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VIA FEDERAL EXPRESS
Hon. Janet Hand Deixler
Secretary to the Siting Board
3 Empire State Plaza
Albany, NY 12233-1350

Re: Brookhaven Energy Project - Case 00-F-0566

Dear Secretary Deixler:

Enclosed for filing, as instructed in your Notice of Schedule for Filing Exceptions, are 25 copies of the Town of Brookhaven's Brief on Exceptions to the Recommended Decision of the Examiners.

Copies are being sent via Federal Express to Presiding Examiner Walter T. Moynihan and Associate Examiner Daniel P. O'Connell, and are being sent to the active parties via first class mail today. E-mail copies are being sent to participants on the active parties list who prefer e-mail.

Very truly yours,

Elaine R. Sammon

Elaine R. Sammon

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Enclosures

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NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

Case 00-F-0566 - Application of Brookhaven Energy, LP for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 580 MW Gas-fired Combined Cycle Electric Generating Plant in the Town of Brookhaven, Suffolk County, New York

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TOWN OF BROOKHAVEN'S BRIEF ON EXCEPTIONS TO THE RECOMMENDED DECISION OF THE EXAMINERS

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April 26, 2002

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TOWN OF BROOKHAVEN'S BRIEF ON EXCEPTIONS TO THE RECOMMENDED DECISION OF THE EXAMINERS

Pursuant to the Siting Board Secretary's April 8 Notice, and § 4.10 of the Board's Rules,[1] the Town of Brookhaven ("Town") submits the following exceptions to the Recommended Decision of the Examiners in this proceeding.

I. Statement of the Case

This is an application, filed under Article X of the Public Service Law ("PSL"), for permission to construct the proposed Brookhaven Energy Project ("Project"), which would be a 580 MW combined-cycle gas turbine merchant electric generating facility, sponsored by American National Power, Inc. ("ANP"), the Houston-based subsidiary of International Power, plc of London, UK, one of the world's largest independent power producers.[2]

A. Site Selection

The record shows that in May 1999 or before, ANP began a site selection study for a new major electric generating facility to be constructed on Long Island. (Ex. 16, p.1). By November, 1999, it had chosen a 28 acre site in the Town of Brookhaven in the hamlet of Yaphank (Yaphank site), which its consultant "deemed as aesthetically acceptable." (Solzhenitsyn, tr. 1372 and 1452). For reasons best known to ANP, it rejected a number of alternative site locations on Long Island and in the Town of Brookhaven, including a site in Shoreham zoned to accommodate large electric generating plants, at which the 800 MW Shoreham Nuclear Plant had been constructed, and was subsequently decommissioned. By January 2000, ANP acquired options on the Yaphank site lands, and formed Brookhaven Energy, LP ("Brookhaven Energy"), a Delaware limited partnership, as its wholly owned subsidiary. On March 16, 2000, ANP registered Brookhaven Energy to do business in New York to

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[1] The Public Service Commission's Rules of Procedure apply to Article X certification proceedings. See Board Rule § 1000.1

[2] Information on International Power and ANP is posted at www.anpower.com.

be the Project's legal owner, while ANP is its actual manager and owner-operator.

It is the position of ANP and Brookhaven Energy that selection of the Yaphank site for the Project became final, a *fait accompli,* as of March 16, 2000, meaning that alternative site locations would not be allowed to be considered in the Project's yet to be commenced Article X siting proceeding. ANP takes the position that neither it nor Brookhaven Energy has the power of eminent domain, and therefore an alternative sites analysis would not be required as an element of the environmental assessment process under Article X of the Public Service Law, as interpreted by Board Rule § 1001.2.

Board Rule § 1001.2 provides that an applicant that lacks the power of eminent domain may limit evaluation of site alternatives in the application to parcels that it owns or has under option to purchase. In adopting this provision, the Board commented that: "The distinction between private applicants and others is based on PSL § 164(b), which provides that the information to be submitted on alternatives is to be no more extensive than that required under [SEQRA], and on the holding of *Horn v. IBM*, 110 A.D. 2d 87 (2d Dept. 1985), that applicants without the power of eminent domain need not consider site alternatives unless they own or have options on such sites."[3] See ANP's Siting Study, Exhibit 16 at p. 1.

On March 24, 2000, a week after Brookhaven Energy became registered to do business in New York, ANP initiated the formal Article X process to gain permission to construct the Project at Yaphank, by filing and serving a Preliminary Scoping Statement (PSS) with the Siting Board.[4] The PSS described the proposed Project at the Yaphank site. However, it omitted any meaningful information explaining why the Yaphank site was selected, and why alternatives, which admittedly had

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[3] See Board Memorandum and Resolution Adopting Article X Regulations in Case 97-F-0809, December 16, 1997, at www.dps.state.ny.us/fileroom/doc3483.pdf.

[4] As the Project's maximum capacity of 580 MW exceeds the 80 MW threshold in PSL Article X, a certificate from the Siting Board is prerequisite to its construction and operation in New York State.

been studied, were rejected. (Compare Application Section 5.1, and Fitzpatrick, et al., Tr. 709 with the Site Selection Study, Exhibit 16).

It was clear, however, that the Siting Board would need to override the height limits of the Town Code for more than five enormous structures if it were to grant a certificate for the construction and operation of the proposed Project at the Yaphank Site. While the Town Code could allow siting of a small electric generating facility at the Yaphank Site by a special permit on terms consistent with the light industry scale of development in the area, the Town opposes the proposed Brookhaven Energy Project because it is plainly too large, too massive, too noisy and out of character with existing and planned uses of the area. For these reasons, the Town determined that it must oppose construction of the Project at the Yaphank Site.

B. Pre-Application Process Under Article X

After the PSS was filed in March 2000, Brookhaven Energy conducted a pre-application public involvement process, required under Article X, over the next 14 months. Section 4 and Appendix D of the Application shows that the public involvement process was a one-sided public relations juggernaut, designed to show the benefits of having the Project in Yaphank while glossing over and sugar coating the Project's mass, height, and visibility. The clear inference was that the Project will be constructed in Yaphank, that it would be futile to oppose it because ANP had the economic power to fend off opposition by local groups, and that meaningful opposition is beyond the economic capacity of local people to contest the Project. Fortunately, the Town became involved in the process and, as set forth herein, exposed the fatal flaws in the application. Furthermore, the Town determined to oppose the Project because it does not belong at Yaphank, and there are much more suitable site locations in the Town, especially Shoreham, where zoning allows such projects as of right and requires a 50 acre lot minimum for such sites.

C. Stipulations

In December 2000, Brookhaven Energy and DPS Staff signed stipulations that outlined the studies to be done for the formal Article X application for the Project at the Yaphank site.[5] However, the Stipulations did not require the Applicant to make any comparative analysis of the proposed Yaphank Site with potential alternative sites. The Town was not a signatory to the stipulations.

D. Application

The Application, consisting of two four-inch thick binders, plus another two-inch thick volume, was filed on June 25, 2001. The Application omitted any discussion of alternative site locations, citing only that Brookhaven Energy is a private applicant without the power of eminent domain (Applicati § 1.3 at p. 1-12). On August 3, 2001, the Town timely filed its notice of intent to become a party as of right in the Article X proceeding for the Project. The Application was deemed complete on August 15, 2001, and the pre-hearing process commenced.

E. Pre-Hearing Process

On August 20, 2001, the assigned ALJs issued notices for a pre-hearing conference and issues conference, and deadlines of September 4 for requests for intervenor funding and September 28 (extended to October 4) for filing of proposed issues. A pre-hearing conference, scheduled for September 12, was cancelled due to the attacks on the World Trade Center. On October 11, there was a combined pre-hearing and issues conference, and public statement hearings. Thereafter, on October 25th, the ALJs recognized, in addition to the statutory parties (PSL § 166(1)), the Town, Long Island Power Authority (LIPA), and Suffolk County as having full party status in the Article X case. Yaphank Civic and Taxpayers Association gained limited Party status. Adjudicable DEC issues were discussed, but no party came forward with information that fulfilled DEC's threshold for adjudication.

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[5] The stipulations are in the Application volume entitled "Legal Documents and Testimony."

1. Intervenor Funding

The Town was the only party that made a timely request for intervenor funding. On September 13, the ALJs granted the Town's requests for funding for its engineering and technical consultants in limited respects. However, they denied the request to use the intervenor fund to defray the costs of the Town's Article X consultant and co-counsel, who had been retained to provide his unique skill and experience in power plant siting cases. In an affidavit, the Town Attorney explained that such skill and experience was critical to the Town's meaningful participation in this rapidly accelerated process. Without considering that consultant's expertise or the Town's need, the Examiners and the Board perfunctorily denied the request on the ground that the intervenor fund does not cover legal fees. The Town hereby excepts and seeks reconsideration of this issue by the Board, as explained in more detail below.

2. Issues

On October 2, 2001, the Town filed proposed issues for adjudication at the hearing. The Town also moved for a ruling that (1) the Application is deficient on the ground that Brookhaven Energy is not a "private applicant" because it has the power of eminent domain, and it has failed to discuss alternative site locations in its application in violation of PSL § 164(1)(b); (2) Brookhaven Energy failed to disclose or discuss site alternatives in disregard of fundamental principles of environmental impact analysis; (3) the Town should be allowed to cross examine and offer evidence on direct examination to show that the Shoreham site is a reasonable and preferable site location; (4) the Board should require the Applicant to comply fully with the Town zoning code and comprehensive plan; and (5) the Project imposes unacceptable visual, noise, and traffic impacts.

After the issues conference on October 11, 2001, the ALJs issued their Ruling on October 25. They determined that:

1. Brookhaven Energy is a "private applicant" and cannot be required to present alternative sites that it neither owns nor has an option to purchase. [Ruling p. 23].

2. The Town will not be allowed to present evidence to show that the Shoreham site within the Town is a preferable alternative to the Yaphank site. [Ruling pp. 24-26].

3. Brookhaven Energy was required to make its Siting Study available. [Ruling p. 27]

4. Traffic, noise and visual impacts were made issues for adjudication at the Town's request. [Ruling, pp. 29-31].

5. Compliance with local laws was made an issue. [Ruling, pp. 32-34].

6. Decommissioning was made an issue. [Ruling, p. 49].

The Town petitioned the Siting Board for interlocutory review of the ALJs' October 25 issues ruling and the intervener funding request for its consultant. On January 2, 2002, the Board denied the Town's petition. The Town requests reconsideration by the Board at this time, for the reasons set forth below.

3. The Motion to Exclude and Offer of Proof

Testimony on behalf of the Town and DPS Staff was filed on January 10, 2002. The Town's testimony covered noise (Froedge), Traffic (Shafer), visual impacts (Palmer, Shafer, Koppelman), and land use and local laws (Koppelman). Then Brookhaven Energy moved to exclude eight excerpts from the Town's filed testimony, alleging that the excerpts improperly addressed the Shoreham site as an alternative and that they asserted irrelevant information on the acreage of much larger sites on which ANP had built two similar power plants in Massachusetts. The Town responded on January 18th, stating that the testimony proposed for exclusion was offered to support the Town's position that the Yaphank site is unsuitable, and that the existence of other potential locations for a major electric generating facility in the Town was offered to show that the Town Code allows major power plants, as of right, at Shoreham on sites zoned for heavy industry, and that it would be a mistake to locate the proposed facility at Yaphank, which is zoned only for light industry.

The Town also advised the Examiners of a December 21, 2001 Federal Energy Regulatory Commission ("FERC") decision, which revealed that, as of December 2001, not only was a natural gas

pipeline progressing through the approval process to supply the Shoreham vicinity, but that ANP/Brookhaven Energy had contracted to purchase all of the gas it will need for the Yaphank Project from that pipeline.[6] The January 2, 2002 Order, which stressed the "current lack of natural gas" at Shoreham as a major factor in affirming the ALJs' ruling to deny testimony on alternative sites, suggests that the Board was misinformed as to the potential for a new and ample gas supply at Shoreham. This fact alone cries out for the examination of the reasons that ANP rejected other sites. This Board should not allow ANP to hide such relevant facts from the ALJs, the Town and the public.

At the opening of the hearings, the ALJs denied Applicant's motion to exclude portions of the Town's testimony insofar as it related to Town witnesses, Palmer or Shafer. That testimony shows that ANP has constructed generating plants in Massachusetts identical to the one proposed in Yaphank on sites of 129 and 147 acres each, more than 4 and 5 times the size of the Yaphank site. Of course, this fact supports the Town's position that the Yaphank site is too small.

However, the ALJs excluded portions of the testimony of the Town's land use expert, Dr. Lee Koppelman, based on the Board's January 2 refusal to disturb the ALJ's October 25 Ruling that testimony on the Shoreham site would be rejected, and based on the Town's inability to produce an "affidavit" from LIPA, a third party not under the Town's control, which this Board arbitrarily required in order to allow discussion of a Shoreham alternative. The Town submits that this decision was erroneous in that it has imposed a very onerous threshold requirement to permitting proof on the availability and suitability of the Shoreham site. It was unreasonable to require the Town to produce an affidavit from a third party not under the Town's control, especially since there is no procedure for obtaining such an affidavit. Invoking the established procedure permitting interrogatories, the Town submitted interrogatories to LIPA, the owner of that part of the Shoreham site which is zoned to allow plants, as of right. LIPA responded that it would entertain discussions as to a major generating facility

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[6]See the Town's January 18, 2002 Response to Applicant's Motion to Exclude, at p. 7.

at Shoreham. This answer, together with the FERC ruling establishing the availability of a natural gas pipeline at Shoreham in the near future, was a reasonable response by the Town to the Board's January 2, 2002 Order that should have been deemed sufficient to allow discussion of a Shoreham alternative. Based on the LIPA interrogatory response and the new FERC information, the Examiners should have allowed the Town to cross examine and to proffer testimony on the factual issue of whether the Shoreham site would be superior to the proposed Yaphank site. The Town made an offer of proof of the excluded testimony. (Tr. 1722-25). The Town submits that the ALJs' ruling excluding portions of Dr. Koppelman's testimony was erroneous, requests that it be reconsidered, and that the excluded testimony be admitted.

F. Hearing Process

Four and a half days of adjudicatory hearings, plus a half-day tour of the site and nearby historic, scenic, recreational and aesthetic resources, commenced on February 4, 2002 and concluded February 8. The overall record compiled to date incorporates the Examiners Recommended Decision dated April, 5, 2002, the Application (Exhibit 1), the testimony of the Applicant, Town, Staff and LIPA, which has been incorporated into 1750 pages of transcript, including the issues conference, legislative public hearings, and adjudicatory hearings, 77 Exhibits and various rulings, together with motions and briefs of the parties. Among the exhibits are ANP's Siting Study, made available by the ALJs October 25 Issues Ruling (Exhibit 16), and Joint Stipulations and proposed certificate conditions, agreed to among various statutory parties, the Applicant and Suffolk County (Exhibit 26). The Town is not a signatory to the Joint Stipulations.

G. Post-Hearing Process

Following close of the hearings on February 8, the Parties submitted initial briefs on March 12, and reply briefs on March 26. On April 1, 2002, The Applicant served a motion to strike portions of the Town's reply brief, which the Town answered on April 9. The motion to strike is not mentioned in the ALJ's Recommended Decision, which is dated April 5 and became available on April 8, and the

Town presumes that the motion to strike was mooted by issuance of the Recommended Decision. However, the Town filed its response to the Motion to Strike on April 9, to protect the Record.

II. Summary of the Town's Basic Position

It is the Town's basic position that the Project, as proposed for construction and operation in Yaphank, on only 28 acres that are zoned for light industry not to exceed 50 feet in height, should not be granted a certificate by the Board. The proposed Project facilities, include two huge air cooling condensers (each 90 feet high, 150 feet long and 90 feet wide), two enormous 72 foot high turbine buildings, a 72 foot high water tank, two 160 foot stacks, associated structures exceeding 100 feet in height, and switchgear. Under the Town's Zoning Code, none of these structures are permitted as of right. Under the Town's Comprehensive Plan and zoning code, these proposed facilities are simply too massive and visually intrusive to be allowed at the Yaphank site by special permit.[7] The site is too small and the facilities are too big. The Project is made up of structures typical of "heavy industry." The proposed facilities would be completely out of character with the existing and proposed light industrial land uses in the community. The Town's 50 foot height limit would be violated to such an extent that it would be comparable to a re-zoning of the area, and the Town has submitted expert testimony establishing this. Dr. Koppelman's testimony in this respect is uncontested. The massive Project facilities would be a perpetual eyesore to local residents and thousands of travelers on the adjacent roads, including the Long Island Expressway ("LIE"), Sills Road, Long Island Avenue, Gerard Road and Yaphank Avenue. Moreover, operation of the Project would impose a continuous irritating noisy roar across the area, to the detriment of existing and proposed development and property values in the vicinity. Nearby historic sites would be forever blighted. In short, it would be a colossal mistake to approve the Project at the proposed site. Furthermore, the Applicant's analysis of visual impacts on

[7] The Project facilities are described in Section 3 of the Application, Exhibit 1. The Town takes exception to the statement at p. 38 of the Recommended Decision that states that the Project would meet the standards for issuance of a special permit.

aesthetic, scenic, historic and recreational resources is fatally flawed, and precludes the granting of a certificate for this Project under Public Service Law § 168(2)(b)-(e). Accordingly, the Town respectfully requests that the Siting Board reject the ALJ's recommendation that Brookhaven Energy's application for a certificate authorizing the Project be granted. The Board should deny the application outright, or require the Applicant to seek a more suitable site location for the Project.

III. Exceptions to the Recommended Decision and Requests for Reconsideration

The Town takes the following exceptions to the Examiners' Recommended Decision ("RD"), and makes the following request for Reconsideration of the Board's January 2, 2002 Order Concerning the Town's Interlocutory Appeal:

A. Exceptions as to Alternative Site Locations and the Shoreham Site

The Town, years ago, set aside a large amount of land at the north side of the Town, in the Shoreham vicinity, for large electric generating plants.[8] In fact, an 800 MW nuclear plant was constructed at Shoreham, but was decommissioned before going into service.[9] The Town's fundamental objection is to siting the Proposed 580 MW plant at the 28 acre L-1-zoned site in Yaphank, while there is ample land at Shoreham and elsewhere zoned for new large power plants as of right. A new peaking facility is presently under construction there.[10] New gas and electric transmission interconnections are actively being licensed and constructed between New England and Shoreham.[11]

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[8] The Town supported this statement by the direct testimony of Dr. Lee Koppelman, (tr.1708): "The Town of Brookhaven and the County of Suffolk selected Shoreham as the place [forty years ago] where Power Plants should be located because they are obnoxious uses which can easily be hidden at Shoreham and have a minimum impact on other properties, especially residential properties." This testimony was arbitrarily stricken (tr. 206-207; 213), but is part of the Town's offer of proof (tr. 1722-23).

[9] The Board is asked to take official notice of this fact.

[10] See *Petition of PPL Global*, PSC Case 01-F-1633, Declaratory Ruling issue December 10, 2001; see also, Order for lightened Regulation in Case No. 01-E-1634 issued March 28, 2002.

[11] See 97 FERC 61,363, *Islander East Pipeline Company*, FERC Docket Nos. CP01-384-000, et al., December 21, 2001; see also *Application of Cross Sound Cable*, PSC Case No. 00-T-1831, Order in Article VII case issued

Furthermore, the Long Island Power Authority has already stated that it will entertain a new major electric generating facility at Shoreham.[12] Thus, the "power park" concept planned for Shoreham[13] years ago remains very much alive and within the Town's Comprehensive Plan and zoning ordinance.

In fact, ANP considered Shoreham as a potential site, but rejected it.[14] While the Applicant alleges that the lack of gas supply weighed against its selection of Shoreham when the siting study was conducted over three years ago, ANP has since participated in a plan to bring natural gas to Shoreham from Connecticut, and in fact this new pipeline would supply the Brookhaven Energy Project in Yaphank.[15] The principal difficulty in siting the Brookhaven Energy Project at Shoreham would appear to be competitive jealousy among the owners of the lands at Shoreham (LIPA and KeySpan), and ANP.[16] In any event, if the Examiner's decision excluding evidence on the alternatives actually studied and the reasons for discarding them is allowed to stand, we shall never know why a tiny parcel in an historic district was selected over an area set aside for roughly 40 years for power plants. Is this the purpose or spirit of Article X?

The applicant is either a "private applicant" as it contends, or it is an "electric corporation" under the Transportation Corporation Law, as the Town sets forth below. If it is a "private applicant," the result of the Examiners' Recommended Decision, would be that the commercial economic self-interests of a private developer should supplant the Town's long-standing plan for major power facilities

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February 27, 2002.

[12] See LIPA's Response to Interrogatory B-59.

[13] Proposed but stricken Koppelman testimony at tr. 1708, fn 8, supra.

[14] Exhibit 16, p. 14.

[15] Recommended Decision at p. 52.

[16] See Siting Study, Ex.16, p. 14: ANP reports that it was told that LIPA had "no interest." The Recommended Decision's discussion and conclusion with respect to LIPA's opposition to the Project at p. 85 strongly supports the inference that commercial self-interest on the part of the Shoreham land owners is the rationale for Brookhaven Energy's reluctance to pursue siting its Project at Shoreham.

to be concentrated at Shoreham. Under the Examiners' rationale, the Town's comprehensive land-use plans must be sacrificed to the dictates of a private developer, and this Board must effectively re-zone that developer's choice of land in order to foster and develop competition in electric markets, even when at least one superior alternative site is available.

But there is something wrong with this picture. The Legislature re-enacted Article X in 1992 to balance considerations of power plant need, local land use, and the environment in a single proceeding. Then, in 1996, a competitive framework for pricing electricity was adopted by the PSC. Thus, the "need" component in Article X was mooted by the adoption of competition, which employs the market as the determinant of need for new plants by placing the investment risk on private investors. Therefore, after 1996, consideration of "need" in Article X was limited to making a relatively simple finding of whether a proposed facility would foster competition. The Examiners' in this case single mindedly focused on finding that the proposed Project would promote competition (RD, pp 49-50 and 84-85). At the same time, however, they blindly refused even to think about whether competition would be fostered as well or better if the Project could be built at a site other than Yaphank, and at the same time provide greater adherence to local land use laws and plans, with improved environmental protection. Thus, they erroneously ruled against receiving evidence or allowing cross examination on the optimal location of the Project within the Town. The Town submits that these rulings defy logic, and are unreasonable and discordant with the Legislature's objectives.

Furthermore, and of critical significance, when the Public Service Law is read in context with the related Transportation Corporations Law ("TCL"), it is clear that the Applicant possesses the power of eminent domain, so that its application for the Project is fatally deficient under Article X because it fails to submit evaluations of alternative site locations. If such evaluations had been made, however, the Shoreham site would have been shown to be greatly superior to Yaphank. Even assuming, *arguendo*, that the Applicant did not have the power of eminent domain, it would still be necessary to evaluate alternative site locations. ANP could not simply ignore any public discussion of

alternative site locations for the Project by blithely selecting a site and placing it in a wholly-owned shell partnership (with corporate partners) before commencing the Article X process. Such a transparent procedure makes a mockery of the environmental review process as envisioned under both Article X and the State Environmental Quality Review Act ("SEQRA"). These points are addressed below.

The Town challenged the Applicant's position on alternative sites at the first available opportunity, which was when it filed its proposed issues for adjudication on October 2, 2001.

1. Brookhaven Energy Is Not a "Private Applicant," Because It Has the Power of Eminent Domain

Brookhaven Energy is not a "private applicant" as it contends, but is, rather, an "electric corporation" within the meaning of the TCL, and therefore is vested with the power of eminent domain. Because Brookhaven Energy has the power of eminent domain, it is required by § 164(1)(b) of the Public Service Law (PSL) to provide the Siting Board with an evaluation of alternative site locations. Brookhaven Energy's failure to evaluate alternative locations to the proposed facility in its application violates PSL § 164(1)(b), which means that the application lacks sufficient information to allow this Board to make the findings required under PSL § 168, including subsection (2)(c)(i) thereof.

This Board rejected this contention in its January 2, 2002 Order, at pages 4 through 5, and the Town hereby takes exception and requests reconsideration. This Board's conclusion to reject the Town's "private applicant" contention rests on the finding that "TCL § 10 requires that an entity be a corporation and be engaged in the business of supplying electricity directly to utility customers in order to be an 'electric corporation' with the power of eminent domain under TCL § 11(3-a)." The Town submits that this reasoning is superficial and ignores the intent of the law. Therefore, it should be rejected on reconsideration because Brookhaven Energy admits that it was organized for the sole purpose of developing the proposed project (Application § 22, fn2; PSS p. 3-5[17]), in order to supply electricity to the public of Long Island and New York State (PSS § 1.1). There is no basis for the

[17]References to "PSS" are to applicant's Preliminary Scoping Statement.

Board's assertion in its January 2 Order that the entity must directly serve the end user.

Nor is the Board correct in concluding that Brookhaven Energy, a Delaware limited partnership, should not be deemed a corporation under the TCL. While defining the term "electric corporation" as a "corporation organized to . . . supply for public use electricity . . ." (TCL § 10), the TCL itself does not define the term "corporation." However, Brookhaven Energy is clearly "an electric corporation" under PSL §2(13), where the term "electric corporation," is expressly defined to include "partnerships" and "associations" that own an "electric plant," which includes generating facilities such as the facilities proposed by Brookhaven Energy. The definition of "electric corporation" in the PSL strongly supports the conclusion that Brookhaven Energy is also an "electric corporation" for the purposes of the TCL. Moreover, the Public Service Commission has recently ruled that all developers of Article X facilities are "electric corporations," regardless of business form, under the PSL. *See* Athens Generating Company, Case No. 99-E-1629, Order Providing for Lightened Regulation (July 12, 200); Athens Generating Company, Case No. 01-E-0816, Order Authorizing Issuance of Debt (July 30, 2001).

As a matter of policy, it is essential to construe the term "corporation" as used in the TCL to include Brookhaven Energy in order to assure that business entities that generate electricity for the public have parallel privileges and obligations[18] under the TCL regardless of their technical organizational format. Indeed, of the 24 Article X applicants listed on the PSC's web site, only five appear to be organized as LPs, while nine are corporate LLCs, nine others are domestic or foreign business or transportation corporations, and one is a public authority. To hold that the TCL's privileges and obligations apply to the corporate entities, but not to the LPs would mean that Article X applications by LPs would avoid evaluating alternative site locations, while applications by corporate entities would not. The Legislature had no such intent. In the Article X context, as well as under

[18] Privileges include the power of eminent domain. (TCL § 11). Obligations include the duty to serve (TCL § 12), and to consider alternative sites.

SEQRA, evaluation of alternatives is critically important, is at the "heart" of the environmental process, and may not be brushed aside.[19]

Further, at the time the TCL was enacted, first in 1890 and re-enacted in 1909, [20] New York's "Partnership Law" and "Limited Partnership Law" were non-existent. One can speculate that the corporation was the only form of business entity actively involved in providing electricity to the public at the time. The Partnership/Limited Partnership Law was eventually enacted in 1919[21] and the TCL was subsequently amended in 1926 and again in 1964. [22] Still, the basic form of business entity engaged in the generation and sale of electricity at the time, and at least until the 1980s, was the corporation, normally operating as a vertically integrated public utility.[23] Therefore, we submit that the term "corporation," as used in the TCL is synonymous with the contemporary term "business entity," and that the TCL's term, "corporation," properly includes today's modern forms of business entity unknown to the original drafters of the TCL, and unused until very recently. As discussed above, the Public Service Law recognized this reality in Section 2(13), a recognition which binds this Board.

Limited partnerships are generally employed to limit the liability of their partners while allowing revenues to flow through to the partners for federal tax purposes. The factors that distinguish a corporation from other business organizations, including limited partnerships, are limits of liability, a perpetual existence, and the conduct of matters through centralized management. None of these attributes that distinguish a limited partnership from a corporation are relevant to the purposes of the

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[19] *Shawangunk Mountain Environmental Associates v. Planning Board of the Town of Gardiner*, 157 A.D. 2d 273, 276 (3d Dept. 1990); see also, Jackson v. New York State Urban Devel. Corp., 67 N.Y. 2d 400, 415 (1986); *Citizens Against Retail Sprawl v. Giza*, 280 A.D.2d 234, 237-238 (4th Dept. 2001).

[20] 1909 N.Y. Laws, ch. 219.

[21] 1919 N.Y. Laws, ch. 408.

[22] 1926 N.Y. Laws, ch. 762 amend. L. 1909, ch. 219, and 1964 N.Y. Laws, ch.734 amend. L. 1926, ch. 762.

[23] Garfield and Lovejoy, Public Utility Economics, Prentice Hall, Inc.1964 at Chapter 1

TCL or provide a reason to exclude a limited partnership from inclusion as an "electric corporation." On the other hand, bringing the limited partnership within the scope of the TCL is consistent with the TCL's inherent *raison d'etre*, and assures that an environmental impact review of alternative locations will not be circumvented. The intent of the TCL is to vest specific obligations (TCL § 12) and privileges (TCL § 11) on those who generate and supply electricity in New York State. Thus, there are strong public policy reasons to include limited partnerships, like Brookhaven Energy, under the TCL and no constructive public policy rationale to exclude them.

The central point is that, in New York, the business entity's purpose is the source of its being granted the power of eminent domain under the TCL. It need not be organized as a transportation corporation, or as a "public utility." If the entity's purpose is to provide electricity to the public, then the Legislature intended that the TCL should apply. Accordingly, Brookhaven Energy is an "electric corporation" within the meaning and intent of §10 of the TCL and has the power of eminent domain. It is not a "private applicant." The Board's January 2 reasoning simply fails to implement the legislative purpose. Accordingly, it should now be rejected, and the Board should deny Brookhaven Energy's Application for failure to supply the required information as to alternatives. The Town hereby takes exception to any other result.

2. The Legislature Did Not Intend for the Board to Prevent Public Input and Discussion of Alternative Site Locations for the Project

The Town requests that the Board reconsider its January 2 Order at pages 5 through 6, which affirms the Examiners' October 25th Ruling on alternative sites. The Town further takes exception to the Examiners' Recommended Decision at page 90, which affirms their bench rulings that denied the Town the opportunity to show that the application for the Yaphank site should be denied because there are serious problems with the Yaphank site and superior alternative sites are available. See RD discussion at pages 86 through 90.

The Town submits that the requested reconsideration and exceptions should be granted

because the procedure followed by the Board and Examiners in this case, instead of developing a full record, has actually prevented discussion and evaluation of alternative site locations for the Project in a manner that violates both Article X and SEQRA. This is explained in the following sub-sections.

a. Assuming, *arguendo*, that Brookhaven Energy lacks the power of eminent domain, its application was still required to evaluate the alternatives that it examined prior to selecting its preferred site.

The Town's October 2, 2001 submission contended that even if Brookhaven Energy lacked the power of eminent domain, it could not properly refuse to describe in its application those reasonable alternative site locations which it actually considered and rejected prior to the date on which it formally initiated the pre-application process under Article X, which was on March 24, 2000.[24] Evaluation of site alternatives is the heart of the environmental impact evaluation process, whether done under Article X or SEQRA.[25] Site alternatives were admittedly considered by ANP before March 24 (see Site Study, Exhibit 16), but were omitted from the Application.

The Town submits that evaluation of alternative site locations is mandated as part of the Article X process, and is not optional.[26] PSL § 163(1)(e) states that the PSS should contain a discussion of "reasonable alternatives to the proposed facility as may be required by [PSL §164(1)(b)]". PSL § 164(1)(b) requires that applications contain:

> A description and evaluation of reasonable alternative locations to the proposed facility, if any, ... (Emphasis added).

The Board and the Examiners overlook the plain language of the statute and ignore the words "if any" at the end of the initial clause of PSL § 164(1)(b). The facts are that alternative locations were considered and rejected by Brookhaven Energy. Siting Study, Ex 16. Therefore, there are "some"

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[24] See Town's Proposed Issues filed October2, 2001 at pp. 20-23.

[25] PSL § 164(b) states that the information required in an Article X application shall be no more extensive than required under SEQRA, which confirms that Article X is the functional equivalent of SEQRA. See Gerrard, Ruzow and Weinberg, *Environmental Impact Review in New York*, § 8B.03 [15][a], (Matthew Bender, 2001).

[26] The Town initially made this point in its October 2 issues filing at p. 19.

alternative site locations, and the "if any" term is applicable. But, alternative site locations are not discussed in the Application. In failing to evaluate them, Brookhaven Energy ignores and violates § 164(1)(b), which unambiguously requires their evaluation.

Brookhaven Energy's tortured interpretation of PSL § 164(1)(b) allows so-called "private applicants" to exclude public consideration of alternative sites unilaterally and secretly. This is an egregious violation of the policy of encouraging public participation under both Article X and SEQRA.[27] Thus, where reasonable alternative locations to a proposed facility were considered, they must be disclosed and evaluated as part of the application process. In the absence of an evaluation of the alternative sites actually considered by Brookhaven Energy in the application, this Board is unable to find that the project is in the public interest, considering its environmental impacts and "reasonable alternatives examined as required by [PSL §164(1)(b)]." (Emphasis added).

Interpreting the term "if any" in § 164(1)(b) to mean that evaluation of alternative sites can be easily circumvented and disregarded by applicants who set up a shell partnership owning but one site, cuts the heart out of the environmental impact review process in direct contravention of Article X and SEQRA. First, as recognized in the Board's June 15, 2001 Opinion and Order Granting a Certificate in Athens, Case No. 97-f-1563, information comparing a proposed site with alternatives is useful to the consideration of whether "it would be a mistake to locate a facility at the proposed site in view of other realistic options....". Therefore the Town should have been allowed to cross examine and present evidence to show that the Yaphank site is inferior to Shoreham.

Second, it is the ALJ's and this Board's responsibility to interpret and administer Article X "in accordance with the policies set forth" in SEQRA. (ECL § 8-0103(6)). The Article X process is the functional equivalent of SEQRA. See PSL § 164(b); *Gerrard, Ruzow and Weinberg*, Environmental

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[27] See *Merson v. McNally*, 90 N.Y. 2d 742 (1997): "An environmental review process" conducted through closed bilateral negotiations between an agency and a developer would bypass, if not eliminate, the comprehensive, open weighing of environmentally compatible alternatives both to the proposed action and to any suggested mitigation measures."

Impact Review in New York, § 8B.03[15][a] (Matthew Bender, 2001). SEQRA regulations require that a draft environmental impact statement must include a description and evaluation of each alternative, which should be at a level of detail sufficient "to permit a comparative assessment" of the alternatives discussed. 6 NYCRR § 617.9(b)(5)(v). Furthermore, only the environmental impact statement process outlined at § 8-0109 of SEQRA is excluded from actions subject to Article X.[28] SEQRA's purposes and policies, as set forth at §§ 8-0101 and 8-0103, remain applicable in this case. Thus, the Town submits that the ALJs' rulings and Recommended Decision have violated this requirement, and the Town hereby takes exception.

The facts of the Appellate Division's decision affirming the Siting Board's Opinion and Order issuing an Article X certificate for the Athens Project [29] are distinguishable here because, in this case, Brookhaven Energy admittedly conducted a site selection process. Brookhaven Energy's position, that selecting its preferred site before commencing environmental review under Article X forecloses any examination of alternatives, is inconsistent with PSL § 164(1)(b), and with the spirit of Article X and SEQRA. Indeed, the Appellate Division's opinion in *Horn v. IBM,*[30] which was relied upon by the Court in *Citizens for the Hudson Valley*, applies a "rule of reason" that limits the discussion of alternatives that an applicant needs to put forth in its application. Under the "rule of reason" standard, it would be unreasonable and reversible error for the Article X Siting Board to disregard evaluation of site alternatives, particularly when at least one of the alternatives admittedly evaluated by the Applicant is zoned for major electric generating facilities, such as the proposed Project, and the site owner would entertain having the Project built on the site, as is the case herein.

Neither *Horn* nor *Citizens for the Hudson Valley* supports the proposition that discussion of

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[28] See SEQRA § 8-0111(5)(b).

[29] *Citizens for the Hudson Valley v. New York State Board*, 281 A.D. 2d 89, LEXIS 3664, (3d Dept, April 12, 2001)

[30] 110 A.D.2d 87, 493 N.Y.S.2d 94 (2d Dep't 1985).

alternative sites is absolutely foreclosed on the ground that the applicant neither owns, nor has options on alternative sites. In fact, the decision in *Horn* says that "in certain cases involving proposed development by a private entity an in-depth analysis and discussion of alternate sites for the project may be appropriate and necessary."[31] Under the facts of this case, where a Siting Board is being asked to override provisions of a Town's zoning code and comprehensive plan in order to squeeze an oversized major facility onto an undersized parcel in a light industry zone, it is absolutely appropriate and necessary to evaluate alternative site locations, especially ones which could meet the Town Code and have a significantly reduced environmental impact. It is unreasonable to foreclose or ignore such a required evaluation, especially since the Town has provided evidence that such a superior site is available for this proposed Project.

Moreover, the Town is directed by §§ 166(1)(h) and 168 (2)(d) of the PSL to present evidence in support of its Code. The Board's and Examiners' rulings have unreasonably denied this opportunity to the Town.

It may be argued that Board Rule §1001.2(d)(2), which permits limiting site alternatives to parcels owned by or under option to private applicants, excuses Brookhaven Energy's failure to evaluate in its application the potential alternate sites that the Applicant admittedly examined before it commenced the Article X process. But any such argument is wrong because §1001.2(d)(2), as applied to the facts, is inconsistent with PSL § 164(1)(b), and is unreasonable, for the reasons given above.

b. The Examiners' October 25 Ruling, the Board's January 2, 2002 Order and the Examiners' Subsequent Rulings and Recommended Decision Have Prevented the Town from Developing the Record with Respect to Shoreham and Other Alternate Site Locations

In its October 2nd Issues filing, the Town proposed to develop the record on alternative sites

[31] 110 A.D. 2d at 95.

through cross examination of the Applicant's witnesses and by submission of its own affirmative testimony.[32] The Examiners' October 25 Issues Ruling denied this request, stating that the Examiners had decided to follow the Board's Order in the *Athens*[33] case that states:

> [W]e would require evidence that some greatly superior site is available that should (and may) be used instead for such a generating plant, before we would consider "alternative sites" to be a material issue.

This restriction on the obligation to discuss alternatives is not supported in law or in legislative intent. Furthermore, in *Athens,* the Board had given the intervening group the opportunity to present its case before making its ruling. In contrast, the Examiners in this case ruled that evidence of the Shoreham site's superiority had to be presented even before the issues conference, and indeed only six weeks after the application had been declared complete and only two weeks after denial of the Town's request for funding to develop its evidence. (October 25 Issues Ruling at p. 26, and Examiners' September 13, 2001 Ruling on Funding). In this manner, the Examiners sought to absolve the Applicant from discussing alternative site locations. The Town filed a timely interlocutory appeal to this Board, and the Board, eight weeks later, affirmed the Examiners' ruling, with the proviso that if the Town could submit "an affidavit" on a timely basis stating that a site is available at Shoreham, then the Town would be permitted to proffer testimony on the factual issue of whether the Shoreham site would be superior to the Yaphank site.[34]

The real mischief of this ruling is two-fold. For the Town to meaningfully participate in a discussion of alternatives or to even require such a discussion by the Applicant, the ruling requires the Town to produce an "affidavit" from a third party over which it has no control and for which Article X

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[32] Town's October 2, 2001, Proposed Issues at pp. 15-17.

[33] Case 97-F-1563, *Athens Generating Company, L.P.*, Opinion and Order (Issued June 15, 2000), p. 100.

[34] This gave the Town a month to produce an affidavit. The Town's testimony had to be filed January 10, the Applicant's rebuttal was filed January 24, and the hearings commenced February 4 and concluded February 8. The Town was hurried.

provides no procedures. The ruling further absolves the Applicant from ever discussing alternatives, which even *Horn* recognizes are important considerations, especially when the proposed location of the Project is on only 28 acres as compared to 129 and 147 acre sites used by the same Applicant for identical projects in Massachusetts.

Also, the Board's January 2, 2002 Order at footnote 10 erroneously presumed that gas will not be available at Shoreham in the future, despite the fact that ANP itself had agreed to buy the full supply for the Project through the Islander East Pipeline. Additionally, the PPL Global facility recently approved at Shoreham will be oil fired in order to be available in the summer of 2002. These facts alone warranted reconsideration of Shoreham as a preferable site location.

The Town requests reconsideration of pages 5 through 6 of the Board's January 2 Order affirming the Examiner's Issues Ruling on these points because it is erroneous.

i. The Examiners Abused Their Discretion in Their October 25 Ruling

First, the Examiners' October 25 Ruling is based on the incorrect statement that the Town had not demonstrated that Shoreham is superior, or would rectify a problem with Yaphank. The Town in its October 2 filing, which was an issues statement, in fact stated at page 16:

> The Town's evidence on the Shoreham site would include information on the environmental, technological and economic suitability of Shoreham, including the visual impacts of the proposed facility at Shoreham; availability of land at Shoreham; environmental, technological and economic shortcomings of the proposed Yaphank site as compared to Shoreham; and the benefits to the public with respect to back up generation possibilities at Shoreham compared to Yaphank.

Thus, the Town did explain the nature of the information it planned to submit as to the superiority of a site at Shoreham, and as to shortcomings at the Yaphank site, but in a non-adversarial tone. Indeed, an adversarial or confrontational format was not employed in the issues statement to avoid giving an erroneous impression that the Town's review and information would be biased or one-

sided.[35] Therefore, the Examiners' ruling is wrong and an abuse of discretion. The Town requests reconsideration of this issue.

ii. The Town Fulfilled Any Reasonable Expectation in Its Issues Filing as to Shoreham

The Examiners claim that the Town should have proclaimed that Shoreham is a "greatly superior site" on October 2, before the Town's experts had even given their views to the Town. This appears to fault the Town for not being disingenuous. The Town was interested in developing a constructive dialogue, and its October 2 request that Shoreham should be considered as an alternative clearly fulfilled any reasonable expectation for a statement of a viable issue for adjudication in this case. Indeed, a site such as Shoreham, which had been selected for an 800 MW nuclear generator, is an obvious candidate for a 580 MW gas-fired generator. It is ordinary common sense. Moreover, the the Town could not reasonably have been expected to prepare and submit a full affirmative case at the time it submitted its issues statement, barely six weeks after the Application had been determined to be complete. On the other hand, the Applicant, having discarded Shoreham in 1999 allegedly because it lacked a gas supply, seems to have been less than forthright on this record in 2001 with respect to the fact that it plans to obtain its gas for the proposed Project at Yaphank from a pipeline to Shoreham from Connecticut. The indisputable fact is that Shoreham is a greatly superior site as compared to Yaphank, as the Town has maintained throughout this case.

iii. The Town Has Shown that LIPA Would Entertain a Major Project, Such as Applicant's, at Shoreham; The Board's Affidavit Requirement Is Unreasonable and Arbitrary.

The Town submitted to the ALJs LIPA's January 22 response to an information request B-59, which stated that:

> While LIPA has not made a decision as to the future development of

[35] The Town had requested intervenor funding to study Shoreham as an alternative, which the Presiding Examiner denied. Issues Ruling, October 25, p. 50. There was a concern on the Town's part that an adversarial tone would undercut the merits of the funding request.

> the lands it owns at the Shoreham site, LIPA would entertain discussions regarding the development of all or part of such site for a merchant generating plant.[36]

The Examiners determined that this language did not satisfy the Board's requirement that the Town provide "an affidavit" stating that a site at Shoreham is available for sale to Brookhaven Energy. Therefore, the Examiners excluded portions of the Town's testimony and refused to allow the Town to cross-examine the Applicant on Shoreham and alternative sites. The Town submits that the Board's affidavit requirement is extremely onerous, arbitrary and unreasonable, as are the Examiners' rulings in response to it, because they collectively prevented the Town from cross-examining and from proffering direct evidence to show that it would be a mistake to build the Project at Yaphank, which has several problems because it is too small, relative to a larger and more remote location, such as Shoreham. The affidavit requirement improperly put the burden of proof on the Town, and shifted it away from the Applicant. When all is said and done, the Applicant has succeeded in involving this Board in commercial gamesmanship, which short-circuited the full development of the facts on the record and which prevents a full examination of the issues so that an informed decision can be made in the public interest, as required by the legislature. The only sure loser in this scenario is the public.

iv. The Town Was Improperly Denied Its Opportunity to Cross-Examine the Applicant with Respect to Shoreham

Cross examination was strictly limited by the ALJs to topics that they deemed to be within the scope of their October 25 issues ruling. The Presiding Examiner refused to strike a Brookhaven Energy witness panel's testimony that Brookhaven Energy is a "private applicant," and denied the Town the opportunity to cross-examine on this point. Tr. 782-3. The Town submits that this ruling improperly allowed unqualified witnesses to offer a legal conclusion, and also contravened the State Administrative Procedure Act ("SAPA"). The Town's request to examine the Applicant on the full

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[36] See Letter, dated January 24, 2002, to the ALJs from Elaine R. Sammon, of counsel to the Town, transmitting LIPA's responses to interrogatories B-56 to B-59. Also quoted and discussed by the Presiding Examiner at tr. 208-209.

scope of the application was denied (tr. 790-799), despite the Town's absolute right of cross-examination under §306(3) of the SAPA. The Town was not even allowed to examine the Applicant on its planned gas supply (tr. 797), despite the Federal Energy Regulatory Commission's ("FERC") preliminary approval of the Islander East natural gas pipeline,[37] and Brookhaven Energy's contract to purchase all of the natural gas needed to fuel the proposed plant at Yaphank from this line.[38] This is plainly relevant to the superiority of Shoreham, and the Application and record should be supplemented so the Board can base its decision on the existing circumstances.

Moreover, the Town was silenced by the Examiners (tr. 793-794; 1456-1461) when it attempted to examine the Applicant on the fact that the proposed two 90 foot-high, football field sized, air cooling towers are not required by existing technology. The Town then pointed out on brief that no large air-cooling system has yet been placed in operation in New York State, which undercuts Applicant's assertion that air cooling towers are "required by existing technology." But the Examiners brushed aside the Town's argument as "unpersuasive." (RD at p. 31). But the fact is that dry air cooling technology is new and untried at major plants in the State because it is inefficient. Far from being "required by existing technology" as alleged by the Applicant, the massive air cooling towers proposed for Yaphank would not be required if the plant was built at Shoreham. But the Town was improperly prevented from developing this point on the record.

v. The Examiners Erred in Excluding Portions of the Town's Testimony, and the Town's Offer of Proof Should Be Granted

The Examiners struck portions of the Town's proffered direct testimony of Dr. Lee Koppelman that they believed improperly addressed alternative site locations in violation of the Board's January 2,

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[37] Appendix G-2 of the Application (prepared before June 25, 2001) at p. 2 refers to Islander East as potential "incremental capacity." By February, 2002 the regulatory approval process for Islander East had advanced substantially.

[38] Preliminary Determination On Non-Environmental Issues, in Islander East Pipeline Company, L.L.C. et al., FERC Docket No. CP01-384-000, 97 FERC 61,363 (Dec. 21, 2001).

2002 Order. Tr. 206-213. An offer of proof was submitted. Tr. 1722-25. In this testimony, Dr. Koppelman, who is the leading land use planner in Suffolk County, and its former Planning Commissioner, stated that: (1) Shoreham was planned as the future location for power plants in the Town and County; (2) Shoreham was a superior site to Yaphank; (3) Yaphank is too small for the proposed Project; (4) there are sites other than Shoreham that are also more suitable than Yaphank; and (5) a special permit would not be granted by a Town Board for the Project at Yaphank. Based on the above analysis, the Town submits that the Examiners should not have excluded this testimony. The Town requests that the Board admit the excluded testimony, and that the application for the Project at Yaphank be denied.

3. Exceptions to the Examiner's Findings as to "Reasonable Alternatives"

Based on the above analysis and discussion with respect to the Town's position on alternative site locations, exception is taken to the section of the Recommended Decision at pages 50 through 52 headed "Reasonable Alternatives."

B. Exceptions as to Local Laws and Refusal to Apply Provisions of the Town's Zoning Code

The Town excepts to the part of the Recommended Decision that addresses Land Use and Local Laws (pages 27 through 39) for the following reasons.

1. Because Project Facilities Would Grossly Exceed the 50 Foot Height Limit of the Town Code, Because A Special Permit Would Be Denied to The Applicant, and Because the Project Would Be Out of Character with Existing and Planned Uses of the Area Under the Comprehensive Plan the Board Should Deny the Applicant's Application

The proposed massive electric generating facility would be the largest on Long Island. It would have a capacity of 580 MW, and consist of two combined-cycle combustion turbine (jet engine) units each with a heat recovery steam generator fueled by natural gas. See Section 3 of the Application for a description of the Project. The Town continues to oppose the Project because of: (1) the massive size of the proposed Project's structures, which would be totally inconsistent with and violative of the

Comprehensive Plan and zoning; (2) the unsightly visual impacts that the Project would have on the historic district, recreational, scenic and aesthetic resources, and on residents and visitors to the Town, including the motoring public; and (3) the proposed Project's anticipated adverse noise impacts. The Project's structures include two air-cooled condensers (ACC), each 90 feet wide by 150 feet long and 90 feet high; two 72-foot tall generation buildings; two 160 foot high stacks; an electrical switchyard, containing an unknown number of towers approximately 100 feet tall; a 72 foot tall water tank 70 feet in diameter; a 50 foot tall water tank 60 feet in diameter; a control building; and a host of ancillary facilities. (Solzhenitsyn, tr. 1514-1515) The general arrangement layout at figure 3-7 of the application lists 65 separate structures and features to be installed on the 28 acre site. The elevation drawings at figures 3-8 and 16-2 show the height of the structures.

It is significant that almost 50% of the cross sectional areas of the Project facilities shown on the elevation drawings extend above 50 feet in height, the Town Zoning Code's height limitation for that area. Thus, The Applicant is not seeking a typical variance as one might seek from a zoning board of appeals for a simple spire or stack. The Applicant is requesting that the Siting Board exercise its extraordinary power in order to erect non-conforming industrial structures that will extend along hundreds of linear feet in violation of the 50 foot elevation limit. Applicant is seeking: (1) to erect two air cooled condensers that would exceed the zoned height limitation by 80% over a 27,000 square foot area; (2) to erect two generation buildings that would each exceed the zoned height limitation by 44% over an additional 35,000 square foot area; (3) to erect a water tank that would exceed the zoning limitation on height by 44% over another 3,800 square feet; and (4) to erect an unknown number of towers exceeding the height limitation by 100% in the switchyard. This application runs roughshod over the ordinance and Comprehensive Plan for no reason except that the Applicant wants it there. It is no surprise that the Town's land use expert, Dr. Koppelman, stated unequivocally that a special use permit would not be granted to Applicant, and the variances requested were tantamount to a rezoning (tr. 1713).

a. The Brookhaven Zoning Code is Not Unreasonably Restrictive in View of Existing Technology or the Needs of or Costs to Ratepayers, and the Applicant Has Failed to Demonstrate that the Code Should Be Overridden

Section 168(2)(d) of the Public Service Law specifically states that the facility must be designed to operate in compliance with applicable state and local laws and regulations, including zoning laws. The statute also states that this Board may refuse to apply any local ordinance, rule or regulation including zoning laws that would otherwise be applicable only if it finds that the laws are "unreasonably restrictive in view of the existing technology or the needs of or costs to ratepayers." Under Article X, this Board must give the municipality an opportunity to present evidence in support of the ordinance, rule, or regulation. Public Service Law §168(2)(d). In addition, in Subsection 168(2)(e) of the Public Service Law, the legislature warns that, before a certificate is issued, the Board must find that construction and operation of the facility is in the public interest considering environmental impacts of the facility and reasonable alternatives.

Simply put, in the case at bar, the Applicant has failed to produce any evidence which would justify overriding any part of the Brookhaven Zoning Code (which has been enacted pursuant to State Town Law and Article IX of the State Constitution) under Section 168(2)(d). Since the exception provided under PSL § 168(2)(d) has not been satisfied, the proposed plant does not comply with the local laws, rules and regulations of the Town of Brookhaven relating to power plants. Accordingly, because the Brookhaven ordinance applies, the proposed plant is illegal and should not be approved.

i. The Proposed Project

The Project is proposed for construction in an area zoned L-1, where the maximum height of structures is 50 feet (Town Code Article XXIX; see Application at Section 10.4.1 at p. 10-90-91). The Applicant requests that the Board determine that the 50 foot height limitation is unreasonably restrictive and should not be applied to the generation buildings, air cooled condensers, exhaust stacks, water tanks, and switchyard towers, in view of existing technology. See Application at Section 10.4.1

at p. 10-90-91.

The Town submits that this request should be denied. The 50 foot height limitation is not unreasonable. It is a reasonable height limit for the types of light industry facilities existing and planned to be permitted in the vicinity. See Application figures 10-3, 10-4, and 10-5. In fact the area has been developed in accordance with this limitation. The Applicant argues that in view of the existing technology, the air cooled condensers, turbine buildings and the other massive facilities, must be higher than 50 feet. But the Town submits that if such is the case, then the Project should not be built at the 28 acre Yaphank site, but rather in the Town's L-4 zone which allows such structures as of right. It would be a grievous mistake to site the plant at Yaphank. The Town has provided expert testimony establishing that such a certification would be a serious error of judgment, from a land use point of view, and it would vitiate the zoning code and Comprehensive Plan for the area. The site is too small and there are other locations in the Town that would more readily accommodate facilities of the size proposed, such as the area zoned L-4, for heavy industry.

Indeed, the record shows that ANP has constructed two generating plants identical to that proposed in Yaphank on sites that are 147 and 129 acres in area, (Shafer, tr. 345; and Ex. 28), which allows for buffering of the plants' adverse visual, zoning, land use and noise impacts. Id. On the other hand, 84% of the Yaphank site would be disturbed by the proposed Project, and there would be very little buffer. Palmer, tr. 1582. The Applicant should know better than to ride roughshod over the ordinance, the comprehensive plan, the historic district and local recreational, scenic and aesthetic resources, and to request this Board to assist it in doing so.

ii. Failure to Apply the Height Limitation of the Brookhaven Zoning Code Would Be Unlawful, Because Locating the Project at the Yaphank Site Would Violate the Comprehensive Plan

The Town of Brookhaven, like all other towns and municipalities in the State of New York is governed by specific laws when it is implementing and exercising its zoning power. Town Law, Art.

16. Central to the zoning power bestowed upon towns by the state legislature is the admonition that: "[a]ll town land use regulations must be in accordance with a Comprehensive Plan adopted pursuant to this section." Town Law § 272-a (11)(a). A similar provision appears in the state law empowering Villages (Village Law § 7-704). A municipality's considerable authority to protect the health, safety and welfare of its citizens through its use of zoning and a Comprehensive Plan is well recognized by the State's highest Court:

> This court has long recognized the considerable authority of municipalities to implement zoning plans and programs to meet the increasing encroachments of urbanization on the quality of their residents' lives. Because they are legislative enactments, these land-use regulations generally enjoy a strong presumption of constitutionality as valid exercises of the State's police power to advance the public health, safety and welfare.

Stringfellow's of New York, Ltd. v. New York City, 91 N.Y.2d 382, 396-397 (1998) (citing *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548-549 (1985) and *Udell v. Haas*, 21 N.Y.2d 463, 469-470 (1968)).

In *Udell v. Haas*, 21 N.Y.2d 463 (1968), the Court of Appeals wrote the seminal case on Comprehensive Plans. In that case it held:

> Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.
>
> This fundamental conception of zoning has been present from its inception. The almost universal statutory requirement that zoning conform to a "well-considered plan" or "Comprehensive Plan" is a reflection of that view. (See Standard State Zoning Enabling Act, U.S. Dept. Of Commerce [1926].) The thought behind the requirement is that consideration must be given to the needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community. (*De Sena v. Gulde*, 24 A.D.2d 165, 265 N.Y.S.2d 239 [2d Dept., 1965].) Thus, the mandate of the Village Law (§ 177) is not a mere technicality which serves only as an obstacle course for

> public officials to overcome in carrying out their duties. Rather, the Comprehensive Plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.
>
> Moreover, the "Comprehensive Plan" protects the landowner from arbitrary restrictions on the use of his property which can result from the pressures which outraged voters can bring to bear on public officials. "With the heavy presumption of constitutional validity that attaches to legislation purportedly under the police power, and the difficulty in judicially applying a 'reasonable' standard, there is danger that zoning, considered as a self-contained activity rather than as a means to a broader end, may tyrannize individual property owners. Exercise of the legislative power to zone should be governed by rules and standards as clearly defined as possible, so that it cannot operate in an arbitrary and discriminatory fashion, and will actually be directed to the health, safety, welfare and morals of the community. The more clarity and specificity required in the articulation of the premises upon which a particular zoning regulation is based, the more effectively will courts be able to review the regulation, declaring it ultra vires if it is not in realty 'in accordance with a Comprehensive Plan.'" (Haar, "In Accordance With a Comprehensive Plan", 68 Harv.L.Rev. 1154, 1157-1158) *Udell*, 21 N.Y.2d at 469-470 (emphasis added).

An analysis of *Udell* discloses that the Comprehensive Plan itself is the bedrock of zoning and all zoning in the community must be based on the Comprehensive Plan. Since 1968, this concept has been reaffirmed many times by the Court of Appeals, e.g., *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668 (1996); *Asian-Americans For Equality, et al. v. Koch*, 72 N.Y.2d 121 (1988); and by the Appellate Divisions, *Taylor v. Incorporated Village of Head of The Harbor*, 104 A.D.2d 642 (2d Dep't, 1984) and *Kravetc v. Plenge*, 84 A.D.2d 422 (4th Dep't, 1982).

In addition, the State Legislature, in its comprehensive revision of land use laws in the state has recognized that the Comprehensive Plan is the key factor in the land use process (Town Law § 272-a; Village Law § 7-704). In discussing the Comprehensive Plan as it relates to Towns, the legislature notes in Section 272-a, among other things:

> (b) Among the most important powers and duties granted by the legislature to a town government is the authority and responsibility to undertake town Comprehensive Planning and to regulate land use for the purpose of protecting the public health, safety and general welfare

of its citizens. (Emphasis added).

* * *

(f) The town Comprehensive Plan is a means to protect the health, safety and general welfare of the people of the town and to give due consideration to the needs of the people of the region of which the town is a part.

(g) The Comprehensive Plan forces cooperation among governmental agencies planning and implementing capital projects and municipalities that may be directly affected thereby.

Town Law § 272-a (1)(b), (f) and (g) (emphasis supplied).

Having discussed the purpose of a Comprehensive Plan, the legislature went to great lengths concerning the contents of a Comprehensive Plan and the method of preparing one. Thereafter, it sets forth in Section 261-a(2)(a) the importance of a Comprehensive Plan in creating a plan for the Transfer of Development Rights, and for Incentive Zoning (Town Law §§ 261-b, 264). All of these sections require compliance with the Comprehensive Plan, which is the "essence of zoning" (*Udell*, 21 N.Y.2d 469) and which is adopted pursuant to the State Constitution (Article IX) and Town Law (§ 272-a(11)(a)).

Dr. Lee E. Koppelman, a highly respected and well recognized authority in the area of land use planning, testified on behalf of the Town concerning the Comprehensive Plan of the Town of Brookhaven and whether the proposed facilities were consistent with that plan.

Q. Are the proposed facilities consistent with the Comprehensive Plan for the Town of Brookhaven?

A. No. Absolutely not. As I stated above, the proposed use is not consistent with the Longwood Plan. In fact, the interpretation on the part of the applicant is diametrically inconsistent with the objectives of the Longwood Plan, and the Town of Brookhaven's officially adopted Comprehensive Plan. The applicant is proposing a very intensive heavy industrial usage, which is totally out of scale from the standpoint of bulk and density, as well as usage vis-a-vis visual pollution and noise pollution. It must be kept in mind that as the residential sections of the Yaphank community continue

to grow, the radical incompatibility between the massive generating facility and the residential community would only intensify the deleterious impact upon the overall community.

Further, Dr. Koppelman testified concerning the proposed facilities and the Longwood Hamlet Plan.

Q. Are the proposed facilities consistent with the Longwood Plan?

A. No. In particular, I would single out the plans for the Longwood Alliance and the Shoreham/Wading River hamlets. In the applicant's submission there is an absolute misinterpretation of the direction, meaning, and objectives of the Longwood Plan. The applicant basically concluded that the plan stressed maximum protection within the Special Groundwater Protection Area (which is accurate), but it goes on to state that since the plan does not oppose quality light industrial uses to provide employment and tax base outside of the core area, heavy industrial use such as the plant is also appropriate. This is wrong. The hamlet plan absolutely does not endorse or support heavy industrial usage anywhere within the boundaries of the hamlet. The fact that the project is outside the boundaries of the SGPA does not support the applicant's conclusion that, therefore, their proposition is in accord with the planning objectives of the hamlet. The fact that the applicant's site is not in agricultural usage, or part of an open space corridor does not translate to mean that it is, therefore, an acceptable land usage.

Furthermore, while the Longwood Plan anticipates industrial development in the Longwood School District on the south side of the Long Island Expressway, the plan proposed by the applicant is far greater in size and visual impact than anything that was contemplated when the Plan was drafted.

The Shoreham hamlet plan is the only one of the hamlet studies that acknowledges an L-4 heavy industrial power generating land use zone in the entire Town of Brookhaven.

Put differently, in terms of *Udell*, to override the Brookhaven Comprehensive Plan and established zoning in order to locate the plant at Applicant's proposed site is to abandon the

Comprehensive Plan and "[w]ithout [the Comprehensive Plan] there can be no rational allocation of land use." 21 N.Y.2d at 469.

Dr. Koppelman's testimony was not diluted on cross examination and it stands unrefuted in the record. This, we submit is critical to the issue of whether the Applicant has succeeded in its burden to demonstrate that the local laws, especially zoning laws, should not be applied because of § 168 of the Public Service Law. We respectfully submit that Applicant has totally failed to carry its burden in this regard.

b. Applicant Failed to Present Credible Evidence or Qualified Witnesses to Show that the Height Limitation of the Zoning Code is Unreasonably Restrictive as Applied to the Proposed Project

The testimony of Mr. Solzhenitsyn, the purported land use expert of Applicant does not take issue with the Comprehensive Plan testimony of Dr. Koppelman. When examined as to the importance of a Comprehensive Plan, he stated that such a plan "gives a vision for orderly development, it is guidelines for what should go where. . . . It is a policy direction." (1675). Addressing what he claimed to be Brookhaven's Comprehensive Plan, Mr. Solzhenitsyn testified that he examined a document, entitled "'1996 Comprehensive Land Use Plan,' which did not mention power plants at this site." (1673-74).[39] Obviously, this witness knew when he searched for a site for this plant that Brookhaven's "vision for orderly development" and its "guidelines for what should go where" did not include a 580MW power plant on this 28 acre site.

The only land use analysis that Mr. Solzhenitsyn did was to tour a two mile area in the vicinity of the proposed plant. That two mile area is far from a land use analysis of the Town of Brookhaven.

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[39] The Town does not concede that this isolated document constitutes the Comprehensive Plan of the Town. Applicant has not shown whether it was adopted as such by the Town Board or by the Planning Board. In fact, in *Udell, supra*, the Court of Appeals stated that the zoning law and the zoning map are crucial elements of the Comprehensive Plan. *Udell*, at p. 472; *see also, Asian Americans v. Koch*, 72 N.Y.2d 121, 132 (1988) holding that a Comprehensive Plan requires examination of "all available and relevant evidence of the municipality's land use policies."

He did not consult Brookhaven ordinances for any site other than the subject site, plus a two (2) mile radius. (1652-53). He also admitted that immediately adjacent to the site proposal for this monstrous plant is a large parcel devoted to unobtrusive nicely landscaped industrial park uses, all of which comply with all regulations in the L-1 zone. (1676). Particularly, they all comply with the 50 foot height limit in the Brookhaven Zoning Code.

The subject application would require at least five height variances, for the two cooling condensers, which are 90 feet in height, for the two turbine buildings, which are 72 feet in height, and for the water tank, which is 72 feet in height. There are an unknown number of towers proposed for the switchyard that would measure approximately 100 feet in height. These proposed buildings, condensers, towers and tank would loom over and totally dominate the entire area in terms of massive bulk and visibility, especially since it is undisputed that the proposed site is an elevated parcel, standing significantly above sensitive visual receptors to the north, east and southeast. As recognized by Dr. Koppelman, granting such variances "would be tantamount to rezoning the area as 'L-4.'" The Town submits that if the Siting Board were to grant a certificate for the Project at the Yaphank site, it would be tantamount to such a rezoning, which would be an *ultra vires* act under *Udell*. See 21 N.Y.2d at 465, 470, 476-478.

In summary, Mr. Solzhenitsyn was unfamiliar with the dominant role that the Comprehensive Plan plays in New York Planning Law and the state statutes and constitutional provision pertaining to it when he consulted the 1996 Plan. Nothing was said in it about power plants at this site. Such testimony, we submit cannot form the basis to override the Town's zoning laws under Section 168(2)(d) of the Public Service Law.

Mr. Solzhenitsyn did in fact testify that he reviewed the zoning ordinance concerning the zoning of the property, and he found specifically that the power plants are permitted as of right, that is, without any requirement of additional administrative permission, in the L-4 zone, which embraces the Shoreham power plant area. The Town, through its zoning ordinance, which is part of its Comprehensive Plan

(*Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 684, 685 (1996)), has selected the Shoreham site as the area in which it has approved the location of power plants, such as Applicant's, on an "as of right" basis. Although excluded from the record at the end of the hearing, the Town asks this Board to consider the fact that the Shoreham site has at least 104 acres on which this power plant may be located in total conformity with the Town Comprehensive Plan and zoning ordinances. (Tr. 1746)

The ALJs steadfastly protected Mr. Solzhenitsyn and sustained objections when counsel sought to inquire of Mr. Solzhenitsyn whether he had reviewed the zoning for other sites. (Tr.1742-1743). We reiterate our position that, under Section 168(2)(e), the ALJs should have permitted the Koppelman testimony and other testimony on the Shoreham site as a viable and preferable alternate site to Yaphank. We ask this Board to consider the Town's offers of proof that the Shoreham site and its area (104 acres) zoned for power plants is a far better site for the Plant. We also ask the Board to include Dr. Koppelman's testimony in this regard and to consider it. (Tr. 1714-1715). This testimony is relevant to the question of whether the zoning should be overridden, *i.e.*, the existence of alternate sites bears heavily on the issue.

c. A Special Permit Use Is Not an "As of Right" Use and Must Be Denied if It Is Not Compatible with the Proposed Location

Mr. Solzhenitsyn's analysis of the zoning of the subject property during the hearing disclosed that it was subject to a special permit use, which is not an "as of right" use, by the Board of Zoning Appeals of the Town of Brookhaven. It is well settled that such a use as a special permit use involves an analysis by the Zoning Board of the particular use in the particular location. The Zoning Board is empowered by state law and by decisional law to deny an application for a special permit use if, based on the testimony at hearings, it is clear that the use is not compatible with that particular area. *Clipperley v. Town of East Greenbush* 262 A.D.2d 764 (3d Dept. 1999) (holding that a special permit was properly denied based on excess traffic); *Holbrook Associates v. McGowan*, 261 A.D.2d

620 (2d Dept. 1999) (holding that a valid reason to deny a special permit is the fact that "the use, although permitted, is not desirable at a particular location"); *LoGudice v. Baum*, 149 A.D.2d 420 (2d Dept. 1989) (holding that a special use may be denied at a particular location).

In other words, it is well established that a special permit use is not an as of right use at all. Rather, such uses are a well known and frequently utilized land use device, throughout the United States. They are not unique to Brookhaven. Nevertheless, Mr. Solzhenitsyn apparently did not know the fundamental difference between "as of right" and special permit uses in the Town of Brookhaven or anywhere else. In fact, he stated as follows:

> Q. Is the special permit as of right?
>
> A. Special permit is what it is. If you have satisfied the conditions for a special permit, then there is no reason to deny it. You have to satisfy those conditions. (Tr. 1656).

This is a total misunderstanding of the special permit use and the role of conditions within that use. Statutory pre-conditions are a threshold issue that must be satisfied before the use is considered within that zone as a special permit. Even if the threshold conditions are met, the special permit use may be denied for specific reasons relating to the site and/or area, such as whether the use is desirable at that particular location. *See Chipperley and Holbrook Asso.*, *supra*; *LoGuidice v. Baum*, *supra*.

Mr. Solzhenitsyn admitted that the Applicant did not develop the questions of special permit on its application and that it did not consider it. (Tr. 1658) He did, however, review the special permit provisions in the Brookhaven Town Code and noted that it required public hearings and an analysis under the State Environmental Quality Review Act. (Tr. 1661). When pressed on the special permit issue, Mr. Solzhenitsyn finally admitted that a board could deny a special permit.

> Q. If it does, would you agree, wouldn't you, that it would be an appropriate reason to deny the application, if it makes such a finding.
>
> A. Assuming it correctly made the finding, sure it would have that power to deny, yes.

He also admitted on cross examination that he did not review State Town Law § 274-b, concerning special permits and how a Zoning Board of Appeals or other administrative body is to analyze the issuance of the special permit use. (Tr. 1664). Ms. Harriman, of the staff of the PSC, rushing to the aid of Mr. Solzhenitsyn and his attorney, Mr. Gordon, on the question of whether, upon proper proof, a Board of Appeals could deny a special permit if it found that it did not comply with the Comprehensive Plan of the Town, noted specifically, "Mr. Solzhenitsyn has already stated on the record that he is not an expert in the Town Law, is not familiar with the provision Mr. Armentano is referring to and Mr. Armentano is free to brief this issue." (Tr. 1668) (emphasis added). Need we say more about his expertise in land use? Q.E.D.

Based upon the testimony of Mr. Solzhenitsyn, upon his absolute lack of any qualification to opine in these proceedings or to advise Applicant as a Land Use Planner, upon his never having qualified in any other proceeding, either judicial or administrative, as a Planning Expert (tr. 1651), upon his failure to review the most rudimentary aspects of Land Use Planning Law, such as the Town Law section relating to special permits, and upon his failure to be dissuaded by the omission of the power plant use from any part of the 1996 Brookhaven Land Use Plan (the only document he consulted) and its inclusion as of right in the L-4 zone, we once again move to strike all of his testimony on the basis that he is not a qualified witness on the subjects of land use and local laws.

In contrast, Dr. Koppelman, whose qualifications are undisputed and beyond question, made it clear that the project is completely unsuited for the Yaphank site. He testified as follows:

> Q. Would a variance from the 50 foot height limit for this Project at this site be consistent with sound zoning and land-use practice?
>
> A. No, not in my opinion. In this case, a disproportionately large part of the project's cross sectional area would be in excess of the 50 foot elevation. This can be seen readily by drawing a horizontal line across the elevation drawings marked Figures 16-2 in Section 16 of the Application. The shortest of the two tanks is at elevation 50 feet. The huge generator buildings and air cooling condensers tower over this elevation. Granting a height variance in this case would be tantamount to re-zoning the area as "L-4," not simply allowing a single stack or

> tower to exceed the 50 foot elevation to accommodate a smaller, less massive structure for commercial or light industry use. As I said above, the percent of cross sectional area of the Project above 50 feet in height is greatly disproportionate, as compared to height variances more commonly granted for stacks or towers. Two building height variances of 80%, each of which would allow the construction of a building 90' high in a 50'zone that would cover half of a football field, plus three additional building height variances of 44% each are tantamount to a rezoning of the parcel. **Such substantial and intrusive variances would never be granted to a private landowner who might develop the property. Why should it not be the same for a private electrical plant? In fact, the Special Permit use for power plants should not be allowed on this site.** (Tr. 1713) (Emphasis added).

If this Board does not strike Mr. Solzhenitsyn's testimony, certainly when the testimony of Dr. Koppelman and Mr.Solzhenitsyn are weighed, there can be only one rational conclusion: Applicant has failed to demonstrate by any evidence that this Board should override the Brookhaven Comprehensive Plan and zoning ordinance under Public Service Law § 168(d). To the contrary, the Town has established unequivocally that the Comprehensive Plan does not allow a power plant use at this site, especially since there is ample land in the Town zoned for power plant use as of right, and not subject to any conditions.

As the Town's counsel stated at the close of the hearing, concerning Mr. Solzhenitsyn's testimony:

> Your Honor, I'm going to conclude at this time by moving to strike his testimony that has been offered, and his testimony here, on the basis that he has never qualified as a land use planner, he is being put forth here as a professional expert witness, land use planner. For example, he lists on his resume a significant number of projects that he worked on. None of it is dealing with land use planning, when you read it. It essentially deals with due diligence, environmental, site selection, things of that nature.
>
> He admits that it is not part of the Comprehensive Plan of the Town.
>
> He didn't check that State law that would be applicable here if we weren't dealing under Article X.

> All these things, in my view, go to the question of whether he is a qualified witness for this Board, or for the Siting Board.
>
> Certainly I would think that an applicant coming in with such a large project on such a small site, should produce much more expertise that Mr. Solzhenitsyn on this particular issue, when the guts of this case is that this applicant is asking you and the Siting Board to overrule the local zoning, to overrule the local Comprehensive Plan, which he specifically mentions in his testimony does not provide for a power plant on this site, and which he specifically mentioned shows large development to the south of this site, in complying low-rise typical light industrial-type buildings. To override the ordinances of the Town, I submit to you requires much more testimony from a much more qualified land use planner than Mr. Solzhenitsyn. (Tr. 1692-1694.)

Based on all of the above, it is clear: (1) the Applicant did not produce a qualified witness in the area of Land Use Planning, and (2) even assuming that Mr. Solzhenitsyn is a qualified witness, Applicant has not proven that there is any necessity whatsoever to override the Zoning Laws of the Town of Brookhaven. Not only did he not study the alternative "as of right" site at Shoreham, all he did was select the subject site, tour a few miles around it, and proclaim that this is a proper site for this plant – i.e., 28 acres in an historic area, in contrast to the two identical Massachusetts plants built by Applicant on 147 and 129 acres respectively. His appraisal of the Yaphank site was nothing more than a textbook windshield analysis by a person not even qualified to be a planner or an expert on land use and zoning.

As Dr. Koppelman testified, "The Special Permit use for power plants should not be allowed on this site." That testimony was never challenged on cross-examination or by Mr. Solzhenitsyn at any time. Accordingly, the certificate should be denied, because the use is not an "as of right" use; rather it is subject to a special permit use, which use the evidence incontrovertibly establishes would not have been granted under the circumstances of this application. See Koppelman analysis, supra.

d. Section 168(2)(d) Is Unconstitutional

The Public Service Law Section 168 (2) (d), which permits this Board, an administrative agency, to overrule not only the Town Zoning Code, but its entire Comprehensive Plan for the Town, is unconstitutional in that it violates Article IX Section (2) (b) (1) of the State Constitution, and section 2 of the Statute of Local Governments, because the provision was not enacted and then reenacted by two separate Legislatures and approved twice by the governor which is required by those sections.[40] Section 168 of the Public Service Law (Article X) provides that the Board may not grant a certificate unless it first finds and determines:

> That the facility is designed to operate in compliance with the applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the Board may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such as unreasonably restrictive in view of the existing technology....

The Town submits that the aforesaid provision impermissibly diminishes, impairs and suspends powers granted to the Town under both the State Constitution and the Statute of Local Governments, and it is unconstitutional in that it was not enacted by the legislature and approved by the governor in one calendar year and then reenacted and approved in the following calendar year, as absolutely required in Article IX of the Constitution (at § (2)(b)(1)) and the Statute of Local Governments (at §2). The local laws, zoning ordinances and Comprehensive Plan which are referred to in PSL § 168 are specifically authorized by the Statute of Local Governments at Section 10 (1), (6) and (7) and under

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[40] In pertinent part, Article IX, Section (2) (b) (1) provides that a power granted in the Statutes of Local Governments:

> may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year.

The language of Section 2 of the Statute of Local Governments is identical in this respect.

these circumstances it is clear that this attempt to override the local government power is unconstitutional.

No doubt the Respondents will rely upon *Wambat Realty Corp. v. State*, 41 N.Y.2nd 490 (1977), in which the Court of Appeals stated that there was no need for dual passage when the State itself passed "comprehensive zoning and planning legislation . . . to insure preservation and development of the resources of the Adirondack Park Region." *Id.* at 491. *Wambat* is easily distinguishable on the basis that the State was exercising its own plenary power to zone land for a public purpose. That power was reserved to it in the Constitution itself. *Id.* at 954. This case involves an attempt to permit a state creature -- this Board -- to override Town zoning and land use regulations for private benefit. Such a distinction renders *Wambat* inapplicable to the case at bar.

Further, the Applicant may attempt to rely upon *Floyd v. UDC,* 33 N.Y.2d 1 (1973), in which the Court of Appeals specifically relied upon the fact that "UDC's powers stem from the State Constitution itself, Article XVIII," to override local zoning powers because of the housing emergency without the need for dual passage. 33 N.Y.2d at 7. This case, too, is distinguishable on that basis.

At bar, section (d) of Section 168 was enacted in 1992, so that there was ample opportunity for the dual enactment, which never took place.

In summary, the override provision of Section 168 (d) is unconstitutional. If this Board assumes that the provision is constitutional, it still should not be interpreted to permit this Board to override a Comprehensive Plan, i.e., the "essence of zoning." Much more specific language should be required for such an extraordinary power. In any event, in this case there was no proof that the ordinance or the Comprehensive Plan itself should be violated.

Based upon the above analysis and discussion, exception is taken to the sections of the Recommended Decision at pages 27 through 39 entitled "Lane Use, Local Laws, Decommissioning," "Request for Waivers of Local Laws," and "Request for Findings of Compliance with Local Laws."

C. Exceptions as to Visual Impacts: The Record Shows that (a) the Applicant's Visual Analysis Is Fatally Flawed, and (b) the Project Would Be Visually and Aesthetically Unacceptable and Cannot be Adequately Mitigated

The Town excepts to that part of the Recommended Decision that addresses "Visual and Cultural Resources, and Aethetics" at pages 14 through 27, including the statements that: (1) "Screening would be used to mitigate the potential visual impacts . . . ." (p. 16); (2) views would be mitigated at viewpoints 20, 36 and 48; and the conclusions at pages 26 through 27. Section 168(2) of the Public Service Law explicitly states that the Siting Board "may not grant a certificate for the construction or operation of a major electric generating facility, either as proposed or as modified by the Board, unless it shall first find and determine:

* * *

> The nature of the environmental impacts, including an evaluation of the predictable adverse and beneficial impacts of the environment and ecology, public health and safety, aesthetics, scenic, historic and recreational value, forest and park, . . .
>
> That the facility (i) minimizes adverse environmental impacts, considering . . . the interests of the State with respect to aesthetics [and] preservation of historic sites, . . .
>
> That the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, . . . ; and
>
> That the construction and operation of the facility is in the public interest, considering the environmental impacts of the facility and reasonable alternatives examined as required pursuant to paragraph (b) of subdivision 1 of section one hundred sixty-four of this article.

PSL § 168(2)(b)-(e).

1. The Town Has Established that the Applicant's Visual Analysis Cannot Be Relied Upon, Should Be Disregarded and Precludes the Granting of a Certificate

a. The Town's Submissions and the Applicant's Admissions Prove that the Applicant's Visual Analysis Is Fatally Flawed

The Applicant has failed to excuse the flawed methodology by which it claims to have assessed

the Project's visual impacts upon the many historic, scenic, recreational and aesthetic structures and sites in the immediate area. Applicant used the Visual Resources Assessment Procedure ("VRAP"), selected viewpoints, and made photo-simulations by which it came up with a conclusion that the impact would not result in an undue degradation of views. (Applicant's Brief, p. 40). In fact, Applicant had previously reached the conclusion that the Project at the Yaphank site was aesthetically acceptable, when it purchased its interest in property in Yaphank, and its VRAP process was nothing more than gloss to support its earlier decision to locate the Project at Yaphank instead of at some other, larger, more expensive location where its massive buildings could be more readily screened and buffered, just as they are at Applicant's two sites in Massachusetts, each measuring 129 and 147 acres with identic plants as that proposed for Yaphank. (Tr.1372, 1452-1453). Staff, without any justification, supported the Applicant's position. (Staff Brief, pp. 26-29).

However, the Town's expert witness with respect to visual analysis and co-author of the VRAP, James Palmer, after first making reference to Applicant's photo-simulations, testified as follows:

> These ... simulations clearly show the significant change and stark contrast that this proposed project will have in comparison to the existing conditions. While the Applicant is making efforts to mitigate the visual impacts, they are constrained by the extraordinary size of the proposed facility and the relatively small size of the proposed site. (Tr. 1573).

Dr. Palmer is a principal author of the VRAP procedure, and a highly qualified leading expe on aesthetic impacts of major projects. (Tr. 1571-1572; Ex. 68). He stated that Applicant's photo-simulations were too small, and not necessarily representative of how large and massive the Project would actually appear if constructed. (TR. 1574). He noted that the VRAP procedure was being "used here outside of its intended purpose." (Id). Moreover, he testified that Applicant had ignored significant impacts (Tr. 1575), and showed that the negative aesthetic impacts of the Project would be considerably worse and severe than Applicant had initially concluded.(Tr. 1576-7;Table 1). These results, said Dr. Palmer, showed that "the Project will be visually incompatible, out of scale, and

dominant in the context of the surroundings." (Tr. 1578). He emphasized: (1) that the Project would have high visual impacts from private lands, which Applicant ignored (tr. 1579), (2) that Applicant had improperly restricted the viewpoints selected for analysis to those representing average conditions within a landscape zone, and (3) that the Applicant had inappropriately restricted its analysis of viewpoints with many potential viewers on the grounds, by attempting to wrongly minimize their significance, stating that they were "short term" or "not representative of a landscape zone." (Tr. 1579).

Simply put, the Applicant improperly discounted the fact that the Project would disrupt the view of more than 100,000 daily riders in 78,000 vehicles on the adjacent Long Island Expressway and Sills Road, alone. (Tr. 1621, 1625). That does not account for those who would also view the Project from sites along Long Island Avenue and Yaphank Avenue. Applicant simply denied that Town residents, visitors and others who would see the Project constantly from their nearby places of work and from their cars are sensitive visual receptors. Instead, Applicant selectively designated as sensitive only more remote locations. Based on its selectivity, the Applicant then backed into the answer by creating the favorable question. The real answer to this question is in one's eyes, not in self-serving, visual simulations. The Town's submissions have incontrovertibly established that Project would be aesthetically overwhelming, offensive, out of scale at Yaphank, and in complete disharmony with the L-1 zone. As Dr. Koppelman testified: the Special Permit would be denied at this site. (Tr. 1713).

Overall, Dr. Palmer concluded that the proposed Project at Yaphank would cover too much of the site and would be much taller and more massive than is envisioned as acceptable by the Town Code. He stressed that as the area develops, the Proposed facility would be significantly out of character with other development, and that the other uses and users would be exposed to significant visual impacts. (Tr. 1581). He concluded: that the Project would have significant adverse visual impacts; that the site would be too small for the magnitude of the proposal; and that the structures would be too massive and too high to be in harmony with that neighborhood. (Tr. 1583). In a phrase:

it does not belong there.

Neither Staff nor Applicant were able to refute or dilute Dr. Palmer's plainly correct opinion as to the Project's adverse aesthetic impacts. Indeed, Applicant's visual impact assessment was nothing more than an after-the fact rationalization rigged to support Mr. Solzhenitsyn's initial conclusion in November1999 that the Project at the Yaphank Site was "aesthetically acceptable". (Tr. 1372, 1452-1453). He made this judgment at the time that he selected the Yaphank site, months before he began the VRAP, and sometime after VRAP was agreed to in the stipulations in December 2000.

The Applicant made an unabashed misleading attempt to minimize the negative visual impacts that its proposed Project would have on aesthetic, historic, scenic and recreational resources in the community. For example, the applicant incredibly alleged that:

> The recreational and educational opportunities at the Suffolk County Farm are found looking inward, not outward. This holds true for the Farm's many buildings [which include the Almshouse Barn that is listed on the State and National Registers of Historic Places] and outdoor landscaped areas. (Brief, p. 42 (emphasis supplied)).

In contrast, regarding the large field on the south side of the 276 acre farm, Applicant's visual impact expert admitted that "the plant, is an open view from that location ... it would be visible." (Tr. 1521). As to the enormous acreage devoted to planting fields on the entire west side of the Farm, Applicant's expert further admitted: (1) that the plant would be visible from that entire area as well (Tr. 1522), and (2) that the Applicant suggested to the Cornell managers of the farm that one of the reasons why the managers would not want to have planting done to screen that expansive view of the proposed Project was because that is "the best view of their planting fields for the visitors to the farm." (Tr. 1526). The Applicant did not deny that there are as many as 8,000 visitors to the Farm during a single weekend, and more than 150,000 visitors annually.

Applicant's visual expert also admitted that the proposed Project would be visible from the fields on the north side of the farm that are adjacent to the Almshouse Barn. (Tr. 1522). Not only would the proposed Project be visible from the north, south and west fields of the farm, its prominence

would be emphasized because it is 50 feet higher in elevation than the farm. (Tr. 1516-1517). It is beyond dispute that the negative visual impacts that the plant would have on the views of the north, south and west fields of the Farm cannot be sufficiently mitigated.

Applicant's witness, Mr. Solzhenitsyn, admitted that, although St. Andrew's Church is one of the sensitive visual receptors required to be considered in this Application because it is listed on both the National and State Lists of Historic Places, an analysis was never conducted to determine if St. Andrews would have a view of the proposed site based on topography alone. (Tr. 1539). In fact, the Application's Figure 16-3 reveals that the only visual receptors that were considered based on topography alone, that is without vegetation, were those between three and five miles from the proposed site. Figure 16-3 represents a Viewshed map wherein the views from the sensitive visual receptors within a three-mile radius of the site were considered with existing vegetation in place. In his testimony, Mr. Solzhenitsyn: (1) admitted that no analysis was done for the aesthetic, scenic, historic and recreational resources within the three-mile radius without vegetation (Tr. 1507); (2) admitted that vegetation acts to obstruct potential viewpoints (Tr. 1498); (3) admitted that the Application's treatment of sites between three and five miles from the proposed plant was "more conservative" than the treatment given to those sensitive visual receptors within the three-mile radius of the plant (tr. 1498); (4) admitted that there is no guarantee as to how long any particular piece of vegetation will remain in place (Tr. 1508); and (5) admitted that vegetation can be destroyed or altered by such commonplace occurrences as construction, diseases, or storms, opening views to the site (tr. 1510-1513).

Similarly, Figure 16-3 reveals that the Applicant would control only a small fraction of the vegetation that the Applicant claims would screen the view of the proposed plant from nearby sensitive visual receptors, and the Applicant admitted that more than 80% of the vegetation on its proposed site would be disturbed by the planned construction. (tr. 1505). Furthermore, Applicant's expert admitted that blights have been known to affect vegetation, such as that which is being relied upon by Applicant in its analysis, and in fact, admitted that such a blight affected vegetation at the Suffolk County Farm,

which is the location of the Alms House Barn, another property listed on the National and State Register of Historic Places. (tr. 1511-1512, 1517).

Applicant's expert admitted that icestorms could destroy or alter the vegetation in the area. (Solzhenitsyn, tr. 1512-1513). The Applicant also admitted that vegetation could be removed by individual property owners, resulting in more overwhelming views of the Project than are available now from sensitive visual receptors, such as the properties on the National and State Registers of Historic Places. (1510). Applicant's expert further admitted that critical screening vegetation may also be disturbed by road construction, such as that presently taking place to create a service road between the south side of Long Island Avenue and the north side of the Long Island Expressway, which landscap the Applicant relies upon to shield the proposed site from the State protected land adjacent to the Carmans River (a New York State scenic and recreational resource) at the corner of Yaphank Avenue and Long Island Avenue, the State Fishing access area, the historic A. Cook House, the historic J.P. Mills House, and the children's day camp, all located along the north side of Long Island Avenue, and all of which would have a view of the site if such vegetation along Long Island Avenue were to be removed or otherwise destroyed or altered. (Solzhenitsyn, tr. 1548).

Unlike Brookhaven Energy, all other applicants in Article X proceedings examined by the Town have performed an analysis of their project's visual impact on nearby historic sites without vegetation, *i.e.*, using the more "conservative" topographical approach. The Town is not aware of any other Article X application that performed its visual analysis in the casual manner that Brookhaven Energy did, that is completely avoiding performing an analysis of the closest locations based on topography alone without vegetation. In the *Glenville, Ramapo, Bethlehem, Empire State* and *Athens* cases, the applicants performed the visual impact assessment using topography alone, without considering vegetation.[41] Clearly, it is essential for applicants to perform this more conservative (and

[41] Glenville Energy Park Project, Glenville, NY (Jan. 2002), Vol. II, Chapter 16; Ramapo Energy Project, Ramapo, NY (Nov. 29, 1999), Vol. I, Chapter 13; Bethlehem Energy Center Project, Glenmont, NY (June 2001), Vol. I,

realistic) analysis to ascertain what might be visible if vegetation is removed because of construction, age, storm damage, disease, or simply because a third party property owner chooses to remove the vegetation. The Applicant failed to identify any other Article X applicant that followed its simplistic methodology, that is studiously avoiding any analysis that would give the Examiners or this Board the ability to determine whether listed historic sites within 3 mile of the proposed Project could have views of the Plant when vegetation is damaged or removed as a result of anticipated development in the surrounding area, or as a result of storms or disease.

b. The Town Proved that the Applicant Failed to Properly Consider Historic Resources in the Area

The Applicant's visual impact expert admitted that the Applicant never checked the Suffolk County Historic Trust to fully explore local historic resources and the visual impact that the proposed Project would have on them (Solzhenitsyn, tr. 1520). Furthermore, Mr. Solzhenitsyn admitted that the Applicant never checked with the Director of Historical Services for Suffolk County as to whether the entire Suffolk County Farm was eligible for listing on the National Register. (Tr.1520-1521). The Suffolk County Farm, a critical educational, historic and recreational resource, is visited by more than 150,000 visitors on an annual basis. (Solzhenitsyn, tr. 1528-1529). Its visitors would be dramatically impacted by the proposed project. They would have an unimpeded view of the oversized plant from the south, north and west fields of the farm. (Tr. 1521-1522). Views of the fields are so critical to visitors that plantings suggested by the Applicant to mitigate the view were rejected as an option by the Farm's caretakers because they would also destroy the views of the fields. (Tr. 1526).

With respect to the more than 60 historic sites recognized as historic resources by the State appointed Central Pine Barrens Joint Planning and Policy Commission and referenced in the testimony of Dr. Koppelman (tr. 1710-1712), including the Southaven Historic District, the Town submits that the

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Section 4.6; Empire State Newsprint Project, Rensselaer, NY (Dec. 2001), Vol. I, Chapter 10; Athens Generating Project, Athens, NY (Aug. 1998), Vol. I, Chapter 10.

Applicant's analysis cannot be relied upon by this Board. Most of those sites were not addressed in the Applicant's initial analysis of visual impacts. Additionally, in response to Dr. Koppelman's testimony, in Exhibit S-3, the Applicant asserted that the proposed Project would not be visible from the location of the Southaven Historic District. However, upon cross-examination, when asked whether or not it was true that the Southaven Historic District ran from East Main Street and Yaphank Avenue South to Sunrise Highway, the Applicant's visual impacts expert admitted that he did not know where that Historic District was located. The Town submits that this admission alone is sufficient to destroy the credibility of Mr. Solzhenitsyn's testimony with respect to those historic resources listed on Exhibit S-3.

As discussed above, Mr. Solzhenitsyn could not state whether the site would be visible from St. Andrew's Church or any of the critical historic resources within a three-mile radius of the proposed site, absent vegetation, because the Applicant had never done such an analysis. (Tr. 1507) This failure to use the more conservative method for closer sites is all the more egregious because four of the six sites that the Applicant identified as listed on the National and State Register or eligible for such listing are within that radius. Those sites are the Suffolk County Alms House Barn, the Robert Hawkins Homestead, the Homan-Gerard House and Mill, and St. Andrew's Episcopal Church. (Solzhenitsyn, tr. 1496). Because the Applicant has not studied these historic resources or neighboring scenic and recreational resources such as the Carmans River, without vegetation, neither the ALJs nor this Board have any way of knowing at which of these sensitive receptors the site would be visible when some vegetation is removed as a result of anticipated construction in the area and other vegetation dies or is damaged by disease, blight, drought, infestation or storms. Even if this Board could determine which historic sites would be visible absent a piece of vegetation, Applicant's analysis provides no way of knowing what magnitude of the monstrous buildings would be visible in such circumstances.

Regarding figure 16-3, Applicant further admitted that even its analysis based upon topography alone, without vegetation, which was applied only for locations between the three and five mile radius

lines, would not be sufficient for the ALJs or the Siting Board to determine whether the 90-foot tall structures or the 72-foot tall structures would be visible, because it only analyzed visibility "at the exact location of the stacks." (Solzhenitsyn, tr. 1503). Of course, the air cooled condensers and the buildings exceeding the 50 foot height limitation in the Town's Zoning Code are not at the exact location of the stacks. (Solzhenitsyn, tr. 1503). Thus, neither the ALJs nor the Siting Board is able to make an informed judgment from Applicant's visual analysis or testimony as to whether the condensers, buildings, water tanks or 100 foot towers may be visible anywhere with 5 miles of the site, absent vegetation.

Furthermore, it is reasonable to anticipate that development in the surrounding area will result in the loss of vegetation, as yards are cleared, parking lots paved and new clearer views of the site are opened to aesthetic, scenic, historic and recreational protected uses. The Town respectfully submits that based upon all of the foregoing, Applicant's visual analysis should be disregarded.

Applicant's submissions were further misleading, as they were based upon a hearsay "letter of no effect" (Ex. 20) from the Office of Parks, Recreation and Historic Preservation ("OPRHP"), regarding negative impacts on the Old Suffolk County Home and the Almshouse Barn. As was explained in testimony by the Town's expert, Dr. Lee Koppelman, that letter is merely an opinion, and it is one with which he disagrees. Tr. 1734-1735. Dr. Koppelman's opinion is supported beyond doubt by Applicant's own visual impact expert who admitted that the proposed Project would indeed be visible from the Old Suffolk County Home (tr. 1531), in addition to his earlier cited admissions as to the visibility of the Project and the inability to screen such dominating views from the neighboring fields of the Suffolk County Farm at the Almshouse Barn. Tr. 1522, 1526.

The Old Suffolk County Home is a unique 2 story "X" shaped structure that has been deemed eligible for listing on the State and National Registers of Historic Places. When asked whether the proposed Project would be visible from the second floor windows of that historic building, Applicant's visual impact expert admitted that the plant would be visible. Tr. 1531. Applicant's witness further

admitted that there were "ground level views," as well. Tr. 1531. It is beyond cavil that the OPRHP hearsay "no effect" letter opinion cannot be relied upon by this Board, and that Dr. Koppelman's contrary opinion is the only expert opinion upon which this Board should rely.

Applicant's submissions also misleadingly claimed that the Applicant will preserve "extensive existing vegetation" at the proposed site (Brief, p. 42), and yet the Applicant admits that it would disturb 84% of the existing vegetation at the site. This is the maximum that could possibly be allowed.

Additional discrepancies in Applicant's submissions include its statement that: "Brookhaven Energy's analysis demonstrates that the Project will not be visible from any of the listed sites in Dr. Koppelman's testimony, with one exception – the J.P. Mills House [a residence that Applicant's ex identified is in a State protected wild, scenic and recreational river zone]." Brief, p. 45. Both Dr. Koppelman's testimony and the list of historic resources compiled by the State-appointed Central Pine Barrens Commission refer to many other historic resources, including:

> (1) the historic A. Cook House (Tr. 1712), which Applicant's expert (a) identifies as a "sensitive visual receptor" (Tr. 1544-1545), and (b) admits that the Project's visibility depends "on the roadside buffer of vegetation" that will likely be disturbed by New York State's ongoing installation of a service road (Tr. 1545);
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> (2) the Suffolk County Farm (Tr. 1710), a State recognized historic, recreational and educational resource, from which the Applicant's expert admits the Project will be visible and cannot be sufficiently screened without ruining the best views of its planting fields (Tr. 1521-1522); and
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> (3) the Southaven Historic District (Tr. 1712), the location of which Applicant's expert admits he does not know (Tr. 1542).

As to the many other houses, churches and other historic resources in the area that are included in Dr. Koppelman's testimony, the Applicant's expert has admitted that it would be impossible to know if there would be a negative visual impact after the Project disturbs 84% of the vegetation on its proposed site, because the Applicant never analyzed those sites without vegetation. (Tr. 1507).

The Town's experts have unanimously agreed is that (1) the Applicant's visual analysis is fatally flawed, (2) the views that are anticipated would clearly interfere with and reduce the public's

enjoyment and appreciation of State-recognized aesthetic, historic, scenic and recreational resources in the area in violation of DEC standards, rules and regulations, and (3) these negative visual impacts cannot be sufficiently mitigated. This is not a case where the Board is dealing with a single negative impact at an isolated historic site. The Applicant's proposed site is in the center of a uniquely heavy concentration of aesthetic, historic, scenic and recreational sites. It is literally surrounded on the north by the Yaphank Historic District and on the east by the Southaven Historic District, with other historic resources to the north, south, east and west. (Tr. 1710-1713, revised Fig. 16-3). The anticipated visual impacts not on one historic building, but on an entire historic area, combined with the Applicant's request that this Board completely disregard the Comprehensive Plan and zoning regulations of the Town, plus the Applicant's absolute refusal to discuss alternative sites results in an application that must be denied, for to grant it would allow the Applicant to run roughshod over the Yaphank community and the laws, rules and regulations of the Town relating to land use on an elevated parcel in what is otherwise a completely Code-compliant light industry zone surrounded by scenic, historic, recreational and aesthetic resources.

Granting this Application would create a precedent under which any applicant willing to create a shell partnership could completely avoid the public protection of mandatory discussion of alternative sites, while simultaneously overriding local zoning of a magnitude equivalent to 80% variances, by trumpeting unsubstantiated claims that "technology" requires the overrides. The Town submits that this is completely contrary to the letter and spirit of Article X as set forth in its legislative history and contrary to public policy.

c. Applicant Failed to Comply with the Town's Timely Request for a Height Indicator, such as a Balloon, to Be Placed on the Property for the Examiner's Site Visit and Tour of Aesthetic, Scenic, Historic and Recreational Resources

On January 29, 2002, one full week before the ALJs' site visit, the Town requested of Applicant's counsel that a height indicator such as a balloon or other device be placed on the site to

more accurately allow the parties to evaluate its potential visual impacts. No such height indicator was placed on the property on the day of the site visit. (Solzhenitsyn, tr. 1554).

d. The Visual Simulations Provided in the Application Are Inadequate

The Town's witnesses' testimony incontrovertibly established that the visual simulations used in the application diminish the actual visual impact of distant objects. (Palmer, tr. 1574). Applicant's simulation photos are selective, self serving and should not be relied upon by this Board. The same can be said for Applicant's entire Viewshed analysis. Perhaps to add a patina of scientific objectivity, the Applicant, as required by Stipulation 11, undertook a Visual Resources Impact Assessment Procedu (VRAP) as part of its evaluation of the Project's visual and aesthetic impacts. However, Town witness Palmer, who was a principal author of the VRAP (See Ex. 68 and tr. 1571), testified that the Applicant and its consultants had used VRAP outside of its intended purpose, and had failed to use forecasting in making their visual impact simulations and evaluation (tr. 1574-5). In short, the Applicant's VRAP analysis is meaningless, and should be disregarded by this Board. (Palmer, tr. 1574-1578; Solzhenitsyn, tr. 1419-1429).

2. The Town Has Shown that the Visual Impact of the Project Cannot Be Adequately Mitigated

The Project's massive structures (See Application at Figs 16-2) would be in plain view from the roads abutting the site. (Palmer, tr. 1573; See Exs. 22 and 68, photos showing simulations from viewpoints 14, 77, 78, 79 and 80). Over 10,000 persons who travel on Sills Road daily between the Long Island Railroad and the Long Island Expressway ("LIE") [see Application at Table 15-2] and over 64,000 motorists who daily pass by the site on the LIE itself [Application, § 16.2.7 at p. 16-16] would be perpetually distracted by the uncharacteristic mass of the Project structures in stark contrast to the existing rural setting. (Palmer, tr. 1573).

The Application at Section 16.1 downplayed the Project's obvious overpowering visual impact

by stressing that the facilities would have a "neutral color scheme," would use reduced-height shielded lights, and would offer a planting program at affected residences, which would be as close as 2000 feet away. These measures are trivial. They are a far cry from meaningful visual mitigation. Critically, the Applicant admitted that visual mitigation is impossible at the Yaphank site, due to the site's small size and the huge mass of the proposed structures -- "Camouflage or disguise is not viewed as feasible." (Application, § 16.3.6 at p. 16-22; Solzhenitsyn, tr. 1375). Dr. Palmer, the Town's expert on visual impacts, agreed. He stated that Applicant's mitigation is limited due to "the extraordinary size of the proposed facility and the relatively small size of the proposed site." Referring to visual simulations from viewpoints 14, 77, 78, 79 and 80 and other simulations showing the views "with" and "without" the proposed Project, he testified that these "clearly show the significant change and stark contrast that this proposed project will have in comparison to the existing conditions." Palmer at tr. 1573. Dr. Koppelman unequivocally stated that "the Project imposes unacceptable visual impacts that cannot be adequately mitigated." (Koppelman, tr. 1714).

In rebuttal, the Applicant lamely responded that it is "unwarranted" to consider the Project's adverse aesthetics and visual impacts by simply looking at it from Sills Road and the LIE. According to the Applicant, the people who pass by and persons who occupy the nearby light industry facilities (all of which are 50 feet or less in height) are not "sensitive receptors;" only the people and historic sites some distance away are "sensitive," in the opinion of the Applicant's visual and aesthetic witness, Mr. Solzhenitsyn (tr. 1418).

Mr. Solzhenitsyn is the same person who, in November 1999 (tr. 1453), single handedly "deemed" the Yaphank site aesthetically acceptable. Application, § 16.3.2 at p. 16-18; Solzhenitsyn, tr. 1372 and 1452. Thus, all of Mr. Solzhenitsyn's subsequent viewshed analysis and written support, as displayed in the Application, is mere *post hoc* rationalization. The reality is that the Board is being asked to blindly accept the self-serving opinion of the Applicant's visual impact consultant. Doing so would force the Project's unmitigated severe adverse visual and aesthetic impacts on the people of

Yaphank for years to come. The Town submits that this Board should not allow such an outcome.

One of the findings that this Board is required to make in order to issue a certificate is that the facility minimizes adverse environmental impacts, considering, among others, "the interest of the state with respect to aesthetics..." (PSL § 168(2)(c)(i)). And yet neither the DPS Staff nor the Staff of any other agency that is a statutory party to this case has offered any testimony or opinion on the Project's visual impacts on aesthetic, scenic, historic or recreational resources. Although the only witness panel from a State agency, lead by DPS Mr. Keller, testified that "the siting of the BELP Facility is in the public interest," tr. 1271, on cross-examination by the Town, Mr. Keller said his panel's testimony was limited to the electrical interconnection aspects of the Project, and did not cover its visual impacts. (Tr. 1326-1327). Thus, the Town takes exception to the Recommended Decision's findings and conclusions regarding public interest set forth at pages 71 through 85 and entitled "Public Interest." The record is barren of necessary information from the State as to its position concerning the proposed Project's visual impacts on aesthetic, scenic, historic and recreational resources, save the testimony of Town witnesses Koppelman and Palmer, which should be accepted by the Board as the basis for rejecting the requested certificate.

Additionally, the proposed Plant would have severe negative impacts on surrounding vacant property, including property values, restricting future development (even within the existing zoning) and limiting increases to the tax base. All of the visual, noise and traffic impacts associated with the Project would impose a huge negative impact on the development potential of the surrounding vacant land. While the taxes that the plant would pay might offset the impact to some limited extent, so, too, would light industry of the same assessed value on the 28 acres, without impacting the development potential of neighboring acres. These negative impacts, given the Plant's size and the higher topography of the proposed site, will impact future development of hundreds of acres. There is no reason that Brookhaven taxpayers should shoulder this burden in circumstances, such as these, where the Town has set aside ample acreage elsewhere for uses such as the proposed Project.

For all of the foregoing reasons, the application lacks sufficient analysis and reliable information to allow this Board to make the findings necessary under Public Service Law Section 168 to issue a Certificate for the Project.

The Town challenges the accuracy of particular statements in the Recommended Decision relating to visual impacts. At page 17, the Recommended Decision states that, "from viewpoints at the Suffolk County Farm, the Project's exhaust stacks would protrude above the prominent horizontal line of treetops, and would exceed the height of the existing distant transmission towers. The Town submits that admissions by the Applicant's expert make it clear that the structures that would require this Board to overrule the height restriction in the Town Zoning Code would also be clearly visible from the Suffolk County Farm. Tr. 1521-1522.

Similarly, at page 17 the Recommended Decision misleadingly states that "from viewpoints on the top floor of the Suffolk County Skilled Nursing Facility, only the stacks would be visible above the horizon line due to forest cover and topography." Upon cross examination, Applicant's expert could not definitively state that the Project's buildings would not be visible above the treetops. Tr. 1536-1537. Nor did he limit such visibility to the top floor, rather stating that the Project becomes visible "somewhere between the first and fifth" floors. Tr. 1537.

Furthermore, the Recommended Decision stresses that the Applicant's visual mitigation plan "focuses on retaining and maintaining on-site vegetation," while ignoring Applicant's admission that it plans to disturb 84% of the on-site vegetation. RD, pp. 17, 26-27.

The Recommended Decision further states that there would be no effect on the Carmans River Recreational Area, "because the Project would not be visible from any portion within the boundaries of the river area, as that term is defined in 6 NYCRR § 666.3(xx)." RD, p. 17. This ignores the fact that the Applicant is relying on the fragile narrow line of vegetation along Long Island Avenue to screen part of that river area from views of the site, and that the Applicant has admitted that a service road planned by the Department of Transportation for that area may indeed disturb that vegetation. Tr. 1545.

With respect to the Old Suffolk County Home, which is eligible for listing on the National Register of Historic Places and on the State Register of Historic Places, the Recommended Decision acknowledges that the proposed Project would be visible from that location, and hypothesizes that "a row of trees at this location would eliminate views of the Project." RD, p. 18. This statement completely ignores two facts. First, it ignores Applicant's admission that the Project would be visible not only from ground level, but also from the second floor from the Old Suffolk County Home, and further it ignores Applicant's statement that despite an existing "very healthy row of vegetation," the Plant would still be visible. Furthermore, the Applicant's witness admitted that mitigation was only proposed in the application for the "ground level views," and now that the Applicant has the SHPO letter, he admitted that he believed that the Applicant would no longer deem such landscaping to be recommended or necessary. Tr. 1531-1532.

In its discussion of a list of approximately 60 historic resources cited by Dr. Koppelman in his testimony, the Recommended Decision notes that the Applicant asserts that Dr. Koppelman "did not explain why these alleged resources have any historic significance." RD, p. 23. The Recommended Decision neglects to mention that, in his testimony, Dr. Koppelman explicitly explains that the list of historic resources was compiled by the State appointed Central Pine Barrens Joint Planning and Policy Commission, which is an advisory committee established by the New York State Legislature in 1993 under the Long Island Pine Barrens Protection Act. The Recommended Decision further ignores Dr. Koppelman's explanation that those sites are listed as "Historic Resources" on the Commission's website. Tr. 1710-1712.

Finally, at page 26, the Recommended Decision states that "the examiners note that the Town has not identified any scenic values associated with any of the properties identified by Dr. Koppelman." Such an assertion is absolutely contradicted by Dr. Koppelman's explicit testimony stating that, "the Carmans River, which flows through the immediate vicinity of the proposed Yaphank site, has been designated as a "Scenic River" and "Recreational River" by the New York State Legislature, under the

New York State Wild, Scenic and Recreational River System Act. All of the aforementioned properties are within the viewshed of the proposed plant. All of these sites display a special character as well as special historic and aesthetic interest and value for residents of, and visitors to, the Town of Brookhaven." Tr. 1712.

All of the foregoing statements were set forth in the Recommended Decision as summarizing the visibility of the Project. RD, p. 17. The Town submits that such a misleading characterization of the facts cannot be relied upon by this Board.

Based upon the foregoing analysis and discussion, exception is taken to the sections of the Recommended Decision at pages 14 through 26 entitled "Visual and Cultural Resources, and Aesthetics."

D. Request for Reconsideration of the Board's January 2 Order and Examiners Rulings that Denied Intervenor Funding to the Town's Co-Counsel and Legal Consultant

The Town requests that the Board reconsider its January 2, 2002 Order at pages 6 through 7, where it affirmed the Examiners' determination to deny reimbursement of the Town from the intervenor fund for the costs of the Town's special counsel and Article X consultant. Contrary to the Board's and Examiners' rulings, there is no prohibition against use of the intervenor fund to defray a municipality's attorney's fees, and there is a sound basis for using the fund to defray the legal costs of intervening Towns, particularly in circumstances such as these, where the Town Attorney was compelled to hire a consulting attorney with unique skills and experience in Article X proceedings that she deemed necessary for the Town to meaningfully participate in this accelerated process. Affidavit of Annette Eaderesto, Esq., dated October 3, 2001, annexed as Exhibit "A" to the Supplemental and Renewed Request for Intervenor Funding for the Town, dated October 5, 2001.

PSL §164(6)(a) states that the intervenor fund is to be "disbursed ... to defray expenses incurred by municipal ... parties ... for expert witness and consultant fees." PSL § 164(6)(a) does not say that legal fees are excluded, and the Town submits that the term "consultant" includes lawyers. In

fact, the dictionary defines "consultant" as "one who gives professional advice or services." (Webster's Ninth New Collegiate Dictionary, 1987). Lawyers, by definition, give professional advice and services, and that is what the Town's special counsel did in this case. The PSL, therefore, plainly allows the intervenor fund to be allowed to defray Brookhaven's legal costs.

The Town Attorney submitted an affidavit explaining that special counsel was retained to provide essential expertise on Article X. This was deemed especially important in this case, as it was the first major power plant siting case in the area, and the Town had no previous Article X experience.

Moreover, the Legislature anticipated that at least half of the intervenor fund would be available to participating municipalities, so that they would be encouraged to participate fully in siting cases that affect lands within or near their borders. While land use and development decisions are normally made by local governments, commonly Towns in New York State, the Legislature, in Article X, vested the Siting Board with power to override local laws under limited circumstances. In exchange, the Legislature provided for at least half of the Intervenor Fund as a source of financial support for participation by local governments before the Siting Board, to balance compliance with local law with power supply and reliability needs. But, Article X was never intended to render local governments impotent, or to usurp their legitimate concerns and interests. In fact, Article X provides that the Board is "to make available to municipal parties at least half of the amount of the intervenor fund," so long as the municipality's expenditures "contribute to an informed decision as to the appropriateness of the site and facility."(PSL § 164(1)(b)). The only criterion is contribution to an informed decision, not whether the consultant is an engineer, lawyer, or scientist.

While the Intervenor Fund may not be a "blank check" for a Town,[42] the Legislature did not intend that the fund be untapped where a Town's participation contributes to an informed Board decision. Under such circumstances, the Board's discretion needs to be guided by this considered

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[42] See Ruling on "Request for Additional Funds..." June 9, 1999, in *Athens,* Case No. 97-F-1563 at p. 2 [Harrison, J.].

legislative policy. The Board should provide funding to reimburse a Town for its legal costs in Article X cases where the Town counsel's participation contributes to an informed decision being made by the Board.

Accordingly, the Board should reimburse the Town from the intervenor fund for the Town's legal consultant and special counsel on Article X.

E. Exceptions as to the Examiners' Findings as to Operational and Construction Noise

The Town hereby excepts to the Examiners' recommendations as to noise and mitigation of noise from operation and construction of the proposed Project. These include the recommendations that the Board accept the topic agreement that addresses noise (RD, p. 49); the statement that the Project's expected noise level would comply with the Town Code (RD, p. 48); the statement that the highest construction-related noise level at the nearest residential location would be below the existing daytime ambient noise level of that location (RD at p. 45); and the statement that Project construction is expected to comply with the Town's noise control limits (RD, p. 45). Moreover, the Town takes exception to the Examiners' failure to find that offsite noise from operation and construction of the Project could be more fully mitigated by siting the Project at a larger site, which would allow for more complete noise attenuation at the property line, and lower offsite noise levels at adjacent and nearby properties.

1. Noise from Operation

The Town submits that the offsite ambient noises from operation of the Project, even with the noise mitigation measures planned by the Applicant that are predicted to be within maximum levels specified by Staff and the Town Noise Code, will nevertheless be a public nuisance because they will disrupt existing and planned uses of the adjacent lands in the community. These offsite ambient noises cannot be mitigated adequately because the 28 acre site is too cramped to allow room for buffering and attenuation of the ambient noise from the facilities when they are operating. By comparison, the

Applicant has constructed two identical plants in Massachusetts on sites that are 129 and 147 acres. (Shafer, tr. 345; Ex. 28).

Applicant's approach to noise control was to select so-called "sensitive receptors," which it chose as being the residences closest to the Project, some 2000 feet distant, and to add noise mitigation, such as buildings, cladding and sound mufflers, around the Project's noisiest components to the extent that "permissible" offsite sound levels would not be exceeded. (Application, Appendix N, § 4.3; and Appendix N at Appendix N-4, p. 2, lines 1-12. Froedge, tr. 481-2; Keast, tr. 427). The noise mitigation design was done by a proprietary noise propagation computer model, owned by Alstom Power (ANP's equipment supplier), which "back-calculated" the minimum sound mitigation needed to achieve a selected noise standard. (Keast tr. 464-5; Ex 17; Froedge, tr. 481). In this fashion, the Applicant designed noise mitigation to meet the predicted operational noise levels at the selected nearest residences and at the property lines of the site. (Application, Appendix N, Appendix N-1, p. 2 (top)).

Applicant initially proposed to design its plant for a noise standard equivalent to a loud and disturbing Modified Composite Noise Rating ("CNR") of "D." A CNR of "D" means that sporadic noise complaints can be expected from the public. (Application, Appendix N at page 11). In essence, the Applicant initially chose the least noise mitigation that it believed that it could get away with. (See Application, § 11.6.2 at p. 11-13). Indeed, noise mitigation is costly, and reduces plant efficiency. (Application, § 11.6.2, table 11-9, and p. 11-13). However, at Staff's insistence Applicant finally consented to design the facilities to attempt to achieve a relatively less noisy standard equivalent to a CNR of "C." (Keast, tr. 388-389; see Ex. 26, tab A at p. 34, ¶(g)). A CNR of "C" means that the community reaction is expected to be between "sporadic complaints" and "no reaction, although noise is generally noticeable." (Application, Appendix N, figure 4). Thus, even a CNR of C will definitely produce noticeable noise in the adjacent community. There is no evidence as to why an even quieter standard, such as a CNR of "B," has not been chosen, or why the Applicant should be allowed to add

persistent noise to the nearby community simply because noise may be allowed up to specified levels by the existing Town Noise Code. The Code would appear to allow sporadic noises of up to 75 dBA at the property lines of industrial plants (Ex. 30), but that does not mean that a constant din of noise should be tolerated at all industrial property lines all the time. And yet, Applicant's expert testified that the Project will emit a "steady sound" during operation. (Keast, tr. 468). The Town submits that the Project's continuous offsite noise will amount to a public nuisance because it will be persistent and unremitting, and, in addition to the Project's adverse aesthetic and land use impacts, persistent offsite noise is another basis for denial of the Application for the Project.

Applicant asserts that it can design and install the Project facilities in conformity with a CNR of "C," which, in its judgment, will be lower than the maximum limits specified in the Town Noise Code (See Ex. 30), and be acceptable to the public. (Keast/Holmes, tr. 411, 423).

On the other hand, the Town's noise expert, D. T. Froedge, testified that discrepancies and omissions in Applicant's noise analyses suggest that operation of the Project's facilities may well violate the Town Code and exceed the criteria necessary to meet a CNR of "C." (Froedge, tr. 479). Mr. Froedge critiqued the Applicant's application and testimony on behalf of the Town, at Spectra's request. (tr. 475). He has outstanding academic credentials, and over 30 years of experience in community noise control, acoustics, and blasting . (tr. 473-5). He has also advised New York State DEC on noise issues. (tr. 474).

In his testimony, Mr. Froedge first observed that the Applicant had failed to supply sufficient information to validate the Applicant's noise projections. (tr. 476). This problem was compounded by the fact that the Applicant's vendor, Alstom, had used a proprietary computer model, which Applicant refused to reveal. (Ex. 17, response to B-9). Spectral noise content was omitted from the Application in certain cases (tr. 476; 494-496). Apparently this vital data is somehow accounted for in the proprietary noise projection model (Ex. 17). But there is no way to verify that the predicted noise limits will actually be achieved. (tr. 479, 502). The Applicant's noise projections are actually no more than

design criteria; they are not actual noise levels produced from the individual components of the facility. (tr. 482).

Dr. Froedge further testified that the Applicant's noise projection methodology is flawed because it attempts to calculate noise projections and guarantee far-field noise projections based on equipment that does not yet exist. Moreover, Alstom Power does not guarantee the noise values that it gives in Appendix N-5 for each of the Project components (lines 5-8 of Appendix N-5 to Appendix N of Application; see also Ex. 17, Response to IR No. B-8), which means, Mr. Froedge testified, that there is no assurance that noise levels can be maintained within the limits of a CNR of C or the Town Code. (tr. 483; 512). As the Applicant's expert admitted, the Town and the Siting Board are being asked to take on faith that the Applicant will actually meet the noise limits and that the Project's offsite noises will be acceptable to the public. (Keast, tr. 467).

Staff appears to accept on faith that a CNR of C can be attained, or if the worst should happen, that corrective measures are available to correct offending noise excesses. (tr. 511). But there is absolutely no evidence that any such corrective measures are feasible.

The Applicant has made much of its assertion that the incremental noise impact from operation of the Project's components on the nearest residences, 2000 and more feet distant, will be minimal, at least when compared to the current ambient noise at these homes from the Long Island Expressway.[43] But Applicant downplays the noise impact on adjacent light industry properties, except to admit that these impacts will necessarily be greater (tr. 468-9). The reality is that operation of the facility will have a significant adverse noise impact on the surrounding community, which is and is projected to be made up of only light industrial uses. (See Application, Figures 10-3 and 10-5). The noise emanating from the air-cooled condensers, for example, will average 99 dBA, and is expected to attenuate with

[43] However sound barrier walls can be erected along the LIE to abate the ambient road noise. In fact such barriers are visible along much of the LIE, and new ones are under construction, as anyone who drives on the LIE can observe..

distance, so that overall average noise from Project facilities will be on the order of 60-63 dBA at the property lines. See Application, Appendix N, Appendix N-4, p.2, lines 2-4. These noises will be constant, night and day, week after week, month after month, and year after year as long as the plant is operating. (Keast, tr. 468). It will be a monotonous sound from air cooling fan blades, turbines, compressors and the like. It will be about as loud as an auto traveling at 40 mph and 50 feet distant. (Application, Appendix N, Figure 1). These are the sounds of heavy industry, and because the 28 acre Project site is so small, they will be heard constantly by travelers on the adjacent roads and workers at adjacent light industry facilities. The absence of a buffer, as the Applicant provided at two of its comparable facilities in Massachusetts (Shafer tr. 345-346; ex. 28), means that the noise emanating across the site boundary will be an irritating public nuisance, even if not in excess of the current noise limits of the Town Code.

There is no basis to assume, as the Applicant infers, that the Code's noise limits somehow grant the Applicant an absolute right to emit constant sound right up to the edge of the Code's maximum noise emission level. Discretion needs to be used, and would likely be used if the Town, not the Board, was the final arbiter of this matter. The Brookhaven Energy Project is in fact noisy, in addition to being oversized for the site. The Project's noise would impose an intolerable nuisance, and is an additional basis for denial of the Application for the Project at the Yaphank site.

On the other hand, a facility, such as that proposed at Yaphank could no doubt be accommodated at other larger and more suitable sites in the Town.

2. <u>Noise from Construction</u>

Construction of the Project facilities, if allowed to go forward, would entail at least 26 months of intense noisy activity, including earth moving and loud steam blows to clean steam pipes. Application § 11.5.1. Major construction phases include excavation, concrete pouring, steel erection, siding and machinery installation, and blow-out/start-up. (Application, Table 11-4). Each of these activities is predicted to produce average daytime noise levels at the site boundary as loud as 74 dBA, and of at

least 69 dBA.(Id.). These noises are as loud as a big heavy truck at 100 feet, and louder than a gas lawn mower at 100 feet. (Keast, tr. 432; Application, Appendix N, Figure 1). Nighttime average noise level at the site boundary will be only slightly lower, at 67 dBA. (Application, table 11-6). Construction noise is proposed to meet a CNR of "D" (Application, § 11.5.4 at p. 11-11), meaning that "sporadic" noise complaints are to be expected. (Application, Appendix N, figure 4).

The actual sound levels heard at the property line, both at night and during the day, will be loud, and at times louder, and at times quieter, than the predicted averages. (Keast, tr. 441-2). It is plainly evident, therefore, that since the average sound levels are about 70 dBA, sound levels in excess of 70 dBA, and in excess of the Town Code's maximum of 75 dBA (Ex. 30; Keast tr. 441-442), will be heard routinely at and across the site boundaries during construction. Accordingly, construction of the Project in the manner proposed would result in frequent violations of the Town's noise code. These will include piercing tones from backup warnings on earth movers, and the throbbing of heavy diesel engines. (Keast, tr. 447). The construction noises will constitute major disturbances to the users of adjacent properties.

The Brookhaven Noise Code, § 50-6, prohibits construction, drilling, earth moving, excavating or demolition work (defined as between the hours of 6 PM and 7 AM), and during weekends and during legal holidays, except by special variance, limited to 30 days in any calendar year. (Application § 10.4.1 at p. 10-78; and § 11.3.1). The Applicant, on the other hand, is requesting that the Siting Board refuse to apply these prohibitions, pursuant to its extraordinary power under PSL § 168(2)(d), so that construction work may proceed on weekdays between 6 PM and 7 AM and on weekends. Applicant has failed to explain how these provisions of the Town code are unreasonably restrictive, other than to assert that building the plant is "labor intensive." (Application §11.5.1, §10.4.1 at page 10-78.). Applicant further asserts that it is entitled to do night time and weekend construction because its predicted construction noise levels are below the applicable Code noise limits. (Id.). The Town submits that neither of these reasons justify a determination by the Board not to respect the provisions

of the Town Code with respect to noise control, which if applicable, would only grant a 30 day variance at most in any calendar year.

Accordingly, if construction is to go forward, the Board should limit construction to day time hours on weekdays, and assure that the maximum sound levels of the Town Code are fully respected at the property line as well as at the nearest residences and elsewhere.

F. Exceptions as to the Examiners' Recommendations as to Decommissioning

The Town hereby excepts to the Recommended Decision at pp 450-43, which is the section that addresses decommissioning. The Examiners' recommendation that the Board should accept the minimal funding levels for decommissioning negotiated among the Applicant, Staff and other Signatories to the Joint Stipulations is unsupported by any credible evidence. For example, the Examiners recited decommissioning criteria "contended" by the Applicant (pp. 40-41), but there is no support in the record to warrant a conclusion that they can be achieved. Indeed, the Staff, Applicant, and Signatories seem to have simply picked the decommissioning fund figure of $4.5 million out of thin air, with help from the rankest of hearsay about demolition of some of old plants in Wales. (Tr. 616-618; Ex. 32). The gist of the Examiners' recommendation is to put the Town at risk in the event that the scrap value of plant components is inadequate to cover the major costs of decommissioning.

On the other hand, Town witness Shafer, a highly qualified professional civil engineer with broad experience in both the public and private sectors (tr. 339-344; Ex. 27), testified that Applicant's decommissioning proposal was woefully inadequate. He pointed out that abandonment and decommissioning of the plant could take place at any time during construction or during the operating life of the plant, which could be 40 years. (tr. 355). He said that the Applicant's proposed cost analysis and finances are not sufficient to cover this time frame. He disagreed with Applicant's assumption that the scrap value of the equipment, buildings and structures on the site should be deemed as sufficient to cover the complete demolition cost of the above ground portion of the Project. (tr. 356). He noted that

Applicant's assumed scrap value is quite high, but if the plant is decommissioned because major equipment has been damaged, perhaps due to a boiler explosion, fire or other cause, or because of market changes or technological obsolescence, the salvage value of on-site equipment would be severely diminished. (id.). Under this scenario, the amount of funding would be sorely lacking, and the Town as the host community would be left unprotected.

Mr. Shafer first noted that the most likely decommissioning scenario should assume decommissioning of the completed plant with no or minimum salvage value of the structures and equipment. The removal sequence would be the reverse of construction, and would entail several hundred workers on site over two years. Considering the scope of the task, he opined that both the construction letter of credit and the demolition fund are orders of magnitude less than the actual decommissioning costs under any likely scenario. (tr. 358-359). Mr Shafer made a reasoned decommissioning cost estimate, based on analyses of the costs of specific tasks in the demolition process, which is Exhibit 29. His estimate is $12 million.

The fundamental difference between the Town and the Applicant is their different perspectives on the purpose of the decommissioning fund. The Board's rule requiring a decommissioning fund, Mr. Shafer pointed out, is to protect the host community against the possibility that the Project owner will walk away from the project, become bankrupt, or allow it to lie fallow for some other reason, meaning that it remain indefinitely as a huge decaying unsightly physical presence. (Tr. 666-667). The fund's purpose is to protect the Town from having a "white elephant" on its hands. (Tr. 680). From the Applicant's point of view, on the other hand, the fund is just another nuisance, to be minimized as much as possible. Thus, from the Applicant's point of view, the scrap value of the facilities should be maximized, and the market risk of future scrap price should be fobbed off on the Town. But that approach is directly counter to the purpose of the fund. There is no way to know what future scrap price will be. (Shafer, Tr. 680)

The Board's appropriate choice on decommissioning is Mr. Shafer's, which is supported by

credible evidence, and which implements the policy purpose of the rule implementing the decommissioning fund. The Examiners' recommendation should be rejected.

G. Exceptions as to Recommendations with Respect to the Joint Stipulations and Certificate Conditions

The Town excepts to the Examiners' recommendations as to acceptance of the Joint Stipulations at page 5 of the Recommended Decision and Certificate Conditions and at page 71 of the Recommended Decision to the extent they are inconsistent with the Town's position and reasons given above.

Conclusion

For the reasons given above, the requested exceptions to the Recommended Decision should be granted, and the Board should deny Brookhaven Energy's Application for a certificate to construct and operate the Project at the Yaphank site.

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April 26, 2002

Respectfully submitted,
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