STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 5, 1979

COMMISSIONERS PRESENT:

Charles A. Zielinski, abstaining
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Richard S. Bower

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)

BY THE COMMISSION:

By application filed November 22, 1978, the New York State Electric & Gas Corporation and Long Island Lighting Company filed, pursuant to the "old" Article VIII of the Public Service Law,[1/] an application for a certificate of environmental compatibility and public need to construct two 1250 megawatt nuclear fueled electric generating facilities in the Town of New Haven, Oswego County or, alternatively, in the Town of Stuyvesant, Columbia County. The application also describes coal-fueled alternate facilities. The application has been docketed by the Chairman and hearing procedures prescribed by Article VIII have commenced. At the March 27, 1979 prehearing conference, Ecology Action of Oswego presented

2022 343

1/ 1972 Session Laws, Chap. 385.

a motion to dismiss the application as premature. The Presiding Examiners gave other parties an opportunity to respond and reserved decision. On April 13, 1979, they ruled that the "basis and real thrust" of the Ecology Action motion was the question of need for the proposed facilities and that "hearings must be held" on this issue because there is "insufficient fact available upon which to base a final ruling." The Examiners therefore denied the motion "without prejudice to reassertion at an appropriate time," indicating that discovery should be completed, and prefiled testimony be distributed first and then "if circumstances indicate," the parties may make an "appropriate motion." On April 26, 1979, Ecology Action filed the interlocutory appeal that is now before us.[1/] Responses to the appeal have been received from the applicants, staff, and Stuyvesant area intervenors.

Interlocutory Review

Ecology Action claims that the dismissal it seeks will avoid the expenditure of large amounts of time and money by all participants on an application that is clearly premature. Moreover, it argues that this savings is possible only if the application is dismissed now. Applicants argue that Ecology Action has failed to demonstrate, as required by 16 NYCRR § 70.8(a), that interlocutory review of the Presiding Examiners' ruling is necessary to prevent detriment to the public interest.

Applicants' expenditures in relation to the proposed facility already exceed $50 million and will increase by $15-17 million annually while this litigation proceeds.[2/] While the ultimate rate treatment of these expenditures is yet to be determined, it would be virtually impossible to prevent them from having some impact on consumer rates. The costs incurred by taxpayer-supported institutions (e.g., the Department of

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

2/1979 Report of the New York Power Pool, Vol. 2, p. 16.

2022 344

Public Service, the Department of Environmental Conservation, the Nuclear Regulatory Commission) and citizen groups in the course of this case are difficult to measure, but could easily total in the millions of dollars. We conclude that the cost of Article VIII proceedings is so great that there would be detriment to the public interest if a case that should have been or could have been summarily dismissed is allowed to run its course. The Ecology Action motion therefore meets the requirement that interlocutory appeals be taken only where a prompt decision is necessary to prevent a detriment to the public interest.

Grounds For Dismissal

The Ecology Action motion rests upon two grounds: prematurity and legal insufficiency. It argues that the proposed ownership of a generating facility must be reasonably certain before an Article VIII application can be filed. Absent certainty of ownership, it points out that the public cannot be given reasonable notice of what is at stake in the proceeding. The environmental and economic values to be considered in an Article VIII proceeding depend upon who will bear the construction cost and how the plant's output will be used, it claims. Moreover, in the discovery and evidentiary hearing process, the relevance and materiality of evidence on future electric load, consumer impact, alternate sites and generating modes depend in part on who will own the plant and how its output will be used.

Staff supports Ecology Action's arguments. According to staff:

> A firm commitment by the applicants to construct a proposed generating facility is essential to going forward with hearings. Thus, as Ecology Action points out, we must know the identity of the applicant(s) in order at a minimum to assess its ability to finance the proposed facility, to assess the likely impacts on ratepayers during the construction period and to assess their need for capacity.

Three parties from the Stuyvesant area, Columbia County, the Town of Stuyvesant, and Concerned Citizens for Safe Energy, Inc., filed a statement in support of dismissal on the ground of prematurity and legal insufficiency.

We find nothing novel in the thought that an application that is either premature or fails to provide information required by law should be dismissed. We agree with Ecology Action and staff that a firm commitment by the applicant to construct the proposed facility is a necessary condition for granting an Article VIII application. The balancing of the benefits and costs of various alternatives the Siting Board is required to perform by Public Service Law § 146 can take place only if there is record evidence indicating who will own the proposed generating facility and how its output will be used. In fulfillment of that evidentiary requirement, both Article VIII[1/] and the regulations we issued under Section 142(f)[2/] require that an application provide fairly specific cost and load data. Of necessity, the cost and load data presented are for the applicant, the entity that will build, own, and operate the generating facility. When the probable ownership of a generating facility is not known, an Article VIII proceeding cannot be maintained. The application must be deemed premature and legally insufficient. Expenditure of the vast amounts of time and money that are necessary to prepare and process an Article VIII application cannot be justified if there is substantial doubt about who would ultimately own the generating facility or, indeed, whether it would be built, even if a certificate were issued.

1/See Section 142(c)-(e).

2/See 16 NYCRR § 72.1(c), § 72.1(d), § 72.1(e), § 72.1(h), § 72.1(k) and § 72.3(d).

Applicants themselves do not dispute the proposition that an application that is premature or legally insufficient should be dismissed; instead, they argue that this application is neither premature nor legally insufficient. To this issue we now turn.

Support For Dismissal

Applicants' response to the appeal raises two issues, and ultimately makes the point that whatever the general rule, this application is neither premature nor legally insufficient.

Applicants first assert that there are many factual issues in Article VIII proceedings and that as long as there are any material factual issues an application cannot be dismissed. This is true. Under the rubric of "need for the facility" alone there are, in this and in all Article VIII cases, dozens of factual issues. For the purpose of considering a motion to dismiss, applicants' claims about the public need for the proposed facility must be accepted as true. We believe however that the Presiding Examiners improperly characterized basis of the Ecology Action motion as raising only questions of need. The motion papers make some assertions regarding the need for the proposed facility, but the motion does not depend on these assertions. We do not find the public need questions material to the ownership issue the motion raises. Even if there is a public need for the proposed facilities, as applicants allege, the probable ownership 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.

There are no material issues of fact regarding the probable ownership and utilization of the proposed generating facilities. The question is currently so permeated with doubt that no party can say what ownership shares would be proper. Applicants themselves confess uncertainty about the ownership of the facilities proposed in this case. This application was filed and docketed on the basis of NYSE&G and LILCO's expressed intention to share equally the cost and output of the proposed facilities. However, in testimony subsequently filed in Case 80003, Application for Jamesport Generating Facility, applicants stated:

> [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/

We do not share the belief that, in spite of the ownership uncertainties, the alleged "statewide need for New Haven" makes it desirable to continue the planning and licensing process because there is a "likelihood" that other utilities will purchase shares in the plant. We do not believe any utility, much less LILCO or NYSE&G, each of whom claims serious current cash flow problems, should embark on a costly Article VIII proceeding to certificate a facility it will not own when there is nothing more than a "likelihood" that unidentified "other utilities" will eventually step in and pick up part of the tab for the planning, licensing, and construction costs by purchasing some portion of it.

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

The proposed facilities are not the only ones currently under consideration in Article VIII proceedings. Private electric companies currently have some 6000 megawatts of generating capacity under consideration in the Article VIII process--megawatts that purportedly will serve statewide needs. And, more significantly, the members of the New York Power Pool, including LILCO and NYSE&G, believe that most of those megawatts of capacity should be built before the capacity proposed in this case.[1] In addition, the Power Authority of the State of New York has plans to build 3000 megawatts of capacity to meet statewide needs. In view of these facts, and the failure of any other electric company in the state to invest in the New Haven/Stuyvesant project, applicants' implication that there will be a market for the capacity they propose, even though LILCO may have no use for it, is unsupportable. As applicants said in their prefiled Jamesport testimony, the appropriate ownership arrangements for the capacity proposed here may not be known for some time. In fact, it is unlikely to be known until other pending Article VIII cases are decided.

Applicants' second argument is that even if LILCO will not be a 50% owner of the proposed facilities "the inherent power of the Board to certify less than the total relief requested clearly leads to a conclusion that there are still triable issues of fact remaining." Without question, the record in an Article VIII case may ultimately justify certification of fewer or smaller units that an applicant proposes. But, in view of the great expense and complexity of an Article VIII proceeding, it seems close to irresponsible for an applicant to propose construction of, and seek licenses for, 4800 megawatts[2] of generating capacity and then casually

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1/They are Case 80002 (Somerset), 850 megawatts; Case 80006 (Sterling), 1150 megawatts; Case 80007 (Lake Erie), 1700 megawatts; and Case 80003 (Jamesport), 2300 megawatts. The Lake Erie units do not carry a specific service date.

2/That is, 2300 MW in Case 80003 and 2500 MW in this case.

assert, less than six months after the application is filed, that the involved Siting Board should feel free to certificate some lesser amount of capacity. A utility applying for an Article VIII certificate is under an affirmative obligation to do its best to tailor its proposal to fulfill perceived service requirements economically and in compliance with environmental, health and safety standards.

As long as the probable ownership and use of the proposed facilities is uncertain, we do not believe it is "clearly desirable" to proceed with the licensing process. The application is premature, and must be dismissed on that ground. Applicants' response to the Ecology Action appeal does nothing to reduce the doubts about LILCO's probable ownership of the proposed facilities that the Jamesport testimony raises. It casts the issue in terms of whether LILCO is or is not a "proper party" to the proceeding. LILCO is a proper party; the question was whether it is a probable owner.

CONCLUSION

The Public Service Law divides jurisdiction over electric generating facilities between the Public Service Commission and the Siting Boards established by Article VIII. Our interest in facilities planning is a necessary incident to our obligation to see that electric companies provide safe and adequate service at just and reasonable rates, and our power to regulate their rates, securities, records, practices and property to that end. The Siting Boards have the obligation to determine that specific proposed electric generating facilities will meet public needs and reasonable environmental, safety and health standards.

It is our conclusion that this case should not go forward. The application is premature and legally insufficient and will remain so until its proponents are able to present evidence that relates to the probable owners of the proposed

facilities and their ultimate use. Public utility companies, public agencies, and citizen groups should not expend huge sums on hypothetical Article VIII litigation.

Under the Article VIII rules, we have the power to act on an interlocutory appeal or certify it to the Siting Board. 16 NYCRR § 70.8(c). We have made it clear that we believe the application should be dismissed. However, the same rules give any party aggrieved by dismissal of an Article VIII application the right to appeal to the Siting Board. 16 NYCRR § 70.8(d)(1). It seems likely, then, that the Siting Board will be called upon to consider the Ecology Action motion. We believe it is in the public interest for the Siting Board to be given an opportunity to discharge its statutory obligations before a final decision on Article VIII application is made. Accordingly, we are certifying the appeal to the Board, with our recommendation that the motion to dismiss be granted. By this order, we also establish a briefing procedure that will give interested parties an opportunity to be heard by the Board.

The Commission orders:

1. The interlocutory appeal of Ecology Action of Oswego dated April 26, 1979 is hereby certified to the New York State Board for Electric Generation Siting and The Environment for Case 80008, with a recommendation that the application be dismissed for the reasons stated herein.

2. Copies of this order shall be served upon each party, and each party shall have the right to file a brief on the issues raised by the Ecology Action Motion by July 25, 1979 and a reply brief by August 6, 1979. All briefs must be submitted in accordance with the requirements of 16 NYCRR § 70.22(c)-(e).

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

2022 351

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 80008 - NEW YORK STATE ELECTRIC & GAS CORPORATION and LONG ISLAND LIGHTING COMPANY - New Haven/Stuyvesant Generating Facility

CHARLES A. ZIELINSKI, Chairman, abstaining:

I agree with the Commission's decision to certify the Ecology Action appeal to the New Haven/Stuyvesant Siting Board. However, because I am a member of that Board, I am reserving decision on the proper disposition of the underlying motion until I have had an opportunity to consider the briefs to be filed by the parties.

2022 352