

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

APPLICATION OF KLEEN ENERGY	:	DOCKET NO. 225 D
SYSTEMS, LLC FOR A CERTIFICATE OF	:	
ENVIRONMENTAL COMPATIBILITY AND	:	
PUBLIC NEED FOR AN ELECTRIC	:	
GENERATING FACILITY AND	:	
SWITCHYARD IN MIDDLETOWN	:	January 6, 2011

KLEEN ENERGY SYSTEMS, LLC'S POST HEARING BRIEF

Kleen Energy Systems, LLC ("Kleen Energy") submits this Post-Hearing Brief following the Council's re-opening of this docket, on its own motion pursuant to Conn. Gen. Stat. § 4-181a(b), to determine the existence of changed conditions based on the findings and recommendations of the Executive Report of the Thomas Commission. Kleen Energy does not believe that additional conditions of approval—in addition to those already imposed based on the findings of the Nevas Commission—are necessary since Kleen Energy is already in compliance with the applicable recommendations of the Thomas Commission Executive Report. To the extent that the Siting Council seeks to impose conditions of approval consistent with the Thomas Commission Executive Report recommendations, Kleen Energy has no objection to the same with the exception of any possible retroactive implementation of NFPA 54 temporary interim amendment 09-3, which would impose requirements on Kleen Energy's gas supplier who is not a party or intervenor in this proceeding.

I. FACTUAL BACKGROUND

By Findings of Fact, Opinion and Decision and Order dated November 21, 2002, Kleen Energy received a Certificate for a 620 MW natural-gas fired combined cycle electric generating facility (the "Facility") on River Road in Middletown, Connecticut (the "Site"). On February 7, 2010, the Kleen Energy Facility experienced an explosion caused by the release and combustion of natural gas during the process known as "gas blows," which were undertaken for the purpose of cleaning debris from the newly constructed natural gas lines located between the gas compressor station and the heat recovery steam generators. Since the time of the explosion, Kleen Energy has been cooperating with federal, state, and local authorities as they have been conducting investigations regarding the cause of the explosion.

As the Council is aware, as a result of the February, 2010 incident, Kleen Energy requested an extension of its certificate from November, 2010 through June 30, 2011. Simultaneously, the Council, on its own motion, re-opened Kleen Energy's certificate pursuant to Conn. Gen. Stat. § 4-181a(b) based on changed conditions and the consideration of attachment of conditions consistent with the findings of the Nevas Commission. The docket was so re-opened, the Council granted Kleen Energy's certificate extension request and attached conditions 8, 9 and 10 to Kleen's decision and order. These new conditions prohibited the use of natural gas as a cleaning medium, required submission of a new fuel pipeline cleaning operations plan and the submission of a revised emergency response

plan. Kleen Energy has fully complied with all three of these newly-imposed conditions.

The re-opening of this docket was specifically limited to the consideration of the attachment of conditions consistent with the Thomas Commission Report's findings and recommendations and did not involve a re-opening of the entire docket and Certificate. The Council held a public hearing on December 7, 2010.

II. LEGAL ARGUMENT

A. The Re-Opening of This Docket Is Limited to Consideration of the Imposition of Conditions Consistent with the Findings of the Thomas Commission Report

The Council, on its own motion, moved to re-open this docket pursuant to § 4-181a. The Uniform Administrative Procedures Act, Connecticut General Statutes § 4-181a(b), provides:

(b) On a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion. The procedure set forth in this chapter for contested cases shall be applicable to any proceeding in which such reversal or modification of any final decision is to be considered. The party or parties who were the subject of the original final decision, or their successors, if known, and intervenors in the original contested case, shall be notified of the proceeding and shall be given the opportunity to participate in the proceeding. Any decision to reverse or modify a final decision shall make provision for the rights or privileges of any person who has been shown to have relied on such final decision.

Because the re-opening of this docket was specifically limited to consideration of the imposition of conditions consistent with the Thomas Commission Report, issues outside the purview of that report are necessarily beyond the scope of the Council's consideration of its motion to re-open including unfounded accusations of the lack of environmental compliance as well as

continued concerns relating to property damage raised by residents from the Town of Portland.

B. Kleen Energy Is In Compliance with virtually all of the Applicable Provisions of the Thomas Commission Report.

The evidence is undisputed that Kleen Energy is in compliance with virtually all applicable provisions of the Thomas Commission Report. See Pre-filed Testimony of William Corvo, Richard Audette; December 6, 2010 Transcript ("TR") at 123-125. In fact, virtually all relevant recommendations have already been incorporated into Kleen Energy's prior Decision and Order based on the previous re-opening of Docket 225C based on the findings of the Nevas Commission. See Decision and Order #8-10.

As can be seen from a review of the seven Thomas Commission Report recommendations, the majority of the recommendations cannot be implemented by Kleen Energy or imposed as conditions of the approval of a certificate since they suggest areas of regulatory or statutory change or contain recommendations to other jurisdictions such as the hiring of additional inspectors by local building inspectors or fire marshals.

The recommendations of the Thomas Commission and Kleen Energy's compliance with these recommendations are delineated below:

- 1) Ban the use of flammable gas to conduct gas blows. Kleen Energy has already agreed, during the Docket 225C re-opening proceeding, that it will not utilize flammable gas to clean the remaining natural gas piping that requires cleaning before the Facility becomes operational. In fact, the ban on the use of natural

gas as a cleaning agent has been incorporated into Kleen Energy's Decision and Order in Docket 225C as Order #8 and Kleen Energy has complied with this order. The Governor has also banned the use of flammable gas for the cleaning of pipes through an Executive Order, and Kleen Energy will also comply with this Executive Order. In fact, as the Council is aware, Kleen Energy completed the remaining pipe cleaning at the Facility with the use of nitrogen. See pre-filed testimony of William Corvo, Richard Audette; see *also* Kleen late file exhibit submitted December 3, 2010 (Thielsch Engineering Report).

2) The second recommendation of the Thomas Commission suggests requiring of special inspectors to inspect power generating facilities. Kleen Energy has independently requested that the South District Fire Department (of the City of Middletown) Fire Marshal personally attend and supervise any pipe cleaning activity that has occurred at the Kleen Energy Facility since February 7, 2010. Kleen Energy has had meetings with both Middletown's South District Fire Department and the Building Inspector's Office in order to gain the input from these two offices in conducting any future pipe cleaning at the facility. In addition, Kleen Energy's Engineering, Procurement and Construction ("EPC") contractor, O&G Industries, Inc., has secured the services of a third party engineering firm, Thielsch Engineering to assist it.

Therefore, Kleen Energy is in compliance with this requirement and does not believe that any additional condition of approval is necessary related to recommendation #2.

3) Recommendation #3 of the Thomas Commission recommends a clearing house for future power plant applications. Since the Kleen Energy Facility is approved and construction is almost complete, this recommendation has no impact on Kleen Energy. Kleen Energy therefore leaves it to the Siting Council and/or other governmental officials to decide as to how this recommendation should best be implemented.

4) Recommendation #4 of the Thomas Commission suggests that recommendations of conditions to licensing be made to the Siting Council and specifically recommends that the Siting Council attach, as a condition of Kleen Energy's certificate extension request, the condition that flammable gas not be utilized during gas blows at the Facility. As already noted, Kleen Energy has agreed that it will not utilize flammable gas to conduct any remaining pipe cleaning at the Kleen Energy Facility and the Siting Council has already incorporated this requirement. In addition, the Governor's Executive Order fully addresses this issue. Therefore, Kleen Energy believes that no additional action is necessary related to this recommendation.

5) Recommendation #5 of the Thomas Commission suggests that the Siting Council consider whether it can and should re-open all certificates for electric generating facility under C.G.S. §4-181a (b).

Kleen Energy notes that the Siting Council has in fact done so and therefore believes that this recommendation has been satisfied and requires no additional action by the Siting Council.

6) Recommendation #6, read in conjunction with Recommendation #4, suggests that the Siting Council consider the adoption of certain codes for the projects under its jurisdiction, despite the fact that the Thomas Commission simultaneously realizes that the adoptions of such codes as regulations would likely take more than a year.

Moreover, Kleen Energy notes that the Thomas Commission issued its report in draft on the morning of September 21, 2010 and then finalized it that same day, before any member of the public had any opportunity to review or comment upon the report. Putting aside the due process and Administrative Procedures Act issues associated with the issuance of the Thomas Commission Report, it should be noted that the Siting Council does not routinely include, in its decisions and orders, compliance with any particular building code. To the contrary, certificate holders are required to obtain building permits from the local jurisdiction(s) where the facilities are to be constructed and building code compliance is appropriately left to those local jurisdictions.

Furthermore, the very NFPA standards that the Thomas Commission suggests should be retroactively applied to Kleen Energy acknowledge that the NFPA standards should not be applied retroactively and state that new standards "shall not apply to facilities, equipment, structures or installations that existed or were approved for construction or installation prior to the effective date of the standard," unless the provision specifically calls for retroactive application of the new standard. NFPA 37, Standard for the Installation and Use of Stationary Combustion Engines and Gas Turbines (2010 edition), sec. 1.4.1; *see also*, Section 1.3 of NFPA 54, National Fuel Gas Code (2009 edition). Section 1.3.2 of the 2010 edition of NFPA 850, Recommended Practice for Fire Protection for Electric Generating Plants and High Voltage Direct Converter Stations similarly notes that "the recommendations contained in this document are intended for new installations, as the application to existing installations might not be practicable."

Kleen Energy does not believe that the Siting Council should retroactively apply NFPA and building code standards to the Kleen Energy Facility that were not in place at the time Kleen Energy obtained its building permit. Despite the fact that Kleen Energy does not believe that such standards should be applied retroactively, the Kleen Energy Facility was designed to the specifications of several of the standards found in

Recommendation #6, as outlined in greater detail in Kleen Energy's interrogatory responses and as contained in Kleen Energy's late filed exhibit, the Thielsch Engineering Report submitted on December 3, 2010. In short, while not being required, the Kleen Energy Facility is in compliance with or would not be impacted by the retroactive implementation of NFPA 37 (2010 Edition); NFPA 54 (2010 Edition); NFPA 850 (2010 Edition); ASME B 31 and ASME B 31.1.

As noted during the public hearing, Kleen Energy believes that there could be a problem complying with NFPA 54 Temporary Interim Amendment to the extent that it requires a gas supplier to purge all piping at the Facility because the gas supplier does not own the piping system at the Kleen Energy Facility and therefore would not want the responsibility for purging that piping. TR at 126.

7) Finally, recommendation #7 recommends the hiring of special inspectors to assist local fire marshals and building inspectors on the complex issues surrounding the development of a power plant.

As noted in this proceeding, Kleen Energy has met with representatives from the City of Middletown's Building Inspector's Office and the South District Fire Department in order to coordinate pipe cleaning activities that will be taking place with respect to future pipe cleaning activities. As part of these discussions, O&G Industries has offered the use of its third party engineering firm,

Thielsch Engineering, for the benefit of the City of Middletown were City officials to decide that such assistance is needed or desired.

Moreover, Kleen Energy, in compliance with Decision and Order #9 of Docket 225C, Kleen Energy submitted its revised pipe cleaning procedures to the Council and required State agencies along with the local Regional Director of OSHA and representatives of the City of Middletown on or about December 10, 2010.

Therefore, while Kleen Energy believes that the use of special inspectors by local building inspectors and fire marshals is outside of the Siting Council's jurisdiction, Kleen Energy has no objection to this recommendation. Furthermore, Kleen Energy believes that, since this recommendation falls outside the purview of the Siting Council's jurisdiction and is addressed to municipal agencies, no additional condition of approval is necessary to comply with this recommendation.

C. No Additional Conditions of Approval Are Necessary

Kleen Energy does not believe that any additional conditions of approval are necessary going forward. As evidenced by the record, Kleen Energy has complied with the all of the conditions of approval imposed not only by the Siting Council but also by other federal and state agencies. Kleen Energy has fully complied with the added conditions of approval ordered under Docket 225C as a result of the Nevas Commission re-opening, and has already submitted its revised emergency response plan (submitted as a revision to Kleen Energy's

D&M Plan on December 2, 2010) and submitted its fuel pipeline cleaning operations plan (submitted on December 10, 2010). Kleen Energy notes that the remaining fuel piping was successfully cleaned without incident on December 18 and 19, 2010 and that the Siting Council approved the revisions to the D&M Plan as well.

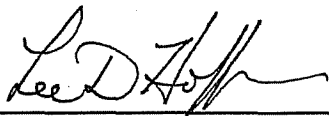
Finally, it has been suggested during the course of this proceeding that Kleen Energy take steps to set up some sort of emergency notification system whereby nearby residents in both Middletown and Portland would be notified of events that may be occurring at the Kleen Energy Facility. As Kleen Energy stated, it is willing to explore ways to implement such a system. TR at 45. Indeed, Kleen Energy will discuss how to best implement such a system with representatives of the Town of Portland. However, Kleen Energy notes that it cannot and should not be required to notify citizens who are not willing to provide appropriate contact information to Kleen Energy. Therefore, to the extent the Siting Council wishes to require Kleen Energy to set up a notification system for nearby citizens, Kleen Energy requests that such notification system be limited to those citizens who are willing to provide their contact information for such system.

III. CONCLUSION

Kleen Energy is in compliance with all applicable recommendations of the Thomas Commission Executive Report. While Kleen Energy does not believe the implementation of any additional conditions of approval are necessary, Kleen Energy is willing to comply with all applicable provisions of the Thomas

Commission Executive Report with the exception noted concerning the retroactive implementation of NFPA 54 temporary interim amendment 09-3, which would impose a requirement on Kleen Energy's gas supplier, who is not a party or intervenor to this proceeding.

Respectfully Submitted,
KLEEN ENERGY SYSTEMS, LLC

By: 

Lee D. Hoffman, Esq.
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Telephone: (860) 424-4300
Facsimile: (860) 424-4370
lhoffman@pullcom.com
Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing was delivered by electronic mail and/or U.S. Mail, first class postage prepaid, to all parties and intervenors of record as follows:

NRG Middletown Power LLC
Alfred E. Smith, Jr.
Aimee Hoben
Murtha Cullina LLP
Two Whitney Avenue
New Haven, CT 06503

Duncan R. Mackay, Esq.
Vincent P. Pace, Esq.
The Connecticut Light & Power Company
P.O. Box 270, Hartford, CT 06141-0270
T: 860.665.5000; F: 860.665.5504

John R. Morissette
Manager-Transmission Siting And Permitting
The Connecticut Light & Power Company
P.O. Box 270, Hartford, CT 06141-0270
T: 860.665.2036; F: 860.665.2611

Christopher R. Bernard
Manager-Regulatory Policy (Transmission)
The Connecticut Light & Power Company
P.O. Box 270, Hartford, CT 06141-0270
T: 860.665.5967; F: 860.665.3314

The City of Middletown
Timothy P. Lynch
Deputy City Attorney
City Attorney's Office
245 DeKoven, P.O. Box 1300
Middletown, CT 06457-1300

Connecticut River Watershed Council, Inc.
c/o Jaqueline Talbot
DeKoven House Community Center
27 Washington Street
Middletown, CT 06457

Earle Roberts
785 Bow Lane
Middletown, CT 06457

Town of Portland
c/o Jean M. D'Aquila
D'Aquila Law Offices, LLC
100 Riverview Center, Suite 205
Middletown, CT 06457

Susan S. Bransfield, First Selectwoman
Town of Portland
33 East Main Street
Portland, CT 06480

State Senator Eileen Daily
103 Cold Spring Drive
Westbrook, CT 06498

State Representative James O'Rourke
Legislative Office Building
Room 4108
Hartford, CT 06106-1591



Lee D. Hoffman

ACTIVE/67524.14/CLARSON/2336879v2