



STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

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DATE: June 17, 2022

TO: Council Members

FROM: Melanie A. Bachman *MA B*
Executive Director/Staff Attorney

RE: **DOCKET NO. 509** - Homeland Towers, LLC and New Cingular Wireless PCS, LLC d/b/a AT&T application for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a telecommunications facility located at 1837 Ponus Ridge Road, New Canaan, Connecticut. **Mark Buschmann Motion to Dismiss/Motion for Stay of Proceeding – DRAFT Staff Report**

On April 13, 2022, pursuant to Connecticut General Statutes (CGS) §16-50k, Homeland Towers, LLC and New Cingular Wireless, PCS, LLC (Applicants), submitted an application to the Connecticut Siting Council (Council), for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a telecommunications facility located at 1837 Ponus Ridge Road, New Canaan, Connecticut.

On April 18, 2022, pursuant to CGS §16-50gg, the Council sent correspondence to the Town of New Canaan and the City of Stamford, which is located within 2,500 feet of the proposed facility site, requesting comments and inviting the municipalities to participate in the Council's public hearing process.

During a meeting held on May 12, 2022, the Council deemed the application complete and approved the schedule for the proceeding, including a public hearing on June 28, 2022.¹ The Council also granted Intervenor status to Cellco Partnership d/b/a Verizon Wireless.

During a meeting held on May 26, 2022, the Council granted the Applicants' Motion for Protective Order; Party and Connecticut Environmental Protection Act (CEPA) Intervenor status to the New Canaan Neighbors; Party status to Jamie Buschmann, Trustee; Party status to Mark Buschmann, Trustee; CEPA Intervenor status to Mark Buschmann; and grouped the Buschmanns in their various capacities, pursuant to CGS §16-50n, based on similar interests and common counsel.

On June 1, 2022, in both his trustee and individual capacities, Mark Buschmann (MB), submitted a Motion to Dismiss, or in the alternative, Motion for Stay of Proceeding (Motion) on the basis that the Council is improperly constituted under its enabling statute. The Motion requests the application be dismissed because the Council is improperly constituted and lacks the power to act on the application, or in the alternative, requests the application proceeding be postponed until the Council is properly constituted and has the power to act on the application.

On June 15, 2022, the Applicants objected to MB's Motion as untimely and unsupported by law.

In its Motion, MB claims that of the three public members currently appointed to the Council by the Governor, only one "may be" experienced in the field of ecology while the other two "are affiliated with the energy sector."

¹ Notice of the Council's public hearing was published in the *New Canaan Advertiser* on May 19, 2022.

In support of its Motion, MB cites to cases related to membership on state licensing boards for electricians and lawyers and attaches a copy of the Council member biographies that are posted on the Council's website. The cases are distinguishable on the facts and the biographies are not the official Council member appointment letters issued by the Governor. Contrary to MB's claims, the Council is properly constituted under its enabling statute.

In 1970, the proposed construction of an electric transmission line facility over 75 miles of southwest Connecticut, a nuclear electric generating facility on an island off the shores of Norwalk and an oil-fired electric generating facility at Stamford Harbor prompted the passage of the Public Utility Environmental Standards Act (PUESA), the Council's enabling statute.² PUESA created the Council to address the energy-environment conflict in the state.³ Its purpose is to balance 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.

In harmony with PUESA's purpose, membership on the Council is intentionally balanced and consists of:

- (1) The Commissioner of Energy and Environmental Protection, or her designee;
- (2) the Chairperson of the Public Utilities Regulatory Authority, or the Chairperson's designee;
- (3) one designee of the speaker of the House and one designee of the president pro tempore of the Senate; and
- (4) **five members of the public**, to be appointed by the Governor, **at least two of whom shall be experienced in the field of ecology, and not more than one of whom shall have affiliation, past or present, with any utility or governmental utility regulatory agency**, or with any person owning, operating, controlling, or presently contracting with respect to a facility, a hazardous waste facility, as defined in section 22a-115, or an ash residue disposal area. (Emphasis added.)

PUESA requires categories of Council members.⁴ The categories are not mutually exclusive. For the public member category, the Governor **must** appoint at least two members experienced in the field of ecology and **may** appoint no more than one member with an affiliation with a utility or governmental utility regulatory agency. The appointment of **at least two** members experienced in the field of ecology is mandatory. The appointment of **no more than one** member with a past or present affiliation with a utility or a governmental utility regulatory agency is permissive. Consistent with PUESA, the Council currently has two public members experienced in the field of ecology and one public member with a past affiliation with a utility.

Council membership has been frequently debated since the Council's creation over 50 years ago.⁵ The legislative intent was to establish a Council with 50% public members with expertise in ecology and electric system planning.⁶ A co-author of PUESA stated, "Ideally, affiliation with the utility industry would enhance one's awareness and knowledge of the energy-environment conflict, and one's sensitivity to the obligation to use that awareness and knowledge in the public interest."⁷ Under PUESA, affiliation "with any utility or governmental

² Public Act 71-575, "An Act Concerning the Power Facility Evaluation Council;" Conn. Gen. Stat. §16-50g, *et seq.* (2021) (Initially formed as the Power Facility Evaluation Council, jurisdiction was limited to energy facility siting. Renamed the Council in 1981, jurisdiction was expanded to include cable television and telecommunications tower siting.)

³ *Id.*, Lowenthal, John, "Prometheus, Meet the Power Facility Evaluation Council," 46 Conn. Bar Journal 379-421 (1972).

⁴ *Block v. Statewide Grievance Comm.*, Conn. Supp. 5, 13 (Conn. Super. 2000) (Enabling statute determines composition).

⁵ Legislative proposals over the years included, but aren't limited to, creating a veto for the DEEP Commissioner over the votes of the other eight members, increasing membership to eleven with two direct appointments by the DEEP Commissioner, removing the two legislative appointments, excluding members with any past or present affiliation with a utility, adding a "local representative," and adding a member "with knowledge of agriculture."

⁶ Public Act 71-575, Environment Committee Transcript, March 17, 1971, at pages 458-507.

⁷ Public Act 71-575, Senate Session Transcript, May 13, 1971, at pages 1855-1888; Lowenthal, *supra* note 3 at 408.

utility regulatory agency” does not include public members’ status as electric ratepayers in the state. Such a broad interpretation of affiliation is absurd, but the issue arose during legislative deliberations in 1971.⁸

In 2011, Council membership was modified to include the Commissioner of the Department of Energy and Environmental Protection (DEEP) in lieu of the Commissioner of the Department of Environmental Protection (DEP) and to include the Chairperson of the Public Utilities Regulatory Authority (PURA) in lieu of the Chairperson of the Department of Public Utility Control (DPUC). Public Act 11-80 created DEEP as the merged successor to DEP and DPUC, which was reconstituted as PURA and placed within DEEP.⁹ It transferred the environment and energy related powers and duties of DEP and DPUC to DEEP. The Act established DEEP’s energy goals to ensure the reliability and safety of the state’s energy supply; increase the use of clean energy; and develop the state’s energy-related economy. The Act established DEEP’s environmental goals to conserve, improve and protect the natural resources and environment of the state, and preserve the natural environment while fostering sustainable development.

These energy and environment goals are inextricably linked with the Council’s purpose under PUESA. To exclude the appointment of a public member with a past or present affiliation with DEEP would be just as absurd as excluding the appointment of members based on their status as electric ratepayers in the state. Like the Council, DEEP was created to address the energy-environment conflict in the state. Since the creation of DEEP and modification of Council membership in 2011, public member appointments to the Council included members with a past or present affiliation with DEEP.

The Governor’s appointment of public members to state boards and commissions, including the Council, is regulated under CGS §4-9a, which states, “**Public members** shall constitute **not less than one-third** of the members of each board and commission within the Executive Department, ... Public member means an elector of the state who has no substantial financial interest in, is not employed in or by, and is not professionally affiliated with, any industry, profession, occupation, trade or institution regulated or licensed by the relevant board or commission, and **who has had no professional affiliation with any such industry, profession, occupation, trade or institution for three years preceding his appointment** to the board or commission.”¹⁰ (Emphasis added.)

Consistent with CGS §4-9a the five public members appointed to the Council under PUESA constitute five-ninths, or approximately 56%, of the total Council membership. At present, the three public members appointed to the Council under PUESA constitute one-third of the total Council membership and three-sevenths, or approximately 43%, of the current total Council membership.

Also consistent with CGS §4-9a, the three public members currently appointed to the Council had no affiliation with the energy or telecommunications industries for three years preceding their appointment to the Council:

⁸ Public Act 71-575, Senate Session Transcript, May 13, 1971 at page 1865 (“This is so broad that it could be interpreted that if you’re contracting to buy electricity for your home, you can’t serve on this commission.”)

⁹ Public Act 11-80, “An Act Concerning the Establishment of the Department of Energy and Environmental Protection and Planning for Connecticut’s Energy Future”; Unlike PURA, the Council remains an autonomous agency affiliated with DEEP for administrative purposes only pursuant to Conn. Gen. Stat. §4-38f (2021) (“An agency assigned to a department for administrative purposes only shall: (1) Exercise any quasi-judicial, rule-making or regulatory authority, licensing and policy-making functions which it may have independent of such department and without approval or control of the department; (2) prepare its budget, if any, and submit its budgetary requests through the department; and (3) hire its own personnel or enter into contracts, if authorized by law, or if the general assembly provides or authorizes the expenditure of funds therefor.”)

¹⁰ Public Act 77-614, “An Act Concerning the Reorganization of the Executive Branch of State Government;” *Block v. Statewide Grievance Comm.*, 47 Conn. Supp. 5 (Conn. Super. 2000).

1. Mr. Morissette was appointed as a public member in 2019. He retired from Eversource Energy in 2016. Prior to Mr. Morissette's 2019 appointment to the Council, Mr. Ashton, a former CEO of Yankee Gas, served as the public member with a past affiliation with a utility. He passed away in 2017. Copies of the appointment letters issued by the Governor for the appointments of Mr. Morissette and Mr. Ashton are attached.
2. Mrs. Cooley was appointed as a public member with experience in the field of ecology in 2021. She is a legal fellow at the Connecticut Institute for Resilience and Climate Adaptation (CIRCA).¹¹ Prior to Mrs. Cooley's 2021 appointment to the Council, Dr. Klemens, an active environmental consultant,¹² served as one of the public members with experience in the field of ecology. He resigned in 2019. Copies of the appointment letters issued by the Governor for the appointment of Mrs. Cooley and Dr. Klemens are attached.
3. Mr. Quinlan was appointed as a public member with experience in the field of ecology in 2021. He retired from DEEP in 2017.¹³ Prior to Mr. Quinlan's 2021 appointment to the Council, Mr. Harder, a retired DEEP regulator, served as one of the public members with experience in the field of ecology. He resigned in 2021. Copies of the appointment letters issued by the Governor for the appointments of Mr. Quinlan and Mr. Harder are attached.

The Council's current membership is consistent with the legislative intent to establish a Council with 50% public membership with expertise in ecology and electric system planning under PUESA, and it is consistent with the requirements for the Governor's appointment of public members to boards and commissions under CGS §4-9a. There is no prohibition on the appointment of public members who are experienced in the field of ecology from having a past affiliation with any utility or governmental utility regulatory agency under PUESA. The limitation to one public member with a past affiliation with a utility or governmental utility regulatory agency applies to the no more than three other public members who are not specifically appointed with experience in the field of ecology.¹⁴ Currently, one of the public members who was not specifically appointed with experience in the field of ecology has a past affiliation with a utility and one of the public members who was specifically appointed with experience in the field of ecology has a past affiliation with a governmental utility regulatory agency. The other public member who was specifically appointed with experience in the field of ecology has a present affiliation with a collaboration between a state university and a governmental utility regulatory agency.

With respect to the Motion to Dismiss, MB cites to two cases where the plaintiffs appealed the suspension of their occupational licenses by the respective state boards responsible for issuing those licenses on the basis that the boards were improperly constituted and therefore, did not have the power to act. One case relates to the lack of a public member and the other case relates to the lack of public members with professional qualifications. Neither of these scenarios apply to the Council.

In *Block*, a three member board acted to reprimand a licensee without the one public member required by statute. The Court held it was an improperly constituted board when it acted without the one public member. Under CGS

¹¹ CIRCA is a collaboration between the University of Connecticut and DEEP.

¹² Dr. Klemens recused from voting on any matter in which he was retained by an interested party as an environmental consultant while serving on the Council. See Docket 192B; Petition 983; and Petition 1312.

¹³ Mr. Quinlan recuses from voting on any matter in which he was involved with a DEEP Request for Proposals before serving on the Council. See Docket 492 and Petition 1443A.

¹⁴ A public member with experience in the field of ecology appointed in 2016 had a past affiliation with a governmental utility regulatory agency. He was a former Bureau Chief for DEEP's Water Permitting and Enforcement Division, Serving at the same time, a public member who was not experienced in the field of ecology appointed in 2007 had a past affiliation with a utility. He was a former CEO of Yankee Gas.

§4-9a, the one public member amounts to one-third of the three-member board. The absence of the one public member deprived the board of its power to act. The Council currently has three public members. Unlike the scenario in *Block*, under CGS §4-9a, the three public members amount to one-third of the nine-member Council. The Council is properly constituted with public members and has the power to act.

In *DuBaldo*, a seven member board acted to suspend an electrical contractor license with two members who did not “engage” in the occupation of unlimited journeymen required by statute. The Court held it was an improperly constituted board when it acted without two members who were “engaged” in the occupation of unlimited journeymen. “Engaged” was defined by the Court as “employed; occupied; busy.” The Council’s statute requires at least two members who are “experienced” in the field of ecology. Unlike the scenario in *DuBaldo*, under PUESA, the Council currently has two members experienced in the field of ecology. “Experience” is defined as “direct observation of or participation in events as a basis of knowledge.”¹⁵ The Council is properly constituted with at least two members experienced in the field of ecology and has the power to act.

The *Block* and *DuBaldo* cases were decided in accordance with the common law rule that in the absence of evidence to the contrary, boards are assumed to be properly constituted.¹⁶ Evidence to the contrary existed in those cases based on actions taken by a board lacking a public member and a board lacking public members with professional qualifications required by statute. Here, evidence to the contrary does not exist. The Council meets the requirements for the number of public members and public members with professional qualifications. The appointment letters issued by the Governor for the public members under PUESA and compliance with the requirements for public members under CGS §4-9a evidence proper constitution of the Council.

With respect to the alternative Motion for Stay of Proceeding until the Council is properly constituted, the other two most recent public members appointed to the Council by the Governor, Mr. Murphy and Mr. Edelson, resigned in 2019 and 2021, respectively. Both gentlemen were former public officials, one a state legislator and the other a town First Selectman. Both appointments remain vacant at this time, but these vacancies do not deprive the Council of the power to act.

In a case cited by *DuBaldo*, the Connecticut Supreme Court held that “the failure of the Governor to appoint public members to a multi-member board does not deprive the board of the power to act where a quorum equal to a majority of the members of the board exists during transaction of the business involved.”¹⁷ A quorum of the Council is five members. Currently, the Council consists of seven members. If one or two members were absent or recused from an action on a jurisdictional matter, a quorum of Council members would exist during the transaction of the business involved.

Therefore, based on the consistency of current Council membership with the requirements of PUESA and CGS §4-9a, and based on the existence of a quorum of Council members to act on the subject application in accordance with PUESA, Council staff recommends the Motion to Dismiss and its alternative be denied.

¹⁵ Defined by Webster’s American Heritage Dictionary, which was used by the Court in *DuBaldo*.

¹⁶ *Furtney v. Zoning Commission*, 159 Conn. 585 (1970) (plaintiff in zoning appeal claimed a board member was improperly appointed because no oath was taken, but the Court held that although the member had not taken the oath, the member was a de facto officer and the board had the power to act); *Hebb v. Zoning Board of Appeals*, 150 Conn. 539 (1963) (plaintiff in zoning appeal claimed a board was improperly constituted because two alternates acted in place of two regular members, but the Court held that although the alternates designations should have been recorded, the statute permitted alternates designation and the board had the power to act.)

¹⁷ *Levinson v. Conn. Board of Chiropractic Examiners*, 211 Conn. 508 (1989) (plaintiff in license suspension appeal claimed board was improperly constituted because the board did not consist of one-third public members, but the Court held that although the public membership was not filled, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.)



M. JODI RELL
GOVERNOR

STATE OF CONNECTICUT
EXECUTIVE CHAMBERS

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CONNECTICUT
SITING COUNCIL

December 4, 2007

Philip T. Ashton
39 Daffodil Lane
Meriden, Connecticut 06450

Dear Mr. Ashton:

Pursuant to Sections 4-1a and 16-50j of the Connecticut General Statutes, it is my pleasure and privilege to reappoint you as a member of the Connecticut Siting Council, to serve at the pleasure of the Governor, for a term coterminous with my term, or until a successor is appointed and has qualified, whichever is longer.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Jodi Rell".

M. Jodi Rell
Governor

- cc: Honorable Susan Bysiewicz, Secretary of the State
- cc: Honorable Nancy S. Wyman, Comptroller
- cc: Messrs. Kevin P. Johnston and Robert G. Jaekle, Auditors of Public Accounts
- cc: Ms. Susan Southworth, Legislative Library
- cc: Department of Public Utility Control
- cc: Commissioner Gina McCarthy, Department of Environmental Protection
- cc: Honorable James A. Amann, Speaker of the House
- cc: Honorable Donald E. Williams, Jr., President Pro Tempore
- cc: Honorable Dan Caruso, Chairman, Connecticut Siting Council
- cc: S. Derek Phelps, Executive Director, Connecticut Siting Council



Ned Lamont
GOVERNOR
STATE OF CONNECTICUT

October 21, 2019

John Morissette
10 Susan Road
Vernon, CT 06066

Dear Mr. Morissette:

Pursuant to Sections 4-1a and 16-50j of the Connecticut General Statutes, it my honor and privilege to appoint you as a member of the Connecticut Siting Council, to serve at the pleasure of the Governor, for a term coterminous with my term, or until a successor is appointed and qualified, whichever is longer.

Sincerely,

A handwritten signature in blue ink that reads "Ned Lamont".

Ned Lamont
Governor

cc: Honorable Denise W. Merrill, Secretary of the State
Honorable Kevin P. Lembo, Comptroller
Messrs. John C. Geragosian and Robert J. Kane, Auditors of Public Accounts
Carrie Lisitano, Legislative Library
Commissioner Katie Dykes, Department of Energy and Environmental Protection
Commissioner Marissa Paslick Gillett, PURA
Melanie Bachman, Executive Director, CT Siting Council



Dannel P. Malloy
GOVERNOR
STATE OF CONNECTICUT

October 16, 2013

Michael W. Klemens
P.O. Box 506
Salisbury, CT 06068

Dear Mr. Klemens:

Pursuant to Sections 4-1a and 16-50j of the Connecticut General Statutes, it is my pleasure and privilege to appoint you as a member of the Connecticut Siting Council, as a person experienced in the field of ecology, to serve at the pleasure of the Governor, for a term coterminous with my term, or until a successor is appointed and has qualified, whichever is longer, in succession to Colin Tait, who resigned.

Sincerely,

A handwritten signature of Dannel P. Malloy in black ink.

Dannel P. Malloy
Governor

cc: Honorable Denise Merrill, Secretary of the State
cc: Honorable Kevin Lembo, Comptroller
cc: Messrs. John Geragosian and Robert Ward, Auditors of Public Accounts
cc: Christine Graesser, Legislative Library
cc: Arthur House, Chair, Public Utility Regulatory Authority
cc: Commissioner Daniel C. Esty, Department of Energy and Environmental Protection
cc: Honorable Donald E. Williams, Jr., Senate President Pro Tempore
cc: Honorable Brendan J. Sharkey, Speaker of the House of Representatives
cc: Robert Stein, Chairman, Connecticut Siting Council
cc: Melanie Bachman, Staff Attorney, Connecticut Siting Council



STATE OF CONNECTICUT
GOVERNOR NED LAMONT

March 15, 2021

Luanne Cooley
17 Hillside Circle
Storrs, CT 06268

Dear Ms. Cooley:

Pursuant to Sections 4-1a and 16-50j of the Connecticut General Statutes, I have the honor and privilege to appoint you to the Connecticut Siting Council, as a member experienced in the field of ecology, for a term coterminous with my term, or until a successor is appointed and qualified, whichever is longer.

Sincerely,

A handwritten signature in blue ink that reads "Ned Lamont". The signature is fluid and cursive, with the first name "Ned" and last name "Lamont" clearly distinguishable.

Ned Lamont
Governor

cc: Honorable Denise W. Merrill, Secretary of the State
Honorable Kevin P. Lembo, Comptroller
Mr. John C. Geragosian, Auditor of Public Accounts
Carrie Lisitano, Legislative Library
Commissioner Katie Dykes, Department of Energy and Environmental Protection
Melanie Bachman, Acting Executive Director, Connecticut Siting Council



Dannel P. Malloy
GOVERNOR
STATE OF CONNECTICUT

March 30, 2016

Michael Harder
61 Prentice Hill Road
Hebron, CT 06248

Dear Mr. Harder,

Pursuant to Sections 4-1a and 16-50j of the Connecticut General Statutes, it is my pleasure and privilege to appoint you as a member of the Connecticut Siting Council, as a person experienced in the field of ecology, to serve at the pleasure of the Governor, for a term coterminous with my term, or until a successor is appointed and has qualified, whichever is longer.

Sincerely,

A handwritten signature in blue ink, reading "D. Malloy".

Dannel P. Malloy
Governor

- cc: Honorable Denise Merrill, Secretary of the State
- cc: Honorable Kevin Lembo, Comptroller
- cc: Messrs. John Geragosian and Robert Ward, Auditors of Public Accounts
- cc: Carrie Rose, Legislative Library
- cc: Arthur House, Chair, Public Utility Regulatory Authority
- cc: Commissioner Robert Klee, Department of Energy and Environmental Protection
- cc: Honorable Martin M. Looney, Senate President Pro Tempore
- cc: Honorable Brendan J. Sharkey, Speaker of the House of Representatives
- cc: Robert Stein, Chairman, Connecticut Siting Council
- cc: Melanie Bachman, Staff Attorney, Connecticut Siting Council



STATE OF CONNECTICUT
GOVERNOR NED LAMONT

October 28, 2021

Mark Quinlan
52 Sunset Terrace
Collinsville, CT 06019

Dear Mr. Quinlan:

Pursuant to Sections 4-1a and 16-50j of the Connecticut General Statutes, I have the honor and privilege to appoint you to the Connecticut Siting Council, as a member with experience in ecology, to serve a term coterminous with my own, or until a successor is appointed and has qualified, whichever is longer.

Sincerely,

A handwritten signature in blue ink that reads "Ned Lamont".

Ned Lamont
Governor

cc: Honorable Denise W. Merrill, Secretary of the State
Honorable Kevin P. Lembo, Comptroller
John C. Geragosian and Clark J. Chapin, Auditors of Public Accounts
Carrie Lisitano, Legislative Library
Katie Dykes, Commissioner, Department of Energy and Environmental Protection
Melanie Bachman, Executive Director, Connecticut Siting Council