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TO: Suffolk County Executive Bellone and the Suffolk County Legislature
Brookhaven Town Supervisor Romaine and the Brookhaven Town Council
Riverhead Town Supervisor Walter and the Riverhead Town Council

FROM: Frederick Eisenbud

DATE: March 2, 2015

SUBJECT: The County and/or Towns Must Challenge LIPA's December 17, 2014 Resolution Authorizing Commercial Solar Facilities Without First Conducting Any Environmental Review

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Honorable Elected Leaders of Suffolk County and the Towns of Brookhaven and Riverhead:

On December 17, 2014, acting pursuant to an October 25, 2012 LIPA RFP for up to 280 MW of renewable energy, , the LIPA Trustees passed a resolution that directed PSEG-LI to negotiate Power Purchase Agreements ("PPA's") for 11 commercial solar generating facilities which are primarily in the Towns of Brookhaven and Riverhead. Collectively, if constructed, these commercial facilities will generate 122.1 MW of solar electricity. LIPA adopted its resolution without any SEQRA review whatsoever, despite the fact that the projects will require construction of almost 530,000 solar panels on more than 630 acres of open space or agricultural land. The same resolution also authorized PSEG-LI to prepare a new request for proposals for an additional 160 MW of renewable power. LIPA and PSEG-LI have made clear that they do not believe they must conduct environmental review before designating sites for contract negotiation or to approve PPAs. They leave it to the Towns to shoulder this responsibility. This position is as outrageous as it is arrogant, and the County and impacted Towns should challenge the resolution in court so that environmental impacts will become part of LIPA's decision making process. There is a four month statute of limitations for SEQRA-based lawsuits, so the deadline for filing a court challenge is on or before April 16, 2015.

This is precisely the type of situation which requires elected officials to step up and protect their constituents. An *ad hoc* community group in Shoreham, upset by the decision to approve a 9.5 MW solar electrical generating facility in a residentially zoned area on 60 acres of what is now open space, is litigating the Town's and LIPA's approvals in the Supreme Court, at great personal sacrifice. The facility, if constructed, will consist of 50,000 solar panels set out over the entire 60 acres, eliminating all open space and scenic vistas, and adversely impacting the current character of

the community.[1] The December 17, 2014 LIPA resolution approved the negotiation of another PPA, a 24.99 MW facility, to be constructed on the Tallgrass Golf Course, which is right across the road from the site of the proposed 9.5 MW facility. Neither the homeowners who are challenging the 9.5 MW project, nor other members of the county who will reside near the 11 proposed additional commercial facilities, should have to spend their own funds to litigate a common defect in the process: LIPA's refusal to conduct environmental review.

With the possible exception of the two 2 MW projects in Kings Park[2], every one of the 11 proposed new solar generating facilities authorized by the December 17, 2014 LIPA resolution is a Type I SEQRA action, which presumptively requires preparation of a Draft Environmental Impact Statement.[3] Involved agencies must require preparation of a DEIS if even one potential adverse impact "may" be significant, and courts have held that to be an exceedingly low threshold. Among the factors which the agency must consider are: "(iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;" "(viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;" and "(x) the creation of a material demand for other actions that would result in one of the above consequences". LIPA's offers to guarantee payment for 20 years at a rate 2 to 3 times the cost of electricity on the open market for commercial solar power is causing huge, out-of-state companies to purchase open space in Suffolk County to enable them to respond to LIPA's Requests for Proposal.

Naturally, you are asking yourselves, how can I oppose solar projects when everyone knows how good solar power is for the environment? Please review the enclosed blog I prepared, entitled "The Emperor Has No Clothes (Why The Push For Commercial Solar Makes No Sense)".[4] By the time Suffolk County prepares its model code for commercial solar projects and the Towns consider and adopt that model code, these 11 commercial projects will be approved by LIPA without environmental review. Citizens of this County and the impacted Towns have the right to expect their elected officials to act to protect their common interests. Even if, at the end of the day, commercial solar projects are found to make sense, you must force LIPA to conduct SEQRA review before any approvals are made. Expecting individuals to do so is patently unfair.

cc: Newsday
Channel 12 News
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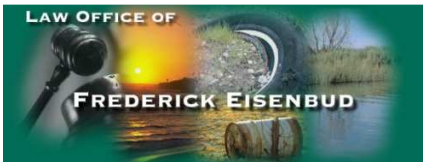
[1] My firm represents this group in an Article 78 which is awaiting the court's decision. This action does not involve any of the additional 11 commercial solar facilities authorized by LIPA on December 17, 2014.

[2] These projects, in the Town of Smithtown require only nominal amounts of open space compared to the 9 projects in Brookhaven and Riverhead.

[3] 6 NYCRR §617.4(b)(6) declares that "activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds;... (i) a project or action that involves the physical alteration of 10 acres" is a Type I Action.

[4] For additional detail, review my earlier Blog, "All Solar Power is not Created Equal (So Slow Down PSEG-LI and LIPA and Get it Right)". http://fredeisenbudlaw.blogspot.com/2015/01/all-solar-power-is-not-created-equal-so.html Distributed (rooftop) solar will accomplish all of the environmental benefits without eliminating open space and agricultural uses, or changing the character of communities (and 20 year contracts at fixed exceedingly high prices won't be necessary).



THE EMPEROR HAS NO CLOTHES
(Why the push for Commercial Solar Makes No Sense)

By: Frederick Eisenbud, Esq.[i]

SPower, the entity seeking to construct a 9.5 MW solar electrical generating facility on a 60 acre portion of the Delalio sod farm in Shoreham, along Route 25A, recently sent a brochure to the community touting the environmental benefits of the project, its ability to eliminate fluctuating prices for electricity during peak usage, its benefits for the environment, and why a buffer of trees around the facility will "protect the local viewshed and maintain the rural character of the area." How can anyone be against this project and doesn't opposing it make you "anti-environment"? Opposition to this project is based on there being a better solar alternative that won't eliminate altogether 60 acres of open space, the existing viewshed, and the existing agricultural use which the Brookhaven Town Code's Planned Conservation Overlay District expressly states must be preserved. Putting solar panels on roof tops ("distributed solar power") can provide the same benefits to the environment, without the adverse impacts caused by huge commercial projects, at a fraction of the cost to LIPA and its ratepayers. Supporting distributed solar power is most assuredly a pro-environment position.

PSEG-LI recently concluded that the reliability of LIPA's electrical system can be maintained without additional power sources until 2024. Why then are LIPA and PSEG-LI moving full speed ahead with negotiating 11 Power Purchase Agreements ("PPAs") for 122.1 MW of commercial solar power at significantly inflated cost compared to purchasing power on the open market, and say they will soon release a new Request for Proposals for another 160 MW of commercial solar power? These PPAs will require LIPA to purchase all the power from these commercial facilities for 20 years at a fixed cost of approximately $0.17 per kWh, more than twice the cost of power on the open market. After 20 years, LIPA and its ratepayers will pay approximately $360,000,000 more for the commercial solar power than they would for open market power. The proposed 9.5 MW solar facility proposed by SPower in Shoreham is even worse – LIPA has guaranteed it will pay SPower $0.22 per kWh generated for the next 20 years, almost three times the cost of power on the open market.

The State has set a goal of having 20% of power from renewable sources by 2025. But why rush into commercial solar contracts at high prices now when that goal may be able to be achieved by 2025 with rooftop solar systems at a fraction of the cost to LIPA, and without any of the negative aspects of commercial solar systems such as high energy cost, and loss of large tracts of open space? LIPA expects to eliminate rebate incentives for rooftop solar systems altogether within two years because the cost will be low enough so that incentives no longer will be needed to encourage rooftop systems to be installed. LIPA

will then receive all the power from these rooftop solar systems at virtually no cost to LIPA. Nevertheless, LIPA prefers the long term high priced contracts because it wants to avoid the loss of revenues suffered when power from solar systems installed on roofs is credited to the system owner.

Dare I say anything negative about solar? It is crazy to rush into overpriced 20 year contracts for commercial solar power when no more power is needed for at least ten years. If enough people install solar systems on their roofs in the next few years, the length of time until more power is needed by LIPA to maintain reliability will be further extended, and the power from the commercial solar systems may no longer be needed. Regardless, ratepayers will pay the inflated cost for commercial solar for twenty years if these 20-year contracts are signed.

Whether LIPA likes it or not, the ever declining cost of rooftop solar systems and the increasing efficiency of lighting and appliances will cause LIPA to lose more revenue every year. Whatever the solution to this problem may be, the answer cannot be to enter into 20 year fixed contracts at inflated prices for solar power that may never be needed. Indeed, if you examine your monthly LIPA bill, and divide the monthly charge by the number of kWhs you used, you will see that you are paying about $0.22 per kWh to LIPA to cover all of its monthly costs for power, transmission lines, maintenance, taxes, and revenue lost from renewable energy and energy efficiency. Only a fraction of what you pay goes to pay for electricity. By agreeing to pay SPower $0.22 per kWh for all the solar power it generates for the next 20 years, however, LIPA will then have to find the funds to cover all the other costs it has for expenses other than acquisition of electricity. At the end of the day, the ratepayers will have to pay for this shortfall.

In addition, when LIPA agrees to purchase solar power from huge commercial developers like SPower, the money spent goes out of State. When local companies install roof-top systems, the money goes to local companies, and the money saved by the owners of roof-top systems by reason of their monthly LIPA charges being significantly reduced gets spent right here, in our communities.

One of the arguments made in the lawsuit challenging LIPA's and PSEG-LI's approval of a PPA for SPower's 9.5 MW commercial solar system is that the approval occurred without any environmental review at all. If a Draft Environmental Impact Statement had been prepared, alternatives, such as distributed rooftop solar systems, would have had to be considered in depth. No such review took place.

LIPA and PSEG-LI have the luxury of time. The commercial solar projects and their long term inflated costs can wait; proper planning must come first. Slow down – and get it right.

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[i] Law Office of Frederick Eisenbud, THE Environmental Law Firm [sm], 6165 Jericho Turnpike, Commack, New York 11725 (631-493-9800). Frederick Eisenbud, an environmental attorney in Commack, represents Shoreham Wading River Advocates for Justice, an unincorporated community group in Shoreham which is challenging Town, LIPA and PSEG-LI approval of a 9.5 MW commercial solar project on a 60 acre sod farm. He has a solar system on his home. The opinions expressed here are his own.