STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

PETITION NO. 1371 – THE CONNECTICUT LIGHT AND POWER COMPANY D/B/A EVERSOURCE ENERGY PETITION FOR A 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 27, 2020

SANDRA K. BOYNTON, TRUSTEE'S REPLY TO 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

Sandra K. Boynton, Trustee ("Boynton") hereby submits the following reply to the July 23, 2020 memorandum in opposition (the "Opposition") to Boynton's Application For Party Status and To Reverse or Modify Declaratory Ruling filed June 23, 2020 (the "Application").

Rather than presenting credible evidence that Eversource mailed notice to Boynton or that the removal of the cedar trees is justified by the reasons stated in its Petition, Eversource's Opposition instead seeks to distract the Council with a bevy of incoherent and flawed arguments, which taken to their logical conclusion, would result in Eversource having unchecked powers to bulldoze through Connecticut without accountability to Connecticut residents or the Siting

Council. Yet, despite throwing arguments against a wall to see what might stick, at the end of the day, Eversource cannot rebut Boynton's testimony that she never received notice of the Petition, and it has no substantive response to Boynton's expert arborist opinion that there is no need to tear down the cedar trees in question as Eversource proposes.

I. Changed Conditions

Eversource begins its Opposition by incredibly arguing that its own missteps in providing notice – which resulted in facts being concealed from the Siting Council at the time of its decision – do not constitute change conditions or extraordinary circumstances, even when those facts are later revealed. See Opposition, at pp. 2-3. As explained by the Council in its 1996 finding – quoted prominently by Eversource in the Opposition – changed conditions exist when the Council is presented with "new information or facts that were not available at [the time of the earlier decision] that would compel us to reopen..." Town of Fairfield v. Connecticut Siting Council, 238 Conn. 361, 366-67 (1996). Here, there is significant new information that compels reopening:

- Boynton, an abutting property owner, did not receive notice of the filing.
- Eversource did not prove compliance with the notice requirements imposed by the Council.
- Eversource has maintained transmission lines on the property without removing the cedar trees, for decades – and those trees have never interfered with the lines or access to Eversource's facilities.
- An expert arborist has provided an opinion that removal of the trees is unnecessary for the purposes claimed by Eversource, the trees have reached their maximum height and do not interfere with the transmission lines, and their removal imposes a substantial adverse environmental impact.

The cases cited by Eversource in the Opposition are completely irrelevant, because Eversource cannot point to a single case in Connecticut holding that there aren't changed

conditions when Eversource fails to satisfy the legal requirements for providing notice to abutters of a petition for declaratory ruling. Indeed, the purpose of providing notice to abutting property owners is so that new information can be provided to the Council about the impact of Eversource's project on affected properties. Contrary to Eversource's view of its own powers, its petitions are not the final word on the scope of its rights in this State. Residents have an equal say. Eversource's failure to provide notice, which prevented Boynton from presenting new facts before the Council issued its decision, renders this entire proceeding defective.

II. Notice

Eversource has failed to prove that it complied with the Council's requirement that abutters be provided notice of the filing of the Petition. See Conn. Reg. § 16-50j-40(a) (requiring the petitioner to "***provide notice***" to each abutting owner). The only evidence that Eversource can muster is the May 7, 2019 letter attached as Exhibit G to the Petition and the Affidavit of Andrew Lord, who writes that "[a] single Notice as to the planned filing of the Petition was sent by Eversource to Boynton, Trustee at her mailing address of 164 Salmon Kill Road, Lakeville, CT." (See Lord Aff., ¶ 12).

Eversource's argument that it "was not required to submit to the Council any tracking information" misses the point. Pursuant to the 2015 Memorandum and section 16-50j-40(a), it is Eversource's burden to prove that notice was provided "within 30 days after receipt" of the Petition. The notice purportedly sent by Eversource on May 7 – three days prior to the filing of the Petition – does not comply with this regulation. Moreover, its choice not to bother tracking the notices that it sends is hardly a defense when an abutter cries foul, and Eversource accordingly has no evidence to rebut the lack of notice.

Moreover, Connecticut courts have consistently held that uncorroborated self-serving testimony that a letter was placed in the mail, while creating a presumption that notice was sent, can be rebutted by credible testimony that no notice was in fact sent or received. See Nat'l Health Care Assocs. v. Connecticut Dep't of Soc. Servs., No. HHBCV166032066S, 2017 WL 1194290, at *5 (Conn. Super. Ct. Feb. 17, 2017) (holding defendant rebutted presumption of delivery by denying receipt and pointing out that plaintiff failed to provide proof that a properly stamped letter was deposited in the mail); Zaneski-Nettleton v. Dep't of Soc. Servs., 64 Conn. L. Rptr. 423, 2017 WL 2452079, at *3 (Super. Ct. May 5, 2017) (presumption of mailing rebutted by credible testimony that notice was not received); Bozelko v. Comm'r of Correction, 196 Conn. App. 627, 636 (2020) (reversing trial court decision in order to allow appellant to present evidence to rebut the presumption that she received notice).

In the present case, Boynton has presented credible evidence that Eversource never mailed notice of the filing of the Petition to Boynton, as follows:

- Boynton states under penalty of perjury that she never received the notice.
- Eversource has not provided any tracking information.
- Mr. Lord does not provide a copy of a properly-stamped envelope, does not state whether he actually placed stamps on any envelope or whether the stamp was sufficient, does not identify which mailbox the notice was placed in, and does not identify any letter or envelope directly addressed to Boynton.
- In the affidavits submitted by Eversource, none of the communications between Eversource on the one hand and McEwan and Boynton on the other hand indicate in any way that McEwan or Boynton were made aware of the Petition.

Throughout its Opposition, Eversource ascribes importance to the fact that Boynton and McEwan were aware of the project. However, Boynton and McEwan's deep concern about their family's Properties makes clear that no notice of the Petition was ever provided by Eversource to

Boynton. If Eversource had ever properly notified them of the filing of the Petition, they would have immediately participated in the Siting Council proceedings to express their opposition to Eversource's heavy-handed approach to the natural resources on the Properties. Cf. Janetty Racing Enterprises, Inc. v. Site Dev. Techs., LLC, No. UWYCV050444820, 2010 WL 4352712, at *2 (Conn. Super. Ct. Oct. 8, 2010) (in light of parties' demonstrated involvement in matters at issue, the court held it was not reasonable to conclude that they would have ignored a notice of default judgment).

III. Hearsay

In its Opposition, Eversource seeks to rewrite the law on admissibility of evidence in administrative proceedings and then, incredibly, the law on hearsay – all the while presenting actual inadmissible hearsay as supposed evidence that notice was provided. As an initial matter, "[i]t is fundamental that administrative tribunals are not strictly bound by the rules of evidence and that they may consider exhibits which would normally be incompetent in a judicial proceeding, so long as the evidence is reliable and probative." Griffin v. Muzio, 10 Conn. App. 90, 93, cert. denied, 203 Conn. 805, 525 A.2d 520 (1987), quoting Lawrence v. Kozlowski, 171 Conn, 705, 710 (1976), cert. denied, 431 U.S. 969 (1977). "Moreover, hearsay evidence is not prohibited in administrative proceedings by the Uniform Administrative Procedure Act, which permits the introduction of oral or documentary evidence." Tomlin v. Personnel Appeal Board, 177 Conn. 344, 348, 416 A.2d 1205 (1979). See also Huang Do v. Comm'r of Motor Vehicles, 330 Conn. 651, 677 (2019) (hearsay evidence is generally admissible in administrative hearings). Accordingly, even if there had been hearsay in the McEwan Affidavit and Boynton Affidavit – which there is not - that would not have created a basis to disregard the evidence.

Regardless, Eversource's attempt to characterize McEwan and Boynton's testimony as "hearsay" is incorrect as a matter of law.[1] Section 8-1 of the Conn. Code of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted." The facts contained in the McEwan Affidavit and Boynton Affidavit do not contain any hearsay at all. The facts, based on McEwan and Boynton's personal knowledge relating to their knowledge of the Properties and communications with Eversource, are simply not hearsay.[2]

IV. Eversource's Easement Rights

In its Opposition, Eversource makes the outrageous claim that, by virtue of its rights under the easement, it has absolute authority to decide which trees can be removed, regardless of the environmental impact of the tree clearing. If that were a true statement of the law, of course, then Eversource would never be required to obtain approval from the Siting Council for its work on transmission facilities.[3] To be clear, this dispute has nothing to do with Eversource's easement. As a matter of law, Eversource was required to demonstrate the absence of environmental impact in its Conn. Gen. Stat. §16-50k Petition. That obligation exists regardless of the scope of its easement, and surely Eversource understands that the Siting Council – and not

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[1] In its Opposition, Eversource writes the following and describes it as inadmissible hearsay: "*Specifically, Mr. McEwan's affidavit contains numerous references to 'my mother' and Ms. Boynton's affidavit contains numerous references to 'my son.'*" This makes no sense. According to Eversource's absurd definition of hearsay, any testimony about another person – regardless of what the testimony actually is - would constitute "hearsay."

[2] Ironically, Eversource has submitted a prime example of inadmissible hearsay evidence in the form of a chart appended to the Affidavit of Charles Burnham that purports to summarize the contents of communications of others – to which he was not even a party without even attempting to establish any basis (such as the business records exception) for admitting those statements.

[3] In addition, the Opposition conveniently ignores well-settled common law principles that prohibit the overburdening of its easement.

Eversource – has the final say as to what it can or cannot do on a Connecticut resident's property.

V. Environmental Impact

Eversource's "sky-is-falling" hyperbole about increased electricity rates together with its unfounded accusations that Boynton seeks to circumvent the Siting Council's process and renegotiate the 1926 easement are a transparent attempt to distract from Eversource's failure to provide any evidence or argument that the removal of trees on the Properties is warranted, or that the removal will not have a substantial adverse environmental impact.[4] Boynton submitted the affidavit of a licensed arborist, Mr. Koneazny, who reports that the cedar trees have "reached their maximum growing height of approximately 30 – 40 [feet]" and "will not in any way interfere with the power lines." In addition, Mr. Koneazny concluded that the trees "will not block the access road in any way nor encroach on the new road that has been installed." In its Petition, Eversource represents that tree clearing will be required "to accommodate access road installations and improvements, work pads and pull pad installation and for required conductor clearances," (See Petition, at p. 4). Mr. Koneazny's report proves that Eversource's proposed removal of trees is not at all related to these stated reasons, and Eversource's Opposition provides virtually no substantive evidence in rebuttal.

Rather than attempting to provide any substantive defense of its plan to tear down the cedar trees on the Properties, Eversource instead makes quite clear its attitude that it has sole

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[4] In its Opposition, Eversource argues that tree removal cannot have a substantial adverse environmental effect. See Opposition, at p. This absurd argument is another attempt by Eversource to drastically expand its powers and to belittle the importance of the environmental impact of its actions. Fortunately, in adopting PUESA – an environmental protection statute - the Connecticut Legislature had the final say on this issue.

powers to make all decisions, regardless of environmental impact. In one shocking statement in its Opposition, it revealed its misconception of its powers by actually expressing the following: "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." Opposition at p.. 6-7. With all due respect, the Connecticut Siting Council – and not Eversource – is vested with sole decision-making as to precisely what Eversource is permitted to do. In adopting the Public Utilities Environmental Standards Act ("PUESA"), the Connecticut Legislature made clear that Eversource does not have the right to bulldoze its way through the State of Connecticut. Its actions are heavily regulated by the Siting Council, and the laws of this State.

As PUESA made clear, Eversource's powers are strictly limited by the statute whose purpose is stated clearly:

> The purposes of this chapter are: To provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria, and technically sufficient to assure the welfare and protection of the people of the state…

Conn. Gen. Stat. § 16-50g.

Conclusion

Despite Eversource's rambling attempt to obfuscate the issue now before the Council, two facts emerge clearly from its Opposition: 1) it has no proof that it ever provided notice of the Petition to Boynton – and the evidence demonstrates just the opposite, and 2) it cannot defend its attempt to remove the cedar trees on the Properties, even though those trees have existed for decades without interfering with the transmission line in any way.

Boynton respectfully requests that the Council grant her Application for Party Status and to Reverse or Modify the Council's Decision.

Respectfully Submitted,

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