

CONNECTICUT SITING COUNCIL

IN RE:

THE UNITED ILLUMINATING COMPANY (UI) :
APPLICATION FOR A CERTIFICATE OF :
ENVIRONMENTAL COMPATIBILITY AND PUBLIC : **DOCKET NO. 516**
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 MILES 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 : **NOVEMBER 27, 2023**
SUBSTATIONS TRAVERSING THE :
MUNICIPALITIES OF BRIDGEPORT AND :
FAIRFIELD, CONNECTICUT :

MOTION FOR RECONSIDERATION

The intervenors, SASCO CREEK NEIGHBORS ENVIRONMENTAL TRUST
 INCORPORATED, STEPHEN OZYCK, ANDREA OZYCK, KARIM MAHFOUZ, WILLIAM
 DANYLKO, DAVID PARKER, 2190 POST ROAD LLC, INVEST II, INTERNATIONAL
 INVESTORS, SOUTHPORT CONGREGATIONAL CHURCH, PEQUOT LIBRARY
 ASSOCIATION, TRINITY EPISCOPAL CHURCH AND SASQUANAUG ASSOCIATION
 FOR SOUTHPORT IMPROVEMENT, INC. (collectively, the “Intervenors”), hereby
 respectfully request that the Connecticut Siting Council (“CSC” or the “Council”) reconsider its

denial of the Intervenor's Motion for Order to Compel Production of Documents, dated November 14, 2023 (the "Motion to Compel"). The Motion to Compel sought full compliance with the Intervenor's First Set of Interrogatories and Requests for Production, dated October 3, 2023.

As discussed in greater detail in the Motion to Compel, the applicant, The United Illuminating Company ("UI"), objected to twenty-two (22) of the Intervenor's initial thirty-nine interrogatories and requests for production. UI objected on three general grounds, i.e., that the information sought was either irrelevant to the CSC's hearing on UI's Application for a Certificate of Environmental Compatibility and Public Need (the "Application"), was confidential and propriety, or was Critical Electric Infrastructure Information ("CEII"), otherwise exempt from disclosure pursuant to federal law. UI provided no factual or legal justification for any of its three classes of objections.

During the CSC's November 16, 2023 continued evidentiary hearing, the Council considered the Intervenor's Motion and sought guidance from its Executive Director, Attorney Melanie Bachman. Attorney Bachman recommended denial of Intervenor's Motion to Compel and provided the following justification:

In support of its petition, SCNET relies on the rules of superior court for discovery in civil cases. Those rules do not apply in administrative agency proceedings. This administrative proceeding is governed by the Uniform Administrative Procedure Act, and the Council's rules of practice in its regulations. In further support of its position, SCNET relies on an eight year old superior court order in an undecided case related to cellular network proprietary information for telecommunications facilities, which is clearly distinguishable from transmission facility proprietary information, and federal energy regulatory commission defined critical energy infrastructure information for energy facilities. The UI witness panel is prepared for cross-examination this afternoon on topics that are relevant to this council's evaluation of the application, including but not limited to the Fairfield to New Haven railroad corridor transmission line asset condition assessment that is in the record under council administrative notice items number 31 for docket 3b and number 34 for docket 508, as well as UI's responses to council interrogatories 5

and 6. Furthermore, all the presentations related to asset conditions along the existing transmission line are publicly available on the ISO New England Website.

The Council briefly deliberated on the Motion to Compel. Commissioners Hannon, Silvestri and Golembiewski declined discussion. Commissioner Nguyen commented in support of Intervenor's Motion to Compel. Chairman Morrissette stated, "I agree with Attorney Bachman's analysis of the...information that was submitted and I believe that the information is available through the cited reports, *anything beyond that is unnecessary for the Council to make its decision.*" (Emphasis added). The Council did not engage in a substantive, interrogatory by interrogatory, review of UI's objections nor did it exercise its right to examine contested documents in camera. As Chairman Morrissette would note later in the hearing, the Council elected to rely "on the assumptions and value that UI has provided and [the CSC] will not compel them to provide the raw data." The Council voted four to one to deny the Intervenor's Motion to Compel.

Part of Attorney Bachman's justification for recommending denial of the Intervenor's Motion to Compel was that UI's witness panel was available and prepared for cross-examination. However, during the evidentiary hearing, the undersigned counsel repeatedly attempted to examine the applicant's witness panel on issues material to, inter alia, UI's load projections for the rebuilt circuit and its costs analyses for project alternatives, in particular, its undergrounding alternative. UI's principal engineer, Meena Sazanowicz, repeatedly objected to the undersigned's line of questioning and alleged, without providing support, that the information requested was "protected and proprietary."¹

¹ The CSC's regulations specifically provide that "the council shall give effect to the rules of privilege recognized by law in Connecticut." Regs., Conn. State Agencies § 16-50j-28(a).

Based upon the foregoing, it is apparent that absent reconsideration of the Motion to Compel, the Intervenors will be deprived of a fundamentally fair proceeding and their opportunity to attain a full and true disclosure of the facts.

I. Connecticut Uniform Administrative Procedures Act (“UAPA”)

The Intervenors do not contest that CSC proceedings are governed by the Connecticut Uniform Administrative Procedure Act, Conn. Gen. Stat. § 4-166 et seq. (“UAPA”) and the Council’s rules of practice, Regs., Conn. State Agencies § 16-50j-1 et seq. It is well established, however, that “[h]earings before administrative agencies...although informal and conducted without regard to the strict rules of evidence, must be conducted so as not to violate the fundamental rules of natural justice...Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and *an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence.*” (Emphasis added; citations omitted; internal quotation marks omitted) Giaimo v. New Haven, 257 Conn. 481, 512-13, 778 A.2d 33 (2001).

The UAPA unambiguously provides that, “[i]n a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes...” Conn. Gen. Stat. § 4-177c(a)(1).

The UAPA also affords parties to contested cases “the opportunity...at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.” Conn. Gen. Stat. § 4-177c(a)(2). Connecticut General Statutes § 4-178 defines the scope of cross-examination required in a contested case under the UAPA as

that “required for a *full and true disclosure of the facts.*” Conn. Gen. Stat. § 4-178(5) (emphasis added). The Council’s regulations similarly provide for cross-examination where required for a “full and true disclosure of the facts.” Regs., Conn. State Agencies § 16-50j-28(c). As discussed in greater detail in this Motion, the information and associated documentation requested by the Intervenors by way of written discovery and cross-examination is relevant and material to the Council’s review and consideration of UI’s Application. The requested information and/or documentation is not otherwise in the possession of the Intervenors or the Council, and UI has not substantiated its claim of privilege or exemption from disclosure pursuant to either Federal or State law.

a. The Requested Information is Relevant and Material to this Contested Case

The information requested by the Intervenors in this contested case is relevant and material to the Council’s review and consideration of UI’s Application. In March 2023, UI applied to the CSC for a Certificate of Environmental Compatibility and Public Need for its proposed rebuild of approximately 7.3 miles of existing 115-kV overhead transmission line in Fairfield and Bridgeport between Sasco Creek and the Congress Street Substation. Despite the absence of any order or mandate from the Department of Transportation (“DOT”) to remove existing transmission infrastructure from the railroad catenaries, UI’s Application proposes to rebuild its transmission line within, and adjacent to, the DOT right of way (“ROW”) on 102 new monopoles, ranging in height from ninety-five (95’) to one hundred forty-five (145’) feet, designed to accommodate a larger wire than required given the conductor’s existing and projected load.

When considering a Certificate of Environmental Compatibility and Public Need, the Council is charged with balancing the public need or benefit of a proposed facility with the

effects of the proposed facility on the natural environment (including historic and cultural resources), at the lowest reasonable cost to consumers. *See generally* Conn. Gen. Stat. § 16-50k. The objected to interrogatories and questions on cross-examination sought information pertinent to the performance and condition of UI's existing infrastructure, the projected load of the circuit and the prudence of designing a system to accommodate a higher capacity (i.e., thicker) wire than required. Additionally, with respect to project alternatives, the Intervenor sought production of the documentation relied upon by UI's team of engineers to substantiate their budgetary cost analyses. All of this information is directly relevant to a meaningful review of the need, benefit and cost associated with UI's project.

The objections to Interrogatories SCNET 1-22 and SCNET 1-32 are particularly baseless. Both interrogatories relate to the reliability of UI's existing transmission infrastructure; which, in turn, implicates the public need and public benefit component of this proceeding.² Neither interrogatory was objected to on the basis of privilege or confidentiality. Rather, UI simply claimed irrelevance.

b. UI has not Substantiated its Claim of Privilege

The Intervenor's remaining interrogatories (i.e., SCNET 1-16 through 1-19 and SCNET 1-34 through 1-38) were objected to on the basis of alleged irrelevance and privilege. UI claims that Intervenor's interrogatories SCNET 1-35, 1-36 and 1-37 request "confidential and

² SCNET 1-22 states: What is the performance history of UI's existing facilities at the Site within the last two (2) years? (B) Specifically, please identify all unplanned outages occurring within the last two year, including the date of the outage, the cause of the outage as determined by UI, and the duration of the outage.

SCNET 1-32 states: Please provide a copy of any document in UI's possession (including but not limited to any and all papers, reports, records and communications, as well as any documents or communications in electronic form) which contain any research or analysis pertaining to the structural integrity, reliability and/or resiliency of the existing 115-kV transmission line located between catenary structure B648S and UI's Congress Street substation, and UI's associated electrical infrastructure.

proprietary information.” A-SCNET 1-35, A-SCNET 1-26 and A-SCNET 1-37. Similarly, during the Council’s November 16, 2023 continued evidentiary hearing, UI’s witnesses repeatedly objected to any line of questioning on cross which requested information or documentation substantiating UI’s project alternative cost estimates. Specifically, the Intervenor requested the information relied upon by UI to calculate its estimated cost of undergrounding the transmission system.³ UI objected on the grounds that such information is “protected and proprietary.”

UI, however, has produced nothing to substantiate its claim that any of the requested information is confidential or proprietary. Nor has UI demonstrated that the public interest in preserving confidentiality, in this instance, outweighs the benefit of discovery. See generally Office of Consumer Counsel v. Dept. of Public Utility Control, 44 Conn. Supp. 21, 27, 665 A.2d 921 (1994). Per the CSC’s own regulations, “[t]he council shall give effect to the rules of privilege recognized by law in Connecticut.” Regs., Conn. State Agencies § 16-50j-28(a). It is a general tenet of Connecticut and federal law that confidentiality does not equate to privilege. The U.S. Supreme Court has observed that “orders forbidding any disclosure of...confidential information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel...or to the parties.” Federal Open Market Committee v. Merrill, 443 U.S. 340, 362 n. 24 (1979); see also Hartford Life and Acc. Ins. Co. v. Wiggin, 1997 WL 280157, 19 Conn. L. Rptr. 522 (Conn. Super. Ct., May 15, 1997) (“Even if the documents at issue did

³ UI claims that undergrounding is a cost-prohibitive alternative. However, it offers no support for its estimated cost of approximately \$100 million per mile. A thorough analysis of the undergrounding option is clearly material and relevant to this CSC proceeding. Undergrounding offers a safe and reliable alternative to overhead transmission and one which eliminates the majority of the adverse visual and direct impacts to cultural and historic resources located within 0.5 miles of the project corridor.

The cost estimate provided by UI is entirely inconsistent with cost figures provided by the Intervenor’s expert, Harry Orton, P.E., and the Town of Fairfield’s expert, Ray Awad, P.E., as well as the actual costs provided by the State’s other principal transmission provider, Eversource, and reported in the CSC’s 2022 Life Cycle Cost Analysis Report.

contain confidential information, that would not render them undiscoverable. Generally, documents containing trade secrets or proprietary information are subject to discovery.”). Furthermore, Connecticut law provides that materials obtained, created and/or relied upon by expert witnesses are not privileged, confidential or otherwise exempt from disclosure. See Murchie v. Hurwitz, Et. Al., 1992 WL 91675 (Conn. Sup., JD of Stamford-Norwalk at Stamford, J. Rush, April 8, 1992) (An opposing party “has a right to investigate the factual basis of any opinions, expressed by the expert, the nature of any facts that may have been disregarded by the expert as not being relevant to his opinion, and the nature of the request being made to the expert.”).

As noted in the Motion to Compel, to the extent any requested cost information or documentation is determined to be confidential or proprietary, the Intervenor is willing to execute binding confidentiality agreements with UI and the Council. Further, past precedent with the CSC provides that withheld information may be submitted under seal. The Council, however, elected not to adopt either approach and instead accepted “the assumptions and value that UI has provided...” As practical matter, this approach has permitted UI to rule out a project alternative as cost-prohibitive without being required to provide the Council or the public with *any documentation* to substantiate its exorbitant and, likely indefensible, cost estimates. Such an approach is fundamentally unfair and enables an applicant-utility to exploit its own procedural and evidentiary advantage.

Similarly, UI alleges, without support, that the Intervenor’s interrogatories SCNET 1-16, 1-17, 1-18, 1-19, 1-34 and 1-38 request confidential Critical Electric Infrastructure Information (“CEII”). The Federal Energy Regulatory Commission (“FERC”) generally defines “critical electric infrastructure” as a system or asset of the bulk-power system, the incapacity or

destruction of which would negatively affect national security; economic security; public health or safety; or any combination of such matters. CEII is specific to engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that (i) relates details about the production, generation, transmission, or distribution of energy; (ii) could be useful to a person planning an attack on critical infrastructure; (iii) is exempt from mandatory disclosure under the Freedom of Information Act; and (iv) gives strategic information beyond the location of critical infrastructure.

UI has not substantiated its claim that any of the requested information or documentation qualifies as CEII. To the extent UI validates its concern regarding the potential disclosure of CEII, the CSC is permitted to examine the withheld and contested evidence in camera. See generally Office of Consumer Counsel, supra 44 Conn. Supp at 24. There must, however, be a degree of administrative oversight. An applicant-utility should not be permitted to avoid the disclosure of documents which are materially-adverse to its application by simply ‘crying CEII.’

With that said, however, the Intervenor challenge UI’s characterization of interrogatories SCNET 1-16, 1-17, 1-18 and 1-19 as requesting the disclosure of CEII.⁴ All four of the challenged interrogatories request information pertaining to the circuit’s actual and projected load levels. These are the *same metrics* disclosed publicly by Eversource in its June 2015

⁴ The Intervenor’s interrogatories request the following:

16. Please identify the load rating of the existing transmission circuits located within the Site, including each circuit’s summer and winter seasonal rating.

17. Please identify the thirty (30) minute peak load of the existing transmission circuits located within the Site that were observed within the last sixty (60) months.

18. Please provide the average daily load history for the existing transmission circuits located within the Site as calculated over the last twenty-four (24) months.

19. Please identify the projected load rating for the transmission circuits proposed by UI as part of its application associated with this Docket 516, including each proposed circuit’s summer and winter seasonal rating.

Application for a Certificate of Environmental Compatibility and Public Need associated with the Greenwich Substation and Line Project. (CSC Docket 461; available at https://portal.ct.gov/-/media/CSC/1_Dockets/medialibrary/Docket_461/Application/GreenwichSSCSCApplication62415pdf.pdf).

Eversource's willingness to publish and disclose the actual and projected load levels associated with its Greenwich Substation and Line Project militates against UI's characterization of the same information as confidential CEII.

c. The CSC Did Not Properly Adjudicate UI's Objections

The only way to properly adjudicate the objections would be for the CSC to engage in a substantive, interrogatory by interrogatory, review of UI's objections, which is the process that would be followed by the Superior Court. The intervenors acknowledge that Siting Council process is not governed by the Connecticut Rules of Practice but rather the UAPA, which clearly provides that the Intervenors shall be afforded the opportunity to discover relevant and material records, papers and documents in the Applicant's possession, except as otherwise provided by federal law or any other provision of the general statutes. *See*, Conn. Gen. Stat. § 4-177c(a)(1). It is important for the CSC to take note as to how the Superior Court would generally adjudicate objections as an example of how a fair process should be administered. To the extent that the CSC has any concerns about the potential confidentiality, the CSC has the right to examine the contested documents in camera. To date, the CSC has failed to properly engage in a substantive, interrogatory by interrogatory, review of UI's objections, and failed to provide the Intervenors and UI with the opportunity to provide argument on the objections. If the CSC did engage in that proper process for adjudicating the objections, the undersigned is confident that UI will not be able to justify the basis for many of its objections for the reasons stated above in Sections

I(a)(b). The Intervenor will be denied due process and a fair hearing if the CSC simply relies “on the assumptions and value that UI has provided” proper compliance with Intervenor’s interrogatories.


II. The Subbloie Case is Persuasive Authority and Should not be Dismissed by the Council

In Subbloie, Albert, Et. Al v. Connecticut Siting Council, Et. Al. (Conn. Sup. JD of New Britain At New Britain, J. Levine, May 13, 2015), the Court (Hon. G. Levine) did, in fact, issue an order of remand vacating the original Siting Council decision and required the Siting Council to conduct a new hearing and render a new decision. The fact pattern is almost the same as this case where: Cellco refused to provide certain records and data relied upon by Cellco’s expert witness on grounds that the same were purportedly “confidential and proprietary”; the intervenors filed a Motion to Compel production of the records and data on the basis that withholding of potentially material information would deprive the intervenors from having a fair hearing in violation of due process; and the CSC improperly denied said motion. The CSC, represented by the Assistant Attorney General Robert Marconi and Assistant Attorney General Claire Kindle, acknowledged and agreed that the records and data considered by Cellco’s experts should have been discoverable by the intervenors and upon remand at the new CSC hearing any records and data considered by Cellco’s experts shall be discoverable by the intervenors and the CSC. At the CSC’s November 16, 2023 continued evidentiary hearing, Executive Director Bachman aptly pointed out that it was an eight year old superior court case and that it was related to cellular network proprietary information for telecommunications facilities. Those facts do not distinguish the Subbloie case where the CSC acknowledged and agreed that records and data that the applicant objected to providing the intervenors in discovery on the basis that it was “confidential and proprietary” should have been discoverable by the intervenors because it was considered by applicant’s expert witness.

The same premise applies in this case. Allowing UI to withhold the disclosure of records and data considered by one of UI's expert witnesses would deprive the intervenors from having a fair hearing in violation of due process. To the extent any requested information or documentation is determined to be confidential or proprietary, the Intervenors are willing to execute binding confidentiality agreements with UI and the Council. Further, past precedent with the CSC provides that withheld information may be submitted under seal.

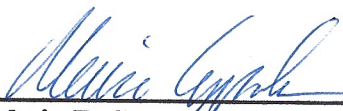
WHEREFORE, the Intervenor respectfully move the CSC for reconsideration of its denial of Intervenor's Motion to Compel. The Intervenor also respectfully request the opportunity for argument on the record.

**RESPECTFULLY SUBMITTED BY:
SASCO CREEK NEIGHBORS ENVIRONMENTAL TRUST
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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was electronically mailed and/or deposited in the United States mail, first-class, postage pre-paid this 27th day of November, 2023 to the individuals on the Service List for this Docket, as of November 27, 2023.


Mario F. Coppola, Esq.