STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

Petition of Plainfield Renewable Energy LLC for a Declaratory Ruling that No Certificate of Environmental Compatibility and Public Need Is Required for the Construction, Maintenance, and Operation of a 37.5 MW Wood Biomass Staged Gasification Generating Project in Plainfield, Connecticut	)	Petition 784MR
	)	August 14, 2008

PLAINFIELD RENEWABLE ENERGY LLC's GENERAL OBJECTION TO WITNESS LIST, PRE-FILED TESTIMONY AND EXHIBITS FOR PRELIMINARY HEARING ON MOTION TO REOPEN

Plainfield Renewable Energy LLC ("PRE") hereby submits a general objection to the witness list, pre-filed testimony, and exhibits submitted by Friends of the Quinebaug River ("FQR") on August 7, 2008. None of FQR's materials are relevant to the sole issue before the Connecticut Siting Council (the "Council"), namely whether there is ***new evidence of changed conditions*** that would require further proceedings to examine the Council's original June 7, 2007 declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance, and operation of a 37.5 megawatt wood biomass fueled gasification power plant (the "Project") in Plainfield, Connecticut.[1]

I. Procedural Posture and Standard of Review

The August 14, 2008 hearing on FQR's May 20, 2008 Motion to Reopen is limited to the determination of ***whether*** to open and reconsider the Council's earlier final decision on Petition 784, rendered on June 7, 2007. The Council's notice of this public hearing could not have been more clear:

[1] PRE also reiterates and incorporates by reference its opposition to the applicability of Connecticut General Statues § 4-181a(b) to the reconsideration of a petition for a declaratory ruling, which is not a contested case as defined by Conn. Gen. Stat. § 4-166(2). See Response of PRE to Motion of FQR to Reopen Hearing, dated June 19, 2008, at 5-8. See also Summit Hydropower Partnership v. Commissioner of Environmental Protection, 226 Conn. 792, 811 (interpreting § 4-166(2) as "manifesting a legislative intention to limit contested case status to proceedings in which an agency is ***required by statute*** to provide an opportunity for a hearing to determine a party's legal rights or privileges") (emphasis added).

> This hearing is being held pursuant to Connecticut General Statutes § 4-181a(b) to ***hear evidence as to whether conditions have changed such that the Council should conduct further proceedings*** to examine whether its original decision should be reversed or modified. Under Connecticut General Statutes § 4-181a(b), the Council must first consider whether changed conditions exist, and, if so, whether such conditions constitute a basis sufficient to hold further proceedings to consider whether such changes, if any, justify reversing or otherwise modifying the Council's original decision. (See the court cases of Town of Fairfield v. Connecticut Siting Council, 238 Conn. 361 (1996), and Sielman v. Connecticut Siting Council, 2004 WL 203046 (2004) for guidance as to the nature of this hearing.).

Notice of Public Hearing on Petition 784MR, dated July 14, 2008 (emphasis added). Thus, this is not a hearing on the merits of the Council's declaratory ruling on Petition 784; rather, this is a hearing to assist the Council in ascertaining "whether there [is] sufficient reason to entertain reconsideration of its prior decision." Town of Fairfield, 238 Conn. at 370.[2]

FQR has the burden to show changed conditions that would justify a further hearing on whether to reopen Petition 784. See Sielman, 2004 WL 203046, at *3. This is a heavy burden, indeed. It is well established that courts and agencies favor finality in judicial decisions. See id., 2004 WL 203046 at *5; see also Meinket v. Levinson, 193 Conn. 110, 113 (1984). Reopening a previously adjudicated administrative case is thus a drastic remedy, not favored by the Council and courts. Finally, seeking reopening under § 4-181a(b) is a more drastic remedy than § 4-181a(a). See Sielman, 2004 WL 203046 at *5 ("[A]n agency's ability to reconsider any of its decisions under § 4-181a(b) is more restricted than when requested under § 4-181a(a) . . . .").

[2] PRE notes that the Council was not required to hold a hearing on FQR's motion to reopen under § 4-181a(b). See Sielman, 2004 WL 203046 at *3 ("The court is aware that the CSC could have acted on plaintiffs' application [to reopen under § 4-181a(b)] without a hearing and simply denied the application."). Moreover, the fact that the Council decided to hold a public hearing does not turn this into a contested case, nor does it create a right to appeal. See Town of Fairfield, 238 Conn. at 373; Sielman, 2004 WL 203046, at *4; see also Ordon v. State Dept. of Public Health Bureau of Regulatory Affairs, 2000 WL 33981684, at *2 (Conn. Super. Ct. 2000).

II. The Council's Own Rulings Limit What Constitutes Evidence of Changed Conditions

Section 4-181a(b) does not define the term "changed conditions". However, prior decisions of the Council after preliminary hearings on motions to reopen under § 4-181a(b) make clear that there are stringent limitations on what constitutes evidence of "changed conditions".

In the decision on the Motion to Reopen Docket No. 141 (the decision underlying Town of Fairfield v. Connecticut Siting Council, supra), the Council established the general standard for evidence of changed conditions as (1) "new information or facts ***that were not available at the time*** that would compel [the Council] to reopen th[e] case"; (2) "unknown or unforeseen events or any relevant circumstances that would compel [the Council] to reopen th[e] case"; or (3) "scientific or technological breakthroughs that would have altered [the Council's] analysis". Decision on Motion to Reopen Docket No. 141, Dated July 30, 1993, at 6 (emphasis added) (attached as Exhibit A). See also Town of Fairfield, 238 Conn. at 372 (quoting Council's memorandum of decision not to reopen Docket No. 141).[3]

As is particularly relevant to FQR's motion to reopen Petition 784, the Council also explicitly stated that "claims that the [prior] proceeding was ***inadequately noticed . . . is not a changed condition*** that would justify reopening of the proceeding." Decision on Motion to Reopen Docket No. 141, Dated July 30, 1993, at 6 (emphasis added).

In the Decision on the Motion to Reopen Docket No. 198 (the decision underlying Sielman v. Connecticut Siting Council, supra), the Council further elaborated that evidence of changed conditions does not include "issues already covered" in the underlying docket and

[3] One example of evidence of changed conditions under § 4-181a(b) that might justify reopening a decision and modifying the result would be a late-breaking ruling of the Connecticut Supreme Court that fundamentally changed the relevant law and demanded a completely opposite result. See Department of Trans. v. Freedom of Information Com'n, 2001 WL 1734436, at *2 (Conn. Super. Ct. 2001). Of course, such a changed condition (or anything even remotely similar to it) is not present in this case.

decision. Reconsideration Opinion on Motion to Reopen Docket No. 198, Dated Sept. 5, 2002 (attached as Exhibit B).[4]

Thus, according to the Council, evidence of "changed conditions" must be new information or facts that (1) ***were not available*** at the time of the original hearing and decision on Petition 784; (2) ***do not concern issues of public notice***; (3) ***do not relate to an issue already covered*** in the underlying decision on Petition 784; and (4) are so ***material*** that it would ***compel*** reopening the original case. None of FQR's proffered evidence meets this stringent standard.

III. Other Analogous Descriptions of Evidence of Changed Conditions

Even though these four substantial limitations placed on evidence of changed conditions are perfectly clear from the Council's prior rulings, PRE notes that the Council's four limitations also find substantial support in other portions of § 4-181a, analogous case law on changed conditions in workers' compensation cases, and analogous case law on changed conditions with respect to motions to reopen judicial judgments.

A. New Evidence Standard Under § 4-181a(a)(1)(B)

Though FQR's petition is being considered under § 4-181a(b), it is generally appropriate to look to § 4-181a(a) for guidance when construing terms in § 4-181a(b). See Town of Fairfield, 238 Conn. at 371 ("An agency's preliminary decision whether to entertain a petition under § 4-181a(b) is, for present purposes, in all material respects identical to an agency's preliminary decision whether to entertain a petition for reconsideration under § 4-181a(a)."). One possible

[4] Docket No. 198 concerned the approval of a cell tower in the Town of Salem. For the hearing on the motion to reopen Docket No. 198, the Council explicitly limited the evidence presented to evidence regarding (1) the approval of a new cell tower in the neighboring town of East Haddam, and (2) notification of another proposed cell tower in East Haddam. See Reconsideration Findings of Fact for Motion to Reopen Docket No. 198 at ¶ 5. The Council refused to hear evidence about characteristics of neighborhood of the Town of Salem surrounding the cell tower at issue in underlying docket, because this general issue was already covered in the original proceedings on Docket No. 198, and thus was not evidence of changed conditions. See id.

ground for reconsideration of a decision under § 4-181a(a) occurs when "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 . . . ." Conn. Gen. Stat. § 4-181a(a)(1)(B) (emphasis added). In other words, new evidence under § 4-181a(a)(1)(B) is only evidence that is so contrary to the prior evidence before the Council on the underlying petition, such that the new evidence would materially affect the underlying merits of the case and support reconsideration. Therefore, for consistency with § 4-181a(a)(1)(B), new evidence of changed conditions under § 4-181a(b) must also ***materially affect the merits of the case.***

B. Changed Conditions Standard Under Workers' Compensation

Courts have clearly established what constitutes "changed conditions" in the analogous context of the portion of the workers' compensation statute that allows reopening a workers' compensation judgment or settlement.[5] As succinctly explained by the Connecticut Supreme Court in an early workers' compensation case, "changed conditions of fact . . . refer to conditions which ***are different from those existent when the agreement or award was made.***" Gonirenki v. American Steel & Wire Co., 137 A. 26, 28 (Conn. 1927) (emphasis added). As elaborated by Tutsky v. YMCA of Greenwich, 28 Conn. App. 536 (1992):

> The test by which the commissioner determines whether to open a claim is whether the new evidence [is] sufficient to show that an ***injustice had been done by his award and that a different result would probably be reached on a new hearing***. . . . [A] claimant seeking to open a workers' compensation proceeding must establish the following by a preponderance of the evidence: (1) the ***proffered***

[5] The Workers' Compensation Statute states in relevant part:

> Any award of, or voluntary agreement concerning, [workers'] compensation . . . shall be subject to modification . . . upon the request of either party . . . whenever it appears to the compensation commissioner . . . that ***changed conditions of fact have arisen*** which necessitate a change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court.

Conn. Gen. Stat. § 31-315 (emphasis added).

> ***evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence***; (2) it would be ***material*** on a new trial; (3) it is not merely cumulative; and (4) it is likely to produce a different result in a new trial. . . . Importantly, it is the ***claimant who bears the burden of showing that there is new evidence that is likely to produce a different result.***

Id. at 541-43 (emphasis added) (internal quotation marks and citations omitted). Thus, in the analogous workers compensation context, changed conditions (1) are something different from what existed at the time of the original decision; (2) can only be based on material, non-cumulative evidence that could not have been discovered earlier by due diligence; and (3) are likely to produce a different result if the hearing were reopened.

C. New Evidence Standard on Motion to Reopen a Judgment

Courts have also clearly established what constitutes "new evidence" in the context of motions to reopen or reconsider judgments. As recently explained by the Connecticut Supreme Court, in Chapman Lumber, Inc. v. Tager, 288 Conn. 69, --- A.2d ----, 2008 WL 2727385 (Conn. July 22, 2008):

> A motion to open in order to permit a party to present further evidence ***need not be granted where the evidence offered is not likely to affect the verdict.*** Newly-discovered evidence which is ***merely cumulative***, or which impeaches the . . . credibility of a witness, will not suffice ordinarily to grant a new trial, and ***never unless it appears reasonably certain that injustice has been done*** in the judgment rendered, and that the result of a new trial will probably be different.

Chapman Lumber, 2008 WL 2727385 at *15 (emphasis added) (internal quotation marks and citations omitted. See also Pass v. Pass, 152 Conn. 508, 511-12 (Conn. 1963) ("The evidence must, in fact, be ***newly discovered, material to the issue*** on a new trial, such that ***it could not have been discovered and produced on the former trial by the exercise of due diligence, not merely cumulative*** and ***likely to produce a different result.***") (emphasis added). Therefore, the Connecticut Supreme Court has instructed that the extraordinary remedy of reopening a judgment based on new evidence will only occur if it appears reasonably certain that (1) injustice

has been done; (2) the proffered evidence could not have been discovered earlier by the exercise of due diligence; (3) the proffered evidence is not cumulative; (4) and the proffered evidence would have likely changed the original outcome.

V. Conclusion

For all the reasons stated above, PRE respectfully requests that any of FQR's witnesses, pre-filed testimony, and exhibits that do not constitute new evidence of changed conditions based on the factors and limitations described above be excluded from the public hearing on August 14, 2008.

Respectfully submitted,

PLAINFIELD RENEWABLE ENERGY LLC

By: _____

Bruce L. McDermott
Robert J. Klee
Wiggin and Dana LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
Telephone: (203) 498-4400
Telefax: (203) 782-2889

17960\1\2093510.3