UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Joint Proceedings

In the Matter of	
NEW YORK STATE ELECTRIC & GAS CORPORATION AND LONG ISLAND LIGHTING COMPANY	Docket Nos. STN-50-596 STN-50-597
(New Haven 1 and 2 Nuclear Power Plant	

State of New York
Department of Public Service
Board on Electric Generation
Siting and the Environment

In the Matter of	
NEW YORK STATE ELECTRIC & GAS CORPORATION AND LONG ISLAND LIGHTING COMPANY	Case 80008
(New Haven/Stuyvesant Nuclear Generating Facility)	

APPLICANTS' MEMORANDUM ON THE LEGAL ARGUMENTS REGARDING STANDING ADVANCED AT PRE-HEARING CONFERENCE BY PROPOSED INTERVENORS AND APPLICANTS' ANSWER TO THE PETITION OF EMERSON MEAD AND THE TOWN OF CONESVILLE

Pursuant to the Board's request at the May 23, 1979 pre-hearing conference in the above captioned proceeding and set forth in the Board's June 20, 1979 order with regard to standing of certain proposed intervenors and pursuant to the Board's June 25, 1979 order regarding the request of Emerson Mead that he as an individual, and the Town of Conesville, be admitted as intervenors in this proceeding, the Applicants respectfully submit the following.

STANDING OF CONCERNED CITIZENS FOR SAFE ENERGY AND OTHER HUDSON RIVER INTERVENORS

Concerned Citizens for Safe Energy, Inc. (Concerned Citizens) is located in the Hudson Valley, 100-125 miles from the New Haven site. The petition to intervene contains no allegations that any member of the organization lives in the vicinity of the New Haven plant who would be harmed by the construction and operation of the proposed plant. In its Petition to Intervene, Concerned Citizens broadly stated its interests in this proceeding, and in Mr. Kafin's Affirmation in Support of Petition To Intervene (dated March 12, 1979), the purposes of the organization are set out as follows:

> 4...
> (a) To study and investigate environmental and public safety concerns involved with the construction of nuclear and/or fossil fuel power generating plants in Columbia County, the Hudson River Valley and elsewhere;

(b) To communicate publicly its findings and opinions;

(c) To study, investigate and communicate findings and opinions regarding alternate sources of electric power other than nuclear fuel.

At the Prehearing Conference held in Oswego, New York on May 23rd, 1979 it was urged that the broad purposes quoted above provide a basis for admitting Concerned Citizens as a party. There was much discussion as to the standing of this organization. (SM573-578). The broad statements quoted in the petition to intervene do not confer standing on Concerned Citizens.

Mr. Kafin relies on Scenic Hudson Preservation Conf. v. Federal Power Com'n., 354 F2d 608 (2nd Cir. 1965), as precedent for conveying standing upon Concerned Citizens. This case deals with the standing of a party to obtain review of decisions. It does not address the question involved here of initial right to be granted party status.

The Administrative Procedure Act grants standing to a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" (5 U.S.C.A. §702) and is one of the provisions controlling standing before administrative bodies such as the Nuclear Regulatory Commission.

In a series of cases beginning in 1970, the Supreme Court has developed the criteria governing the right of groups such as Concerned Citizens to participate in proceedings before administrative agencies.

In Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 25 L.Ed.2d 184, 90 S. Ct. 827 (1970), the plaintiffs challenged a ruling by the Comptroller of the Currency which would allow national banks to make data processing services available to bank customers and other banks. In respect of the question of standing a two-part test was used: "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." 397 U.S. 150, 152, 25 L.Ed.2d 184, 90 S. Ct. 827. The second question is "...whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S 150, 153, 25 L.Ed.2d 184, 90 S. Ct. 827. The Court ruled that the Association of Data Processing Service Organization was an appropriate organization representing persons potentially injured by the rule in question. Although the Camp case, in holding that the plaintiff had an economic interest and would be adversely affected by the proposed action, stated that non-economic issues can also confer

party status upon intervenors. However, the nature of allegations which must be made by persons who claim non-economic injuries were not specifically identified.

The next relevant case decided was Sierra Club v. Morton, 405 U.S. 727, 31 L.Ed.2d 636, 92 S. Ct. 1361 (1972) in which the issue was the nature of non-economic allegations necessary to establish status as a party. The Sierra Club, an environmental interest group, attempted to challenge a decision of the Forest Service which would permit commercial development of Mineral King Valley. The Court held that the Sierra Club lacked standing due to its failure to allege that it or its members would be affected by the development.

> The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area.... We do not question that this type of harm may amount to an "injury in fact"... Aesthetic and environmental well-being, like economic well-being are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. 405 U.S. 727, 734-735, 31 L.Ed.2d 636, 92 S. Ct. 1361.

The Court went further by saying:

> But a mere "interest in a problem" no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA.... if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. 405 U.S. 727, 739-740, 31 L.Ed.2d 636, 92 S. Ct. 1361.

Applicants submit that like the Sierra Club, Concerned Citizens for Safe Energy is a special interest organization which lacks the "injury in fact" to confer standing upon it.

In Warth v. Seldin, 422 U.S. 490, 45 L.Ed.2d 343, 95 S. Ct. 2197 (1975), which followed Sierra Club v. Morton, plaintiffs claimed that the town of Penfield's zoning ordinance was in contravention of their federal constitutional and civil rights. Here again, the "injury in fact" test was a key question:

> ...the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, "none may seek relief on behalf of himself or any other member of the class." 422 U.S. 490, 502, 45 L.Ed.2d 343, 95 S. Ct. 2197.

Under the Warth case, it is clear that Concerned Citizens for Safe Energy does not have an injury in fact.

Similarly, in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 48 L.Ed.2d 450, 96 S. Ct. 1917 (1976), the Court followed the holding of Sierra Club where several indigents and organizations consisting of indigents asserted that the Internal Revenue Service violated the Internal Revenue Code of 1954 and the Administrative Procedure Act by issuing a Revenue Ruling allowing favorable tax treatment to a non-profit hospital which only offered emergency room services to indigents.

The indigent organizations were held to have lacked standing:

> We note at the outset that the five respondent organizations, which described themselves as dedicated to promoting access of the poor to health services, could not establish their standing simply on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail. Since they allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. 426 U.S. 26, 39-40, 48 L.Ed.2d 450, 96 S. Ct. 1917.

Finally in Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 53 L.Ed.2d 383, 97 S. Ct. 2434 (1977), the Washington Apple Advertising Commission challenged the constitutionality of a North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers be identified by grade on the containers other than the applicable federal grade or a designation that the apples are not graded.

Enunciated here is a three-fold test for association standing:

> Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Based upon the above cases, Concerned Citizens for Safe Energy clearly lack standing in this case; it has alleged no harms to its members in fact, primarily because they are too remote from the New Haven site. Its general assertion that it is an organization with "...a charter mandated to study and investigate environmental and public safety concerns involved with the construction of nuclear and fossil fuel generating plants..." (SM 574), is not sufficient to confer standing. Without identification of specific individual members' injuries, Concerned Citizens is not entitled to participate in this litigation.

Mid-Hudson Nuclear Opponents have also failed to demonstrate injury to any of its members and it is not entitled to participate under the cases discussed above. There is a similar lack of demonstration of injury in the petitions of Columbia County and the Town of Stuyvesant and logic indicates that the principles discussed above should also apply to these entities.

ULSTER COUNTY ENVIRONMENTAL
MANAGEMENT COUNCIL, TOWN OF GARDINER

The Ulster County Environmental Council in its pleading of May 11, 1979[1] and the Town of Gardiner in its pleading of May 11, 1979[2] urge a change in the requirements for intervening in licensing proceedings based on the Three Mile Island incident.

> ...In light of new evidence related to the recent Three Mile Island incident, injury to the environment of Ulster County and the natural resources on which its residents depend, and injury to the health of its residents can result from a plant located at New Haven.
>
> ...The Three Mile Island plant, located about 240 miles from Albany, New York increased the background level of radiation there, as recorded by the NYS Dept. of Health. In our opinion, this new evidence requires a change in the NRC's policy regarding a show of standing based on distances averaging 50 miles. The Ulster County line is located about 130 miles from New Haven and therefore would definitely be effected in the event of a plant malfunction at New Haven.[3]
>
> ...We suggest that recent events at Three Mile Island No. 2 (TMI) require a change in the established 50 mile test of standing.

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(1) Received from the Office of the Secretary of the Commission with docket date stamp of June 13, 1979.

(2) Received from the Commission by copy of letter dated May 25, 1979 from Counsel for NRC Staff.

(3) Ulster County Environmental Management Pleading, May 11, 1979 pg 1.

> Our reason for making this suggestion is the finding of the New York Dept. of Health that 133Xe was identified in the Albany, New York atmosphere (New York Times, May 3, 1979, p. B12) some 4 weeks after release during the early hours of the TMI incident. Albany is over 200 miles from TMI indicating that an incident of similar magnitude at New Haven or anywhere in this region could significantly increase the radiation to which citizens of Gardiner are exposed.(4)

Although some of the events or consequences with the Three Mile Island incident may be incontestable, it is not clear that the assertions of the Town of Gardiner and the Environmental Management Council are either based on fact or the the conclusions are necessarily supported by fact. Furthermore, the Town and the Council have not represented that they are competent to make the assertions and conclusions upon which they urge the Board to rely. Assuming arguendo that radiation was measured at Albany and that radiation is associated with the Three Mile Island incident, the Town and the Council seem to suggest, if not urge, that the mere recordation or detection with sufficiently sensitive instrumentation of an event some miles from the event renders the consequences of the event significant at the location of detection. It is as if the Town and

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(4) Town of Gardiner's Pleading, May 11, 1979 pg 2.

Council were urging that, in an analagous vein, seismic events that are measurable hundreds, thousands or even tens of thousands of miles away from the earthquake, ipso facto, impairs the health and safety of persons located at any point of measurement or detection. In the absence of a determination from a competent source, of the consequences of the Three Mile Island incident and an assessment whether the impacts on the population are de minimus or not, the Applicants urge the Board to reject the Environmental Management Council's and Town of Gardiner's suggestions in this proceeding that any element needed to satisfy the requirements of standing be abrogated or altered.

PETITION OF EMERSON MEAD, INDIVIDUALLY AND ON BEHALF OF THE TOWN OF CONESVILLE

Mr. Mead's hand written and late petition[5] requests intervenor status in the "proceedings on the proposed Stuyvesant Nuclear Power Plant". (Petition, page 1). This untimely petition does not, on its face, establish grounds necessary for intervening in this proceeding in that the Petitioner, individually and as representative of the Town of Conesville, fails to satisfy the regulatory requirements regarding a showing of standing. Although residence within

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(5) Mr. Mead's undated petition was served upon the Applicants by Counsel for NRC Staff on June 19, 1979.

30-40 miles[6] of the reactor site is sufficient to satisfy the "zone of interest" test as set forth in the Pebble Springs case, Portland General Electric Co. (Pebble Springs Nuclear Plant, (Units 1 & 2), CLI 76-27, 4 NRC 610 (1976), and residence within 50 miles[7] might also satisfy this test, the Petitioner's remote location in Schoharie County, more than 100 miles from the proposed New Haven 1 & 2 facility, and the failure to particularize an injury that the Petitioner would sustain from the construction and/or operation of New Haven Units 1 & 2 as required by 10 CFR §2.714(a)(2), should preclude a finding of standing.

The notice appearing in the Federal Register on February 9, 1979, required that petitions to intervene be filed by March 12, 1979. Mr. Mead's petition was filed after that date. Other than the Petitioner's allegation that he wasn't aware of these proceedings as good cause for failure to file on time, Petitioner has failed to address the factors contained in 10 CFR §2.714(a)(1). With respect to the granting of discretionary intervention, in view of

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(6) Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 190, reconsideration denied, ALAB-110, 6 AEC 247, affirmed, CLI-73-12, 6 AEC 241 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station Unit 3), ALAB-125, 6 AEC 371, 372 n. 6 (1973); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631, 633-34 (1973).

(7) Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 at n. 4 (1977).

the Petitioners' silence on the factors contained in 10 CFR §2.714(a), (d) and the Pebble Springs case (Portland General Electric Co. (Pebble Springs Nuclear Power Plant Units 1 & 2), supra, at 614-17), the Petitioner has not justified, on the face of its pleading, the granting of party status as a matter of discretion.

Respectfully submitted,

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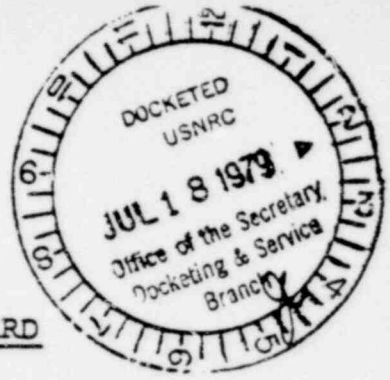

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
NEW YORK STATE ELECTRIC & GAS CORP.	)	Docket Nos. STN 50-596
AND LONG ISLAND LIGHTING CO.	)	50-597
	)	
(New Haven 1 & 2)	)	

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE BOARD ON
ELECTRIC GENERATION SITING AND THE ENVIRONMENT

In the Matter of the Application of the	)	
	)	
NEW YORK STATE ELECTRIC & GAS CORP.	)	
AND LONG ISLAND LIGHTING CO.	)	Case 80008
	)	
(New Haven 1 & 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANTS' MEMORANDUM ON THE LEGAL ARGUMENTS REGARDING STANDING ADVANCED AT PRE-HEARING CONFERENCE BY PROPOSED INTERVENORS AND APPLICANTS' ANSWER TO THE PETITION OF EMERSON MEAD AND THE TOWN OF CONESVILLE" in the above-captioned proceeding were served upon the individuals on the list attached hereto by deposit in the United States mail, first-class on July 13, 1979.

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