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August 30, 2013

VIA COURIER AND ELECTRONIC MAIL

Robert Stein, Chairman
Connecticut Siting Council
Ten Franklin Square
New Britain, CT 06051
United States of America

Re: Docket No. 190B—Meriden Gas Turbines, LLC Certificate of Environmental Compatibility and Public Need for a 530 MW Combined Cycle Generating Plant in Meriden, Connecticut. Reopening of this Docket Pursuant to Connecticut General Statues § 4-181a(b) Limited to Council Consideration of Changed Conditions and a Decommissioning Plan – *Brief of the City of Meriden*

Dear Chairman Stein:

On behalf of the City of Meriden, enclosed is an original and 20 copies of the City of Meriden's brief.

Very truly yours,

BROWN RUDNICK LLP

Philip M. Small
Counsel for the City of Meriden

Enclosures

cc: Service List (via electronic mail)

61363312 v1-024513/0002

STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

MERIDEN GAS TURBINES, LLC CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR A 530 MW COMBINED CYCLE GENERATING PLANT IN MERIDEN, CONNECTICUT. **Reopening of this docket pursuant to Conn. Gen. Stat. § 4-181a(b) limited to Council consideration of changed conditions and Decommissioning Plan.**	:	DOCKET NO. 190B
	:	
	:	
	:	August 30, 2013

BRIEF OF THE CITY OF MERIDEN

I. SUMMARY

Meriden Gas Turbines, LLC's ("MGT") recent decision to abandon its partially-constructed 530-megawatt electric generating facility (the "Project") without completing the environmental mitigation required by the Connecticut Siting Council ("Council") creates significantly changed conditions from those contemplated or foreseeable when the Council issued a Certificate of Environmental Compatibility and Public Need ("Certificate") to MGT on April 27, 1999 in Docket 190. MGT's abandonment of the Project and its refusal to comply with Council requirements presents two fundamental questions for the Council:

(1) Can MGT unilaterally abrogate Council jurisdiction and evade Council-imposed obligations by relinquishing its Certificate?

(2) Should the Council, as part of its mandate to protect the environment and ecology of the State, require MGT to implement a reasonable decommissioning plan that addresses the continuing environmental harm caused by MGT's partially-constructed Project and its abandonment?

The law, the facts, and sound public policy dictate that MGT's surrender of the Certificate does not abrogate the Council's jurisdiction over MGT and the Project, whose

remaining structures continue to mar an environmentally important and scenic traprock ridge.

Further, the record in this proceeding, including MGT's insistence on selling the Site "as is" and its unwillingness to commit to any environmental mitigation, demonstrates that MGT has not complied with the Council's conditions and has no intention of doing so. As a result, absent Council action, the abandoned Project will cause continuing and substantial environmental harm while providing no counterbalancing public benefit.

Consequently, the Council should require MGT to properly abandon the Project through a decommissioning plan, developed by MGT and approved by the Council, which (i) identifies current site conditions and unsatisfied Council requirements and (ii) addresses and mitigates the existing environmental harm and the impact of MGT's abandonment of the Project.

MGT's arguments that the Council is interfering with its private property rights or that this matter is solely between MGT and the City of Meriden ("City") are unavailing. The Council permitted MGT to construct the Project, under strict conditions, in an environmentally sensitive and scenic area only after weighing the benefits and attendant burdens. MGT's failure to comply with those conditions and its abandonment of the Project disrupts that careful balance. MGT remains obligated to mitigate the existing and continuing environmental harm that it has caused, and MGT should not be allowed to avoid that responsibility by attempting to surrender the Certificate.

II. BACKGROUND

In 1999, MGT's predecessor proposed building a power plant on an environmentally sensitive and scenic traprock ridge in Meriden, Connecticut. The Council approved the Project (with two dissenting votes) by its Decision and Order (the "Decision & Order") granting the

Certificate to PDC - El Paso Meriden LLC.[1] Docket No. 190, Decision & Order, April 27, 1999. The Project is located at 600 South Mountain Road, Meriden, Connecticut (the "Site"). In the Decision & Order, the Council required MGT to implement, through development and management plans ("D&M Plans"), a range of environmental and visual mitigation measures to reduce the impact of the Project on the area, including vegetative screening, landscaping, and wetland restoration. Decision & Order, Conditions 2.e - 2.g; Findings of Fact, April 27, 1999, No. 76.

Due to the size and complexity of the Project, the Council approved construction of the Project in phases through its approval of a series of D&M Plans. The approved D&M Plans required, among other things, erosion and sedimentation control measures, wetland restoration, landscaping, and visual mitigation measures to minimize the adverse environmental impact of the Project. *See* D&M Plans dated Aug. 2, 2001 and Nov. 16, 2001. As described below, MGT has not only failed to comply with numerous requirements of the Council-approved D&M Plans, but MGT also refuses to acknowledge its obligation to complete the environmental and visual mitigation.

Further, Condition 1.a of the Decision and Order required that the Facility "be constructed and operated substantially as specified by the Certificate Holder in the application and record, except where otherwise ordered by the Council." MGT committed in the Docket No. 190 record to properly dismantle the Project if it became economically unviable. Docket No. 190, Transcript, January 26, 1999 (11:00 AM), pp. 60-61.[2] As with the approved D&M Plans, MGT refuses to acknowledge or affirm this commitment and its obligation to comply with Condition 1.a.

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1 In 2001, NRG Energy, Inc. ("NRG") acquired PDC - El Paso Meriden LLC and renamed it Meriden Gas Turbines, LLC.

2 Attached as **Exhibit A**.

MGT began construction in 2001 and continued through 2002, substantially completing site excavation, grading, the access drive, the Power Plant-Generator Building and the Control Building, an 800,000-gallon water tank and a 500,000-gallon fuel tank, the cooling tower, and other accessory structures.[3] MGT Reply to City Interrog. No. 4; Exhibit City-2 (MGT Appraisal), pp. 51-52. MGT also installed gas combustion turbines, heat recovery steam generators, a steam turbine, transformers, and other major components of its Project. MGT Reply to City Interrog. No. 5; D&M Plan dated October 4, 2002.

Unfortunately, MGT was unable to obtain financing to complete the Project. In 2003, MGT halted construction and, subsequently, removed from the Site almost all of the electric generating equipment it had installed. Transcript, July 16, 2013 ("Tr. 7/16"), p. 94; D&M Plan dated October 4, 2002. To reduce its carrying costs, MGT renegotiated its property tax agreement with the City to defer portions of its annual tax payments. Pre-filed Testimony of J. Lagano ("Lagano PFT"), pp. 4-5; Property Tax Payment Settlement Agreement.

However, MGT's loss of financing also meant MGT abandoned in-place the Project infrastructure and failed to implement the D&M Plan requirements relating to environmental mitigation. Specifically, the Power Plant-Generator building, the Control Building, the water and fuel tanks, the cooling tower foundation, and other accessory structures remain on the Site. Exhibit City-2 (MGT Appraisal), pp. 51-52; MGT Reply to Council Interrog. No. 10; MGT Reply to City Interrog. Nos. 9-12. When MGT ceased construction, it had not completed all of the environmental and visual mitigation measures required by the Council and those measures still have not been completed. *See, e.g.*, MGT Reply to City Interrog. No. 7 ("MGT did not

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[3] The names of the structures used in this brief are taken from MGT's Appraisal, Exhibit City-2. During her testimony, MGT's witness, Ms. Lagano refused to adopt those terms. Tr. 184-185 (Atty. Small: "is it correct that your appraiser called one of the buildings a larger structure, the power plan generator building – or power plant turbine building?" J. Lagano: "I'm not sure what he – what he called it." Atty. Small: "What do you call it?" J. Lagano: "The big building.")

complete final landscaping . . . ."); Tr. 7/16, p. 158 (J. Lagano) ("There have been no plantings to my knowledge."), p. 142 (the detention pond "is not seeded . . . ."); Docket No. 370B, MGT Reply to Q-CSC-3, June 5, 2009 ("[t]he landscaping plan has not been implemented," "wetland/watercourse restoration following construction activities was not completed and upland area restoration following construction activities was not completed," and "stormwater controls not adversely affected by unbuilt portions of the facility were completed."); Docket No. 370B, MGT Reply to Q-CSC-13, May 29, 2009 ("[n]o wetlands were created following the project.").[4]

Subsequent to MGT halting construction, MGT and the City had a number of fruitless discussions regarding MGT completing the required erosion and sedimentation control, landscaping, and visual mitigation measures required by the Council and the City.[5] Pre-filed Testimony of L. Kendzior, Exhibit City-8 ("Kendzior PFT"), pp. 9-10. Even after MGT notified the City in April 2012 that it might abandon the Project, the City met twice with MGT to review the uncompleted work. Lagano PFT, p. 6; Kendzior PFT, p. 10.

Despite the City's efforts to develop a consensual resolution to the remaining environmental mitigation prior to initiating this proceeding, MGT never committed to performing any additional mitigation or sitework. *See* MGT Reply to Council Interrog. No. 12 ("MGT is not aware of any environmental mitigation required on its site under the Decision and Order or the Development and Management Plans"); Lagano PFT, p. 6 ("the City is insisting upon completing certain items that no longer make environmental or economic sense."); Kendzior PFT, pp. 13-14. Further, MGT opposed any use of the construction bonds to complete

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4 MGT's responses to Q-CSC-3 and Q-CSC-13 are attached as **Exhibit B**.

5 MGT applied for and obtained from the City a subdivision and site plan approval for the Project in 1998. A condition of the approvals was MGT's posting of two bonds totaling $1,886,490 for the proposed sitework. The bonds were subsequently reduced to $610,000. Many of the Council-imposed requirements are identical or substantially similar to those in the City's approvals.

the outstanding work. Kendzior PFT and exhibits cited therein, p. 14; Tr. 7/16, p. 144 (J. Lagano) ("we did not want the bonds to be called . . . .").

Despite its opposition to the City using the bonds, MGT has attempted to shield its failure to comply with the Decision & Order and the D&M Plans by invoking the bonds as a panacea for the incomplete environmental mitigation. *See, e.g.*, MGT Reply to City Interrog. No. 7 ("A cash construction bond was posted for the benefit of the City of Meriden accounting for such work yet to be completed."); Tr. 7/16, pp. 159-160 (J. Lagano) ("There is a bond, as I described before, that is a cash bond that contemplates plantings."); Tr. 7/16, p. 142 (J. Lagano) ("the seeding of [the detention pond] is contemplated in the construction bond."); Tr. 7/16, pp. 143-144 (Mr. Hannon: "one part of the document you're saying that that's something that can be taken care of through the bonding, but then in another document there are issues about whether or not the City can even go ahead and call bonding without some type of confrontation." J. Lagano: "Yeah, I -- I think there's a couple points here. . . .").

As a direct consequence of MGT's steadfast refusal to complete or even acknowledge the remaining Council-imposed environmental mitigation, the City filed its Petition to Reopen Docket No. 190 (the "Petition") on March 18, 2013, and requested the Council require MGT to submit and implement a decommissioning plan for the Project.[6]

Shortly after the City filed its Petition, MGT notified the Council that it intended to surrender the Certificate and claimed that, consequently, the Council no longer had jurisdiction over the Project and that the City's Petition was moot. MGT letter, March 20, 2013.

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6 The City filed the Petition within a few weeks of MGT's filing of a lawsuit against the City related to the Property Tax Settlement Agreement. MGT's lawsuit made clear that a consensual resolution to the outstanding environmental and visual mitigation would not be possible. Kendzior PFT and exhibits cited therein, p. 10-12.

On March 22, 2103, the Council placed the Petition on the April 18, 2013 meeting agenda and requested comments on whether the Petition should be granted. Both MGT and the City filed comments with the Council on April 5, 2013. On April 18, 2013, the Council voted to reopen Docket No. 190 pursuant to Conn. Gen. Stat. § 4-181a(b) to consider changed conditions and a decommissioning plan. After hearings on June 4 and July 16, 2013, the evidentiary record was closed. On July 24, 2013, the Council issued a notice inviting the parties to submit, by August 16, 2013, briefs and proposed findings of fact related to (i) jurisdiction, (ii) changed conditions, and (iii) a decommissioning plan. At the request of the City and MGT, the Council extended the briefing schedule until August 30, 2013.

As discussed below, the record developed in this proceeding demonstrates that (i) the Council continues to have jurisdiction over the Project, (ii) changed conditions exist that warrant modification of the Decision & Order, and (iii) MGT should submit and implement a Project decommissioning plan to the satisfaction of the Council.

III. DISCUSSION

A. THE COUNCIL CONTINUES TO HAVE JURISDICTION OVER THE PROJECT AND MGT DESPITE MGT'S ATTEMPT TO SURRENDER THE CERTIFICATE

The Council continues to have jurisdiction over the Project and MGT because: (i) MGT may not unilaterally surrender the Certificate and avoid its responsibilities under the Decision & Order and the approved D&M Plans without Council action, (ii) the Project continues to be a "facility" as defined under Conn. Gen. Stat. § 16-50i(a)(3), and (iii) regardless of the status of the Certificate, MGT remains subject to the Decision & Order and the D&M Plan approvals. MGT's contention that the Council's jurisdiction can be abrogated simply by MGT's surrendering of the Certificate is legally and factually erroneous and contravenes the Council's

enabling statutes, the Public Utility Environmental Standards Act ("PUESA"), as well as the Uniform Administrative Procedure Act ("UAPA"), case law and Council regulations and precedent.

1. *Under PUESA and the UAPA, a certificate-holder may not unilaterally surrender a certificate issued by the Council.*

MGT's effort to surrender the Certificate has no impact on the Council's continuing jurisdiction over the Project and MGT. Only the Council is authorized by statute to issue, modify, transfer, or revoke the Certificate. Consequently, MGT's surrender of the Certificate is effective only upon the Council's acceptance and is subject to the Council's review, conditioning and approval.

PUESA grants the Council broad power to regulate the development of electric generating (and other) facilities to minimize their adverse impacts to "the quality of the environment and the ecological, scenic, historic and recreational values of the state." Conn. Gen. Stat. § 16-50g. Specifically, the Council has "exclusive jurisdiction over the location and type of facilities and over the location and type of modifications of facilities." Conn. Gen. Stat. §§ 16-50x(a); *see, also,* Conn. Gen. Stat. § 16-50w ("In the event of any conflict between the provisions of [PUESA] and any provisions of the general statutes, as amended, or any special act, [PUESA] shall take precedence."). The Council's statutory authority includes the power to issue certificates of environmental compatibility and public need ("certificate") for the construction or modification of a facility. Conn. Gen. Stat. § 16-50k(a).

Under PUESA, the Council alone is authorized to issue, amend, and transfer certificates. *See* Conn. Gen. Stat. §§ 16-50k(a), 50k(b), 50*l*(d), and 50p(e). In each case, the applicant or certificate holder seeking to construct, modify, or change control of a facility must first request and obtain Council approval.

Nothing in PUESA or the Council's regulations expressly addresses revocation or suspension of a certificate. As a result, the Council's authority to suspend or revoke a certificate is governed by the UAPA. Under Conn. Gen. Stat. § 4-182(d)(1): "When an agency is authorized under the general statutes to issue a license, but is not specifically authorized to revoke or suspend such license, the agency may: (A) Revoke or suspend such license in accordance with the provisions of subsection (c) of this section; . . ."[7]

As with PUESA, nothing in the UAPA authorizes or allows the certificate holder to *unilaterally* surrender a certificate issued by the Council. This contrasts with other sections of the General Statutes in which the General Assembly expressly grants licensees the authority to surrender permits. *See, e.g.,* Conn. Gen. Stat. § 36a-51(c) ("Any licensee may surrender any license issued by the [banking] commissioner under any provision of the general statutes by surrendering the license to the commissioner in person or by registered or certified mail, . . ."). The absence of statutory language regarding the voluntary surrender of a certificate in PUESA or the UAPA evidences the General Assembly's intent to exclusively vest the power to revoke certificates with the Council.

Further, under the UAPA, "[n]o revocation, suspension, annulment or withdrawal of any license is lawful" unless, prior to the agency proceeding, the agency notifies the licensee and provides the licensee the opportunity to be heard. Conn. Gen. Stat. § 4-182(c). Based on the broad language of this provision, the surrender of a license, which is a "withdrawal" by the licensee, would require agency action. Consequently, MGT's surrender of the Certificate is subject to Council review, acceptance and conditioning. *See Goldstar Medical Services, Inc. v. Dept. of Social Services,* 288 Conn. 790, 805 (2008) (The "contention that a provider can place

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7 A certificate issued by the Council would be subject to the UAPA, which defines a license as "any agency permit, certificate, approval, registration, charter or similar form of permission required by law . . . ." Conn. Gen. Stat. § 4-166(6).

itself beyond the reach of these strong statutory sanctions and provisions simply by terminating its provider agreement on thirty days notice defies logic and requires a construction of the statute that thwarts its intended purpose, and leads to an absurd result."); *Stern v. Connecticut Medical Examining Board*, 208 Conn. 492, 505 fn. 2 (1988) (noting that while the Connecticut courts had not yet decided the issue, "other jurisdictions have held . . . that licensees are not entitled to surrender their licenses as of right . . . in order to thwart agency jurisdiction. . . . In addition, it may be significant that no statute in Connecticut expressly permits or prevents a physician from surrendering his or her license."); *Senise v. Corcoran*, 552 N.Y.S.2d 483, 485 (1989) ("petitioner's unilateral attempt to divest the superintendent of jurisdiction [by surrendering his license] would frustrate the legislative directive that the superintendent be empowered to discipline insurance brokers . . . ."))(citations omitted); *Serrani v. Board of Ethics of the City of Stamford*, CV-920122888-S (Conn. Super. Ct., March 30, 1992) (finding that the city's ethics board "would be meaningless if its investigations were terminated every time a public official resigned or left office."). Here, allowing MGT to avoid its obligation to mitigate the environmental harm caused by the Project by simply surrendering the Certificate would certainly thwart the intended purpose of PUESA to protect the environment and ecology of the state.

Notably, while neither the UAPA nor PUESA includes any mechanism by which a licensee may unilaterally surrender a license, they provide specific processes for the Council to modify or revoke certificates. *See, e.g.,* Conn. Gen. Stat. §§ 16-50k(b), 16-50*l*(d), 16-50p(e), 4-181a(b), 4-182(d)(1). Given these specific provisions and the absence of any provision regarding surrender by a certificate-holder, the Council exercises exclusive authority to revoke or withdraw certificates. *See Starks v. University of Connecticut*, 270 Conn. 1, 31 (2004)("when statutes provide that an activity shall be performed in a certain manner, there ordinarily is an implied prohibition against performing that activity in a different fashion."); *see*, *also*, *State v.*

Kelly, 208 Conn. 365, 371 (1988) ("[a] statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way").

Importantly, other state agencies that operate under the UAPA and statutory schemes similar to that of the Council require any surrender of certificates and licenses to be approved by the authority. *See, e.g.*, DPUC Docket No. 97-03-25, *Application of Teleglobe USA, Inc. – Reopening*, Decision, Sept. 14, 2005 (reopening docket to consider request to surrender Certificate of Public Convenience and Necessity); DPUC Docket No. 99-05-13, *Application of Allied Riser of CT, Inc. - Reopening*, Decision, May 11, 2005 (same); Conn. Agencies Regs. § 22a-174-2a(h) (the Department of Energy and Environmental Protection "may revoke any permit on [its] own initiative or at the *request* of the permittee.") (emphasis added); Bureau of Air Management License Revocation Request Form, form DEEP-AIR-REQ-004 (Exhibit 2 of the City's Response to Council request for comment, April 5, 2013).

Here, MGT is attempting to evade its obligation to properly decommission the Project and to mitigate the resulting adverse environmental and visual impacts. If MGT is permitted to do so by simply surrendering its Certificate, the Council's ability to enforce the conditions it imposes on certificate-holders, including those related to the orderly decommissioning or abandonment of the facilities, will be eviscerated. Imposing and enforcing conditions in its decisions and orders and through D&M plan approvals is fundamental to the Council's statutory purpose to "protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values," and must be preserved. *See* Conn. Gen. Stat. §§ 16-50g, 16-50p, 16-50u. Council conditions, however, would be meaningless and unenforceable if the certificate holder could simply negate Council jurisdiction by surrendering its certificate when the facility is abandoned or no longer functional. Allowing MGT to circumvent its obligations in

such a manner would set a dangerous precedent and would contravene the statutory scheme developed by the General Assembly. *See Goldstar Medical Services,* 288 Conn. at 805.

For the reasons described in this section, MGT's purported surrender of the Certificate does not eliminate the Council's jurisdiction over MGT or the Project.

2. *The Project continues to be a facility as defined in Conn. Gen. Stat. §16-50i(a)(3) and, therefore, remains subject to Council jurisdiction.*

Even if MGT could unilaterally surrender the Certificate, the Project remains an electric generating "facility," as defined in Conn. Gen. Stat. § 16-50i(a)(3), and, therefore, remains subject to Council jurisdiction. The record makes clear that the buildings and infrastructure remaining on the Property fall squarely within the statutory definition of a "facility."

Under PUESA, the Council has jurisdiction over all aspects of a facility, including type, location, site preparation, construction, fuel supply, modification, and operation. Conn. Gen. Stat. §§ 16-50k(a), 16-50p(a)(1), 16-50w, and 16-50x(a). Under Council regulations, the term "facility" includes "any electric generating or storage facility . . . , *including associated equipment for furnishing electricity* . . . ." Conn. Gen. Stat. § 16-50i(a)(3) (emphasis added.). The term "associated equipment" means "any *building*, *structure*, *fuel tank*, backup generator, transformer, circuit breaker, disconnect switch, *control house*, *cooling tower*, pole, line, cable, conductor or emissions equipment *that is a necessary component for the operation of an . . . electric generating or storage facility* . . . ." Conn. Agencies Regs. § 16-50j-2a(1)(B) (emphasis added).

Further, decades of Council decisions demonstrate that, in the electric generating facility context, the term "facility" encompasses practically everything on a site being developed for electric generation. The Council has exercised jurisdiction over a broad range of structures, ranging from turbines and generators to training buildings, processing plants, storage sheds, and

an indoor firing range. *See, e.g.*, Petition No. 70, Decision, July 2, 1981 (training building); Petition No. 107, Decision, July 26, 1984 (refuse processing plant); Petition No. 521, Decision, Aug. 14, 2001 (sand storage shed), Petition No. 666, Decision, April 27, 2004 (indoor firing range). As a result, the Council's jurisdiction is not strictly limited to the equipment directly generating electricity. Instead, the Council's jurisdiction extends over the entire electric generating facility site, including associated buildings, structures and fixtures, even those only tangentially related to electric generation.

Here, the remaining building, control house, fuel tanks, and other structures on the Site are clearly "associated equipment" because they are both expressly itemized in the regulation and were constructed as a "necessary component for the operation" of MGT's electric generating facility. Specifically, according to MGT's appraisal (Exhibit City-2), the following components of the electric generating facility, each of which fits squarely within the definition of "associated equipment," are present on the Site:

- **Power Plant-Generator Building** – This building is a 43,776 sq.ft. steel building with portions of the roof reaching 82 feet in height. Exhibit City-2 (MGT Appraisal), pp. 51-52. The "building was designed for the specific use of electric power generation . . . ." *Id.*, p. 54. This building "was to house the turbine generators" and other "power plant equipment." Tr. 7/16, pp. 185-186 (J. Lagano).
- **Control Building** – This building is a 15,000 sq. ft. steel building "designed to support computer systems." Exhibit City-2, pp. 51-52. Based on the description in MGT's appraisal, the purpose of this building was to house the systems necessary to operate the Plant.[8]
- **Above Ground Tanks** – There are two above ground steel tanks with capacities of 800,000 and 500,000 gallons that were intended to store fuel and water. Exhibit City-

8 Although Ms. Lagano testified "I don't know what the purpose of that smaller building is," Tr. 7/16, p. 186, the description of this building contained in MGT's appraisal provides a strong indication of its purpose.

2, p. 52. One tank was for "backup fuel" for the Project. Tr. 7/16, p. 189 (J. Lagano). The other tank was likely intended to store water needed for cooling the Project. Tr. 7/16 p. 130-131.[9] The "water and fuel tanks . . . have no use or value to any other user." Exhibit City-2, p. 55.

- **Cooling Tower Foundation** – This is a 19,500 sq.ft. concrete foundation with 2 feet high concrete walls. The foundation "is designed like a pool, with a sloping floor to collect the cooled water" for the power plant. Exhibit City-2, p. 52; Tr. 7/16, p. 190. Similar to the storage tanks, the "cooling tower foundation [has] no use or value to any other user." Exhibit City-2, p. 55.

- **Third Building Foundation and Miscellaneous Improvements** – There is a 4,600 sq. ft. concrete foundation to support another building and, scattered throughout the Site, there are concrete footings and foundations and exposed pipes and conduits that were installed for power plant use. Exhibit City-2, pp. 50,52; Tr. 7/16, p. 149. During the hearing, MGT was unable to provide information regarding below grade improvements. Tr. 7/16, pp. 150-151 (J. Lagano: "I don't know what record exists to show what is underground.")

MGT claims that it has surrendered the Certificate and, therefore, these buildings and structures are no longer associated with an electric generating facility. This argument is flawed because the definition of "associated equipment" is not based on the certificate holder's subjective intentions. Rather, it must be based on the objective uses and functionality of the equipment. Here, MGT admits that the buildings and equipment were designed and built for a specific purpose – i.e. electric generation. MGT cannot now disavow that purpose simply to avoid the Council's jurisdiction.

The record demonstrates that each of the remaining buildings, storage tanks, structures and equipment on the Site was constructed as a "necessary component for the operation" of the Project and, therefore, falls squarely within the statutory definition of "facility." Notably, the

9 Ms. Lagano testified "I don't know what the purpose was of the water tank." Tr. 7/16, p. 189.

buildings and structures have little or no value to other potential users and are "not easily or economically convertible to an alternate use." Exhibit City-2, pp. 50-56; Tr. 7/16 at 186-190. Further, the electric generating facility and the associated equipment do not cease to be a "facility" simply because MGT claims to have surrendered the Certificate. As a result, the Council continues to have jurisdiction over the Project and the "associated equipment" remaining on site.

3. *Even if MGT surrenders the Certificate, MGT remains subject to the conditions and requirements contained in the Decision & Order and D&M Plan approvals.*

The Council's Decision & Order and its D&M Plan approvals impose specific obligations on MGT. These obligations are not vacated by MGT's attempted surrender of the Certificate.

As background, on April 27, 1999, the Council issued its Decision & Order (along with Findings of Fact, an Opinion, a Dissenting Opinion, and the Certificate). The Decision & Order first states that "the application submitted by [MGT] to construct, operate and maintain [the Project] is hereby approved." Decision & Order, p. 1. Next, the Decision & Order states that the Certificate "shall be issued, subject to the following conditions and requirements" and contains a large number of conditions, including a requirement for Council approval of a D&M Plan covering construction and environmental mitigation. Subsequent to the issuance of the Decision & Order, MGT submitted, and the Council approved, numerous D&M Plans.[10] Many of the Council's approvals of D&M plans contained the following statement or a substantially similar statement:

> "Any deviation from this format may result in the Council implementing enforcement proceedings pursuant to General Statutes § 16-50u including, without limitation, injunction and

10 The Council issued approval letters for D&M Plans on April 13, 2000, Sept. 14, 2001, Dec. 13, 2001, June 24, 2002, Aug. 6, 2002, and Oct. 29, 2002.

> imposition of expenses resulting from such failure and of civil penalties in an amount not less than one thousand dollars per day for each day of construction or operation in material violation."

As discussed below, under both PUESA and the UAPA, the Decision & Order and the D&M Plan approvals are independent legal documents binding on and enforceable against MGT by the Council, separate and apart from the Certificate. Therefore, even if MGT can surrender the Certificate without Council approval (which the City believes it cannot), the Decision & Order and the D&M Plan approvals remain in full force and effect, and MGT's compliance obligation continues until and unless either MGT satisfies the applicable Council requirements or the Council removes the obligation.[11]

The Certificate only provides MGT the right to construct the Project. It is a simple, short document authorizing MGT to construct and operate a facility that is issued in accordance with and subject to the terms and conditions set forth in the Decision & Order. By contrast, the Decision & Order and the Council's D&M Plan approvals establish the associated obligations and duties imposed on MGT by the Council. In other words, MGT's "surrender" of the Certificate merely terminates MGT's right to build the Project, but it does not rescind the Decision & Order or the D&M Plan approvals or nullify MGT's obligations thereunder.

Importantly, PUESA does not simply authorize the Council to issue certificates. Instead, PUESA requires the Council to issue a "decision" on any certificate application. Specifically, Conn. Gen. Stat. § 16-50p(a)(1) states: "In a certification proceeding, the council shall render a *decision* upon the record either granting or denying the application as filed, or *granting it upon such terms, conditions, limitations or modifications* of the construction or operation of the facility as the council may deem appropriate." (emphasis added). Further Conn.

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11 The Decision & Order was originally set to expire in 2003; however, the Decision has been extended by the Council at the request of MGT until 2016.

Gen. Stat. § 16-50p(a)(3) requires that "[t]he Council shall file with its order an opinion stating in full its reasons for the decision." Therefore, the Council's Decision & Order is the legal document -- the "decision" -- that granted MGT the Certificate, and it imposes specific obligations and duties on MGT. *See* Conn. Gen. Stat. § 16-50u (authorizing the Council to enforce compliance with a "certificate *and any other standards established pursuant to this chapter*.") (emphasis added). Consequently, MGT's attempted "surrender" of the Certificate does not affect the viability or enforceability of the Decision & Order, the D&M Plan approvals or MGT's responsibilities to comply with the requirements in these Council documents.

The Decision & Order and D&M Plan approvals cannot be unilaterally surrendered by MGT. They can only be modified, vacated or revoked by Council action in accordance with PUESA and the UAPA. Alternatively, MGT may ask the Council to amend the Certificate or modify or vacate the Decision & Order due to changed conditions. *See* Conn. Gen. Stat. §§ 16-50p(e), 4-181a(b). Unless and until the Council withdraws or modifies the Decision & Order and the D&M Plan approvals, the obligations they impose on MGT remain in effect and are binding on MGT, regardless of whether MGT relinquishes its right to construct the Project by surrendering its Certificate.

B. MGT'S ABANDONMENT OF THE PARTIALLY-COMPLETED PROJECT, ITS FAILURE TO FULLY COMPLY WITH THE COUNCIL'S DECISION & ORDER AND THE D&M PLANS, AND THE EXCESSIVE VISUAL IMPACT OF THE PROJECT ALL CONSTITUTE DISTINCT CHANGED CONDITIONS THAT WARRANT THE REOPENING OF DOCKET NO. 190 AND THE MODIFICATION OF THE DECISION & ORDER.

MGT's abandonment of the Project, its refusal to comply with Council conditions, and the unexpected visual impact of the Project constitute changed conditions because they are unforeseen events and new information that were not considered by the Council at the time the Decision & Order was issued. Conn. Gen. Stat. § 4-181a(b) provides that "[o]n a showing of

changed conditions, the agency may . . . modify the final decision, at any time, at the request of any person or on the agency's own motion." Changed conditions exist if there is "new information or facts that were not available at [the time of the Council's decision and order] . . . or unforeseen events or any relevant circumstances that would compel us to reopen the case." *See Town of Fairfield v. Connecticut Siting Council*, 37 Conn. App. 653, 657 (1995) (quoting the Council's July 30, 1993 opinion). Notably, the Council will not "reevaluate" or "reinvestigate" "subject matter [that] has already been carefully considered by the Council in deciding [the] application." *Id.* at 656.

Here, the City has identified three distinct changed conditions. Kendzior PFT, pp. 3-9. Due to these changed conditions, the Council should reopen Docket No. 190 because the it did not have information about or consider the possibility that: (i) MGT would abandon its partially constructed electric generating facility, (ii) MGT would refuse to implement the required environmental mitigation, or (iii) the Project's structures would have a significant visual impact on the City of Meriden and the surrounding areas. The Council is not reevaluating or reinvestigating these issues. Rather, the Council is addressing "unforeseen events" that have arisen subsequent to the Council's Decision & Order.

1. *MGT's abandonment of the Project is a changed condition.*

MGT's termination of the Project and its attempt to surrender its Certificate its partially-completed electric generating facility in an environmentally sensitive area constitutes a changed condition under Conn. Gen. Stat. § 4-181a(b). MGT's abandonment is an "unforeseen event" because, at the time the Decision & Order was issued, the Council did not foresee that MGT would abandon the Project after completing a substantial portion of the construction and causing significant environmental and visual impacts.

Neither the Decision & Order nor the Findings of Fact in Docket No. 190 contain any reference to or recognition of the prospect that MGT might commence and significantly complete construction of and then abandon the Project. In fact, during the Docket No. 190 proceedings, MGT testified that it had analyzed the long-term economic viability of the Project and determined the Project would not be economically obsolete for at least 20 years. Docket No. 190, Tr. 01/26/99 (11:00 AM), p. 60. A scenario where MGT would commence and essentially complete the infrastructure of the Project, irreparably disturbing an environmentally and visually sensitive area, and would then abandon the Project prior to operation was simply not contemplated in 1999.

By contrast, the Council has carefully considered the issue of post-construction abandonment in other dockets. *See* Docket No. 225a, *Kleen Energy Systems, LLC, Petition for Reconsideration*. There, the Council modified a condition requiring the certificate holder to obtain full financing before commencing construction, but the Opinion noted that the "Council is concerned however, that if the project were only partially constructed and then terminated, nothing is in place to ensure restoration of the project site." Docket No. 225a, Opinion, March 25, 2003. In its decision and order, the Council included a condition that "[i]f the project is not constructed or not completed, the project site must be *restored to the satisfaction of the Council*." Decision and Order, March 25, 2003 (emphasis added). Therefore, the Council considered the possibility of a post-construction abandonment and, as a result, imposed specific conditions on the certificate holder to address its concerns. The absence of any conditions in the Decision & Order related to post-construction abandonment, such as restoring the Site to the satisfaction of the Council, confirms that the Council did not consider MGT's abandonment scenario.

MGT has asserted in its filings that Condition 4.d. of the Decision & Order, which requires Council notification of "permanent termination of any operation of the project,"

demonstrates the Council contemplated MGT's abandonment. *See* MGT's response to Council request for comment, April 5, 2013, p. 4. This assertion is unpersuasive because Condition 4 applies to the typical lifecycle of an electric generation project, not the abandonment of a nearly complete facility as is the case here. First, Condition 4.d, by its plain language applies to "termination of any *operation*" of the Project." (emphasis added). MGT, however, never operated the facility, nor did MGT terminate its operation. Second, the notice requirement for termination of operation under Condition 4.d is subsequent to the notice requirements for the commencement of construction under Condition 4.a, the commencement of facility testing under Condition 4.b., and the commencement of commercial operation under Condition 4.c. Contrary to MGT's assertion, Condition 4.d provides no support for its claim that the Council contemplated MGT's abandonment of a partially-constructed Project. Rather, it demonstrates that the Council anticipated that, once construction commenced, the Project would operate commercially.

In fact, for more than a decade, MGT and its parent, NRG, have publicly maintained that the Project would be completed, and MGT obtained several extensions from the Council of the construction deadline for the Project, including as recently as March 2011. Tr. 7/16 p. 95 ("we had tried for a number of years, very hard, to see if we could make this work."); Kendzior PFT, pp. 9-10 and exhibits cited therein; Extension Letter from Linda Roberts to Andrew Lord, dated March 4, 2011. Therefore, until very recently, the abandonment of the Project was not anticipated by the Council or, apparently, by MGT.

MGT is not simply surrendering a permit for an electric generating facility that it never started to build, an outcome which frequently occurs and which may have been contemplated by the Council. Rather, MGT seeks to abandon the Project after substantially constructing the facility and extensively disturbing an area that contains sensitive resources such as inland

wetlands, vernal pools, and scenic traprock ridges – an action unprecedented in Connecticut. MGT's abandonment of the Project is precisely the type of "new information" or "unforeseen event" that constitutes a changed condition under Conn. Gen. Stat. § 4-181a(b). *See Town of Fairfield*, 37 Conn. App. at 657.

2. *MGT's refusal to comply with the Decision & Order and the approved D&M Plans is a changed condition.*

MGT was expected, but, by its own admission, has failed to fully comply with the environmental restoration, visual mitigation, and decommissioning requirements contained in the Decision & Order and the approved D&M Plans. This failure is a changed condition.

In its Decision & Order, the Council required MGT to submit: "Plans for landscaping, including preservation of existing natural vegetation; configuration of earthen berms; and planting of new coniferous vegetation to provide ecological habitat, visual screening, an acoustical buffers" and "[d]etailed erosion and sedimentation control and stormwater management plans with provisions for inspection, enforcement, and revision." Decision & Order, Conditions 2.e. and 2.g; Docket No. 190, Findings of Fact, No. 76. The D&M Plans submitted to and approved by the Council required: (i) the creation of wetlands, (ii) protection of vernal pool watersheds, (iii) planting of ornamental trees and shrubbery, (iv) evergreen plantings along retaining walls, fill slopes and cut slopes, and (v) seeding and planting of the stormwater management pond. D&M Plans dated Aug. 2, 2001 and Nov. 16, 2001.

The status of the Site and MGT's compliance with the Decision & Order and approved D&M Plans is uncertain. Tr. 7/16, p. 151 (J. Lagano) ("I don't know to what degree from the plans, how much was constructed and how much was not. . . . I don't know to what extent it was constructed fully or partially . . . ."); Tr. 7/16, p. 152 (Chairman Stein: "Some of these items that have still not been completed, are they also in the D&M plan of the Siting Council?" J. Lagano:

"Yeah, I just – I'm not sure I know the answer to that."). Notably, MGT has not provided the Council with any evidence that it fully complied with the D&M Plans. MGT Reply to Council Interrog. No. 24 ("As the construction was suspended, the general contractor was not asked to prepare as built surveys."). Further, MGT's witness, Ms. Lagano, did not directly respond to Mr. Martin's question as to whether MGT would be amenable to providing an existing conditions map. Tr. 7/16, pp. 100-101.

The one thing that is clear is that MGT, by its own admission, failed to fully implement the environmental and visual mitigation required by the Council. Docket No. 370B, MGT Reply to Q-CSC-3, June 5, 2009 ("[t]he landscaping plan has not been implemented," and "wetland/watercourse restoration following construction activities was not completed and upland area restoration following construction activities was not completed."); MGT Reply to Q-CSC-13, May 29, 2009 ("[n]o wetlands were created following the project."); Tr. 7/16, p. 158 (J. Lagano) ("There have been no plantings to my knowledge."), p. 181 ("Seeding the detention pond has not been done.").

MGT's admissions are consistent with the deficiencies identified by the City during reviews of the Project in 2008 and 2012 and by its environmental consultant for purposes of this hearing. Exhibits City-4, City-5, and City-6; Kendzior PFT, pp. 5-7; Pre-filed Testimony of M. Libertine ("Libertine PFT"), Exhibit City-9, pp. 4-6.

Further, MGT has been non-committal as to whether MGT intends to fully implement the D&M Plans in the future. MGT stated repeatedly that the Site is being sold "as is," indicating

that it will not perform any additional work on the Site. MGT Reply to City Interrog. Nos. 10 - 13; Tr. 7/16, p. 132[12], pp. 159-160[13], pp. 145-146[14].

MGT takes the position that the environmental and visual mitigation measures required by the Council-approved D&M Plans may no longer be appropriate. Lagano PFT, p. 6 ("the City is insisting upon completing certain items that no longer make environmental or economic sense."). To a limited extent, the City agrees that changes to the D&M Plans may be necessary given MGT's abandonment of the Project (e.g. additional vegetative screening in lieu of ornamental plantings). However, any changes to the D&M Plans should be made through a decommissioning plan process administered by the Council, rather than at MGT's discretion.

MGT's position with respect to the City's bonds is also perplexing. As noted previously, MGT has repeatedly invoked the bonds as the appropriate mechanism to address the Council's and the City's concerns regarding environmental mitigation. Tr. 7/16, pp. 142, 159-160; MGT Reply to City Interrog. No. 7. However, MGT consistently refused during the hearing to consent to the City's drawing on the bonds to perform any work. Tr. pp. 143-144, 161-163. As a result, MGT is, on the one hand, using the existence of the bonds to shield it from its responsibility to complete the work required by the Decision & Order and D&M Plan approvals while, on the other hand, protesting the use of those bonds for that very same purpose.

In sum, the record establishes: (i) that MGT has not complied with the D&M Plans (e.g. landscaping, plantings, wetland seeding), (ii) that MGT does not know and is unwilling to

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12 Mr. Wilensky: "As is. And what happens if this sale is not -- sales are not consummated, the site stays as it is. Is that correct?" J. Lagano: "I suppose any property that's put up for sale has the opportunity never to – to sell."

13 J. Lagano: "What I said was that we are marketing the plant for sale as-is." Atty. Small: "Let me follow up on that. Does that mean that MGT does not intend to plant those trees." J. Lagano: "There is a bond, as I described before, that is a cash bond that contemplates plantings."

14 Mr. Hannon: "Is it [MGT's] intent to go in and finalize some of things or is this work that you would expect to be done through the calling of the bond?" J. Lagano: "You know, the – the interesting things is that we actually had a – you know, a representatives from [MGT] in February [2013] meet with the City to go over these kinds of things."

determine the extent of its non-compliance, and (iii) that MGT is unwilling to address its non-compliance by completing the remaining environmental or visual mitigation measures. MGT's failure to comply with the D&M Plan approvals and the associated environmental impact will continue indefinitely and constitute an unforeseen and changed condition.

In addition to its failure to implement the D&M Plans, MGT has not complied with the express decommissioning and restoration commitment it made to the Council in Docket No. 190. Condition 1.a. of the Decision & Order states that the "facility shall be constructed and operated substantially as specified by the Certificate Holder in the application and record, except where otherwise ordered by the Council." In testimony before the Council, MGT stated that "if it was decided the plant was economically unviable, the plant would be dismantled, we would obviously obtain as much as we could in salvage costs, . . ." Docket No. 190, Tr. 01/26/99 (11:00 AM), pp. 60-61. MGT estimated that decommissioning would cost approximately $12 to $14 million. *Id.*, p. 77.

Starting approximately ten years ago, MGT removed the major electrical generating equipment from the Site, including the gas turbines, the steam turbine, the generator units, the heat recovery steam generators, and the step-up transformers. However, MGT has not dismantled and removed the associated equipment, including the Power Plant-Generator Building, the Control Building, the 800,000-gallon water tank, the 500,000-gallon fuel storage tank, cooling tower foundation and other electric-generation specific improvements at the Site. Tr. 7/16 pp. 81-82 (Atty. Lord: "Is there anything in that testimony that says that the buildings would be removed? L. Kendzior: "I'll just quote it to you again, if it was decided that the plant was economically unviable, the *plant* would be dismantled.") (emphasis added). Consequently, MGT has failed to comply with Condition 1.a. of the Decision & Order. Such failure is a

changed condition because the Council, when issuing the Decision & Order, would not have anticipated that MGT would disregard its own decommissioning commitment.

The Council, when it issued the Decision & Order, required and expected MGT's compliance with the Decision & Order and the D&M Plan approvals. MGT's non-compliance is an unforeseen event that constitutes a changed condition.

3. *The visibility of the Project far exceeds what was presented to and expected by the Council at the time the Decision & Order and is, therefore, a changed condition.*

The existing Power Plant-Generator Building and related infrastructure are far more visible from the surrounding area than anticipated at the time the Certificate was issued. The present degree of visibility is new information that constitutes a changed condition.

Although the Council approved the size and height of the buildings and infrastructure through the D&M Plan process, the Council relied upon a visibility report prepared by MGT which dramatically understated the true visual impact of the Project on the surrounding community. Libertine PFT, pp. 2-4; Tr. 7/16 pp. 54-56, 70-71, 84-88 (M. Libertine: "there seems to be somewhat of an omission as to what the overall power plant building and its visibility on the landscape might have been."). Further, MGT, through the D&M Plan approval process, subsequently increased the height of the massive Power Plant-Generator Building to the current height of 82 feet. D&M Plan, Sept. 4, 2001. Despite the significant increase it height, MGT, in the submitted D&M Plan, stated the "updated site arrangement . . . does not change the viewshed as previously presented in the original application," and "there is no increase in height discernible from any vantage location." *Id.* at p. 6.

With the Power Plant-Generator Building and tanks now looming over the City, the visibility of the Project is clearly far greater than what was represented to the Council by MGT's

visibility experts or expected by the Council. Libertine PFT, pp. 3-4 ("My analysis demonstrates that the Project's visual impacts greatly exceed the impact predicted by MGT."). The extent of the visibility of the Project is further exacerbated by MGT's failure to install the vegetative screening required by the D&M Plans. *Id.* This increase in the visual impact of the Project from that presented to Council at the time the Decision & Order was issued is "new information or facts" and constitutes a changed condition. *See Town of Fairfield*, 37 Conn. App. at 657.

4. *The foregoing changed conditions are sufficient to justify the reopening of Docket No. 190 and the modification of the Decision & Order.*

MGT's abandonment of a partially-completed facility, its refusal to fully comply with the Decision & Order and D&M Plans, and the substantial increase in the visibility of the Project create a vast imbalance between the benefits and the burdens of the Project. This imbalance, as well as the integrity of the Siting Council certificate process, justify the reopening of Docket No. 190 and the modification of the Decision & Order.

The Council has established precedent for reopening dockets and modifying its decisions where changed conditions justify reconsideration of the Council's original decision. Although there is no specific test for Council reconsideration, the Council will generally find that changed conditions warrant modification of the decision and order if the careful balance between the benefits and the burdens of the facility struck by the Council in the original decision is disrupted.

For example, the Council modified its decision and order where a facility could not provide the benefits of electricity production during peak demand periods due to the unavailability of river water and a prohibition in the decision and order on the use of potable water. Docket No. 187, *Milford Power, LLC, Reopening*, Findings of Fact and Opinion, April 7, 2009. By modifying its decision and order, the Council again struck a balance between the public benefits of operating the facility during peak demand periods and the "complex and

difficult environmental, energy, and economic issues" raised by the use of potable water. Docket No. 187, Opinion and Decision and Order, April 7, 2009; *See, also*, Docket No. 225B, *Kleen Energy Systems, LLC Certificate of Environmental Compatibility and Public Need, Opinion*, July 22, 2009 (modifying its decision and order to "avoid any potential harm to the aquifer" resulting from an oil pipeline routed through an aquifer protection zone established subsequent to the issuance of the certificate); Docket No. 187A, *Milford Power, LLC, Reopening*, Opinion, Dec. 2, 2010 (modifying a condition requiring a backup fuel oil system that caused plant shutdowns but which no longer provided tangible benefits given increases in natural gas supply, improvements to the transmission grid and construction of other generation facilities).

In this case, MGT's abandonment of a partially-constructed Project, its refusal to implement environmental mitigation required by the Council, and the unexpected visibility of the Project eviscerate the careful balance struck by the Council between the public benefits and the adverse effects caused by the Project. When it originally issued the Certificate, the Council determined that the Project "offers substantial benefits to the public that outweigh potential environmental damage." Docket No. 190, Opinion, April 27, 1999, p. 3. The identified "environmental damage" included installing structures and buildings along a traprock ridge that hosts "vernal pools, species of special concern, and unique habitat that contributes to high quality ecological integrity and balance." *Id.* Appropriately and as required by its governing statutes, in issuing the Certificate, the Council balanced these effects against the prospect of "a clean and reliable source of electric generation" and "economic benefits." *Id.*

MGT's abandonment of the Project, however, now eliminates the "substantial benefits to the public" which originally counterbalanced and outweighed the environmental and visual damage from Project construction. As the Docket No. 190 dissent presciently noted, "[t]he

market risk of overbuilding power plants is on the proponents; but the environmental risks are on the public." Docket No. 190, Dissenting Opinion, April 27, 1999, p. 1.

MGT's abandonment of its partially-constructed electric generating facility and its refusal to implement environmental mitigation results in many adverse impacts to the area without providing any corresponding public benefit. Specifically, absent Council action, MGT's partially constructed facility will continue to be a blemish on this scenic traprock ridge which forms a "north-south greenway corridor through central Connecticut." Docket No. 190, Opinion, p. 3. The deserted Power Plant-Generator Building will continue to be highly visible from throughout the City. Libertine PFT, p. 3. Further, the Project could become a nuisance and a public safety hazard. Access will be difficult to restrict given the access road, its location within a forested recreational area, and the fact that the Site, which is set back from the road, will be shielded from the view of public safety officials. Tr. 7/16 p. 14-15. There is, however, no longer any corresponding public benefit (i.e. cleaner, more efficient, more reliable electricity) to weigh against these public harms. Modifying the Decision & Order to require a decommissioning plan would help to correct this imbalance by mitigating some of the adverse effects of MGT's construction and abandonment.

In summary, the changed conditions present in this case fully justify the Council's reconsideration and modification of the Decision & Order pursuant to Conn. Gen. Stat. § 4-181a(b) because they disrupt the Council's prudent balancing of the benefits of the Project (of which there are now none) and the adverse environmental impacts (which are essentially unmitigated).

C. THE COUNCIL HAS THE AUTHORITY TO REQUIRE MGT TO DEVELOP AND IMPLEMENT A DECOMMISSIONING PLAN ADDRESSING MGT'S NONCOMPLIANCE WITH COUNCIL REQUIREMENTS AND THE ADVERSE EFFECTS OF MGT'S ABANONMENT.

1. *The Council has the statutory authority to require MGT to submit and implement a decommissioning plan.*

Consistent with the mandate under Conn. Gen. Stat. § 16-50g to balance public need against the adverse effects of facilities, the Council can require MGT to submit and implement a decommissioning plan. The purpose of PUESA is to, among other things: "Provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; . . . "

To implement this mandate to balance public need and environmental harm, the Council may grant an application "upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate." Conn. Gen. Stat. § 16-50p(a)(1); *see, also*, *Preston v. Connecticut Siting Council*, 20 Conn. App. 474, 491-492 (1990) ("The council was well within its statutory authority in imposing [an environmental permitting] condition, and we will not substitute our judgment for that of the council regarding the adequacy and reasonableness of the condition."), *cert. denied*, 214 Conn. 803 (1990). Further, the Appellate Court in *Preston* found that "General Statutes § 16-50g mandates that the council, in performing its statutory functions, . . . balance the need for public utility services at a reasonable cost with environmental, ecological, scenic, historic and recreational values; . . ." *Id.* at 485.

The Council, therefore, has broad statutory authority and the obligation to impose conditions that properly balance the public benefit and the environmental harm resulting from a facility. A condition that requires the decommissioning the Project is within the Council's

authority because the Project no longer provides any public benefits to offset the substantial adverse visual, environmental, scenic, public safety and other effects imposed on the public.

Importantly, the Council has long recognized its authority to require developers to decommission and remove abandoned facilities. For example, since the 1980s, if a telecommunications tower is abandoned, the Council has mandated that the certificate holder "dismantle the tower and remove all associated equipment . . . ." *See, e.g.*, Docket No. 87, *Application of SNET Cellular, Inc.*, Decision and Order, March 22, 1988, Condition No. 9.

Similarly, the Council recently required BNE Energy, Inc. to include a "Project Decommissioning Plan" in the D&M Plans for its 4.8-megawatt wind generating project. *See* Petition No. 984, *BNE Energy, Inc.*, Decision and Order, June 9, 2011, Condition No. 3.m. The Project Decommissioning Plan included the removal of the turbines, the wind towers, and associated foundations to two feet below grade. *See* Petition No. 984, *Decommissioning Plan – Colebrook North*, Oct. 21, 2011. The plan also included the provision of financial assurance to guarantee the decommissioning and removal is completed. *Id.*

Consequently, in keeping with its statutory mandate to balance the public benefit against the environmental harm of any facility, the Council has the authority to impose a condition requiring MGT to properly decommission the Project.[15]

2. *The Council should require MGT to submit and implement a project decommissioning plan that provides for the mitigation of adverse environmental and visual impacts, including the removal of the remaining buildings.*

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15 MGT asserts that the bonds related to the subdivision and site plan approvals are an adequate remedy for the City and obviate the need for a decommissioning plan. This assertion is misplaced. First, MGT's obligation to comply with the Council's Decision and D&M Plans is separate and distinct from its obligation under local zoning approvals. The City's use of the bonds does not relieve MGT of the obligations imposed by the Council. Second, MGT has made clear to the City that any attempt to draw upon the bonds would be challenged and that access to the property would not be granted. Finally, the bonds, which may not be sufficient to cover the current scope of outstanding work, were certainly not intended to address the adverse effects of MGT's abandonment of the Project. Kendzior PFT, p. 14.

A decommissioning plan would: (i) allow the Council to determine which of the environmental and visual mitigation measure were not implemented; (ii) provide the Council the opportunity to eliminate or modify any conditions or requirements that are no longer suitable for the Site; (iii) allow the Council to determine what, if any, additional measures are necessary due to MGT's abandonment of the Project; and (iv) establish a timeframe for MGT's completion of all outstanding work.

Therefore, the City respectfully requests that the Council modify the Decision & Order by adding the following conditions:

1. Within sixty (60) days of the date of the Council's Decision & Order in Docket No. 190B, MGT shall submit to the Council an existing conditions or as-constructed plan showing the completed site improvements, including underground structures and conduits;
2. Within sixty (60) days of the date of the Council's Decision & Order in Docket No. 190B, MGT shall submit to the Council a report itemizing all conditions or requirements in the D&M Plans that have not been satisfied, including, without limitation, all erosion and sedimentation control measures, storm drainage, landscaping, and plantings for the Site. MGT may request the Council modify any such conditions that MGT believes are no longer appropriate.
3. Within sixty (60) days of the date of the Council's Decision & Order in Docket No. 190B, MGT shall submit for the Council's review and approval, a Project Decommissioning Plan (the "Plan"). The Plan shall include the following elements and MGT's proposed timeframe for completing each element:

a. MGT shall complete all of the requirements contained in the Decision & Order and the approved D&M Plans, as they may be amended by the Council;

b. All buildings and structures shall be removed to grade level.

c. MGT shall complete South Mountain Road for acceptance by the City;

d. Site access shall be restricted with physical barriers and signage; and,

e. MGT shall provide financial assurance to ensure the Plan will be completed.

4. Upon approval of the Plan by the Council, MGT shall fully implement the approved Plan in the timeframe approved by the Council.

5. MGT shall provide quarterly reports to the Council and the City on its progress until all elements of the approved Decommissioning Plan have been implemented to the satisfaction of the Council.

IV. CONCLUSION

For the reasons described above, the City respectfully requests that the Council: (i) find that MGT's attempted surrender of the Certificate does not void Council jurisdiction, (ii) find that MGT and the Project remain subject to the Council's jurisdiction, (iii) find that the changed conditions presented herein warrant the reconsideration and modification of the Decision & Order, and (iv) modify the Decision & Order to require MGT to submit for the Council's approval and to implement a decommissioning plan.

Respectfully submitted,

CITY OF MERIDEN

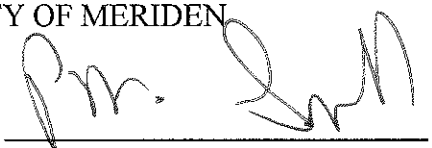
By: 

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Exhibit List

Exhibit A	Docket No. 190, Transcript, January 26, 1999 (AM), excerpts.
Exhibit B	Docket No. 370B, MGT Reply to Q-CSC-3, June 5, 2009, and MGT Reply to Q-CSC-13, May 29, 2009.

Exhibit A

Docket No. 190, Transcript, January 26, 1999 (11:00 AM), excerpts

Exhibit B

Docket No. 370B, MGT Reply to Q-CSC-3, June 5, 2009, and MGT Reply to Q-CSC-13, May 29, 2009

SERVICE LIST