STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

APPLICATION OF KLEEN ENERGY SYSTEMS

,LLC FOR A CERTIFICATE OF ENVIRONMENTAL

COMPATIBILITY AND PUBLIC NEED FOR AN ELECTRIC

GENERATING FACILITY AND SWITCHYARD

IN MIDDLETOWN

DOCKET NO. 225C

SEPTEMBER 2, 2010

TOWN OF PORTLAND'S BRIEF

Factual and Procedural Background of August 3, 2010 Hearing

Kleen Energy Systems, LLC (alternatively, "Kleen Energy" or "Kleen") holds a Certificate of Environmental Compatibility and Public Need to construct an electrical generating facility and switchyard on River Road in Middletown. The certificate, originally granted on November 21, 2002 to expire on November 21, 2006, was extended through November 21, 2010.

On February 7, 2010, a catastrophic explosion occurred on Kleen's worksite while its contractors were blowing natural gas at high pressure and volume through a natural gas pipeline to clean it of

debris. The natural gas blown through the pipe exploded when it found an ignition source. U.S. Chemical Safety and Hazard Investigation Board, U.S. Chemical Safety Board, Urgent Recommendations ("Chemical Safety Board Recommendations"), P. 3. The explosion killed six workers and injured at least 50 others. *Id.*, p.1.

The damage from the explosion led Kleen on June 22, 2010 to request that its certificate be extended through June 30, 2011. On July 1, 2010, the Council voted unanimously to reopen the docket in accordance with CGS Sec. 4-181(b) and "... hold a hearing that would be limited to Council consideration of changed conditions and of the attachment of conditions to the certificate consistent with the findings contained in the Final Report issued by the Kleen Energy Plan Investigation Review Panel." That panel, also known as the Nevas Commission after its chairman, published its final report on June 3, 2010.

The Council granted the Town of Portland (the "Town") party status on July 29, 2010.

Nature of August 3, 2010 Hearing

The Town understands that the Council's vote of July 1, 2010 reopened the docket for the limited purposes stated in the resolution. Kleen does too, as evidenced by its counsel's remarks at the August 3, 2010 hearing. Transcript of August 3, 2010 hearing ("Tr.") p. 67. In other words, the council found changed conditions on its own motion, then set a hearing to consider whether the changed conditions warranted modifying Kleen's certificate consistent with the Nevas Commission's Final Report. If so, the hearing differed from that in Town of Fairfield v. Connecticut Siting Council, 238 Conn. 361, (1996) where the scope of the Council's review was limited to determining whether conditions had indeed changed enough to warrant reopening the docket. 238 Conn. at 368, 372-373.

Assuming the Town's understanding is accurate, Sec. 4-181a (b) made the contested case procedure applicable to the hearing. Further, the Council's decision will constitute a final decision within the meaning of CGS Sec. 4-166(3) as a decision made after reconsideration.

Even if the hearing, contrary to the Town's assumption, concerns a preliminary consideration of changed conditions, changed conditions should be found. The Council when granting a certificate must determine that the facility will not conflict with policies of the state concerning, among other things, the natural environment, public health and safety, and air and water purity. CGS Sec. 16-50p (a) (3).

Six people died, dozens more were injured, and many more suffered property damage when Kleen tried to purge its natural gas pipelines. Kleen cannot begin operations without purging more of those pipelines. Testimony of Richard Audette, Project Director for O& G Industries, the project's general contractor. On cross-examination Mr. Audette testified that another 600 to 800 feet of fuel gas pipeline still need to be purged. Tr., pp. 30-31, 97. In his prefiled testimony Mr. Audette stated in response to Q11 that the protocols and scope of work for cleaning the main gas piping system were still being drafted.

The death and injury caused by the first attempt to blow out the pipelines must by any rational calculation constitute a change in conditions, particularly when another purging of the pipeline must take place. So must the property damage that resulted to homes in Middletown and Portland. See, for example, Tr. pp. 119-120, testimony of James Inglis, and Tr. pp. 129-130, testimony of William Corvo. Those changes in conditions fully justify the Council's consideration of whether to attach further conditions to the certificate to protect public health and safety and the natural environment.

One further procedural comment seems in order. Although Kleen's need for an extension of its certificate may have precipitated the August 3, 2010 hearing, the hearing did not primarily concern the

extension. Rather, as stated in the notice of hearing and by Chairman Caruso as the hearing began (Tr., p. 7), the Council is considering whether to modify the certificate consistent with the Nevas Commission Final Report. Extension of the certificate will be considered at a later hearing.

Reports and Testimony

The Town adduces from several sources the evidence accumulated under this heading. "Reports" refers to the Nevas Commission Final Report and the agency reports attached to it; the Chemical Safety Board Recommendations; and the comments of the Connecticut Department of Health dated July 23, 2010. Testimony is divided into the testimony of Kleen Energy and the testimony of others including the Town's witnesses.

Reports

1. Nevas Commission. As the Final Report's introduction states, the Nevas Commission was charged with determining the origin and cause of the February 7, 2010 explosion. The task of recommending specific legislative or regulatory changes was assigned to a second commission chaired by James Thomas, Commissioner of the Connecticut Department of Public Safety (the "Thomas Commission"). Nevas Commission Report, p.1.

That said, the Nevas Commission made findings and recommendations pertinent to this docket:

Finding 1. The February 7, 2010 explosion resulted from cleaning or "blowing" a natural gas pipeline with large quantities of natural gas under high pressure that exploded when it came in contact with an ignition source. Nevas Commission Report, p. 2.

Finding 2. No agency had oversight over the gas blowing process. *Id.*, p.2

The recommendations to the Thomas Commission may be found on pages 4-7 of the Nevas Commission Report. Many of these recommendations deal with areas of investigation that the Nevas Commission believes might prove particularly useful, such as consulting with industry experts about different methods of gas blowing (natural gas pipeline cleaning) , or determining whether any other state or federal agency had regulated gas blowing. However, the Nevas Commission urged the Thomas Commission to consider recommending that this Council impose safety conditions upon gas blowing within its jurisdiction. *Id.*, p. 5.

2. Chemical Safety Board. The United States Chemical Safety and Hazard Investigation Board (the "Chemical Safety Board") after investigating the Kleen Energy explosion and an earlier natural gas explosion in Garner, North Carolina, issued findings and urgent recommendations. The Chemical Safety Board's report appears as item 30 in the list of documents of which the Council has taken administrative notice. Of particular relevance are the following findings and recommendations of the Chemical Safety Board:

Finding 4. On February 7, 2010, the pipe cleaning crew did not have a safety meeting about natural gas blow hazards, or review procedures for a natural gas blow.

Finding 6. Ignition sources such as electrical power, welders working, and diesel fueled heaters running were ongoing inside the building during the gas blow.

Finding 14. A similar natural gas blowing explosion occurred on January 26, 2003 at the Calpine Wolfskill Energy Center natural gas power plant in Fairfield, California. Although no injuries were reported, the blast shattered windows a quarter of a mile away and was heard up to ten miles away.

Finding 22. On February 7, 2010 significantly more natural gas was released than was actually need to clean the pipe line.

Finding 23. Compressed air and nitrogen blows may be used as well as natural gas to clean pipelines. These methods have inherent safety advantages because they do not develop flammable gas clouds, although nitrogen can present an asphyxiation hazard.

Finding 24. Pigging (propelling a device through the pipe line) with air or nitrogen is inherently safer than fuel gas blows.

Finding 27. The Chemical Safety Board has not found a scenario that requires the use of natural gas blows to clean fuel gas piping.

Finding 41. Companies should use safer methods and not release flammable gases near ignition sources and workers.

Finding 60. Releasing large volumes of natural gas near workers or ignition sources is inherently unsafe.

Among its urgent safety recommendations, the Chemical Safety Board recommended to the governor and legislature of this state:

Urgent Recommendation 16 – They prohibit the use of flammable gas released to the atmosphere to clean fuel gas piping.

Urgent Recommendation 17 – They adopt an amended version of the National Fuel Gas Code that would require the use of air blows or pigging with air instead of flammable gas to clean fuel gas pipe lines.

3. Department of Public Utility Control. A report from the Department of Public Utility Control (DPUC) forms Exhibit 2 to the Nevas Commission Report. The DPUC report made the following statements of interest:

1. DPUC exercises only limited, indirect authority over Kleen Energy. It approved a capacity contract between Kleen and CL&P that required Kleen before construction to obtain all necessary permits and required Kleen to provide liability insurance and performance security. Beyond the capacity contract, DPUC has no jurisdiction over Kleen because Kleen is a federally exempt wholesale generator. Such exempt wholesale generators fall outside DPUC's control under CGS Sec. 16-1(4),(8). DPUC report, pp. 1, 4.

2. Both the DPUC and the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration lose their regulation over natural gas when the gas is no longer involved in transportation. A power plant like Kleen that consumes but does not transport the natural gas falls outside the authority of either agency. DPUC Report, p. 7.

3. Despite its lack of jurisdiction, the DPUC's Gas Pipeline Safety Unit (GPSU) attempted to guide Kleen in the proper procedures for cleaning its gas lines. GPSU became involved because of concerns expressed to it by Algonquin Gas Transmission, which owns and operates the gas pipeline that services Kleen's plant. Kleen modified its purging procedure to introduce a nitrogen slug into the pipeline before

introducing the natural gas. Kleen, however, ignored GPSU's concerns that the purging or blowing be conducted with a non-combustible gas to avoid unexpected combustion. DPUC Report, p. 9.

4. Department of Public Safety. The Department of Public Safety's Report forms Exhibit 6 of the Nevas Commission Report. DPS concluded that it could not identify any jurisdiction that currently allows state or federal regulation of the gas blow process. DPS Report, p. 1.

DPS also concluded that it could adopt and amend an American Society of Mechanical Engineers standard on power piping, B31.1, that would allow it to regulate gas blows of natural gas pipes. This standard forms a part of the National Fire Protection Association National Fuel Gas Code Handbook, but has not yet been adopted in Connecticut. DPS Report, Exhibit B, pp. 29-30,33.

5. Department of Public Health. On July 23, 2010, Dr. J. Robert Galvin, Commissioner of the Connecticut Department of Public Health, responded to the Council's request for agency comments. Dr. Galvin made eight recommendations. Kleen, through its counsel at the August 3, 2010 hearing, stated it could accept four of the recommendations, specifically recommendations 1, 5, 6, and 7. By implication, Kleen objects to recommendations 2, 3, 4, and 8.

Recommendations 1, 5, 6, and 7 respectively call for the prohibition of flammable gas in gas pipe cleaning; require adherence to OSHA standards for management of highly hazardous chemicals; require an independent site safety manager during construction; and require flammable gas safety procedures and training in which contractors, workers, and their representatives participate.

Recommendations 2,3,4, and 8—to which Kleen objects – respectively call for prohibiting the venting of flammable gas indoors or out in the vicinity of workers or ignition sources; prohibit work activity where the flammable gas concentration exceeds 10% of the lower explosive limit for the gas; require adherence to the most current version of the National Fuel Gas Code, as outlined in National Fire Protection Association Standard 54; and prohibit early completion incentives in construction contracts related to gas-fueled power plants.

6. Thomas Commission. The Town recognizes that the Thomas Commission has not submitted a report. However, the Nevas Commission's findings and recommendations were directed to the Thomas Commission., which will recommend legislative and regulatory changes. The Town observes that, according to the minutes of its August 24, 2010 meeting, the Thomas Commission has now met twice. It plans to meet again on September 14,2010 and September 28, 2010. It further plans to present its recommendations to the governor's office by October 1, 2010.

The Thomas Commissions proceedings may be found at the Department of Public Safety web site at http://www.ct.gov/dps/cwp/view.asp?a=2153&q=463662.

Testimony

Kleen's Testimony

Through the testimony of its Project Coordinator, William Corvo, Kleen committed to not using natural gas to clean the pipe line during the remaining construction of the facility. It will use compressed

air or nitrogen, or "smart pigging", to clean the remaining pipe. Corvo prefiled testimony, Q8. Richard Audette, project director for the general contractor, O&G Industries, Inc., confirmed that O&G as well was committed to cleaning the pipe line without natural gas. Audette prefiled testimony, Q12.

Through Corvo's prefiled testimony, Kleen requested that the Nevas Commission Report be incorporated into the record. It further indicated its willingness to incorporate the Nevas Commission Report as part of the approval of its extension request "To the extent the Nevas Commission Report addresses the construction of power plants in its findings..." Q9.

As already mentioned, Kleen through its counsel stated its willingness to comply with recommendations 1, 5, 6, and 7 in the comment of the Department of Public Health. Tr., p. 94.

Testimony of Town's Witnesses

Most of the town's witnesses reside in the subdivision directly across the Connecticut River from Kleen's facility. In their prefiled testimony, they gave evidence of the explosion's impact upon them and their property.

Jane Benoit of 18 Wellwyn Drive stated that the pictures flew off her wall while she saw a massive fireball from her front window. Dan Dziob of 35 and 39 Wellwyn Drive stated that both his homes suffered extensive damage from the blast. Robert Rosenberg of 68 Payne Boulevard, who chose to give public comment rather than serve as a witness for the town, testified that the blast cracked his house's foundation.

During cross-examination, Mr. Corvo told the Council that Portland residents had filed 65 claims for property damage from the explosion, of which 15 remain unsettled. Tr., pp. 129-130.

Several Portland residents testified as well to the devaluation of their properties because of the explosion at the plant. Beth Sylvestro of 58 Payne Boulevard said that the explosion reduced showings of her house, which was on the market, to next to none. Both she and Ms. Benoit wondered why anyone would want to buy properties in a "blast zone."

Portland's residents testified to emotional damage as well. Ms. Sylvestro stated she still jumps every time she hears a loud noise. Robert Rosenberg stated much the same in his written statement. Before the Council, he testified that the explosion had traumatized his wife. Tr., p. 109. Ms. Benoit testified in her written statement to living in fear. Gilbert and Marlene Cockfield of 14 Wellwyn Drive likewise spoke of the "devastating emotional toll" and no longer feeling safe in their home. As did other residents, they wondered how others would feel living close to a plant like that of Kleen Energy.

First Selectwoman Susan Bransfield urged the Council to incorporate into any extension of Kleen's certificate all the conditions of both the Nevas and Thomas Commission Reports. She also urged that the Council condition any extension on appropriate compensation to Middletown and Portland residents who suffered damage to real or personal property from the blast. Extension conditions should also include the requirements that , for the Portland properties affected by the blast, Kleen (1) inspect the properties before and after any future hazardous activity such as pipe cleaning or blasting, (2) notify the town and those property owners at least a week in advance of future hazardous activities and (3) set up a hot line to field the complaints of town officials and residents.

Other Witnesses

Senator Eileen M. Daily in her prefiled testimony noted that Portland residents could never be fully compensated for the trauma they suffered but "...must be fully compensated for their property."She joined First Selectwoman Bransfield's requests for protection against future hazardous activities on the site. Despite her keen awareness of the state's need for electricity, she preferred to see no electricity generation on the site rather than repeat the tragedy of February 7, 2010.

Senator Daily made the salient point that, during the construction of Kleen's facility, the Council is the only body capable of setting conditions that will guarantee public health and safety.

State Representative James. A. O'Rourke concurred with the remarks of Senator Daily, First Selectwoman Bransfield, and Portland residents that no extension be granted until the Council reviews the recommendations of the Thomas Commission and Kleen compensates affected Portland residents for their damages. Representative O'Rourke further recommended that the Council consider additional conditions to increase safety of nearby residents and minimize the negative visual impact of Kleen's facility.

As did Senator Daily, Representative O'Rourke made a salient point. Property damage to Portland residents and ongoing diminution of their property values were not considered likely when the Council approved the facility. (Indeed, the Council's November 21, 2002 Opinion considered noise during construction and visibility from the Portland side with only minor screening from deciduous trees; not surprisingly , the Opinion made no mention of fatal explosions on site , or cracked foundations and related property damage across the river.) Property damage on the other side of the river because of facility construction should constitute a Sec. 4-181a(b) changed condition that would justify reconsideration of certificate conditions.

Argument and Recommendations

First Selectwoman Bransfield concluded her prefiled testimony by remarking on the Town's paramount interest in public safety. In particular, the Town has a paramount interest in avoiding any further explosions on Kleen's facility during its construction. No doubt all parties share this interest, even though they may differ in their estimations of how to assure it. No doubt either that all parties are willing to allow some changes to the conditions of Kleen's certificate. In this final section of its brief the Town will consider and recommend the changes the Council should impose to avoid the recurrence of another catastrophe when Kleen purges or blows its gas pipeline during future construction.

While the Town may have a paramount interest in public safety, it has a related interest in making whole those of its residents who suffered property damage from the February 7, 2010 explosion. Kleen will no doubt object vehemently to the Council considering make whole provisions. In this final section the Town will argue that the Council has the authority and the duty under these circumstances to impose make whole provisions on Kleen, and will recommend reasonable conditions to that effect.

Public Safety Provisions

1. Minimal Position. One can conceive a minimal group of changes to the certificate. Kleen in its testimony has in fact staked out this minimal position. The record reflects that Kleen would be willing to allow the following changes to the conditions of its certificate:

1. That it not use natural gas to blow out its natural gas pipeline.

2. That it use either compressed air or nitrogen, or pigging with compressed air, to blow out its natural gas pipeline.

3. That the Nevas Commission Final Report be incorporated in its extension request to the extent that report addresses the construction of power plants in its findings.

4. That the certificate incorporate recommendations 1, 5, 6, and 7 of the Department of Public Health's July 23, 2010 comments to the Council.

The Town endorses all four of these changes. On this record, however, the Town believes those changes insufficient to protect public safety. The deaths, injuries, and damage that ensued on February 7, 2010 did not occur fortuitously. They occurred when the pipe cleaning crew failed to have a safety meeting about natural gas blow hazards or procedures. They occurred while welders were working, heaters were running, and electrical power was operating inside the building. They occurred after Kleen or its contractors ignored the recommendation of the Gas Pipeline Safety Unit that a non-combustible gas be used for the blow, and then released far more natural gas than was needed to clean the pipeline.

The potential consequences of another explosion are far too terrible for the Council to be content with this minimal position. Neither should the Council expect any other body to assure public safety during the next gas blow. The Nevas Commission, the DPUC, and the DPS all agree no one else exercises that authority.

2. Town's Position. In addition to the minimal position, the Town urges the Council to add the following conditions to Kleen's certificate:

1. All recommendations of the Department of Public Health in its July 23, 2010 comments.

2. Any safety conditions the Thomas Commission may recommend that the Council impose upon gas blows within its jurisdiction.

3. Recommendation 4 in the prefiled testimony of First Selectwoman Susan Bransfield dated July 27, 2010. Recommendation 4 would require that, for the Portland properties affected by the blast, Kleen (1) inspect the properties before and after any future hazardous activity such as pipe cleaning or blasting, (2) notify the town and those property owners at least a week in advance of future hazardous activities and (3) set up a hot line to field the complaints of town officials and residents.

Senator Daily and Representative O'Rourke joined in recommendation 4 during their testimony.

4. At Kleen's expense, an independent expert appointed by the Council should monitor the implementation of all original and additional public safety conditions the Council imposes on the certificate.

Kleen may argue that its certificate should not be held hostage to the uncertain schedule of the Thomas Commission. That schedule, however, is no longer as uncertain as it may have been when the Nevas Commission issued its Final Report. The Thomas Commission has now met twice. It expects to issue its report by October 1, 2010. That would leave over a month and a half before Kleen's certificate expires. If the Thomas Commission is delayed in issuing its recommendations, any extension of Kleen's certificate should be made subject to reopening to consider the recommendations when the Thomas Commission issues them.

Make Whole Provisons

On June 6, 2007 Attorney General Blumenthal issued an opinion to this Council on the obligation of utility companies to indemnify homeowner for injury or accident in right of way construction activities. 2007 Conn. AG LEXIS 10 (June 6, 2007) , attached to this brief and available on the Attorney General's web site at http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=383846. The attorney general advised that the Council may impose such an obligation as a condition of granting a certificate of environmental compatibility and public need. The opinion states:

"...the Council has the authority to require utility companies, as a condition of their receipt of a certificate of environmental compatibility and public need, to indemnify and hold harmless all property owners along the route of a transmission line for all injuries and damages to persons or property related to construction and operation of the transmission line."

Although the opinion concerns utility rights of way, most of the statutes it cites apply equally to power plants. The Council's obligation to protect the state's environment and ecology under Sec. 16-50g applies to all facilities under its jurisdiction. So does its duty to consider the environmental impact of the facility on public health and safety. Sec. 16-50p (a) (3) (B). So does its ability to impose conditions on the construction or operation of the facility. Sec. 16-50p (a) (1).

Neither logic nor law furnish good reason for distinguishing damage to a property owner's property because of power line construction from damage to that owner's property from power plant construction. The attorney general's opinion implies as much. As Representative O'Rourke suggested, the Council may have anticipated the Portland residents would suffer some noise and some loss of view amenity. It never anticipated cracked foundations and other extensive property damage from the facility's construction.

The Town therefore urges the Council to impose the following conditions on Kleen's certificate to make whole property owners in Portland and Middletown who suffered damage from the February 7, 2010 explosion and have not yet settled their claims from the February 7, 2010 explosion:

1. At Kleen's expense, an independent structural engineer selected by the Council shall evaluate each property harmed by blast to determine whether the buildings have sustained hidden damage.

2 At Kleen's expense, an independent adjuster to whom the findings of the structural engineer are made available,shall appraise the damage to each property harmed by the blast, and transmit the results to Kleen and each property owner.

3. Kleen shall offer to each property owner harmed by the blast the amount of damages as found by the adjuster. If the owner will not accept the offer, Kleen shall place the amount offered in escrow pending resolution of any suit or other claim process the property owner may bring against Kleen.

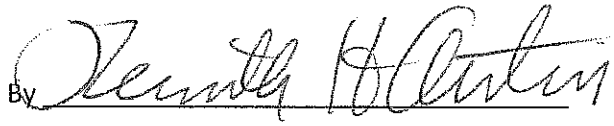
4. Kleen shall indemnify Portland homeowners on Wellwyn Drive, Payne Boulevard, and Lyman Road against future damages from the construction or operation of its power plant.

5. An independent landscape architect chosen by the Council shall at Kleen's expense review and revise as necessary any landscaping plan Kleen may have prepared pursuant to the Design and Management Plan , with the objectives of restoring the view amenity of the Portland residents across from the facility , and minimizing noise from the facility. Kleen shall implement the landscaping plan, as revised, under the landscape architect's supervision.

These conditions do not fall outside the scope of the August 3, 2010 hearing. If adopted, they would be consistent with the findings and recommendations in the Nevas Commission Report. They would not contradict those findings and recommendations. Moreover, they would cohere with them.

For it is not inconsistent to provide restitution to the victims of past damage while seeking to prevent more such damage in the future.

TOWN OF PORTLAND

By 

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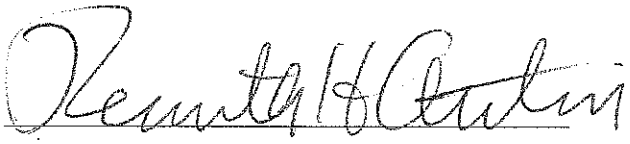
Certification of Service

I hereby certify that on this 2nd day of September, 2010, a copy of the foregoing brief was delivered by U.S. Mail, first class postage prepaid, to all of the parties and intervenors appearing on the attached Service List dated July 30, 2010.



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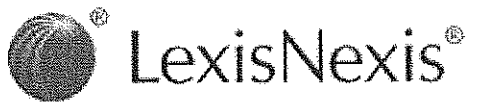

LEXSEE 2007 CONN. AG LEXIS 010

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT

[NO NUMBER IN ORIGINAL]

2007 Conn. AG LEXIS 10

June 6, 2007

REQUESTBY:

[*1]
Daniel F. Caruso, Chairman
Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

OPINIONBY:

RICHARD BLUMENTHAL, ATTORNEY GENERAL

OPINION:

You have asked me to provide "an opinion as to what the rights and responsibilities are of the utility companies relative to their use of existing easements" in connection with the Middletown -- Norwalk 345 kV electric transmission line and associated facilities approved by the Council in Docket No. 272. The Council's request for an opinion also referred to a letter from Senator Gayle Slossberg and Representative Paul Davis to the Council dated March 20, 2007. In that letter, Senator Slossberg and Representative Davis requested:

> that the Siting Council seek an opinion from the Attorney General's office clarifying the rights and obligations of the utility company as related to indemnification of homeowners in the event of an injury or accident in the Right of Way of construction activities.

In preparing this response, my Office has reviewed samples of the various easement agreements that the Connecticut Light and Power Company ("CL&P") has used over the years along the Middletown-Norwalk right-of-way.

As you are aware, this office does not have [*2] the statutory authority to resolve legal issues related to privately owned property. Only a court of competent jurisdiction can make binding determinations on personal property rights. *Zhang v. Omnipoint Communication Enterprises, Inc.* 272 Conn. 627 (2005). Nevertheless, according to case law, homeowners apparently would not be liable for injuries or accidents occurring in the utility right of way ("ROW") related to the construction and operation of the approved transmission line. Additionally, we conclude that all aspects of transmission line construction are within the jurisdiction of the Siting Council. The Siting Council has the authority to ensure that electric transmission facilities are constructed so that any private property that may be affected by a transmission line project is protected and utility companies are required to assume all liability for injuries or damages in transmission rights of way related to the construction and operation of transmission facilities. The Council may impose such requirements as a condition of its granting a certificate of environmental compatibility and public need, and I recommend that it do so.

There are more [*3] than 450 separate easement agreements between CL&P and individual property owners along the Middletown-Norwalk right-of-way. These easements were obtained by CL&P in the early twentieth century, long

before transmission lines or construction projects of this magnitude were envisioned or contemplated. CL&P obtained these easements, most probably, by either using the power of eminent domain given the company by the State of Connecticut or with the property owners' knowledge that eminent domain was available to the company.

The specific terms of each of these agreements vary slightly and the model easement form used by CL&P changed over the years.

Generally, under Connecticut law, the character and extent of an easement created by deed is ascertained by the intent of the parties. *Abington Ltd. Partnership v. Heublein, 246 Conn. 815, 831 (1998).* Absent evidence to suggest that the terms of an easement were intended to have any special or unusual connotation, the words of an easement are construed according to their ordinary meaning. *Lakeview Association v. Woodlake Master Condominium Association,* 239 Conn. 769, 777 (1997). **[*4]** It is only where the language of the deed is ambiguous that the courts look beyond that language to the surrounding circumstances to determine the intent of the parties. *Lynch v. White,* 85 Conn. 545, 550. "Although in most contexts the issue of intent is a factual question over which our scope of review is limited, the construction of a deed, considered in light of all the surrounding circumstances, presents a question of law over which we exercise plenary review." *Zhang v. Omnipoint Communications Enterprises, Inc.,* at 634.

The easement deeds used by CL&P along the Middletown-Norwalk right-of-way reference a right to install wires, towers and poles. There are no references to voltage. One easement form references such items being installed "for the transmission of electric current of any character necessary or convenient from time to time in the conduct of grantee's business . . . ."

The easements state that CL&P has the right to clear vegetation of all types, from brush to trees, and overhanging tree limbs in the easement area. Property owners generally retain a right to cultivate the areas between poles, towers and wires so long as those activities **[*5]** do not obstruct or interfere with the use, maintenance or operation of that equipment.

The sample easements reviewed between CL&P and the property owners along the Middletown -- Norwalk right-of-way do not appear to contain any language concerning liability or indemnification of property owners for damages or injury arising from the construction, operation and maintenance of CL&P's transmission lines.

Despite the lack of any reference in the easements to issues of liability, case law indicates that homeowners have no liability for damages or injuries in the easement right of way related to the construction, operation and maintenance of transmission lines. While we know of no Connecticut case directly on point, cases from other states indicate that utility companies owning transmission lines are liable for damages or injury resulting from those lines.

In *Kibbons v. Union Electric Company,* 823 S.W.2d 485 (Mo. banc 1992) the plaintiff's decedent was electrocuted while performing construction duties in Union Electric Company's (UE's) transmission line easement on property owned by J.R. Green Properties, Inc. (Green). The Court noted that, "Green's predecessor **[*6]** in title had conveyed an easement over this tract, including Lot 6, to Union Electric (UE) to construct, operate, and maintain utility poles and lines over the property." *Id.,* at 487. In analyzing liability, the Missouri Supreme Court stated:

> A landowner has no duty to maintain or repair, *Gnau,* 672 S.W.2d at 145; *Mispagel,* 785 S.W.2d at 282; *Annin v. Lake Montowese Dev. Co., Inc.,* 759 S.W.2d 240, 241-2 (Mo.App. 1988), or to warn or barricade dangerous conditions on the easement that are in the sole control of the holder of the easement. *Gnau,* 672 S.W.2d at 145; *Reyna v. Ayco Development Corp.,* 788 S.W.2d 722 (Tex.App. 1990). This is because the landowner is only liable for those injuries caused by devices placed on the premises by the holder of the easement that are under the landowner's possession and control. *Hunt v. Jefferson Arms Apartment Co.,* 679 S.W.2d 875, 879 (Mo. App. 1984). There is no duty even where the landowner has knowledge of the potentially harmful [*7] condition. *Gnau,* 672 S.W.2d at 145, citing *Green v. Duke Power Co.,* 305 N.C. 603, 290 S.E.2d 593 (1982).
>
> In *Duke Power,* a child was injured when she touched a transformer on an easement owned by Duke Power Company on land owned by a housing authority and leased to an individual. The lessee knew the box was unlocked and had notified both the power company and the housing authority. In following the principle that it is control and not ownership which determines liability, the North Carolina Supreme Court held that Duke had the sole duty to keep the transformer safe and that the knowledge of the owner

and lessee of the servient estate is "irrelevant to the question of their liability" where they had no control over the transformer. 290 S.E.2d at 598.

UE had sole control of the lines on its easement. Green, having no control of the lines on the easement, could not be liable for any dangerous condition resulting therefrom and accordingly had no duty to maintain, repair, warn of or barricade the condition in order to protect invitees on its own property crossing [*8] through the easement.

Kibbons v. Union Electric Company, supra, at 488-489 (footnotes omitted).

More recently, the Appellate Division of the New York Supreme Court decided *Tagle v. Jakob,* 275 A.D.2d 573, 712 N.Y.S.2d 681 (A.D. 3 Dept. 2000), in which a homeowner was sued by a guest who was injured when climbing a tree in contact with utility wires on an easement on the homeowner's property. The plaintiff sued both the New York State Electric and Gas Corporation (NYSEG) and the homeowner. The Court held that the homeowner was not liable, stating, "In the absence of any obligation to maintain or repair the easement, the [servient owner's] only duty is to refrain from unreasonably interfering with the exercise of the right to the use of the easement by the owner of the dominant estate." *Id.,* 712 N.Y.S.2d at 683 (citations omitted). The Court noted that the utility wires which caused plaintiff's injury passed through the large pine tree located within the confines of NYSEG's easement. The instrument conveying the easement did not contain any covenants obligating [*9] the grantor to maintain or repair it." *Id.*

We have no reason to believe that Connecticut's courts, if faced with similar circumstances, would reach different conclusions.

In addition to the apparent protection against liability afforded homeowners by case law, additional protection may be provided by the Connecticut Siting Council and the Connecticut General Assembly.

The siting of electric transmission facilities is governed by the Public Utility Environmental Standards Act enacted by the Connecticut General Assembly. Conn. Gen. Stat. § 16-50g, *et seq.* According to law, the Siting Council has full authority to direct the manner and method of transmission line construction.

One of the Council's primary responsibilities is to "protect the environment and ecology of the state." Conn. Gen. Stat. 16-50g. To meet that responsibility, the Council shall not grant a certificate "unless it shall find and determine: The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, [*10] but not limited to... the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish, aquaculture and wildlife." The Council must also determine "why the adverse effects... are not sufficient reason to deny" a certificate. Conn. Gen. Stat. 16-50p(a)(3)(B) and (A). In making its required findings and determinations, the Council must pay particular attention to areas designated by the General Assembly for special consideration and attention, such as "residential areas." Conn. Gen. Stat. 16-50p(a)(3)(D).

In issuing a certificate for a transmission line, the Council may impose "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). The Council may, therefore, require utility companies to ensure that its construction practices are the least intrusive and most environmentally sensitive possible. These conditions may be set forth in the certificate itself or in the [*11] Development and Management Plan that must be approved by the Council. Significantly, the Council is not required to base its certificate on specific rights or references given utility companies in deeds they have acquired: "In making its decision as to whether or not to issue a certificate, the council shall in no way be limited by the fact that the applicant may already have acquired land or an interest therein for the purpose of constructing the facility which is the subject of its application." Conn. Gen. Stat. 16-50p(g). n1

n1 State authority over utility company operations within a transmission line right of way does not end once construction is completed. The Department of Public Utility Control ("DPUC") has the authority to ensure that utility companies maintain those lines in a manner that protects the public's safety (Conn. Gen. Stat. 16-11) and any person may file a complaint with the DPUC concerning any unsafe practices by a public service company, which complaint will be investigated by the DPUC. Conn. Gen. Stat. 16-12, 16-13. Additionally, Conn. Gen.

> Stat. § 16-243 gives the Department of Public Utility Control "exclusive jurisdiction and direction over the method of construction of reconstruction in whole or in part of each system used for the transmission or distribution of electricity, ..."

[*12]

As with other issues related to the construction of a transmission line, the Siting Council, as a condition of its certificate of environmental compatibility and public need, may require utility companies to assume liability for all injuries or damages in utility rights of way during construction and to carry appropriate insurance or other financial security to cover such possibilities. The Council has the authority to ensure that "the location of the line will not pose an undue hazard to persons or property along the area traversed by the line." Conn. Gen. Stat. 16-50p(a)(3)(E). Construction or operation of a transmission line may create hazards to persons or property -- a fact inherent in such construction projects. The Council's power to protect persons and property necessarily includes the protection from damage or injury as a result of the construction or operation of a transmission line. Consequently, the Council has the authority to require utility companies, as a condition of their receipt of a certificate of environmental compatibility and public need, to indemnify and hold harmless all property owners along the route of a transmission [*13] line for all injuries and damages to persons or property related to construction and operation of the transmission line.

The State of Connecticut through its Department of Environmental Protection ("DEP") and its Department of Transportation already make such indemnification requirements part of easement and/or encroachment agreements with various utilities, including CL&P. For example, a DEP utility easement granted to CL&P includes the following language:

> [t]he Grantee herein [CL&P], for itself, its successors and assigns, hereby agrees to now and forever indemnify and save, protect, and keep harmless the State of Connecticut from every and all causes of action, suits (including without limitation reasonable attorney's fees and court costs), costs, loss, damage, liability, expense, penalty and fine whatsoever, which may arise from or relating to, or claimed against the State of Connecticut, by any person or persons, for any and all injuries to person or property or damage of whatever kind or character consequent upon or arising from the negligent use or maintenance by the Grantee, its employees or authorized agents of (i) the Easement area and (ii) all electric and communications [*14] facilities contained in the Easement Area.

The Council should grant similar indemnification protections to individual property owners along utility rights-of-way. It has the authority to do so in certificating new construction projects or modifications to existing projects, through insurance or other financial security requirements, irrespective of the specific language that may be contained in existing easements. The General Assembly may also wish to specifically make such indemnification provisions a requirement of all certificates of environmental compatibility and public need issued by the Council.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawTransportation & PipelinesElectricity TransmissionReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawLimited Use RightsGeneral Overview

LIST OF PARTIES AND INTERVENORS
SERVICE LIST

Status Granted	Status Holder (name, address & phone number)	Representative (name, address & phone number)
Applicant	Kleen Energy Systems, LLC	Mr. William C. Corvo President Kleen Energy Systems, LLC P.O. Box 2696 Middletown, Connecticut 06457 (860) 632-1044 Biagio6539@aol.com Lee D. Hoffman, Esq. Pullman & Comley, LLC 90 State House Square Hartford, Connecticut 06103-3702 (860) 424-4315 (860) 424-4370 – fax lhoffman@pullcom.com
Intervenor	NRG Middletown Power LLC	Alfred E. Smith, Jr. Murtha Cullina LLP Two Whitney Avenue P.O. Box 704 New Haven, CT 06503 (203) 772-7722 (203) 772-7723 – fax asmith@murthalaw.com
Intervenor	The Connecticut Light and Power Company	Duncan R. Mackay, Esq. Vincent P. Pace, Esq. The Connecticut Light & Power Company P.O. Box 270 Hartford, CT 06141-0270 (860) 665-5000 (860) 665-5504 – fax mackadr@nu.com pacevp@nu.com John R. Morissette Manager-Transmission Siting and Permitting The Connecticut Light & Power Company P.O. Box 270 Hartford, CT 06141-0270 (860) 655-2036 (860) 665-2611 – fax morisjr@nu.com

LIST OF PARTIES AND INTERVENORS
SERVICE LIST

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Intervenor	City of Middletown	Timothy P. Lynch Deputy City Attorney City Attorney's Office City of Middletown 245 deKoven, P.O. Box 1300 Middletown, CT 06457-1300 (860) 344-3422 (860) 344-3499 - fax Tim.lynch@cityofmiddletown.com
Intervenor	Earle Roberts	Earle Roberts 785 Bow Lane Middletown, CT 06457-4810 (860) 346-0068 (860) 344-9327 – fax eroberts4675@sbcglobal.net
Intervenor	Connecticut River Watershed Council, Inc.	Jacqueline Talbot Connecticut River Watershed Council, Inc. DeKoven House Community Center 27 Washington Street Middletown, CT 06457 (860) 704-0057 (860) 704-0057- fax jtalbot@ctriver.org

LIST OF PARTIES AND INTERVENORS
SERVICE LIST

Status Granted	Status Holder (name, address & phone number)	Representative (name, address & phone number)
Party (granted on July 29, 2010)	Town of Portland	Jean M. D'Aquila D'Aquila Law Offices, LLC 100 Riverview Center, Suite 205 Middletown, CT 06457 (860) 704-0290 (860) 704-0545 jmd@daquilalaw.com Susan S. Bransfield, First Selectwoman Town of Portland 33 East Main Street P.O. Box 71 Portland, CT 06480 (860) 342-6715 (860) 342-6714 sbransfield@portlandct.org
Intervenor (granted on July 29, 2010)	The Honorable Eileen M. Daily State Senator - 33rd District 103 Cold Spring Drive Westbrook, CT 06498 (860) 240-0462 (860) 240-0036 fax daily@senatedems.ct.gov	
Intervenor (granted on July 29, 2010)	The Honorable James A. O'Rourke State Representative – 32nd District Legislative Office Building, Room 4108 Hartford, CT 06106-1591 (860) 635-2992 (860) 240-8585 (860) 240-0206 fax Reporourke@att.net	