NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 00-F-0566 - Application of Brookhaven Energy Limited Partnership for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 580 Megawatt Electric Generating Facility in the Town of Brookhaven, Suffolk County.

OPINION AND ORDER GRANTING CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED

Issued and Effective: August 14, 2002

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BY THE BOARD:

I. INTRODUCTION

A. Procedural History

On June 25, 2001, Brookhaven Energy, L.P. (Brookhaven or the Applicant) filed an application for a Certificate of Environmental Compatibility and Public Need (Certificate) to construct and operate a 580 megawatt (MW) electric generating facility (the Project) on a site located in the Town of Brookhaven, Suffolk County. By letter dated August 15, 2001, Chairman Helmer found, pursuant to Public Service Law (PSL) §165(1), that the application complied with the filing requirements set forth in PSL §164. The Chairman fixed October 5, 2001 as the date for the commencement of public hearings.

In addition to filing an application for a Certificate with the Siting Board, the Applicant filed applications with the New York State Department of Environmental Conservation (DEC) for environmental permits required by the federal Clean Water and Clean Air Acts. The Applicant seeks a State Pollutant Discharge Elimination System (SPDES) permit for storm water discharges during the operation of the Project. The Applicant also seeks permits pursuant to the Prevention of Significant Deterioration Program (40 CFR §52.21) and with Title V of the federal Clean Air Act. As discussed in the Recommended Decision, the authority to issue the required water and air permits pursuant to federal law has been delegated by the United States Environmental Protection Agency (EPA) to DEC.

On October 11, 2001, the examiners convened afternoon and evening public statement hearings at the Yaphank Fire Hall in the Town of Brookhaven at 2:00 p.m. and 7:00 p.m. Both sessions were well attended, and a total of 23 people commented about the Project. About half the speakers favored the Project for various reasons including, the replacement of antiquated electric generating equipment, the promise of lower electric rates, jobs associated with the construction and operation of the Project, and tax benefits. Those opposing the Project expressed concerns about potential adverse impacts to air and

visual resources, as well as, noise and traffic. Many challenged the Applicant's plan to build the Project on a 28-acre site in Yaphank, when a significant portion of the property associated with the former Shoreham Nuclear Plant remains undeveloped.

Also on October 11, 2001, the examiners convened a joint prehearing conference to identify active parties and to consider proposed issues for adjudication. After considering appeals from the examiners' issues ruling,[1] we issued an order on January 2, 2002.[2] (January 2 Order).

The examiners conducted an evidentiary hearing from February 4 through 8, 2002 at the Yaphank Fire Hall. In addition to the Applicant, the following parties participated in the PSL Article X proceedings: the Staff from the Department of Public Service (DPS Staff), the Town of Brookhaven (the Town), and the Long Island Power Authority (LIPA).

On April 8, 2002, the examiners' Recommended Decision was issued, supporting the issuance of a Certificate and DEC permits. Briefs on exceptions were submitted by the Applicant, the Town, and LIPA. Briefs opposing exceptions were submitted by the Applicant, Town, LIPA, and DPS Staff.

Subsequently, DEC Commissioner Crotty provided us with the requested federally delegated environmental permits for the Project, as required by PSL §172(1).

At the outset we note that the Town opposes the Project, arguing that it is too large, massive and noisy, and that it is out of character with existing and planned uses of the area.[3] According to the Town, it would be a grievous mistake to site the plant at Yaphank.[4] As a result, the Town

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[1] Case 00-F-0566, Ruling on Party Status, Issues, Intervenor Funding and Schedule (issued October 25, 2001).

[2] Case 00-F-0566, Order Concerning Interlocutory Appeals from Article X Issues Ruling (issued January 2, 2002).

[3] Town of Brookhaven's Brief on Exceptions, p. 3.

[4] Ibid., p. 29.

respectfully requests that we reject the examiners' recommendation that Brookhaven's application for a Certificate authorizing the Project be granted. The Town wants us either to deny the application outright, or require the Applicant to seek a more suitable site for the Project.[5]

Brookhaven objects to the Town's brief on exceptions because it is basically a repeat of arguments made in the Town's interlocutory appeal, dated November 7, 2002 and its post hearing brief, dated March 12, 2002. The Applicant concludes that the Town's brief does not comply with the requirements of 16 NYCRR §4.10. According to the Applicant, the Town does not explain why it believes the Recommended Decision is in error as required by 16 NYCRR §4.10(c)(iv). Brookhaven argues further that it is improper to request reconsideration of our January 2 Order at this stage of the proceeding. The Applicant wants us to disregard the Town's brief on exceptions.[6]

As set forth within, many of the arguments presented in the Town's brief on exceptions are repeated from the two sources identified by the Applicant. Parties are required, however, to raise all of their objections to the Siting Board as exceptions or else those objections are waived. (16 NYCRR §1000.1; 16 NYCRR §4.10(d)(2)). We will therefore present the merits of the Town's arguments, and address them below.

B. Project Description

Brookhaven proposes to construct and operate a combined-cycle electric generating facility that would be located in the Town of Brookhaven, Suffolk County. The nominal capacity during normal base load operations would be about 540 MW. During periods of power augmentation, however, the total output could be increased to 580 MW.

The Project would include two separate turbine trains. Each train would consist of a 72-foot tall generation building that would house the combustion and steam turbines, and a heat

[5] Ibid., p. 10.

[6] Brookhaven's Brief Opposing Exceptions, pp. 38-39.

recovery steam generator, which would vent to a 160-foot tall emission stack. A control room and administration area would be located between the two generation buildings. Other ancillary structures and equipment associated with the Project include: (1) air pollution control equipment, (2) two diesel fueled generators for safe start-up and shutdown under emergency conditions, (3) two 90-foot tall air-cooled condensers, (4) a natural gas compressor building and metering facility, (5) an electric switchyard, (6) a workshop and storage building, (7) an ammonia storage building, (8) a 50-foot tall raw water storage tank, and (9) a 72-foot tall demineralized water storage tank.

The Project site encompasses about 28 acres, and is located southeast of the Sills Road interchange (Exit 66) of the Long Island Expressway (LIE). The Project site is bounded on the north by the LIE, on the west by Sills Road (Suffolk County Route 101), on the south by the Long Island Railroad (LIRR), and on the east by LIPA's right-of-way for two 138 kilovolt (kV) transmission lines. The Project would connect to these transmission lines via a switchyard. A 20-inch diameter KeySpan Energy pipeline abuts the site to the north, and would provide natural gas to fuel the Project.

Water is available near Sills Road from the Suffolk County Water Authority. The nearest wastewater treatment facility is the Yaphank Sewer Treatment Plant. The treatment plant serves several facilities owned by Suffolk County, and is about one mile away. Brookhaven Energy proposes to connect to these nearby resources.

II. THE RECOMMENDED DECISION

A. Required Findings

Article X allows us to grant or deny an application as filed, or to certificate a facility upon such terms, conditions, limitations or modifications of the construction or operation of the facility as we deem appropriate.[7] To grant a Certificate, we must find:

[7] PSL §168(2).

- That the facility is reasonably consistent with the policies and long-range planning objectives and strategies of the most recent state energy plan, or that the facility was selected pursuant to an approved procurement process.[8]

- The nature of the probable environmental impacts, specifying predictable adverse and beneficial effects on (a) the normal environment and ecology, (b) public health and safety, (c) aesthetics, scenic, historic, and recreational values, (d) forest and parks, (e) air and water quality, and (f) fish and other marine life and wildlife.[9]

- That the facility minimizes adverse environmental impacts, considering (a) the state of available technology, (b) the nature and economics of reasonable alternatives required to be considered under PSL §164(1)(b), and (c) the interest of the State in aesthetics, preservation of historic sites, forest and parks, fish and wildlife, viable agricultural lands, and other pertinent considerations.[10]

- That the facility is compatible with public health and safety.[11]

- That the facility will not discharge any effluent in contravention of DEC standards or, where no classification has been made of the receiving waters, that it will not discharge effluent unduly injurious to fish and wildlife, the industrial development of the State, and the public health and public enjoyment of the receiving waters.[12]

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[8] PSL §168(2)(a).

[9] PSL §168(2)(b).

[10] PSL §168(2)(c)(i).

[11] PSL §168(2)c)(ii).

[12] PSL §168(2)(c)(iii).

- That the facility will not emit any air pollutants in contravention of applicable air emission control requirements or air quality standards.[13]

- That the facility will control the runoff and leachate from any solid waste disposal facility.[14]

- That the facility will control the disposal of any hazardous waste.[15]

- That the facility will operate in compliance with applicable state and local laws and associated regulations, except that we may refuse to apply specific local laws, ordinances, regulations, or requirements we determine to be unduly restrictive.[16]

- That the construction and operation of the facility is in the public interest, considering its environmental impacts and the reasonable alternatives considered under PSL §164(1)(b).[17]

PSL §168(2)(d) and §172(1) provide us with preemptive authority over other necessary state and local approvals. We may refuse to apply any local ordinance that would otherwise be applicable if we find that the ordinance, as applied to a proposed facility, would be unreasonably restrictive. Before we decide not to require compliance with a local ordinance, however, the affected municipality must be given an opportunity to present evidence in support of the ordinance. And even if we require compliance with the substantive provisions of a local ordinance, the municipality cannot require an applicant to

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[13] PSL §168(2)(c)(iv).

[14] PSL §168(2)(c)(v).

[15] PSL §168(2)(c)(vi).

[16] PSL §168(2)(d).

[17] PSL §168(2)(e).

obtain a permit or other approval under that ordinance without our authorization.

B. Summary of Joint Stipulations

By letter dated December 5, 2001, Brookhaven provided notice, pursuant to 16 NYCRR §3.9(a)(1), that it was entering into settlement negotiations with the parties to this proceeding. As a result of these discussions, the Applicant, the respective staffs from the Department of Health (DOH), DPS, DEC, and Suffolk County (collectively referred to as the Signatories) executed Joint Stipulations on January 30, 2002. The Yaphank Civic and Taxpayers Association, the Town, and LIPA did not sign the Joint Stipulations.

The Joint Stipulations contain 12 topic agreements that identify the probable environmental impacts of the proposed facility. Each topic agreement contains stipulated facts and cross-references to the application and exhibits in this case that demonstrate the evidentiary basis for the Signatories' agreements. The Signatories also proposed draft Certificate conditions to minimize the Project's potential adverse impacts as required by PSL §168. A copy of the Certificate conditions is attached as an appendix.

The topic agreements address: air resources, electric transmission facilities, gas supply and transmission, land use/local laws/decommissioning, noise, public interest, reasonable alternatives, soils/geology/seismology/tsunami occurrence, terrestrial ecology, traffic, visual and cultural resources, and water resources. In general, the examiners noted that the Joint Stipulations and the topic agreements adequately address the matters specified by PSL §168. The examiners concluded that the evidentiary record in this case supports the terms of the Joint Stipulations and that they provide a sufficient basis for us to determine that the proposed facility should be certificated. The discussion that follows reviews all the issues raised by the parties in their briefs on exceptions, many of which are covered by the Joint Stipulations.

C. Approved Procurement Process

The examiners recommended that we find the Project has been selected pursuant to an approved procurement process. No party takes exception to this recommendation.

Concurrent with its application, Brookhaven submitted a motion for a declaratory ruling that the Project has been selected pursuant to an approved procurement process. Brookhaven states that the Project would, if approved, operate as a merchant plant, supplying electricity in the competitive electricity supply market. In addition, Brookhaven asserts that it would not seek to recover any costs from ratepayers under the PSL, nor would it operate as a qualifying facility and seek a contract under the Public Utility Regulatory Policies Act of 1978. Thus, Brookhaven concludes, no risk would be borne by the ratepayers as Brookhaven would bear all risks associated with the construction and operation of the Project.

In Athens Generating Company, the Siting Board found that the Athens' facility was selected pursuant to an approved procurement process because it was a merchant plant selected by competitive process for electric generation.[18] Likewise, in the instant case, we find that the Project has been selected pursuant to an approved procurement process in compliance with PSL §168(2)(a)(ii).

III. TOWN'S EXCEPTIONS

A. Local Zoning

According to the Signatories, the record demonstrates that predictable impacts on the environment from the Project have been evaluated, including the Project's general compatibility with current land uses and its compliance with local laws. They agree that the Project would be compatible with its setting because the Project site is surrounded on all sides by infrastructure corridors, and located in an area with multiple industrial facilities, with a substantial buffer to the

[18] Case 97-F-1563, Athens Generating Company, Order Concerning Interlocutory Appeals, (issued January 28, 1999), p. 4.

nearest residences, and with only 13 residences within a half-mile of the Project's buildings.

With respect to the local laws, the Signatories note that the Project would meet all applicable substantive State, County, and local regulatory requirements and Brookhaven would obtain the regulatory permits and approval required for construction of the Project. In the normal course of business, Brookhaven expects to require certain permits and approvals under regulations issued by the Town and its agencies, including, but not limited to, building permits, highway permits, sanitation permits, and permits related to fire prevention. The Joint Stipulation contains agreement among the parties that we should authorize the Town and its agencies to issue the permits or approvals listed in Section 10.4 of the Application.

The request is reasonable, and no party opposes it. Accordingly, we authorize the Town and its agencies to issue the various permits and approvals listed in Section 10.4 of the Application with two exceptions: one concerns a building height limit and the other a restriction on nighttime construction.

Section 85-308.B.2.b.3 of the Town Code limits the height of buildings in L-1 districts to 50 feet. The examiners recommended that we grant the requested waiver of this provision of the Town Code for all necessary components of the Project.[19] The examiners also recommend a waiver of the restriction outlined in the Town's Code at Section 50-6.B.7, which among other things, prohibits construction, drilling, earth moving, excavation or demolition work at night (defined as between the hours of 6 p.m. and 7 a.m.), during weekends, and during legal holidays, except for emergency work or by special variance. According to the examiners, PSL §168(2)(d) grants us the authority to waive the Town Code.

For the first time in this proceeding, the Town alleges in its brief on exception that PSL §168(2)(d), which authorizes us to overrule local laws, is unconstitutional.

[19] Recommended Decision, p. 31.

According to the Town, PSL §168(2)(d) violates Article IX, Section (2)(b)(1) of the New York State Constitution, and Section 2 of the Statute of Local Governments because this provision from PSL Article X was not enacted and then reenacted by two separate Legislatures, and approved each time by the Governor.[20]

The Town cites two cases that it anticipates the Applicant will rely upon to rebut the Town's claim that PSL §168(2)(d) is unconstitutional. These two cases are: (1) Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490 (1977), and (2) Floyd v. New York State Urban Development Corp., 33 NY2d 1 (1973). In its brief on exceptions, the Town argues why these cases are distinguishable from this matter.[21]

In its brief opposing exceptions, Brookhaven characterizes the Town's argument as follows: Since PSL Article X authorizes the Siting Board to overrule local zoning restrictions under certain instances, PSL Article X is invalid because it was not enacted twice by the Legislature.[22] The Applicant argues that the Town's attempt to challenge the constitutionality of PSL §168(2)(d) is meritless.[23]

Contrary to the Town's arguments, Brookhaven contends that Floyd and Wambat do apply. Citing Floyd, Brookhaven asserts that Article IX, Section 2(b)(1) of the New York Constitution would apply to a certain statute only if the powers of a particular municipality were disrupted. According to the Applicant, the Court in Wambat held that the singly enacted Adirondack Park Agency Act, which encroaches on local zoning powers, is not invalid.[24]

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[20] Town of Brookhaven's Brief on Exceptions, p. 41.

[21] Ibid., p. 42.

[22] Brookhaven's Brief Opposing Exceptions, pp. 57-58.

[23] Ibid., p. 57.

[24] Ibid., pp. 58-59.

With respect to the constitutionality of PSL §168(2)(d), DPS Staff characterizes the Town's challenge as a violation of the "Home Rule" provision of the State Constitution. DPS Staff explains that a similar challenge was asserted in the Athens[25] matter, which the Court considered and rejected.[26] For that reason, DPS Staff argues that we should reject the Town's challenge.[27]

In Athens, the Siting Board considered the constitutionality of PSL §168(2)(d) with respect to the New York Constitution Article IX, Section 2(b)(2). The Athens Siting Board concluded that PSL Article X, and in particular PSL §168(2)(d), is a law of general applicability because its terms apply generally with respect to any and all local laws or regulations. This conclusion was based on relevant decisions (e.g., Wambat, supra.), which have concluded that enactment by general law may override local law.[28] The Appellate Division considered this question in CHV, supra, and upheld the Athens Siting Board's determination.[29]

The Town also challenges the constitutionality of PSL §168(2)(d) under New York Constitution Article IX, Section 2(b)(1). In pertinent part, Article IX, Section 2(b)(1) provides that a power granted in the Statute of Local Governments:

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[25] Case 97-F-1563, Application by Athens Generating Company, L.P., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 15, 2000).

[26] Matter of Citizens for the Hudson Valley v. NYS Board on Electric Generation Siting and the Environment (CHV), 281 A.D.2d 89 (3rd Dept. 2001).

[27] DPS Staff's Brief Opposing Exceptions, pp. 9-10.

[28] Case 97-F-1563, supra, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 15, 2000), pp. 30-31.

[29] CHV, 281 A.D.2d at 95.

> 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.

Article IX, Section 2(b)(1) of the New York Constitution applies to amendments to the Statute of Local Governments. Contrary to the Town's assertions, PSL Article X does not amend the Statute of Local Governments. Rather, PSL Article X is a general law.[30] The Court of Appeals has determined that:

> [a] general law...applicable to all municipalities, cannot be construed as a law designed to be disruptive of the property or affairs 'of a local government.' The two-legislative-session approval provision (NY Const. Art. IX, S. 2, Subd. (b), Par. (1)) reasonably applies only where a special act, disruptive of the powers of a particular municipality, is involved.[31]

We also rely on the Court's determination in Wambat, where, as here, "the issue is ... whether the State may override local or parochial interests when State concerns are involved. That is, and has been, resolved in favor of State primacy."[32] In Wambat, the Court of Appeals determined that the Adirondack Park Agency (APA) Act may encroach on local zoning powers although it was enacted only once.[33] The Siting Board, like the APA, is a state agency created by the Legislature, and addresses power plant siting, a state-wide concern.[34] Therefore, we reject the Town's argument that the double-enactment requirement of

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[30] Ibid.

[31] Floyd, 33 NY2d at 6.

[32] Wambat, 41 NY2d at 498.

[33] Wambat, 41 NY2d at 490.

[34] See Floyd, 33 N.Y.2d at 7 (housing is a matter of state-wide concern).

Article IX, Section 2(b)(1) applies, and deny the Town's exception regarding the constitutionality of PSL §168(2)(d).

In addition to its claim that PSL §168(2)(d) is unconstitutional, the Town takes exception to the findings presented at pages 27-39 of the Recommended Decision, which relate to land use and local laws.[35] According to the Town, the Project would require height variances for the two cooling condensers, both of which would be 90 feet in height, for the two turbine buildings, both of which would be 72 feet in height, and for a water tank, which would be 72 feet in height. In addition, the Town contends there would be an unknown number of towers proposed for the switchyard that would measure about 100 feet tall.[36]

Pursuant to the local zoning code, the Town maintains that none of these structures is permitted as of right. Since the Project is made up of structures typical of "heavy industry," the Town asserts that the proposed facilities would be completely out of character with the existing and proposed light industrial land uses near the site. The Town concludes that the Project would not comply with the requirements for a special permit.[37]

To support its exceptions, the Town cites case law[38] to demonstrate why we should give substantial deference to the Town's zoning ordinance and the Comprehensive Plan on which the zoning ordinance is based.[39] In addition, the Town renews its motion to strike all of the testimony of the Applicant's witness, Mr. Solzhenitsyn, on the grounds that he is not

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[35] Town of Brookhaven's Brief on Exceptions, pp. 26 and 42.

[36] Ibid., p. 35.

[37] Ibid., pp.9 and 29.

[38] 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)).

[39] Town of Brookhaven's Brief on Exceptions, pp. 27 and 30.

qualified in the subjects of land use and local laws.[40] If we do not strike Mr. Solzhenitsyn's testimony, then the Town argues that more weight should be assigned to the testimony of its witness, Dr. Koppelman. According to the Town, Dr. Koppelman's testimony shows that the Project would not be consistent with the Town's zoning ordinance and the Comprehensive Plan.[41]

Referring to its offer of proof, which includes additional proposed testimony by Dr. Koppelman, the Town explains that years ago, the Town of Brookhaven set aside a large amount of land at the north side of the Town, in the vicinity of Shoreham, for large electric generating plants. The Town objects to siting the Project at the 28 acre, L-1-zoned site in Yaphank when there is ample land near Shoreham which is zoned particularly for power plants as of right.[42] According to the Town, state law and case law[43] empower zoning boards to deny applications for special permits if the proposed use is not compatible with, or desirable at, a particular area.[44]

With respect to the requested height variance, the Applicant contends in its reply to exceptions that the only evidence in the record shows that the height limitation in the local zoning code is unreasonably restrictive in light of existing technology. According to Brookhaven, the Town did not offer anything to rebut this evidence.[45]

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[40] Ibid., p.38.

[41] Ibid., p. 39.

[42] Ibid., pp. 10-11.

[43] Clipperley v. Town of East Greenbush, 262 A.D.2d 764 (3d Dept. 1999) (a special permit was properly denied based on excess traffic); Holbrook Associates v. McGowan, 261 A.D.2d 620 (2d Dept. 1999) (a permitted use was properly denied because the proposed use is not desirable at a particular location); LoGudice v. Baum, 149 A.D.2d 420 (2d Dept. 1989) (a special use may be denied at a particular location).

[44] Town of Brookhaven's Brief on Exceptions, pp. 36-37.

[45] Brookhaven's Brief Opposing Exceptions, p. 46.

To refute the Town's argument concerning the extreme nature of the requested height waiver, the Applicant refers to the Town Code which limits the maximum lot coverage by buildings and other improvements to 25% of the total area of the site. According to the Applicant the total area of the Project would be less than 7% of the area of the site.[46] The Applicant explains further that the total area of those Project structures that would require a variance from the height limit would cover less than 5.4% of the total area of the site. The Applicant concludes there is no evidence to support the Town's claim that the requested waiver from the height limit is extreme.[47]

Brookhaven disagrees with the Town's assertion that the Project would not be consistent with the Comprehensive Plan. First, the Applicant argues that the Comprehensive Plan and the associated Longwood Mini-Master Plan do not differentiate between light and heavy industry or the scale of industrial development.[48] Second, the Applicant points out that electric generating facilities are allowed in L-1 Districts by special permit.[49]

The Applicant objects to the Town's motion to strike Mr. Solzhenitsyn's testimony, and requests that we deny this motion. The Applicant points to Mr. Solzhenitsyn's qualifications, and contends that the Town's arguments go to the weight that should be assigned to Mr. Solzhenitsyn's testimony.

Finally, the Applicant supports the examiners' conclusions in the Recommended Decision with respect to the Project's compliance with the criteria for a special permit, except for the height limit. Brookhaven wants us to grant the waivers recommended by the examiners, and then conclude that the Project would comply with the requirements for a special permit.

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[46] See Exh. 1, Vol. 1, pp., 10-92 to 10-93.

[47] Brookhaven's Brief Opposing Exceptions, pp. 48-49.

[48] Ibid., pp. 50 and 52.

[49] Ibid., p.55.

The Applicant wants us to incorporate the special permit approval into the requested Certificate.[50]

DPS Staff supports the examiners' findings in the Recommended Decision concerning the need for a waiver from the height limit given the state of existing technology. According to DPS Staff, the Town and its witness, Dr. Koppelman, completely ignore the fact that the Town Code authorizes the siting of an electric generating facility in an L-1 district.[51] DPS Staff concludes that the height limit in the Town Code is unreasonable, and we should waive the height limit as unduly restrictive.[52]

We are required to find, pursuant to PSL §168(2)(d), that the proposed facility is designed to operate in compliance with local laws concerning "the environment, public health and safety, all of which shall be binding upon the applicant." Accordingly, the required finding presumes that electric generating facilities will be designed to comply with local laws. This presumption, therefore, is consistent with the Town's assertion that we should give deference to the Town's zoning ordinance and the Comprehensive Plan on which it is based.

PSL §168(2)(d) provides further, however, that we may refuse to apply any local ordinance, which would otherwise be applicable if we find that the local ordinance is "unreasonably restrictive in view of the existing technology, or the needs of, or cost to, ratepayers." We may grant this waiver only after the municipality has been provided with the opportunity to present evidence in support of the local ordinance.

The Recommended Decision explains that, contrary to Dr. Koppelman's testimony, the Comprehensive Plan considered industrial development south of the LIE.[53] The finding made in

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[50] Brookhaven's Brief on Exceptions, pp. 11-13.

[51] DPS Staff's Reply Brief on Exceptions, p. 8.

[52] Id.

[53] Recommended Decision, pp. 28, 30 and 31.

the Recommended Decision concerning the intent of the Comprehensive Plan is further supported by the plain language of the local ordinance. According to §85-308.B.1 of the Town Zoning Code, there is an ever-increasing demand for electric power in the Town, and to facilitate the development of an adequate supply, electric generating facilities may be established by special permit. Additionally, we note that although the ordinance limits building height, the criteria for a special permit allow emission stacks up to 200 feet, which is higher than the 160 ft. stacks associated with the Project.[54]

By its own terms, the Town Zoning Code, which is undisputedly based on the Comprehensive Plan, contemplates the construction and operation of electric generating facilities in L-1 Districts, as well as other industrial operations that would require emission stacks. Therefore, we reject the Town's claim that the Project would be inconsistent with the Comprehensive Plan, and deny the related exceptions.

The examiners concluded that, given the available technology, the height limit would be unreasonably restrictive. We agree with their conclusion because it is not possible to construct emission stacks, cooling towers, associated switchyard and electrical transmission towers consistent with good engineering practices beneath the 50-foot height limit.[55] Accordingly, we grant the requested waiver of Town Code §85-308.B.2.b.3 concerning the building height limit.

Furthermore, we accept the examiners' conclusion that the proposed setback for the emission stacks would be consistent with the range of setbacks authorized in Town Code §85-308.B.2.b.10. With respect to the location of the gas metering station on the site, we conclude that the setbacks proposed for the gas metering station would be consistent with

[54] Consequently, the height of the stacks for the Project would comply with §85-308.B.2.b.4 of the Town Zoning Code.

[55] Case 97-F-1563, supra, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 15, 2000), p. 88.

the stated objectives of the Town Code because its location would be convenient to the right-of-way where the interconnection is to be placed, the location reuses a previously disturbed, cleared dirt area, the metering station will be below the roadway grade which eliminates or reduces its visibility, and the location is distant from residential parcels. In adopting these conclusions, we note that neither the Town, nor any other party, took exception to these particular conclusions presented in the Recommended Decision.[56]

In the Recommended Decision, the examiners concluded that the Project would meet the standards for a special permit pursuant to §85-308.B.3 of the Zoning Code for electric generating facilities, in particular, and §85-29 of the Zoning Code for special permits, generally.[57] The examiners' conclusions were contingent upon their recommendations concerning the height limit, the emission stack setbacks, and the location of the gas metering station. Since we have accepted the examiners' conclusions and recommendations concerning those elements of the Project, we adopt the examiners' conclusions that the Project would meet the standards for a special permit pursuant to §85-308.B.3 and §85-29. Pursuant to the authority provided by PSL §168(2)(d) and §172(1), we will authorize the facility and not require the applicant to seek a special permit pursuant to Town Code §85-308.B.3 and §85-29.

With respect to Brookhaven's request for a waiver of Town Code §50-6.B.7 concerning nighttime construction work, we note that the Town does not except to the examiners' recommendation that we grant the waiver.[58] Accordingly, we grant the waiver from Town Code §50-6.B.7, and authorize nighttime construction work consistent with Certificate Conditions VII.B, VII.C, VII.D, VII.E and VII.F. This waiver would permit the

[56] See 16 NYCRR §4.10(d)(2).

[57] Recommended Decision, p. 38.

[58] 16 NYCRR §4.10(d)(2).

Applicant to undertake a two-shift construction schedule and thereby reduce the overall cost of the Project. As discussed below, the noise impacts related to the construction activities would be within acceptable limits.

B. Visual

PSL Article X requires us to find that the proposed facility "minimizes adverse environmental impacts, considering the state of available technology, . . . the interest of the state with respect to aesthetics, preservation of historic sites, . . . and other pertinent considerations."[59] In addition, New York's Parks, Recreation and Historic Preservation Law (PRHPL) includes provisions relating to approval of a private project by a state agency,

> if it appears that any aspect of the project may or will cause any change, beneficial or adverse, in the quality of any historic, architectural, archeological, or cultural property that is listed on the national register of historic places or property listed on the state register, or is determined to be eligible to be listed on the state register by the commissioner [of Parks, Recreation, and Historic Preservation.][60]

The Town excepts to the section in the Recommended Decision at pages 14 through 27 entitled, "Visual and Cultural Resources, and Aesthetics." In particular, the Town excepts to the statements that: (1) "Screening would be used to mitigate the potential visual impacts . . . .";[61] (2) views would be mitigated at viewpoints 20, 36 and 48; as well as (3) the other conclusions presented on pages 26 through 27 of the Recommended Decision.[62]

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[59] PSL §168(2)(c)(i).

[60] PRHPL §14.09.

[61] Recommended Decision, p. 16.

[62] Town of Brookhaven's Brief on Exceptions, p. 43.

According to the Town, the Project would be massive and would be a perpetual eyesore to local residents and thousands of travelers on the adjacent roads, including the LIE, Sills Road, Long Island Avenue, Gerard Road, and Yaphank Avenue. The Town points out that Brookhaven's parent company has constructed two generating plants identical to the one proposed in Yaphank on sites that are 147 and 129 acres in area.[63] The Town contends that the larger sites buffer those plants' adverse visual, zoning, land use, and noise impacts.[64]

To support its exceptions, the Town argues that the Applicant used a flawed methodology to assess the Project's potential visual impacts of many historic, scenic, recreational and aesthetic resources located near the Project site. According to the Town, the Applicant used the Visual Resources Assessment Procedure (VRAP), simply to support an earlier, predetermined decision to locate the Project at Yaphank instead of at a more suitable location. Citing the testimony offered by the Town's visual expert witness,[65] the Town contends that the Applicant's photo-simulations were too small, and not necessarily representative of how large and massive the Project would actually appear if constructed. In addition, the Town notes that its witness stated that the VRAP procedure was being "used here outside of its intended purpose."[66]

Unlike here, the Town contends further that every other PSL Article X application included a visual impact analysis on nearby historic sites without vegetation, which according to the Town, is a more conservative, and therefore preferable, approach.[67] The Town favors this approach to

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[63] Tr. p. 345 and Exh. 28.

[64] Town of Brookhaven's Brief on Exceptions, p. 29. See Tr. p. 345 and Exh. 28.

[65] Tr. p. 1574.

[66] Town of Brookhaven's Brief on Exceptions, pp. 43-44.

[67] Ibid., p. 48.

identify what portions of the Project could be visible if vegetation is removed because of construction activities, age, storm damage, disease, or simply because a third party property owner chooses to remove the vegetation.[68] By not adopting the more conservative approach it favors, the Town submits that the Applicant underestimated the potential negative visual impacts that the Project would have on aesthetic, historic, scenic and recreational resources in the community.[69] Examples of the potentially impacted resources include the Suffolk County Alms House Barn, the Robert Hawkins Homestead, the Homan-Gerard House and Mill, and St. Andrew's Episcopal Church.[70] The Town respectfully submits that we disregard the Applicant's visual analysis.[71]

In addition, the Town excepts to the examiners' reliance on Exhibit 20, which is a letter dated August 16, 2001 from Julian W. Adams, Senior Historic Sites Restoration Coordinator from the NYS Office of Parks Recreation and Historic Preservation (OPRHP) to Andrew Davis of the DPS Staff. The letter explains that the OPRPH Staff reviewed the Project for potential impacts to historic and archeological resources, and determined that the Project would have no adverse impacts pursuant to PRHPL §14.09. On exception, the Town argues that we should not rely upon "the OPRHP hearsay 'no effect' letter." Rather, the Town contends that we should rely upon Dr. Koppelman's testimony offered at the hearing.[72]

Finally, the Town challenges the accuracy of certain statements in the Recommended Decision relating to visual impacts.[73] For example, the Town contends that the Recommended

[68] Ibid., pp. 48-49.

[69] Ibid., p. 46.

[70] Ibid., p. 50.

[71] Ibid., p. 51.

[72] Ibid., p. 52.

[73] Ibid., p. 57.

Decision at page 17 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." The Town points out that during cross-examination, the Applicant's expert could not definitively state that the Project's buildings would not be visible above the treetops.[74] According to the Town, the Applicant's witness, Mr. Solzhenitsyn, did not limit such visibility to the top floor, rather he states that the Project becomes visible "somewhere between the first and fifth" floors.[75]

The Town contends further that the focus of the conclusions in the Recommended Decision at pages 17 and 26-27 concerning the Applicant's visual mitigation plan is "on retaining and maintaining on-site vegetation," but ignores the Applicant's admission that it plans to disturb 84% of the on-site vegetation.[76]

According to the Town, the Recommended Decision at page 17 further states 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)." The Town asserts, however, that this ignores the fact that the Applicant is relying on a relatively 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.[77]

The Town argues that the Recommended Decision also neglects to mention that Dr. Koppelman testified that the list of historic resources was compiled by the State-appointed

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[74] Tr. pp. 1536-1537.

[75] Town of Brookhaven's Brief on Exceptions, p. 57, See Tr. p. 1537.

[76] Ibid., p. 57.

[77] Id., See Tr. p. 1545.

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. According to the Town, the Recommended Decision further ignores Dr. Koppelman's explanation that those sites are listed as "Historic Resources" on the Commission's website.[78] The Town submits that we should not rely upon such a misleading characterizations of the facts.

In its brief opposing exceptions, Brookhaven states that PSL Article X does not require applicants to make their projects invisible. According to the Applicant, it has committed to a comprehensive array of visual mitigation measures.[79]

Brookhaven opposes the Town's exceptions concerning the Applicant's use of the VRAP to assess the Project's potential visual impacts. According to the Applicant, the Town's witnesses relied on view points from nearby roadways rather than from sites listed, or eligible for listing, on the State or National Registers of Historic Places, residences or parks. According to the Applicant, views of the Project from nearby roadways would be transient.[80]

According to Brookhaven, the basis for the Town's exceptions is the possibility of the widespread loss of vegetation in the vicinity of the Project site. The Applicant asserts that the Town's position is unreasonable. The Applicant argues that the primary on-site vegetative species is pitch-pine, which is a hardy species native to this portion of Long Island.[81]

Brookhaven alleges that the Town has misinterpreted the benefits of the Applicant's visual assessment protocol.

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[78] Ibid., p. 58. See Tr. pp. 1710-1712.

[79] Brookhaven's Brief Opposing Exceptions, pp. 68-69.

[80] Ibid., pp. 60-61.

[81] Ibid., pp. 63-65.

Although the mitigative effects from vegetative screening were considered within three miles of the Project, the Applicant explains that it relied only on topography to assess potential visual impacts in the area located three to five miles away from the Project. According to the Applicant, the more conservative approach for the more distant area increased the potential number of sensitive visual receptors that the Applicant included in its visual analysis.[82]

Although the Town asserts that the Applicant did not consider many historic resources in the area near the Project, the Applicant contends there is no merit to the Town's assertions. According to the Applicant, it did consider all the sites identified by Dr. Koppelman.[83]

Contrary to the Town's claim in its brief on exceptions, Brookhaven supports the examiners' determination to assign significant weight to OPRHP's August 16, 2001 letter concerning the potential adverse impacts to archeological and historic resources. In addition to consulting with OPRHP Staff, Brookhaven states that it consulted with the local administrators and caretakers from many of the historic resources, and that these individuals agreed with OPRHP's assessment.[84] Finally, Brookhaven argues there is no merit to the Town's criticisms about the findings presented in the Recommended Decision in pages 17 and 26-27.[85]

The Town exceptions can be categorized as follows: (1) a criticism of the Applicant's visual impact analysis, (2) an objection over the reliability of Exhibit 20, which is the letter provided by the OPRHP Staff, and (3) assertions that some the facts presented in the Recommended Decision are inaccurate. Each group of exceptions is addressed below. For

[82] Ibid., pp. 62-63.

[83] Ibid., pp. 65 and 67. See Tr. pp. 1431-1432.

[84] Ibid., p. 66.

[85] Ibid., p. 70.

the reasons presented, we deny the Town's exceptions concerning potential visual impacts.

Although the Town's witness, Dr. Palmer, stated that the Applicant used the VRAP outside of its intended purpose,[86] Dr. Palmer clarified during his cross-examination that an analysis consists of two components typically undertaken at different times by different parties. The first component is a regional evaluation for planning purposes that Dr. Palmer said would likely be undertaken by a municipality to assign zones and management areas. The second component would be undertaken by a project sponsor, according to Dr. Palmer, to evaluate the potential impacts.[87] Dr. Palmer also acknowledged that the VRAP has been used repeatedly, in the same manner, to assess potential visual impacts for other Article X projects.[88]

Brookhaven conducted its visual impact assessment based on the procedures set forth in the US Army Corps of Engineers VRAP. As explained above, that process includes two components. The Applicant identified view groups, defined landscape similarity zones, selected representative viewpoints, prepared computer-assisted simulations of the completed facility, and developed comparative ratings of visual impact quality. Subsequently, the Applicant identified visually sensitive resources and performed visual assessment field work, viewshed analyses, visual simulations and visual impact analyses. Base on these analyses, the Applicant considered whether visual impact mitigation measures were needed.

We conclude that the record citation identified by the Town to support its exception has been taken out of context given our complete review of the record. Basically, the Town's objection is that the Applicant undertook both components of the VRAP. Dr. Palmer's critique of how the VRAP was carried out in this, and other PSL Article X cases, does not invalidate the

[86]Tr. p. 1574.

[87]Tr. pp. 1607-1609.

[88]Tr. pp. 1602-1603.

results of Brookhaven's visual impact analysis. Therefore, we deny the Town's exception.

Another criticism of the Applicant's visual impact analysis is that the evaluation undertaken within a three-mile radius of the site considered vegetation, rather than topography alone. Pre-Application Stipulation No. 11, relates to visual resources and aesthetics. Section 3(a) outlines the parameters for developing viewshed maps, and allows for a consideration of vegetation within the three-mile radius of the site. The basis for this methodology is the relatively flat but undulating terrain on Long Island, where elevation changes are gradual. Since the topography in the vicinity of the site generally lacks ridges, valleys or coastal areas, there are no distant, expansive views. In addition, the dominant non-herbaceous vegetation is pitch pine and maritime oak species.[89] Pitch pine provides year round screening. Given the unique topography of central Long Island, we find that the methodology outlined in the pre-application stipulation for developing viewshed maps is reasonable. Therefore, we deny the Town's exception.

To assess potential visual impacts on historic sites, Brookhaven consulted with OPRHP as well as the local administrators and caretakers from these sites. We find that the Town's exception to the examiners' reliance on Exhibit 20, which is OPRHP's August 16, 2001 letter, is unfounded based on Lane Construction Corporation.[90]

In Lane, the Appellate Division, 3rd Department reviewed a determination of the Deputy Commissioner of the DEC pursuant to CPLR Article 78, which denied an application for a mined land reclamation permit to operate a hard rock quarry in the Town of Nassau, Rensselaer County. The project would have reduced the elevations of the north and south hills of Snake Mountain which are 900 feet and 850 feet, respectively, to about 600 feet over a 100 to 150-year mining period. After

[89]See Exh. 1, pp. 16-3, 16-4.

[90] Matter of Lane Construction Corp. v. Cahill, 270 A.D.2d 609 (3rd Dept. 2000).

considering the record, the Deputy Commissioner concluded that the project's potential impacts on the historical and scenic character of the community could not be sufficiently mitigated. The Appellate Division held that the Deputy Commissioner took the requisite hard look and made a reasoned elaboration, which was based in part on letters from OPRHP. The court determined that the Deputy Commissioner's reliance on correspondence from OPRHP was proper particularly since the DEC was required to consult with OPRHP with respect to evaluating the proposed mine's potential impacts on historical buildings and landmarks.

We have discretion to weigh and evaluate the evidence presented in the record. Upon review, we concur with the examiners' evaluation of Exhibit 20, and rely on it in making the relevant PSL 168 findings concerning the potential impacts that the Project may have on local historic resources.

The Town excepts to the findings in the Recommended Decision concerning the Suffolk County Skilled Nursing Facility, the amount of vegetation that would be cleared from the site, the Carmans River wild, scenic and recreational river corridor, and the list of local historic sites prepared by Dr. Koppelman.

With respect to the Suffolk County Skilled Nursing Facility, we generally concur with the finding in the Recommended Decision with the clarification provided by the Town, that portions of the Project's buildings may also be visible above the treetops, and that views of the Project may be visible from other floors of the nursing facility. No additional mitigation, however, is necessary given the distance between the Project and the nursing facility and the nature of the current view which includes LIPA's transmission line.

The Town excepts to the examiners' finding on page 17 of the Recommended Decision concerning on-site vegetation. Presently, the site is vegetated, and about 84% of the vegetation on the site would be cleared to construct the Project. Brookhaven would retain and maintain a vegetative screen along the parameter of the site as well as implement an off-site screening and landscaping plan. We note that Chapter 70 of the Brookhaven Code limits the clearing of

vegetated sites.[91] The Applicant has agreed to comply with this provision of the Town Code, and the Town has presented no evidence to show that the Applicant could not comply. Therefore, we deny the Town's exception.

The Town's exception with respect to the findings in the Recommended Decision about the Carmans River Recreational Area reiterates the Town's concern that the vegetative screen on the site, and the off-site screening and landscaping plan do not sufficiently mitigate potential visual impacts. We find otherwise and deny the exception.

Finally, the Town takes exception to how the examiners' characterized the list of local historic resources presented by Dr. Koppelman. We fine that the examiners' characterization is accurate. Regardless of the characterization, the record shows that the Applicant considered every resource listed on Exhibit 75,[92] and that the Project would not adversely impact these resources.

We conclude that the Project, with the implementation of the proposed mitigation, would minimize any potential adverse visual impacts, would not impair any historic, architectural, archeological or cultural resources, and would comply with the requirements of PSL Article X and other applicable laws and regulations.

C. Decommissioning

With respect to site restoration and decommissioning, the examiners recommended that we incorporate the language contained in the Joint Stipulations in our order, which would return the land to a "green field" condition. According to the examiners, prior to commencing any construction, other than research, surveying, boring, or related activities necessary to prepare final design plans and permits, the Applicant should be required to obtain a performance bond, escrow, letter of credit, or other comparable financial instrument, in the amount of

[91]Exh. 1, pp. 10-82 and 10-83.

[92]Tr. pp. 1431-1432.

$1.0 million for the first year of construction, and $1.5 million for the remainder of the construction period, to assure funding for the restoration of any disturbed areas in the event that the Project is not completed.

The examiners also recommended that the Applicant be required to develop a decommissioning plan to restore the site upon closure of the facility and either: (1) post a performance bond, escrow, letter of credit, or other comparable financial instrument, with appropriate renewal provisions, in the amount of $4.5 million, or (2) contribute $75,000 per year for 40 years into a dedicated interest-bearing decommissioning account to cover the costs of decommissioning, dismantling, and closing the plant when it has reached the end of its useful life. If the Applicant elects to establish a decommissioning account, the examiners recommended it be required to provide on January 1 of each year a performance bond, escrow, letter of credit, or other comparable financial instrument for an amount equal to the difference between $4.5 million and the balance in the decommissioning account on January 1 of that year.

The Town takes exception and requests that the decommissioning fund be increased from $4.5 million to $12 million. The Town disagrees with the examiners in two major areas: the value assigned to salvage and scrap, and the method of plant removal. With respect to the salvage and scrap value, the Town notes that it would be at risk in the event that the scrap value of plant components is inadequate to cover the major costs of decomissioning. The Town disagrees with the underlying assumption in the Joint Stipulations 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. If the plant were 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 Town argues, the salvage value of on-site equipment would be severely diminished, the amount of funding would be sorely lacking, and the Town as the host community would be left unprotected.

Consequently, the Town proposes that the decommissioning cost of the Project be estimated with no or minimum salvage value for the structures and equipment.

The second major difference raised by the Town concerns the method of removing the plant. According to the Town, the removal sequence should be the reverse of construction, and would entail several hundred workers on site over two years. The Town analyzed the costs of specific tasks in the demolition process, to arrive at its estimate of $12 million.

On the subject of salvage value, Brookhaven responds that the Town's witness admitted on cross-examination, that the two facilities he cited where explosions occurred were not even decommissioned and are still operating today;[93] that it would be likely that there would be insurance proceeds available in the event of a major equipment explosion;[94] and that he has no experience in estimating scrap or salvage value for equipment at power plants.[95] The Applicant also points out its estimate of decommissioning costs is based on actual experience from a number of projects and that $4.5 million fund exceeds these estimates even when salvage or scrap credits are excluded.

We note that there is a world-wide second-hand market for generating equipment and even if this equipment were destroyed in an explosion, the Town would be protected because it would be all but impossible for the Applicant to finance the Project without having insurance coverage for these types of contingencies. We also disagree with the Town's "reverse construction" method as being too costly for decommissioning because reverse construction generally anticipates that each piece of structure or building would be removed piece by piece instead of simply being ripped down after the machinery is removed.

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[93] Tr. at 661, line 12 to 664 line 13.

[94] Tr. at 661, lines 5-11.

[95] Tr. at 656, lines 3-12.

We agree with the examiners that the Town's request for a $12 million decommissioning fund be rejected because it has not justified employing a "reverse construction" approach to decommissioning the Project when a less expensive demolition method is an available option. As to the appropriateness of the $4.5 million, we find that it is supported by actual experience and the amount is sufficient to cover anticipated decommissioning costs. Thus, we adopt the examiners' recommendation.

D. Public Safety, Public Interest and Other Matters

1. Aesthetics

The Town takes exception to the Recommended Decision's findings and conclusions set forth at pages 71 through 85 in the section entitled "Public Interest." Citing PSL § 168(2)(c)(i), the Town states that we must find that the facility minimizes adverse environmental impacts, considering, among others, "the interest of the state with respect to aesthetics..." The Town contends, however, there is no evidence in the record about the Project's potential visual impacts on aesthetic, scenic, historic or recreational resources, except for the expert testimony of the Town witnesses Koppelman and Palmer. In addition, the Town contends that the Project would have severe negative impacts on surrounding vacant property, including property values, future development, and the tax base. The Town argues that the Project would not be in the public interest.[96]

In its brief on exceptions, the Town attempts to expand the scope of the public interest issue considered in this proceeding to include potential adverse aesthetic impacts. Potential adverse aesthetic impacts, as described by the Town, were thoroughly considered as part of the Project's potential visual impacts. Contrary to the Town's contentions, there is substantial evidence concerning this topic in addition to Drs. Koppelman's and Palmer's testimony. For example,

[96]Town of Brookhaven's Brief on Exceptions, pp. 56 and 69.

Section 16 of the application materials,[97] expressly addresses visual resources and aesthetics. This portion of the application was sponsored by the Applicant's witness panel of Ruth Nichols, Nathan Morphew and Stephan Solzhenitsyn. Their testimony has been incorporated into the hearing record.[98] The Town's exceptions concerning potential visual impacts were addresses above, and for the reasons therein, the Town's exceptions are denied.

For the first time in this proceeding, the Town contends that the Project would have severe negative impacts on surrounding vacant property, including property values, future development, and the tax base. The examiners' issues ruling identified the topics relevant to the public interest finding. These topics were again identified during the hearing,[99] and are addressed in detail below. They are limited to the impacts on the electric transmission system of LIPA, the wholesale electric markets, and competition. In addition, the examiners considered these concerns in the Recommended Decision on pages 77-78. The Town did not identify the issues of negative impacts on surrounding vacant property, property values, future development and tax base at the issues conference. Nor did the Town proffer any evidence on these topics during the hearings. Accordingly, the Town's exceptions are unsupported by the record, and, therefore, are denied.

2. Noise

The examiners concluded that the noise evaluation of the Project demonstrated acceptable impacts with respect to protection against hearing damage (based on Occupational Safety and Health Administration (OSHA) standards), sleep interference, indoor and outdoor speech interference, low frequency noise annoyance, potential for community complaint, and the potential

[97]Exh. 1, Vol. 1.

[98]Exh. 25.

[99]Tr. p. 797.

for structural damage due to vibration or infrasound.[100] The examiners noted that the Project's noise levels would be below EPA guidelines and Department of Housing and Urban Development Housing (HUD) regulations. The examiners also found that the noise from the Project would comply with the Town's Code. The examiners stated that as a result of all the noise mitigation measures set forth in the topic agreement, the Project's construction-related and operational noise impacts would be minimized and significant adverse noise impacts would be avoided.

Sound levels are measured in decibels. However, because the human ear is more sensitive to sounds of middle frequencies, and less so to sounds of high or low frequencies, a weighting scale, known as the "A" scale, has been developed to approximate the response of the human ear to noise, and the related decibels are often listed as A-weighted decibels (dBA). In accordance with DPS requirements, the Modified Composite Noise Rating (CNR) method is used to assess potential noise impacts. This methodology takes into account many factors including the expected sound levels from the plant, the existing sound levels, character of the noise (e.g., tonal, impulsive), duration, time of day and year, and subjective factors such as community attitude and history of previous exposure.

Baseline noise surveys were conducted to establish the parameters of the existing noise in the community surrounding the Project. Ambient sound levels were measured at six locations representing the five most sensitive receptors and one property line measuring point. Existing ambient noise levels were measured in the vicinity of the site in February and April of 2000 (with the trees bare) and July of 2000 (with leaves on the trees). Measurements were made from 8 a.m. to 5 p.m. (daytime) and 12 a.m. to 4 a.m. (nighttime) both during the week and on weekends at the six locations. The adverse noise impacts expected from the plant's construction and operation were identified and evaluated.

[100] Exh. 1, §11.7.

Construction noise was evaluated with computer noise modeling. To mitigate noise during construction, Brookhaven agreed to operate construction equipment in accordance with manufacturers' recommendations, to limit earth-moving activities to specified hours, to use a steam discharge silencer for pipe cleaning activity, and to install mufflers on safety valves.

Brookhaven predicts that the Project's daytime construction noise levels would not exceed a CNR of D at any of the selected noise receptors, which corresponds to a sound level of about 46 dBA.[101] The Applicant notes that the levels range from 38 dBA to 52 dBA and would be at lower than the existing ambient background noise levels of the five most sensitive receptors.

During operation of the Project, the Applicant would mitigate and avoid noise impacts by adding sound insulating cladding to the turbine buildings, heat recovery steam generator pump enclosures, and gas compressor station. Brookhaven has also committed to reduce noise by installing quieter fans and larger fans with lower air velocities and silencers. Other measures such as modifying the air intake louver design and the inlet duct acoustic shroud would also be undertaken to reduce noise. Brookhaven expects the Project to operate at a CNR of C or about 42 dBA.[102] At the residential receptors, Brookhaven anticipates nighttime operating noise levels to be 9 dBA or more below the existing ambient equivalent noise levels.

Within six months of the start of commercial operation, the Applicant would submit an operational noise evaluation report that conforms to the post-construction noise evaluation protocol approved by us.

In its brief on exceptions, the Town notes that construction of the Project would entail at least 26 months of

[101] At a CNR of D, sporadic noise complaints can be expected from the public.

[102] At a CNR of C, community reaction is expected to be between sporadic complaints and no reaction, although noise is generally noticeable.

noisy activity, including excavation, and earth-moving, concrete pouring, steel erection, siding and machinery installation, and blow-out/start-up. The Town points out that each of these activities would produce average daytime noise levels at the site boundary of at least 69 dBA and as loud as 74 dBA, and average nighttime noise levels at the site boundary of 67 dBA. Asserting that these levels are averages, the Town explains that the actual sound levels heard at the property line, both at night and during the day, would be loud and at times louder or quieter than the predicted averages. Since the average sound levels would be about 70 dBA, the Town reasons that sound levels in excess of 70 dBA, and in excess of the Town Code maximum of 75 dBA would be heard routinely at and across the site boundaries during construction.

With respect to the operation of the Project, the Town notes there are a number of discrepancies and omissions in the Applicant's noise analysis, and the noise projections were calculated using a proprietary computer model. Nonetheless, the Town's witness calculated his own noise projections the results of which were, for the most part, similar to the Applicant's.[103]

Even with the noise mitigation measures planned by the Applicant that would reduce sound levels to within the 75 dBA maximum specified for industrial parcels in the Town's Code, the Town submits that the noise expected from operation of the Project would be a public nuisance because it would disrupt existing and planned uses of the adjacent lands in the community. The Town maintains that a constant din of noise should not be tolerated at all industrial property lines all the time. For example, the Town observes that the noise expected to emanate from the operation of the Project would attenuate with distance to a range of 60-63 dBA at the property lines. However, the Town states these noises would be perpetual, night and day, week after week, and month after month as long as the Project is operating.

[103] Tr. p. 478.

There is no basis to assume, the Town maintains, that its code's noise limits grant the Applicant an absolute right to emit constant sound right up to the edge of the code's maximum noise emission level. According to the Town, the Project's noise would impose an intolerable nuisance, which it believes is a basis for denying a Certificate for the Project at the Yaphank site.

According to the Town, workers at adjacent light industry facilities and travelers on the adjacent roads can expect to hear the noise because the 28-acre Project site is too cramped to allow room for buffering and attenuation of the noise from the Project. By comparison, the Town points out that the Applicant has constructed two identical plants in Massachusetts on sites that contain 129 and 147 acres. The absence of a buffer similar to those at the facilities in Massachusetts, the Town argues, means that the noise emanating across the site boundary would be an irritating public nuisance, even if not in excess of the Town's current noise limits.

With respect to construction noise, Brookhaven believes that the Project will comply with the Town's Noise Control Code limits. According to the Applicant, construction activities are generally exempt from the Town's Noise Control limits; thus, during the daytime (weekdays), the 75 dBA limit does not apply to the Project's construction activities. Next, Brookhaven states that the average noise level at the property line during construction at nighttime is predicted to be 67 dBA, not "about 70 dBA," which is significant because the dBA scale is logarithmic. Finally, Brookhaven concedes that certain construction activities could cause a momentary peak over 75 dBA, but that the activities allowed by the proposed Certificate conditions at night would be "very unlikely" to exceed the 75 dBA limit.

The Applicant disputes the Town's claim that the Project would be a public nuisance because the operational noise will disrupt existing and planned uses of adjacent lands in the community. To the contrary, the Applicant points out that the evidence demonstrates the Project's potential noise impacts on

the surrounding community would comply with several recognized standards and guidelines for assessing such impacts. Moreover, Brookhaven claims, the Project's operational noise cannot be deemed to be a public nuisance if it complies with the Town's Noise Control Code. By enacting the Noise Control Code, the Applicant reasons, the Town itself has defined what the acceptable noise levels are for the community and cannot disown its own law now.

We agree with the examiners that the concerns raised by the Town with respect to noise should not preclude issuance of a Certificate. The Applicant is required to comply with Town's noise control limits during Project construction.[104] Moreover, the Certificate conditions require the Applicant to receive our permission before engaging in noisy construction activities between the hours of 6 p.m. and 7 a.m.[105] The operating noise from the Project would also comply with the Town's Code, which prohibits a nighttime (10 p.m. to 7 a.m.) noise contribution of more than 50 dBA at any residence or its property line and a daytime (7 a.m. to 10 p.m.) limit for residences of 65 dBA.[106]

Furthermore, the Project's noise level would be below EPA guidelines and HUD regulations. The present annual average day and night sound level at location 3, the most critical location, is 58.9 dBA.[107] With the addition of the noise from daytime construction of the Project, this would grow by 0.5 dBA to 59.4 dBA - still below the EPA's recommended limit of 60 dBA to protect the public health and welfare.[108] The EPA guideline is consistent with generally-accepted sleep disturbance criteria.

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[104] Certificate condition I.D.(I).

[105] Certificate condition VII.B.

[106] Tr. p. 401.

[107] Ex. 1, Vol. 1, Section 11, p. 11-11.

[108] Id.

Hence it is not expected that Project's construction would cause sleep disturbance.

The 59.4 dBA is also below the limit of 65 dBA that HUD considers acceptable for housing locations. In addition, an increase of less than 3 dBA is generally considered to be unnoticeable in residential communities. Consequently, daytime construction would have a negligible noise impact on residences in the neighborhood. The expected noise from nighttime construction is also 2 dBA or more below the existing average nighttime ambient equivalent noise level at every residential location.

We observe that Brookhaven's failure to meet a CNR of C would mean that it is out of compliance with its Certificate and the Applicant would be subject to action by us for violation of the Certificate. Also, since the Town's noise ordinance will not be waived, the Town retains the full power to enforce its noise restrictions and would in no way be hindered in its enforcement efforts by our approval of the Project.

E. Alternative Sites

In our January 2 Order, we upheld the examiners' issues rulings that: (1) Brookhaven, as a private applicant, is not required to address alternative sites; and (2) the Town was properly precluded from introducing evidence regarding the Shoreham site.[109] We then stated:

> If, however, the Town is hereafter able to show on a timely basis through an affidavit that the Shoreham site is indeed available for sale or lease to the applicant, the Town will then be permitted to proffer testimony on the factual issue of whether the Shoreham site would be superior to the proposed Yaphank site.[110]

We also required that "any presentation purporting to show that the Shoreham site would be a 'greatly superior'

[109] Case No. 00-F-0566, Order Concerning Interlocutory Appeals (issued January 2, 2002).

[110] Ibid. at 6.

location for [the Project] would have to address the current lack of natural gas pipelines in the vicinity of the [Shoreham] site."[111]

In its brief on exceptions, the Town seeks reconsideration of our January 2 Order and reversal of several rulings by the examiners that were based on that order. The Town maintains that the affidavit we required is problematic because it requires the Town to produce an affidavit from a third party over which it has no control and for which Article X provides no procedures. However, the Town believes it has addressed the substantive matters.

The Town states that in its October 2, 2001 filing for the issues conference it stated on 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 claims it 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.

Next, the Town points out that on January 24, 2002, it submitted a letter (not an affidavit) to the examiners with an attached discovery response from LIPA - the current owner of a portion of the Shoreham site. According to the Town, the attached discovery response B-59 satisfies our requirements. LIPA's response to B-59 states that LIPA has not made a decision as to the future development of the site.

The Town also referred to a December 23, 2001 FERC decision, which revealed that, as of December 2001, it granted preliminary approval for the Islander East Pipeline Company

[111] Id.

facility (i.e., it was progressing through the approval process), which would supply the Shoreham and Yaphank vicinities, and that Brookhaven had contracted to purchase all of its gas supplies for the Project from that pipeline.

At the subsequent hearing, the examiners pointed out that LIPA's response to B-56, which was also included in the Town's letter, states:

> LIPA has not made a decision as to the future development of the lands it owns at the Shoreham site. Therefore, such lands or any portion thereof are not currently available for sale or lease to [Brookhaven].

The examiners ruled that the Town failed to comply with the January 2 Order in that the Town did not produce (1) an affidavit, (2) in a timely fashion, (3) demonstrating that the Shoreham site is available for sale or lease, (4) to Brookhaven.[112]

At the hearing, the Town attempted to submit testimony and cross-examine the Applicant's witnesses allegedly not for the purpose of sponsoring an alternative site, but rather to show that the application for the Yaphank site should be denied because there are serious problems with the Yaphank site and an alternative site is available.[113] The examiners were unpersuaded by this argument and precluded the Town from proceeding further along this line.

The Applicant challenges the Town's claim that its failure to produce any real evidence with regard to the alleged superiority of the Shoreham site is the result of excessive gentility and restraint on its part. According to Brookhaven, this argument is at odds with the Town's failure to make even a minimal showing that the Shoreham site was actually available to Brookhaven at any stage in this proceeding. Furthermore, Brookhaven points out, the examiners did not require production

[112] Tr. 206-10.

[113] Tr. pp. 206-213, offer of proof submitted Tr. pp. 1722-25, Tr. p. 797.

of a "full affirmative case," as the Town asserts, but merely a threshold showing that would indicate that the supposed superiority (including availability) of the Shoreham site was real enough to justify adjudication of an issue not otherwise relevant to the proceedings, and justify forcing the Applicant to respond to evidence on alternative sites that it was not otherwise required to consider.

Brookhaven notes that the January 2 Order gave the Town a second opportunity to present specific information with regard to the Shoreham site, but the Town also failed to meet the requirements of the January 2 Order. Brookhaven observes that the Town emphasizes the unreasonableness of the requirement that the evidence be in the form of an affidavit as if this requirement were the only possible basis for rejecting consideration of the Shoreham site. Entirely aside from the affidavit, Brookhaven maintains the Town's submission fails to meet any of our threshold requirements for consideration of Shoreham.

Brookhaven rejects the Town's claim that it has shown that LIPA would entertain a major project at the site. Instead, the Applicant points to LIPA's discovery response B-56, which demonstrates that the Shoreham site or any portion thereof is not available for sale or lease to Brookhaven. Inasmuch as it is not available, Brookhaven claims that further investigation of its supposed superiority is entirely inappropriate and represents only a waste of time. Consistent with this position, the Applicant reasons that the Town's presentation with respect to the proposed Islander East natural gas pipeline currently undergoing the approval process and its potential to provide natural gas to Shoreham is a smokescreen and does not alter the fact that the site must be available for the proposed Project in order to be worthy of consideration.

Regarding the Town's claim of an absolute right of cross-examination, Brookhaven argues this right does not extend to issues not raised and determined to be adjudicable. The Applicant supports the examiners conclusion, noting the State Administrative Procedure Act (SAPA) allows the examiner to

exclude irrelevant or unduly repetitious cross-examination.[114] SAPA §306(1). See also PSL §§165(2), 167(1)(b).

We note that the Town sought to cross-examine Applicant's witnesses on the subject of gas supply under the guise of public interest, but as the presiding examiner correctly stated:

> Let me quote to you from the issues ruling. Under public interest, the items that were raised as an issue for public interest are the impacts on the electric transmission system of LIPA, the wholesale electric markets, competition, and decomissioning costs and funding. That was it. Those were the only issues raised at the issues conference.[115]

In addition, the Town admits in its brief that it wanted to cross-examine the Applicant's witness as to the availability of natural gas supply for the Shoreham site:

> The Town was not even allowed to examine the Applicant on its planned gas supply (Tr. 797), despite the fact that [FERC] granted preliminary approval for the Islander East natural gas pipeline under Long Island Sound to Shoreham . . . The [Siting Board Order] stressed the "current lack of natural gas" at Shoreham . . ."[116]

Furthermore, the examiners had convened a pre-hearing conference to, inter alia, "formulate or simplify issues" to be adjudicated at the evidentiary hearing. Unless an issue is raised and determined to be adjudicable, preclusion of cross-examination of any witness on that issue is proper because it facilitates the orderly conduct of the proceeding. This, we find, comports with SAPA and fundamental due process requirements because parties are given a fair opportunity at the prehearing conference to identify issues they believe should be adjudicated and to present the basis for that belief. The Town had a fair opportunity to raise any issue at the prehearing

[114] Recommended Decision at 90.

[115] Tr. p. 797.

[116] Applicant's Reply Brief, p. 47.

conference, and SAPA allows the examiners to exclude irrelevant or unduly repetitious cross-examination. SAPA §306(1). We conclude that no violation of SAPA's requirements occurred.

In its brief on exceptions, the Town reargues the positions it advanced that resulted in the January 2 Order, i.e., that Brookhaven is not a private applicant, and Article X does not prevent a discussion of alternative sites.

1. Private Applicant Status

The Town reiterates its argument that Brookhaven is not a "private applicant," but rather an "electric corporation" within the meaning of the Transportation Corporation Law (TCL) §10 and, therefore, is vested with the power of eminent domain contained in TCL §11 (3-a). Consequently, the Town argues that Brookhaven is not a private applicant as defined in 16 NYCRR §1000.2(o) and cannot avail itself of our rule 16 NYCRR §1001.2(d)(2), which states that private applicants may limit discussions of site alternatives to parcels owned by, or under option to such applicants. To the contrary, the Town maintains that Brookhaven's failure to evaluate alternative sites violates PSL §164(1)(b), renders the application deficient, and precludes us from finding that Brookhaven meets PSL §168(2)(c)(i), i.e., that the Project minimizes adverse environmental impacts, "considering . . . the nature and economics of . . . reasonable alternatives . . .."

The Town seeks reconsideration of the January 2 Order, which rejected the Town's "private applicant" contention because the 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. According to the Town, Brookhaven admits that it was organized for the sole purpose of developing the Project in order to supply electricity to the public of Long Island and New York State. Thus, the Town concludes there is no basis for our assertion that the entity must directly serve the end user.

Nor are we correct, the Town claims, in concluding that Brookhaven, a Delaware limited partnership, should not be deemed a corporation under the TCL. The Town acknowledges that the term "electric corporation" is defined as a "corporation organized to . . .supply for public use electricity . . ." (TCL §10), but the Town notes that TCL itself does not define the term "corporation." According to the Town, Brookhaven 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 here. The Town reasons that the definition of "electric corporation" in the PSL strongly supports the conclusion that Brookhaven is also an "electric corporation" for the purposes of the TCL. Moreover, the Town observes, the PSC has recently ruled that all developers of all Article X facilities are "electric corporations," regardless of business form, under the PSL.[117]

Brookhaven notes that all of the arguments raised by the Town have already been rejected in the January 2 Order and were not issues addressed in the Recommended Decision. Further consideration of the issue at this late stage, the Applicant contends, is unnecessary and procedurally inappropriate. According to Brookhaven, the Town's brief on exceptions fails to comply with the requirements of 16 NYCRR §4.10, which requires a brief on exceptions to be directed to the Recommended Decision, and which states that a party "should not simply reiterate [its] position, but should explain why the party believes the Recommended Decision to be in error." (16 NYCRR §4.10(c)(iv)). Brookhaven claims that the Town's brief is nothing more than a word-for-word repetition of major portions of the Town's post

[117] See Case 99-E-1629, Athens Generating Company, Order Providing for Lightened Regulation (issued July 12, 2000); Case 01-E-0816, Athens Generating Company, Order Authorizing Issuance of Debt (issued July 30, 2001).

hearing brief, dated March 12, 2002, and its interlocutory appeal petition, dated November 7, 2002.

As to the substance of the Town's arguments, Brookhaven notes that the plain language of TCL §10 specifies that an "electric corporation" must be a "corporation." According to the Applicant, the Town again speculates that this limitation may be the historical result of the enactment of the TCL prior to the existence of the Partnership Law and the Limited Partnership Law, despite the fact that (as the Town itself acknowledges) the TCL was amended multiple times subsequent to the enactment of both of these laws, thereby providing ample opportunity to broaden the reach of the TCL if the Legislature had so desired.

With regard to the Town's argument that Brookhaven's status as an electric corporation under the PSL should carry over to the TCL, Brookhaven argues that the use of a term under one statutory scheme is not binding and is not even indicative as to the meaning of the same term under another statutory scheme.[118]

Beyond the issue of Brookhaven's business structure, the Applicant notes that the TCL has another major requirement for qualifying as an electric corporation: that the corporation be organized to supply energy to the public. Brookhaven emphasizes it will operate as a merchant facility, will possess none of the distribution infrastructure and have no direct interaction with the public. Brookhaven maintains that the Town's desire to ignore the plain language of the statute would effectively obliterate the existence of the "private applicant" as recognized by our regulations and expressly upheld by the courts.[119]

Given the preservation requirement set forth in 16 NYCRR §4.10(d)(2), it was appropriate for the Town to raise claims made previously in its prefiled exceptions.

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[118] See Simonelli v. Adams Bakery Corp., 2001 WL 1097229 at *1, Sept. 20, 2001 (3d Dept. 2001).

[119] CHV, 281 A.D.2d 89, 97, 73 N.Y.S.2d 532, 537 (3d Dept. 2001).

Nevertheless, it neither explained why the Recommended Decision's reliance on our January 2 Order was in error nor presented new facts or change in circumstances that would cause us to come to different conclusions than those set forth in such order.[120]Consequently, for the reasons stated in our January 2 Order, our conclusions that Brookhaven is a private applicant and not an electric corporation with the power of eminent domain under TCL §11 (3-a), stand, and we will not further consider the Town's arguments with respect to the private applicant status of Brookhaven.

2. Article X's Requirements

The Town reargues its position that, even if Brookhaven lacks the power of eminent domain, it cannot properly refuse to describe in its application those reasonable alternative sites that it actually considered and rejected prior to the date on which it formally initiated the pre-application process under Article X. The Town claims that site alternatives were admittedly considered by Brookhaven's parent, but were omitted from the application.

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

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

According to the Town, we overlooked the plain language of the statute and ignored the words "if any" at the end of the initial clause of PSL §164(1)(b). Believing there are "some" alternative locations, the Town contends that "if any" term is applicable. Since alternative sites are not discussed in the application, the Town maintains that Brookhaven

[120] See 16 NYCRR §4.10(c)(2)(iv).

ignored and violated PSL §164(1)(b), which requires their evaluation.

According to the Town, interpreting the term "if any" in PSL §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 the State Environmental Quality Review Act (SEQRA). According to the Town, it was recognized in Athens that 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 . . ."[121]

In addition, the Town argues that the Article X process has long been recognized as a functional equivalent of SEQRA.[122] The Town notes that DEC's 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.[123] Furthermore, the Town opines, only the environmental impact statement process outlined at ECL §8-0109 of SEQRA is excluded from actions subject to Article X, and SEQRA's purposes and policies as set forth at ECL §§8-0101 and 8-0103 remain applicable in this case. Thus, the Town maintains that it is the examiners' and our responsibility to interpret and administer Article X "in accordance with the policies set forth" in SEQRA.[124] The Town concludes that the examiners have violated this requirement.

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[121] Case 97-F-1963, supra, Order Granting a Certificate (issued June 15, 2001), p. 96.

[122] See PSL §164(b); *Gerrard, Ruzow and Weinberg*, Environmental Impact Review in New York, §8B.02[15][a], Matthew Bender, 2001 ed.

[123] 6 NYCRR §617.9(b)(5)(v).

[124] ECL §8-0103(6).

With respect to the Town's argument that "if any" includes alternatives that were given a preliminary examination prior to commencement of the Article X process, Brookhaven asserts that the Siting Board and the Third Department have determined that, for private applicants such as Brookhaven, "reasonable" alternative locations are limited to sites under their control. Brookhaven explains that the Town's construction of "if any" would render this rule meaningless, as most private applicants are likely to investigate more than one site as a matter of good business practice prior to purchasing or obtaining an option on any single site. Further, the Applicant reasons, PSL §164 requires consideration of alternatives, "if any," which clearly indicates that, in certain instances (such as a private applicant with control over only one site), there will not be any alternative locations required to be addressed in the Article X application. The Town turns the language of the statute on its head, Brookhaven continues, by arguing that the requirement that the alternatives, "if any," be considered somehow necessitates consideration of alternatives over which an applicant has no control.

Brookhaven does not agree with the Town that Article X demands consideration of additional alternatives in accordance with the policies set forth in SEQRA. Brookhaven claims that Horn v. IBM,[125] a SEQRA case, supports exclusion of the Shoreham site based on the Applicant's lack of control over it. SEQRA's implementing regulations expressly state that consideration of "[s]ite alternatives may be limited to parcels owned by, or under option to, a private project sponsor."[126] Limiting consideration of alternatives to sites actually under the applicant's control, Brookhaven states, is thus entirely in keeping with SEQRA policy, and the Town's SEQRA argument is completely without merit.

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[125] Horn v. IBM, 110 A.D.2d 87, 493 N.Y.S.2d 94 (2d Dept. 1985).

[126] 6 NYCRR §617.9(b)(5)(v). See CHV 281 A.D.2d at 97, 723 N.Y.S.2d at 537-38 (referencing SEQRA's requirements to reach the same conclusion).

Finally, the Applicant again claims that the Town's brief on exceptions should be disregarded because it does not comply with requirements of 16 NYCRR §4.10.

Again, the Town's raising of arguments on exceptions that were previously rejected on interlocutory appeal was appropriate (16 NYCRR §4.10(d)(2)). On the merits, the Town's argument that a private applicant lacking the power of eminent domain shall be required to make a presentation on alternative sites is unavailing. This argument was considered and rejected by the Appellate Division in the CHV case (281 A.D.2d at 97). Given that Brookhaven does not own or control each of the sites it considered acquiring before the pre-application process, the Town's position that the Applicant was obliged to make a presentation on these sites is baseless.[127]

The words "if any" in PSL §164(1)(b) refers to "reasonable alternatives" that are actually available to the applicant, and cannot be read to require consideration of alternatives over which an applicant has no control. The Town's argument that SEQRA separately requires analysis of alternatives overlooks both the fact that actions under Article X are exempt from SEQRA's environmental impact review mandates, and the fact that the alternatives analysis required by Article X "shall be no more extensive than required under article eight of the environmental conservation law [SEQRA]," which, again, limits alternatives analysis to those under the ownership or control of a private applicant.

F. Intervenor Funding

The Town seeks reconsideration of our January 2 Order with respect to intervenor funding. In that order, we affirmed the presiding examiner's decision refusing a disbursement to pay for the services of an attorney who is participating in this

[127] The CHV Court held that "DEC rules under the State Environmental Quality Review Act (ECL Art. 8), applicable to Public Service Law while [Article X] proceedings by virtue of Public Service Law §164(1)(b), specify that '[s]ite alternatives may be limited to parcels owned by, or under option to a private project sponsor.' [citations omitted]."

proceeding on behalf of the Town in an "of counsel" capacity and who entered an appearance at the prehearing conference.[128] As we noted in that order, PSL §164(6)(a) authorizes disbursements "to defray expenses incurred by municipal and other local parties to the proceeding . . . for expert witness and consultant fees." The Town repeats it contention that "the term 'consultant' includes lawyers because the dictionary defines 'consultant' as 'one who gives professional advice or services,'" and adds that so long as the Town's expenditures "contribute to an informed decision as to the appropriateness of the site and facility" (PSL §164(1)(b)), it matters not whether the consultant is an engineer, lawyer, or scientist.

We disagree; Article X refers to legal advisors as "counsel"[129] and does not authorize use of intervenor account funds to defray the costs of counsel. For the reasons stated in our January 2 Order, our prior determination stands.

IV. LIPA'S EXCEPTIONS

A. No-Action Alternative

In its brief on exceptions, LIPA challenges the examiners' recommendations with respect to the no-action alternative. The examiners agreed with the Signatories that the record demonstrates that, if the no-action alternative were chosen, the additional generation and other economic and environmental benefits associated with the Project would not accrue. The no-action alternative, they observed, is inconsistent with the competitive market economics and environmental objectives of the State. They found that Brookhaven complied with 16 NYCRR §1001.2(c) by "evaluat[ing] the adverse or beneficial site changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed facility" (emphasis added). According to the examiners, Brookhaven demonstrated that impacts are likely to be

[128] January 2 Order, pp. 6-7.

[129] See, e.g., PSL §167(1)(b).

similar with or without the proposed Project in the reasonably foreseeable future.

LIPA asserts in its brief on exceptions that Brookhaven's no-action analysis: (1) fails to address the adverse socioeconomic and competitive impacts to LIPA and its customers, (2) is inconsistent with the State Energy Plan, (3) is inconsistent with the objectives of Article X of the PSL, (4) overstates the positive air quality impacts, and (5) is unreasonably narrow since it fails to consider numerous environmental impacts (e.g., visual impacts of the Project's stacks and vapor plumes and permanent clearing of 15 acres of forest at the Project site).

According to the Applicant, LIPA's understanding of the reasonable alternatives requirement is far too broad and its arguments exceed the intent of 16 NYCRR §1001.2(c), which is limited to an evaluation of site changes that are likely to occur. Brookhaven supports the examiners' conclusion that the impacts are likely to be similar with or without the proposed Project at the site.

We agree with the examiners that the no-action alternative, that is, not proceeding with the construction and operation of the Brookhaven facility, is not superior to proceeding with the Project, considering its environmental impacts and public interest considerations.[130] Specifically, each area of adverse impact alleged by LIPA is discussed in other sections of this order. In each instance, we find that the impact will be acceptable and some, such as the air quality impact of the Project, will lead to an overall improvement as compared to the no-action alternative. In addition, we find that the Project will use the best technology that is available

[130] Although the no-action alternative analysis includes an evaluation of site changes, such analysis is not limited to consideration of the impacts of denying the Certificate in its entirety to such site specific issues. Rather, we also consider the environmental impacts and benefits and public interest considerations set forth in Section 168 in deciding whether the no-action alternative is superior.

to fulfill its primary objective, which is to generate electricity for sale into the competitive wholesale market operated by the New York Independent System Operator (NYISO); that the record presents an analysis of technological alternatives to the Project's energy generation, including fuel, cooling, peaking and technological alternatives to the Project's air emission control equipment, and that the analysis demonstrates the proposed technology and proposed emission control equipment would minimize environmental impacts by meeting or exceeding regulatory requirements. The no-action alternative would serve only to delay the environmental and public interest benefits of adding this state-of-the-art, natural gas fuel power plant to the Long Island power grid at a time of projected capacity shortfalls and during the formative years of the Long Island and State-wide competitive market for electricity. Therefore, we accept the terms of the topic agreement addressing reasonable alternatives and deny LIPA's exceptions.

B. Electric Transmission Interconnection

Brookhaven proposes to connect the Project to LIPA's system via two existing 138 kV transmission lines, which are adjacent to the Project site. The Signatories provided a topic agreement that evaluates the impact of the Project on the transmission system, including voltage, stability, thermal, and short-circuit analyses, which conclude that no major system upgrades are required either in existing substations or along existing lines.

Existing electro-magnetic field (EMF) effects in the vicinity of the Project were also analyzed. The proposed interconnection, the Signatories agree, would not significantly affect electric and magnetic field levels, and all projected EMF levels would be within State guidelines. In any event, Brookhaven agrees to finance such system upgrades or remedial measures as required by the NYISO's Minimum Interconnection Standards (MIS).

LIPA does not take issue with the results of these studies, however, LIPA points out that the MIS does not

determine whether transmission upgrades would be necessary to deliver the Project's output across the system to load centers. LIPA's concern is with the Holbrook Interface, which is west of the Project. LIPA claims that transmission constraints across this interface would limit the transfer of some power generated upstream, or east of the interface, to load west of the interface. In other words, it asserts that existing generating capacity would be "bottled."

LIPA's transmission system is designed such that resources are not bottled at peak or near-peak (i.e., 90% of peak) load levels. However, by 2005, LIPA notes, the following electric capacity resources will be added east of the Holbrook Interface: a direct submarine cable between Shoreham and New Haven, Connecticut (330 MW), four "fast track" gas turbines (160 MW), and possibly the Project (580 MW). In 2005, LIPA anticipates that approximately 2,545 MW of total capacity would exist east of Holbrook if the Project is built, but that only 2,095 MW may be dispatched over the transmission system (approximately 1,047 MW to exit Holbrook to serve load to the west of the substation). Thus, it is anticipated that approximately 460 MW of capacity would be bottled up. The comparable near-peak bottled capacity is 580 MW.

Inasmuch as most of the on-Island generating facilities are over 30 years old and have an estimated weighted heat rate of 11,500 BTU/kWh, it is anticipated that this generation would be displaced by the more efficient Project, which would have a heat rate of 6,900 BTU/kWh. LIPA fears that the bottling up of generating units that are under long-term contract to LIPA could impact it by $50.6 million per year. This cost, LIPA states, would ultimately flow through to customers and would equate to a 2.1% electric rate increase. To eliminate the bottling, LIPA suggests transmission facilities estimated to cost $183.4 million would be needed. LIPA's concerns about installed capacity, operating reserves, and facility reinforcements are discussed below.

1. Installed Capacity Costs

With respect to installed capacity, LIPA estimates that, it would have to purchase replacement capacity at a cost of $47.6 million, if the Project is built, if the NYISO changes its capacity requirement rules, and if its future capacity costs are the same as the historical values. The examiners rejected LIPA's $47.6 million per year estimate because: (1) LIPA used near-peak, instead of peak, conditions in determining the amount of bottled generating capacity east of Holbrook, (2) LIPA did not consider a recent decrease in the Long Island locational installed capacity requirement; (3) LIPA's projections show that the region west of the Holbrook interface will have sufficient capacity, which should drive down the costs of installed capacity; (4) construction of the Project would also depress installed capacity prices; (5) LIPA relied on the historic prices of a tight supply market in its estimate; and (6) LIPA will have an opportunity to sell some of its excess capacity located east of the Holbrook Interface. LIPA challenges each of the findings in the Recommended Decision.

a. LIPA's Capacity Requirements

LIPA notes that it has long-term contracts for installed capacity located east of the Holbrook Interface to meet its requirements west of the interface. Under the NYISO rules, LIPA explains, it must either own or have under contract sufficient installed generating capacity to meet its anticipated share of annual peak load plus an additional reserve margin, which is primarily intended to allow for load uncertainty and generator outages. Moreover, according to the NYISO's rules, a specified percentage of LIPA's projected peak load must be met using resources located on Long Island, which is referred to as its locational requirement.

If the Project is constructed as proposed, LIPA fears that the NYISO would conclude that the total amount of installed capacity provided by resources located east of Holbrook would exceed the amount that ought to be counted. Furthermore, LIPA anticipates that the NYISO would increase the total Long Island installed capacity requirements by an offsetting amount to

counteract the effect of bottling. In that case, LIPA would need to purchase additional capacity located on Long Island in the amount required to replace the amount considered undeliverable by the NYISO, which LIPA estimates would range from 420 MW at peak to 529 MW at near peak. LIPA estimated its $47.6 million purchases of replacement capacity on the 529 MW near-peak conditions.

The Applicant and DPS Staff disagree with LIPA's claim that under the NYISO's rules the Project's bottling effect is likely to cause the NYISO to increase LIPA's locational requirement. While DPS Staff finds it reasonable to assume that the NYISO would be concerned with the issue of the deliverability of capacity from resources east of the Holbrook Interface, and may promulgate rules that limit the amount of this capacity that can be used to meet load requirements situated to the west of the Holbrook Interface, DPS Staff points out that the NYISO's rules at this time do not require such a change, nor do they require an increase in the on-Island locational requirement.

DPS Staff concedes that discussions have begun at the NYISO and New York Reliability Council to consider potential rule changes that would align the financial and physical aspects of the capacity market, but emphasizes that those discussions are in a nascent stage. DPS Staff anticipates that the NYISO will undertake studies to determine how best to ensure the deliverability of capacity resources in a manner consistent with maintaining a competitive environment for all suppliers. DPS Staff notes that LIPA's suggested approach is only one of several options available to the NYISO.

DPS Staff also notes that LIPA's locational requirement may be decreased based upon LIPA's claims that the unit forced outage rates for generating units on Long Island had decreased in recent years, and that those improvements were not

reflected in the study that determined the Long Island locational requirement for the 2001-2002 capability year.[131]

DPS Staff also observes that, absent the Project, there will be approximately 120 MW in 2005 of unused transmission capacity at peak load capable of moving electricity from the east.

First, the examiners adopted DPS Staff's position that LIPA erred in using the 529 MW near-peak conditions in its calculation of the $47.6 million cost of installed capacity instead of the 420 MW peak. This error, DPS Staff calculates, overstates the shortfall by approximately 20%. Moreover, DPS Staff notes that LIPA included the 330 MW cable from New England in its capacity estimates despite the fact that LIPA provided no NYISO or other rule supporting its inclusion. Without it, DPS Staff states the shortfall would be reduced by 330 MW or about 75% from the peak number of 420 MW, which DPS Staff maintains, would reduce the shortfall to 90 MW, or about $8.1 million under LIPA's cost assumptions.

To determine if the bottling effect would compel LIPA to purchase additional installed capacity west of Holbrook, we will prorate the on-Island requirements and available capacity to the east and west of the Holbrook Interface. We estimate that LIPA's west of Holbrook installed capacity requirements have been reduced by the NYISO from 98% to 93%, or from 3,984 MW to 3,781 MW. As far as available installed capacity is concerned, we will include LIPA's projected purchases of 130 MW from the proposed KeySpan Spagnoli Road 260 MW generating unit, as discussed further infra, which is proposed to be located west of the Holbrook Interface. Adding this 130 MW to the available capacity that is located west of the Holbrook Interface brings the total available installed capacity to 3,966 MW or 185 MW more than that which would be required west of Holbrook. Thus, we conclude that, even if the NYISO divided Long Island at the

[131] DPS Staff reports in its reply brief that the NYISO reduced the Long Island installed capacity requirements from 98% to 93% in the first quarter of 2002.

Holbrook Interface, LIPA would be able to meet its installed capacity requirements without purchasing additional capacity to offset the claimed bottling effect.

b. Future Capacity Costs

With respect to LIPA's cost estimates, the base case cost of additional purchases were estimated by LIPA to be $47.6 million per year, which reflects an installed capacity price of $90 per kilowatt (kW)-year.

According to LIPA, the base case value of $90 per kW-year is reasonable because monthly auction values for installed capacity in New York City have exceeded $50 per kW-year for the last three seasons; values in the deficiency auction for the Long Island zone over the past several months have exceeded $140 per kW-year; and the NYISO has determined an installed capacity penalty value of $148 per kW-year for Long Island.

According to Brookhaven, LIPA overestimated the future value of installed capacity on Long Island by basing its projections on historical values that are the result of the limited quantities of generating capacity on Long Island and LIPA's limited ability to import capacity onto Long Island. As new generating facilities are constructed on Long Island and in surrounding areas, the Applicant reasons, the balance between supply and demand will shift to favor buyers of installed capacity rather than sellers, reducing the value of installed capacity to levels far below the cited historical levels. The Applicant contends that LIPA failed to take into account this growth in on-Island generating capacity that it acknowledges will take place over the next several years.

The examiners observed that the capacity west of the Holbrook Interface is projected to be 4,096 MW in 2005, which exceeds the load of 4,065 MW by 31 MW. LIPA asserts that this extremely small "reserve margin" cannot support a finding that installed capacity prices on Long Island will be driven down.

The impact of this excess capacity should reduce the price for installed capacity, the Applicant asserts, because the marginal cost of selling installed capacity from existing

generators is very low, since physical operation of those facilities is not required to make such capacity sales. Brookhaven explains that, to the extent generating facilities are maintained in operating condition in order to sell energy and/or ancillary services, the marginal cost of selling installed capacity from that facility is close to zero.

The Applicant observes that the only buyers of installed capacity are utilities and other load serving entities, which need only enough installed capacity to meet their obligations under the NYISO's tariffs. As a result, Brookhaven concludes that when supplies of installed capacity exceed the demand for installed capacity by even a modest amount, some generators will be unable to sell their installed capacity at any price, which will force installed capacity suppliers to reduce their prices down to the very low marginal cost of providing installed capacity. According to Brookhaven, these prices will be far below those forecasted by LIPA.

Brookhaven claims that the price of installed capacity has fallen in this manner in other markets. For example, the Applicant states that the NYISO divides New York State into three zones for the supply of installed capacity: New York City, Long Island, and the Rest of the State (ROS); that the amount of installed capacity available in ROS exceeds the demand for installed capacity; and that, as a result, prices for installed capacity in ROS are a fraction of the levels predicted by LIPA.

Brookhaven notes that the prices of installed capacity in ROS during the Summer Capability period of 2001, which were determined in accordance with the NYISO's old installed capacity (ICAP) rules, varied between $2.25 and $2.95 per kW-month and the prices in ROS for the months of February through March 2002, varied between $0.39 and $0.29 per kW-month.

If prices for installed capacity on Long Island fall to an average price of $1.30 per kW-month as a result of the construction of new generating capacity now proposed for Long Island and surrounding areas, the Applicant maintains that the maximum amount of LIPA's injury as a result of any bottling

of installed capacity by the Project would be between $6.6 million and $8.3 million, even if all of LIPA's other assumptions were accepted.

The main issue raised by LIPA's exception is whether there will be sufficient excess capacity west of the Holbrook Interface to drive down the cost of purchasing excess capacity from the historic values to those comparable to the ROS. LIPA claims that projected capacity will exceed the load by only 31 MW, which it asserts is an extremely small reserve margin. However, LIPA ignores the fact that its locational requirement is only 93% of its load. Consequently, it need only 3780 MW of installed capacity to meet NYISO requirements. This would create an excess of 285 MW in the installed capacity market, which when added to the 31 MW results in a 316 MW surplus.

We agree with the Applicant that the marginal cost of selling installed capacity from existing generators is low since the physical operation of those facilities is not necessitated by the sale of such capacity. In addition, since the market for installed capacity is dictated by NYISO requirements, we agree that once those requirements are met, some generators will be unable to sell their installed capacity at any price. As a result, even a modest excess of installed capacity can force the price down to the marginal cost of providing such service. Excess installed capacity west of Holbrook of 316 MW should be sufficient to drive the price down. Consequently, we accept the Applicant's position.

c. Mitigation Available to LIPA

The examiners found that LIPA failed to take into consideration mitigation of its claimed damages by selling installed capacity into New England over the new 330 MW submarine cable. According to the examiners, LIPA may use this cable to make sales of installed capacity into New England even when the cable is fully loaded with energy deliveries from New England to Long Island. The examiners accepted Brookhaven's explanation that, to the extent LIPA has covered all of its installed capacity needs from other sources, it may be able to treat its imports from New England over this cable as an

interruptible resource and thereby qualify to sell as much as 660 MW of installed capacity into New England. At an average price of $1.00 per kW-month, this would produce an additional $6.6 million in revenues to LIPA.

LIPA claims that sales to mitigate damages do not address the bottling problems that would be caused by the Project, and the examiners' finding is speculative in nature and unaccompanied by any study or analysis as to the feasibility or economics of such sales. Next, LIPA asserts it is under no obligation to mitigate the effects of the externality costs imposed upon it by the Project. Lastly, LIPA finds it inconsistent that the examiners deducted the capacity of the underwater cable from LIPA's estimate of bottled capacity and then rely on the cable's firm transfer capability as a means for LIPA to sell capacity bottled east of Holbrook into New England.

Brookhaven responds that the fundamental problem with LIPA's claim that the examiners erred because their finding is not supported by any study or analysis of any kind is that LIPA is the party seeking to demonstrate that it will incur additional costs as a result of the alleged bottling of installed capacity, and in such circumstances, the burden of proof that there are no other commercially feasible markets for LIPA's bottled installed capacity must fall on LIPA alone.

Concerning LIPA's claim that it is under no obligation to mitigate damages caused by the Project, Brookhaven points out that the Public Service Commission (PSC) requires utilities to prudently mitigate any stranded costs resulting from the transition from regulation to competition. For example, in its Order Clarifying April 1998 Excess Capacity Filing Requirement issued September 4, 1997 in Case 93-G-0932, the Public Service Commission held that:

> [T]he prior order requires [Local Distribution Companies] to aggressively mitigate capacity costs which might otherwise be stranded through such actions as a sale of that capacity in the secondary market, use of that capacity to offset capacity needs from other

> customers, off-system sales, and other options which may be available to the LDCs.[132]

With respect to LIPA's claim that the examiners erred because it is not possible both to deduct the capacity of the cable from LIPA's estimate of bottled capacity and then to rely on the cable's firm transfer capability as a means for LIPA to sell capacity bottled east of Holbrook into New England, Brookhaven would agree if LIPA intended to subtract from its calculations of energy and capacity bottled by the Holbrook Interface the full 660 MW swing of the cable from 330 MW of imports to 330 MW of exports. However, the Applicant notes that this adjustment would eliminate any bottling of capacity across the Holbrook Interface whatsoever for the reasons noted above. Thus, Brookhaven surmises that what LIPA is referring to is only the 330 MW import capacity of the cable. In such circumstances, Brookhaven explains the examiners are plainly correct, since even after imports across the cable are stopped, that facility has an additional 330 MW of export capacity which LIPA can and must use to mitigate any stranded costs it would otherwise incur.

Other than the general assertion that LIPA will have an opportunity to sell some of its excess capacity located east of Holbrook into the New England market via the new cable, the examiners made no specific findings regarding the quantity or the per unit price of capacity. This general assertion is consistent with the creation of a competitive market for such

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[132] Case 93-G-0932, Proceeding on Motion of Commission to Address Issues Associated With the Restructuring of the Emerging Competitive Natural Gas Market, Order Clarifying April 1998 Excess Capacity Filing Requirement, (issued September 4, 1997), pp. 2-3. As recently as March 21, 2002, the PSC has reaffirmed its commitment to this requirement. Case 00-M-0504, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities - Order Establishing Parameters for Lost Recovery and Incremental Cost Studies, (issued March 21, 2002), p. 23. ("[W]e reaffirm our statement that the utilities have an obligation to productively manage and reasonably mitigate their costs.")

power and does not require a specific estimate of prices to support it. In light of the PSC's position that it expects utilities to prudently mitigate any stranded costs resulting from the transition from regulation to competition, it is reasonable to conclude that LIPA, although not a private utility, would take advantage of its opportunities to mitigate its stranded costs. As a participant in the competitive markets in New York and, regionally, the Northeast, it is reasonable to expect that LIPA would offer its excess capacity for sale in the New England market.

Finally, the examiners also correctly recognized that, under current NYISO rules, transmission capacity is not counted as ICAP. LIPA's inclusion of the proposed 330 MW cable between Long Island and New England as a locational ICAP resource, therefore incorrectly inflates its estimate of the amount of bottled ICAP. This issue is not to be confused with whether or not LIPA can sell ICAP over the same cable to New England. Market participants can and do sell ICAP located in one control area to customers in a second control area. However, these sales are made using physical generating capacity and are not considered to be a substitute for locational requirements for ICAP. So while LIPA under current rules can not purchase ICAP from New England and count that toward its 93% locational requirement, LIPA would, under current market structures, be able to offer its physical generating capacity for sale to customers in New England via transmission interconnections between New York and New England.

2. Loss of Operating Reserve Revenues

With respect to LIPA's $5.7 million estimated loss of sales in the operating reserve market, the examiners concluded that the loss is tied to LIPA's inability to access the transmission system because it expects to be outbid by the Applicant. Also, the examiners stated that LIPA ignored anticipated changes, such as increased competition from other providers, in the operating reserves market that could reduce LIPA's sales even if the Project were not built.

Operating reserves consist of generating capacity that is held ready to provide energy either immediately upon notice, or within 10 or 30 minutes of notice (depending on the characteristics of the plant), to substitute for the unexpected loss of a generator that is providing energy, or to meet an unexpected increase in electric demand. Adequate operating reserves are critical to maintaining the reliability of electric service.

The NYISO operates a market for operating reserves consisting of the three different services, which are individually selected for each hour of every day. Spinning reserves consists of the unloaded portion of a generator that otherwise has been selected and is on-line to provide energy into the market. The 10- and 30-minute non-synchronized reserves are provided from generating units that are capable of start-up and synchronization with the electric grid within 10- or 30-minutes, respectively, after receiving an instruction from the NYISO. The 10- and 30-minute non-synchronized operating reserves requirements are typically met by combustion turbines that are capable of ignition and loading to the grid within the applicable timeframes.

LIPA observes that the NYISO selects individual units for 10- or 30-minute non-synchronized reserves for each hour and makes a payment for the availability, not for the output, based on the bid of the last unit selected for that hour. LIPA explains that the energy must be capable of reaching the remainder of the New York Control Area, when the NYISO calls upon that unit to generate energy; if the energy cannot be delivered when the unit is called upon, the unit cannot be eligible for selection in the day ahead operating reserve market. If the Project is chosen in the day ahead market to generate energy and uses the last increment of transfer capability across the Holbrook Interface, LIPA notes, the NYISO would then be precluded from selecting any additional generation located east of Holbrook to act as operating reserves because LIPA's output cannot be delivered across the interface. Thus, LIPA argues that the key issue is whether the unit is available

to be called upon by the NYISO, and it is not a question of being "outbid."

Brookhaven responds that the Federal Energy Regulatory Commission (FERC) has already issued an order requiring the NYISO to develop procedures that will allow head-to-head competition for available transmission capacity between suppliers of energy and suppliers of operating reserves:

> [We] do not understand why procedures cannot be developed to permit the ISO to procure ancillary services from western suppliers, even during constraints, if it would lead to overall lower costs of energy and ancillary services, as several commenters suggest . . . Accordingly, we shall direct the NYISO to develop procedures to maximize access to western suppliers of 10 minute reserves.[133]

In such circumstances, Brookhaven notes that the required changes to the NYISO's tariffs permitting such competition are likely to be in effect by the time the Project becomes operational in October of 2004. Thus, Brookhaven concludes that the examiners were correct in stating that LIPA's loss of revenues may result from it being outbid.

With respect to the question of whether LIPA would continue to earn the same level of revenues from operating reserves if the Project were not constructed, LIPA relies on its historically-substantial position in the New York operating reserve market. For the 12-month period ending in October 2001, LIPA earned $25.8 million in revenues from selling operating reserves to the NYISO, 42% of which was obtained from units east of the Holbrook interface. LIPA determined that, if the Project operates, only 360 MW of the approximately 530 MW of capacity located at Holtsville would be capable of selection as operating reserves. The associated revenue loss of $5.7 million, LIPA claims, is conservative because it does not include the effect on market price of eliminating the LIPA-controlled capacity from

[133] New York Independent System Operator, Inc., 91 FERC ¶61,218 at p. 61, 799-800 (2000)(footnote omitted), order on rehearing, 97 FERC ¶61,155 (2001).

the operating reserve markets, nor the NYISO-computed profit uplift costs associated with operating reserves.

LIPA deems it speculative to assume that the addition of other units on Long Island actually will reduce the revenues to be earned by LIPA. Instead, it emphasizes that the Project itself does not add non-synchronized operating reserve capacity, nor is there evidence about the price at which LIPA currently bids its operating reserve into the market. Thus, LIPA contends the Recommended Decision could make no finding whether other generation will be able to underbid LIPA.

Brookhaven responds that LIPA's reliance on historic data ignores future changes. The Applicant notes that approximately 388 MW of existing generating resources located east of Holbrook are attributable to two Port Jefferson Steam Turbines, which would lose their "must run" status because LIPA's own study indicates that the Port Jefferson Steam Turbines would become uneconomical to operate once the Project is online. Thus, Brookhaven reasons 388 MW of transmission capacity across the Holbrook Interface would be freed up. Inasmuch as LIPA admits that with the Project operating, it will be able to sell 360 MW of the 530 MW total capacity of the Holtsville gas turbines on which its $5.7 million loss of operating revenues is based, Brookhaven continues, only an additional 170 MW of capacity over the Holbrook Interface would be required to avoid this revenue loss in its entirety.

According to the Applicant, LIPA's alleged loss of operating reserves revenues would not occur, if even one of the Port Jefferson units, which has a capacity of approximately 190 MW, were forced into retirement. Alternatively, Brookhaven claims, LIPA can avoid this loss by simply using the new submarine cable to New England to export the output of the Port Jefferson units if they can be economically operated to supply energy. Finally, Brookhaven challenges LIPA's assertion that the Project adds nothing to the capacity available to provide non-synchronized operating reserves. The Applicant points out that the Project includes 40 MW of "steam augmentation" which can be sold as spinning reserves.

We find LIPA's arguments unpersuasive because it relies strictly on historic facts and does not consider significant future changes. For example, the NYISO is under order to develop procedures that will allow competition for available transmission capacity between supplies of energy and operating reserves. LIPA also ignores the likely impacts of the Project on the must-run status and economics of operating the Port Jefferson units, the opening of markets via the submarine cable to New England, and increase competition from other providers as noted by the DPS Staff and reflected in the Recommended Decision. Consequently, we affirm the examiners' conclusion.

3. Transmission System Upgrade Costs

To mitigate the alleged bottling effect, LIPA contends transmission system upgrades costing an estimated $183.4 million would be necessary. The $183.4 million cost figure is a "planning level" cost estimate. If these upgrades were constructed, LIPA notes, all resources east of the Holbrook Interface, including the 580 MW Project, could be fully dispatchable at near-peak (i.e., 90% of peak) and peak system conditions in 2005. If LIPA were required to invest in the upgrades, it estimates that they would cost it $39 million annually (equivalent to an approximately 1.6% increase in retail rates).

The examiners agreed that the addition of the upgrades would alleviate the constrains across the Holbrook Interface, but maintained that it would be counter-productive to adopt LIPA's proposal, which would allow existing more expensive and more polluting facilities to continue to operate.

The examiners also rejected the Applicant's argument that transportation of its power would be subject to the NYISO's Open Access Transmission Tariff, which is under the jurisdiction of FERC, and, as such, FERC has exclusive jurisdiction over those rates. Brookhaven viewed LIPA's inclusion of these costs as an interference with FERC's exclusive jurisdiction under the Federal Power Act (FPA) because LIPA claims that construction of the Project, under the NYISO's present rules, would result in

wholesale charges for electricity that LIPA alleges are not just and reasonable and would result in injury to retail customers on Long Island. The Recommended Decision set forth a number of cases that the Applicant presented in support of its position.

In its brief on exceptions, Brookhaven agrees that, as a general rule, there is no conflict between our exclusive jurisdiction over generation siting and the FERC's exclusive jurisdiction over wholesale sales and transmission services, but the Applicant claims this general rule does not apply in this case for the simple reason that LIPA has deliberately placed the provisions of the NYISO's FERC-approved tariffs at issue in this proceeding. According to Brookhaven, the essence of LIPA's claim is that these FERC-approved tariff provisions are now and are likely to remain unjust and unreasonable, and consequently, that we should deny certification of the Project to protect consumers on Long Island from these unreasonable tariff provisions. The Applicant argues that, we have broad discretion to protect the public interest, but that authority does not extend to entertaining LIPA's collateral attack on FERC's determination of just and reasonable tariff provisions for the NYISO.

LIPA argues that the very essence of our "public interest" responsibility under Section 168(2)(e) of the Public Service Law is to weigh all of the socioeconomic and other costs of the Project, including the costs of externalities, against its benefits. According to LIPA, Brookhaven proffers no logical explanation as to why the socioeconomic costs and negative competitive impacts of the Project cannot be considered by us.

LIPA contends that there is no Supremacy Clause preemption issue presented because that can arise only when a state and federal agency (or legislature) seek to regulate the same area. Here, LIPA notes, our "public interest" authority to approve or disapprove proposed generating facilities does not conflict with FERC's authority in any way since the FPA specifically excludes the regulation of electric generating facilities (which includes the certification thereof) from FERC's jurisdiction. 16 U.S.C. §824(b)(1).

We note that issues with respect to specific FERC tariff provisions are for FERC to resolve. We agree, however, with the examiners and LIPA that our consideration of the socioeconomic impacts of a new transmission line in this case does not conflict with FERC's jurisdiction. Having said that, we agree with the examiners that it would be counter-productive to handicap developers of generating facilities by considering the costs of new transmission systems in deciding whether to grant them Certificates. The fact that transmission upgrades could be built to advantage existing generators that are less efficient, more expensive, and more polluting is not a persuasive consideration in deciding whether a new, state-of-the-art generating facility should be certificated. LIPA, as a public authority, may wish to explore upgrades in its transmission system as a separate matter.

In sum, LIPA's arguments are founded upon the expectation that Brookhaven would be a highly-efficient generator that will successfully compete in the marketplace for electricity supply. The fact that LIPA or other generation owners may need to undertake measures to increase their competitiveness is a function of the marketplace that is expected to provide lower-cost and less-polluting electricity to consumers on Long Island.

C. Public Interest

While the examiners noted that the public interest is affected by many factors, in this section they concentrated on the expected production cost savings and the impact those savings would have on wholesale electric prices. The examiners presented a description of the differences among the Applicant's estimated $61 million production cost savings, DPS Staff's $51 million projected savings, and LIPA's $27 million. The examiners concluded that, even if LIPA's estimate is adopted, the $27 million in savings would be in the public interest, and that the savings would ultimately be reflected in rates.

1. Projected Production Cost Savings

In Brookhaven's application, it estimated annual production cost savings of $150 million based on General Electric's Multi-Area Production Simulation (MAPS) model. During the course of the proceeding, the Applicant revised its MAPS analysis to reflect updated conditions such as the installation of ten 44 MW "fast track" combustion turbine generators on Long Island, and to correct errors such as a heat rate of 6,900 BTU/kW instead of the 8,000 BTU/kW originally reflected in the study. Brookhaven's updated analysis shows an annual production cost savings of $61 million.[134]

MAPS is a planning model designed to dispatch generating units in a manner reasonably representing the dispatch of units by the NYISO, i.e., based upon minimizing total bid costs while meeting all reliability requirements and accounting for impacts such as transmission constraints. The MAPS analysis is based upon estimates of the operating costs of the units (for the most part these are avoidable fuel and variable operation and maintenance costs) and simulates entering bids based upon their avoidable operating costs consistent with the incentives provided by the NYISO-coordinated energy market.

LIPA ran its own MAPS analysis, which showed an approximately $27 million annual savings.[135] That analysis differed from Brookhaven's in several respects. LIPA included a 260 MW combined-cycle plant (KeySpan Spagnoli Road Energy Center), modeled Port Jefferson Units 3 and 4 and Northport Unit 1 to burn gas year round, operated Port Jefferson Unit 3 as a "must run" facility, and did not reduce the heat rate of the Project. DPS Staff also ran a MAPS analysis identical to LIPA in all respects except one - it did not include the Spagnoli

[134] Brookhaven's MAPS analysis also predicts annual reductions in emissions of 1,283 tons of NO_x and 678 tons of SO_2 on Long Island.

[135] LIPA's MAPS analysis also predicts annual reductions in emissions of 502 tons of NO_x and 564 tons of SO_2 on Long Island.

Road unit. DPS Staff analysis showed that the Project would produce savings of $51 million annually.[136]

Based on the analyses presented, it is apparent that the inclusion of the Spagnoli Road facility is responsible for $24 million of the difference between Brookhaven's and LIPA's estimates of annual cost savings. The burning of gas year-round at Port Jefferson Units 3 and 4 and Northport Unit 1, the "must run" status of a unit at Port Jefferson, and the higher heat rate attributed to the Project account for the remaining $10 million difference. Each assumption will be discussed below.

On January 28, 2002, KeySpan Energy Development Corporation filed an application for the certification of the Spagnoli Road unit, seeking authority to construct and operate a 260 MW generating plant on Long Island. LIPA included the Spagnoli Road plant in its MAPS analysis to reflect the most accurate representation of system conditions for the year modeled to estimate energy cost savings. The examiners assumed for the sake of argument that the Spagnoli Road unit should be considered and concluded that LIPA's estimate of a $27 million annual savings in production costs would be in the public interest.

Brookhaven takes exception with the inclusion of the Spagnoli Road unit in the computation of production cost savings. Without it, there would be an additional $24 million in annual savings. Brookhaven notes that it and DPS Staff entered into a stipulation addressing this issue on December 1, 2000, which provided that Brookhaven would include in its base case all facilities with pending Article X applications prior to the date that Brookhaven filed its application. Inasmuch as KeySpan's Article X application for the Spagnoli Road Facility was not filed until January 28, 2002, over seven months after the June 25, 2001 date of Brookhaven's own Article X application

[136] DPS Staff's MAPS analysis also predicts annual reductions in emissions of 796 tons of NO_x and 805 tons of SO_2 on Long Island.

filing, the Applicant would not consider this unit's impact. According to the Applicant, if we were to accept LIPA's suggestion that the Spagnoli Road facility should be included in the base case, then we would create problems for all future Article X filings because either facility would have a lesser impact if the other were considered as part of the base case than if it were excluded.

Indeed, if we were to accept LIPA's claims, Brookhaven suggests that it could well result in the rejection of all competing applications on the ground that each proposed project would produce little or no additional energy cost savings assuming all of the other proposed projects also on the drawing board move forward. The Applicant requests that we not erect such a "Catch 22" obstacle to needed new investment in generation in New York State.

We disagree with the Applicant that inclusion of the impacts of subsequently filed applications will create an obstacle to investment in new generation. We recognize that either facility may have a lesser impact if the other were considered as part of the base case than if it were excluded, but we will rely on the market forces in a competitive environment to ultimately determine which unit should be built. Our obligation is to ensure that each application meets the requirements of PSL §168, which states in part that "the construction and operation of the facility is in the public interest."[137]

In the instant case, Brookhaven claims that the public interest standard should consider the projected production cost savings. We believe that any such projection should, as accurately as possible, assess future conditions. No doubt, if the KeySpan unit is approved, it would have a large impact on the projected savings. Since the record has been developed on this subject, in accordance with procedures set forth by the examiners, we will consider the potential impacts of the

[137] PSL §168(2)(e).

Spagnoli Road Unit in our overall assessment of the public interest.

As far as the remaining $10 million difference in project savings is concerned, we note that there is no breakdown of the costs among the various adjustments. First, LIPA assumes that various generating units would operate on gas year-round because the cost of gas is currently cheaper than oil. Brookhaven notes that this assumption is not supported by historic generation patterns. Therefore, the Applicant rejects LIPA's assumption.

Second, Brookhaven claims that the "must run" status of Port Jefferson Unit 3 is questionable. Brookhaven argues that the Project would supply the necessary leading and lagging reactive voltage support for eastern Long Island and that LIPA's own MAPS study indicates that the two Port Jefferson Steam Turbines (which have a capacity of 388 MW) would become uneconomical to operate once the Project is online. LIPA responds that its contract with KeySpan Generation that applies to these units does not provide for retirements except in the case of a major failure of a unit that the parties agree should not be repaired. LIPA adds that Brookhaven's reliance on MAPS runs is misplaced because the MAPS analyses relate to the energy markets and ignore the economic value that LIPA controlled units have in the installed capacity and ancillary services markets.

Third, Brookhaven corrected its original MAPS run, which used an 8,000 BTU/kWh heat rate as a simplifying assumption that LIPA adopted in its runs. The correct value, the Applicant states, is 6,900 BTU/kWh.

In the absence of a value assigned to each of these adjustment, we will adopt, for the sake of argument, the examiner's assumption that the $10 million adjustment is valid. Even accepting these adjustments, the Project would at least produce $27 million in production cost savings. Such savings are likely to translate into lower bids in the competitive market, and, in turn, lower rates for consumers. Accordingly, we find that the production cost savings resulting from the Project would be in the public interest.

2. Impact on Wholesale Electric Prices

In the Recommended Decision the examiners refused to adopt LIPA's proposal that only 10% or $2.7 million of the production cost savings would flow through to customers.

In its brief on exceptions, LIPA cites three reasons supporting its position. First, LIPA believes Brookhaven would be able to employ a "bidding strategy" in the bid-based energy market and capture for itself most of the production cost differential between its unit and the next most expensive unit on Long Island. LIPA repeats its claim that the Applicant would not flow through the full $27 million in production cost savings predicted by its MAPS analysis. According to LIPA, MAPS analyses assume that generators bid their generation into the energy market at cost, but LIPA emphasizes that Brookhaven is not required to bid its generation into the energy market at cost, and that a profit-seeking developer will use the competitive markets to maximize returns. To the extent that Brookhaven bids above its costs, but low enough to be dispatched by the NYISO, LIPA reasons, the Applicant can maximize its revenues and maintain its level of output. LIPA assumes this bidding strategy would eliminate most of the impact on market prices from the Project and consumers would realize only $2.7 million of the annual savings.

Brookhaven observes that LIPA offered no analysis to support its assumption that it would retain 90% of the savings and LIPA did not set forth an analysis or study demonstrating that the market conditions underlying DPS Staff's proffered model was invalid. Instead, LIPA claims that DPS Staff relied on an analysis prepared in 1996 before the commencement of the NYISO operations and before LIPA was established. DPS Staff observes that, if a generator bids more than its production cost, it will still only be paid the market price, unless its bid exceeds the market price - in which case it would not be selected and would forgo a profitable sale. DPS Staff concludes

that the generator's best strategy is generally to bid its production costs and rely on the NYISO to dispatch it.[138]

On this issue, the examiners found:

> While there is some truth to LIPA's first claim that not all of the savings would immediately flow through to the power purchasers, the savings are available and ultimately would be reflected in rates. The reasoning behind this conclusion is the straightforward economic theory that supply and demand will come into balance when the market price reflects the risks and rewards of production and use of the goods (electricity in this case). If the ratio of price to production cost is too high, the market will attract more producers which will exert downward pressure on the price. In fact, this is already happening; Brookhaven is seeking to enter the market.[139]

We adopt the examiners' findings.

Second, LIPA asserts that the existence of its contractual "hedges" (principally the Power Supply Agreement with KeySpan Generation and certain Transmission Congestion Contracts), would limit the benefit to its customers to approximately $2 million of the MAPS-indicated $27 million savings. LIPA notes that DPS Staff agreed that in the "short run," LIPA's hedging arrangements mean that the cost savings projected by the MAPS analysis will not be passed through to Long Island consumers, but LIPA states that the Power Supply Contract does not terminate until 2013, and its ownership of the Nine Mile Point Two nuclear facility, and other of LIPA's bilateral contracts are long term in nature.

Brookhaven disagrees with LIPA's claim that consumers are precluded by its existing supply arrangements from achieving

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[138] A more complete discussion of these incentives, DPS Staff states, can be found in the testimony of Professor William Hogan in the NYISO filing before the FERC, Docket Nos. ER 97-1523-000, OA97-470-000, and ER97-4234-00, January 31, 1997.

[139] Recommended Decision, pp. 84-85.

the savings produced by the Project. The Applicant points to LIPA's brief on exceptions where it states:

> Further, as of February 1, 2002, virtually all of LIPA's 1.1 million customers may choose to receive their electric commodity from competitive providers.[140]

In such circumstances, Brookhaven reasons, LIPA's own electricity purchasing and/or hedging arrangements cannot possibly prevent LIPA's retail customers from lowering their aggregate energy costs.

The examiners found that LIPA should not be allowed to invoke its own electricity supply arrangements with other, higher priced supplies as a reason to reject the Project:

> If such a practice were uniformly applied, the near monopoly position of KeySpan Generation on Long Island would be left intact and the benefits to the consumer of lower production costs and an improved environment would be needlessly delayed.[141]

Here again, we adopt the examiners' findings.

Third, LIPA claims that the Applicant in Section 12.4.3 of its application reduced its own MAPS-indicated savings figure by 80% in order to accurately assess the "economic impact" of the Project's energy cost savings.

We observe that this assumption in the application is followed by a parenthetical explanation that in this particular computation no credit is taken for the reductions in the price of bilateral contracts. Consequently, we cannot conclude that only 20% of the benefit would be realized by consumers as LIPA suggests.

In sum, we find that the Project would result in substantial savings to consumers as a result of its entry into the competitive market for electricity and, as such, that the Project would be in the public interest, considering its

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[140] LIPA Brief on Exceptions at 3 (footnote omitted).

[141] Recommended Decision, p. 85.

environmental impacts, which would be minimized and slight, and its benefits to the environment through reduced air pollution.

3. Consistency with State Energy Plan

According to the examiners, consumers would benefit from the Project's lower production cost and lower emissions, which the examiners found consistent with the goals of the State Energy Plan.

LIPA disagrees, pointing out that the State Energy Plan provides for "encouraging more efficient and reliable energy systems emphasizing longer term commitments to improving system infrastructure" (emphasis added) and establishes as an "Energy Policy Strategy" in promoting competition the following: "Support and foster the development, maintenance, and improvement of an adequate energy supply infrastructure throughout the State to ensure uninterrupted supplies of energy are delivered to New York consumers . . ." (emphasis added).[142] LIPA asserts that in light of the Project's significant bottling effect, and the lack of any proposal by Brookhaven to mitigate that impact, the Project is not consistent with the objective and strategy of the State Energy Plan quoted above.

According to Brookhaven, LIPA's concerns about the transmission constraints have already been addressed by FERC, which has decided that new market entrants are not required to shoulder these burdens. Furthermore, the Applicant notes that state regulation in this field is preempted by FERC's exclusive jurisdiction under the FPA over rates for wholesale transmission service.[143]

Next, Brookhaven observes that LIPA ignores the examiners' recommendation that Brookhaven's motion for a declaratory ruling that the Project has been selected pursuant to an approved procurement process be granted. The Applicant maintains that a demonstration of a facility's consistency with

[142] See State Energy Plan, pp. 1-13, 1-14.

[143] See, e.g., Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953, 966 (1986).

the State Energy Plan is not required where a project has been selected pursuant to an approved procurement process (PSL §168(2)(a)). Since no party, including LIPA, opposed that motion or the recommendation with respect to the motion, Brookhaven claims, LIPA's exception lacks any legal foundation.

Although we recognize that the Project's operation may cause the KeySpan units east of Holbrook not to run, we attribute this to competition, and not to "bottling" at the Holbrook Interface. We believe that the Project would increase competition by reducing KeySpan's monopolistic hold on the wholesale generation market on Long Island. Because the introduction of competition and reductions in energy generation costs and air emissions are goals of the State Energy Plan, we find that the Project is consistent with the State Energy Plan.

4. Destructive Competition

The examiners expressed the opinion that construction and operation of the Project would not lead to destructive competition. Instead, they concluded that the Project would lessen the near-monopoly position of KeySpan Generation on Long Island and provide consumers with the competitive benefits of lower production costs and an improved environment.

LIPA excepts, explaining that the Project would be sited in a location such that its operation will cause a transmission constraint. According to LIPA, the Project would prevent competitor's generation from being useable to meet installed capacity and operational needs of the New York City Control Area, which cannot be characterized as "promoting competition" in the public interest. In addition, LIPA points out that two key objectives of competition in the wholesale electricity markets are to increase the supply of capacity and energy resources and to lower electricity costs to consumers. In this case, LIPA claims, the Project, due to its bottling effect on LIPA's resources, would effectively remove an equivalent amount of installed capacity and at least 200 MW of operating reserves from the market.

As to the second objective of lowering electricity costs to consumers, LIPA, as set forth above, claims that the

Project's actual effect would be to significantly increase electricity costs to Long Island consumers. For these reasons, LIPA states that the Project, as proposed, would not foster and promote competition in the public interest.

Moreover, LIPA believes the examiners erred by focusing on reducing the near-monopoly position of KeySpan Generation on Long Island. LIPA argues this was an error because LIPA, a nonprofit, New York State governmental entity, controls the KeySpan units for market purposes pursuant to long-term contracts. And the contracts themselves, LIPA notes, have been twice determined by FERC to be in the public interest, and have also been approved by the PSC.

Brookhaven responds that LIPA has merely repeated its claims that the Project would impose costs on LIPA and its customers by bottling $47.6 million in installed capacity and that LIPA's consumers will actually realize only a small fraction of the expected production cost savings. In addition, Brookhaven explains even if FERC has held LIPA's power supply agreement with KeySpan to be in the public interest, FERC has never endorsed LIPA's efforts to invoke that power supply agreement as a justification for precluding entry by new competitors like Brookhaven into a highly concentrated market. Moreover, the Applicant continues, FERC's approval of that restructuring arrangement does not preempt or limit in any way the authority of the State of New York to promote competition and new entry into all markets for generation services in the State.

We have addressed and rejected LIPA's arguments with respect to the bottling effect and the impacts on the cost of electricity for Long Island consumers. Our findings do not support LIPA's claim that construction and operation of the Project would lead to destructive competition. In addition, we cannot conclude that LIPA's position as a nonprofit entity, or its long-term contracts with KeySpan, should be held against Brookhaven in its pursuit of a Certificate for this Project. Brookhaven, as a new entrant into the power market on Long Island, would reduce market concentration in that market, thus

improve competition. The Project would also result in production cost savings which, as already discussed, would benefit consumers in the form of lower rates.

5. Air Quality Improvement

As described below in Section V (A), the proposed facility would meet all applicable air quality standards under federal and state clean air statutes and regulations. That finding is predicated upon the Applicant obtaining emission reduction credits for emissions of nitrogen oxides (No_x) at the rate of 1.15 to one. That is, for every one hundred tons of No_x that will be emitted by the facility, emission reductions equaling 115 tons must be obtained. In fact, the Applicant has secured the required emission reduction credits (ERCs) in the amount of 148.9 tons.[144] Moreover, LIPA's MAPS analysis, which incorporated conservative values for the actual operation of the Project, showed that net annual reductions of 502 tons of No_x and 564 tons of SO_2 would result if the plant were constructed and operated in conformance with the DEC permits and this Certificate. Accordingly, we may conclude that the facility is in the public interest as well because it would provide a net improvement to air quality.

V. OTHER REQUIRED FINDINGS NOT CONTESTED

A. Air Resources

Under PSL Article X, we must make findings specifically with regard to the impact of construction and operation of the Project on air resources. These findings are based upon compliance with the federal Clean Air Act and ECL Article 19, as well as their respective implementing regulations.

Brookhaven's application addresses the Project's impact on air quality, including the cumulative effect of air emissions from existing facilities and the potential for significant deterioration in local air quality. No parties

[144] Recommended Decision at 9.

challenge the findings presented in the Recommended Decision concerning the probable environmental impacts on air quality, or that the facility would not emit any air pollutants in contravention of applicable air emission control requirements or air quality standards.

B. Water Resources

Under PSL Article X, we must make findings specifically with regard to the impact of construction and operation of the Project on water resources. These findings are based, in part, upon compliance with the federal Clean Water Act and ECL Article 17, as well as their respective implementing regulations.

Brookhaven's application addresses the Project's potential impacts on water resources, including potential impacts on the environment, ecology, water quality, fish and other marine life, and wildlife. Process water would be supplied by the Suffolk County Water Authority. The Project has been designed to allow the Yaphank Sewer Treatment Plant to accept the Project's process and sanitary wastewater.

With respect to storm water, the Applicant seeks a SPDES permit from the DEC. As explained above the DEC reviewed Brookhaven's application for a SPDES permit, and subsequently issued it.

No parties challenge the findings presented in the Recommended Decision concerning the probable environmental impacts on water quality, and that the facility would not discharge any effluent in contravention of DEC standards.

C. Terrestrial Ecology and Earth Resources

The application materials consider the potential environmental impacts associated with the construction of the proposed facility on plants and wildlife. Under PSL Article X, we must make findings concerning the potential impacts related to the construction and operation of the proposed facility on the environment, ecology and wildlife. PSL Article X requires consideration of the Project's potential impacts on agricultural lands, ecosystems, soils, geology, and seismology. The probable

environmental impacts to these resources are discussed in the application and other related materials. No parties challenge the findings presented in the Recommended Decision concerning these topic areas, and we, therefore, adopt the examiners' findings and conclusions.

VI. STATUTORY DETERMINATIONS

We find and determine that:

1. On the basis of the findings and determinations in this decision and the declaratory ruling of the Public Service Commission in Cases 99-E-0084 and 99-E-0089,[145] the Project has been selected pursuant to an approved procurement process PSL §168(2)(a)(ii)].

2. Based upon the full record in this proceeding, the nature of the probable environmental impacts, including predictable adverse and beneficial impacts, of the Project on the environment and ecology; public health and safety; aesthetics, scenic, historic, and recreational values; forest and parks; air and water quality; and fish and other marine life and wildlife, will be as described in the examiners' Recommended Decision [PSL §168(2)(b)].

3. For the reasons set forth in this decision and the examiners' Recommended Decision, the Project, if constructed and operated in accordance with all the Certificate terms set forth in this decision and the terms of permits issued by other agencies, will minimize adverse environmental impacts, considering the state of available technology and the interest of the state respecting aesthetics, preservation of historic sites, forest and parks, fish and wildlife, viable agricultural lands, and other pertinent considerations [PSL §168(2)(c)(i)].

4. For the reasons set forth in the examiners' Recommended Decision, the Project, if constructed and operated in accordance with all the Certificate terms set forth in this

[145] Cases 99-E-0084 and 99-E-0089, Petitions of Sithe Energies, Inc. and Ramapo Energy Limited Partnership, Declaratory Ruling Concerning Approved Procurement Process (issued August 25, 1999).

decision and the terms of permits issued by other agencies, will be compatible with public health and safety [PSL §168(2)(c)(ii)].

5. For the reasons set forth in this decision and the examiners' Recommended Decision, the Project, if constructed and operated in accordance with all the Certificate terms set forth in this decision and the terms of permits issued by other agencies, will not discharge any effluent in contravention of DEC standards; and, where no classification has been made of the receiving waters, the Project will not discharge effluent unduly injurious to fish and wildlife, the industrial development of the state, or the public health and public enjoyment of the receiving waters [PSL §168(2)(c)(iii)].

6. For the reasons set forth in this decision and the examiners' Recommended Decision, the Project, if constructed and operated in accordance with all the Certificate terms set forth in this decision and the terms of permits issued by other agencies, will not emit any air pollutants in contravention of applicable air emission control requirements or air quality standards [PSL §168(2)(c)(iv)].

7. The Project does not include a solid waste disposal facility and is not expected to generate hazardous waste; however, any hazardous wastes that are generated will be disposed of properly [PSL §168(2)(c)(v) and (vi)].

8. For the reasons set forth in this decision and the examiners' Recommended Decision, the Project, if constructed and operated in accordance with all the Certificate terms set forth in this decision and the terms of permits issued by other agencies, will operate in compliance with all applicable state and local laws and associated regulations except local laws, ordinances, regulations, or requirements specified herein before that we find to be unreasonably restrictive in view of the existing technology or the needs of or costs to ratepayers located inside or outside the municipality that enacted such local laws, ordinances, regulations, or requirements [PSL §168(2)(d)].

9. For the reasons set forth in this decision and the examiners' Recommended Decision, the construction and operation of the Project, if constructed and operated in accordance with all Certificate terms set forth in this decision and the terms of permits issued by other agencies is in the public interest, considering the environmental impacts of the facility and reasonable alternatives. [PSL §168(2)(e)].

We therefore grant to Brookhaven Energy, L.P., a Certificate of Environmental Compatibility and Public Need for the construction and operation of an 580 MW natural gas-fired electric generating facility at the Town of Brookhaven site, subject to the terms, conditions, and limitations set forth in this Opinion and Order.

The New York State Board on
Electric Generation Siting and the
Environment for Case 00-F-0566 orders:

1. The Recommended Decision of Examiners Walter T. Moynihan and Daniel P. O'Connell, to the extent consistent with this Opinion and Order, is adopted and, together with this Opinion and Order and the terms of the topic agreements submitted by the parties in this proceeding, constitutes the decision of this Board in this proceeding.

2. Subject to the conditions appended to this Opinion and Order and the terms of the topic agreements submitted by the parties in this proceeding, a Certificate of Environmental Compatibility and Public Need is granted pursuant to Article X of the Public Service Law to Brookhaven Energy, L.P. (the Applicant) for the construction and operation of an 580 MW gas-fired electric generating facility on the Town of Brookhaven site in Suffolk County, provided that the Applicant files, within 30 days after the date of issuance of this Opinion and Order, a written acceptance of the Certificate pursuant to 16 NYCRR §1000.14(a).

3. Upon acceptance of the Certificate granted in this Opinion and Order or at any time thereafter, the Applicant shall serve copies of its compliance filing(s) in accordance with the requirements set forth in 16 NYCRR §1003.3(c) and Certificate

Condition II.D. The compliance filings shall be served on any party who notifies the Secretary and the Applicant of its desire to receive such service within thirty days of the issuance of this Certificate. Pursuant to 16 NYCRR §1003.3(d), parties served with the compliance filing may file comments on the filing within 15 days of the service date of the compliance filing.

4. This proceeding is continued.

By the New York State Board on Electric Generation Siting and the Environment for Case 00-F-0566

(SIGNED) JANET HAND DEIXLER
Secretary to the Board

APPEARANCES

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BROOKHAVEN ENERGY PROJECT
DPS CASE 00-F-0566

PROPOSED CERTIFICATE CONDITIONS
January 30,2002

I. Project Authorization

A. The Certificate Holder is authorized to construct and operate the Project, including associated interconnects, as described in the Application and the *Site Development Plan* accompanying the Application, except as waived, modified or supplemented by this Certificate or other permits.

B. The Certificate Holder is responsible for obtaining a State Pollutant Discharge Elimination System ("SPDES") permit for storm water discharge to the groundwater aquifer, a Prevention of Significant Deterioration ("PSD") permit and a Title V permit under the Clean Air Act ("CAA"), and other approvals and permits as specified in the Application.

C. The Project shall be designed to operate and be operated in compliance with all applicable federal and state laws and regulations. Facility plans and specifications shall be prepared in conformance with applicable requirements of the New York State Uniform Fire Prevention and Building Code and shall be certified by a registered engineer/architect. Final plans to be submitted as compliance filings are addressed in Section II.C.

D. The Project shall be designed to operate and be operated in compliance, to the fullest extent practical and subject to the exceptions below, with all applicable laws and regulations of the Town of Brookhaven.

(i) The Project shall be designed to operate and be operated in compliance with all applicable local laws and regulations, as described in Section 10.4 of the Application.

(ii) The Certificate Holder is authorized to construct the following buildings in excess of 50 feet: generation buildings, HRSGs, and demineralized water tank, all at approximately 72 feet, as shown on the *Site Development Plan.* Certificate Holder is authorized to construct additional structures in excess of 50 feet: air-

cooled condensers (approximately 90 feet), electrical transmission structures including lightning rods (approximately 100 feet).

E. The Certificate Holder is authorized to enter into an interconnection agreement with the Long Island Power Authority for interconnection of the Project facilities to the Brookhaven-to-Holbrook and Brookhaven-to-Holtsvile 138 kV electric transmission circuits adjacent to the site, as described in Section 8 of the Application.

F. The Certificate Holder is authorized to connect the Project facilities to (1) the Keyspan gas transmission system adjacent to the site, as described in Section 9 of the Application, and/or (2) the proposed Islander East project (or similar project) provided the Islander East project (or similar project) has undergone appropriate review and received necessary approvals for construction and development.

G. The Certificate Holder shall abide by a standard agreement for process water supply with the Suffolk County Water Authority, which standard agreement shall be submitted as part of a compliance filing.

H. The Certificate Holder is authorized and required to connect to the Suffolk County DPW's Yaphank Sewer Treatment Plant, but only upon the formation of a sewer district. At such time, the Certificate Holder shall abide by a standard agreement for sewer connection with the Suffolk County DPW, which standard agreement shall be submitted as part of a compliance filing. See Section XII.

II. General Conditions

A. The Project shall be constructed, operated and maintained as set forth in the Application and other submissions, and as indicated by the Certificate Holder in stipulations and agreements during this proceeding, except as these may be waived, modified or supplemented by the Board, and except as set forth in conditions contained in the SPDES, Title V Air and PSD Permits issued by the New York State Department of Environmental Conservation ("NYSDEC").

B. The Certificate Holder shall submit a schedule of all plans, filings and other submissions to the Board required in the Certificate Conditions. The Certificate Holder shall coordinate the schedule for submitting Compliance Filings with the relevant state agencies having jurisdiction over such Compliance Filings. The Schedule shall include at a minimum, a cross-referenced table showing the applicable Certificate Condition Number, an abbreviated description of the Certificate Condition, the description of the Compliance Filing Submittal, the dates drafts will be submitted, the Formal Scheduled Submittal Date and any Updated Filing Dates. Any abbreviations should be set forth in a

legend. The Schedule pages shall be numbered and include on each page the issuance date.

C. No tree clearing, earth moving or site and civil construction which is the subject of a licensing package that is part of the Compliance Filing, or of a submission required by the SPDES Permit, or by the PSD and/or new source review approvals, may begin before the Board has approved the particular Licensing Package or submission, except for research, surveying, any necessary soil borings and the preparation and use of a temporary access road from Sills Road and related activities necessary to prepare final design plans. At a minimum, there shall be a licensing package submitted to the Board describing the protocol for vegetation clearing, grading and proposed layout of the Project Site for the early stage of construction. See Section VI.B.

D. The Certificate Holder shall submit a Compliance Filing consistent with Part 1003 of the Article X regulations. A "licensing package" is defined herein as a component of the Compliance Filing and includes all plans or other submissions required by these Certificate Conditions. Licensing packages may be submitted individually or on a combined basis. All filings shall be served on all active parties that have advised the Board of their desire to receive a copy of such filings.

E. Operation of the Project shall be in accordance with the SPDES, PSD and Title V Air Permits.

F. These Certificate Conditions shall be made contract requirements for the construction contractors as applicable.

G. All on-site personnel shall go through site initiation training, which will include important environmental protection practices that need to be communicated broadly to all personnel. Training will be conducted by the on-site Environmental, Health and Safety officer, or equivalent, who shall be trained in environmental compliance matters.

III. Air Resources

A. The Certificate Holder shall operate the Project pursuant to the air permits issued by NYSDEC under Article 19 (6 NYCRR Part 201-6) and the PSD program (40 C.F.R. §§ 52.21 and 124), as they may be modified or amended by NYSDEC from time to time.

B. The Certificate Holder shall use natural gas as the exclusive fuel for the combustion turbines.

C. The Certificate Holder shall apply dust minimization techniques as set forth in the PSD

permit. Any dust controlling agents, other than water, that are used by the Certificate Holder in controlling fugitive dust will be approved by NYSDEC.

IV. Electric Transmission Facilities

A. The Certificate Holder shall finance such system upgrades or remedial measures as required by the NYISO Minimum Interconnection Standard and the Class of 2002 Transmission Reliability Assessment Study.

B. The Certificate Holder shall work with LIPA, and any successor Transmission Owner (as defined in the NYISO Agreement), to ensure that, with the addition of the Brookhaven Energy Project, the Brookhaven-Holtsville and Brookhaven-Holbrook 138 kV transmission lines will have system protection and appropriate communication capabilities to ensure that operation of the electric transmission system is adequate under NPCC "Bulk Power System Protection Criteria," and meets the protection requirements at all times of the NERC, NPCC, NYSRC, NYISO, and LIPA, and successor Transmission Owner (as defined in the NYISO Agreement). The Certificate Holder shall ensure compliance with applicable NPCC criteria and shall be responsible for the costs to verify that the relay protection system is in compliance with applicable NPCC, NYISO, NYSRC and LIPA criteria.

C. The Certificate Holder is authorized to construct and agrees to design, engineer, and construct transmission facilities in support of the Project as provided in the System Reliability Impact Study ("SRIS") approved by the New York Transmission Planning and Advisory Subcommittee ("TPAS"), the New York Independent System Operator ("NYISO") Operating Committee, and the NYISO 2002 Transmission Reliability Assessment Study ("TRAS"), and in accordance with the applicable and published planning and design standards and best engineering practices of NYISO, LIPA, the New York State Reliability Council ("NYSRC"), Northeast Power Coordinating Council ("NPCC"), North American Electric Reliability Council ("NERC"), and North American Electric Reliability Organization ("NAERO"), and successor organizations depending upon where the facilities are to be built and which standards and practices are applicable. Specific requirements shall be those required by the NYISO Operating Committee and TPAS in the approved SRIS and by any interconnection or facilities modification agreements.

D. The Certificate Holder shall operate the Project in accordance with the approved tariffs and applicable rules and protocols of LIPA, NYISO, NYSRC, NPCC, NERC, and NAERO, and successor organizations. The Certificate Holder reserves the right to seek subsequent review of any specific operational orders at the NYISO, New York State Public Service Commission ("NYSPSC"), the Federal Energy Regulatory Commission, or

in any other appropriate forum. The Certificate Holder shall comply with operational orders issued by NYISO, or its successor. In the event that the NYISO encounters communication difficulties, the Certificate Holder shall comply with LIPA system operator, or its successor, consistent with Section IV.H.

E. The Certificate Holder shall design, engineer, and construct the transmission interconnection such that its operation shall comply with the electromagnetic field ("EMF") standards established by the NYSPSC in Opinion No. 78-13 (issued in June 19, 1978) and the Statement of Interim Policy on Magnetic Fields of Major Electric Transmission Facilities (issued September 11, 1990), respectively.

F. The Certificate Holder agrees to comply with the applicable reliability criteria of LIPA, NYISO, NPCC, NYSRC, NERC and successors. If it fails to meet the reliability criteria at any time, it shall notify the NYISO immediately, in accordance with NYISO requirements, and shall simultaneously provide the NYS Public Service Commission with a copy of the NYISO notice.

G. The Certificate Holder shall file a copy of the following documents with the Board and the NYS Public Service Commission: all facilities agreements and interconnection agreements with LIPA and successor Transmission Owner (as defined in the NYISO Agreement); the SRIS approved by the NYISO Operating Committee; any documents produced as a result of the updating of requirements by the NYSRC; the Relay Coordination Study (which will be filed not later that 18 months prior to the projected commercial operation of the facility); and a copy of the facilities design study, including all updates .

H. The Certificate Holder shall comply with dispatch instructions issued by NYISO, or its successor, in order to maintain the reliability of the transmission system. In the event that the NYISO System Operator encounters communication difficulties, the Certificate Holder shall comply with dispatch instructions issued by LIPA, or its successor, in order to maintain the reliability of the transmission system.

V. Fuel Supply

A. The use, storage, or transportation of any fuel for the combustion turbines other than natural gas is prohibited.

B. The Certificate Holder shall file a copy of the following documents with the Board and with the NYSPSC: all precedent agreements and natural gas transportation agreements with Keyspan (or if interconnection to the Islander East project (or similar project) is pursued, all precedent agreements and natural gas transportation agreement associated

with such interconnection) and any subsequent agreements with any other gas transportation company, whether or not jurisdictional to the NYSPSC.

C. The Certificate Holder shall comply with NYSPSC's interruptible gas requirements, as applicable.

VI. Tree Clearing, Land Use & Local Laws

A Subject to the Board's ongoing jurisdiction, the Certificate Holder shall identify a parcel of land acceptable to the Town of Brookhaven pursuant to a protocol established in consultation with the Town of Brookhaven. Upon receipt of all necessary governmental approvals for the Project and to the extent the actual tree clearing exceeds 70% of the site, the Certificate Holder shall purchase and convey a suitable parcel of land equal in area to the tree clearing exceeding 70% of the site in accordance with the protocol. In the event that the Town fails to cooperate with the Certificate Holder in identifying and/or approving an offset parcel that would otherwise be required by the Town Code, the Certificate Holder shall identify an appropriate offset parcel in a compliance filing with the Board, and, subject to the Board's approval, obtain such offset parcel.

B. The Certificate Holder shall file as a compliance filing a Tree Protection Plan, based on a professional arborist's recommendations, for the facility and related or associated facilities and interconnects, including laydown or storage areas and any access roads. The Tree Protection Plan measures shall be included in the final facility design, construction plans and specifications. The Tree Protection Plan measures shall include provisions for tree protection, including tree roots, boles and branches. Measures shall specify techniques to be employed in order to avoid damage to trees in buffer areas specified and any areas outside of the approved clearing limits, and remedial measures to address inadvertent damages. Measures shall address tree protections, soil compaction prevention and relief, and restoration measures for replacement of damaged or destroyed trees within designated buffer areas or outside of the approved clearing limits.

(i) The Certificate Holder shall submit, in a compliance filing, site plans identifying existing on-site trees that shall be preserved, to the extent practicable, during construction and operation of the energy facility. A wooded buffer along all sides of the energy facility shall be maintained, as designated on final site plans for any areas of construction or construction support. Protected trees and buffers shall be tagged or fenced off prior to the start of construction.

(ii) A tree buffer zone of approximately 50 feet or more, as designated in Figure 14-6 of the Application and in the Site Development Plan shall be maintained between the westerly fence line and the eastern side of Sills Road, subject to the

jurisdiction of the Suffolk County Department of Public Works within the County right-of-way. Where the tree buffer is within the County right-of-way, the Certificate Holder will coordinate tree preservation measures with the Suffolk County Department of Public Works. Buffer zones at the construction laydown areas shall be maintained throughout construction, as shown in Figure 14-6 of the Application and in the Site Development Plan. Buffer zones shall be designated on final site plans.

(iii) Tree planting specifications shall be presented for restoration plantings and screening enhancement areas and the Residential Tree Planting Program, addressing the size, quality and condition of trees to be planted, appropriate planting techniques and specifying watering, maintenance and replacement responsibilities as appropriate.

C. The Certificate Holder shall file as a compliance filing a Facility Maintenance Plan within one year of the start of commercial operations. The Plan shall address upkeep and maintenance of the facility, including surface treatment, maintenance and painting schedules, building facades, overall site appearance, landscape maintenance and groundskeeping.

D. The Certificate Holder shall prepare an Outdoor Lighting Plan as a compliance filing. The Lighting Plan shall include details of all proposed outdoor lighting, and shall avoid off-site glare and lighting impacts to the maximum extent practicable. Final lighting plans shall detail the use of task lighting where appropriate, designate full-cutoff shields for lighting fixtures, and address specific controls for lighting beneath the air-cooled condensors.

E. The Certificate Holder shall minimize fugitive dust from construction and shall comply with the dust control measures set forth in the PSD permit.

F. Pursuant to PSL § 172(1), and subject to the conditions set forth below, the County of Suffolk is authorized to require certain permit/approvals. Subject to the Board's ongoing jurisdiction, the Certificate Holder shall seek the regulatory permits/approvals listed below (and comply with their respective requirements) from the relevant Suffolk County agencies, as appropriate, pertaining to the construction work for or operation of the Project, as follows:

(i) County Sanitary Code Article 12 permit;

(ii) County Sewer Agency Formal Approval for sewer connection as soon as a sewer district is formed;

(iii) If a sewer district is not formed at the time when sewer connection is necessary, a County Sanitary Code Article 6 permit for a sanitary-only septic system;

(iv) County DPW Highway Permit (Traffic Division traffic signal alteration plan); and

(v) County DPW Highway Permit (Traffic Division improvements, per Certificate Condition X).

In the event that the Certificate Holder experiences an unreasonable delay, beyond the Certificate Holder's control, in obtaining any of the foregoing permits or approvals, the Certificate Holder may, upon reasonable notice to the County, inform the Siting Board about the delay and seek the relevant authorization directly from the Siting Board. The County may appear before the Siting Board to address the existence, cause or reasonableness of any delay.

VII. Noise

A. Construction noise sources shall be mitigated by proper equipment maintenance and the use of appropriate mufflers.

B. Nighttime, weekend, and holiday construction is permitted. However, except as provided below, noisy construction activities shall be limited to between 7 AM and 6 PM on weekdays, unless permission is sought and received from the Board. Construction activities requiring continuous work, such as concrete pours and steam blows, as well as other less noisy activities (such as mechanical and electrical installation within buildings and at the HRSGs and ACCs) are permitted on an as required basis, but each such event must be scheduled to maximize use of daytime hours and minimize the probability and duration of nighttime work. Equipment installation and assembly shall be performed to the fullest extent possible within buildings planned to house such equipment. For nighttime construction involving noisy activities, the Certificate Holder shall identify in a compliance filing the specific noise control measures which shall be implemented to minimize potential off-site noise impacts.

C. The Certificate Holder shall comply with federal noise level requirements for employees during construction and operation of the Project as established by the Occupational Safety and Health Administration of the U.S. Department of Labor (40 CFR § 1910.95).

D. The Certificate Holder shall comply with federal regulations limiting truck noise (40 CFR § 205).

E. Safety valves shall incorporate mufflers.

F. A temporary vent silencer shall be installed on the steam-blow vent during pipe clean out.

G. During operation, the Project will achieve a modified Composite Noise Rating (CNR) of "C" at selected noise receptors.

H. The Certificate Holder shall submit an operational noise evaluation report by an acoustical engineer within six-months of the start of commercial operation. The operational noise evaluation report shall conform to the Post Construction Noise Evaluation Protocol approved by the Board. The ambient noise data presented in the Application shall be used in the CNR analysis.

VIII. Public Interest

A. Certificate Holder shall make good faith efforts to promptly address reasonable complaints raised by members of the public with respect to the construction and operation of the Project.

(i) A toll-free dedicated telephone line with specified hours of operation and inquiry response time and a complaint log should be maintained to support this effort.

B. To facilitate two-way communication with members of the public during construction and operation, the Certificate Holder shall endeavor to establish a Local Liaison Committee in consultation with interested parties in the vicinity of the Project and develop a Local Liaison Plan. The Certificate Holder shall submit a written description of the Local Liaison Plan to the Board as a pre-construction compliance filing, and the Certificate Holder shall implement the Plan upon its approval by the Board, throughout facility construction. The Local Liaison Committee Plan shall specify:

(i) methods and means to be employed for timely notification and information dissemination to involved communities and stakeholders of the construction schedule prior to and during each phase of construction;
(ii) the targeted communities and stakeholders and limits of geographic areas;
(iii) a representative from the Certificate Holder's organization as a point of contact (PC) for the community, including the manner in which the community and stakeholders can contact the PC; and
(iv) methods to be used to evaluate the adequacy and effectiveness of the Public Liaison Program.

C. The Certificate Holder shall maintain a Local Liaison Log that details community outreach activities conducted by the Certificate Holder. This log will be available for

inspection upon request at the Project during business hours by members of the public and their representatives, and by the NYSPSC or other State, County, or Town agencies, and tabulates complaints raised with respect to plant construction or operation expressed by the community and resolutions thereof implemented by the Certificate Holder.

D. Subject to safety and operations considerations, the Certificate Holder shall escort members of the public that wish to inspect plant construction and operation at reasonable times, upon request. Requests for meetings or plant inspection will be made to the PC.

IX. Soils, Geology, Seismology and Tsunami Occurrence

A. The Project will be designed with a seismic zone factor Z = 0.15, as described in Section 13 of the Application. However, if the International Building Code (IBC 2000) is adopted prior to commencement of project design engineering, the seismic provisions of the IBC may be utilized in the project design.

X. Traffic

A. Regular parking for on-site construction personnel shall be within the Project site and not in the laydown areas west of Sills Road. Parking areas for construction workers shall be set forth in a compliance filing. The Certificate Holder shall distribute to trucking companies making deliveries, truck operators and construction workers maps showing preferred arrival and departure routes.

B. The Certificate Holder shall submit conceptual plans and engineering calculations as part of a compliance filing, which shall also be served on the Suffolk County DPW and Town of Brookhaven, relative to the following improvements:

(i) Long Island Avenue southbound dual left turn onto Sills Road (north of LIE);

(ii) extension of Sills Road dedicated northbound left turn lane onto LIE westbound;

(iii) extension of Sills Road dedicated southbound left turn lane into Project site; and

(iv) warning signs indicating the entrance and exit of heavy vehicles to the site and the off-site laydown areas for Sills Road, Old Town Road and Old Patchogue-Yaphank Road.

C. The Certificate Holder shall submit pavement cores, conceptual plans and engineering calculations as part of a compliance filing, to be circulated to the Suffolk County DPW and Town of Brookhaven, relative the following improvements:

(i) use of Sills Road northbound shoulder as a dedicated right turn lane into Project site; and

(ii) use of Sills Road northbound shoulder as an acceleration lane from Project site, or alternatively the implementation of a no-right-on-red restriction exiting the site.

D. The Certificate Holder shall submit to the Suffolk County DPW a traffic signal alteration plan for traffic management during construction and operation. The plan for operation may be submitted at a later date, subject to the Board's ongoing jurisdiction.

E. The Certificate Holder shall minimize traffic impacts during construction of the sewer line, and shall coordinate with gas and water interconnecting utilities, as follows:

(i) potential traffic disruptions will be considered during the planning of the work; and

(ii) the physical limits of work areas will be arranged to minimize congestion related to construction;.

F. The Certificate Holder shall coordinate closely with the New York State Department of Transportation ("NYSDOT"), Suffolk County DPW, Suffolk Police, and Town of Brookhaven Traffic Division with respect to delivery of the combustion turbines and related equipment, and shall comply with all applicable regulations regarding limitation on weight, timing and duration of lane closures.

XI. Visual and Cultural Resources & Aesthetics

A. The Certificate Holder shall construct the Project using low-glare, neutral-colored architectural materials, and in accordance with Exhibit 22, which includes color and other architectural design principles. Certificate Holder shall report the results of its efforts to coordinate with the Local Liaison Committee (see Section VIII), and any subsequent proposed changes to the architectural color elevation drawings shall be incorporated in a Compliance Filing, as described in Exhibit 22; facility colors and architectural details shall be presented in such compliance filing.

B. The Certificate Holder shall design the Project's combustion turbines to use dry low-nitrogen oxides combustion technology for NO_X control while burning natural gas. Steam injection shall only be used for power augmentation, consistent with the Project's air quality permits.

C. The Certificate Holder shall prepare a Lighting Plan and submit it as a compliance filing. The Lighting Plan shall include details of all proposed outdoor lighting and shall avoid off-site glare and lighting impacts to the maximum extent practicable. Final lighting plans shall detail the use of task lighting where appropriate, designate full-cutoff shields for lighting fixtures, and address specific controls for lighting beneath the air-cooled condensers. The Lighting Plan shall also conform to the plan included in the *Site Development Plan*, and be refined based upon final design and layout for the Project.

D. The Certificate Holder shall coordinate with Suffolk County to provide the County with details of the facility design and locations of Project components, for consideration in development of final design of the proposed County golf course.

E. The Certificate Holder shall implement its residential off-site landscaping mitigation program pursuant to the protocol in Exhibit 8 to the Joint Stipulations.

F. The Certificate Holder shall implement its Unanticipated Discovery Plan (Appendix J to Application) in the event that cultural resources are encountered during construction.

G. The Facility Maintenance Plan shall be filed as a compliance filing within one year of the start of commercial operation. The Plan shall address upkeep and maintenance of the facility, surface treatment maintenance, painting schedules, building facades, overall site appearance, landscape maintenance and groundskeeping.

XII. Water Resources

A. Certificate Holder may not withdraw more than 250 gpm from the Suffolk County Water Authority system except during times when the system can support such withdrawal, if and as arranged with the Suffolk County Water Authority.

B. Steam injection for power augmentation is limited to 360 hours per year on a rolling 12-month basis.

C. The Project shall be designed and implemented so as not to adversely affect the Yaphank Sewer Treatment Plant (STP) and allow the STP to accept the discharge of process and sanitary wastes from the Project. The Project's 30-day average discharge may not exceed the capacity to be purchased from the Yaphank STP. Connection to the STP is required when a sewer district is formed by Suffolk County and prohibited until such time.

D. If a sewer district is not formed at the time when building occupancy occurs, Certificate Holder shall install a septic system for sanitary wastewater for not more than 2,700 gallons per day. In such event, the Certificate Holder shall obtain a SPDES permit

modification. Subject to the Board's ongoing jurisdiction, an application shall also be submitted to the Suffolk County Dept. of Health Services under Article 6 of the County Sanitary Code.

E. If a sewer district is not formed at the time when building occupancy occurs, Certificate Holder shall ensure that industrial wastewater is segregated from sanitary wastewater and is not discharged into the septic system. Under such circumstances, industrial wastewater shall be hauled to sewer plants that have been indicated by the Suffolk County DPW, or such other plants as the Suffolk County DPW may approve. In the event that a sewer system is subsequently formed, the Certificate Holder shall undertake to connect to the STP, including obtained necessary approvals for same, and cease use of the on-site septic system

F. Certificate Holder shall operate the Project in accordance with the effluent limitations imposed under its SPDES permit for storm water discharge.

G. All chemical storage areas will be located indoors, except as necessary during construction.

H. The Certificate Holder shall comply with all local, state and federal chemical and waste-storage, use, and handling regulations, as described in Sections 3.2.8, 3.2.9, 9.4, and 10.4 of the Application.

I. The Certificate Holder shall implement the Construction Storm Water Pollution Prevention Plan (CSWPPP) and the Joint Spill Prevention Control and Countermeasures and Storm Water Pollution Prevention Plan (Joint Plan), as applicable, to assure that water quality remains protected as required by the Clean Water Act and the ECL.

J. Subject to the Board's ongoing jurisdiction, Certificate Holder shall undergo Suffolk County Department of Health Services review pursuant to Article 12 of the Suffolk County Sanitary Code.

XIII. Decommissioning

A. Prior to commencing any construction, other than research, surveying, boring or related activities necessary to prepare final design plans and permitting, the Certificate Holder shall obtain a performance bond, escrow, letter of credit or other comparable financial instrument, in the amount of $1 million for the first year of construction, and in the amount of $1.5 million for the remainder of the construction period, to assure funding for the restoration of any disturbed areas in the event that the plant is not completed.

B. The Certificate Holder shall develop a decommissioning plan to restore the site upon closure of the facility. The Certificate Holder shall either (1) post a performance bond, escrow, letter of credit or other comparable financial instrument, with appropriate renewal provisions in the amount of $ 4.5 million, or (2) contribute $75,000 per year for 40 years into a dedicated interested bearing decommissioning account, to cover the costs of decommissioning, dismantling, closing, the plant when it has reached the end of its useful life. If the Certificate Holder elects to establish a decommissioning account, it shall also provide on January 1st of each year a performance bond, escrow, letter of credit or other comparable financial instrument for an amount equal to the difference between $ 4.5 million and the balance in the decommissioning account on January 1st of that year.

XIV. General Construction and Solid Waste

A. The Certificate Holder shall submit an Environmental Compliance Plan as a compliance filing to ensure (1) implementation and maintenance of required environmental mitigation measures; (2) compliance with the terms of this Certificate; and (3) compliance with applicable federal, state and local statutes, ordinances, rules and regulations. The Compliance Plan shall include:

(i) The name(s) of the environmental inspector(s) and a statement of qualifications for each inspector demonstrating sufficient knowledge and experience in environmental matters to complete the inspections and audits;

(ii) A certification confirming the independence of the inspector(s) from the Certificate Holder and certifying the authority of the inspector(s) to "stop work" in cases of non-compliance or imminent environmental or safety hazard;

(iii) Provision for deployment of more than one inspector in the event that two or more major field operations are undertaken simultaneously, such that at least one inspector shall be assigned to each construction area and no inspector shall be assigned to more than two active construction areas at any one time;

(iv) A proposed checklist of matters to inspect for compliance, including the specific items or locations to be inspected, the inspection method to be employed (e.g., visual, auditory, testing by instrument, etc.), and acceptability criteria to be applied by the inspector(s);

(v) A procedure setting forth how the Certificate Holder shall respond to and correct problems found by the inspector(s);

(vi) A schedule for monthly environmental audits during construction and submission of audit checklists, together with a written explanation of problem(s) signed by the auditor(s) and an authorized representative of the Certificate Holder, to DPS Staff, DEC Staff, and local agency and/or building inspectors; and

(vii) A schedule for submission of annual audits during the first two years of operation of the Facility to DPS, DEC, and appropriate local agencies.

B. Trucks used for transporting cut or fill material, if any, shall be covered to avoid loss of transported material and truck speed on-site shall be controlled to minimize dust.

C. The Certificate Holder shall not dispose of land clearing waste or construction related waste by burning those waste materials on the site. The Certificate Holder shall be responsible for the actions of its contractors to prevent the burning of waste materials on the site. All land clearing and construction wastes must be disposed of at an appropriate location, which will be identified in a compliance filing.

D. Before hiring contractors for solid waste haulage, the Certificate Holder shall request evidence that such contractors are in possession of all required permits and licenses. During the period of operation, the Certificate Holder shall retain for inspection records showing that all waste hauling and disposal contractors have all required permits and licenses. Solid waste shall be disposed of only at appropriate locations.

E. All unused, excavated materials and/or construction debris shall be removed upon completion of construction and placed at an appropriate location or state permitted disposal facility. The locations and the truck routes to be used in traveling to the disposal facility shall be set forth in a compliance filing.