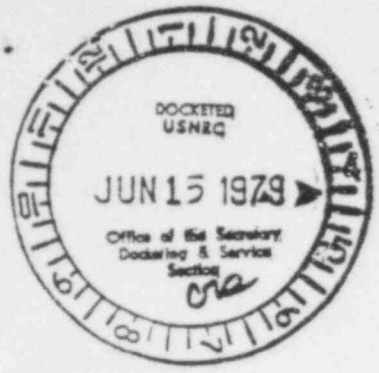

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

June 11, 1979

PSC CASE 80008 and Dockets 50-596 and 50-597 -- NYSE&G and LILCO -- New Haven 1 and 2.

DEPARTMENT OF PUBLIC SERVICE STAFF REPLY TO COMMENTS ON THE PROPOSED JOINT PROTOCOL IN CASE 80008 AND DOCKETS STN 50-596 AND 50-597 MADE AT PRE-HEARING CONFERENCE.

At a joint pre-hearing conference held on May 23 in Case 80008 and Dockets STN 50-596 and 50-597, a number of comments were offered by various parties on the proposed joint protocol in 80008. This reply responds to those verbal comments. Department of Public Service Staff will respond to comments made by parties by the June 26 reply date established by the Joint Hearing Board.

I. THE APPLICANTS' CONCERN WITH REGARD TO ISSUE IDENTIFICATION.

Counsel for New York State Electric & Gas (NYSE&G) indicated his concern with the protocol, "because we have no specific rules as to how issues will be narrowed in the Article VIII portions of the case" (S.M. 432). He states that "specific rules" are needed to govern issue identification, and that it will be necessary to very carefully define what issues are in controversy, what evidence is, in fact, applicable or acceptable to which Board and what are the decisions to be made by the

respective bodies..." He believes that without that definition "we will lose control of the proceeding." (S.M. 432).

Staff maintains, as we indicated at the pre-hearing conference, that the protocol adequately outlines procedures for issue identification in the Article VIII case. At pages 5 and 6 the protocol states that "parties shall be required to exchange statements of specific issues to be contested." Subsequently, a process overseen by Staff of narrowing those issues is identified, ultimately resulting in submission to the Presiding Examiner and decision by him on the contested issues. We believe that this procedure is comprehensive and should be adopted by the Article VIII Examiners.

Apparently, NYSE&G's primary concern regards the time when this issue identification is to take place. At S.M. 434-435, Mr. Schutt indicated that he believed the protocol deficient because time limits are not set forth and no discovery is provided on issues identified. Since the protocol provides that discovery is to continue until evidentiary hearings begin, it appears that NYSE&G seeks to have issue identification take place before the Draft Environmental Statement (DES) is issued.

There are numerous problems with NYSE&G's suggested procedure. First, the DES is the process by which DPS Staff identifies and resolves the environmental issues in the application. Other parties can then review the document and truly determine instances where the "applicant and Staff have inadequately

addressed issues", thus providing some real meaning to this ritualistic phrase required in NPC contentions.

Second, the purpose of waiting until the DES is published to identify issues is to allow parties ample opportunity to conduct discovery and propose stipulations before identifying contested issues. This is consistent with our objective of expediting these hearings. We also see no justification for a process of having other parties identify issues prior to the time Staff identifies issues.

We believe that the applicants will have ample opportunity to discover the other parties once issues are identified. The proposed schedule allows three to four months for this after parties submit their contested issues. If the applicants then move for additional time for discovery, some rearrangement of the order of issue consideration in the evidentiary hearings is possible. This would allow evidentiary hearings to go forward while discovery is being completed.

II. THE PROPOSAL THAT THIS CASE BE TRIED BY STAGES.

Mr. Kafin, counsel for Columbia County and Concerned Citizens for Safe Energy, agrees that the hearings should be held on an issue-by-issue basis (but only for cross-examination of the direct cases filed by parties other than the applicant.) He suggests that the applicants be cross-examined before any other party is required to put in a direct case. (S.M. 444-446). This, Mr. Kafin believes, will avoid the possibility of the applicant putting in a "thin" direct case followed by discovery by other parties and submission by those parties of an answering case. This, in turn Mr. Kafin fears, would be followed in the guise of rebuttal by submission by the applicants "real" case.

Mr. Kafin's fears are unfounded. First, he will have ample opportunity to test the strength of the applicants' case through discovery. Second, an extensive rebuttal case of the kind Mr. Kafin suggests would almost certainly be improper and would be subject to a motion to strike or reopening of discovery. It would also leave open the possibility of surrebuttal on the points raised in the rebuttal testimony.

II. ANSWERING TIMES FOR MOTIONS.

At S.M. 470, Dr. Helen Daly of Ecology Action raises a concern with respect to the time for answering motions within the joint hearings. She notes that the ten day time period in the

protocol excludes weekends and holidays, while the time period governing interlocutory appeals in the Article VIII regulations, 16 NYCRR § 70.8, includes weekends and holidays. We simply reiterate that the time period for motions within the protocol governs motions within the joint hearings and that the Commission rules of practice govern appeals to the Commission.

ROBERT GREY
Staff Counsel