

STATE OF CONNECTICUT

SITING COUNCIL

Re: The Connecticut Light and Power Company and The United) Docket 272
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) January 25, 2005
Interconnections)
)

**APPLICANTS' BRIEF ADDRESSING
DOT JURISDICTION OVER PROJECTS APPROVED BY THE SITING COUNCIL**

The United Illuminating Company ("UI") and The Connecticut Light and Power Company ("CL&P") (collectively, the "Companies" or "Applicants") submit this brief in response to the June 16, 2004 request by the Connecticut Siting Council (the "Council") to address whether the Council preempts the authority of the Connecticut Department of Transportation ("DOT") with respect to siting decisions potentially affecting roads under the DOT's jurisdiction. See June 16, 2004 hearing transcript at p. 234. As discussed in this brief, the authority of the Council to grant certificates of environmental compatibility and public need and approve conditions of construction and development and management ("D&M") plans trumps the DOT's authority with respect to those issues.

1. The Companies' Franchise Rights to Occupy Public Highways

As explained more fully in the Companies' December 22, 2003 Memorandum Concerning their Eminent Domain Powers and their Franchise Rights to Install Facilities in Highways, the legislature has granted to electric public service companies the critically important right to locate facilities in town and state public highways. *See* 1909 Special Acts, Vol. XV, pp. 1093, 1094; Special Acts, 1963, Vol. XXXI, p. 267. The power to locate facilities in public highways is a fundamental attribute of electric public service companies, and in Connecticut it is an essential characteristic that distinguishes a regulated public service company from other companies. These rights are subject to regulation by duly authorized state agencies, principally the DOT and the Connecticut Department of Public Utility Control ("DPUC").

As discussed below, the Council's authority over locating electric transmission lines in public highways preempts that of the DOT in the event of a conflict between the two agencies.

2. DOT Jurisdiction

The DOT has the limited authority to issue permits governing public utility work:

[Public utility companies] desiring to open or make any excavation in a portion of any public highway . . . shall, if required by the authority having jurisdiction over the maintenance of such highway, make application to such authority, which may, in writing, grant a permit for such opening or excavation upon such terms and conditions as to the manner in which such work shall be carried on as may be *reasonable*.

Conn. Gen. Stat. § 16-229 (emphasis added).

The Commissioner of Transportation (the "Commissioner") is authorized to adopt regulations for the issuance of "state highway right-of-way encroachment permits." *See* Conn. Gen. Stat. § 13b-7. The DOT's regulations provide that "[t]he granting of permits to install public utility and other structures does not diminish or waive the jurisdiction of the

Transportation Commissioner over State highways.” Regs. Conn. State Agencies § 13b-17-17. This regulation further provides that “[n]o work shall be performed within the State’s right of way until a permit has been issued, except as provided in Section 13b-17-24--Emergency Permits.”

At first blush, the DOT statutes and regulations appear to give the DOT broad authority over certain types of utility projects. However, the statutes and other provisions governing the authority of the Council over those projects make clear that when the DOT’s requirements conflict with those imposed by the Council, the DOT’s authority must yield. The DOT cannot use its permitting power to preclude the installation of needed public service facilities in state highways as approved by the Council.

3. Council Jurisdiction

The Council is the state agency responsible for considering the need and siting, and granting certificates for, among other things, electric transmission lines of 69 kilovolts or more such as the Middletown to Norwalk Project. Conn. Gen. Stat. § 16-50i(a)(1). The Public Utility Environmental Standards Act (“PUESA”) provides that “[n]otwithstanding any other provision of the general statutes to the contrary, except as provided in section 16-243, the council shall have *exclusive jurisdiction* over the location and type of facilities and over the location and type of modifications of facilities” and “shall give such consideration to other state laws and municipal regulations *as it deems appropriate.*” Conn. Gen. Stat. § 16-50x (emphasis added).

In the event of a conflict, Conn. Gen. Stat. § 16-50x clearly controls over Regs. Conn. State Agencies § 13b-17-17, the DOT regulation cited above that purports to establish that utility permits do not diminish or waive DOT jurisdiction. *See Slimp v. Dept. of Liquor Control*, 239

Conn. 599, 617 n.18 (1996) (“[i]f a regulation is shown to be inconsistent with a statute, the regulation is invalidated, not the statute”).¹

This jurisdictional statute contains exceptions that specifically allow town zoning commissions and inland wetland agencies, but not the DOT or other agencies, to “regulate and restrict” utility locations in conjunction with the Council. Conn. Gen. Stat. § 16-50x(d). Even these listed entities, however, cannot preempt or override Council decisions, as aggrieved parties may appeal zoning and inland wetland agency decisions to the Council for *de novo* review. On appeal, the Council may “affirm, modify or revoke” the orders appealed from “or make any order in substitution thereof by a vote of six [Council] members.” *Id.*; Docket No. 95-08-34, *DPUC Investigation of the Process of and Jurisdiction Over Siting Certain Utility Company Facilities and Plant in Conn.*, at 14 (DPUC Oct. 30, 1996).

Moreover, when a utility company applies to the Council for certification of a project, it must serve a copy of the application on various state departments, agencies and commissions, including the DOT, and the Council must consult with and solicit written comments from the

¹ The DOT’s own statutes also limit its authority. For example, if the terms of a DOT permit issued for a facility under Conn. Gen. Stat. § 16-229 are unreasonable, Conn. Gen. Stat. § 16-231 provides for a right of appeal to the DPUC and gives the DPUC the right to grant its own permit if the DOT is uncooperative or stalls a pending application. In addition, while the DOT may promulgate regulations for the location and installation of public utilities “for the purpose of protecting the functional or aesthetic characteristics of any state highway” (Conn. Gen. Stat. § 13a-126a), this subsection expressly provides that “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.” *Id.* This statute was enacted before the Council was created and before jurisdiction over certain utility projects was transferred from the DPUC to the Council, and it is reasonable to conclude that Gen. Stat. § 13a-126a limits the DOT’s authority with respect to decisions made by the Council, as well as the DPUC, since the Council is “within” the DPUC (Conn. Gen. Stat. § 16-50j) and because § 13a-126a refers to statutes concerning the location of facilities, which for electric transmission and other specified facilities is now clearly under the Council’s jurisdiction. In any event, however, in the event of a conflict Conn. Gen. Stat. § 16-50x must control.

DOT and others before it begins public hearings. Conn. Gen. Stat. §§ 16-50l(b), 16-50j(h).² These provisions, read in conjunction with § 16-50x, establish that the legislature intended the Council to consider the opinions of the listed entities as it “deems appropriate” when issuing a certificate, but did not intend for the Council to be bound by those opinions. *See also Bristol Res. Recovery Facility Operating Comm. v. City of Bristol*, No. CV-92-0453461, 1995 WL 410806, at *15-18 (Conn. Super. Ct. 1995) (Council certificate prevailed over a voter initiative opposing a new facility: “[t]he council’s authority is defined in such a way as to leave no doubt as to its breadth and scope”).

The Council’s statutory authority under PUESA is very broad. PUESA addresses the “criteria for the location, design, construction and operation of facilities” and gives the Council the authority to grant or deny an “application as filed, or . . . upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate.” Conn. Gen. Stat. §§ 16-50g, 16-50p(a). This preemptive authority gives the Council the power to make determinations concerning the location of a transmission line within a highway right of way, as well as the conditions of construction. PUESA includes the legislature’s recognition that other agencies may have particular interests and expertise with respect to these issues, which may be useful to the Council, and has created the process discussed above through which those agencies may participate in the siting approval process. The DOT may present its recommendations to the Council, and explain its reasons for those recommendations, but the Council may impose other, or different, conditions as it “may deem appropriate.” However, as PUESA makes clear, it is the Council, and not the DOT, that has the final word. Thus, if the DOT opposes a proposed facility or the conditions of its construction, it

² The General Assembly has passed technical amendments to these statutes. The amendments do not change this analysis. *See* 2004 Conn. Acts 246 (Spec. Sess.) (passed June 3, 2004); 2004 Conn. Acts 236

must make its case before the Council. The DOT cannot insist on any permit condition that would be inconsistent with the terms and conditions in Council certificates or D&M plans approved by the Council.

Legislative history supports the conclusion that Council decisions take precedence over those of the DOT. When the Connecticut General Assembly debated Public Act 73-458, § 4, which later became Conn. Gen. Stat. § 16-50x, members of the Senate and the House characterized the legislation as providing utilities with a “one-stop” permitting procedure that would consolidate the entire permitting process by giving overarching authority to the Council. *See* Testimony of Senator Costello before the Connecticut General Assembly, pp. 3084-87 (May 9, 1973) (describing the bill as placing “the entire contest over any application . . . before the Power Facilities Evaluation Council”). Representative Wagner similarly testified that:

Currently amongst the various and sundry state, federal, and local agencies that a power plant or public utility must go before to have a power plant, be [sic] approximately sixteen separate applications. The one-stop does not mean that all of these would be eliminated, but it would consolidate the ones on the state level to one. . . . [W]hat is provided for in this amendment is *to allow everyone to come in at one hearing.*

Testimony of Representative Wagner before the Connecticut General Assembly, pp. 6235-37 (May 14, 1973) (emphasis added).³

(Spec. Sess.) (passed June 8, 2004).

³ Representative Avcollie stated that the bill allowed the Council to override the Department of Environmental Protection (“DEP”). Testimony of Representative Avcollie before the Connecticut General Assembly, p. 6282 (May 14, 1973). The DEP opposed the bill on these grounds. DEP

Conclusion

For the foregoing reasons, the authority of the Council to grant certificates, approve conditions and D&M plans preempts the DOT's authority with respect to those issues.

Respectfully submitted,

THE UNITED ILLUMINATING COMPANY

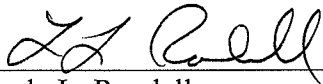
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CERTIFICATION

This is to certify that on this 25th day of January, 2005, the original and twenty (20) copies of the foregoing was delivered by hand to the Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051, and one (1) copy was mailed, postage prepaid, on this 25th day of January 2005, to all other known parties and intervenors. Additionally, an electronic copy of the foregoing was provided to the Connecticut Siting Council and all other known parties and intervenors.



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