

State of Connecticut



Hartford

March 8, 2005

RICHARD BLUMENTHAL
ATTORNEY GENERAL

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CONNECTICUT
SITING COUNCIL

Honorable Leonard Fasano
State Senator

Honorable Richard Roy
State Representative

Honorable Joseph Crisco
State Senator

Honorable Peter Villano
State Representative

Honorable Mary Fritz
State Representative

Honorable Lawrence Miller
State Representative

Honorable Themis Klarides
State Representative

Honorable Ray Kalinowski
State Representative

Honorable Al Adinolfi
State Representative

Honorable Joe Mioli
State Representative

Re: Connecticut Siting Council Docket 272

Dear Senators and Representatives:

I appreciated your letter dated March 1, 2005 requesting that I seek an immediate injunction against the Connecticut Siting Council ("Council") to enjoin the Council from issuing a decision in this proceeding, the Phase II 345 kV transmission line that is proposed to run from Middletown to Norwalk. In your letter you assert that the Council has failed to comply with various provisions of Public Act 04-246 ("P.A. 04-246" or the "Act") as well as certain requirements of the Uniform Administrative Procedure Act. Specifically, you state that the Council:

1. Failed to initially establish Best Management Practices for Electric and Magnetic Fields ("BMP");
2. Recently enacted BMP without notice to various parties except the energy industry; and
3. Engaged in ex parte communications;

You ask that my office determine why the Council's independent expert in this case, KEMA, changed its position regarding possible undergrounding beyond the amount proposed by the applicants.

I certainly support and share your concern about potential flaws in this important proceeding. I strongly agree that the Council should have employed a more open, inclusive and transparent process when drafting its Revised BMP. I am also very concerned by the statement quoted in your letter from the Council on January 10, 2005 that during the Phase II proceeding it received verbal remarks or comments from the "energy industry," especially given that the Act requires the Council to base its revised BMP upon "the latest completed and ongoing scientific and medical research." Conn. Gen. Stat. § 16-50t(c) (as amended by P.A. 04-246).

The statements made by the Council that it received verbal comments from the "energy industry" are very serious and could be construed as an admission by the Council that it has received "ex parte" communications which are prohibited by law. Conn. Gen. Stat. § 4-181. I believe my office must ask the Council to disclose all such communications, who supplied those communications and when and where they were given and received. I will file an appropriate request seeking such disclosure.

I am also sympathetic to your concern over KEMA's participation. Like you, I was disappointed when KEMA, at the February 14, 2005 technical conference and the subsequent hearing, stated that it no longer believed that additional undergrounding of the proposed Middletown to Norwalk transmission line was feasible or advisable. As you know, I have consistently and vigorously fought for maximum undergrounding of the proposed transmission line, and will continue to do so. The suggestion that KEMA received ex parte communications, which may have formed the basis for the reversal of its opinion on extending the amount of undergrounding for this project, requires that KEMA's actions must be further reviewed and explained.

In light of the importance of our shared concerns, and likely legal obstacles to court action, one direct and effective way to address promptly the questions would be legislative action releasing the Council from its statutory decision deadline of April 7, 2005. As you are aware, many important issues remain to be addressed in this proceeding, but the statutory deadline imposed by Conn. Gen. Stat. 16-50p has arbitrarily closed debate and study on health and environmental impacts. That statute requires the Council to issue a decision within eighteen months after the application is filed -- a time limit set when the legislature could not know the complexity of siting a transmission project involving this challenging scope and scale. Legislative action would enable the Council and all parties to fully examine the effects of this massive project in light of recent developments.

The injunctive remedy proposal raises issues relating to timing -- whether to consider action now before the Siting Council reaches some decision, when a court would likely reject it, or later after the administrative process arrives at a point that permits judicial intervention.

We would never rule out any viable legal step, but an immediate injunctive action -- at this moment -- seems fraught with legal barriers and pitfalls. The action would presumably be to enjoin or stop the Council from issuing a final decision, even before it reaches that decision.

Under statutes and relevant case law, a court may review actions of an administrative agency only after an agency issues a final decision and the aggrieved parties exhaust their administrative remedies. Conn. Gen. Stat. § 4-183. Even then, an appealing party must demonstrate that a specific and personal legal interest is specially and injuriously affected by final agency action. See, e.g., ABC, LLC et al. v. State Ethics Commission, 264 Conn. 812, 823 (2003). While there are extraordinary instances when an ongoing administrative process may be enjoined, those very rare cases generally involve threatened action when the administrative agency has absolutely no jurisdiction or authority over the subject matter of the proceeding. Such circumstances do not seem present here.

In specific regard to the Revised BMP, the Council has specifically requested that parties and intervenors address the issues that my office and various towns have raised, including whether the Revised BMP should be rescinded. The Council has not yet made a preliminary ruling on this issue, which could provide the parties with the opportunity to seek judicial review prior to the Council's issuance of a final decision. Conn. Gen. Stat. § 4-183 (b). Until the Council acts on our requests, a court will almost certainly say that we cannot know with certainty whether the Council will disagree with our concerns, possibly giving us grounds for immediate judicial review. A ruling would prompt us to consider court action, and give us potential legal grounds to do so.

In short, an effort to seek court review may be appropriate at some point, but such action immediately before a final decision, would be legally problematic. Equally important, the complex litigation and appeal in such an action would be time-consuming and likely conclude too late to protect our concerns. It would divert attention from our battle in the administrative process, with highly uncertain likelihood of success. Hence, a legislative solution may be more direct, timely and effective.

After the Council issues its decision in this matter, I can absolutely assure you I will promptly review possible legal action that is appropriate and necessary to protect the concerns we share.

Very truly yours,



RICHARD BLUMENTHAL
ATTORNEY GENERAL

RB/pas