STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

NORTHEAST UTILITIES SERVICE COMPANY APPLICATION TO THE CONNECTICUT SITING COUNCIL FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED ("CERTIFICATE") FOR THE CONSTRUCTION OF A NEW 345-KV ELECTRIC TRANSMISSION LINE FACILITY AND ASSOCIATED FACILITIES BETWEEN SCOVILL ROCK SWITCHING STATION IN MIDDLETOWN AND NORWALK SUBSTATION IN NORWALK, INCLUDING THE RECONSTRUCTION OF PORTIONS OF EXISTING 115-KV AND 345-KV ELECTRIC TRANSMISSION LINES, THE CONSTRUCTION OF BESECK SWITCHING STATION IN WALLINGFORD, EAST DEVON SUBSTATION IN MILFORD, AND SINGER SUBSTATION IN BRIDGEPORT, MODIFICATIONS AT SCOVILL ROCK SWITCHING STATION AND NORWALK SUBSTATION, AND THE RECONFIGURATION OF CERTAIN INTERCONNECTIONS	**DOCKET NO. 272** **MARCH 22, 2004**

THE TOWNS OF BETHANY, CHESHIRE, DURHAM, EASTON, FAIRFIELD, HAMDEN, MIDDLEFIELD, MILFORD, NORTH HAVEN, NORWALK, ORANGE, WALLINGFORD, WESTON, WESTPORT, WILTON AND WOODBRIDGE'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO RESCHEDULE CERTAIN DEADLINES AND HEARINGS

The above-captioned towns (the "Towns"), each a party in this contested proceeding, move to dismiss the application in this proceeding (the "Application") because of the Applicants' willful refusal to comply with the order of the Siting Council (the "Council") granting the Towns' Motion to Compel dated March 5, 2004, and their

intentional disregard of their statutory obligation to respond to pre-hearing discovery. This motion is necessitated by the gamesmanship employed by the Applicants The Connecticut Light and Power Company ("CL&P") and The United Illuminating Company ("UI") [1], which is clearly intended to deny to the Towns the information and documents required by them to participate as major stakeholders in this Docket; i.e., to prepare pre-filed testimony, to prepare witnesses to testify and to prepare cross-examination of the Applicants' witnesses. Because of these gross failures, the Application should be dismissed.

In the alternative, the Towns renew the request in their Motion dated March 5, 2004 (the "Motion to Compel"), that the hearing date for EMF (March 25, 2004) and other deadlines as set forth below be extended.[2] This alternative relief will not delay the commencement of the hearings on the issue of need and will not significantly delay this Docket, so long as the Applicants cease their present tactics and comply with discovery in a meaningful manner, so that the Towns' rights to due process and fundamental fairness are not further eviscerated.[3]

[1] CL&P and UI are sometimes hereinafter referred to collectively as the "Applicants." The undersigned represents solely the towns of Durham and Wallingford in this proceeding. The undersigned has been authorized to submit this motion on behalf of the Towns.

[2] The Towns note that while they filed a motion with respect to scheduling, which was denied by the Council at its March 17, 2004 meeting, the Applicant previously achieved an extension of the date to file pre-filed testimony on EMF issues by merely submitting a letter to the Council. The Council chose to grant the relief requested in the letter immediately without any public meeting to discuss it.

[3] Hearings before administrative agencies must be conducted "so as not to violate the fundamental rules of natural justice …Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence." *Huck v. Inland Wetlands and Watercourses Agency,* 203 Conn. 525, 536 (1987)(internal citations omitted)

Argument

At its meeting on March 17, 2004, the Council granted the Towns' Motion to Compel and ordered the Applicants to respond to all discovery by March 19, 2004. The Motion to Compel demanded that the Applicants respond fully and completely to the Towns' interrogatories (the "Pre-Hearing Questions"). Notwithstanding the Council's order, the Applicants continue to object to many of the Pre-Hearing Questions. Additionally, with respect to the Pre-Hearing Questions that the Applicants claim to have answered, the Applicants have not answered each interrogatory as accurately as possible and as fully as is reasonable. By failing to provide complete and timely responses, the Applicants have placed the Towns in the untenable position of entering the evidentiary hearings without the same information that is in the Applicants' hands. The Towns have been effectively denied their opportunity to know the facts on which the Council is being asked to act, to cross-examine witnesses based on all of the facts and to offer rebuttal evidence after having analyzed the Applicants' position after full disclosure of the facts on which they based the Application. This is unfair and violates due process. *Huck v. Inland Wetlands and Watercourses Agency,* 203 Conn. 525, 536 (1987)(internal citations omitted).

The Applicants' actions "will deny the Towns their statutory right to present their case and conduct cross-examination" on the subject matter of the Pre-Hearing Questions, and will deny the Towns a "full and fair disclosure of the facts," in violation of Conn. Gen. Stat. § 16-50o(a). It is impossible to specify any prejudice greater than that, particularly since it is the Towns and their citizens who are being asked to bear the burden of the transmission line proposed in the Application.

In addition, § 4-177c of the Uniform Administrative Procedure Act ("UAPA") requires that each party "shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party… and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved." *Conn. Gen. Stat. § 4-177c(a).* "§ 4-177c unambiguously requires parties and agencies in administrative proceedings to provide other parties to the proceedings access to relevant documents." *Office of Consumer Council v. Department of Public Utility Control,* 44 Conn. Sup. 21, 29 (1994). In that case, the Superior Court held that the DPUC's decision denying the OCC's discovery of certain of the applicant's documents violated OCC's rights under Conn. Gen. Stat. § 4-177c and was an abuse of discretion. The Court sustained OCC's appeal and remanded the case to the DPUC for further proceedings. The resulting delay, increased costs, and waste of resources could have been avoided if the applicant had produced the documents in the first instance.

Similarly, the Applicants' failure to fully respond to the Pre-Hearing Questions and to the Council's order on the Motion to Compel, effectively denies the Towns' rights to discovery under Conn. Gen. Stat. § 4-177c(a)(1), and frustrates the Towns' ability to "respond, cross-examine, and present evidence and argument on all issues involved" in violation of Conn. Gen. Stat. § 4-177c(a)(2). If the Council permits the hearings (other than with respect to "need") to proceed on the current schedule (without full and meaningful responses by the Applicants to the Pre-Hearing Questions), the Council will be acting in abuse of its discretion; *see Office of Consumer Council v. Department of Public Utility Control, supra*, and will be allowing the Towns' procedural and substantive

rights to be trampled on, all in violation of both the UAPA and the Public Utility Environmental Standards Act ("PUESA"). Accordingly, the Council must either dismiss the Application or reschedule certain deadlines and hearing dates, as requested below.[4]

Furthermore, the Application is a moving target, which makes it impossible for the Towns to adequately prepare for the hearings within the parameters of the current schedule. After filing the Application, the Applicants filed a supplement to the Application. Since then, the Applicants have submitted three addenda to the supplement.[5] Each filing requires new discovery and analysis by the Towns. Because the Applicant has not been forthcoming in their discovery responses, the Towns' rights under PUESA and the UAPA have been impacted.

The specific deficiencies in the Applicants' responses are as follows:

Despite the Council's order compelling the Applicants to respond, the Applicants continue to object to Pre-Hearing Questions 24, 26 and 32 of the Towns' First Set of Interrogatories (the "First Set"). Further, Questions 1, 2, 3, 11, 12, 13, 15, 16 and 17 of the First Set asked for data used in the GE Harmonic Studies in machine - readable format. Now, nearly two months later, the Towns still have not been provided with that data, which is essential to the Towns' ability to submit testimony and prepare for cross-examination by the April deadlines.

[4] While the Applicants may claim some need for urgency to move this Docket along, the requested extension is needed because of the Applicants' own failure to comply with discovery in a meaningful way.
[5] For example, in their response to Towns-03, Q-050 dated March 16, 2004, the Applicants indicate that yet further studies are being conducted of both a hybrid and an all-underground line between East Shore and East Devon substation. Clearly, these studies will require further analysis by the Towns, and may necessitate further discovery. If the Applicants had submitted a complete application at the outset of this proceeding, instead of submitting it piecemeal, this rolling process would not have been necessary.

EMF Issue

The Council had set a deadline of March 9, 2004 (the "March 9th Deadline"), for testimony relating to the subject matter of the hearings scheduled for March 23, 24, and 25, 2004. The Applicants submitted a letter to the Council on March 4, 2004, requesting this deadline be extended to March 16, 2004. Within 24 hours of receiving the Applicants' letter request, the Council, without public deliberation, changed the date for filing testimony related to EMF to March 16, 2004, but has to date refused to change any of the dates requested by the Towns. The Council has reserved the hearing scheduled for March 25, 2004 to receive evidence as to the issue of EMF.

The Applicants' failure to respond to the Towns' Second Set of Interrogatories on the issue of EMF by the March 2, 2004 requested date, has seriously impaired the Towns' ability to fully participate in the scheduled March 25, 2004 hearing on EMF issues. In addition, on March 15, 2004 (one day before pre-filed testimony was due on the issue of EMF), the Applicants submitted revised measurements of EMF ("Revised EMF Data") along the route of the proposed line. It is patently unfair for the Applicants to be permitted to make this substantial change at the eleventh hour and effectively preclude the Towns from conducting discovery with respect to the Revised EMF Data. Nonetheless, on March 18, 2004, the Towns served new Pre-Hearing Questions directed to the Revised EMF Data (just three days after receipt). The fact that pre-hearing testimony was past due underscores the untenable position in which the Towns have been placed. Under the current schedule, even if the Towns desired to submit pre-filed testimony after receiving full and complete responses from the Applicants as to the new discovery concerning the Revised EMF Data, the Towns could not do so. Moreover,

even if the Applicants fully and completely responded to the new discovery today, there is not sufficient time to adequately prepare cross-examination of the Applicants' witnesses for the March 25th hearing date.

Undergrounding Issue

The Applicants' failure to fully respond to the First Set by the requested date, has made it impossible for the Towns to prepare testimony on or before the assumed deadline for the filing of testimony for the hearings scheduled for April (the "April Hearings"), thus preventing the Towns from presenting a case-in-chief on the issue of undergrounding. That failure will also have a substantial negative impact on the Towns' ability to respond to the Applicants' case-in-chief concerning the extent to which the Facility in this proceeding can be installed underground.

Given the amount and the complexity of the data requested in the First Set, it will require a minimum of six weeks for the Towns' analysis of that data and the preparation of a case-in-chief on the issue of undergrounding. Although a deadline for the filing of testimony concerning the subject matter of the April Hearings has not yet been set by the Council, the Towns assume that this deadline will be at least two weeks prior to the April Hearings. Assuming *arguendo* that this deadline will be set on or about April 6, 2004, it will be impossible for the Towns to both prepare their case-in-chief on the issue of undergrounding and prepare cross-examination on that issue, in time for the April Hearings.

Furthermore, the Applicants' failure to respond to the First Set in a meaningful way will have a substantial negative impact on the Towns' ability to prepare testimony and cross-examination for the hearing scheduled for May (the "May Hearings"), under

the schedule currently contemplated, because the Applicants' failure to respond to the First Set will require the Towns to simultaneously prepare for both the April Hearings and the May Hearings.

As a result of the Applicants' intentional disregard of the statutory requirements with respect to providing meaningful responses to Pre-Hearing Questions, and the Siting Council's order granting the Towns' Motion to Compel, the Towns are severely prejudiced by the current schedule.

Requested Relief

For the aforementioned reasons, the Towns respectfully request that the Council dismiss the Application. Alternatively, the Towns respectfully request that if the Council does not dismiss the Application, the Council should revise the schedule in this Docket as follows to:

(i) require the Applicants to respond fully and completely to all of the Towns' pre-hearing questions by a date certain (the Discovery Response Deadline);

(ii) postpone the Deadline to file testimony as to EMF to a date not sooner than (2) weeks after the Discovery Response Deadline;

(iii) postpone the hearing concerning EMF, currently scheduled for March 25, 2004, to a date not sooner than (2) weeks after the new deadline for the filing of testimony described under roman numerette (ii) *supra*;

(iv) set the deadline for the filing of testimony concerning the subject matter of the April Hearings, to a date not sooner than (6) weeks after the Discovery Response Deadline;

(v) postpone the April Hearings (as tentatively scheduled), to start not sooner than (2) weeks after the deadline for filing testimony described under roman numerette (iv) *supra;*

(vi) delay the deadline for the filing of testimony concerning the subject matter of the May Hearings, to a date not sooner than (10) weeks after the Discovery Response Deadline;

(vii) postpone the May Hearings, to start not sooner than (2) weeks after the deadline for filing testimony described under roman numerette (vi) *supra*; and

(viii) order the Applicants to direct GE to provide the Towns with the data and models requested in the First Set; or, alternatively, order the Applicants to direct GE to run scenarios requested by the Towns, at the Applicants' expense.

The sooner the Applicants disavow their gamesmanship and provide full, complete, and meaningful responses, the sooner this Docket can proceed in a manner which complies with the Connecticut General Statutes and without reversible error.

Conclusion

For the aforesaid reasons, the Council should dismiss the Application or, in the alternative, re-schedule certain deadlines and hearings as specified above.

Respectfully submitted,

THE TOWNS OF BETHANY, CHESHIRE, DURHAM, EASTON, FAIRFIELD, HAMDEN, MIDDLEFIELD, MILFORD, NORTH HAVEN, NORWALK, ORANGE, WALLINGFORD, WESTON, WESTPORT, WILTON, AND WOODBRIDGE

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CERTIFICATION

I hereby certify that a copy of the foregoing has been mailed and/or hand-delivered to all known parties and intervenors of record this 22nd day of March, 2004.

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