

BRUCE L. MCDERMOTT
203.772.7787 DIRECT TELEPHONE
860.240.5723 DIRECT FACSIMILE
BMCDERMOTT@MURTHALAW.COM

March 2, 2020

VIA ELECTRONIC FILING
AND UPS NEXT DAY DELIVERY

Melanie Bachman
Executive Director
Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

Re: Petition 1214 - Groton Fuel Cell 1, LLC Petition for a Declaratory Ruling that no Certificate of Environmental Compatibility and Public Need is Required for the Construction, Maintenance, and Operation of a 5.6 Megawatt Fuel Cell Combined Heat and Power Electric Generating Facility Located at the Pfizer Groton Campus, 445 Eastern Point Road, Groton, Connecticut

Dear Ms. Bachman:

Enclosed for filing with the Connecticut Siting Council in the above-captioned petition is Groton Fuel Cell 1, LLC's Response to Town of Groton's Petition for Reconsideration.

I certify that a copy hereof has been furnished on this date via electronic mail and/or first class mail, postage prepaid, to all parties, intervenors and participants of record according to the Siting Council's service list for this docket as of this date. A copy has also been filed with the Siting Council as an electronic web filing and is complete.

Very truly yours,



Bruce L. McDermott

Enclosure

cc: Service List

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

Groton Fuel Cell 1, LLC Petition for : Petition No. 1214
a Declaratory Ruling that No Certificate of :
Environmental Compatibility and Public Need is :
Required for the Construction, Maintenance, and :
Operation of a 5.6 Megawatt Fuel Cell :
Combined Heat and Power Electric Generating :
Facility Located at the Pfizer Groton Campus, :
445 Eastern Point Road, Groton, Connecticut. : March 2, 2020

GROTON FUEL CELL 1, LLC'S RESPONSE TO
TOWN OF GROTON'S
PETITION FOR RECONSIDERATION

Groton Fuel Cell 1, LLC ("GFC") hereby requests that the Connecticut Siting Council ("Council") deny the February 28, 2020, purported Petition for Reconsideration ("Petition") filed by the Town of Groton ("Groton") in connection with Petition No. 1214. The Council should deny Groton's Petition based on the following grounds: (I) the factual grounds of the Petition's first paragraph are derived from a witness who has impeached her own credibility based on inconsistent prior testimony and casts doubt on the entirety of the paragraph; (II) the Petition seeks "reconsideration" of the Council's explanatory letter dated February 14, 2020 ("Letter"), which Letter does not constitute a "final decision", and as such, cannot be subject to reconsideration under Connecticut General Statutes ("CGS") Section 4-181a(a)(1); (III) paragraphs 2 through 5 of the Petition do not have any rational legal basis; and (IV) the law firm representing Groton, Suisman, Shapiro, Wool, Brennan, Gray and Greenberg P.C. ("Groton Counsel"), has not filed an appearance filing for Petition No. 1214, and therefore their Petition is procedurally deficient.

Background:

GFC submitted its petition in connection with Petition No. 1214 on January 25, 2016 for a 5.6 megawatt (“MW”) fuel cell combined heat and power electric generating facility (“Facility”) and associated equipment located at the Pfizer Groton campus, 445 Eastern Point Road, Groton, Connecticut. On March 3, 2016, the Council approved GFC’s Petition. Since then, there have been numerous e-mails and phone calls between GFC and the Council and Groton and the Council about the Council’s jurisdiction over the Facility at issue.

On January 25, 2018, Mary Gardner, Groton’s tax assessor, called the Council multiple times seeking to speak with the Council’s Executive Director, Melanie Bachman. After speaking with Ms. Gardner, Executive Director Bachman contacted FuelCell Energy, Inc. (“FuelCell”) (parent company of GFC) and advised FuelCell that Ms. Gardner was inquiring as to the authority of the Council and the precedential value of its decisions, and whether the fuel cell installation at the Pfizer campus, including its heat recovery equipment actually constitutes a Class I renewable. FuelCell reported to Executive Director Bachman that it had a pending tax appeal adverse to Groton and FuelCell did not understand the position of Groton given the provisions of Connecticut General Statutes specifically exempting behind-the-meter fuel cells from property taxation. Executive Director Bachman reported to FuelCell that Ms. Gardner seemed to be making an argument that the behind-the-meter fuel cell at the Pfizer facility is a co-gen facility and co-gen facilities, unlike Class I renewables, are taxable. Executive Director Bachman relayed to FuelCell that she advised Ms. Gardner that the Council’s staff report mentions that the thermal energy produced by the Facility would be provided

for use in Pfizer's existing thermal distribution system and that the Council would not have jurisdiction over the fuel cell at Pfizer if it were a cogeneration unit because the Council does not have jurisdiction over cogeneration facilities less than 25MW.

In December, 2019, FuelCell finally had the opportunity to depose Ms. Gardner, at which time Ms. Gardner denied all knowledge and recollection of the conversation with Executive Director Bachman (see discussion below). As a result of Ms. Gardner's incredible memory failure, FuelCell contacted the Council to again confirm the conversation that had taken place between Executive Director Bachman and Ms. Gardner in 2018. In response to these numerous communications with Ms. Gardner and FuelCell, Executive Director Bachman, issued the Letter on February 14, 2020, in order to explain and clarify the Council's position on the Facility and its jurisdiction more broadly.

On February 28, 2020, Groton responded to the Letter by submitting its Petition for Reconsideration with the Council.

I. Groton Tax Assessor's Statements Lack Credibility.

In its Petition, Groton claims that the Council's statement that over the past several months "a public officer of the Town of Groton 'asked' [the Council] to explain [the] 'jurisdiction' of the Connecticut Siting" is false. Petition at 1. However, in Ms. Gardner's December 9, 2019 sworn deposition ("Deposition"), she was asked directly about her interactions with the Council:

Q. And did you discuss your interpretation of this statute with anyone at PURA?
A. I -- in my discovery phase of trying to figure out what I was looking at, I did reach out to the Connecticut Siting Council and PURA. I don't recall my conversations with them.

....

Q. Do you know who Melanie Buckman is?· Or Bachman.· I apologize.

A. I believe she's Connecticut Siting Council.

Q. Do you know what her position is there?

A. I don't recall.

Q. Do you recall reaching out to her with respect to your research on the Groton fuel cells?

A. I do.

Q. Do you recall when you did that?

A. I do not.

Q. Do you recall what you asked her?

A. I do not.

Q. You don't recall anything you asked her?

A. I don't recall what I asked her specifically, no.

Q. Approximately, do you recall what you asked her?

A. I probably was asking about the Groton fuel cell, did it have heat recovery system generators, I would guess.

Q. Do you recall what her response was to you?

A. I do not.

Q. Do you recall asking her if the Siting Council takes into account the costs when reviewing and approving an application for a fuel cell?

A. Well, I think you're reading my comments to her or questions to her.· If that's -

Q. They weren't -- they weren't -- no, I'm not.

A. Okay.

Q. I'm just asking, do you remember in substance asking her whether the Siting Council takes into account costs when reviewing and approving an application for a fuel cell?

A. I may have asked her that.· I don't recall.

Q. Do you recall what her response was?

A. No.

Q. Do you recall asking her how much weight a staff report would carry in their determination as to the classification of a fuel cell?

A. No.· I may have asked her.· I'm not denying that I did or didn't.· I'm just -- I truly don't recall.· I have not looked at these records in detail.

Q. Do you recall her telling you that the -- that fuel cells are Class I renewables?

A. I do not recall.

Q. Do you recall her discounting your argument that the Groton fuel cell is a cogen facility and not a Class I renewable?

A. I do not.

Q. Do you recall anything about your conversation with her?

A. I do not.

Q. Was there anybody else at the Siting Council that you spoke with?

A. I don't recall that either.

Deposition at 44, 149–151 (emphasis added). See Exhibit A. Despite being asked over a dozen different questions about her exchange with the Council, thirteen times Ms. Gardner’s answer was some formulation of “I do not recall.” In this exchange, her firmest recollection about the exchange was in regard to what the overall topic of the conversation was and she stated that she “probably was asking about the Groton fuel cell, did it have heat recovery system generators, I would guess.” Deposition at 149. Even though her sworn Deposition in December 2019 demonstrated that she “did not recall” anything about her interactions with the Council—three months later her memory has returned. Now Ms. Gardner, newly imbued with powers of recollection, is confidently claiming that she never asked the Council to explain the jurisdiction of the Council. This demonstration of Ms. Gardner’s selective memory is textbook inconsistent prior statement testimony. Her credibility as a witness in this matter is impeached and the Petition’s first paragraph, which is derived from her statements about the circumstances of her exchanges with the Council, should be disregarded entirely.

II. Council Letter is Not a “Final Decision” Under CGS Section 4-181a.

In addition to the factual failings of Groton’s Petition, the Petition also fails on legal grounds. Groton’s Petition begins with an introductory request that has no logical legal basis whatsoever. It requests, as part of its Petition, that pursuant to CGS Section 4-181a the Council should “reconsider and vacate its February 14, 2020 purported ruling or ‘decision’”. Petition at 1. The fatal flaw in Groton’s request is that no such ruling or decision exists—only an explanatory Letter sent to both parties.

Under CGS Section 4-181a(a)(1):

Unless otherwise provided by law, a party in a contested case may, within fifteen days after the personal delivery or mailing of the final decision, file with the agency a petition for reconsideration of the decision on the ground that: (A) An error of fact or law should be corrected; (B) new evidence has been discovered which materially affects the merits of the case and which for good reasons was not presented in the agency proceeding; or (C) other good cause for reconsideration has been shown.

Here, in order for Groton to file a petition for reconsideration with the Council under CGS Section 4-181a(a)(1) there must first be a “final decision” issued by the Council. CGS Section 4-166(5) makes clear that a “final decision” means

(A) the agency determination in a contested case, (B) a declaratory ruling issued by an agency . . . or (C) an agency decision made after reconsideration. The term does not include a preliminary or intermediate ruling or order of an agency, or a ruling of an agency granting or denying a petition for reconsideration.

First, the Letter is not an “agency determination in a contested case”, as the “contested case” involving the parties (Petition No. 1214) was decided by the Council four years ago (March 4, 2016) and no subsequent “contested cases” have occurred. Under CGS Section 4-166(4), a “contested case” means “a proceeding, including but not restricted to rate-making, price fixing and licensing, in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held.” Further, the test for determining contested case status “has been well established and requires an inquiry into three criteria, to wit: (1) whether a legal right, duty or privilege is at issue, (2) and is statutorily required to be determined by the agency, (3) through an opportunity for hearing or in which a hearing is in fact held.” Town of Middlebury v. Dep't of Env'l. Prot., 283 Conn. 156, 164 (2007). Here, no such proceeding, hearings,

or opportunities to be heard have occurred, nor is there any legal right, duty or privilege at issue that is statutorily required to be determined by the Council. As such, there exists no “contested case” in which there could be an agency determination.

Additionally, the Council was never petitioned for any “declaratory ruling” in connection with issuing the Letter—the Council merely sent the explanatory Letter as a courtesy to the parties to address questions being asked of the Council’s Executive Director by both sides. Nor has the Council made any decision in connection with a petition for reconsideration because again, there is no pertinent “decision” that could be petitioned for reconsideration.

Therefore, the Council never issued a “final decision” or a ruling on February 14, 2020—it sent GFC and Groton an explanatory letter (i.e., the Letter) offering its legal position on the Council’s jurisdiction over the behind-the-meter fuel cell installed at the Pfizer campus. Explanatory correspondence can be reviewed, and it can even be disagreed with, but it cannot be petitioned for reconsideration under CGS Section 4181a(a)(1).

III. Petition Paragraphs 2 through 5 have No Rational Legal Basis.

a. Paragraph 2.

In the Petition’s second paragraph, Groton states that the Council provided “no notice to the Town of Groton of the pendency of this proceeding, did not offer or permit the Town of Groton to submit evidence and argument” and “in re-opening this proceeding and issuing the Decision the Council violated its own rules of practice, the applicable Connecticut General Statutes, and the legal requirements of fundamental

fairness.” Petition at 1. No notice was provided because none was required. This matter was not reopened and no new decision was ever issued. Therefore, the Council sending GFC and Groton the Letter did not violate any of its rules of practice.

b. Paragraph 3.

In the Petition’s third paragraph, Groton states that the Council “lacked all jurisdiction to have rendered the Decision” and that the Council “therefore is illegally using this docket as an open platform to make further decisions, orders and modifications and to advance private commercial interests, and to affect the legal rights of parties, all without following proper legal process.” Petition at 1. The Council’s decision in this matter was made in 2016. In reality, it is Groton that has attempted to twist the Council’s decision and illegally use the docket as an open platform to advance its own interests, contrary to state statutes. As the Council’s reinforcement of its initial 2016 decision does not fit into Groton’s agenda, Groton now seeks to complain that the process it set in motion is “illegal.” Again, since no decision was issued by the Council on February 14, 2020, no such alleged illegality or advancement of special interests has occurred.

c. Paragraph 4.

In the Petition’s fourth paragraph, Groton states that “based upon information and belief, the Decision is designed to assist the financial interests of a party that has brought litigation against the Town, litigation which does not involve the Council and which litigation is pending currently in the Superior Court of the State of Connecticut.”

Groton also claims that “[t]his therefore is being done to disadvantage of the Town and affect the judicial process and the rights of the parties therein. The Decision is *ultra vires*, and demonstrates predisposition and bias in favor of a private, commercial interest.” Petition at 1–2. As clearly demonstrated above, it is actually Groton that attempted to use the Council to advance its own interests contrary to state statutes and to the disadvantage of a Connecticut-based manufacturer. It is Groton that dragged the Council into the tax appeal matter, and only now complains that its plan has been thwarted by the Council’s steadfast adherence to its 2016 decision.

d. Paragraph 5.

In the Petition’s fifth paragraph, Groton states that “Groton therefore contests the findings, terms and conditions of the Decision, and challenges the legal authority upon which the Decision was issued.” Petition at 2. Again, no such decision has been issued by the Council and therefore any such challenge to the Council’s legal authority should be disregarded.

IV. Groton Counsel Has Not filed for Appearance in Petition No. 1214.

Pursuant to RCSA Section 16-50j-22.

Each person making an appearance before the Council as an attorney, agent, or representative of any person, firm, corporation, or association subject to the Council’s regulatory jurisdiction in connection with any contested case or petition for a declaratory ruling shall promptly notify the Council in writing in order that the same may be made a part of the record of the contested case or petition for a declaratory ruling.

As of the date hereof, Groton Counsel's has failed to file any such appearance with the Council in Petition No. 1214. Therefore, the Petition is procedurally deficient under RCSA Section 16-50j-22 and should be denied.

Conclusion.

GFC respectfully requests that the Council deny Groton's Petition because (I) Groton derives the first paragraph of its Petition from a witness lacking credibility based on inconsistent prior testimony; (II) the explanatory Letter is not a "final decision" that can be petitioned for reconsideration; (III) paragraphs 2 through 5 of the Petition have no rational legal basis; and (IV) the Petition is procedurally deficient based on Groton Counsel's failure to file an appearance.

Respectfully submitted,

Groton Fuel Cell 1, LLC



Bruce L. McDermott
Samuel R. Volet
Murtha Cullina LLP
265 Church Street
New Haven, CT 06510
Phone: (203) 772-7787
E-mail: bmcdermott@murthalaw.com

Exhibit A

FUELCELL ENERGY, INC. vs TOWN OF GROTON
Mary Gardner on 12/09/2019

Page 44

1 Q. Do you see anything in this statute that
2 accepts from that definition a fuel cell that has a
3 heat recovery system?

4 A. I do not see that.

5 Q. And yet, I believe you've testified that in
6 your opinion this fuel cell is not solely a Class 1
7 renewable energy source because of the heat recovery
8 system. Correct?

9 A. Yes.

10 Q. And did you discuss your interpretation of
11 this statute with anyone at PURA?

12 A. I -- in my discovery phase of trying to
13 figure out what I was looking at, I did reach out to
14 the Connecticut Siting Council and PURA. I don't
15 recall my conversations with them.

16 Q. Do you remember who you spoke to at PURA?

17 A. No.

18 Q. Do you remember when you spoke to PURA?

19 A. No.

20 Q. Do you remember what they told you?

21 A. I do not. It's in here. I mean, I just
22 don't recall it.

23 Q. Okay. How about, did they agree with your
24 interpretation? Do you recall that?

25 A. I -- I am not even quite sure what I was

1 Q. Do you know who Melanie Buckman is? Or
2 Bachman. I apologize.

3 A. I believe she's Connecticut Siting Council.

4 Q. Do you know what her position is there?

5 A. I don't recall.

6 Q. Do you recall reaching out to her with
7 respect to your research on the Groton fuel cells?

8 A. I do.

9 Q. Do you recall when you did that?

10 A. I do not.

11 Q. Do you recall what you asked her?

12 A. I do not.

13 Q. You don't recall anything you asked her?

14 A. I don't recall what I asked her specifically,
15 no.

16 Q. Approximately, do you recall what you asked
17 her?

18 A. I probably was asking about the Groton fuel
19 cell, did it have heat recovery system generators, I
20 would guess.

21 Q. Do you recall what her response was to you?

22 A. I do not.

23 Q. Do you recall asking her if the Siting
24 Council takes into account the costs when reviewing
25 and approving an application for a fuel cell?

1 A. Well, I think you're reading my comments to
2 her or questions to her. If that's --

3 Q. They weren't -- they weren't -- no, I'm not.

4 A. Okay.

5 Q. I'm just asking, do you remember in substance
6 asking her whether the Siting Council takes into
7 account costs when reviewing and approving an
8 application for a fuel cell?

9 A. I may have asked her that. I don't recall.

10 Q. Do you recall what her response was?

11 A. No.

12 Q. Do you recall asking her how much weight a
13 staff report would carry in their determination as to
14 the classification of a fuel cell?

15 A. No. I may have asked her. I'm not denying
16 that I did or didn't. I'm just -- I truly don't
17 recall. I have not looked at these records in
18 detail.

19 Q. Do you recall her telling you that the --
20 that fuel cells are Class I renewables?

21 A. I do not recall.

22 Q. Do you recall her discounting your argument
23 that the Groton fuel cell is a cogen facility and not
24 a Class I renewable?

25 A. I do not.

1 Q. Do you recall anything about your
2 conversation with her?

3 A. I do not.

4 Q. Was there anybody else at the Siting Council
5 that you spoke with?

6 A. I don't recall that either.

7 Q. Okay. Do you recall having any discussions
8 with anybody at the DEP about this fuel cell?

9 A. I may have reached out in part of the
10 discovery phase, but I don't recall any
11 conversations.

12 Q. You don't recall any responses either?

13 A. Again, I haven't looked at these files in a
14 while.

15 Q. Okay. Who is Michael Collins?

16 A. Isn't he an attorney?

17 Q. There is an attorney named Michael Collins,
18 but...

19 A. I think so.

20 Q. Okay. Just curious. Do you know why you
21 would have reached out to him regarding the fuel
22 cells in Groton?

23 A. Not off the top of my head, no.

24 Q. Just curious. Okay. All right.

25 (Exhibit 32, Photograph, marked for