NYSE&G, however, proposes to have statements of issues distributed between all parties by August 1, 1979 and a ruling on the issues to be litigated from the Presiding Examiner by December 15, 1979. NYSE&G's proposal would require that statements from parties cover all coal related and all non-forecast need issues, and all environmental issues which would be litigated in the Article VIII proceeding other than those raised initially in the Draft Environmental Statement (DES). In addition, NYSE&G would require that all parties other than the Departments of Public Service and Environmental Conservation Staffs submit statements of issues by August 1, 1979 on issues arising out of the applicant's proposed New Haven or Stuyvesant nuclear facility.[1/] NYSE&G, in effect, proposes to accelerate the issue identification procedures for all parties by approximately nine months.[2/]

The applicant presents two justifications for this substantial alteration in the proposed schedule. First, NYSE&G states that the proposed protocol "makes little or no attempt to integrate the procedures of the Nuclear Regulatory Commission (NRC) and the State of New York."[3/] Second, the applicant

1/ NYSE&G Comments on Joint Protocol, at 7, 9 (June 11, 1979); (hereafter NYSE&G Comments).

2/ The applicant's proposed schedule has statements of issues being submitted on August 1, 1979. Staff's proposal calls for statements of issue to be submitted one month after issuance of the DES in May of 1980.

3/ NYSE&G's Comments at 2.

alleges that it will need more time than proposed by Staff to conduct discovery "in complex areas where knowledge of underlying fact and analytical methodology will be necessary prior to preparation of testimony."[1/] Aside from these justifications, NYSE&G also claims that a number of "advantages" related to the NRC identification procedures could be incorporated into the Article VIII proceeding. NYSE&G urges that parties in Article VIII proceedings be required to state the factual basis for each contested issue. The applicant believes this will reduce time, effort and cost by forcing a narrowing of the issues that will be litigated before the Siting Board.

After review of NYSE&G's comments, we believe that the proposed NYSE&G schedule and issue identification procedure should be rejected. For reasons discussed below, we believe NYSE&G's proposal will not achieve any of the alleged benefits, but rather will result in the hasty formulation of issues lacking foundation and the serious possible omission of relevant and pertinent facts from the proceeding. In addition to these substantial problems, NYSE&G's proposal completely ignores the significance of the issuance of the DES in this proceeding and the fundamental differences that exist between Article VIII and the statutory mandate of the NRC.

1/ NYSE&G's Comments at 4.

B. Analysis of NYSE&G's Comments.

1. NYSE&G's Schedule.

NYSE&G's schedule is supposed: (1) to integrate the Article VIII and NRC proceedings; and (2) provide the company with sufficient time for discovery. Neither of these reasons justify an acceleration of the issue identification process we have proposed. While the joint protocol was intended to "integrate" Article VIII with NRC licensing proceedings when possible, it is not intended to absorb the Article VIII proceeding to the point where it becomes an adjunct or subsidiary of the NRC proceeding. We have proposed similar procedures for both proceedings where they appear sensible. The fact that we have not done so in every instance does not mean that the "efficiencies of a joint hearing will not be achieved [or] that the time elaps[ed] during the hearing stage will merely be additive." as NYSE&G asserts claims.[1/]

The applicant's second argument also does not justify early identification of issues. NYSE&G states that it is planning extensive discovery on contentions to prepare for cross-examination. They believe that Staff's schedule would not allow sufficient time for discovery and that extending

1/ NYSE&G's Comments at 3.

the discovery period will jeopardize the target dates we have proposed for hearings. They conclude that at best the proposed schedule will have hearings begin slightly after the September 1, 1980 target date anticipates.

We believe that NYSE&G's suggestion that issues be identified early so that NYSE&G will be able to discover the bases for the issues is wrong. We believe that discovery of a party should not be commenced until that party has filed its direct testimony. It is improper to expect parties to be able to respond to discovery regarding their positions on specified issues until they have submitted a direct case. To do otherwise would require a party to be ready to defend his issues with expert testimony and comprehensive support at the time contentions are filed. We do not believe that this is a proper use of the issue identification process.

NYSE&G's suggested procedure implies that submitting a contention on a particular issue creates some kind of burden on the part of the proponent of that issue before he is allowed to cross-examine the company with regard to it. This is an incorrect understanding of the contentions process. Once contentions are specifically identified (See discussion, infra) the party proposing them has no additional burden in order to forward in the hearings on the issues the contention raises.

Also, as a practical matter we do not believe that parties will be prepared to identify the contentions they have established until comprehensive discovery is completed. This is certainly the case for Staff and we are certain that it is also true for intervenors with even less resources than us.

We finally note that we do not believe that the applicant would approve of discovery against it in the analogous time period; i.e., before an applicant has been formulated and filed.

In contrast to this procedure, Staff has proposed a schedule which permits identification of issues which truly are contested based on comprehensive discovery following issuance of the DES. Unlike the NRC issue identification process which forces parties to take a scatter-shot approach and identify every conceivable issue before an early and arbitrary cut-off date, we have proposed a process whereby all possible issues can be whittled down through discovery and stipulations. In fact, we hope to eliminate many

issues through the use of stipulations. Staff has urged NYSE&G to engage in stipulation negotiations to narrow the scope of issues and some work has already been done with regard to certain of the environmental issues.

We also do not believe that NYSE&G's assertion of possible insufficient time to conduct adequate discovery is reason to cut short the full period of discovery necessary for development of direct cases and issue identification. We believe that the four month period that NYSE&G will have under Staff's schedule is sufficient to serve interrogatories and receive replies within the 45 day response time. However, if for some cause the applicant's discovery time is not adequate it could be extended or hearings could be scheduled first on those areas where the applicant is ready to go forward with cross-examination.

2. Scope of Issues to be Identified and NYSE&G's Tests.

Identifying issues from this application -- which cost over $50 million and took over four years to prepare -- is obviously not an easy task. And NYSE&G's proposal that we must adopt issues by August 1 of this year before its responses to Staff's interrogatories are submitted places us in an impossible position. Staff and other parties would have to raise every

possible issue without the benefit of responses to discovery which permit the narrowing and formulation of concise issues. The rational approach is to wait until discovery responses are submitted, as we have proposed.

LILCO has made the need for an extensive discovery time before issues are identified even more apparent by informing Staff that it will take three months to respond to interrogatories on issues related to financing of the facility.[1/] Given this time frame we do not see how NYSE&G expects us to know what the issues in this case are at the early August 1, 1979 deadline they suggest.

NYSE&G recognizes the importance of the DES in identifying issues and would have Staff identify DES related issues following issuance of that document. However, this procedure does not address the basic unfairness of having other parties identify issues before the document is available. To follow the applicant's suggestion would cut short the intervenors' discovery period and deny them the use of Staff's analysis to develop issues that are of particular interest to them. As a practical matter intervenors rely heavily on the work of the Staff to determine where they can best use their limited resources in developing their areas of concern.

1/ We served questions on LILCO in mid-May. LILCO's counsel has informed us that they hope to respond by mid-August.

Furthermore, the test that the applicant proposes for allowing new issues to be raised after publication of the DES will not be of much help. NYSE&G suggests that:

> only those positions of the Staffs which are more prejudicial to a party than are applicant's position on the same issues be allowed to be covered in the submission of a statement of additional issues.[1/]

We believe that deciding whether a position is "more prejudicial to a party" will create additional confusion in the issue identification process.

Finally, the procedure that NYSE&G suggests -- identifying issues before and after the DES -- creates duplication of effort. The complicated and time consuming practice of identifying issues during the discovery period will only take away from the substance of the case.

3. The Requirement that the Basis of Issues be Stated.

The applicant also submits that the "basis for each contested issue must be set forth to effectively expedite the proceeding." We agree that when an issue is identified, it must be specific. But this does not mean that it must be in affidavit form or be a preview of the proponents direct case. We believe that good faith informal explanations of parties' issues should be able to provide NYSE&G with adequate guidance

1/ NYSE&G's Comments at 10.

as to whether the issue is meritorious. We also note that sustaining a valid issue should only require a minimal showing by the proponent and in no way reflects on the applicant's overall burden with regard to this case.

C. The Applicant's Proposed Modifications To The Discovery Rules Should Not Be Adopted.

On May 28, 1979 DPS and DEC Staffs transmitted to all parties proposed modifications to the NRC Rules of Discovery. The principal purpose of these modifications was to harmonize Article VIII discovery procedures with the NRC rules since the NRC rules differ in several major respects from Article VIII practice While the modifications are not significant, we nevertheless consider them to be essential to the State proceeding.1/

In past Article VIII proceedings discovery has not been restricted to lists of specified issues but has been broad and wide ranging. This practice is consistent with the broad and open discovery procedures and practices that have been adopted and encouraged in most federal and state adjudicatory proceedings throughout the country. Staff, therefore, opposes adoption of NYSE&G's discovery procedures which would

1/ We indicated at the prehearing conference on May 23, 1979 that we have offered these NRC based rules as an alternative to the discovery rules we served on March 19, 1979 and that we are willing to use NRC based rules.

limit discovery to only those issues which are identified by parties. The applicant has submitted its direct case and parties should be permitted to probe the application through open discovery so that competent and relevant issues may be framed.

In its comments, NYSE&G also proposes language changes to provide that the applicant "shall" have a right to discovery. Staff agrees with these changes. The applicant's right to discover other parties' direct cases should not be left open to interpretation.

NYSE&G also seeks to eliminate the discovery provision that states that DPS and DES Staff will not be required to respond to discovery that is "reasonably obtainable from any other source."[1/] NYSE&G states that it cannot foresee a justification for this "limitation" upon other parties' ability to obtain information. First, we note that this protection is consistent with other discovery rules and, in fact, is expressly contained in the NRC discovery rules.[2/] Second, Staff in no way intends, as the applicant alleges, to contract its obligations in the proceedings. While we will fully respond to all proper interrogatories that are served

1/ Proposed Rules of Discovery transmitted to all parties on May 28, 1979.

2/ See 10 C.F.R. 2.720(2)(ii)(1978).

to discover the bases upon which our analyses and recommendations rest, Staff simply does not wish to undertake other parties' work when other readily obtainable sources of information clearly exist.

Lastly, after reviewing the comments submitted on our May 28, 1979 proposal, we believe that two points contained in our initial proposal should be incorporated into the Article VIII discovery rules. First, informal discovery should be encouraged as the principal means of exchanging information; and second, oral depositions should not be permitted until informal and other means of discovery have been attempted. We previously stated:

> We do not believe that [oral depositions] will be used frequently by the parties but, if necessary, [they] can be used to provide valuable immediate follow-up on issues not possible through written interrogatories. Since all discovery should conclude before the beginning of evidentiary hearings, depositions upon oral examinations may assist the parties in rounding out their presentation in a timely and efficient manner.[1/]

We note that NYSE&G has also "strongly" urged that oral discovery not be used as a general means of discovery and that it "only be employed to seek specific follow-up information relating to written responses."[2/] This approach is sound and should be adopted for this proceeding.

1/ Letter of transmittal and Proposed Rules of Discovery from Craig Indyke, Department of Public Service Staff Counsel to all parties (March 19, 1979).

2/ Letter comments from Norman W. Spindell on behalf of NYSE&G to Judge Thomas Matias in response to Staff's March 19, 1979 Rules of Discovery at 3 (April 6, 1979).

II. COMMENTS BY ECOLOGY ACTION OF OSWEGO.

Ecology Action of Oswego (EA) submitted comments addressing Staff's proposed schedule, the joint hearing protocol, the Memorandum of Understanding between the DEC, DPS and NRC, Staff's May 28 proposed discovery rules, and the procedures for mailing documents in this proceeding. Staff replies to these comments in order.

A. EA's Comments on Staff's Proposed Schedule.

EA's initial concern is that the schedule proposed by Staff will result in a premature decision on the application. We believe that a decision to build additional capacity must be reasonably contemporaneous with the planned construction start-up and in-service dates of the proposed facility. Therefore, we share EA's concern that this application may be premature and speculative. Based on the Department of Public Service Staff and New York State Consumer Protection Board forecasts of need in the early 1990's[1/] and recent analyses by the Trial Staffs of the DPS in Cases 80001, 80003, 80004, 80005, 80006 and 80007,[2/] the justification for new

1/ Case 27319, 149-b Long Range Electric Plans, Exhs. 84, 86-89 (1978).

2/ Position Paper on Electric Generation Planning by Staff of the Department of Public Service, June 13, 1979.

base load capacity in the proposed time frame is in substantial doubt. Thus, we recognize that this proceeding may be decided in an expedited fashion. However, at this juncture Staff's schedule is a reasonable benchmark. It takes into account the NYS Energy Planning Board's forecasts and pending Article VIII cases, particularly the Jamesport proceeding.

B. The Joint Hearing Protocol.

EA's comments on the joint hearing protocol are directed at two issues: (1) the need for separate rulings by each hearing body; and (2) the sequence of evidentiary presentations. On the first point, DPS Staff believes that in most instances where one body has made a ruling, the examiners of the other need not state their position if they concur. However, we assume that parties may request the other hearing body to state its position on rulings which have significant consequences.

With regard to the sequence of evidentiary presentations, we believe that the formulation of direct cases prior to hearings and an issue-by-issue presentation is preferable to EA's proposed procedure, which delays the parties' direct filings until after cross-examination of the applicant's direct case. By formulating direct cases before hearings,

there will be few surprises at the hearings and cross-examination will be pointed and meaningful. Assuming adequate discovery is permitted up to the commencement of evidentiary hearings, the filing of direct cases before the hearings will mesh well with Staff's proposed discovery rules and issue identification procedure.

C. Memorandum of Understanding and Interagency Consultation.

EA's comments also indicate a fear of improper consultation among agency Staffs. This fear is unjustified, as is EA's fear that the Memorandum of Understanding between the NRC, DPS and DEC will somehow permit the DPS or DEC Staffs to compromise their position "behind closed doors." The NRC, DPS, and DEC Staffs have separate statutory obligations to fulfill in the proceedings. This, however, does not mean that in areas of common interests parties should not cooperate or consult with one another either formally or informally. In addition, compromises between agency staffs that result in a weak or improper analysis will not be tolerated and the Memorandum protects against compromises by providing that differences of opinion will be expressed in the DES and FES. Consequently, the independent judgment of State Staff will not be inhibited, and DPS and DEC Staff will file separate testimony in the State proceeding if necessary.

EA also insists that Memorandum of Understanding must be served on all parties. Since the Memorandum of Understanding is merely a contract for services between three authorized agencies, we fail to see the merit of EA's request. The contract does not affect the State Staff's responsibilities and we fail to see how the administrative and due process rights of the parties are harmed. While service of the contract upon all parties for comment appears unnecessary, we will provide copies of the Memorandum to any party who specifically requests it, as we have already done for Ecology Action.

D. EA's Comments On Staff's Discovery Rules.

Ecology Action also questions the status of DPS and DEC as contractors for the NRC. EA states that it does not understand the meaning of the language contained in Staff's May 28 rules of discovery which relates to Staff's contractor status and the "Subpoenas" and "Production of NRC Records and Documents" provisions. EA speculates that the Staff's proposal may allow DPS or DEC Staff to "hide behind their contractor relationship" each time intervenors want to conduct discovery. This, however, is not the case. The proposed rules of discovery were drafted specifically to ensure that DPS and DEC Staff's would continue to be available for

discovery as they have in past Article VIII proceedings. Furthermore, we foresee no information or analyses that will be developed by the DPS or DEC Staff solely for the NRC; information and analyses conducted by the State Staff will be subject to discovery in the Article VIII proceeding.

E. EA's Request to Consolidate Mailings.

EA requests to have all motions, responses, testimony, briefs, etc., reproduced and served upon all parties through a central office. Obviously, the high costs of licensing proceedings such as this significantly impede the effective participation of many parties. Unfortunately, Staff is not in a position to substantially ease their burden and we doubt that the Secretary's Office has either the authorized funds or personnel to act as a central clearinghouse as EA suggests.

CONCLUSION

Staff's proposed schedule and discovery rules are a reasonable attempt to harmonize NRC and Article VIII siting procedures. They provide adequate time to develop and synthesize issues into manageable formats before hearings. As we have repeatedly stated, proper issue identification and preparation of direct cases requires full discovery. Therefore, we respectfully urge the Presiding Examiner to adopt Staff's proposed protocol and discovery rules and to use our schedule to ensure that Case 80008 progresses properly.

Respectfully submitted,

ROBERT GREY
Staff Counsel

CRAIG M. INDYKE
Staff Counsel

Dated: June 27, 1979
Albany, New York

cc: All Active Parties
NRC Parties