BEFORE THE CONNECTICUT SITING COUNCIL

In re: NTE Connecticut, LLC application for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a 550-megawatt dual-fuel combined cycle electric generating facility and associated electrical interconnection switchyard located at 180 and 189 Lake Road, Killingly, Connecticut	Docket No. 470B Filed: June 21, 2019

JOINT PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Conn. Gen. Stat. § 4-181a(a)(1), the Connecticut Fund for the Environment,, Not Another Power Plant, and Sierra Club respectfully submit this motion for reconsideration of the Siting Council's June 6, 2019 final decision and order to grant a Certificate of Environmental Compatibility and Public Need (CECPN) for the Killingly Energy Center (KEC) that omits NTE's previously proposed Greenhouse Gas Reduction Program (GHG Reduction Program). In addition, in light of the deficiency letter provided by the Federal Energy Regulatory Commission (FERC) to ISO New England (ISO-NE) on June 6, 2019 regarding KEC's participation in ISO-NE's most recent Forward Capacity Auction (FCA 13),[1] the signatory parties respectfully request that the Siting Council clarify that its CECPN is conditioned on KEC retaining the Capacity Supply Obligation that it obtained from ISO-NE in FCA 13.

I. The Siting Council Should Reconsider Its Decision to Omit NTE's Greenhouse Gas Reduction Program as an Enforceable Condition of the Siting Certificate Because that Decision Was Based on an Error of Fact or Law

[1] Attached as Exhibit 1.

The Council should reconsider its decision to approve a CECPN for KEC that does not incorporate NTE's GHG Reduction Program as an enforceable condition because this decision stemmed from either an error of fact or of law.

In order to grant a CECPN, the Council must find and determine the "nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities" that "impact on, and conflict with the policies of the state concerning the natural environment . . ." and must determine why the adverse effects or conflicts "are not sufficient reason to deny the application."[2] Through the Global Warming Solutions Act, Connecticut has committed to reducing statewide GHG emissions 80 percent from a 2001 baseline by 2050[3] and the Governor's Council on Climate Change has recently concluded that to meet this goal, Connecticut "will need to continue to decarbonize the electric grid – achieving 84 percent carbon-free electric generation by 2050."[4] Given that KEC, by itself, can emit more than 2.2 million tons of carbon dioxide annually[5]—5 percent of Connecticut's total statewide greenhouse gas emissions from *all* sectors[6]—it will not be possible for Connecticut to achieve its Global Warming Solutions Act commitment, or the Governor's Council on Climate Change's charge, if the state continues to add fossil fuel generators that lack enforceable, declining limitations on their GHG emissions.[7]

In order to make KEC's emissions consistent with Connecticut's Global Warming Solutions Act, at the January 26, 2017 hearing in Docket 470, NTE outlined a commitment to

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[2] Conn. Gen. Stat. § 16-50p(a)(3)(B) & (C); *see also* Conn. Siting Council, Dkt. No. 424, Opinion at 15 (Dec. 27, 2012) (affirming Council's examination of "the policies of the state concerning the natural environment, ecological balance, public health and safety, air and water purity, and fish, aquaculture and wildlife, together with all other environmental concerns"), *aff'd sub nom. Civie v. Conn. Siting Council*, 157 Conn. App. 818 (Conn. App. 2015).
[3] Conn. Gen. Stat. § 22a-200a(a)(2).
[4] Grouped Parties Admin. Notice Item #3 (Governor's Council on Climate Change Final Report) at 13.
[5] Finding of Fact #458; Applicant Ex. #1(c), Appendix A, Permit No. 089-0107, at 6.
[6] Grouped Parties Admin. Notice Item #2 (2016 Conn. Greenhouse Gas Emissions Inventory) at 2.
[7] *See* CFE Br. at 13-16; Sierra Club Br. at 12-13.

reduce the greenhouse gas emissions from KEC by 80 percent between the date that the facility becomes operational and 2050.[8] On February 3, 2017, NTE submitted to the Connecticut Department of Energy and Environmental Protection (DEEP) a letter appending NTE's proposed GHG Reduction Program,[9] which detailed the specific terms of NTE's commitment to reduce GHG emissions from KEC.[10] DEEP, however, declined to incorporate the GHG Reduction Program into the final air permit for KEC,[11] or any subsequent permit modification.[12]

Following the grant of NTE's motion to reopen in February, NTE has continued to affirm its intention to comply with the GHG Reduction Program.[13] And at the hearing on April 18, 2019, NTE on multiple occasions confirmed its willingness that the Siting Council condition the CECPN on compliance with the GHG Reduction Program.[14]

On June 6, 2019, the Council voted to approve a final decision package granting a CECPN for KEC, but declined to incorporate NTE's GHG Reduction Program in the CECPN, instead referencing NTE's voluntary intention to reduce GHG emissions from KEC over time.[15] The Council appeared to rest its decision to exclude the GHG Reduction Program on a determination that the program existed as, or was akin to, a private agreement. The Council

[8] Council Admin. Notice Item #57 (Jan. 26, 2017 Hr'g Tr. at 1129:21-25).
[9] A copy of NTE's February 3, 2017 letter and the GHG Reduction Program were provided as Attachment 1 to Sierra Club's post-hearing brief.
[10] The GHG Reduction Program identified annual numerical GHG caps for each year between 2020 and 2050, established several permissible offset mechanisms, and included a commitment to achieve zero net GHG emissions beginning in 2050.
[11] Apr. 18, 2019 Hr'g Tr. at 114:20-23.
[12] The air permit was most recently modified on December 10, 2018. NTE Exhibit #1 at 6.
[13] *See, e.g.*, NTE Exhibit #4 (Resp. to Council Interrog. 35 ("To make clear NTE's commitment to sustainable and environmentally responsible energy, NTE has committed to implement a voluntary greenhouse gas (GHG) reduction program for the Killingly Energy Center. NTE developed this program to support the State of Connecticut's compliance with the Global Warming Solutions Act of 2008 ("GWSA"), CGS § 22a-200a, to reduce GHG emissions at least 80% below 2001 levels by 2050. Following consultation and conceptual alignment with both DEEP and the Sierra Club, NTE committed to incorporating a voluntary GHG reduction program (that anticipates both reductions and offsets) through which NTE will effectively eliminate GHG emissions from the Killingly Energy Center by 2050. NTE stands by this commitment. Through this commitment, the Killingly Energy Center will provide significant benefits for the Connecticut residents and help advance Connecticut's leadership in clean energy development and GHG control"); Apr. 4, 2019 Hr'g Tr. at 48:19-49:4.
[14] Apr. 18, 2019 Hr'g Tr. at 115:18-116:1 & at 160:4-9.
[15] *See* Findings of Fact ##464 & 465; Opinion at 12.

analogized to a prior docket approving the siting of a cross-Long Island Sound fiber optic cable in which the applicant, Cross-Sound Cable Company (CSCC), and third parties had developed a private agreement establishing conditions for ensuring protection of shellfish in the vicinity of the cable.[16] In its Opinion in that docket, the Council noted "CSCC has also committed to work with shellfish lease bed holders, the [Connecticut Department of Agriculture, Bureau of Aquaculture], and the Soundkeeper to develop, implement, and monitor a successful shellfish bed refurbishment program."[17] There, the Council concluded that "these measures are appropriate and will serve to mitigate any long-lasting effects to the shellfish beds."[18] By analogizing to the cross-Sound cable docket, the Council appeared to either be suggesting that a similar private agreement exists regarding NTE's greenhouse gas commitment—by implication rendering unnecessary the inclusion of NTE's GHG Reduction Program in the CECPN—or that the GHG Reduction Program is akin to a private agreement and cannot be incorporated into a CECPN. Because the former suggestion is unsupported by fact and the latter is incorrect as a matter of law, the Council's decision to exclude the GHG Reduction Program should be reconsidered.

Pursuant to Conn. Gen. Stat. § 4-181a(a)(1)(A), reconsideration is appropriate where a determination by the Council is affected by an error of fact or of law.[19] One or the other is present here. To the extent the Council believed that the GHG Reduction Program was already embodied in an enforceable agreement, this was an error of fact. As detailed above, although NTE submitted its GHG Reduction Program to DEEP in February 2017, DEEP declined to

[16] Connecticut Siting Council, Dkt. No. 208, Findings of Fact #106 (Jan. 3, 2002) (noting the existence of private agreements with "shellfish leaseholders in the immediate vicinity of the proposed submarine cable system route, on January 9, 2001, which included provisions for installation; plan review; refurbishment; independent installation monitoring; independent contaminant testing of water, sediment, and shellfish; and notification requirements.").
[17] Conn. Siting Council, Dkt. No. 208, Opinion (Jan. 3, 2002).
[18] *Id.*
[19] Conn. Gen. Stat. § 4-181a(a)(1)(A) (authorizing a motion for reconsideration where "[a]n error of fact or law should be corrected").

incorporate the GHG Reduction Program into any subsequent air permit issued for the facility. Moreover, petitioners are aware of no agreement—public or private—that would make the GHG Reduction Program enforceable against NTE by any entity, and NTE's Council confirmed that no such private agreement exists.[20] Indeed, to petitioners' knowledge, the 2017 submission to DEEP is the only place in which the specifics of NTE's GHG Reduction Program appear. If the Council's decision to exclude the GHG Reduction Program from the CECPN was based on a mistaken factual premise—that the commitment was already embodied in a separate private agreement—the Council should reconsider that decision and incorporate the GHG Reduction Plan as an enforceable condition of the CECPN, consistent with NTE's commitments at hearing.

In addition, to the extent the Council believed that it lacked that authority to require compliance with the GHG Reduction Program as a condition of the CECPN or subsequent Development and Management (D&M) Plan, this is an error of law. Pursuant to Conn. Gen. Stat. § 16-50p, the Council may grant a CECPN "upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate."[21] Courts have confirmed that the Council's power to create and impose conditions is wide-ranging and extensive: "[T]he wording of § 16-50p(a)(1) conferring on the council to grant certificates upon such conditions 'as the council may deem appropriate' suggests the broadest possible delegation of power to the council to set conditions in the certificate . . . ."[22] Decisions by the Council establishing a variety of conditions have been upheld by the courts, including conditions regarding the nature of fuels to be combusted, the emission controls to be

[20] Pers. commc'n between Kenneth Baldwin and Josh Berman on June 7, 2019. If such an agreement existed, NTE would have been obligated to produce it pursuant to Conn. Gen. Stat. § 16-50o(c) (which requires submission of all agreements "in connection with the construction or operation of the facility") and in response to Council Interrogatory #43.
[21] Conn. Gen. Stat. § 16-50p(a)(1).
[22] *Town of Middlebury v. Conn. Siting Counsel*, No. HHBCV074013143, 2007 WL 4106365 at *3 (Conn. Super. Nov. 1, 2007).

utilized, the disposal of wastes,[23] a requirement to have a legally permitted site for five years of ash disposal as a condition of operation,[24] and flexible deadlines for completion of construction.[25] Courts have also upheld the Council's incorporation of substantive requirements into D&M Plans. For example, in the cross-Sound cable docket discussed above, the Council included in its CECPN a requirement that CSCC "incorporate a shellfish bed restoration plan in the D&M Plan."[26] Thus, even if the Council declined to incorporate the full text of the GHG Reduction Program into its CECPN, it could require its incorporation into the D&M Plan.

Ultimately, merely stating as a Finding of Fact and in its Opinion that NTE has made a voluntary commitment to reduce GHG emissions[27] is not an adequate substitute for incorporating compliance with the GHG Reduction Program as a condition of the CECPN or requiring its incorporation as a condition of the D&M Plan. KEC's consistency with Connecticut's state climate policy hinges on ensuring that NTE abides by its stated commitment to limit greenhouse gas emissions from the facility beyond what is currently required in its air permit.[28] As courts have held in other contexts, for mitigation measures to be "reasonably certain to occur" so as to support an agency's reliance on the efficacy of those measures, the mitigation measures must be binding on and enforceable upon the applicant.[29] While NTE's commitment is undoubtedly well-intentioned, a "sincere general commitment" to undertake measures where feasible is insufficient

[23] *See* Conn. Siting Council, Dkt. No. 103, Decision & Order at 1-3 (Nov. 22, 1989), *aff'd City of Torrington v. Conn. Siting Council*, No. CV 90 0371550 S, 1991 WL 188815, at *8 (Conn. Super. Sept. 12, 1991).
[24] *Town of Preston v. Conn. Siting Council*, 20 Conn.App. 474, 491-92 (Conn. App. 1990).
[25] *Town of Middlebury v. Conn. Siting Counsel*, No. HHBCV074013143, 2007 WL 4106365 at *4 (Nov. 1, 2007).
[26] Conn. Siting Council, Dkt. No. 208, Opinion (Jan. 3, 2002).
[27] Findings of Fact ##464 & 465; Opinion at 12.
[28] *See* Conn. Gen. Stat. § 16-50p(a)(3)(B) (requiring the Siting Council to consider conflicts "with the policies of the state concerning the natural environment . . . .").
[29] *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F.Supp.3d 1033, 1053-54 (N.D.Cal. 2015) (rejecting agencies' reliance on plan to mitigate adverse impacts to endangered spotted owls because plan relies on mitigation that the agencies cannot enforce); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935-36 & n.17 (9th Cir. 2008) (finding that where an agency lacks power to guarantee that mitigation actions will occur, the proper course is to exclude those actions from its analysis and consider only those under its control or reasonably certain to occur).

to support an agency's action in reliance on those measures[30] and the courts have struck down agency attempts to rely on mitigation measures undertaken by private parties where the agency cannot act to enforce the implementation of the measures.[31]

The Council should incorporate the GHG Reduction Plan as an enforceable condition of the CECPN or of the D&M Plan.

II. The Siting Council Should Clarify that the CECPN For KEC is Conditioned on KEC's Retention of its Capacity Supply Obligation from ISO-NE.

In both Docket 470 and 470B, the Council has consistently found that obtaining a Capacity Supply Obligation (CSO) from ISO-NE is an essential ingredient of establishing the need for KEC. Consequently, in light of recent developments raising questions regarding the future status of KEC's CSO the Council should clarify that KEC's CECPN is conditioned on KEC retaining the CSO that it obtained from ISO-NE earlier this year.

NTE submitted its initial CECPN application for KEC in August 2016. On February 6, 2017, with its CECPN application pending, KEC participated in ISO-NE's Eleventh Forward Capacity Auction (FCA 11) and failed to obtain a CSO.[32] On May 16, 2017, the Council issued a final decision package denying NTE's CECPN application without prejudice. Citing KEC's failure to obtain a CSO in FCA 11, the Council determined that "ISO-NE has effectively determined that KEC is not required for resource adequacy, at least through the [Capacity

[30] *Nat'l Wildlife Fed'n*, 524 F.3d at 935-36.
[31] *See, e.g.*, *Fla. Key Deer v. Brown*, 364 F.Supp.2d 1345, 1355-56 (S.D. Fla. 2005) (striking down agency's reliance on reasonable and prudent alternatives that the agency concluded would eliminate jeopardy to endangered species because measures were voluntary and not practically enforceable by agency), *aff'd sub nom. Fla. Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008).
[32] Finding of Fact #7.

Commitment Period] of 2020-2021."[33] Based on the lack of need finding, the Council declined to reach any finding regarding the balancing of need and environmental impacts.[34]

In January 2018, prior to its participation in ISO-NE's Twelfth Forward Capacity Auction (FCA 12) NTE moved to reopen the Council's decision.[35] However, NTE withdrew its motion after KEC again failed to clear the auction.[36] In January 2019, NTE once again moved to reopen the Council's decision, and on February 4, 2019, NTE participated in FCA 13 and this time was notified that it had received a CSO for KEC for the capacity commitment period beginning on June 1, 2022,[37] despite FCA 13 clearing at a far lower price than had either FCA 11 or 12.[38] On February 15, 2019, in receipt of the results of FCA 13,[39] the Council granted NTE's motion to reopen confirming the existence of "changed conditions."[40]

On February 28, 2019, ISO-NE filed the results of FCA 13 with FERC, which docketed ISO-NE's filing in Docket No. ER19-1166-000 and accepted comment on the filing through April 12, 2019. On April 12, 2019, a group of existing capacity suppliers[41] filed a motion to intervene and protest with FERC asking FERC to scrutinize how the Independent Market Monitor set KEC's minimum offer price for FCA 13 to "ensure conformance with [ISO-NE's] Tariff, including whether the FCA 13 Results are just and reasonable."[42] The protest noted that

[33] Council Admin. Notice Item #57 (Dkt. No. 470 Opinion at 5 (May 11, 2017)).
[34] Council Admin. Notice Item #57 (Dkt. No. 470 Decision & Order at 1 (May 11, 2017)).
[35] Council Admin. Notice Item #57 (Dkt. No. 470A Mot. to Reopen (Jan. 19, 2018)).
[36] Council Admin. Notice Item #57 (Dkt. No. 470A Withdrawal Ltr. (Feb. 8, 2018)).
[37] NTE Exhibit #2 at 1.
[38] NTE Exhibit #2 Attachment at 2 (FCA 13 cleared at a price of $3.80/kW-month; FCA 12 cleared at a price of $4.63/kW-month; and FCA 11 cleared at a price of $5.30/kW-month).
[39] NTE Exhibit #2.
[40] Dkt. No. 470B, Reopening Decision (Feb. 15, 2019).
[41] Great River Hydro, LLC, NRG Power Marketing LLC, Cogentrix Energy Power Management, LLC, and Vistra Energy Corp.
[42] Motion to Intervene and Protest of the Capacity Suppliers, FERC Dkt. No. ER19-1166-000 (Apr. 12, 2019), at 22.

KEC had cleared at an auction price below $3.80/kW-month despite the offer review trigger price for a combined cycle unit in FCA 13 being more than double that level: $8.19/kW-month.[43]

On June 6, 2019, shortly prior to the Council's final vote approving KEC's CECPN, FERC addressed the capacity suppliers' protest by submitting a deficiency letter to ISO-NE notifying the ISO that its February 28, 2019 FCA 13 results filing "does not provide sufficient detail to enable the Commission to process the filing."[44] Specifically, FERC found that "additional information is required" regarding the data the Internal Market Monitor relied upon in establishing KEC's minimum offer price, and requested that ISO-NE provide this information within 30 days.[45]

Pursuant to Conn. Gen. Stat. §§ 4-181a(a)(1)(B) and (C), reconsideration is appropriate where a determination by the Council is affected by new evidence, or there is other good cause.[46] The Council's decisions regarding KEC—first denying NTE's original application following KEC's failure to clear in FCA 11 and subsequently granting NTE's 2019 motion to reopen and its CECPN application after NTE cleared in FCA 13—demonstrate that the Council's evaluation of need hinges directly on the facility's receipt of a CSO from ISO-NE. The FERC deficiency letter, new evidence that arose on the day the final CECPN decision was voted upon by the Council, raises questions regarding the future status of KEC's CSO and of the broader FCA 13 auction results. If KEC subsequently loses its CSO, the Council's basis for establishing a need for the facility—and hence the rationale for granting a CECPN—would also be gone. The situation would be the same as in Docket 470 where the Council denied NTE's application based on a failure to establish a need for the facility. In light of the FERC deficiency letter, petitioners

[43] *Id.* at 1-2.
[44] FERC June 6, 2019 Deficiency Letter at 1.
[45] *Id.* at 1-3.
[46] Conn. Gen. Stat. §§ 4-181a(a)(1)(B), (C).

request that the Council clarify that NTE's CECPN for KEC is contingent on KEC retaining the CSO that it obtained from ISO-NE in FCA 13.

RESPECTFULLY SUBMITTED this 21st day of June, 2019.

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This 21st day of June, 2019.

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