

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

Re:

**The United Illuminating Company Application
For a Certificate of Environmental Compatibility
and Public Need for the Construction, Maintenance
and Operation of a Proposed 115 kV/13 kV Electric
Substation and Associated Facilities Located
at 3-7 Wildflower Lane, Trumbull, Connecticut**

Docket No. 317

November 21, 2006

**BRIEF OF THE WILDFLOWER COALITION AND THE TOWN OF TRUMBULL
TO COUNCIL'S CERTIFIED QUESTIONS**

- I. If the United Illuminating Company wished to acquire land to build a substation, the Connecticut Siting Council could authorize condemnation of the property.

Pursuant to the Connecticut Constitution, art. I § 11, state government may take private property for public use under its eminent domain powers. The state's eminent domain powers may be delegated to an agency which is then empowered to determine whether to exercise such powers. *Connecticut Light & Power Co. v. Huschke*, 35 Conn. Sup. 303 (1979), citing *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 587-88 (1952). The Connecticut Legislature delegated the eminent domain power to The United Illuminating Company ("UI") in Special Acts, 1951, Vol. XXVI, p. 348, § 1 which authorizes it to: "enter upon, take and use all such land, interests in land and real estate as shall be necessary or convenient in the exercise of any of its rights, powers and privileges"

UI's delegated powers of eminent domain are not absolute and are still subject to approval and certification of the Connecticut Siting Council (the "Council") pursuant to

the Public Utility Environmental Standards Act (the "Act"). Conn. Gen. Stat. § 16-50g *et seq.* Under the Act, those parties who have been delegated eminent domain powers must first obtain a certificate of environmental compatibility and public need. Conn. Gen. Stat. § 16-50k(a). However, the Council also has the authority to approve advance land acquisitions in situations where the Council has already determined that no material adverse environmental effect will ensue. Conn. Gen. Stat. §§ 16-50k(a), 16-50z(a).

UI cannot acquire land for a substation without Council approval or certification. In CSC Petition No. 237, Connecticut Light and Power requested a declaratory ruling that Conn. Gen. Stat. § 16-50z, which forbids a public service company from acquiring property for the purpose of erecting a transmission facility without prior certification, does not apply to electrical substations. In its response, the Council agreed that while technically a substation is not a "transmission facility" under its interpretation of the statute, the issue is immaterial because for any substation to function it must be connected to the distribution grid through transmission lines. In effect, the Council found that certification is required prior to the acquisition of real property intended for use as a substation since that substation will require a transmission facility.

In the case at hand, if UI wished to acquire a certain piece of real property for the purpose of building a substation, it could do so by first filing a certificate of environmental compatibility and public need with the Council, unless the Council determines that the facility will not cause materially adverse environmental effects in which case such action is not necessary. Upon issuance of said certificate by the Council, UI would then be free to acquire the property.

II. If UI does not wish to acquire the property the Connecticut Siting Council cannot require them to condemn the property.

No Connecticut precedent or statute authorizes the Council to mandate condemnation of certain real property. While the Council does not have statutory power to mandate UI to condemn certain property, the Council has methods to encourage such action. The Council has discretion to deny the issuance of a certificate of environmental compatibility and public need if it decides that a particular site is not appropriate for a particular use pursuant to Conn. Gen. Stat. § 16-50p(a)(3)(B). In essence, by denying a certificate, the Council would compel UI to find another site better suited for such an intensive utility use.

Conn. Gen. Stat. § 16-50p(a)(3)(B) permits the Council to deny a certificate where: “[t]he nature of the probable environmental impact of the facility alone and cumulatively . . . with other effects, on, and conflict with the policies of the state concerning, the natural environment, ecological balance, public health and safety, scenic, historic and recreational values. . . .” It is important to note that the Act prohibits the Council from considering the fact that UI already owns the property it proposes to use for the substation. Specifically, Conn. Gen. Stat. § 16-50p(g) forbids the Council from being influenced by the fact that “the applicant may already have acquired land” See *a/so* CSC Petition No. 237 (Council repeated the statutory mandate that prior land ownership cannot be considered in determination to issue certificate).

Therefore, the Council can refuse to issue a certificate based on the environmental impact of further development of the site. If the Council were to deny the certificate, UI

would be compelled to find another location more suitable to its needs and that of the town.

III. The Town of Trumbull can condemn certain property for the purpose of UI building of substation.

The Town of Trumbull can condemn property for the purpose of allowing UI to build a substation. Conn. Gen. Stat. § 8-128 specifically permits the town to engage in redevelopment activities. The issue of taking property by eminent domain has been a controversial one; nonetheless, the U.S. Supreme Court and the Connecticut Supreme Court have clearly stated that it is constitutional according to both the federal and state constitutions. In *Kelo v. New London*, 545 U.S. 469, 450 (2005), the Court wrote: “a state may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.” Further the Court stated: “this ‘Court long ago rejected any literal requirement that condemned property be put into use by the general public.’” *Id.* at 451. The Court focused its consideration on whether the taking “serves a public purpose.” *Id.* at 452.

Here, the public purpose is simpler than the facts in *Kelo*. Rather than taking private residential land for the purpose of private development that would benefit the community as a whole, the Town of Trumbull would take commercial property for a public utility. While a public utility is not a public use in the literal sense – the property would not be open to the public – the public would directly benefit from the availability of electricity serviced by the substation and is therefore equally permissible.

While the Town could condemn property for the purpose of enabling UI to build a substation, the Town’s powers in doing so are coextensive with the ability of UI to do so

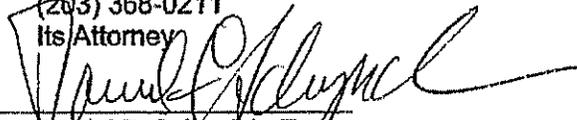
for itself with the approval of the Council. These co-extensive powers were granted by Special Acts, 1951, Vol. XXVI, p. 348, § 1 whereby UI was delegated eminent domain powers by the Legislature.

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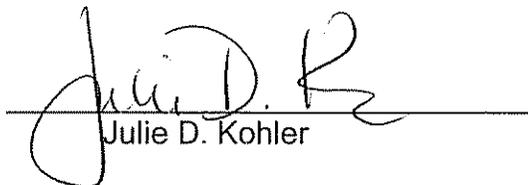
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Certification

This is to certify that a copy of the foregoing has been sent via email, this date to all parties and intervenors of record.



Julie D. Kohler