UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

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 AND GAS CORP. AND LONG ISLAND LIGHTING CO. New Haven/Stuyvesant Nuclear Generating Facility	Case 80008

COLUMBIA COUNTY, TOWN OF STUYVESANT
AND CONCERNED CITIZENS FOR SAFE
ENERGY REPLY TO COMMENTS

Columbia County, Town of Stuyvesant and Concerned Citizens for Safe Energy, Inc. hereby reply to the Applicant's comments dated June 11, 1979 to the proposed joint protocol and rules of discovery.

Applicant's comments reveal an appalling lack of understanding of the NRC Rules and the issue definition process they set forth with respect to "environmental issues."

Applicant incorrectly reads the NRC Rules as establishing a date as early as August 1, 1979 as the cutoff date for the identification of the "environmental issues" to be litigated in this case.

In fact, under 10 CFR §51.52(b) the final narrowing of "environmental issues" cannot occur until after the issuance of the final environmental impact statement, now scheduled for August 1, 1980.

(5)

WHY A JOINT HEARING?

As pointed out in the first section of Part 51 of the NRC Rules (10 CFR §51.1), the National Environmental Policy Act of 1969 ("NEPA") added to the NRC's mandate a responsibility for carefully considering the environmental aspects of proposed actions, including the one proposed in this case. (See Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 938 [1974]).

Under Article VIII of the New York State Public Service Law ("PSL"), a similar responsibility is imposed upon the New York State Board on Electric Generation Siting and the Environment where the proposed action is the construction of a major steam electric generating facility.

Given the similarity of these two responsibilities, the fact that they must be discharged almost contemporaneously, and the legal requirement that the principal procedural device of an adjudicatory hearing be used, common sense dictates that a coordinated process be followed.

The proposed joint protocol relating exclusively to the hearing on "environmental issues," contains the rules of that process.

ISSUE NARROWING

Section V of the proposed joint protocol sets forth the procedures for identifying contentions and contested issues.

Subsection V.A refers to the NRC Rules for issue identification for the purposes of the NRC proceeding.

Subsection V.B establishes a separate schedule for issue identification for the purposes of the Article VIII proceeding.

APPLICANT'S COMMENT

The Applicant alleges that the procedures set forth under Subsection V.B are much slower than the procedures set forth under Subsection V.A. The Applicant claims that under the NRC Rules the "environmental issues" will be identified, cast in cement and permanently fixed in the very near future. The

Applicant then complains that under the procedures set forth in Subsection V.B, definition of the "environmental issues" will not occur until a much later date when the draft environmental impact statement is issued. This, argues Applicant, will slow the case down by reopening matters previously closed.

Applicant is completely wrong because the procedures set forth in Subsection V.B will begin before the commencement of the procedures set forth in Subsection V.A. As explained below, under the NRC Rules, the narrowing of "environmental issues" does not occur until after issuance of the final environmental impact statement, while under Subsection V.B this will occur following the issuance of the draft environmental impact statement -- a prior event.

THE NRC RULES

Under NEPA, the NRC Rules make the final environmental impact statement subject to the "full scrutiny of the hearing process" and forbid the final narrowing of environmental issues until its issuance.

The NEPA guidelines, applicable to all Federal agencies, state:

> "For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study." (40 CFR §1502.5[c]).

Part 51 of the NRC Rules provides that in an adjudicatory hearing on an application for a construction permit:

> "[T]he staff will offer the final environmental impact statement in evidence. Any party to the proceeding may take a position and offer evidence on the aspects of the proposed action covered by NEPA and this part in accordance with the provisions of Subpart G of Part 2 of this chapter." (10 CFR §51.52[b]).

Therefore, under the NRC Rules, the final narrowing of "environmental issues" cannot occur until after issuance of the final environmental impact statement:

> "[S]ince the [environmental impact] statement may well go to waste unless it is subject to the full scrutiny of the hearing process, we also believe that the intervenors must be given the opportunity to

cross-examine both [the applicant and staff] witnesses in light of the statement." (Greene County Planning Board v. FPC 455F. 2d 412[2d Cir. 1972], cert. den., 409 U.S. 849[1972]).

The NRC Rules, keeping open the narrowing of environmental issues until a point following the issuance of the final environmental impact statement, are in obedience to the mandate of the court in Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109(D.C. Cir. 1971), cert. den., 404 U.S. 942(1972) in which prior rules of the NRC seeking to narrow the consideration of environmental issues in contested hearings on permit applications were struck down.

THE ARTICLE VIII RULES

Under PSL § 143.2 a similar issue definition process is provided for. It is interesting to note, however, that the issue resolution process described in PSL §143.2 could occur well in advance of the issue resolution process called for by 10 CFR §51.52(b)(1).

Recognizing that the Article VIII procedures might result in an acceleration of the issue definition process to a point which would be inconveniently earlier than that permitted under the NRC Rules (i.e. before the issuance of the environmental impact statements), the proposed joint protocol at Subsection V.B seeks to establish a procedure which will move the Article VIII issue definition process back to a time when it could coincide with the identification of contentions in the NRC proceeding under Part 51 of the NRC Rules.

The joint protocol fails to slow down the much faster Article VIII procedure completely to coincide with the ponderous NRC procedure. It is quite clear under Part 51 that the staff final environmental impact statement is the fundamental pleading in the NRC adjudicatory hearing on "environmental issues." For that reason, 10 CFR §51.52(b) calls for contentions on the final environmental impact statement. Unfortunately, while the proposed joint protocol leaves this NRC procedure alone, it attempts to force the definition of issues in the Article VIII proceeding at an earlier date than would be required in the NRC proceeding because Subsection V.B uses the draft environmental impact statement under 10 CFR§51.22 as the triggering document.

Originally, we were prepared to permit this small irregularity and acceleration of the process to go unchallenged. However, it now must be mentioned since the Applicant in its comments reads the proposed joint protocol as providing a slower State schedule

than Federal schedule -- although it is perfectly clear to us that, without the joint protocol, the Federal schedule is slower than the State schedule and the joint protocol provides an acceleration over the schedule that would prevail under the NRC Rules alone.

We now think that Subsection V.B should be amended to conform to Subsection V.A by substituting the word "Final" for the word "Draft" in the second line of Subsection V.B.

CONCLUSION

Applicant's comment on the issue definition provisions of the proposed joint protocol should be disregarded as a collateral attack on the validity of the NRC Rules forbidden by 10 CFR §2.758.

The proposed joint protocol should be amended to delay issue definition in the Article VIII proceeding to a point where it can coincide with the issue definition under the NRC Rules after the issuance of the final environmental impact statement as provided for in 10 CFR §51.52(b).

June 26, 1979

Respectfully submitted,

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