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April 5, 2013

VIA HAND AND ELECTRONIC DELIVERY

Ms. Linda Roberts
Executive Director
Connecticut Siting Council
Ten Franklin Square
New Britain, CT 06051



Re: Docket 190; Meriden Gas Turbines, LLC Facility

Dear Ms. Roberts:

I write on behalf of NRG Energy, Inc. and Meriden Gas Turbines, LLC (individually and collectively, "NRG") to provide you with an original and fifteen (15) copies of NRG's comments regarding the City of Meriden's request to re-open Docket No. 90.

Thank you for your assistance in this matter. Please contact me if you have any questions or require additional information.

Sincerely,

A handwritten signature in cursive script that reads "Andrew W. Lord".

Andrew W. Lord

Enclosure

cc: Service List

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

MERIDEN GAS TURBINES, LLC CERTIFICATE	:	DOCKET NO. 190
OF ENVIRONMENTAL COMPATIBILITY AND	:	
PUBLIC NEED FOR THE CONSTRUCTION,	:	
MAINTENANCE AND OPERATION OF A 530 MW	:	
COMBINED CYCLE GENERATING PLANT IN	:	
MERIDEN, CONNECTICUT.	:	April 5, 2013

COMMENTS OF NRG ENERGY, INC.

Introduction

Pursuant to the Notice issued by the Connecticut Siting Council ("Siting Council" or the "Council") on March 22, 2013 in the above referenced proceeding, NRG Energy, Inc. ("NRG") hereby submits its comments with respect to the City of Meriden's (the "City" or "Meriden") request to Reopen and Modify the Connecticut Siting Council's April 27, 1999 decision to grant a Certificate of Environmental Compatibility and Public Need ("Certificate") to Meriden Gas Turbines, LLC ("MGT") for the construction, maintenance and operation of a 530 MW combined cycle generating plant on property located in Meriden, Connecticut (the "Property").

This request to reopen poses several fundamental problems for the Council. First, the petition asks the Council to reopen a docket that no longer is under the Council's jurisdiction, as MGT in no way constructed or seeks to construct the electric generation facility contemplated in Docket No. 190. While the Council would undeniably retain jurisdiction to reopen this proceeding if MGT proceeded with its plans and actually constructed an electric generating facility at the Property, as it now stands with MGT having withdrawn the Certificate and not having constructed a generating facility, the Property is not a "facility" subject to Siting Council review. Accordingly, acting on this petition would be an unprecedented exercise of jurisdiction by the Council.

Second, putting the lack of jurisdiction aside, the Council cannot reopen a docket pursuant to Section 4-181a(b) unless the requesting party demonstrates that "changed conditions" warrant the Council's review. The fact that MGT has terminated its plans to complete the project and relinquished its Certificate is not a "changed condition." It has always been a potential contingency and was considered by the Council in its original decision and in the ensuing years that MGT may ultimately not construct an electric generation facility at the Property. If the Council had jurisdiction, it could deny Meriden's request on this basis alone.

Finally, the City's petition is inappropriately before the Council as many of these issues are already under consideration in the Connecticut Superior Court. In essence, the City's petition is an inappropriate vehicle to address commercial matters between MGT and the City that are subject to ongoing Superior Court proceedings. The City's attempt to gain any leverage by reopening this docket simply exploits the Council's good and valuable purpose of reviewing, and if so worthy, approving the construction of facilities that fall within its purview. MGT's and the City's positions with respect to property taxation and associated municipal matters may ultimately be resolved by the two parties. There is no need for the Council to be drawn into this dispute while this matter is under review at the Superior Court.¹

Based on the foregoing, NRG suggests the Council confirm its lack of jurisdiction over this matter and dismiss the petition, or in the alternative deny the petition on account of lack of changed conditions.

Comments

I. The Siting Council No Longer Has Jurisdiction Over the Property

As a threshold matter, one critical assumption contained in the City's petition to reopen is that the Property remains a "facility" subject to Siting Council jurisdiction.² It is well established principle that "[a]n administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority.... [i]t is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." Nizzardo v. State Traffic Commission, 259 Conn. 131, 156 (2002). In its enabling legislation, the legislature narrowly defined the jurisdictional scope of the Siting Council.³ In addition to laying out specific timetables for review, the legislature limited Siting Council jurisdiction to specific and explicitly defined "facilities" which include among other things, certain telecommunications towers, transmission lines, and (relevant to this proceeding) electric generating facilities.⁴

As the City correctly notes throughout its petition, MGT has withdrawn its plans to develop the Property into an electric generating facility.⁵ The Property consists of two empty buildings and an access road. Particularly, the Property contains no electrical generating or associated equipment, no stacks, switchyard, or cooling towers that would ordinarily identify it as a power plant. As currently comprised, the Property is not an

¹ In fact, the property tax agreement between the City and MGT requires that once MGT delivers the City a notice of abandonment which it did in April 2012, the parties shall cause a tax assessment to be based on a highest and best use other than a power generating facility.

² See e.g., Meriden Petition p. 7 "Conn. Gen. Stat. § 16-50g requires the Council to balance public need against the adverse effects of facilities" (emphasis added).

³ Conn. Gen. Stat. § 16-50 et seq.

⁴ Conn. Gen. Stat. § 16-50i(a)(3) defines "facility" as: "any electric generating or storage facility using any fuel, including nuclear materials, including associated equipment for furnishing electricity."

⁵ Meriden Petition p. 2.

electric generating facility, or a "facility" at all as defined in the General Statutes. Indeed, absent MGT's former intention to move forward with construction of the Property as a generation facility, the Property is not unlike other commercial property located within Connecticut. As such, the jurisdictional basis for this docket has foreclosed and, likewise, the City's request falls outside Siting Council oversight.

Despite this lack of jurisdiction, in an effort to divert this docket back under Siting Council purview, the City's petition requests the Siting Council reopen this docket on account of "changed conditions." While to be sure, the Siting Council may reopen dockets to address changed conditions, applying this rule to MGT's decision to surrender its Certificate and withdraw its plans to construct a natural gas generation facility misses the mark. As noted above, a key issue in this case is the fact that MGT in no way constructed or seeks to construct the electric generation facility contemplated in Docket No. 190, and in fact has formally and irrevocably abandoned the project, and has notified the City of Meriden of such abandonment. The procedural power of an agency to reopen a prior decision cannot create substantive statutory jurisdiction where, as here, none exists.

To illustrate this point, the cases cited in the City's petition underscore the fundamental differences between a traditional (and appropriate) reopening of a Siting Council docket and the jurisdictional problems associated with reopening Docket No. 190. Noticeably, the cases cited in the City's petition⁶ all involve locations where the applicant completed a facility as defined in the General Statutes. In all of the cases cited in the City's petition, the Council reopened a docket where the applicant moved forward with its application and actually constructed the facility permitted by the Certificate. Tellingly, none of the cases cited in the City's petition involve the reopening of docket where an applicant chose not to construct a facility.

Taking the cases cited in the City's petition, which attempt to draw a parallel between this case and previous "changed conditions" cases, in Docket No. 187A, the Council issued a Certificate to PDC-El Paso Milford, LCC to construct, operate and maintain a 544 megawatt natural gas combined-cycle electric generating facility in Milford. The facility commenced operation in 2004. In a subsequent request to reopen the docket due to "changed conditions" associated with suspending the requirement to have immediate availability to operate on fuel oil, the reopening was appropriate because the facility was: (1) completed and (2) met the definition of "facility." This is also true for other facilities that the Council approved, including among others, those facilities identified in the City of Meriden's request to reopen and modify Docket No. 190.

Thus, the logical inference from these reopened cases is that in order for the Council to retain the jurisdictional basis to reopen a docket, an applicant must be pursuing completion of a facility or such facility must actually exist. By ignoring these key distinctions and ultimate conclusion, the City's petition stretches logic beyond its

⁶ See e.g., Docket No. 187, *Milford Power, LLC, Certificate of Environmental Compatibility and Public Need*; Docket No. 225B, *Kleen Energy Systems, LLC Certificate of Environmental Compatibility and Public Need*.

breaking point in requesting the Council reopen Docket No. 190. The Council no longer has jurisdiction over MGT's Property or activities.

Moreover, to assert jurisdiction here would deny MGT the right to sell or transfer the Property to potential purchasers. Unlike a telecommunications tower, the buildings located on the Property have useful value as adaptive reuse properties. Because MGT has surrendered its certificate to construct an electric generation facility, MGT is free to sell the Property and associated buildings to prospective purchases. In fact, MGT has been marketing the property actively for sale. Thus far, all of the prospective purchasers intend to use the buildings on the Property for uses other than an electric generating facility.⁷

II. MGT's Abandonment of the Project is not a "Changed Condition"

Even assuming, for the sake of argument, that the Property is a "facility" and the reopening of the docket is permissible, the surrender of MGT's Certificate is not a "changed condition" that merits reopening.

Pursuant to Conn. Gen. Stat. § 4-181a(b), a changed condition requires new information or facts that were not available at the time of the Council's final decision. The alleged "new information" the City argues merits a reopening of this docket is that MGT will no longer construct an energy generation facility at the Property. But in any Council grant of a Certificate, there is an inherent possibility that the Certificate holder may choose not to construct the facility as contemplated, and surrender its Certificate. The very fact that the Siting Council plans for such events in approving telecommunications towers evidences that this result is not only foreseeable, but an inherent and often considered factor in Siting Council review. Accordingly, asserting now (fourteen years after the fact) that the Council did not consider a possible withdrawal when it reviewed and approved MGT's Certificate lacks support. To the contrary, the Certificate clearly anticipated abandonment as the Certificate required notice of such action to the Council.⁸ Accordingly, the fact that the MGT has now

⁷ Regardless of the current and future use of the site, while it remains the property of NRG, the company is committed to maintaining it in a secure, safe and compliant manner. Irrespective of how any matters are adjudicated and what, if any activities are conducted within the property boundaries, it will not alter NRG's diligent management of the site and its confines. In spite of having stopped construction of the generating station over a decade ago, NRG maintains a physical presence on site and has conducted monthly inspections as required by the Order involving a complete site walkdown by our environmental professionals. It is a secure, gated site with limited access entry. There have been no reported spills, no environmental Notices of Violation, and no industrial activities at the property that could result in an environmental incident.

⁸ See Condition 4 in Decision and Order Docket No. 190 that required that the Certificate holder notify the Council of any permanent termination of any operation of the project. Moreover, for nearly ten years, both the Council and Meriden knew that the contemplated energy generation facility was delayed and that its completion would depend on obtaining a long-term contract to sell energy. The possibility of the surrender of the Certificate to construct a power plant at the Property is addressed in MGT's tax agreement with Meriden that set forth the tax parameters in the event that the Certificate was surrendered. At the time the Certificate was issued and for the

surrendered its Certificate does not give rise to a claim of "changed conditions." As such in the event the Council finds jurisdiction, the Council should deny the petition to reopen.

Conclusion

In conclusion, Meriden's request to reopen and modify Docket No. 190 should be denied. Because MGT's buildings and property are not and will not be an electric generating facility and because Meriden has surrendered its Certificate, the Siting Council no longer has jurisdiction over the Meriden Property. For this reason the Council should dismiss the petition for lack of jurisdiction. Even if the Council had jurisdiction, the request to reopen the docket should be denied because Meriden has not proven that MGT's surrender of the Certificate constitutes a "changed condition."

NRG ENERGY, INC.

By:



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ensuing years, both the Council and Meriden knew that there was a possibility that the contemplated power plant on the Property might not be constructed.