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Chairman

STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

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September 30, 2010

TO: Parties and Intervenors

FROM: Linda Roberts, Executive Director 

RE: **DOCKET NO. 225C** - Kleen Energy Systems, LLC Certificate of Environmental Compatibility and Public Need for the construction, maintenance and operation of a Electric Generating Facility and Switchyard on River Road, Middletown, Connecticut. Reopening of this docket pursuant to Connecticut General Statutes § 4-181a(b) limited to Council consideration of changed conditions and of the attachment of conditions to the certificate consistent with the findings and recommendations contained in the Final Report issued by the Kleen Energy Plant Investigation Review Panel.

As stated at the hearing in New Britain on August 3, 2010, after the Council issues its draft findings of fact, parties and intervenors may identify errors or inconsistencies between the Council's draft findings of fact and the record; however, no new information, evidence, argument, or reply briefs will be considered by the Council.

Parties and Intervenors may file written comments with the Connecticut Siting Council on the Draft Findings of Fact and the Conclusions of Law issued on this docket by October 5, 2010.

LR/RDM/laf

Enclosures



**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	<p>Mr. William C. Corvo President Kleen Energy Systems, LLC P.O. Box 2696 Middletown, Connecticut 06457 (860) 632-1044 Biagio6539@aol.com</p> <p>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</p>
Intervenor	NRG Middletown Power LLC	<p>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@murthala.com</p>
Intervenor	The Connecticut Light and Power Company	<p>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</p> <p>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</p>

**LIST OF PARTIES AND INTERVENORS
SERVICE LIST**

Status Granted	Status Holder (name, address & phone number)	Representative (name, address & phone number)
Intervenor	The Connecticut Light and Power Company	Christopher R. Bernard Manager-Regulatory Policy (Transmission) The Connecticut Light & Power Company P.O. Box 270 Hartford, CT 06141-0270 (860) 665-5967 (860) 665-3314 – fax bernacr@nu.com
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.lynych@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 italbot@ctriver.org

**LIST OF PARTIES AND INTERVENORS
SERVICE LIST**

Status Granted	Status Holder (name, address & phone number)	Representative (name, address & phone number)
<p style="text-align: center;">Party (granted on July 29, 2010)</p>	<p>Town of Portland</p>	<p>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</p> <p>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</p>
<p style="text-align: center;">Intervenor (granted on July 29, 2010)</p>	<p>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</p>	
<p style="text-align: center;">Intervenor (granted on July 29, 2010)</p>	<p>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</p>	

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contained in the Final Report issued by the Kleen Energy Plant }
Investigation Review Panel. } September 29, 2010

DRAFT Findings of Fact

Introduction

1. On November 21, 2002, the Connecticut Siting Council (Council) granted a Certificate of Environmental Compatibility and Public Need (Certificate) to Kleen Energy Systems, LLC (Kleen) for the construction of a 620-megawatt natural-gas fired combined cycle electric generating facility off of River Road in Middletown. (Kleen 1)
2. As a condition of the Council’s Decision and Order, the Certificate would expire if construction was not completed by November 21, 2006. On August 31, 2006, the Council approved the Development and Management Plan and a request for an extension of time to November 21, 2009 to complete construction of the facility. (Kleen 1; Docket 225 Record)
3. On November 19, 2009, the Council granted a second extension of time until November 30, 2010 to complete construction. (Docket 225 Record)
4. On February 7, 2010, there was an explosion at the facility. The explosion was caused by the release and combustion of natural gas that was being used to clean natural gas piping at the facility, a procedure otherwise known as a “gas blow”. (Kleen 1; Kleen 2)
5. After the explosion, Governor M. Jodi Rell established a commission, the Kleen Energy Plan Investigation Review Panel, chaired by Judge Alan Nevas (the “Nevas Commission”), that included representatives of the Department of Environmental Protection, Department of Labor (DOL), Connecticut State Police (including the State Fire Marshal and the Office of the State Building Inspector), Department of Consumer Protection (DCP), and the Department of Public Utility Control, to identify the cause and origin of the explosion. (Council Administrative Notice Item 29)
6. The Nevas Commission issued a Final Report on June 3, 2010 that included findings and recommendations regarding pipe cleaning procedures used at the facility. In addition, the report included an analysis of existing regulations concerning such activities and recommended changes to regulatory criteria to prevent such an event in the future. (Council Administrative Notice Item 29)
7. The project was estimated to be 97 percent complete at the time of the explosion. (Kleen 3)
8. On June 23, 2010, Kleen filed a Request for an Extension of its Certificate with the Council to allow for additional time to repair and complete construction at the site, through and including June 30, 2011. The project was estimated to be 80 percent complete at the time of the filing. (Kleen 1)

9. At a regular meeting of the Council held on July 1, 2010, in response to Kleen's Request for an Extension, the Council initiated its own motion to reopen the proceeding on changed conditions under C.G.S. §4-181a(b) and to hold a hearing specifically limited to Council consideration of changed conditions and of the attachment of conditions to the Certificate consistent with the findings and recommendations contained in the Final Report issued by the Nevas Commission. (Minutes of Council meeting, July 1, 2010).
10. Pursuant to General Statutes § 16-50m, the Council, after giving due notice thereof, held a public hearing on August 3, 2010, beginning at 1:20 p.m. at the Council's office, 10 Franklin Square, New Britain, Connecticut. (Council's Hearing Notice dated July 9, 2010; Transcript 1, 08/13/10, 1:20 p.m. [Tr. 1], p. 4)
11. Parties to the proceeding are Kleen and the Town of Portland. Intervenors to the proceeding are NRG Middletown Power LLC, The Connecticut Light and Power Company, the City of Middletown, the Connecticut River Watershed Council, State Senator Eileen Daily, State Representative James O'Rourke, and Earle Roberts. (Tr. 1, p. 8)
12. Public notice of the hearing was published in the Middletown Press on July 13, 2010. (Record)

Nevas Commission Findings

13. The findings of the Nevas Commission are to be applied by a second, separate commission established by the Governor, the Thomas Commission, whose charge is to recommend any necessary specific legislative or regulatory changes to prevent such an event from occurring again. (Council Administrative Notice Item 29)
14. The Nevas Commission findings are:
 - a. "The Commission finds that the February 7, 2010 explosion was the product of a process used to clean a natural gas pipeline using large quantities of natural gas that came into contact with an ignition source known as a gas blow";
 - b. "The Commission finds that, although the Kleen Energy construction project was heavily regulated by a variety of agencies, no agency regulated the process used – or any process that might be used such as gas purging – to clean the natural gas pipeline that was the source of the explosion"; and
 - c. "The Commission finds, and recommends to the Thomas Panel, that there are significant regulatory steps that should be taken to ensure that the events of February 7, 2010 are not repeated".(Council Administrative Notice Item 29)
15. The Nevas Commission Final Report suggested that the Thomas Commission should examine the following areas pertaining to natural gas blows:
 - a. "Determine whether any other state or federal agency has developed regulatory structure applicable to natural gas pipeline cleaning";
 - b. "Consult with industry experts to determine which methods of gas blowing are used and/or recommended, and identify the advantages and disadvantages of each method";
 - c. "Identify the agency, or agencies, best suited to regulate the gas blow process";
 - d. "Recommend the level of training and expertise necessary for that agency to effectively establish and enforce necessary cleaning regulations";
 - e. "Consider recommending that the Connecticut Siting Council impose safety conditions upon any entity constructing a power plant that will employ the gas blow cleaning process";

- f. “Consider recommending that the Connecticut Department of Consumer Protection and/or the Connecticut Department of Labor identify, if appropriate, special licensing, credentials, and/or training for those assigned to effect power plant gas blows in Connecticut. Further, consider recommending that the latter agencies address whether work schedule limitations are appropriate for those assigned to perform power plant gas blows in Connecticut”; and
 - g. consider the establishment of regulations concerning natural gas blow procedures.
(Council Administrative Notice Item 29)
16. The Nevas Commission Final Report contained a statement by Judge Nevas to the Council urging that the Council attach conditions to Kleen’s Certificate that a) address the findings of the Nevas Commission; and b) incorporate any more specific recommendations made by the Thomas Panel.
(Council Administrative Notice Item 29)
17. Additionally, Judge Nevas suggested the following:
 - a. “...a coordination council consisting of pertinent state agencies be assembled to share information during the course of construction of a large power facility. The Siting Council might serve as the coordinating entity using its “changed conditions authority if concerns arise that there is a pattern of violations during construction”;
 - b. “The Siting Council should review this report and ultimately the Thomas Commission report to determine whether its “changed conditions” authority would enable it to review all power plants within its jurisdiction to determine whether such plants warrant further attention”; and
 - c. “...the Thomas Commission solicit comments and input from the Siting Council as to how the Siting Council might address concerns relative to gas-fired baseload power plant facilities that have been permitted in the past and the records which are now closed”.
(Council Administrative Notice Item 29)

State Agency Comment

18. Pursuant to General Statutes § 16-50j(h), on May 20 and August 4, 2010, the following state agencies were solicited to submit written comments regarding potential modifications of the Certificate: Department of Environmental Protection (DEP), Department of Public Health (DPH), Council on Environmental Quality (CEQ), Department of Public Utility Control (DPUC), Office of Policy and Management (OPM), Department of Economic and Community Development (DECD), Department of Agriculture (DOAg), Department of Emergency Management and Homeland Security (DEMHS), and the Department of Transportation (DOT). (Record)
19. On July 27, 2010 DEMHS provided a written response to the Council indicating that it had no comment. (DEMHS correspondence of July 27, 2010)
20. On July 29, 2010, the DPH provided written comment to the Council recommending that the following conditions be attached to any extension of the Kleen Certificate for any future construction or maintenance activities;
 - a. Prohibit the use of flammable gas for the cleaning fuel gas piping and the identification of a safer alternative prior to the commencement of further pipe cleaning;
 - b. Prohibit the venting of flammable gas indoors or outdoors where it could pose a hazard;
 - c. Prohibit any work activity where the concentration of flammable gas would exceed 10% of the lower explosive limit for that gas with continuous monitoring to ensure compliance;
 - d. Require adherence to the code requirements of the Natural Fuel Gas Code (NFPA 54) even when gas is used at a pressure less than what the code specifies;

- e. Require compliance with the Occupational Safety and Health Administration Standard 29 CFR § 1910.119;
 - f. Require the inclusion of flammable gas safety procedures that involve contractors, workers, and their representatives in the project development and decision-making process; and
 - g. Prohibit the inclusion of early completion construction contracts.
- (DPH comments received July 29, 2010)

21. The following state agencies did not file written comment on the application: DEP, DOT, CEQ, DPUC, OPM, DOAg and the DECD. (Record)

Municipal and Public Official Comment

22. The City of Middletown did not participate in the Council's hearing and did not submit comments prior to the hearing. (Record)

23. The Town of Portland, through First Selectwoman Susan Bransfield, requested that any extension of the Certificate include the following conditions:
- a. All affected parties are appropriately compensated and made as whole as possible;
 - b. Include any safety recommendations set forth by the Thomas Commission;
 - c. Include all conditions contained within the Nevas and Thomas Commissions reports;
 - d. Perform pre-and post-property inspections within a specific radius of the facility, both immediately before and after any hazardous activities, to assess impact. Provide a written notification to said properties one week in advance of any hazardous activity. Establish a telephone hotline to support municipal and resident complaints and a response to such complaints within a specified time limit.

(Portland 1; Portland 2f; Tr. 1, pp. 157-160)

24. Representative James O'Rourke requested the following:
- a. The Council deny Kleen's request for an extension until the Thomas Commission submits its findings to the Council and the public;
 - b. Kleen compensates property owners for any damages to their property resulting from the explosion;
 - c. The Council create of a new docket to review in detail Kleen's conformance with the original decision and to consider additional conditions that may increase public safety and minimization of negative visual impacts.

(O'Rourke 2; Tr. 1, pp. 139-145)

25. Senator Eileen Daily requested that any extension of the Certificate include the following conditions:
- a. Make whole all parties whose property was damaged;
 - b. Conduct property damage assessments using experts selected by the Town of Portland;
 - c. Follow all of the Nevas Commission recommendations;
 - d. Re-open the docket after the Thomas Commission submits its findings; and
 - e. Consider the Town of Portland's requests regarding the pre- and post-property inspections and the establishment of a telephone hotline.

(Daily 1; Tr. 1, p. 145)

Proposed Fuel Gas Piping Cleaning Procedure

26. The Kleen facility utilizes carbon steel piping to transfer natural gas from an Algonquin gas pipeline located on River Road to the power plant. During installation of the piping, debris such as rust, dirt, welding slag or other materials can remain within the interior of the pipe. It is necessary to remove such material in order to provide non-contaminated natural gas to the gas turbines. Contaminated fuel can damage the sensitive blades of the turbines. (Council Administrative Notice Item 30; Tr. 1, pp. 25-26, 60-63)
27. Kleen used high pressure natural gas blows to remove the debris from portions of the fuel supply piping system. On the day of the explosion, natural gas used in the gas blow was vented to the exterior, rear portion of the plant where it ignited, causing the explosion. (Council Administrative Notice Item 30)
28. The use of pressurized natural gas to clean fuel gas lines is common throughout the power plant industry. (Council Administrative Notice Item 30)
29. Kleen estimates 80% of the gas fuel piping at the plant was cleaned to specifications prior to the explosion, with approximately 600 to 800 linear feet remaining that would need to be cleaned. (Tr. 1, pp. 28-29, 96)
30. Natural gas would not be used to clean the remaining piping. (Kleen 3)
31. Kleen is currently investigating the use of air or nitrogen blows as a cleaning method for the remaining piping. Neither media has a volatility hazard. (Tr. 1, pp. 24-25, 36)
32. Kleen's engineer and design engineer, as well as a third party engineering firm and a third-party safety organization, are examining these two methods to determine which one to use. (Tr. 1, pp. 25-26)
33. Air and nitrogen blows are commonly used in the United States to clean fuel-gas piping, although the length of pipe that can be cleaned by either method is relatively short, less than 200 linear feet. (Council Administrative Notice Item 30; Tr. 1, pp. 25, 96-97)
34. If air or nitrogen is used to clean the remaining piping, it may be necessary to divide the piping smaller segments using isolation valves. (Tr. 1, pp. 31-32, 96-97)
35. An air blow would require the installation of a temporary air compressor at the site. (Tr. 1, p. 62)
36. Nitrogen would be brought to the facility by truck. (Tr. 1, p. 61)
37. Nitrogen presents an asphyxiation hazard and special procedures need to be followed to assure its safe use. (Tr. 1, p. 56)
38. The cost of air or nitrogen blows is comparable to that of gas blows. (Tr. 1, p. 62)
39. As an alternative to nitrogen or air blows, Kleen is also considering replacing the remaining piping with stainless steel piping, which can be cleaned more easily by low-pressure "pigging". Installing stainless steel piping and cleaning by pigging are commonly done in Europe. (Tr. 1, pp. 25, 60-61)

40. Algonquin examined the portion of piping under its control that connects to the Kleen facility and found no damage resulting from the explosion. (Tr. 1, p. 63)

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DRAFT Conclusions of Law

A. The Council does not have jurisdiction to attach the Town of Portland’s requested conditions to Kleen Energy Systems, LLC’s Certificate of Environmental Compatibility and Public Need.

The Town of Portland’s (Town) Post Hearing Brief (Brief) in this docket urges the Connecticut Siting Council (Council) to attach five conditions to the existing Certificate of Environmental Compatibility and Public Need (Certificate) held by Kleen Energy Systems, LLC (Kleen) to “make whole property owners in Portland and Middletown who suffered damage from the February 7, 2010 explosion.”¹ The five conditions requested by the Town to be attached to the existing Certificate are: 1. an independent structural engineer to evaluate property damage; 2. an independent adjuster to appraise property damage; 3. a requirement that Kleen offer to pay the amount of damages found by the adjuster; 4. a requirement that Kleen commit to indemnify homeowners against future damages; and 5. an independent landscape architect to supervise Kleen’s implementation of a landscaping plan.²

The Council is an administrative agency of specific and limited jurisdiction. Jurisdiction over the siting of electric generating facilities, such as the Kleen facility, is conferred upon the Council pursuant to Conn. Gen. Stat. §16-50i(a)(3).³ The Council can only exercise such jurisdiction, power or authority as is authorized by statute. The Connecticut Supreme Court has held that, "Administrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely [on] the validity of the statutes vesting them with power and they cannot confer jurisdiction [on] themselves."⁴ The Public Utility Environmental Standards Act (PUESA) governs the jurisdiction,

¹ Connecticut Siting Council, Docket 225C, Town of Portland Post Hearing Brief, September 2, 2010 at page 17.

² *Id.*

³ Conn. Gen. Stat. §16-50i(a)(3) (2010) (“Facility means... (3) any electric generating facility...”).

⁴ *Wheelabrator Lisbon, Inc. v. Dep’t of Pub. Util. Control*, 283 Conn. 672, 685 (2007).

power and authority of the Council.⁵ Private property damage evaluation, appraisal, payment and indemnification are not among the statutory factors to be considered by the Council in making siting decisions.⁶ Only a court of competent jurisdiction can make binding determinations on private property rights.⁷ Therefore, the Council is an inconvenient forum for consideration of the relief requested by the Town.

The Council notes that several Portland and Middletown residents, including Town witnesses, Gilbert and Marlene Cockfield, Beth Ann Sylvestro and Jane Benoit, filed a complaint alleging nuisance claims dated August 4, 2010 against Kleen and other defendants in the Hartford Superior Court seeking monetary relief for private property damage.⁸

1. The Council does not have statutory authority to order independent evaluation and appraisal of private property damage.

The Council has the authority to obtain consultants as may be appropriate to fulfill its statutory charge under the PUESA.⁹ The Council has exercised this authority to hire consultants.¹⁰ However, the authority conferred upon the Council to hire consultants under Conn. Gen. Stat. §16-50v(f) does not apply to the request from the Town for the Council to require Kleen to hire an independent structural engineer to evaluate property damage and an independent adjuster to appraise property damage. Only the request from the Town for the Council to require Kleen to hire an independent landscape architect would be a permissible exercise of the Council's authority under the PUESA.

In fulfilling its statutory charge under the PUESA, the Council has required Certificate holders to retain independent environmental consultants as part of the Council's Decision and Order (D&O) and the Council's approval of Development and Management Plans (D&M Plans) for specific projects.¹¹ On September 1, 2006, the Council ordered Kleen to retain a herpetologist to conduct daily "sweeps" of the construction areas for the presence of eastern box turtles prior to site clearing

⁵ Conn. Gen. Stat. §16-50g (2010) ("...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...").

⁶ Conn. Gen. Stat. §16-50p (2010); *Bornemann v. Conn. Siting Council*, 287 Conn. 177 (2008) (plaintiff claimed telecommunications carrier should have been required by the Council to fund independent research on the biological effects of radio frequency emissions on wildlife, and that telecommunications carrier should have been required by the Council to pay the plaintiffs' costs and attorney's fees. These claims, however, were "*beyond the statutory authority of the council.*") (emphasis added).

⁷ 2007 Conn. Att'y Gen. Opin. LEXIS 10 (June 6, 2007), citing *Zhang v. Omnipoint Communication Enterprises, Inc.*, 272 Conn. 627 (2005).

⁸ *Inglis, et al. v. O&G Industries, Inc., et al.*, Hartford Superior Court, Docket No. CV-10-6013522-S, Return Date: September 21, 2010.

⁹ Conn. Gen. Stat. §16-50v(f) (2010).

¹⁰ Connecticut Siting Council, Petition 754, December 14, 2007 (the Council hired Gradient Corporation to assist the Council in publishing "Best Management Practices for Electric and Magnetic Fields"); Connecticut Siting Council, Request for Proposal, July 1, 2010 (the Council hired Epsilon, Inc. to assist the Council in evaluating applications for siting of renewable energy facilities).

¹¹ Connecticut Siting Council, Docket 272, Decision and Order ¶20, December 7, 2005; Connecticut Siting Council, Docket 370, Decision and Order ¶8, March 16, 2010.

operations.¹² On March 13, 2009, the Council ordered Kleen to retain an independent environmental consultant to conduct field “sweeps” of the construction area for the eastern box turtle.¹³ On July 22, 2009, the Council ordered Kleen to retain an independent environmental inspector experienced in horizontal directional drilling (HDD) to monitor HDD installation of an oil pipeline in the areas of Indian Brook and associated wetlands.¹⁴

In all of the D&Os and D&M Plan approvals where the Council has required Certificate holders, including Kleen, to retain independent environmental consultants, the circumstances were directly related to the Council’s authority to so order pursuant to its charge under the PUESA. Orders for independent evaluation and appraisal of private property damage do not comport with the Council’s statutory charge under the PUESA. Therefore, the Council does not have statutory authority to order independent evaluation and appraisal of private property damage.

2. The Council does not have statutory authority to order payment and indemnification for private property damage.

It is well established that administrative relief cannot encompass a monetary award.¹⁵ In the case of *Walsh v. Town of Stonington Water Pollution Control Authority*, plaintiff-landowners objected to defendant-water pollution control authority’s application to the Department of Environmental Protection (DEP) for a renewal of its discharge permit to continue operations of the defendant’s treatment plant on land located near plaintiffs’ residences.¹⁶ Over the objection of the plaintiffs, who intervened in the permit renewal proceeding, the DEP granted the defendant’s request to renew the permit.¹⁷ Thereafter, the plaintiffs appealed to the Superior Court seeking to recover monetary damages for nuisance in connection with the defendant’s operation of the waste water treatment plant.¹⁸ The court held that “adjudication of a common law nuisance action is not within the special competence of the DEP” and “that the administrative remedy would not have been adequate because administrative relief cannot encompass a monetary award.”¹⁹

Similar to the permit renewal application at issue in *Walsh*, on June 23, 2010, Kleen applied to the Council for an extension of its existing Certificate to complete construction of the electric generating facility. During a regular meeting held on July 1, 2010, the Council, on its own motion, reopened the record in the Kleen docket for the limited purpose of consideration of changed conditions and of the attachment of conditions to the

¹² Connecticut Siting Council, Docket 225, Development and Management Plan submitted May 16, 2006 and amended August 30, 2006, approved September 1, 2006.

¹³ Connecticut Siting Council, Docket 225, Development and Management Plan Revision 7 submitted February 24, 2009, approved March 13, 2009.

¹⁴ Connecticut Siting Council, Docket 225B, Decision and Order ¶1, July 22, 2009.

¹⁵ *Walsh, et al. v. Town of Stonington Water Pollution Control Authority, et al.*, 1998 Conn. Super. LEXIS at *5, *aff’d* 250 Conn. 443 (1999).

¹⁶ *Walsh, et al. v. Town of Stonington Water Pollution Control Authority, et al.*, 250 Conn. 443 (1999).

¹⁷ *Id.* at 447-448.

¹⁸ *Id.*

¹⁹ *Walsh, supra* note 14 at *6.

Certificate consistent with the findings and recommendations in the Final Report issued by the Kleen Energy Plant Investigation Review Panel. Neither the Council's consideration of the request for an extension of the Certificate nor the Council's adjudication of the reopened Kleen docket would provide the remedy sought by the Town in its Brief. Adjudication of a common law nuisance action is not within the special competence of the Council. Therefore, the Council does not have statutory authority to order payment and indemnification for private property damage.

Based on the foregoing analysis, it is evident that the Council is an inconvenient forum for consideration of the relief requested by the Town. Only a court of competent jurisdiction, such as the Hartford Superior Court, can make a binding determination on the private property damage claims of the residents of Middletown and Portland.

B. The 2007 Attorney General Opinion cited by the Town in its Brief does not apply to the Kleen facility.

In support of its position that the Council make the property owners of Middletown and Portland whole by attaching the five requested conditions to Kleen's Certificate, the Town cites to a 2007 Attorney General Opinion (Opinion) written in response to a request from state legislators for the Council to seek an opinion "as to what the rights and responsibilities are of the *utility companies* relative to their *use of existing easements*" in connection with Connecticut Light and Power Company's (CL&P) construction of the Middletown to Norwalk 345kV *electric transmission line* approved by the Council in Docket 272. (Emphasis added.) Unlike CL&P, Kleen is not a "public service company" under Conn. Gen. Stat. §16-1(4)²⁰ or an "electric company" under Conn. Gen. Stat. §16-1(8),²¹ that is subject to the jurisdiction of the Department of Public Utility Control (DPUC).²² Kleen is an "exempt wholesale generator" (EWG) that is specifically excluded from the DPUC statutory definitions of "public service company" and "electric company."

An EWG is "any person defined by the Federal Energy Regulatory Commission [(FERC)]... exclusively in the business of owning or operating... all or part of one or more eligible facilities and selling electricity at wholesale." An "eligible facility" is partly defined as a facility that is used for the generation of electric energy exclusively for sale

²⁰ Conn. Gen. Stat. §16-1(4) (2010) ("Public service company" includes electric, electric distribution, gas, telephone, telegraph, pipeline, sewage, water and community antenna television companies..., **but shall not include... an exempt wholesale generator...**) (emphasis added).

²¹ Conn. Gen. Stat. §16-1(8) (2010) ("Electric company" includes... every person owning, leasing, maintaining, operating, managing or controlling poles, wires, conduits or other fixtures, along public highways or streets, for the transmission or distribution of electric current... or, engaged in generating electricity to be so transmitted or distributed... **but shall not include... (B) an exempt wholesale generator...**) (emphasis added).

²² Kleen Energy Plant Investigation Review Panel, Final Report, June 2010, Exhibit 2 DPUC Report at 4 ("Federally-designated exempt wholesale generators, like the Kleen project, are not public service companies subject to the Department's ratemaking, performance and safety regulation jurisdiction."); *Id.* at 5 ("Like most merchant generators, Kleen is not a "public service company" under the jurisdiction of the Department. Rather, Kleen is a FERC-approved exempt wholesale generator.")

at wholesale.²³ FERC-approved EWG status is derived from the federal Energy Policy Act of 2005, the purpose of which was to encourage steady, cost effective increases in U.S. energy security by using the market rather than government regulation to facilitate development of a competitive market for independent wholesale electric power.²⁴

The Town's Brief states, "neither logic nor law furnish good reason for distinguishing damages to a property owner's property because of power line construction from damages to that owner's property from power plant construction."²⁵ The Supreme Court has held that damages proven to have arisen from some act of a *utility company* are recoverable.²⁶ (Emphasis added). In *Oppenheimer, et al. v. Connecticut Light and Power Company*, plaintiff-property owners brought an application to Superior Court under Conn. Gen. Stat. §16-236 seeking damages from the DPUC grant of a Certificate to defendant-utility company pursuant to Conn. Gen. Stat. §16-235 to locate a steam-generating plant in a residential zone.²⁷ Conn. Gen. Stat. §16-236 states, "any judge of the Superior Court may, upon the application of any party interested, ...appoint three disinterested persons to make written appraisal of all damages due any person by reason of anything done... in violation of any order made under section 16-235."²⁸ The DPUC may make any order necessary to exercise its exclusive jurisdiction over the method of construction of electric transmission lines, including "all plants... used for generating electricity located on private property upon which there are conductors capable of transmitting electricity to other premises in such manner as to endanger any person or property."²⁹ The DPUC, however, lacks jurisdiction over Kleen under these provisions because Kleen is not a utility company; Kleen is an EWG.³⁰ Therefore, the DPUC statutes applied by the Supreme Court in the *Oppenheimer* case do not apply to Kleen.

Kleen is not a public utility company. Kleen is a FERC-approved, EWG that seeks to generate electric energy exclusively for sale at wholesale.³¹ The Opinion specifically refers to CL&P's electric transmission line facility and liability for injury or damage in transmission rights of way related to the construction and operation of the electric transmission line facility. The Kleen project is not an electric transmission line facility for which utility easements over private property are required.³² The Kleen project is an

²³ *National Association of Regulatory Utility Commissioners v. Securities and Exchange Commission*, 63 F.3d 1123 (D.C. Cir. 1995).

²⁴ *Id.* at 1125.

²⁵ Town of Portland Post Hearing Brief, *supra* note 1 at 16.

²⁶ *Oppenheimer, et al. v. Connecticut Light and Power Company*, 149 Conn. 99 (1961).

²⁷ *Id.*; Conn. Gen. Stat. §16-235 (2010).

²⁸ Conn. Gen. Stat. §16-236 (2010).

²⁹ Conn. Gen. Stat. §16-243 (2010).

³⁰ Kleen Energy Plant Investigation Review Panel, Final Report, June 3, 2010, Exhibit 2 DPUC Report at 4 ("Federally-designated exempt wholesale generators, like the Kleen project, are not public service companies subject to the Department's ratemaking, performance and safety regulation jurisdiction."); *Id.* at 5 ("Like most merchant generators, Kleen is not a "public service company" under the jurisdiction of the Department. Rather, Kleen is a FERC-approved exempt wholesale generator.").

³¹ *Id.*, citing Federal Energy Regulatory Commission, Docket EG07-59-000, FERC Order Approving Kleen Energy Systems, LLC Exempt Wholesale Generator Status.

³² Conn. Gen. Stat. §16-50i(a)(1) (2010) ("Facility means: (1) An electric transmission line of a design capacity of sixty-nine kilovolts or more, including associated equipment...").

electric generating facility that is located on a single, defined parcel of property.³³ Therefore, the Opinion cited by the Town in its Brief does not apply to the Kleen facility.

1. Kleen is not an electric transmission line facility.

The Opinion states, “the Council has the authority to require *utility companies*, as a condition of their receipt of a [Certificate], to indemnify and hold harmless all property owners along the route of the transmission line for all injuries and damages to persons or property related to *construction and operation of the transmission line*.”³⁴ (Emphasis added). In support of this statement, the Opinion cites to Conn. Gen. Stat. §16-50p(a)(3)(E), which states, “in the case of an *electric or fuel transmission line*, [the Council shall find and determine] that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line.”³⁵ (Emphasis added). That section applies exclusively to electric and fuel transmission line facilities that are constructed and operated by a utility company and are under the Council’s jurisdiction pursuant to Conn. Gen. Stat. §16-50i(a)(1) and (2).³⁶ Kleen does not hold a Certificate to construct and operate an electric or fuel transmission line facility and Kleen is not a utility company. Kleen holds a Certificate to construct and operate an electric generating facility under Conn. Gen. Stat. §16-50i(a)(3) and Kleen is an EWG. Therefore, the requirements cited by the Opinion specifically pertaining to electric and fuel transmission line facilities that are constructed and operated by a utility company under Conn. Gen. Stat. §16-50p(a)(3)(E) do not apply to Kleen.

Similarly, the requirements cited by the Opinion specifically pertaining to electric transmission facilities under Conn. Gen. Stat. §16-50p(a)(3)(D), which states, “in the case of an electric transmission line... iii)... the Council shall take into consideration, among other things, residential areas, private or public schools, licensed child day care facilities, licensed youth camps or public playgrounds adjacent to the proposed route of the overhead portions...” do not apply to Kleen.³⁷ That section applies exclusively to electric transmission line facilities that are constructed and operated by a utility company and are under the Council’s jurisdiction pursuant to Conn. Gen. Stat. §16-50i(a)(1). Kleen does not hold a Certificate to construct and operate an electric transmission line facility and Kleen is not a utility company. Kleen holds a Certificate to construct and operate an electric generating facility under Conn. Gen. Stat. §16-50i(a)(3) and Kleen is an EWG. Therefore, the requirements cited by the Opinion specifically pertaining to electric transmission line facilities under Conn. Gen. Stat. §16-50p(a)(3)(D) do not apply to Kleen.

³³ Conn. Gen. Stat. §16-50i(a)(3) (2010); Connecticut Siting Council, Docket 225, Findings of Fact ¶16, November 21, 2002 (“The proposed Kleen Energy site is a 137-acre property north of Bow Lane in Middletown, Connecticut.”).

³⁴ 2007 Conn. Att’y Gen. Opin. *supra* note 6 at *13.

³⁵ Conn. Gen. Stat. §16-50p(a)(3)(E) (2010).

³⁶ Conn. Gen. Stat. §16-50i(a)(1) (2010) (“Facility means: (1) An electric transmission line of a design capacity of sixty-nine kilovolts or more, including associated equipment...”); Conn. Gen. Stat. §16-50i(a)(2) (2010) (“Facility means:...(2) a fuel transmission facility...”).

³⁷ Conn. Gen. Stat. §16-50p(a)(3)(D) (2010).

2. Kleen does not hold utility easements over private property.

The Opinion states, “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 injury or damage in *transmission right of ways related to the construction and operation of transmission facilities*.”³⁸ (Emphasis added). Kleen does not hold a Certificate to construct and operate an electric transmission line facility and Kleen is not a utility company. Kleen holds a Certificate to construct and operate an electric generating facility under Conn. Gen. Stat. §16-50i(a)(3) and Kleen is an EWG.

The Opinion specifically refers to the liability of CL&P for damage or injury relative to the use and control of CL&P’s more than 450 separate utility easements on private property along the Middletown to Norwalk right of way.³⁹ Kleen does not hold any utility easements over the private property of any resident of Middletown or Portland. The Kleen project is located on a single, defined 137-acre parcel of property north of Bow Lane in Middletown.⁴⁰ The closest residence in Middletown is 650 feet to the southwest of the Kleen site⁴¹ and the closest residence in Portland is approximately 3000 feet across the Connecticut River to the Kleen site.⁴² Kleen does not hold utility easements over these or any other private properties. Therefore, the requirement cited in the Opinion that utility companies assume all liability for injury or damage in rights of way related to the construction and operation of electric transmission line facilities does not apply to Kleen.

Based on the foregoing analysis, it is evident that the 2007 Attorney General Opinion cited by the Town in its Brief does not apply to Kleen and that the Council is an inconvenient forum for consideration of the relief requested by the Town. Only a court of competent jurisdiction, such as the Hartford Superior Court, can make a binding determination on the private property damage claims of the residents of Middletown and Portland.

C. Changes in industry practice standards warrant the Council’s attachment of conditions to Kleen’s existing Certificate consistent with the findings and recommendations contained in the Kleen Energy Plant Investigation Review Panel Final Report issued on June 3, 2010.

The Kleen Energy Plant Investigation Review Panel (Nevas Commission) was charged by Governor Rell to determine the origin and cause of the February 7, 2010 explosion at the Kleen site and to provide information necessary for a second Commission to provide recommendations for necessary legislative and regulatory changes. The Final Report of the Nevas Commission (Final Report) included an analysis

³⁸ 2007 Conn. Att’y Gen. Opin., *supra* note 6 at *12-13.

³⁹ *Id.* at 3.

⁴⁰ Connecticut Siting Council, Docket 225, Finding of Fact ¶16, November 21, 2002.

⁴¹ Connecticut Siting Council Docket 225, Finding of Fact ¶21, November 21, 2002.

⁴² Connecticut Siting Council Docket 225, Finding of Fact ¶94, November 21, 2002.

of existing regulations concerning the “cleaning” or “blowing” of natural gas pipelines and recommended changes to regulatory criteria for consideration by the Thomas Commission to prevent the recurrence of such an explosion.⁴³ Additionally, the United States Chemical Safety Board (USCSB) issued urgent safety recommendations that included a recommendation to the Governor and Legislature of Connecticut to “enact legislation applicable to power plants in the state that prohibits the use of flammable gas that is released to the atmosphere to clean fuel gas piping.”⁴⁴ The recommendations of the Nevas Commission and the USCSB specifically relate to the use of flammable gas to conduct “gas blows” at power plants. This has resulted in a change of industry practice standards.

On July 1, 2010, the Council, on its own motion, reopened the record in the Kleen docket for the limited purpose of consideration of changed conditions and of the attachment of conditions to the Certificate consistent with the findings and recommendations in the Final Report issued by the Kleen Energy Plant Investigation Review Panel. During the hearing held on August 3, 2010, witnesses testified that Kleen embraces and accepts the intent and conceptual approach of the Nevas Commission, and that Kleen is on board with the elements of the Final Report that recommend the Council attach as conditions language that addresses the findings of the Nevas Commission and the adoption of the specific recommendations of the Thomas Commission.⁴⁵ Witnesses also testified to acceptance of the implementation of the USCSB determination “that nobody should use natural gas as a cleaning agent for power plants pipe cleaning period.”⁴⁶

Therefore, in accordance with the Nevas Commission findings and recommendations, and the USCSB recommendation that the use of flammable gas to conduct “gas blows” at power plants be prohibited, there are changed conditions in industry practice standards that warrant the Council’s attachment of conditions to Kleen’s Certificate consistent with the findings and recommendations of the Nevas Commission Final Report.

D. The Council must make its own motion to reopen the Kleen docket for the limited purpose of consideration of changed conditions and of the attachment of conditions to the Certificate consistent with the findings and recommendations in the Executive Report issued by the Thomas Commission on September 21, 2010.

The Thomas Commission was charged by Governor Rell to recommend specific legislative and regulatory changes consistent with the information provided by the Nevas

⁴³ Kleen Energy Plant Investigation Review Panel, Final Report, June 3, 2010.

⁴⁴ U.S. Chemical Safety Board, 2010-01-I-CT-UR16 (June 28, 2010).

⁴⁵ Connecticut Siting Council, Docket 225C, Transcript 38-39 (August 3, 2010) (“The Kleen Energy Project embraces the philosophical mandate that Judge Nevas laid down in his comments when he delivered the report. And we embrace the goal, which is never to let anybody ever get hurt again while trying to build a plant of this type by completely avoiding the use of natural gas as a cleaning agent to achieve the pipe cleaning that is required...”); *Id.* at 68-69; Kleen Energy Plant Investigation Review Panel, Final Report at 8, June 3, 2010.

⁴⁶ Connecticut Siting Council, Docket 225C, Transcript 70 (August 3, 2010).

Commission. The Thomas Commission issued its Executive Report on September 21, 2010. On September 22, 2010, Governor Rell issued Executive Order No. 45 wherein it is ordered and directed that the use of flammable gases to conduct “gas blows” by power plants be banned in Connecticut.⁴⁷ The Executive Order was issued as a result of the findings and recommendations of the Nevas Commission, the findings and recommendations of the USCSB, and the findings and recommendations of the Thomas Commission.

The evidentiary record in this docket closed on September 2, 2010. The Kleen Certificate expires on November 30, 2010. Kleen filed a request for an extension of its Certificate on June 23, 2010. In accordance with the recommendation of the Nevas Commission that the Council attach as conditions to the Certificate language that addresses adoption of the specific recommendations of the Thomas Commission, another public hearing is necessary. The Council must provide at least 30 days notice of the commencement date and location for a public hearing from the date that the Council votes at a public meeting to reopen a docket on changed conditions under Conn. Gen. Stat. §4-181a(b).⁴⁸ The Council must also provide a 30 day period after the close of a public hearing for the filing of limited appearance statements.⁴⁹

Therefore, in accordance with the Nevas Commission recommendation that the Council attach as conditions to the Certificate language that addresses adoption of the specific recommendations of the Thomas Commission, the Council must make its own motion to reopen the Kleen docket for the limited purpose of consideration of changed conditions and of the attachment of conditions to the Certificate consistent with the findings and recommendations in the Executive Report issued by the Thomas Commission on September 21, 2010.

⁴⁷ State of Connecticut, Governor M. Jodi Rell, Executive Order No. 45 (September 22, 2010).

⁴⁸ Conn. Gen. Stat. §16-50m (2010).

⁴⁹ Conn. Gen. Stat. §16-50n(f) (2010).