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March 12, 2002

Via E-Mail and Federal Express

OUR FILE NUMBER 5653-117

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New York State Public Service Commission
Three Empire State Plaza
New York, NY 12233-1350

Hon. Daniel P. O'Connell
Office of Hearings and Mediation Services
NYS Department of Environmental Conservation
625 Broadway, 1st floor
Albany, NY 12233-1550

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

Dear Judges Moynihan and O'Connell:

Enclosed is the Town of Brookhaven's Post-Hearing Memorandum to the Examiners and Recommended Findings.

Very truly yours,

Elaine R. Sammon

Elaine R. Sammon

ERS/sk
Enclosures
cc: Hon. Janet Hand Deixler,
Secretary to the Siting Board (5 copies)
Active parties

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NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

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

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TOWN OF BROOKHAVEN'S POST-HEARING MEMORANDUM TO THE EXAMINERS AND RECOMMENDED FINDINGS

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March 12, 2002

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TOWN OF BROOKHAVEN'S POST-HEARING MEMORANDUM TO THE EXAMINERS AND RECOMMENDED FINDINGS

I. Introduction

This memorandum is submitted to the Presiding and Associate Administrative Law Judges ("ALJs") on behalf of the Town of Brookhaven, which submits that the sponsor of the Brookhaven Energy Project ("Project") should not be awarded a certificate under Article X of the Public Service Law ("PSL").

The Project is proposed for construction and operation in Yaphank, Town of Brookhaven, on only 28 acres, zoned for light industry not to exceed 50 feet in height. The proposed Project facilities, include two huge air cooling condensers (each 90 feet high, 150 feet long and 90 feet wide), two enormous 72 foot high turbine buildings, two 160 foot stacks, and associated structures and switchgear. Under the Town's zoning code these structures are not permitted as of right. Under the Town's Comprehensive Plan and zoning code, these facilities are simply too massive and visually intrusive to be allowed at the Yaphank site.[1] The site is too small and the facilities are too big. The Project is made up of structures typical of "heavy industry." The proposed facilities would be completely out of character with the existing and proposed light industrial land uses in the community. The Town's 50 foot height limit would be violated to such an extent that it would be comparable to a rezoning of the area. The massive Project facilities would be a perpetual eyesore to local residents and thousands of travelers on the adjacent roads, including the Long Island Expressway ("LIE"), Sills Road and Yaphank Avenue. Moreover, operation of the Project would impose a continuous irritating noisy roar across the

[1] The Project facilities are described in Section 3 of the Application, Exhibit 1.

area, to the detriment of existing and proposed development in the vicinity. Nearby historic sites would be forever blighted. In short, it would be a colossal mistake to approve the Project at the proposed site. Furthermore, the Applicant's analysis of visual impacts on aesthetic, scenic, historic and recreational resources is fatally flawed, and precludes the granting of a certificate for this Project under Public Service Law § 168(2)(b)-(e). Accordingly, the Town respectfully requests the ALJs to recommend to the Siting Board that Brookhaven Energy's application for a certificate authorizing the Project should be denied.

II. Background on the Proposed Project

The Applicant's plans to develop a major electric generating plant on Long Island can be traced in the record to early 1999. The Project's site selection, pre-application, application, pre-hearing and hearing processes to date are as follows.

A. Site Selection Process

The Project is sponsored by American National Power, Inc. ("ANP"), the Houston-based subsidiary of International Power, plc of London, UK, one of the world's largest independent power producers.[2] The record shows that in May 1999, ANP began a site selection study for a new major electric generating facility to be constructed on Long Island. (Ex. 16, p.1). By November, 1999, it had chosen the Yaphank site, which its consultant "deemed as aesthetically acceptable." (Solzhenitsyn, tr. 1372 and 1452). Thereafter, ANP acquired options on the site lands, and formed Brookhaven Energy, LP (BELP), a Delaware limited partnership, as its wholly owned subsidiary. On March 16, 2000, ANP registered BELP to do business in New York in order to have BELP be the Project's legal owner, while ANP is its actual manager and owner.

Siting of the Project was, thus, a *fait accompli* as of March 16, 2000, according to

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

ANP/BELP. ANP takes the position that neither it nor BELP has the power of eminent domain, and therefore an alternative sites analysis is not required pursuant to Article X of the Public Service Law, as interpreted by Board Rule § 1001.2.[3] See ANP's Siting Study, Exhibit 16 at p. 1.

The Town challenged the Applicant's position on alternative sites at the first available opportunity, which was when it filed its proposed issues for adjudication on October 2, 2001, asserting that BELP is an "electric corporation" within the meaning of the Transportation Corporations Law ("TCL"), and therefore is vested with the power of eminent domain. Because Brookhaven Energy has the power of eminent domain, the Town contended, BELP is required by § 164(1)(b) of the Public Service Law (PSL) to provide an evaluation of alternative site locations as part of its application under Article X. According to the Town, Brookhaven Energy's failure to evaluate alternative locations to the proposed facility in its application contravenes PSL § 164(1)(b), which means that the application lacks sufficient information to allow the Board to make the findings required under PSL § 168, including subsection (2)(c)(i) thereof, in order to issue a certificate for the Project. The Board, in its January 2, 2002 Order, affirmed the ALJs' ruling that BELP does not have the power of eminent domain, and it is not within the power of the ALJs to reconsider that Board ruling at this juncture of the proceedings. The Town will raise

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[3] Board Rule § 1001.2 provides that an applicant that lacks the power of eminent domain may limit evaluation of site alternatives in the application to parcels that it owns or has under option to purchase. In adopting this provision, the Board commented that: "The distinction between private applicants and others is based on PSL § 164(b), which provides that the information to be submitted on alternatives is to be no more extensive than that required under [SEQRA], and on the holding of *Horn v. IBM*, 110 A.D. 2d 87 (2d Dept, 1985), that applicants without the power of eminent domain need not consider the site alternatives unless they own or have options on such sites." See Board Memorandum and Resolution Adopting Article X Regulations in Case 97-F-0809, December 16, 1997, at www.dps.state.ny.us/fileroom/doc3483.pdf.

this issue again before the Board at the appropriate time.

On October 2, 2001, the Town also submitted that even if BELP lacked the power of eminent domain, BELP could not properly refuse to describe in its application those reasonable alternative site locations which it actually considered and rejected prior to the date on which it formally initiated the pre-application process under Article X, which was on March 24, 2000. Site alternatives were admittedly evaluated by ANP before March 24, and evaluation of site alternatives is the heart of the environmental impact evaluation process, whether done under Article X or SEQRA.[4] *Horn v. IBM*, which is relied upon by Staff and the Board to support Board Rule § 1001.2, is a SEQRA case decided on the standard of the "rule of reason."(110 A.D.2d 87, 96).

The Town submits that under this standard, it would be unreasonable and reversible error for the Article X Siting Board to disregard evaluation of site alternatives, particularly when at least one of the other sites admittedly evaluated by the Applicant is zoned for heavy industrial facilities, such as the proposed Project. In those circumstances, it would clearly be unreasonable and reversible error if the Board refused to apply the height restrictions of the Town Code in a light industry zone and authorized heavy industrial facilities there, which are plainly out of character with the community and which ignore local land use plans and zoning.

Moreover, ANP/BELP appears to assert that the required analysis of alternatives, "if any" in PSL § 164(b) magically becomes "none" when an applicant simply rejects all but one of many potential sites that were considered prior to beginning the Article X pre-application process. But

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

the Town disagrees, because the words "if any" do not mean "none." The Town, in this memorandum, urges the ALJs to recommend that the Board apply the Town Code's height restriction, find the Applicant's analysis of visual impacts to be insufficient, and deny the requested certificate. With such an outcome, the ALJs would not only be recommending the aesthetically and environmentally appropriate result, they would also be recommending that the Board avoid unreasonable and unlawful results in this case.

B. Pre-Application Process

On March 24, 2000, a week after BELP became registered to do business in New York, BELP initiated the formal Article X process to gain permission to construct the Project at Yaphank, by filing and serving a Preliminary Scoping Statement (PSS) with the Siting Board.[5] The PSS described its proposed Project at the Yaphank Site. However, it did not describe how the Yaphank site was selected. (See Application Section 5.1; and Fitzpatrick, et al., tr. 709). It became clear that the Siting Board would need to override the height limits of the Town Code for at least 5 enormous structures if it were to grant a certificate for the construction and operation of the proposed Project at the Yaphank Site.

BELP describes its management of the public involvement process in detail in Section 4 and Appendix D of the Application. In sum, this Section of the Application describes a one-sided public relations campaign, designed to show that the Project in Yaphank is beneficial, and that ANP/BELP has such tremendous financial and legal power to get the Project constructed in Yaphank that it would be futile to oppose them. Thus intimidated, the public generally ignored ANP, except for the Yaphank Taxpayers and Civic Association, which staunchly opposes the

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

Project, and participates in this proceeding as a limited party.

In December 2000, BELP and DPS Staff signed stipulations that outlined the studies to be done for the formal Article X application for the Project at the Yaphank site.[6] Consideration of alternate sites was ignored.

C. Application Process

The Application, consisting of two four-inch thick binders, plus another two-inch thick volume, was filed seven months later, on June 25, 2001. Notice of filing was served. On August 3, 2001, the Town filed its notice of intent to become a party to the Article X proceeding for the Project. The Application was deemed complete on August 15, 2001, and the pre-hearing process commenced.

D. Pre-Hearing Process

The assigned ALJs promptly issued notices for a pre-hearing conference and issues conference, and of deadlines for requests for intervenor funding and proposed issues. However, the pre-hearing conference, scheduled for September 12, was cancelled due to the attacks on the World Trade Center. Following the October 11 issues conference, the ALJs recognized, in addition to the statutory parties (PSL § 166(1)), the Town, Long Island Power Authority (LIPA), and Suffolk County as having full party status in the Article X case. No adjudicable DEC issues were raised.

1. Intervenor Funding

The Town was the only party that requested intervenor funding. The ALJs ultimately granted the Town's requests for funding for its engineering and technical consultants. However it

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

denied the Town's requests for funding for its legal consultant and co-counsel, on the ground that the intervenor fund does not cover legal fees. The Siting Board affirmed this ruling by its order of January 2, 2002. As the Siting Board has ruled on this matter, it is no longer within the power of the ALJs to reconsider, and the Town hereby gives notice that it will raise this issue again before the Board at the appropriate time.

2. Issues

On October 2, 2001, the Town filed its proposed issues for adjudication at the hearing. The Town contended that (1) the application was deficient because BELP is not a "private applicant," it has the power of eminent domain, and has failed to discuss alternatives in its application, (2) the Shoreham site is a reasonable and preferable site location, (3) BELP failed to disclose or discuss site alternatives in disregard of fundamental site selection principles, (4) the Board should require the Applicant to comply fully with the Town zoning code and comprehensive plan, and (5) the Project imposes unacceptable visual, noise, and traffic impacts.

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

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

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

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

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

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

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

The Town petitioned the Siting Board for interlocutory review of the ALJs' October 25 issues ruling, and the Board on January 2, 2002, denied the Town's petition on the grounds that:

1. BELP is a "private applicant" and does not have the power of eminent domain, because it is a limited partnership, not a corporation, and under the Transportation Corporations Law (TCL) only corporations can have the power of eminent domain.

2. The ALJs' decision to exclude consideration of an alternate site at Shoreham was within their discretion, as they had concluded that the Town had failed to demonstrate or assert that the Shoreham site would be available or greatly superior to the Yaphank site. The Board added that if the Town shows through an affidavit that the Shoreham site is available, then the Town will be allowed to proffer testimony on the factual issue of whether the Shoreham site would be superior to the proposed Yaphank site; in addition, the Board added that any such showing would need to address the current lack of natural gas pipelines in the vicinity of Shoreham.

3. **The Motion to Exclude and Offer of Proof**

Testimony on behalf of the Town and DPS Staff was filed on January 10, 2002. The Town's testimony covered noise (Froedge), Traffic (Shafer), visual impacts (Palmer, Shafer, Koppelman), and land use and local laws (Koppelman). Then BELP moved to exclude eight excerpts from the Town's filed testimony, alleging that the excerpts improperly addressed the Shoreham site as an alternative and asserted irrelevant information on the sizes of sites where ANP had built similar power plants in Massachusetts. The Town responded, stating that the testimony proposed for exclusion was offered to support the Town's position that the Yaphank site is unsuitable, and that the existence of other potential locations for a major electric generating facility in the Town was offered to show that the Town code allows major power plants at sites zoned for heavy industry, and that it would be a mistake to locate the proposed facility at Yaphank, which is not zoned for heavy industry.

The Town submitted to the ALJs a LIPA response to information requests, which stated that:

> While LIPA has not made a decision as to the future development of the lands it owns at the Shoreham site, LIPA would entertain discussions regarding the development of all or part of such site for a merchant generating plant.[7]

The Town also submitted references to a December 23, 2001 Federal Energy Regulatory Commission ("FERC") decision, which revealed that, as of December 2001, not only was a natural gas pipeline progressing through the approval process to supply the Shoreham vicinity, but that ANP/BELP had contracted to purchase all of its supplies for its Yaphank Project from that pipeline.[8]

The ALJs ruled at the opening of the hearings not to exclude any of the testimony of Town witnesses, Palmer or Shafer. This testimony shows that ANP has constructed generating plants in Massachusetts identical to the one proposed in Yaphank on sites of 129 and 147 acres each, more than 4 and 5 times the size of the Yaphank site. The ALJs excluded portions of the testimony of the Town's land use expert, Dr. Lee Koppelman, based on the Board's January 2 refusal to disturb the ALJ's October 25 Ruling that testimony on the Shoreham site would be rejected, and that the Town had not produced the "affidavit" suddenly required by the Siting Board. The Town submits that this decision improperly elevated form over substance, and that LIPA's interrogatory response and the FERC decision establishing the availability of a natural gas pipeline at Shoreham should have been deemed sufficient proof under the Board's January 2, 2002 Order to allow the Town to proffer testimony on the factual issue of whether the Shoreham site would be superior to the

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[7]See Letter, dated January 24, 2002, to the ALJs from Elaine R. Sammon, of counsel to the Town.

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

proposed Yaphank site. An offer of proof was made of the excluded testimony. (tr. 1722-25). The Town submits that the ALJs' ruling excluding portions of Dr. Koppelman's testimony was erroneous, requests that it be reconsidered, and that the excluded testimony be admitted. To have excluded this testimony has the rippling effect of foreclosing other areas of interrogation.

The ALJs' decision to keep the Town from cross examining and offering direct testimony on alternative sites cuts the heart out of the environmental impact review process in direct contravention of Article X and SEQRA. As recognized in the Board's June 15, 2001 Opinion and Order Granting a Certificate in Athens, Case No. 97-f-1563, information comparing a proposed site with alternatives is useful to the consideration of whether "it would be a mistake to locate a facility at the proposed site in view of other realistic options...." In addition, the Article X process has long been recognized as a functional equivalent of SEQRA. See PSL § 164(b); *Gerrard, Ruzow and Weinberg*, Environmental Impact Review in New York, § 8B.03[15][a], Matthew Bender, 2001 ed. 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. 6 NYCRR § 617.9(b)(5)(v). Furthermore, only the environmental impact statement process outlined at § 8-0109 of SEQRA is excluded from actions subject to Article X.[9] SEQRA's purposes and policies as set forth at §§ 8-0101 and 8-0103 remain applicable in this case. Thus, it is the ALJs' and Board's responsibility to interpret and administer Article X "in accordance with the policies set forth" in SEQRA. (ECL § 8-0103(6)). The ALJs rulings have violated this requirement.

E. Hearing Process

Four and a half days of adjudicatory hearings, plus a half-day a tour of the site and nearby

[9] See SEQRA § 8-0111(5)(b).

historic, scenic, recreational and aesthetic resources, commenced on February 4, 2002 and concluded February 8. Cross examination was strictly limited by the ALJs to topics that they deemed to be within the scope of their October 25 issues ruling. The Presiding Examiner refused to strike a BELP witness panel's testimony that BELP is a "private applicant," and denied the Town the opportunity to cross examine on this point. (tr. 782-3). The Town submits that this ruling improperly allowed unqualified witnesses to offer a legal conclusion, and also contravened the State Administrative Procedure Act. The Town's request to examine the Applicant on the full scope of the application was denied (tr. 790-799), despite the Town's absolute right of cross examination under §306(3) of the State Administrative Procedure Act. The Town was not even allowed to examine the Applicant on its planned gas supply (tr. 797), despite the fact that the Federal Energy Regulatory Commission ("FERC") in December 2001 granted preliminary approval for the Islander East natural gas pipeline[10] under Long Island Sound to Shoreham from Connecticut, and the fact that the FERC's opinion notes that BELP has a contract to purchase all of the natural gas needed to fuel the proposed plant at Yaphank from this line.[11] By contrast, the Board's January 2, 2002 Order stressed the "current lack of natural gas" at Shoreham as a major factor in affirming the ALJs' ruling to deny testimony on alternative sites. The ALJs should have allowed the Town to cross examine on this matter, even though gas supply was not made an issue for adjudication, because the Board's January 2, 2002 order suggests that it was misinformed as to the potential for a new and ample gas supply at Shoreham and because of the newly acquired

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

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

information in the FERC decision.

Moreover, the information on gas supply in the Application is now out of date. The Application should be supplemented so the Board can base its decision on the new circumstances.

The overall record compiled to date incorporates the Application (Exhibit 1), the testimony of the Applicant, Town, Staff and LIPA, which has been incorporated into 1750 pages of transcript, including the issues conference, legislative public hearings, and adjudicatory hearings, and 77 Exhibits. Among the exhibits are ANP's Siting Study, made available by the ALJs October 25 Issues Ruling (Exhibit 16), and Joint Stipulations and proposed certificate conditions, agreed to among various statutory parties, the Applicant and Suffolk County (Exhibit 26). The Town is not a signatory to the Joint Stipulations.

III. The Record Shows that (1) Project Facilities Would Grossly Exceed the 50 Foot Height Limit of the Town Code, (2) the Board Should Deny BELP's Request to Ignore the 50 Foot Height Zoning Limit, and (3) the Project Would Be Out of Character with Existing and Planned Uses of the Area Under the Comprehensive Plan

The proposed electric generating facility would be the largest on Long Island. It would have a capacity of 580 MW, and consist of two combined-cycle combustion turbine (jet engine) units each with a heat recovery steam generator fueled by natural gas. See Section 3 of the Application for a description of the Project. The Town opposes the Project because of the massive size of the Project's structures, which are totally inconsistent with the Comprehensive Plan and zoning, their unsightly visual impacts, and their noise. The Project's structures include two air-cooled condensers (ACC), each 90 feet wide by 150 feet long and 90 feet high; two 72-foot tall generation buildings; two 160 foot high stacks; an electrical switchyard, containing an unknown number of towers approximately 100 feet tall; a 72 foot tall water tank 70 feet in diameter; a 50

foot tall water tank 60 feet in diameter; a control building; and a host of ancillary facilities. (Solzhenitsyn, tr. 1514-1515) The general arrangement layout at figure 3-7 of the application lists 65 separate structures and features to be installed on the site. The elevation drawings at figures 3-8 and 16-2 show the height of the structures. Note that almost 50% of the cross sectional areas of the Project facilities shown on the elevation drawings extend above 50 feet in height. Thus, BELP is not seeking a typical variance as one might seek from a zoning board of appeals for a simple spire or stack. BELP is requesting that the Siting Board exercise its extraordinary power in order to erect non-conforming industrial structures that will extend along hundreds of linear feet above the 50 foot elevation. Applicant is seeking (1) to erect two air cooled condensers that would exceed the zoned height limitation by 80% over a 27,000 square foot area; (2) to erect two generation buildings that would each exceed the zoned height limitation by 44% over an additional 35,000 square foot area; (3) to erect a water tank that would exceed the zoning limitation on height by 44% over another 3,800 square feet; and (4) to erect an unknown number of towers exceeding the height limitation by 100% in the switchyard. This should not be permitted.

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

Section 168(2)(d) of the Public Service Law specifically states that the facility must be designed to operate in compliance with applicable state and local laws and regulations, including zoning laws. The statute also states that the Board may refuse to apply any local ordinance, rule or regulation including zoning laws that would otherwise be applicable only if it finds that the laws are "unreasonably restrictive in view of the existing technology or the needs of or costs to ratepayers." Under Article X, the Board must give the municipality an opportunity to present evidence in support of the ordinance, rule, or regulation. Public Service Law §168(2)(d). In

addition, in Subsection 168(2)(e) of the Public Service Law, the legislature warns that before a certificate is issued, the Board must find that construction and operation of the facility is in the public interest considering environmental impacts of the facility and reasonable alternatives.

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

1. **The Proposed Project**

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

The Town submits that this request should be denied. The 50 foot height limitation is not unreasonable. It is a reasonable height limit for the types of light industry facilities existing and planned to be permitted in the vicinity. See Application figures 10-3, 10-4, and 10-5. The Applicant argues that in view of the existing technology, the air cooled condensers, turbine buildings and the other massive facilities, must be higher than 50 feet. But the Town submits that if such is the case, then the Project should not be built at the 28 acre Yaphank site. It would be a

mistake to site the plant at Yaphank It would be a serious error of judgment, from a land use point of view, and it would vitiate the zoning code and Comprehensive Plan for the area. The site is too small and there are other locations in the Town that would more readily accommodate facilities of the size proposed, such as the area zoned L-4, for heavy industry.

Indeed, the record shows that ANP has constructed two generating plants identical to that proposed in Yaphank on sites that are 147 and 129 acres in area.(Shafer, tr. 345; and Ex. 28), which allows for buffering of the plants' adverse visual, zoning, land use and noise impacts. (Id.) On the other hand, 84% of the Yaphank site would be disturbed, and there would be very little buffer. (Palmer, tr. 1582).

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

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

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

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

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

> Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.
>
> This fundamental conception of zoning has been present from its inception. The almost universal statutory requirement that zoning conform to a "well-considered plan" or "Comprehensive Plan" is a reflection of that view. (See Standard State Zoning Enabling Act, U.S. Dept. Of Commerce [1926].) The thought behind the requirement is that consideration must be given to the needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community. (*De Sena v. Gulde*, 24 A.D.2d 165, 265 N.Y.S.2d 239 [2d Dept., 1965].) Thus, the mandate of the Village Law (§ 177) is not a mere technicality which serves only as an obstacle course for public officials to overcome in carrying out their duties. Rather, the Comprehensive Plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.
>
> Moreover, the "Comprehensive Plan" protects the landowner from arbitrary restrictions on the use of his property which can result from the pressures which outraged voters can bring to bear on public officials. "With the heavy presumption of constitutional validity that attaches to legislation purportedly under the police power, and the difficulty in judicially applying a 'reasonable' standard, there is danger that zoning, considered as a self-contained activity rather than as a means to a broader end, may tyrannize individual property

> owners. Exercise of the legislative power to zone should be governed by rules and standards as clearly defined as possible, so that it cannot operate in an arbitrary and discriminatory fashion, and will actually be directed to the health, safety, welfare and morals of the community. The more clarity and specificity required in the articulation of the premises upon which a particular zoning regulation is based, the more effectively will courts be able to review the regulation, declaring it ultra vires if it is not in realty 'in accordance with a Comprehensive Plan.'" (Haar, "In Accordance With a Comprehensive Plan", 68 Harv.L.Rev. 1154, 1157-1158)

Udell, 21 N.Y.2d at 469-470 (Emphasis added).

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

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

> (b) Among the most important powers and duties granted by the legislature to a town government is the authority and responsibility to undertake town Comprehensive Planning and to regulate land use for the purpose of protecting the public health, safety and general welfare of its citizens. (Emphasis added).
>
> * * *
>
> (f) The town Comprehensive Plan is a means to protect the health, safety and general welfare of the people of the town and to give due consideration to the needs of the people of the region of

which the town is a part.

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

Town Law § 272-a (1)(b), (f) and (g).

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

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

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

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

community.

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

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

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

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

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

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

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

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

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

The testimony of Mr. Solzhenitsyn, the purported land use expert of Applicant does not take issue with the Comprehensive Plan testimony of Dr. Koppelman. When examined as to the importance of a Comprehensive Plan, he stated that such a plan "gives a vision for orderly development, it is guidelines for what should go where. . . . It is a policy direction." (1675). Addressing what he claimed to be Brookhaven's Comprehensive Plan, Mr. Solzhenitsyn testified that he examined a document, entitled "'1996 Comprehensive Land Use Plan,' which did not mention power plants at this site." (1673-74).[12] Obviously, this witness knew when he searched for a site for this plant that Brookhaven's "vision for orderly development" and its "guidelines for what should go where" did not include a 580MW power plant on this 28 acre site.

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

[12] The Town does not concede that this isolated document constitutes the Comprehensive Plan of the Town. Applicant has not shown whether it was adopted as such by the Town Board or by the Planning Board.

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

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

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

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

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

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

C. A Special Permit Use is not an "As of Right" Use and Must be Denied if It Is Not Compatible with the Proposed Location

Mr. Solzhenitsyn's analysis of the zoning of the subject property during the hearing disclosed that it was subject to a special permit use, which is not an "as of right" use, by the Board of Zoning Appeals of the Town of Brookhaven. It is well settled that such a use as a special permit use involves an analysis by the Zoning Board of the particular use in the particular location. The Zoning Board is empowered by state law and by decisional law to deny an application for a special permit use if, based on the testimony at hearings, it is clear that the use is not compatible with that

particular area. *Clipperley v. Town of East Greenbush* 262 A.D.2d 764 (3d Dep't 1999) (holding that a special permit was properly denied based on excess traffic); *Holbrook Associates v. McGowan*, 261 A.D.2d 620 (2d Dep't 1999) (stating that a valid reason to deny a special permit is the fact that "the use, although permitted, is not desirable at a particular location"); *LoGudice v. Baum*, 149 A.D.2d 420 (2d Dep't. 1989) (holding that a special use may be denied at a particular location).

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

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

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

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

the special permit issue, Mr. Solzhenitsyn finally admitted that a board could deny a special permit.

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

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

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

In contrast, Dr. Koppelman, whose qualifications are beyond question, made it clear that

the project is completely unsuited for the Yaphank site. He testified as follows:

> Q. Would a variance from the 50 foot height limit for this Project at this site be consistent with sound zoning and land-use practice?
>
> A. No, not in my opinion. In this case, a disproportionately large part of the project's cross sectional area would be in excess of the 50 foot elevation. This can be seen readily by drawing a horizontal line across the elevation drawings marked Figures 16-2 in Section 16 of the Application. The shortest of the two tanks is at elevation 50 feet. The huge generator buildings and air cooling condensers tower over this elevation. Granting a height variance in this case would be tantamount to re-zoning the area as "L-4," not simply allowing a single stack or tower to exceed the 50 foot elevation to accommodate a smaller, less massive structure for commercial or light industry use. As I said above, the percent of cross sectional area of the Project above 50 feet in height is greatly disproportionate, as compared to height variances more commonly granted for stacks or towers. Two building height variances of 80%, each of which would allow the construction of a building 90' high in a 50'zone that would cover half of a football field, plus three additional building height variances of 44% each are tantamount to a rezoning of the parcel. Such substantial and intrusive variances would never be granted to a private landowner who might develop the property. Why should it not be the same for a private electrical plant? In fact, the Special Permit use for power plants should not be allowed on this site. (tr. 1713).

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

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

> Your Honor, I'm going to conclude at this time by moving to strike his testimony that has been offered, and his testimony here, on the basis that he has never qualified as a land use planner, he is being put forth here as a professional expert witness, land use planner. For example, he lists on his resume a significant number of projects that he worked on. None of it is dealing with land use planning, when you read it. It essentially deals with due diligence, environmental, site selection, things of that nature.
>
> He admits that it is not part of the Comprehensive Plan of the Town.
>
> He didn't check that State law that would be applicable here if we weren't dealing under Article X.
>
> All these things, in my view, go to the question of whether he is a qualified witness for this Board, or for the siting Board.
>
> Certainly I would think that an applicant coming in with such a large project on such a small site, should produce much more expertise that Mr. Solzhenitsyn on this particular issue, when the guts of this case is that this applicant is asking you and the siting Board to overrule the local zoning, to overrule the local Comprehensive Plan, which he specifically mentions in his testimony does not provide for a power plant on this site, and which he specifically mentioned shows large development to the south of this site, in complying low-rise typical light industrial-type buildings. To override the ordinances of the Town, I submit to you requires, much more testimony from a much more qualified land use planner than Mr. Solzhenitsyn. (1692-1694)

Based on all of the above, it is clear: (1) the Applicant did not produce a qualified witness in the area of Land Use Planning, and (2) even assuming that Mr. Solzhenitsyn is a qualified witness, Applicant has not proven that there is any necessity whatsoever to override the Zoning Laws of the Town of Brookhaven. Not only did he not study the alternative "as of right" site at Shoreham, all he did was select the subject site, tour a few miles around it, and proclaim that this is

a proper site for this plant – i.e., 28 acres in an historic area, in contrast to the two identical Massachusetts plants owned by Applicant on 147 and 129 acres respectively. His appraisal of the Yaphank site was nothing more than a textbook windshield analysis by a person not qualified to be a planner or an expert on land use and zoning.

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

IV. The record shows that (a) the Applicant's Visual Analysis is Fatally Flawed, and (b) the Project would be visually and aesthetically unacceptable and Cannot be Adequately Mitigated

Section 168(2) of the Public Service Law explicitly states that the Siting Board "may not grant a certificate for the construction or operation of a major electric generating facility, either as proposed or as modified by the Board, unless it shall first find and determine:

* * *

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

(b) of subdivision 1 of section one hundred sixty-four of this article.

PSL § 168(2)(b)-(e).

A. The Applicant's visual analysis is fatally flawed, should be disregarded and precludes the granting of a certificate

1. The Applicant's Visual Analysis is Fatally Flawed

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

Similarly, Figure 16-3 reveals that the Applicant would control only a small fraction of the

vegetation that the Applicant claims would screen the view of the proposed plant from nearby sensitive visual receptors, and the Applicant admitted that more than 80% of the vegetation on its proposed site would be disturbed by the planned construction. (tr. 1505). Furthermore, Applicant's expert admitted that blights have been known to affect vegetation, such as that which is being relied upon by Applicant in its analysis, and in fact, admitted that such a blight affected vegetation at the Suffolk County Farm, which is the location of the Alms House Barn, another property listed on the National and State Register of Historic Places. (tr. 1511-1512, 1517).

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

2. The Applicant Failed to Properly Consider Historic Resources in the Area

ANP/BELP's visual impact expert admitted that the Applicant never checked the Suffolk

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

With respect to the more than 60 historic sites recognized as historic resources by the Central Pine Barrens Joint Planning and Policy Commission and referenced in the testimony of Dr. Koppelman (tr. 1710-1712), including the South Haven Historic District, the Town submits that the Applicant's analysis cannot be relied upon by the ALJs or the Siting Board. Most of those sites were not addressed in the Applicant's initial analysis of visual impacts. Additionally, in response to Dr. Koppelman's testimony, in Exhibit S-3, the Applicant asserted that the proposed Project would not be visible from the location of the South Haven Historic District. However, upon cross-examination, when asked whether or not it was true that the South Haven Historic District ran from East Main Street and Yaphank Avenue South to Sunrise Highway, the Applicant's visual impacts expert admitted that he didn't know the answer to that question. The Town submits that this admission alone is sufficient to destroy the credibility of Mr. Solzhenitsyn's testimony with respect to those historic resources listed on Exhibit S-3.

As discussed above, Mr. Solzhenitsyn could not state whether the site would be visible from St. Andrew's Church or any of the critical historic resources within a three-mile radius of the proposed site, absent vegetation, because the Applicant had never done such an analysis. (tr. 1507) This failure to use the more conservative method for closer sites is all the more egregious because four of the six sites that the Applicant identified as listed on the National and State Register or eligible for such listing are within that radius. Those sites are the Suffolk County Alms House Barn, the Robert Hawkins Homestead, the Homan-Gerard House and Mill, and St. Andrew's Episcopal Church. (Solzhenitsyn, tr. 1496). Because the Applicant has not studied these historic resources without vegetation, neither the ALJs nor the Siting Board have any way of knowing at which of these sensitive receptors the site might be visible should some vegetation succumb to disease, such as blight, drought, infestation, storms, or simply old age and even if the ALJs and the Siting Board could determine which historic sites would be visible absent a piece of vegetation, Applicant's analysis would give them no way of knowing to what degree the buildings and stacks would be visible in such circumstances.

Regarding figure 16-3, Applicant further admitted that even its analysis based upon topography alone, without vegetation, which was applied only for locations between the three and five mile radius lines, would not be sufficient for the ALJs or the Siting Board to determine whether the 90-foot tall structures or the 72-foot tall structures would be visible, because it only analyzed visibility "at the exact location of the stacks." (Solzhenitsyn, tr. 1503). Of course, the air cooled condensers and the buildings exceeding the 50 foot height limitation in the Town's Zoning Code are not at the exact location of the stacks. (Solzhenitsyn, tr. 1503). Thus, neither the ALJs nor the Siting Board is able to make an informed judgment from Applicant's visual analysis or testimony as to whether the condensers, buildings, water tanks or 100 foot towers may be visible

anywhere with 5 miles of the site, absent vegetation.

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

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

On January 29, 2002, one full week before the ALJs' site visit, the Town requested of Applicant's counsel that a height indicator such as a balloon or other device be placed on the site to more accurately allow the parties to evaluate its potential visual impacts. No such height indicator was placed on the property on the day of the site visit. (Solzhenitsyn, tr. 1554).

4. The Visual Simulations Provided in the Application are Inadequate

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

evaluation (tr. 1574-5). In short, the Applicant's VRAP analysis is meaningless, and should be disregarded. (Palmer, tr. 1574-1578; Solzhenitsyn, tr. 1419-1429).

B. The Visual Impact of the Project Cannot be Adequately Mitigated

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

The Application at Section 16.1 downplays the Project's obvious overpowering visual impact by stressing that the facilities will have a "neutral color scheme" and will use reduced-height shielded lights, and that the Applicant will offer a planting program at affected residences, which are as close as 2000 feet away. These measures are trivial. They are a far cry from meaningful visual mitigation. Critically, the Applicant admits that visual mitigation is impossible at the Yaphank site, due to the site's small size and the huge mass of the proposed structures -- "Camouflage or disguise is not viewed as feasible." (Application, § 16.3.6 at p. 16-22; Solzhenitsyn, tr. 1375). Dr. Palmer, the Town's expert on visual impacts, agreed. He stated that Applicant's mitigation is limited due to "the extraordinary size of the proposed facility and the relatively small size of the proposed site." Referring to visual simulations from viewpoints 14, 77, 78, 79 and 80 and other simulations showing the views "with" and "without" the proposed Project, he testified that these "clearly show the significant change and stark contrast that this proposed project will have in comparison to the existing conditions." (Id.) (Palmer at tr. 1573). Dr.

Koppelman added that "the Project imposes unacceptable visual impacts that cannot be adequately mitigated." (Koppelman, tr. 1714).

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

Mr. Solzhenitsyn is the same person who, in November 1999 (tr. 1453), single handedly "deemed" the Yaphank site aesthetically acceptable. (Application, § 16.3.2 at p. 16-18; Solzhenitsyn, tr. 1372 and 1452). Thus, all of Mr. Solzhenitsyn's subsequent viewshed analysis and written support, as displayed in the Application, is mere *post hoc* rationalization. The reality is that the ALJs are being asked to blindly accept the self-serving opinion of the Applicant's visual impact consultant. Doing so would force the Project's unmitigated severe adverse visual and aesthetic impacts on the people of Yaphank for years to come. The ALJs should not allow such an outcome.

One of the findings the Board is required to make in order to issue a certificate is that the facility minimizes adverse environmental impacts, considering, among others, "the interest of the state with respect to aesthetics..." (PSL § 168(2)(c)(i)). And yet neither the DPS Staff nor the Staff of any other agency that is a statutory party to this case has offered any testimony or opinion on the Project's visual impacts on aesthetic, scenic, historic or recreational resources. Although the only witness panel from a State agency, lead by DPS witness Keller, testified that "the siting of the BELP Facility is in the public interest," (tr. 1271), on cross-examination by the Town, witness

Keller said his panel's testimony was limited to the electrical interconnection aspects of the Project, and did not cover its visual impacts. (tr. 1326-7). The record is barren of necessary information from the State as to its position concerning the proposed Project's visual impacts on aesthetic, scenic, historic and recreational resources, save the testimony of Town witnesses Koppelman and Palmer, which should be accepted by the Board as a basis for rejecting the requested certificate.

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

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

V. The Record Shows that Noise from Operation of the Project Would Be a Public Nuisance

Operation of the proposed combined-cycle power plant creates tremendous noise. In essence, the plant is a pair of jumbo jet engines set inside turbine buildings that run at full power to

rotate the armature of an electric generator, which produces electricity. Heat recovery units are installed behind the jets to enhance efficiency. The unattenuated sound power levels inside the turbine and heat recovery steam-generator buildings are so great that an unprotected person near them would "be a cinder," in the words of Applicant's noise expert. (Keast, tr. 452). For example, the average unattenuated sound power levels of some major components are as follows:

Gas turbine compressor inlet	- 156 dBA[13]
Gas turbine exhaust	- 148 dBA
Exhaust duct between diffuser and boiler	- 143 dBA
Gas turbine unit	- 128 dBA

[source: Application, Appendix N5 of Appendix N at § 2 and tr. 451-455]

To put these noise levels into perspective, a sound level of 141 dBA is 100 times greater than the sound of a jet plane taking off at a distance of 300 feet. (Keast tr. 432, Application, Appendix N at Fig. 1). Suffice it to say that important Project components produce deafening amounts of noise, and that noise mitigation is a vitally important part of the Project's design and operation. Inadequate sound mitigation would result in serious adverse health and environmental impacts. The Town submits that the offsite ambient noise from the Project, even with the noise mitigation measures planned by the Applicant that are predicted to be within maximum levels specified by Staff and the Town Noise Code, will nevertheless be a public nuisance because they will disrupt existing and planned uses of the adjacent lands in the community. These offsite ambient noises can not be mitigated adequately because the 28 acre site is too cramped to allow room for buffering and attenuation of the ambient noise from the facilities when they are operating.

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[13]The term "dBA" refers to a logarithmic decibel (dB) scale, weighted to the tone of A. See Appendix N of the Application at § 2.3.

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

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

Applicant initially proposed to design its plant for a noise standard equivalent to a loud and disturbing Modified Composite Noise Rating ("CNR") of "D." A CNR of "D" means that sporadic noise complaints can be expected from the public. (Application, Appendix N at page 11). In essence, the Applicant initially chose the least noise mitigation that it believed that it could get away with. (See Application, § 11.6.2 at p. 11-13). Indeed, noise mitigation is costly, and reduces plant efficiency. (Application, § 11.6.2, table 11-9, and p. 11-13). However, at Staff's insistence Applicant finally consented to design the facilities to attempt to achieve a relatively less noisy standard equivalent to a CNR of "C." (Keast, tr. 388-389; see Ex. 26, tab A at p. 34, ¶(g)). A CNR of "C" means that the community reaction is expected to be between "sporadic complaints" and "no reaction, although noise is generally noticeable." (Application, Appendix N, figure 4). Thus,

even a CNR of C will definitely produce noticeable noise in the adjacent community. There is no evidence as to why an even quieter standard, such as a CNR of "B," has not been chosen, or why the developer should be allowed to add persistent noise to the nearby community simply because noise may be allowed up to specified levels by the existing Town Noise Code. The Code would appear to allow sporadic noises of up to 75 dBA at the property lines of industrial plants (Ex. 30), but that does not mean that a constant din of noise should be tolerated at all industrial property lines all the time. And yet, Applicant's expert testified that the Project will emit a "steady sound" during operation. (Keast, tr. 468). The Town submits that the Project's continuous offsite noise will amount to a public nuisance because it will be persistent and unremitting, and, in addition to the Project's adverse aesthetic and land use impacts, persistent offsite noise is another basis for denial of the Application for the Project.

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

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

In his testimony, Mr. Froedge first observed that the Applicant had failed to supply sufficient information to validate the Applicant's noise projections. (tr. 476). This problem was

compounded by the fact that the Applicant's vendor, Alstom, had used a proprietary computer model, which Applicant refused to reveal. (Ex. 17, response to B-9). Spectral noise content was omitted from the Application in certain cases (tr. 476; 494-496). Apparently this vital data is somehow accounted for in the proprietary noise projection model (Ex. 17). But there is no way to verify that the predicted noise limits will actually be achieved. (tr. 479, 502). The Applicant's noise projections are actually no more than design criteria; they are not actual noise levels produced from the individual components of the facility. (tr. 482).

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

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

The Applicant has made much of its assertion that the incremental noise impact from operation of the Project's components on the nearest residences, 2000 and more feet distant, will be minimal, at least when compared to the current ambient noise at these homes from the Long

Island Expressway.[14] But Applicant downplays the noise impact on adjacent light industry properties, except to admit that these impacts will necessarily be greater (tr. 468-9). The reality is that operation of the facility will have a significant adverse noise impact on the surrounding community, which is and is projected to be made up of only light industrial uses. (See Application, Figures 10-3 and 10-5). The noise emanating from the air-cooled condensers, for example, will average 99 dBA, and is expected to attenuate with distance, so that overall average noise from Project facilities will be on the order of 60-63 dBA at the property lines. See Application, Appendix N, Appendix N-4, p.2, lines 2-4. These noises will be perpetual, night and day, week after week, and month after month as long as the plant is operating.(Keast, tr. 468). They will be a monotonous sound from air cooling fan blades, muffled turbines, compressors and the like. They will be about as loud as an auto traveling at 40 mph and 50 feet distant.(Application, Appendix N, Figure 1). They are the sounds of heavy industry. And because the 28 acre Project site is so small, they will be heard constantly by travelers on the adjacent roads and workers at adjacent light industry facilities. The absence of a buffer, as the Applicant provided at two of its comparable facilities in Massachusetts (Shafer tr. 345-346; ex. 28), means that the noise emanating across the site boundary will be an irritating public nuisance, even if not in excess of the current noise limits of the Town Code.

There is no basis to assume, as the Applicant infers, that the Code's noise limits somehow grant the Applicant an absolute right to emit constant sound right up to the edge of the Code's maximum noise emission level. Discretion needs to be used, and would likely be used if the Town, not the Board, was the final arbiter of this matter. The Brookhaven Energy Project is in fact

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

noisy, in addition to being oversized for the site. The Project's noise would impose an intolerable nuisance, and is an additional basis for denial of the Application for the Project at the Yaphank site.

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

VI. The Record Shows that Noise from Project Construction Would Violate the Town's Noise Code

Construction of the Project facilities, if allowed to go forward, would entail at least 26 months of intense noisy activity, including earth moving and loud steam blows to clean steam pipes. Application § 11.5.1. Major construction phases include excavation, concrete pouring, steel erection, siding and machinery installation, and blow-out/start-up. (Application, Table 11-4). Each of these activities is predicted to produce average daytime noise levels at the site boundary as loud as 74 dBA, and of at least 69 dBA.(Id.). These noises are as loud as a big heavy truck at 100 feet, and louder than a gas lawn mower at 100 feet. (Keast, tr. 432; Application, Appendix N, Figure 1). Nighttime average noise level at the site boundary will be only slightly lower, at 67 dBA. (Application, table 11-6). Construction noise is proposed to meet a CNR of "D" (Application, § 11.5.4 at p. 11-11), meaning that "sporadic" noise complaints are to be expected. (Application, Appendix N, figure 4).

The actual sound levels heard at the property line, both at night and during the day, will be loud, and at times louder, and at times quieter, than the predicted averages. (Keast, tr. 441-2). It is plainly evident, therefore, that since the average sound levels are about 70 dBA, sound levels in excess of 70 dBA, and in excess of the Town Code's maximum of 75 dBA (Ex. 30; Keast tr. 441-442), will be heard routinely at and across the site boundaries during construction. Accordingly, construction of the Project in the manner proposed would result in frequent violations of the

Town's noise code. These will include piercing tones from backup warnings on earth movers, and the throbbing of heavy diesel engines. (Keast, tr. 447). The construction noises will disturb uses of adjacent properties.

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

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

VII. The Record Shows That if Construction Were to Occur, the Decommissioning Fund Would Be Insufficient

Section 10.6 of the Application set out Applicant's initial proposal for funding site restoration in the event that the Project is abandoned, cannot be completed, or is decommissioned. (See Board Regulations at § 1001.7 (b)). The Applicant initially suggested that site restoration

costs would be covered by the scrap value of the facilities, and then grudgingly proposed a net decommissioning cost estimate of $1.5 million for. (Application, § 10.6.3). Brookhaven Energy proposed to fund decommissioning through an initial letter of credit, beginning at $500,000, and increasing to $1,500,000 during construction, and then establishing a decommissioning fund to be built up at the rate of $50,000 per year, which it projected would grow to $6.3 million after 40 years.(Application, § 10.6.4).

Town witness Shafer, a highly qualified civil engineer with broad experience in both the public and private sectors (tr. 339-344; Ex. 27), testified that Applicant's decommissioning proposal was woefully inadequate. He pointed out that abandonment and decommissioning of the plant could take place at any time during construction or during the operating life of the plant, which could be 40 years. (tr. 355). He said that the Applicant's proposed cost analysis and finances are not sufficient to cover this time frame. He disagreed with Applicant's assumption that the scrap value of the equipment, buildings and structures on the site should be deemed as sufficient to cover the complete demolition cost of the above ground portion of the Project. (tr. 356). He noted that Applicant's assumed scrap value is quite high, but if the plant is decommissioned because major equipment has been damaged, perhaps due to a boiler explosion, fire or other cause, or because of market changes or technological obsolescence, the salvage value of on-site equipment would be severely diminished. (id.). Under this scenario, the amount of funding would be sorely lacking, and the Town as the host community would be left unprotected.

Mr. Shafer explained why he believes that the amounts of funding Applicant proposed in its construction letter of credit and decommissioning account are inadequate. He first noted that the most likely decommissioning scenario should assume decommissioning of the completed plant with no or minimum salvage value of the structures and equipment. The removal sequence would

be the reverse of construction, and would entail several hundred workers on site over two years. Considering the scope of the task, he opined that both the construction letter of credit and the demolition fund are orders of magnitude less than the actual decommissioning costs under any likely scenario. (tr. 358-359). Mr Shafer made a reasoned decommissioning cost estimate, based on analyses of the costs of specific tasks in the demolition process, which is Exhibit 29. His estimate is $12 million.

Applicant offered testimony by Guy Marchmont, an ANP employee, in response to Mr. Shafer's conclusions on decommissioning.(tr. 608-618). He testified initially (tr. 610-611) that Brookhaven Energy had, as part of the January 2002 Joint Stipulations reached with Staff and certain others, agreed to a decommissioning fund amount of $ 4.5 million (Ex 26 at Tab B, § XIII), some three times larger than initially proposed, thereby giving considerable credence to Mr. Shafer's observation that the funding proposed in the Application was woefully inadequate. Mr. Marchmont conceded that Mr. Shafer is "partly correct" in stating that the Applicant had assumed a high scrap value which would only be valid early in the Project's life. (tr. 610). But he argued that the Applicant's newly proposed increased funding amount of $ 4.5 million is a sufficient cushion against dropping scrap prices (id.). He stressed that scrap will always have value, and belittled Mr. Shafer's decommissioning cost estimate as unnecessary "de-engineering."(tr. 612-615). He offered some admittedly second hand reports (tr. 635) of decommissioning costs at plants in the United Kingdom. (tr. 616-618; Ex. 32). Interestingly, his argument against Mr. Shafer's sequenced plan of decommissioning, based on bashing the structures to bits (tr. 630), runs counter to his principal hypothesis that plant components can be salvaged and sold at high cost for re-use.

However, the fundamental difference between the approaches used by witnesses Marchmont and Shafer is obviously attributable to their different perspectives on the purpose of the

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

The Siting Board's appropriate choice on decommissioning is the one proposed by Mr. Shafer. Assume no or minimum scrap prices, and calculate the cost of a reasonable decommissioning scenario. That is what Mr. Shafer did. His answer is $12 million. (Ex 29). The Board's policy with respect to decommissioning should be the same.

VIII. The Record Shows that Applicant's Proposed Traffic Mitigation Is Completely Inadequate.

Construction of the Project facilities, if it was to go forward, would substantially increase traffic congestion in the vicinity of the site, due to workers arriving and departing at shift changes, and due to equipment and materiel deliveries. The impacts of construction related traffic on nearby roads, including traffic safety, and measures to minimize delays, was first evaluated in Section 15 of the Application. The traffic study area is displayed on Figure 15-1. Section 15 was supplemented by the direct testimony of Applicant's witness panel. (tr. 260-292), the direct testimony of Town witness Shafer (tr. 338-345, 347-354), and the rebuttal testimony by the King/Solzhenitsyn/Hill panel. (tr. 293-303). After Town witness Shafer's testimony was prepared

and filed, Applicant, Staff and Suffolk County agreed on joint stipulations and proposed certificate conditions with respect to traffic, which are found at Exhibit 26, Tab B, at Section X. These proposals appear to alleviate most, if not all of Mr. Shafer's concerns. For example, parking for construction personnel is to be within the Project site and not to the west of Sills Road, as initially proposed. Certain roadway improvements will be made, as set forth in paragraphs B and C of Section X of the proposed conditions, and other matter were agreed to.

The Town does not object to these proposals.

IX. The Town's Recommendations with Respect to the Required Findings under Article X.

Article X (PSL § 168(2)(a)-(e)) provides that the Siting Board may not grant a certificate for construction or operation of a major electric generating facility unless it shall first make certain findings and determinations. In response to the Presiding Examiner's request at the conclusion of the hearings (tr. 1750), the required findings under Article X, and the Town's position with respect to each of them is as follows:

Finding (a): Whether the facility is consistent with the most recent State Energy Plan (SEP), or has been "selected pursuant to an approved procurement process," which boils down to whether the facility would foster competition in the market for electricity.

Town position: As the LIPA testimony shows that the Project would be anti-competitive (tr. 851-7), the Town submits that the ALJs should recommend that the Board find that the project will not promote or foster competition in the relevant electric markets, and that the project has not been selected pursuant to an approved procurement process. The Town refers to LIPA's filings for further support on this issue.

Finding (b): The Board must determine the nature of the Project's probable environmental impacts, including among others, an evaluation of the predictable adverse

and beneficial impacts on aesthetics, scenic, historic and recreational value, and public health and safety.

Town position: The Town submits that a fair evaluation of the record shows that the Project would have unacceptable adverse impacts on aesthetic, scenic, historic and recreational resources in the Yaphank community, and would irreparably damage the public's enjoyment of such sites. Noise from the Project would be a public nuisance and impair public health and safety.

Finding (c): Whether the facility:

(i) minimizes adverse environmental impacts, considering available technology, the nature and economics of reasonable alternatives required to be considered under § 164(b), and the State's interest with respect to aesthetics, historic sites, forests and parks, fish and wildlife, agricultural lands, and other considerations;

(ii) is compatible with health and safety; and

(iii) will meet air, water and solid waste requirements.

Town position

The Town submits that the facility does not minimize adverse impacts, considering the available technology, the nature and economics of reasonable alternatives required to be considered under § 164(b), and the State's interest with respect to aesthetics, historic, scenic and recreational sites, and adverse noise and land use impacts. Considering the State's and the Town's interest with respect to aesthetics, historic, scenic and recreational sites and consistency with land use plans, it would be a mistake to allow the proposed facility at Yaphank. Moreover, there are greatly superior sites elsewhere in the Town, including Shoreham. The Town was improperly denied its right to submit evidence on

alternative sites.

Finding (d): Whether the facility is designed to operate in compliance with state and local laws, except that the Board may refuse to apply provisions of local laws if it finds that as applied to the proposed facility such provisions are unreasonably restrictive, in view of existing technology, or cost to ratepayers. The Board shall provide the municipality an opportunity to present evidence in support of such local laws.

Town position

The facility will greatly exceed the 50 foot height limitation of the Town's zoning code, and be inconsistent with the Town's Comprehensive Plan and with the light industry development plan for the area. Construction of the Project will violate the Town's noise code. There are other locations within that Town that are zoned for large electric generating plants, where larger sites are available to allow for buffering of adverse visual and noise impacts. The Town was denied an opportunity to present evidence on these points in violation of § 168(2)(d), as well as § 166(1)(h).

Finding (e): Whether construction and operation of the facility is in the public interest, considering environmental impacts of the facility, and reasonable alternatives examined as required under § 164(b).

Town position

Construction and operation of the facility is not in the public interest considering its adverse aesthetic, visual and noise impacts, the fact that it cannot be screened or otherwise sufficiently mitigated, the fact that it exceeds the Town Code's height limitation, and the fact that there are reasonable alternative sites which require examination.

Conclusion

For the reasons given above, the record requires the ALJs to recommend that the Board should deny Brookhaven Energy's Application for a certificate to construct and operate the Project at the Yaphank site.

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March 12, 2002

Respectfully submitted,
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