PULLMAN &COMLEY

Lee D. Hoffman
90 State House Square
Hartford, CT 06103-3702
p 860 424 4315
f 860 424 4370
lhoffman@pullcom.com
www.pullcom.com

February 16, 2024

VIA ELECTRONIC MAIL AND US MAIL
Melanie Bachman
Executive Director/Staff Attorney
Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

Re: PETITION NO. 1589 – USS Somers Solar, LLC petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed construction, maintenance and operation of a 3.0-megawatt AC solar photovoltaic electric generating facility located at 360 Somers Road, Ellington, Connecticut, and associated electrical interconnection. Council Interrogatories to Petitioner

Dear Ms. Bachman:

I am writing on behalf of my client, USS Somers Solar, LLC, in connection with the above-referenced Petition. With this letter, I am enclosing the original and fifteen copies of a Motion for Reconsideration in this Petition.

Should you have any questions concerning this submittal, please contact me at your convenience. I certify that a copy of this Motion for Reconsideration has been sent to all parties on the Service List for this Petition as of this date.

Sincerely,

Lee D. Hoffman
Enclosure

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

PETITION NO. 1589 – USS Somers Solar, LLC petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed construction, maintenance and operation of a 3.0-megawatt AC solar photovoltaic electric generating facility located at 360 Somers Road, Ellington, Connecticut, and associated electrical interconnection. Council Interrogatories to Petitioner.	**Petition No. 1589**
	February 16, 2024

USS SOMERS SOLAR, LLC'S PETITION FOR RECONSIDERATION

Pursuant to Conn. Gen. Stat. §4-181a ,[1] the Petitioner, USS Somers Solar, LLC ("USS Somers" or "Petitioner") respectfully moves the Connecticut Siting Council ("Council") for reconsideration of its February 1, 2024 decision on USS Somers' Petition for Declaratory Ruling for the above-referenced proposed solar photovoltaic electric generating facility ("Decision"). Based on the Council's authority under Conn. Gen. Stat. §16-50k and the fact that the Council's newest member has now had sufficient time to familiarize himself with the Council and its procedures, USS Somers respectfully requests that the Council repeat its vote with all eligible members voting and approve USS Somers' Petition for the Facility, subject to the conditions articulated in the Council's Staff Report.

[1] *See*, Conn. Gen. Stat. § 4-181a. Contested cases. Reconsideration. Modification. (a)(1) Unless otherwise provided by law, a party in a contested case may, within fifteen days after the personal delivery or 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 twenty-five days of the filing of the petition, the agency shall decide whether to reconsider the final decision. The failure of the agency to make that determination within twenty-five days of such filing shall constitute a denial of the petition.

I. PROCEDURAL BACKGROUND

At the Council's meeting on February 1, 2024 ("Meeting"), the Council discussed several petitions, including the instant Petition (Petition 1589). At the prior public hearing in this Petition, speakers from the Connecticut Parachutists, Incorporated ("CPI") voiced several concerns regarding safety issues and future restrictions on private development. *Public Session Transcript 6:30 p.m., 12/05/23*, ("Tr.") pp. 95-7.

During the discussion of Petition 1589 at the Meeting, the Council took its vote on the Petition. The newly appointed member of the Council, Mr. Chance Carter, abstained from the vote, as he did for every vote at the February 1, 2024 meeting, and gave as his reason that this was his first meeting as an appointed Council member. Three members voted to deny the Petition – Presiding Officer John Morissette, Council Member Daniel P. Lynch, Jr., and Council Member Quat Nguyen. The remaining three members of the Council voted to approve the Petition.

The end result was a rather unique situation where the Petition was neither approved nor denied, as the vote was a tie with one abstention. USS Somers has brought this motion because it respectfully requests that a seventh vote be cast by Mr. Carter once he reviews the relevant materials and that the Council, in reconsidering this Petition, and the information that is in the record for this Petition, should approve the Petition consistent with its statutory authority and the information contained in the record.

II. IN THE INTEREST OF FAIRNESS, THE COUNCIL SHOULD CAST ITS SEVENTH VOTE TO BREAK THE TIE.

Under the State's Uniform Administrative Procedure Act,

> "If a hearing…in a declaratory ruling proceeding is held…before less than a majority of the members of the agency who are authorized by law to render a final decision, a party… may request a review by a majority of the members of the agency, of any… ruling made at the hearing. The majority of the members may make an appropriate order, including the reconvening of the hearing."

Conn. Gen. Stat. § 4-178a. Administrative agencies must act in a fundamentally fair manner so as not to violate the rules of due process. *Bryan v. Sheraton-Hartford Hotel*, 62 Conn. App. 733, 740 (2001). Other Connecticut agencies mandate in their rules of procedure[2] that in the event of a tie vote, a member of the agency shall be designated to review the entire record of the complaint and cast the deciding vote. Such rules maintain the fairness of agency proceedings by ensuring that decisions are based upon a majority of the voting members.

While the Council acted with procedural fairness throughout this proceeding and all seven members of the Council were present to vote, not all of the present members were prepared to vote. This is completely understandable, as Mr. Carter could not have been expected to familiarize himself with all of the details of the record for his first meeting. However, as Council members have demonstrated over the years in Council proceedings, Council members do have the ability to go through the record of a Petition, familiarize themselves with that record, and then render a vote.

Although Mr. Carter was newly appointed to the Council, the law[3] allows him to cast his vote to break the tie. In the interest of fairness, USS Somers would request that the Council allow Mr. Carter the time to familiarize himself with the record and cast the deciding vote in this matter.

III. THE COUNCIL EXCEEDED ITS STATUTORY AUTHORITY.

A. There is Need for Balance in Reaching a Decision.

In crafting section 16-50k, the Legislature was quite clear in providing the Council with guidelines as to when a petition is to be approved. Section 16-50k provides, in pertinent part:

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[2] *See*, Rule 7F. of the Rules of Procedure of the Statewide Grievance Committee, as amended May 21, 1992, and published in the Connecticut Law Journal, June 16, 1992, pp 1-7D.

[3] A member of an administrative agency may vote after reading the record *Ryker v. Town of Bethany*, 97 Conn. App. 304, 315 (2006). "Participation in a decision by a member of a board based solely on his reading of the record has been sanctioned by our Supreme Court [in] Pet v. Dept. of Health Services, 228 Conn. 651, 671 (1944)." *Lewis v. Statewide Grievance Comm.*, No. CV94 0533428, 1994 WL 669697, at *4 (Conn. Super. Ct. Nov. 16, 1994), aff'd, 235 Conn. 696 (1996).

> "The council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling… any facility with a capacity of not more than sixty-five megawatts, as long as such project meets air and water quality standards of the Department of Energy and Environmental Protection."

Conn. Gen. Stat. § 16-50k. "An administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority." *State v. State Employees' Review Board*, 231 Conn. 391, 406, 650 A.2d 158 (1994).

Although this Petition is for a Declaratory Ruling, which directs the Council to consider to air and water quality standards, even Certificate proceedings which include the consideration of other environmental factors, such as public health and safety, require a balancing of impacts with the need for increasing the generation of electricity, specifically renewable energy. *See*, *Petition for a Declaratory Ruling for Renewable Energy Facility*, dated August 2018, at p. 3-4; *FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669, 701 (2014) ("when ruling on applications for certificates, the council is required to consider "the policies of the state concerning the natural environment ... [and] public health and safety… but it is not required to deny applications that conflict with those policies."); *Not Another Power Plant v. Connecticut Siting Council*, 340 Conn. 762, 781 (2021) (PUESA ensures the Council makes fully informed decisions which protect the environment to the extent reasonably possible while balancing the state's need for adequate and reliable public utility services at the lowest reasonable cost to consumers.)

The balancing of the need for adequate public utility supply at the lowest reasonable cost to consumers is particularly important for this Petition as the Project is approved to participate in the Shared Clean Energy Facilities ("SCEF") Program. As the Council is well aware, the SCEF Program allows for solar energy projects to be developed that provide savings to low-income customers, customers of limited economic means, and environmental justice communities. These societal benefits should also be weighed by the Council as it makes its decision on the Petition.

B. Extra-Record Evidence Cannot Be Considered by the Council.

In reviewing the record in this Petition, it appears that when two members of the Council voted to deny the Petition, they did so based on evidence that was not made a part of the record. The Council was correct when it pointed out that it could not rely upon evidence prepared by USS Somers but not made part of the record, such as the glare study that was provided to the Federal Aviation Administration ("FAA"). As a result, the Council should similarly not be allowed to rely upon extra-record information such as site visits or familiarity with the site that other Council members do not possess, that the Petitioner did not have an opportunity to respond to, or that took place after the record in the matter was closed.

It is axiomatic that an administrative agency can only decide the issues before it based on the record that is in place when it issues that decision. *See*, *Strong v. Conservation Comm'n of Town of Old Lyme*, 28 Conn. App. 435, 441 (1992) ("an administrative agency must base its decision on substantial reliable evidence in the record. It may not base its decision on the special concerns and insights of its members unless it has given the applicant an opportunity to respond to them.") Extra-record evidence cannot be considered. *See*, *Feinson v. Conservation Comm'n of Town of Newtown*, 180 Conn. 421, 429 (1980) ("[An agency] acts without substantial evidence and arbitrarily, when it relies upon its own knowledge and experience ... without affording a timely opportunity for rebuttal of its point of view." Section 4-183 of the Uniform Administrative Procedures Act permits a court to overturn an agency's decision in such a case.)

Based on the record of the Council's January 18, 2024 and February 1, 2024 meetings, it appears that extra-record evidence was the deciding factor in two of the denial votes that were cast. USS Somers would ask that the Council re-consider its vote based solely on the information that was contained in the record of the Petition.

Moreover, to the extent that the votes for denial in this Petition were based upon concerns raised by CPI in the public hearing, they should be recast. Unsupported[4] alleged safety risks to private individuals who voluntarily choose to undertake parachuting activities on private property are not under the purview of the Council in rendering a decision on this Petition, as Mr. Morissette correctly noted in his comments at the Council's meeting on January 18, 2024. To the extent such information was relied upon, it would have clearly exceeded the Council's authority pursuant to § 16–50k to consider air and water quality standards and even exceeds the authority the Council retains for Certificate proceedings to consider matters of public health and safety, as this is not a matter of *public* health and safety, but rather involves a *private* entity attempting to exercise access rights when no evidence of such access rights exist.

The members of CPI retain a private interest in the airport property with private rights of access to certain FAA-approved landing zones for the parachutists – which do not include the Project Area. The Project Area is an alternative landing zone. *See*, Pre-filed Testimony of Larry Durocher. The Council considers *public* safety when approving projects within its authority but is not required to consider *private* rights of access that CPI and its members may or may not possess. CPI and its members are not a protected class of individuals, nor, in this case are their issues ones of public safety. Perhaps even more importantly, CPI and its members have failed to provide anything in the record of this Petition to demonstrate that any of them have any clearly defined access rights whatsoever over the proposed Project Area.

Further, in terms of concerns raised in the public hearing regarding the safety of airport operations, the FAA has authority over air traffic safety. The FAA, however, has provided its

[4] The claims CPI and its members make regarding safety risks are not supported by anything in the record, and in fact, directly conflict with evidence provided in the record. Specifically, at the public hearing, Mr. Durocher's uncontroverted testimony was that "the chances [that any of the parachuters end up in the solar field] are really remote." Tr. at p. 53. *See also*, Pre-filed Testimony of Larry Durocher.

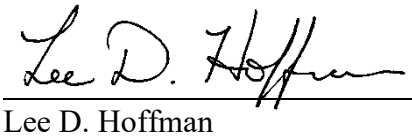
approval of this Project through its finding of "No Hazard to Air Navigation". *See*, Appendix B to the Petition, Appendix H.

IV. CONCLUSION

USS Somers respectfully requests that the Council reconsider its February 1, 2024 decision on the Petition by repeating the vote and allowing Mr. Carter to cast his vote and considering its statutory authority in rendering its decision.

WHEREFORE, USS Somers respectfully requests that the Council reconsider its February 1, 2024 decision and approve this Petition.

Respectfully Submitted,
USS Somers Solar, LLC

By: 

Lee D. Hoffman
Liana A. Feinn
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103-3702
Juris No. 409177
860-424-4300 (p)
860-424-4370 (f)
lhoffman@pullcom.com
Its Attorneys