

Public Authorities Law §§ 1020-1020-w, 1020-a, 1020-c(1), 1020-d, 1020-e, 1020-f, 1020-f(c), 1020-f(u), 1020-g(g), 1020-g(h), 1020-g(I), 1020-gg, 1020-s(1); Public Service Law Article 4

LIPA employees may receive "bonuses" as part of an incentive compensation plan. Whether financial sponsorships of programs under the auspices of local organizations and charitable contributions are legal depends on the purpose for which the sponsorships or contributions are made.

October 9, 2007

Kevin Law  
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Long Island Power Authority  
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Formal Opinion  
No. 2007-F4

Dear Mr. Law:

You have requested an opinion regarding certain uses of funds of the Long Island Power Authority (LIPA). First, you have indicated that LIPA currently pays bonuses to its employees based on LIPA reaching certain performance benchmarks. You have asked whether payment of these bonuses is legal. Second, LIPA makes financial contributions to local not-for-profit organizations and civic and business entities. You have asked whether these contributions may legally be made by LIPA. As explained more fully below, we conclude that payment of the bonuses to LIPA employees appears to be legal. Whether sponsorships of programs under the auspices of local organizations and charitable contributions are legal depends on the purpose for which the sponsorships or contributions are made.

### **Background**

LIPA was established by title 1-A of the Public Authorities Law ("LIPA Act").<sup>1</sup> In creating LIPA, the Legislature made the following statement:

The legislature hereby finds and declares  
that:

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<sup>1</sup>Another title 1-A governs the Green Island Power Authority. See Public Authorities Law §§ 1020-1020-w, 42 McKinney's Cons. Laws of N.Y. at 548-74 (2004).

Constantly escalating and excessive costs of electricity in the counties of Suffolk and Nassau and that portion of the county of Queens served by the Long Island lighting company (hereinafter referred to as the "service area") pose a serious threat to the economic well-being, health and safety of the residents of and the commerce and industry in the service area.

There is a lack of confidence that the needs of the residents and of commerce and industry in the service area for electricity can be supplied in a reliable, efficient and economic manner by the Long Island lighting company (hereinafter referred to as "LILCO").

Such excessive costs and lack of confidence have deterred commerce and industry from locating in the service area and have caused existing commerce and industry to consider seriously moving out of the service area.

The decisions by LILCO to commence construction of the Shoreham nuclear power plant and thereafter to continue such construction were imprudent.

The investment of LILCO in the Shoreham nuclear power plant has created significant rate increases, straining the economic capabilities of ratepayers in the service area, and likely will require further substantial rate increases if such plant is placed in service.

It is uncertain whether the Shoreham nuclear plant ever will go into commercial service, or if it does whether its reliability, cost of construction, operation and maintenance will be such as to provide sufficient, reliable and economic electric service to ratepayers in the service area. The very substantial financial strain of the investment in the Shoreham nuclear plant has required LILCO to suspend dividends on its common and preferred stock, severely

threatening the continued economic viability of LILCO.

For all the above reasons, a situation threatening the economy, health and safety exists in the service area.

Dealing with such a situation in an effective manner, assuring the provision of an adequate supply of electricity in a reliable, efficient and economic manner, and retaining existing commerce and industry in and attracting new commerce and industry to the service area, in which a substantial portion of the state's population resides and which encompasses a substantial portion of the state's commerce and industry, are hereby expressly determined to be matters of state concern within the meaning of paragraph three of subdivision (a) of section three of article nine of the state constitution.

Such matters of state concern best can be dealt with by replacing such investor owned utility with a publicly owned power authority. Such an authority can best accomplish the purposes and objectives of this title by implementing, if it then appears appropriate, the results of negotiations between the state and LILCO. In such circumstances, such an authority will provide safe and adequate service at rates which will be lower than the rates which would otherwise result and will facilitate the shifting of investment into more beneficial energy demand/energy supply management alternatives, realizing savings for the ratepayers and taxpayers in the service area and otherwise restoring the confidence and protecting the interests of ratepayers and the economy in the service area. Moreover, in such circumstances the replacement of such investor owned utilities by such an authority will result in an improved system and reduction of future costs and a safer, more efficient, reliable and economical supply of electric energy. The legislature further finds that such an

authority shall utilize to the fullest extent practicable, all economical means of conservation, and technologies that rely on renewable energy resources, cogeneration and improvements in energy efficiency which will benefit the interests of the ratepayers of the service area.

Public Authorities Law § 1020-a. LIPA became responsible for the provision of electric service to its service area in 1998.

LIPA was created as a corporate municipal instrumentality of the State, a body corporate and politic, and a political subdivision of the State. Id. § 1020-c(1). It is governed by a board of trustees, one of whom is designated as chairman. Id. § 1020-d. The board is authorized to hire employees required for the performance of LIPA's duties without regard to any personnel or civil service law, rule, or regulation of the State but in accordance with guidelines adopted by LIPA, id. § 1020-e, and to prescribe their duties and qualifications and fix and pay their compensation, id.; see also id. § 1020-f(c).

In addition to specific grants of power, LIPA has been granted "all of the powers necessary or convenient to carry out the purposes and provisions" of the LIPA Act. Public Authorities Law § 1020-f. The provisions of the LIPA Act, "being necessary for the prosperity of the state and its inhabitants," are to be "liberally construed to effect [its] purposes." Id. § 1020-gg.

LIPA is generally not subject to oversight by the Public Service Commission,<sup>2</sup> the state governmental entity that regulates the provision of service by electrical corporations in New York. Public Authority Law § 1020-s(1); Public Service Law article 4.

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<sup>2</sup>LIPA is subject to Public Service Commission regulation only to the extent that (1) article 7 of the Public Service Law applies to the siting and operation of a major utility transmission facility, (2) article 10 (formerly article 8) of the Public Service Law applies to the siting of a generating facility (now expired and repealed), and (3) section 18-a of the Public Service Law provides for assessment for certain costs, property, or operations. Public Authority Law § 1020-s(1).

## Analysis

### A. Payment of Bonuses to LIPA Employees

You have asked whether the current practice of paying bonuses to LIPA employees - which, according to your letter, depends on "whether certain performance benchmarks are met by LIPA" - is legal. We understand that LIPA has adopted an incentive compensation plan whereby the performance of LIPA employees and of LIPA itself are evaluated annually in terms of whether certain benchmarks, established beforehand, have been met. Each employee and LIPA are rated on a scale from one to five based on the success of the employee and of LIPA in meeting the benchmarks. An employee's total compensation for the year includes a base salary and an incentive payment determined by combining the employee's personal rating with LIPA's corporate rating. An employee who fails to perform satisfactorily may receive no incentive payment in addition to his base salary.

We believe that this payment of bonuses to employees of LIPA falls within LIPA's authority to fix the compensation of its employees. Completion of the requisite goals is a condition of the employment agreement between LIPA and its employees upon which the employees' total compensation is paid. The State Comptroller has opined that performance incentive programs may be established by local governments under their authority to fix the compensation of their officers and employees. See Op. St. Comptr. No. 85-44 (city may establish performance incentive award program for its employees); cf. Op. St. Comptr. No. 81-107 (county may establish attendance incentive award program). Likewise, we conclude that a performance incentive payment program may be part of a compensation package for LIPA employees.

Your letter suggests that the size of the bonuses paid as part of the incentive program, rather than the mere fact of the bonuses, may be of concern. We note that the rates to be charged by LIPA are to be "at the lowest level consistent with sound fiscal and operating practices of the authority and which provide for safe and adequate service." Public Authority Law § 1020-f(u). The compensation packages of LIPA employees should satisfy this standard.

### B. Financial Contributions to Local Organizations

With respect to your second question, you have indicated that LIPA sponsors programs organized by local civic, business, and not-for-profit entities and makes charitable contributions to

not-for-profit entities, and have asked whether such payments are legal.

An example of a program sponsorship is LIPA's participation in the National Solar Tour. LIPA partners with Renewable Energy Long Island, a not-for-profit organization, to host this program locally. Under the program, homes and businesses on Long Island that have solar features are opened so prospective solar energy-users can see how solar features are installed and used.

Examples of payments that have taken the form of charitable contributions can be found at the LIPA website, at <http://www.lipower.org/community/charities/index.html>.<sup>3</sup> We understand that LIPA's charitable giving program was initially implemented by LILCO. LIPA decided to continue the program upon its acquisition of most of LILCO's retail electrical system, in order to smooth the transition in service responsibility from LILCO to LIPA, to promote and preserve customer goodwill, and to further the well-being of the Long Island community. See Long Island Power Authority, Minutes of the 113<sup>th</sup> Meeting Held on May 3, 1999, at 17-18, available at [http://www.lipower.org/pdfs/company/papers/minutes/may03\\_99.pdf](http://www.lipower.org/pdfs/company/papers/minutes/may03_99.pdf). Originally approved as a two-year program, it has been re-adopted every two years since.<sup>4</sup> It was most recently adopted to "enable LIPA to participate appropriately in the enhancement of the well being of the Long Island community, and to preserve and promote customer good will." Long Island Power Authority, Minutes of the 172<sup>nd</sup> Meeting Held on Dec. 15, 2005, at 29-30, available at <http://www.lipower.org/pdfs/company/papers/minutes/121505.pdf>.

Under the charitable giving program, a not-for-profit corporation can apply to receive funds from LIPA for non-discriminatory, non-religious purposes to be served within LIPA's service area. See Charitable Giving, Eligibility Requirements, available at <http://www.lipower.org/community/charities/eligibility.html>.

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<sup>3</sup>LIPA has contributed to organizations such as the Brookhaven Wheelchair Athletes, the Long Island Junior Soccer League, and the New York Horse Rescue Corporation.

<sup>4</sup>See *id.*, Minutes of the 134<sup>th</sup> Meeting Held on June 28, 2001, at 19-20, available at [http://www.lipower.org/pdfs/company/papers/minutes/jun28\\_01minute\\_s.pdf](http://www.lipower.org/pdfs/company/papers/minutes/jun28_01minute_s.pdf); *id.*, Minutes of the 156<sup>th</sup> Meeting Held on June 26, 2003, at 17-19, available at <http://www.lipower.org/pdfs/company/papers/minutes/062603.pdf>.

Grants are awarded by a committee of LIPA employees in accord with general guidelines. In the past, the program has been authorized to distribute up to \$125,000 each year. A ratepayer who does not want to participate in the program has been able to opt out and receive a credit of \$0.15 on his or her electric bill for his or her pro rata share of the annual expenditure.

In our opinion, the legality of a payment such as those described above, whether in the form of a sponsorship or a charitable contribution, depends on whether it directly relates to a power, duty, or purpose of LIPA. Therefore, for example, we believe that participation in the National Solar Tour is authorized by Public Authorities Law § 1020-g(h), which grants LIPA the power to "implement programs and policies designed to provide for the interconnection of . . . solar electric generating equipment owned or operated by residential customers." See also *id.* § 1020-a ("The legislature further finds that [LIPA] shall utilize to the fullest extent practicable . . . technologies that rely on renewable energy resources, cogeneration and improvements in energy efficiency which will benefit the interests of [LIPA's] ratepayers.").

Other grants of power to LIPA that may authorize particular financial contributions include Public Authorities Law § 1020-g(g), which authorizes LIPA to "study means of maintaining the customer base in, and attracting commerce and industry to the service area," and section 1020-g(i), which authorizes LIPA to "develop, with public participation, a comprehensive least-cost plan which shall consider practical and economical use of conservation, renewable resources, and cogeneration for providing service to its customers."

In the event, however, that a financial contribution does not directly relate to one of LIPA's powers, duties, or purposes, then we believe it would fall outside LIPA's authority to give. As a creature of statute, LIPA lacks powers not granted to it by express or necessarily implicated legislative delegation. Abiele Contracting, Inc. v. New York City School Constr. Authority, 91 N.Y.2d 1, 10 (1997). While we recognize that the LIPA Act is to be liberally construed to effect its purposes, Public Authorities Law § 1020-gg, its purposes must in fact be served in order for LIPA's acts to be authorized.

With respect to the charitable giving program, we find nothing in the powers, duties, or purposes of LIPA that renders improving community goodwill or the well-being of the community unrelated to the provision of electrical service as part of LIPA's mission. Moreover, while LIPA has "all the powers

necessary or convenient to carry out the purposes and provisions" of the LIPA Act, Public Authorities Law § 1020-f, we believe that increased goodwill is neither necessary nor convenient for complying with the provisions of or achieving the purposes of the LIPA Act. "Indeed, the beneficial corporate public relations generated by the largesse made in the name of public utilities essentially advances predominately the private interests of the utility corporations . . . and are too peripheral to the service interests of the ratepayers." Cahill v. Public Service Com'n, 76 N.Y.2d 102, 114 (1990) (emphasis in original). Furthermore, the charitable contribution program appears to conflict with the "sine qua non objective" of the LIPA Act, "to give LIPA the authority to save ratepayers money by controlling and reducing utility costs." Citizens for an Orderly Energy Policy v. Cuomo, 78 N.Y.2d 398, 414 (1991). For these reasons, we are of the opinion that the charitable contribution program is not authorized.

We recognize that our conclusion that LIPA is not authorized to make payments to business, civic, and not-for-profit entities that do not directly relate to LIPA's mission contrasts with the corporate sponsorships and charitable contributions that investor-owned utility corporations may make. It has been suggested that our conclusion will result in disadvantaging or penalizing worthwhile organizations and causes that, were they located in a community that was serviced by such a shareholder-owned utility corporation, could receive corporate funds.<sup>5</sup> While we do not doubt that these organizations provide worthy services, support of these services is not why the State created LIPA.

Very truly yours,

ANDREW M. CUOMO  
Attorney General

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<sup>5</sup>Of course, the giving of such funds by shareholder-owned corporations may be subject to other restrictions. See, e.g., Cahill v. Public Serv. Com'n, 76 N.Y.2d 102 (1990) (policy of passing cost of charitable contributions to utility ratepayers was unconstitutional under First Amendment).