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NEW YORK STATE BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

Application of the NEW YORK STATE ELECTRIC & GAS CORPORATION and the LONG ISLAND LIGHTING COMPANY pursuant to Article VIII of the Public Service Law for a certificate of environmental compatibility and public need to construct two 1250-megawatt nuclear generating units in the Town of New Haven, Oswego County, or at an alternate site in the Town of Stuyvesant, Columbia County.

CASE NO. 80008

APPLICANTS' BRIEF IN OPPOSITION TO INTERLOCUTORY APPEAL BY ECOLOGY ACTION OF OSWEGO

NEW YORK STATE ELECTRIC
& GAS CORPORATION
LONG ISLAND LIGHTING COMPANY

Dated: July 25, 1979

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STATEMENT OF CASE

On November 22, 1978 Applicants (New York State Electric & Gas Corporation and Long Island Lighting Company) filed an Application for a Certificate of Environmental Compatibility and Public Need for a 2500 MW nuclear fueled generating station in the Town of New Haven. On January 22, 1979 the Chairman of the New York State Board on Electric Generation Siting and the Environment docketed the Application. In the letter docketing the Application, Chairman Zielinski made reference to motions by Ecology Action of Oswego (Ecology Action) and Concerned Citizens for Safe Energy directed to him to deny docketing of the Application. In granting docketing, Chairman Zielinski stated:

Ecology Action claims first that siting a power plant at New Haven will create an "energy park," because a number of plants are already located in that area, the cumulative effect of which will have environmental, safety and reliability implications that are greater than those that will be considered in the Article VIII review process, and requiring, theretofore, generic hearings on the implications of siting multiple facilities in a small geographic area before an Article VIII review can occur. It also contends that the applications are premature because they allegedly project need too far into the future to allow for proper consideration. In addition, it argues that no action should be taken in this case until the Jamesport application is decided. Finally, it claims that if a need for two 1250 MW units is not shown, the applicant should be directed to file an application for one unit.

Concerned Citizens for Safe Energy essentially argues that the application is premature, claiming specifically that the application should not be considered until the Jamesport application is decided; that load growth projections are excessive; and that action on this application should not begin until the current 149-b hearings are completed. They also claim that NYSE&G ratepayers should not be required to pay for the cost of oil-fired units not serving NYSE&G customers.

While the issues raised by these parties appear to be germane to the substantive examination of the application in the Article VIII process, they do not show that the application is insufficient for docketing purposes. The statute and regulations contemplate only a determination on whether the application meets

> minimal requirements sufficient to permit consideration of substantive issues in the Article VIII proceeding. This application meets those requirements. I am forwarding the motions to the presiding examiner in this case for his consideration of the issues they raise in the hearings in the case.

At a pre-hearing conference held on March 27, 1979, Ecology Action submitted a motion to dismiss the Application on the grounds that the proceeding was not brought by the proper parties, that the Application was premature because the proposed plant was not needed within a 15 year planning period, and that the proposed project was not financially viable for the Applicants. The motion for dismissal consisted of arguments and quotations from isolated portions of briefs, documents and other sources not in the record of this proceeding. No affidavits or other evidence properly admissible in this proceeding were submitted in support of the motion nor was data from the Application referred to or relied upon by the movants.

The Applicants and the Staff of the Public Service Commission opposed the motion primarily on the grounds that issues of fact remained to be decided. The Department of Environmental Conservation conceded, in a letter dated April 9, 1979, that there was no record basis for granting the motion. In a single document Concerned Citizens for Safe Energy, Columbia County and the Town of Stuyvesant supported

the motion but also did not submit any supporting affidavits or references to materials in the record of this proceeding which supported the motion.

By an opinion issued April 13, 1979, the Examiners denied the motion of Ecology Action on the grounds that issues of fact remained for trial but indicated the motion could be renewed upon the completion of discovery and the submission of pre-filed testimony.

By a document dated April 26, 1979, Ecology Action appealed the Examiners' decision. The document in effect concedes that issues of fact relating to the need for the facility exist by dropping the allegations and arguments relating to forecasts of various persons. However, Ecology Action pressed an argument that the proper Applicants have not been identified with the result that the parties cannot conduct appropriate discovery.

Only Applicants responded to the appeal in a brief indicating that issues of fact still existed.

By an order issued July 10, 1979 (Certification of Appeal), the Public Service Commission certified the appeal of Ecology Action to the New York State Board on Electric Generation Siting and the Environment for Case 80008 (Siting Board). The Public Service Commission believes the public interest is great enough to permit an interlocutory appeal and, for the reasons stated therein, recommended the dismissal of the Application.

THE RECOMMENDATION OF THE PUBLIC SERVICE COMMISSION

The Examiners characterized Ecology Action's motion as one asserting that the proposed generating station was not needed by the Applicants (Opinion issued April 13, 1979, p. 2). The Public Service Commission conceded that "Under the rubric of 'need for the facility' alone there are, in this and in all Article VIII cases, dozens of factual issues" (Order Certifying Appeal and Recommending Dismissal of the Application, p. 5) but characterized the appeal as one questioning ownership (Id. at p. 5).

In essence, the Public Service Commission cites testimony pre-filed in the Jamesport proceeding (Case 80003) on February 23, 1979, to the effect that Long Island Lighting Company did not know if it would ultimately participate in the construction of 4700 MW of generating capacity within a five year period. The Public Service Commission quoted the following statement from testimony which was pre-filed but never adopted due to cancellation of the hearing:

> "[W]e 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. 1/"

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

Using the above language, the Public Service Commission found that there was sufficient doubt in the ultimate ownership that the Application should be dismissed. They found that without certainty as to ownership, the Board would be unable to properly determine the appropriate costs upon which or against which the environmental impacts can be evaluated.

The Public Service Commission rejected the positions taken by Applicants that the Siting Board could certify less than the total amount of capacity which is the subject of this proceeding and indicated that state-wide needs for additional generating capacity could not be used as the justifiable for the certification of a given generating station (Certification of Appeal, p. 6). In effect, the Commission has held that the public interest can only be established by the demands of and the interests of the consumers of the individual Applicant as they are perceived on the day the Application is filed, and that those interests and demands must remain substantially static throughout the pendency of the Application.

After distinguishing the jurisdiction of the Public Service Commission as to rates, rate base and utility financing from the Siting Board's jurisdiction over the questions of need and the environmental impact of generating stations, the Commissions certified the appeal of Ecology

action to the Siting Board.

POINT I

THE MOTION IS ONE RELATING TO THE NEED FOR THE FACILITY

Without stating or defining its terms, or the citation of authority, the Public Service Commission has held that "ownership" is prerequisite to making an application under Public Service Law Article VIII and that "ownership" is something distinguished from need for the facility*. Applicants submit that under the circumstances here present ownership and need for the facility cannot be separated.

The criteria which a given utility would use to determine that it should participate in a generating station are, in general, exactly those which would be utilized to determine the need for the facility. To illustrate, if a utility perceives that it will be unable to meet the electrical demands on its system, that it is necessary to replace facilities which produce energy at excessively high costs, that alternatives available to it would result in higher costs for its customers than the facility proposed, or that the proposed facility will add to the reliability of its system (e.g., displacing oil fire units, for example), it will decide to make, or participate in, an application for a Certificate of Environmental Compatibility and Public Need for a specified generating station.

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* Applicants note there is no language in Article VIII which requires that an applicant and ultimate owner must be designated in the application.

The Siting Board in determining to issue the requisite certificate will consider the same or similar questions. If a Company can provide sufficient data to permit the Siting Board to make the findings required by Public Service Law §146, the requisite certificate will be issued, the facility erected and the applicant will in the normal course be the owner of the facility. If the applicant fails to make the requisite demonstration, the certificate will not be issued to it and it will not be an owner of the proposed facility. Since the very decisions which lead to the determination to make an application pursuant to Public Service Law Article VIII in order to become an owner of a proposed facility are the same as the decisions necessary to determine the need pursuant to Public Service Law Article VIII, the question of need cannot be separated from the question of ownership.

The Public Service Commission has created a distinction without a difference. The question raised by Ecology Action is one of the need for the facility. The Public Service Commission concedes there are many factual issues under the "rubric of need." As long as factual issues remain, both Public Service Law Article VIII and general principles of administrative law require a hearing and prevent the dismissal of the Application.

POINT II

THERE ARE A MULTITUDE OF FACTS WHICH REMAIN AT ISSUE ON THE QUESTION OF NEED

As previously indicated, the Public Service Commission stated that "under the rubric of need" there are dozens of issues of fact. (Certification Order, p. 5). Applicants submit that the recommendation of dismissal on the basis set forth in the opinion has implicitly decided the "dozens" of issues relating to need and concluded that at least one of the Applicants cannot demonstrate its need. There has been an increasing informality in the consideration of non-record materials in Article VIII proceedings. With the proliferation of forecast materials and the ever lengthening proceedings under Public Service Law §149-b, there is now a plethora of materials on electric system planning easily available to most people. Without effort to restrict oneself to materials actually before the decisional body and to materials which parties have had an opportunity to examine and an opportunity to rebut or reply to on the record, it is difficult to exclude, from the judgmental process, impressions from the plethora of material available.

There have been few if any cases involving planning for electric generating units in which significant factual issues relating to the need for the facility have not been adjudicated (See among others, Examiners Recommended Decis-

ions in Cases 80002, 80003, and 80006 and Recommended Decision Case 27319). When one considers the complexity of system planning and the extent to which it is dependent upon assumptions as to future events, the existence of substantial dispute is not surprising and is indeed predictable.

There appears, in the opinion of Applicants, to be an unwise and inappropriate tendency in the State of New York for many persons to believe that planning for electric generating capacity consists of preparing a table on which the available generating capacity is shown over the planning period along with the anticipated demands and an appropriate reserve. Capacity is deemed needed only when one observes that the total of the demand and reserve is greater than available capacity. If generation planning were this simple, one would only need to consider the validity of the forecast of the demand and the appropriate size of the reserve. Planning for generating capacity is not so simple. An examination of the contents of Chapters 1 and 9 of the Environmental Report shows that the Applicants considered many factors beyond load and capacity. Among other things, they considered the nature of the capacity (e.g., whether it should be base load, intermediate or peaking capacity), types of fuels, possible retirements, substitution of fuels to enhance reliability, the economics of installation of new units before capacity was needed to meet demands on their respective systems (e.g., displacement of oil fired capacity),

the appropriate size of the units, availability of capacity for purchase as well as other factors which bear on the decision to participate in a new facility. Merely looking at a load and capacity table does not provide all the information needed to determine the need for a specific facility.

At pages 20-21 of the Recommended Decision in Case 27319, the deficiencies implicit in determining the need for facilities based on Tables showing just load and capacity were noted. Mr. Carr, testifying on behalf of the Public Service Commission Staff, and Mr. Harvey, testifying on behalf of the Department of Environmental Conservation did just that. As to Mr. Carr, the Recommended Decision states:

> "...Mr. Carr testified that he was not attempting to assign optimum on-line dates for new units but only to show surplus and deficiency years. According to his Exhibit 60 no deficiency would occur before the winter of 1991-2 even without the additions listed in Table XII above. Mr. Carr testified further that he had not considered economics, the availability of fuel or 'generating uncertainties,' a term which may include licensing or construction delays and suboptimum output of generating units." Id. at 20-21.

As to Mr. Harvey, the Recommended Decision states:

> "...He admitted that his conclusions were based solely upon an analysis of statewide reliability; economic benefits and fuel availability were evidently not considered, nor did he make choices between base-load capacity and peaking units, i.e. he did not consider load shape." Id. at p. 21.

Applicants are highly concerned that the Public Service Commission in recommending dismissal have, in effect, conducted system planning from a load and capacity table. By letter dated June 14, 1979, three attorneys on the Staff of the Public Service Commission forwarded a document entitled "Position Paper on Electric Generation Planning by Staff of the Public Service Commission" (Position Paper) to the Siting Board in Cases 80001 and 80003-80007*. Presumptively this Position Paper, which concludes that only a single generating unit is needed between now and 1992 on the basis of 1978 forecasts, was before the Public Service Commission when it made its recommendation.

An examination of this Position Paper will reveal that as a planning document, it relies on a load and capacity table presented in Case 27319 and does not treat or deal with the myriad of facts which bear upon the need for a given addition to generating capacity. Applicants greatly fear that the Position Paper has improperly affected the Commission's disposition of the instant motion.

Even using 1978 data, the existence of issues of fact relating to need or ownership is clearly apparent. The Staff of the Public Service Commission, as reflected in its

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* The Position Paper apparently was sent directly to the Siting Board in each case. All of the Boards have four members in common with the Siting Board in 80008. The propriety of submission of the Position Paper encompassing data not in the record in all of the proceedings and outside the briefing schedule is highly questionable and highly prejudicial. Applicant strongly excepts to the contents of the Position Paper but have not as yet been afforded an opportunity to comment thereon.

Position Paper clearly believes that with a single exception, none of the generating units envisioned in Cases 80003, 80004, 80005, 80006 and 80007 are needed. Extensions of their reasoning would seem to include the New Haven units. However, the plans submitted by the member systems of the New York Power Pool conclude that with one possible exception, all these units are needed. The position of the New York Power Pool while allegedly untenable to the Public Service Commission Staff is supported by the Recommended Decision in Case 27319 which states that the plan submitted by the New York Power Pool in 1978 was appropriate. Obviously, the existence of these differing opinions establishes the existence of facts to be litigated.

In addition to issues existing in 1978, events of 1979 will clearly affect the appropriateness of any plan and any forecast. To illustrate, in the New York State Electric & Gas Corporation forecast contained in Chapter 1 of the Environmental Report, it was assumed oil would be available for new homes choosing to heat with oil and that the real price of oil would rise at a rate slower than the real price of electricity on the NYSEG System. (Environmental Report, p. 1.1-25). The effect of this assumption was a reduction in the estimated amount of load growth of New York State Electric & Gas Corporation's system stemming from the installation of electric heat. Long Island Lighting Company's estimated costs of producing electricity in its oil fired

generating station will obviously be revised upward due to OPEC price increases. There is considerable probability that planning on the basis of 1978 experience as reflected in reports filed with the Energy Office pursuant to Energy Law §5-112 is now inappropriate. Similarly, any system planning done prior to 1979 which relied upon estimates of the price and availability of oil must be revised even without reference to the proposal of President Carter in his energy message delivered on July 15, 1979. While it is too soon to predict the impacts of the President's program, if any substantial portion is implemented, electric system planning may be significantly affected. For instance, using data from Volume 2, Exhibit 7 of 1979 Report of the New York Power Pool pursuant to Energy Law §5.112, it is roughly estimated that to effectuate President Carter's goal to reduce the oil burned to generate electricity in the State of New York by 50%, new generating capacity and/or conversions from oil to other fuels would total 6,000 MW. Any new capacity constructed would be in addition to the capacity shown as planned in the 1979 SEO filing.

The events of 1979 clearly illustrate the rapidity of change in circumstances affecting generating planning and the proof of need for a given facility. Facts and circumstances change so rapidly that any premature determination of factual issues encompassed within the concepts of "ownership" or "need" must and should be avoided. There are

real and substantial reasons the Application was submitted and no undisputed facts exist under which the Application should or can be dismissed.

POINT III

ISSUES RELATING TO STATEWIDE NEED SHOULD BE CONSIDERED BY THIS BOARD IN THIS PROCEEDING

Applicants were truly shocked at the concept expressed by the Public Service Commission that statewide needs cannot justify processing this Application. Without conceding that the Applicants cannot justify the licensing of the proposed plant for their own and their customers needs, statewide needs logically must and should have a significant impact on a great number of issues in this proceeding. Because of their importance, it is by no means remote that statewide interests might be controlling on virtually all aspects of this case.

Public Service Law §146 requires the Siting Board to make findings that the proposed facility is needed and that its construction is in the public interest. In both the old and new versions of Article VIII §146 requires the Siting Board to find that:

> (e) that the facility is consistent with the long-range planning objective for electric power supply in the state, including an economic and reliable electric system, and for protection of the environment.

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As set forth above, Public Service Law §146 requires a finding that a proposed generating facility is consistent with long-range planning objectives for electric power supply in the state. Nowhere in Article VIII is the Board limited to the needs and interests of the individual applicants or their customers.

The concepts of public need and public interest are in no way limited solely to the needs and interests of the customers or stockholders of the Applicants. The laws of the State of New York indicate the propriety of statewide planning. Public Service Law §149-b originally provided:

> Each electric corporation shall prepare and submit ... its long range plan for future operations. (1972 Laws of New York Chapter 385).

In 1975, §149-b was amended to provide:

> The members of the New York Power Pool shall prepare and submit annually a single comprehensive long range plan for future operations.

In 1978 the Energy Law was amended and §149-b of the Public Service Law was repealed. Energy Law §5-112 provides:

> "On or after ... the members of the New York Power Pool ... shall prepare and submit annually a single comprehensive long-range plan for future operations."

Even the Public Service Commission itself has criticized electric utilities for planning for generation facilities on an individual system basis rather than on a statewide basis. In Opinion 74-1 issued January 7, 1974 in

Case 26368, the Commission stated at page 13:

> "The schedules of future generating facilities in the plan do not appear to be the result of a statewide, systematic approach to the identification and selection of the best possible sites. The sites selected indicate that the companies have proceeded on a franchise-by-franchise basis, each utility specifying sites for new generation within its own franchise area to meet its own loads, with but limited regard to the need for a broad, statewise system perspective. This is a fundamental deficiency of great concern to us and it is imperative that remedial action be implemented promptly."

The law of the State of New York clearly mandates integrated statewide long-range planning on the part of electric utilities in the State of New York. If statewide planning is to be conducted, there are circumstances where the interests of individual utilities and their customers will be rightfully subverted to the wider interests of the State as a whole. Many issues such as the size of units, location and possibly even fuel will be mandated by broad state interests rather than the more limited interests of the individual utility. To illustrate, the selection of the size of units to achieve maximum economy and reliability is more a function of the size of the other units in the state and total statewide loads than functions of individual system requirements. Considering the clear mandate to conduct planning on a statewide basis, it is surprising for the Public Service Commission to denigrate statewide planning and assert that questions of need and questions of

economy can only be decided on a company by company basis*. The Siting Board clearly should not let itself be the victim of the now narrow visions of the Public Service Commission.

POINT IV

THE BOARD DOES HAVE THE POWER TO CERTIFY LESS THAN THE TOTAL RELIEF REQUESTED

Applicants are astounded that the Recommendation of the Public Service Commission states that Applicants casually suggested that the Siting Board may certify less total capacity than that amount requested. They are outraged at the suggestion that the Applicants have not given careful and thorough consideration to the proposals contained in the Application. Unfortunately, the process of selecting a site after a statewide survey, as i .ged by the United States Nuclear Regulatory Commission Regulatory Guide, Revision 2, Chapter 9, the Joint Working Paper for the Preparation of Environmental Reports for Generating Facilities in New York State and the Opinion in Case 26829 - Long-Range Plans, page 23 et. seq. (Public Service Commission Opinion 75-34): conducting the extensive monitoring under 16 NYCRR, Parts 73-80; and finally preparation of an application is a lengthy one. Because it is, a company cannot react to passing fads and a great number of unforeseen events can occur. Experience in the past has indicated -- easy pathway to licensing a generating station is yet available and that almost inevitably the Applicants will be

accused of misfeasance, if not malfeasance, or even plain lack of intelligence. In an effort to assure licensing, no step is casually taken. However, realistically, no matter how confident one is of the correctness of his decisions when made, and when adjudicated, there is always the possibility that the triers of the fact will reach a different conclusion. Thus, should Applicants fail to carry their burden of persuasion on any issue, the Siting Board may ultimately grant a certificate which differs from the proposal. No matter how strongly one feels, there is always a possibility that one will lose. The recognition of the power of the Board to certify a generating station different than the one described in the Application is only the recognition that alternatives do exist should the Board ultimately determine the Applicants are in error. Thus, should the Board determine that the proofs do not establish the need for two units, the certification of a single unit for a single owner or multiple owners is a possible alternative.

The Application cannot be dismissed on the basis that Applicants recognize the possibility that the Board can grant less than all the relief requested.

POINT V

APPLICANTS HAVE BEEN DENIED AN OPPORTUNITY TO BE HEARD

While Administrative bodies are not bound to adopt

any specified hearing processes and are not bound by technical rules of evidence, they must afford the participants a fair opportunity to be heard. As stated in the Matter of Simpson v. Wolansky, 38 N.Y.2d 391 (1975):

> "...True, the hearing conducted by the administrative official acting in a judicial or quasi-judicial capacity may be more or less informal and even technical legal rules of evidence and procedure may be disregarded (cf. Matter of Brown v. Ristich, 36 NY2d 183), but included in the fundamental requirement of a fair trial, absent the waiver, is the entitlement of the party whose rights are being determined to be fully apprised of the proof to be considered, with the concomitant opportunity to cross-examine witnesses, inspect documents and offer evidence in rebuttal or explanation (Matter of Hecht v. Monaghan, 307 NY 461, 470; Matter of Friedel v. Board of Regents of Univ. of State of N.Y., 296 NY 347, 352; Matter of Heaney v. McGoldrick, 286 NY 38, 45).
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> Respondent, in rendering an account of his decision in this disciplinary matter, affirmed in a statement that: "As Director it is my duty to consider every aspect of such a case even if it does not appear in a hearing transcript. I have continually been supported by our Board of Visitors and parent associations in my attempt to eliminate resident abuse." The majority at the Appellate Division was correct, therefore, in finding that respondent acknowledged his reliance on matters not appearing in the record in making the determination under scrutiny. This was in violation of the salutary general proposition, to which there is no relevant exception here, that it is not proper for an administrative

> agency to base a decision of an adjudicatory nature, where there is a right to a hearing, upon evidence or information outside the record (Matter of Newbrand v. City of Yonkers, 285 NY 164, 179; Matter of New York Water Serv. Corp. v. Water Power & Control Comm., 283 NY 23, 31-32; Matter of Greenbaum v. Bingham, supra, pp. 347-348; Matter of Wignall v. Fletcher, 278 App. Div. 28, aff'd 303 NY 435; Matter of Revere Assoc. v. Finkelstein, 274 App. Div. 440; Matter of Smith v. Rosoff Tunnel, 259 App. Div. 617, 619-620; 1 NY Jur, Administrative Law, § 133; see 18 ALR 2d 552, 555)."...

In this instance, Applicants have been denied a fair hearing by the adoption of excessively informal procedures, and by making findings of fact on materials not in the record of this proceeding.

Without specific designation of materials to be incorporated in a proceeding, a party cannot anticipate issues, may be prevented from responding and generally is left without a knowledge of the record within which he must present his case. If large amounts of materials from other proceedings are to be utilized without specific identification, an applicant cannot know in advance of a decision what portions of extensive records will be deemed relevant by his opponents or by the Siting Board itself.

Chairman Charles Zielinski examined the Application and pursuant to Public Service Law §143 determined that the Application was complete and could proceed to hearings. Presumably, he examined Chapter 1 of the Environmental Re-

port in which the need for the proposed generating station is discussed and Chapter 9 in which alternatives to the station are discussed. The docketing letter explicitly rejected arguments relating to the need for the facility and that the Application was premature. In papers supporting this motion, there has been no reference to any uncontroverted fact establishing that the proposed facility is not needed or in the public interest. There has been no citation to any markedly changed circumstance which would lead to the conclusion that the Application is presently insufficient. There is merely an allegation that a single paragraph from another proceeding casts such grievous doubt in this proceeding as to require its dismissal.

The order of the Public Service Commission makes explicit its use of material fro. several sources other than the record in this proceeding. Besides referencing material filed of the Jamesport proceeding, the Commission references the 1979 Report of the New York Power Pool, Vol. 2, p. 16 for expenditures incurred pending the resolution of this proceeding, alleged claims of difficulty in financing construction projects (presumably from testimony in rate cases filed by Applicants), claims of statewide need allegedly made in Cases 80002, 80003, 80006, 80007, and presumably in Cases 80004 and 80005 brought by the Power Authority of the State of New York which are also referenced.

There is great danger in referencing materials in other proceedings without formal incorporation because the material incorporated may not be relevant, may be out of date and the parties in the existing proceeding, while possibly disagreeing with the accuracy of the claim asserted or fact referenced, are not given the opportunity to rebutt the testimony or material referenced. The danger is exacerbated when the decision making body itself searches unspecified records for supporting materials not utilized by the movants.

In this case, without carefully referenced affidavits or material in the record, Applicants can not carefully and meaningfully respond to those vague assertions with meaningful arguments. Applicants submit that the prevailing informality has denied it an appropriate ability to respond to the motion and to the recommendation.

POINT VI

THE JAMESPORT RECORD HAS BEEN MISINTERPRETED

The danger of relying on small portions of records in other cases is well illustrated by the Public Service Commission's reliance on the quotation from the testimony of Madsen and Rider in Case 80003. When viewed in context, the comment that LILCO did not know if it would ultimately participate does not by itself establish an inappropriate resolve on the part of Long Island Lighting Company with respect to the New Haven facility. First, the statement was

made in response to the following question posed by the Jamesport Siting Board:

> "In light of the revised forecasts of demand and capacity in Case 27319, is there an economic justification for LILCO and NYSEG to implement a facilities expansion plan that would add approximately 4700 megawatts of capacity in the five year period 1988 - 1993?" (Case 80003 Order Directing Remand Issued December 22, 1978, p. 6).

In response, the Applicants stated that regulatory, construction and voluntary delays would make it unlikely that the two facilities would be in service within a five year period. Included in the testimony is a table showing the originally scheduled in-service dates and the delayed dates for sixteen generating units included in the 1978 Report of the Member Systems of the New York Power Pool Pursuant to Public Service Law §149-b (1978 149-b Report)* (Case 80003, Testimony of Madsen and Rider filed February 23, 1979, p. 2-3). Similarly the testimony included a table showing changes in ownership of seven proposed generating units occurring between the initial proposal and the 1978 149-b Report. Units which have changed ownership include units proposed in Case 80003 (Jamesport) and 80006 (Sterling) in which ownership changed during the pendency of the proceeding. These two

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* It can be noted that in the 1979 Report of the Member Systems of the New York Power Pool pursuant to Section 5-112, the two Lake Erie Units are shown without an estimated in-service date. The MTA Fossil Plant (Arthur Kill) is shown as a 700 MW fossil plant without a site and the Greene County Unit (Cementon) proceeding is in a state of suspension and probably abandonment.

tables clearly demonstrate the likelihood of delays and that changes in ownership of generating units are common. Unless one ascribes some deliberate intent to deceive, or behavior amounting to fraud, one can only conclude that there is a possibility that ownership or participation in any given facility will change between the date of the initial proposal to construct a given facility and its construction. In light of the cited data, only the most undiscerning would be so brashly confident of his estimate of future events not to be cognizant that such events could effect ownership of units for which certification is sought. Indeed, Public Service Law §141 even contemplates the transfer of Certificates of Environmental Compatibility and Public Need and thus recognizes the possibility if not the probability of a change in ownership of a licensed facility.

Having in mind the number of changes in ownership of proposed generating units which have occurred over the years and the adaptations to those changes in Cases 8003 and 80006, possible changes in ownership clearly do not require the termination of a project or dismissal of a proceeding. Applicants submit that the Public Service Commission has implicitly decided that the facts establish that the applicants do not need the proposed generating stations and thereby have decided the very need issue which it conceded included many unresolved issues of fact. To insist on a cosmetic assurance of "ownership" when history indicates that indeed changes

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have been made during the pendency of proceedings indicates a pre-disposition as to the need for the facility. In any event, the Public Service Commission has failed to indicate any undisputed fact which establishes that LILCO will not participate in this proceeding.

The Public Service Commission has incorrectly interpreted the recognition of the realities involved in the determination of ultimate ownership as a lack of resolve. The continuation of Long Island Lighting Company in this proceeding and their entry into a contract with New York State Electric & Gas Corporation to participate are clearly evidence of their intent to participate in the New Haven units.

POINT VII

THE PARTIES CAN MEANINGFULLY CONDUCT DISCOVERY AT THIS TIME

The Public Service Commission in its certification to the Siting Board reasoned that the Siting Board must have certainty of ownership in order to address certain issues they believe relevant to the proceeding and that the parties must have some certainty as to ownership in order to conduct discovery and address a variety of issues in the proceeding. In its Order Certifying Appeal and Recommending Dismissal of Application, the Public Service Commission states at p. 5-6:

> "Even if there is a public need for the proposed facilities, as applicants allege, the probable owner-

> ship and utilization of the proposed facility must be reasonably certain from the outset of the proceeding so the parties, and ultimately the Siting Board, can determine whether its public benefits will outweigh the costs and impacts of its construction and operation or whether some alternative may be superior. The Ecology Action motion is not a need motion, it is an ownership motion. Because the ownership question is fundamental to so many of the public need, siting, and cost issues that are raised in the Article VIII certification process, a finding that the ownership of the plant is uncertain is dispositive and requires dismissal."*

The position of the Public Service Commission is inherently unsound for a variety of reasons. First, New York State Electric & Gas Corporation and Long Island Lighting Company are the Applicants and the effort of disproving or challenging the contents of Chapter 1 of the Environmental Report can obviously be undertaken at once. As in the Sterling and Jamesport proceedings, should the interests in ownership change, all parties will be afforded the opportunity to litigate the effect of that change. The appropriateness of a given company's participation can only be examined with reference to the contents of the Application as it stands at any given juncture of the proceeding. The parties are not inhibited from making any argument, or discovery they deem appropriate. The Siting Board will ultimately decide the

* It is interesting to note that while attempting to distinguish need from ownership, the two concepts are inextricably tied together by the phrase "Because the ownership question is fundamental to so many of the public need ... issue(s).

issues on the record as it exists at the end of the proceeding.

What the Public Service Commission really objects to is the dynamic nature of events influencing Article VIII proceedings. Electric system planning is difficult under the best of circumstances but forecasting electric demands is one of the most difficult elements. It is possible that the only certainty in forecasting is that circumstances will invariably change the day after a forecast is made and the accuracy of the forecast adversely affected. Administrative Law Judge Harold Colbeth, in his recommended decision in Case 27319, the 1978 149-b Proceeding, stated:

> "Electric system planning is the continuous search for a balance point among conflicting objectives. Considerations of first cost and economical operation clash with demands for zero environmental impact. Reliability of service is hostage to the availability of fuel. And governmental authorities are nurturing what Schumpeter called 'a tropical growth of new legal structures' to complicate the rules of the game.
>
> The American public has little understanding of the complexities of system planning. In fact, the public has not even arrived at a consensus on the relative importance of low cost, high reliability and minimum environmental impact. Such uncertainty denies to the system planner the very specification of goals with which he should commence. Selecting his own goals, the planner begins his work only to encounter further obstacles. Forecasts of the loads he must meet fifteen years from now will almost inevitably turn out to

> be wrong. Even if a reliable confidence interval can be assumed, say plus or minus 10%, the planner must take aim at some one figure within the range of values, each of which is almost equally likely but only one of which can come true.
>
> Thereafter, reserve margins must be specified. Based upon statistical probabilities as they are, they may turn out to be either excessive or inadequate. The probable cost and availability of different fuels must be assessed along with the accessibility of capital. Construction schedules must be outlined but their success remains speculative, dependent as always upon good management, the performance of suppliers, the output of labor, and the timely granting of permits by regulatory authorities." (Recommended Decision, Case 27319, Issued July 11, 1979.)

As the difficulties inherent in planning are multiplied, the probability of shifting facts and opinions multiplies. In previous Article VIII proceedings, means of accommodating to changes in ownership have been adopted. In Case 80006, (Sterling), Niagara Mohawk Power Corporation was added as a participant subsequent to docketing, and in Case 80003, New York State Electric & Gas Corporation became a participant in the Jamesport case after hearings had commenced. It is equally as significant that in every Article VIII proceeding the basic facts used to both support and attack the need for a given facility have changed during the course of the proceeding. Annual reports filed pursuant to the former Public Service Law §149-b invariably resulted in the submission of

new data and in most instances resulted in additional testimony. Change in facts affecting planning of electric systems is inherent in any proceeding which is pending over an extended period.

It is not only changes in matters relating to the need for the facility which have significantly affected Article VIII proceedings, but changes in basic laws relating to the environment have required new data and additional hearings. To illustrate, basic changes or new rules relating to air quality, water quality and solid waste disposal occurred during the pendency of Case 80002 - Somerset Station. Each successive change required the submission of new data by means of exhibits, new testimony and an opportunity for discovery. Ideally, many of the frustrations of dealing with an Article VIII proceeding would be alleviated if all the facts and governing laws would remain the same throughout the proceeding. Such is not the case. The parties must proceed on the basis of the condition of record as it exists and be prepared to accommodate to those changes which inevitably follow in the course of these proceedings.

Under the circumstances in this proceeding, the parties must and certainly can proceed with discovery and to hearings on the facts as they exist at the present time. No one can assure them that there will be an absence of change.

POINT VIII

THE EXPENDITURE OF FUNDS CANNOT BE THE BASIS OF A DISMISSAL OF THE APPLICATION

The Public Service Commission's recommendation is based in part upon the fact that this proceeding will be expensive. Applicants first note that the extent of this expense was not included within the moving papers or within the Application. Nonetheless, they are aware that the licensing of a generating station under Article VIII and the applicable Federal laws and regulations is expensive. However, one must note that the cost of licensing is largely controlled by persons other than Applicants. The Applicants did not adopt the rules nor are they in control of the issues to be tried or time which will be expended on trying the issues. However, if one is to build a plant, the expenditure of large amounts of time and money is currently unavoidable.

To the extent that expenses of a proceeding are considered in adjudging the motion in question, they must be weighed against the costs both to the Applicants and to society. When one just considers that the ultimate costs of the facility is estimated at $3,336,627,000 (Environmental Report Table 8.2-1) and the savings in oil were projected to be some $5,000,000,000 (Environmental Report p. 1.1-66) the expenditures of 15 to 17 million dollars per year to achieve licensing is clearly not overwhelming. The cost to society

of not building a needed plant may be overwhelming but no one has apparently considered that cost.

Applicants know of no instance in which a party was denied a hearing because parties could not afford the cost. Applicants submit that the judgment that the cost of the proceeding is such that any uncertainty in the identity of the ultimate owners requires dismissal is implicitly based upon the unexpressed preconception that the Applicants will be unable to carry their burden of persuasion. Applicants submit that as long as issues of fact on the question of need remain, they must be allowed a hearing on the issues presented regardless of any cost which may be involved.

CONCLUSION

The existence of substantial issues of fact mandate the affirmance of the decision of the Examiners. To do otherwise will deny the Applicants the opportunity to prove their case. The simplistic approach Applicants believe was utilized by the Public Service Commission belies the reality of electric system planning. Applicants strongly believe that the public interest will not be served by a dismissal of this Application.

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Dated: July 25, 1979

NEW YORK STATE BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

Application of the NEW YORK STATE ELECTRIC & GAS CORPORATION and the LONG ISLAND LIGHTING COMPANY pursuant to Article VIII of the Public Service Law for a certificate of environmental compatibility and public need to construct two 1250-megawatt nuclear generating units in the Town of New Haven, Oswego County, or at an alternate site in the Town of Stuyvesant, Columbia County.

CERTIFICATION OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that a true copy of Applicant's Brief in Opposition to Interlocutory Appeal by Ecology Action of Oswego was served upon the persons appearing on the attached list by depositing in the post office box regulary maintained by the government of the United States in the County of New York, State of New York.

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