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DOCKET NUMBER
PROD. & UTIL. FAC. 50-596, 597

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

BOARD ON
ELECTRIC GENERATION SITING AND THE ENVIRONMENT

CASE 80008 - Application of New York State Electric & Gas Corporation and Long Island Lighting Company for a certificate of environmental compatibility and public need to construct two 1250 MW nuclear or coal fired electric generating units at a site in New Haven, Oswego County or alternatively, Stuyvesant, Columbia County. (New Haven Units 1 & 2).

STAFF'S REPLY TO STATEMENTS IN RESPONSE TO COMMISSION CERTIFICATION TO THE SITING BOARD

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Dated: Albany, New York
August 6, 1979

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 80008 - New Haven 1 and 2.

STAFF'S REPLY TO STATEMENTS
IN RESPONSE TO COMMISSION
CERTIFICATION TO THE SITING BOARD

I. INTRODUCTION.

This brief replies to responses of two parties to the Public Service Commission's certification of Ecology Action of Oswego's motion for dismissal of the application in Case 80008. The Commission certified the motion to the Siting Board with a recommendation that the application be dismissed. (Order of July 10, 1979). We reply primarily to the applicants' (New York State Electric & Gas Corporation and Long Island Lighting Company) submission dated July 25, 1979. We will also respond briefly to comments of the Department of Environmental Conservation (DEC).

II. BACKGROUND.

On January 22, 1979 the application in this case was docketed by Chairman Zielinski. On February 23, 1979 the applicants submitted pre-filed testimony in the remanded Jamesport proceeding (Case 80003). That pre-filed testimony included the following questions and answers:

> Q. What is your overall conclusion about the ultimate timing and ownership of the Jamesport and New Haven units?

A. Even with the best efforts of the Applicants the projects probably will not be completed as currently scheduled. Coupled with the likelihood that ownership of the New Haven units will change, it is very unlikely that LILCO and NYSE&G will add 4700 MWe in the five-year period referenced in the Board question.

Q. Keeping in mind the factors that you've already described, what is your conclusion about "an economic justification" for LILCO and NYSE&G to bring Jamesport and New Haven on line "in the five-year period 1988-1993?"

A. We have several conclusions. First, we do not believe it is realistic to assume that the stations will come on line within that five-year span, or any five-year span. Second, 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, though it is clearly desirable for them to get on with the facility's planning and licensing in light of the Statewide need for New Haven and thus the likelihood that other utilities will purchase shares in that plant. A clear answer to the question of appropriate ownership arrangements for New Haven may not be available for some time. Third, it is our emphatic conclusion that it does make sense for these two companies to jointly build and own Jamesport, and to bring the station on line as soon as is feasible.

(Pre-filed testimony of Madsen and Rider, Case 80003, pp. 5-6).

On March 27, 1979 Ecology Action submitted a motion to dismiss the application alleging prematurity and legal insufficiency. Ecology Action cited portions of the above-quoted material and argued that since LILCO is not firmly committed to the proposal in Case 80008 the application should be dismissed. Staff and other parties replied to the motion, and it was denied by the Examiners on April 13, 1979. Ecology Action made an interlocutory appeal to the Commission in a document dated April 26, 1979. The Commission by Order dated July 10, 1979 certified the Ecology Action motion to the Siting Board with a recommendation of dismissal. Parties were permitted to submit comments by July 25, 1979 to the Commission recommendation.

A. Staff's Position.

Staff has taken the position that there is no point in conducting costly and time-consuming hearings on an application where one of the co-applicants is not certain if it will participate in the actual construction and operation of the generating units. We pointed out that if, Ecology Action suggests, and as may be reasonably inferred from the pre-filed Jamesport testimony, LILCO has no interest in building the New Haven facility, there may be no basis for going further in this case than developing a record on this issue. (Staff

Reply, April 6, p. 2). We believed that the question of ownership could be differentiated from the question of need where an applicant disavows its interest in actual construction and ownership. We have pointed out that without knowing who the likely owners of the proposed facility are, it will be impossible to conduct the statutory balancing of costs and benefits required by Section 146 of the Public Service Law.* While we recognized that ownership may indeed change because of the dynamic nature of electric needs in this State, we believed that we must be reasonably certain when beginning the complex Article VIII litigation that an applicant believes the proposed facility meets its particular needs or some other definite use for the power and therefore stands ready to construct it. In short, Article VIII is simply not an academic exercise for the purpose of siting hypothetical power plants.

Because we believed that the pre-filed Jamesport statements did not in themselves constitute a sufficient showing of lack of interest to construct and operate the proposed units, we recommended dismissal of the Ecology

* For example, Section 146(g) of Article VIII provides that the Siting Board must determine that the proposed facility is in the public interest considering "the total cost to society as a whole." Total cost includes the specific cost of constructing this facility. Costs of capital and benefits derived from early installations, i.e., fuel substitution, depend upon who the owner(s) will be.

Action motion without prejudice to resubmit it at a later time. However, we have pursued the question of LILCO's seeming disavowal of its interest in the proposed New Haven plant with interrogatories submitted to LILCO on May 23, 1979. We specifically asked LILCO whether it intended to construct the proposed facilities in view of the pre-filed 80003 testimony and in view of its own assertions regarding transmission benefits associated with adding downstate rather than upstate capacity.* To date, no response to the interrogatories has been provided.

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* We asked:

> (5) In view of Mr. Madsen's statements in the pre-filed testimony on remand in 80003, "that building this facility at Jamesport, in this particular time period, is clearly superior to all the other planned facilities in New York State regardless of Jamesport's ownership or which area of New York State (NYS) is forecasted to be growing faster at the present time", does LILCO at the present time intend to construct the units proposed in Case 80008?
>
> (6) If not, is LILCO's participation in the application based solely on anticipated statewide needs for capacity and possible statewide oil displacement rather than LILCO's own capacity needs, possible economic or oil displacement benefits?
>
> Staff's First Interrogatories Of LILCO, May 21, 1979.

B. The Commission Decision.

The Commission, in recommending dismissal of the application, deemed the application premature and legally insufficient (Order, at 4) because the required balancing under § 146 could not be carried out without specific reference to a utility which intends to construct the facility. It differentiated the various factual questions which must be resolved to determine need for the facility from those relating to ownership. It also stated that prima facie allegations regarding statewide need are simply not enough to allow hearings to proceed where the ownership question remains so clouded.

C. The Applicant's Reply.

In essence, the applicants have responded with a reiteration of the argument that the concepts of ownership and need cannot be separated under the present circumstances (p. 7). This is so, they claim, because utilities submit applications only if they perceive some kind of need for the additional capacity - whether it be on capacity, reliability, or economic grounds. When a utility recognizes this need, it submits an application which then must be judged against all applicable need criteria to determine whether there is justification for certifying all or some of the proposed

capacity. Implicitly, then, submission of an application, the applicants argue, constitutes a genuine interest to construct the facility, although that commitment may not be binding in view of the changing nature of electric needs in New York. The applicants also suggest that allegations of statewide need are sufficient to sustain continued processing of the application because of the need for coordinated statewide planning for additional generation. They argue that the pre-filed testimony in Case 80003 has been misinterpreted and that the continued presence of LILCO in the hearings process and their contractual agreement with LILCO "are clearly evidence of their intent to participate in the New Haven units" (Applicants' Response, p. 26). The applicants also believe that additional discovery and litigation can be carried out if there should be new utility participants in the application and that this -- rather than dismissal -- is the proper reply to uncertainties regarding future ownership.

III. STATEMENT OF THE ISSUE.

Staff believes the issue which the Commission directed parties to address is whether or not the applicants are firmly committed to the construction, financing, and ownership of the proposed 2500 MW of capacity for their

own needs or for some other reasonably definite and legitimate purpose, such as the sale of excess capacity to another utility to meet its long-term needs. If the applicants have no such firm plans in mind there is no reason to litigate this application. In this instance the application rests on assumed commitments and speculation and it is legally insufficient and subject to dismissal.

IV. RESPONSE TO APPLICANTS' ARGUMENT.

The applicants' brief has done nothing to overcome the Commission's objections to continued processing of the application. The argument that need and ownership are synonymous just does not overcome the doubt raised by the pre-filed statements in 80003 which show a lack of interest on LILCO's part. The continued participation of NYSE&G alone is not in itself a sufficient basis for concluding that it alone intends to construct the entire facility. In light of the pre-filed statements in Case 80003, the requested assurances of ownership are not simply "cosmetic" as the applicants suggest, they are crucial.

This was specifically spelled out by the Commission in its Order (p. 8) which invites a reaffirmation of ownership by LILCO. The Commission stated:

> The application is premature and legally insufficient and will remain so until its proponents are able to present evidence that relates to the probable owners of the proposed facilities and their ultimate use.

Instead of complying with the Commission's demand for "evidence" of their intent to participate, the applicants have merely referred to LILCO's continued presence in the hearings. This does not indicate an intent to own and operate the facilities, however. It merely indicates that LILCO continues to abide by its obligation to NYSE&G to submit a joint application for an upstate plant.

Since the Commission's invitation to the applicants regarding their intentions could hardly have been misunderstood, we assume the applicants were unable to provide the kind of assurances necessary to enable us to go forward convinced that we will not be wasting our time and resources. One obvious remedy would have been an affidavit, under oath, from LILCO management indicating its present intent in unambiguous terms to finance, construct, and own the facilities in the manner stated in the application for its own use or for some other definite statewide purpose. This could have been easily done and would have satisfied in substantial part the Commission's concern. LILCO's continued silence, therefore, can only be construed as an admission that the Commission is correct in its assessment and that the pre-filed statements should be taken at face value. Since the pre-filed statements indicate LILCO's uncertain commitment to construct and operate

the plants, the Siting Board is left with no alternative other than dismissal.

Further, the applicants' statement that they are "shocked" at "the concept expressed by the Public Service Commission that statewide needs cannot justify processing this application" misses the point of the Commission's order. The Commission, as we have repeatedly stressed, did not address the issue of need; it reviewed the question of ownership. Without applicants who stand ready and willing to construct a proposed facility, looking at the question of whether there is a statewide need is a purely academic exercise.*

As part of its response to the Commission's July 10 Order, the applicants also assert that they have been denied an opportunity to be heard. They believe they have been unable to meaningfully respond to the Commission because "vague assertions" have been drawn from unincorporated or referenced documents outside the record of this case.

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* The Commission stated:

> We do not share the belief that, in spite of the ownership uncertainties, the alleged "statewide need for New Haven" makes it desirable to continue the planning and licensing process because there is a "likelihood" that other utilities will purchase shares in the plant. (Order at p. 6).

There is merely a reiteration of the Commission's legal analysis concluding that mere speculation that other utilities will replace LILCO as an applicant and owner is not sufficient to continue present processing of the application. Statewide need is, of course, a relevant consideration in need determinations under Section 146 of the Public Service Law.

The implication the applicants raise is that they have been unfairly prejudiced or deprived of basic rights Staff believes this position is both incorrect and misleading. We believe an examination of the facts indicates that the applicants have been on notice for some time that the question of intent to build and own the proposed units would be considered in this proceeding. The facts also indicate that they have had several opportunities to be heard on this issue.

Following the submittal of the pre-filed Jamesport testimony, Ecology Action filed its motion of dismissal.* The motion drew upon the applicants' pre-filed Jamesport testimony that raised doubts concerning LILCO's ownership and intent to build. Since that time the questions raised by the applicants' pre-filed testimony have been repeated in Ecology Action's interlocutory appeal to the Commission. They have also been raised by the Commission's July 10 Order Certifying Appeal and Recommending Dismissal of Application. Thus, up to this time the applicants have been asked three times to explain and clarify the Jamesport pre-filed statements. Consequently, Staff does not believe that the applicants can correctly claim they received inadequate notice or opportunities to respond.

* Ecology Action Motion of March 20, 1979.

Applicants' reliance upon Matter of Simpson v. Wolansky* is also of no help to their position. (Applicants' Brief at p. 20). Apparently, they are attempting to assert that statements made outside the record of this proceeding cannot be used by the Commission or the Siting Board to reach a decision upon the issue of ownership or intent to build. We believe that a fair reading of Simpson v. Wolansky does not support this position. Reference to and use of materials outside the record of administrative proceedings has long been upheld as proper practice.**

In the absence of unfair surprise, inadequate notice, insufficient reference to the source or opportunity to respond or cross-examine, there is nothing prejudicial or improper in the use of extra-record facts. The test to determine if the applicants have been denied a right to be heard is whether or not the applicants have been substantially prejudiced by reference to and use of material not formally introduced into the record of this proceeding.***

1124 294

* 38 N.Y.2d 391, 343 N.E.2d 274, 380 N.Y.S.2d 630 (1975). In Simpson, the Court of Appeals was dealing with the rights of an employee of the State who was facing possible dismissal. Therefore, the Court was dealing with an adjudicatory proceeding which involved dissimilar issues and procedures than those involved in Article VIII certification proceedings. Thus, whether Simpson applies to this proceeding is open to question. Regardless of this question, we believe the applicants' assertions concerning the use of unincorporated materials are invalid in this proceeding.

** Market Street R. Co. v. Commission, 324 U.S. 548, 562 (1944); United States v. Pierce Auto Lines, 327 U.S. 515, 529-331 (1946).

*** United States v. Pierce Auto Lines, 327 U.S. 515 (1946). See also, People ex rel Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 155 N.E. 575 (1926);

An examination of the Commission's Order shows that the applicants have not been unfairly prejudiced by reference to or reliance upon the joint pre-filed testimony of NYSE&G and LILCO in the Jamesport proceeding.* In fact, the applicants have not pointed to any specific instance in which they allege unfair prejudice has occurred. Instead, they merely assert in a conclusory style that without specific reference to or incorporation of materials, and presumably hearings on need, they are being denied a fair opportunity to present their case. This position is incorrect.

We submit that the applicants are now and have been fully apprised that the statements of their own representatives calling into question LILCO's plans to finance, construct or own the New Haven units could be used as a basis for dismissing this application unless clarified. In addition, the applicants cannot claim that they have been denied an opportunity to explain, rebut or withdraw their statements. In fact, the Commission Order invited the applicants in no uncertain terms to clarify the ambiguities engendered by the joint pre-filed testimony of NYSE&G and LILCO witnesses Madsen and Rider.**

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

(1936); Matter of Beers v. Wickham, 25 App. Div.2d 165, 268 N.Y.S.2d 57 (1966); and N.Y. State Administrative Procedure Act, § 302, 306(4) (McKinney 1979).

* Similarly, the Commission's reference to the 1979 New York Power Pool Report, and other pending Article VIII cases is not improper. These records and documents were available to the applicants for their use in preparing their application and their response to the Commission Order.

Finally, we note that the applicants make much of the importance of docketing of this application on January 22, 1979, by Chairman Zielinski (Applicants' Brief at p. 22). Since the pre-filed statements calling the applicants' intentions into question were not filed until late February, we see no relevance in the docketing procedure to our consideration now.

V. RESPONSE TO DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S PROPOSAL TO SUSPEND THE APPLICATION.

The Department of Environmental Conservation (DEC) has responded to the Commission's Order with a statement that it agrees "in part" with the Commission's recommendation. It suggests, however, that the proper remedy is not dismissal but "suspension" until prior pending Article VIII applications are resolved, after which time the application could be "rejuvenated." DEC conditions this proposal upon agreement by the applicants that the application be considered newly-filed "for all purposes." DEC rests its recommendation upon an assumption that the viability of this application (e.g., need for the facility) could increase if current Article VIII applications are denied and also on the "quality and quantity" of the "effort reflected in the application."

DEC's proposed suspension would be a conceivable remedy if the Commission's order was premised on a finding that there is no need for this facility at present. The order is not so premised. The Commission has determined that there is sufficient evidence to conclude that LILCO is uncertain whether it will construct and own New Haven Units 1 and 2.

Therefore, should the Siting Board find that LILCO is not a serious applicant, there is no reason to suspend consideration of this application in the hope that some other utility will assume LILCO's role. Article VIII was intended by the Legislature to achieve expeditious consideration of applications by serious proponents. Here there is serious doubt as to the intention of the applicants.

Finally, we do not believe the substantial amounts of money that have been spent justify a continuation of this application. The efforts of these applicants in developing their proposal will not necessarily be wasted if the application is dismissed.* Mere suspension of the application will not preserve the timeliness of the data as DEC appears to suggest.

* We note that 16 NYCRR 70.27 provides that data from prior Article VIII applications may be used to satisfy the environmental data requirements of the applicable Article VIII regulations notwithstanding the environmental monitoring data currency requirements of the regulations. Thus, an applicant could refile relying heavily on the data already assembled for this application.

It will, however, continue the state of uncertainty for the applicants and parties. We believe this is unwarranted.

VI. CONCLUSIONS AND RECOMMENDATIONS.

In summary, the issue before the Siting Board is not whether changes in the New Haven-Stuyvesant applicants can or should take place. Instead the issue is: considering the responses of the applicants together with their pre-filed statements in the Jamesport reopening, is there a reasonable basis to conclude that an applicant or group of applicants is no longer firmly committed to build the entire facility? We believe the answer at this time is yes. The applicants were given full opportunity by the Commission's Order of July 10 to come forward. In our estimation, they have not done so. Without definite proponents of the application, we believe fair and efficient litigation of the application is not possible and that the proper balancing under Section 146 of the Public Service Law cannot be carried out. We therefore recommend that the application be dismissed.

Respectfully submitted,

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Dated: Albany, New York
August 6, 1979

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

BOARD ON
ELECTRIC GENERATION SITING AND THE ENVIRONMENT

CASE 80008 - Application of New York State Electric & Gas Corporation and Long Island Lighting Company for a certificate of environmental compatibility and public need to construct two 1250 MW nuclear or coal fired electric generating units at a site in New Haven, Oswego County or alternatively, Stuyvesant, Columbia County. (New Haven Units 1 &2).

CERTIFICATION OF SERVICE

STATE OF NEW YORK)
: SS.:
COUNTY OF ALBANY)

This is to certify that a true copy of the Reply Brief of Staff of the Public Service Commission, 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 Albany, State of New York, and inter-agency mail of New York State, on August 6, 1979

CRAIG INDYKE

DOCKET NOS. STN 50-596 AND STN 50-597 - In the Matter of New York State Electric and Gas Corporation and Long Island Lighting Company (New Haven 1 and 2)

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DOCKET NOS. STN 50-596 and STN 50-597
CASE 80008

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