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November 2, 2016

Via Hand Delivery

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

Re: **Docket No. 470 – 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 at 180 and 189 Lake Road, Killingly, Connecticut**

Dear Ms. Bachman:

Enclosed please find an original and fifteen (15) copies of NTE Connecticut, Inc.'s Objection to NAPP's Motion for Stay and/or to Dismiss regarding the above-referenced matter.

Sincerely,

Kenneth C. Baldwin

KCB/kmd
Enclosure
Copy to:
Parties and Intervenors of Records
Mark Mirabito

15571476-v1

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:	:	
	:	
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 2, 2016

OBJECTION OF NTE CONNECTICUT, LLC TO
NOT ANOTHER POWER PLANT'S MOTION FOR STAY AND/OR TO DISMISS

NTE Connecticut, LLC ("NTE") hereby objects to the motion of Not Another Power Plant ("NAPP"), dated November 1, 2016, to stay and/or to dismiss NTE's application ("Application") for the Killingly Energy Center, a 550 MW combined cycle natural gas power plant proposed in Killingly, Connecticut (the "Motion"). The Motion should be denied because, despite NAPP's assertions to the contrary, the Connecticut Siting Council ("Council") is not required to review the natural gas pipeline as part of the Application.

BACKGROUND

On August 17, 2016, NTE filed the Application with the Council. The Application includes a section for "project-related interconnections." One such interconnection is for a natural gas pipeline. (Application at Section 8.0). As noted in the Application, the Killingly Energy Center would be served by an upgrade to an existing natural gas pipeline and not the construction of an entirely new natural gas pipeline. (Application at Section 8.1). 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 September 14, 2016, over one and a half months ago, NAPP filed a petition for party status and Connecticut Environmental Protection Act intervenor status. During a public meeting on September 29, 2016, ***over a month ago***, the Council granted NAPP party status and Connecticut Environmental Protection Act intervenor status. On October 20, 2016, NAPP issued twenty-nine (29) interrogatories to NTE to which NTE responded on October 27, 2016. On November 1, 2016, just ***two (2) days*** before the evidentiary hearing, NAPP filed the Motion.

ARGUMENT

NAPP asserts that the Application should be dismissed because the Council cannot approve it without also considering the potential environmental impact of the natural gas pipeline expansion. 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, NAPP's motion should be denied.

I. CONNECTICUT STATUTES DO NOT REQUIRE THE COUNCIL TO CONSIDER THE NATURAL GAS PIPELINE EXPANSION AS PART OF THIS PROCEEDING

NAPP asserts that, under the both CEPA and the Public Utility Environmental Standards Act ("PUESA"), the Council is required "to consider all connected, cumulative and similar actions as part of its review of the Application." (Motion at 7). This claim is unsupported and incorrect.

Because NAPP fails to define CEPA, it is unclear if it is referring to the Connecticut Environmental Policy Act or the Connecticut Environmental Protection Act. In either case,

however, NAPP is simply incorrect. The Connecticut Environmental Policy Act only applies to "activities proposed to be undertaken by state departments, institutions or agencies, or funded in whole or in part by the state . . . ." (Conn. Gen. Stat. § 22a-1c). Since the facility is neither being proposed by the state nor receiving state funding, CEPA is not applicable to the Council's review of the Application. (City of New Haven v. Conn. Siting Council, 2002 Conn. Super. LEXIS 2753 (Aug. 21, 2002), at *53, n. 27). Moreover, the Connecticut Environmental Protection Act 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).

Second, PUESA only 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 of environmental compatibility and public need ("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. APPLICABLE CASE LAW DOES NOT REQUIRE THE COUNCIL TO CONSIDER THE NATURAL GAS PIPELINE EXPANSION AS PART OF THIS PROCEEDING

In an attempt to support its position, NAPP cites various sources – the majority of which are irrelevant and the rest of which undermine NAPP's position. For instance, NAPP cites to matters involving New York's State Environmental Quality Review Act ("SEQRA") and the National Environmental Policy Act ("NEPA") . (Motion at 4-5). However, SEQRA only applies to actions in New York and NEPA only applies to actions for which there is federal funding or federal control. (New York State Environmental Conservation Law, Article 8; 42 U.S.C. § 4321 et seq.). Since the facility is located in Connecticut and is not under federal control or receiving federal funding, neither SEQRA nor NEPA are applicable to the Council's review of the Application and any case law interpreting those statutes is irrelevant to this proceeding.

To further bolster its claims, NAPP also cites to two Connecticut cases – City of Norwalk v. Connecticut Siting Council, 2004 WL 2361540 (Aug. 18, 2004),and City of New Haven v. Conn. Siting Council. 2002 WL 847970 (Apr. 9, 2002). However, neither of these cases supports NAPP's position.

First, the City of Norwalk analysis is irrelevant to this matter. As NAPP itself noted, the court in the City of Norwalk relied on federal case law in reaching its conclusions. (Motion at 5-6). However, the federal case on which it relied specifically noted that "[i]mpermissible segmentation involves a 'major ***federal*** action' where a small part of that action has been 'segmented' in order to escape application of the ***NEPA*** process." (Hirt v. Richardson, 1237 F.

Supp. 2d 833, 842 (W.D. Mich. 1999) (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.). Thus, the "impermissible segmentation" test is inapplicable.

Second, NAPP misapplies the court's decision in City of New Haven and fails to acknowledge that the decision actually undermines its position. The "independent utility" test cited in NAPP's motion relates to NEPA. *See* City of New Haven v. Conn. Siting Council. 2002 WL 847970 (Apr. 9, 2002), at *6 ("The ***National Environmental Protection Act*** requires that an entity filing an environmental impact statement address related proposals only when the project in question has no 'independent utility.'") (internal citations omitted) (emphasis added)) . Since the facility is not under federal control or receiving federal funding, NEPA does not apply. (42 U.S.C. § 4321 et seq.). Thus, the "independent utility" test is inapplicable.

Moreover, the City of New Haven's analysis of the requirements of Connecticut state law - which NAPP failed to address in its motion - specifically undermines NAPP's position. As an initial matter, the Connecticut superior court's decision in City of New Haven v. Conn. Siting Council, 2002 WL 847970 (Apr. 9, 2002) ("New Haven I"), which was cited by NAPP, involved a motion for stay in which the court was evaluating the likelihood of success on the merits. The court's decision on the actual merits of the appeal is contained in City of New Haven v. Conn. Siting Council, 2002 Conn. Super. LEXIS 2753 (Aug. 21, 2002) ("New Haven II").

The New Haven cases involved the court's review of a Council decision approving an application for a Certificate for a submarine electric transmission and fiber optic cable system pursuant to a provision of the PUESA that required, among other things, that the Council consider:

> the nature of the probable environmental impact, including a specification of every single adverse and beneficial effect that, whether alone or cumulatively with other effects, conflict with the policies of the state concerning the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and purity and fish and wildlife . . .

(New Haven I, at *3-4 (citing Conn. Gen. Stat. § 16-50p(c)(2)(B))). Even though the Council's review of environmental impacts under section 16-50p(c)(2)(B) was even broader than section 16-50p(a)(3)(B) - which specifically limits the Council's evaluation of cumulative environmental impacts to existing facilities - the court still held that "[t]he plain language of this provision establishes that . . . the Siting Council must examine the environmental effects 'alone or cumulatively' of the 'facility' seeking the certificate, ***not*** of other facilities seeking certificates." (New Haven I, at *4 (emphasis added)). In New Haven II, the court expounded upon this earlier decision and held that "[t]he plain language of this provision 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." (New Haven II, at *37 (emphasis added)). Similarly, here, 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. Thus, the Council should deny the Motion.

III. COUNCIL PRECEDENT DOES NOT REQUIRE THE COUNCIL TO CONSIDER THE NATURAL GAS PIPELINE EXPANSION AS PART OF THIS PROCEEDING

Council practice has specifically permitted the review of natural gas pipeline applications *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 natural gas pipeline; thereby, avoiding the "derogation of [the Council's] duties" NAPP suggests. (Motion, at 7-8).

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:

> [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 (emphasis added)). Based on this finding, the Council conditioned its approval of the Meriden 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. 190, 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 NAPP'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, NAPP's motion should be denied.

Respectfully submitted,
NTE CONNECTICUT, LLC

By:_____
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CERTIFICATION OF SERVICE

I hereby certify that on this 2nd day of November 2016, a copy of the foregoing was sent via electronic mail, to the following:

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