legislative body you have the opportunity and the authority to seek whatever remedies you can for the benefit of the ratepayers.

CHAIRMAN HORSLEY:

Okay. Are there any further questions? Is there anything anyone -- anything else you would like to add, Irving?

MR. LIKE:

Thanks for allowing me to come here.

CHAIRMAN HORSLEY:

Thank you for being here. We appreciate it. This is enlightening, because it has been dragging on. We don't -- you know, we're hearing of depositions and all sorts of things like that and it's good to hear your thoughts on it and where you're actually going. So your recommendation, bottom line, is to -- we should seek the Comptroller's opinion --

MR. LIKE:

Audit.

CHAIRMAN HORSLEY:

Audit.

MR. LIKE:

I want to leave you also with one other thing which I think is a great credit to the Legislature. The lawsuit, the lawsuit established that LIPA is a fiduciary; that's a very important rule of law now. They can't say, "Well, we're not subject to oversight by the PSC. We can do whatever we want." And that's what they argued initially, and the Court said, "No. You're a fiduciary, you have a duty to account, you have a duty not to discriminate." That's now the law and LIPA has to live with that. And I think it would live with it more effectively if it was an elected body.

CHAIRMAN HORSLEY:

I know that every time that we've mentioned the PSC, LIPA seems to pissle (sic) at the concept of oversight by the PSC.

Would any of the members in the audience, our LIPA friends, would they like to say anything at this point in time? You're welcome to.

LEG. CILMI:

If they can wait, can I ask one more question?

CHAIRMAN HORSLEY:

Oh, right. Yes. Sir, I'm sorry, I couldn't remember your name. Mr. Cilmi has one more question and then we'll get to you.

LEG. CILMI:

Yeah, just one more question. You can make your way up, that's fine. If I might ask Irving, when were you retained for this? How long has this been going on?

MR. LIKE:

I think it goes back to like 2001 or 2002.

LEG. CILMI:

I can't imagine the stacks of paper that you must have thanks to our very efficient court system.

CHAIRMAN HORSLEY:

Okay. Your name for the record, sir?

MR. VERSACELLI:

Good afternoon. My name is Michael Versacelli, I'm from the law firm of Rifkin Radler. We represent the Long Island Power Authority, specifically in connection with the lawsuit commenced by Suffolk against the Long Island Power Authority that Mr. Like represents Suffolk and that is pending before Judge Emerson in Supreme Court, Suffolk.

I don't want to comment too much on the litigation. The matter is still subject of a pending litigation before Judge Emerson. I just wish to advise the committee that much of Mr. Like's presentation today had to do with claims that were expressly refuted by LIPA, by LIPA's expert and independent accounting firm Baker, Tilly, Verchow and Krause, and rejected by the Supreme Court, Judge Emerson, in a June 3rd, 2010 order.

I have with me today, I'm not sure if the committee is familiar with the decision, but I have copies of the decision for distribution to the committee. I think it pretty much speaks for itself with respect to the additional Nassau rebates, the claims regarding the Clean Energy Grant, whether LIPA correctly used the investment earnings to pay the additional Nassau rebates; all those claims which were never part of the original lawsuit and were referred to the Court as unpleaded claims or the subject of a motion for some rejudgment by LIPA. To dismiss those unpleaded claims, the Court found and determined as a matter of law that those unpleaded claims were subject to dismissal. The sole issue now pending before Judge Emerson is whether -- and simply whether the rebates and credits authorized by the Shoreham settlement agreement were properly calculated and whether the surcharge imposed on the ratepayers to collect those amounts was also properly computed.

Issues relating to the additional Nassau rebates, the Clean Energy Grant were dismissed because it was ultimately determined that none of those monies were related to the rebates and credits authorized by the Shoreham settlement agreement. In fact, LIPA's expert report finds that those

amounts are not being collected as part of the surcharge, therefore there's no damage to Suffolk ratepayers in connection with those amounts.

I also have with me today a copy of the accountant's report that was submitted by LIPA in connection with that motion; and again, I offer that up for distribution. I'm not sure if the committee has a copy of that, but I believe that Judge Emerson used those reports to reach her findings. In fact, with respect to Suffolk's experts, the Court specifically found that those experts were unqualified and that many of Suffolk's experts auditors' report was deficient in several respects.

So again, I think the decision speaks for itself and I'd like to distribute that to you as well as the independent accountant's report.

Again, much of what Mr. Like says are just allegations. They're not proof, they were expressly refuted by LIPA and the litigation and rejected by the Court.

With respect to the calculation of the investment earnings, it was -- that calculation is also contained in the Verchow Krause report. Mr. Like said that those -- the earnings could not have been properly calculated, that the 19 million that we said were properly calculated were reviewed. The bank statements, the general ledgers, they were reviewed by our experts and determined that the earnings were properly calculated. Again, that's all contained in the report which I make available to you.

This notion that there was somehow a secret, secret side agreement with Nassau County is just -- it's false. There was no secret side agreement. It was debated and approved at a meeting of LIPA's Board of Trustees back in February, 2000, and it was widely report in the newspapers back in January of 2000. Again, with respect to the secrecy of this agreement and whether it has anything to do with the Shoreham settlement agreement, again, those claims have been raised numerous times and rejected repeatedly by the Court. The only issue now is that those issues are the subject of a pending motion to reconsider, reargue that Judge Emerson still has not made a decision on. But until she does, those claims are not part of this lawsuit; in fact, they never were. If you'd like, I don't know if the committee has a copy of the decision and the report, I have copies here for distribution to everybody.

CHAIRMAN HORSLEY:

Well, I don't -- we do have the decision, the short-form order that was dated 8/14/09, that we have.

MR. VERSACELLI:

June 3rd, 2010.

CHAIRMAN HORSLEY:

I don't know if that's --

MR. VERSACELLI:

By Judge Emerson?

LEG. STERN:

It's a June decision, but the motion date is August of '09.

CHAIRMAN HORSLEY:

Oh, okay.

MR. VERSACELLI:

Yes, that's correct.

CHAIRMAN HORSLEY:

Yes, we do have that, but we do not have the other backup material that you're referring to, the audit. Maybe what we could do is -- is that the big fat one right there?

MR. VERSACELLI:

No, this one. I just have one. I just have multiple copies of it.

CHAIRMAN HORSLEY:

That was just to scare us, huh?

*(*Laughter*)*

What I'd ask you to do, Michael, if you would is just give a copy of that to Mr. Nolan, our counsel.

MR. VERSACELLI:

Okay, that's fine, just the one copy then. I brought all these for nothing.

MR. NOLAN:

That's fine.

CHAIRMAN HORSLEY:

Is that good? He can make --

MR. NOLAN:

If I need a copy I can make it.

CHAIRMAN HORSLEY:

Yeah, he'll always make more copies for us and he'll look through it for us.

MR. VERSACELLI:

Okay.

CHAIRMAN HORSLEY:

You know, Michael, I just have one question, and I think it goes to -- I look at things probably more simply, certainly more simply than Irving does. If these arguments were all thrown out and they're disagreed to by the Court, and I know this was before the Court's decision, why was Chairman Kessel ready to settle? Is that something that you can answer? I mean, he agreed to this, you know, that there was an injustice done and the ratepayers of Suffolk needed -- you know, we're going along swimmingly and then suddenly the board decided against it. And maybe because he was wrong, I mean, if that might be the answer, but I want you to say that.

MR. VERSACELLI:

Well, I wasn't present for those negotiations. I have sitting next to me Linda Nicolino, she'll be more than happy to address you on that point.

MS. NICOLINO:

Thank you. Linda Nicolino, General Counsel and Secretary to the Long Island Power Authority. Wayne, as you know, I was involved in my capacity at the time as Acting General Counsel in connection with discussions between yourself and some other Legislators and opposing counsel about the settlement negotiations and the number of \$18 million was thrown out, and I believe the only thing Mr. Kessel ever said at the time was that he would, in good faith, carry such a recommendation forward to the Board of trustees. And, in fact, he did on more than one occasion and the Trustees categorically denied the possible settlement of a lawsuit that they very much felt

on the merits they would be successful with. And I was involved in discussions with them in Executive Session, which is, quite frankly, the appropriate forum for such discussions as opposed to public session like it is here, and I find it somewhat ironic that we're being asked to talk about confidential settlement discussions in a public session. But nevertheless, he took it back to the Trustees, the Trustees felt that as fiduciaries, it would be inappropriate for them to put \$18 million worth of ratepayer money into a settlement of a case that they felt we could win on. And that if they were judicially determined to be wrong, they would endure the consequences accordingly.

And to date, I believe that the judgment is sound, I believe that the Court has agreed with us that the case, in large part with respect to the one remaining claim notwithstanding, has no merit, never did, and unless an Appellate Court Judge tells us differently, we are prepared to stand by that decision, and I am very clear in my instructions from the board that there will be no settlement of this case. So an elected Board of Trustees I do not believe would hold any greater fiduciary obligation in connection with the distribution of LIPA ratepayer funds.

CHAIRMAN HORSLEY:

Legislator Cilmi.

LEG. CILMI:

Thanks. I don't know if it's appropriate to ask this question or not, but dating back to when Mr. Like was hired, and I'm not sure that any of these lawsuits go back further than that, but combined between what Mr. Like is -- and this is in no way a judgment of value, but just a simple question. If we add up all of the legal fees that Mr. Like has been paid by the County and the legal costs to LIPA in this lawsuit, which then get passed on, I would imagine, to the ratepayers, what sort of total number are we talking about? I mean, how much is this whole endeavor cost people?

CHAIRMAN HORSLEY:

Counsel?

MR. NOLAN:

Well, from our end, I would have to go to the Budget Review Office, they could give you a figure on how much we've paid to Mr. Like's firm during this particular litigation. I'm not sure what the number is at this point.

LEG. CILMI:

How about you guys?

MS. NICOLINO:

I don't have a number off the top of my head, but I would expect it to be a couple of hundred thousand dollars on the LIPA end, including legal fees and expert fees. We've incurred substantial costs in the last year in connection with having the independent audit done.

LEG. CILMI:

Is it safe to say that it's less than a million?

MR. NOLAN:

Yeah, I would think so, yeah.

CHAIRMAN HORSLEY:

Are there any further questions? Would anyone else like to say anything? Everything is mum. Okay. Well, thank you very much. And we appreciate you all coming down and giving testimony to us, and it certainly gives us an idea of how to proceed forward and we'll discuss this in the future. Okay? Motion to adjourn?

LEG. STERN:

Hold on one second.

CHAIRMAN HORSLEY:

Oh, hold on.

LEG. STERN:

Before we adjourn, I'm sure my colleagues would agree that we should take just a moment to wish you a very happy birthday.

CHAIRMAN HORSLEY:

Oh, thank you.

LEG. STERN:

You did a good job as always. Enjoy your birthday and we wish you good health and happiness.

CHAIRMAN HORSLEY:

Well, thank you very much. Can we sing?

LEG. CILMI:

And also take a moment to wish our colleague Legislator Cooper as well, hopefully he'll be --

CHAIRMAN HORSLEY:

Yes, absolutely, and I think that's appropriate. Legislator Cilmi is making the comment that we should also wish best wishes to Legislator Cooper who apparently had an appendectomy, and I guess it was of a serious nature. But he's on the mend and everything I hear is that he's doing well. So absolutely, best wishes to Legislator Cooper.

And with that, motion to adjourn. Thank you.

(*The meeting was adjourned at 3:00 P.M. *)

{ } - Denotes Spelled Phonetically

