COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition and Application of IDC Bellingham LLC for a Certificate of Environmental Impact and Public Interest	)	EFSB 01-1

FINAL DECISION

Selma Urman
Hearing Officer
October 12, 2001

On the Decision:
Diedre Matthews
William Febiger
Jolette Westbrook
John Young

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FOR: Maurice Durand; Debra Ferullo; Kenneth Hamwey; Donald Keller; Robert W. Loftus, Jr.; Jerry Novicky; and Lorraine Spencer
Intervenors

-and-

Box Pond Association, Inc.; Concerned Citizens of Bellingham, Inc.; and Joan Eckert, c/o Francis Cresti
Interested Persons

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The Energy Facilities Siting Board ("Siting Board") hereby grants the Petition and grants the Application of IDC Bellingham LLC for a Certificate of Environmental Impact and Public Interest, with respect to Five Special Permits granted by the Town of Bellingham Zoning Board of Appeals.

I. INTRODUCTION

Pursuant to G.L. c. 164, §§ 69K½ - 69O½, IDC Bellingham LLC ("IDC" or "Company") has petitioned the Siting Board for a Certificate of Environmental Impact and Public Interest ("Certificate") with respect to Five Special Permits issued by the Town of Bellingham Zoning Board of Appeals ("Zoning Board") in connection with IDC's proposed electric generating facility ("facility") in the Town of Bellingham ("Bellingham"). If issued as requested, the Certificate would have the effect of granting IDC the Five Special Permits with the conditions as modified by the May 25, 2001 agreement between the Town of Bellingham Board of Selectmen ("Town"), the Zoning Board, and IDC.[1] The Certificate also would render moot the first count of an appeal filed in the Norfolk Superior Court and the Land Court by opponents of the Special Permits pursuant to G.L. c. 40A, § 17, seeking to void the issuance of the Special Permits ("Opponents' Appeal").[2]

A. Procedural History

On December 21, 1999, the Siting Board conditionally approved the petition of IDC to construct a natural gas-fired combined-cycle electric generating facility with a net nominal electrical output of 700 MW. IDC Bellingham LLC, 9 DOMSB 225 (1999) ("Final Decision"). On March 3, 2000, IDC submitted a Compliance Filing indicating, inter alia, that it would change its turbine vendor

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[1] For a description of the May 25, 2001 agreement between the Town, the Zoning Board and the Company, see Section I. A, below.

[2] The Opponents' Appeal includes a second count seeking declaratory relief based on the plaintiffs' allegation that the May 1997 rezoning of the locus of the facility is invalid (Exh. IDC-2, App. F, Tab 70). This claim is not the subject of the instant proceeding. There is no record evidence that the pendency of this claim would preclude the construction of the facility should a Certificate issue.

from Siemens Westinghouse to General Electric, and that the facility's output would be reduced from 700 MW to 525 MW. On September 12, 2000, the Siting Board issued a Final Decision on Compliance approving the reconfigured facility. IDC Bellingham LLC-Compliance, 11 DOMSB 27 (2000) ("IDC Compliance Decision"). A consolidated appeal of the Final Decision and the IDC Compliance Decision is pending before the Supreme Judicial Court. See Box Pond Association, Inc. v. EFSB et al, No. SJC-08452. On September 24, 2001, the Siting Board approved with conditions a project change filed by the Company on June 6, 2001. IDC Bellingham LLC, EFSB 97-5B (2001) ("IDC Project Change Decision").[3]

On May 5, 2000, IDC filed with the Zoning Board five applications seeking Special Permits under the Town of Bellingham Zoning By-Laws ("Zoning By-Laws"). IDC's first Special Permit Application sought permission to construct certain structures in excess of the height restrictions set forth in §§ 1500 and 2610 of the Zoning By-Laws (Exh. IDC-2, App. A, Tab 1). The Company filed its second Special Permit Application in accordance with § 3240 of the Zoning By-Laws, which requires any major new stationary source of air pollution to obtain a Special Permit pursuant to Zoning By-Laws § 3290 (id., App. A, Tab 2). The Company filed its third Special Permit Application in accordance with the provisions of § 2400 of the Zoning By-Laws, which requires a Special Permit for any project that will use temporary structures and will provide parking for more than three light commercial vehicles or more than one heavy commercial vehicle (id., App. A, Tab 3). The Company filed its fourth Special Permit Application in accordance with §§ 3232 and 3234 of the Zoning By-Laws, which require a Special Permit for certain exterior lighting (id., App. A, Tab 4). The Company filed its fifth Special Permit Application in accordance with § 3250 of the Zoning By-Laws, which requires an applicant to obtain a Special Permit for the use of certain hazardous materials (id., App. A, Tab 5).

On January 3, 2001, the Zoning Board granted the Five Special Permits with a total of 23 conditions (hereinafter referred to individually as "Special Permit 1"; "Special Permit 2"; "Special Permit 3"; "Special Permit 4"; "Special Permit 5", and collectively, as "Special Permits"). On January 23,

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[3] The Final Decision, IDC Compliance Decision and the IDC Project Change Decision are collectively referred to as the "facility decisions" or "facility proceedings".

2001, the Opponents' Appeal was filed in Norfolk Superior Court and the Land Court pursuant to G.L. c. 40A, § 17 and G.L. c. 231 (Exh. IDC-1, App. E, Tabs 65-69).[4]

On February 9, 2001, pursuant to G.L. c. 164, §§ 69K½-69O½ and 980 CMR 6.02, IDC filed its Initial Petition for a Certificate of Environmental Impact and Public Interest based upon the Opponents' Appeal of the Special Permits, and upon three of the conditions incorporated in the Special Permits.

On February 15, 2001, the Chairman of the Siting Board issued a decision on IDC's Initial Petition holding that, in accordance with 980 CMR 6.02(4), the Siting Board would defer a decision on the merits of the Petition, and instead would adjudicate concurrently both the merits of the Petition and the merits of the Company's Application for a Certificate ("Application"). IDC Bellingham LLC, EFSB 01-1, Procedural Order Re Initial Petition for Certificate of Environmental Impact and Public Interest (February 15, 2001) ("February 15, 2001 Procedural Order") at 2. Pursuant to G.L. c. 164, § 69L½, IDC filed its Application on April 3, 2001.

Pursuant to G.L. c. 30A, § 10, the Town and the Zoning Board filed a joint petition for leave to intervene in the certificate proceeding. In addition, the following groups and individuals filed a petition for leave to intervene as individuals, pursuant to G.L. c. 30A, § 10, and filed collectively, pursuant to G. L.c. 164, § 10A: (1) Box Pond Association, Inc. ("BPA"); (2) Concerned Citizens of Bellingham, Inc. ("CCOB"); (3) Maurice Durand; (4) Joan Eckert; (5) Debra Ferullo; (6) Kenneth Hamwey; (7) Donald Keller; (8) Robert W. Loftus, Jr.; (9) Jerry Novicky; and (10) Lorraine Spencer.

The Hearing Officer granted the joint petition of the Town and the Zoning Board and the individual petitions of Maurice Durand, Debra Ferullo, Kenneth Hamwey, Donald Keller, Robert W. Loftus, Jr., Jerry Novicky, and Lorraine Spencer (collectively, "Intervenors"). The Hearing Officer denied the individual petitions to intervene of BPA, CCOB and Joan Eckert and the collective petition to intervene filed pursuant to G.L. c. 30A, § 10A. The Hearing Officer, however, granted BPA,

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[4] The following are the plaintiffs to the Opponents' Appeal: Maurice Durand; Jerry Novicky; Lorraine Spencer; Brian Sutherland; Donald Keller; Debra Ferullo; Robert Loftus, Jr.; and Kenneth Hamwey.

CCOB and Joan Eckert status as interested persons in the proceeding.

On June 5, 2001, the Town, the Zoning Board and the Company (collectively, the "Settling Parties") submitted an Amended Joint Motion to Revise the Proposed Certificate Conditions and for the Town and the Zoning Board to Withdraw as a Party to the Proceeding ("Amended Joint Motion"). The Settling Parties also requested that the Town and the Zoning Board be excused from responding to any information or discovery requests issued in the proceeding (Amended Joint Motion at 3). On June 7, 2001, the Hearing Officer granted the Amended Joint Motion, thereby allowing the Town and the Zoning Board to withdraw from the proceeding, and to be excused from responding to any information or discovery requests issued in the proceeding. IDC Bellingham LLC, EFSB 01-1 (Hearing Officer Ruling, June 7, 2001, at 2).

An adjudicatory hearing was held on June 27, 2001. IDC presented the testimony of two witnesses: Donald C. DiCristofaro, Vice President of Environmental Affairs for IDC; and Stephen R. Pritchard, Vice President for Project Development for IDC. The record includes approximately 82 exhibits, consisting primarily of the Company's responses to information requests issued by the Siting Board and the Intervenors. On July 2, 2001, the Hearing Officer issued two briefing questions for the parties to address. On July 16, 2001, the Company and the Intervenors filed briefs; on July 23, 2001, the Company and the Intervenors filed reply briefs.

B. Special Permits

The Company maintains that three conditions incorporated in the Special Permits, Conditions 20, 22(a), and 23, are burdensome, inconsistent with the Company's other resource permits, and/or constitute the raising and imposition of a non-regulatory condition (Exh. IDC-1, at 9).

Condition 20 of the Special Permits provides that the Company shall abide by an agreement with the Massachusetts Department of Environmental Protection ("MDEP") to evaluate zero ammonia technology ("ZAT") within the first five years of operation, except that the Company shall exclude acquisition costs of ZAT equipment in any such evaluation ("ZAT Condition") (id., App. E, Tab 65, at 23).

Condition 22(a) of the Special Permits provides that the facility be designed with at least four concrete walls around the transformers and CCW coolers, and that the walls be at least 10 feet higher than the transformers ("Transformer Condition") (id.).

Condition 23 of the Special Permits provides that the Company must enter into a Payment in Lieu of Taxes Agreement with the Town ("PILOT Agreement") on or before July 1, 2001, and that the obligations of the agreement must be at least equal to those in existing agreements between Bellingham and industries of a similar nature ("PILOT Condition") (id., App. E, Tab 65, at 25).

As stated in Section I.A, above, on May 25, 2001, the Settling Parties entered into a Settlement Agreement. Pursuant to this Settlement Agreement, the Settling Parties requested that the Siting Board grant the Company leave to amend its Application to reflect the jointly proposed modifications to the three conditions as follows:

The modified version of Condition 20 ("Modified Condition 20" or "Modified ZAT Condition") would provide that if MDEP requires the Company to re-evaluate ZAT, then the Company shall abide by MDEP's evaluation requirements. In addition, Modified Condition 20 would require IDC to actively oppose any installation of ZAT that would cause the Company to exceed the maximum limits on water use set forth in the Water Agreement, the Final Decision and the IDC Compliance Decision ("Modified ZAT Condition") (Exh. IDC-2-S).

The modified version of Condition 22(a) ("Modified Condition 22(a)" or "Modified Transformer Condition") would require the transformers and CCW coolers to have concrete walls on at least four sides that are 10 feet higher than the transformers or CCW coolers, or, in the alternative, equivalent noise mitigation that results in maximum noise levels generated from the facility which do not exceed: (1) the MDEP limit of an increase of 10 decibels, A-weighted ("dBA") from new noise sources; (2) the 65-dBA limit set forth in the Town of Bellingham noise ordinance; (3) a 45-dBA steady state noise limit for residential receptors; and (4) a 40-dBA limit at the closest residence during normal operation of the facility. Modified Condition 22(a) further would provide that, should IDC construct higher walls to satisfy the Modified Transformer Condition, any necessary and related facility layout changes would be deemed approved without requiring further action by the Siting Board or the

Zoning Board (id.).

The modified version of Condition 23 ("Modified Condition 23" or "Modified PILOT Condition") would require IDC to make a good faith effort to meet with the Town to negotiate a PILOT Agreement. Modified Condition 23 further would provide that if the parties do not reach an agreement by July 1, 2001, the failure to reach an agreement shall not constitute grounds for violation of the Certificate/ Special Permit (id.).

C. Jurisdiction

The Company's Initial Petition is reviewable pursuant to G.L. c. 164, § 69K½, which provides that any applicant proposing to construct or operate a generating facility may petition the Siting Board for a Certificate with respect to that facility. Likewise, the Company's Application is reviewable by the Siting Board pursuant to G.L. c. 164, § 69L½, which requires any applicant seeking a Certificate pursuant to § 69K½ to file with the Siting Board an Application containing the information specified in § 69L½.

IDC's Initial Petition for a Certificate and its Application for a Certificate each is reviewed by the Siting Board consistent with the Siting Board's mandate set forth in G.L. c, 164, § 69H, which requires the Siting Board to implement the energy policies in its statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

II. THE INITIAL PETITION

A. Standard of Review

Any person who proposes to construct or operate a generating facility in the Commonwealth may seek a Certificate from the Siting Board. G.L. c. 164, § 69K½. The applicant first must file an Initial Petition for a Certificate. Id. The Siting Board shall grant an Initial Petition if: (1) the applicant asserts one or more of the seven grounds for a Petition set forth in G.L. c. 164 § 69K½; and (2) the Siting Board determines that, on the merits, at least one of the grounds asserted constitutes a valid basis

for granting the Initial Petition. Id.[5]

B. The Company's Initial Petition

IDC asserted in its Initial Petition four of the seven statutory grounds upon which an Initial Petition may be based.

IDC asserted that under G.L. c. 164, § 69K½ (vi), the facility cannot be constructed due to delays caused by the Opponents' Appeal to the Land Court pursuant to G.L. c. 40A, § 17 of the Zoning Board's issuance of Five Special Permits. The Company also asserted, pursuant to G.L. c. 164, § 69K½, ¶ 2, that the ZAT, PILOT, and Transformer Conditions of the Special Permits are burdensome and have a substantial impact on the responsibilities of the Siting Board (Exh. IDC-1, at 1-2). In addition, the Company asserted pursuant to G.L. c. 164, § 69K½ (iii), that the ZAT and PILOT Conditions are inconsistent with IDC's other resource permits for the facility. Finally, IDC asserted, pursuant to G.L. c. 164, § 69K½ (iv), that the ZAT and PILOT Conditions are the result of the Zoning Board's improper consideration and imposition of non-regulatory conditions (id. at 10-16). The Siting Board addresses each of these grounds below. In addition, the Siting Board addresses the Intervenors' contention that the Siting Board should require an applicant for a Certificate to demonstrate that it has exhausted its administrative remedies prior to seeking relief from the Siting Board.

1. Delay Caused by Appeal

G.L. c. 164, § 69K½ (vi) provides that the Siting Board shall grant an Initial Petition if it finds that "the facility cannot be constructed because of delays caused by the appeal of any approval,

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[5] Within seven days of the filing of an Initial Petition for a Certificate, the Siting Board must decide whether to hold a hearing on the merits of the grounds asserted in the Petition, or to accept an Application for a Certificate and to defer a decision on the merits of the Petition until the hearing on the Application. 980 CMR 6.02 (4). In this case the Siting Board deferred its review of the merits of IDC's Initial Petition until the hearing on the Company's Application. February 15, 2001 Procedural Order at 2.

consent, permit, or certificate." Pursuant to G.L. c. 164, § 69H, the Siting Board's responsibility in this proceeding is to implement the provisions of G.L. c. 164, §§ 69H-69Q "so as to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost."

IDC stated that, pursuant to G.L. c, 40A, § 11, the Five Special Permits cannot take effect until the Opponents' Appeal regarding the Special Permits has been dismissed or denied (Exh. IDC-1, at 10). IDC further stated that until the resolution of the Opponents' Appeal, a building permit for construction of the facility cannot be issued, and that, accordingly, there will be a substantial delay in the project's schedule (id.).[6] IDC therefore requested the Siting Board to consider the Company's Petition for a Certificate pursuant to G.L.c. 164, § 69K½ (vi) (id.).

At the evidentiary hearing in this matter, counsel for the Intervenors argued that, to have its Initial Petition granted pursuant to G.L. c. 164, § 69K ½ (vi), IDC must demonstrate that it would never be able to construct the facility unless the Initial Petition were granted (Tr. at 36). Since the Siting Board has not previously had occasion to review an Initial Petition based on this provision of G.L. c. 164, § 69K½, the Hearing Officer asked the parties to address on brief the nature of the evidence that is required to demonstrate that an approved generating facility cannot be built due to delays caused by the appeal of any approval, consent, permit, or certificate.

The Intervenors argued that G.L. c. 164, § 69K½ (vi) may only be invoked if an Applicant can demonstrate that "appeal of a permit effectively *precludes* the construction of the facility; it does not apply when an appeal merely *delays* construction"(emphasis supplied) (Intervenors Brief at 2). The Intervenors stated that the Siting Board should exercise its authority to use this provision only under extraordinary circumstances, such as a delay that would result in loss of financing for the project (id.).

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6 The Company stated that other steps required for the project, including selection of and negotiation with an engineering, procurement and construction ("EPC") contractor and making a compliance filing with the Siting Board, would have been initiated to allow construction to begin soon after issuance of a building permit, but that these steps could not proceed given the uncertainty as to when a building permit can be issued (Exh. BP-2-6).

The Intervenors also stated that granting an Initial Petition pursuant to G.L. c. 164, § 69K½ (vi) "effectively repeals" G.L. c. 40A, § 17 by denying appellate rights for opponents of power plants (id. at 3-4).[7] The Intervenors asserted that this result would violate a fundamental rule of statutory interpretation: "We assume, as we must, that the Legislature was aware of existing statutes... and that if possible a statute is to be interpreted in harmony with prior enactments to give rise to a consistent body of law" (id. at 4, citing Jancey v. School Committee of Everett, 421 Mass. 482, 496 (1995)).

The Intervenors further argued that even if a delay were sufficient cause to invoke the provision, the Company has not shown that the pending Land Court action has caused a delay (Intervenors Brief at 2). As an example, the Intervenors claimed IDC cannot commence construction until it has received a final air plan approval from MDEP (id. at 6, citing 310 CMR 7.02(2)(a); 310 CMR 7.00).[8] The Intervenors concluded that since IDC has yet to obtain permits from several other state agencies, has not selected a contractor, and has not formulated its detailed design work, the Company cannot claim that the Land Court Appeal is the sole cause of any construction delays (id. at 6-7). The Intervenors suggested that, at most, the Land Court Appeal exposes the Company to risk, and that this risk is not sufficient to set in motion the Siting Board's authority to override other permit processes (id. at 7).

IDC asserted that it is permitted to invoke G.L. c .164, § 69K½ (vi) because it is legally prohibited from commencing construction of the facility due to the pendency of the Opponents' Appeal, and argued that the Siting Board must grant the Company's Initial Petition on this basis (Company Brief at 8-9).

IDC disputed the Intervenors' contention that, in order to invoke G.L. c. 164, § 69K½ (vi), the Siting Board must find that a facility could never be built because of delays associated with an appeal of a permit, stating that this interpretation is inconsistent with the clear language and intent of G.L. c. 164, § 69K½ (vi) (id. at 10). IDC maintained that if the Legislature had intended such a result, it would

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[7] G.L. c. 40A, § 17 provides for the judicial review of decisions of a zoning board of appeals.

[8] The Siting Board notes that on August 20, 2001, MDEP issued its conditional air plan approval for the facility. The conditional air plan approval is MDEP's pre-construction air quality approval. See 310 CMR 7.00; 310 CMR 7.02. Therefore, any argument raised by the Intervenors regarding an outstanding air plan approval is moot.

have drafted the statute differently (id.). IDC asserted that the clear language of the statute addresses a delay in the construction process (id. at 10, citing Stop & Shop Supermarket Co. v. Urstadt Biddle Properties, Inc., 433 Mass. 285, 289 (2001); Massachusetts Comm. College Council v. Labor Relations Comm'n., 402 Mass. 352, 354 (1988)).

The Company also disputed the Intervenors' alternative interpretation that the Siting Board may use this section as a basis for granting an Initial Petition only if it finds that an appeal is the sole reason that an applicant cannot begin construction (id. at 13). IDC maintained that if this were the Legislature's intent, it could have drafted the statute differently by wording it as, "construction is delayed solely because of an appeal" (emphasis supplied) (Company Brief at 12). The Company noted that under this interpretation, an opponent to a facility need only file multiple appeals to overcome any Certificate application (id.). The Company averred that the Legislature, in enacting the 1997 Siting Board statute to encourage the construction of new generation plants, did not intend such an outcome (id.). IDC asserted it would be contrary to prudent business practice for power plant developers to expend significant sums of money in an uncertain climate, and it would inhibit the development of needed generating facilities (id.). The Company maintained that the interpretation of the statute proffered by the Intervenors oversimplifies the generating facility development process by characterizing it as a linear process, rather than a process where there is coordination of multiple parallel and serial activities (id. at 14, citing Tr. at 20, 22,29, 30, 35).

The Company also disputed the Intervenors' argument that the Certificate statute effectively repeals G.L. c. 40A, § 17 (Company Reply Brief at 4). IDC submitted that, in authorizing a Certificate petition based on appeals, the Legislature knowingly carved out an exception to G.L. c. 40A, §17, as it had done earlier for G.L. c. 40A, § 3, which allows a public service corporation to petition the Department of Telecommunications and Energy for exemption from local zoning ordinances (id.). IDC concluded that allowing the Siting Board to grant an Initial Petition when construction of a generating facility is delayed by a zoning appeal is not only in harmony with G.L. c. 164, § 69H, but also in harmony with G.L. c. 40A, § 3 (id. at 4, citing Jancey v. School Committee of Everett, 421 Mass. 482, 496 (1995)).

The Company argued that G.L. c. 164, § 69K½ specifically limits the entities that can apply for a Certificate, and sets forth clear standards that an applicant must meet to obtain a Certificate (Company Reply Brief at 3). IDC maintained that it is consistent with this statutory mandate for the Siting Board to grant an Initial Petition when the construction of a project is delayed because of an appeal (id.).

The Siting Board recognizes that the duty of statutory interpretation lies with the courts. However, since this is an issue of first impression, the Siting Board must address the statutory question that is at issue in this proceeding. Three interpretations of the G.L. c. 164, § 69K½ (vi) have been presented by the parties: (1) that § 69K½ (vi) applies only when an applicant can demonstrate that a facility could never be constructed because of the delay caused by an appeal; (2) that § 69K½ (vi) applies when, but for the filing of an appeal, a generating facility could be constructed; and (3) that § 69K½ (vi) applies when a permit is required for a project, and full appellate review would result in delays in the project's construction.

Each of these interpretations sets forth a possible reading of the language of G.L. c. 164, § 69K½ (vi); however, only the final interpretation appears to be consistent both with the procedural requirements of G.L. c. 164, § 69O½, which contemplates adjudication of a Certificate request within a six month period, and with the Legislature's presumed intent in amending this section of the statute to address delays caused by an appeal of a permit.

Under the first interpretation, an applicant could not file an Initial Petition unless it could demonstrate that the delay caused by the appeal would be fatal to the project. The application then would be subject to the six month review process and potential delays resulting from an appeal of the Certificate, thereby jeopardizing the construction or completion of the project. The Siting Board finds that this interpretation would effectively preclude any applicant from seeking a Certificate pursuant to G.L. c. 164, § 69K½ (vi), a result which the Legislature could not have intended when it amended the statute in 1997, and which conflicts with the Siting Board's mandate to provide a reliable energy supply for the Commonwealth.

The second interpretation of § 69K½ would require an applicant to wait until it has received all

outstanding permits prior to filing an Initial Petition for a Certificate. This interpretation would also seal the fate of a project. Under this "but for" test, a Certificate petition would fail in the instance where more than one permit is appealed by a project opponent. Moreover, requiring an applicant to obtain all outstanding permits ignores the possibility that other permitting bodies may choose to defer action until the appeal is resolved. Adoption of this interpretation thus also would be in conflict with our understanding of the Legislature's purpose in enacting this statute, which is to address rather than to prolong delays caused by the appeal of a permit. In addition, it would conflict with the Siting Board's mandate to provide a reliable energy supply for the Commonwealth.

The third interpretation of § 69K½ allows the adjudication of an Application for a Certificate to proceed in parallel with an applicant's pursuit of other permits. Given the length of the Certificate process at the Siting Board, and the possibility of appellate review, this interpretation of G.L. c. 164, § 69K½ (vi) is consistent with the Legislature's clear intent to address delays caused by the appeal of a permit and with the Siting Board's mandate.[9]

Accordingly, the Siting Board finds that in order to satisfy the requirements of G.L. c. 164, § 69K½ (vi), an applicant must demonstrate that it is prevented from commencing or continuing construction of a generating facility due to delays caused by the pendency of an appeal of an approval, consent, permit, or certificate. However, not every appeal that results in a delay of facility construction will satisfy the requirements of this section. The Siting Board will, at a minimum, look to the nature and timing of the appeal, and the length of delay in construction that would result from the pendency of an appeal.

IDC has shown that pending the resolution of the Opponents' Appeal of the Special Permits in the Company's favor, it is precluded from obtaining a building permit to commence construction of the approved facility and is not able to effectively complete other steps required for construction, including

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[9] The Siting Board does not agree with the Intervenors' contention that granting a petition pursuant to G.L. c. 164, § 69k½ (vi) effectively repeals G.L. c. 40A § 17. Instead we conclude that this statute can be interpreted in harmony with prior enactments of the Legislature by assuming that the Legislature intentionally carved out a limited exception to G.L. c. 40A, § 17 in order to address delays in the construction of critical energy infrastructure.

completion of an EPC contract and a compliance filing with the Siting Board. Although the precise timing of the issuance of a decision from the Land Court on the Opponents' Appeal cannot be ascertained, we note that the Opponents' Appeal was filed on January 23, 2001, and there is no evidence in this proceeding that the Land Court has issued a decision. Moreover, parties to the Land Court proceeding would have the opportunity to appeal the decision. The Siting Board finds that this showing is sufficient to demonstrate that the facility cannot be built due to the delay caused by the appeal, and is sufficient to carry out our interpretation of the Legislature's purpose in enacting this provision. Based on the above, the Siting Board finds that the Company has stated a valid ground for granting an Initial Petition in accordance with G.L. c. 164, § 69K½ (vi).

2. A Burdensome Condition

General Law c. 164, § 69K½, ¶ 2, provides that the Siting Board must grant an Initial Petition if it finds "that any state or local agency has imposed a burdensome condition or limitation on any license or permit which has a substantial impact on the responsibilities of the board as set forth pursuant to section 69H." The Company has asserted that the ZAT, Transformer, and PILOT Conditions of the Special Permits are burdensome. The Siting Board considers each of the conditions below.

a. The ZAT Condition

Condition 20 of the Special Permits implicitly assumes that MDEP, in issuing its Conditional Air Quality Permit for the facility, would follow its recent practice of requiring new generators, after five years of operation, to evaluate the costs and benefits of replacing their existing NO_X control equipment with ZAT. On August 20, 2001, subsequent to the evidentiary hearing in this matter, MDEP issued its Conditional Air Quality Permit. The Conditional Air Quality Permit contains no requirement that IDC evaluate ZAT for the facility within the first five years of operation (see Exh. EFSB-38, at 7-8). The Siting Board, therefore, finds that the requirement in the ZAT Condition of the Special Permits that the Company adhere to an agreement with MDEP to evaluate ZAT equipment within the first five years of operation of the facility, except for cost considerations, is moot. Accordingly, the Siting Board finds

that the ZAT Condition does not constitute a burdensome condition which has a substantial impact on the responsibilities of the Siting Board. Moreover, the Siting Board finds that issues in this proceeding associated with the ZAT Condition and the Modified ZAT Condition have been rendered moot in light of the issuance of the Conditional Air Quality Permit.

b. The Transformer Condition

IDC maintained that the cost associated with implementing the Transformer Condition would outweigh the benefits of the Condition (Exh. IDC-1, at 15). Specifically, IDC indicated that it can achieve the requirement for a noise increase of no more than 5 dBA set forth in the Final Decision at a cost of approximately $300,000, while it estimates implementation of the Transformer Condition to be in excess of $1,700,000 (Exhs. EFSB-5; EFSB-6; EFSB-7). The Company stated that the Siting Board required IDC to increase noise at residential receptor R-4 by no more than 5 dBA, but left the design of noise mitigation sufficient to achieve this level to the Company (Exh. IDC-1, at 16).

The Intervenors alleged that IDC has failed to demonstrate that the Transformer Condition has a substantial impact on the responsibilities of the Siting Board (Intervenors Brief at 10). The Intervenors contended that the Company's showing of a burden rests on the testimony of the Company's witnesses that implementation of the Transformer Condition would result in a design change (id. at 11, citing Exh. IDC/SRP-1, at 6). According to the Intervenors, projects such as the facility routinely undergo design changes after obtaining Siting Board approval, since the Siting Board issues its decision prior to the issuance of other permits that may require design changes (id. at 11).

The Siting Board notes that a need for design changes is not sufficient to show that the Transformer Condition is a burdensome condition which has a substantial impact on the responsibilities of the Siting Board. The Company, however, has presented evidence regarding the cost of implementing of the Transformer Condition and has alleged that similar levels of noise reduction could be achieved at a significantly lower cost. A condition that requires significant incremental expenditure on environmental mitigation may be burdensome, and may have a substantial impact on the responsibility of the Siting Board to ensure a reliable energy supply for the Commonwealth with a

minimum impact on the environment at the lowest possible cost. Based on the evidence in this case, the Siting Board finds that the incremental expenditure for IDC to implement the Transformer Condition does not represent the least cost means to achieve the desired level of noise mitigation. Accordingly, the Siting Board finds that the Company has stated a valid ground for the granting of its Initial Petition, in accordance with G.L. c. 164, § 69K ½, ¶ 2.

c. The PILOT Condition

IDC argued that since the Company has no control over the Town's willingness to negotiate or enter into a PILOT agreement, the PILOT Condition is burdensome and has a substantial impact on the responsibilities of the Siting Board (Exh. IDC-1, at 12). The Company argued that pursuant to this condition, failure to execute a PILOT agreement by July 1, 2001 would preclude IDC from constructing the facility (id. at 13).

The Intervenors asserted that the Company has failed to present a valid argument to support its contention that the PILOT Condition constitutes a burdensome condition with a substantial impact on the responsibilities of the Siting Board (Intervenors Brief at 9). According to the Intervenors, this condition merely sets a time limit for the Company to fulfill an obligation executed with the Town of Bellingham in the Wastewater Services Agreement[10] (id. at 10, citing Exh. BP-22, Tr. at 123).

The Siting Board notes that to its knowledge, the Company and the Town had not entered into a PILOT Agreement as of the July 1, 2001 deadline set forth in the PILOT Condition. As a result, the PILOT Condition prohibits the construction of the facility. The Siting Board finds that, in light of its approval of the construction of the facility in the Final Decision, the PILOT Condition is a burdensome condition which has a substantial impact on the responsibility of the Siting Board to provide a reliable energy supply for the Commonwealth. Based on the above, the Siting Board finds that the Company has stated a valid ground for granting an Initial Petition in accordance with G.L. c. 164, § 69K½, ¶ 2.

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[10] On April 5, 1999, the Company and the Town entered into a Wastewater Services Agreement that provides, inter alia, that the agreement is subject to and conditioned upon the execution of a payment in lieu of taxes agreement (Exh. IDC-1, App. A, Tab 16, at 3).

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3. Inconsistency with Other Resource Use Permits

General Law c. 164, § 69K½ (iii) provides that the Siting Board must grant an Initial Petition if "an applicant believes there are inconsistencies among resource use permits issued by state or local agencies." IDC asserted that the ZAT and Transformer Conditions are inconsistent with the Final Decision and the IDC Compliance Decision and that the Transformer Condition is inconsistent with these Siting Board decisions, as well as with MDEP's draft air permit provisions (Exh. IDC-1, at 21-22). Since the Siting Board has found that the ZAT Condition is now moot, the Siting Board addresses the Transformer Condition only.

The Company stated that the Transformer Condition is inconsistent with the Final Decision and the IDC Compliance Decision with respect to project layout and noise impacts and noise mitigation (Exh. IDC-1, at 15). IDC stated that implementation of the height requirements around the transformer would result in height changes in some other facility structures, and is therefore inconsistent with the project configuration approved by the Siting Board (id. at 15-16, citing Final Decision at 315; IDC Compliance Decision at 67). IDC also made the argument that the Siting Board left to the Company the specific design of mitigation measures for achieving an increase in noise levels of no more than 5dBA at Residential Receptor 4 (Exh. IDC-1, at 16).

The Intervenors argued that the Transformer Condition is not inconsistent with the Final Decision and the IDC Compliance Decision (Intervenors Brief at 11). According to the Intervenors, the Company can comply with both the Transformer Condition and Siting Board's Final Decision (id.).

The Siting Board found in the Final Decision at 360 that with the implementation of additional noise mitigation that would limit L_{90} noise increases at receptor R-4 to 5dBA, the environmental impacts of the facility would be minimized with respect to noise. Further, the Siting Board found in IDC Compliance Decision at 67, that the noise impacts of the reconfigured facility would be less than those of the facility in its originally approved configuration. On its face, the requirement of the Transformer Condition that the Company build walls surrounding the transformer that are 10 feet or higher than the transformer itself is not inconsistent with the Final Decision or the IDC Compliance Decision. Further,

in this proceeding, the Company failed to provide sufficient evidence that implementation of the Transformer Condition would require specific changes to the design of the project layout that are inconsistent with the design assumptions upon which the Siting Board relied the facility proceedings. Consequently, the Siting Board finds that the Company has not stated a valid ground for the granting of an Initial Petition pursuant to G.L. 164, § 69K½ (iv).

4. Improper Consideration and Imposition of Non-Regulatory Condition

General Laws c. 164, § 69K½ (iv) provides that the Siting Board must grant an Initial Petition if an applicant believes that "a non-regulatory issue or condition has been raised or imposed by such state or local agencies, such as, but not limited to, aesthetics and recreation." IDC asserts that the Zoning Board lacked the authority to impose both the ZAT and PILOT Conditions (Exh. IDC-1, at 11, 13). Based on our determination that the ZAT Condition is moot, we address the PILOT Condition only.

IDC asserted that the Zoning Board lacks the authority to impose the PILOT Condition and therefore IDC may seek a Certificate pursuant to G.L. c. 164, § 69K½ (iv) (id. at 11). In support of its position, the Company argued that issues related to IDC's tax obligations are beyond the Zoning Board's jurisdiction, which is limited to granting and conditioning special permits pursuant to G.L. c. 40A, § 9 (id. at 11, citing Assessors of Dover v. Dominican Fathers Province of St. Joseph, 334 Mass. 530, 536-537 (1956)). In addition, the Company argued that the Zoning Board lacks the authority to impose conditions in the Special Permits, the performance of which is beyond the Company's control (id. at 11-12, citing V.S.H. Realty, Inc. v. Zoning Bd. of Appeals of Plymouth, 30 Mass. App. Ct. 530 (1991) ("It is unreasonable [for the Zoning Board] to impose a condition the performance of which lies entirely beyond the applicant's power")).

In addition, IDC contended that the PILOT Condition is invalid because it "sets an imprecise standard, delegates to another Town agency the Zoning Board's zoning authority, and postpones for future action the satisfaction of the condition" (id. at 12, citing Weld v. Board of Appeals of Gloucester, 345 Mass. 376 (1963); Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618,624 (1986)). IDC argued that a determination of whether an agency has imposed a non-regulatory

condition is a question of law (Company Reply Brief at 6, citing Berkshire Power Development, 8 DOMSB 274, at 290, n.12 (1999)) ("Berkshire Decision").

The Intervenors argued that the PILOT Condition is a regulatory condition that ensures compliance with § 1530 of the Zoning By-Laws, which requires the Zoning Board to evaluate the "social, economic, or community needs which are served by the proposal" as well as the "potential fiscal impact" of the facility (Intervenors Brief at 8). The Intervenors asserted that the Zoning Board considered these criteria and that Bellingham will receive millions of dollars in tax revenues from the facility (id. at 8, citing Exh. IDC-2-S, App. F, Tab 73(A)).

The Siting Board has stated that an applicant may seek a Certificate pursuant to G.L. c. 164, § 69K½ (iv) where an agency has required an applicant to comply with a particular condition or take other specific action which the agency lacks the legal authority to require. Berkshire Decision at 286 to 290, n.12 (1999). While § 1530 of the Zoning By-Laws requires consideration of the potential fiscal impact of and economic need for a project in evaluating an application for a Special Permit, it does not provide express authority for the Zoning Board to determine the terms of any fiscal agreement that an applicant enters into with the Town. Thus, the Zoning board's authority to impose the PILOT Condition is at least questionable. Under G.L. c.164, § 69K½ (iv), an applicant is required to show only a reasonable belief that an agency lacks the authority to impose a condition in order to seek an Initial Petition pursuant to this sub-section of the statute. Here, the Siting Board finds that the Company provided a reasonable basis for alleging that the Zoning Board improperly considered a non-regulatory condition. Consequently, the Siting Board finds that the Company has stated a valid ground for the granting of an Initial Petition pursuant to G.L. c. 164, § 69K½ (iv).

5. Exhaustion of Administrative Remedies

The Intervenors argued on brief that, pursuant to 980 CMR 6.02, the Company should be required to exhaust its administrative remedies prior to petitioning for a Certificate (Intervenors Brief at 14). Specifically, the Intervenors stated that the Company has not petitioned the Zoning Board to amend the Special Permits or to modify the conditions contained in the Five Special Permits, and

should be required to do so, prior to seeking a Certificate (id.). The Intervenors argued that requiring applicants to exhaust their administrative remedies before seeking relief from the Siting Board would encourage developers to resolve problems without litigation, and reduce the need for the Siting Board to resolve local disputes (id. at 14).

IDC argued that the Company has satisfied the requirements of 980 CMR 6.02, since it filed its Initial Petition only after the Opponents' Appeal had been filed (Company Brief at 26). Moreover, the Company stated that the Chairman of the Siting Board determined that the Company has satisfied the applicable procedural requirements for filing an Initial Petition (Company Reply Brief at 10, citing February 15, 2001 Procedural Order at 2).

The Siting Board reiterates the Chairman's determination in the February 15, 2001 Procedural Order that the Company has satisfied the procedural requirements for filing an Initial Petition. While the Siting Board encourages applicants to make every effort to resolve local issues on a local level before (and indeed after) filing a Petition for a Certificate, we will not go beyond our statute to impose a requirement that applicants exhaust their administrative remedies prior to such a filing.

C. Decision

The Siting Board shall grant an Initial Petition for a Certificate provided that (1) the petitioner asserts in its Initial Petition one or more of the seven grounds on which Siting Board jurisdiction to grant an Initial Petition may be based, as set forth in G.L. c. 164, § 69K½ and (2) the Siting Board finds that at least one of the grounds asserted is a substantively valid basis for the granting of the Initial Petition. G.L. c. 164, § 69K½.

In Section II. B, above, the Siting Board has found that the Company asserted in its Initial Petition four of the seven grounds on which Siting Board jurisdiction to consider an Initial Petition may be based. In Sections II. B.1, II. B. 2b and 2c, and II.B. 4, above, the Siting Board also has found that IDC has stated three substantively valid grounds for the granting of the Company's Initial Petition. Any of these grounds would be sufficient, pursuant to G.L. c. 164, § 69K½, to support the granting of an Initial Petition.

Accordingly, the Siting Board GRANTS the Company's Initial Petition for a Certificate of Environmental Impact and Public Interest.

III. THE APPLICATION

A. Standard of Review

Pursuant to G.L. c. 164, § 69O½, the Siting Board must make four findings to support the issuance of a Certificate for a generating facility. First, the Siting Board must determine that the issues raised by the agency, or agencies, whose actions are at issue in the Certificate proceeding have been addressed in a comprehensive manner by the Board, either in its prior approval of the generating facility or in the Certificate proceeding itself. Berkshire Decision 8 DOMSB at 291.

The Siting Board's decision also must include the Board's "findings and opinions" with respect to: (1) the compatibility of the generating facility with considerations of environmental protection, public health, and public safety; (2) the extent to which construction and operation of the generating facility will fail to conform with existing state or local laws, and, if the facility will not conform in some respect, the reasonableness of exempting it from conformance, consistent with the implementation of the energy policies in the Siting statute; and (3) the public interest or convenience requiring construction and operation of the generating facility. Id.

B. The Issues

In this proceeding, IDC has requested that the Siting Board issue a Certificate granting the Five Special Permits as they were issued by the Zoning Board, with modifications that provide relief from three conditions that the Company claims are burdensome, are inconsistent with its other resource use permits, or are based on the improper consideration and imposition of non-regulatory conditions. Thus, the Siting Board must (1) identify the issues raised by the Zoning Board in issuing the Five Special Permits and in imposing the three contested conditions; (2) determine which of those issues are within

the appropriate scope of the proceeding;[11] and (3) determine whether the issues that are properly before the Siting Board have been comprehensively addressed either in the facility proceedings or in this proceeding.

1. Scope of Issues Raised by the Agency

Because the parties to this proceeding differ in their understanding of the scope of "issues raised by the agency," the Siting Board addresses this matter before examining the issues raised.

a. Intervenors' Position

The Intervenors stated that "it is not clear precisely what are the 'issues raised' as they apply to this proceeding" (Intervenors Brief at 12). However, the Intervenors suggested that, because the Special Permits were granted, the "issues raised" should encompass all the topics addressed in the Special Permits (id.). The Intervenors listed a number of topics addressed in the Special Permits which the Siting Board did not address in the facility proceedings, including property loss compensation, assignment of rights, demolition obligations, and payments in lieu of taxes (id. at 13).

b. Company's Position

IDC argued that the "issues" that the Siting Board must comprehensively address are the issues raised by the Zoning Board and that, for the purpose of this proceeding, these issues fall into two broad categories: (1) IDC's requests for Five Special Permits; and (2) the three disputed conditions (Company Brief at 29). The Company noted that the Five Special Permits relate to air quality, the height of certain project components, the use of temporary structures, parking and lighting plans, and

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[11] The Siting Board does not interpret G.L. c. 164, § 69O½ as requiring that all issues raised by an agency, without exception, be comprehensively addressed in a Certificate proceeding. Where an agency raises issues that are not within the Siting Board's jurisdiction to determine, are not properly within the scope of a Certificate proceeding, or otherwise are not properly before the Board, G.L. c. 164, § 69K½ does not require that such issues be comprehensively addressed. Berkshire Decision 8 DOMSB at 292, n.13.

the storage of hazardous materials, while the three disputed conditions relate to the use of ZAT, the use of transformer walls for noise mitigation, and the negotiation of a PILOT Agreement (id.). The Company argued that substantive aspects of the PILOT Condition are not within the Siting Board's jurisdiction (id.). The Company then discussed the degree to which the Siting Board has addressed the following issues: (1) air quality, including the use of ZAT; (2) noise, including noise mitigation; (3) the project's site plans and visual impacts, including the height and location of project components; (4) the use of temporary structures during construction, and the project's parking and lighting plans; and (5) the storage of hazardous materials (id. at 30 to 47).

In response to the Intervenors' arguments, the Company first argued that the Siting Board is not required to review every comment or issue raised in the Zoning Board proceedings, and noted that the Intervenors seek to have the Siting Board review even those conditions with which the Company has explicitly agreed to comply (Company Reply Brief at 8).

IDC also argued, citing the Berkshire Decision, that the Siting Board must address only issues "properly within the scope of the Certificate proceeding" (id.). The Company maintained that each of the issues that the Intervenors characterize as "not previously addressed" is either beyond the scope of the Siting Board's jurisdiction or outside the scope of this proceeding (id. at 10). Specifically, the Company asserted that determinations of property value are outside of the scope of the Siting Board's statutory mandate, citing a hearing officer ruling in the Berkshire Power proceeding noting that the Siting Board has generally declined to exercise jurisdiction over property value impacts (id. at 9). The Company argued that the Siting Board's review of the PILOT Condition is limited to determining whether the condition constitutes a burdensome condition in accordance with G.L. c. 164, § 69K½, and whether the Zoning Board acted outside its authority in imposing the condition. The Company noted that the Siting Board has held that it is not empowered to interpret or enforce the conditions incorporated in permits issued by other agencies (id. at 9, citing Berkshire Decision at 297-298).

IDC asserted that the assignment of rights is outside the Siting Board's jurisdiction, which is limited to a review of issues directly related to the potential environmental, health or safety impacts of granting a proposed Certificate (id. at 9-10, citing Berkshire Decision, Hearing Officer Procedural

Order at 9, March 26, 1999; Hearing Officer Procedural Order at 5-6, May 25, 1999). Finally, the Company stated the Siting Board's jurisdiction does not extend to demolition obligations, since the Siting Board's mandate pertains to issues related to the construction and operation of a generating facility, not to its decommissioning (id. at 10).

c. Analysis

In defining the appropriate scope for its review of an application for a Certificate, the Siting Board looks to the language of its statute. G.L. c. 164, § 69O½ first directs the Siting Board to issue a Certificate only if it determines that the issues raised by the agency, or agencies, whose actions are at issue in the Certificate proceeding have been addressed in a comprehensive manner by the Board, either in its prior approval of the generating facility or in the Certificate proceeding itself. It then requires the Siting Board to make findings with respect to: (1) the compatibility of the generating facility with considerations of environmental protection, public health and safety, (2) the extent to which the construction and operation of the generating facility will fail to conform with existing state and local laws, and (3) the public interest or convenience requiring construction and operation of the generating facility.

IDC has suggested that, for the purposes of this proceeding, the "issues raised" by the agency are the subject matter of the Special Permits and the reasons given by the Zoning Board for the imposition of the disputed conditions. The Intervenors argue for a broader interpretation, calling for the review of every condition attached to each of the Special Permits. In developing its own understanding of this language, the Siting Board considers the probable intent of G.L. c. 164, § 69O½. The Siting Board recognizes that in establishing procedures for the granting of a Certificate, the Legislature has given the Siting Board the unusual role of acting on behalf of another agency when doing so is in the public interest. By explicitly requiring the Siting Board to comprehensively address the issues raised "by the agency, or agencies, whose actions are at issue," the Legislature ensured that the Siting Board would not substitute its judgment for that of another agency without first giving full consideration to all the arguments advanced by that agency on behalf of its chosen course of action. Thus, the "issues

raised by the agency" are, first and foremost, the regulatory concerns underlying an agency's decision to take a particular action which may include a decision to deny a permit, or to grant a permit with certain conditions.[12]

The Siting Board also sees a review of certain issues, whether or not raised by the agency, as foundational to making the other three findings required by its statute. Simply put, the Siting Board cannot develop "findings and opinions" with respect to a facility's compatibility with considerations of environmental protection, public health, and public safety, or to the extent to which it would conform with existing state or local laws, or the public interest or convenience requiring construction of the facility, without considering the effect of the proposed Certificate on these matters. Consequently, to provide an evidentiary basis for its decision, the Siting Board must consider the subject matter of each permit or other authorization to be issued as part of the requested Certificate, and develop a record to support the three required findings.

Thus, where a Certificate is requested based on a challenge to all or some portion of an agency's action, the Siting Board must determine whether the issues raised by the agency in support of the challenged action have been comprehensively addressed, either in the facility proceedings or in the Certificate proceeding. In addition, if the Certificate would reiterate some portion of the agency's action, the Siting Board must determine that it has addressed the subject matter of the permit, either in the facility proceeding or in the Certificate proceeding, to the extent necessary to determine the environmental protection, public health, and public safety implications of the permit. When a Certificate is requested to implement an agency approval following appeal of that approval, the Siting Board must determine that it has addressed the subject matter of the approval, either in the facility proceedings or in the Certificate proceeding, to the extent necessary to determine the environmental protection, public health, and public safety implications of the permit. The Siting Board recognizes that certain state and local permits may appropriately address subjects that are not relevant to the scope of the Siting

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[12] The Siting Board notes that the statute's focus on issues raised *by the agency* suggests that the purpose of this particular provision is to protect the interests of the agency whose role is being assumed by the Siting Board.

Board's inquiry in a Certificate proceeding. The Siting Board need not address such subjects in order to develop an adequate evidentiary foundation for its decision.

2. Determination of Issues Raised

In this proceeding, IDC has requested a Certificate granting the Five Special Permits as they were issued by the Zoning Board, with modifications that provide relief from three conditions that the Company claims are burdensome, are inconsistent with its other resource use permits, and/or are based on the improper consideration and imposition of non-regulatory conditions. Consistent with our analysis above, the Siting Board must determine that the issues raised by the Zoning Board in support of the three challenged conditions have been comprehensively addressed, either in the facility proceedings or in the Certificate proceeding. In addition, the Siting Board must determine that it has addressed the subject matter of the Five Special Permits, either in the facility proceedings or in the Certificate proceeding, to the extent necessary to determine the environmental protection, public health, and public safety implications of the permits and to the extent necessary to determine conformance with existing state and local laws. Finally, the Siting Board must include in its decision findings and conclusions with respect to the public interest or convenience requiring construction and operation of the generating facility.

a. Issues Raised by the Agency in Support of the Conditions

The Siting Board turns first to determining the issues raised by the Zoning Board in support of the three contested conditions. Consistent with established principles of due process, in attempting to identify the issues that were raised by an agency in establishing certain permit conditions, the Siting Board looks to the required written statement of reasons set forth in the agency's final decision in the permit proceeding, rather than to issues that may subsequently be raised by the agency in other documents or other forums. See, e.g., G.L. c. 30A, § 11.[13] Thus, if the agency's final decision includes

[13] The Siting Board notes that the requirements of G.L. c. 30A, the State Administrative

(continued...)

a statement of reasons, the Siting Board's inquiry into the "issues raised" for purposes of the Board's review under G.L. c. 164, § 69O½ is complete. Berkshire Decision, 8 DOMSB at 292.

In those cases where the agency in question has not issued a statement of reasons contemporaneous with its final decision, the Siting Board may seek other contemporaneous indicators of the bases for the agency's action. Thus, for example, in the absence of a statement of reasons, the Siting Board may look to the official record of the proceeding in which the agency considered and acted upon the permit at issue. Id. at 292-293. Finally, in the absence of any contemporaneous indicator of the bases for the agency's decision, the Siting Board may consider statements made by the agency after the agency's final decision was issued. These ex post facto statements are, however, the least reliable source of information regarding the concerns that formed the basis for the agency's final decision, since it may not be possible to discern from them which issues were in fact raised by the agency during the permit proceeding, and which issues have arisen or been added since the proceeding was concluded. Id. at 293.

i. ZAT Condition

Condition 20 of each of the Special Permits states that:

> ... IDC shall abide by an agreement with the MDEP to evaluate these ZATs within the first five years of operation; provided, however, that IDC, while making any such evaluation, shall exclude the acquisition costs of any such ZAT equipment to be installed at the plant. (Exh. IDC- 2, App. E, Tab 65, at 23).

Condition 20 implicitly assumes that the MDEP, in issuing its Conditional Air Quality Permit for the facility, would follow its practice in several recent permits of requiring new generators, after five years of operation, to evaluate the costs and benefits of replacing their existing NO_X control equipment with ZAT. Final Decision at 270; see also e.g. Southern Energy Kendall Decision, 11 DOMSB at 293

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13 (...continued)
Procedure Act, apply only to state agencies. G.L. c. 30A, § 1. Accordingly, not every agency whose actions may be the subject of a Certificate proceeding will have issued a written statement of reasons.

(2000); Brockton Power Decision, 10 DOMSB at 190 (2000). As noted in Section I.B.1, above, during the pendency of this proceeding, the MDEP issued its Conditional Air Quality Permit for the IDC Bellingham facility. That permit does not require a re-evaluation of ZAT at any time during the life of the facility; instead, it requires the facility to achieve a NO_X concentration of 1.5 parts per million by volume, dry ("ppmvd") in its stack emissions.

Because MDEP has not required the Company to re-evaluate ZAT within the first five years of operation, all issues regarding the assumptions to be used in such an evaluation are moot. The Siting Board determines that there are no remaining issues to be addressed with respect to the ZAT Condition. The Siting Board further determines that, because Condition 20 has been rendered moot by the terms of the Conditional Air Quality permit, Condition 20 should be omitted from any Certificate issued as a result of this proceeding.

ii. Transformer Condition

Condition 22 (a) of each of the Special Permits states that:

> Transformers and CCW coolers shall have concrete walls on at least four sides, ten (10) feet higher than said transformers.
> (Exh. IDC-2, App. E, Tab 65, at 23).

The Special Permits include this requirement as one of an extensive set of noise mitigation measures, but do not describe the purpose of this specific measure (id.). Further, the transcripts of the Zoning Board hearings contain no reference to the height of the transformer walls (id. at App. E, Tabs 59 to 64). The Special Permits state that the noise impacts resulting from the operation of the facility would: (1) be well below the MDEP's 10 dBA limit on increases from new sources; (2) be well below the 65 dBA limit set in the Town of Bellingham's noise ordinance; and (3) meet the 45 dBA steady-state noise limit for residential receptors in a new Bellingham By-Law not applicable to the facility (id. at App. E, Tab 65, at 19). The Special Permits note that the maximum allowable noise from the facility during normal operation would be 40 dBA at the nearest existing residence (id.).

Because Condition 22(a) of the Special Permits was imposed as part of a general noise mitigation package, the Siting Board concludes that the issue raised by this condition is the minimization

of noise generated by the facility. The noise impacts of the facility are within the Siting Board's jurisdiction, and are clearly relevant to an evaluation of the compatibility of the generating facility with considerations of environmental protection, public health and safety and the extent to which construction and operation of the facility will fail to conform with existing state and local laws, ordinances, by-laws, rules and regulations. Consequently, in Section III.B.3.f, below, the Siting Board addresses the noise impacts of the facility, and considers Condition 22(a) in that context.

iii. PILOT Condition

Condition 23 of each of the Special Permits states that:

> The Applicant shall, on or before July 1, 2001, execute and enter into a Payment in Lieu of Tax Agreement, the obligation of which will be at least equal to agreements existing with the Town of Bellingham and industries of a similar nature.
> (Exh. IDC-2, App. E, Tab 65, at 25).

In evaluating the social, economic, or community needs served by the proposal, the Zoning Board in the Special Permits indicates that Bellingham will receive millions of dollars in annual tax revenues from the facility through a PILOT Agreement to be signed and executed by the parties prior to the issuance of any occupancy permits (id. at 12). The Special Permits also reference tax revenues (although not the PILOT Agreement) in evaluating the potential fiscal impact of the facility (id. at 19). The Special Permits do not provide an explanation for the July 1, 2001 date referenced in Condition 23.

Because the PILOT Agreement is discussed in the context of social, economic and community needs and potential fiscal impacts, the Siting Board concludes that the issues raised by the PILOT Agreement are primarily those of local economics. Such issues are not clearly relevant to the evaluation of the compatibility of the generating facility with considerations of environmental protection, public health and safety, and do not properly fall under the Siting Board's jurisdiction. Moreover, there is no indication in the record of the Zoning Board's purpose in imposing the July 21, 2001 deadline for the PILOT Agreement. The Siting Board therefore confines its analysis of Condition 23 in Section III.B.3.g, below, to the question of whether the condition constitutes a burdensome condition in

accordance with G.L. c. 164, § 69K½, and whether the Zoning Board acted outside its authority in imposing the condition.

b. Subject Matter of the Special Permits

The Siting Board turns next to the subject matter of the Five Special Permits issued by the Zoning Board. The Five Special Permits address, respectively, building and structure height, air quality, temporary structures and parking, exterior lighting, and the storage and use of hazardous materials. Each of these subjects is relevant to an analysis of whether the facility is compatible with considerations of environmental protection, public health, and public safety and the extent to which construction and operation will fail to conform with exiting state and local laws, ordinances, by laws, rules and regulations. Thus, these issues are properly within the scope of this proceeding. Consequently, in Sections III.B.3.a, b, c, d, and e below, the Siting Board addresses the issues of building and structure height, air quality, temporary structures and parking, exterior lighting, and the use, storage, and disposal of hazardous materials as they relate to the facility.

3. Evaluation of Issues Raised

a. Building Heights

IDC's request for Special Permit 1 relates to § 2610 of the Zoning By-Laws, which governs the height of buildings and structures (Exhs. IDC-2, App. A, Tab 1, at 2, 3; EFSB-37, Att. at 16, 17). Section 2610(b) of the Zoning By-Laws states that a structure or projection not used for human habitation, which is not otherwise permitted under the height restrictions set forth in § 2600, may be authorized by special permit from the Zoning Board, upon determination by the Zoning Board that the proposed height is functionally important for the use, and that the structure or projection and its use will not result in threats to health, safety, or visual compatibility with the surroundings (Exhs. IDC-2, App. E, Tab 65, at 9, 10; EFSB-37, Att. at 17). IDC sought this special permit because several facility structures would be in excess of otherwise applicable height restrictions, including: the dual-flue stack (225 feet high plus any necessary aircraft lighting); the air-cooled condenser (114 feet high,

including pipes); the turbine building (90 feet high with lights at 98 feet and roof steam drums with vents 107 feet above grade); a water tank (no more than 46 feet high); and three electric transmission towers (80 feet high) (Exh. IDC-2, App. A, Tab 1, at 3, and App. E, Tab 65, at 1, 9, and Tab 68, at 2, 5).

In Special Permit 1, the Zoning Board found that the structures that exceed Bellingham's height limitations are needed to support the project's function in an environmentally sound and efficient manner, and that the heights of these structures are functionally important (id., App. E, Tab 65, at 10). The Zoning Board cited a visual analysis which indicated that the stack would not be visible, or would be minimally visible, from most potential viewing locations (id., Tab 65, at 10). The Special Permit noted that the Federal Aviation Administration ("FAA") had determined that there would be no hazard to air navigation from either a 190-foot stack, a 225-foot stack, or a 260-foot construction crane, and the Zoning Board concluded that structures allowed by the Special Permit would not pose a threat to health or safety (id., App. E, Tab 65, at 8-10). The Zoning Board found that increasing the stack height from 190 feet to 225 feet would reduce modeled nitrogen dioxide concentrations, and specifically allowed and required the taller stack height of 225 feet (id., App. E, Tab 65, at 10).[14]

The Special Permit states that the applicant presented information that the project was "specifically designed to . . . minimally intrude on the surrounding neighborhood character and social structure" (id., App. E, Tab 65 at 8). The Zoning Board found that the project is in harmony with the general purpose and intent of the Zoning By-Laws, which permit electrical generating facilities in Industrial Districts (id., App. E, Tab 65, at 10). Accordingly, the Zoning Board voted to grant Special Permit 1 (id., App. E, Tab 65, at 20).[15]

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S). Proposed Special Permit 1 would allow construction of the facility with buildings as described in the original Special Permit 1, at the heights described in Special Permit 1, and with a stack height of 225

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[14] Condition 6 of Special Permits 1 and 2 requires that the stack be 225 feet high (Exh. IDC-2, App. E, Tab 65 at 21, Tab 66, at 7).

[15] Modification of the height requirement appears in Special Permit 4, the special permit for lighting (Exh. IDC-2, App. E, Tab 68, at 5).

feet (id. at 1).

In the facility proceedings, the Siting Board's review of building and structure heights focused on visual impacts. The Siting Board evaluated the visual impacts of the facility with a 190-foot stack in the Final Decision at 292-300. In the Final Decision at 298, the Siting Board noted that the facility would be somewhat screened from view as a result of its proposed wooded buffer. The Company indicated that the upper portions of the approved 190-foot stack together with other high elements of the facility, such as the air-cooled condenser or the heat recovery steam generator ("HRSG"), would be visible from a few viewshed locations, but that from remaining viewshed locations, including most residential locations, facility views would be screened or be limited to portions of the stack. Final Decision at 293-294. The Siting Board directed the Company, in Condition C of the Final Decision, to provide reasonable off-site mitigation of visual impacts to screen views of the facility, as requested by property owners or municipal officials. Id. at 299-300, 360. The Siting Board found that, with implementation of Condition C, the visual impacts of the facility would be minimized. Id. at 300.

The Siting Board specifically addressed the visual impacts of a 225-foot stack in the project change proceeding. IDC Project Change Decision at 6-9. In the IDC Project Change Decision at 8, the Siting Board noted that visual impacts would be "more pronounced . . . from numerous viewpoints" with a 225-foot stack, and modified Condition C to require that the Company provide, as requested by property owners and municipal officials, the option of at least one tree with a minimum height of 14 feet where needed to screen views of the facility. The Siting Board found that, with implementation of Condition C, as modified, the visual impacts of the facility would be minimized. Id.

Special Permit 1 describes the heights of several buildings and structures that were not specifically addressed by the Siting Board in the facility proceedings. These structures are shorter than the air-cooled condenser, and thus would be less visible from surrounding areas. Wooded areas around the facility generally would screen these other buildings. The record indicates that the FAA has determined that the 225-foot stack would not pose a hazard to air navigation. No other issues related to building height have been raised by the Zoning Board or by parties in this proceeding. Consequently, the Siting Board finds that construction of the facility, with buildings and structures extending to the

heights described above, is compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to building height.

b. Air Quality

IDC's request for Special Permit 2 relates to § 3240 of the Zoning By-Laws, which requires that a special permit be obtained for any use that would be classified as a major stationary new source under United States Environmental Protection Agency ("USEPA") regulations; subject to MDEP regulations under 310 CMR 7.00; or subject to § 112 of the Clean Air Act due to emissions of asbestos, benzene, beryllium, mercury, vinyl chloride, or radionuclides (Exhs. IDC-2, App. A, Tab 2, at 2; EFSB-37, Att. at 23). IDC stated that the facility is classified as a major new stationary source of air pollution, and that it is subject to permitting under 310 CMR 7.00, but that it is not subject to § 112 of the Clean Air Act (Exh. IDC-2, App. A, Tab 2, at 2).

In Special Permit 2, the Zoning Board found that facility emissions would be well below significant impact levels ("SILs") for criteria pollutants and below both Threshold Effects Exposure Limits ("TELs") and Allowable Ambient Levels ("AALs") for noncriteria pollutants (id., App. E, Tab 66, at 3). The Zoning Board also reviewed modeling of cumulative ambient air impacts from multiple sources in the area, and noted in the Special Permit the low levels of hazardous emissions from gas-fired power plants (id., App. E, Tab 66, at 4). The Special Permit stated that the facility's air emissions would be regulated by MDEP; that the facility is not expected to emit asbestos, benzene, beryllium, vinyl chloride, or radionuclides that facility emissions are not expected to harm the environment or other premises or to jeopardize health or safety; that the facility would incorporate stringent air pollution controls; and that the facility's environmental impacts are in harmony with the general intent of the Zoning By-Laws (id., App. E, Tab 66, at 4-6). Accordingly, the Zoning Board voted to grant Special Permit 2 (id., App. E, Tab 66, at 6).

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S).

Proposed Special Permit 2, like the original Special Permit 2, would allow construction of the facility under § 3240 of the Zoning By-Laws (and under provisions for special permits in §§ 1500 and 3290) (id. at 1). With the exception of the Modified ZAT Condition, which we have found to be moot, the Proposed Special Permits do not differ from the original Five Special Permits with respect to air quality (see Exhs. IDC-2, App. E, Tab 65, at 20-25; IDC-2-S).

The Siting Board extensively reviewed the air quality impacts of the facility in two of the facility proceedings. See Final Decision at 260-275; IDC Compliance Decision at 44-52. The Siting Board found that combined concentrations would be below ambient air quality standards for criteria pollutants, except ozone, and that impacts would be below TELs and AALs for non-criteria pollutants. Final Decision at 268-269, 346-349. The Siting Board reviewed the cumulative impact of emissions from the facility and other existing and proposed sources, and concluded that the IDC project would contribute less than one percent of the cumulative concentrations of nitrogen dioxide, sulfur dioxide, fine particulates, and carbon monoxide at the point(s) of maximum cumulative pollutant impact within 10 kilometers of the facility. Id. at 269. The Siting Board considered the use of zero ammonia technologies for nitrogen oxides control, but did not find sufficient evidence in the record to support requiring such a technology. Id. at 269-270. The Siting Board also reviewed the cumulative health impacts of the facility, and determined that the impacts of criteria pollutant emissions would be minimized and that the air toxics emissions from the facility would have no discernable public health impact. Id. at 348-349. The Siting Board found that, with implementation of certain NO_X and CO_2 offset measures, the environmental impacts of the facility would be minimized with respect to air quality. Id. at 275.

In the facility proceedings, the Siting Board found that the air quality impacts of the facility would be minimized. Since the Final Decision was issued, MDEP has issued the Conditional Air Quality Permit for the facility, which further limited emissions, particularly of NO_X, for which the anticipated stack concentration was reduced from 2.0 ppmvd to 1.5 ppmvd. See IDC Project Change Decision at 4. We note that the local air quality impacts of the facility would be further reduced through the use of the higher 225-foot stack. While the Siting Board did not previously evaluate whether the

facility would emit asbestos, benzene, beryllium, or vinyl chloride, the Siting Board notes that these substances are not typically emitted by gas-fired power plants and agrees with the Zoning Board's conclusion that these substances would not be emitted. No other issues related to air quality have been raised by the agency or by other parties in this proceeding. Consequently, the Siting Board finds that construction and operation of the facility, which would emit criteria pollutants in quantities that would trigger certain air pollution control requirements, is compatible with considerations of environmental protection, public health, and public safety.

The record shows that the facility has received its Conditional Air Quality Permit from MDEP, which indicates that the project complies with federal and state air regulations (Exh. EFSB-38). The Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to regulated air emissions.

c. Temporary Structures and Parking

IDC's request for Special Permit 3, which addresses temporary structures and parking, relates to §§ 2210, 2220, and 2400 of the Zoning By-Laws, which, in combination, indicate that a special permit is required for the use of temporary structures and for provision of parking for more than three light commercial vehicles or more than one heavy commercial vehicle (Exhs. IDC-2, App. A, Tab 3, at 2; EFSB-37, Att. at 9-12).[16] IDC requested a special permit for temporary structures and parking during construction of the facility (Exh. IDC-2, App. A, Tab 3, at 1).

In its application for Special Permit 3, the Company stated that there would be trailers, changing rooms, bathrooms, temporary workshops and tool shops on-site during construction of the facility, which is expected to last less than two years (id., App. A, Tab 3, at 2). The Company asserted that these temporary structures would not intrude on the surroundings due to their low height and non-obtrusive appearance, and due to the effective visual screening provided by wooded areas at the

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[16] Special Permit 3 also indicates that IDC would request that the Bellingham Planning Board reduce the parking requirements for the facility, indicating that the requirements of the Zoning By-Laws exceed what is necessary for the facility (Exh. IDC-2, App. E, Tab 67, at 3).

periphery of the site (id., App. A, Tab 3, at 3). The Company stated that on-site construction and laydown areas would be established to house commercial vehicles during construction (id.). Finally, the Company stated that two or three station vehicles and no other commercial vehicles would be stored on-site during normal facility operation (id.).

In granting Special Permit 3, the Zoning Board found that the temporary structures at the site would not visually intrude on their surroundings (id., App. E, Tab 67, at 2).[17] The Zoning Board also found that storage of commercial vehicles on-site would be minimized, and that equipment would remain on-site as much as possible (id.). Furthermore, the Zoning Board identified measures that would be taken to minimize the impacts of using heavy equipment, including dust and erosion control measures (id., App. E, Tab 67, at 3). Overall, the Zoning Board concluded that parking, storage, and temporary structures would be in harmony with the general intent of the Zoning By-Laws and voted to grant Special Permit 3 (id., App. E, Tab 67, at 3, 4).

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S). Proposed Special Permit 3, like the original Special Permit 3, would allow the use of temporary structures and the on-site parking of construction equipment during construction of the facility (id. at 2). In addition, the Settling Parties proposed a new condition, Condition 24, related to temporary structures and parking (id. at 7). Condition 24 states that:

> The Company shall work with the Town of Bellingham Conservation Commission to develop a plan for and to implement the restoration to a vegetative state of areas which are used for temporary structures and parking and other construction activities but which are not used for post-construction operation of the Plant. In the event that the Town of Bellingham Conservation Commission requires trees to be planted in any such restored areas, such trees shall be bagged and burlap nursery stock planted in accordance with the technical specifications of the Town of Bellingham's Scenic Roads By-law in effect as of the date of this decision. (Exh. IDC-2-S at 7).

With the exception of new Condition 24, the proposed Permits do not differ from the original Special Permits with respect to temporary structures and parking (see Exhs. IDC-2, App. E, Tab 65, at 20-25;

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[17] Special Permit 3 cites low height, "non-obtrusive" appearance, and effective visual screening provided by existing wooded areas as factors making the temporary structures non-intrusive (i.e., as mitigating visual impacts) (Exh. IDC-2, App. E, Tab 67, at 2).

IDC-2-S).

In the Final Decision at 335 and in the IDC Compliance Decision at 72, the Siting Board reviewed the on-site land use impacts of the construction of the facility, which was to include -- in addition to the 14.5-acre requirement for the plant footprint -- a temporary land requirement of 12 acres for construction laydown and parking. Most of the remainder of the 156-acre site is wooded and would be retained as conservation land, open space or permanently undeveloped land, providing a buffer from off-site areas in all directions. Final Decision at 334, 338; IDC Compliance Decision at 71-72.

The Final Decision did not directly address the impacts of temporary structures and parking; however, portions of the Final Decision are relevant to such an analysis. For example, the analysis of visual impacts in the Final Decision at 292-295, 298-300 focused on specific elements of the facility likely to be visible in off-site areas, notably the stack and the air-cooled condenser. The Siting Board notes that, given the on-site wooded buffer, other structural features of the project, including temporary structures and parking, would not be readily visible from off-site areas.

Similarly, the Siting Board evaluated the local traffic impacts of the facility, including issues related to the transport of construction equipment and materials. Final Decision at 322-329. The Company committed to schedule deliveries of large equipment and plant components during off-peak traffic periods, and to coordinate such deliveries with local officials. Id. at 326. The Siting Board also reviewed the construction noise impacts of the facility, estimated to be a maximum of 63 dBA at the nearest residence during the excavation and finishing stages of the construction period. Id. at 306, 316. To minimize construction noise, the Company committed to comply with federal regulations limiting truck noise and to ensure that construction equipment manufacturers' normal sound muffling devices are used and kept in good repair during construction. Id.

In the Final Decision at 292-316, 322-329, 333-343, the Siting Board reviewed the land use and visual impacts of constructing the facility, and also evaluated construction period impacts with respect to traffic and noise. The use of temporary structures and parking allowed by Special Permit 3 is consistent with the record developed in the facility proceedings. New Condition 24 further mitigates

the possible long-term impacts of parking and the use of temporary structures by providing for the restoration of temporary workspace to a vegetated condition once the facility is in operation. No other issues related to temporary structures and parking at the facility have been raised by the agency or by other parties in this proceeding. Consequently, the Siting Board finds that the use of temporary structures and parking during construction of the facility is compatible with considerations of environmental protection, public health, and public safety. The Siting Board further finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to the use of temporary structures and parking during construction of the facility.

d. Exterior Lighting

IDC's request for Special Permit 4 relates to § 3230 of the Zoning By-Laws, which governs exterior lighting (Exhs. IDC-2, App. A, Tab 4, at 2; EFSB-37, Att. at 21-22). Section 3230 of the Zoning By-Laws states that a special permit is needed for lighting in excess of certain limitations on height and illuminance; a special permit may be granted if the limitations are inherently infeasible for a particular use and reasonable efforts have been made to avoid glare or light overspill onto residential premises (Exhs. IDC-2, App. E, Tab 68, at 1; EFSB-37, Att. at 21-22). IDC sought this special permit to allow a variety of light fixtures that would exceed the otherwise applicable requirements of the Zoning By-Laws; these include lights on the landings of stairs and on galleries of the air-cooled condenser, lights on water tanks, and aviation lighting as required by the FAA on the stack (Exh. IDC-2, App. A, Tab 4, at 2-4 and App. E, Tab 68, at 1, 2).

In granting Special Permit 4, the Zoning Board found that the lighting proposed by IDC is the minimum required per code for purposes of worker safety, security, and nighttime inspections of outdoor equipment (id., App. E, Tab 68, at 3). The Zoning Board found that the lighting would be directed and hooded in accordance with the Zoning By-Laws (id., App. E, Tab 68, at 3, 4). The Zoning Board also found that reasonable efforts have been made to avoid glare or light overspill onto residential premises (id., App. E, Tab 68, at 4). Accordingly, the Zoning Board voted to grant Special

Permit 4 (id., App. E, Tab 68, at 5).

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S). Proposed Permit 4, like the original Special Permit 4, would allow implementation of a lighting plan consistent with the plan attached to the Company's Application No. 4 to the Zoning Board (Exhs. IDC-2, App. A, Tab 4, at 3, 4 and Tab 12; IDC-2-S; see also Exhibit A of the attached Certificate). However, Condition 6 of the Five Special Permits is revised to require that the stack lighting be directed downward as much as engineeringly feasible (Exh. IDC-2-S at 3). With the exception of the change to Condition 6, the conditions attached to the proposed special permits do not differ from those attached to the original special permits with respect to exterior lighting.

In its Final Decision at 296-300, the Siting Board considered the impacts of nighttime lighting as part of its analysis of the visual impacts of the facility. The Siting Board noted that the facility would be somewhat screened from view as a result of its proposed wooded buffer, and that the Company would attempt to minimize the visual impact of exterior lighting in its final lighting design by using fixtures that would be oriented downward and hooded, with no unnecessary illumination. Id. at 296-298.

Since the Final Decision was issued, IDC has developed a detailed exterior lighting plan which it submitted to the Zoning Board for review. The record indicates that downward directed lights have been proposed where possible, and that the wooded buffer around the facility should reduce the visibility of exterior lighting at abutting land uses.

The Siting Board notes that facility lighting is generally needed for security and for employee and public safety, and that there are specific public safety benefits associated with aviation lighting on the stack. An upward component to air traffic safety lighting is likely to be essential to its proper public safety function, notwithstanding the engineering feasibility of directing such lighting to limit an upward component. Consequently, the Siting Board finds that the proposed revision to Condition 6 is not compatible with considerations of environmental protection, public health, and public safety.

No other issues related to exterior lighting have been raised by the agency or by other parties in this proceeding. Consequently, the Siting Board finds that construction of the facility, with exterior lighting as described in Special Permit 4, is compatible with considerations of environmental protection,

public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to exterior lighting.

e. Hazardous Materials

IDC's request for Special Permit 5 relates to § 3250 of the Zoning By-Laws, which addresses the use and storage of hazardous materials (Exhs. IDC-2, App. A, Tab 5, at 2, 3; EFSB-37, Att. at 23). Section 3250 of the Zoning By-Laws states that a special permit is needed for use(s) involving: (a) manufacturing, under certain conditions; (b) storage of flammable materials in excess of specified quantities, except fuel for onsite use, and (c) transport, use, treatment, storage, or disposal of hazardous waste, under specified conditions (Exh. EFSB-37, Att. at 23). The Company indicated that a nominal 40,000 gallons of 19% aqueous ammonia would be stored on-site in a bulk storage tank (Exh. IDC-2, App. A, Tab 9).

In granting Special Permit 5, the Zoning Board found that storage of hazardous materials at the site is not expected to cause harm or adversely affect the environment, and that there would be very few waste materials arising from construction and operation of the facility (id., App. E, Tab 69, at 3-4). Special Permit 5 specifically addressed the use of ammonia at the facility, finding that there would be multiple levels of protection against spills of aqueous ammonia from storage, including a secondary containment dike around the primary tank (id., App. E, Tab 69, at 4). The Zoning Board also found that, when compared to other manufacturing processes, the delivery and use of 19% aqueous ammonia on the site would not jeopardize health or safety on-site or offsite, would not harm the environment or other premises, and would not excessively burden the health and safety of residents in the area (id., App. E, Tab 69, at 4-5). Accordingly, the Zoning Board voted to grant Special Permit 5 (id., App. E, Tab 69, at 6).

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S). Proposed Special Permit 5, like the original Special Permit 5, would allow the storage and use of hazardous materials listed in Att. D of the original special permit application to the Zoning Board (Exhs. IDC-2,

App. A, Tab 5 at 3 and Tab 6; IDC-2-S, Exhibit A; see also Exhibit B of the attached Certificate). In addition, the Settling Parties proposed a new condition, Condition 25, addressing the storage and handling of hazardous materials, that would be attached to all Five Special Permits (Exh. IDC-2, at 7). Proposed Condition 25 requires that all chemicals be stored and handled in accordance with the applicable Materials Safety Data Sheets ("MSDS") (Exh. IDC-2-S at 7). With the exception of Condition 25, the conditions attached to the proposed special permits do not differ from those attached to the original Special Permits with respect to use and storage of hazardous materials (see Exhs. IDC-2, App. E, Tab 65, at 20-25; IDC-2-S).

In two of the facility proceedings, the Siting Board reviewed IDC's plans for the storage and handling of hazardous materials, including its use and storage of aqueous ammonia and its emergency response plans. Final Decision at 316-321; IDC Compliance Decision at 67-68. The Siting Board determined that the Company had designed the facility to avert spills of hazardous materials, and that the Company intended to develop emergency procedures and response plans similar to those previously found acceptable by the Siting Board. Final Decision at 321. With respect to the use of aqueous ammonia, the Siting Board noted that the Intervenors had argued that safety risks from the use and storage of ammonia could be eliminated by requiring the use of NO_X control technologies that do not require ammonia, but went on to note that the record did not demonstrate that such technologies were available at the time, and that there were questions about the water demands of such technologies. Id. at 269, 320-321. The Siting Board concluded that the Company had taken all steps that were feasible to minimize the safety risks of ammonia. Id. at 321.

The Siting Board also evaluated the solid and hazardous waste impacts of the facility in the underlying case and the compliance case. Final Decision at 291-292; IDC Compliance Decision at 56-57. Hazardous solid wastes generated during operation would include spent lubrication oil filters, empty hazardous waste containers, and depleted catalyst units from the selective catalytic reduction system. Final Decision at 292. As noted in the Final Decision, some solid waste from construction and operation of the facility would be recycled, reclaimed, or reused; the rest would be disposed of at appropriate disposal sites by the Company or its licensed contractor. Id. Disposal would be

conducted in a manner consistent with applicable government regulation. Id.

The storage and handling of materials other than ammonia and hazardous waste were not explicitly addressed by the Siting Board in the Final Decision, except with respect to spill control and prevention. The record shows that newly proposed Condition 25 would require that all chemicals be stored and handled in accordance with the applicable MSDS. The Siting Board notes that MSDS contain information on the proper handling and emergency procedures to be used for various chemical products. The proposed additional condition that all chemicals be handled in accordance with applicable MSDS merits adoption, and should address both environmental and public safety concerns. No other specific hazardous material issues have been raised by the agency or by other parties in this proceeding.

Accordingly, the Siting Board finds that the storage and use of hazardous materials, including aqueous ammonia, at the facility is compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to storage and use of hazardous materials.

f. The Transformer Condition

Condition 22(a) of the Special Permits required, as one of a set of noise mitigation measures, that the facility be designed with transformers and CCW coolers having concrete walls on at least four sides, 10 feet higher than said transformers (Exh. IDC-2, App. E, Tab 65 at 23, Tab 66 at 24, Tab 67 at 7, Tab 68 at 8, and Tab 69 at 9). In the Special Permits, the Zoning Board found that development of the project would occur in a central location within the site in order to maintain natural buffers between the project and surrounding land uses (id., App. E, Tab 65, at 16). The Zoning Board found that the noise impacts resulting from the operation of the facility would: (1) be well below the MDEP 10 dBA limit on increases from new noise sources, as detailed in MDEP Policy 90-001; (2) be well below the 65 dBA limit set in the applicable Town of Bellingham noise ordinance; and (3) although not applicable, meet Bellingham's steady-state noise limit of 45 dBA for residential receptors (id., App. E,

Tab 65, at 17). The Zoning Board concluded that the project's impact on the neighborhood character and social structures would be minimal (id.).

IDC argued that the facility could be designed to meet Siting Board and MDEP requirements, even without the walls required by Condition 22(a), and that overall noise impacts would be very similar under either design (Exhs. EFSB-25; EFSB-34). The Company estimated the incremental capital cost of noise mitigation to comply with Condition 22(a) as $1,400,000 (Exh. EFSB-5). In addition, the Company argued that the transformer walls required by Condition 22(a) could reduce the energy efficiency of the transformers, especially in hot weather, might result in a need to spread equipment out across the site, and could restrict access for emergency vehicles (Exhs. EFSB-22; EFSB-23; EFSB-24).

The Company suggested that the Siting Board adopt the Modified Transformer Condition developed by the Settling Parties (Exh. IDC-2-S). The Modified Transformer Condition would allow the Company either to provide concrete walls extending 10 feet above transformers and CCW coolers or to provide equivalent noise mitigation (id. at 5). In addition, the Modified Transformer Condition specifies that maximum plant-generated noise from the facility may not exceed a variety of limits (id.). Finally, the Modified Transformer Condition states that if IDC builds the higher walls, any related and necessary plant layout changes, including height, would be deemed approved without further action by the Siting Board or the Zoning Board (id.).

The Intervenors contended that IDC has admitted it could comply with the original Condition 22(a); that such compliance would not cause the Company to forego or delay construction of the facility; that the net cost of complying with the condition is $1,400,000, or less than 2% of the project cost; that complying with the condition would not affect wetlands or stack height; and that there is no evidence that the transformer wall would create an additional adverse visual impact (Intervenors Brief at 11). The Intervenors contended that the original Condition 22(a) would impose a relatively minor expense upon IDC, while reducing sound by 5 dBA (id. at 12).

The Siting Board extensively evaluated the noise impacts of the facility in two of the facility proceedings. Final Decision at 300-316; IDC Compliance Decision at 60-67. The Siting Board did

not highlight the transformers or CCW coolers as principal sources of noise from the facility. Id. The Siting Board noted that the Company proposed a variety of noise mitigation technologies to reduce noise from various facility components; these mitigation technologies included noise barrier walls or equivalent on all sides of the main and auxiliary transformers. Id. at 304. Modeling presented to the Siting Board indicated that, with the noise mitigation as proposed by the Company, the level of noise that is exceeded 90% of the time ("L_{90}") would increase by 4 dBA or less at all residential receptors save one, and would increase by 8 dBA at the remaining residential receptor, identified as receptor R-4. Id. at 314. The Siting Board found noise mitigation beyond that proposed by the Company to be cost-effective, and directed the Company to implement additional noise mitigation to limit L_{90} noise increases to 5 dBA at receptor R-4. Id. at 315. Such mitigation was estimated by the Company to cost $1,419,800. Id. at 305. The Siting Board found that, with the implementation of such mitigation, the environmental impacts of the facility would be minimized with respect to noise. Id. at 316. In the IDC Compliance Decision at 67, the Siting Board evaluated the change in noise levels associated with the change in facility configuration, and found that the noise impacts of the facility in the compliance configuration would be less than the noise impacts of the facility in the approved configuration.

The record shows that Condition 22(a) would increase the capital costs of the facility by approximately $1,400,000 and an undetermined operational cost, while providing little incremental relief from noise impacts. While the Intervenors contended that implementation of Condition 22(a) would result in a 5 dBA reduction in noise, the record does not indicate that total facility noise levels would be 5 dBA lower with Condition 22(a), or any lower at all. Because Condition 22(a) increases the cost of the facility significantly while providing little incremental benefit, the Siting Board finds that Condition 22(a) is burdensome. Further, because Condition 22(a) does not represent the lowest cost means to achieve the desired level of noise mitigation, the Siting Board concludes that Condition 22(a) is at odds with our mandate to implement policies to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Consequently, the Siting Board finds that Condition 22(a) is a burdensome condition which has a substantial impact on the responsibilities of the Siting Board.

The Settling Parties have proposed a Modified Transformer Condition. The Modified Transformer Condition would provide the same level of overall facility noise mitigation as the original Condition 22(a), at a significantly lower cost. Thus the Modified Transformer Condition is generally consistent with the Siting Board's mandate to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

However, the Siting Board notes that the Modified Transformer Condition provides that, if IDC builds the higher walls, any related and necessary plant layout changes would be deemed approved by both the Siting Board and the Zoning Board. While this provision apparently is acceptable to the Zoning Board, it is not acceptable to the Siting Board, as it would relieve the Company of any obligation to report even major changes in project layout to the Siting Board. Without having layout changes specified, the Siting Board would not be able to determine the facility's environmental impacts, and would not be able to determine whether the facility, as modified, would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Our concern can be resolved by omitting the reference to the Siting Board from the Modified Transformer Condition.

Based on the record in this case and the facility proceedings, the Siting Board finds that construction of the facility with noise barrier walls around the main transformers and CCW coolers, or with equivalent noise mitigation, as set forth in the Modified Transformer Condition, is compatible with considerations of environmental protection, public health, and public safety. Consequently, the Siting Board adopts the Modified Transformer Condition, with the further modification that the reference to the Siting Board be omitted. Further, the Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to construction of noise barrier walls around the main transformers and CCW coolers, or equivalent noise mitigation.

g. PILOT Condition

Condition 23 of the Special Permits required the Company to enter into a PILOT Agreement

on or before July 1, 2001, and stated that the obligations of the Agreement must be at least equal to those contained in agreements existing between the Town of Bellingham and industries of a similar nature (Exh. IDC-2, App. E, Tab 65, at 25). The record contains no evidence that a PILOT Agreement was reached by July 1, 2001.

The Company argued that Condition 23 is burdensome because it is inconsistent with both the Final Decision and the IDC Compliance Decision (Company Brief at 20). IDC states that under the PILOT Condition, if a PILOT Agreement was not executed by July 1, 2001, which it was not, IDC's Special Permits could be void and IDC would be unable to construct the facility (id.). Further, IDC asserted that the Zoning Board has no authority to condition IDC's Special Permits on actions the performance of which lies beyond IDC's control (id. at 22, citing, V.S.H. Realty, Inc. v. Zoning Bd. of Appeals of Plymouth, 30 Mass. App. Ct. 530 (1991)). Therefore IDC argued that, since IDC has no control over the Town of Bellingham's willingness to negotiate or execute a PILOT Agreement, the Zoning Board did not have the authority to impose Condition 23 (id. at 22).

IDC stated that the Settling Parties agreed to modify Condition 23 to state: (1) that IDC shall make good faith efforts to meet and negotiate a PILOT Agreement with Bellingham; and (2) that failure of the parties to reach an agreement by July 1, 2001 shall not constitute grounds for violation of the Special Permits ("Modified PILOT Condition") (Exh. IDC-2(S)). However, IDC stated that the agreement reached by the Settling Parties does not change the fact that the condition currently in effect is Condition 23 as it is worded in the Special Permit (Company Reply Brief at 6).

The Intervenors argued that Condition 23 is not a burdensome condition which has a substantial impact on the responsibilities of the Siting Board (Intervenors Brief at 9-10). The Intervenors asserted that Condition 23 merely places a time limit upon IDC to fulfill an obligation IDC voluntarily incurred by executing a Wastewater Services agreement with Bellingham (id.). The Intervenors also asserted that IDC's argument that Condition 23 is not within the Zoning Board's authority must fail because G.L. c. 169, § 69K½ does not empower the Siting Board to decide whether conditions to a permit lie within an agency's jurisdiction (Intervenors Brief at 9). Instead, the Intervenors argued, the Siting Board's authority is limited to determining whether a condition is regulatory in nature (id.). The Intervenors

asserted that Condition 23 is regulatory in nature because it is designed to ensure compliance with the regulatory criteria that govern the issuance of special permits in the Town of Bellingham and thus, G.L. c. 169, § 69K½ (iv) does not apply (id.).

As a preliminary matter, we note that the Siting Board did not review the issue of the PILOT Agreement in the Final Decision. In the Final Decision, the Siting Board, as required by its statutory mandate, reviewed the environmental impacts associated with the facility and determined that the facility would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. In Section III.B, above, the Siting Board determined that the appropriate scope of analysis for Condition 23 is whether it constitutes a burdensome condition and whether the Zoning Board acted outside its authority in requiring the Condition.

The Siting Board notes that on December 21, 1999, it approved the construction of the facility with a net nominal output of 700 MW and that on September 21, 2000 it approved the construction of the facility at a reduced net nominal output of 525 MW. Pursuant to G.L. c. 164, § 69J¼, once a generating facility is approved by the Siting Board, it shall be deemed to contribute to a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Since no information was submitted to indicate otherwise, the Siting Board concludes that a PILOT Agreement was not reached by the July 1, 2001 date specified in Condition 23. Therefore, under the current terms of Condition 23 the facility cannot be constructed. The Siting Board finds that Condition 23, which would preclude the construction of a generating facility that contributes to a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, is in conflict with the Siting Board's mandate to ensure a reliable energy supply for the Commonwealth. Consequently, the Siting Board finds that Condition 23 is a burdensome condition which has a substantial impact on the responsibilities of the Siting Board as set forth in G.L. c. 164, § 69K½.[18]

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[18] Because the Siting Board has found that original Condition 23 is a burdensome condition which has a substantial impact on the responsibilities of the Board, the Siting Board need not reach the issue of whether original Condition 23 is a non-regulatory condition.

The Modified PILOT Condition, which was agreed to by IDC, the Town of Bellingham and the Zoning Board, allows for construction of the facility even though the Settling Parties did not execute a PILOT Agreement by July 1, 2001. The proposed modification removes the burdensome aspects of original Condition 23 and allows negotiations regarding the PILOT Agreement to continue.

The Siting Board notes that the PILOT Agreement, when negotiated, will address issues of local economics (including, primarily, the annual revenues to be paid by IDC to Bellingham). These issues are far removed from matters of environmental impacts, public health, and public safety. Therefore, the Siting Board need not make a finding pursuant to G.L. c. 164, § 69O½ regarding the bearing of the Modified PILOT Condition on the facility's compatibility with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the Modified PILOT Condition has no bearing on whether the facility would conform to local or state laws, ordinances, by-laws, rules, or regulations.

C. Findings

Pursuant to G.L. c. 164, § 69O½, the Siting Board must make four findings to support the issuance of a Certificate of Environmental Impact and Public Interest for a generating facility. First, the Siting Board must determine that the issues raised by the agency or agencies whose permits or approvals are at issue in the Certificate proceeding have been addressed in a comprehensive manner by the Board, either in its prior approval of the generating facility or in the Certificate proceeding itself. The Siting Board also must address: (1) the compatibility of the generating facility with considerations of environmental protection, public health and public safety; (2) the extent to which construction and operation of the generating facility will fail to conform with existing state and local laws, rules and regulations and the reasonableness of exempting it from conformance, consistent with the implementation of the energy policies in G.L. c. 164; and (3) the public interest or convenience requiring construction and operation of the generating facility.

In this section, the Siting Board addresses each of these four statutory requirements, based on its analysis in Sections III.B. 3, above..

1. Issues Raised by the Agency

In Section III. B. , above, the Siting Board found that it must determine that the issues raised by the Zoning Board in support of the three challenged conditions have been comprehensively addressed either in the underlying facility proceedings or the Certificate proceeding. In addition, the Siting Board found that it must determine that it has addressed the subject matter of the Five Special Permits either in the underlying facility proceedings or in the Certificate proceeding.

With respect to the issues raised in support of the three contested conditions, the Siting Board determined that in light of the MDEP's issuance of the Conditional Air Quality Permit, the ZAT Condition has been rendered moot, with no remaining issues to be addressed. The Siting Board also determined that since the Transformer Condition was imposed as a part of a general noise mitigation package, the issue raised by this condition is the minimization of noise generated by the facility. Regarding the PILOT Condition, the Siting Board determined that substantive issues related to the PILOT Condition are beyond the scope of the Siting Board's statutory authority, and that the Siting Board's inquiry is limited to the issue of whether the condition constitutes a burdensome condition in accordance with G.L. c. 164, § 69K½, and whether Zoning Board acted outside its authority in requiring the condition.

In Sections III.B.3.(a-f), above, the Siting Board reviewed the subject matter of each of the Five Special Permits as well as the issues raised by the Transformer Condition, in light of its findings in the facility proceedings. For ease of review, we summarize each below.

a. Building Height

In the Final Decision, the Siting Board reviewed building and structure height, and focused its inquiry on the visual impacts of a 190 foot stack. Final Decision at 292-300. The Siting Board found that with implementation of Condition C, to require reasonable off-site mitigation of visual impacts, the visual impacts of the facility would be minimized. Id. at 300. In the IDC Project Change Decision, the Siting Board reviewed the visual impacts of a 225 foot stack, and revised Condition C to offer the option of larger trees. The Siting Board found that with the implementation of Condition C, as revised,

the visual impacts of the facility would be minimized. IDC Project Change Decision at 6-9. In this proceeding, the Siting Board reviewed the heights of several buildings that were not previously addressed, and found that the surrounding wooded areas would generally screen these buildings. Consequently, the Siting Board finds that is has comprehensively addressed issues related to building heights either in its prior approval of the facility or in this proceeding.

b. Air Quality

The Siting Board extensively reviewed air quality impacts of the facility in the facility proceedings, and found that with implementation of certain NO_X and CO_2 offset measures, the facility's air quality would be minimized and that air toxic emissions from the facility would have no discernable public health impact. Final Decision at 348-349. Since the Final Decision, MDEP issued its Conditional Air Quality Permit for the facility, which reduced anticipated emissions. In this proceeding, we noted that the local air quality impacts of the facility would be further reduced by the use of a 225-foot stack. We also noted that, while the Siting Board did not previously evaluate issues related to the emission of asbestos, benzene, beryllium, or vinyl chloride, we concur with the Zoning Board's conclusion that these substances would not be emitted from the facility. Consequently, the Siting Board finds that it has comprehensively addressed issues related to air quality either in its prior approval of the facility or in this proceeding.

c. Exterior Lighting

In the Final Decision, the Siting Board evaluated the impacts of nighttime lighting in its analysis of the visual impacts of the facility. Id. at 296-300. In this proceeding, the Siting Board reviewed the need for facility lighting, and the public safety benefits associated with lighting in general, and particularly aviation lighting on the stack. The Siting Board found that an upward component to air traffic safety lighting is likely to be essential to its proper public safety function, and concluded that the proposed revision to Condition 6 of the Special Permits is not compatible with considerations of environmental protection, public health, and public safety. Consequently, the Siting Board finds that it has

comprehensively addressed issues related to exterior lighting either in its prior approval of the facility or in this proceeding.

d. Temporary Structures and Parking

In the Final Decision, the Siting Board reviewed the land use and visual impacts of facility construction, as well as construction period traffic and noise impacts. Id. at 306, 316 and 322-329. In this proceeding, the Siting Board determined that the use of temporary structures and parking allowed pursuant to Special Permit 3 is consistent with our Final Decision. In addition, the Siting Board found that new Condition 24 of the proposed Certificate further mitigates long-term impacts of the use of temporary structures and parking by providing for the restoration of the temporary workspace to a vegetated condition. Consequently, the Siting Board finds that it has comprehensively addressed issues related to temporary structures and parking either in its prior approval or in this proceeding.

e. Hazardous Materials

In the Final Decision and the IDC Compliance Decision, the Siting Board extensively reviewed the Company's plans for storage and handling of hazardous materials, including the use and storage of aqueous ammonia. Final Decision at 316-312; IDC Compliance Decision at 67-68. The Siting Board did not explicitly address in the facility proceedings the storage and handling of materials other than ammonia and hazardous waste, except with respect to spill control and prevention. In this proceeding, the Siting Board found that the proposed additional Condition 25, which requires all chemicals to be stored and handled in accordance with the applicable MSDS, should address both environmental and public safety concerns. Consequently, the Siting Board finds that it has comprehensively addressed issues related to hazardous materials either in its prior approval of the facility or in this proceeding.

f. Transformer Condition

In Section III. A.2.a (ii), above, the Siting Board found that the issue raised by the Zoning

Board in the Transformer Condition is the minimization of noise generated by the facility. In the Final Decision, the Siting Board extensively evaluated the noise impacts of the facility and found that with implementation of noise mitigation that would limit L_{90} noise increases at receptor R-4 to 5 dBA, the environmental impacts of the facility would be minimized with respect to noise. Final Decision at 360. In the IDC Compliance Decision, the Siting Board evaluated the change in noise levels associated with the change in the configuration of the facility, and found that there would be a reduction in noise impacts as a result of the revised configuration. IDC Compliance Decision at 67. In this proceeding, the Siting Board found that construction of noise barrier walls around the main transformers and CCW coolers, or equivalent noise mitigation, as set forth in the Modified Transformer Condition, is generally consistent with the Siting Board's mandate to provide a reliable energy supply at the lowest possible cost. The Siting Board found, however, that it would retain its jurisdiction to review any project changes related to building the higher walls. Consequently, the Siting Board finds that it has comprehensively addressed issues related to noise mitigation either in its prior approval of the facility or in this proceeding.

The Siting Board has considered the issues raised by the Zoning Board, as well as the subject matter of each of the Special Permits and has determined that each issue has been addressed comprehensively, either in the Final Decision, the IDC Compliance Decision, the IDC Project Change Decision, or in this proceeding. Consequently, the Siting Board finds that the issues raised by the agency whose action is at issue in this proceeding have been addressed in a comprehensive manner by the Siting Board, either in its prior approval of the facility, or in this proceeding. Further, the Siting Board finds that it has addressed the subject matter of each Special Permit to the extent necessary to determine the environmental protection, public health and public safety implications of the permits.

2. Compatibility with Considerations of Environmental Protection, Public Health and Public Safety

Pursuant to G.L. c. 164, § 69O½, the Siting Board must address the compatibility of the generating facility with considerations of environmental protection, public health and public safety in its

decision on an Application for a Certificate.

In the Final Decision, the Siting Board conducted a comprehensive review of IDC's proposal to construct a 700 MW natural gas-fired combined-cycle power plan. See Final Decision. The Siting Board comprehensively reviewed the air quality impacts, water quality impacts, visual impacts, noise impacts, traffic impacts, safety impacts, electric and magnetic field impacts and land use impacts of the generating facility as proposed, and concluded that, upon compliance with certain conditions, the generating facility at the site "...would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." Id. at 359.

In the IDC Compliance Decision, the Siting Board reviewed the Company's proposed change in turbine vendors with a resulting reduction of output of the facility from 700 MW to 525 MW. The Siting Board found that, with conditions, this change would not alter in any substantive way the Siting Board's analysis of the project's environmental impacts. IDC Compliance Decision at 76.

In the IDC Project Change Decision, the Siting Board reviewed project changes resulting from Zoning Board and MDEP review of the facility including: (1) an increase in the facility stack height from 190 feet to 225 feet; (2) a reduction in the projected emissions of certain criteria pollutants; (3) a change in the air permit limits for ammonia emissions; (4) a reduction in the size of the ammonia storage tank from 40,000 gallons to 29,000 gallons; and (5) a change in departure time for the main construction shift. The Siting Board found that changes related to a decrease in criteria pollutants, a change in the air permit limits for short term ammonia and a decrease in the size of the ammonia tank did not require further inquiry. The Siting Board also found that upon compliance with revised Conditions C and G, regarding mitigation of visual impacts of the facility stack, and mitigation of traffic impacts of the main construction shift, the Company's plans for the construction of the facility would minimize the environmental impacts of the facility consistent with the minimization of cost associated with the mitigation, control, and reduction of the environmental impacts of the facility. IDC Project Change Decision at 13-15.

In Section III.B.3.(a-f), above, the Siting Board has reviewed the issues related to the environmental, public health and public safety implications of the proposed Certificate and has found

that:

- Construction of the facility, with buildings and structures extending to the heights described in the Special Permits, is compatible with considerations of environmental protection, public health, and public safety.

- Construction and operation of the facility, which would emit criteria pollutants in quantities that would trigger certain requirements, is compatible with considerations of environmental protection, public health, and public safety.

- The use of temporary structures and parking during construction of the facility is compatible with considerations of environmental protection, public health, and public safety.

- Construction of the facility, with exterior lighting as described in the Special Permits issued by the Zoning Board, is compatible with considerations of environmental protection, public health and public safety.

- The use and storage of hazardous materials, including aqueous ammonia, at the facility is compatible with considerations of environmental protection, public health, and public safety.

- Construction of the facility with noise barrier walls around the main transformers and CCW coolers, or with equivalent noise mitigation, as set forth in the Modified Transformer Condition, is compatible with considerations of environmental protection, public health and public safety.

Consequently, based on its findings in the Final Decision, the IDC Compliance Decision, the IDC Project Change Decision, and Section III.B.2, above, the Siting Board finds that the construction

and operation of the facility, in compliance with the Special Permits issued by the Zoning Board and modified in the attached Certificate are compatible with considerations of environmental protection, public health and safety.

3. Conformance with Existing State and Local Laws

G.L. c. 164, § 69O½ requires the Siting Board to include in its Decision a finding regarding "the extent to which construction and operation of the generating facility will fail to conform with existing state and local laws, ordinances, by-laws, rules, and regulations and [the] reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies contained in [G.L. c. 164]." G.L. c. 164, § 69O½ (ii). In the Final Decision, the Siting Board reviewed the facility's consistency with the policies of the Commonwealth, and found that the facility is consistent with current environmental protection policies of the Commonwealth and with such energy policies of the Commonwealth as have been adopted by the Commonwealth for the specific purpose of guiding the decisions of the Siting Board. Final Decision at 357-358. In Section III. B.3, above, the Siting Board has reviewed the extent to which the construction and operation of the facility, in compliance with the Special Permits issued by the Zoning Board and modified in the attached Certificate, conform with existing state and local laws, and has made the following findings:

- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to construction of the facility, with respect to buildings and structure heights.

- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to regulated air emissions.

- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to the use of temporary structures and

parking during construction of the facility.

- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to exterior lighting.

- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to storage and use of hazardous materials.

- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rule or regulations with respect to construction of noise barrier walls around the main transformers and CCW coolers, or equivalent noise mitigation.

Consequently, the Siting Board finds that the construction and operation the facility in compliance with the Five Special Permits issued by the Zoning Board and modified by the Siting Board in the attached Certificate would conform with existing state and local laws ordinances, by-laws, rules, and regulations.

4. Public Interest or Convenience

Pursuant to G.L. c. 164, § 69O½, the Siting Board must address the public interest or convenience requiring construction and operation of the generating facility in its decision on an application for a Certificate. In the facility proceedings, the Siting Board, after reviewing the site selection process and the environmental impacts of the facility, found that upon compliance with certain conditions, the construction and operation of the facility would "provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." Final Decision at 359; Compliance Decision at 76. The Siting Board also found that, upon compliance with certain conditions, the construction and operation of the facility would "minimize the

environmental impacts of the facility consistent with the minimization of cost associated with the mitigation, control, and reduction of the environmental impacts of the proposed generating facility." Project Change Decision at 15.

Accordingly, after reviewing the proposed generating facility and its compatibility with considerations of environmental protection, public health and public safety, the Siting Board finds that the public interest requires the construction and operation of IDC's generating facility.

IV. DECISION

Pursuant to the Siting Board's enabling statute, the Siting Board shall issue a Certificate of Environmental Impact and Public Interest with respect to a generating facility only if the Siting Board determines that the issues raised by the state or local agencies, whose actions are the subject of the petitioner's Application have been comprehensively addressed, either in the Siting Board's approval of the facility under G.L. c. 164, § 69J¼, or in the Siting Board's review of the facility under G.L. c.164, § 69K½. G.L. c 164, § 69O½. In addition, the Siting Board's decision to issue a Certificate must include findings with respect to: (1) the compatibility of the generating facility with considerations of environmental protection, public health, and public safety; (2) the extent to which the generating facility will not conform to existing state and local laws, ordinances, by-laws, rules, and regulations, and the reasonableness of exempting it from conformance, consistent with the implementation of the energy policies of G.L. c. 164; and (3) the public interest or convenience requiring construction and operation of the generating facility. G.L. c. 164, § 69O½.

In Section III C. 1 above, the Siting Board has found that the issues raised by the agency whose actions are at issue in this proceeding have been comprehensively addressed either in the facility proceeding, the facility compliance proceeding, the facility project change proceeding, or in this proceeding.

In Section III. C. 2 , above, the Siting Board has found that the construction and operation of the generating facility, in compliance with the Special Permits issued by the Zoning Board, and modified in the attached Certificate, is compatible with considerations of environmental protection, public health,

and public safety.

In Section III. C. 3 , above, the Siting Board has found that the construction and operation of the generating facility, in compliance with the Special Permits issued by the Zoning Board, and modified by the Siting Board in the attached Certificate, would conform with existing state and local laws, ordinances, by-laws, rules, and regulations.

In Section III. C. 4 , above, the Siting Board has found that the public interest requires the construction and operation of IDC's generating facility, with the modified and revised conditions of the Special Permits.

Accordingly, the Siting Board GRANTS the Company's Application for a Certificate of Environmental Impact and Public Interest with respect to the issuance of Five Special Permits with conditions as modified in the attached Certificate. The Siting Board also issues a Certificate of Environmental Impact and Public Interest, a copy of which is attached hereto as Attachment A and is part of the Siting Board's Final Decision in this proceeding.

In accordance with G.L. c. 164, § 69K½, this Certificate shall be enforced by the Town of Bellingham Zoning Board of Appeals and Building Inspector as if directly granted by the Zoning Board.

The Company shall file this Certificate with the Town of Bellingham Building Inspector and Town Clerk.

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Selma Urman
Hearing Officer

Dated this 12th day of October, 2001.

COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD

Application of IDC Bellingham LLC for a Certificate of Environmental Impact and Public Interest	)	EFSB 01-1

CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST AND SPECIAL PERMITS

Pursuant to its authority under G.L. c. 164, §§ 69K½-O½, the Energy Facilities Siting Board hereby (1) issues a Certificate of Environmental Impact and Public Interest ("Certificate") as provided by G.L. c. 164, §§ 69K½, and (2) grants Five Special Permits pursuant to the Town of Bellingham's Zoning By-Laws ("Zoning By-Laws") to IDC Bellingham LLC ("Company").

The Five Special Permits are granted to the Company relative to its proposed electric generating facility to be located in an Industrial District at the corner of Depot Street and Box Pond Road in Bellingham, Massachusetts ("Project"). The Special Permits granted are as follows:

1. A Special Permit under Zoning By-Laws Sections 1500 and 2610 to construct and use certain structures, as hereafter described, in excess of otherwise applicable height restrictions. The structures exempted from the Zoning By-Laws' height restrictions are: One dual-flue 225-foot high stack; one air-cooled condenser with the top of the distribution piping 114 feet above grade; one multi-leveled combustion turbine/steam turbine/heat recovery steam generator building with a maximum roof height of 90 feet; two high-pressure steam drums, two intermediate pressure steam drums, and two low pressure steam drums with relief vents 107 feet above grade surrounded by steam drum walkways and lighting fixtures 98 feet above grade and installed on the 90-foot high roofs; one raw water/fire water storage tank no more than 46 feet above grade; and three 80-foot high 345-kilovolt support structures.

2. A Special Permit under Zoning By-Laws Sections 1500, 3240, and 3290 regarding Air Quality.

3. A Special Permit under Zoning By-Laws Sections 1500, 2200, and 2400 for the use of temporary structures and parking for more than three light commercial vehicles or more than one heavy commercial vehicle during construction of the Project.

4. A Special Permit under Zoning By-Laws Sections 1500, 3232, 3234 and 3290 to implement a lighting plan consistent with Exhibit A attached hereto and incorporated herein.

5. A Special Permit under Zoning By-Laws Sections 1500, 3250 and 3290 for the storage and use of the hazardous materials listed in Exhibit B attached hereto and incorporated herein.

This Certificate and the Special Permits are issued subject to the following conditions:

1. A work schedule, consistent with Exhibit C attached hereto and incorporated herein, shall be followed during the construction phase of the Project. Any modification of the work schedule by the Company shall be approved by the Town of Bellingham Zoning Board of Appeals ("Zoning Board") after a public hearing, with notice to all parties.

2. At the point in time when the Project is deemed to have operated for its useful life and the Company or its successors has determined it is no longer prudent to staff and maintain the Project, the Company shall cause the Project to be demolished and the land returned to a clean, graded, and seeded condition, all in accordance with a fully executed Decommissioning Fund, described in Paragraph 3 hereafter, executed prior to the issuance of any occupancy permits.

3. On the first July 1 after the Project commences "commercial operation" (as defined in the Water Agreement), and on the same day each year thereafter for a period of 20 years, the Company shall deposit $35,000 into an interest-bearing escrow account in a Massachusetts bank in the name of the Town of Bellingham and subject to its sole control. If the Company complies with the above Project demolition obligation, at the end of the Project's useful life as determined by the Company, the balance in the escrow account, including all accrued interest, shall be released to the Company upon successful demolition and land restoration as determined by the Zoning Board. In the event the Company does not commence compliance with the above-described demolition and restoration within 60 days after receipt of written notice from the Zoning Board to commence, all monies in the escrow account, including accrued interest, shall be utilized by the Town of Bellingham for demolition and restoration. Any balance remaining after such demolition and restoration by the Town of Bellingham shall be refunded to the Company.

4. The Company shall maintain the Project site and any utility easement routes in a clean and orderly condition, and shall routinely perform landscape care and Project painting, and shall keep the site generally free of litter.

5. Once in commercial operation, construction related facilities and equipment shall be removed from the site as quickly as practically possible.

6. The stack shall be 225 feet high (design specifics to be determined by the Company) and stack lighting or marking requirements shall be no more than that required by the Federal Aviation Administration ("FAA").

7. Location of the steam turbine, gas turbine, HRSG, air-cooled condenser and switching yard on the site shall be substantially similar to those locations shown on Exhibit D attached hereto and incorporated herein (the Site Plan), except as may be modified with the Town of Bellingham Building Inspector's approval.

8. No obnoxious, offensive, or dangerous odors or like emissions from the Project shall be reasonably detectable beyond the Project property line. Any related complaints shall be promptly investigated by the Company. The nature of the complaint, status of the investigations, and resolution shall be reported in writing to the Town of Bellingham's Health Agent within seven days of a complaint, and corrective action taken as appropriate.

9. The Company shall use reasonable efforts to minimize noises during construction, startup and acceptance testing. The Town of Bellingham Building Inspector and Health Agent shall be notified at least 48 hours prior to any blasting.

10. The Company shall have the right to assign the Special Permits to another entity subject to the written consent of the Zoning Board, which consent shall not be unreasonably withheld, provided that such entity has demonstrated successful technical and operational experience and financial capability to undertake the obligations of the Special Permits.

11. The Company shall make an immediate report of any significant incident at the Project to the Town of Bellingham Health Agent and Board of Selectmen.

12. A responsible Project official shall be designated by the Company as the operation's community contact on a daily available basis. This individual shall be responsible for resolving citizen and municipal complaints and inquiries.

13. The Company shall obtain all permits required by law from all other governmental agencies, necessary to construct the Project.

14. Prior to the commencement of construction, the Company shall cause the following two parcels of land to be placed under a permanent conservation restriction running in favor of the Town of Bellingham or the Town of Mendon or a not-for-profit conservation organization in the case of the Mendon parcel:

(a) Lot 2 as shown on the Subdivision Plan; and

(b) The Mendon Parcel.

15. Land within 300 feet of the current westerly right-of-way line of Depot Street; land within 200 feet of the current northerly and/or northeasterly right-of-way lines of Box Pond Road and Box Pond Drive shall be maintained as "Buffer Land." Such Buffer Land may include and overlap minimum

front and side yards required under Section 2600 of the Zoning By-Laws. All Buffer Land is subject to the following conditions:

(a) Front and side yards within Buffer Land may be landscaped in conformance with the Zoning By-Laws;

(b) Perimeter, security and safety fences may be erected on Buffer Land;

(c) Reasonable access roads and drives and water lines, gas lines, electric lines, other utility lines, water wells, water well pumps and pump houses (not to exceed a footprint of 1,500 square feet and a height of 20 feet) and storm drainage lines, catch basins and manholes, may be erected and maintained on or under Buffer Land;

(d) No buildings or structures may be installed or maintained on or under Buffer Land except as set forth in Items 15(a) through 15(c), above.

16. Prior to the commencement of construction of the Project, the Company shall work with and, where necessary, provide appropriate training to the Town of Bellingham Fire Department, the Police Department, the Department of Public Works and the Local Emergency Planning Committee ("LEPC") to develop a final construction Emergency Response Plan; prior to the commencement of operation of the Project, the Company shall work with and, where necessary, provide appropriate training to the Town of Bellingham Fire Department, the Police Department, the Department of Public Works, and the LEPC to develop a final operations Emergency Response Plan; and shall work with and, where necessary, provide appropriate training to the Town of Bellingham Conservation Commission, Fire Department, Department of Public Works, and the LEPC to develop a final Spill Prevention, Control and Countermeasure Plan – which plans shall address all applicable items set forth in Exhibit E attached hereto and incorporated herein.

17. Prior to the commencement of construction, the Company shall work with the Town of Bellingham Police Department to develop a traffic mitigation plan which plans shall address all applicable items set forth in Exhibit E attached hereto and incorporated herein.

18. All exterior building colors and landscape materials shall be non-reflective (dark) and subject to the prior written approval of the Town of Bellingham Planning Board, which shall not be unreasonably withheld or delayed.

19. Prior to the commencement of operation of the Project, the Company shall have (i) received the approval, which approval shall not be unreasonably withheld or delayed, of the Town of Bellingham LEPC for the inventory of equipment described in Exhibit F hereto; and (ii) paid its appropriate share of the costs to purchase equipment set forth in such inventory.

20. No condition 20

21. On the first July 1 after the Project commences "commercial operation" (as defined in the Water Agreement), and on every July 1 thereafter for the next nine years, the Company shall provide $50,000 in funds to the Town of Bellingham as a Property Value Loss Compensation Program or a Neighborhood Improvement Fund to be expended or used in the sole discretion of the Town of Bellingham's Board of Selectmen. To qualify for same, a party must be a Bellingham residential property owner and accept the Bellingham assessed value of property for tax purposes or provide a Licensed Appraiser whose opinion includes an analysis of sales of existing homes in comparable residential areas, performed within six months of this agreement. Further, the neighborhood improvements must be in the Town of Bellingham, and within a one-mile radius of the center of the project site.

22. The Plant shall be designed with the following noise mitigation measures:

(a) Transformers and CCW coolers shall have (1) concrete walls on at least four sides that are ten (10) feet higher than said transformers or CCW coolers, respectively; or, in the alternative, (2) equivalent noise mitigation, such that the maximum plant-generated noise from IDC's facility shall not exceed (i) the Massachusetts DEP ten-decibel limit on increases from new noise sources, as detailed in DEP Policy 90-001; (ii) the 65-decibel limit set in the applicable Town of Bellingham noise ordinance; (iii) a 45-decibel steady-state noise limit for residential receptors in the Town; and (iv) a 40-decibel limit at the closest residence in existence on the date of this decision (or at any location beyond the distance to such residence) during normal operation of IDC's plant. If IDC builds higher walls in accordance with this condition, any related and necessary plant layout changes, including height, are deemed approved without further action by the Zoning Board.

(b) Building doors shall be kept closed at all times except for when they are being used for specific entry or exit. Doors shall be acoustically designed for adequate noise reduction.

(c) All ventilation openings to the turbine building and any buildings or enclosures designed and installed for sound attenuation shall be equipped with state-of-the-art[19] sound attenuation mufflers or baffles, or equivalent.

[19] State-of-the-art sound abatement means and measures shall mean for purposes of this decision the use of means and measures that will provide the best sound abatement for the equipment, process or source noted herein as recognized by current engineering principles and practices at the time of construction necessary to meet the requirements of the permit. Means and measures of sound abatement shall be considered equivalent if they provide noise reductions which differ by no more than 2 dBA at the equivalent distance.

(d) Gas turbines, steam turbines and the HRSGs shall be contained within a structure specifically designed to attenuate sound. The walls of these structures shall be made of state-of-the-art sound attenuation material to minimize sound that could be emitted from these sources. The gas turbine intakes shall be equipped with at least twelve feet of silencer, or equivalent.

(e) All on-site gas supply lines shall be buried under ground, contained within state-of-the-art acoustically treated structures, or specifically constructed with state-of-the-art sound attenuation materials to prevent these sources from causing excessive noise, a pure tone or tonal sound audible off property.

(f) All high pressure steam lines shall be buried under ground, contained with state-of-the-art acoustically treated structures, or specifically constructed with state-of-the-art sound attenuation materials.

(i) The main steam lines from the heat recovery steam generators to the steam turbine buildings will be enclosed or acoustically treated.

(ii) The natural gas pipelines from the gas compressor building to the gas turbines will be buried, enclosed, or acoustically treated.

(g) HRSG design shall include a silencer with gas turbine exhaust duct cladding and state-of-the-art noise attenuation cladding as necessary. HRSG high-pressure feedwater and recirculation pump design shall include pumps enclosed in a building with sound attenuating cladding. The HRSG shall also be enclosed by state-of-the-art sound attenuation walls and roofing.

(h) Turbine exhausts shall be equipped with state-of-the-art sound attenuating mufflers.

(i) All steam release vents (normal and emergency) shall be fitted with sound abatement mufflers prior to the initial testing and start up.

(i) Non-emergency steam releases shall be conducted only during daylight hours.

(ii) The Company shall notify the Town of Bellingham Board of Health and Police Department before such non-emergency releases are to be conducted.

(j) The air-cooled condenser shall be designed and constructed with state-of-the-art noise attenuation features using low noise fans and motors as appropriate.

(k) Perimeter berms, noise abatement walls and other sound minimization features may be employed as necessary to minimize sound levels from the Plant.

(l) The maximum allowable Plant-generated noise during normal operation will be 40 dBA at the closest residence in existence on the date of this decision.

23. The Company shall make good faith efforts to meet with the Town of Bellingham, negotiate, execute and enter into a Payment in Lieu of Tax Agreement ("PILOT") on or before July 1, 2001, the obligations of which will be at least equal to existing agreements between the Town of Bellingham and industries of a similar nature. If a PILOT agreement has not been executed by July 1, 2001 despite the Company's efforts, such failure shall not be considered grounds for a violation of these Special Permits.

24. The Company shall work with the Town of Bellingham Conservation Commission to develop a plan for and to implement the restoration to a vegetative state of areas which are used for temporary structures and parking and other construction activities but which are not used for post-construction operation of the Plant. In the event the Town of Bellingham Conservation Commission requires trees to be planted in any such restored areas, such trees shall be bagged and burlap nursery stock planted in accordance with the technical specifications of the Town of Bellingham's Scenic Roads By-Law in effect as of the date of this decision.

25. All chemicals shall be stored and handled in accordance with the applicable Materials Safety Data Sheets ("MSDS").

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(Signature of the Chairman of the Energy Facilities Siting Board)

[EXHIBIT A]

[EXHIBIT B]

[EXHIBIT C]

[EXHIBIT D]

[EXHIBIT E]

[EXHIBIT F]

APPROVED by the Energy Facilities Siting Board at its meeting of October 12, 2001, by the members and designees present and voting: James Connelly (Chairman, DTE/EFSB); Deirdre K. Manning (Commissioner, DTE); W. Robert Keating (Commissioner, DTE); David L. O'Connor, Commissioner, Division of Energy Resources; Joseph Donovan (for Elizabeth Ames, Director of Economic Development); and Sonia Hamel (for Robert Durand, Secretary of Environmental Affairs).

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James Connelly, Chairman
Energy Facilities Siting Board

Dated this 12th day of October, 2001.

Appeal as to matters of law from any final decision, order or ruling of the Siting Board may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Siting Board be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Siting Board within twenty days after the date of service of the decision, order or ruling of the Siting Board, or within such further time as the Siting Board may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the clerk of said court. (Massachusetts General Laws, Chapter 25, Sec. 5; Chapter 164, Sec. 69P).