STATE OF CONNECTICUT

SITING COUNCIL

Re:	The Connecticut Light and Power Company and The United Illuminating Company Application for a Certificate of Environmental Compatibility and Public Need for the Construction of a New 345-kV Electric Transmission Line and Associated Facilities Between Scovill Rock Switching Station in Middletown and Norwalk Substation in Norwalk, Connecticut Including the Reconstruction of Portions of Existing 115-kV and 345-kV Electric Transmission Lines, the Construction of the 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 272 December 22, 2003

APPLICANTS' MEMORANDUM
CONCERNING THEIR EMINENT DOMAIN POWERS
AND THEIR FRANCHISE RIGHTS TO INSTALL FACILITIES IN HIGHWAYS

PRELIMINARY STATEMENT

This memorandum is submitted by The Connecticut Light and Power Company ("CL&P") and The United Illuminating Company ("UI") (collectively, the "Applicants"), in response to a request from the Connecticut Siting Council ("Council") for (a) a discussion of the sources of the Applicants' eminent domain powers, and the principal requirements for the use of such powers; and (b) a discussion of the Applicants' rights to locate facilities in municipal and state public highways, and the principal requirements for the exercise of those rights.

A. THE APPLICANTS' EMINENT DOMAIN POWERS

Source of Public Service Companies' Eminent Domain Powers

It is a fundamental principle of law that the power to appropriate private property for public use is an attribute of sovereignty and essential to the exercise of government. *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 587 (1952) The legislature may exercise this power itself or may delegate it to another. *Id.* (Statute delegating state power of eminent domain to interstate natural gas pipeline company was constitutional.) Eminent domain powers are often delegated to public service companies, such as the natural gas pipeline company in the *Northeastern Gas Transmission* decision cited above. In particular, the power is delegated to electric public service companies in order to enable them to take land necessary for electric transmission facilities. *Connecticut Light & Power Co. v. Costello*, 161 Conn. 430, 436 (1971) (approving taking of easements for transmission line right of way for construction of a portion of the 345-kV Big 11 New England power loop.)

In Connecticut, the legislature has delegated eminent domain powers to electric public service companies in the special act by which the company is created, often referred to as a "charter" or "franchise;" and sometimes by supplementary grants by special acts amending the charter. The electric public service companies that exist today are the products of the merger of predecessor companies; as a result, the surviving company possesses all of the eminent domain powers in the charters of all of its predecessors. Thus, in *CL&P v. Costello, supra*, the court traced the history of several of the legislative grants and corporate mergers by which CL&P had acquired eminent domain rights that enabled it to take land necessary for constructing its

facilities. 161 Conn. at 431, 435. Since the time of the *Costello* decision, CL&P has also acquired by merger the charter powers of the former Hartford Electric Light Company, authorizing it "to enter upon, take and use…land, interests in land and real estate as shall be necessary or convenient in the exercise of any of its right, power and privileges…" An Act Amending the Charter of the Hartford Electric Light Company ,1947 Special Act No. 177, § 1, The legislature delegated the eminent domain power to UI in identical language in An Act Amending the Charter of the United Illuminating Company, Special Acts, 1951, Vol. XXVI, p. 348, § 1.

The Significance of Siting Council Approval of a Facility

Traditionally, the determination of what property was necessary for public utility purposes, and therefore subject to acquisition by the eminent domain power, was entirely within the discretion of the public service company exercising the power, subject only to judicial review of the company's good faith in making the determination. *Connecticut Power Co. v. Powers,* 142 Conn. 722, 725-26 (1955). This discretion was limited by the legislation that created the Council's predecessor agency, the Connecticut Power Facilities Evaluation Council, and now governs proceedings before the Council relating to electric transmission facilities. This legislation, the Public Utility Environmental Standards Act ("PUESA" or the "Act"), , as amended, now appears as Chapter 277a of the General Statutes, Conn. Gen. Stats. §16-50g *et seq.* With respect to facilities subject to the Council's jurisdiction, PUESA provides that, subject to limited exceptions, no one "shall exercise any right of eminent domain in contemplation of…a facility…without having first obtained a certificate of environmental

compatibility and public need…issued with respect to such facility.". Conn. Gen. Stats. § 16-50k(a) Electric and gas public service companies are also precluded from accepting voluntary conveyances of "real property" for "transmission facilities,[1]" without first obtaining a certificate of environmental compatibility and public need ("Certificate"). Conn. Gen. Stats. § 16-50z(a). Further, even where the company has obtained a Certificate for a facility, if it seeks to take a residence by eminent domain, the homeowner may seek a determination from the Council that the taking is not necessary for the purpose for which the Certificate was issued. Conn. Gen. Stats. § 16-50z(c).

The Council has authority to approve advance land acquisition. If the Council has determined that a proposed facility will have no material adverse environmental effect, no certificate is required, and the company may proceed to acquire land for the facility by eminent domain, without first obtaining a Certificate. Conn. Gen. Stats.§§ 16-50k(a), 16-50z(a). In addition, the Act authorizes the Council to grant permission for advance land acquisition for electric and gas transmission facilities to avoid hardship for the property owner; to prevent development of a proposed transmission corridor pending the issuance of a certificate; or to allow adjustment of the boundaries of existing rights of way. Conn. Gen. Stats. § 16-50z(a). Finally, with respect to electric and gas transmission facilities, the company may acquire real estate rights, without the necessity of a certificate, for: (1) relocation of a facility required by a public highway project or other governmental action; (2) acquisition of additional rights or title

[1] "Transmission facilities" are not defined by PUESA. The Council has interpreted the prohibition of § 16-50k(a) to apply to the acquisition of real estate for transmission lines, but not to the acquisition of land for a substation. Petition No. 237 – The Connecticut Light and Power Company (CL&P) petition for a declaratory ruling that Connecticut General statute 16-50z does not apply to electrical substations. Decision, July 26, 1989.

to property already subject to an easement or other rights for electric transmission or distribution lines; and (c) widening a portion not exceeding one mile in length of a transmission right of way for reasons of safety or convenience of the public. Conn. Gen. Stats. § 16-50z(b).

Assembling the rights necessary to build a major transmission facility is a time consuming process, and the preliminary steps in this process are usually commenced before a Certificate is issued. Otherwise, the time for construction of an approved facility would be extended by a year or more. Thus, while an application is pending, or even before it is filed, the company will identify the properties or rights it is likely to need, and the owners from whom they must be acquired. In some cases, the company may begin preliminary negotiations of a purchase. It is therefore not unusual for an applicant to the Council to be contacting owners of key properties, and to be conducting preliminary negotiations with them, while an application is pending before the Council.

Compensation for Property Taken by Eminent Domain

The exercise of the eminent domain power is subject, of course, to the constitutional requirement that just compensation shall be paid for the taking of private property and that no person shall be deprived of his property without due course of the law. Conn. Const. Art. I, §§ 9, 11; *Northeastern Gas Transmission Co., supra,* 139 Conn. at 588. Where an entire parcel of land is taken, the landowner is entitled to the fair market value of the property when put to its highest and best use at the time of the taking. *Minicucci v. Comm'r of Transportation,* 211 Conn. 382, 384 (1989). If property taken for a facility approved by the Council includes a residence,

the homeowner is entitled by statute to recover his moving expenses, in addition to the fair market value of the property. Conn. Gen. Stats. §16-50z(d).

In the case of a partial taking, such as one in which the condemnor acquires a transmission line easement across a defined strip of land that is part of a larger parcel of property, the landowner is entitled to compensation not just for the diminution in the value of the strip that is subjected to the easement, but also for the diminution in value (if any) of the remainder of his property. "Damages are measured by application of the `before and after' rule. The court should consider any and all damages which will forseeably follow from the proper construction of the project, including any damages to the remainder…" *Plunske v. Wood*, 171 Conn. 280, 283, 284 (1976) (citations omitted). Thus, for instance, where a landowner has obtained approval for the subdivision of an undeveloped parcel of land into a certain number of lots, and the effect of taking an easement through the parcel is to reduce the number of lots that the property will yield, the landowner will be entitled to recover the diminution in the market value of the entire parcel that is attributable to the reduction of the potential lot yield.

Good Faith Negotiation Requirement

A company's exercise of eminent domain power is authorized if the company and a landowner "cannot agree" or are "unable to agree" on the amount of the compensation due to the landowner. See, for instance, the charter of the Rocky River Power Company, CL&P's predecessor, Special Acts 1905, Vol. XIV, p. 860, § 6; and An Act Amending the Charter of the United Illuminating Company, 1951 Special acts, Vol. XXVI, p. 348, § 2 Such a provision

requires that, before initiating eminent domain proceedings, the condemner must exhaust all reasonable efforts to obtain the land by agreement. *CL&P v. Costello*, 161 Conn. at 442.

Eminent Domain Procedure

In Connecticut, the judicial procedure for approving the exercise of an eminent domain power by a public service company, and for determining the compensation due to the landowner, is prescribed in the charter provisions that delegate the eminent domain power to the company. The charters provide that, upon application of the company, a judge of the superior court shall appoint three disinterested citizens as a committee to assess the damages caused by the taking. See, for instance, *CL&P v. Costello*, 161 Conn. at 439. The committee's recommendation is subject to review and approval by the superior court, Conn. Pr. Bk. §§ 19-8 – 19-17; and a judgment of the superior court approving or modifying a committee's recommended award may be appealed to the Appellate Court like any other judgment of the Superior Court. See, for instance, *CL&P v. Costello, supra.*

B. THE APPLICANTS' POWERS TO INSTALL THEIR FACILITIES IN MUNICIPAL AND STATE PUBLIC HIGHWAYS

The eminent domain power delegated by the State to public service companies applies only to private property, and not to public property such as that of the State and its municipalities. *Bridgeport Hydraulic Co. v. Town of Weston*, 6 Conn. Supp. 359, 362 (1938) However, the legislature has granted to electric public service companies the critically important right to locate facilities in town and state public highways.

Source of Public Service Companies' Powers to Locate Facilities in Highways

As is the case with eminent domain powers, grants of authority to public service companies to locate their facilities in public highways are found in their charters or franchises. For instance, a Special Act amending the charter of The Rocky River Power Company, CL&P's corporate predecessor, vests it with the authority to deliver electricity:

> by wires, cables, conduits, conductors, and pipes, or any other apparatus necessary for the purpose, either overhead or underground, over or under streams, and through public streets and ways and public grounds, with power to change, relocate, and alter the same whenever necessary.
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> 1909 Special Acts, Vol. XV, p. 1093, 1094

Similarly, by an amendment to its charter, UI has been granted the right, "for the purposes of conducting and transmitting electricity," to:

> erect, lay, maintain and operate poles, towers, wires, conduits, cables, fixtures and other structures and apparatus of every kind, either overhead or underground, over or under any waters of this state and in, over, under and upon the public highways streets and grounds in any town, city or borough within the state
>
> Special Acts, 1963, Vol. XXXI, p. 267

There is a similar grant of power in virtually every one of the charters of the predecessor companies of CL&P and UI. The power to locate facilities in public highways is indeed a fundamental attribute of electric public service companies, and in Connecticut it has traditionally been an essential characteristic that distinguishes a regulated public service company from other companies that participate in businesses related to the generation and supply of electric power.

Regulation and Restriction of the Exercise of the Franchise Power to Locate Facilities in Streets: Dispute Resolution.

The authority of electric public service companies to place their facilities in public highways, granted by their franchises, is subject to regulation and qualification by other legislative enactments. *Hartford Electric Light Co. v. Water Resources Commission*, 162 Conn. 89, 95 (1971) (Electric utility's franchise right to construct power lines across Connecticut River, a navigable highway, was subject to requirement for an encroachment permit from the state Water Resources Commission.) Thus, the legislature has authorized the Department of Transportation ("DOT") and municipalities to require permits for placement of utility facilities in highways, including excavations for the installation of underground cables, and to impose "such terms and conditions as to the manner in which such work may be carried on as may be reasonable." Conn. Gen. Stats. § 16-229. See also, Conn. Gen. Stat. § 13a-126a.[2] The DOT's regulations concerning encroachment permits appear as Regs. Conn. Agencies, § 13b-17-1 through 46.

[2] "Notwithstanding the provisions of any other statute, the Commissioner of Transportation may, for the purpose of protecting the functional or aesthetic characteristics of any state highway or state highway appurtenance, promulgate regulations for the location and installation of any public service facility within, on, along, over or under the right-of-way of any state highway or state highway appurtenance and, when necessary to insure the protection of the aesthetic characteristics of any state highway, within, on, along, over or under the right-of-way of any other public highway; provided no such regulation shall limit, restrict or derogate from any power, right or authority of the Department of Public Utility Control as provided by statute in respect to the location and installation of such public service facilities. The state shall pay the additional cost of any location, relocation, installation, adjustment or readjustment of any public service facility made necessary by such regulations."

Examples of the permit conditions that the DOT may attempt to impose are provided by the current ongoing negotiations between CL&P and the DOT concerning the installation of portions of the Bethel to Norwalk project in state highways. To date, the DOT has insisted that all facilities and construction must be located off the pavement of the highway, including the paved shoulder/breakdown lane. In addition, the DOT is insisting that during construction the same number of traffic lanes remain open for travel in each direction as are available now. In contrast, CL&P's understanding during the Docket 217 proceedings was that it would be able to install underground cables beneath the pavement and that it would be able to leave a single lane of traffic open in each direction on multi-lane roads during non-rush hour periods.

In general, the DPUC and the DOT have shared jurisdiction over public service facilities installed in state public highways. *DPUC Investigation into Coxcom, Inc. d/b/a/ Cox Communications Connecticut's Installation of Ground-Mounted Back-Up Generators,* DPUC Docket No. 00-03-09 (February 7, 200). However, if a town or the DOT neglects to act upon or refuses a permit, or imposes conditions that the public service company deems unreasonable, the company "may appeal to the department of Public Utility Control, which may…determine whether such permit ought to be granted, or such terms and conditions altered, and may… grant such permit in writing upon such terms and conditions as to the carrying on of such work as it finds just and reasonable." Conn. Gen. Stats. § 16-231. The DPUC has been reluctant to exercise this power. Thus, in DPUC Docket NO. 00-04-20, *Application of Coxcom, Inc. Appealing Denial of Encroachment Permits by the Department of Transportation,* (August 2, 2000), in which the appellant complained that the DOT had "effectively denied" its permit

application filed on March 23, 2000, the DPUC denied the appeal on the ground that the DOT had not denied the permit nor neglected to issue it, but on the contrary was still considering the permit request.

In the case of facilities that require a Certificate from the Siting Council, it is the Siting Council that determines whether and where the facilities it certifies may be placed in a highway. Section 16-50x(a) of PUESA provides that the Council "shall have exclusive jurisdiction over the location and type of facilities" subject to its jurisdiction, and that "[w]henever the council certifies a facility…such certification shall satisfy and be in lieu of all certifications, approvals and other requirements of state and municipal agencies in regard to any questions of public need, convenience and necessity for such facility." Thus, if a town or the DOT opposes a proposed location of a proposed facility, it must make its case before the Council, and it will be bound by a decision of the Council approving the construction of a particular facility in a particular location, such as the installation of electric transmission cables in the paved area of a street.

Relocation of Facilities Installed in Highways

In general, the towns and DOT may require that utility facilities constructed within their highway rights-of-way pursuant to a franchise power be relocated elsewhere if they become inconsistent with the highway use.[3] However, where the DPUC or the Siting Council has made a determination fixing the location of the facilities, a change in the circumstances existing at the time of its decision would be required in order for this relocation power to be exercised.

[3] *See*, Connecticut Railway & Lighting Co. v. New Britain Redevelopment Comm'n., 161 Conn. 234 (1971) (utility facilities in public streets are subject to relocation when required by public necessity).

If the DOT requires the relocation of public service facilities constructed within a state highway, the General Statutes require that the state must share or pay the expense of the relocation. Conn. Gen. Stats. § 13a-126.

Locating Facilities in Highway Rights of Way By Agreement With the DOT

Quite apart from using its franchise power to locate its facilities in state highways, a public service company may enter into an agreement with the DOT pursuant to which the company may acquire rights for either a defined or an indefinite term to locate its facilities in or along public highways or other DOT property. Section 13a-80a of the General Statutes authorizes the DOT, upon complying with certain conditions to "sell…*or enter into agreements* concerning *any interest* the state may have on, above or below any state highway right-of-way…" (emphasis added). Such "agreements" may include leases or easements for utility facilities. In addition, section 13a-126c of the General Statutes, provides:

> Notwithstanding any provision of the general statutes to the contrary, the Commissioner of Transportation may enter into an agreement with the owner or operator of a public service facility…desiring the longitudinal use of the right-of-way of a limited access highway to accommodate trunkline or transmission type utility facilities…
>
> (emphasis added)

Transmission facilities, unlike the lower voltage distribution lines that are used to deliver power directly to homes and businesses, are usually constructed in dedicated rights of way, and not in public highways. Electric utilities usually prefer to have permanent, or at least long term rights for the location of their transmission facilities. Thus, the Pequonnock (Bridgeport) to Ely Ave. (Norwalk) line, constructed within and along the DOT's railroad right of way, is located

there in part pursuant to a lease agreement with the DOT and in part pursuant to easements from the owners of the underlying land. A public service company would ordinarily prefer a location agreement that provides permanent, or at least long term, location rights for transmission facilities, rather than having to depend on its franchise rights.

The DOT has also preferred agreements with public service companies to companies' exercise of franchise rights – but for the opposite reason. The DOT does not want to be exposed to any risk of cost sharing when it orders the relocation of utility facilities, so it will seek to extract an agreement from the public service company in which, in exchange for the DOT's cooperation in the installation of the facilities, the public service company waives its reimbursement rights.

Only recently, responding to the pressure to avoid expanding rights of way through densely settled areas in order to construct new lines, have the Companies sought to locate high voltage transmission lines beneath or along state public highways. The placement of these large facilities in highways, rather than in a dedicated right of way such as can be used for overhead lines, raises siting issues that the Companies have not had to face before. Soon the Council may find it necessary to consider siting issues relating to such underground installations. The DOT requirements impose significant costs, which could add significantly to the overall cost of any underground portions of a project. The DOT policies also may raise environmental / social issues. For instance, the installation of underground cables away from the paved area of a highway, so as to minimize traffic disruption, but excavation outside the paved area may involve the cutting of specimen trees or the disruption of lawns maintained by homeowners within the

DOT right of way. This presence of the the DOT as intervenor in this proceeding will facilitate the resolution of such issues by the Council.

CONCLUSION

A decision by the Council approving the construction of an electric transmission facility in a specified location vests the applicant with legal authority to exercise its eminent domain power to the extent necessary to acquire private property and to use town and state highways as authorized by the decision. However, there are a host of procedural and practical requirements that must be followed in order to effectively exercise these powers. Particularly in the case of installing electric transmission lines in public highways, the Siting Council may be called upon to resolve issues between the company, the highway authority, and possibly property owners abutting the highway.

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