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

Case No. 80008

United States of America
Nuclear Regulatory Commission

Dockets 50-596-597

In the Matter of	)
	)
New York State Electric & Gas	)
and Long Island Lighting Co. -	)
New Haven/Stuyvesant, nuclear/coal	)
generating facility application	)
	)

June 11, 1979

COMMENTS BY ECOLOGY ACTION OF OSWEGO ON ADOPTION OF PROPOSED SCHEDULE, PROPOSED JOINT PROTOCOL TO GOVERN CONDUCT OF HEARINGS, MEMORANDUM OF UNDERSTANDING BETWEEN THE NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT AND THE U.S. NUCLEAR REGULATORY COMMISSION, PROPOSED RULES OF DISCOVERY. AND PROCEDURE FOR JOINT MAILINGS

Background. On April 27, 1979, attorneys for the DPS, DEC, and NRC staffs circulated a proposed Protocol for the Conduct of Joint Hearings to "avoid unnecessary duplication, thereby expediting the decision-making process and reducing the time, effort, and costs which would otherwise be incurred by the parties were separate proceeding held" (p. 1). We wholeheartedly agree with these goals, and our suggested modifications for the joint hearings, discovery process, memorandum of understanding, and schedule are aimed at reaching these goals, as well as the goals of establishing an honest, complete, and up-to-date record upon which to make the final cost/benefit analysis and balancing test between need and environmental compatibility. We agree with the Siting Board in Case 80005: the decision must be made on the "best available evidence...that exists at the time a decision is required" (Jan. 11, 1978, Opinion and Order, p. 25).

355 209

I. PROPOSED SCHEDULE

A. Current Proposed Schedules

Safety Review[1]		Joint Hearings[2]	
SER	Aug. 29, 1980	DES	April 1, 1980
SER suppl.	Jan. 23, 1981	FES	Aug. 1, 1980
Hearings	Feb. 24, 1981	Hearings	Sept. 1, 1980
Decision	July 8, 1981	Decision	Oct. 1, 1981

Utility Dates[3]	
Target date	May, 1992
Capacity Reliability Date	May, 1994
Construction Start	1984 (or 1986 to meet capacity reliability date, derived by extrapolation)

B. 1994 More Realistic Target Date than 1992: Proposed Decision Date is Premature

The capacity reliability date (formerly called delayed construction schedule in the 149-b Reports) has been shown to be closer to the actual date than the target date for other proposed plants. Thus, we can anticipate construction to begin in 1986 or later. A decision is not needed, therefore, until that time period. An Oct. 1981 decision is five or more years prior to the utilities more realistic proposed construction start. Even given the utilities' 1984 proposed construction start, the 1981 proposed decision date is three years early.

C. SER Schedule is Delayed

In a June 4, 1979 telephone conversation with Mr. Olin Parr of the NRC, Ecology Action of Oswego learned that the SER schedule is under review due to the 3 Mile Island accident, and that it looks as if at the very minimum a three month delay can be anticipated. The NRC hopes to have a better idea of the magnitude of the slip in about one month.

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[1]Letter of April 24, 1979 from Mr. Roger Boyd, NRC, to Mr. Allen Kintigh, NYSEG.

[2]Letter of April 2 1979, from DPS and DEC staff to Hearing Examiners and ASLB.

[3]SEO 1979 Report (5-112), volume 2.

D. SER Publication and Decision must be Complete Prior to Publication of the DES and Joint Hearings

The SER publication and decision must be completed prior to release of the DES since so many aspects of the DES, FES, and subsequent hearings rest on conclusions in the SER. For example, how can cost of the plants be determined until all safety requirements have been determined, especially since the 3 Mile Island accident. Since conclusions and recommendations are made in the DES, the SER publication and decision must be made prior to the DES publication.

E. Implications of Premature Joint Hearing Schedule

A premature SER, DES, FES, discovery, and hearing will result in the development of an outdated record at the time the final decision is required. The issues which would need to be reheard are numerous and serious, many which might ultimately decide acceptance or rejection of the proposed nuclear plants (e.g., cost, viable alternatives, need, etc.). The costliness of rehearing issues to update the record is great, especially considering the alternative of not developing the initial record prematurely. The purpose of the Joint Protocol is to reduce time, effort, and cost - a premature hearing schedule will eliminate the attainment of these goals.

F. Conclusion

Since utility spokespeople have complained about the length from filing an application to the end of hearings in Article VIII proceedings, and since the utility has slipped construction start and startup of the proposed facility by one year since filing the application, they have placed the Examiners and Siting Board in an untenable position: If they stay within the 18-24 month timeframe they will be accused of making a final decision on a dated and incomplete record; if they delay the start of hearings in order to have a current record at the time of final decision, they will be accused of delay. The logical conclusion is for the Examiners the Board to immediatley dismiss the case due to premature filing of the application, given the slip in the schedule by the Applicant since

docketing. Applicant should be told to stop filing prematurely if it wants rapid decisions, and to only submit timely applications with applicants who know it is beneficial to participate in the plant (see Interlocutory Appeal by Ecology Action, April 26, 1979).

II. PROPOSED JOINT HEARING PROTOCOL

A. "separate rulings by each body shall be made thereon" (p. 4)

We find this procedure to be superior to the one proposed at the May 23, 1979 prehearing conference. An active response of agreement rather than a passive nonresponse by the alternate hearing examiners will lead to a superior record. We want to ensure that the alternate hearing examiners be given sufficient time to make a decision on each ruling. We can only be sure that they have come to a decision if it is actively expressed on the record: a nonresponse could either mean agreement or that a decision has not yet been made.

B. "Approximately one month after NRC issuance of the DES,...the parties to the Article VIII proceeding, other than the applicants, shall be required to exchange statements of specific issues believed to be contested." (p. 6)
"The presiding Examiner shall attempt to narrow the contested issues prior to the evidentiary hearings and, after consultation with the Associate Examiner, shall issue an order listing those issues which may be litigated by parties in the Article VIII proceeding." (p. 6)

The Applicant filed under the old Article VIII law, thus the procedures developed in hearings under the old law should be followed. All issues to determine need and environmental compatibility must be raised to develop an adequate record so the Board can make the required balancing test. Since the old law does not require narrowing of the issues, only the new law does, no party should be restricted in its ability to raise issues. Section V.B of the proposed joint hearing protocol must be deleted.

C. Conduct of Evidentiary Hearings

"After an adequate period for full discovery of the Applicant's Direct Case," (p. 10)

It is not clear whether this refers solely to direct testimony filed with the application or whether further direct testimony from the Applicant is to be expected. This can have significant impact on the schedule and must be clarified.

D. Conduct of Evidentiary Hearings

"An evidentiary hearing shall begin for examination of all witnesses presenting testimony and exhibits on that contention issue." (p. 10)

The Applicant filed under the old Article VIII law, thus the procedures developed in hearings under the old law should be followed. Therefore, the following procedures should be used:

1. Direct case and testimony of Applicant covering all aspects upon which the Board must make the final balancing test filed first (Applicant can identify which parts of the testimony concern NRC contentions)
2. Cross by parties
3. Direct case of parties
4. Cross of parties' direct case
5. All rebuttal testimony filed
6. Cross of rebuttal testimony
7. Briefs
8. Reply briefs

E. Cooperation Among Agency Staffs

"The staffs (NRC, DPS, DEC) shall consult each other in conducting their analyses and in preparing for, and participating in, the joint hearing." (p. 12)

The NRC, DPS, and DEC staffs were constituted as independent staffs, each with their independent purposes. Consultation with regard to analyses will jeopardize the development of an adequate unbiased record. Each staff must be allowed to carry out its analyses unbiased by the opinions of other staff. The procedures proposed on page 12 will avoid differences of opinion to be developed on the record which may be genuine. The Board should know the original positions of staff prior to reaching of any compromise position, and the extent of the differences must be fully disclosed to the other parties and the Board. We can find no positive purpose in this consultation process - but serious drawbacks in arriving at the truth.

F. Participation

"A party to the NRC proceeding may be represented only in accordance with 10 CFR § 2.713(a)." (p. 11)

We hope that the ASLB will allow other than an attorney or member of intervenor's group to participate. What we have in mind is that under some circumstances another person, such as an expert witness, might expedite the hearing process by cross examining a witness of the applicant (as was allowed in the Nine Mile #2 hearings). Such an allowance could only benefit the record.

III. MARCH, 1979, MEMORANDUM OF UNDERSTANDING BETWEEN NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT AND THE DEPARTMENTS OF ENVIRONMENTAL CONSERVATION AND PUBLIC SERVICE AND THE U.S. NUCLEAR REGULATORY COMMISSION

In March, 1979, a Memorandum of Understanding between DPS, DEC, and the NRC was agreed to, setting forth "mutually acceptible levels of cooperation between the State of New York and NRC related to providing NRC with specific technical support of the DPS staff in the preparation of designated sections of the NRC's DES and FES" (p. 1). They will provide "services involving analysis, evaluation and written material...to reduce duplication, provide for more effective use of resource and permit a more orderly and efficient hearing" (p. 1).

We are disturbed by the fact that all parties have not been officially asked to comment on the Memorandum of Understanding. It is our position that this Memorandum of Understanding will prejudice our interests in this proceeding and that we should have had an opportunity to comment on this radical departure from established procedures.

We are merely raising preliminary concerns at this point. We expect all parties to be mailed the Memorandum of Understanding, that they and Ecology Action of Oswego will be given a full opportunity to be heard prior to the final adoption of the Memorandum of Understanding. If parties will not be afforded an opportunity to comment on the Memorandum of Understanding, we want to be officially notified of this immediately.

355 204

Ecology Action of Oswego has serious reservations about the agreement. Once State agencies become employees of the Federal government, the citizens of the State lose the independent voice of their own agencies. Should differences of opinion occur, the threat of termination of the contract "upon 30 days written notice by any party" (point 13) is a powerful incentive for either the NRC or State to compromise in return for saving the Memorandum of Understanding. Since all this disagreement would occur "behind closed doors" the intervenors would be unaware of the issues, and they could be successfully suppressed at the hearing level (point 13). Once this compromise is reached, and the NRC does not wish the public to be informed about what issues were compromised, it apparently has the right to prevent intervenors from subpoenaing DPS and DEC staffs "in their capacity as contractors for the NRC" (Proposed Rules of Discovery, May 28, 1979, Part II, A, p. 2), and to deny production of DPS and DEC records and documents in their capacity as contractors to the NRC Staff (Proposed Rules of Discovery, May 28, 1979, Part II, G, p. 4). Although "nothing in the agreement is intended to restrict...the statutory authority of...DPS" (p. 3, point 12), we believe that the agreement is such that in fact it will be extremely restrictive.

The Applicant filed under the old Article VIII law, and thus the procedures developed in hearings under the old law should be followed. In these hearings the staffs of the DPS and DEC do not take a position on issues until after cross of the Applicant's case. Under the Memorandum of Understanding the same staff would be writing numerous sections of the DES in which evaluations are made, and positions and conclusions are reached, these staffs would be forced to take a position before commencement of hearings and the benefit of cross-examination of Applicants by intervenors and statutory parties. This departure from normal procedure can only lead to an inferior decision since it is based on less information.

The Memorandum of Understanding only leads to an efficient hearing, not the development of the best record on which to base the decision for balancing need vs.

environmental considerations and cost/benefit analysis. The fact that the Memorandum of Understanding fails to identify any reason related to a better decision but only a more efficient hearing lies at the very heart of our concerns. We believe that the Memorandum of Understanding will lead to an inferior record.

IV. PROPOSED RULES OF DISCOVERY

As mentioned in the previous section, we do not approve of the Memorandum of Understanding. Two points under the Proposed Rules of Discovery highlight our concerns of the Memorandum of Understanding:

> Subpoenas
> "The exemption contained in subsection (h) of 10 CFR § 2.720 shall apply to DPS and DEC staffs only in their capacity as contractors for the NRC and only in matter relating solely to the federal proceeding."
> (p. 2, May 28 proposal)
>
> Production of NRC Records and Documents
> "Shall not apply to the Article VIII proceeding, except to the extent that DPS and DEC staffs in their capacity as contractors to the NRC staff are requested to produce a record or document which relates solely to the federal, and not to the Article VIII proceeding."
> (p. 4, May 28 proposal)

We do not fully understand what it means to be a contractor for the NRC, and all the limitations it places on intervenors to exercise their rights as parties under Article VIII. If it allows the DPS and DEC staffs to hide behind their contractor relationship each time intervenors want to subpoena them or request documents, this would jeopardize intervenor's rights in Article VIII proceedings, since staffs do not enjoy this protection in state hearings. Since the issues which DPS and DEC would aid the NRC in producing the DES are also issues which must be raised under Article VIII and is material which these staffs would be developing for the state record, we do not understand how any record or document produced by DPS and DEC can "relate solely to the Federal proceeding" - all will apply to the state hearing also. Intervenors in Article VIII must retain the right to obtain all these documents and to subpoena witnesses if necessary, since they are all related to Article VIII issues.

B. Informal Rules of Discovery

"Parties should first seek discovery on an informal basis."
(p. 1, March 19, proposal)

To avoid a subsequent allegation of behind the scenes agreements and collusion, all parties should receive a list of all issues raised at the informal discovery level, as well as the formal discovery interrogatories.

V. PROCEDURE FOR JOINT MAILING OF TESTIMONY, BRIEFS, MOTIONS, ETC. SHOULD BE ADOPTED FOR THE CONVENIENCE OF THE APPLICANT AND ALL PARTIES

Should the mailing list in the Article VIII proceeding continue to be large (at present over 50 persons), expenses for Applicants, Staffs, and intervenors would be reduced if one central office (perhaps Secretary Madison's office) were established which would receive one copy from each party, make copies, and then send one copy of each, in one mailing envelop, to all parties.

VI. CORRESPONDENCE REQUEST

We request receipt of all correspondence between all parties in the case. This includes all documents sent to the public documents room concerning this application, and answers to all interrogatories.

Respectfully submitted,

Helen Daly

Helen Daly, Intervention Coordinator
Ecology Action of Oswego

Ruth Caplan

Ruth Caplan, Ecology Action

June 11, 1979

Copies to all Parties

355 209