

NTE Connecticut, LLC application for a	:	
Certificate of Environmental Compatibility	:	
and Public Need for the construction,	:	Docket No. 470B
maintenance and operation of a 550-megawatt	:	
dual-fuel combined cycle electric generating	:	
facility and associated electrical interconnection	:	
switchyard located at 180 and 189 Lake Road,	:	May 30, 2019
Killingly, Connecticut	:	

**POST-HEARING BRIEF OF
NOT ANOTHER POWER PLANT AND WYNDHAM LAND TRUST**

Pursuant to the Council’s invitation to the parties and intervenors to submit briefs by May 30, 2019, Not Another Power Plant and Wyndham Land Trust hereby submit this post-hearing brief regarding the application originally filed by NTE Connecticut, LLC (“NTE”) on August 17, 2016 (Docket No. 470) and reopened by the Connecticut Siting Council (the “Council”) on February 15, 2019 (the “Application”). In the Application, NTE seeks a Certificate of Environmental Compatibility and Public Need (“CECPN”) pursuant to General Statutes §16-50k regarding a proposed electric generating facility and associated switchyard located in Killingly, Connecticut (the “KEC Facility”).

In sum, the Application must be denied for two reasons. First, NTE failed to show that a public need exists for the KEC Facility, instead revealing that the facility would place additional environmental and health burdens on an already-impacted community. Second, the Application is devoid of any analysis of the impact of the proposed gas line upgrades, despite the fact that those upgrades: (a) are essential to the KEC Facility; and (b) would damage land protected by the Wyndham Land Trust.

I. NTE Failed to Demonstrate Public Need

In order to issue a CECPN, the Council must find that a public need exists for the KEC Facility. “[A] public need exists when a facility is necessary for the reliability of the electric power supply of the state.” General Statutes § 16-50p(c)(3); see also § 16-50p(h).

On February 4, 2019, ISO-NE’s FCA 13 cleared 1,089 MW of “surplus capacity over the capacity requirement.”¹ The 800 MW Vineyard Wind project was unable to participate as a Renewable Technology Resource, effectively precluding almost all of its capacity from being counted toward meeting New England’s reliability needs despite the fact that the project will go forward and the resource will be able to participate in next year’s auction.² As a consequence, the amount of surplus capacity for the 2022-2023 Capacity Commitment Period is even larger than the 1,089 MW identified by ISO-NE. In addition, system peak load is no longer rising and is projected to decline year-on-year over the next decade.

The Connecticut Department of Energy and Environmental Protection (“DEEP”) has recognized that Connecticut has a surplus of energy capacity. In its 2014 Integrated Resource Plan (“IRP Report”), DEEP states: “For more than a decade, the New England region has enjoyed a surplus of electric generating capacity needed to meet reliability objectives. The 2014 IRP projects that Connecticut will continue to have plenty of capacity through 2024 and beyond, due to ample in-state generation, low demand growth, and new transmission built to reduce congestion.”³

The Council similarly stated in Docket No. F-2014/2015, “even taking into account the most conservative prediction, ISO-NE 90/10 forecast, and conservatively neglecting the effects

¹ NTE Exhibit 2, ISO-NE Press Release, 1.

² Synapse Testimony, 13-14.

³ Adm. Notice No. 69, IRP Report, iii.

of non-ISO-NE-dispatched DG, the electric generation supply during 2015-2024 will be adequate to meet demand.”⁴

In the initial hearing on this docket, with respect to both the IRP Report and the Ten-Year Forecast, then-Chairman Stein stated in this hearing that “both of these seem to, not imply, but seem to state rather clearly that our energy generating resources will be more than adequate.”⁵ Similarly, Acting Chairman Silvestri noted that Connecticut is currently a net exporter of electric energy and has sufficient capacity to meet its own energy needs for far into the future.⁶ NTE agreed that “the Connecticut IRP and other documents do say Connecticut has sufficient capacity.”⁷

As supply remains strong, demand is decreasing. ISO-NE projects that summer peak load will decline at a compound annual growth rate of 0.4 percent from 2018 to 2027, and winter peak load will decline at an even greater rate of 0.7 percent during that period.⁸ In the 2019 draft CELT, 2022 summer peak load is projected to be 2,720 MW (10.1 percent) lower than ISO-NE had projected in the 2016 CELT.⁹ The consequence of declining peak load is that the region is no longer building to meet new load; it is merely building to replace generation as it retires. Thousands of additional megawatts of new renewable generation resources are coming online as a result of renewable portfolio standards and state resource procurements¹⁰ and Connecticut

⁴ Adm. Notice No. 38, Connecticut Siting Council Review of the Ten-Year Forecast of Connecticut Electric Loads and Resources, Docket No. F-2014/2015 (“Ten-Year Forecast”), 50.

⁵ Orig. Trans., 410:12-15.

⁶ Id. at 305:11-12.

⁷ Id. at 282:3-5.

⁸ ISO-NE, CELT Report: 2018-2027 Forecast Report of Capacity, Energy, Loads, and Transmission (May 1, 2018, rev’d May 9, 2018), Tab 1.5.1.

⁹ Synapse Testimony, 12:7-8.

¹⁰ Id. at 13:1-15:2.

already added more than 1,400 MW of combined cycle gas in the past two years alone.¹¹

Reserve margins indicate capacity at levels well above the Net Installed Capacity Requirement (“NICR”)—the quantity of capacity resources that ISO-NE has determined are needed to meet the level of system reliability established by the North American Electric Reliability Corporation¹²—both with and without KEC.¹³ And even under a scenario that assumes only known clean energy resources come online in New England and all “at-risk” resources retire in the next seven years, reserve margins over the coming decade still indicate capacity at levels above NICR.¹⁴ At the same time, given rapid declines in renewable energy costs¹⁵ and increasingly robust renewable portfolio standards,¹⁶ it is likely that far more renewable generation will be added to the New England system than the projects already identified and contracted for today resulting in more robust reserve margins.

Now that it has finally obtained a capacity supply obligation (“CSO”) from ISO-NE, NTE points to that as evidence of the need for the KEC Facility. As Synapse explained, “an unbuilt plant holding a CSO in no way indicates reliability need for such a proposed plant.”¹⁷ The repeated downward revisions of forecasted peak load¹⁸ counsel against the “need” for the

¹¹ Orig. Trans., at 259:5-18.

¹² Id. at 471:6-21.

¹³ Synapse Testimony, 19, Fig. 1.

¹⁴ Id. at 21, Fig. 2.

¹⁵ Id. at 12:11-13.

¹⁶ Pub. Act 18-50 (extending and increasing Connecticut’s renewable portfolio standard from 20 percent by 2020 to 40 percent by 2030); 2018 Mass. Acts Ch. 227 (doubling the rate at which the Massachusetts renewable energy portfolio standard increases for the years 2020 to 2030).

¹⁷ Synapse Testimony, 8:11-12.

¹⁸ Forecasted 10-year compound annual growth rate for net summer peak demand went from 1.61 % in the 2010 CELT, to 1.30% in the 2011 CELT, to 0.79% in the 2012 CELT, to 0.88% in the 2013 CELT, to 0.67% in the 2014 CELT, to 0.54% in the 2015 CELT and to 0.17% in the 2016 CELT. (Grouped Parties Exhibit 8, Fig. 6.) In the 2018 CELT, they were at -0.4%. (ISO-NE, CELT Report: 2018-2027 Forecast Report of Capacity, Energy, Loads, and Transmission (May 1, 2018, rev’d May 9, 2018), Tab 1.5.1.)

full amount of resources that clear in FCA 13, even beyond the fact that the auction cleared capacity well in excess of NICR. NTE's CSO simply demonstrates its ability to build a gas plant profitably in light of capacity prices in a single year. It is proof of nothing more.

NTE has also pointed to winter fuel security as a benefit of the KEC Facility. As Synapse explained, “[w]inter fuel security does not require new fossil generation capacity; it requires assurance of energy availability during winter cold snaps, which can be obtained absent [the KEC Facility].”¹⁹ This conclusion is fully consistent with prior conclusions produced by NTE's expert, Mr. Hibbard, in a report he co-authored for the Massachusetts Attorney General in 2015.²⁰ He concluded that a combination of energy efficiency and demand response “represents the best solution from the perspective of ratepayer costs,” and incremental energy efficiency “combined with firm imports of distant low-carbon resources on new or existing transmission lines provides the greatest benefits from the standpoint of [greenhouse gas] emissions.”²¹

II. The KEC Facility Will Negatively Impact Killingly

Reduced air quality and increased noise will undeniably be the result of the KEC Facility. Unfortunately, NTE has been unable to commit to retaining a wide buffer of the mature trees currently in existence on the site, despite the fact that those trees would shield the nearby residents and protected land. NTE stated that “50 feet of tree vegetation” is contemplated around most of the perimeter, but “there may be a need for construction logistics to clear and then replant.”²² With regard to replanting trees, NTE conceded that they have not “given any thought to what height they would be at planting.”²³ If the existing mature trees are to be cleared, the

¹⁹ Synapse Testimony, 8:14-15.

²⁰ Hibbard and Aubuchon (2015).

²¹ Id. at v.

²² Hearing Trans., 5/2/19, 74:21-75:3.

²³ Id. at 75:4-8.

Council should insist that they be replaced by mature and/or fast-growing trees that are regularly pruned and maintained, to ensure that a true buffer is created quickly and continues to exist far into the future.

A. Noise Issues

NTE performed no analysis with regard to construction noise, instead relying on the fact that such noise is exempt from the state and local regulations. NTE committed to limit its “louder construction activities” to daylight hours, but then made it clear that it considers that to be a reference to the loudest activities, such as blasting and steam blows.²⁴ Many other construction activities could occur at night and exceed the 51 dBA limit dictated for non-construction activities.²⁵ NTE has conceded that it is possible that construction noise may go on seven days a week for three years.²⁶

With regard to operational noise, the “analysis” performed by NTE cannot be relied upon. In Section 4.2 of the Environmental Overview in Support of Petition for Changed Conditions (“Overview”), NTE states that it incorporated “mitigation assumptions, including sound walls” into the modeling effort.²⁷ NTE then admits that the “details of the specific mitigation measures incorporated in the modeling effort” may change.²⁸ This appears likely to be the case, as the Town of Killingly just last month ordered NTE to hire a “qualified noise expert to determine alternative approaches to noise attenuation and either eliminate the need for the property perimeter noise barriers or minimize the height and length of barriers required to

²⁴ Id. at 72:1-11. NTE has not actually calculated the noise levels of the construction activities, so this reference to blasting as a particularly loud construction activity was simply a guess. See id. at 76:18-25.

²⁵ Id. at 73:4-10.

²⁶ Id. at 75:22-76:1.

²⁷ Overview, 20.

²⁸ Id.

comply with the Killingly and State noise regulations.”²⁹ There is no information in the record regarding what the noise level would be at the property boundaries without hypothetical attenuation.

Only two of the locations used in the noise analysis are actually located near the property line: ST-2 and LT-1.³⁰ Those two locations show results much higher than the other locations, which have no legal relevance and were apparently included in the report to minimize the impact of the less-than-optimal ST-2 and the LT-1 results.³¹ In addition, there are neighboring parcels in which the noise levels could reach 55 dBA, which exceeds the already very high nighttime limit of 51dBA, but those exceedances are not addressed.³²

The limit of 51 dBA is atypically high for a rural residential area, only made permissible because of NTE’s status as an industrial emitter surrounded by residences (not to mention fragile protected open spaces and wetlands). Therefore, measures should be put in place to prevent noise levels from violating the already atypically high standard. NTE has recommended that the Council “require, as a part of its Development and Management Plan process, detailed information about final noise mitigation measures and plans to demonstrate compliance” and the undersigned parties strongly recommend that the Council adopt NTE’s suggestion.³³

In addition to the measure proposed by NTE, local and state officials must have the authority to enforce compliance through orders that can stop the operation of the KEC Facility in

²⁹ Town of Killingly Inland Wetlands & Watercourses Commission and Planning and Zoning Commission Update to Order of Regulations and Restrictions, filed with the Council on April 11, 2019, at 34.

³⁰ Appendix D, Sound Survey and Analysis Report, at 22.

³¹ Id. at 23. For purposes of determining compliance with the state and local regulations, sound pressure readings are measured within one foot of the property lines. See Regs., Conn. State Agencies § 22a-69-4(g).

³² Id. at 22.

³³ Id. at 24.

the event of noise exceedances. No other remedy will adequately address the toll that day-to-day noise violations might take on area residents and wildlife, who were not anticipating the construction of an industrial facility in an area zoned for rural residential use.

B. Air Quality Issues

Killingly is already home to Lake Road Generating, a 753MW gas-fired electric plant located less than one mile from the proposed KEC Facility.³⁴ There are numerous other stationary sources of air pollution nearby including: an asphalt plant; a polystyrene foam molding plant; an ash landfill; and the Frito-Lay facility, that last of which is responsible for emissions from manufacturing and from its co-generation plant.³⁵ NTE acknowledged that the KEC Facility would cause this community to experience “a new source” of additional pollutants.³⁶ NTE also acknowledged that these emissions would not only result from the burning of natural gas, but also from the burning of ULSD (which could occur up to 720 hours annually).³⁷

If, instead, NTE was to install a solar energy-generating facility, no new source of emissions would result.³⁸ Having taken the natural gas approach, NTE should show greater concern for the cumulative impact its facility will have on sensitive receptors by conducting additional cumulative impact analyses beyond the minimum required for its air permit. To date, NTE has not done so.³⁹ When the Connecticut Fund for the Environment noted the Town of Killingly’s concern “with health impacts on children and the elderly because of schools and eldercare facilities located within a two to three-mile radius of the proposed facility” at a recent

³⁴ Karen Johnson, Pre-filed Testimony, Dkt. 470, A4.

³⁵ Id.

³⁶ Hearing Trans., 4/18/19, 97:11-16.

³⁷ Id. at 102:22-103:6.

³⁸ Id. at 97:23-98:2.

³⁹ Id. at 107:5-10.

hearing, NTE stated in reply that it “do[es] not believe that additional health studies are warranted in this case.”⁴⁰ Health studies and mitigation measures are certainly warranted the Council should require both of NTE.

III. NTE Impermissibly Segmented its Application

NTE plans to connect the KEC Facility to the Algonquin Gas Transmission main line located 2.8 miles away from the facility in Pomfret, Connecticut (the “AGT”).⁴¹ In order to connect to the AGT in that location, NTE plans to use an existing Eversource⁴² right-of-way; as the existing pipeline in that right-of-way would generate insufficient pressure to meet the needs of the KEC Facility, Eversource has agreed to replace the existing pipeline (4 to 6 inches in diameter), with a much larger one (16 inches).⁴³

The permit for the larger pipeline has not been approved, nor is its approval guaranteed.⁴⁴ Even NTE had to acknowledge a critical point made by Council Member Hannon—the original installation of the smaller pipeline occurred in a world without DEEP and the EPA.⁴⁵ This time around, as noted by Mr. Hannon, there will be more hurdles to face.⁴⁶ In addition, much of the pipeline exists in what is now the Dunn Preserve, held by the Wyndham Land Trust, but which was unprotected land at the time the pipeline was originally installed.⁴⁷ “In order to [replace the pipeline], much of the Dunn Preserve will be denuded of trees and vegetation and large quantities of soil will be excavated. . . . [U]nless an aggressive replanting plan is required, it will take decades for the destroyed vegetation and soils to reestablish the current forested nature of

⁴⁰ *Id.* at 107:20-108:4.

⁴¹ App., § 8.1.1.

⁴² “Eversource” and “Yankee Gas” were used interchangeably throughout these proceedings when referencing the party responsible for the pipeline upgrades.

⁴³ Hearing Trans., 5/2/19, 58:20-24.

⁴⁴ *Id.* at 62:18-20.

⁴⁵ *Id.* at 60:16-24.

⁴⁶ *Id.*

⁴⁷ Benjamin Williams, Pre-filed Testimony, Dkt. 470, 2:26-28.

the Dunn Preserve.”⁴⁸ Because the Council has not required NTE to investigate this impact, no such “aggressive replanting plan” has been discussed.

The Application summarizes the work associated with the removal, upgrade and replacement of the natural gas pipeline. In addition to the aforementioned Dunn Preserve, the pipeline traverses many other protected and regulated natural resources:

From the [point of interconnection] with the AGT pipeline, the existing pipeline heads southeast beneath a wetland area for approximately 2,000 feet, then continues southeast for approximately 600 feet abutting an open field before crossing Holmes Road and the Airline North State Park Trail. The pipeline continues southeast for approximately 3,000 feet through forested and protected open space, then heads south, paralleling Durkee Brook for approximately 3,000 feet. The pipeline continues southeast for approximately 2,500 feet, passing west of Bruce’s Pond and crossing River Road. The pipeline continues in a southeasterly direction, crossing the Quinebaug River into the Town of Killingly. South of the Quinebaug River, the pipeline continues approximately 2,000 feet through forested lands until it enters the southern edge of Lake Road. . . . The approximate length of the existing pipeline is 2.8 miles.”⁴⁹

Figure 8-1 of the Application provides a general map of the pipeline.

The new pipeline must cross, go through, or abut open space and protected land held by the Wyndham Land Trust; the Bafflin Sanctuary owned by the Connecticut Audubon Society; the Airline North State Park Trail; a large undeveloped parcel owned by the Pomfret Rod and Gun Club; and the Quinebaug River.⁵⁰ Additionally, “The existing pipeline traverses several wetland areas.”⁵¹ In order to construct the necessary pipeline, NTE readily admits that “some clearing may be necessary to accommodate the replacement lateral and to provide sufficient workspace for construction.”⁵²

Despite including a description that makes it clear environmental impacts associated with

⁴⁸ Id. at 3:8-16.

⁴⁹ App., § 8.1.1.

⁵⁰ Id. at § 8.1.8.

⁵¹ Id. at § 8.1.5.

⁵² Id.

this larger pipeline must exist in abundance, NTE performed no analysis of them, choosing instead to state that Eversource is going to handle the design and permitting of the pipeline and that NTE is simply a customer.⁵³ NTE uses this technique to wash its hands of the project and close its ears to the details—it was not even able to verify whether the construction of the pipeline would be occurring within the existing right-of-way.⁵⁴ During the initial hearings, Dr. Klemens noted the problem with NTE’s approach, when he asked, “you can’t provide information on amount of wetland potential impact, amount of wetland digging, how you’re going to protect the wetlands, how you’re going to protect the wood turtles, you’re saying we have to wait for another day to get that plan?”⁵⁵

NTE’s position—that the installation of the larger pipeline is a project separate and distinct from the KEC Facility and not at issue here—does not ring true. If a larger pipeline is not approved, the KEC Facility will not have the gas it needs to run.⁵⁶ It is hard to imagine a way in which this pipeline is anything but a key component of the KEC Facility. And yet the Council has not required NTE to do any analysis on its environmental impacts or likelihood of success. Such a division of an application in order to avoid a comprehensive review of a facility is referred to as “impermissible segmentation” and is “universally criticized.” See In the matter of Amenia Sand and Gravel, Inc., 2000 WL 1845906, at *2 (N.Y. Dep’t of Env. Cons., Nov. 22, 2000).

For example, in Delaware Riverkeeper Network v. FERC, the petitioners appealed FERC’s issuance of a certificate of public convenience and necessity on the grounds that FERC did not consider, as part of its environmental review of the Northeast Upgrade Project, three

⁵³ Hearing Trans., 5/2/19, 59:8-14.

⁵⁴ Id. at 60:11-14.

⁵⁵ Orig. Trans., 233:9-14.

⁵⁶ Id. at 62:21-63:3.

other connected, contemporaneous, closely-related and interdependent Tennessee Gas pipeline projects. 753 F.3d 1304 (D.C. Cir. 2014). FERC is required to satisfy the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370h, by identifying and evaluating the environmental impacts of actions that require a certification of public convenience and necessity. In Delaware Riverkeeper, FERC conducted a NEPA review of the Northeast Upgrade Project and recommended a Finding of No Significant Impact without considering the environmental impact of three other Tennessee Gas upgrade projects on the same line. Id. at 1308. Under the NEPA regulations, FERC is required to include “connected actions,” “cumulative actions,” and “similar actions” in a NEPA review. 40 C.F.R. §1508.25(a). The Appellate Court found that the four pipeline projects were “connected actions” because there is a “clear physical, functional, and temporal nexus between the projects,” and remanded the case back to FERC for consideration of the four projects. Delaware Riverkeeper, supra, 753 F.3d 1308-09.

The Second Circuit similarly discredits segmentation as “an attempt to circumvent NEPA by breaking up one project into smaller projects and not studying the overall impacts of the single overall project.” Stewart Park & Reserve Coalition v. Slater, 352 F.3d 545, 559 (2d Cir. 2003); see also Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988) (“Segmentation is to be avoided in order to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant action.”). The standard established by the Second Circuit is that a project is improperly segmented “if the segmented project has no independent utility, no life of its own, or is simply illogical when viewed in isolation.” Stewart Park, 352 F.3d at 559 (citing Hudson River Sloop Clearwater, Inc., v. Dep’t of Navy, 836 F.2d 760, 763-64 (2d Cir. 1988)).

Connecticut trial courts have followed federal case law concerning impermissible segmentation, finding in City of Norwalk v. Connecticut Siting Council, that

[t]he courts have held that “impermissible segmentation” occurs where there are two proposed actions and “the proposed component action has little or no independent utility and its completion may force the larger or related project to go forward notwithstanding the environmental consequences . . . Courts have also required that environmental effects of multiple projects be analyzed together when those projects will have a cumulative effect on a given region . . . Finally, multiple stages of a development must be analyzed together when the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.

2004 WL 2361540, at *12 (2004). And, in City of New Haven v. Connecticut Siting Council, the court applied the “independent utility” test in a claim that the Council had impermissibly segmented review of an application. 2002 WL 847970, at *2 (2002).

A purpose of the Public Utility Environmental Standards Act (“PUESA”), General Statutes §§ 16-50g et seq., is “to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria.” Id. (emphasis added). Thus the Council is compelled under both CEPA and PUESA to consider all connected, cumulative and similar actions as part of its review of the Application.

As the facility cannot operate without a source of natural gas, the Council must consider the environmental impact of the replacement of the 2.8 miles of natural gas pipeline. Based on the limited information provided by NTE regarding these interrelated activities, the Council must conclude that the environmental impact to the wetlands, river, open space and protected land that the proposed pipeline will cross and abut will outweigh any potential benefits of the proposed facility.

CONCLUSION

NTE has failed to carry its burden of demonstrating that the KEC Facility would serve a public need, or that there would be a minimal impact to the surrounding environment and its inhabitants. Therefore, pursuant to General Statutes §16-50k, the Council should deny NTE's application.

**NOT ANOTHER POWER PLANT
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CERTIFICATION

I HEREBY CERTIFY that a copy of the foregoing document was electronically mailed to the following service list on May 30, 2019:

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