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NEW YORK STATE BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

Application of the NEW YORK STATE ELECTRIC & GAS CORPORATION and the LONG ISLAND LIGHTING COMPANY pursuant to Article VIII of the Public Service Law for a certificate of environmental compatibility and public need to construct two 1250-megawatt nuclear generating units in the Town of New Haven, Oswego County, or at an alternate site in the Town of Stuyvesant, Columbia County.

CASE NO. 80008

REPLY BRIEF OF ATTORNEY GENERAL ROBERT ABRAMS IN SUPPORT OF INTERLOCUTORY APPEAL BY ECOLOGY ACTION OF OSWEGO FOR DISMISSAL OF APPLICATION

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Statement of the Case

This case involves an application by the New York State Electric & Gas Corporation ("NYSE&G") and Long Island Lighting Company ("LILCO") for a certificate of environmental compatibility and public need to construct two 1250 megawatt nuclear-fueled electric generating facilities in the Town of New Haven, Oswego County or, alternatively, in the Town of Stuyvesant, Columbia County. The application was filed on November 22, 1978 under the old Article VIII of the Public Service Law, L.1972, c.385, and is based on the representation that NYSE&G and LILCO will share in the cost and output of

the proposed facility. However, in testimony filed on February 23, 1979 in Case 80003, Application for Jamesport Generating Facility, these applicants conceded that -- contrary to their assurance in the application -- they did not know whether LILCO would participate in building or owning the plant. They there testified that they did "not yet know whether it will prove to be desirable for LILCO to join with NYSE&G in building and owning New Haven..." This basic fact -- that LILCO is not committed to participation in the project -- is not denied in the applicants' brief in opposition to the appeal, dated July 25, 1979.

After that testimony was filed, Ecology Action of Oswego moved for dismissal of the application. On April 13, 1979 the Presiding Examiners denied the motion without prejudice to reassertion following discovery and the distribution of pre-filed testimony. Ecology Action then filed an interlocutory appeal with the Public Service Commission, pursuant to 16 NYCRR § 70.8.

By order issued on July 10, 1979, the Commission (Chairman Zielinski, abstaining) certified the appeal to this Board, recommending that the application be dismissed. The Commission reasoned that the Article VIII application was premature so long as ownership and utilization of the proposed facility were uncertain.*

* The Commission also concluded that an interlocutory appeal was proper, which conclusion is not challenged in applicants' brief.

Summary of the Attorney General's Position

It is the position of the Attorney General that the Commission's recommendation is correct and should be adopted by this Board in dismissing the application. Until the applicants are able to inform the Board with certainty who intends to build, own, and utilize the facility, they cannot even provide the information required to complete their application. Moreover, this Board should not proceed unless the applicants truly intend to go ahead with the project if they obtain approval. Neither this Board, the Department of Public Service, the Department of Environmental Conservation, nor other public entities or citizen groups should be required to expend their funds on an expensive proceeding when the project is uncertain and there is insufficient information to permit a study of its impacts.

ARGUMENT

THE APPLICATION MUST BE DISMISSED BECAUSE, CONTRARY TO ITS REPRESENTATION, AT LEAST ONE OF THE APPLICANTS IS NOT COMMITTED TO THE PROJECT

Applicants mis-state the issue raised by the motion to dismiss, insisting that the question is whether the facility is needed. In truth, however, the only issue

is whether the Presiding Examiners should spend their time holding lengthy hearings -- or the parties should spend their time on discovery and the preparation of testimony -- when LILCO is not committed to building the plant even if this Board approves. Put another way, should the Board require that the applicants be ready, able and eager to proceed with the project before subjecting itself and the parties to the expense of proceeding with the application? Alternatively, should the case continue although a major premise underlying the application -- LILCO's firm intention to be a joint owner -- appears to be untrue?

Significantly, NYSE&G has not said that it is prepared to build, or that it needs, the facilities by itself if LILCO is not ready to act as a joint owner. Therefore, LILCO's lack of commitment may signify the demise of this proposal.

Ownership of the facility must be known before the application to this Board can even be completed. An application for a certificate of environmental compatibility and public need must contain very detailed information about the prospective owner of, and proposed use for, the facility. So long as the issues of ownership and use are not resolved, this vital information cannot be provided or reviewed.

Examples of the detailed information about the owner required for the application appear in 16 NYCRR § 72.1, which is concerned with a need for the facility. Subdivision (a) requires the applicant to "provide an analysis of the need for the proposed facility, taking into account existing and planned generation and transmission facilities of the applicant..." Similarly, § 72.1(c) demands that the applicant provide information "with respect to its peak day load requirements and generating capacity on a monthly basis for one year prior to, and two years following, the filing of its application." The applicant is also required to give information about its peak load requirements and capacity on a seasonable basis for a 25-year period, § 72.1(d), hourly load tabulations for its peak load day of the preceding summer and winter, § 72.1(e), and "the impact on the applicant's system" if the proposed facility is not in service by the estimated in-service date, § 72.1(h). This information must be fully set out on forms A-1 through A.

These sections assume, of course, that the applicant is also the proposed owner, and that the specific information provided would refer to the owner's facilities. There is simply no point in having this information furnished about an entity other than the prospective builder and owner. If the owner's identity is not certain the information cannot be given, and the application, therefore, cannot be completed. The information in the existing application is no longer pertinent, in view of LILCO's uncertain position.

It is submitted that neither discovery nor a hearing should be commenced until there are applicants ready, able and eager to proceed with construction, and all the necessary information to complete the application is furnished -- information which would then form a basis for discovery, pre-filed testimony, and the hearing. In the present case such information is not available because at least one of the applicants, LILCO, is not ready, able or eager to proceed -- and this fact is not contradicted by applicants. Moreover, NYSE&G has not said it will proceed without LILCO. Therefore, no hearing should be held.

In their attempt to show that the issue of ownership is really the same as the issue of need, applicants resort to specious reasoning. They say (brief, 7-8) that any company will be an owner if it has, and can show, need. What this discussion leaves out is that some companies lack the desire or financing to seek Article VIII approval. Indeed, LILCO evidently does not wish to be an owner, and therefore the issue of need does not arise. Its lack of desire to build renders the application invalid.

While knowledge of the owner's identity is necessary to complete portions of the application dealing with need, it

is critical as well on other issues. The Board must also consider the proposed owner's technical and financial strength, its integrity, reliability and management competence before deciding whether "the facility is in the public interest, considering the environmental impact of the facility." Public Service Law, § 146(g). For example, if a proposed owner has a history of poor facility construction, poor maintenance, technical weakness, inadequate procedures, or poor management, those factors would all increase the risk of a nuclear incident at the facility which could cause great harm to the public and contaminate the environment for many years to come. Unless the ownership of the proposed facility is known, those risks cannot be assessed. Nor can it be determined if applicant has the resources necessary to complete the building of the plant, or to assure safe management of nuclear waste as well as safe decontamination and decommissioning of the plant.

The importance of scrutinizing the qualifications of a nuclear plant owner is reflected as well in the Atomic Energy Act, which requires the applicant to provide information with respect to "the technical and financial qualifications of the applicant, the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the [Nuclear Regulatory Commission] may deem appropriate for the license." 42 U.S.C. § 2232(a). These requirements are reflected in the N.R.C. regulations,

10 CFR § 50.33, calling for information about the applicant's identity, business and status. One of the considerations in granting approval under these regulations is whether the applicant "is technically and financially qualified to engage in the proposed activities in accordance with the regulations in this chapter." Id. § 50.40(b). Again, these issues cannot be considered -- and indeed the application cannot even be completed -- until the identity of the proposed owner is known.

Applicants talk at length about Chairman Zielinski's decision, in January 1979, to docket their application. However, that occurred a month before the testimony was filed in Jamesport to indicate LILCO's indecision on whether "to join with NYSE&G" on this project. Thus, the decision to docket commented on the issue of need but not the issue of LILCO's ownership -- as applicants had not yet conceded publicly that ownership was in doubt.

Applicants argue that ownership of certain other power plants has changed from time to time, and that such change is to be expected. Therefore, they say, LILCO's lack of commitment to this project is not significant. However, we submit that throughout the entire proceeding this Board must have before it proposed owners who are then ready, able and eager to build the plant if approval is obtained.

Otherwise the Board is wasting its time. While it is recognized that the intentions of these parties may change in the future, the applicants must at least have a current intention and commitment to build the plant while their application is pending.

Here, the application indicates such a current intention, but applicants since then have said that LILCO is not committed to the project. Indeed, their testimony filed in the Jamesport proceeding in February 1979 sheds doubt on the accuracy of the application when filed in November 1978, because it said: "we do not yet know whether it will prove to be desirable for LILCO to join with NYSE&G in building and owning New Haven"* -- suggesting that as of the later date LILCO had never made a firm decision to participate in this project. While applicants say that the "Jamesport record has been misinterpreted" (brief, p. 23), they do not deny the truth of the quoted material or assert that LILCO is firmly committed at this time to building the plant. Nor do they say that NYSE&G is prepared to build the plant without LILCO.

Because of the testimony in Jamesport, the application pending before this Board is no longer meaningful and must be dismissed. If another company has a present commitment to build this plant instead of LILCO, that company

* Emphases added.

should join now in a new application, so that the Board will have before it applicants ready, able and eager to build the plant if approval is obtained. To proceed in the absence of such applicants would waste the Board's valuable time. And to require the parties to go ahead with discovery of applicants, despite the lack of commitment to the project, would also be very wasteful.

Applicants' are really asking the Board to proceed on this application with LILCO as a dummy party, in the hope that another company will take its place during the proceeding. However, it cannot be assumed that another company will come forward, or that it could be substituted during the proceeding. To the contrary, the proceeding would have to be suspended to allow any new prospective owner to file all the necessary information about itself required by the regulations, such as in § 72.1, and that material would then have to be scrutinized through discovery and at the hearing. Significantly, licenses to build nuclear power plants are not transferable except with approval by the Board, Public Service Law § 141(2), and the N.R.C., 42 U.S.C. § 2234. This demonstrates once again the importance of knowing from the beginning who the prospective owners are.

Applicants propose, however, that although they cannot demonstrate <u>their</u> need for the plant, hearings should

nonetheless be held to consider Statewide need. This is untenable, however. Statewide need for power becomes relevant only if the proposed builders and owners themselves need the power to service their customers. Unless (i) the owners need the power, and (ii) cannot obtain it from other sources inside or outside the State, approval cannot be given. It is quite evident from 16 NYCRR § 72.1, for example, that evidence of the owners' own need is critical. If such need cannot be seriously alleged, because the identity of the proposed owners is unknown, the application must be dismissed, and the issue of Statewide need would not be relevant.

CONCLUSION

Because of the uncontradicted fact that LILCO is not committed to building the plant even though its participation was a critical assumption underlying the application, and since NYSE&G has declined to make a commitment to build the plant without a partner, this application must be dismissed.

Dated: New York, New York
August 3, 1979

Respectfully submitted,

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CERTIFICATION OF SERVICE

STATE OF NEW YORK)
: SS.:
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This is to certify that a true copy of the Reply Brief of Attorney General Robert Abrams, in support of Interlocutory Appeal by Ecology Action of Oswego for Dismissal of Application was served upon the persons appearing on the attached list by depositing in a post office box regularly maintained by the government of the United States in the County of New York, State of New York, on August 3, 1979.

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