STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

The Connecticut Light and Power Company and the United 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 the Scovill Rock Switching Station in Middletown and the Norwalk Substation in Norwalk, Connecticut	:	**DOCKET NO. 272**
	:	**DECEMBER 15, 2005**

MEMORANDUM OF WILSONS RE CONTINUED PROCEEDINGS

I. Background

This proceeding was initiated by the Siting Council and the Companies (the Connecticut Light & Power Company ("CL&P") and The United Illuminating Company ("UI")), pursuant to Section 4-183 (h) of the General Statutes, purportedly to consider additional evidence to fill a glaring gap in the Record. The Siting Council found, without any supporting evidence, that a "special agreement" existed between Northeast Utilities and the "Royal Oak neighbors."[1] This finding was the sole support for the Council's extraordinary decision to site the transmission lines at issue here outside of an existing right-of-way.

The Companies acknowledged in their Section 4-183 (h) Motion that: 1) the Council's conclusion that a "special agreement" existed was based solely upon statements made during final arguments made by Ms. Trish Bradley and the Companies; and 2) that the record lacked any supporting evidence for these statements.[2] To fill this evidential gap, the Companies

[1] The Council's finding #538 that "there is an agreement in place since 1977 ...." lacks any supporting evidence in the Record.

[2] See statements of Companies, page 7 of Companies Memorandum in Support of Motion for Leave to Present Additional Evidence to the Connecticut Siting Council. Pursuant to Conn. Gen. Stat. § 4-183(h) stating, in part, "In addition, Ms. Bradley introduced the concept of the special "agreement" with CL&P, which had not been the subject of any testimony or other evidence ...."; see also statement of CL&P, page 26, November 30, 2005 transcript

represented to the Court that that they would offer additional evidence to the Siting Council to support the Council's decision. The additional evidence presented in this case plainly shows that the Council's decision cannot be supported by the evidence.

First, as is shown below, no "special agreement" ever existed. The Companies, faced with the fact that no Royal Oak neighbor ever signed an unqualified acceptance of the purported "special agreement", did not even attempt to show that a "special agreement " existed.

Second, the Companies' fallback position, that a "special understanding" existed, also proved to be unsupportable. The Companies showed that only three Royal Oak neighbors ever received the "special agreement" letters, and the Companies conceded that they did not know whether the Royal Oak neighbors were even aware of the "special understanding."

Finally, the evidence offered by the Companies showed that there was nothing "unique" about the Companies' treatment of Royal Oak. As the "special agreement" letter shows, the purported "special agreement" applies not just to Royal Oak but to a very large area of the State extending from Wallingford to Haddam and including hundreds of neighborhoods. Moreover, the Companies conceded that this "special" treatment of Royal Oak, whatever that means, is applied at other locations across the state whether any agreement exists or not.

Accordingly, the record shows that there is simply no evidential support for the Council's decision to distinguish Royal Oak, as a "unique 'residential' area", from other neighborhoods on which a right-of-way is located. The Council's extraordinary precedent to site the transmission lines here outside of an existing right-of-way in Royal Oak rests on no foundation whatsoever.

In addition, as is also shown below, the Council and the Companies, in their effort to salvage a plainly erroneous decision, are now ignoring the time limit set by the legislature in

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stating, "... the only material on the record relating to that (agreement) was in the final argument, which is not evidence, we need to clear that up by presenting evidence ...."

Section 16-50p of the General Statutes. That time limit governs the Council notwithstanding the Court's remand pursuant to Section 4-183 (h) of the General Statutes.

II. The "Special Agreement" cited by the Council never existed.

The Siting Council's based its Decision and Opinion dated April 7, 2005 on a purported agreement that was never made part of the record during the Siting Council's Hearings. The Siting Council said:

> Initially, the Council may not have considered deviating from an existing electric transmission line right-of-way. However, **because the Royal Oak neighborhood and existing right-of-way are intertwined specifically via a special agreement between CL&P and the Royal Oak neighbors for vegetation management within the ROW**, the Council interprets this as **a unique "residential" area**. (Emphasis added) Opinion at 15.

Recognizing that the Siting Council had taken the extraordinary step of siting the transmission lines at issue here outside of an existing right of way, and recognizing that the Siting Council had taken that extraordinary step based upon misleading statements about a "special agreement" that never existed, the Companies, with the concurrence of the Siting Council, sought permission from the Superior Court, pursuant to Section 4-183 (h) of the General Statutes, to allow the Siting Council to consider additional evidence.

This too was an extraordinary step because Section 4-183 (h) is designed to allow an administrative agency to consider additional evidence that actually exists. For example, under different circumstances, Section 4-183 (h) might be used appropriately where a critical piece of foundation evidence, that was inadvertently omitted from the record, must be made part of the record to support an administrative decision. Here, the Companies and the Siting Council acknowledged in the motion papers filed pursuant to Section 4-183 (h) that the "special

agreement" upon which the Siting Council based its decision never existed. See footnote 2 supra.

Upon learning that the Wilsons might call the Siting Council's attention to the unfortunate fact that no "special agreement" ever existed, the Companies withdrew all references to the "special agreement" in the prefiled testimony of Mr. Ronald Johnson. What had been a "special agreement" now became an "special understanding". They reasoned that, if the Siting Council could not be persuaded to find that a "special agreement" existed, an impossibility given their concession, then perhaps they could substitute a "special understanding." Mr. Johnson's testimony before the Council, however, highlighted another unfortunate fact-- no "special understanding" ever existed either.

Indeed, as the evidence presented has shown:

> 1) the Record is devoid of any evidence that the Royal Oak neighbors as a group were ever informed of the purported "special understanding"—the evidence before the Siting Council shows that only three neighbors received the "special understanding" letters, only one neighbor signed and returned a "special understanding" letter, and that one neighbor who did sign did not agree to its terms (Transcript p. 35, lines 13-22 and Exhibits A, B, and C; Transcript p. 36, lines 2-5);
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> 2) the Royal Oak neighbors ignored the responsibilities imposed by the "special understanding."—the Companies were required to perform the maintenance that the neighbors failed to perform in both four year cycles that postdated 1997 (Transcript p. 41, lines 16-22; p. 42, lines 1-9);

3) the Companies' treatment of the Royal Oak right-of-way was not "unique" in any sense of that word—the letter "agreement" offered as evidence by the Companies shows that the "agreement" applies to hundreds of neighborhoods from " the Carpenter La. Jct. in Wallingford, CT to Oxbow Jct. in Haddam, CT" (See first sentence of 1997 letter), and the Companies purport to apply the same treatment as that afforded to Royal Oak, whatever that is, to other locations across the state whether any agreement exists or not. (Transcript p. 50, lines 7-16.) ; and

4) Remarkably, Mr. Johnson conceded that he, and therefore the Companies, did not know whether any Royal Oak landowner is even aware of any purported agreement or understanding. (Transcript p. 39, lines 11-21.)

Accordingly, no matter how the evidence before the Council is stretched or manipulated, the Record will not support a finding that there existed here a "special agreement", a "special understanding", or, indeed, anything "unique" at all with respect to the Royal Oak neighbors.

III. The Council's action in continuing the proceedings violates Section 16-50p of the General Statutes.

This continued proceeding was initiated by the Companies, with the concurrence of the Siting Council; both filed motions pursuant to Section 4-183 (h) of the General Statutes. To the extent that Section 4-183 (h) of the General Statutes and Section 16-50p of the General Statutes conflict, the Legislature has decided that Section 16-50p of the General Statutes takes precedence. Section 16-50w of the General Statutes provides:

> In the event of any conflict between the provisions of this chapter and any provisions of the general statutes, as amended, or any special act, this chapter shall take precedence.

The Section 4-183 (h) motions were filed and this continued proceeding was held long after the deadline imposed by the Legislature under Section 16-50p of the General Statutes for a decision by the Council.

Section 16-50p of the General Statutes (Public Act 04-236) reads as follows:

> In a certification proceeding, the council shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate. The council's decision *shall* be rendered within twelve months of the filing of an application concerning a facility described in subdivision (1) or (2) of subsection (a) of section 16-50i, as amended, or subdivision (4) of said subsection (a) if the application was incorporated in an application concerning a facility described in subdivision (1) of said subsection (a), and within one hundred eighty days of the filing of any other application concerning a facility described in subdivision (4) of said subsection (a), and an application concerning a facility described in subdivision (3), (5) or (6) of said subsection (a), provided such time periods *may* be extended by the council by not more than one hundred eighty days with the consent of the applicant. The council shall file, with its order, an opinion stating in full its reasons for the decision. (Emphasis added.)

The Council's action in seeking to consider additional evidence ignores the deadline imposed by Public Act 04-236 Sec. 6(a). This deadline is mandatory, not directory, because the Council, to extend the initial twelve month deadline, must obtain the "consent of the applicant", and then may extend the deadline for a period not to exceed 180 days.

In *Angelsea Productions, Inc. v. Commission on Human Rights & Opportunities*, 236 Conn. 681 (1996) the Connecticut Supreme Court, in holding that a CHRO time limit was mandatory, said:

> One final reliable guide in determining whether a statutory provision is directory or mandatory is whether the failure of the state to comply with its provisions results in ... a requirement that the state seek an extension of time. *Id.* at 695

Noting that the CHRO was authorized to grant an extension of time for three months to a CHRO investigator who failed to comply with an initial time

limitation the Court said:

> Pursuant to § 46a-83 (b), if the investigator fails to make a finding regarding reasonable cause within the prescribed nine month time period, "the executive director or his designee may grant a single extension of the investigation of three months." If the investigator merely had to attempt to comply with the nine month deadline, there would be no purpose in providing for an extension. We have often recognized that the legislature is not presumed to enact meaningless legislation. *Id.* (Emphasis added)

Section 16-50p of the General Statutes authorizes one extension of time with the "consent of the applicant." The time limit set forth in Section 16-50p of the General Statutes is, therefore, mandatory, under the reasoning of Court in *Angelsea Productions.*

A remand under Section 4-183 (h) of the General Statutes "represents a continuation of the original agency proceeding", thereby extending the original proceedings. *Salmon v. Dept. of Public Health & Addiction Services*, 259 Conn. 288, 319 (2002), *Raines v. Freedom of Information Commission*, 221 Conn. 482, 489 (1992). The Siting Council's action in considering additional evidence is not a ministerial act. *Conetta v. Stamford*, 246 Conn. 281, 291 (1988). Its action demonstrates that the administrative record was, at best, incomplete, and that the Siting Council's prior decision in April 2005 lacked finality. *Schieffelin & Co. v. Department of Liquor Control*, 202 Conn. 405, 410-11 (1987). The Siting Council's action to reopen the record removed the finality of the Council's April 2005 decision. *Fairfield v. Connecticut Siting Council*, 238 Conn. 361, 369 (1996). By considering additional evidence, the Council has insured that its April 2005 decision was immune from judicial review. *Schieffelin & Co. v. Department of Liquor Control*, 202 Conn. 405, 410-11 (1987), *Fairfield v. Connecticut Siting Council*, 238 Conn. 361, 369 (1996) (the Superior Court may not review non-final

decisions of an administrative agency), *Cleveland v. U.S. Printing Ink, Inc.*, 218 Conn. 181, 185-86 (1991).

The Council's only final decision in this case will be made when the Council completes its consideration of the additional evidence and enters a new decision. *Schieffelin & Co. v. Department of Liquor Control*, 202 Conn. 405, 410-11 (1987). By that time, the time prescribed by the legislature for a decision by this Council will long have passed.

Judge Cohen's decision in *City of Norwalk v. The Connecticut Siting Council*, Superior Court, J.D. New Britain, No. CV-03-0524145-S (2004), 2004 WL 2361540, cited during the hearing, does not apply to this case.[3] In *City of Norwalk,* Judge Cohen excused the Council's untimely action by finding that Norwalk had waived its claim. Here, the Wilsons have made plain both to the Court on the Section 4-183 (h) motions and to the Council that further proceedings violate Section 16-50p of the General Statutes. There was no waiver by the Wilsons.

The Siting Council, like all administrative agencies, is a creature of the Legislature and is subject to limitations imposed by the Legislature. *Salmon Brook Convalescent Home v. Comm. on Hosp. & Health Care*, 177 Conn. 356 (1979). Here, the Legislature expressly required that the Siting Council render its final decision within the time allowed by Section 16-50p of the General Statutes. The Siting Council has ignored that legislative mandate without offering any explanation for its action or citing any meaningful precedent as authority for its action.

By acting outside of the time limit imposed by the Legislature, the Siting Council has effectively decided that no time limit applies. The Siting Council's next decision will trigger new appeals by aggrieved parties because that decision will serve as the reviewable final agency

[3] Judge Cohen's decision addressed reconsideration under Section 4-181a of the General Statutes; that section is not applicable in this case.

decision. *Schieffelin & Co. v. Department of Liquor Control*, 202 Conn. 405, 410-11 (1987). The rights conferred by Sections 4-181(a) and 4-183(h) of the General Statutes will be available to any aggrieved parties as a result of that decision. A further reconsideration by the Council pursuant to either of those statutes will necessarily delay again a final decision in this case and will trigger yet another round of appeals. Contrary to the Legislative mandate expressed in Section 16-50p, the Council's decision will not be rendered within the deadline.

Conclusion

The record developed before the Siting Council on November 30, 2005 demonstrates that Section 4-183(h) of the General Statutes was plainly misused in this case. The evidence shows conclusively that there was never a "special agreement" or "special understanding" between the Companies and the Royal Oak neighbors. Tellingly, the Companies' witness could not even testify that Royal Oak neighbors were aware of the purported agreement or understanding. More tellingly, the evidence has shown that there is nothing "unique" here to justify the extraordinary action of the Siting Council. The "unique 'residential' area" described in the Council's decision simply does not exist. The "unique" treatment of the Royal Oak area now cited by the Companies is not limited geographically and extends to hundreds of neighborhoods far beyond Royal Oak. The "unique" treatment now cited by the Companies is extended to neighborhoods whether or not the affected neighbors even know that it is being extended. The "unique" treatment cited by the Companies plainly now applies to any location where it becomes convenient to apply it. Accordingly, given the evidential Record presented to the Council by the Companies in this case, a reaffirmation the Siting Council's April 7, 2005 Decision will lead to the creation of two separate rights-of-way for transmission lines where one would suffice.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on December 15, 2005, an original and 20 copies were hand-delivered to the Siting Council and a copy of the foregoing Memorandum was sent via email, to the following:

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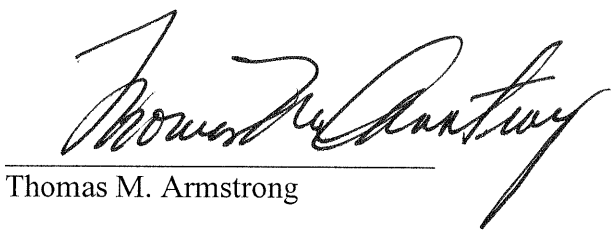

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