STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

RE: JOINT APPLICATION OF THE CONNECTICUT LIGHT AND POWER COMPANY AND THE UNITED ILLUMINATING COMPANY FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR A 345-KV ELECTRIC TRANS-MISSION LINE FACILITY AND ASSOCIATED FACILITIES BETWEEN SCOVILL ROCK SWITCHING STATION IN MIDDLETOWN AND NORWALK SUBSTATION IN NORWALK	:	DOCKET NO. 272
	:	December 15, 2005

CITY OF MIDDLETOWN'S BRIEF

EXECUTIVE SUMMARY

There are no "vegetation management agreements" between the utility and the homeowners in the Royal Oak subdivision. The letters introduced into evidence and the testimony received by the Council on November 30, 2005 merely demonstrate a practice of the utility with regard to tree

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trimming within the right-of-way easement area. The letters or the utility's practice do not limit the rights secured by the Easement Agreements and do not bind the utility to any legally enforceable promises. If the utility elects to act in a manner that is inconsistent with the practice set out in the letters and cut down a tree located within the easement area, the homeowner could not enjoin such conduct because it is a right granted to the utility by the Easement Agreement.

Further, the Council received testimony that the utility's practice in this situation is not unique. The understanding with the Royal Oak subdivision homeowners is no different than the policy practiced along the rest of the project corridor. Therefore, the circumstances in this situation are not exceptional.

FACTUAL BACKGROUND

On November 8, 2005 the Court (Cohn, J.) granted a motion by the Connecticut Light and Power Company to present evidence to the Siting Council concerning "vegetation manage-

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ment agreements" that were referenced by a party and which were considered by the Council in its deliberations but which are not in the evidentiary Record. *Wilson v. Connecticut Siting Council, Doc. No. HHB CV05-4006206-S (Judicial District of Hartford/New Britain at New Britain).*

On November 30, 2005 the Siting Council conducted a hearing to comply with the Court's order.

LEGAL ARGUMENT

Connecticut General Statutes Section 52-550 provides, in relevant part, that "[n]o civil action may be maintained in the following cases unless the agreement, or a memorandum of agreement, is made in writing and signed by the party, or the agent of the party, to be charged: . . . (4) upon any agreement for the sale of real property or **any interest in or concerning real property;** (5) **upon any agreement that is not to be performed within one year from the making thereof;** ..." C.G.S. δ52-550(a)(4)(5), as amended (emphasis added).

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The Connecticut Appellate Court has held that in order to be in compliance with C.G.S. Sec. 52-550 (known as the Statute of Frauds), any agreements concerning the sale of land or any interest therein must be in writing and signed by the party to be charged therewith. Fruin v. Colonnade One at Old Greenwich Ltd. Partnership, 38 Conn. App. 420, 662 A.2d 129, *affirmed* 237 Conn. 123, 676 A.2d 369 (1995).

Further, the Connecticut Supreme Court has held as long standing precedent that a contract that cannot be performed within one year must be in writing. Burkle v. Superflow Manufacturing, Inc., 137 Conn. 488, 78 A.2d 698 (1951).

In the present situation the utility has produced only three letters addressed to individual property owners along the right of way in the Royal Oak subdivision. CL&P Pre-filed Testimony of Anthony W. Johnson III, November 22, 2005, Exhibits A, B, and C. Of these three, only one is signed by the property owner and that one contains four qualifying conditions that do not appear to have been accepted by the

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utility. *Id*. Accordingly, none of these letters qualifies as a contract in order to satisfy the requirements of the Statute of Frauds that an agreement for an interest in land must be in writing.

Mr. Johnson also testified that the utility performs maintenance along its right of way "[t]ypically, every four years or so." *Id*. at page 3, line 8. Therefore, as the contract would not be performed within one year, in order to comply with the Statute of Frauds it must be in writing to be enforceable. The exhibits submitted with the pre-filed testimony are not contracts but letters setting out the company's practice in this area.

Further, the Royal Oak subdivision right of way traverses approximately a dozen properties and the utility has not produced any purported agreements with these other property owners. In fact, Mr. Johnson testified that the utility "as a matter of practice" employs the special vegetation management practices along the entire right of

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way. *Id.* at page 5, lines 4-9. Accordingly, it is apparent from Mr. Johnson's testimony that the maintenance arrangement concerning the right of way in the Royal Oak subdivision was arrived at as a matter of practice and policy by the utility rather than as a product of contract negotiation that limited the rights reserved to the company by the Easement Agreement recorded on the land records.

The letters introduced as Exhibits A, B and C merely memorialize the policy that the company has volunteered to follow. The letters are not contracts and do not amend or otherwise limit the utility's rights in the easement area. The letters do not create any right of action on the part of the property owners with regard to the easement area. If the utility elects to discontinue the vegetation management practices set out in the letter, the property owner has no recourse because the company continues to enjoy the expansive rights set out in the Easement Agreement.

Even assuming for the sake of argument that Exhibits A

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B and C are considered binding agreements that limit the company's easement rights, they are only effective for these three properties. Any similar conduct by the utility throughout the rest of its right of way in the subdivision is performed on a volunteer basis by the company as a matter of policy and not pursuant to contract. Accordingly, there is no agreement between the utility and the Royal Oak property owners concerning vegetation management within th easement area but merely a practice instituted by the company. There is nothing to prevent the company fro discontinuing this practice at any time.

Further, on cross-examination by the City of Middletown Mr. Johnson testified that the company's practice is not limited to the Royal Oak subdivision but is in place state-wide. He testified that the company would be taking action on a property where, in the company's opinion, the owner had neglected to manage the vegetation, within days of his testimony. Mr. Johnson further testified that he was unaware

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of any court proceedings brought to enforce such agreements. Cross examination of Anthony W. Johnson III by City of Middletown counsel, November 30, 2005. Consequently, the vegetation maintenance "agreement" is not unique to the Royal Oak subdivision. Further, Mr. Johnson's testimony about the company's prospective action against the delinquent property owner and the lack of court enforcement of any of these so-called agreements reinforces the conclusion that these are not legally binding contracts but merely statements of company policy.

RESPECTFULLY SUBMITTED,
CITY OF MIDDLETOWN

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CERTIFICATION

I hereby certify that a copy of the foregoing has been mailed to all parties and interveners set out on the November 30, 2005 service list provided by the Siting Council on this 15th day of December, 2005.

Timothy P. Lynch
Commissioner of the Superior Court

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