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June 27, 1979

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Re: PSC CASE 80008 and NRC Dockets 50-596
and 50-597 -- NYSEG and LILCO -- New Haven

Gentlemen:

In response to the comments of New York State Electric & Gas Corporation regarding the proposed Protocol for hearings before the Atomic Safety and Licensing Board and New York State Siting Board, the Department of Environmental Conservation (DEC) submits this reply.

On April 27, 1979, the staffs of DEC, the Department of Public Service (DPS) and the Nuclear Regulatory Commission (NRC) submitted for consideration by all parties a Protocol to govern the conduct of joint hearings on common issues in the above referenced cases. New York State Electric & Gas Corporation (hereinafter the Applicant or NYSEG) proposes that the Protocol be significantly modified. DEC believes that the NYSEG proposals are wholly inappropriate and will be dysfunctional to the goal of achieving full identification, analysis and discussion of all issues.

The joint protocol was designed to allow joint hearings to be held on issues common to the record and necessary for consideration in both proceedings. The protocol is governed by the basic idea that since each board has to consider issues which the other also has to consider, it made no sense for parties to litigate such issues more than once. NYSEG has apparently misunderstood this basic premise behind the joint protocol. Applicant erroneously believes that the protocol should be utilized to subordinate the State proceeding to the NRC proceeding.

To the extent that NYSEG proposes to limit the opportunity for identification of issues and discovery on any matter legitimately considered pursuant to Article VIII of the Public Service Law, DEC urges the Examiners to reject the Applicant's position. NYSEG's proposal that "all parties other than the Staffs should be required to issue statements and issues by August 1, 1979 on the issues arising out of Applicant's proposal to build a nuclear facility (NYSEG Comments, p.7) is wholly unreasonable and reflects an insensitivity to the needs and resources of intervenor parties. Apparently, the Applicant believes that citizen groups require less time to effect their analyses than Staffs will require for completion of a Draft Environmental Impact Statement. This is an absurd proposition. Moreover, Applicant overlooks the fact that intervenors will, in all likelihood, heavily rely upon the Environmental Impact Statement for carrying out their analyses.

NYSEG's proposal that issues relating to a coal facility be identified by Staffs by August 1, 1979 overlooks the fact that there will be a significant overlap of issues and matters of analysis between the nuclear and coal cases.

Applicant's suggestion that the "task of submitting lists of contested issues by these governmental entities would be facilitated if consolidation of governmental parties should occur" should be rejected and, moreover, is unnecessary. Article VIII does not require that there be a commonality of positions between the Staffs of DEC and DPS. The Staffs of the two agencies have in the past consistently attempted to work together so as to avoid duplication of effort in various aspects of Article VIII proceedings. To the extent that the Staffs can work together on certain issues, it is clear that the Staffs will do so. But, there is no basis in law for compelling such a result and any attempt to do so may frustrate the clear directive of Article VIII that both DEC and DPS Staffs will be independent parties.

NYSEG proposes that, after August 1, 1979, discovery must be limited to only those issues which are contested. [NYSEG Comments, p.9] Aside from the fact that such early issue identification is ill-advised, a limitation on discovery of this type is also inappropriate. Complete and full discovery is perhaps the best device available for insuring the compilation of a complete and full hearing record in the shortest possible period of time once hearings are commenced. It is in the interest of all parties, including the Applicant, to make sure that issues not previously recognized do not emerge for the first time during hearings. Applicant's suggestion fails to take into consideration that intervening events may cause new issues to be identified after the date for identification has passed. In addition, there is an interrelationship between issues in Siting cases, so that the resolution of one issue identified in controversy may cause parties to reexamine earlier conclusions as to matters not previously identified as being in controversy.

Applicant further recommends that "all non-forecasting need issues can be identified" by August 1. [NYSEG Comments, p.9] Applicant goes on to suggest that the New York State Energy Planning Board proceeding "will only determine the forecast to be utilized in this Article VIII proceeding." Applicant's analysis is ill-conceived. The determination of the Jamesport proceeding will clearly impact on all issues of need and financial capability which may arise in this case. The record in the 1978 §149-b proceeding indicated that there was little or no need for new generating capacity in the State of New York before the early to mid-1990s. If any facility is certified as a result of Case 80003, the justification, if any, for the New Haven facilities will be even more precarious than it is now. Conversely, if the Siting Board finds no basis for certifying a facility in Case 80003, the reasoning behind such a conclusion would likely be equally applicable in the present case. In addition, we note that NYSEG has misconstrued the function of the State Energy Planning Board proceeding. Without fully delineating the functions of that proceeding, it is safe to conclude that the Board will do more than to merely indicate to the Siting Board which forecast should be utilized in analyzing the need issue in this proceeding.

Finally, we strongly urge the Joint Boards to reject Applicant's proposal that "all environmental issues...to be litigated in the Article VIII proceeding other than those raised initially in the DES should be identified on August 1, 1979." In view of the likely schedule for conducting this

proceeding, such an insistence on early issue identification is wholly unnecessary. The format for issue identification presented in the proposed Protocol (paragraph V, B.) allows full analysis and review of the Application. The NYSEG approach will foreclose much of this opportunity and force a rush to judgment as to what is in controversy.

In conclusion, DEC urges the members of the Joint Boards to reject Applicant's proposals regarding Paragraphs IV and V of the Proposed Protocol. The NYSEG proposal to modify NRC Rules for the Article VIII proceeding [Attachment II of Applicant's Comments] should be rejected. The modification in the proposed schedule for Joint Hearings [Attachment III of Applicant's Comments] should also be dismissed.

Sincerely,

David A. Engel
Senior Attorney

cc: All Parties