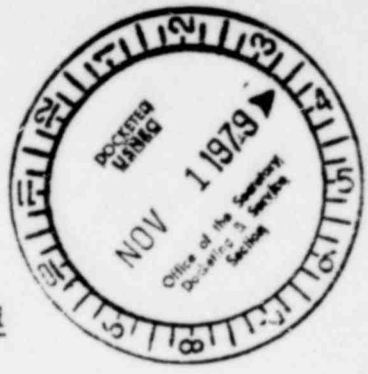

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
NEW YORK STATE ELECTRIC & GAS CORPORATION and LONG ISLAND LIGHTING COMPANY	)	Docket Nos. 50-596 50-597
	)	
(New Haven Nuclear Power Station, Units 1 and 2)	)	

MOTION FOR INDEFINITE DELAY IN THIS PROCEEDING DUE TO THE DISMISSAL BY THE STATE SITING BOARD OF CASE 80008

On October 12, 1979, the New York State Board on Electric Generation Siting and the Environment (Siting Board) issued an order dismissing Case 80008. The Applicants will move for rehearing before the Siting Board pursuant to Public Service Law §148 which is a prerequisite to appealing the order of dismissal.

In light of the present uncertainty of the extent of state agency participation and the status of the agencies participating in this joint NRC-New York State proceeding, the present uncertainty of the role of agencies of the state acting as consultants to the NRC Staff on environmental matters, and the uncertainty of the outcome of the motion for rehearing or any appeal, the Applicants submit that it is unnecessary and inadvisable to proceed with the resolution of substantive

or procedural matters before this Board. Hence, the Applicants respectfully move that this Licensing Board indefinitely postpone the litigation of proposed contentions as well as the litigation of other procedural or substantive matters involved in the application before the Nuclear Regulatory Commission until the motion for rehearing and any related appeals are finally decided.

Respectfully submitted,

NEW YORK STATE ELECTRIC
& GAS CORPORATION
and
LONG ISLAND LIGHTING COMPANY

Roderick Schutt
Ira Lee Zebrak
Attorneys for Applicants

Roderick Schutt, Esq.
Ira Lee Zebrak, Esq.
Huber Magill Lawrence & Farrell
99 Park Avenue
New York, New York 10016

Dated: October 29, 1979

STATE OF NEW YORK
BOARD ON
ELECTRIC GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State Board on Electric Generation Siting and the Environment for the New Haven/Stuyvesant Generating Facility held in the City of Albany on October 12, 1979.

BOARD MEMBERS PRESENT:

Charles A. Zielinski, Chairman, Public Service Commission

Peter Lanahan, Alternate for Robert F. Flacke, Commissioner, Department of Environmental Conservation

James L. Larocca, Commissioner, State Energy Office

Dr. William E. Seymour, Alternate for William D. Hassett, Commissioner, Department of Commerce

Fred Bartle, Ad Hoc Member

CASE 80008 - Application of the New York State Electric & Gas Corporation and the Long Island Lighting Company for a certificate of environmental compatibility and public need - New Haven/Stuyvesant.

ORDER DISMISSING APPLICATION

(Issued October 12, 1979)

BACKGROUND

On November 22, 1978, New York State Electric & Gas Corporation (NYSE&G) and Long Island Lighting Company (LILCO) filed an application for a certificate of environmental compatibility and public need to construct two 1230 megawatt

nuclear fueled electric generating facilities in New Haven, Oswego County, or, alternatively, in Stuyvesant, Columbia County. The application was docketed by the Chairman of the Public Service Commission and hearing procedures prescribed by Article VIII were commenced.[1] At a prehearing conference held on March 27, 1979, Ecology Action of Oswego moved to dismiss the application on the grounds that it was premature and legally insufficient. The motion was denied by the hearing examiners on April 13, 1979. Ecology Action then filed an interlocutory appeal of that ruling to the Public Service Commission[2] and, on July 10, 1979, the Commission certified the appeal to us with a recommendation[3] that Ecology Action's motion to dismiss be granted.

NYSE&G and LILCO have filed several briefs opposing Ecology Action's motion and the Public Service Commission's recommendation. The Department of Environmental Conservation has also submitted a letter suggesting that the proceeding on NYSE&G's and LILCO's application be "suspended" pending Siting Board action on other Article VIII applications. Responses to applicants' arguments were submitted by the staff of the Department of Public Service, the Attorney General, Ecology Action, and Safe Energy for New Haven. Statements supporting the Commission's recommendation were received from the Village of Mexico, the Town of Kinderhook, the Columbia County Farm Bureau, Columbia County, the Town of Stuyvesant, and Concerned Citizens for Safe Energy, Inc.

1/1972 Session Laws, Chap. 385.

2/Interlocutory appeals are governed by Section 70.8 of the Rules of Procedure. 16 NYCRR § 70.8.

3/Case 80008 - Application of the New York State Electric & Gas Corporation and the Long Island Lighting Company for a certificate of environmental compatibility and public need - New Haven/Stuyvesant, Order Certifying Appeal and Recommending Dismissal of Application, issued July 10, 1979.

SUMMARY OF MOTION TO DISMISS AND COMMISSION'S RECOMMENDATION

Ecology Action's motion is based on the theory that an Article VIII application is premature and legally insufficient unless the ownership and ultimate use of a proposed generating facility are reasonably certain. Ecology Action claims that despite NYSE&G's and LILCO's announced intention in the application to share the cost and output of the proposed facilities, the statements of applicants' planners in Case 80003, Jamesport[1/] demonstrate that ownership has not been determined.

The Public Service Commission agreed with Ecology Action that an Article VIII application should be dismissed when probable ownership has not been demonstrated. With respect to that question, the Commission found that even the applicants themselves were uncertain about who would own the facilities, and whether other utilities would purchase shares in the plants. The Commission further found unpersuasive applicants' claim that statewide need would result in other utilities coming forward to participate in New Haven/Stuyvesant since 6000 megawatts of generating capacity to serve statewide needs are currently under consideration in the Article VIII process and the members of the New York Power Pool, including NYSE&G and LILCO, believe that capacity should be built before the capacity proposed in this case.

DISCUSSION

Applicants claim that the Commission's recommendation is based on a misunderstanding of Article VIII and a misinterpretation of the record. They assert that probable

1/ Case 80003, testimony of Madsen and Rider, filed February 23, 1979, p. 5.

ownership can "evolve" during the course of an Article VIII proceeding, in which issues relevant to need are litigated, and that there is no particular barrier under Article VIII to processing an application where ownership is not reasonably certain. Similarly, applicants renew their claim, without additional support, that continuing with this application would be desirable because of the statewide need for the New Haven/Stuyvesant units. In any event, according to NYSE&G and LILCO, the testimony of their system planners in Case 80003, Jamesport, which was relied on by both Ecology Action and the Commission, only reflects the possibility that ownership arrangements may change during the course of an Article VIII proceeding. Thus, contrary to the Commission's conclusion, they contend that the issue of ownership of the New Haven/Stuyvesant facilities is not "permeated with doubt."

We agree with the recommendation of the Public Service Commission. It would be wasteful to proceed with lengthy and costly proceedings on a proposed generating facility whose ownership and use are subject to substantial uncertainty at the very outset of the hearings. Applicants concede that ownership is relevant but would have us proceed with substantial uncertainty about it from the outset. We believe this would be unfair to the other parties in the case and inconsistent with the spirit of Article VIII. The statute contemplates a public examination and exploration of significant aspects of an application. This cannot be accomplished when there is substantial uncertainty about ownership at the outset of hearings.

Furthermore, applicants have made no credible showing of statewide need for the facilities, and have not disputed the Public Service Commission's conclusion that ownership of the New Haven/Stuyvesant units will not be known until other pending Article VIII cases are decided. Ownership cannot be inferred from either the current or probable future demand of any particular company or companies in the state. Moreover, no other utility has expressed interest in sharing ownership of the proposed facility even in the face of the Public Service Commission's opinion recommending dismissal because of uncertain ownership.

This brings us to applicants' final argument. They contend that no reliable evidence has been introduced in this proceeding calling into question their announced intention to share equally in the construction of the New Haven/Stuyvesant unit. This argument misses the mark. The plain facts are that probable ownership has been called into question by statements from applicants themselves. In these circumstances, it is the applicants' responsibility to remove the uncertainty by confirming their present commitment to own and operate the proposed facility if it is licensed. The applicants have had many opportunities to do this and, instead, have failed to do so, claiming that the parties must show that the companies do not intend to own the facilities. Their continued failure to respond directly to the Ecology Action motion and the Public Service Commission's recommendation with a clear affirmation of present intent simply confirms our conclusion that the probable ownership and utilization of the proposed facilities are too uncertain to proceed with the case.

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Finally, we believe the application should be dismissed, rather than suspended. Suspension, especially on the condition that the application would subsequently be considered newly filed, as advocated by DEC staff, assumes that all data in the application would continue to be representative of current conditions. We cannot accept this assumption. Conversely, dismissal of the application does not preclude future use of so much of its data as remains timely in a new application. Under regulations implementing Article VIII, an applicant may use material filed in a prior Article VIII application in a subsequent one upon a showing that the data remain "representative of conditions at and in the vicinity of the site despite the passage of time."[1/]

The Board on Electric Generation Siting and the Environment for Case 80008 orders:

The application of the New York State Electric & Gas Corporation and the Long Island Lighting Company for a certificate of environmental compatibility and public need to construct two 1250 megawatt nuclear generating units at a site in the Town of New Haven, Oswego County, or an alternative site in the Town of Stuyvesant, Columbia County, is dismissed.

By The New York State Board
On Electric Generation Siting
And The Environment - Case
80008,

(SIGNED) SAMUEL R. MADISON
Secretary to the Board

1/16 NYCRR § 70.27.

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