STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on November 8, 2006

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 05-E-0098 - Petition of Caithness Long Island, LLC for a Certificate of Public Convenience and Necessity to Develop, Own and Operate an Approximately 346 Megawatt Electric Generating Plant in the Town of Brookhaven, Suffolk County; and for an Order Regarding Regulatory Regime.

ORDER GRANTING A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, PROVIDING FOR LIGHTENED REGULATION AND APPROVING FINANCING

(Issued and Effective November 15, 2006)

BY THE COMMISSION:

INTRODUCTION

By petition dated January 25, 2005 (and supplemented on March 28 and August 5, 2005), Caithness Long Island, LLC (Caithness) requests an order granting a Certificate of Public Convenience and Necessity (CPCN) to construct, own and operate a 346 megawatt (MW) electric generating facility in the Town of Brookhaven, Suffolk County and providing for lightened regulation as an electric corporation under the Public Service Law (PSL). By petition dated February 10, 2006, Caithness requests financing approval pursuant to PSL §69. Caithness does not request the waiver of any filing requirements. By motion dated April 18, 2005, Caithness requests an expedited proceeding regarding its CPCN application, pursuant to 16 NYCRR §21.10(a)(1).

A Notice of Proposed Rulemaking concerning the initial petition was published in the State Register on June 1, 2005. The minimum period for the receipt of public comments regarding the initial petition expired on July 18, 2005. A Notice of Proposed Rulemaking concerning the financing petition was published in the State Register on March 22, 2006. The minimum period for the receipt of public comments on the financing petition expired on May 8, 2006. In addition, on June 29, 2006, the Secretary issued a notice requiring service of documents and soliciting comments which established July 26, 2006 as a deadline for comments and August 2, 2006 as a deadline for reply comments. Replies to the motion for an expedited proceeding were due on May 2, 2005. The comments and replies received are discussed below.

Pursuant to the State Environmental Quality Review Act (SEQRA), the Long Island Power Authority (LIPA) served as Lead Agency for the purposes of environmental quality review of the proposed electric generating facility. In November 2004, LIPA determined that the proposed facility may have a significant adverse impact on the environment and that an environmental impact statement would be prepared. In March 2005, a Draft Environmental Impact Statement (DEIS) was accepted by LIPA. In June 2005, a Final Environmental Impact Statement (FEIS) was accepted by LIPA. On June 1, 2006, LIPA further determined that the potential presence of a Pitch Pine-Oak-Heath Woodland community on a small portion of the Caithness site does not present either newly discovered information or a change in circumstances resulting in potentially significant adverse impacts to the environment that require LIPA to prepare a supplemental environmental impact statement under SEQRA.

The Commission grants the requests contained in the Caithness petitions, in the manner stated, and for the reasons given, herein. In addition, in conjunction with these

decisions and in its role as an "Involved Agency", the Commission makes SEQRA findings.

THE PETITIONS

Concerning its request for a CPCN, Caithness explains that its proposed electric generation facility was selected by LIPA as part of a comprehensive portfolio of new energy resources to help meet the peak demand for electricity on Long Island. According to Caithness, LIPA chose to secure capacity, energy and ancillary services from the Caithness project which would be provided pursuant to a 20-year power purchase agreement. A minor portion of the output would be retained by Caithness for wholesale merchant transactions. Caithness states that it will not sell electricity at retail and will operate solely within the wholesale market through the long-term power purchase agreement with LIPA for the bulk of its output and market transactions for the remainder. Of the nominal 346 MW project, the majority of the output would be subject to the LIPA power purchase agreement and about 40 MWs would be available to Caithness for merchant transactions. Caithness notes that dispatch of the plant would be subject to the New York Independent System Operator (NYISO) and its merchant sales would be at market-based rates under a Federal Energy Regulatory Commission (FERC) tariff.

Regarding its request for an order providing for lightened regulation, Caithness states that it will not sell electricity at retail and will only provide wholesale electric service, that it is not affiliated with an active power marketer but is affiliated with Desert Southwest Power, LLC, a registered power marketer that Caithness represents does not engage in any marketing activities. It asserts that exercise of market power by Caithness is not a realistic scenario where Caithness would be marketing no more than the about 40 MWs of output that would not be subject to the LIPA power purchase agreement. Caithness

concludes that the public interest in fostering competition in wholesale power markets warrants application of a lightened regulation scheme to Caithness and that such a regime would be consistent with Commission precedent.

Concerning its request for approval of financing under PSL §69, Caithness estimates that it will require up to $495 million in long-term financing to finance construction of the project. Caithness asserts that its proposed financing arrangements are warranted because they are for a statutory purpose and in the public interest, and are consistent with the Commission's prior decisions. Caithness seeks Commission approval to pursue any or a combination of the following financing alternatives:

(1) debt financing on a non-recourse basis with the facility serving as collateral for the debt over a period not longer than 20 years;

(2) some portion of the required financing may be supported by private equity investment;

(3) some portion of the cost could be financed through intra-company debt; and

(4) Caithness may support Project financing by entering into a sale-leaseback or lease-leaseback arrangement with a financial institution (Caithness requests confirmation that, to the extent it pursues such a sale-leaseback arrangement, the details need not be specified as long as: the arrangement does not cause Caithness to incur long-term indebtedness in excess of the amount approved pursuant to the petition; the financial institution entering into the arrangement is not subject to Commission jurisdiction as long as its role with respect to the Caithness project remains passive; and such an arrangement is properly subject to review pursuant to PSL §69 and not PSL §70).

According to Caithness, under any of the above arrangements, the financial institution would play no role in the day-to-day operation or management of the electric generation facility. Caithness further seeks Commission

authority to substitute financing entities and/or change the terms of payment so that it will have the flexibility to respond to changing market conditions as long as the total amount financed does not exceed the amount approved by the Commission.

By motion made pursuant to 16 NYCRR §21.10(a)(1), Caithness requests expedited treatment such that the public hearings required by PSL §68 be held before the Commission on the application, exhibits and other written documents without oral testimony.

PROCEDURAL MATTERS

Motion for Expedited Treatment

By motion dated April 18, 2005, Caithness requests expedited proceedings pursuant to 16 NYCRR, §21.10 regarding the requested CPCN. Based on its filed affidavits of service, it appears that Caithness served its request upon the parties entitled to receive its application for a CPCN and provided for newspaper publication by publishing a notice on April 26, 2005 in the Suffolk and Nassau County editions of Newsday. Parties had until May 6, 2005 to file objections to the request. No party filed an objection. The only response to the motion was made by the Town of Brookhaven, dated April 25, 2005, wherein the Town requested that approval of the petition for a CPCN "be subject to the completion of the SEQRA process" which was not then complete. Nothing in the Town of Brookhaven response states an objection to proceeding without oral testimony or states a substantive position regarding the petition for a CPCN.

Pursuant to 16 NYCRR, §21.10, the Commission may grant a motion for expedited proceedings if: (1) the applicant has served a copy of its motion, and the public notice required, upon each party entitled to receive a copy of the application and published the required newspaper notice; (2) no person, municipality or agency has filed with the Secretary, within 10 days of the date of publication of the required newspaper

notice, a written objection stating substantive reasons for opposition to the granting of such a motion; and (3) the Commission does not find a substantive basis for opposition to the granting of the CPCN at the hearings held before the Commission on the application and other filed information without oral testimony.

Discussion

We are satisfied that Caithness served its motion and provided for newspaper publication in the manner required. In addition, no party filed a timely substantive objection. The only remaining question is whether we now, having reviewed the application and other filed information without oral testimony, find a substantive basis for opposition to the granting of the CPCN. While several comments have been received in opposition to the Caithness project and could be construed as requesting evidentiary hearings, the comments dwell primarily on alleged facts and issues that are not relevant or material to our decision. We understand the comments and do not find, as is discussed further below, that they raise any substantive reasons for denying the CPCN or that oral testimony is necessary to better understand the facts or the positions of the parties. The motion for expedited proceedings is granted and we shall proceed to hear the matter of the proposed CPCN upon the application and other filed information without oral testimony.

Motion to Intervene of East End Property Company # 1

By motion dated July 26, 2006, East End Property Company # 1 (East End) seeks intervenor party status. East End states that it is the owner of a large apartment complex housing approximately 2,000 residents located between one-half mile and three-quarters of a mile from the proposed Caithness site. East End is concerned that the Caithness project will have a negative impact on the local environment in terms of air quality, water quality, visual resources, noise, traffic and community character.

Caithness states that it opposes East End's request for intervenor status "because it is a patently obvious attempt to disrupt and delay this proceeding after unsuccessfully pursuing similar tactics in Caithness's special permit proceeding before the Town of Brookhaven." Caithness characterizes East End's motion as "belated" and "nothing more than a continuation of its scorched earth effort to block the Caithness Project."

Discussion

It is not unreasonable for a neighboring property owner to raise concerns about a project's potential impacts on the local environment or to be given intervenor status. We routinely welcome such input. The objections to granting intervenor status Caithness has stated are directed primarily in opposition to East End's procedural requests rather than being on point to the issue of intervention. East End's request is not belated so long as East End takes the record and the process where it stands at the time of its intervention request. East End's motion for intervention is granted.

East End Request for Time Extension

In its comments dated July 26, 2006, East End requests an extension of the time period in which to submit comments. Its reasons given to justify its request include that the copy of the LIPA power purchase agreement it has is so heavily redacted that analysis of the terms and conditions of the document cannot be determined, that there is pending litigation regarding the project that should be resolved before the Commission proceeds, and that the details of a host community package is not yet available and the Commission should review such a package. East End also questions the need for the project, but that comment does not appear to relate to the request for an extension of time.

Caithness opposes extending the time period for comments. According to Caithness, all of East End's issues are being litigated in Suffolk County Supreme Court as part of pending litigation; the Commission should not duplicate the review of the Supreme Court; if a delay is granted it "would be in stark contrast to the actions of other state and local agencies … which have proceeded to issue approvals;" and the Supreme Court denied East End's application for a preliminary injunction and the Commission should not, in effect, reverse that ruling. Caithness points out that East End and its representative, the law firm Jaspan Schlesinger Hoffman, LLP (Jaspan Firm), has been aware of these proceedings for some time and should not be allowed to wait to the last minute to intervene and then be allowed to delay the proceeding.

Discussion

The minimum period for the receipt of public comments regarding the CPCN petition expired on July 18, 2005. The minimum period for the receipt of public comments on the financing petition expired on May 8, 2006. In addition, on June 29, 2006, the Secretary issued a notice in effect extending the comment periods by soliciting additional comments which established July 26, 2006, as the deadline for comments, and August 2, 2006, as the deadline for reply comments. Parties have had ample and extended opportunities to comment. East End has been permitted to intervene so long as it takes the record and the process where it stands at the time of its intervention request. Caithness has persuasively demonstrated that East End and its representative have been aware of this proceeding for some time and could have intervened much earlier in the process. It would indeed be unfair and unnecessary to now delay consideration of the petitions to accommodate a party that could have participated earlier. We take notice that, after the comments were received, a Supreme Court decision was issued in

the litigation noted above that generally favors the positions given by Caithness. The Supreme Court decision appears to moot East End's primary argument for a delay and our need to address its merits. In any event, the request by East End for an extension of the time period in which to submit comments is denied as unnecessary and undesirable.

Caithness Motion to Bar Jaspan Firm

By motion dated August 1, 2006 (including corrections to the cited case number dated August 3, 2006), Caithness requests that the Jaspan Firm be barred from this proceeding. Caithness asserts that the Jaspan Firm has an impermissible conflict of interest because it originally appeared in this proceeding representing the Town of Brookhaven, withdrew from that representation, and has now attempted to appear in this proceeding representing East End. According to Caithness, the Town of Brookhaven supports the Caithness petition and East End opposes it, therefore it is impermissible for the Jaspan Firm to switch clients and represent a client that has interests that are adverse to its original client. Caithness cites provisions of the New York Lawyer's Code of Professional Responsibility which it claims have been violated by the Jaspan Firm, and the Commission's regulations that require all persons appearing before the Commission to conform to the standards of conduct required of attorneys appearing before the Courts of the State of New York. East End responds by asserting that Caithness does not have standing to complain about the representation of East End by the Jaspan Firm since Caithness is not a present or former client of the Jaspan Firm; that the Town of Brookhaven is adequately represented by the Town Attorney and has not complained; that East End has a fundamental right to legal counsel of its own choice; that the Lawyer's Code should not be applied in a manner that would deprive East End of counsel in

the middle of a proceeding; and that a similar motion to disqualify brought by Caithness in Supreme Court was denied.

By a letter dated August 18, 2006, Caithness seeks to reply to East End's response. The letter does not demonstrate extraordinary circumstances justifying such a reply, and will not be considered.

Discussion

Caithness has the burden of persuasion for its motion to be granted, and has not met its burden. The fundamental premise of Caithness's motion, that the Town of Brookhaven supports the petition and has interests that are adverse to East End's interests, is not supported by the record. The Town of Brookhaven is a party to this proceeding, is represented by the Town Attorney, and has not indicated either support or opposition to the petition. Nor has it made any complaint about East End being represented by its former counsel. The only input received from the Town of Brookhaven is a procedural request that the Commission not act on the petition until the SEQRA process has been completed. In addition, our regulations specifically state that "[a] party's representative need not be an attorney." The New York Lawyer's Code of Professional Responsibility includes many fiduciary and other requirements that are not enforced by us and do not relate to representation before us. As a law firm, the Jaspan Firm is subject to the Lawyer's Code, but not by operation of our rules. Any party aggrieved by an action of the Jaspan Firm as relates to the Lawyer's Code should pursue their grievance in a manner and forum contemplated by such Code. The motion to bar the Jaspan Firm from appearing before us in this proceeding is denied.

Motion to Dismiss of John McConnell

In a document received on August 8, 2006, styled as both "Supplemental Comments" and a "letter motion," John McConnell requests that the application be denied because of

alleged "deficiencies in a filed petition that were never corrected according to [16 NYCRR, §17.4]." In response, Caithness objects to the un-timeliness of the document so far as it constitutes comments, and submits information to refute the substance of the alleged deficiencies.

Discussion

As noted above, July 26, 2006 was the deadline for comments and August 2, 2006 was the deadline for reply comments. To the degree that the document contains comments, it will not be considered as it is untimely.

As a motion, the theory stated to justify denial of the application is flawed and the motion is denied. Our regulations at 16 NYCRR, §17.4(a) provide that "[d]eficiencies in a filed petition, when called to the attention of the applicant, must be promptly corrected, or the application may be denied for lack of proper submission." However, our regulations also provide, at 16 NYCRR, §21.1(h), in part, that "[w]ithin 30 days after the filing of a petition for a certificate of public convenience and necessity, either the director of the division of the Department of Public Service most concerned with the petition, the director's representative or counsel shall advise the petitioner of any deficiencies in such petition." In this case, no such deficiencies were identified or called to the attention of the applicant by the Department of Public Service. Mr. McConnell is not affiliated with the Department of Public Service and therefore does not have authority to identify deficiencies that would give rise to a potential denial of an application pursuant to the device set forth in the above-quoted regulations, and, in any event, his proffer of alleged deficiencies is untimely having been made more than 30 days after the filing of the petition and after the deadline for comments. To the degree that the document is a motion, it is denied.

Motion to Strike of Dr. Carmine Vasile

In a document received on September 6, 2006, styled as a "Motion to Strike & Dismiss," Dr. Carmine Vasile requests that the Commission strike the Caithness reply comments dated August 1, 2006 (including, presumably, the corrections to the cited case number dated August 3, 2006 also submitted by Caithness). Dr. Vasile cites 16 NYCRR §§17.4, 18.1(i), 21.2(b), 21.10, 85-2.8(c), 85-2.12, 86.5(1) and 86.5(6), as well as 6 NYCRR §617.8(f) "and related statutes" as providing support for his motion. Dr. Vasile also makes a considerable number of factual allegations intended to demonstrate that new concealed evidence provides grounds to dismiss both Caithness petitions, that 16 NYCRR §§85-2.8(c) and 85-2.12 were violated, that there was fraud regarding the air permits obtained by Caithness, and that FERC's environmental assessment regarding the gas supply pipeline cannot comply with U.S. Environmental Protection Agency (EPA) requirements. In response, Caithness claims procedural and jurisdictional flaws in the motion, objects to the un-timeliness of the document so far as it constitutes comments, and submits information to refute the substance of the alleged deficiencies.

Discussion

As noted above, July 26, 2006 was the deadline for comments and August 2, 2006 was the deadline for reply comments. To the degree that the document contains comments, it will not be considered as it is untimely.

As a motion, little, if any, of Dr. Vasile's document relates to the issue of the motion, that is, on what basis the Caithness reply comments are improper and should be stricken. As discussed above regarding the motion to dismiss of John McConnell, 16 NYCRR, §17.4 relates only to petition deficiencies identified by the Department of Public Service, of which there are none. 16 NYCRR, §18.1(1) concerns filing requirements

regarding "affiliated interest" and has no relation to the motion that we can discern. 16 NYCRR, §21.2(b) implements the requirement of PSL §68 that the petitioner provide a verified statement by a responsible company official that all required municipal consents have been secured. The provision also requires the petition be accompanied by a certified copy of the franchise by the affected municipality; however this requirement relates to petitioners providing retail service and not to those, such as Caithness, providing wholesale service. Section 21.10 of 16 NYCRR concerns the motion for expedited proceedings treated elsewhere in this order. The following cited provisions, 16 NYCRR, §§85-2.8(c), 85-2.12, 86.5(1) and 86.5(6), concern transmission lines and are not relevant here. Finally, 6 NYCRR, §617.8(f) concerns scoping procedures under SEQRA that have long since been completed by the Lead Agency. None of the other allegations made, even if true and within our jurisdiction, address or demonstrate that the Caithness reply comments are procedurally defective. Therefore, the motion to strike the reply comments must be and is denied.

SUMMARY AND DISPOSITION OF COMMENTS

Several written comments opposing the proposed facility were received by the Commission from individual residents of the area and from the owner of a large apartment complex. Caithness submitted reply comments.[1]

Don Seubert

In an undated letter received on March 14, 2006, Don Seubert, representing the Medford Taxpayers & Civic Association, submitted a copy of statements and petitions in opposition to

[1] Supplemental comments and replies either not submitted directly o the Commission, or received after the established deadlines, have not been considered. Where the comments are duplicative, the discussion sections may disregard issues already discussed elsewhere in this Order.

the Caithness project previously presented to the Town of Brookhaven. The concerns stated include criticism of the location chosen for the facility because it is too close to residences; the lack of communication with residents; LIPA's role as Lead Agency for the purposes of environmental review and contracting entity; the threat of environmental harm from a new source of air emissions; the storage and use of fuel oil and ammonia; the construction and operation of a new natural gas pipeline; the credibility of need for new generation facilities; the new facility as a disincentive for conservation, cleaner, cheaper alternatives, and repowering of existing facilities; the use of economic development lands for a use that is not job-intensive; the segmentation of review of the natural gas pipeline from the review of the remainder of the project; the justice of placing another industrial facility in an area with many other industrial facilities; and the threat of harm to public health and safety from explosions and pollutant releases. As an alternative, Mr. Seubert recommends the repowering of older, dirtier power plants to increase their efficiency; energy conservation; and the new construction of only clean, renewable energy facilities.

A second letter was received from Don Seubert dated May 16, 2006. The additional concerns stated in this letter include "ethical, legal and lobbying concerns" with Caithness as an organization; the project may have to be relocated if it does not qualify for Empire Zone Credits; the "recent discovery" that the project is sited on a rare "Pine-Shrub-Oak-Heath Community" and the implications that recent discovery has on the validity of the overall project assessment; permission should be withheld and await the outcome of pending lawsuits; the Commission should require disclosure of a list of contributions made by LIPA and KeySpan Corporation (KeySpan) to all organizations over the past five years; the location of County hydro-geological zone lines

is arbitrary; information on the proposal is missing from Town files; the cost of the gas supply pipeline should be incorporated into LIPA's analysis; allowing Caithness to qualify for a payment in lieu of taxes agreement and for LIPA-funded upgrades to the transmission system is unfair to taxpayers, given the ability of Caithness to place a portion of the power on the open market in a merchant transaction; some of the maps provided are outdated and inaccurate, there should be an independent environmental justice study; and the proposal does not address the requirement that by 2013 20-25% of all power should be from renewable sources.

A third letter was received from Don Seubert dated May 22, 2006. The additional concerns stated in this letter include: the Commission has a citizen fiduciary obligation to review all aspects of the Caithness/LIPA proposal; the Commission should also review Caithness operations and finances throughout the country; certain LIPA actions took place before the environmental review was complete; LIPA kept documents from the public and threatened to restrict public comment; the Commission should identify the individuals that will be funding the private equity investment portion of the financing so that the Commission will not be in complicity with an illegal application; the citing by Caithness of Calpine Bethpage as precedent is evidence the financing petition should be denied because Calpine Bethpage went bankrupt; and LIPA needs complete independent oversight.

Finally, a fourth letter was received from Don Seubert dated July 26, 2006 that primarily repeats his earlier assertions. In addition, he alleges that the president and treasurer of his civic association met privately with LIPA officials without the knowledge of the rest of the civic association board or members. He intimates that the meeting resulted in a deal for a Brookhaven Councilmember to switch his

vote to one in support of the Caithness project, and in exchange, for the Councilmember to receive campaign contributions and for his constituency to obtain a new community center.

In reply, Caithness characterizes Mr. Seubert’s comments as “an assortment of unrelated items” that are misplaced and notes an inconsistency between his items and Mr. Seubert's statement that "lightened regulation scrutiny should be employed." Caithness questions in detail the relevance and accuracy of Mr. Seubert’s comments. Caithness notes that the power purchase agreement was not approved by LIPA until the SEQRA process, including LIPA’s adoption of SEQRA findings, was completed. Caithness also notes that the pending litigation, host community benefits package, Empire Zone qualification, the power purchase agreement, the process leading to adoption of the FEIS, the New York State Department of Environmental Conservation (DEC) air permit, and the Town’s review processes are not before the Commission for approval. Caithness further asserts that Mr. Seubert's call for specifics concerning the "financing plan" ignores the fact that Caithness has asked to be a wholesale generator of electricity under a lightened regulatory regime for which Caithness believes it has provided more than enough information to support its petition for financing approval. Caithness criticizes Mr. Seubert’s assertion that the history of Caithness's operations elsewhere in the country "is a cause of concern" as lacking specifics. As to Mr. Seubert's discussion of Caithness's reliance on the Commission's decision in the Calpine Bethpage proceeding, Caithness notes that decision was cited for the appropriate scope of review with respect to Caithness's petition for financing approval. Continuing, Caithness notes that the issue of the facility's location outside the deep recharge zone (Zone IH) was raised by Mr. Seubert during the DEIS comment

period and was addressed in the FEIS Response to Comments, and is also before the Supreme Court in the East End litigation. Caithness also notes that also before the Supreme Court is the impact on the alleged "Pine-Shrub-Oak-Heath Community." Caithness points out that LIPA's review of the issue with independent biologists and LIPA's own environmental consultants led LIPA to the conclusion that the information "does not present either newly discovered information or a change in circumstances resulting in potential significant adverse impacts to the environment that require LIPA to prepare a [supplemental EIS]." Regarding the allegation that the maps used are outdated, Caithness asserts that the maps in question were sufficiently current to accurately portray the location of the facility. As to the issues of need and alternatives, Caithness asserts that these issues are clearly addressed in Caithness's petition, that demand growth has been demonstrated, and that the FEIS clearly addresses other alternatives such as demand side management and alternative technologies. Finally, Caithness criticizes Mr Seubert's "vague references" to a variety of items such as "underground plumes," "methane vents," "landfill evaluation," and "environmental justice," among others, that Caithness believes warrant little comment because they are either irrelevant to the pending petitions and the Caithness FEIS, or they were thoroughly addressed in the FEIS.

Discussion

Many of the comments received in this proceeding, such as many of Mr. Seubert's comments, do not relate to issues before us or subject to our jurisdiction. We do not have general supervisory power over LIPA, the Town of Brookhaven, Suffolk County, DEC, EPA, FERC, or any other federal, state or local agency that has concurrent or sole jurisdiction over one or more aspects of the Caithness project

or its interconnections. The issues raised by Mr. Seubert regarding LIPA's role, the use of economic development lands, qualification for Empire Zone Credits, contributions by LIPA and KeySpan, the designation of County hydro-geological zone lines, information allegedly missing from Town files, qualification for payment in lieu of taxes agreements, LIPA-funded upgrades to the transmission system, the timing of LIPA actions, LIPA's document disclosure practices, LIPA's public comment practices, the alleged need for independent oversight of LIPA, alleged private meetings of civic association officers with LIPA, and alleged vote-switch deals are all matters beyond our jurisdiction, and therefore are not relevant or material to our decisions in this proceeding, and are not considered.

Regarding process issues, as to the claimed lack of communication with residents, we can only address that issue in the context of this proceeding. Caithness has adequately performed our requirements regarding notice, publication of notice, and service of documents. The parties who were interested had multiple opportunities to comment. Mr. Seubert alone has submitted four sets of comments. Secondly, Mr. Seubert's request that permission should be withheld and await the outcome of pending lawsuits is now moot as the Supreme Court has ruled on the key lawsuit. Finally, the segmentation of the environmental impact review of the natural gas pipeline from the review of the remainder of the project is not a barrier to our making a decision on the record before us. SEQRA is a state statute that does not apply to environmental reviews conducted by FERC. As the proposed extension of the Iroquois Pipeline to serve the Caithness project with natural gas is a matter of federal jurisdiction, it is permissible, proper, and required for the environmental review of the pipeline pursuant to the National Environmental Policy Act (NEPA) to be segmented and conducted by FERC separately from the remainder of the

environmental reviews that are subject to state and local jurisdiction under SEQRA.

As to the land use issues raised, the location chosen for the facility is not too near residences, particularly given the generally flat topography of the area that limits visibility of the facility, and has been approved by the Town. In addition, we have not found the quality or accuracy of the maps provided to be a hindrance in our review. The Town of Brookhaven has a comprehensive plan of zoning provisions and other land use ordinances that provide for the segregation of industrial uses from other incompatible uses such as residences. The site is in an industrial area that is planned for expansion as such. The addition of a new natural gas electric generation facility is compatible with the existing and planned uses. While Mr. Seubert's general concerns about the threat of harm to the environment and public health and safety from explosions, pollutant releases, air emissions, the storage and use of fuel oil and ammonia, and the construction and operation of a new natural gas pipeline are understandable, he has not raised any particular concerns about the design of the Caithness project that indicate any particular risk that would not be created by similar industrial uses of the land. Concerns regarding the environmental justice of siting another industrial facility in the area were adequately addressed in the FEIS and do not constitute a barrier to the proposed Caithness project.

As to the presence of an unusual plant community on a small portion of the site, a review of the biological studies in the record indicates that a recent severe fire occurred on the site in 2003 that destroyed approximately 70% of the overstory tree canopy in this portion of the site. The current plant community that includes some pioneer species that do not occur in mature forest is transitional as the natural process of succession slowly restores the area to its state before the

fire. It is expected that the plant community will mature into the surrounding forest community and that the non-forest pioneer species will naturally die out as the tree canopy re-establishes itself. While this type of plant community is unusual due to its transient nature, none of the species identified are considered endangered or threatened plant species.

Regarding need for the facility and alternatives, we note that LIPA has entered into a power purchase agreement with Caithness to supply electric energy to LIPA as part of a broad energy plan for Long Island that recognizes the reality of current demand growth and includes generation, transmission, conservation, and renewable resource energy components. We expect that LIPA will pursue additional energy conservation and the repowering of existing facilities in due course, and the addition of the capacity from the Caithness plant should provide LIPA with added flexibility to maintain reliable service as it reworks its supply portfolio. LIPA is also working to increase the amount of energy it obtains from renewable resources as part of the overall plan.

As to the comments that relate to the petition for financing approval, the level of scrutiny Mr. Seubert proposes we undertake over Caithness and its financial backers clearly goes beyond what is required under our lightened regulatory regime for these types of wholesale facilities or to protect ratepayers. Mr. Seubert is also incorrect in his belief that we have a fiduciary obligation to review all aspects of LIPA's procurement processes.

John and Johan McConnell

In a letter dated March 13, 2006, John and Johan McConnell submitted a copy of comments previously presented to the Town of Brookhaven. The concerns stated include: the Town of Brookhaven never followed up on the concerns expressed in reports prepared by experts hired by the Town; the site may have

been classified in the wrong hydrogeologic zone; LIPA may have more generation capacity than stated in newspaper articles; a Town Councilwoman changed her position regarding the Caithness proposal since being elected; the area has taken more than its fair share of industrial uses; two civic groups changed their position regarding the Caithness proposal since the host community benefit package was introduced; two Town Board members should recuse themselves because they stated their support of the Caithness proposal due to the host community benefit package; fuel oil would be stored above a deep aquifer recharge area; and to refill the stored oil, it would require 94 fuel-oil trucks per day that would travel on a two-lane county road through a residential area with air quality already affected by the Long Island Compost facility. The McConnells request that the Caithness petition be denied due to the concerns they raise.

A second letter was received from John McConnell dated July 26, 2006. The additional concerns stated in this letter include questions regarding the validity of the visual simulations because he witnessed the balloon test (floating a tethered balloon at the site of the proposed power plant exhaust stack) and saw that, due to wind, the balloon never reached the full stack height. He also cited two Newsday articles intended to demonstrate that one Councilman changed his vote on the Caithness project in order to get money for the village and school district he represents; that a criminal complaint was filed against that Councilman for his actions; and that another Councilmember was the recipient of intimidation tactics for not supporting the Caithness project.

In reply, Caithness asserts that Mr. McConnell's statements regarding the balloon demonstration are inaccurate and that the balloon demonstration was not performed to support the visual simulations for the Caithness project, but was conducted rather for the purpose of providing the public

and local officials an opportunity to draw their own conclusions regarding the potential visibility of the project stack, the tallest feature of the proposed project. According to Caithness, a months-earlier balloon demonstration to substantiate the accuracy and reliability of the visual impact assessment presented in the DEIS was conducted under more optimal wind conditions. Caithness further asserts that Mr. McConnell's remaining comments mirror prior inaccurate statements by others with respect to the completion of the SEQRA process and other issues not falling under the Commission's jurisdiction.

Discussion

As discussed above, adding another industrial use to the area as proposed is not unfair or incompatible with surrounding land uses. A review of the FEIS indicates that the concerns expressed in the cited reports prepared by experts hired by the Town of Brookhaven were adequately addressed. The storage of fuel oil at the planned location has also been adequately addressed in the FEIS and is conclusively resolved by the Major Oil Storage Facility licensing process. If it becomes necessary to replenish a large quantity of the stored back-up fuel oil on an immediate basis, Mr. McConnell is correct that it will be necessary for a substantial number of fuel-oil trucks to travel to and from the Caithness site. The added traffic would cause additional delays at intersections projected to be already experiencing significant delays due to high traffic volumes. This is an unmitigated impact of the facility for which no practicable mitigation measure was identified.

The issues raised by John and Johan McConnell regarding the designation of County hydro-geological zone lines, alleged changes in positions by elected Town officials and civic groups, alleged need for recusal of Town Board members, and alleged criminal actions and investigations are all matters

beyond our jurisdiction and are not considered. Mr. McConnell's concerns regarding the balloon test are misplaced as described in the Caithness reply comments summarized above.

Dr. Carmine F. Vasile

In a letter dated March 9, 2006, Dr. Carmine F. Vasile requests that the Commission deny the Caithness petition because he believes the project will create an updraft of toxic fumes from nearby toxic waste sites. According to Dr. Vasile, hot air emanating from the exhaust stack will create an area of low pressure resulting in updrafts, and the updrafts, in turn, will uplift toxic fumes from nearby hazardous waste sites that he claims Caithness and LIPA failed to identify. His concern is that the effect he describes will create a potential safety hazard to low-flying aircraft and to birds. He cites a Newsday article noting vapor intrusion migrating from the soil into adjacent structures caused by trace elements of contamination from spilled toxic solvents that had been cleaned up. In addition, Dr. Vasile alleges that certain LIPA practices constitute waste, fraud and abuse.

A second letter was received from Dr. Vasile dated July 24, 2006. In this letter he asserts that Caithness cannot complete the environmental review process because of defects in its visual impact assessment; that Caithness has not determined the height at which "blow-down" will cause stack plumes to go down or sideways; that a full evidentiary hearing will provide grounds to dismiss based on bribery of Town officials; that on May 6, 2005 Caithness admitted that the SEQRA process was not yet complete; and that other miscellaneous accusations of deceit, collusion and bribery, both past and ongoing, taint the review process.

In reply, Caithness criticizes Dr. Vasile's comments as rife with misstatements of law and fact. Regarding Dr. Vasile's comments concerning toxic fumes and thermal uplift, Caithness

cites DEC's contrary findings which include: Dr. Vasile's incorrect characterization of the source characteristics of so-called "hazardous waste sites;" the conditions required to create a low pressure area at ground level, as alleged, cannot occur due to the characteristics of the air cooled condenser and the flow of air through it; and other factors, such as distance to source and dilution, make the theory untenable. Caithness also cites conclusions in the FEIS that the air modeling analysis demonstrated that the maximum air quality concentrations at all locations would be below significant impact concentrations and well below New York State and National Ambient Air Quality Standards—health based standards designed to protect the most sensitive population groups, specifically senior citizens and other members of the population, that may have difficulty breathing.

Caithness asserts that, despite Dr. Vasile's argument, the SEQRA environmental impact statement process has been completed, SEQRA does not preclude a project sponsor from submitting an application to an agency prior to the completion of the SEQRA process, and SEQRA only precludes an agency from making a final determination on an application before the FEIS, if required, is issued. Caithness anticipates that the Commission will adopt a findings statement in compliance with SEQRA prior to, or in conjunction with, its determination concerning the Caithness petitions. According to Caithness, the FEIS addressed and dismissed Dr. Vasile's "blowdown" concern, concluding that a stack height of 170 feet was the lowest stack height achievable to ensure insignificant air quality impacts, and that as a result, DEC has issued the required air permits. As to Dr. Vasile's allegations concerning fraud, intimidation, deceit and collusion, Caithness asserts that they are baseless, unsupported by any evidence, and beyond the Commission's jurisdiction.

Discussion

Dr. Vasile's theory that the Caithness project will create an updraft of toxic fumes from alleged nearby toxic waste sites lacks a scientific basis. First, the air cooled condenser uses very little air flow from ground level, getting most of its intake air starting 20-30 feet above the ground. Secondly, Dr. Vasile has incorrectly identified point source registrations of boiler stacks and other permitted air emission sources as "hazardous waste" or "toxic waste" sites. Finally, Dr. Vasile has not correctly considered the absolutely minute quantity of toxic vapors or emissions that would emanate from the ground, assuming that there even were hazardous waste sites nearby, in relation to the quantity of air flow through the air cooled condenser. Any minute quantity of vapors would be greatly dispersed and diluted such that there would be no possibility of harm to transient birds or airplanes. Dr. Vasile has not provided any engineering calculations, scientific analyses, or studies to give any credibility to his theory or to prompt further inquiry.[2]

Dr. Vasile's arguments regarding completion of the SEQRA process are misplaced and lack merit as described in the Caithness reply comments summarized above. Similarly, Caithness is correct that the "blow-down" concern is adequately addressed in the FEIS and resolved conclusively by the issuance of the air permits.

The issues raised by Dr. Vasile regarding certain LIPA practices that allegedly constitute waste, fraud and abuse, alleged bribery of Town officials, and other miscellaneous

[2] The Newsday article he cites describes a very different condition involving long-term vapor intrusion from soil into adjacent structures where, due to the laws of physics, such vapors would tend to collect and not be dispersed. This creates a potential for harm due to long-term, intransient exposure.

accusations of deceit, collusion and bribery, both past and ongoing, do not relate to matters before us or to our review process, are matters beyond our jurisdiction and are not considered.

Thomas Bermel

In a letter dated March 18, 2006, Thomas Bermel submitted two documents that he asks be made part of the record. The first document is a copy of a statement he previously presented to the Town of Brookhaven. The concerns stated include the availability of cheaper "green power" as an alternative; the legality of a LIPA-funded host community benefits package; the lack of air safety/air quality impact studies; the need to clean up from the deposition of emissions and failure to provide for payment of clean up costs; the incompatibility of the site with an adjacent property proposed for affordable workforce housing; and the loss of crops and business by local farmers due to pollution. As an alternative, Mr. Bermel recommends importing green power, use of the Spagnoli Road Article X site, energy conservation, the repowering or upgrading of existing power plants, and building the project on Plum Island (located off the northeastern tip of the north fork of Long Island). The second document is a list of questions posed to the Town of Brookhaven, noting that Caithness purchased an additional ten acre parcel adjacent to the Caithness site, and questioning the intended use of the new parcel and Caithness plans to build the power plant or to, instead, "profit as an industrial landlord."

A second letter was received from Thomas Bermel, dated July 25, 2006. The additional concerns stated in this letter include: a review of the environmental impact of the fuel gas supply pipeline on the Caithness property was never conducted; Caithness should not be given temporary authority to construct the power plant using only oil as fuel; Town of Brookhaven

consultants raised concerns about the visual impact analysis and the air quality analysis; Caithness and LIPA acted in collusion and perpetrated a fraud on the Commission by submitting an environmental impact statement which subverted the SEQRA process; the Town of Brookhaven joined in the collusion and accepted bribery in the form of campaign contributions and under the guise of a "Community Benefits Package;" and the Town willfully ignored Freedom of Information Law requests for documents.

In reply, Caithness notes that the site plan shown in the FEIS does illustrate the location of the on-site gas pipeline lateral and the on-site gas metering facilities. According to Caithness, the full pipeline that will supply natural gas to the Caithness project is not shown in the FEIS because the pipeline will not be subject to SEQRA review. As to Mr. Bermel's concern about construction of the power plant to use only oil as fuel, Caithness notes that there is no such possibility as the air permits limit oil use to no more than 30 days annually. In response to the comment regarding concerns raised by Town of Brookhaven consultants, Caithness states that "Mr. Bermel refers to letters prepared by EDR and Cambridge Environmental, both of which were submitted as comments during the DEIS comment period and both of which were thoroughly addressed in the [FEIS]." Caithness denies the relevance and veracity of all of Mr. Bermel's other comments regarding alleged procedural shortcomings, collusion and bribery.

Discussion

Most of the comments made by Mr. Bermel regard issues already discussed above that we will not repeat here. While we do not believe that Caithness has any intention of commencing operation of the dual-fuel facility until it is interconnected to a supply of natural gas, we will alleviate Mr. Bermel's concern with a condition that will explicitly

prevent Caithness from constructing the power plant to use only oil as fuel. The potential use of Plum Island as an alternative site is not an alternative that warrants further consideration. Plum Island is remote; located approximately 17 miles off-shore from Orient Point, the extreme eastern tip of the north fork of Long Island. The land is held by the U.S. Government as a federal reserve housing the Plum Island Animal Disease Center. Due to the nature of its use, the limited ferry access to the island is restricted. There are no attributes of Plum Island that make it a feasible or practical alternative.

The issues raised by Mr. Bermel regarding the legality of a LIPA-funded host community benefits package, the intended use of an additional ten acre parcel, alleged collusion and bribery, and the Town's practices in administering the Freedom of Information Law are all matters beyond our jurisdiction and are not considered.

East End

In comments dated July 26, 2006, East End requests that the Commission not act on the Caithness financing petition. It asserts the power purchase agreement upon which it is based requires approval by the New York State Comptroller and the Public Authorities Control Board (PACB), and such approval has not yet been obtained. East End also asserts that Commission approval of the CPCN would be premature until such time as LIPA and Caithness have made a final determination as to how the Caithness project will obtain the natural gas required for its operation. Citing Commission comments on the DEIS, East End also asserts that Commission approval would be premature pending the completion of a supplemental environmental impact statement regarding the final pipeline design, and that it is impermissible to segment the environmental review for the pipeline from the Caithness project. East End also asks that

the Commission make a thorough examination of whether the Caithness project is financially beneficial to LIPA's ratepayers, particularly when all the costs LIPA has assumed are considered. East End questions whether the Caithness project will qualify for claimed Empire Development Zone benefits of $72,000,000. East End also questions the propriety and financial impact on ratepayers of the $152,000,000 host community benefit package and asks that it be reviewed by the Commission. Finally, East End questions the need for the Caithness project, given the expected 2007 in-service date of the Neptune Power Cable, and suggests that it would be more prudent, both economically and environmentally, to repower the Northport Plant in phases.

In reply, Caithness claims that its petition for financing approval does not rely upon the execution of the power purchase agreement with LIPA, but instead is based on the amount of indebtedness Caithness believes it could seek in relation to the project. Caithness also contends that PACB approval of the power purchase agreement with LIPA is not required, but even if it was, such approval is not a prerequisite to approval by the Commission of Caithness's petition for financing approval. Caithness states that both LIPA and Caithness contend in the East End Litigation that the power purchase agreement need not be submitted to the PACB. Caithness also contends that it is not within the Commission's jurisdiction to decide this matter. Similarly, Caithness argues that State Comptroller approval of a power purchase agreement is not a prerequisite to approval of Caithness's petition for financing approval. As to the concerns raised about segmentation of the environmental impact review of the natural gas supply pipeline from SEQRA review of the Caithness project, Caithness states that it is pursuing an extension of the Iroquois Pipeline which will be properly subject to its own environmental review pursuant to the NEPA in lieu of

SEQRA. Caithness argues that: the other matters raised by East End are currently before the Suffolk County Supreme Court; none provides a basis to delay action on the petitions Caithness has filed; and East End offers no legal basis to suggest that the Commission has the authority to review such matters. Finally, Caithness asserts that LIPA's 2004-2013 Energy Plan demonstrates a need for both the Caithness and Neptune projects to meet demand growth.

Discussion

The issues raised by East End regarding whether the Caithness project will qualify for Empire Development Zone benefits and the propriety and financial impact on ratepayers of the host community benefit package are matters beyond our jurisdiction and are not considered. All of the other matters raised by East End, except one, have already been discussed above.

As to East End's request that we not act on the Caithness financing petition until the underlying power purchase agreement upon which it is based is approved by the PACB, we agree with Caithness that such approval is not a prerequisite to our approval of the petition for financing approval. Whether or not PACB approval is required for the power purchase agreement is an issue for the financial marketplace to consider before investing in the Caithness project. In a lightened regulatory regime, the generator is at risk if the project cannot be financed, not the ratepayers.

DISCUSSION AND CONCLUSION

Environmental Quality Review

We participated in the SEQRA process as an "Involved Agency." The original petition was not considered complete until the DEIS was accepted by LIPA as Lead Agency on March 24, 2005. The Department of Public Service filed two sets of comments on the DEIS. The FEIS, including the response to all

comments, was accepted by LIPA as Lead Agency on June 23, 2005. LIPA issued its Lead Agency findings statement on December 15, 2005. On June 1, 2006, LIPA, as Lead Agency, further determined that the potential presence of a Pitch Pine-Oak-Heath Woodland community on a small portion of the Caithness site does not present either newly discovered information or a change in circumstances resulting in potentially significant adverse impacts to the environment that require LIPA to prepare a supplemental environmental impact statement under SEQRA.

After having considered the relevant environmental impacts, facts and conclusions disclosed in the FEIS and weighed and balanced relevant environmental impacts with social, economic and other considerations, we are acting to approve the Caithness project as a needed component of LIPA's energy plan to serve the electric demand needs of Long Island. Our SEQRA findings are set forth in greater detail in the Appendix attached hereto entitled "Findings Statement." In addition, we have certified that the requirements of the SEQRA regulations have been met and consistent with social, economic and other essential considerations from among the reasonable alternatives available, the actions are ones that avoid or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

The environmental review for the natural gas fuel supply pipeline has been segmented and will be conducted by FERC pursuant to federal jurisdiction, but if the applicant changes the gas pipeline proposal such that it is no longer subject to federal jurisdiction, the environmental review for the natural gas fuel supply pipeline will either remain segmented and will be conducted pursuant to Article VII of the Public Service Law,

or will not be segmented and will require a supplemental environmental impact statement.

Public Convenience and Necessity

We are authorized to grant approval to an electric corporation pursuant to PSL §68, after due hearing and upon a determination that the construction of electric plant is necessary and convenient for the public service. Our rules establish pertinent evidentiary requirements for a CPCN application (16 NYCRR §21.3). The rules require a description of the plant to be constructed and of the manner in which the cost of such plant is to be financed, evidence that the proposed plant is in the public interest and economically feasible, and proof that the applicant is able to finance the project and render adequate service.[3]

The proposed Caithness facility is needed to help meet growing peak demand and enhance competition in the wholesale power market statewide and in the Long Island load pocket. That the Neptune Cable will be enhancing LIPA's system in no way shows that the proposed facility will not be needed.

On the basis of the facts and representations submitted in the petitions, it appears that Caithness will be able to finance the project and render adequate service. Most facility output will be sold in the wholesale market on Long Island pursuant to a power purchase agreement with LIPA; the remainder will be available for other marketplace transactions. Thus, the facility will provide benefits to Long Island by enhancing competition. Accordingly, the project appears to be economically feasible and in the public interest.

[3] The requirements of 16 NYCRR §21.3 (a) concerning the population of a franchise territory and (e) concerning estimated revenues, expenses and a number of prospective customers are applicable only when retail service will be provided, which is not the case here.

Caithness satisfied the requirements of PSL §68 by filing a copy of its Certificate of Formation as an exhibit to its petitions. Caithness also showed that it has obtained the municipal consent regarding the right to use property by obtaining site plan and other approvals from the Town of Brookhaven.

Hearings having been held in this proceeding upon the application and other filed information without oral testimony, we find, pursuant to PSL §68, that the construction and operation of the facility, as described in the petition, the supporting documents, and this Order, is necessary and convenient for the public service.

Lightened Regulation of Caithness

The lightened regulatory regime Caithness requests is similar to that afforded to other comparably-situated exempt wholesale generators (EWGs) participating in wholesale electric markets. Its Petition is therefore granted, to the extent discussed below.

In interpreting the PSL, we have examined what reading best carries out the statutory intent and advances the public interest. In the AES and Carr Street Orders,[4] it was concluded that new forms of electric service providers participating in wholesale markets would be lightly regulated. Under this realistic appraisal approach, PSL Article 1 applies to Caithness, because it meets the definition of an electric corporation under PSL §2(13) and is engaged in the manufacture of electricity under PSL §5(1)(b). Caithness, therefore, is subject to provisions, such as PSL §§11, 19, 24, 25 and 26, that

[4] Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing For Lightened Regulation (issued April 23, 1999)(Carr Street Order); Case 99-E-0148, AES Eastern Energy, L.P., Order Providing For Lightened Regulation (issued April 23, 1999)(AES Order).

prevent producers of electricity from taking actions that are contrary to the public interest.[5]

All of Article 2 is restricted by its terms to the provision of service to retail residential customers, and so is inapplicable to wholesale generators like Caithness. Certain provisions of Article 4 are also restricted to retail service.[6]

It was decided in the AES and Carr Street Orders that other provisions of Article 4 would pertain to wholesale generators.[7] Application of these provisions was deemed necessary in light of obstacles to entry into the generation market. The Article 4 provisions, however, were implemented in a fashion that limited their impact in a competitive market, with the extent of scrutiny afforded a particular transaction reduced to the level the public interest required. Moreover, wholesale generators were allowed to fulfill their PSL §66(6) obligation to file an annual report by duplicating the report they were required to file under federal law.

Regarding PSL §70, it was presumed in the AES Order that regulation would not "adhere to transfer of ownership

---

[5] The PSL §18-a assessment is applied against gross retail revenues; so long as Caithness sells exclusively as a wholesaler, there will be no retail revenues and no assessment will be collected.

[6] See, e.g., PSL §§66(12), regarding the filing of tariffs (which are required at our option); 66(21), regarding storm plans (which are submitted by retail service electric corporations); 67, regarding inspection of meters; 72, regarding hearings and rate proceedings; 75, regarding excessive charges; and, 76, regarding rates charged religious bodies and others.

[7] PSL §68 provides for certification of electric plant, but pertains only to construction of new plant (unless such plant is reviewed pursuant to PSL Article VII) or to electricity sales made via direct interconnection with retail customers. PSL §§69, 69-a and 70 provide for the review of securities issuances, reorganizations, and transfers of securities or works or systems.

interests in entities upstream from the parents of a New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption."[8] Wholesale generators were also advised that the potential for the exercise of market power arising out of an upstream transfer would be sufficient to defeat the presumption and trigger PSL §70 review.[9] This analysis of Article 4 adheres to Caithness.

Turning to PSL Article 6, several of its provisions that adhere to the rendition of retail service do not pertain to Caithness because it is engaged solely in the generation of electricity for wholesale.[10] Application of PSL §115, on requirements for the competitive bidding of utility purchases, is discretionary and will not be imposed on wholesale generators. In contrast, PSL §119-b, on the protection of underground facilities from damage by excavators, adheres to all persons, including wholesale generators.

---

[8] AES Order, p. 7.

[9] In this context, under PSL §§66(9) and (10), we may require access to records sufficient to ascertain whether the presumption remains valid.

[10] See, e.g., PSL §§112, regarding enforcement of rate orders; 113, regarding reparations and refunds; 114, regarding temporary rates; 114-a, regarding exclusion of lobbying costs from rates; 116, regarding discontinuance of water service; 117, regarding consumer deposits; 118, regarding payment to an authorized agency; 119-a, regarding use of utility poles and conduits; and, 119-c, regarding recognition of tax reductions in rates.

Most of the remaining provisions of Article 6 need not be imposed generally on wholesale generators.[11] These provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates monopoly providers charged to captive retail customers. Wholesale generators, however, do not serve retail customers. Moreover, imposing these requirements could interfere with wholesale generators' plans for structuring the financing and ownership of their facilities. This could discourage entry into the wholesale market, or overly constrain its fluid operation, to the detriment of the public interest.

The Petition states that Caithness is currently affiliated with a power marketer, but it does not describe any plans the new owner might have for such an affiliation. Because the potential for the exercise of market power can arise out of an affiliation between a generator and a power marketer, even though Caithness does not describe its plans for its affiliation, PSL §110(1)(on the reporting of stock ownership) and PSL §110(2)(on access to books and records and the filing of reports) pertains to Caithness and any marketing affiliate.

Consequently, we will not impose the requirements of Article 6 on Caithness except for §119-b; we will impose §110(1) and (2) to the extent discussed above. Caithness is reminded, however, that it remains subject to the Public Service Law with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed above and in

[11] These requirements include supervision of affiliated interests under §§110(1) and (2), and approval of: loans under §106; theuse of utility revenues for non-utility purposes under §107;corporate merger and dissolution certificates under §108;contracts between affiliated interests under §110(3); and,water, gas and electric purchase contracts under §110(4).

previous orders.[12] Included among these requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities,[13] to give notice of generation unit retirements,[14] and to report personal injury accidents pursuant to 16 NYCRR Part 125.

Financing

Approval of the financing plans of Caithness is appropriate under lightened regulation. The scrutiny applicable to monopoly utilities may be reduced for lightly-regulated companies like Caithness that operate in a competitive environment. As a result, we need not make an in-depth analysis of the proposed financing transactions. Instead, by relying on the representations Caithness made in its filing, prompt regulatory action is possible.[15]

The proposed financing appears to be for a statutory purpose and does not appear contrary to the public interest, and is approved up to a maximum amount of $495 million in many types of debt. Given that Caithness does not provide retail service, it is afforded the flexibility to modify, without our prior approval, the identity of the financing entities, payment terms,

---

[12] See, e.g., Case 05-E-1095, TransCanada Power (Castleton) LLC, Declaratory Ruling on Transfer of Ownership Interests and Order Providing for Lightened Regulation (issued January 26, 2006).

[13] Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards issued January 5, 2005) and Order on Petitions for Rehearing and Waiver (issued July 21, 2005).

[14] Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

[15] Because a PSL §69 approval of a securities issuance is a Type 2 action for the purposes of the State Environmental Quality Review Act, 16 NYCRR §§7.2(a) and 7.2(b)(2)(v), no further review is required under that statute.

and amount financed under the transactions, up to the $495 million limit.[16] Affording Caithness this financing flexibility avoids disruption of its financing arrangements and enables it to operate more effectively in competitive wholesale electric markets, thereby promoting the efficient development of these markets. Captive New York ratepayers cannot be harmed by the terms of this financing because Caithness bear all the financial risk associated with this financial arrangement.

The Commission orders:

1. Caithness Long Island, LLC (Caithness), and its affiliates shall comply with the Public Service Law in conformance with the requirements set forth in the body of this Order.

2. A Certificate of Public Convenience and Necessity is granted, authorizing Caithness to construct and operate the electric plant described in its petition and in this Order, subject to the following conditions:

(a) Caithness shall obtain all necessary federal, state, and local permits and approvals, and shall implement appropriate mitigation measures defined in such permits or approvals;

(b) the approved project shall be subject to inspection by authorized representatives of the Department of Public Service (DPS), pursuant to PSL §66(8); and

(c) within three days after commencement of commercial operation of the electric plant, Caithness shall notify the Secretary to the Commission in writing by filing an

[16] See, e.g., Case 03-E-1181, Dynegy Danskammer LLC and Dynegy Roseton LLC, Order Authorizing Entry Into Credit Facility and Issuance of Secured Notes (issued November 26, 2003); Case 01-E-0816, Athens Generating Company, L.P., Order Authorizing Issuance of Debt (issued July 30, 2001).

original and three copies of such notification that it commenced such operation.

3. The financing arrangements described in the Petitions filed in this proceeding and discussed in the body of this Order are approved, up to a maximum amount of $495 million.

4. The Commission finds no substantive basis for opposition to the granting of the certificate that would warrant further hearings.

5. Operation of the proposed power plant shall not commence until the natural gas fuel supply pipeline is constructed and is operational.

6. If the plans for the natural gas fuel supply pipeline change such that federal jurisdiction no longer applies to the environmental review for the natural gas fuel supply pipeline, and in that event if the environmental review for the natural gas fuel supply pipeline is not subject to review pursuant to Article VII of the Public Service Law, then a supplemental environmental impact statement and our further participation as an Involved Agency in the State environmental review process will be necessary.

7. Caithness shall file with the Secretary to the Commission, within 90 days of the issuance of this Order, revised plan and profile drawings of the substation and the transmission interconnection. All further plan revisions shall be filed in a timely manner.

8. Prior to construction of the substation and interconnection facilities, not including minor activities required for testing and development of final engineering and design information, Caithness shall provide, to the DPS Staff, proof of acceptance of the design by the Long Island Power Authority (LIPA).

9. The authorized Electric Plant shall be subject to inspection by authorized representatives of the DPS pursuant to §66(8) of the Public Service Law.

10. Caithness shall incorporate and implement as appropriate, the standards and measures for engineering design, construction and operation of its proposed electric facilities , including features for facility security and public safety, plans for quality assurance and control measures for facility design and construction, utility notification and coordination plans for work in close proximity to other utility transmission and distribution facilities, vegetation and facility maintenance standards and practices, emergency response plans for construction and operational phases, and complaint resolution measures, as identified in its Supplement of October 10, 2006.

11. Caithness shall file with the Secretary to the Commission, within three days after commencement of commercial operation of the Electric Plant, an original and three copies of written notice thereof.

12. Caithness shall design, engineer, and construct facilities in support of the authorized Electric Plant as provided in the System Reliability Impact Study (SRIS) approved by the New York Independent System Operator (NYISO), the Transmission Planning and Advisory Subcommittee (TPAS), the NYISO Operating Committee, and the NYISO Class Year 2006 Annual Transmission Reliability Assessment Study, and in accordance with the applicable and published planning and design standards and best engineering practices of NYISO, LIPA, the New York State Reliability Council (NYSRC), Northeast Power Coordinating Council (NPCC), North American Electric Reliability Council (NERC), and North American Electric Reliability Organization (NAERO), and successor organizations, depending upon where the facilities are to be built and which standards and practices are applicable. Specific requirements shall be those required by

the NYISO Operating Committee and TPAS in the approved SRIS and by the Interconnection Agreement (IA) and the facilities agreement with LIPA.

13. Caithness shall work with LIPA, and any successor Transmission Owner (as defined in the NYISO Agreement), to ensure that, with the addition of the Electric Plant (as defined in the IA between Caithness and LIPA), the system will have power system relay protection and appropriate communication capabilities to ensure that operation of the LIPA Transmission System is adequate under NPCC Bulk Power System Protection Criteria, and meets the protection requirements at all times of the NERC, NPCC, NYSRC, NYISO, and LIPA, and successor Transmission Owner (as defined in the NYISO Agreement). Caithness shall ensure compliance with applicable NPCC criteria and shall be responsible for the costs to verify that the relay protection system is in compliance with applicable NPCC, NYISO, NYSRC and LIPA criteria.

14. Caithness shall operate the Electric Plant in accordance with the IA, approved tariffs and applicable rules and protocols of LIPA, NYISO, NYSRC, NPCC, NERC, and NAERO, and successor organizations. Caithness may seek subsequent review of any specific operational orders at the NYISO, the Commission, the Federal Energy Regulatory Commission, or in any other appropriate forum.

15. Caithness shall be in full compliance with the applicable reliability criteria of LIPA, NYISO, NPCC, NYSRC, NERC, NAERO and successors. If it fails to meet the reliability criteria at any time, Caithness shall notify the NYISO immediately, in accordance with NYISO requirements, and shall simultaneously provide the Commission and LIPA with a copy of the NYISO notice.

16. Caithness shall file a copy of the following documents with the Secretary to the Commission:

(a) all facilities agreements with LIPA, and successor Transmission Owner (as defined in the NYISO Agreement);

(b) the SRIS approved by the NYISO Operating Committee;

(c) any documents produced as a result of the updating of requirements by the NYSRC;

(d) the Relay Coordination Study, which shall be filed not later than four months prior to the projected date for commencement of commercial operation of the facility; and

(e) a copy of the facilities design studies for the Electric Plant, including all updates.

17. Caithness shall obey unit commitment and dispatch instructions issued by NYISO, or its successor, in order to maintain the reliability of the transmission system. In the event that the NYISO System Operator encounters communication difficulties, Caithness shall obey dispatch instructions issued by the LIPA Control Center, or its successor, in order to maintain the reliability of the transmission system.

18. (a) After commencement of construction of the authorized Electric Plant, Caithness shall provide the DPS Staff and LIPA with a monthly report on the progress of construction and an update of the construction schedule. In the event the Commission determines that construction is not proceeding at a pace that is consistent with Good Utility Practice, and that a modification, revocation, or suspension of the Certificate may therefore be warranted, the Commission may issue a show cause order requiring Caithness to explain why construction is behind schedule and to describe such measures as are being taken to get back on schedule. The Order to Show Cause will set forth the alleged facts that appear to warrant the intended action. Caithness shall have thirty days after the issuance of such Order to respond and other parties may also file comments within

such period. Thereafter, if the Commission is still considering action with respect to the Certificate, a hearing will be held prior to issuance of any final order of the Commission to amend, revoke or suspend the Certificate. It shall be a defense in any proceeding initiated pursuant to this condition if the delay of concern to the Commission:

(i) arises in material part from actions or circumstances beyond the reasonable control of Caithness (including the actions of third parties);

(ii) is not in material part caused by the fault of Caithness; or

(iii) is not inconsistent with a schedule that constitutes Good Utility Practice.

(b) Caithness shall file with the Secretary to the Commission, no more than four months after the commencement of construction, a detailed progress report. Should that report indicate that construction will not be completed within 12 months, Caithness shall include in the report an explanation of the circumstances contributing to the delay and a demonstration showing why construction should be permitted to proceed. In these circumstances, an order to show cause will not be issued by the Commission, but a hearing will be held before the Commission takes any action to amend, revoke or suspend the Certificate.

(c) For purposes of this condition, Good Utility Practice shall mean any of the applicable acts, practices or methods engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good

Utility Practice is not intended to be limited to the optimum practice, method, or act, to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region in which Caithness is located. Good Utility Practice shall include, but not be limited to, NERC criteria, rules, guidelines and standards, NPCC criteria, rules, guidelines and standards, NYSRC criteria, rules, guidelines and standards, and NYISO criteria, rules, guidelines and standards, where applicable, as they may be amended from time to time (including the rules, guidelines and criteria of any successor organization to the foregoing entities). When applied to Caithness, the term Good Utility Practice shall also include standards applicable to an independent power producer connecting to the distribution or transmission facilities or system of a utility.

(d) Except for periods during which the authorized facilities are unable to safely and reliably convey electrical energy to the New York power grid (e.g., because of problems with the authorized facilities themselves or upstream electrical equipment) Caithness's Electric Plant shall be exclusively connected to the New York Grid over the authorized facilities.

19. Caithness shall work with LIPA’s system planning and system protection engineers to discuss the characteristics of the transmission system before purchasing any equipment for the authorized substation and other system protection and control equipment related to the electrical interconnection of the Project to the LIPA transmission system. This discussion is designed to ensure that the equipment purchased will be able to withstand most system abnormalities. The technical considerations of interconnecting the Electric Plant to the LIPA 138kV transmission facility shall be documented by Caithness and provided to DPS Staff and LIPA. Updates to the technical information shall be furnished as available.

20. Caithness shall work with LIPA's engineers and safety personnel on testing and energizing equipment in the authorized substation. A testing protocol shall be developed and provided to LIPA for review and acceptance. A copy shall be provided to Staff following LIPA approval. Caithness shall make a good faith effort to notify DPS Staff of meetings related to the electrical interconnection of the Project to the LIPA transmission system and provide the opportunity for DPS Staff to attend those meetings.

21. Caithness shall call DPS's Bulk Transmission Section within six hours to report any transmission related incident that affects the operation of the Electric Plant. Caithness shall submit a report on any such incident within seven days to DPS's Bulk Transmission Staff and LIPA. The report shall contain, when available, copies of applicable drawings, descriptions of the equipment involved, a description of the incident and a discussion of how future occurrences will be prevented. Caithness shall work cooperatively with LIPA, NYISO and the Regional Reliability Council to prevent any future occurrences.

22. Caithness shall make modifications to its Interconnection Facility, if it is found by the NYISO or LIPA to cause reliability problems to the New York State Transmission System. If LIPA or the NYISO bring concerns to the Commission, Caithness shall be obligated to address those concerns.

23. If, subsequent to construction of the authorized Electric Plant, no electric power is transferred over such Plant for a period of more than a year, the Commission may issue an Order to Show Cause requiring Caithness to explain why power has not been transferred for such period, and specifying what, if any, action the Commission may be considering with respect to the Certificate and the basis for such action. Caithness shall have thirty days after issuance of such Order to respond, and

other parties may file comments within such period. Thereafter, if the Commission is still considering action with respect to the Certificate, a hearing will be held prior to issuance of any final order of the Commission to amend, revoke or suspend the Certificate.

24. In the event that an equipment failure of the authorized Electric Plant causes a significant reduction in the capability of such Plant to deliver power, Caithness shall promptly provide to DPS Staff and LIPA copies of all notices, filings, and other substantive written communications with the NYISO as to such reduction, any plans for making repairs to remedy the reduction, and the schedule for any such repairs. Caithness shall report monthly to the DPS Staff and LIPA on the progress of any repairs. If such equipment failure is not completely repaired within nine months of its occurrence, Caithness shall provide a detailed report to the Secretary to the Commission, within nine months and two weeks after the equipment failure, setting forth the progress on the repairs and indicating whether the repairs will be completed within three months; if the repairs will not be completed within three months, Caithness shall explain the circumstances contributing to the delay and demonstrate why the repairs should continue to be pursued. A hearing will be held before the Commission takes any action to amend, revoke or suspend the Certificate.

25. This proceeding is continued pending compliance with the above ordering clauses; following compliance, it will be closed.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 05-E-0098 - Petition of Caithness Long Island, LLC for a Certificate of Public Convenience and Necessity to develop, own and operate an approximately 346 megawatt electric generating plant in the Town of Brookhaven, Suffolk County; and for an Order Regarding Regulatory Regime.

FINDINGS STATEMENT

This findings statement was prepared in accordance with Article 8 of the Environmental Conservation Law, the State Environmental Quality Review Act (SEQRA). The name of the Lead Agency is the Long Island Power Authority (LIPA). The address of the lead agency is: 333 Earle Ovington Boulevard, Suite 403, Uniondale, New York 11553. The name of the agency making this statement is the New York State Public Service Commission (Commission). The address of the agency making this statement is: 3 Empire State Plaza, Albany, NY 12223-1350. The name, address and telephone number of a person who can provide additional information regarding this statement is: Andrew C. Davis, New York State Department of Public Service, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2853. This statement is made regarding three actions by the Commission, to wit: (1) the granting of a Certificate of Public Convenience and Necessity; (2) the issuance of an order allowing lightened regulation; and (3) the granting of financing approval. The actions are collectively classified as “Type I” actions pursuant to the SEQRA implementing regulations at 6 NYCRR Part 617. The location of the actions is in the Town of Brookhaven, Suffolk County, New York, on a 96-acre parcel of land located south of the Sills Road interchange (Exit 66) of the Long Island Expressway, east of Old Dock Road and north of Horseblock Road and bounded on the north by the Long Island Railroad.

Background

On January 26, 2005, Caithness Long Island, LLC (Caithness) filed a Petition for a Certificate of Public Convenience and Necessity (CPCN). The Petition was not considered complete until the Draft Environmental Impact Statement (DEIS) was accepted by LIPA as lead agency on March 24, 2005. The Department of Public Service filed two sets of comments on the DEIS. The Final Environmental Impact Statement (FEIS), including the response to all comments, was accepted by LIPA as lead agency on June 23, 2005. LIPA issued its lead agency findings statement on December 15, 2005. By petition dated February 10, 2006, Caithness requested financing approval. On June 1, 2006, LIPA, as lead agency, further determined that the potential presence of a Pitch Pine-Oak-Heath Woodland community on a small portion of the Caithness site does not present either newly discovered information or a change in circumstances resulting in potentially significant adverse impacts to the environment that require LIPA to prepare a supplemental environmental impact statement under SEQRA.

Discussion

The Commission has considered the relevant environmental impacts, facts and conclusions disclosed in the FEIS.[1] Caithness proposes to construct and operate one Siemens-Westinghouse 501F combustion turbine, firing natural gas as its primary fuel, with low sulfur (0.04%) distillate oil being used

[1] The FEIS Considered cumulative impacts of the proposed facility with the impacts of the Brookhaven Energy Project, certified pursuant to PSL Article X, but not yet constructed. We note that the Brookhaven Energy Project has been cancelled, and that any of the non-significant adverse cumulative impacts of the proposed Caithness Project and the cancelled Brookhaven project identified in the FEIS will not occur. In particular, additional delays in traffic identified in the EIS as resulting from the concurrent construction of the two energy generating facilities will not occur.

as a back-up fuel. The gas turbine would operate as a combined-cycle unit with a nominal power output of 346 megawatts, a single steam turbine, and a heat recovery steam generator (HRSG) equipped with natural gas-fired duct burners. Emissions from the combustion turbine will exhaust through a single 170-foot stack. An air-cooled condenser would be used to minimize water use and eliminate cooling tower plume impacts. Emissions of nitrogen oxides (NOx) would be controlled using dry low-NOx steam injection and a selective catalytic reduction (SCR) unit. Emissions of carbon monoxide (CO) and volatile organic compounds (VOC) would be controlled using a catalytic oxidation (CO catalyst) unit. The facility would also include an auxiliary boiler which fires primarily natural gas with distillate oil back-up, employing a low NOx burner and flue gas recirculation (FGR) to control emissions of NOx. The facility would also include a natural gas-fired fuel gas heater, an emergency diesel fire pump, a steam turbine generator, a 20,000-gallon aqueous ammonia storage tank, and a 750,000-gallon fuel oil storage tank.

The New York State Department of Environmental Conservation determined that the air contaminant emissions that will be emitted by the facility will be controlled to the maximum extent practicable under current state and federal air pollution control regulations and will not result in a significant adverse impact on public health or the environment. The height of the exhaust stack was reduced from 225 feet to 170 feet to reduce potential visibility of the proposed project to the degree possible given applicable air dispersion requirements. The lower stack height eliminates the need for Federal Aviation Administration (FAA) hazard lighting.

Construction-related impacts include temporary habitat disturbance to approximately 11 acres of land and permanent loss of approximately 17 acres of forested pitch

pine-oak stands, and temporary increases in traffic delays. Approximately 53 acres of the 96 acre parcel would remain undisturbed. No New York State regulated wetlands, protected streams, or federally regulated wetlands are located on the 96-acre parcel which contains the project site. There are no known prehistoric archeological sites within the project area. No historic structures will be physically altered in connection with the construction, and visibility of the project from historic sites would be intermittent. The site is an industrial area. The results of the environmental justice analysis revealed that construction and operation of the project would not result in any significant adverse and disproportionate effect on any environmental justice communities or communities of concern.

The facility's water supply requirements of approximately 50,400 gallons per day would be provided by the Suffolk County Water Authority (SCWA). Sanitary wastewater would be discharged to an on-site subsurface disposal system. Process wastewater would be trucked off-site for proper disposal. Stormwater from site runoff and secondary containment areas would be discharged to groundwater through an on-site infiltration basin.

The facility will interconnect to the 138-kilovolt (kV) LIPA electric system within the 96-acre parcel via a new 138 kV switchyard to be constructed on site and adjacent to the existing LIPA 139 kV Holbrook-to-Brookhaven transmission line right-of-way. A natural gas pipeline lateral will be required to supply the primary fuel for the project. Construction of the natural gas pipeline will involve clearing and grading, installation of the pipeline via trenching and/or directional boring, and restoration of the affected area.

The mitigation measures discussed in the FEIS are practicable and necessary and result in a facility that will not

create significant environmental impacts. The mitigation measures proposed are reasonable responses to identified impacts, and will avoid or minimize the identified adverse effects to the extent practicable. There was consideration of alternatives to the purchase of power by LIPA, including other generation facilities proposed by other developers, conservation and load management programs, and other options, as addressed in the FEIS. The facility will not result in significant adverse impacts, is in the public interest, and is superior to the alternatives that were considered.

After having considered the relevant environmental impacts, facts and conclusions disclosed in the FEIS and weighed and balanced relevant environmental impacts with social, economic and other considerations, the Commission has approved the Caithness project as a needed component of LIPA's energy plan to serve the electric demand needs of Long Island, of which the Commission takes note.[2] The potential benefits to LIPA and its customers outweigh the potential adverse effects that will result from construction and operation of the proposed generation facility identified in the FEIS.

Certification

The Commission certifies that (1) the requirements of 6 NYCRR Part 617 have been met; and (2) consistent with social, economic and other essential considerations from among the reasonable alternatives available, the actions are ones that avoid or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

[2] LIPA 2004 Energy Plan

Filing of this Findings Statement

The Secretary will file a copy of this findings statement with: the chief executive officers of the Town of Brookhaven and Suffolk County; LIPA as lead agency; all involved agencies; any person who has requested a copy; the applicant/petitioner; all parties participating in this proceeding; and all parties on the service list for this proceeding. A copy will be maintained by the Secretary in files that are readily accessible to the public and made available on request.

JACLYN A. BRILLING
Secretary