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August 3, 2006

VIA FEDEX

Honorable Jaclyn A Brilling
Secretary
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Case 05-E-0098 Caithness Long Island, LLC
Corrected Filing

Dear Secretary Brilling:

It has been brought to our attention that the filing we submitted on behalf of Caithness Long Island, LLC on August 1, 2006 contained an incorrect index number. Instead of 05-E-0098, the filing referred to 06-E-0098. We apologize for any convenience this may have caused. Enclosed please find replacements with the correct index number. Only the index number references on pages 1 and 2 have been changed. No other changes have been made. All parties previously served are being served with a complete replacement copy.

If you have any questions, please do not hesitate to contact me at this office.

Respectfully submitted,


Stephen L. Gordon

Enclosures

cc: Active Party List (w/enc.)



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2006 AUG -2 PM 12:34

STEPHEN L. GORDON
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August 1, 2006

VIA FEDEX

Honorable Jaclyn A Brilling
Secretary
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Case 06-E-0098 Caithness Long Island, LLC
Reply to Comments & Opposition to Motion to Intervene

Dear Secretary Brilling:

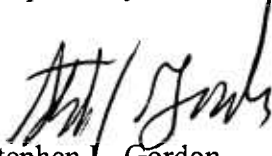
In accordance with the Notice Requiring Service of Documents and Soliciting Comments, issued June 29, 2006, in the above-referenced matter, enclosed for filing please find an original and five copies of Caithness Long Island, LLC's reply to comments submitted in response to the notice. This filing also constitutes Caithness's opposition to the motion to intervene filed by Jaspan Schlesinger Hoffman, LLP ("Jaspan") on behalf of East End Property Company # 1, LLC ("East End").

Caithness also requests that Jaspan be barred from this proceeding. Jaspan previously represented the Town of Brookhaven in this proceeding. The Town, which is still an Active Party, recently granted special permit approval to the Caithness Project, and therefore supports the Project. Jaspan now seeks to intervene on behalf of an opponent of the Project. The Town, in granting special permit approval, relied on the Caithness final environmental impact statement, which East End is attacking in its papers. The Town and East End not only have differing interests with respect to the Caithness Project, their positions are materially adverse. As explained in the enclosed filing, this represents a clear and impermissible conflict of interest in violation of the New York Lawyer's Code of Professional Responsibility ("Code"), and therefore a violation of 16 NYCRR 2.1.

Honorable Jaclyn A Brillling
August 1, 2006
Page 2

If you have any questions, please do not hesitate to contact me at this office.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "St/Gordon", written over the typed name.

Stephen L. Gordon

Enclosures

cc: Active Party List (w/enc.)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

-----X
In The Matter :

Caithness Long Island, LLC :

Case No. 05-E-0098

Petition for Certificate of Public Convenience
and Necessity pursuant to Section 68
of the Public Service Law and
Order on Regulatory Regime. :

Petition for an Order Regarding Financing
Approval pursuant to Section 69 of the Public
Service Law. :
-----X

**CAITHNESS LONG ISLAND, LLC'S RESPONSE TO COMMENTS,
OPPOSITION TO EAST END'S MOTION TO INTERVENE AND REQUEST THAT
LAW FIRM REPRESENTING EAST END BE EXCLUDED FROM PROCEEDING**

INTRODUCTION

In accordance with the Notice Requiring Service of Documents and Soliciting Comments, issued June 29, 2006, Caithness Long Island, LLC ("Caithness") respectfully submits this reply to comments submitted to the Public Service Commission concerning the proposed Caithness Long Island Energy Center ("Project").¹ This submission also constitutes Caithness's opposition to the motion to intervene filed by Jaspan Schlesinger Hoffman, LLP ("Jaspan Firm") on behalf of East End Property Company # 1, LLC ("East End"). Finally, in the event East End is permitted to intervene, Caithness requests that the Jaspan Firm be barred from this proceeding based on an impermissible conflict of interest.

¹ Comments were received from, or on behalf of, Dr. Carmine Vasile, East End Property Company #1, LLC, Mr. Thomas Bermel, Mr. John McConnell, and Mr. Donald Seubert. East End's comments were received on July 27, 2006. Mr. Bermel's comments were received on July 28, 2006. The McConnell and Seubert comments were not received until July 31, 2006.

The Project consists of a dual fuel, combined cycle generating facility, with an average nominal rating of 326 MW,² proposed to be located in the Town of Brookhaven, Suffolk County, New York. Caithness has three applications pending before the Commission. On or about January 25, 2005, Caithness filed a petition seeking (1) a Certificate of Public Convenience and Necessity ("CPCN") pursuant to Section 68 of the Public Service Law and (2) an Order providing for lightened regulation as an electric corporation (collectively, "CPCN/Lightened Regulation Petition"). On or about February 10, 2006, Caithness filed a petition for financing approval pursuant to Section 69 of the Public Service Law ("Financing Approval Petition"). These petitions have been consolidated under case number 05-E-0098.

The comments submitted to the Commission in opposition to the Caithness Project significantly distort the record concerning the environmental review conducted for the Project pursuant to the State Environmental Quality Review Act ("SEQRA"). As documented in Caithness's Financing Approval Petition, the Long Island Power Authority ("LIPA") issued a final environmental impact statement ("FEIS") for the Caithness Project in June 2005. LIPA then issued its SEQRA findings statement in December 2005 in conjunction with its decision to enter into a power purchase agreement ("PPA") with Caithness.³ (A copy of LIPA's SEQRA findings statement was attached to Caithness's Financing Approval Petition as Exhibit D). Thus, the environmental review of the Caithness Project is complete.

Further, since Caithness submitted its Financing Approval Petition, the Project has received other major approvals:

² The project would have a "maximum" rating of approximately 346 MW.

³ The PPA, which has a 20-year term, is for approximately 286 MWs of the Project's output; the remaining 40 MWs of the Project's output would be available for wholesale merchant transactions.

- In April 2006, the United States Environmental Protection Agency ("EPA") issued a final Prevention of Significant Deterioration permit for the Caithness Project.
- On or about June 19, 2006, the Suffolk County Department of Health Services ("SCDHS") granted Caithness a permit pursuant to Article 12 of the Suffolk County Sanitary Code pertaining to the Project's regulated materials storage and containment design.
- On or about July 13, 2006, SCDHS granted the Caithness Project approvals relating to safeguarding Long Island's groundwater supply under Articles 6 and 7 of the Suffolk County Sanitary Code.
- On or about July 20, 2006, the New York State Department of Environmental Conservation ("DEC") issued Caithness (1) a Part 201 State Facility Air (Pre-construction) permit, (2) a Clean Air Act Title IV Phase II Acid Rain Permit and (3) a State Pollution Discharge Elimination System Permit.
- On or about July 25, 2006, the Town Board of the Town of Brookhaven granted Caithness special permit approval for the Project along with associated variances/waivers concerning the height of certain buildings/structures.

Caithness notes that the litigation referred to in the opposition comments is fully submitted to the Supreme Court. The action, entitled *East End Property Company #1, LLC, et al. v. Kessel, et al.*, Index No. 06-001410, Sup. Ct., Nassau County (Cozzens, J.) (the "East End Litigation"), in part challenges the SEQRA review undertaken for the Project. The comments purport to suggest that there is merit to the East End Litigation, and that action on Caithness's petitions pending before the Commission should be delayed. There is no merit to this litigation, but, more to the point, this is not the appropriate forum to determine its merits. Moreover, the delay sought by East End, if granted, would be in stark contrast to the actions of other state and local agencies, which have proceeded to issue approvals for the Caithness Project. Despite the pendency of the litigation, SCDHS, NYSDEC and the Town Board, all involved agencies under SEQRA, have appropriately proceeded to issue their respective approvals for the Caithness Project.

It is also worth noting that, in the East End Litigation, Justice Cozzens refused to extend a temporary restraining order, which was initially granted to the petitioners *ex parte*. The Court then denied petitioners' application for a preliminary injunction.⁴ Both LIPA and Caithness contend that the arguments raised by the petitioners are baseless, and are confident that the Court will agree. To delay a determination on Caithness's petitions any longer would effectively grant East End the preliminary injunction the Court has already denied.

Moreover, as explained below, it is clear that the issues raised by East End and others do not provide a basis for further delay through an extension of the comment period. Caithness therefore respectfully requests that the Commission reject the comments submitted in opposition to the Project, deny East End's request to delay a determination on Caithness's petitions, and proceed expeditiously to approve the petitions.

Also, for the reasons stated below, Caithness requests that East End's motion to intervene at this late stage of the proceeding be denied. East End's motion is nothing more than a continuation of its scorched earth effort to block the Caithness Project. Even if East End is allowed to intervene at this late stage, the Jaspan Firm should be excluded based on an impermissible conflict of interest resulting from its former representation of the Town of Brookhaven in this proceeding.

⁴ We note that one of the factors in deciding whether to grant a preliminary injunction is whether the claim is likely to succeed on the merits.

RESPONSES TO COMMENTS

1. Dr. Carmine Vasile's Comments

Caithness responds to Dr. Vasile's comments in the order in which they are presented in his letter, dated July 24, 2006.⁵ As shown below, Dr. Vasile's comments are rife with misstatements of law and fact.

There is no Basis to Dismiss Caithness's Petitions

Dr. Vasile first argues that Caithness's Petitions must be dismissed because "Petitioner cannot complete the SEQRA process nor comply with 16 NYCRR Vol. § 86.5 . . . particularly Sub-Sections (1) & (6), due to poor site selection and other deficiencies discussed in my previous submissions to the Commission." Dr. Vasile's argument is flawed for several reasons. First, the SEQRA environmental review process is complete. LIPA issued the FEIS in June 2005, and issued its SEQRA findings statement in December 2005. The Commission need only issue a findings statement prior to, or in conjunction with, its determination concerning Caithness's petitions. *See* 6 NYCRR 617.11(c). Second, Dr. Vasile's reliance on 16 NYCRR Part 86 is

⁵ Dr. Vasile makes reference to certain "dispositive motions" filed by Thomas Bermel and himself. Caithness was never served with copies of these motions when they were filed. A CD disc was received at this office on July 27, 2006 with the hard copy of Mr. Vasile's comments. This disc contains a variety of submissions that apparently were previously filed with the Commission, but were not served on Caithness.

Dr. Vasile complains that he was not served a complete copy of Caithness's CPCN/Lightened Regulation Petition. Dr. Vasile was not on the initial distribution list of the Petition. Neither was Dr. Vasile on the Active Party List issued in the case on April 25, 2005. Caithness was not aware that Dr. Vasile was included as an Active Party until a new list was issued on June 29, 2006. Caithness also was not aware that Dr. Vasile was seeking a complete copy of the petition until it reviewed Dr. Vasile's July 24, 2006 comments. Finally, we note for the record that: (1) Dr. Vasile never requested a copy of the CPCN/Lightened Regulation Petition from Caithness; (2) Dr. Vasile has been served with a copy of the Caithness's Financing Approval Petition in accordance with the Notice Requiring Service of Documents and Soliciting Comments, dated June 29, 2006 (Case No. 05-E-0098); (3) the documents included in Exhibit A to the CPCN/Lightened Regulation Petition are included in Exhibit A to the Financing Approval Petition; and (4) Exhibits B and C to the CPCN/Lightened Regulation Petition are copies of the SEQRA environmental assessment form and draft scope of work, copies of which were broadly available to the public including at local library repositories.

misplaced, as this set of regulations applies to projects subject to Article VII of the Public Service Law (*i.e.*, intrastate electric transmission lines and natural gas pipelines). Finally, with respect to Dr. Vasile's reference to other comments he has made, as explained below, they are either baseless or completely irrelevant to this proceeding.

In support of his allegations, Dr. Vasile also makes reference to "EDR's May 6, 2006 Field Report" which referred to wind conditions experienced during an elevated balloon demonstration at the Project site conducted on April 26, 2005. Dr. Vasile apparently relies on this report to contend that the air impact analysis conducted for the Project failed to address meteorological conditions that might cause "blow-down." Dr. Vasile's contention is incorrect. First, the EDR report in question was dated May 6, 2005, not May 6, 2006. This correction is important because the report was prepared during the draft environmental impact statement ("DEIS") comment period. The FEIS Response to Comments specifically addressed the issues raised by EDR. See <http://www.lipower.org/pdfs/projects/caithness/text/Response.pdf> (Response to Comment No. 43). Second, Dr. Vasile's suggestion that the wind conditions observed by EDR somehow support his claim that the air impact modeling analysis performed by Caithness was deficient is incorrect. As explained in the FEIS Response to Comments:

The rigorous modeling analysis used five years of hourly meteorological data and demonstrated that the maximum air quality concentrations at all locations would be below the significant impact concentrations and well below the 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. (emphasis added)

See *id* (Response to Comment 31) (emphasis added).

In addition, Section 9.5.3(D) of the FEIS describes the cavity region modeling that was conducted to support Caithness's determination that a stack height of 170 feet was the lowest

stack height achievable to ensure insignificant air quality impacts. See

<http://www.lipower.org/pdfs/company/projects/caithness/text/AirQuality.pdf>. Lastly, both DEC and EPA, agencies with regulatory jurisdiction over these issues, approved the air modeling protocol prepared for the Project, approved the modeling analysis conducted using this protocol, and, on the basis of this analysis, issued air permits for the Project.

Dr. Vasile's Allegations Concerning "Fraud, Intimidation, Deceit and Collusion"

At various points in his comments, Dr. Vasile levels allegations concerning fraud, intimidation, deceit and collusion.⁶ Beyond the fact that the allegations are baseless and unsupported by any evidence, the Commission simply was no jurisdictional authority to adjudicate the merits of these allegations as part of their consideration of Caithness's petitions.

Dr. Vasile has Misrepresented the Contents of Caithness's Response to the Town's Motion to Intervene

Dr. Vasile relies on the following sentence from Caithness's response to the Town of Brookhaven's Motion to Intervene in this proceeding to assert that Caithness has admitted material facts to support dismissal:

Caithness Long Island therefore does not oppose the Town's intervention, but also respectfully reiterates its request that the Commission grant Caithness Long Island's motion for expedited proceedings and, once the SEQRA process is complete, grant it a CPCN based on the Petition, the exhibits thereto, and subsequent documentation submitted to the Commission concerning the Caithness Long Island Energy Center.

See Caithness's Response to Motion to Intervene, May 6, 2005, at 4. Dr. Vasile falsely claims that the foregoing sentence constitutes an admission that Caithness's CPCN/Lightened

⁶ Dr. Vasile's attempt to support his claims by referring to the fact that the Jaspan Firm previously moved to intervene in this proceeding on behalf of the Town of Brookhaven simply does not support his allegations of improper conduct. However, as explained below, the fact that the Jaspan Firm is now seeking to intervene in the same proceeding on behalf of another party who opposes the Project represents a clear and impermissible conflict of interest for the Jaspan Firm.

Regulation Petition “was based on an incomplete SEQRA process.” SEQRA does not preclude a project sponsor from submitting an application to an agency prior to the completion of the SEQRA process. SEQRA only precludes an agency from making a final determination on an application before the FEIS is issued (assuming one is required). As noted above, the FEIS already has been issued for this Project, and it is anticipated that the Commission, in compliance with SEQRA, will adopt a findings statement prior to, or in conjunction with, its determination concerning Caithness’s petitions.

As Caithness’s Response to the Town’s Motion to Intervene clearly explained:

As provided for under 16 NYCRR 21.10(a), the sole purpose of the motion [for expediting proceedings] was to request that the Section 68 hearing for the Project be held before the Commission on the application and such exhibits, prepared testimony or other information as may be filed by the petitioner or by any other party, without oral testimony. Caithness Long Island therefore anticipates that, even if its motion for expedited proceedings is granted, the record developed as part of the SEQRA review process could be incorporated, as appropriate, into the record for the Section 68 Petition.

Id. at 3. The motion therefore did not seek a determination by the Commission before the SEQRA process was complete. Rather, its request pertained only to the form of the Commission’s hearing.

Caithness’s Motion for Expediting Proceedings Did Not Violate the Commission’s Rules

Dr. Vasile argues that Caithness’s motion for expedited proceedings violated an array of the Commission’s rules. A motion for expedited proceedings is expressly authorized under 16 NYCRR 21.10. Caithness’s motion complied with that provision. Moreover, Dr. Vasile’s claim that Caithness violated certain regulations is erroneous. Dr. Vasile asserts that Caithness has violated the following regulations:

- 17 NYCRR 17.4. Dr. Vasile once again claims that Caithness’s response to the Town’s motion to intervene contains an “admission” that Caithness’s petitions are “deficient”. As explained above, this is not true.

- 17 NYCRR 18.1(i). Dr. Vasile makes reference to Caithness's failure to disclose to the Commission its alleged "conspiracy" with LIPA. Also as explained above, the allegations are baseless, and in any event, are not relevant to, and do not fall within the scope of the Commission's jurisdiction over, this proceeding.
- 16 NYCRR 21.2(b). Dr. Vasile claims that Caithness's petitions are deficient because Caithness failed to obtain required municipal consents. Dr. Vasile notably provides only a partial quotation from the cited regulation. As is evident from the regulation itself, it applies only to projects involving a franchise, which the Caithness Project does not.
- 16 NYCRR 21.10. Addressed above.
- 16 NYCRR 85-2.8(a) & 85-2.12. The cited regulations, which pertain to "ELECTRIC TRANSMISSION LINES AND FUEL GAS TRANSMISSION LINES 10 OR MORE MILES LONG" (*i.e.*, certain Article VII projects), clearly do not apply to the Caithness Project.

Caithness Did Not Violate Section 85-2.12

Contrary to Dr. Vasile's claim, Caithness did not violate 16 NYCRR 85.12's service requirements because, as explained above, that provision does not apply to the Caithness Project.

The FEIS Addressed the Department of Public Service's DEIS Comments

In his conclusion, Dr. Vasile asserts that LIPA failed to address comments submitted by the Department of Public Service ("DPS") during the DEIS comment period. This assertion is inaccurate. All of the comments submitted by DPS were addressed by LIPA in the FEIS. *See* FEIS Response to Comments - Responses to Comments 16, 17, 18, 64, 87, 88, 98 and 121

(<http://www.lipower.org/pdfs/projects/caithness/text/Response.pdf>). Further, where appropriate, the text of the environmental impact statement was amended based on the

comments. *See, e.g.*, FEIS at Section 1.4

(<http://www.lipower.org/pdfs/company/projects/caithness/text/PurposeNeed.pdf>), Fig. 2.1

(<http://www.lipower.org/pdfs/company/projects/caithness/text/ProjectDescription.pdf>), Section 12.9 (<http://www.lipower.org/pdfs/company/projects/caithness/text/Infrastructure.pdf>).

Prior Submissions By Dr. Vasile That Were Not Served On Caithness

Although Caithness was not served with copies of the documents when filed by Dr. Vasile, Caithness responds to them at this time as follows:

(i) On March 9, 2006, Dr. Vasile submitted certain comments to the Commission. Those comments, which were attached to a March 11, 2006 e-mail sent to the attorney representing DPS staff in this proceeding and copied to DEC, were addressed in the response to comments issued by DEC in conjunction with its issuance of final permits for the Caithness Project. The DEC Response to Comments notes:

The March 11, 2006 e-mail was addressed to the New York State Public Service Commission but was copied to DEC. This e-mail provided the most comprehensive listing of Dr. Vasile's comments and subsequent e-mails essentially restated the same concerns. The March 11, 2006 e-mail provides eight statements in the Executive Summary of the comments, followed by 45 Background & Additional Comments. The majority of the Background & Additional Comments (B&AC) (14 through 45, primarily under the headings "Misguided Comments", "Related Waste Fraud & Abuse", "Mail/Wire/Bank-Fraud Petition", "PSC Jurisdiction" and "Refund Demand") are unrelated to the draft permits or EIS, and therefore are not addressed.

These comments are similarly unrelated to the petitions Caithness has pending before the Commission, and therefore should be disregarded. Elsewhere, Dr. Vasile makes comments concerning toxic fumes and thermal uplift. These comments were addressed in detail in DEC's response to comments (pages 49-51). Rather than repeat those responses here, we refer the Commission to them and attach a copy of the relevant pages hereto as Exhibit A.

(ii) By correspondence dated May 13, 2006 and May 16, 2006, Dr. Vasile moved to intervene in this proceeding. Dr. Vasile's motion was granted even though Caithness was not served with copies of the papers. The papers are largely repetitive of allegations contained in Dr. Vasile's March 9, 2006 submission, which is addressed above. The only issue raised by Dr. Vasile worth noting is his claim regarding the need for the Project in his May 16, 2006 letter.

The need for the Caithness Project is clearly demonstrated both in the FEIS and the CPCN/Lightened Regulation Petition. Proof of the growing need for more electric supply on Long Island was confirmed in the past few weeks when LIPA set a new peak load record of 5,426 MWs which exceeded last summer's peak load record by 160 MWs. Moreover, need is independently supported by the fact that Caithness's state-of-the-art facility will be far more efficient and far less polluting than the existing fleet of power plants on Long Island. Thus, there is no doubt that the Caithness Project is needed.

(iii) Dr. Vasile also attached a May 16, 2006 request to intervene by Thomas Bermel. Beyond the reasons he presents to support intervention, Mr. Bermel's submission merely expresses grievances concerning the status of the Town of Brookhaven's records, which is not relevant to Caithness's petitions.

(iv) Dr. Vasile also includes a June 12, 2006 fax to the Town of Brookhaven making a variety of statements and seeking information that have no relevance to Caithness's pending petitions.

2. East End's Comments

For the reasons stated below, Caithness opposes East End's belated request to intervene in this proceeding 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.⁷ Nevertheless, to protect its rights, Caithness responds to the comments submitted by East End as follows:

⁷ For example, as it has in this proceeding, East End submitted detailed summaries of its litigation argument and copies of its litigation papers to the Town Board during the special permit proceeding.

Caithness's Petitions Should Not Be Delayed Any Further

East End requests an "extension to the specified time period in which comments on" Caithness's petitions may be submitted. The request purportedly is made so that "all involved parties have a full opportunity to be heard." East End also relies on the litigation currently pending in the Supreme Court as a basis for delay, even though no other state or local agency has seen fit to delay their issuance of approvals for the Caithness Project. Neither argument justifies a delay.

Below, several patently false statements made by the Jaspan Firm on behalf of East End in requesting a delay are documented. However, Caithness first notes that its CPCN/Lightened Regulation Petition has been pending for over a year and a half, and its Financing Approval Petition has been pending for six months. It is long past time for these petitions to be decided.

East End cannot claim that it was not aware of this proceeding. The Jaspan Firm represents the petitioners in the East End Litigation. Other petitioners in the litigation include Donald Seubert, who is already an active party in this proceeding. Further, the Jaspan Firm itself has long been aware of this proceeding because it filed a motion to intervene in the proceeding on behalf of the Town of Brookhaven over one year ago. In fact, the Jaspan Firm was included on the original Active Parties List issued for the proceeding on April 27, 2005. *See* Exhibit B attached hereto. Moreover, while East End submitted its one-sided litigation papers as exhibits to its comments, it neglected to submit the Affirmation of Michael Murphy in Opposition to Extension of Temporary Restraining Order, dated January 30, 2006. That affirmation apprized the Supreme Court and East End of the fact that Caithness's CPCN/Lightened Regulation Petition was already pending before the Commission and that Caithness intended to submit its Financing Approval Petition within weeks. *See* Exhibit C attached hereto at ¶ 71. Thus, East

End has long known about this proceeding, but chose to wait until now to seek intervention and a delay. East End's demand for a delay is nothing more than a blatant attempt to obtain the equivalent of the preliminary injunction that the Supreme Court has already denied in the East End Litigation.

Further, the reasons East End presents to support delay, by its admission, mirror the arguments East End has made in the litigation. In a desperate attempt to vet its arguments in another forum, East End essentially demands that the Commission reach beyond its jurisdictional boundaries to decide matters that are already before the Supreme Court. Caithness briefly responds to East End's "substantive points" as follows.

- East End claims that the "Petition for Financing Approval is purportedly made based upon the execution of the Power Purchase Agreement ("PPA")" with LIPA. Although execution of the PPA represented a convenient time for Caithness to seek financing approval, the basis for the Petition is the amount of indebtedness Caithness believes it could seek in relation to the Project. Moreover, contrary to East End's contention, State Comptroller approval of a PPA is not a prerequisite to approval of Caithness's Financing Approval Petition.⁸ Moreover, even if PACB approval of the PPA were required (which it is not), as with the State Comptroller approval, it would not be a prerequisite for approval of a Financing Approval Petition, and therefore would not be a basis for delay.
- East End argues that LIPA engaged in impermissible segmentation by not including consideration of a proposed extension of the Iroquois Pipeline in the Caithness FEIS. East End asserts that consideration of Caithness's petitions is premature because a "final determination" concerning the natural gas supply has not been made, and supports this assertion by falsely claiming that "in its comments to the Draft Environmental Impact Statement, the Commission [should refer to DPS] indicated that a Supplemental Environmental Impact Statement ["SEIS"] should be prepared once a final pipeline design has been achieved." In fact, DPS stated the exact opposite in its April 29, 2005 DEIS comments. In a footnote to a sentence addressing "on-site" natural gas supply facilities, DPS stated:

⁸ Although the petitioners in the East End Litigation have argued otherwise, both LIPA and Caithness contend that the PPA need not be submitted to the Public Authorities Control Board ("PACB"). It is not within the Commission's jurisdiction to decide this matter.

Any additional environmental analysis related to the gas transmission pipeline lateral and interconnection facilities should be addressed in the siting analysis for the selected fuel gas pipeline facility pursuant to the National Environmental Policy Act or Public Service Law Article VII, as appropriate.

See <http://www.lipower.org/pdfs/projects/caithness/text/Response.pdf> (Comment No. 121) (emphasis added). In other words, DPS recognized that the chosen natural gas pipeline will not be subject to SEQRA because it will be subject to its own environmental review "pursuant to National Environmental Policy Act or Public Service Law Article VII, as appropriate." This is the same position both LIPA and Caithness have taken in the East End litigation.

- East End advances assorted arguments concerning the financial terms of the PPA and certain commitments LIPA and Caithness have made in relation to the Project. All of these issues are currently before the Supreme Court and none provides a basis to delay action on the petitions Caithness has filed.⁹
- East End makes reference to the need for an SEIS based upon the alleged presence of a plant community at the Project site. LIPA, as lead agency, has already considered this issue and has determined that an SEIS is not required. Rather than repeat LIPA's reasoning, Caithness attaches a copy of LIPA's determination as Exhibit D.
- East End asserts that the Community Benefits Package negotiated by the Town of Brookhaven and LIPA, and, by implication, the process by which the Town approved Caithness's special permit application also should be reviewed by the Commission. East End offers no legal basis to suggest that the Commission has the authority to conduct such a review, let alone as part of this proceeding, or that the existence of the package should delay the proceeding.

⁹ East End claims that "LIPA and Caithness were advised prior to the execution of the PPA that the Project would in fact not receive and/or would be ineligible for Empire Zone benefits . . ." It is particularly troubling that East End would repeat this assertion in this forum after doing so in the East End Litigation where LIPA and Caithness demonstrated its falsity. In the litigation, LIPA and Caithness submitted a copy of a letter dated September 12, 2005 that LIPA received from Charles A. Gargano, Chairman of the Empire State Development Corporation, confirming that the Empire Zone "law does not preclude participation in the program for a utility project provided such project is consistent with the local zone development plan and passes the cost benefit test." A copy of the letter is attached as Exhibit []. East End has never offered any proof to support its claim. Moreover, LIPA has publicly stated on several occasions that even without the Empire Zone benefits, the economics of the Caithness project were still better than any of that of any of the other proposals submitted to LIPA and that it would have selected the Caithness Project even if Empire Zone benefits were not available. Thus, apart from being untrue, the claim is of no relevance.

- Finally, East End challenges the need for the Project with a throwaway reference to the Neptune Project. As documented in LIPA's 2004-2013 Energy Plan the Caithness and Neptune projects are both needed to meet demand growth. As stated earlier, the growing need for additional electric supply on Long Island is indisputable, and has been confirmed in recent weeks by the record peak demand increase of 160 MWs over the peak demand of the previous summer.

In sum, the Commission should not delay action on Caithness's petition any longer.

Neither, should the Commission entertain East End's plea to consider issues that are already before the Supreme Court in the East End Litigation and of no relevance to this proceeding.

3. Mr. Bermel's Comments

Mr. Bermel submits comments concerning the natural gas pipeline supply for the Project. He claims that the FEIS fails to address on-site facilities associated with the Project. This is incorrect. *See* FEIS Responses to Comments - Response to Comment 18 (<http://www.lipower.org/pdfs/projects/caithness/text/Response.pdf>). As explained above, the pipeline that will supply natural gas to the Project will not be subject to SEQRA review. Mr. Bermel then makes several comments concerning the timing of approval of the pipeline that are little more than speculation. For example, it is public knowledge that Iroquois Gas Transmission System, LP is taking active steps towards seeking FERC approval to extend its pipeline to eastern Long Island. Moreover, there is no possibility that the Caithness Project will be an oil-only facility. Both the DEC and EPA air permits limit oil use to no more than 30 days annually.

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 Response to Comments. *See* FEIS Response to Comments <http://www.lipower.org/pdfs/projects/caithness/text/Response.pdf> (Responses to Comments 34, 35, 36, 37, 38, 39, 40, 42, 43, 54, 55, 56, 57 & 69).

Mr. Bermel argues that Caithness improperly submitted its CPCN/Lightened Regulation Petition before the SEQRA process was complete. As discussed earlier, this argument is incorrect. Mr. Bermel also mirrors Dr. Vasile's claims concerning collusion and bribery, which already have been addressed. Lastly, Mr. Bermel makes reference to the Town's alleged failure to respond to freedom of information requests, which has no relevance to the Commission's consideration of Caithness's petitions.

4. Mr. McConnell's Comments

Mr. McConnell makes reference to earlier comments he submitted to Judge Bouteiller. Caithness did not receive copies of those comments and therefore cannot reply to them. Caithness requests that in the unlikely event Mr. McConnell's prior comments raise a substantive issue of relevance to Caithness's petitions that is not otherwise addressed herein, it will be afforded the opportunity to reply.

Mr. McConnell also makes a number of inaccurate statements concerning the April 26, 2005 balloon demonstration. This demonstration was not performed to support the DEIS for the Caithness Project. As stated in response to Dr. Vasile's comments, the FEIS Response to Comments specifically addressed this issue. That response states:

The ballooning demonstration on April 26, 2005 was conducted 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. Wind conditions on that day were not optimal, but nevertheless sufficient for the intended purpose. The decision to proceed was based, in part, on the fact that the demonstration had been widely publicized, and the initially scheduled demonstration several weeks earlier had been postponed due to predicted wind conditions. A formal visual impact assessment would not be conducted under the sustained wind conditions experienced on April 26, 2005.

To substantiate the accuracy and reliability of the visual impact assessment presented in the DEIS, actual wind speed data for October 7, 2004 (the date of the initial balloon demonstration and visual assessment) and April 26, 2005

were obtained from the National Oceanic and Atmospheric Administration (NOAA) Climatic Data Center. The following table compares the surface wind speeds recorded on those days at Islip Airport, the closest data collection point to the project site:

Time (EST)	Surface Wind Speeds (Knots)	
	October 7, 2004	April 26, 2005
9:00 am	0	11
10:00 am	3	10
11:00 am	0	12
12:00 Noon	4	12
1:00 pm	8	8
2:00 pm	8	10
Source: NOAA Climatic Data Center		

As shown by the data in this table, the wind speeds during the morning of October 7, 2004 when the visual assessment was conducted were substantially lower than the wind speeds experienced during the more recent balloon demonstration on April 26, 2005. The relatively calm conditions on the date of the formal visual assessment provided for an accurate assessment, which is reflected in the DEIS.

For a formal visual impact assessment, specific techniques are used during the balloon demonstration to compensate for any potential movement caused by wind. As can be seen in the photo from Viewpoint 1 in Figure 6-4a, flags are positioned at 20-foot intervals on the tether to provide an indication of the extent of potential stack visibility. These flags also indicate the relative angle of the tether, enabling the observer to determine if the balloon is experiencing blow down from the wind. Even during ideal conditions, intermittent winds may temporarily disrupt the position of the balloon. When these situations are encountered, the observer waits for relative calm conditions before making formal observations or taking any photographs.

With regard to the accuracy of the photo simulations presented in the DEIS, the methodology described in Section 6.4.3 of the DEIS clearly indicates that GPS coordinates and computer-generated models are used to accurately construct the photo simulations—the position of the balloon in the photograph was irrelevant to this process and is not used to either scale or position the proposed project in the photograph. The subsequent assessment of potential visibility and associated impacts is based on the photo simulations and the general landscape setting and context as observed in the field.

See <http://www.lipower.org/pdfs/projects/caithness/text/Response.pdf> (Response to Comment No. 43).

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. Thus, no further reply is necessary.

5. Mr. Seubert's Comments

Mr. Seubert submitted two documents addressed to Beveridge & Diamond. It is assumed Mr. Seubert intended to address these submissions to the Commission.

The first submission appears to concern Caithness's Financing Approval Petition. The opening paragraphs of this submission contain an assortment of unrelated items that lead to a request for an extension of time. The referenced items relate to Caithness's Financing Approval Petition, and therefore do not provide a basis for extending the comment period or delaying a determination on Caithness's petitions any further. Mr. Seubert's statement that Caithness's motion for expedited proceedings was premature merely indicates that Mr. Seubert's misapprehends the motion's purpose, which was explained in Caithness's reply to Dr. Vasile's comments.

Because Caithness is an independent power producer, not a regulated utility, Caithness agrees with Mr. Seubert's statement that "lightened regulation scrutiny should be employed." Mr. Seubert, in attempting to create numerous issues relating to the Project, then forgets that the Caithness Financing Petition is properly reviewed under a lightening regulatory regime.

Mr. Seubert makes a number of inaccurate statements. For example, he states: "The power purchase agreement was agreed to before the SEQRA hearing, April 20, 2005." In fact,

the FEIS was issued in June 2005. LIPA issued a findings statement in December 2005, at which time the PPA was approved.¹⁰

As stated in response to other comments, neither the PPA nor the Community Benefits Package referenced by Mr Seubert is before the Commission for approval.¹¹ Further, Mr. Seubert's call for specifics concerning the "financing plan" ignores that fact that Caithness is wholesale generator of electricity, not a regulated utility providing electricity to ratepayers. Under a lightened regulatory regime, Caithness has provided more than enough information to support its Financing Approval Petition.

Mr. Seubert's comments concerning the CPCN/Lightened Regulation Petition are similarly misplaced. Mr. Seubert asserts that the history of Caithness's operations elsewhere in the country "is a cause of concern", but fails to provide any specifics. Mr. Seubert makes reference to other issues that already have been addressed, including those relating to the Empire Zone, pending litigation, alleged existence of a plant community, SEQRA process, alleged cooling tower plumes,¹² Town files,¹³ need,¹⁴ PPA terms, bulk system impacts, PILOT payments,

¹⁰ Contrary to Mr Seubert's contention a three-minute time limit for comments to ensure that a meeting arranged by LIPA would proceed in an orderly fashion was not a "threat" and, in any event, is completely irrelevant to the pending petitions.

¹¹ Mr. Seubert's discussion of Caithness's reliance on the Commission's decision in the Calpine Bethpage proceeding is confusing since that decision was cited for the appropriate scope of review with respect to Caithness's Financing Approval Petition. Mr. Seubert's reference to "insider information" also is misplaced since Caithness and its parent, Caithness Energy, LLC, are privately held companies. This, in part, may explain Mr. Seubert's confusion over the financing arrangements that Caithness may pursue in relation to the Project.

¹² The facility will have an air cooled condenser.

¹³ Mr. Seubert also makes an assertion concerning adjacent property owners' receipt of registered mail concerning a March 9th hearing. The hearing in question pertained to Caithness's application to the Town Board for special permit approval. Mr. Seubert does not explain how this notice is relevant to this proceeding.

natural gas supply pipeline, and air impact analysis. The issue of the facility's location outside the deep recharge zone (Zone III), which was raised by Mr. Seubert during the DEIS comment period and was addressed in the FEIS Response to Comments.¹⁵ See <http://www.lipower.org/pdfs/projects/caithness/text/Response.pdf> (Response to Comment No. 103). It is also before the Supreme Court in the East End Litigation.

Mr. Seubert alleges that the maps included in the CPCN/Lightened Regulation Petition and Environmental Assessment Form are old. He ignores that the Commission, as an involved agency, received copies of the EIS, which included numerous maps. Moreover, the maps in question were sufficiently current to accurately portray the location of the facility. Finally, Mr. Seubert makes vague references to a variety of items such as "underground plumes", "methane vents", "landfill evaluation", "environmental justice", among others, that warrant little comment because they are either irrelevant to the pending petitions and the Caithness FEIS, or they were thoroughly addressed in the FEIS. (Caithness's environmental justice analysis falls under the latter category. See FEIS Section 7.3.)

In sum, Mr. Seubert's comments reflect the disjointed concerns he previously raised during the SEQRA process, the DEC draft permit comment period, and the Town special permit hearings. At every appropriate time, Caithness has patiently presented concise, coherent responses to the concerns raised by Mr. Seubert. He has chosen to ignore them.

(Continued ...)

¹⁴ Mr. Seubert's comments confuse LIPA's predicted annual growth in demand and overall supply needs. These issues are clearly addressed in Caithness's petition. Contrary to Mr. Seubert's comments, the FEIS also clearly addresses other forms of addressing demand growth such as demand side management, alternative technologies, etc. See FEIS Section 1.2 & 18.6 & 18.6. See also FEIS Response to Comments (<http://www.lipower.org/pdfs/projects/caithness/text/Response.pdf> (Response to Comment Nos. 48, 115).

¹⁵ Mr. Seubert questions how LIPA became lead agency. That process is documented in the FEIS Appendices. Further, DPS assented to LIPA acting as lead agency.

EAST END'S MOTION TO INTERVENE SHOULD BE DENIED

As documented earlier, East End's delay in seeking intervention in this proceeding is inexcusable. Its request therefore should be denied. Moreover, East End does not satisfy the requirements for intervention. 16 NYCRR 4.3(c) provides that intervention is permissible if the person seeking intervention "is likely to contribute to the development of a complete record or is otherwise fair and in the public interest." As evidenced by its submission, East End is interested in nothing more than delaying this proceeding or pursuing issues that (1) do not fall within the scope of the Commission's consideration of Caithness's petitions and (2) are already before the Supreme Court in the East End Litigation. East End's motion should be denied.

THE JASPAN FIRM SHOULD BE BARRED FROM THIS PROCEEDING

The Jaspan Firm's participation in this proceeding on behalf of an opponent of the Caithness Project represents an impermissible conflict of interest. Thus, even if East End is allowed to intervene, the Jaspan Firm should not be permitted to represent East End in this proceeding.

It is undisputed that the Jaspan Firm, on behalf the Town of Brookhaven, moved to intervene in this proceeding on or about April 25, 2005. It is undisputed that, as a result of that motion, the Jaspan Firm was included as an Active Party for the Town in the proceeding. *See* Active Parties List, dated April 27, 2005. It also cannot be disputed that the Town is not an opponent of the Caithness Project. To the contrary, the Town recently granted special permit approval for the Caithness Project along with associated variances/waivers. *See* Exhibit E hereto.

Now the Jaspan Firm seeks to intervene on behalf of an entity that openly opposes the Caithness Project, and has initiated a lawsuit against the Project. This represents an

impermissible conflict of interest. The conflict is not cured by the fact that the Jaspan Firm no longer represents the Town concerning the Caithness Project. The fact remains that the Jaspan Firm represented the Town during the SEQRA process and intervened on its behalf in this proceeding, and the Town remains on the Active Party List. The Jaspan Firm's subsequent representation of a client opposing the Caithness Project in the same proceeding creates an obvious and direct conflict of interest, which is not permitted under the New York Lawyer's Code of Professional Responsibility ("Code").

16 NYCRR 2.1 provides in relevant part:

A party's representative need not be an attorney, but all persons appearing before the commission must conform to the standards of conduct required of attorneys appearing before the courts of the State of New York. Any person signing a pleading or brief or entering an appearance in any proceeding will be considered to have agreed to conform to those standards. A failure to conform to those standards will be grounds for exclusion from that or any later proceeding.

Thus, the Code applies to this proceeding.

DR 5-105(A) requires a lawyer to decline proffered employment from a new client where "the exercise of independent professional judgment in behalf of [an existing] client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would likely involve the lawyer in representing differing interests. . . ." The Code defines "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of the lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." See also Ethical Consideration ("EC") 14.

Even though the Jaspan Firm's representation of the Town may have ended, it may not represent East End in this proceeding. DR 5-108(A) provides:

Except as provided in DR 9-101(B) a lawyer who has represented a client in a matter, shall not, without the consent of the former client after full disclosure:

1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

2. Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret has become generally known.

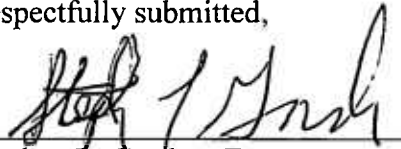
Here, however, the Jaspan Firm may not even seek such consent. EC 5-16 cautions: "If a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent." (emphasis added). There is no question that East End and the Town have "differing interests" with respect to the Caithness Project in this proceeding. Moreover, there is no doubt that their interests are "materially adverse." One supports the Project; the other opposes it. The Jaspan Firm simply may not represent an opponent of the Caithness Project in this proceeding without violating the Code and 16 NYCRR 2.1. Clearly, the Jaspan Firm feels no compunction about violating the Code or the Commission's rules. Thus, the burden unfortunately falls on the Commission to enforce 16 NYCRR 2.1 and bar the Jaspan Firm from any further participation in this proceeding.

CONCLUSION

Caithness respectfully requests that the Commission not delay this proceeding any further, and promptly grant Caithness's petitions. Caithness also requests that East End's motion to intervene be denied, or, if intervention is granted, that the Jaspan Firm be excluded from the proceeding.

Dated: New York, New York
August 1, 2006

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Stephen L. Gordon", is written over a horizontal line.

Stephen L. Gordon, Esq.
Michael Murphy, Esq.
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(212) 702-5400

Attorneys for Caithness Long Island, LLC

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

Michael Murphy, being duly sworn, deposes and says:

That on the 1st day of August, 2006, a true and complete copy of the forgoing document, and the exhibits thereto, was served by First Class Mail, by depositing said copy in a mailbox maintained by the Government of the United States, in the City of New York, properly enclosed in a postpaid envelope addressed to each party as shown on the attached list.

Sworn to before me this 1st day
of August, 2006



A handwritten signature, likely "Michael Murphy", is written over a horizontal line.

Marie L. Lehmann
Notary Public

44784v.1 <NewYork> 011585

MARIE L. LEHMANN
NOTARY PUBLIC, State of New York
No. 41-4806378
Qualified in Queens County
Commission Expires Sept. 30, 2006

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RESPONSE TO PUBLIC COMMENTS RECEIVED ON THE DRAFT PERMITS FOR THE CAITHNESS LONG ISLAND ENERGY CENTER

July 20, 2006

A. INTRODUCTION

Caithness Long Island LLC proposes to construct and operate the **Caithness Long Island Energy Center** ("the project") which is a nominal 346 megawatt (MW), dual fuel, combined-cycle electric generating station consisting of one Siemens Westinghouse Power Corporation 501F combustion turbine generator (CTG), a heat recovery steam generator equipped with natural gas-fired duct burners, and a single steam turbine. Natural gas will be the primary fuel with low sulfur (0.04%) distillate oil serving as the back-up fuel. The CTG will utilize a dry low-NOx combustor and water injection in addition to selective catalytic reduction (SCR) to reduce emissions of nitrogen oxides (NOx). An oxidation catalyst will be used to reduce emissions of carbon monoxide (CO) and volatile organic compounds (VOC). Emissions from the combustion turbine will exhaust through a single 170-foot stack. An air-cooled condenser will be used to minimize water use and eliminate cooling tower plume impacts. Other on-site equipment will include a 750,000 gallon fuel oil storage tank, gas compressors, an auxiliary boiler, fuel gas heater, emergency diesel fire pump and associated balance-of-plant systems and facilities.

The project will be located on a 15 acre site within an approximately 96 acre parcel located at the terminus of Zorn Boulevard, south of exit 66 on the Long Island Expressway (LIE), in the Town of Brookhaven, Suffolk County.

A Notice of Complete Application for this project was originally published in the Environmental Notice Bulletin (ENB) on January 11, 2006, with the deadline for public comments ending on February 10, 2006.

<http://www.dec.state.ny.us/website/enb2006/20060111/Reg1.html#147220442600004>

A legislative public hearing for the receipt of public comments on the application was held at 7:00PM on February 1, 2006.

Subsequent to the Notice of Complete Application, a Notice of Use of Emission Reduction Credits was published in the ENB with the deadline for comments ending on May 20, 2006. No comments were received on the Notice of Use of Emission Reduction Credits.

The responses to comments have been formulated to address specific concerns raised during the public comment period, both at the Legislative Hearing, as well as those submitted in writing. It should be noted that a number of comments relate to issues not germane to the air or water permitting process from a regulatory standpoint. Specifically, a number of comments related only to the SEQRA process and issues unrelated to the air quality or water quality considerations and, thus, need to be addressed in that forum. However, LIPA (as the SEQRA lead agency) has provided responses to these issues which have been incorporated into this document to provide a comprehensive response to questions raised concerning this project. These SEQRA only related items are noted in the first sentence of the response. Furthermore, certain comments were submitted well beyond the comment period deadline and although DEC has no legal obligation to incorporate these in the public record for the permitting process, responses to these comments are provided at the end of this document.

Fran Hurley, Yaphank Taxpayers Association, February 1, 2006 (Hurley)
Johan McConnell, February 4, 2006 (McConnell)
John McConnell, February 4, 2006 (J. McConnell)
Kevin Maher, TRC Environmental, February 6 and 7, 2006 (Applicant)
Don Seubert, undated - received by DEC February 6, 2006 (Seubert)
Michael White, (representing Atlantic Point Properties), February 10, 2006 (White)
Brain Harper, Suffolk County Department of Health Services, February 10, 2006
Robert Hood, undated (Hood)
Samara F. Swanston, Watchperson Project, undated (Swanston)
Robin Thomas (Thomas)

D. LATE COMMENTS RECEIVED

The comment period for the draft DEC permits closed on February 10, 2006. Comments were submitted by several e-mail messages on March 6, on March 11, March 20, and April 21, 2006 by Dr. Carmine F. Vasile, well after the deadline. Based on the foregoing, there is no obligation to consider these late-filed comments; however, to the extent the comments are arguably relevant to the draft air and SPDES permits, the comments are addressed below.

The March 6, 2006 e-mail was addressed to DEC and requested that DEC take action to rescind the FEIS. The March 11, 2006 e-mail was addressed to the New York State Public Service Commission but was copied to DEC. This e-mail provided the most comprehensive listing of Dr. Vasile's comments and subsequent e-mails essentially restated the same concerns. The March 11, 2006 e-mail provides eight statements in the Executive Summary of the comments, followed by 45 Background & Additional Comments. The majority of the Background & Additional Comments (B&AC) (14 through 45, primarily under the headings "Misguided Comments", "Related Waste Fraud & Abuse", "Mail/Wire/Bank-Fraud Petition", "PSC Jurisdiction" and "Refund Demand") are unrelated to the draft permits or EIS, and therefore are not addressed.

In broad terms, comments 1 through 13 repeat two themes from the Executive Summary, namely that the air cooled condenser proposed by Caithness will draw "toxic fumes" from the adjacent landfill and other toxic sites, and that the air cooled condenser (ACC) thermal air plume will pose a hazard to birds and aircraft. It is noted that despite references to various attachments and other documents, the comments are conclusory in nature and, despite their technical tone, are not supported by any offer of proof in the form of engineering calculations, scientific analyses or other studies. Although the issue of claimed hazards caused by plume uplifting from the facility does not relate to the permitting requirements, each issue is nonetheless addressed below:

TOXIC FUMES

It is claimed that the Caithness project will "foul the air by uplifting toxic fumes its air intakes will draw from nearby hazardous waste sites identified in Toxic Targeting's selected toxic sites for Brookhaven and Medford, dated December 20, 2005." In support of this claim, it is claimed that "toxic sites . . . are conspicuously absent from [Caithness's] Site Location Map."

In understanding the potential for a low pressure condition to occur which could draw fumes out of the ground, it is important to understand the following characteristics of the ACC and of the air flow in the vicinity of the ACC:

- The air inlets for the ACC proposed for the Caithness facility are located approximately fifty feet above the ground as shown on Figure 2-7 of the FEIS.
- The ACC's inlet air will be drawn in using large diameter, low-speed fans, typically operating with a throughput velocity of 10 to 20 feet per second.
- Because the ACC is open on all four sides, air flow toward the ACC is not constrained to flow through a narrow corridor but, rather, is drawn in from all directions.
- The flow of air drawn into the ACC is predominately within the layer of air that starts 20-30 feet above the ground and goes up from there to the ACC; i.e., very little of the air flow is at ground level.

Given these characteristics of the ACC and of the flow of air through the ACC, the conditions required to create a low pressure area at ground level (as alleged by B&AC #6 and #8) cannot occur. The ACC cannot "draw fumes" out of the ground, either from the ground immediately beneath the ACC or from landfills at some considerable distance from the ACC.

It is also worth noting that the average wind speed at the facility site is approximately 10 miles per hour, or 15 feet per second. As such, the air flow through the ACC is no more than the average wind speed and cannot, therefore, have any different effect on the ground than would the air flow associated with normal meteorological conditions.

Reference is made in the comments to purported nearby hazardous waste sites. These sites are merely registrations on the EPA Toxic Release Inventory database, which is the community right-to-know database for materials a facility may be storing or using on their facility. They are not "hazardous waste sites." Similarly, what the comments misinterpret as "toxic air vents," are nothing more than DEC point source registrations. These could be boiler exhaust stacks or other permitted air emission sources. The comments imply that these "toxic air vents" are venting toxic fumes from the "hazardous waste sites". There is no indication that such sites are in fact "toxic air vents." Moreover, the comments acknowledge that these sites are at least 0.7 miles from the project site; so even if they were a source of toxic emissions (which has not been shown), those emissions would be greatly diluted in concentration by the time any reach the location of the facility as they would have been broadly dispersed throughout the area of such site.

The comments also reference a Site Location Map prepared by Caithness to assert that Caithness has failed to identify nearby "toxic sites." A comprehensive database review using the Environmental Data Resources (EDR) was conducted and discussed in detail in Section 13.3 of the FEIS. This section of the FEIS also indicates that all of the 96-acre parcel was rigorously examined in a Phase I Environmental Site Assessment to evaluate any "Recognized Environmental Condition" on or near the site. The findings and recommendations are also included in sections 13.4 and 13.5.

THERMAL UPLIFT

The comments assert: "Neither the DEIS or FEIS considered the environmental impacts on endangered bird or safety issues related to low flying aircraft landing or taking off from a nearby Heliport or Brookhaven-Calabro Airport when flying through toxic air turbulence created by hot air updrafts caused by 233 megawatt (MW) (0.8 Billion Btu/hr) of waste heat from Caithness's stack or cooling tower if this commission allows it to operate at full power."

The reason the DEIS and FEIS did not consider environmental impacts on endangered birds or safety issues with low flying aircraft is because there are none. As stated above, Dr. Vasile erroneously concludes that the Caithness facility will be drawing toxic air from the ground and

creating "toxic air turbulence," and that this turbulence will cause environmental impacts and safety issues. The first part of Dr. Vasile's argument has been addressed in the prior response.

The second part is equally without scientific merit. While Dr. Vasile is correct that the ACC will cause a warm updraft, this updraft will have a vertical velocity that will be typically less than the average horizontal wind speed, but more importantly, it will be rapidly dispersed and mixed into the ambient atmosphere within a very short vertical distance. Additionally, the vertical velocity of the warm updraft caused by the ACC will be comparable to the thermal updrafts that would occur from large parking lots or naturally dark areas on a very sunny day.

The warm air plume from the ACC will not create toxic fumes, or otherwise create any air contaminant emissions. The modest updraft component of the warm air from the ACC would pose no environmental effect to birds flying through the plume, and a fixed-wing aircraft would have to be flying perilously close to the ACC to experience even any noticeable turbulence.

With respect to the alleged "safety" issue associated with thermal uplift, the comments refer to testimony regarding wind shear and turbulence effect on aircraft for the Caithness Blythe II 520 MW combined cycle facility in California, located near Interstate 10 and the Blythe Airport, about 5 miles west of the City of Blythe. (CEC Docket #02-AFC-01, <http://www.energy.ca.gov/sitingcases/blythe2/>). The Blythe project, which was approved and is currently in operation, is directly in line with the Blythe Airport runway 26 and only a mile distant from the Blythe Airport. The only remark that the FAA makes regarding flight operations for Blythe Airport is: "Power plant 1 mile east of the airport producing thermal plumes; avoid low altitude direct overflight of the power plant."

For the current project, the Caithness Long Island Energy Center project site is over three miles from the Brookhaven Calabro Airport and is not within the direct flight path from any of the airport's runways.

The comments provided are based on a fundamental misunderstanding of "clear air turbulence - CAT," which is a phenomenon that only occurs high in the atmosphere at the boundaries of air masses moving in different directions (along warm and cold fronts) and along jet-streams. CAT is primarily caused by the wind shear between the rapidly moving jet stream current and the slower moving air at the edges of the jet stream. As such, CAT simply does not occur within the first few hundred feet above ground where the warm air from the air cooled condenser will exhaust. Similarly, the wind speeds and wind shear associated with CAT are vastly greater (hundreds of feet per second) than the low velocity of the warm air exhaust from the ACC which is only 10 to 20 feet per second.

The comments also claim that Caithness has falsely alleged that "air-cooled condensing would be employed to... (3) eliminate cooling tower plume impacts." However, as explained in the FEIS, the air-cooled condenser would be employed in place of a wet evaporative cooling tower, thereby eliminating the negative impacts associated with a wet cooling tower, including water consumption -- a precious commodity on Long Island; elevated visible plumes; possible fogging and icing of adjacent roadways; and particulate emissions associated with circulating water drift. Use of an ACC also eliminates the potential use of contaminated groundwater for cooling, avoiding any possibility of organic chemical emissions through water cooling.*

E. COMMENTS RECEIVED FROM CAITHNESS LONG ISLAND LLC (APPLICANT)



CASE 05-E-0098
Caithness Long Island, LLC

ACTIVE PARTICIPANTS LIST
April 27, 2005

PRESIDING

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

EAST END PROPERTY COMPANY #1, LLC, MARK
KASPIEV, LAUREN NOACK, JOHN McCONNELL,
JOHAN McCONNELL, CHARLES F. OTT, DONALD
SEUBERT, PATRICIA SEUBERT and THE MEDFORD
TAXPAYERS AND CIVIC ASSOCIATION INC.

Petitioners-Plaintiffs,

- against -

RICHARD M. KESSEL as Chairman of the Board of
Trustees of the Long Island Power Authority, MICHAEL
J. AFFRUNTI, NANCY ANN AKESON, HARVEY
AUERBACH, JOHN FABIO, EDNA GERRARD,
HARRIET A. GILLIAM, JAMES C. HERRMANN,
ROBERT S. MAIMONI, NANCY NUGENT,
JONATHAN SINNREICH, DR. JAMES M. SHUART, as
Members of the Board of Trustees of the Long Island
Power Authority, THE LONG ISLAND POWER
AUTHORITY, CAITHNESS LONG ISLAND, LLC
and IROQUOIS GAS TRANSMISSION SYSTEM, LP,

Respondents-Defendants.

Index No. 06-001410
Justice Assigned:
Hon. R. Bruce Cozzens, Jr.

AFFIRMATION OF
MICHAEL MURPHY
IN OPPOSITION TO
EXTENSION OF
TEMPORARY
RESTRAINING ORDER

AFFIRMATION

MICHAEL MURPHY, an attorney duly admitted to practice in the courts of the State of
New York, affirms under penalty of perjury that:

1. I am an attorney with the law firm of Beveridge & Diamond, P.C., environmental
and regulatory counsel to the defendant-respondent Caithness Long Island, LLC ("Caithness").
2. I make this affirmation on behalf of Caithness in opposition to continuation of the
temporary restraining order ("TRO") that has been issued, *ex parte*, in this proceeding.
3. Caithness is seeking to develop an approximate 350 megawatt ("MW") electric
generating facility in an industrially zoned area in the Town of Brookhaven, Suffolk County,

New York ("Project" or "Caithness Long Island Energy Center").

4. Beveridge & Diamond was retained by Caithness to help it obtain certain environmental, regulatory and local land use approvals for the Project. I have been working on these approvals for Caithness for over a year and a half.

5. As such, I am fully familiar with all the facts and circumstances set forth herein.

6. The TRO broadly "enjoin[s] and restrain[s] all respondents-defendants or their agents" from, *inter alia*, "taking any action with respect to the power plant known as Caithness Long Island Energy Center . . ."

7. Even though the Project is many months away from the earliest date at which construction could commence, the TRO precludes Caithness from taking "any action" with respect to the Project.

8. As explained below, unless the restraining order is removed immediately, Caithness will suffer substantial and irreparable harm because agency hearings upcoming in the days and weeks ahead will be delayed, which will cause a delay in the Project schedule. Petitioners-plaintiffs, by contrast, will suffer no harm at all if it expires, since the Project is still months away from construction, let alone operation, and regardless of whether Caithness continues to lay the groundwork for the Project now, petitioners-plaintiffs will still have abundant time to obtain whatever relief might be warranted to prevent the harm they claim.

Background

9. LIPA has concluded that the Caithness Project will help it meet the growing demand for electricity on Long Island.

10. Caithness and the Long Island Power Authority ("LIPA") have negotiated many of the terms of a 20-year power purchase agreement ("PPA") for a substantial portion of the

Project's output.

11. As Chapter 1, *Purpose and Need*, of the Final Environmental Impact Statement ("FEIS") for the Project explains, additional generating capacity must be in place to meet anticipated demand in the 2008-2009 time frame. See FEIS 1-2 to 1-3.

12. The Caithness Project is intended to help LIPA meet that demand, but because it will take approximately two years for the Project to be constructed, it is essential that Caithness not be prevented or delayed from pursuing the approvals it needs for the Project.

13. Commencement of construction on the Project simply may not proceed until Caithness obtains numerous environmental, regulatory and land use approvals; thus, even if there were merit to petitioners-plaintiffs' claims (which there is not), no harm will be suffered by petitioners-plaintiffs while the permit application review process is still under way.

14. A list of these approvals is included in the FEIS and is attached hereto as Exhibit A (pages S-5 to S-6 of the FEIS).

15. As explained below, Caithness still has to obtain numerous permits, which will take at least five to six months to secure.

16. Thus, at the very earliest, Caithness unlikely to secure all of the construction permits it requires before June 2006.

17. Even after all the necessary permits are secured, several more months may pass before construction actually commences to accommodate finalization of the construction schedule, mobilization of construction trades, and delivery and staging of construction equipment.

18. In the meantime, petitioners-plaintiffs literally will suffer no harm if the TRO expires and Caithness is allowed to proceed through the regulatory process while this proceeding

is pending.

19. Indeed, given the nature of the proceeding, there is no reason to believe that this proceeding will not be fully resolved before construction could commence.

20. Removal of the TRO's impediments is also a matter of particular and immediate urgency because a public hearing relating to one of Caithness's regulatory applications is scheduled to proceed on the evening of February 1, 2006 - one day after the order to show cause on the TRO is scheduled to be heard.

21. The *ex parte* restraining order therefore must be removed and/or not continued, and Caithness must be allowed to pursue these applications, if it is to avoid substantial and irreparable harm.

Town of Brookhaven Approvals

22. The Project must obtain at least three approvals from the Town of Brookhaven before construction may commence.

23. The Project is located in the Town's L-1 Industrial Zoning District, in which electric generating facilities are permitted by special permit issued by the Town Board of the Town of Brookhaven. See Brookhaven Town Code §§ 85-31.1, *et seq.* & 85-309.

24. The Project also requires site plan approval from the Town of Brookhaven Planning Board. See Brookhaven Town Code § 85-45, *et seq.*

25. Caithness has filed applications for special permit approval and site plan approval with the Town; however, neither approval has been obtained yet.

26. Moreover, a site plan hearing may not proceed until Caithness has first secured special permit approval.

27. Similarly, the Project will also require a building permit from the Town before any

construction on the Project, including site clearing, may commence. *See* Brookhaven Town Code §§ 85-16, *et seq.*

28. However, site plan approval is a prerequisite to submission of a building permit application. *See* Brookhaven Town Code §85-19.

29. Thus, at least three approvals are required from the Town before any construction on the Project may commence, and the approvals must be obtained in sequence.

30. While the special permit hearing before the Town Board reasonably could occur within the next several weeks, and assuming Caithness obtains that approval at that time, a hearing on the site plan application is not anticipated to be scheduled for several months thereafter.

31. Once site plan approval is obtained, Caithness has been informed that it will take approximately an additional three months before the first building permit may be issued.

32. Thus, based on the approvals Caithness needs to obtain from the Town of Brookhaven alone, Caithness could not commence construction at the Project site for another five to six months, at the earliest.

33. In the meantime, no harm will accrue to petitioners-plaintiffs if Caithness is allowed to proceed with these local zoning applications.

34. On the other hand, because these Town approvals must be secured in sequence, if the broad, wide-ranging *ex-parte* TRO continues while the petition is pending, and even assuming the petition is ultimately dismissed, Caithness will face at least another six months from that point before it will be able to secure these approvals.

35. This could push commencement of construction into the winter months, which could increase construction costs, and lengthen the overall construction period and delay the

commencement of the Project's operation.

Department of Environmental Conservation Approvals

36. Caithness also must secure from the New York State Department of Environmental Conservation ("DEC") air pollution control permits pursuant to Article 19 of the Environmental Conservation Law ("ECL") and a water pollution control (State Pollution Discharge Elimination Permit or SPDES) permit pursuant to Article 17 of the ECL.

37. The DEC permits are both construction and operation permits.

38. Thus, construction may not commence until these permits are issued in final form.

39. Caithness submitted applications for these permits approximately one year ago, and after an extensive permit application review process, DEC recently issued a notice of complete application and draft permits for the Project, and announced a public comment period, which will end on February 10, 2006.

40. This public comment period provides an opportunity for the public and Caithness, as the applicant, to submit comments on the draft permits issued by DEC.

41. Caithness's ability to comment on the draft permits is critical to ensuring that the final permits accurately reflect the information Caithness has submitted in its permit applications.

42. Continuation of the TRO could prevent Caithness submitting comments on DEC's draft permits within the time frame specified by DEC.

43. If Caithness is not able to submit comments on the draft permits, DEC may issue final permits that contain erroneous permit conditions.

44. Unless Caithness meets the February 10 comment deadline, its right to appeal any erroneous permit terms would be foreclosed.

45. Petitioners-plaintiffs would suffer no harm if Caithness is allowed to submit comments on the draft permit; however, Caithness, and the public at large, will suffer great harm if final permits are issued with erroneous permit conditions.

46. In addition, a hearing to accept public comments on the draft DEC permit has been scheduled for February 1, 2006.

47. A public notice regarding DEC's issuance of the draft permits, the public comment period and the February 1, 2006 public statement hearing has already been published in the State Environmental Notice Bulletin ("ENB") and Long Island Newsday -- the latter at Caithness's expense.

48. Caithness's ability to participate at, or even attend, the DEC hearing could be precluded by the breadth of the TRO if it is allowed to continue.

49. Further, Caithness, as the applicant, is required to obtain a hearing location, provide a court reporter and arrangement for appropriate audio equipment for the hearing.

50. Thus, although DEC is not covered by the TRO directly, unless the *ex parte* TRO is removed, the DEC hearing may be in jeopardy, and Caithness's ability to secure final DEC permits in a timely fashion will be jeopardized.

51. Clearly, if the February 1, 2006 hearing is postponed, it will cause confusion among the public because the public has already been put on notice that the hearing will take place on that date.

52. In essence, this small group of petitioners would be denying the rest of the public the opportunity to participate in an important public process.

53. Further, if the hearing is postponed, and even if the TRO is discontinued at a later date, at the very minimum, a new hearing location and date will have to be confirmed at that

time, and a notice of the new hearing date will have to be published in the ENB and Newsday.

54. Based on the efforts I personally undertook with respect to the scheduled February 1, 2006 hearing, confirming the location and date for a new hearing reasonably can be expected to take at least one to two weeks because it has to be coordinated with DEC.

55. However, DEC requires advance notice of at least three weeks for a public statement hearing and ENB publication occurs only once each week.

56. Thus, if the February 1, 2006 hearing is postponed due to the TRO, Caithness would face a delay of more than one month after the injunction is lifted before a new DEC hearing could take place.

57. Even if DEC proceeds with the hearing, the public (as well as Caithness) would be harmed because Caithness -- the applicant -- would not be allowed to participate at the hearing if the TRO is continued.

58. Even without the injunction, Caithness does not anticipate that it will receive final DEC permits for several months; thus, no construction will occur in the meantime.

Suffolk County Department of Health Services Approvals

59. Caithness must obtain three Suffolk County Sanitary Code approvals from the Suffolk County Department of Health Services: Article VI approval for water use; Article VII approval for water pollution control; and Article XII approval for toxic and hazardous materials storage and handling.

60. Caithness has submitted applications for all three approvals, but has not secured any of these approvals at this time.

61. Moreover, the Article VI and VII approvals will not be granted until Article XII approval is secured, with a lag time of at least one month.

62. Thus, even if Caithness secures an Article XII approval by mid-February, Suffolk County would not issue the two remaining until mid-March at the earliest.

Public Service Commission Approvals

63. The Public Service Commission also must issue Caithness a Certificate of Public Convenience and Necessity pursuant to Section 68 of the Public Service Law before construction may proceed.

64. Caithness has submitted a petition for a Section 68 Certificate, and now that an FEIS has been issued for the Caithness Project, the Public Service Commission is free to schedule the petition for determination.

65. Beveridge & Diamond has been informed that the Commission is likely to act on the petition as early as February or possibly March.

66. With a restraining order or injunction in place, the Commission may postpone its decision on Caithness's Section 68 indefinitely, even though the petition has been pending before the Commission for one year.

67. Once the PPA is effective, Caithness will be in a position to secure financing for the Project.

68. Without financing, construction cannot proceed.

69. However, before Caithness may incur long term indebtedness, it first must obtain the approval of the Public Service Commission pursuant to Section 69 of the Public Service Law.

70. Because that process typically takes approximately three months and possibly longer, Caithness had planned to submit a petition for financing approval in the very near future.

71. Beveridge & Diamond was literally in the process of finalizing Caithness's Section 69 petition for submission most likely in the next several weeks.

72. The TRO's continuation will preclude that submission, thereby preventing Caithness from obtaining financing to support construction of the Project well beyond three months.

73. Even if construction is delayed for some reason other than this litigation, it is still critical that Caithness be allowed to proceed with its financing petition to the Public Service Commission so it has the greatest flexibility in terms of time to secure the best terms for financing to support the Project.

74. Any significant change in current market conditions could greatly jeopardize Caithness's ability to obtain the best financing package, and cause it irreparable harm.

No Harm Will be Suffered By Petitioners-Plaintiffs if the TRO is Lifted

75. Petitioners-Plaintiffs have not asserted any irreparable harm to justify the issuance of a TRO or its continuation.

76. The Emergency Affirmation of Steven Schlesinger states, in conclusory fashion, that the TRO's broad restraint is justified because "respondents are presently proceeding to seek governmental permits for their Project based on a defective [State Environmental Quality Review Act ("SEQRA")] process" and if "this fatally flawed SEQRA process conducted by LIPA as lead agency is allowed to stand, all of the involved agencies may wrongly proceed in reliance on LIPA's errors and irreparable harm sought to be prevented will begin immediately." Schlesinger Aff., ¶¶ 3-4.

77. Similarly, in their memorandum of law, petitioners-plaintiffs assert that they will suffer "irreparable harm" without an injunction due to perceived impacts from the Project. Plaintiffs-Petitioners' Mem. of Law at 21.

78. Even if one accepts the factual claims made by petitioners-plaintiffs concerning the Project's impacts if constructed as true, neither the Schlesinger Affirmation nor plaintiffs-

petitioners' memorandum of law, nor any of the supporting papers assert any irreparable harm to justify this injunction. The fact of the matter is that petitioners-plaintiffs will suffer no harm at all.

79. As shown above, construction has no possibility to proceed for at least five to six months from now while Caithness continues its efforts to acquire the necessary approvals.

80. In the meantime, there is no possibility that petitioners-plaintiffs will suffer any harm while their petition is considered on the merits.

81. Caithness should be allowed to proceed with the process of securing the necessary approvals for the Project because if petitioners-plaintiffs ultimately prevail on the merits (which they will not), then only Caithness (and the other defendants-respondents) could possibly suffer any harm because any permits that rely on the FEIS that is being contested may be questioned.

82. That is Caithness's risk, not petitioners-plaintiffs'.

83. Plaintiffs-petitioners' failure to demonstrate any harm to support the restraining order requires its immediate termination.

WHEREFORE, it is respectfully requested that the temporary restraining order not be continued.

Dated: New York, New York
January 30, 2006.


MICHAEL G. MURPHY



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333 East Main Street, Suite 403
Uniondale, NY 11553
(516) 222-7700 • Fax (516) 222-9137
<http://www.lipower.org>

June 1, 2006

Michael E. White, Esq.
Jaspan Schlesinger Hoffman LLP
300 Garden City Plaza
Garden City, NY 11530



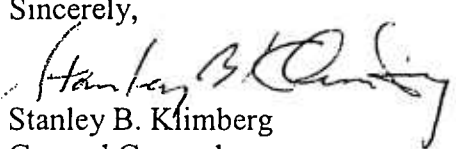
Re: Caithness Long Island Energy Center

Dear Mr. White:

LIPA has reviewed your letter of April 25, 2006 and the attached report of Dr. Eric Lamont relating to the potential presence of a Pitch Pine-Oak-Heath Woodland community at certain locations on the Caithness property, which is located within the Town of Brookhaven's Empire Development Zone.

Based on a review of Dr. Lamont's report by independent biologists and LIPA's own environmental consultants, LIPA has determined that the potential presence of the Pitch Pine-Oak-Heath Woodland community on the outer edge of the 96-acre 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 the State Environmental Quality Review Act. A copy of LIPA's determination is enclosed for your records.

Sincerely,


Stanley B. Klimberg
General Counsel

Enclosure



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<http://www.lipower.org>

June 1, 2006

Michael E. White, Esq.
Jaspan Schlesinger Hoffman LLP
300 Garden City Plaza
Garden City, NY 11530

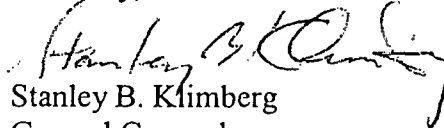
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Sincerely,


Stanley B. Klimberg
General Counsel

Enclosure

Memorandum

TO: Edward J. Grilli
Caithness file

FROM: Monique Brechter

RE: Caithness Long Island Energy Center
Investigation of Eric Lamont Report of Potential Presence of Pitch Pine-Oak-Heath Woodland at the Caithness Project Site

DATE: May 30, 2006

In response to the April 25, 2006 letter from Michael E. White to Stanley B. Klimberg regarding a report prepared by Eric Lamont entitled "The Status of the Rare Pitch Pine-Oak-Heath Woodland Ecological Community at the Caithness Long Island Site, Town of Brookhaven, Suffolk County, New York" ("Lamont Report") that described the presence of the Pitch Pine-Oak-Heath Woodland on the site of the Caithness Long Island Energy Center ("Caithness Project"), I asked biologists from TRC Environmental, through Caithness Long Island, LLC, and AKRF, Inc. (the environmental consultant to LIPA) to review the Lamont Report and how this report affects any of the analysis or conclusions in the Terrestrial Ecology chapter of the Final Environmental Impact Statement ("FEIS") for the Caithness Project.

Attached is a memorandum from Kevin Maher and Scott Heim of TRC and a separate memorandum from Gary Bickle of AKRF, Inc (with cover transmittal from Philip C. Sears). I have fully reviewed both memoranda and concur with each expert's independent conclusion that the Lamont Report raises no significant new issues that require LIPA to reanalyze the potential impacts to natural resources due to constructing and operating the Caithness Project within the Town of Brookhaven's Empire Development Zone. This is also consistent with the findings of the Town of Brookhaven when it issued a Negative Declaration under SEQRA in 1997 for the Town of Brookhaven's Zorn Industrial Subdivision (where the Caithness Project is located).

Both TRC and AKRF conclude that some characteristics, but not all of the characteristics, of a Pitch Pine-Oak-Heath Woodland may be present on a small portion of the edge of the 96-acre site. The Pitch Pine-Oak-Heath Woodland community is not a protected community under any New York State law or Federal law or regulation but is a descriptor of a terrestrial community found, among other places, in New York State. This community is transitional in nature, typically caused by uncontrolled fires, and the small portion at the edge of the 96-acre site that meets some characteristics of a Pitch Pine-Oak-Heath Woodland is expected to progress through the normal successional cycle, absent additional uncontrolled fires, to the characteristics of the Pitch Pine-Oak Forest. Further, no threatened or endangered species are located in such community.

Aerial photographs reviewed by TRC, as fully discussed in the TRC memorandum, show that the small area of possible Pitch Pine-Oak-Heath woodland located at the edge of the 96-acre parcel and the scrub oak community (a descriptor of the Pitch Pine-Oak Forest) present within the 15-acre Caithness Project site were caused by a recent fire that removed either a portion or all of the overstory tree canopy of the Pitch Pine-Oak Forest community. I also note that the changes to the terrestrial community due to a recent fire were also explained in section 14.3 of the FEIS.

Overall, any possible impact caused during construction of the Caithness Project to any small parcel of possible Pitch Pine-Oak-Heath Woodland is not significant because such community is entirely temporary within or around the 96-acre parcel and adjacent sites and would be cycled back into a Pitch Pine-Oak Forest community unless another uncontrolled fire were to occur. Because the Caithness Project will be located within the Town of Brookhaven's Zorn Industrial Subdivision and the area is subject to industrial and commercial development, the likelihood of the community permitting such uncontrolled fires is highly unlikely.

Based on the two reports attached and pursuant to the requirements of 6 NYCRR § 617.9(a)(7), there is no significant, newly discovered information provided in the Lamont Report that would trigger the need for a supplemental environmental impact statement.

I concur with the conclusions of this memorandum.



Edward J. Griffin

5/31/06
Date



Environmental and Planning Consultants

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www.akrf.com

May 15, 2006

Monique S. Brechter
Long Island Power Authority
333 Earle Ovington Boulevard
Uniondale, New York 11553

Re: **Caithness Long Island Energy Center**

Dear Monique:

Please find enclosed a copy of a memorandum from Gary Bickle of our office summarizing his field visit to the Caithness Long Island Energy Center site. The purpose of his site visit was to assess the presence or absence of a Pitch Pine-Oak-Heath Woodland community as asserted by Eric Lamont in a report prepared for Michael A. White of Jaspan Schlesinger Hoffman, LLP Attorneys at Law. The Final Environmental Impact Statement for the project stated that the plant community in those locations is a Pitch-Pine-Oak forest, which is a more common plant community than the Pitch-Pine-Oak Heath Woodland. Mr. Bickle found that the two locations described by Dr. Lamont had some, but not all the characteristics of a Pitch Pine-Oak Heath Woodland community. Those identified characteristics of the Pitch-Pine-Oak Heath Woodland community were likely caused by an uncontrolled fire. The identified characteristics are temporary in nature, and the areas will probably progress through the successional cycle and assume all the characteristics of the Pitch-Pine-Oak forest.

Mr. Bickle found that the findings in the FEIS on pages 14-8 to 14-9 regarding the Pitch-Pine-Oak forest are accurate and fairly represent the community that is present at those locations on the project site. Therefore, we believe that the conclusions in the FEIS are correct regarding the Pitch-Pine-Oak forest community and no further analysis of this subject is needed. If you have any questions or comments, please do not hesitate to call me at (646) 388-9795 or Steve Rosen at (646) 388-9712.

Sincerely,

AKRF, INC.

A handwritten signature in cursive script that reads "Philip C. Sears".

Philip C. Sears
Senior Consultant

cc: Stephen S. Rosen
Gary Bickle
Christine Fazio, Carter, Ledyard & Milburn



Environmental and Planning Consultants

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New York, New York 10016

tel: 212-696-0670

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Memorandum

To: Stephen Rosen

From: Gary Bickle, Vice President

Subject: Caithness Long Island Energy Center

Date: May 10, 2006

On Tuesday, May 2, 2006, I visited the site of the proposed Caithness Long Island Energy Center (CLIEC) in the Town of Brookhaven, Suffolk County, NY. The purpose of the visit was to investigate the presence/absence of a rare vegetation community identified as a Pitch Pine-Oak-Heathland Woodland as described by the New York Natural Heritage Program (Edinger et al. 2002).

The vegetation community within the 15-acre CLIEC project site and 96-acre project parcel was examined as part of the natural resources section in the Final Environmental Impact Statement (FEIS), June 2005 for the CLIEC project. The vegetation community within the project site was further described by TRC in a March 30, 2006 Memorandum following a March 22, 2006 site visit to the project site made with representatives of the Town of Brookhaven and representatives of the CLIEC project team as part of the Town's site plan review. The purpose of the March 2006 site visit was to inspect the 1.46-acre community within the 15-acre project site identified as a scrub oak variant of the Pitch Pine-Oak Forest community (in accordance with Edinger et al. (2002)) for the potential presence of a Pitch Pine-Scrub Oak Barrens vegetation community as defined by Edinger et al. (2002). As presented in the March 2006 Memorandum, TRC concluded that the characteristics of the 1.46-acre scrub oak community within the project site were not consistent with those of the Pitch Pine-Scrub Oak Barrens but were consistent with those of the Pitch Pine-Oak Forest community.

TRC based its opinion on the following:

- Two vegetation species, bracken fern (*Pteridium aquilinum*) and Pennsylvania sedge (*Carex pensylvanica*), are present in the herbaceous layer of the stand. According to the New York Natural Heritage Program descriptions, both species are noted as being indicator species for the Pitch Pine – Oak Forest community. Neither species is listed as an indicator species for the Pitch Pine-Scrub Oak Barren.
- TRC opines that the 1.46 acre scrub oak community developed from an intense fire that occurred within the surrounding Pitch Pine-Oak Forest community and that the removal

of the overstory tree canopy permitted increased sunlight to reach the scrub oak that resprouted after the fire. TRC notes that in other Pitch Pine - Oak Forest communities on the site, scrub oak is a significant and dominant component of the shrub layer.

Subsequent to the March 2006 site visit and Memorandum, LIPA received a letter from Michael E White; dated April 2006 that presented the results of a visit to the CLIEC project site and project parcel made by Eric Lamont, Ph.D. Dr. Lamont claimed that two areas on the project site meet the definition of Pitch Pine-Oak-Heath Woodland. He also indicates that "Other smaller stands of scrub oak – dominated Pitch Pine-Oak-Heath Woodland occur at the 96 acre site." The New York Natural Heritage Program ranks this community as G3G4, S2S3, indicating that this community is fairly rare and vulnerable in the state. As presented in the April 2006 document, Dr. Lamont based his identification of the Pitch Pine-Oak-Heath Woodland on the following:

- The two stands found on the project site have the vegetation characteristics of the Pitch Pine-Oak-Heath Woodland community, albeit at opposite ends of the vegetation spectrum for density of the scrub-shrub layer: one stand near the center of the 15-acre project site dominated with a very dense thicket of scrub oak and a few widely scattered pitch pine and white oak individuals, and the other with a less dense scrub oak shrub layer and 40 to 50% canopy cover comprising pitch pine and tree oaks.
- The dominant shrub in the Pitch Pine-Oak-Heathland Woodland is scrub oak. Unlike TRC, Dr. Lamont specifically identifies bracken fern and Pennsylvania sedge among other species that comprise understory species within this vegetation community.
- Dr. Lamont specifically identifies three technical differences between a "forest" community and a "woodland" community as clarified by Reschke (1990): a forest community consists of more than 60% canopy cover of trees whereas woodlands are communities with a sparse canopy of trees (25% to 60% coverage).

Observations Made During the May Site Visit

Scott Heim of TRC accompanied me on my May 2nd site visit. The observations made in this memorandum are strictly my own. Mr. Heim's role was to provide assistance in clarifying the boundary of the 96-acre project parcel and 15-acre project site. During the May site visit, it was observed that an area that may meet the characteristics of Pitch Pine-Oak Heath Woodland was present adjacent to the 96-acre project parcel (directly to the east and contiguous with the central portion of the site). This area may represent the second area of Pitch Pine-Oak-Heath Woodland described in Dr. Lamont's April 2006 document. Dr Lamont's report was vague and unclear about the locations of the claimed Pitch Pine-Oak-Heath Woodland. This vegetation community is not located in an area that would be disturbed by the CLIEC project (per Figure 2-5 of the FEIS). It is located adjacent to the project parcel. However, it provides some valuable insights as to the vegetation dynamics at the site. The aerial photograph contained in the EIS for the site (circa 2001) shows this area having vegetative characteristics similar to the adjoining Pitch Pine-Oak Forest community. Subsequent to the aerial photograph, a wildfire impacted portions of this area. Charred remains and damage to bark were clearly evident during the May site visit. The shrub layer was fairly sparse with some scrub oak (average height approximately two feet). Because the site visit was conducted early in the growing season, the presence of grass and fern species within the community could not be determined. However, Pennsylvania sedge and a plant identified as pin weed (*Lechea villosas*) were observed. There was no evidence of bracken fern. The canopy was fairly sparse, but Pitch Pine was present throughout the area as sporadic individuals.

The characteristics of the 1.46- acre scrub oak community located toward the center of the 15-acre project site appear to vary significantly from those of the recently burned community described above. The 1.46-acre scrub oak community contained a dense layer of scrub oak that was approximately four feet in height. There were no canopy species (e.g., pitch pine or tree

oaks) in this central portion of the project site. Pitch Pine was observed to become more prevalent along the edges of the transition to the Pitch Pine-Oak Forest Community. Bracken fern and Pennsylvania sedge remnants from last year's growing season appeared to be prevalent within this scrub oak community. Because the site visit was conducted early in the growing season, the presence of grass and fern species within this community could not be determined.

The two vegetation communities described above are clearly at different stages of the successional cycle. The recent fire within the area adjacent to the 96-acre project parcel is likely responsible for the less dense presence of scrub oak. The fairly open nature of the recently burned area allows for more sunlight penetration and promotes the presence of more diverse understory herbaceous layer. The conditions offered by the dense scrub oak community on the 1.46 acre site likely prevent significant sunlight penetration which would likely reduce the diversity of understory species.

Discussion

Both of the areas described above appear to have some but not all of the characteristics of the Pitch Pine-Oak-Heath Woodland, as described by the New York Natural Heritage Program (Edinger et al. 2002). However, both of these areas also appear to have characteristics that may exclude them from designation as Pitch Pine-Oak-Heath Woodland. The 1.46 acre scrub oak area at the center of the 15-acre project site appears to have the following characteristics of the Pitch Pine-Oak-Heath Woodland:

- The canopy is dominated by scrub oak; and
- Pennsylvania sedge is a component of the understory community.

The area does not appear to have the following characteristics of the Pitch Pine-Oak-Heath Woodland:

- The canopy is limited for approximately 80% of the 1.46-acre area to scrub oak. The characteristics described by Edinger et al. (2002) of the Pitch Pine-Oak-Heath Woodland include that of an open canopy comprising 30% to 60% white oak and pitch pine. A Pitch Pine overstory was observed along the ecotone to the adjoining Pitch Pine Oak Forest. Otherwise this area possessed no canopy cover.
- Bracken fern is clearly present within the 1.46 acres site. The characteristics described by Edinger et al. (2002) of the Pitch Pine-Oak-Heath Woodland include the presence of a number of herbaceous understory species but does not list bracken fern among them. Dr. Lamont includes bracken fern in his description of the understory characteristic of the Pitch Pine-Oak-Heath Woodland, but it is clearly not included in the characteristics for this community as described by the New York Natural Heritage Program.

On the basis of the May 2006 site visit, it appears that the 1.46-acre scrub oak community at the center of the project site may not meet the characteristics of a Pitch Pine-Oak Forest or the Pitch Pine-Oak-Heath Woodland.

The vegetation community adjacent to the central portion of the 96-acre project parcel described earlier in this Memorandum appears to have some of the characteristics of the Pitch Pine-Oak-Heath Woodland as described by Edinger et al. (2002). Unlike the 1.46 acre scrub oak community, the understory within this area appeared to be more consistent with the characteristics for the Pitch Pine-Oak-Heath Woodland. While the site visit was conducted early in the growing season, this area appeared to possess a variety of grass species and generally appeared to have a more diverse herbaceous cover. However, based on the observations of my May 2, 2006 site visit, the canopy coverage appears to be inconsistent with the 30% to 60% white oak and pitch pine characteristic described by Edinger et al. (2002) for this vegetation community. The canopy coverage of white oak and pitch pine appeared to be 10% to 20% at

the time of this site visit. Accordingly, this portion of the site does not appear to possess all of the characteristics of the Pitch Pine-Oak-Heath Woodland described by Edinger et al. (2002).

Summary and Recommendations

Attempting to categorize vegetation communities, particularly those in the midst of successional change, can be difficult. Experts can disagree as to plant community characterizations, and conditions at this site clearly may be subject to different interpretations. However, on the basis of the characteristics for the Pitch Pine-Oak-Heath Woodland community described by the New York Natural Heritage Program, while possessing some of the characteristics of the community, neither of the two plant communities described above possess all of the characteristics for this community. The findings on pages 14-8 to 14-9 of the CLIEC FEIS regarding the Scrub Oak stand are accurate and fairly represent the community that is present on the southern portion of the project site.

Should further clarification be required, it may be helpful to review historical aerial photographs of the area to determine whether these types of scrub oak communities have a history in and around the project site and project parcel. A repeated history of their presence may provide evidence of a dynamic environment that supports a Pitch Pine-Oak-Heath Woodland. In the absence of periodic disturbance by fire, the plant communities observed during my May 2nd site visit and described herein would likely continue on a successional pathway to a Pitch Pine-Oak Forest community. Given the presence of development adjacent to the project site and project parcel, the designation of this area as part of the Brookhaven Empire Zone and the nearby presence of major roadway arteries, it is unlikely that fires of the magnitude necessary to support the continuation of scrub oak dominated communities will be permitted to occur. Therefore, it is likely that any Pitch Pine-Oak-Heath Woodland in the area would cease to exist in the future as the community progresses into a Pitch Pine-Oak forest, which currently exists on the CLIEC project site.

References

- Edinger, G.J., D.J. Evans, S. Gebauer, T.G. Howard, D.M. Hunt, and A.M. Olivero, editors. 2002. *Ecological Communities of New York State*, Second Edition: A revised and expanded edition of Carol Reschke's *Ecological Communities of New York State*. New York Natural Heritage Program, New York State Department of Environmental Conservation, 625 Broadway, 5th Floor, Albany, New York 12233-4757.



TRC MEMORANDUM

To: Stephen Rosen, AKRF

From: Kevin Maher, TRC Environmental
Scott Heim, TRC Environmental

Date: May 15, 2006

Subject: **Caithness Long Island Energy Center:
Summary of Site Visits on April 26 and May 2, 2006**

1.0 Introduction

Scott J. Heim (TRC Senior Ecologist) conducted a site visit at the proposed Caithness Long Island Energy Center project site located at the terminus of Zorn Boulevard in the Town of Brookhaven, New York on April 26, 2006. An additional site visit was subsequently conducted with Gary L. Bickle (AKRF, consultant for the Long Island Power Authority) on May 2, 2006. The purpose of the site visits was to inspect the proposed 15-acre project development site and adjacent areas within the project's 96-acre project parcel relative to the potential presence of a Pitch Pine-Oak-Heath Woodland plant community, as defined in the Ecological Communities of New York State (Reschke, 1990 and Edinger et al., 2002). According to a letter report provided to the Long Island Power Authority (LIPA) that was prepared by Eric Lamont for Michael E. White of Jaspan Schlesinger Hoffman, LLP, two stands of the Pitch Pine-Oak-Heath Woodland community have recently been reported to occur on the site (Lamont, 2006). One of these stands was reported to correspond approximately to the 1.5-acre scrub oak (*Quercus ilicifolia*) stand identified within the project's Draft and Final Environmental Impact Statements (EIS) while a second stand was reported to occur at the 96-acre project parcel (Lamont, 2006). During the site visits, the scrub oak stand and adjacent area was observed as well as other portions of the 96-acre project parcel for the potential presence of areas that may be representative of the Pitch Pine-Oak-Heath Woodland plant community.

It is important to note that no protected threatened, or endangered plant species have been identified on the 96-acre project parcel. It should also be noted that the Pitch Pine-Oak-Heath Woodland community as defined in the Ecological Communities of New York State is not a protected community under any New York State or Federal law or regulation. See NY Environmental Conservation Law § 9-1503; 6 NYCRR 193.3 and Title 50 Code of Federal Regulations §17.12 (50 CFR 17.12). Rather, it is a descriptor of



a terrestrial community found, among other places, in New York State. As noted in the Preamble to Appendix A to *Ecological Communities of New York State* (Edinger et al., 2002), the New York State Natural Heritage Program ranking carries no legal weight. Thus, the identification of a portion of a potential Pitch Pine-Oak-Heath Woodland community on the 96-acre parcel does not impact the overall conclusions in the EIS with respect to terrestrial ecology, as the potential disturbance of some of this community will not result in any significant adverse environmental impact.

2.0 Summary of Ecological Community Investigations Presented in EIS

The characteristics of the plant communities present on the entire 96-acre parcel and potential impacts to ecological resources resulting from the Caithness Long Island Energy Center were described in Section 14.0, Terrestrial Ecology, of the project's Environmental Impact Statement. The EIS was prepared in accordance with the review requirements of the New York State Environmental Quality Review Act (SEQRA), for which LIPA served as the Lead Agency. The assessment conducted for the EIS concluded that the assemblage of plant species on the 96-acre parcel comprises Pitch Pine-Oak Forest as defined in the *Ecological Communities of New York State*. The Pitch Pine-Oak Forest represents a G4-G5/S4 ranked community that is apparently or demonstrably secure globally and apparently secure in New York State. This conclusion is consistent with the Town of Brookhaven's SEQRA review of the Zorn Industrial Subdivision application, which included the Caithness project parcel. In 1997 the Town issued a SEQRA Negative Declaration finding that the subdivision proposal "will not have a significant impact on the environment and, therefore, an environmental impact statement is not required."

The ecological assessment provided in the EIS was based on a review of 2001 aerial photography and subsequent on-site field surveys by a TRC Biologist in Fall 2002 and late 2004. The field surveys consisted of identifying and characterizing ecological communities present on the site through both qualitative and quantitative components. A qualitative walkover survey was initially conducted on the entire property to identify the community types and their approximate distribution. No unique or rare ecological communities were identified during this initial survey. In order to further define the ecological communities present at the site in support of the EIS, a quantitative survey was subsequently conducted. A total of twelve 5-meter by 5-meter square sampling plots were randomly established throughout the site and vegetative structural features quantitatively characterized. The results of this quantitative sampling were presented in the EIS and are summarized below.

The ecological communities observed and sampled at the Caithness Long Island, LLC (Caithness) project site were classified based on the definitions provided in *Ecological Communities of New York State* (Reschke, 1990). The results of the surveys and sampling indicated that three rather distinct plant communities are present and, based on their characteristics, all three of the communities identified on the site were classified within the EIS as variations of the Pitch Pine-Oak Forest community, which, as indicated

previously, is apparently or demonstrably secure globally and apparently secure in New York State.

As defined by Reschke (1990) and Edinger et al. (2002), the Pitch Pine-Oak Forest represents "a mixed forest that typically occurs on well-drained, sandy soils of glacial outwash plains or moraines." The vegetation within this community is described in detail as:

"The dominant trees are pitch pine (*Pinus rigida*) mixed with one or more of the following oaks: scarlet oak (*Quercus coccinea*), white oak (*Q. alba*), red oak (*Q. rubra*), or black oak (*Q. velutina*). The relative proportions of pines and oaks are quite variable within this community type. At one extreme are stands in which the pines are widely spaced amidst the oaks, in which case the pines are often emergent above the canopy of oak trees. At the other extreme are stands in which the pines form a nearly pure stand with only a few widely spaced oak trees."

"The shrublayer is well-developed with scattered clumps of scrub oak (*Quercus ilicifolia*) and a nearly continuous cover of low health shrubs such as blueberries (*Vaccinium pallidum*, *V. angustifolium*) and black huckleberry (*Gaylussacia baccata*). The herbaceous layer is relatively sparse; characteristic species are bracken fern (*Pteridium aquilinum*), wintergreen (*Gaultheria procumbens*), and Pennsylvania sedge (*Carex pensylvanica*)."

The three variations of the Pitch Pine-Oak Forest community type identified on the site included: 1) pine dominated; 2) oak dominated; and 3) scrub oak dominated. The pitch pine dominated variant of this community generally consisted of an overstory comprised of pitch pine (77% canopy cover) and white/scarlet oaks (15% canopy cover) and a shrub understory comprised primarily of scrub oak and lowbush blueberry (each with approximately 65% cover).

The oak dominated variant of this community generally consisted of an overstory comprised of white oak (42% canopy cover), scarlet oak (10% canopy cover) and pitch pine (36% canopy cover) with a shrub understory comprised primarily of scrub oak (53% cover) and lowbush blueberry (36% cover).

The scrub oak variant of the Pitch Pine-Oak Forest community was found to contain an extremely dense scrub oak stand with huckleberry, blueberry and staggerbush (*Lyonia mariana*) seedlings/sprouts also present in the understory along with bracken fern and Pennsylvania sedge.

On March 24, 2005, LIPA released the Draft Environmental Impact Statement (DEIS), which included the assessment and conclusions summarized above, for public review after finding that the DEIS was adequate in its scope and content for purposes of commencing public review, as required under SEQRA. LIPA distributed the DEIS to all interested persons, including all involved agencies, various civic and environmental organizations, elected officials, and all persons who commented on the Draft Scope of

Work. A public hearing on the DEIS was held on Wednesday April 20, 2005. LIPA held the public comment period open through May 25, 2005 to receive written comments. Subsequent to the close of the DEIS public comment period, LIPA responded to the comments received on the DEIS in a Final Environmental Impact Statement (FEIS), which was issued in June 2005.

3.0 Recent Site Evaluation of Ecological Communities

As summarized above, the ecological site assessment conducted for the project's EIS identified the presence of three variations of the Pitch Pine-Oak Forest community type at the 96-acre project parcel. These Pitch Pine-Oak Forest community variations were characterized as: 1) pine dominated; 2) oak dominated; and 3) scrub oak dominated. Recently, correspondence has been received by LIPA alleging that two areas of the parcel including the scrub oak dominated stand (*Quercus ilicifolia* Stand) identified on Figure 14-1, Plant Community Map, of the EIS are more accurately characterized as "Pitch Pine-Oak-Heath Woodland" as defined in the Ecological Communities of New York State. The Pitch Pine-Oak-Heath Woodland community is ranked by Edinger G3/G4/S2/S3 indicating that it is: (1) apparently secure to vulnerable globally, and (2) rare to very vulnerable in New York State (Edinger et al., 2002).

The Pitch Pine-Oak-Heath Woodland community is described in the Ecological Communities of New York State as follows:

"a pine barrens community that occurs on well-drained, infertile, sandy soils in eastern Long Island...The structure of this community is intermediate between a shrub-savanna and a woodland. Pitch pine (*Pinus rigida*) and white oak (*Quercus alba*) are the most abundant trees, and these form an open canopy with 30 to 60% cover. Scarlet oak (*Quercus coccinea*) and black oak (*Q. velutina*) may also occur in the canopy."

"The shrublayer is dominated by scrub oaks (*Quercus ilicifolia*, *Q. prinoides*), and includes a few heath shrubs such as huckleberry (*Gaylussacia baccata*) and blueberry (*Vaccinium pallidum*). The density of the shrublayer is inversely related to the tree canopy cover; where the trees are sparse, the shrubs form a dense thicket, and where the trees form a more closed canopy, the shrublayer may be relatively sparse. Stunted, multiple-stemmed white oaks may be present in the shrublayer if the site has burned regularly."

"Characteristic species of the groundcover include bearberry (*Arctostaphylos uva-ursi*), Pennsylvania sedge (*Carex pensylvanica*), golden heather (*Hudsonia ericoides*), beach heather (*Hudsonia tomentosa*), and pinweed (*Lechea villosa*)."

Based on the observations noted during the April 26th site visit, TRC believes that a portion of a stand of the Pitch Pine-Oak-Heath Woodland plant community is present in one area of the 96-acre site but not the 15-acre development site. The scrub oak stand

within the 15-acre development site is not a Pitch Pine-Oak-Heath Woodland community as will be discussed in more detail below. The approximate location of this Pitch Pine-Oak-Heath Woodland plant community is depicted on the aerial included as Attachment A. This community is approximately 6.5 acres in size with the majority (approximately 80%) of this community situated outside the project's 96-acre parcel although within a 10-acre parcel known as the "Esposito parcel". The Esposito parcel is not part of the 96 acre parcel.

It is highly likely that the Pitch Pine-Oak-Heath Woodland plant community identified on the site was created as a result of a recent severe fire that apparently occurred in 2003 which resulted in removal of approximately 70% of the overstory tree canopy. This is evidenced by the presence of charred and dead pitch pine stems within the area encompassing the community. This community is currently comprised of sparse pitch pines in the tree overstory (approximately 30% cover) with a shrub understory comprised of scrub oak, various heath shrubs (blueberry, huckleberry) and sweet fern. Patches of herbaceous ground cover are also present in this community and consists of primarily of Pennsylvanian sedge, pinweed and several grasses. Given that the community's origin is evidently associated with a fire event, the community can be viewed as transitional as succession occurs. Indeed, the community is completely surrounded by a mature Pitch-Pine-Oak Forest community (i.e., that apparently was not impacted by the 2003 fire event). Ultimately, in the absence of fire, this relatively small potential Pitch Pine-Oak-Heath Woodland plant community would be expected to mature into the surrounding Pitch-Pine-Oak Forest community. It also should be noted that no endangered or threatened plant species have been observed within this community during the inspections by TRC or others (Lamont, 2006). Photographs of this community are provided in Attachment B.

Both the tree canopy closure and shrub species composition generally conform to the description of the Pitch Pine-Oak-Heath Woodland plant community. In addition, pinweed (*Lechea villosa*) and Pennsylvania sedge were also present within this community, which are listed as characteristic species of the groundcover for the Pitch Pine-Oak-Heath Woodland plant community. Although Pennsylvania sedge is also a characteristic species of the Pitch Pine-Oak Forest community and is common within the 96-acre site, pinweed was not previously identified (nor is it a characteristic species) within the Pitch Pine-Oak Forest community.

It should also be noted that additional evaluation of the scrub oak stand and adjacent areas within the 15-acre project site did not identify similar conditions described above for the Pitch Pine-Oak-Heath Woodland plant community. It is the opinion of TRC that the characteristics of the scrub oak stand located within the 15-acre project site are most consistent with the Pitch Pine-Oak Forest community, even though the scrub oak cover type identified on the site does not specifically conform to either definition for the Pitch Pine-Oak Forest community or the Pitch Pine-Oak-Heath Woodland community provided by Reschke (1990) and/or Edinger et al. (2002). This conclusion is supported by the fact that the two species (bracken fern and Pennsylvania sedge) observed within the

herbaceous layer of the scrub oak stand at the project site are specifically noted as being indicator species for the Pitch Pine-Oak Forest.

4.0 Review of Aerial Photographs/Past Fire History

It is well known that periodic disturbances such as fire increase the diversity of ecological communities within the Pine Barrens. Wildfires can alter the structure and composition of pitch pine-oak forests resulting in a loss of forest canopy cover and subsequent conversion into more open ecological communities. This change is a result of the increased amounts of sunlight available to the lower vegetative strata which may allow colonization by shade intolerant plants as well as permitting an increase in germination for these plants on the exposed sandy soils.

A review of available aerial photography of the Caithness project site and surrounding area was undertaken to document past fire occurrence and changes to the ecological communities. Available photographs are presented in Attachment C and include aerial photographs from March 1957, March 1966, April 1976, September 1980, April 1994, 2001, and June 2004. The later three aerial photographs are in color while the earlier photographs are in black and white.

The 1957 and 1966 photographs show that the site and surrounding area are relatively undisturbed although the quality of these photographs do not allow an interpretation of the ecological communities present on the site. However, in the April 1976 photograph, a recent and severe burn appears to have occurred within the southern portion of the 96-acre parcel and areas south of the site as a fire break line is clearly present along the northern boundary of the burned area. In the September 1980 photograph the fire break line is still very evident while the burned area itself appears to have a mixture of plant communities present although these are somewhat difficult to distinguish due to the quality of the photograph. The April 1994 color photograph appears to depict another fire break line running east-west in the northern portion of the 96-acre parcel. The area below this fire break line corresponds fairly well to the pitch pine dominated stand of the Pitch Pine-Oak Forest community delineated during the EIS as depicted on the next aerial photograph (2001). A dense pitch pine stand is also depicted on the April 1994 photograph near the approximate location of the existing scrub oak stand present within the 15-acre development site. In 2001, the scrub oak stand is clearly visible within the development site and the dense pitch pine stand is no longer present. In the June 2004 color photograph, the scrub oak stand is still clearly visible while the newly created Pitch Pine-Oak-Heath Woodland community present primarily within the Esposito parcel is now visible. It is also interesting to note that this photograph also depicts another large area containing an open ecological plant community off-site (south and east of a motorcross facility) having similarities to the Pitch Pine-Oak-Heath Woodland community present within the Esposito parcel.

The historical aerial photographs indicate that the plant communities present on the 96-acre parcel have been created and undergone succession frequently in the past 30 years in response to wildfire disturbances. In fact, the Pitch Pine-Oak-Heath Woodland

community present within the Esposito parcel was created in the last significant wildfire that occurred at the site in 2003 while the scrub oak community present within the development site was apparently created by a fire occurring in the mid- to late-1990s.

5.0 Conclusions and Findings

It is TRC's opinion that the Pitch Pine-Oak-Heath Woodland community that is located primarily on the Esposito parcel and the scrub oak community (stand type of the Pitch Pine-Oak Forest) present on the 15-acre project site developed from fairly recent intense fires that occurred within the Pitch Pine-Oak Forest community and removed either a portion or all of the overstory tree canopy. The reduction in overstory tree canopy permitted increased sunlight to reach the scrub oak that re-sprouted after the fire. Charred and dead pitch pine stems were noted within these areas to support this conclusion in addition to the aerial photographs that document the occurrence of recent fires at the site.

It is reasonable to assume that the ranking of the Pitch Pine-Oak-Heath Woodland community (G3/G4/S2/S3 - apparently secure to vulnerable globally and rare to very vulnerable in New York State) is directly related to the community's dependency on disturbance such as wildfires to create and maintain conditions conducive to this plant community (Edinger et al, 2002). It is estimated that prior to Euro-American settlement, the more open ecological communities within the Pine Barrens of Central Suffolk County (including the Pitch Pine-Oak-Heath Woodland) were probably restricted to less than 17,300 acres confined primarily to nutrient-poor and fire prone sandy soils located north of Westhampton and Quogue (Kurczewski, 2000). This acreage increased to approximately 250,000 acres by the late 1800s due to disturbances associated with clearing and fires (Kurczewski, 2000). Following active fire suppression, most of these open communities have subsequently reverted to the pitch pine-oak forest community (Kurczewski, 2000).

The historical occurrence of fire at the site within the past 30 years as well as the recent 2003 fire that resulted in the establishment of the three- to four-acre Pitch Pine-Oak-Heath Woodland community substantiates the importance of fire within the Pine Barrens ecosystem in creating and maintaining community diversity. Conversely, active suppression of periodic disturbances such as wildfire is likely to perpetuate the continuance of climax pitch pine-oak forests. Therefore, as the project area continues to be developed for light industrial uses, as allowed by the zoning of the project area and recommended by the Town's comprehensive plan, fire suppression, with or without the project, is likely to be even more responsive thereby limiting the potential for and the impact of wildfires. Consequently, in the absence of future fires, this recently created Pitch Pine-Oak-Heath Woodland community is likely to revert to the climax Pitch Pine-Oak Forest community that is representative of the remainder of the 96-acre project parcel. In fact, the scrub oak stand present at the site may have formerly been representative of a more open ecological community but has since undergone succession since the intense fire that created these conditions occurred (between 1994 and 2000) so that it now contains greater similarities to the surrounding Pitch Pine-Oak Forest community.

Further, it is important to note that no protected threatened, or endangered plant species have been identified on the site. It should also be noted that the Pitch Pine-Oak-Heath Woodland community that may potentially be located within a portion of the 96-acre project parcel is not a protected community under any New York State or Federal law or regulation. See NY Environmental Conservation Law § 9-1503; 6 NYCRR 193.3 and Title 50 Code of Federal Regulations §17.12 (50 CFR 17.12). Rather, it is a descriptor of a terrestrial community found, among other places, in New York State. As noted in the Preamble to Appendix A to *Ecological Communities of New York State* (Edinger et al., 2002), the New York State Natural Heritage Program ranking carries no legal weight. Thus, the identification of a portion of a potential Pitch Pine-Oak-Heath Woodland community on the 96-acre parcel does not impact the overall conclusions in the EIS with respect to terrestrial ecology, as the potential disturbance of some of this community will not result in any significant adverse environmental impact.

Finally, due to significant concerns regarding the long-term viability of the Pine Barrens, New York State passed the Long Island Pine Barrens Protection Act in 1993, creating the 100,000-acre Central Pine Barrens zone which covers portions of the Towns of Brookhaven, Riverhead and Southampton, and small portions of the Villages of Quogue and Westhampton Beach, to protect, preserve and enhance the functional integrity of the Pine Barrens ecosystem and the significant natural resources, including plant and animal populations and communities. The Central Pine Barrens is divided into two zones: the 21,247-hectare (52,500-acre) Core Preservation Area in which development is strictly limited, and the 19,223-hectare (47,500-acre) Compatible Growth Area surrounding the core area in which careful planned development will continue. The Caithness project site is located outside both the Core Preservation Area and Compatible Growth Area of the Central Pine Barrens and has been specifically designated for industrial uses by the Town of Brookhaven. Attachment D presents the boundaries of the Central Pine Barrens Core Preservation and Compatible Growth Areas in relation to the site.

cc: R. Ain, Caithness Long Island
M. Garber, Caithness Long Island
S. Gordon, Beveridge and Diamond
H. Davitian, Entek Power
C. Fazio, Carter Ledyard

References Cited

Edinger, G.J., D.J. Evans, S. Gebauer, T.G. Howard, D.M. Hunt, and A.M. Olivero (editors). 2002. *Ecological Communities of New York State*. Second Edition. A revised and expanded edition of Carol Reschke's *Ecological Communities of New York State*. (Draft for Review). New York Natural Heritage Program, New York Department of Environmental Conservation, Albany, NY.

Kurczewski, F.E. 2000. Historical changes in the pine barrens of Central Suffolk County, New York. *Northeastern Naturalist*.

Lamont, E. 2006. The Status of the Rare Pitch Pine-Oak-Heath Woodland Ecological Community at the Caithness Long Island Site, Town of Brookhaven, Suffolk County, New York. April. 3pp.

Reschke, C. 1990. *Ecological Communities of New York State*. New York Natural Heritage Program, New York State Department of Environmental Conservation, Latham, NY.

ATTACHMENT A

2004 Site Aerial

ATTACHMENT C

HISTORIC SITE AERIAL PHOTOGRAPHS

ATTACHMENT D

CENTRAL PINE BARRENS AREA MAP

RESOLUTION SUBMISSION

WORK SESSION NO.:

TOWN BOARD MEETING NO. *8A*

MOVED BY COUNCILMEMBER:

Keper

REVISION:

MEETING OF: JULY 25, 2006

SHORT TITLE: ADOPTION OF FINDINGS, CONCLUSIONS AND DECISION – APPLICATION OF CAITHNESS LONG ISLAND, LLC FOR SPECIAL PERMIT AND RELATED VARIANCES/WAIVERS FOR A PROPOSED 350 MEGAWATT ELECTRIC GENERATING FACILITY

DEPARTMENT:

REASON: To adopt findings and conclusions

PUBLIC HEARING REQUIRED: Held March 9, 2005 and April 25, 2006

DEPARTMENT OF FINANCE APPROVED: YES NO

DOLLARS INVOLVED: \$

SEQRA REQUIRED: No

DETERMINATION MADE: POSITIVE NEGATIVE

FEIS/FINDINGS FILED:

EXECUTION OF DOCUMENTS REQUIRED: No

JMB:phd

Present/Absent

Motion/Aye/No/Not Voting

____/____

Councilmember Fiore-Rosenfeld

2 / *1* / *1* / *1*

____/____

Councilmember McCarrick

____/____/____/____

____/____

Councilmember Walsh

____/____/____/____

____/____

Councilmember Keper

1 / *1* / *1* / *1*

____/____

Councilmember Mazzei

____/____/____/____

____/____

Councilmember Bissonette

____/____/____/____

____/____

Supervisor Foley

____/____/____/____

RESOLUTION NO. 8A
MEETING: JULY 25, 2006

ADOPTION OF FINDINGS, CONCLUSIONS
AND DECISION – APPLICATION OF
CAITHNESS LONG ISLAND, LLC FOR
SPECIAL PERMIT AND RELATED
VARIANCES/WAIVERS FOR A PROPOSED
350 MEGAWATT ELECTRIC GENERATING
FACILITY

WHEREAS, two public hearings were advertised and held by the Town Board of the Town of Brookhaven on March 9, 2006, and April 25, 2006, with regard to an application for a special permit and related variances/waivers for a proposed 350 megawatt electric generating facility received from Caithness Long Island, LLC for property located in Yaphank, New York, at which meetings all interested parties were given an opportunity to be heard; and

WHEREAS, after due consideration and deliberation;

NOW, THEREFORE, BE IT RESOLVED by the Town Board of the Town of Brookhaven that the Town Board hereby formally adopts the attached Findings, Conclusions and Decision with respect to the application for a special permit and related variances/waivers for a proposed 350 megawatt electric generating facility by Caithness Long Island, LLC.

TOWN BOARD OF THE
TOWN OF BROOKHAVEN

-----X
In the Matter of the Petition of

CAITHNESS LONG ISLAND, LLC

FINDINGS, CONCLUSIONS,
AND DECISION

To the Brookhaven Town Board for a Special
Permit, Waivers, and Variances For the
Operation of an Electric Generating Facility
-----X

PRESENT:

Brian X. Foley, Supervisor
Steve Fiore-Rosenfeld, Councilman
Kevin McCarrick, Councilman
Kathleen Walsh, Councilwoman
Constance Kepert, Councilwoman
Timothy Mazzei, Councilman
Carol Bissonette, Councilwoman

APPLICANT:

Caithness Long Island, LLC

LOCATION:

East of Old Dock Road, north of Horseblock Road and
south of the main line of the Ronkonkoma branch of
the Long Island Railroad, Yaphank, Town of Brookhaven

ZONING DISTRICT:

L Industrial 1

RELIEF REQUESTED:

Special permit and related variances/waivers for a
proposed approximately 350 megawatt electric generating facility

DETERMINATION:

Approved

PROCEDURAL HISTORY:

A public hearing on this matter was held on March 9, 2006, to consider the application for a special permit. In addition, a second public hearing was held by the Town Board on April 25, 2006, for requested area variances/waivers. These formal Findings of Fact, Conclusions of Law, and Decision are adopted and furnished in this matter as follows:

FINDINGS OF FACT

Upon all the evidence submitted and testimony adduced at the public hearing conducted in connection with this application and upon the due deliberation thereon, this Board hereby finds as follows:

FIRST: The subject parcel is approximately 96 acres in size and is located within the Hamlet of Yaphank. The application involves a proposal to use the subject parcel for an approximately 350 megawatt electric generating facility. The proposed use requires issuance of a special permit and waivers/area variances from this Board.

SECOND: The parcel is in an L Industrial 1 District. Pursuant to Section 85-309, electric generating facilities are permitted by special permit within the L Industrial 1 District and shall be subject to the criteria set forth in Section 85-31.2 of the Code of the Town of Brookhaven (the "Code") as well as the dimensional criteria as stated in Sections 85-313 and 85-315 of the Code.

THIRD: The Long Island Power Authority, acting as lead agency under the State Environmental Quality Review Act, issued a Final Environmental Impact Statement (FEIS) in June 2005, which indicated that the proposed project would not result in any significant environmental impacts.

FOURTH: In addition to the specific requirements as outlined in Sections 85-313 and 85-315, the applicant must satisfy the conditions outlined in Section 85-31.2(B)(2) of the Code.

FIFTH: The application complies with the minimum lot area requirements of 20 acres. In addition, the application complies with the required lot width, front yard setback, side yard setback and rear yard setback requirements as well as maximum floor area ratio.

SIXTH: The applicant has applied to the Town Board for waivers of and area variances from the maximum permitted building and structure height restrictions as outlined in Section 85-313(G) of the Code, as well as the permitted stack height of the proposed facility as outlined in Section 85-315(B) of the Code.

SEVENTH: The applicant's proposal includes a request for a variance/ waiver for a portion of the generation building. The generation building contains the turbines. A portion of the generation building will contain a crane to enable components of the turbines to be removed and repaired. On that portion of the generation building the applicant is requesting to build to a height not to exceed 75' in the "High Bay" area. The remainder of the building will comply with the 50' restriction.

EIGHTH: A second variance/waiver from the height restrictions is for the proposed heat recovery steam generator (HRSG). The proposed height of the HRSG is 85' (excludes roof-top equipment to which the height restriction does not apply). The applicant contends that the 85' height for the HRSG is required for safety design purposes to accommodate the volume of steam that must be produced to power the steam turbine generator.

NINTH: A third variance/waiver from the height restrictions involves the proposed air-cooled condenser, which is also proposed to be 85' in height. The applicant stated that the air flow requirements for the air-cooled condenser requires that the structure height be 85'. The purpose of the proposed air-cooled condenser is to minimize water use and water vapor plumes, as compared to a water-cooled condenser.

TENTH: The final variance/waiver from the special permit criteria involves a stack which is proposed to reach a height of 170'. The maximum permitted stack height as contained in the dimension requirements pursuant to Section 85-315B(1) of the Code is 125'. The applicant testified that the stack height was necessary to fully comply with the very stringent requirements of the State and Federal government on air emissions. The applicant went on to state that any impact of the additional height of the stack would be more than offset by the additional buffer setback from the property line that the applicant would be supplying for the stack. The Code requires a buffer of 150% which would be at about 255' from the stack base to the property line. The applicant is providing a set back of 460' from the nearest property line.

ELEVENTH: In addition to the variance/waiver requests from the height restrictions contained in Sections 85-313 and 85-315 of the Code, the applicant has requested a special permit as required for the operation of the electric generating facility. In order to obtain a special permit, the applicant must satisfy the specific special permit criteria as contained in Section 85-315(B) of the Code, as well as the criteria provided for in Section 85-31.2 of the Code. While the applicant needed a waiver/variance for the height of the stack, the applicant fully complied and exceeded the additional specific special permit criteria for the electric generating facility.

TWELFTH: The applicant also addressed the general criteria for special permits as contained in Section 85-31.2(B). Section 85-31.2(B) states that no special permit shall be granted by the Town Board unless it shall determine (a) that the use will not prevent the orderly and reasonable use of adjacent properties or of properties in the surrounding area or impair the value thereof; (b) that the use will not prevent the orderly and reasonable use of permitted or legally established uses in a district wherein the proposed use is to be located or permitted or legally established uses in adjacent districts; (c) that the safety, health, welfare, comfort, convenience or order of the Town will not be adversely affected by the proposed use and its location; and (d) that the use will be in harmony with and promote the general purposes and intent of this chapter. In addressing these criteria, the applicant stated that the Caithness facility will be compatible with the surrounding proposed and permitted land uses and that it will provide appropriate buffers between the proposed facility and adjacent properties. The significant

setbacks which will exceed the requirements as stated in the Code will offset the stack height and will offset any negative impact of the stack height and will insure that there will be no significant adverse visual, noise or other impacts on the surrounding property.

THIRTEENTH: In addressing what impacts the project may have on health, safety, welfare, comfort and convenience, the applicant made reference to the specific chapters in the FEIS which provided that the project will comply with the noise ordinance limits as well as all local, state and federal air and water quality standards. The applicant further stated that the information detailed in the FEIS and addressed by the Board's findings statement in compliance with SEQRA demonstrates that the project will not have an additional impact on traffic conditions within the project area. The final criteria that the Board must consider as contained in Section 85-31.2(B) is whether the use will be in harmony with and promote the general purposes and intent of Chapter 85 of the Code. In addressing this criteria, the applicant noted that the project would be in the L Industrial 1 District and that the proposed use is expressly allowed by a special permit; that the stated purpose of the District is to provide for a wide range of light industrial and high quality uses; that the project is consistent with the overall purpose of the L-1 District and, that the project as a state of the art electric generating facility, will provide a much needed resource as well as an economic benefit to the surrounding communities.

FOURTEENTH: The Board held two public hearings on this application. Each hearing had a duration of approximately 5 hours in which the Board heard testimony from the applicant, representatives from LIPA and individuals from the surrounding community, as well as trade unions and other representatives from business, industry and environmental groups. Those in support of the application testified as to the need for the project to meet the continued demand for energy. That although there are ongoing efforts to conserve energy and promote alternative methods to meet Long Island's, and in particular Suffolk County's, growing electric energy demand, natural growth of electric energy is expected to be approximately 80-100 megawatts a year. The LIPA representative testified that approximately 30% of the new residential building permits on Long Island were issued in the Town of Brookhaven and that the average annual load growth in the Town of Brookhaven over the next 5 years is 3%, which is twice as much as the annual load growth for the entire LIPA service area. LIPA further stated that the Caithness project was selected over other power plant proposals because it minimizes environmental impacts, the project site was further away from residences than any other existing or proposed power plant on Long Island and, as demonstrated in the FEIS, the Caithness facility will have no negative impacts on the environment or on public health. Other testimony in support of the application, including those from leading environmental groups on Long Island, support the state of the art clean burning and resource conservation aspects of the proposed facility. The trade groups testified in support of the economic benefits the project will bring to the region. Those in attendance who testified against the application, including some residents in the nearby communities and representatives of the local civic organizations, expressed concerns about the environmental impact of the project, the need for the continuing development and reliance on these and other types of electric generating facilities instead of focusing on the development of alternative sources of energy and conservation, as well as traffic impact and health concerns for those residents who live near the proposed facility.

FIFTEENTH: The Town, LIPA and Caithness have reached agreement on a proposed Community Benefits Package. The proposed package, portions of which will be submitted by LIPA and/or Caithness to the Town of Brookhaven Industrial Development Agency, includes the following elements:

- \$139 million in payments-in-lieu-of-taxes (PILOTs) over a 20-year period to the local school district, Suffolk County, Town of Brookhaven and several special districts, subject to separate agreement with the Town of Brookhaven Industrial Development Agency and any other required approvals;
- Any reimbursement of PILOTs received by Caithness under the Empire Zone Program shall be returned to LIPA and benefit all LIPA customers;
- LIPA will contribute \$5 million to a community development fund managed by the Town of Brookhaven, of which \$1 million will be contributed after commencement of construction on the Caithness facility and \$4 million will be contributed after commencement of commercial operations of the Caithness facility;
- The community development fund will be used to support projects in the communities of Bellport, Brookhaven, East Patchogue, Gordon Heights, Medford, North Bellport and Yaphank;
- LIPA will contribute \$1 million towards the construction of a community center in North Bellport after the commencement of construction on the Caithness facility;
- LIPA will contribute \$1 million towards the construction of a community center in Medford after the commencement of construction on the Caithness facility;
- LIPA will contribute \$1 million to a special projects fund for the Longwood School District after the commencement of construction on the Caithness facility;
- LIPA will contribute \$1.5 million to a special projects fund for the Patchogue-Medford School District after the commencement of construction on the Caithness facility;
- Following commencement of construction on the Caithness Long Island Energy Center, Caithness will contribute \$25,000 per year to a scholarship program for students of the Longwood, Patchogue-Medford and South Country School Districts interested in pursuing careers in science, engineering or the environment;
- Caithness will work with the Nassau-Suffolk Building Trades Council to provide the opportunity for residents of the Longwood, Patchogue-Medford and South Country School Districts to enroll as apprentices in the building and construction trades;
- The goal of the apprenticeship program would be to enroll ten residents per year into this career training opportunity;

- Caithness will endeavor to employ qualified people from the local community on the permanent staff at the plant. To achieve this, Caithness will:
 - coordinate with community leaders as the facility approaches commercial operation to ensure that the community is aware of the job opportunities;
 - make a good faith effort at the initial facility staffing to hire at least two qualified people from the local community;
 - work with local community leaders to ensure that the community is aware of job openings after commercial operations begin;
 - as part of this effort, Caithness commits to provide general power plant industry training as well as job specific training to any individuals Caithness hires on to the facility staff.
- Caithness will offer to participate in the South Country School District's Junior Achievement program in 2006, and their Job Shadowing and Internship programs after completion of construction on the facility;
- Caithness will also participate in similar programs at the Longwood and Patchogue-Medford School Districts;
- After commencement of commercial operations of the Caithness Long Island Energy Center, Caithness will provide copies of emissions monitoring reports it submits to the New York State Department of Environmental Conservation pursuant to air facility permits from the USEPA and NYSDEC, to the Longwood Public, Patchogue-Medford and South Country Libraries;
- Following approval of the Caithness project, LIPA will work to implement the repowering of older generating facilities over the next few years, as stated in the Agreement with KeySpan;
- LIPA will work with the Town of Brookhaven to investigate the feasibility of siting additional alternative energy systems at Brookhaven Town Hall in Farmingville;
- LIPA will dedicate \$2 million from the Residential Energy Affordability Partnership (REAP) and Assisted Home Performance Program and work with the Town of Brookhaven to promote these programs to communities in the vicinity of the Caithness Long Island Energy Center;
- LIPA will offer to conduct energy audits and develop comprehensive energy plans for the Longwood, Patchogue-Medford and South Country School Districts, and develop an alternative energy program such as photovoltaics depending upon the results of each energy audit and the districts' desires;

- LIPA has offered to include the facilities managers of the Longwood, Patchogue-Medford and South Country School Districts in the Building Operator's Certification Program;
- LIPA and Caithness will meet with local elected officials and other community leaders periodically to assess progress in carrying out the programs and achieving the goals of this host community benefit initiative;
- LIPA will contribute \$500,000.00 to energy-related community development projects in the Village of Patchogue after commencement of construction on the Caithness facility;
- LIPA will professionally landscape and beautify the West Yaphank Substation after commencement of construction on the Caithness facility.

Prior to commencement of construction, the following agreements must be executed: (i) an agreement between LIPA and the Town of Brookhaven with respect to the contributions by LIPA listed above in this paragraph "FIFTEENTH" of at least the amounts stated therein being signed, and (ii) an agreement between Caithness Long Island, LLC, the Town of Brookhaven Industrial Development Agency, and any other required signatory thereto with regard to the payment of PILOTs in an amount no less than as set forth in this Paragraph "FIFTEENTH" being signed.

SIXTEENTH: In addition to the benefits described in paragraph Fifteenth above, in order to enhance the protection of open space, wildlife, habitat and natural resources in the Town of Brookhaven, fifteen percent of the Town of Brookhaven's portion of the PILOT payments from the Caithness Project will be dedicated to the purchase of environmentally sensitive and significant properties.

CONCLUSIONS

In reviewing all of the information presented to it, including the FEIS prepared for the project, the ten hours of testimony and documentation submitted at the two public hearings, Planning Division's review and findings contained in the findings statement prepared in accordance with SEQRA and after a careful consideration of the special permit criteria as provided in Sections 85-31.2(B) and 85-315 of the Code, provisions of the Code relating to the issuance of the requested variances and waivers, and other relevant information, the Town Board concludes as follows:

A. The applicant has satisfied the criteria for the issuance of a special permit for the proposed electric generating facility use. The Board in making this determination has reviewed all the information the applicant has submitted in support of its proposal as well as all the documentation and testimony of those who raised concerns about the project and those who testified in support of it. The applicant has provided more than sufficient information to satisfy the criteria and considerations as outlined in Section 85-31.2(B)(2), (3) of the Code. The proposal is extremely well suited for the L Industrial 1 District and its location and proximity to necessary infrastructure, distances from residences, consistency with the Town's

comprehensive plan and ability to provide setbacks from adjacent properties exceeding the Code requirements makes it an ideal project for the area.

B. The Board further considered the applicant's request for a waiver of the specific height criteria set forth in Sections 85-313 and 85-315 of the Code. Section 85-31.2(B)(4) requires that the applicant must comply with the specific dimension requirements contained in the Code regarding the operation of an electric generating facility, except where hardship is shown, the request for relief is reasonable and the requested relief will not compromise the public health, safety and general welfare, the Board may waive or modify such requirements. As outlined by the applicant, the project meets or exceeds all the dimension requirements except for the height restrictions for (1) the proposed High Bay of the generation building due to the necessity for a portion of the building to house a crane to enable components of the turbines to be removed and repaired, necessitating a height not to exceed 75' for a portion of the building, (2) the air-cooled condenser (85'), (3) the HRSG (85' to roofline), and (4) the stack (170'). In the absence of the requested waivers, the applicant will suffer hardship because the applicant will not be able to proceed with the proposed project, and therefore not be able to supply cost effective, reliable electricity to the Long Island ratepayers. Further, the applicant's request is reasonable based on the circumstances and information presented, and will not compromise the public health, safety and general welfare.

C. The applicant's requested relief from the height restrictions also may be considered as an area variance application. The law is settled in New York on what a Board must consider in determining whether to grant an area variance. The Board must consider (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue other than an area variance; (3) whether the requested variances are substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical and environmental conditions in the neighborhood or district and (5) whether the alleged difficulty was self created which consideration shall be relevant to the decision of the board, but which shall not necessarily preclude the granting of the area variance. The applicant has provided information establishing that the proposed heights of the stack, the generation building, the HRSG and the air-cooled condenser will be built to the minimum height necessary for this type of facility and in order to comply with local, state and federal environmental regulatory standards. As previously noted, the air-cooled condenser would exceed the 50' height limit so as to minimize water use and water vapor plumes. In order to insure optimal operating conditions, the air-cooled condenser must have sufficient clearance from the ground to generate the required air flow to cool water and maintain facility operations. As previously noted, the applicant further showed that the HRSG must exceed the 50' height limit in order to accommodate the volume of steam that must be produced to power the steam turbine generator. As previously noted, the generation building contains the turbines and the portion of the generation building requiring a variance/waiver (i.e., the High Bay) will contain a crane to enable components of the turbines to be removed and repaired. In regards to the stack, the applicant has stated that the initial modeling of the stack height was approximately 215' in

height. The applicant was able to redesign the stack reducing the height to the proposed 170'. The applicant contends that a further reduction in the stack height will result in unacceptable localized air quality impacts and that the setbacks provided exceeded the Code requirements and addressed any impacts of the project exceeding the height restrictions.

D. That in the review of the applicant's testimony and documentation, including the FEIS, the facility will not result in any significant adverse impacts in the area, including air quality, water quality, noise, traffic or visual impacts, the public interest will be served by providing for a state of the art facility which will meet or exceed the current local, state and federal regulations and will be a significant improvement in reliability of existing power plants on Long Island and accordingly this Board finds that the applicant has met the criteria for the granting of waivers and area variances from the specific height restrictions as contained in the Town of Brookhaven Code.

Therefore, upon motion duly made and seconded, the members of the Town Board present having voted in favor of issuance of a special permit for the operation of an approximately 350 megawatt electric generating facility requiring waivers and variances, the applications (1) for a special permit, (2) for a waiver of the height requirements for the stack, air-cooled condenser, heat recovery steam generator and the High Bay of the generation building, and (3) for a variance from the height requirements for the stack, air-cooled condenser, heat recovery steam generator and the High Bay of the generation building, are all accordingly granted subject to the following conditions:

1. This special permit shall allow for the operation of an electric generating facility with an output of approximately 350 megawatts and associated equipment, structures and appurtenances, and a 138 kV switchyard and associated equipment, structures and appurtenances, both to be located on the 96.37 acre site.
2. Development of the site shall be in substantial conformance with the map entitled "Overall Alignment Plan" prepared by Nelson & Pope for Caithness Long Island, LLC, showing a last revision date of March 23, 2006, and may only be modified upon review and approval of the Planning Board.
3. Applicant/Owner shall provide and maintain a minimum of 100' of landscaping or natural area along the western property line with the exception of possible future access to out parcels, or other developable property, and such requirement may only be modified upon review and approval of the Planning Board.
4. This special permit shall expire two years after the date of the Town Board's grant of approval hereof, unless a building permit has been issued and substantial construction has commenced in reliance thereon, or unless extended in accordance with the Town Code.

5. Prior to commencement of construction, the following agreements must be signed: (i) an agreement between LIPA and the Town of Brookhaven with respect to the contributions by LIPA listed above in paragraph "FIFTEENTH" of at least the amounts stated therein being signed, and (ii) an agreement between Caithness Long Island, LLC, the Town of Brookhaven Industrial Development Agency and any other required signatory thereto with respect to the payment of PILOTs in an amount no less than as set forth in paragraph "FIFTEENTH" being signed.

Adopted:

TOWN BOARD OF THE
TOWN OF BROOKHAVEN

Brian X. Foley, Supervisor

Attest:

Pamela J. Bethell, Town Clerk

RESOLUTION SUBMISSION

WORK SESSION NO.:

TOWN BOARD MEETING NO. 8

MOVED BY COUNCILMEMBER:

REVISION:

Walsh

MEETING OF JULY 25, 2006

SHORT TITLE: SEQRA – ACCEPTANCE AND ADOPTION OF FINDINGS STATEMENT
FOR CAITHNESS LONG ISLAND, LLC PROJECT (CAITHNESS
LONG ISLAND ENERGY CENTER

DEPARTMENT: Town Board

REASON: Compliance with SEQRA (Town Board as an involved agency)

PUBLIC HEARING REQUIRED: No

DEPARTMENT OF FINANCE APPROVAL: YES NO

DOLLARS INVOLVED: None

EXECUTION OF DOCUMENT REQUIRED: YES - SEQRA – Findings Statement
(attached hereto)

BMW:mr

Present Absent

Motion /Aye/ No/ Not Voting

_____/____

Councilmember Fiore-Rosenfeld

_____/____/____/____

_____/____

Councilmember McCarrick

_____/____/____/____

_____/____

Councilmember Walsh

_____/____/____/____

_____/____

Councilmember Kepert

_____/____/____/____

_____/____

Councilmember Mazzei

_____/____/____/____

_____/____

Councilmember Bissonette

_____/____/____/____

_____/____

Supervisor Foley

_____/____/____/____

SEQRA – ACCEPTANCE AND
ADOPTION OF FINDINGS
STATEMENT FOR CAITHNESS
LONG ISLAND, LLC PROJECT
(CAITHNESS LONG ISLAND
ENERGY CENTER)

WHEREAS, CAITHNESS LONG ISLAND, LLC, submitted an application to the Town Board seeking a special permit and related variances/waivers in connection with a proposed Caithness Long Island Energy Center, 350 Megawatt Electric Generating Facility, for property located East of Old Dock Road, North of Horseblock Road in Yaphank, New York; and

WHEREAS, pursuant to SEQRA, the lead agency, Long Island Power Authority (LIPA), issued a Positive Declaration regarding the Caithness Long Island Energy Center project; and

WHEREAS, a Final Environmental Impact Statement (FEIS) was accepted by the lead agency, LIPA, on June 23, 2005 and the lead agency, LIPA, issued its Findings Statement pursuant to SEQRA 6 NYCRR 617.11 on December 15, 2005; and

WHEREAS, the Town Board, as an involved agency, pursuant to 6 NYCRR 617.11, is required to adopt a Findings Statement for the special permit and related variances/waivers in connection with the Caithness Long Island Energy Center project submitted before the Town Board; and

WHEREAS, this Town Board finds that the Findings Statement attached hereto accurately and adequately examines environmental issues presented by the proposed action, the Caithness Long Island Energy Center project,

NOW, THEREFORE, BE IT RESOLVED, by the Town Board of the Town of Brookhaven that the Findings Statement pursuant to SEQRA 6 NYCRR 617.11 for the proposed action, the Caithness Long Island Energy Center project, is hereby accepted and adopted by the Town Board of the Town of Brookhaven and be it further

RESOLVED, that the SEQRA Finding Statement shall be filed as required by the State Environmental Quality Review Act.

**Town Of Brookhaven
State Environmental Quality Review
Findings Statement:**

This Findings Statement is based on information contained in the Draft Environmental Impact Statement (DEIS) and the Final Environmental Impact Statement (FEIS) prepared for the Caithness Long Island Energy Center (Caithness Project or Caithness facility), and site inspections.

These Findings are made by the Town Board of the Town of Brookhaven pursuant to Article 8, the State Environmental Quality Review Act and 6 New York Code of Rules and Regulations Part 617.

Name of Action: ~~Caithness Long Island Energy Center~~

Applicant: Caithness Long Island, LLC (Caithness)

Description of Action: Special Permit and Variances/Waivers for the operation of an approximately 350 megawatt power generation facility.

Location: The proposed facility is on an approximately 96-acre parcel located south of the Sills Road interchange (Exit 66) of the Long Island Expressway within the Town of Brookhaven, Suffolk County, Long Island. The property is east of Old Dock Road and north of Horseblock Road and bounded on the north by the Long Island Railroad.

Agency Jurisdiction: Zoning powers, special permit, variance/waiver review.

Date FEIS Filed: June , 2005.

The Town Board of the Town Of Brookhaven finds that:

The FEIS, which was issued in June 2005 by the Long Island Power Authority (LIPA), as lead agency, demonstrates that the Caithness Project will not result in any significant adverse environmental impacts. Moreover, there is a demonstrated need for the project and the social and economic benefits of the proposed project outweigh any environmental impacts associated with the proposed project. The FEIS contains details concerning the employment opportunities that will be provided through the construction and the operation of the plant.

The FEIS did not identify any significant adverse environmental impacts resulting from the Caithness Project. The Town has identified measures that ensure environmental impacts of the project are minimized. The measures are detailed in this Findings Statement, consistent with the requirements of Part 617.11 (this Findings Statement).

1. Terrestrial Ecology: The proposed power plant will result in the permanent alteration of approximately 17.2 acres of natural vegetation; and an additional temporary loss of 28 acres as a construction laydown area and drainage area.

The loss of this amount of acreage in an area dedicated to industrial use under the Code of the Town of Brookhaven (the "Code") and Town Comprehensive Plan is not considered significant. Additionally, the construction plan will include a revegetation plan using native species to revegetate temporarily cleared areas used in construction laydown.

2. Petroleum Storage Facility: The proposed power plant will require the storage of in excess of 750,000 gallons of petroleum product.

Impacts associated with the large petroleum storage facility will be avoided by the applicant's compliance with the requirements of the New York State Department of Environmental Conservation's (NYSDEC) Major Oil Storage Facilities permit and the requirements of Article XII of the Suffolk County Sanitary Code.

3. Air Quality: Incremental impacts to air quality will occur as a result of the construction and operation of the proposed power plant. As shown in Section 9.5.3 of the FEIS, emissions of criteria pollutants will result in concentrations that are below significant impact levels. Further, non-criteria pollutant emissions will also be below NYSDEC's relevant guideline concentrations. The estimated annual emissions of greenhouse gases is equivalent to approximately 0.7% of the total carbon emissions for New York State. The FEIS therefore demonstrates that the Caithness facility will not result in any significant adverse air quality impacts, as further evidenced by the fact that the Caithness project has already received a final prevention of significant deterioration permit from the United States Environmental Protection Agency and a draft air permit from the NYSDEC.

4. Aesthetic Impacts: The stack, two structures, and a building will require height variances and/or waivers; these structures will be visible in surrounding areas.

Stack, structure and building heights have been reduced to the maximum extent possible through the use of engineering principles. Heights have been reduced to a degree that eliminates the need for aeronautical lighting; this measure will preserve night sky views. In addition the facility has been sited on a lot large enough to allow setbacks and vegetated visual buffers to further minimize visual and aesthetic impacts.

5. Archeological Resources: Archeological investigations were completed. These investigations did not find evidence of cultural artifacts on the site; therefore impacts to archeological and cultural resources are expected to be non-existent.

6. Traffic Impacts: The construction phase will result in temporary traffic impacts. Traffic studies indicate that the Level of Service at most area intersections remain acceptable for the construction phase. The exception is the South Service Road of the LIE at Horseblock Road, which is projected to have an unacceptable level of service; however the projected unacceptable Level of Service exists both with and without power plant construction.

County Roads are involved and it is expected that the Suffolk County Department of Public Works will identify measures to be implemented during the construction period (the only period impacts are anticipated) in the Findings Statement adopted by the County.

7. Noise Impacts: The power plant is expected to produce a maximum of a 3 decibels (A-weighted) noise increase above existing levels at studied receptor locations, which is considered to be a barely perceptible increase in noise.

The facility design, the separation distance of the facility from area residents, and the site size and vegetated buffer areas will ensure that noise impacts are not significant.

8. Water Resources: Water will be required for several functions associated with the operation of the Project. Water is used for steam cycle boiler water makeup, plant maintenance, air inlet cooling, compressor cleaning, and potable water needs. The Project's water demand will average 50,400 gpd. Raw water will be stored on-site in a 750,000-gallon tank. Water will be supplied by the Suffolk County Water Authority (SCWA). SCWA issued a Letter of Availability for the Project with the condition that the Project not

withdraw water at a rate greater than 150 gpm between 12 Midnight and 9AM. Caithness will comply with this restriction. Overall, the Project's average annual withdrawal will constitute less than a 0.05 percent increase over the present demand on the SCWA system.

Wastewater

The Project will generate a minimum volume of wastewater. The majority of the process water will evaporate and not become wastewater. The off-line wash water will be about 1,000 gallons per month. Because it would contain cleaning agents, it will be held and hauled to Suffolk County Sanitary Sewage District No. 3-Southwest. In addition, after being processed through an oil water separator, the floor drain water will be sent to the same sewage treatment plant. The oily materials from the oil water separator will be sent to a licensed disposal facility separately. Overall, these small volumes of process wastewater will not have a significant adverse impact on the existing disposal systems.

Sanitary sewage from workers and visitors is expected to be about 1,500 gpd. This volume of sanitary sewage will be disposed of in its own on-site subsurface disposal system. The new, on-site disposal systems will be designed and built according to Suffolk County Department of Health Services and NYSDEC regulations and standards, and therefore are not expected to have a significant adverse impact.

Surface Water

The Project will not have any surface water discharges, nor will it use any surface water. No surface waters exist on the Project site or on the 96-acre parcel. The nearest surface water body is the Carmans River, located about 1 mile northeast of the Project site. Therefore, the Project will not have a significant adverse impact on surface water quality.

Stormwater

The Project will place impervious surfaces in areas where currently stormwater can infiltrate into the ground, changing the runoff characteristics of the site. Both structural and non-structural methods will be used to prevent significant adverse stormwater and sedimentation impacts.

The site will be designed so that all stormwater is kept on site and sent to a recharge basin. All stormwater will infiltrate into the groundwater. Areas where chemicals and fuel are stored will have containment of 110 percent. These areas include the fuel tank, truck loading area, ammonia storage and transformers. Stormwater from these areas will be conveyed to oil water separators. The water will be visually inspected to ensure that it is clean and does not contain oil or petroleum products. After inspection, the stormwater will be released to the recharge basins. The oily residue will be collected separately and sent to a licensed disposal facility.

Non-structural measures will include the preparation and implementation by Caithness of stormwater pollution prevention and spill prevention control and countermeasure plans. The plans will detail measures to be taken during operation to prevent spillage and loss of chemicals. In addition, cleanup measures will be specified. Specific contacts for environmental response companies will be maintained in the event of a spill. The stormwater pollution prevention plans will be updated periodically as needed. Procedures for truck loading and unloading will be detailed, and a plant employee will be required to be present at the loading and unloading spot. A regular system of daily, weekly, monthly, and annual inspections will be established to ensure that all equipment is in good operating condition. Regular employee training sessions will be held along with drills to ensure that all employees know the proper response to any spills or other emergencies.

These structural and non-structural measures will ensure that the Project does not have a significant impact on stormwater.

CERTIFICATION OF FINDINGS TO APPROVE

The Town Board of the Town of Brookhaven has considered the relevant environmental impacts, facts and conclusions disclosed in the DEIS, FEIS, and other pertinent information and has weighed and balanced relevant environmental impacts with social, economic and other considerations.

Having considered the information and the facts and conclusions relied upon to meet the requirements of 6 NYCRR 617.11, the Town Board certifies that the requirements of 6 NYCRR Part 617 have been met; and consistent with social, economic, and other essential considerations from among the reasonable alternatives available, the action is one that avoids 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 above Findings Statement was approved and adopted by the Town Board on