STATE OF CONNECTICUT

CONNECTICUT SITING COUNCEL

PETITION FOR DECLARATORY
RULING OF THE IROQUOIS
GAS TRANSMISSION SYSTEM , L.P.

PETITION NO. 755

FEBRUARY 22, 2006

DECLARATORY RULING REGARDING THE JURISDICTION
OF THE CONNECTICUT SITING COUNCIL OVER THE
PROPOSED EXPANSION OF A GAS COMPRESSOR STATION
IN THE TOWN OF BROOKFIELD CONNECTICUT

On February 7, 2006 Iroquois Gas Transmission System L.P. ("Iroquois") filed a Petition for Declaratory Ruling ("Petition") with the Connecticut Siting Council (the "Council") pursuant to Conn. Gen. Stat. § 4-176(a) and Conn. Agencies Regs. § 16-50j-38 *et. seq.* A copy of the Petition is attached hereto at Tab 1. In the Petition Iroquois seeks a ruling that the Council does not have jurisdiction over certain proposed additions to Iroquois' previously authorized natural gas compressor station in Brookfield, Connecticut (the "Brookfield Compressor Station"). For the following reasons the Council grants the Petition and rules that the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over the Brookfield Compressor Station under the Natural Gas Act ("NGA"), 15 U.S.C. §717 *et. seq.*, and that the council is therefore

preempted under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl.2, from regulating the project under the Public Utility Environmental Standards Act, ("PUESA") Conn. Gen. Stat. § 16-50g *et. seq.* The Council also rules that it is specifically prevented from exercising jurisdiction over the Brookfield Compressor Station by State law pursuant to Conn. Gen. Stat. § 16-50k(d) which provides, among other things, that PUESA "shall not apply to any matter over which any agency, department or instrumentality of the federal government has exclusive jurisdiction...."

Notwithstanding federal preemption FERC regulations provide for the participation of interested parties in FERC certification proceedings and State commissions, such as the Council, may intervene as a matter of right. 18 C.F.R. § 385.214. Moreover, in *Maritimes & Northeast Pipeline, LLC.* , 81 FERC ¶61,166 (1997) ("*Maritimes*") FERC provided that "[A]s a matter of policy...the Commission has imposed upon applicants a requirement that they cooperate with State and local authorities." *Maritimes*, 81 FERC ¶ 61,166 at 61,730. More specifically, "the Commission has encouraged applicants to cooperate with state and local agencies with regard to the siting of pipeline facilities, environmental mitigation measures , and construction procedures." *Id.* At 61, 729. Consistent with FERC's encouragement to cooperate with state and local officials, Iroquois' Petition states that the company will file with the Council detailed information regarding the additions to the Brookfield Compressor Station to provide the Council with the opportunity to make

recommendations to FERC and Iroquois regarding siting, environmental mitigation measures and construction procedures.

Recognizing FERC's authority over the Brookfield Compressor Station the Council intends to carry out its mandate under Conn. Gen. Stat. § 16-50g to protect the public interest as allowed by federal law and FERC policy.

DISCUSSION

This is not the first time the Council has addressed the issue of its jurisdiction over the Brookfield Compressor Station project. On December 14, 2001 Iroquois filed an application with FERC for a certificate of public convenience and necessity ("certificate") to construct and operate a compressor station in Brookfield. On December 14, 2001 Iroquois filed a separate application with FERC for a certificate to construct and operate its Eastern Long Island ("ELI") Project, which included certain proposed additions to the Brookfield Compressor Station that would enable Iroquois to receive gas from the Algonquin Gas Transmission, LLC Pipeline. These projects were not built, but were the subject of Petitions for Declaratory Ruling to the Council that it lacked jurisdiction to rule whether or not there was a need for the proposed projects. (Connecticut Siting Council Petitions No. 540 and 555). On September 25, 2002 the Council ruled that "the projects are under the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC)." Decision and Order on Petition No 540 and

555. In ruling on this matter the Council adopts its prior decision in Petitions No. 540 and 555, and refers with approval to the ample authority stated in Iroquois' Petition (See Tab 1).

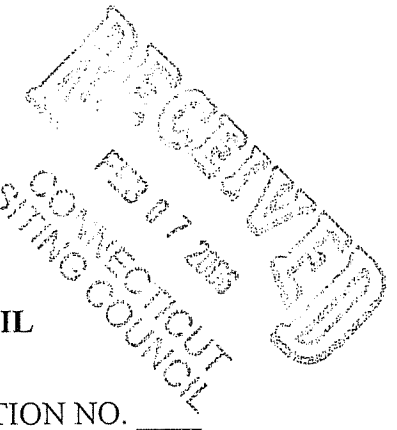
CONCLUSION

The Petition For Declaratory Ruling of the Iroquois Gas Transmission System, LLP., Petition No. 755 is Granted, and the Council shall proceed as provided above.

THE CONNECTICUT SITING COUNCIL

By: _____
Pamela B. Katz
Chairman

ORIGINAL



PETITION NO. 755

STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

IROQUOIS GAS TRANSMISSION SYSTEM, L.P.	:	PETITION NO. ____
PETITION FOR A DECLARATORY RULING	:	
REGARDING THE JURISDICTION OF THE	:	
CONNECTICUT SITING COUNCIL OVER THE	:	
PROPOSED EXPANSION OF IROQUOIS'S	:	
BROOKFIELD COMPRESSOR STATION	:	FEBRUARY 7, 2006

PETITION FOR A DECLARATORY RULING
OF IROQUOIS GAS TRANSMISSION SYSTEM, L.P.

I. INTRODUCTION

Pursuant to Conn. Gen. Stat. §§ 4-176(a) and 16-50k(d) and Conn. Agencies Regs. § 16-50j-38 *et seq.*, Iroquois Gas Transmission System, L.P. ("Iroquois") hereby petitions the Connecticut Siting Council (the "Council") for a declaratory ruling that it does not have jurisdiction over certain proposed additions to Iroquois's previously authorized natural gas compressor station in Brookfield, Connecticut (the "Brookfield Compressor Station"). As demonstrated below, under the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.*, the Federal Energy Regulatory Commission ("FERC" or "Commission") has "exclusive jurisdiction" over Iroquois's proposed additions to the Brookfield Compressor Station. Therefore, under Conn. Gen. Stat. § 16-50k(d), the Council has no jurisdiction over the project.[1]

[1] Under Conn. Gen. Stat. § 16-50k(d), the Public Utility Environmental Standards Act ("PUESA"), chapter 277a of the Connecticut General Statutes, "shall not apply to any matter over which any agency, department or instrumentality of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction, to the exclusion of regulation of such matter by the state."

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

Notwithstanding this exclusive federal jurisdiction, subsequent to the Council's action on this petition for a declaratory ruling, Iroquois proposes to file with the Council detailed information regarding these additions to Brookfield Compressor Station to provide the Council with the opportunity to provide recommendations to FERC and Iroquois regarding siting, environmental mitigation measures, and construction procedures.

II. BACKGROUND

Iroquois is engaged in the business of transporting natural gas in interstate commerce under certificates of public convenience and necessity ("CPCNs") issued by FERC pursuant to Section 7 of the NGA, 15 U.S.C. § 717f. Iroquois owns and operates an existing 411-mile interstate natural gas pipeline extending from the New York-Canadian border at Waddington, New York, through western Connecticut to Long Island and the Bronx, New York (the "Iroquois Pipeline"). On November 14, 1990, Iroquois received a CPCN from FERC to construct and operate the Iroquois Pipeline. *Iroquois Gas Transmission System, L.P.*, 53 FERC ¶ 61,194 (1991) (Opinion No. 357), *order on reh'g*, 54 FERC ¶ 61,103 (1991) (Opinion No. 357-A).[2]

On December 14, 2001, Iroquois filed an application with FERC for a CPCN to construct and operate the Brookfield Compressor Station. Iroquois received its CPCN from FERC for the Brookfield Compressor Station on October 31, 2002.[3] The Brookfield Compressor Station was

---

[2] The Iroquois Pipeline was also the subject of Council Docket No. 134. *See Iroquois Gas Transmission System, L.P.*, Docket No. 134, *Findings of Fact, Opinion, Decision and Order* (Oct. 11, 1990).

[3] *See Iroquois Gas Transmission System, L.P.*, 101 FERC ¶ 61,131 (2002).

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

also the subject of the Council's September 25, 2002 declaratory ruling in Petition No. 540.[4] Iroquois's construction of the Brookfield Compressor Station has not begun, and recently FERC granted Iroquois's request to extend the date for completion of construction to November 1, 2007.[5]

On December 14, 2001, Iroquois filed a separate application with FERC for a CPCN to construct and operate its Eastern Long Island ("ELI") Project, which included certain proposed additions to the Brookfield Compressor Station that would enable Iroquois to receive gas from the adjacent Algonquin Gas Transmission, LLC ("Algonquin") Pipeline (the "Brookfield Additions").[6] The Brookfield Additions were the subject of the Council's declaratory ruling in Petition No. 555 issued on September 25, 2002.[7] Iroquois subsequently withdrew its ELI Project application, including the Brookfield Additions, from FERC's consideration.[8]

On November 14, 2005, Iroquois notified FERC of its intent to modify the Iroquois Pipeline to provide an additional 100 million cubic feet per day of firm natural gas transportation

---

[4] *See* Petitions 540 and 555, *Decision and Order* (Sept. 25, 2002) ("Therefore, the Council will issue a declaratory ruling that no Certificate of Environmental Compatibility and Public Need (Certificate) is required for the proposed modification of an existing Iroquois pipeline by the addition of a natural gas compressor station, located off High Meadow Road, Brookfield, Connecticut (Petition 540) . . . .").

[5] *See Iroquois Gas Transmission System, L.P.*, FERC Docket No. CP02-31, Letter from Michael J. McGehee, FERC, to Paul W. Diehl, Iroquois (Nov. 3, 2005).

[6] *See Iroquois Gas Transmission System, L.P.*, FERC Docket No. CP02-52.

[7] *See* Petitions 540 and 555, *Decision and Order* (Sept. 25, 2002) ("Therefore, the Council will issue . . . a declaratory ruling that no Certificate is required [for] the proposed modifications of an existing Iroquois pipeline by additions to a natural gas compressor station, located off High Meadow Road, Brookfield, Connecticut (Petition 555).)".

[8] *See Iroquois Gas Transmission System, L.P.*, FERC Docket No. CP02-52, Notice of Withdrawal of Certificate Application (Feb. 7, 2003).

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

service to New York City (the "MarketAccess Project").[9] Iroquois's MarketAccess Project will necessitate certain additions to the Iroquois Pipeline in Connecticut. Specifically, Iroquois's MarketAccess Project requires FERC approval of: (i) the Brookfield Additions that were the subject of Council Petition No. 555 and included in Iroquois's ELI Project application to FERC;[10] and (ii) the installation of gas cooling facilities and the relocation of certain site buildings based on a recent wetland delineation of the site conducted in November 2005 (the "Brookfield Gas Cooling Additions"). In short, Iroquois's MarketAccess Project consists of the Brookfield Additions, which were the subject of the Council's September 25, 2002 declaratory ruling in Petition No. 555, and the Brookfield Gas Cooling Additions. Upon completion, the Iroquois's MarketAccess Project will be fully integrated into the existing interstate Iroquois Pipeline system.

III. PRIOR COUNCIL DETERMINATIONS

Recently, the Council has repeatedly acknowledged that FERC has exclusive jurisdiction over facilities used for the transportation of natural gas in interstate commerce and that its own role is wholly advisory.

---

[9] *See Iroquois Gas Transmission System, L.P.*, FERC Docket No. PF06-6, Letter from Paul W. Diehl, Iroquois, to Magalie R. Salas, FERC (Nov. 14, 2005). Iroquois's MarketAccess Project will deliver natural gas to Consolidated Edison Company of New York, Inc. ("Con Edison"). Upstream transportation for the volumes to be delivered to Con Edison will be provided by Millennium Pipeline Company, L.P. ("Millennium") and Algonquin.

[10] Iroquois's Brookfield Additions included a new gas filtration system and new gas meter station to enable Iroquois to receive gas from the adjacent Algonquin Pipeline. See Petition Nos. 540 and 555, Findings of Fact, at ¶ 10 (Sept. 25, 2002). That gas filtration system and gas meter station are now proposed to be constructed by Algonquin, rather than Iroquois, on the site of Iroquois's Brookfield Compressor Station as part of the Millennium Project and Algonquin's Ramapo Project.

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

For example, in its *Decision and Order* on the Brookfield Compressor Station and Brookfield Additions, the Council wrote that:

> The Connecticut Siting Council (Council) does not have jurisdiction to rule whether or not there is a need for the proposed projects (Petitions 540 & 555). The projects are under the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC). The FERC encourages the applicants to cooperate with agencies, such as the Council, regarding the siting of pipeline facilities, environmental mitigation, and construction procedures. The FERC alone will decide whether there is a need for the proposed projects, and whether this project or another one can best provide that service.

Petition Nos. 540 and 555, *Decision and Order* (Sept. 25, 2002). Similarly, as then-Chairman Gelston stated in his opening remarks during those proceedings:

> The Siting Council does not have jurisdiction to rule whether or not there is a need for this project. The project is in the exclusive jurisdiction of the Federal Energy Regulatory Commission, known as FERC. FERC encourages the applicants to cooperate with agencies, such as the Council, regarding the siting of pipeline facilities, environmental mitigation, and construction procedures. FERC alone will decide whether there is a need for the proposed compressor station and whether this project or another one can best provide that service. FERC has not asked for us to review these issues.
>
> Also, the Council is not the decision-making authority in matters involving safety of gas pipelines. Matters involving pipeline safety issues are under the jurisdiction of the United States Department of Transportation Office of Pipeline Safety. Therefore, the comments that will be most helpful to us in doing the work that the FERC has left us to do would concern the likely environmental effects of the proposed facilities and how they might be mitigated.

Docket Nos. 540 and 555, Hearing Transcript, at 5 (Sept. 4, 2002).

Likewise, as the Council found in Docket No. 221:

> The Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction for the siting of interstate natural gas transmission facilities including the route selected, the determination of public need, and the mitigation of environmental impacts. The United States Department of Transportation (U.S. DOT) has exclusive jurisdiction over the regulation of the safety of interstate natural gas

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

> transmission facilities including the safety aspects of their design, construction, and maintenance. The FERC has encouraged applicants before it to cooperate with agencies, such as the Council, with regard to the siting of pipeline facilities, environmental mitigation measures, and construction procedures.

Docket No. 221, *Findings of Fact*, at ¶ 2 (Aug. 1, 2002). *See also* Docket No. 221, Letter from Pamela B. Katz, P.E., to Anthony M. Fitzgerald (May 29, 2003).[11]

As demonstrated below, the Council's recognition of FERC's exclusive jurisdiction over interstate natural gas facilities, and the Council's lack of jurisdiction over such facilities, is wholly consistent with federal court and FERC precedent.

IV. COMMUNICATIONS

Communications regarding this Petition should be directed to the following:

Jeffrey A. Bruner
Paul W. Diehl
Iroquois Pipeline Operating Company
One Corporate Drive, Suite 600
Shelton, CT 06484-6211
(203) 925-7200 (tel)
(203) 929-9501 (fax)

Philip M. Small
Michael E. Kozlik
Brown Rudnick Berlack Israels LLP
CityPlace I, 185 Asylum Street
Hartford, CT 06103-3402
(860) 509-6500 (tel)
(860) 509-6501 (fax)

[11] "[T]he Council sought to make clear its understanding that approval authority for such interstate natural gas transmission projects exists at the federal level, specifically with the FERC, and that the role of the Council is to aid in the approval and siting process by providing meaningful input and recommendations on behalf of the citizens of Connecticut." Docket No. 221, Letter from Pamela B. Katz, P.E., to Anthony M. Fitzgerald (May 29, 2003). *See also* Docket No. 221, *Opinion*, at 1 (Aug. 1, 2002) ("Although the FERC has exclusive jurisdiction for the siting of interstate natural gas transmission facilities including the route selected, the determination of public need, and the mitigation of environmental impacts, the FERC has encouraged applicants before it to cooperate with agencies, such as the Council, with regard to the siting of pipeline facilities, environmental mitigation measures, and construction procedures."); Docket No. 221, Memorandum from S. Derek Phelps to Council Members (Jan. 31, 2002) (discussing FERC's exclusive jurisdiction over the Islander East Pipeline).

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

V. DISCUSSION

A. FERC HAS EXCLUSIVE JURISDICTION OVER IROQUOIS'S MARKETACCESS PROJECT.

1. The NGA is a comprehensive federal regulatory scheme that preempts state regulation of the transportation of natural gas in interstate commerce.

Section 1(b) of the NGA, 15 U.S.C. § 717(b), grants FERC jurisdiction over: (1) the "transportation of natural gas in interstate commerce," (2) the "sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use," and (3) "natural-gas companies engaged in such transportation or sale." A "natural-gas company" is a "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6).

Section 7 of the NGA provides that a natural-gas company must obtain a CPCN from FERC before it constructs, extends, acquires or operates any facility for the transportation or sale of natural gas in interstate commerce.

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of facilities therefor . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . .

15 U.S.C. § 717f(c)(1)(A). FERC will only issue such a CPCN where it finds that:

> the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied . . . .

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

15 U.S.C. § 717f(e). Acting under the NGA, FERC has promulgated detailed regulations setting forth application requirements for such CPCNs. *See* 18 C.F.R. Parts 157 and 380.

The Supremacy Clause of the U.S. Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, federal law preempts state law where:

> (i) Congress expressly intended to preempt state law; (ii) there is an actual conflict between federal and state law; (iii) compliance with both federal and state law is impossible; (iv) there is an implicit federal barrier to state regulation; (v) *Congress has "occupied the field" of the regulation*, leaving no room for a state to supplement the federal law; or (vi) the state statute forms an obstacle to the realization of Congressional objectives.

National Fuel Gas Supply Corp. v. Public Service Comm'n of N.Y., 894 F.2d 571, 575 (2nd Cir. 1990) (internal citations omitted) (emphasis added), *cert. denied*, 497 U.S. 1004 (1990) ("*National Fuel*"). *See also Northern Natural Gas Co. v. Iowa Utilities Board*, 377 F.3d 817, 820-24 (8th Cir. 2004) ("*Northern Natural Gas*") (discussing *National Fuel* and the NGA's complete occupation of the field of regulation).

Since the NGA's passage in 1938, the U.S. Supreme Court has repeatedly held that the NGA preempts state regulation over the interstate transportation and sale of natural gas. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 506-08 (1942); *Federal Power Comm'n v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 503 (1949); *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 89-91 (1963). "[It] is now well settled: Congress *occupied the field* of matters relating to wholesale sales and transportation of natural

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988) (emphasis added) ("*Schneidewind*"). Thus, "[t]he NGA confers upon FERC *exclusive jurisdiction* over the transportation and sale of natural gas in interstate commerce for resale." *Id.* at 300-01 (emphasis added). Regulations promulgated by FERC pursuant to its delegated authority under the NGA also preempt state law. *National Fuel*, 894 F.2d at 576.

This comprehensive federal regulatory scheme governs every aspect of the transportation and sale of natural gas in interstate commerce, preempting state regulation of such matters as the prices at which natural gas may be sold in interstate commerce, whether interstate natural gas pipelines may be constructed or modified, where such pipelines may be located, and the methods of construction and applicable safety standards for such pipelines. *See, e.g., Schneidewind*, 485 U.S. at 309 (holding that the Michigan Public Service Commission may not regulate the rates charged for natural gas sold or transported in interstate commerce); *National Fuel*, 894 F.2d at 579 (holding that "[b]ecause FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review"); *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465, 470 (8th Cir. 1987) ("Congress intended to preclude states from regulating in any manner whatsoever with respect to the safety of interstate transmission facilities"); *Algonquin LNG, Inc. v. Loqa*, 79 F. Supp. 2d 49, 52 (D. R.I. 2000) ("[B]ecause the federal regulatory scheme comprehensively regulates the location, construction and modification of natural gas facilities, there is no room for local zoning or building code regulations on the same subjects").

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

2. Because PUESA would regulate the facilities of natural gas companies subject to the exclusive jurisdiction of FERC, PUESA does not apply to the MarketAccess Project.

Absent Conn. Gen. Stat. § 16-50k(d), PUESA would on its face regulate the facilities of natural gas companies used in transportation of natural gas in interstate commerce. As a "fuel transmission facility" with a design capability of at least two hundred pounds per square inch gauge pressure, the MarketAccess Project is a "facility" under PUESA. Conn. Gen. Stat. § 16-50i(a)(2). PUESA requires that any facility obtain a "certificate of environmental compatibility and public need" from the Council. Conn. Gen. Stat. § 16-50k(a). Under PUESA:

> no person shall . . . commence the preparation of the site for, or commence the construction or supplying of a facility, or commence any modification of a facility, that may, as determined by the [C]ouncil, have a substantial adverse environmental effect in the state without having first obtained a certificate of environmental compatibility and public need . . . issued with respect to such facility or modification by the [C]ouncil . . . .

Id.

However, PUESA by its own terms does not apply to Iroquois's MarketAccess Project because Conn. Gen. Stat. § 16-50k(d) expressly states that "[t]his chapter [277a of the Connecticut General Statutes] shall not apply to any matter over which any agency, department or instrumentality of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction, to the exclusion of regulation of such matter by the state."

In *National Fuel*, a case directly on point, the Second Circuit held that a New York statute analogous to PUESA, which required that an interstate pipeline apply for and obtain a "certificate of environmental compatibility and public need" from the New York State Public

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

Service Commission ("PSC"), was preempted by the NGA because the NGA explicitly vests exclusive jurisdiction in FERC to regulate such facilities, 894 F.2d at 579, and because Congress had so occupied the field of regulation of such facilities by enactment of the NGA that there was no room for the states to regulate, *id.* at 577. Given FERC's "exclusive authority over the 'rates *and facilities*' of interstate gas pipelines," *id.* at 576 (emphasis in original), "[t]he matters sought to be regulated by the PSC were directly considered by the FERC . . . [and] such direct consideration is more than enough to preempt state regulation," *id.* at 579. *See* Conn. Gen. Stat. § 16-50k(d).

A comparison of the PUESA and the FERC regime under the NGA demonstrates that Congress has fully occupied the field that PUESA would regulate. As would Article VII of the New York Public Service Law, PUESA would regulate matters within FERC's exclusive jurisdiction as they apply to Iroquois's MarketAccess Project. Pursuant to the PUESA, the Council shall not grant a certificate of environmental compatibility and public need unless it finds and determines a "public need for the facility and the basis for the need." Conn. Gen. Stat. § 16-50p(a)(3)(A). Similarly, FERC will only issue a CPCN where it finds that:

> the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the [FERC] thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, *is or will be required by the present or future public convenience and necessity*; otherwise such application shall be denied . . . .

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

15 U.S.C. § 717f(e) (emphasis added). It is for FERC, and FERC alone, to determine the public need for the MarketAccess Project. *National Fuel*, 894 F.2d at 577. *See also* Petition Nos. 540 and 555, *Decision and Order* (Sept. 25, 2002).

There is substantial additional overlap between the Connecticut and federal regulatory schemes. For example, PUESA requires a determination of the nature of the probable environmental impact on "the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish, aquaculture and wildlife." Conn. Gen. Stat. § 16-50p(a)(3)(B). Similarly, FERC requires the submittal of an environmental impact statement pursuant to the National Environmental Policy Act, 18 C.F.R. § 380.3(a)(2), and FERC must consider the environmental impacts of the construction, operation and maintenance of the proposed pipeline. 18 C.F.R. § 157.14(6-a). As would the Council under the PUESA, FERC considers and evaluates impacts on water use and quality, 18 C.F.R. § 380.12(d); fish, wildlife, and vegetation, 18 C.F.R. § 380.12(e); cultural resources, 18 C.F.R. § 380.12(f); socioeconomics, 18 C.F.R. § 380.12(g); soils and geology, 18 C.F.R. § 380.12(h) and (i); and land use, recreation, and aesthetics, 18 C.F.R. § 380.12(j).

As does the federal regulatory scheme, PUESA also requires that the Council determine that the location of the pipeline "will not pose an undue hazard to persons or property along the area traversed by the line." Conn. Gen. Stat. § 16-50p(a)(3)(E). Pursuant to 18 C.F.R. § 157.14(a)(9)(vi), FERC considers such public safety concerns through its requirement that the facility comply with federal pipeline safety standards promulgated by the United States Department of Transportation under the Natural Gas Pipeline Safety Act ("NGPSA"), 49 U.S.C.

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

§ 60101 *et seq.* Under the NGPSA, "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). "The Natural Gas Pipeline Safety Act governs safety requirements for interstate gas transmission lines and expressly preempts more stringent regulation of such lines by state agencies." *National Fuel*, 894 F.2d at 577. *See also ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d at 468 ("In the NGPSA, Congress has expressly preempted state regulation of safety in connection with interstate gas pipelines").

There are no material differences between the areas regulated by FERC and by PUESA, nor if there were would that leave any room for the Council to regulate. As *National Fuel* made clear, the NGA has so fully occupied the field that it precludes states from engaging in concurrent site-specific environmental review. 894 F.2d at 579. Moreover, even if a state law purported to authorize the exercise of some "residual" or "piecemeal" siting jurisdiction in an effort to regulate a particular area the state deemed unregulated by the federal government, such an attempt would fail. New York's attempt to do so was held to be preempted by the Second Circuit, which stated that "[s]o-called piecemeal application of Article VII would thus allow the PSC to confront interstate transporters of gas with as much of the panoply of Article VII regulation as it chooses and to force them to litigate the preemption question issue by issue in state tribunals," *id.* at 578, and that if such piecemeal jurisdiction were not preempted, "no state law, no matter how inconsistent with a federal law, would ever be facially preempted so long as it included a provision stating that the relevant state tribunals would abide by the Supremacy Clause, an obligation to which they are already bound." *Id.* Thus, Connecticut may not pick and

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

choose among PUESA's various requirements and apply PUESA piecemeal to substantive areas the Council deems "unregulated" by the federal government. *Id.* at 577-78.

In short, the natural gas facility to which PUESA would apply is precisely that over which FERC has exclusive jurisdiction. "Congress placed authority regarding the location of interstate pipelines ... in the FERC, a federal body that can make choices in the interests of energy consumers nationally . . . . Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review." *Id.* at 579.

3. Notwithstanding federal preemption, FERC has implemented a policy which encourages applicants to cooperate with state and local agencies with regard to the siting of pipeline facilities.

In 1997, FERC issued its order in *Maritimes & Northeast Pipeline, LLC*, 81 FERC ¶ 61,166 (1997) ("*Maritimes*") specifying its current approach regarding state review of proposed interstate natural-gas pipelines. "[A]s a matter of policy . . . the Commission has imposed upon applicants a requirement that they cooperate with State and local authorities." *Maritimes*, 81 FERC ¶ 61,166, at 61,730. Specifically, "the Commission has encouraged applicants to cooperate with state and local agencies with regard to the siting of pipeline facilities, environmental mitigation measures, and construction procedures." *Id.* at 61,729. Such cooperation allows opportunities for state and local authorities to provide recommendations to an applicant and FERC regarding its proposed pipeline route and construction plan. *Id.* at 61,730.[12]

[12] This consultation process is analogous to the municipal consultation process contained in Conn. Gen. Stat. § 16-50*l*(e). Under 16-50x(a), the Council has "exclusive jurisdiction" over "facilities" and "modifications of facilities." However, under Conn. Gen. Stat. § 16-50*l*(e), an applicant to the Council is still required to consult with a municipality, which "may conduct public hearings and meetings as it deems necessary for it to advise the applicant of its recommendation concerning the proposed facility."

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

"The Commission, of course, can modify the applicant's proposal and if, in doing so, a State or local agency recommendation is overruled or modified, the Commission's requirement will prevail." *Id.*

FERC's policy of cooperation with state and local agencies is just that – a "policy" – and is a product of FERC's broad discretion under the NGA. *See, e.g.*, 15 U.S.C. § 717f(e) ("The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."). Nevertheless, "[t]hat [*Maritimes*] policy decision by the FERC . . . does not change the preemptive effect of the NGA as enacted by Congress." *Northern Natural Gas*, 377 F.3d at 824. Thus, the well-established principles of federal preemption remain firmly in place. "[T]he NGA ... vests sole authority to determine an interstate pipeline route in the Commission," *Maritimes*, at 61,729, and "preempts State and local agencies from regulating the construction and operation of interstate pipeline facilities," *id.* at 61,730. Consequently, "the Commission's practice of encouraging cooperation between interstate pipelines and local authorities does not mean that those agencies may undermine through their regulatory requirements, the force and effect of a certificate issued by the Commission." *Id.* at 61,729; *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094, at 61,346-47 (1992).

Consistent with these principles, state and local agencies, through application of state or local laws, may not prohibit or unreasonably delay the construction or operation of facilities approved by FERC. *ANR Pipeline Co.*, 113 FERC ¶ 61,255 at P 31 (2005); *Tenn. Gas Pipeline Co.*, 113 FERC ¶ 61,335 at P 37 (2005). Where a state causes unreasonable delays in the

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

issuance of an approval, an applicant may proceed without such approval. *Tenn. Gas Pipeline Co.*, 95 FERC ¶ 61,169, at 61,553 (2001). Finally, where FERC has issued certificate of public convenience and necessity, any state or local permits issued with respect to a facility must be consistent with the conditions of the FERC CPCN. *ANR Pipeline Co.*, 113 FERC ¶ 61,255 at P 31 (2005); *Tenn. Gas Pipeline Co.*, 113 FERC ¶ 61,335 at P 37 (2005).

The Council has consistently recognized the foregoing and FERC's exclusive jurisdiction over interstate natural gas facilities. *See* Petitions 540 and 555, *Decision and Order* (Sept. 25, 2002); Docket Nos. 540 and 555, Hearing Transcript, at 5 (Sept. 4, 2002); Docket No. 221, *Findings of Fact*, at ¶ 2 (Aug. 1, 2002); Docket No. 221, *Opinion*, at 1 (Aug. 1, 2002); Docket No. 221, Letter from Pamela B. Katz, P.E., to Anthony M. Fitzgerald (May 29, 2003).

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500

VI. CONCLUSION

Based on the foregoing, and pursuant to Conn. Gen. Stat. §§ 4-176(a) and 16-50k(d) and Conn. Agencies Regs. § 16-50j-38 *et seq.*, Iroquois respectfully requests that the Council issue a declaratory ruling that it does not have jurisdiction over Iroquois's MarketAccess Project.

Respectfully submitted,

IROQUOIS GAS TRANSMISSION SYSTEM, L.P.

By: _____

Philip M. Small
Michael E. Kozlik
Brown Rudnick Berlack Israels LLP
CityPlace I, 185 Asylum Street
Hartford, CT 06103-3402
(860) 509-6500 (office)
(860) 509-6501 (fax)
Its Attorneys

40230317 v1 - 070787/0004

BROWN RUDNICK
BERLACK ISRAELS LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
(860) 509-6500