STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

PETITION NO. 1371 – THE CONNECTICUT LIGHT AND POWER COMPANY D/B/A EVERSOURCE ENERGY DECLARATORY RULING, PURSUANT TO CONNECTICUT GENERAL STATUTES §4-176 AND §16-50k, FOR THE PROPOSED 667 LINE REBUILD PROJECT CONSISTING OF THE REPLACEMENT AND RECONDUCTORING OF APPROXIMATELY 6.1 MILES OF ITS EXISTING NO. 667 69-KILOVOLT (kV) ELECTRIC TRANSMISSION LINE STRUCTURES WITHIN EXISTING EVERSOURCE ELECTRIC TRANSMISSION LINE RIGHT-OF-WAY BETWEEN FALLS VILLAGE SUBSTATION IN FALLS VILLAGE (CANAAN) AND SALISBURY SUBSTATION IN SALISBURY, CONNECTICUT, TRAVERSING CANAAN, SHARON AND SALISBURY, AND RELATED SUBSTATION AND ELECTRIC TRANSMISSION LINE STRUCTURE IMPROVEMENTS.

PETITION NO. 1371

JULY 23, 2020

MEMORANDUM OF THE CONNECTICUT LIGHT AND POWER COMPANY D/B/A EVERSOURCE ENERGY IN OPPOSITION TO A MOTION TO REOPEN AND MODIFY THE COUNCIL'S JUNE 7, 2019 DECLARATORY RULING RE: PETITION NO. 1371

The Connecticut Light and Power Company d/b/a Eversource Energy ("Eversource") hereby respectfully submits this memorandum in opposition to the Motion to Reopen and Modify the Council's June 7, 2019 Declaratory Ruling Re: Petition No. 1371 filed by Sandra Boynton, Trustee (the "Motion").[1] As discussed more fully below, Eversource asserts that the Motion of Ms. Boynton, Trustee ("Boynton Trustee"), filed more than a year after the Council's decision was rendered, is an attempt to use the Motion as a mechanism to force Eversource into renegotiating its valid easement rights, and/or limiting the exercise of its rights, granted to one of Eversource's predecessor companies in 1926 and now held by Eversource. Based on the discussion herein, reopening the Council's proceeding is not warranted under governing law and among other consequences, would be detrimental to Eversource's customers served by the existing 667 Line, especially in light of the degraded condition of structures, conductors, and shield

[1] The Motion was submitted to the Council on June 23, 2020 as an "Application for Party Status and to Reverse or Modify Declaratory Ruling" of Sandra Boynton, Trustee, by David E. Dobin, Esq. of Cohen and Wolf, P.C.

wires along the 667 Line that threaten the line's operation and the reliability of the associated electric system.

In summary, the Motion is procedurally defective, lacks merit, creates opportunities to undermine the Council's orderly decision-making process and threatens the timely implementation of a critical reliability project.

Introduction

The Connecticut Legislature enacted the Public Utility Environmental Standards Act ("PUESA") with the purpose, in relevant part, "to assure the welfare and protection of the people of the state". See Connecticut General Statutes ("C.G.S.") Sec. 16-50g. PUESA authorizes the Council to evaluate the environmental effects of a proposed project and to balance the need for that project against those effects. Under C.G.S. Sec. 16-50k, the Council is authorized to determine that a project would have no substantial adverse environmental effect, such that a certificate for such project is not required. In this case, such a determination was made by the Council after careful consideration, as reflected in the Staff Report and the Council's decision. Based on the discussion herein, including the caselaw cited, Eversource respectfully requests that the Council deny the Motion without holding a hearing because there is no additional evidence that would alter the legal insufficiency of the Motion on its face, there is no merit to any of the allegations in the Motion and allowing reopening here would result in undesirable consequences that could jeopardize the timely implementation of the Council's decisions, thereby delaying needed reliability improvements and adversely impacting service to customers.

Procedural Defects Associated with Boynton Trustee's Motion

1. Absence of a Showing of a Changed Condition

C.G.S. Sec. 4-181a(b) requires a showing of changed conditions to support the reopening of the final decision of an administrative agency to consider reversing or modifying that decision. The Motion contains "no showing" whatsoever that is credible, only allegations based on defective affidavits (described below). For example, the Motion fails to include any credible third party reports from

qualified professionals as to the potential for any substantial adverse environmental effect that the Council overlooked in its decision-making process.

Significantly, the Motion does not allege a legally valid changed condition, namely one recognized by the Connecticut courts or prior rulings of the Council. Examples of recognized changed conditions include an increase in population and demand for electricity, additional environmental challenges, and the introduction of renewable resources into the electric grid; See Town of Middlebury v. Connecticut Siting Council, No. HHBCV156029869S, 2016 WL 490298, at *1 (Conn. Super. Ct. Jan. 12, 2016), aff'd 326 Conn. 40, 161 A.3d 537 (2017) and the passage of a new legislative act establishing a new defense in pollution cases; See Starr v. Commissioner of Environmental Protection, 236 Conn. 722, 729 (1996). There are no analogous circumstances, compelling interpretations or actual facts to support a finding of a similar type of changed condition here.

Furthermore, in 1996, the Council found that where changed conditions did not exist, there was no basis to reopen its decision, which finding was upheld by the Connecticut Supreme Court. The Council's finding provides important guidance on this threshold:

> We know of **no new information or facts that were not available at that time that would compel us to reopen** this case. We have **not identified any unknown or unforeseen events or any relevant circumstances that would compel us to reopen** this case. There have been **no scientific or technological breakthroughs that would have altered our analysis**. Our **analysis remains valid** today **and consistent with State law and State policy**, including policy from the State Department of Public Health and Addiction Services and the Department of Environmental Protection. [emphasis added]

Town of Fairfield v. Connecticut Siting Council, 238 Conn. 361, 366-67 (1996).

Similarly, the Superior Court upheld the Council's determination of no changed conditions after it considered whether "the recent approval of a proposed tower in East Haddam for Nextel ... [on] Honey Hill Road and notification to East Haddam of a proposed telecommunications tower on Mount Parnassus Road are a change in conditions", which plaintiff claimed eliminated the need for an approved Cellco tower in nearby Salem. The Court found that "the CSC had substantial evidence before it from which it could make the findings ... and conclude that neither the Mount Parnassus Road tower nor the Honey Hill

tower demonstrated changed conditions." See Sielman v. Connecticut Siting Council, No. CV020517272S, 2004 WL 203046, at *2, *7 (Conn. Super. Ct. Jan. 15, 2004).

Significantly, the Motion does not present any evidence that unknown or unforeseen events have occurred. The conditions presented in Eversource's petition are exactly the same, namely the work presented has not been changed by Eversource. Therefore, a mere allegation of the non-receipt of a notice of the filing of a petition does not qualify as a changed condition. Because the Motion fails to satisfy C.G.S. Sec. 4-181a(b), it can be denied by the Council solely on that ground, although several other grounds for denial exist.

2. Absence of Extraordinary Circumstances

Further, even if a changed condition were to exist, petitions to reopen on the basis of changed conditions "are to be granted only in the most extraordinary circumstances." Farmers' Export Co. v. United States, 758 F.2d 733, 737 (D.C. Cir. 1985). The Motion does not present any evidence that relevant circumstances have changed in some extraordinary way. As such, the Motion would only serve to open the door to disgruntled affected property owners claiming that notice of a petition was not received, thereby undermining the Council's orderly decision-making process. Finally, the Record shows that the Council's decision was sound and remains sound, now one year later.

Absence of Merit of the Motion and Affidavits

The Motion basically repeats the contents of the defective affidavits and contradicts the Record and the Council's analysis. The Record contains an Affidavit from Andrew Lord of Eversource (the "Lord Affidavit"), which is included in Attachment G immediately after the letter addressed to the neighbors. The Lord Affidavit provides sufficient evidence to support the conclusion that such letter to the neighbors was the notice that Mr. Lord referred to. Furthermore, Mr. Lord executed an affidavit dated July 20, 2020 with attachments, submitted simultaneously with this Memorandum, to clarify the factual circumstances surrounding the notice to Boynton Trustee, in response to the claims made by or on behalf of Boynton Trustee.

In contrast, the affidavits of Mr. Devin McEwan and of Ms. Boynton (collectively the "Affidavits") provided with the Motion are legally defective as containing inadmissible hearsay, and thus should be disregarded as information outside of the affiant's personal knowledge. Specifically, Mr. McEwan's affidavit contains numerous references to "my mother" and Ms. Boynton's affidavit contains numerous references to "my son". "[I]f an affidavit contains inadmissible evidence it will be disregarded." Flagstar Bank, FSB v. Kepple, 2012 WL 4901085, at *2 (citing 2830 Whitney Avenue Corp. v. Heritage Canal Development Associates, Inc., 33 Conn. App. 563, 568-69 (1994)).

Furthermore, Mr. McEwan admits that he is not the owner of any abutting property; rather, he states that he is a resident. The Motion does not cite any governing law or regulations that require notice to a "resident," and Eversource is unaware of any such requirement.

Neither the Motion nor the affidavit of Mr. McEwan cites any authority that Mr. McEwan has to act on behalf of Ms. Boynton, including to open mail addressed to her. Without such authority, the latter activity would violate U.S. Postal Regulations. 18 United States Code Section 1702.

Thus, Mr. McEwan's affidavit should be disregarded in its entirety by the Council as irrelevant and wholly lacking in any probative value as to whether the Petition 1371 proceeding should be reopened or a hearing held on such request.

Ms. Boynton's affidavit alleges that she did not receive notice. However, it does not state that she was otherwise unaware of the project. As demonstrated by the facts set forth in affidavits from Charles B. Burnham (the "Burnham Affidavit") and Ervin Qyra (the "Qyra Affidavit"), both of Eversource, submitted simultaneously with this Memorandum, Eversource and/or its representatives have been conducting extensive outreach activities concerning the planned 667 Line work with Ms. Boynton and/or Mr. McEwan, beginning long before the filing of Eversource's petition on May 8, **2019**. In fact, Eversource's outreach activities began with the door hanger placed at 212 Dugway Road on September 17, **2018**, over 7 months prior to its filing with the Council. Discussions continued, including on October 25, 2019 at 212 Dugway Road with Mr. McEwan and Ms. Boynton, as memorialized in a letter dated February 5, 2020 from Mr. Qyra to Mrs. Boynton, attached to the Qyra Affidavit, which includes several

concessions by Eversource to address their concerns. The Motion including the Affidavits make it clear that Ms. Boynton was unhappy with negotiations with Eversource, and in particular, the planned tree removals within Eversource's established right-of-way that are necessary to provide safe work conditions and to promote the reliable operation of the new electric facilities. The negotiations between the holder of easement rights and a current landowner are well beyond the jurisdiction of the Council and thus cannot legally support the relief the Motion seeks.

In fact, the February letter attached to the Qyra Affidavit makes it very clear that Ms. Boynton has little interest in any environmental effects that might occur from Eversource's planned facilities. The February letter reflects that Ms. Boynton sought to have Eversource use an alternative access across another one of her contiguous properties, the property on Brinton Hill Road. However, Eversource politely rejected that approach, citing more significant temporary wetland impacts, more tree removals, new constructability challenges, including spanning/bridging a stream crossing, as well as the triggering of additional permitting requirements, significantly increased costs and the effect on the project schedule.

Absence of Merit of the Supplemental Filing by Boynton Trustee

Perhaps recognizing the insufficiency of the Motion on its face, Boynton Trustee filed a second affidavit of Mr. McEwan dated July 6, 2020 ("McEwan Second Affidavit"). For the reasons previously discussed as to Mr. McEwan's earlier affidavit, the McEwan Second Affidavit is similarly immaterial, based on hearsay and should be disregarded.

In addition, the McEwan Second Affidavit includes as part of his purportedly "personal knowledge of the facts set forth in this Affidavit" information he allegedly received from Eversource, along with information and a "report" from Mr. Koneazny, which was attached as Exhibit 1 to the McEwan Second Affidavit. It is impossible for Mr. McEwan to have the personal knowledge he claims. As to Exhibit 1, the "report" falls far short of any credible factual evidence. There is no demonstration that Mr. Koneazny, who is identified as an arborist, has any familiarity or expertise with the numerous regulations, standards, requirements and safety codes that govern the operation of electric facilities. Further, as explained herein, Eversource's easement rights vest decision-making as to any interference of

trees and brush with Eversource's lines or their operation solely in Eversource's judgment. Finally, as with McEwan's initial affidavit, the McEwan Second Affidavit, along with Exhibit 1, should be entirely disregarded as containing inadmissible evidence and otherwise lacking in merit.

Note that the Motion and the McEwan Second Affidavit represent two bites at the apple to try and unravel the Council's decision. Boynton Trustee should not be allowed further opportunities to submit piece-meal filings that are legally insufficient.

Absence of Any Valid Evidence of a Substantial Adverse Environmental Effect

The main allegation of Boynton Trustee as to an environmental effect from Eversource's planned 667 Line work appears to be the trees slated for removal by Eversource that in her opinion are "not tall". That opinion cannot support the finding of a potential substantial adverse environmental effect that should be considered if the Council's decision in the Petition 1371 proceeding were to be reopened. There is absolutely no evidence of any potential effects on wetlands, watercourses, vernal pools or threatened and endangered species, which are typically the type of effects that the Council closely safeguards.

Eversource's Compliance with Notice Requirements

R.C.S.A. Sec. 16-50j-40(a), in relevant part, requires that before submitting a petition to the Council, the petitioner must provide notice to the owners of property abutting the proposed project site, each person appearing of record as an owner of property where the proposed project facilities are to be located and the appropriate municipal officials and government agencies. This section further requires that "Proof of such notice shall be submitted with the petition for declaratory ruling." This section does not contain any further elaboration.

On March 16, 2015, Attorney Bachman, in her capacity as Acting Executive Director of the Council, provided a Memorandum entitled "Petitions for Declaratory Rulings – Notice Requirements," which elaborated on the notice requirements for petitions ("2015 Council Memorandum"). The 2015 Council Memorandum states, in relevant part:

> Pursuant to R.C.S.A. § 16-50j-40(a), "Notice to other persons," the Connecticut Siting Council requests that an abutters map, in addition to the list of abutters notified, be submitted with all petitions for declaratory rulings.

As is customary with public utility company petition filings, Eversource's Petition included, as proof of the required notice, the Lord Affidavit, along with the abutters map (in accordance with the 2015 Council Memorandum) and a copy of the letter to abutters (See Petition Attachments A and G). Note that Map Sheet 11 of Attachment A to the Petition includes the Boynton Trustee properties. Despite the assertions in the Motion, Eversource was not required to submit to the Council any tracking information.

Based on the foregoing, Eversource fully complied with the notice requirements. Accordingly, on the basis of such submittal, the Staff Report properly noted that "[o]n May 7, 2019, Eversource provided abutting and underlying property owners with written notice of the Petition filing" (See Staff Report at 5).

Effect of the Absence of Notice of a Filing

Assuming, for the sake of argument only, that for some reason Ms. Boynton did not receive Eversource's Notice of its filing of the Petition with the Council or failed to open/read the notice when received, the absence of such notice, even without her actual notice of Eversource's project and planned work (which is not the case here), would not invalidate the Council's action. Connecticut case law does not recognize the notice here as a due process violation or petition process fatal flaw.

In Mobley v. Metro Mobile CTS of Fairfield County, Inc., 216 Conn. 1, 9-10 (1990), the Connecticut Supreme Court held that there was not a due process right to notice of a prehearing application:

> [T]he plaintiffs' collateral attack on the Council's action could only succeed if the Council lacked subject matter jurisdiction because the plaintiffs were deprived of some notice granted them by the principles of due process of law. The purpose of such constitutional notice 'is to advise all affected parties of their opportunity to be heard and to be apprised of the relief sought.' That required notice, however, has traditionally been held to apply to notice of the hearing. It does not extend to notice of a prehearing application as well." [internal citations omitted]

The Court concluded that "the mere fact that the plaintiffs were abutters, as has been assumed, gave them no significant interest protected by the due process clause and did not entitle them to more than published notice of the hearing." Id., at 10-11 (citing Fusco v. State, 815 F.2d 201 (2d Cir.1987)).

See also City of Torrington v. Connecticut Siting Council, No. CV 90 0371550 S, 1991 WL 188815, at *2 (Conn. Super. Ct. Sept. 12, 1991), in which the court held that a defect in personal notice would not deprive an agency of subject matter jurisdiction. "The only notice of constitutional dimension is notice of the hearing, not a notice of the filing of an application for a Certificate." The logic of these decisions applies equally to a petition proceeding because a hearing is not required.

Eversource's Communications to Boynton Trustee and McEwan Provided Actual Notice of the Project

The purpose of the requirement for a petitioner to provide notice is to alert underlying and abutting landowners of a proposed project in the vicinity of their property. In this case, Eversource conducted outreach activities beginning in September of 2018 by leaving a door hanger at Boynton Trustee's property located at 212 Dugway Road. See the door hanger attached to the Burnham Affidavit. The door hanger mentioned the proposed 667 Line Upgrade Project and included contact information for Christine Jones, who serves as an outreach representative on behalf of Eversource. Such outreach activities continued in October of 2018, April and May of 2019, October and November of 2019 and from February 2020 until the present and included direct conversations with both Mr. McEwan and Ms. Boynton. See the table attached to the Burnham Affidavit.

Therefore, even if Ms. Boynton did not receive or open/read the notice that Eversource sent, she and Mr. McEwan were well aware of the 667 Line Rebuild Project and the proposed activities on the Boynton Trustee properties.

Eversource's Vested Rights

In reliance on the Council's ruling on the Petition, on June 22, 2020, Eversource commenced civil construction of the 667 Line Rebuild Project, which is critical to restore reliability to the transmission system served by the 667 Line. Eversource has invested over $1.2 million dollars on that construction, costs that will ultimately be borne by Eversource's customers in their electric rates. Generally, when a

permittee has substantially constructed an improvement in reliance on a permit, it acquires a vested right in that permit that cannot be affected by further administrative action. See Marmah v. Town of Greenwich, 176 Conn. 116, 121 (1978). That principle should apply here to support the Council's denial of the Motion, without a hearing.

Consistent with this principle, note that the Council's enabling legislation restricts the Council's authority to amend a Certificate after site preparation or construction, as well as precludes an amendment once the D&M Plan is approved, except on the application of the holder of the certificate. See C.G.S. Sec. 16-50*l*(d). There is no reason not to apply this principle to a project that receives a favorable declaratory ruling.

Eversource's 1926 Easement Rights

As noted earlier, the efforts of Boynton Trustee appear to be motivated by her dissatisfaction with Eversource's existing easement rights. Eversource is the current holder of easement rights granted over 90 years ago over property then owned by Hezekiah Goodwin, pursuant to an instrument dated March 29, 1926 and recorded in Volume 52, Page 115 of the Salisbury Land Records ("Eversource's 1926 Rights"). Those rights apply to the three properties now owned by Boynton Trustee. Indeed, Ms. Boynton was well aware that Eversource's transmission line runs through her three properties, as reflected in the Motion.

As set forth in the certified copy of Eversource's 1926 Rights, submitted simultaneously with this Memorandum, Eversource has the right "at any time and all times to trim or remove ... such trees and underbrush or other obstructions upon or adjacent to the land ... as in the judgment of the Grantee [Eversource] would interfere with or endanger said [its] line or lines or the operation thereof". Accordingly, Eversource has the right to exercise Eversource's 1926 Easement Rights, *even in the absence of a project subject to the Council's jurisdiction*. Ms. Boynton's rights as a landowner are subject to Eversource's 1926 Rights.

The Council's Decision is Sound

The Council's Decision on Petition 1371 reflects the Council's consideration of Eversource's Petition based on the documents submitted and a conclusion that the 667 Line Rebuild Project would not

have a substantial adverse environmental effect. The Staff Report carefully analyzed the Project details including the environmental considerations.

Furthermore, the Council's decision was rendered more than 12 months before the filing of the Motion. Allowing reopening of the Council's decision would threaten the finality of the Council's decisions. The rationale for finality has been explained by the Connecticut Appellate Court as follows:

> The **law aims to invest judicial transactions with the utmost permanency consistent with justice** .... Public policy requests [requires] that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. (Citations omitted; internal quotation marks omitted; emphasis added) Gennarini Construction Co. v. Messina Painting & Decorating Co., 15 Conn. App. 504, 512 (1988).

Eversource further asserts that reopening the Council's Petition 1371 proceeding based on the Motion, the Affidavits and the McEwan Second Affidavit would lead to one or more of the following detrimental consequences:

1. a wasteful use of the Council's time and resources given that the Council staff conducted a comprehensive review of potential environmental effects from the project;
2. an unnecessary cost to Eversource's electric customers who ultimately bear the costs of this type of project in their electric rates;
3. a delay in implementing much-needed transmission system reliability upgrades;
4. an undesirable precedent, if a defective affidavit or multiple ones by an affected landowner or individuals who are not required to receive notice is/are sufficient to call into question the Council's reasoned decision; and
5. a validation of a backdoor avenue to entangle an administrative agency in an attempt to interfere with a public utility company's exercise of legitimately granted easement rights.

These consequences provide further support for the denial of the Motion, without the holding of a hearing by the Council.

Conclusion

In summary, Eversource respectfully requests that the Council deny the Motion, without holding a hearing, for the following reasons:

- There is no showing of a changed condition, along with any extraordinary circumstance warranting reopening;
- The Motion and Affidavits are legally insufficient and fail to identify any potential substantial adverse environmental effect subject to the Council's jurisdiction;

- There is evidence of Eversource's compliance with the notice requirements;
- Absence of a notice in a petition proceeding does not invalidate the Council's decision;
- The purpose of the notice was accomplished with outreach activities conducted directly with Ms. Boynton and Mr. McEwan that began in late 2018 and continue;
- Eversource has vested rights in the Council's decision under law by virtue of the construction activities and its financial investment;
- Eversource's 1926 Rights authorize tree removal within and adjacent to its right-of-way; and
- Reopening under the circumstances presented here would have the potential to waste the Council's resources, increase costs to Eversource's customers, delay a critical reliability project, create an undesirable precedent for unhappy landowners to allege a lack of receipt of notice and legitimize a backdoor path to contest validly-granted easement rights.

As described herein, several of these reasons standing alone would be sufficient to support the Council's denial of the Motion. However, the cumulative effect of these reasons compels such denial.

Respectfully submitted,

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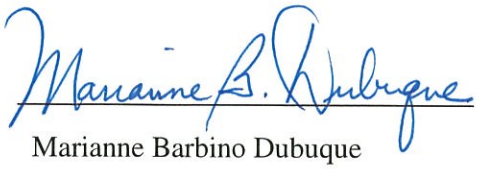
NOTICE OF SERVICE

I hereby affirm that a copy of this Memorandum of The Connecticut Light and Power Company doing business as Eversource Energy was sent to each Party on the service list dated May 9, 2019, with method of service to each party listed via e-mail and to: dball@cohenandwolf.com and ddobin@cohenandwolf.com.

Dated: July 23, 2020



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