STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL
Ten Franklin Square, New Britain, CT 06051
Phone: (860) 827-2935 Fax: (860) 827-2950
E-Mail: siting.council@ct.gov
www.ct.gov/csc

DATE: July 18, 2019

TO: Parties & Intervenors

FROM: Melanie A. Bachman, Executive Director MAB

RE: **DOCKET NO. 470B** - NTE Connecticut, LLC Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a 650-megawatt dual-fuel combined cycle electric generating facility and associated electrical interconnection switchyard located at 180 and 189 Lake Road, Killingly, Connecticut. Connecticut Fund for the Environment, Not Another Power Plant, and Sierra Club Joint Petition for Reconsideration and Clarification.

During a public meeting of the Connecticut Siting Council (Council) held on July 18, 2019, the Council denied the Connecticut Fund for the Environment, Not Another Power Plant, and the Sierra Club's June 21, 2019 Joint Petition for Reconsideration and Clarification, pursuant to Connecticut General Statutes §4-181a(a), of the Council's June 7, 2019 final decision to grant a Certificate of Environmental Compatibility and Public Need to NTE Connecticut, LLC for the above-referenced electric generating facility and associated electrical interconnection switchyard located in the Town of Killingly, on the following bases:

1. **There is no error of fact or error of law.** NTE's voluntary Greenhouse Gas Reduction Program (GHG Program), and/or any agreement related thereto, is not an enforceable condition of a Council Certificate as the GHG Program, and/or any agreement related thereto, is not in the record of the proceeding and the Department of Energy and Environmental Protection has jurisdiction over air pollution control in the state; and

2. **There is no new evidence or good cause for reconsideration.** NTE's Certificate is not conditioned upon NTE's retention of its Capacity Supply Obligation (CSO) from ISO-New England, Inc. (ISO). There is evidence in the record of the motion filed with the Federal Energy Regulatory Commission to ensure the ISO Forward Capacity Auction #13 results are just and reasonable. There is evidence in the record that the ISO Internal Market Monitor approval process is ongoing. There is evidence in the record that if the CSO is subsequently terminated by ISO, NTE would not construct the facility.

Enclosed is a copy of the staff report, dated July 18, 2019.

MAB/MP/laf

Enclosure

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DATE: July 18, 2019

TO: Council Members

FROM: Melanie A. Bachman, Executive Director

RE: **DOCKET NO. 470B** – NTE Connecticut, LLC Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a 650-megawatt dual-fuel combined cycle electric generating facility and associated electrical interconnection switchyard located at 180 and 189 Lake Road, Killingly, Connecticut. **Staff Report – Connecticut Fund for the Environment, Not Another Power Plant and Sierra Club Joint Request for Reconsideration and Clarification.**

On June 21, 2019, pursuant to Connecticut General Statutes (CGS) §4-181a(a), the Connecticut Fund for the Environment, Not Another Power Plant and the Sierra Club (Petitioners) filed a Joint Petition for Reconsideration and Clarification (Joint Petition) of the Connecticut Siting Council's (Council) June 7, 2019 final decision to grant a Certificate of Environmental Compatibility and Public Need (Certificate) to NTE Connecticut, LLC (NTE) for the above-referenced electric generating facility and associated interconnection switchyard located in the Town of Killingly. Petitioners request the Council to reconsider its final decision to omit NTE's Greenhouse Gas Reduction Program (GHG Program) as an enforceable condition of the Certificate and clarify that the Certificate is conditioned on NTE's retention of its Capacity Supply Obligation (CSO) from ISO-New England, Inc. (ISO) in Forward Capacity Auction (FCA) #13.

The evidentiary record closed on May 2, 2019. A final decision was mailed on June 7, 2019. Under CGS §4-181a(a), a party in a contested case may, within 15 days after mailing of the final decision, file with the agency a petition for reconsideration of the decision on the ground that: (A) an error of fact or law should be corrected; (B) new evidence has been discovered which materially affects the merits of the case and which for good reasons was not presented in the agency proceeding; or (C) other good cause for reconsideration has been shown. Within 25 days of the filing of the petition for reconsideration, the agency shall decide whether to reconsider the final decision. The failure of the agency to make that determination within 25 days of such filing shall constitute a denial of the petition.

On June 21, 2019, the Council requested parties and intervenors to submit written comments with respect to whether the Joint Petition should be granted or denied by July 8, 2019. On July 8, 2019, NTE submitted comments in opposition to the Joint Petition on the basis that the Council properly considered the GHG Program, NTE's CSO and the Federal Energy Regulatory Commission (FERC) Review Process.

The Joint Petition claims that the Council should: 1) reconsider its decision to omit NTE's GHG Program as an enforceable condition of the Certificate because the decision was based on an error of fact or law; and 2) clarify that NTE's Certificate is conditioned on NTE's retention of its CSO from ISO.

I. The GHG Program is not an enforceable condition of a Council Certificate.

Petitioners conveniently misconstrue the June 6, 2019 meeting discussion regarding the legislative history of CGS §16-50o as it relates to the Cross Sound Cable matter to justify Petitioners' claim that either an error of fact or an error of law occurred, but Petitioners aren't sure which one.[1] By its own admission, "in the context of this proceeding, the Sierra Club (SC) has not conceded in any way that [the GHG Program] is sufficient for the purposes of the Council's review under the statutory mandate."[2] CGS §16-50o requires the submission into the record the full text of the terms of any agreement entered into by the applicant and any party to the certification proceeding, or any third party, in connection with the construction or operation of the facility.[3] The purpose of CGS §16-50o is not to confer interpretation and enforcement authority of an agreement on the Council nor is the purpose of the requirement to confer development and modification authority of an agreement on the Council. The Council cannot determine private property or contract rights.[4]

The Council is an administrative agency of specific and limited jurisdiction.[5] An administrative agency cannot confer jurisdiction upon itself.[6] It must act strictly within its statutory authority, within constitutional limitations and in a lawful manner.[7] The Council issues Certificates for the construction, maintenance and operation of electric generating facilities in the state. The Department of Energy and Environmental Protection (DEEP) is also an administrative agency of specific and limited jurisdiction. DEEP issues permits for air pollution control in the state. Under the CGS, neither administrative agency could confer or delegate its jurisdiction and statutory authority on the other.[8]

As more fully described in Part A below, the GHG Program, and/or any agreement related thereto, is not in the record of the proceeding. Therefore, there is no error of fact. As more fully described in Part B below, DEEP has jurisdiction over air pollution control in the state. DEEP declined to incorporate the GHG Program into the air permit issued for the facility. By requesting the Council to incorporate the GHG Program into the Certificate, the Petitioners appear to be forum shopping. It would be absurd and unworkable for the Council to condition the Certificate on a GHG Program that is not in the record and that is subject to the jurisdiction of DEEP. Therefore, there is no error of law. The GHG Program is not an enforceable condition of a Council Certificate.

A. The GHG Program is not in the record of the proceeding.

The evidentiary record closed on May 2, 2019. Petitioners could have submitted the GHG Program as an exhibit when the evidentiary record was open. They didn't. Petitioners also could have submitted interrogatories to NTE on the GHG Program when the evidentiary record was open. They didn't. SC simply attached NTE's February 3, 2017 correspondence to DEEP describing the GHG Program, which is clearly marked, "DRAFT," and presumably relates to the originally proposed 550 MW facility based on the date of the correspondence, to their May 30, 2019 Post Hearing Brief. The purpose of a Post Hearing Brief is to

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[1] Joint Petition for Reconsideration and Clarification at page 4 ("...reconsideration is appropriate where a determination by the Council is affected by an error of fact or law. **One or the other is present here**.")(Emphasis added).
[2] 4/18/19 Transcript (Tr.) at p. 195.
[3] Conn. Gen. Stat. §16-50o (2019); NTE Response to Council Interrogatory No. 43 (GHG Program not submitted).
[4] Conn. Gen. Stat. §16-50o requires submission of the lease agreement between the applicant and property owner into the record. The Council has no authority to develop, interpret, modify or enforce the lease agreement. That authority lies with the courts. Compliance with the lease agreement is not an enforceable condition of a Council Certificate or D&M Plan.
[5] *Tilcon Conn, Inc. v. Comm'r of Envtl. Prot.*, 317 Conn. 628 (2015); *Kleen Energy Sys., LLC v. Comm'r of Energy & Envtl. Prot.*, 319 Conn. 367 (2015); *Wheelabrator Lisbon, Inc. v. Dep't of Pub. Util. Control,* 283 Conn. 672 (2007).
[6] *Id.*
[7] *Id.*
[8] *Id.*

summarize allegations of fact and statements of position presented during the evidentiary hearings.[9] It is not an exhibit nor an opportunity to submit new evidence after the evidentiary record closed.[10]

The extent of the evidentiary record related to the GHG Program is as follows:

1. The GHG Program relates to air emissions from the facility.[11]
2. The GHG Program is not included in the air permit issued by DEEP.[12]
3. NTE committed to implement the GHG Program in cooperation with SC.[13]
4. There are no consequences if NTE does not achieve the goal of the GHG Program.[14]
5. Costs and availability of technology to achieve the goal of the GHG Program are unknown.[15]

Petitioners admit that there is no agreement with respect to the GHG Program.[16] Petitioners also admit that DEEP declined to incorporate the GHG Program into the air permit. Yet, despite the absence of the GHG Program from the record and DEEP's decision not to include it in the air permit, Petitioners argue that the Council could impose it as a condition of the Certificate because CGS §16-50p allows the Council to grant a Certificate "upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the Council may deem appropriate."[17] Certainly, this does not include terms, conditions, limitations or modifications subject to the jurisdiction of another administrative agency nor does it include matters that are not part of the evidentiary record. The GHG Program is not an enforceable condition of a Council Certificate.

Petitioners further argue that the Council could impose the GHG Program as a condition of the Development and Management Plan (D&M Plan) citing to *Town of Middlebury v. Connecticut Siting Council.* In that case, the Town of Middlebury submitted a petition for a declaratory ruling to the Council that the D&M Plan submitted for an approved electric generating facility was inconsistent with the Council's final decision in that matter.[18] The court dismissed the appeal and held that "the D&M Plan functions to "fill up the details" in the Council's final decision and ***the D&M Plan cannot provide a substitute for matters not addressed during the application process***."(Emphasis added).[19] The GHG Program is not in the record of this Certificate application proceeding. A D&M Plan is not the subject of a proceeding.[20] A D&M Plan is a condition of a final decision in a proceeding that must be met in order to commence facility construction.[21] The GHG Program is not an enforceable condition of a D&M Plan.

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[9] Council Information Guide to Party and Intervenor Status (attached to Council letters granting Petitioners party status.)
[10] 5/2/19 Tr. at p. 146 ("No new information, no new evidence, no argument and no reply briefs without permission will be considered by the Council.")
[11] 4/18/19 Tr. at pp. 111-112.
[12] 4/18/19 Tr. at pp. 114-115.
[13] Council Finding of Fact (FOF) ¶464 and ¶465; 4/18/19 Tr. at p. 109-110; NTE Response to CSC Interrogatory 35.
[14] 4/18/19 Tr. at p. 114. (By requesting the Council to incorporate the GHG Program into the Certificate, Petitioners appear to be advocating for revocation of the Certificate if NTE does not achieve the goal of the GHG Program.)
[15] 4/18/19 Tr. at pp. 110-114; 229-230; 5/2/19 Tr. at p. 77; DEEP Comment Letter, November 7, 2016.
[16] Noticeably absent from the record of the proceeding and the Joint Petition are any efforts on the part of the Petitioners to enter into an agreement with NTE related to the GHG Program or to participate in the DEEP air permit application process.
[17] In support of this contention, Petitioners list past Council Certificate conditions related to fuel, waste, permitting and construction deadlines. There is no reference to any past Certificate conditions related to **air emissions**.
[18] *Town of Middlebury v. Connecticut Siting Council*, 2002 Conn. Super. LEXIS 610 (Conn. Super. 2002).
[19] *Id.* at *17-18, citing *Town of Westport v. Connecticut Siting Council*, 260 Conn. 266 (2002).
[20] Conn. Gen. Stat. §4-166(4)(2019) ("Contested case" means a proceeding, including licensing, in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after a hearing.)
[21] *Town of Middlebury, supra* note 17; *Town of Westport, supra* note 18; R.C.S.A. §§16-50j-60 to 16-50j-62 (2019).

B. DEEP has jurisdiction over air pollution control in the state.

Pursuant to CGS §22a-170, *et seq.*, DEEP has jurisdiction over air pollution control in the state. Among other powers and duties related to air pollution control, the DEEP Commissioner has a duty to:

1. initiate and supervise programs for air pollution control;
2. initiate and supervise state-wide programs of air pollution control;
3. cooperate with and receive money from any public or private source;
4. adopt, amend, repeal and enforce statutes and regulations; and
5. advise and consult with entities in furtherance of air pollution control goals.[22]

DEEP issued the initial air permit on June 30, 2017.[23] It was modified on March 16, 2018 and further modified on December 10, 2018.[24] Under CGS §22a-174, the DEEP Commissioner may issue an air permit to a new stationary air pollution source in accordance with procedures that include, but are not limited to, publication of notice of the intent to issue a permit, the right to inspect a proposed permit, the opportunity to submit written comments on a proposed permit and the right to a public hearing. Dating back to 2017, there is no record of the Petitioners availing themselves of any of these procedural opportunities relative to the initial air permit or air permit modifications issued by DEEP for the facility.

According to the record, the reason why DEEP declined to incorporate the GHG Program into the air permit is because "it is not the kind of program included in an air permit."[25] In its November 7, 2016 comment letter, DEEP notes that the blanket statement asserting improvement in local or regional air quality from operation of the proposed plant cannot be postulated with absolute certainty.[26] DEEP further notes that while the assertion that the displacement of older, less efficient, higher emitting power plants will lead to improved air quality, this is unknown until ISO-NE evaluates and selects bids for various electric capacity products.[27] DEEP did not reference or attach the GHG Program to its comments. In its April 1, 2019 comment letter, DEEP notes that the NTE facility will operate at a CO2 emissions level as low as any natural gas plant in the northeast and will have one of the lowest PM emissions rates nationally."[28] DEEP did not reference or attach the GHG Program to its comments.

It is clear that the GHG Program is not in the record of this proceeding; the GHG Program relates to air emissions from the facility; the GHG Program is not included in the air permit issued by DEEP; NTE committed to implement the GHG Program in cooperation with SC; there are no consequences if NTE does not achieve the goal of the GHG Program; and costs and availability of technology to achieve the goal of the GHG Program are unknown. Furthermore, in both 2017 and 2019, the record of this Certificate application reflects that the GHG Program is an "air permit issue."[29] DEEP has jurisdiction over air pollution control in the state, DEEP issues air permits and DEEP enforces the provisions of its air permits.

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[22] Conn. Gen. Stat. §22a-171 (2019).
[23] Council FOF ¶265.
[24] *Id.*
[25] 4/18/19 Tr. at pp. 114-115.
[26] DEEP Comment Letter, November 7, 2016.
[27] *Id.*
[28] DEEP Comment Letter, April 1, 2019.
[29] Docket 470, 1/26/17 Tr. at p. 1129 ("Although it's really an air permit issue, we've been looking at what we can do to commit to reducing our greenhouse gas emissions over time."); 4/18/19 Tr. at pp. 111-112 (The GHG Program relates to air emissions from the facility.)

II. NTE's Certificate is not conditioned upon NTE's retention of its CSO from ISO.

Petitioners request the Council to clarify that the Certificate is conditioned upon NTE's retention of its CSO from ISO. The Joint Petition notes that a CSO is an essential ingredient of establishing the "need" for a facility. However, it is certainly not the only ingredient and the Council did not "condition" the Certificate on NTE's retention of its CSO. The statutory standard for an electric generating facility is whether or not there is a "public benefit." A public benefit exists when a facility is necessary for the reliability of the electric power supply of the state or for the development of a competitive market for electricity.[30] Public benefit exists if the Council finds and determines a proposed facility contributes to forecasted generating capacity requirements, reduces dependence on imported energy resources, diversifies the state energy supply mix and enhances reliability.[31] Electric system reliability is comprised of 3 major components: winter energy concerns, resource adequacy and transmission security.[32] In consideration of all of the above-mentioned factors, in its June 7, 2019 final decision, the Council found and determined a public benefit exists for the NTE facility.

In support of its request for clarification, Petitioners attach June 6, 2019 correspondence from FERC to ISO that requests additional information on the NTE facility within 30 days. This correspondence is analogous to an incomplete letter issued by the Council in response to the submission of an application or a petition that lacks sufficient detail to enable the Council to process the filing and requests additional information within 30 days. However, Petitioners claim that the FERC correspondence amounts to "new evidence" that arose on the day the final decision was rendered and provides "good cause" for reconsideration as it raises questions regarding the future status of NTE's CSO and the broader auction results. This is incorrect.

During cross examination of NTE at the May 2, 2019 evidentiary hearing, Petitioners referenced the April 12, 2019 motion to intervene and protest filed with FERC by existing capacity suppliers to ensure whether the FCA #13 results are just and reasonable.[33] NTE responded with a detailed explanation of the 3-4 month ISO Internal Market Monitor (IMM) approval process required for verification of NTE's schedule and price.[34] The record is clear that ISO submitted its FCA #13 results to FERC on or about February 28, 2019, and FERC's review of the FCA #13 results filing is ongoing.[35] This is not new evidence nor does it provide good cause for reconsideration. The record is also clear that if the CSO is subsequently terminated by ISO, NTE would not construct the facility.[36] NTE's Certificate is not conditioned upon NTE's retention of its CSO from ISO.

III. CONCLUSION

Pursuant to CGS §4-181a(a), with regard to the request for reconsideration of the Council's final decision to omit NTE's GHG Program as an enforceable condition of the Certificate, based on the reasons articulated in Section I above related to the absence of the GHG Program from the evidentiary record of the proceeding and DEEP's jurisdiction over air pollution control in the state, staff recommends the Council deny the request for reconsideration.

Pursuant to CGS §4-181a(a), with regard to the request for clarification that NTE's Certificate is conditioned on NTE's retention of its CSO from ISO, based on the reasons articulated in Section II above related to the legal standards for finding and determining a public benefit for a facility and the ongoing IMM approval process for NTE's schedule and price, staff recommends the Council deny the request for clarification.

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[30] Conn. Gen. Stat. §16-50p(c) (2019).
[31] *Preston v. Connecticut Siting Council*, 20 Conn. App. 474 (1990); *Preston v. Connecticut Siting Council*, 21 Conn. App. 85 (1990).
[32] Council FOF ¶¶41-109; Council Opinion at pp. 6-9.
[33] 5/2/19 Tr. at pp. 78-79.
[34] *Id.*
[35] Council FOF ¶93.
[36] Council FOF ¶94.