



STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

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VIA ELECTRONIC MAIL

October 27, 2017

TO: Parties and Intervenors

FROM: Melanie A. Bachman *MAB*
Executive Director

RE: **PETITION NO. 1325** - The Connecticut Light and Power Company d/b/a Eversource Energy petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for proposed modifications to an existing telecommunications facility on electric transmission line structure No. 9950, owned by Eversource Energy within an existing Eversource Energy electric transmission line right-of-way, located at the Birchwood Condominium Complex, 27 Crows Nest Lane, Danbury, Connecticut.

During a public meeting of the Connecticut Siting Council (Council) held on October 26, 2017, the Council ruled on the following motion:

1. Birchwood Condominium Association (BCA) Objection to Petition for Declaratory Ruling, dated October 12, 2017

BCA's objection to the petition was overruled. Enclosed is a copy of the staff report, dated October 26, 2017.

MAB/FOC/bm

Enclosure



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DATE: October 26, 2017

TO: Council Members

FROM: Melanie A. Bachman, Esq. *MAB*
Executive Director/Staff Attorney

RE: **PETITION NO. 1325** - The Connecticut Light and Power Company d/b/a Eversource Energy petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for proposed modifications to an existing telecommunications facility on electric transmission line structure No. 9950, owned by Eversource Energy within an existing Eversource Energy electric transmission line right-of-way, located at the Birchwood Condominium Complex, 27 Crow's Nest Lane, Danbury, Connecticut. **Staff Report - Birchwood Condominium Association Objection to Petition.**

On September 15, 2017, the Connecticut Siting Council (Council) received a petition from Eversource Energy (Eversource) for a declaratory ruling (Petition) that no Certificate of Environmental Compatibility and Public Need (Certificate) is required to replace and upgrade an existing telecommunications facility mounted on an 85-foot tall electric transmission structure no. 9950 (Structure #9950) within an existing, 110-foot wide Eversource electric transmission line right-of-way (ROW) located at the Birchwood Condominium Complex at 27 Crow's Nest Lane in Danbury, Connecticut. The existing telecommunications facility is owned and operated by Eversource for the purpose of supporting a Distribution Supervisory Control and Data Acquisition system (DSCADA system) that is part of Eversource's emergency restoration plan to allow Eversource to control electric system switching devices from a remote location. The DSCADA system enables Eversource to isolate sections of the electric distribution system that experience fault conditions. Eversource is in the process of upgrading its communications system across the state. As part of the upgrade, Eversource proposes the following:

1. Remove the existing 9-foot omnidirectional whip antenna and associated equipment that is mounted on Structure # 9950 and replace it with a 19-foot omnidirectional whip antenna utilizing the existing antenna mount on Structure #9950;
2. Install a 30-foot by 28-foot gravel base equipment compound surrounded by a 12-foot high vinyl fence and arborvitae plantings at the base of Structure #9950; and
3. Install an 11-foot-by 16-foot equipment shelter on a concrete slab, a 20 kilowatt propane-fueled emergency backup power generator on a concrete pad and a 500 gallon above-ground propane tank on a concrete pad within the equipment compound.

On September 20, 2017, the Birchwood Condominium Association (BCA) requested party status. On October 12, 2017, BCA filed an Objection to Petition for Declaratory Ruling (Objection). BCA contends the petition must be denied because it does not present sufficient data, facts or arguments to support a finding that the project will have no substantial adverse environmental effect and it fails to address BCA's health and safety concerns.

I. Background and History of the Existing Facilities

According to Council records, under Docket No. 5, the existing Eversource 115-kV electric transmission line facility between Triangle Substation in Danbury and Plumtree Substation in Bethel was reconstructed in accordance with the Council's February 24, 1975 final decision to issue a Certificate.¹ At the time, the existing 115-kV transmission system was becoming inadequate to maintain a reliable supply of power.² Under Petition No. 702, on June 28, 2005, the Council issued a declaratory ruling that no Certificate was required for the Plumtree to Triangle 115-kV Transmission Line Upgrade Project to bring the Danbury area electrical system into compliance with electric reliability standards and criteria.³ The Council found that a multiple line outage due to a tower or shield wire failure was possible since the three 115-kV circuits serving the Danbury area were supported on a single row of steel lattice towers over 40 years old. The Council's final decision approved the replacement of each lattice tower with two side by side monopoles in the existing ROW between Triangle Substation in Danbury and Plumtree Substation in Bethel.

Under Petition No. 868, on November 20, 2008, the Council issued a declaratory ruling that no Certificate was required for modification of existing Structure #9950.⁴ Pursuant to the Connecticut Department of Public Utility Control's June 26, 2002 final decision in Docket No. 01-05-22, "DPUC Investigation into Public Service Company and Municipal Utility Emergency Plans," and pursuant to Connecticut General Statutes (C.G.S.) §16-32e requiring each public service company to file every 5 years an updated plan for restoring utility service that is interrupted as a result of an emergency, Eversource deployed a statewide network of radio communications sites for its DSCADA system. Due to poor radio coverage in the Danbury area and pursuant to the state tower sharing policy to avoid the unnecessary proliferation of towers, Eversource proposed to install a 9-foot omnidirectional whip antenna at the top of Structure #9950. Originally, Eversource sought to install 2 equipment cabinets in an equipment shelter enclosed by a fence, but subsequently amended the plans to install the cabinets directly onto Structure #9950 in response to concerns of the BCA regarding visual intrusion and site disturbance.⁵

II. Eversource's request to replace and upgrade its existing radio communications facility at Structure #9950 is properly filed as a petition for a declaratory ruling.

In its Objection, on page 2, BCA contends that Eversource must apply for a Certificate because the project involves:

1. the placement of an above-ground 500-gallon propane tank;
2. tree and vegetative removal;
3. burdens on BCA's property beyond the boundaries of Eversource's easement;
4. impacts to parking;

¹ Connecticut Siting Council, Docket No. 5, CL&P Certificate of Environmental Compatibility and Public Need for a 345 kV transmission line and a 115 kV transmission line between points in the Towns of New Milford and Bethel, available at <http://www.ct.gov/csc/lib/csc/doc5d&co.pdf>.

² *Id.* (finding failure to address reliability issues with the 115-kV system could result in line rating exceedance, damage to conductors and equipment, safety hazards and jeopardized electric service to a large area.)

³ Connecticut Siting Council, Petition No. 702, CL&P declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed Plumtree to Triangle 115-kV Transmission Upgrade Project in the towns of Bethel and Danbury, Connecticut, available at <http://www.ct.gov/csc/cwp/view.asp?a=958&Q=247756#700>

⁴ Connecticut Siting Council, Petition No. 868, CL&P declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed modifications to an existing 115-kV transmission line structure (#9950) located off of Crow's Nest Lane, Danbury, Connecticut.

⁵ *Id.* (Staff Report dated November 20, 2008).

5. interference with residents' access to amenities;
6. added expense to BCA's snow removal; and
7. destruction of the property's landscape and scenic value.

In support of these contentions, BCA represents that Eversource's project may be approved by declaratory ruling only if the Council does not find a substantial adverse environmental effect. Eversource submitted a petition to replace and upgrade an existing radio communications facility installed on Structure #9950. Eversource acknowledges Conn. Gen. Stat. §16-50k(a) as the statutory authority for the filing of the Petition and represents that the proposed replacement and upgrade of the existing telecommunications facility mounted on Structure #9950 "would not result in a substantial adverse environmental effect on the environment or ecology, nor would it damage existing scenic, historic or recreation values."⁶

BCA also represents that Eversource's Petition does not present sufficient data, facts, or arguments to support a finding that the project will have no substantial adverse environmental effect in accordance with the requirements of Regulations of Connecticut State Agencies (RCSA) §16-50j-39(a).⁷ Specifically, BCA contends that the petition fails to address BCA's concerns and poses an unacceptable health and safety hazard by placing an uncovered generator and above-ground 500-gallon propane tank in proximity to residential buildings. However, the Petition presents data, facts and arguments in the 16-page narrative and the 8 tabs of supplemental material to support Eversource's position that the project will have no substantial adverse environmental effect consistent with the requirements of RCSA §16-50j-39(a). Furthermore, the narrative headings in the Petition follow the factors the Council is required to evaluate in making a determination of substantial adverse environmental effect on an application for a Certificate.⁸

III. The Petition addresses the concerns expressed in BCA's 5-part argument.

In support of its position that Eversource must file an application for a Certificate for the proposed replacement and upgrade of Eversource's existing radio communications facility on Structure #9950, BCA submitted the affidavit of BCA President, Lauren Zane (Affidavit), and advanced a 5-part argument as follows:

1. The project creates a health and safety hazard to children who regularly use the area as a school bus stop and traverse BCA's property.

The Affidavit indicates the area of construction of the proposed project is located near a bus stop and is an area through which school children traverse BCA's property. BCA acknowledges

⁶ See Conn. Gen. Stat. §16-50k(a) (2017). ("... no person shall... commence any modification of a facility that may, as determined by the Council, have a substantial adverse environmental effect without first having obtained a certificate of environmental compatibility and public need...")

⁷ R.C.S.A. §16-50j-39(a) (2017) ("Any interested person may at any time request a declaratory ruling of the Council with respect to the applicability... of any statute... The request shall state clearly and concisely the substance and nature of the request; it shall identify the statute concerning which the inquiry is made and shall identify the particular aspect to which the inquiry is directed. The request... shall be accompanied by a statement of any data, facts and arguments that support the position of the person making the inquiry...")

⁸ Conn. Gen. Stat. §16-50p(a)(3)(B) (2017) ("The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every adverse effect, including, but not limited to, electromagnetic fields that, whether alone or cumulatively with other effects, impact on, and conflict with the policies of the state concerning the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, agriculture, forests and parks, air and water purity, and fish, aquaculture and wildlife.")

that Eversource states in the petition that it “has agreed to limit work hours as not to interfere with school bus pickup schedules during the school year,” but also states that Eversource told BCA “work hours would most likely be 7 AM to 4 PM Monday through Friday.” The document entitled, “Eversource Proposed Telecommunications Improvements,” dated March 21, 2017, that is attached to the Affidavit as Exhibit 1 indicates “work hours would most likely be 7 to 4, Monday – Friday.” However, in its Petition, dated September 15, 2017, Eversource does not provide any specific work hours, but indicates under the heading, “Safety and Health,” on page 9, “Eversource has agreed to limit work hours so as not to interfere with school bus pickup schedules during the school year.” Additionally, under the same heading, Eversource indicates “the Project would not create any safety or health hazards to persons or property. Eversource does not anticipate the need for specific traffic control measures during construction. The Site will be accessed via the condominium parking lot immediately to the east of the transmission tower.” According to the Site Schematic from page 4 of the Petition and page 7 of BCA’s Objection, the subject parking lot appears to be within Eversource’s ROW. Therefore, Eversource addresses BCA’s health and safety concerns relative to children who regularly use the area as a school bus stop and traverse BCA’s property.

2. The location of an uncovered generator and 500-gallon propane tank next to residential building and recreational areas creates a health and safety hazard.

The Affidavit indicates that the uncovered equipment compound housing the generator and propane tank will be located 180 feet from a residential building and alleges that this poses unacceptable health, safety and security risks to BCA’s community. Eversource’s Petition provides the specifications for the generator and the 500-gallon propane tank behind Tab 2. Additionally, BCA alleges that the equipment compound will exacerbate a problem with trespassers causing property damage. Under the heading, “Community Outreach,” on page 16, it states, “Eversource met with the [BCA] in March of 2017 to review the proposed Project and listen to their concerns... [BCA] requested that the fence be as tall as the height of the proposed equipment shelter. Eversource agreed to this modification and changed the original height of the 8-foot vinyl fence to 12-feet.” Also under that heading, Eversource describes the BCA request for “use of an anti-graffiti covering on the fence.” Eversource indicates it would use such paints if a suitable product for vinyl fence is made available. Therefore, Eversource addresses BCA’s health and safety concerns relative to the location and operation of the emergency generator and fuel tank.

3. The impact of the Project would cause a substantial adverse environmental effect on the surrounding areas.

In support of this contention, BCA submits 3 claims, which are below with the respective corresponding section of Eversource’s Petition that addresses the claims:

- a. The project would require the regrading and leveling of the land in and around the Project Site, including the removal of greenery and trees, which will cause a substantial adverse environmental effect on the surrounding area.
 - Environmental Discussion (page 5)
 - Soil Erosion, Sediment Control and Soil Remediation (page 6)
 - Wildlife and Vegetation (page 6-9)
 - Physical Environmental Effects (page 14)

- Restoration (page 14)
- b. The project would interfere with BCA's snow removal efforts, substantially increase the cost of snow removal and deny unit owners and guests access to parking.
 - This claim is irrelevant to the statutory factors considered in a determination on substantial adverse environmental impact.
 - On page 9 of the Petition, Eversource identifies access to the site via the parking area located immediately east of Structure #9950. From the Site Schematic, it appears to be located within Eversource's ROW.
- c. The project would permanently disfigure the landscape of BCA's property and adversely affect the scenic value of BCA and all of its unit owners.
 - Environmental Discussion (page 5)
 - Soil Erosion, Sediment Control and Soil Remediation (page 6)
 - Wildlife and Vegetation (page 6-9)
 - Visual (page 10)
 - Visibility Analysis (Tab 7)

Therefore, Eversource addresses BCA's concerns relative to substantial adverse environmental effect.

4. Construction of the Project would have impacts far beyond the boundaries of the easement area and create a private nuisance on BCA's property.

In its Objection, BCA alleges that construction of the project will impose an unreasonable burden on BCA's use and enjoyment of its property both within the easement area and outside the easement area and constitutes a nuisance. The Council does not have any jurisdiction beyond the boundaries of the facility site. In support of its easement overburdening claim, BCA cites to *Zhang v. Omnipoint Communications Enterprises, Inc.* where a private telecommunications carrier installed a monopole through the middle of an Eversource-owned lattice electric transmission line structure approved by the Council in Petition No. 383 on December 18, 1997 for which Eversource held an easement over the plaintiff's property that included use for telephone purposes and was found to be consistent with the purpose for which the easement was granted.⁹ Overburdening of an easement refers to the consistency of the use of the easement with the purpose for which the easement was granted.

The Council also does not have any jurisdiction over nuisance claims. Nuisance claims fall strictly within the jurisdiction of the courts and the focus of the analysis is on whether one's conduct causes an unreasonable interference with another's use and enjoyment of its property. In support of its nuisance claim, BCA cites to two cases that are clearly distinguishable on the facts. First, BCA cites to *Pestey v. Cushman* where acrid odors from an undersized and overloaded anaerobic digester installed on a dairy farm one-third of a mile from the plaintiff's residence was found to constitute a nuisance.¹⁰ Second, BCA cites to *Peterson v. Oxford* where the town's acceptance of subdivision roads included acceptance of the appurtenant drainage system, which flowed to a

⁹ *Zhang v. Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627 (2005); Connecticut Siting Council, Petition No. 383, Sprint PCS declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed modifications to a CL&P 115-kV electric transmission line support structure in Fairfield, Connecticut, available at <http://www.ct.gov/csc/cwp/view.asp?a=949&Q=247862>

¹⁰ *Pestey v. Cushman*, 259 Conn. 345 (2002).

brook that, due to a locational error in the subdivision map, resulted in flooding on plaintiff's property and was found to constitute a nuisance.¹¹ Nuisance refers to a condition that exists and not to the act that creates it. Although the Council has no jurisdiction over these two claims nor does it have a copy of the easement, it is important to note that it is quite possible, depending on the language of the easement, Eversource may have their own easement overburdening and nuisance claims relative to BCA's use of Eversource's ROW.

5. The petition is silent on project alternatives that would lessen its environmental impact.

Neither Conn. Gen. Stat §16-50k(a) nor RCSA §16-50j-39(a) require a petitioner to provide project alternatives. Most petitions, like the subject Petition, submitted pursuant to Conn. Gen. Stat §16-50k(a) are requests to modify existing facilities.¹² In its Petition, Eversource is seeking to replace and upgrade an existing telecommunications facility that it owns and operates within an existing Eversource ROW. It plans to install the new omnidirectional whip antenna using the existing antenna mount on Structure #9950. As described above, the Petition includes a 16-page narrative and 8 tabs of supplemental material to support a finding that the project will have no substantial adverse environmental effect.

IV. Conclusion

Pursuant to Conn. Gen. Stat. §16-50k(a), the project is properly filed as a petition and pursuant to RCSA §16-50j-39(a), Eversource has provided sufficient data, facts, and arguments to support a finding that the project will have no substantial adverse environmental effect. The Petition and its supporting documentation address BCA's concerns. Furthermore, BCA has been granted party status in this matter and may submit interrogatories to Eversource for further explanation and clarification on BCA's concerns that are jurisdictional to the Council. Therefore, staff recommends BCA's Objection be overruled.

¹¹ *Peterson v. Oxford*, 189 Conn. 740 (1983).

¹² Conn. Gen. Stat. §16-50k(a) states, "The Council shall... approve by declaratory ruling... (B) the construction and location of any fuel cell unless the Council finds a substantial adverse environmental effect or of any customer-side distributed resources project ... or grid-side distributed resources project... with a capacity of not more than 65 megawatts, as long as... (ii) the council does not find a substantial adverse environmental effect."