STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:	:	
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APPLICATION OF NTE CONNECTICUT, LLC FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF AN ELECTRIC POWER GENERATING FACILITY OFF LAKE ROAD, KILLINGLY, CONNECTICUT	:	DOCKET NO. 470
	:	NOVEMBER 3, 2016

OBJECTION OF NTE CONNECTICUT, LLC TO CONNECTICUT FUND FOR THE ENVIRONMENT'S MOTION TO DISMISS

NTE Connecticut, LLC ("NTE") hereby objects to Connecticut Fund for the Environment's Motion to Dismiss, dated November 2, 2016 (the "Motion"). The Motion should be denied because, despite Connecticut Fund for the Environment's ("CFE") assertions to the contrary, the Connecticut Siting Council ("Council") is not required to review all of the project interconnections as part of NTE's application for a Certificate of Environmental Compatibility and Public Need ("Certificate") for the Killingly Energy Center, a 550 MW combined cycle natural gas power plant proposed in Killingly, Connecticut ("Application").

BACKGROUND

On August 17, 2016, NTE filed the Application with the Council. The Application includes a section for "project-related interconnections" to an existing natural gas pipeline, a water pipe, a wastewater pipe, and electric transmission facilities in the utility switchyard immediately adjacent to the existing utility electric transmission right-of-way. (Application at Section 8.0). On September 15, 2016, the Council determined the Application complete and scheduled a field review and public comment session in the Town of Killingly for October 20, 2016. The Council scheduled the initial evidentiary hearing session for November 3, 2016.

On October 26, 2016, CFE filed a Request for Party Status, which is still pending. On November 2, 2016, just one (1) day before the evidentiary hearing, CFE filed the Motion.

ARGUMENT

CFE asserts that the Application should be dismissed because the Council cannot approve it without also considering the potential environmental impact of all of the interconnections to the project, including the natural gas pipeline expansion and the water and wastewater interconnections. However, the Council is only required to consider "[t]he nature of the probable environmental impact of ***the facility*** alone and cumulatively with other existing facilities . . . ." (Conn. Gen. Stat. § 16-50p(a)(3)(B) (emphasis added)). Thus, for all the reasons sets forth more fully below, the Motion should be denied.[1]

I. CONNECTICUT STATUTES DO NOT REQUIRE THE COUNCIL TO CONSIDER THE OTHER INTERCONNECTIONS AS PART OF THIS PROCEEDING

CFE asserts that the Application is incomplete because it fails to address all of the interconnections for the project. (Motion at 3). CFE also argues that the Application improperly segments the project and, as a consequence, prevents the Council from performing its statutory obligations. (Motion at 4). These claims are unsupported and incorrect.

The fundamental objective of statutory interpretation "is to ascertain and give effect to the apparent intent of the legislature." (Tuxis Ohr's Fuel, Inc. v. Adm'r, Unemployment Comp. Act, 309 Conn. 412, 421 (2013) (internal quotation marks omitted); see also Connecticut Consumer Counsel v. Connecticut Pub. Util., 1998 Conn. Super. LEXIS 2910 (Oct. 16, 1998), at 18 ("[W]e are guided by well established principles, paramount among which is the principle that our fundamental objective is to ascertain and give effect to the apparent intent of the

[1] If CFE is not granted party or intervenor status in this proceeding, it will have no standing. Conn. Gen. Stat. § 16-50n. In which case, the Motion should be denied on that basis.

legislature . . . .") (citations omitted; internal quotation marks omitted)). It is axiomatic that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." (Conn. Gen. Stat. § 1-2z). "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Id.) However, "when the ordinary meaning leaves no room for ambiguity . . . the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (In re Jusstice W., 308 Conn. 652, 661 (2012) (alterations in original; internal quotation marks omitted))

The Public Utility Environmental Standards Act ("PUESA") specifically requires the Council to consider the potential impacts of the facility before it "alone and cumulatively with other ***existing facilities*** . . . ." (Conn. Gen. Stat. § 16-50p(a)(3)(B) (emphasis added)). Except in limited circumstances not applicable here, prior to construction of "a facility," an applicant is required to obtain a Certificate from the Council. (Conn. Gen. Stat. § 16-50k(a)). A "facility" is defined as, *inter alia*, "any electric generating or storage facility using any fuel, including nuclear materials, including associated equipment for furnishing electricity . . . ." (Conn. Gen. Stat. § 16-50i(a)(3)). In reviewing an application for a Certificate, the Council is required to consider "[t]he nature of the probable environmental impact ***of the facility*** alone and ***cumulatively with other existing facilities*** . . . ." (Conn. Gen. Stat. § 16-50p(a)(3)(B) (emphasis added)). Thus, by the plain language of PUESA, the Council is only empowered to review the facility for which it has received an Application and to consider the potential environmental impact of that facility alone and vis-à-vis other "existing facilities." The Council is not empowered to consider the potential environmental impact of some future facility for which it

has not yet even received an application for a Certificate. Thus, the Council should deny the Motion.

II. THE APPLICATION DOES NOT IMPROPERLY SEGMENT THE PROJECT

In an attempt to support its position that the Application improperly segments the project, CFE cites various cases – all of which are irrelevant. First, CFE cites to Stewart Park and Reserve Coalition, Inc., 352 F.3d 545 (2d Cir. 2003), to support its claim that failure to include the other interconnections amounts to improper segmentation. However, the Stewart Park case involved claims that the defendants violated the National Environmental Policy Act ("NEPA") and New York's State Environmental Quality Review Act ("SEQRA"). NEPA only applies to actions for which there is federal funding or federal control, and SEQRA only applies to actions in New York. (42 U.S.C. § 4321 et seq.; New York State Environmental Conservation Law, Article 8). Since the facility is located in Connecticut and is not under federal control or receiving federal funding, neither NEPA nor SEQRA are applicable to the Council's review of the Application and any case law interpreting those statutes is irrelevant to this proceeding.

CFE also cites Delaware Riverkeeper Network v. FERC, 753 F.3d 1304 (D.C. Cir. 2014). However, as CFE itself recognizes, the Delaware Riverkeeper case involved claims that the Federal Energy Regulatory Commission ("FERC") violated NEPA. (Motion, at 4). As noted above, because the facility is not under federal control or receiving federal funding, NEPA does not apply. (42 U.S.C. § 4321 et seq.). Thus, any case law interpreting NEPA is irrelevant to this proceeding.

CFE also attempts to rely on Connecticut Coalition for Environmental Justice v. Development Options, Inc., 2005 WL 525631 (Jan. 5, 2005). However, the Connecticut Coalition court's analysis is irrelevant to this matter. First, the court relied on the Stewart Park case, which as discussed above, addressed segmentation in the context of NEPA. (Stewart Park,

352 F.3d at 559) ("Segmentation is an attempt to circumvent ***NEPA*** by breaking up one project into smaller projects and not studying the overall impacts of the single overall project.") (emphasis added)). As noted above, since the facility is not under federal control or receiving federal funding, NEPA does not apply. (42 U.S.C. § 4321 et seq.). Second, although the Connecticut Coalition court appears to apply this same standard to the Connecticut Environmental Protection Act ("CEPA"), it does not do so in the context of an agency action. (Connecticut Coalition, 2005 WL 525631 (determining that the plaintiff improperly attempted to segment a portion of a private development "to support their claim of a CEPA violation.")). Thus, despite CFE's implication to the contrary, the Connecticut Coalition case does not supports its claim that the Council is required to consider the potential environmental impact of some future facility for which it has not yet even received an application for a Certificate - in direct contravention of the plain language of PUESA, which specifically limits the Council's review to "the probable environmental impact of the facility alone and cumulatively with other existing facilities . . . ." (Conn. Gen. Stat. § 16-50p(a)(3)(B)). Accordingly, the Motion should be denied.

III. THE APPLICATION IS COMPLETE

Without any supporting authority, CFE asserts that the Application is incomplete because it fails to address all of the interconnections for the project. (Motion, at 2-3). In support of this position, CFE relies on Avalon Bay v. Zoning Commission Town of Stratford, 87 Conn. App. 537 (2005), for the proposition that PUESA is an environmental statute that is "remedial in nature and should be broadly construed." (Motion, at 3). However, Avalon Bay did not address PUESA.

In Avalon Bay, the court addressed whether a particular party had standing to pursue an action under CEPA. (Avalon Bay, 87 Conn. App. at 543). While the Avalon Bay court did find

that statutes like CEPA "are remedial in nature and should be liberally construed . . .," even CEPA has its limitations. For instance, CEPA does not "require an examination of future sources of pollution." (City of New Haven v. Conn. Siting Council. 2002 WL 847970 (Apr. 9, 2002), at *47).

Nor does PUESA. In fact, the plain language of Connecticut General Statutes section 16-50p(a)(3)(B) establishes that the Council's only obligation is to examine "[t]he nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities . . ."; not of other facilities seeking or planning to seek certificates. (Cf. City of New Haven v. Conn. Siting Council, 2002 Conn. Super. LEXIS 2753 (Aug. 21, 2002), at *37 ("[t]he plain language . . . establishes that . . . the Siting Council must examine the environmental effects 'alone or cumulatively' of 'a facility' seeking the certificate, not of other facilities seeking ***or planning to seek*** certificates.") (emphasis added)). Thus, even if PUESA is remedial and "thus should be interpreted liberally, the [Council] simply cannot expand the statute beyond the words of the statute itself." (Id.). Accordingly, the Council should deny the Motion.

IV. COUNCIL PRECEDENT DOES NOT REQUIRE THE COUNCIL TO CONSIDER THE OTHER INTERCONNECTIONS AS PART OF THIS PROCEEDING

Council practice has specifically permitted the review of other interconnections *after* the Council has issued a decision approving the electric generating facility. In those cases, the Council has conditioned approval of the electric generating facility on the approval of a subsequent application relating to the interconnection.

For instance, on August 27, 1998, PDC-El Paso Meriden, LLC applied to the Council for a Certificate for the construction, maintenance, and operation of a 544 MW natural gas-fired combined cycle facility in the City of Meriden, Connecticut. (Docket No. 190, Finding of Fact 1). In that docket, the Council found that the "applicant has not yet determined how water would

be withdrawn from the Connecticut River, believing it would be determined later in the DEP water diversion permit process." (Id., Finding of Fact 33). In addition, the Council found that:

> [n]atural gas would be the primary fuel for the proposed plant, to be supplied via a dual connection to both the Tennessee Gas pipeline and the Algonquin Gas Transmission pipeline. PDC-El Paso has entered into negotiations for the transport of gas on both pipelines, but has not confirmed how or where the gas would be provided to the facility.

(Id., Finding of Fact 58). Based on these findings, the Council required a development and management plan that included provisions for water diverted from the Connecticut River. (Id., Decision and Order, Development and Management Plan, at 2.a). In addition, the Council conditioned its approval of the Meriden facility on:

> [s]ubmittal of a petition, amendment, or an application pursuant to CGS 16-50g et seq., for Council approval, for construction of any new natural gas pipeline to the facility, with sufficient detail to determine the jurisdiction, route, type, and location of all support equipment, effect on and changes necessary to existing infrastructure, health and safety effects, and possible alternative configuration and routes for the proposed new pipeline.

(Id.,, Decision and Order, Condition 1.f).

Similarly, on March 15, 2002, Kleen Energy Systems, LLC applied to the Council for a Certificate for the construction, maintenance, and operation of a 520 MW natural-gas fired combined-cycle electric generating facility and switchyard in the City of Middletown, Connecticut. (Docket No. 225, Finding of Fact 1). In that docket, the Council found that "Kleen Energy would construct a new natural gas pipeline in the area of the existing Yankee Gas metering station on River Road." (Id., Finding of Fact 72). "Approval for the pipeline would be sought through the Council petition process." (Id.) Thus, in its November 21, 2002 decision and order, the Council explicitly conditioned approval of the Kleen facility, in part, on:

> [s]ubmittal of a petition, amendment, or an application pursuant to CGS 16-50g et seq., for Council approval, for construction of any new natural gas pipeline to the facility, with sufficient detail to determine the jurisdiction, route, type, and location of all support equipment, effect on and changes

necessary to existing infrastructure, health and safety effects, and possible alternative configuration and routes for the proposed new pipeline.

(Docket No. 225, Decision and Order, Condition 1.f). Consistent with the plain language of the statute and Connecticut Case law, the "Council has ***not*** interpreted the statute to require an examination of the cumulative environmental impact of all related projects . . . ." (New Haven I, at *4 (emphasis added)). Similarly, it should decline CFE's invitation to do so here and deny the Motion.

CONCLUSION

As the foregoing demonstrates, the Council is only required to consider "[t]he nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities . . . ." (Conn. Gen. Stat. § 16-50p(a)(3)(B)). Thus, for all the reasons sets forth more fully above, CFE's Motion should be denied.

Respectfully submitted,
NTE CONNECTICUT, LLC

By: _____

Kenneth C. Baldwin, Esq.
Earl W. Phillips, Esq.
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103-3597
Its Attorneys

CERTIFICATION OF SERVICE

I hereby certify that on this 3rd day of November 2016, a copy of the foregoing was sent via electronic mail, to the following:

John Bashaw, Esq.
Mary Mintel Miller, Esq.
Reid and Riege, P.C.
One Financial Plaza, 21st Floor
Hartford, CT 06103
jbashawfilrrlawpc.com
mmiller@rrlawpc.com

Sean Hendricks, Town Manager
Town of Killingly
172 Main Street
Killingly, CT 06239
shendricks@killinglyct.org

Party Status Request Pending

Jack Looney
Staff Attorney
Connecticut Fund for the Environment, Inc.
900 Chapel Street, Suite 2202 (Upper Mezzanine)
New Haven, CT 06510
jlooney@ctenvironment.org

Joshua Berman
Staff Attorney
Sierra Club Environmental Law Program
50 F St. NW, 8th Floor
Washington, DC 20001
josh.berman@sierraclub.org

Kenneth C. Baldwin