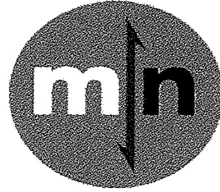


August 10, 2004

Pamela B. Katz
Chairman
Connecticut Siting Council
Ten Franklin Square
New Britain, CT 06501

Re: Docket 272, Application of The Connecticut Light and Power Company and The United Illuminating Company: Questions Concerning P.A. 04-246

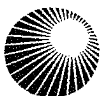
Dear Chairman Katz,

In the course of the July hearings in this Docket, Vice Chairman Tait identified some issues for discussion concerning the amendments to the Public Utility Environmental Standards Act ("PUESA") effected by P.A. 04-246 (the "Act"), and invited responses from the parties. The Connecticut Light and Power Company and The United Illuminating Company (the "Companies" or the "Applicants") are responding to those questions in letter form, which we think will make for a direct and concise response.

On July 19, 2004, the Applicants filed the following two briefs with respect to the Act and its effect on this proceeding:

- Applicants' Response to Council's Interrogatory Concerning "Buffer Zone" Determinations Pursuant to Public Act 04-246 ("Buffer Zone Memo"); and
- Applicants' Comments on Public Act 04-246 ("General Memo").

These briefs and their attachments are relevant to Vice Chairman Tait's questions, and we will refer to them in this letter as appropriate, in order to avoid needless repetition.



Q. Is there a buffer zone requirement for underground lines?

A. No. By its explicit terms, the "buffer zone" referenced in the Act applies *only* to "the overhead portions, if any, of the facility..." (Conn. Gen. Stat. § 16-50p(a)(4)(C), as amended by § 4 of the Act). As discussed in the Buffer Zone Memo, the Act adds to the list of factual findings required by § 16-50p(a)(4)(c) for overhead lines an additional finding that "overhead portions...of the facility...are to be contained within an area that provides a buffer zone that protects the public health and safety, as determined by the council." (P.A. 04-246, § 3 (amending Conn. Gen. Stat. § 16-50p(a)(4)(C)). All of the findings specified in § 16-50p(a)(4)(C) are required specifically for approved overhead sections of an electric transmission line, but not for underground sections. *See*, Buffer Zone Memo at 1, 2. In addition, the buffer zone provision itself refers only to overhead portions of the line:

> In establishing such buffer zone, the council shall take into consideration, among other things, residential areas, private or public schools, licensed child day care facilities, licensed youth camps or public playgrounds adjacent to the proposed route ***of the overhead portions*** and the level of the voltage of the overhead portions and any existing overhead transmission lines on the proposed route...
>
> Act, § 3 (emphasis added)

Please also note that the Act's provision that "at a minimum, the existing right-of-way shall serve as the buffer zone" could not be applied to underground transmission cables installed beneath public highways. The utility does not have a defined right-of-way for such facilities, but only a right to occupy the streets. *See,* "Applicants' Memorandum Concerning Their Eminent Domain Powers and Their Franchise Rights to Install Facilities in Highways," App. Ex. 9, dated December 22, 2003, at 7-13.

Q. To what does the phrase "among other things" in the buffer zone section of the Act refer?

A. The new "buffer zone" provision in Conn. Gen. Stat. §16-50p(a)(4)(C), as amended by § 3 of the Act, is quoted in relevant part in the answer to the preceding question.

Vice Chairman Tait asked whether the phrase "among other things" should be read as meaning "among other types of facilities" or whether it has a broader meaning. Read in the context of the entire "buffer zone" provision in §16-50p(a)(4)(C), it is clear that the phrase has a broader meaning, and indeed vests the Council with discretion to use its expertise to determine what factors, in addition to those listed, should be considered in making buffer zone determinations.

The list of "things" that the Council is directed by this provision to "take into consideration" is not limited to types of facilities and land uses (i.e., residential areas, schools, day care facilities, camps, and playgrounds) but includes properties of the existing and proposed lines (i.e., "the level of the voltage of the overhead portions

and any existing overhead transmission lines on the proposed route"). The list is, by its terms, not just a list of the type of facilities that the Council must protect[1], but rather a list of some of the "things" that the Council is to consider in making buffer zone determinations.

The phrase "among other things" is commonly used to make clear that a list of criteria is not meant to be exclusive. *See,* Conn. Gen. Stat. § 12-107c ("In determining whether such land is farm land, such assessor shall take into account, among other things, the acreage of such land, the portion thereof in actual use for farming or agricultural operations...); Conn. Gen. Stat. § 15-90 ("In adopting or revising [an airport approach plan] the commissioner [of transportation] shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees...); Conn. Gen. Stat. § 16-38e(b) ("In determining whether to [designate an energy saving capital project as a priority energy project] the commissioner [of public works] shall consider among other things the extent to which such project would conserve energy, the time that would normally be required to obtain all necessary agency decisions, the adverse effects of delay in the completion of such project....); Conn. Gen. Stat. § 13b-15(b) ("In [a master transportation] plan the commissioner [of transportation] shall...consider, among other things, federal air quality standards, conservation and cost of energy supplies, present and projected travel volumes...").

Accordingly, in determining whether the existing right of way provides an adequate buffer zone, the Council may, and should, consider all factors that the Council determines to be relevant. In the Buffer Zone Memo, we suggested what these factors should be; reviewed the legislative history that evinces intent to grant the Council broad discretion in making "buffer zone" determinations; and concluded:

> The Council should determine whether the right of way provides an adequate "buffer zone" on a site specific basis, considering whatever factors it deems relevant, but including at least: the scientific evidence (or lack thereof) that such fields are harmful; the change that the new construction will make in existing transmission line fields; the strength of the magnetic fields from the lines that will extend into any of the listed statutory facilities within or adjacent to the right of way; the nature of the use of that facility by children; and the degree to which the fields have been reduced by the application of EMF Best Management Practices.

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[1] When he asked whether the reference of "among other things" might be restricted to other types of facilities, Vice Chairman Tait may have had in mind the principle of construction of *ejusdem generis,* but that principle does not apply here. The principle applies only when "(1) the clause contains an enumeration by specific words; (2) the members of the enumeration suggest a specific class; (3) the class is not exhausted by the enumeration; (4) a general reference supplements the enumeration and (5) there is no clearly manifested intent that the general term be given a broader meaning than the doctrine requires. It rests on particular insights about everyday language usage. When people list a number of particulars and add a general reference like 'and so forth' they mean to include by use of the general reference not everything else but only others of like kind." Lyons v. Fairfax Properties, Inc. 72 Conn. App. 426, 439, 440 (2002). Where the references in the clause go beyond a single specific class, the doctrine does not apply. Id.

Buffer Zone Memo at 26

Q. What happens if undergrounding creates higher magnetic fields in areas near an underground cable?

A. The Companies understand this question to be asked in the following context: there are many locations in which the construction of the new overhead lines using low magnetic field designs would not increase the magnetic fields along the right of way that are associated with existing lines. In such cases, construction of underground lines off the right of way in substitution for new overhead lines on the right of way would necessarily increase overall magnetic field exposures of people, including children, because it would introduce a new magnetic field source, and would not provide any cancellation of the fields from the existing lines.

In this situation, three issues shall be addressed: (1) the application of the "undergrounding presumption" in such circumstances; (2) the rebuttal of the undergrounding presumption in these circumstances; and (3) the effect of statutory provisions that pre-existed the Act.

a) Application of the Undergrounding Presumption

The "undergrounding presumption" enacted by § 7 of the Act is not restricted to situations in which overhead construction of a 345-kV line will increase exposure; or to situations in which exposure from underground lines will be less than that from overhead lines. The plain language of §7 provides, in pertinent part, that for an electric transmission line of 345kV or greater:

> [T]here shall be a presumption that a proposal to place the overhead portions, if any, of such facility adjacent to residential areas, private or public schools, licensed child day care facilities, licensed youth camps or public playgrounds is inconsistent with the purposes of this chapter.

The language of the statute leaves no room to argue that the presumption applies only if the magnetic field exposure from an overhead line would be greater than that of an underground line. Indeed, the presumption does not even mention electric or magnetic fields. Accordingly, even though a legislative intent to minimize magnetic field exposure to children is evident from sources outside the language of the statute, the statute must be enforced according to its terms. P.A. 02-154.[2] *See,* Thornton Real Estate v. Lobdell, 184 Conn. 228, 230 (1981) ("Courts cannot, by construction, read into legislation provisions not clearly stated.")

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[2] "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." P.A. 02-154 § 1.

b) Rebuttal of the Underground Presumption

Proof of an overhead line's consistency with the purposes of PUESA could include proof that underground construction of a new line off the right of way would increase, rather than decrease, overall magnetic field exposures. (See discussion in the answer to the following question.)

c) Pre-existing statutory provisions

While there is no "buffer zone" requirement for underground cables, the Council is nevertheless required to find (as it has always been) that "the location" of any electric transmission line it approves "will not pose an undue hazard to persons or property along the line." Conn. Gen. Stat. § 16-50p(a)(5). It has been the Council's practice for many years in making such a finding to consider EMF health effects research and the fields that are likely to be associated with the approved line. *See,* Buffer Zone Brief, at 5, 6, 24. Thus, in Docket 217, the Council made specific findings with respect to the EMF that was expected to be associated with both the overhead and underground sections of the approved line (Dkt. 272, Finding of Facts ¶ 256) and concluded, "Configuration X, as modified...will not pose an undue hazard to persons or property. There is insufficient evidence to conclude that exposure to the electric and magnetic fields surrounding the lines would pose any risk to human health. Nonetheless, the Council will order the applicant to comply with the Council's Best Management Practices for Electric and Magnetic Fields." Docket 272, Revised Opinion, Sept. 9, 2003, at 9.

The Act makes no change in these pre-existing provisions. Accordingly, the Council can approve an underground line only if the Council is satisfied that, from the standpoint of magnetic fields as well as other safety considerations, the location of the line will pose no "undue hazard."

Q. Does the Act make cost and environmental issues irrelevant to the undergrounding determination?

A. No. While the undergrounding presumption arises without regard to cost, environmental impact, or the relative magnetic field exposures of overhead and underground construction, such considerations are relevant to the rebuttal of the presumption.

In the Buffer Zone Memo, the Companies noted that the Act leaves intact the requirement of PUESA that, in order to certify an electric transmission line, the Council must find that it "will serve the interests of electric system economy..." Conn. Gen. Stat. § 16-50p(a)(3)(D)(ii). *See,* Buffer Zone Memo, at 12, 13. Similarly, the Act leaves intact the requirement of Conn. Gen. Stat. § 16-50p(a)(2) and (3) that the Council may certify a facility only if it finds that "the probable environmental impact of the facility... and conflict with the policies of the state concerning, 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... are not sufficient reason to deny the application.

The undergrounding presumption cannot be applied so as to implicitly repeal these sections of the Act. *See*, State v. Carbone, 172 Conn. 242, 256 (1977) ("Repeals by implication are not favored and will never be presumed where the old and new statute may well stand together.") Nor can the presumption be applied so as to require that if undergrounding can be accomplished, but only at an economic or environmental cost that would preclude certification of an underground line under other provisions of PUESA, the Council must certify no facility, and let the need for reliability improvements go unfulfilled. "We construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation..." In re Steven M., 264 Conn. 747, 757 (2003) "We presume that the legislature had a purpose for each sentence, clause or phrase in a legislative enactment, and that it did not intend to enact meaningless provisions ... It is a basic tenet of statutory construction that the legislature did not intend to enact meaningless provisions ... Accordingly, care must be taken to effectuate all provisions of the statute ... [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant ..." (Internal quotation marks omitted and citations omitted.) Ferrigno v. Cromwell Development Assn., 244 Conn. 189, 196 (1998).

The undergrounding presumption may be given full effect, but construed so as not to do violence to the other provisions of PUESA, only by an appropriate construction of the requirements for rebutting the presumption. After stating the "undergrounding presumption," § 7 of the Act goes on to provide:

> An applicant may rebut this presumption by demonstrating to the council that it will be technologically infeasible to bury the facility. In determining such infeasibility, the council shall consider the effect of burying the facility on the reliability of the electric transmission system of the state.
>
> Id.

In the General Memo, the Companies discuss at some length what proof would be sufficient to demonstrate that undergrounding is "technologically infeasible." Id. at 10-12. The General Memo assumes that "cost" cannot be considered an aspect of "technological infeasibility." Id. at 12-14. That assumption perhaps reflected an insufficient appreciation of the difficulties of reconciling the undergrounding presumption with the balance of PUESA. The Council may consider that, if undergrounding a facility would result in cost or environmental impact so great as to make it uncertifiable under other provisions of PUESA, then the underground construction cannot be considered "feasible."

Alternatively, the Council should consider that proof of technological infeasibility is not the sole means of overcoming the presumption, and that the Applicants must be able to overcome the presumption that proposed overhead construction of a facility adjacent to any of the specified facilities is "inconsistent with...the purposes of this chapter," by proving that such construction ***is*** consistent with those purposes. The Companies so suggested in the Buffer Zone Memo, at 12-14. This response elaborates on that submission.

Section 16-50p(a)(4)(C), as amended by the Act, provides that the Council shall not issue a certificate for an electric transmission line unless it shall find and determine

> that the overhead portions, if any of the facility...are cost effective and the most appropriate alternative based on a life-cycle cost analysis of the facility and underground alternatives to such facility, ***are consistent with the purposes of this chapter***, with such regulations or standards as the council may adopt pursuant to section 16-50t, including, but not limited to, the council's best management practices for electric and magnetic fields and [with Federal Power Commission Guidelines and the "buffer zone" requirement.]
> Id. (emphasis added).[3]

On the other hand, § 16-50p(h), as amended by § 7 of the Act, now provides, with respect to electric transmission lines at 345-kV and above, that:

> there shall be a presumption that a proposal to place the overhead portions, if any, of such facility adjacent to residential areas, private or public schools, licensed child day care facilities, licensed youth camps or public playgrounds is ***inconsistent with the purposes of this chapter***.
> Act, § 7.

The "purposes" of PUESA with respect to the certification of energy facilities are explicitly stated in § 16-50g as follows:

> To provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria, and technically sufficient to assure the welfare and protection of the people of the state;

If the Act did no more than establish a rebuttable presumption that underground construction is inconsistent with the purposes of the Act, an applicant would have to overcome that presumption by establishing that the proposed construction was consistent with all such purposes; or at least with the appropriate balance of such purposes. Thus, considerations of cost, environmental impact, and reliability would all be important to overcoming the presumption.

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[3] In our General Memo, we said that PUESA does not include a requirement of an explicit finding that proposed construction is "consistent with the purposes of this chapter." Id., at 9. As the quotation above demonstrates, that statement was mistaken. We did, however, correctly assume in our earlier memo that the effect of the presumption is "to require that the Council find...that portions of a 345-kV line adjacent to the listed uses be constructed underground, except to the extent that the presumption is overcome."

Of course, the Act does more than establish the presumption; it goes on to provide that "an applicant may rebut this presumption by demonstrating to the council that it will be technologically infeasible to bury the facility." Id. §7. However, as we submit in our General Memo, the statement that the applicant "may" rebut the presumption by such proof does not exclude other means of overcoming the presumption.[4] The Act makes proof of technological infeasibility sufficient, but not necessary, to overcome the presumption of inconsistency with the multiple purposes of PUESA. The Act does not make technological infeasibility the only proof that can possibly rebut the presumption.

As a matter of plain language, a statement that a presumption "may" be overcome by specific proof does not designate such proof as the only means of doing so. A more specific and prescriptive legislative statement is required in order to achieve that end. For instance, Conn. Gen. Stat. § 46b-215b(a) establishes a rebuttable presumption that amounts due for child support shall be those determined pursuant to specific "child support and arrearage guidelines." Id. Prior to its recent amendment, this statute provided that "A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case...shall be sufficient in order to rebut the presumption in such case." However, in P.A. 03-130, § 1, the legislature amended the relevant section of the statute to provide that such a finding "**shall be required**" to rebut the presumption. Id.[5] This amendment made clear that the required finding is both sufficient and necessary; it is the exclusive means by which the presumption may be rebutted.

The Applicants respectfully submit that, in the absence of such prescriptive language in Section 7 of the Act, the Council may find the presumption of inconsistency with the purposes of PUESA rebutted if, in fact, the proof establishes that specific overhead construction adjacent to a statutory facility would be less costly, have less environmental impact, and would result in less magnetic field exposure than alternative underground construction. Indeed, a contrary conclusion would be impermissible, because it would prevent a presumption of a fact (inconsistency with the stated statutory purposes) from being rebutted by proof of that fact. "[A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause." Salemma v. White, 175 Conn. 35, 39-40 (1978), quoting Heiner v. Donnan, 285 U.S. 312, 329, 52 S.Ct. 358, 362 (1932).

The Companies thank the Council for articulating these questions concerning this unprecedented statute and providing the Companies with an opportunity to suggest answers to the questions.

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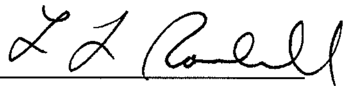
[4] "As a matter of law and logic...the presumption may be overcome by satisfactory proof that overhead construction is consistent with the stated 'purposes of this chapter.'" General Memo, at 13.

[5] This amendment may have been intended to legislatively overrule Amodio v. Amodio, 56 Conn. App. 459, 467, 468 (2000) in which the court ruled that the specified finding was not required to overcome the rebuttable presumption.

Very truly yours,



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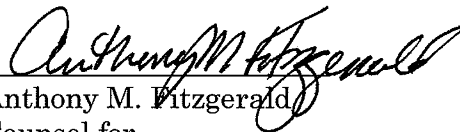

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cc: Service List