

NRC PUBLIC DOCUMENT ROOM  
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

8/1/79

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

NEW YORK STATE ELECTRIC & GAS CORP.  
AND LONG ISLAND LIGHTING CO.

(New Haven 1 and 2)

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 & GAS CORP.  
AND LONG ISLAND LIGHTING CO.

(New Haven 1 and 2)

Case 80008

NRC STAFF RESPONSE TO MOTION OF PETITIONERS  
COLUMBIA COUNTY, TOWN OF STUYVESANT AND  
CONCERNED CITIZENS FOR SAFE ENERGY FOR AN  
EXTENSION OF TIME AND FOR AN INVESTIGATION

By a filing postmarked July 12, 1979, Petitioners Columbia County, Town of Stuyvesant and Concerned Citizens for Safe Energy jointly moved that this Board grant an extension of time for filing their memoranda on standing to intervene in the NRC proceeding until 15 days after the New York State Siting Board rules on a recommendation now before it to dismiss the State application. Petitioners also moved that the Board order an investigation by the NRC legal staff into "whether or not both applicants named in the application still wish to pursue the application." For the reasons set forth herein, the NRC Staff believes that no showing of good cause for an extension of time has been made and that the motion for an investigation of the application should be dismissed.

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### Background

On May 23, 1979, a prehearing conference was held in Oswego, New York at which time the Board examined Counsel for Petitioners Columbia County, Town of Stuyvesant, and Concerned Citizens for Safe Energy regarding those petitioners' position in support of their standing to participate in this proceeding. At that time, a schedule was agreed upon under which the petitioners from outside Oswego County were to file memoranda setting forth their respective positions on the standing questions. These memoranda were to be filed on July 13, 1979.<sup>1/</sup> Petitioners Columbia County, Town of Stuyvesant, and Concerned Citizens for Safe Energy did not file the memoranda requested by the Atomic Safety and Licensing Board (the Board).

Petitioners now request an extension of time until 15 days after the New York State Siting Board rules on the recommendation of the New York State Public Service Commission to dismiss the application before the Siting Board. That recommendation appears to be based primarily on "ownership uncertainties" relating to the proposed facility.<sup>2/</sup>

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1/ Counsel for Petitioners claims, in his Motion for Extension of Time and for an Investigation, that he was never served with the prehearing conference report setting forth the July date for the filing of the standing memoranda. Petitioners' counsel was present at the May 23rd, 1979 prehearing conference at which the date was set. It should also be noted that petitioners' counsel did, in fact, receive a copy of the prehearing conference report from Counsel for the NRC Staff. (See letter from Stephen H. Lewis to Robert J. Kafin, dated July 10, 1979, enclosing a copy of the report and referencing a telephone conversation in which Staff Counsel described to petitioners' counsel the contents of the report.)

2/ Order Certifying Appeal and Recommending Dismissal of Application. New York Public Service Commission, Case 80008, July 10, 1979.

Argument

- A. It is not necessary to suspend an NRC proceeding because of the possibility that a state agency will dismiss the state application.

Petitioners argue that it would be a waste of time to consider the question of legal standing of petitioners to the NRC proceeding when the application may be dismissed at the State level. The Staff disagrees with this position. The Commission has determined that it is appropriate for the NRC to pursue its consideration of applications while state and local proceedings are under way. Wisconsin Electric Power Company (Koshkongong Nuclear Plant, Units 1 and 2), CLI 74-45, 8 AEC 928, 930 (1974). In that case, the Commission stated: "Such a practice is hardly a waste of time. On the contrary, it is the efficient, economical and expeditious course." Id.

The Appeal Board has stated its view that the suspension of NRC proceedings pending action of another regulatory agency is uncalled for:

. . . [W]e can readily agree that it would be productive of little more than untoward delay for each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval. In the Matter of Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB 171, 7 AEC 37, 39 (1974).

In San Onofre, there was a final administrative action under State law which precluded construction of the facility. Under those circumstances, the Appeal Board elected to exercise its discretion to suspend the proceedings before it temporarily. However, the Appeal Board also made it clear that it was not laying down an inflexible rule even in the case of an outstanding disapproval by a state agency. Id. at 40. The Appeal Board further stated that

there was no implication in its ruling that, even in the face of an outstanding disapproval by the state agency, a licensing board would be obligated to suspend its proceedings or to withhold the issuance of its initial decision.

Id. at 40.

The Appeal Board reaffirmed its position in the case of Cleveland Electric Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB 443, 6 NRC 741, 748 (1977), refusing to stay construction of a facility on the basis of uncertainty whether final State approval would be forthcoming.

In the present case, the Licensing Board is not faced with a disapproval by the State Siting Board, as was the Appeal Board in San Onofre. Petitioners claim that there is "a real probability" that this application will be dismissed. (Motion for Extension of Time at p. 2.) However, petitioners present no support for this statement. Until the Siting Board rules, all that has happened is that the New York State Public Service Commission has recommended to the Siting Board that the application be dismissed. This recommendation is no reason, based on the cases cited above, for the Licensing Board to cease its effort to determine who the parties to a proceeding before it will be. Petitioners claim that the Siting Board will rule in September, thus implying that little delay would result from the granting of their motion. However, they neglect to take into account the possibility of administrative or even judicial review of the Siting Board's decision. Such review could extend the delay incurred in this proceeding far beyond September. The Commission has long been opposed to such untoward delay. (Koshkongong, supra.) Further, it is somewhat unclear what the significance of a dismissal of a state application as prematurely filed would be for NRC proceedings. In any

event, determination of the legal importance of any action by the Siting Board must await a consideration of the precise nature of and bases for the action.

It should also be noted that petitioners are not being asked to present lengthy testimony on any issues. They have simply been asked to support in writing arguments relating to their standing in this proceeding. The petitioners opposed neither the filing of the memoranda nor the date suggested at the prehearing conference. (See Tr. page 582.) The fact that some question has arisen as to the possible dismissal of the state application has no effect on petitioners' ability to comply with the procedures established by the Board, and agreed to by the petitioners at the prehearing conference.

Since the petitioners were given approximately seven weeks to reduce their standing arguments to writing, and since the action taken by the Public Service Commission in no way affects petitioners' standing argument, the Staff feels that no showing of good cause for an extension of time for the petitioners to file written memoranda has been made. The Staff would not object to the setting of a date certain in the near future for Columbia County, the Town of Stuyvesant, and Concerned Citizens for Safe Energy to supplement the representations respecting standing which have been made by them to date.

In light of the failure of these petitioners to present their affirmative views by written memoranda on July 13, the NRC Staff will address, on the August 3 date set by the Board for responsive briefs, the question of their standing based upon the arguments advanced by them to date.



- B. The motion for special investigation of either the legal sufficiency of the application, the qualifications of the applicants, or representations made in the application should be dismissed.

Petitioners argue that the NRC legal staff should be compelled to make an investigation of the "legal sufficiency" of the application, the qualifications of the Applicants, and the truthfulness of the representations made in the application concerning ownership by Long Island Lighting Company (LILCO) of the proposed facility, and report to the Licensing Board its findings by August 15, 1979. Any such investigation would be inappropriate at this time.

Under the Commission's regulations, before an application is formally docketed a determination must be made by either the Director of the Office of Nuclear Reactor Regulation (NRR), or the Director of Nuclear Materials Safety and Safeguards (NMSS), as appropriate, that the application is complete and acceptable for docketing. 10 CFR §2.101(a)(2-3). Such a determination was made, and the application for the New Haven facility was docketed. Attached to this application were the affidavits of Mr. Allen E. Kintigh and Mr. Andrew Woffard, in which they attest that the contents of the application, as far as they concern NYSEG and LILCO respectively, are true and correct to the best of their knowledge and belief. Copies of the above-mentioned application (without supporting documents) and affidavits are attached to this response as Appendix A. The application states that LILCO and NYSEG will be co-owners of the proposed New Haven facility. Application p.2. Consequently, there is nothing on the face of the application which would lead the Director of NRR to refuse to accept it for formal docketing. As part of the NRC Staff's comprehensive review of the application, it will investigate the Applicants' financial qualifications, and the investigation of the

need for power which the proposed facility will provide may consider, at least in part, the need by LILCO consumers for the power.<sup>3/</sup> This will be done in the normal course of the review by NRC Staff members possessing appropriate expertise to consider these matters, and the results will be subject to probing by any interested party on the record in this proceeding. As a matter of fact, contentions have been submitted by parties to the proceeding in the areas of concern to the petitioners. The NRC's regulations do not contemplate an alteration of this process, and licensing boards do not have supervisory authority over the Staff's review process. Northeast Nuclear Energy Co. (Montague Nuclear Power Station, Units 1 and 2), LBP-75-19, 1 NRC 436 (1975).

In the event that evidence of fraudulent representations to the NRC should come forward, appropriate enforcement action is available to the NRC. Atomic Energy Act, Section 182a and 186a, 42 USC §§2232, 2236; Virginia Electric & Power Co. (North Anna, Units 1 and 2), ALAB-324, 3 NRC 347 (1976). In the event that ownership of the proposed facility should change, the NRC licensing process will give due consideration to the effects of such a change. See Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), 5 NRC 261 (1977).

In light of the fact that the petitioners' concerns will be appropriately dealt with in the normal course of the Staff's review of this application, the motion for an investigation into the application should be dismissed.

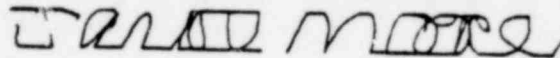
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<sup>3/</sup> Because the New York State Power Pool acts as a fully integrated system, consideration of the need for power question under NEPA must also focus on system-wide need considerations.

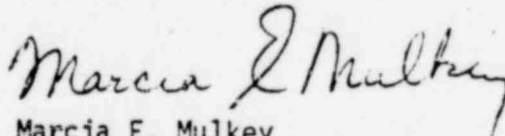
Conclusion

For the reasons set forth herein, the motion of petitioners from the Columbia County area has made no showing of good cause for extension of time and the motion for a special "investigation" should be dismissed.

Respectfully submitted,



Janice Moore  
Counsel for NRC Staff



Marcia E. Mulkey  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 1st day of August, 1979.