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SITING COUNCIL

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 TRANSMISSION LINE FACILITY AND ASSOCIATED FACILITIES BETWEEN SCOVILL ROCK SWITCHING STATION IN MIDDLETOWN AND NORWALK SUBSTATION IN NORWALK	:	DOCKET NO. 272 MARCH 15, 2005

POST-HEARING BRIEF

On Behalf Of

The Town of Middlefield

LAW OFFICE OF BRANSE & WILLIS, LLC
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I. The "Northerly Route" Cannot be Adopted by the Siting Council

A. Procedure for Examination of Northerly Route Alternative not Followed.

Conn. Gen. Stats. § 16-50*l* contains fairly exhaustive provisions regarding who is to receive notice of applications before the Siting Council. It is the purpose of the granting of the notice to "be in such form and in such newspapers as will serve substantially to inform the public of such application and to afford interested persons sufficient time to prepare for and to be heard at the hearing prescribed in section 16-50m". Conn. Gen. Stats. § 16-50*l*(b). Additionally, Conn. Gen. Stats. § 16-50*l* (b) requires that the utility provide notice to its customers, including "(a) brief description of the project, including its location relative to the municipality and adjacent streets" and "the address and a toll-free telephone number of the applicant by which additional information about the project can be obtained; and a statement in print no smaller than twenty-four-point type stating 'NOTICE OF PROPOSED CONSTRUCTION OF A HIGH VOLTAGE ELECTRIC TRANSMISSION LINE.'"

In the present situation, the notice provided did not list the "Northerly Route" on the list of adjacent streets. It did not adequately provide time for those along the "Northerly Route" the opportunity to meaningfully prepare for and to be heard at the hearing held on February 24, 2004, pursuant to Conn. Gen. Stats. § 16-50m. The hearing pursuant to Conn. Gen. Stats. § 16-50m was held at a point in time when the "Northerly Route" was not an "alternative" at all, in the

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sense that it was part of the application and undergoing the same level of review by the Applicants and Council.

While this is not a zoning permit application and has its own statutory framework, reviewing zoning cases in which different or additional land not included in the legal notice was the subject of an approval is instructive in the present instance. In the matter of *Laudatti v. Planning and Zoning Commission of Town of Granby*, CV 01 0807790 S, 2003 WL 1995652 (Conn.Super.), Maloney, J., the trial court reviewed the situation of an amendment to the zoning map of the Town of Granby in which one parcel was advertised but two additional lots were also re-zoned from Residential to Industrial. The two other parcels were outside the scope of the applicant's application. At the public hearing on the zone change for the one parcel owned by Tilcon, Granby's Director of Community Development, Francis G. Armentano, suggested that the two adjacent lots also be re-zoned to create a larger contiguous area of industrially zoned land. *Laudatti* at p. 2. These two other pieces were not part of the original application. *Laudatti* at p. 3. Residents reviewing the materials on file with the town as suggested by the legal notice would not have found reference to these parcels. *Laudatti* at p. 3. The Planning and Zoning Commission decided to re-zone them anyway. Judge Maloney, quoting Cocivi v. Plan and Zoning Commission, 20 Conn.App. 705 (1990), held that "(a) notice is proper only if it fairly and sufficiently apprises the public of the action proposed, making possible intelligent

preparation for participation in the hearing". Cocivi, 20 Conn. App. at 708. *Laudatti* at p. 3.

Based on this, the trial court went on to hold:

> No interested member of the public, reading this notice and then following up with a visit to the town clerk's office to examine (the applicant's) application as directed, would be fairly apprised of the action proposed to be taken. Rather, the public would be totally misled into believing that only (the applicant's) property would be considered at the hearing.

Laudatti at p. 3. Based upon this interpretation of the legal notice as compared to what was approved, the trial court voided the zone change and sustained the appeal. Because the public hearings have now closed without hearings in Middlefield on the Northerly Route, this alternative cannot be considered.

The case of *Urbanowicz v. Town of Enfield Planning & Zoning Commission*, CV 98 0492255 S, 2000 WL 1825400 (Conn.Super.), Cohn, J., is similar in nature. An application for a crematorium was modified to include "abutting land". *Urbanowicz* at p. 5. Judge Cohn held this to be "new proposal", "constituting a new application" and voided the approval. *Urbanowicz* at p. 5. In the present instance, the Siting Council is not simply looking at "abutting land". The land in question bears no relationship to the land shown in the original proposal. There is simply no way that any resident of the Town of Middlefield, upon reviewing the application submitted by the Applicants, could possibly have grasped that the "Northerly Route", as well as, apparently, nearly any other alternative, might also come to pass.

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Conn. Gen. Stats. § 16-50p (d) requires that "(i)f the council determines that the location of all or part of the proposed facility should be modified, it may condition the certificate upon such modification, *provided the municipalities, and persons residing or located in such municipalities, affected by the modification shall have had notice of the application as provided in subsection (b) of section 16-50l.*" (emphasis added). While it is certainly true that some form of notice was provided to Middlefield and its residents, the question is whether the notice "substantially informed the public". The Town of Middlefield argues not. If the Northerly Route is now being considered at the level of an official "alternate" location, the spirit, if not the letter of Conn. Gen. Stats. § 16-50*l*, is clearly being broken.

Prior to considering an alternative that will take property not previously listed as in the path of the proposed route in Middlefield, the Siting was obligated to hold a hearing. In other cases involving the Siting Council and notice, the facility in question was either a power plant (Concerned Citizens for Sterling, Inc. v. Connecticut Siting Council, 215 Conn. 474 (1990)) or a specific cellular tower (Mobley v. Metro Mobile CTS of Fairfield County, Inc., 216 Conn. 1 (1990)). The questions before the Supreme Court largely revolved around very specific locations and whether proper notice was given to those in the vicinity. In those cases, a general notice to those in a fairly defined area was deemed to be enough. The proposal before the Siting Council now is a magnitude larger in scale, a cable running miles, and the level of community impact is

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likewise greater.

B. Factual Record does not Support Northerly Alternative

The route of the proposed line traveling from Oxbow Junction to the Proposed Besick Switching Station is the shortest, least expensive and most reliable route for the proposed 345 kV line in Segment 1. Per the testimony of Roger Zaklukiewicz, *et al.*, dated May 25, 2004, Applicant's Exhibit 90, a "Northerly Route" was examined by the Applicants and rejected. The Northerly Route would require the location of four 345 kV circuits along a common right of way ("ROW") between Chestnut Junction and Black Pond Junction, and between Black Pond Junction and the proposed Besick Switching Station. Applicant's Exhibit 90, p. 14. Use of the Northerly Route would raise reliability concerns should contingencies arise, as compared to the proposed route, where there is no present 345 kV circuit. The Northerly Route is 50% longer than the proposed Segment 1. It would require the addition of up to 62 acres of land, in a long line across the heart of Middlefield, or alternatively, periods of outages as the existing towers are all removed and replaced.

The proposed route for Segment 1 does not require the taking of any additional land. It is less expensive, more reliable and takes no houses. Applicant's Exhibit 90, 15 - 17. Roger Zaklukiewicz also testified on June 2, 2004, that there were inherent security concerns involved with placing all of the lines in one spot. In the event of a fire, a plane crash or terrorist event

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along the route, there was no possibility of losing all of the 345 kV lines running from east to west across the State. The loss of that one location would then lead to "load shedding", or black outs. Additionally, the testimony of Mr. Zaklukiewicz was that the ISO required the Applicants to prepare for contingencies including the loss of one route or facility. The placement of another line along the existing three lines would not address this planning concern.

The Applicants have also testified that the use of the proposed route could be accomplished in a manner such that no residential structures along that portion of the route would face EMF levels in excess of 6 milligausse. No such studies or analysis has been performed along the Northerly Alternative. In fact, no EMF studies have been conducted along the Northerly Route at all. Therefore use of the Northerly Route would render it impossible to meet the mandate of P.A. 04-246 to minimize the hazards of EMF exposure, due to the lack of accurate data. Given the exhaustive reviews performed for other sections of the route, this is not something the Council has felt comfortable leaving to the D&M phase of the approval.

II. Black Pond Junction Is Not a Suitable Alternative to the Besick Switching Station

To meet the "best strong source" requirement for designing a transmission system, the Applicants considered supply options from outside the Southwest Connecticut ("SWCT") region, specifically Southington Substation, Frost Bridge Substation and the Middletown area. See Volume 1, Section G.4.1 of the Application. Middletown was selected as the strongest source

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"because eastern Connecticut is rich in generation resources". Applicant's Exhibit 90, p. 18. As a result, the Applicant needed to develop a plan that would bring electricity from the "strong source" in Middletown to the relatively "weak system" in SWCT. The Applicants have proposed the addition of a 345 kV line along the "Middletown - Norwalk" route, which new line required a new switching station in the vicinity of Meriden or Wallingford. The two possibilities were at Black Pond Junction in Meriden or at Besick.in Wallingford.

While the Applicants determined both Besick and Black Pond Junction are electrically equivalent, the Besick site is superior for several reasons:

A. To use the Black Pond Junction would require use of the Northerly Route, which is undesirable for the reasons set forth above. Applicant's Exhibit 90, p. 18.

B. There is no land available at Black Pond Junction and presently owned by the Applicants to construct the switching station. There is plenty of available at the Besick site, as Northeast Utilities has owned 52 acres there for 40 years and is presently only using 5.4 acres on the site. Applicant's Exhibit 90, p. 18.

C. The terrain at Besick is more favorable to new construction than that at Black Pond. The terrain at Black Pond would require extensive earthwork, blasting, filling and cutting. Applicant's Exhibit 90, p. 19.

D. Access to the Black Pond Junction site is limited by Route 691 on the South side and by

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wetlands on the East and West. The only remaining access, from the North, may conflict with the police academy. The Besick site has no access issues. Applicant's Exhibit 90, p. 19.

E. The area around Black Pond Junction is zoned for rural residential use, while the Besick site is zoned for industrial use. Applicant's Exhibit 90, p. 19.

F. The Black Pond Junction site borders the Cockaponset State Forest and is located west of and in close proximity to Mt. Higby (a trap rock ridge and recreational area). A switching station at this location would be visible from the Mattabassett Trail located on the Cockaponset State Forest property, as well as from Mt. Higby and other vista locations along the ridge top. Applicant's Exhibit 90, p. 19.

III. The Siting Council Does Not Have Statutory Authority to Consider ISO-NE Approval.

The Siting Council and its authority are creations of statute, and its authority is strictly limited. Nizzardo v. State Traffic Commission, 259 Conn. 131, 156 (2002). The tools given to the Siting Council for the evaluation of applications before it are specifically set forth in Conn. Gen. Stats. § 16-50p, as amended. Sections (a) and (b) of Conn. Gen. Stats. § 16-50p set forth the factors that can be considered by the Siting Council in reaching a decision on a docket. Nothing in Conn. Gen. Stats. § 16-50p (a) or (b) either explicitly or otherwise speaks to whether

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the Independent System Operator - New England ("ISO-NE") will accept what decision is made by the Siting Council. Absent the specific authorization to consider that factor, the Siting Council can not create its own criteria for consideration.

This is not to say that consideration of ISO-NE's position should not be important to the Siting Council. It would be unfortunate indeed if, after over a year of hard work, the decision of the Siting Council was essentially "vetoed" by ISO-NE not accepting the system into the over all grid, and not socializing the costs among the wider pool of rate-payers. That said, the proper solution for such a problem is *legislative*, not administrative. It is a function of any administrative agency that its powers are inherently limited. For the Siting Council to step outside of its statutorily created powers simply because it wants to craft a "better" decision is a recipe for trouble. As much as everyone might acknowledge that ISO-NE has a role to play, it is not for the Siting Council, at least at present, to anticipate that role.

IV. Buffer Zone Left to Siting Council Discretion

There is little guidance as to what a "buffer zone" should be. It is clear from the testimony of members of the Legislature before the Siting Council that the specifics of the buffer zone were deliberately left vague, so as to be at the specific discretion of the Siting Council. In the absence of specifically mandated definitions, this is an area in which public policy concerns are paramount. As a result, requesting legal arguments on this issue is not likely to result in

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more than each party lobbying for the definition of "buffer zone" that best suits its local needs.

To the extent that a "buffer zone" will act as a *de facto* penalty on the value of a property, its use must be carefully considered. While it is unclear, as the question posed by the Siting Council's "Issues to Brief" of February 17, 2005 suggests, that the buffer zone can be one size for adults and one size for children, the level of warning and notice might vary. On a golf course, where mostly adults will be present, and the time spent in close proximity to the overhead lines can be measured in tens of minutes, not tens of hours, the level of warning should be lower than at a school or a home. Certainly, large signs on the fairway would be unnecessary, given the evidence heard by the Siting Council that damage is done by prolonged exposure to high dosages, perhaps limited only to children. In fact, specific instructions to each property owner regarding "warnings" provided around the buffer zone is likely to be counter-productive and difficult to enforce.

It is unclear that individual property owners, who are not parties to this docket, can be required to record deed restrictions or equivalent limitations without the same condemnation process that the Applicants would be obligated to use for the creation of an easement. For the Siting Council to create the burden for the Applicants or others to acquire these rights would be a nightmare and would be burdensome beyond all rational expectations. Realistically, the Siting Council needs to use the concept of buffer zones to evaluate what is placed within them,

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considering the factors set forth in Conn. Gen. Stats. § 16-50p (a)(3)(D). Beyond using the buffer zones as a measure for the appropriateness of where to place the lines, the Siting Council would be mistaken in attempting to create bright lines on a map that would forever alter the property rights terrain beneath the lines. Such a step would simply result in years of litigation, with the courts ultimately having the final say on something that was left, by design, to the Siting Council.

RESPECTFULLY SUBMITTED,
TOWN OF MIDDLEFIELD

By________________________________

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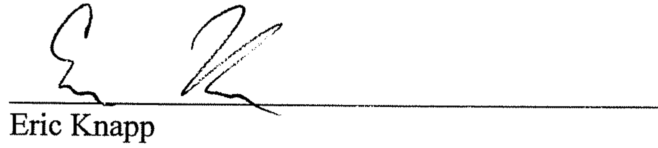
CERTIFICATION

I hereby certify that a copy of the foregoing has been mailed to those listed on the Service List, this 15th day of March, 2005.



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