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January 11, 2024

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

Reference: Connecticut Siting Council Docket No. 516

Dear Attorney Bachman:

Please find enclosed an original and 15 copies of a Post-Hearing Brief dated January 11, 2024, on behalf of the Grouped LLC Intervenors.

We appreciate the consideration that Siting Council and its staff have given to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Christopher B. Russo".

Christopher Russo

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

RE:

DOCKET NO. 516

Application submitted by the United Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Fairfield to Congress Railroad Transmission Line 115-kV Rebuild Project that consists of the relocation and rebuild of its existing 115- kilovolt (kV) electric transmission lines from the railroad catenary structures to new steel monopole structures and related modifications along approximately 7.3 miles of the Connecticut Department of Transportation's Metro-North Railroad corridor between Structure B648S located east of Sasco Creek in Fairfield and UI's Congress Street Substation in Bridgeport, and the rebuild of two existing 115-kV transmission lines along 0.23 mile of existing UI right-of-way to facilitate interconnection of the rebuilt 115-kV electric transmission lines at UI's existing Ash Creek, Resco, Pequonnock and Congress Street Substations traversing the municipalities of Bridgeport and Fairfield

January 11, 2024

POST HEARING BRIEF OF GROUPED LLC INTERVENORS

This post-hearing brief is submitted on behalf of the Grouped LLC Intervenors in the matter of Docket No. 516 before the Connecticut Siting Council (“CSC”) under the Connecticut Environmental Protection Act, C.G.S. §§ 22a-14 et seq. (“CEPA”), to set forth the factual and legal grounds why the captioned application submitted by The United Illuminating Company (“UI”) should be denied. The Grouped LLC incorporate by reference and support the Post Hearing Brief and Finding of Facts filings of SCNETI Intervenors and the Town of Fairfield and adopt the arguments therein.

Additionally, the Grouped LLC Intervenor submit the following factual and legal grounds for denial of the application.

I. PRELIMINARY PROCEDURAL MATTERS

A. Standing

In response to their August 30, 2023 notice, the CSC granted Intervenor and CEPA Intervenor status to Pequot Realty, LLC, 1916 Post Road Associates, LLC, SF Station Street, LLC, Maura J. Garych, Metro Holding Company, LLC, SG Pequot 200, LLC, Paci Restaurant, 461 Broad Street, LLC, and Bridgeport 11823, LLC at its meeting of August 29, 2023. Pursuant to C.G.S §16-50n(c), the CSC grouped the aforementioned parties (hereinafter referred to as the “Grouped LLC Intervenor”) (Council Decision on Grouped Intervenor and CEPA Intervenor and Request for an Additional Evidentiary Hearing, 8/30/23). In response to their October 18, 2023 notice, the CSC granted Intervenor and CEPA Intervenor status to Stephen F. Boccarossa and James Sherwood Bok at its meeting of October 17, 2023. Pursuant to C.G.S §16-50n(c), the CSC grouped Stephen F. Boccarossa and James Sherwood Bok at its meeting of October 17, 2023. Pursuant to C.G.S §16-50n(c), the CSC grouped Stephen F. Boccarossa and James Sherwood Bok with the Grouped LLC Intervenor (Council Decision on Stephen F. Boccarossa; and James Sherwood Bok Requests for Intervenor and CEPA Intervenor, 10/18/23). In response to their November 17, 2023 notice, the CSC granted Intervenor and CEPA Intervenor status to Jacquelyn Thunfors and Sean Cowan at its meeting of November 16, 2023. Pursuant to C.G.S §16-50n(c), the CSC grouped Jacquelyn Thunfors and Sean Cowan with the Grouped LLC Intervenor (Council Decision on Thunfors and Cowan Request for Intervenor and CEPA Intervenor Status, 11/17/23). In response to their November 17, 2023 notice, the CSC granted Intervenor and CEPA Intervenor status to their November 17, 2023 notice, the CSC granted Intervenor and CEPA

Intervenor status to The National Trust for Historic Preservation at its meeting of November 16, 2023. Pursuant to C.G.S §16-50n(c), the CSC grouped The National Trust for Historic Preservation with the Grouped LLC Intervenor (Council Decision on The National Trust for Historic Preservation Request for Intervenor and CEPA Intervenor Status, 11/17/23). The Grouped LLC, Intervenor have Intervenor and CEPA Intervenor status in this proceeding.

B. Burden of Proof

The applicant to an administrative agency bears the burden of proof.

Samperi v. Inland Wetlands Agency, 226 Conn. 579, 593 (1993). "It is an elementary rule that whenever the existence of any fact is necessary in order that a party may make out his case or establish his defense, the burden is on such party to show the existence of such fact." (Internal quotation marks omitted.) *Zhang v. Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 645 (2005), quoting *Nikitiuk v. Pishtey*, 153 Conn. 545, 552 (1966); see *Komondy v. Zoning Board of Appeals*, 127 Conn. App. 669, 678 (2011) ("[T]he burden rests with the applicant to demonstrate its entitlement to the requested relief."). The applicants have the burden of proof to show they are entitled to approval of their application.

C. Standard of Proof

The statutes governing Siting Council consideration of applications for a Certificate of Environmental Compatibility and Public Need are silent as to the standard of proof that the applicant must meet for the application to be granted. "In the absence of state legislation prescribing an applicable standard of proof the preponderance of the evidence standard is the appropriate standard of proof in administrative proceedings" *Goldstar Medical Services, Inc. v. Dept. of Social Services*, 288 Conn. 790, 821 (2008).

D. Due Process and Fundamental Fairness

The requirements of fundamental fairness and due process apply to Siting Council procedures. *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474, 484 (1990); *Rosa v. Connecticut Siting Council*, Superior Court, judicial District of New Britain, Docket No. HHB-CV-05-4007974-S (March 1, 2007), 2007 WL 829582, *Torrington v. Connecticut Siting Council*, Superior Court, judicial district of Hartford, Docket No. CV90-0371550-S (September 12, 1991), 1991 WL 188815.

In *Grimes v. Conservation Commission*, the Supreme Court defined the parameters of "fundamental fairness" in administrative proceedings:

Although no constitutional due process right exists in this case, we have recognized a common-law right to fundamental fairness in administrative hearings. "The only requirement [in administrative proceedings] is that the conduct of the hearing shall not violate the fundamentals of natural justice." *Miklus v. Zoning Board of Appeals*, 154 Conn. 399, 406, 225 A.2d 637 (1967). Fundamentals of natural justice require that "there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary." *Parsons v. Board of Zoning Appeals*, 140 Conn. 290, 293, 99 A.2d 149 (1953), overruled on other grounds, *Ward v. Zoning Board of Appeals*, 153 Conn. 141, 146- 47, 215 A.2d 104 (1965). Put differently, "[d]ue process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act and to offer rebuttal evidence." *Pizzola v. Planning & Zoning Commission*, 167 Conn. 202, 207, 355 A.2d 21 (1974); see also *New England Rehabilitation Hospital of Hartford, Inc. v. Commission on Hospitals & Health Care*, 226 Conn. 105, 149-50, 627 A.2d 1257 (1993) (administrative agency "cannot properly base its decision upon [independent] reports without introducing them in evidence so as to afford interested parties an opportunity to meet them"); *Huck v. Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 536, 525 A.2d 940 (1987) (administrative due process requires due notice and

right to produce relevant evidence); *Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn. 247, 249, 470 A.2d 1214 (1984) (same). The purpose of administrative notice requirements is to allow parties to "prepare intelligently for the hearing." *Jarvis Acres, Inc. v. Zoning Commission*, supra, 163 Conn. [41] at 47, 301 A.2d 244 [(1972)].

(Footnotes omitted.) *Grimes v. Conservation Commission*, 243 Conn. 266, 273-4 (1997).

The CSC is bound by these requirements in its consideration of this application.

The Grouped LLC Intervenors renew the arguments made in their Grouped LLC Intervenors' Comments on Town Motion for Continuance dated September 18, 2023, their Reply to Objection to Motion for Continuance dated September 21, 2023, their Motion to Dismiss and/or Stay Proceedings dated 11/27/23, and their Joint Motion in Opposition to Siting Council's Order dated December 8, 2023 dated December 12, 2023, as well as the Motion to Amend Connecticut Siting Council Schedule dated October 13, 2023, as submitted by the SCNET Intervenors to which the CSC is respectfully referred.

In addition, during the final public hearing dated December 12, 2023, the Grouped LLC Intervenors were not provided with equal time for cross-examination in comparison to other Intervenors. Due to the arbitrary time limit, the Grouped LLC Intervenors were forced to curtail their cross-examination of witnesses. During the course of cross-examination, Commissioner Morrisette stated that counsel for the Grouped LLC Intervenors had indicated that the prior question was their last question, which was not correct, and requested counsel to "wrap it up" just a few short minutes into cross-examination (Hearing Transcript 12/12/23, Page 245, lines 13-17). This strict and uneven time constraint amongst the intervenors violated the due process rights of the Grouped LLC Intervenors.

II. CLAIMS OF LAW

A. The CSC was not properly constituted during the course of the Application.

The CSC is a multi-member Connecticut state agency established by the Public Utility Environmental Standards Act (“PUESA”), Conn. Gen. Stat. § 16-50g, *et seq.* Pursuant to C.G.S. § 16-50j, five of the CSC’s members are appointed by the Governor from the general public, two of whom **must** be experienced in the field of ecology. *See* C.G.S. § 16-50j (b). The CSC’s enabling legislation, C.G.S. § 16-50j (b), governs membership of the Council. Section 16-50j (b) provides as follows:

Except for proceedings under chapter 445, this subsection and subsection (c) of this section, the council shall consist of: (1) The Commissioner of Energy and Environmental Protection, or his designee; (2) the chairperson of the Public Utilities Regulatory Authority, or the chairperson's designee; (3) one designee of the speaker of the House and one designee of the president pro tempore of the Senate; and (4) five members of the public, to be appointed by the Governor, ***at least two of whom shall be experienced in the field of ecology***, and not more than one of whom shall have affiliation, past or present, with any utility or governmental utility regulatory agency, or with any person owning, operating, controlling, or presently contracting with respect to a facility, a hazardous waste facility, as defined in section 22a-115, or an ash residue disposal area.

C.G.S. § 16-50j (b) (emphasis added). “By statute, at least two Council members appointed by the Governor shall be experienced in the field of ecology and not more than one member shall have an affiliation with any utility, government utility regulatory agency, or facility under the Council’s jurisdiction.” *See* <https://portal.ct.gov/CSC/Membership/Membership/Connecticut-Siting-Council-Membership#31235> (last visited Nov. 27, 2023).

The CSC has itself recognized in court filings that the Governor’s appointment of *at least* two members experienced in the field of ecology is mandatory. *see also, Block v. Statewide Grievance Comm.*, Conn. Supp. 5, 13 (Conn. Super. 2000). During the public hearings on the Application prior to the final public hearing, the CSC membership was as follows:

1. Brian Golembiewski (appointed by the Commissioner of Energy and Environmental Protection);
2. Quat Nguyen (appointed by the Chairperson of the Public Utility Regulatory Authority);
3. Daniel P. Lynch, Jr. (appointed by the President Pro Tempore of the Senate);

4. Robert Silvestri (appointed by the Speaker of the House);
5. **John Morissette (appointed by the Governor);**
6. **Robert Hannon (appointed by the Governor).**

See <https://portal.ct.gov/CSC/Membership/Membership/Council-Membership---Energy>.

Prior to the final public hearing, only two members of the CSC were appointed by the Governor -- Mr. Morissette and Mr. Hannon. However, of the Governor's two appointees, only Mr. Hannon is "experienced in the field of ecology." *Id.*; see also, Connecticut Siting Council, Council Membership, Energy and Telecommunications, available at:

<https://portal.ct.gov/CSC/Membership/Membership/Council-Membership---Energy>.

Prior to the final public hearing on the Application, Governor Lamont appointed Thomas J. Near, Ph.D., to the CSC as a member of the public experienced in the field of ecology. However, Commissioner Near did not attend the final public hearing. In addition, no statement was made during the public hearing that Commissioner Near had reviewed the record and all prior proceedings associated with the Application. The intent of C.G.S. § 16-50j is to create a mandatory requirement for the CSC to consist of two members of the public experienced in the field of ecology for the benefit their knowledge and experience would have on the proceedings before the CSC where the environment is of the utmost concern. Their experience creates value in their potential questioning, requests for information and documents, review of arguments and alternatives and the knowledge they can share with their fellow commissioners who are not experienced in the field of ecology. This Application only had one member experienced in the field of ecology participate in its public hearings. It is completely counter to the requirements of the Connecticut General Statutes and its intent. It serves as a sole basis for the denial of the Application. The CSC during the pendency of the Application deferred its decision on the Motion to Dismiss due to the fact the CSC was

improperly constituted. The CSC should deny the Application in accordance with the arguments made in the original Motion to Dismiss and this Post-Hearing Brief.

This fact pattern is similar to the circumstances that were at issue in *DuBaldo v. Department of Consumer Protection, State Electrical Work Examining Board*, 209 Conn. 719 (1989). In *DuBaldo*, an electrical contractor appealed from a decision of the electrical work examining board of the Department of Consumer Protection that suspended his unlimited electrical contractor's license. The applicable statute in *DuBaldo* that established the electrical work examining board, § 20-331, required that “[e]ach such board ... shall consist of seven members who shall be residents of this state, two of whom shall be unlimited contractors, two of whom shall be unlimited journeymen, engaged in and licensed for such occupation under this chapter, and three of whom shall be public members.” *Id.* at 721-22. The plaintiff argued that the two board members who were the unlimited journeymen were not engaged in the occupation of electrical contracting and, therefore, the board failed to meet the statutory requirements set forth in § 20-331. *Id.* at 722. The trial court dismissed the appeal, and the contractor appealed. *Id.* at 721. The Supreme Court held that examining board was not properly constituted as required by its enabling legislation because it included two unlimited journeymen who were not engaged in the occupation of electrical contracting. *Id.* at 723. As such, in *DuBaldo*, the Supreme Court held that the board lacked statutory authority to suspend the contractor’s license. *Id.* Similarly, in this instance, because the CSC lacked two participating public members appointed by the Governor that are “experienced in the field of ecology” during its public hearings on the Application, the CSC was not properly constituted pursuant to its enabling legislation.

Similarly, in *Block v. Statewide Grievance Committee*, 47 Conn. Supp. 5 (2000), the court considered whether a reviewing committee of the Statewide Grievance Committee was

properly constituted. The court relied upon *DuBaldo v. Department of Consumer Protection, State Electrical Work Examining Board*, 209 Conn. 719 (1989) and held that the reviewing committee was improperly constituted when it acted without a public member. *See Block*, 47 Conn. Supp. at 16-17. In *Block*, the court remanded to the reviewing committee for a hearing before a properly constituted reviewing committee. *Id.* at 17. Here, similar to *Block*, the CSC's membership is statutorily mandated to include *at least* two members "experienced in the field of ecology" and the failure to have two members experienced in the field of ecology participate during the public hearings on the Application renders the CSC without authority to act. *See id.* at 16.

B. The CSC failed to provide evidence that it had consulted with and solicited written comments from the necessary state departments under C.G.S. Sec. 16-50j(g).

C.G.S. Sec. 16-50j(g) requires that prior to the commencement of any public hearing that the CSC shall consult with and solicit written comments from a number of state departments. The record of the Application contains evidence that the following departments were consulted and/or solicited for written comments prior to the commencement of the public hearing:

1. Connecticut Airports Authority Comments, 04/17/23
2. Council on Environmental Quality Comments, 05/26/23

However, the record of the Application does not provide evidence that the following departments were consulted or solicited for written comments prior to the public hearing in accordance with C.G.S. Sec. 16-50j(g):

1. Department of Energy and Environmental Protection;
2. Department of Public Health
3. Department of Agriculture
4. Public Utilities Regulatory Authority
5. Office of Policy and Management
6. Department of Economic and Community Development

7. Department of Transportation

Therefore, the CSC failed to provide evidence in the record that it had satisfied the requirements of C.G.S. Sec. 16-50j(g).

C. The CSC failed to hold at least one session of public hearing at a location in the county in which the facility or any part thereof is to be located as required under C.G.S. Sec. 16-50m(a).

C.G.S. Sec. 16-50m requires that at least one session of a public hearing in connection with an application for a certificate as requested in the pending Application be held at a location selected by the CSC in the county in which the facility or any part thereof is to be located after six-thirty p.m. for the convenience of the general public. The proposed facility and its parts thereof proposed in the Application are located in Fairfield County. No public hearing regarding the Application was held at a location in Fairfield County. All public hearings were conducted via Zoom videoconference (see Instructions for Access for 07/25/23, 08/29/23, 10/17/23, 11/16/23, 11/28/23 and 12/12/23). Public Act No. 22-3 does not remove the requirement stated under C.G.S. Sec. 16-50m for a public hearing to be held in the county in which the facility or any part thereof is to be located. As the CSC has closed further public hearings, this Application has not followed the proper procedure and requirements under C.G.S. Sec. 16-50m(a).

D. The Applicant failed to provide an accurate assessment of the historic resources impacted by the Application and the Application would Significantly Affect multiple Historic Districts and Historic Resources.

The proposed transmission lines under the Application would be visible year-round in the viewshed of multiple historic districts and resources. The State Historic Preservation Office stated in its letter dated November 17, 2023, recommended “that a decision of approval be postponed until additional information can be provided, to better make informed/additional recommendations” (State Historic Preservation Office Comments, 11/17/23, p. 2). Their subsequent letter did not rescind that

recommendation (State Historic Preservation Office Additional Comments, 11/22/23).

As demonstrated by Mr. Wes Haynes during his cross-examination at the CSC public hearing held on 12/12/23, the Application is woefully deficient in its assessment of historic resources. Specifically, Mr. Haynes found “glaring omissions” of historic resources located in the South End of the City of Bridgeport, including, but not limited to, the Mary and Eliza Freeman Homes, Walters A.M.E. Zion Church, Little Libera, and dozens of other buildings (Hearing Transcript 12/12/23, p. 242). Mr. Haynes stated the Freeman Homes and Little Liberia are extremely rare communities associated with free people of color discriminated against in white society (Hearing Transcript 12/12/23, p. 243). He also confirmed the Freeman Homes are on the National Register of Historic Places and are a part of only two to three percent of all properties on the National Register, which are associated with Black Americans (Hearing Transcript 12/12/23, p. 243-244). Mr. Haynes highlighted the impact that would be created by the Application. He noted that Little Liberia, the Mary and Eliza Freeman Homes and Walters A.M.E. Zion Church are located in an area where the ground has essentially remained undisturbed (Hearing Transcript 12/12/23, p. 244-245). He opined that it had been identified as an extremely archeologically sensitive and rare location and required archeological work to be done. *Id.* Further, Mr. Haynes found the Applicant’s submission contained mischaracterizations regarding historic resources. (Hearing Transcript 12/12/23, p. 246). He also noted that there were historic landmarks, which are in the same category as Mount Vernon and Mount Rushmore, including the Barnum Museum located in the City of Bridgeport, which should have been referenced in the Applicant’s submission (Hearing Transcript 12/12/23, p. 247). He stated that there are three such landmarks impacted by the Application and it is extremely rare to have three (3) such landmarks within a short distance (Hearing Transcript 12/12/23, p. 247-248). The omissions and mischaracterization of historic resources in the Application in combination with the recommendation of the State Historic Preservation Office and the information brought to light by the

testimony of Mr. Haynes serve as its own basis for the denial of the Application to allow for further investigation into the impact on historic resources associated with the Application.

III. CONCLUSION

The Application and the manner in which the public hearings were conducted are in violation of the Connecticut General Statutes. The due process of the Intervenors were violated and the public did not receive proper notice of the Application. The CSC was not properly constituted under Connecticut General Statutes during the public hearings held on the Application and at the time of filing of the Motion to Dismiss by the Grouped LLC Intervenors. In violation of the Connecticut General Statutes, a public hearing was not held within Fairfield County as required and the record does not contain adequate evidence that the appropriate state departments were consulted prior to the commencement of public hearings as required. In addition, information and testimony provided at public hearings demonstrate that the Application omitted and mischaracterized historic resources and the impact caused to said resources. In accordance with comments by the State Historic Preservation Office and Mr. Wes Haynes, further investigation is needed.

For all these reasons and the reasons stated by the SCNET Intervenors and Town of Fairfield in their Post Hearing Brief and Findings of Fact, the Application should be denied.

GROUPED LLC INTERVENORS

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically mailed and/or U.S. Mail, first-class, postage pre-paid to the following service list on January 11, 2024.

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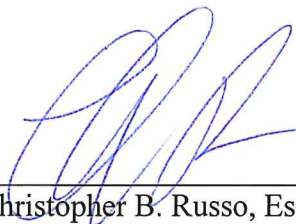
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A handwritten signature in blue ink, appearing to read 'CB Russo', is positioned above a horizontal line.

Christopher B. Russo, Esq.