RELATED CORRESPONDENCE

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STATE OF NEW YORK
BOARD ON
ELECTRIC GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State State Board on Electric Generation Siting and the Environment for the New Haven/Stuyvesant Generating Facility held in the City of Albany on May 14, 1980.

BOARD MEMBERS PRESENT:

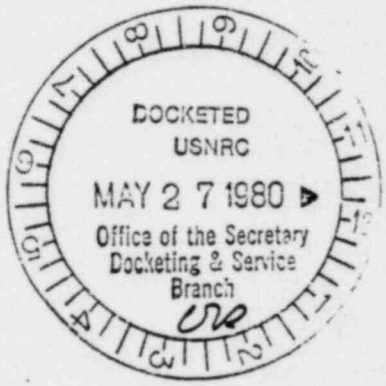
Charles A. Zielinski, Chairman, Public Service Commission

James L. Larocca, Commissioner, State Energy Office

Peter Lanahan, Alternate for Robert F. Flacke, Commissioner, Department of Environmental Conservation

Dr. William E. Seymour, Alternate for William D. Hassett, Commissioner, Department of Commerce

Fred Bartle, Ad Hoc Member



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 DENYING APPLICATION FOR REHEARING

(Issued May 23, 1980)

On November 12, 1979, New York State Electric & Gas Corporation (NYSE&G) and Long Island Lighting Company (LILCO) applied for rehearing of our order of October 12, 1979, dismissing the utilities' joint application for a certificate of environmental compatibility and public need to construct

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two 1250 megawatt nuclear fueled electric generating facilities in New Haven, Oswego County, or, alternatively, in Stuyvesant, Columbia County. The joint applicants further request, if we affirm our dismissal of the application, that we nevertheless authorize the proceeding to continue to develop the environmental issues. Responses in opposition have been filed by the staffs of the Departments of Public Service (DPS) and Fnvironmental Conservation, and by the State's Attorney General, Ecology Action of Oswego, Concerned Citizens for Safe Energy, Columbia County and the Town of Stuyvesant, the Village of Mexico, Ecology Action of Tompkins County, Safety Energy for New Haven and the Montgomery County Land and Homeowners Association.

We dismissed the instant application because we found that there was substantial uncertainty about the ownership of the proposed facilities which we believed would be prejudicial to the other parties. In particular, we noted that the applicants had themselves raised the question of ownership and they had failed to resolve the issue to our satisfaction even though they had numerous opportunities to do so. Finally, we found that no credible showing of need had been made by the applicants.

SUMMARY OF MOTION FOR RECONSIDERATION

Applicants seek rehearing on the following grounds:

(1) That we erred, both legally and factually, in finding that applicants' admission that ownership may change was grounds for dismissal.

(2) That applicants were denied due process because we relied on material outside the record in determining ownership and statewide need.

(3) That the cost of hearings ought not have been material to us.

On the question of ownership, the applicants reiterate their claim that Article VIII contains no reference to ownership or owners. Further, they argue that, given the length of time between initiation of an application and certification, and the dynamic status of the electric utility industry, "the suggestion that a utility's participation in a given generating station might change is not equivalent to a rejection of previously stated intentions to participate."[1/]

The applicants continue to dispute our explicit recognition of statements made by them in a companion proceeding (Case 80003) and elsewhere that ownership of the proposed facility is uncertain. Besides contesting our reliance on their admission that owneship is uncertain, they protest that they were not informed by us that we would rely on facts outside the record tc form conclusions regarding the issue of need. In that narrow regard, they appear to have the support of the DPS, which concludes "that it is unnecessary for the Board to make any findings on need issues at this time." The applicants note that NYSE&G's participation has never been questioned and that since we

1/Applicants state that "if the submission of an affidavit as to the current intent of the parties will result in a restoration of Case 80008 to active status, applicants request permission to submit such an affidavit and the entry of an order conditioning the right to proceed on the receipt of such an affidavit." Applicants do not explain, however, why, when they have been given numerous opportunities to do so, they have not already filed such an affidavit.

may, in our discretion, license fewer units than are proposed, we have implicitly found that NYSE&G has no need for the proposed facility.

Finally, the applicants quarrel with our concern over the cost and difficulty of unnecessary hearings. They argue that until the issues are identified there can be no realistic assessment of whether the hearings would be difficult or expensive.

In the event we are not persuaded to reverse our October 12, 1979 order, applicants request that we permit the proceedings to continue with respect to the environmental issues. In the view of the applicants, "the pending proceedings provide a source of sites which can be quickly licensed in the event existing proposed plans prove unduly conservative."

DISCUSSION

Each of the parties responding to the applicants opposes the application for rehearing. Insofar as the issue of ownership is concerned, the most telling point has been made by Safe Energy for New Haven which notes that "[T]he issue of need can never be adequately addressed if the utilities and consequently their respective service areas are not even determined." And, as Ecology Action of Oswego points out, this proceeding is not analogous to other Article VIII proceedings where there has been a change of ownership. In those cases, the changes of ownership always involved a new owner "with a firm commitment for ownership at the time of the change." We find the arguments of these intervenors persuasive.

We conclude also that the protests of the applicants concerning the use of material outside of Case 80008 to resolve the ownership issue have been answered satisfactorily by the DPS staff. It acknowledges, as we do, that "a party must be apprised of the facts to be considered and thereafter be given an appropriate opportunity to show the contrary before a final decision is made." Nonetheless, DPS staff notes that applicant has had effective notice of the facts at issue and has had numerous opportunities to respond to them. Indeed, the applicants themselves are the source of most of these facts, so they can hardly complain of lack of notice. Moreover, the July 10, 1979 order of the Public Service Commission certifying this matter to us made it clear that the applicants' own statements and filings made in other proceedings were of decisional consequence. The applicants had an opportunity to respond to that order.

On the question of need, we agree with the applicants that the issue was not properly before us when we decided initially to dismiss the application. We therefore take this opportunity to state expressly that we do not reach the question of need for the facility. Our decision to dismiss the application is predicated wholly on the substantial uncertainty about ownership of the facility.

As we observed above, the applicants seek to have the hearings continued on the environmental issues even if the application for rehearing is denied. The parties in opposition unanimously oppose this request. They argue, properly in our view, that Article VIII does not provide for "early site reviews." Moreover, Ecology Action of Oswego notes that such a proceeding, if necessary, would be inchoate, since alternate sites could not be considered as well. In

order to consider alternate sites, and alternate technologies, the size and location of the load to be served must be known and this can happen only if ownership is settled.

CONCLUSION

The arguments presented by the applicants tend to duplicate those made previously to us and the Public Service Commission and are not persuasive. By our order of October 12, 1979, we conveyed to the applicants our doubts that this proceeding could go forward in an orderly and expeditious manner given the uncertainty of LILCO's status as an applicant with a clear intent to own a share of the facility. The petition for rehearing filed by the applicants does not appear to comprehend fully our reservations.

By dismissing the application, we suspended further processing of it--an action required in our view as a matter of law and equity. The applicants still have an opportunity to reform their proposals by clarifying the ownership question so that a Siting Board can be reasonably assured that the amount of capacity which is proposed for licensing by each co-applicant represents the level of capacity it expects to require in the planning period. Unless this is done, the parties would be compelled to address hypothetical ownership probabilities. This would be inefficient, inequitable and, in our view, at variance with the intent of Article VIII of the Public Service Law.

The Board on Electric Generation Siting and the Environment for Case 80008 orders:

1. The November 12, 1979 petition for rehearing filed by New York State Electric & Gas Corporation and Long Island Lighting Company is denied in all respects.

2. This proceeding is closed.

By The New York State Board
On Electric Generation Siting
And The Environment - Case
80008,

(SIGNED) SAMUEL R. MADISON
Secretary to the Board