No. CV 89-0367916 : SUPERIOR COURT

KEVIN F. BRAUN, ET AL : J.D. OF HARTFORD

VS. : AT MANCHESTER

CONNECTICUT SITING COUNCIL : MARCH 14, 1990

MEMORANDUM OF DECISION

This is an appeal from the granting of a Certificate of Environmental Compatibility and Public Need ("Certificate") to The Connecticut Light and Power Company ("CL&P") by the Connecticut Siting Council ("the Council"). The Council is a state agency which, under section 16-50g of the Conn. Gen. Statutes, is charged in part with balancing the need for adequate and reliable public utility service at the lowest reasonable cost with the need to protect the environment and the ecology of the state.

On December 16, 1988 CL&P applied to the Council for a Certificate of Environmental Compatibility and Public Need for the reconstruction of an overhead 115-kv electric transmission line between the Stevenson Substation in Monroe, the Newton Substation in Newton, and the Plumtree Substation in Bethel, Connecticut. The nature of the reconstruction is to

replace existing structures and conductors and increase current capacity, but not the voltage, of the transmission lines. The purpose for the reconstruction is to relieve forecasted overloads on the 115-kv transmission system. All of the construction work is to take place within an existing 12.5 mile right-of-way owned by CL&P.

A public hearing concerning the application and the objections thereto was conducted by the Council on March 28, 1989 pursuant to section 16-50m of the Conn. Gen. Statutes. The Council admitted CL&P and Kevin and Phyllis Braun as parties, and the Town of Newton and Mae Schmidle as intervenors. The Brauns, who had purchased a lot crossed by the existing right-of-way in 1985, and built a house adjacent to the right-of-way, opposed the application claiming that the magnetic fields generated by the new lines would pose a health hazard to them and their family. The Brauns fully participated in the hearing and submitted numerous documents, briefs and memoranda in support of their position.

The Council rendered its Opinion, Finding of Fact, and Decision and Order on August 30, 1989, and granted a Certificate to CL&P. The parties were given notice of the decision of the council on September 5, 1989. The Brauns appealed to this court from the decision of the Council on September 22, 1989. An appeal to the Superior Court of a decision of the Council is

provided for under section 16-50g of the Connecticut General Statutes.[1]

In addition to the jurisdictional issue of aggrievement, the major issues raised by this appeal, as contained in and framed by the pleadings, are as follows.

First, the appellants claim that they were not given an opportunity to file exceptions and briefs and present argument subsequent to the filing of a proposed final decision concerning the issuance of the Certificate by the Council. It is alleged that the appellants were entitled to file such exceptions and briefs and present oral argument pursuant to section 4-179 of the General Statutes because a majority of the council members who rendered the final decision had not heard the matter and had not read the record prior to making the final decision.

Second, the appellants claim that the decision of the Council in granting the Certificate was illegal because: (A) the Council failed to make a required statutory finding and determination pursuant to that portion of section 16-50p of the General Statutes which provides that "... in the case of an electric or fuel transmission line, (the Council shall make a finding) that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line", and (B) it is alleged that the

1 Conn Gen. Stat. Section 16-50q. "Any party may obtain judicial review of an order issued on the application for a certificate ... in accordance with the provisions of section 4-183."

record does not support the council's conclusions that the proposed reconstruction of the transmission lines are needed or will be safe.

## AGGRIEVEMENT

During a trial held on February 28, 1990 on the issue of aggrievement the parties stipulated to the following facts. The appellants own property and reside at 58 Boggs Hill Road in the Town of Newtown, Connecticut. Existing electric transmission lines traverses their property along a CL&P right-of-way, and these lines are relatively close to the appellants residence. The proposed reconstructed lines are to be built along the same right-of-way and will also be in relatively close proximity to the house. The proposed reconstruction will require the replacement of a nearby existing wooden structure, which holds the existing transmission lines, with a larger steel structure. In addition, the new lines will be higher off the ground than are the existing lines and the capacity of the new lines will be greater than the capacity of the existing transmission lines. It was also stipulated that electric transmission lines generate electric and magnetic fields and that there is some evidence based upon epidemiological studies which suggest that such magnetic fields may have an adverse affect on health, although

this is still open for debate in the scientific community.

The court finds that from these facts that the appellants have a specific, personal and legal interest in the subject matter of the decision of the Council, apart from the interest of the community at large, and that there is a possibility that the granting of the Certificate by the Council may adversely affect that specific interest. Thus, the court finds that the appellants are aggrieved for the purpose of this appeal.

APPLICABILITY OF SECTION 4-179.

The appellants claim that prior to rendering its final decision the Council failed to afforded them with an opportunity to present oral argument and file exceptions and briefs pursuant to section 4-179 of the General Statutes because a majority of the members of the Council who rendered the final decision had not heard the matter or read the record. The court finds the appellants have not sustained their burden as to this issue.

Section 4-179 of the Conn. Gen. Statutes reads in pertinent part:

"When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision."

The purpose of this provision of the statutes is to ensure that the parties in a contested case have an opportunity to present their respective positions, evidence, and arguments to the individuals who are to decide the case, rather than to a hearing officer who would, in turn, relate their positions and arguments to the ultimate decision makers. If the officials who are to render the final decision have heard the case or have read the record prior to rendering their decision, due process will have been served as the parties adversely effected by the decision will have had access to, and thus an opportunity to be heard by, the ultimate decision makers.

The Connecticut Siting Council is composed of nine members, seven of whom voted and rendered the final decision in this case. [2] The Council's Decision and Order and accompanying certification shows that and each of the seven members who voted certified that he or she had heard the case or read the record. In addition, a review of the transcript of the March 28, 1989 public hearing reveals that five of the seven members who rendered the final decision were present at the hearings.

The court finds from the record and the certification that a majority of the Council members who rendered the final decision to issue a Certificate

2 Decision and Order and accompanying Certification dated August 30, 1989.

in this case were present at the March 28, 1989 hearings and thus heard the case, and all of the members who voted and rendered the final decision had read the record. Consequently, section 4-179 is not applicable.

NEED

The appellants claim that the evidence does not support the findings and determinations of the Council that there is a public need for reconstructing the transmission lines. This claim is without merit.

In considering the Council's conclusions as to the need for reconstructing the transmission lines the court has reviewed the record referred to by the Council as the basis for its findings in this area and finds that the conclusions stated by the Council in its Opinion , Decision and Order, as well as the facts found by the Council, are supported by the evidence contained in the record.

The need for reconstructing the transmission line cannot be isolated from the rest of the energy network which services the people of the State of Connecticut, nor was it considered in isolation by the Council.

"[T]he proposed line is needed to relieve forecasted overloads on the 115-kv transmission system delivering electric energy through West Central Connecticut into the growing southwest area to satisfy increasing loads. The existing . . .circuits would overload under certain contingency

conditions . . . .Although the probability of this existing line to exceed its load-carrying capacity and overload is low, this occurrence could happen by the summer of 1990, and could produce a power failure throughout the area. The reconstruction would greatly augment the reliability of the power transmission system . . ." Council Opinion.

It would be absurd to require a public utility to wait until a system is in fact overloaded before authorizing an increase in its capacity. The Council, in deciding on an application to install or upgrade a facility, is required to consider whether "the facility conforms to a long-range plan for expansion of the electric power grid of the electric systems serving the state and interconnected utility systems and will serve the interests of electric system economy and reliability." Conn. Gen. Stat. Section 16-50p(e)(4) (B). That is exactly what is proposed in this case. The Council not only found a need for upgrading the transmission lines to protect against a potential overlapping outage, it also found that a reconstruction of the overhead lines would be the most economical, reliable, and environmentally compatible means of accomplishing this goal. (Findings of Fact, No. 30-43; CL&P Ex. 8). The court finds that the portions of the record referred to by the Council as being the basis for these findings are sufficient to support the Council's Findings and Opinion as to the need for the upgrading and the manner of the reconstruction.

## HEALTH AND SAFETY

The appellants also allege that the record does not support a determination by the Council that the proposed transmission lines would not pose an undue health hazard and that they are safe.[3] The court finds that the appellants have not sustained their burden as to these claims.

The issue of health and safety was specifically addressed by the Council in its Opinion: "... the Council believes that the reconstructed line will not significantly increase the environmental effects of the existing line which has been operating under the existing configuration since 1983... there is insufficient evidence for the Council to conclude that this proposed line or other transmission lines in the State are hazardous to human biological health."

Included among the specific findings of the Council is that a review of scientific literature concludes that electric or magnetic fields associated with power lines do not cause cancer. (Finding No. 124). In support of this finding the Council had the benefit of a report of Dr. Margaret Tucker of the

[3] The court notes that the appellants voluntarily placed themselves in close proximity to an existing electric transmission line when they purchased the property and built a house at 58 Boggs Hill Road. According to CL&P, the electromagnetic field exposure at that location is projected to be less with the new lines and towers than is the case with the existing lines. (CL&P Ex. 12 and 13). It is therefore possible that the reconstruction of the transmission lines will lessen the magnetic fields at the residence of the appellants.

National Cancer Institute, National Institutes of Health, as well as the prior testimony of Dr. Lucius Sinks, chief of the Cancer Center Branch of the National Cancer Institute, both of whom concluded that there is no causal relationship between electromagnetic fields and cancer. (CL&P Ex. B, C and D). In addition, the Council administratively noticed a report entitled, "Biological and Human Health Effects of Extremely Low Frequency Electromagnetic Fields", American Institute of Biological Sciences, March, 1985, which noted that no definitive conclusions can be drawn from currently available evidence to show that there is a link between electromagnetic fields and cancer, and that the studies concerning magnetic fields do not demonstrate that such fields are causally related to cancer.

Also included within the record are numerous reports of scientific investigations and studies concerning the potential effects of electric and magnetic fields on biological organisms. These materials were submitted to the Council by both the appellants and the appellees, and, in many instances, they reflect differences in the interpretation of data, and different conclusions as to the ways such magnetic and electric fields may affect organisms. The fact that the evidence presented to an agency could support different conclusions will not prohibit the agency from making a finding or choosing among possible conclusions provided its decision is supported by

substantial evidence. Huck v. Inland Wetlands & Watercourses Agency, 203 Conn. 525, 542 (1987); Tanner v. Conservation Commission, 15 Conn. App. 336, 340 (1988).

The court finds, following a review of these studies, that while it is clear that some biological organisms are affected by electric and magnetic fields, just as organisms are affected by other types of stimuli, there is sufficient evidence contained within the record for the Council to have concluded that such effects are not harmful or hazardous.

For example, the Council took administrative notice of a 1987 report entitled "Biological Effects of Power Line Fields, New York State Power Lines Project Scientific Advisory Panel Final Report" which is the culmination of a five million dollar, five year research project to determine whether there are health hazards associated with electric and magnetic fields produced by 60-Hz power transmission lines. Among the findings contained in the report is the statement, "In our studies, no neurobiological effects were seen at field intensities lower than those encountered within the existing right-of-ways of 345- or 765-kv lines.[4] Even those effects encountered were of reasonably small amplitude and could not be said with confidence to indicate health hazards." supra at 131.

[4] It is noted that the voltage for the proposed transmission lines, which are the subject of this appeal, would be only 115-kv.

While the New York report found some evidence that electric and magnetic can affect certain biological organisms, it contained no conclusive evidence that such effects are hazardous to such biological systems. For example, on cellular level, the studies found no significant effects of magnetic fields upon sister-chromatid exchange, chromosome breakage, DNA, RNA, or protein content, and there was no effect found upon reproductive integrity or of the immune system. There was no evidence found that electric or magnetic fields will cause normal cells to be come cancerous, although there was some suggestion that cells which were already cancerous might grow more rapidly. In summary, the New York study did not find any actual or lasting harmful effect to biological organisms which could be conclusively linked to the magnetic or electric fields associated with high voltage (345-kv to 765-kv), low frequency (60-Hz), transmission lines. As is the case in most scientific inquiries, the results of some of the studies resulted in additional questions of a scientific nature being raised which will require further research and investigation.

In administrative appeals, the court cannot substitute its judgement for that legally vested in the agency. The court's function is to determine on the record whether there is a logical and rational basis for the decision or

whether, in the light of the evidence, the agency has acted illegally or in abuse of its discretion. This is a fundamental limitation on the court. Buckley v. Muzio, 200 Conn. 1, 3 (1986); See, Conn. Gen. Statutes section 4-183(g). The burden of proving illegality or an abuse of discretion is on the party asserting it. Woodbury Water Co. v. Public Utilities Commission, 174 Conn. 258, 260 (1978).

The court is limited to determining whether the record reflecting the evidence which was before the Council supports the conclusions of the Council. The weight and credibility to be given to testimony and evidence presented before the agency is for the agency to evaluate. The court cannot substitute its judgement for that of the agency in the area of the credibility or the weight to be given to the evidence. Huck v. Inland Wetlands & Watercourse Agency, supra at 539-41; C&H Enterprises, Inc. v. Commissioner of Motor Vehicles, 176 Conn. 11, 12 (1978). The agency is entitled to accept that which it reasonably finds persuasive and reject that which it finds unpersuasive in reaching its decision. Briggs v. State Employee's Retirement Commission, 210 Conn. 214, 217 (1989).

In this case, the court finds that there is sufficient and substantial evidence in the record from which the agency, if it chose to believe and accept such evidence, could logically and rationally find that the proposed

transmission line will be both safe and will not pose an undue health hazard.

APPLICABILITY OF SECTION 16-50P(a)

The plaintiff's would have the court sustain this appeal on the grounds that the Council failed to make a specific finding and determination in its Decision and Order that the location of the transmission line will not pose an undue hazard to persons or property pursuant to the General Statutes.

The Council is required to make certain findings and determinations pursuant to section 16-50p of the General Statutes before it is permitted to issue a Certificate with respect to an electric transmission line. One of the findings and determinations is that: "The council shall not grant a certificate . . . unless it shall find and determine . . .in the case of an electric or fuel transmission line, that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line." Section 16-50p(a)(5).

While the record does not reflect the Council's use of the specific words of the statute concerning this issue, it is the finding of the court that the Council did determine that the proposed transmission line would not pose an undue hazard to persons or property and that there is evidence sufficient to support this determination.

In its Decision and Order the Council stated:

"[T]he Connecticut Siting Council *finds* that the effects associated with the construction, maintenance, and operation of an 115-kv electric transmission line along a route from Stevenson Substation to Newtown Substation and Newtown Substation to Plumtree Substation through the Towns of Monroe, Newtown, and Bethel, Connecticut, including effects on the natural environment; ecological integrity; *public health and safety*; . . . are not significant either alone or cumulatively with other effects, are not in conflict with the policies of the State concerning such effects, and are not sufficient reason to deny the application . . ." (Emphasis added.)

The public policy of this state, as expressed by the legislature in enacting the Public Utility Environmental Standards Act, is to provide for "adequate and reliable public utility services . . . [in a manner] . . . technically sufficient *to assure the welfare and protection of the people of the state*". (Emphasis added). Section 16-50g Conn. Gen. Statutes. Implicit in the Council's finding that the reconstruction and operation of the transmission lines are not in conflict with the public policy of protecting the public health and safety of the people of the State is a finding that the operation of the transmission line will not pose an undue health hazard.

In construing statutes, words and phrases are to be given their ordinary and commonly approved usage of the language. Conn. Gen. Stat. Section 1-1; Stitzer v. Rinaldi's Restaurant, 211 Conn. 116, 118 (1989). The word "undue"

means "more than necessary, not proper; illegal." Black's Law Dictionary (rev. 4th ed. 1968). Websters New Collegiate Dictionary defines the term as "exceeding or violating propriety or fitness."

It is clear from the record, The Opinion, The Decision and Order, and The Findings of Fact, that the Council examined and considered a substantial amount of evidence concerning the possible effects of electric and magnetic fields upon health, and as previously indicated, the court finds sufficient evidence in the record to support such a finding by the Council. When viewed in light of that consideration and those findings, the fact that the agency did not make a specific finding that the transmission line will not pose an undue health hazard is not sufficient to interfere with the decision of the Council.

The court finds that the Opinion and Findings of Fact of the Council, when considered in their entirety, can reasonably be interpreted to indicate that the Council concluded that the health risks associated with the proposed reconstruction of the transmission lines are not excessive, illegal, improper or significant and therefore are not "undue". See, Tomlin v. Personnel Appeal Board, 177 Conn. 344, 350, 351 (1979).

The appellants have not sustained their burden of proving that the Council acted illegally or in abuse of its discretion in granting the Certificate of Environmental Compatibility and Public Need.

The decision of the agency is affirmed and the appeal is dismissed.

Terence A. Sullivan J.

Terence A. Sullivan, Judge