

STATE OF CONNECTICUT

SITING COUNCIL

Re: The United Illuminating Company application for a) Docket 317
Certificate Environmental Compatibility and Public)
Need for the construction, maintenance, and)
operation of a proposed 115-kV/13.8-kV electric)
substation and associated facilities located at 3-7)
Wildflower Lane, Trumbull, Connecticut.) November 22, 2006
)

**THE CONNECTICUT LIGHT AND POWER COMPANY'S BRIEF ON EMINENT
DOMAIN POWERS**

PRELIMINARY STATEMENT

This memorandum is submitted by The Connecticut Light and Power company ("CL&P") in response to the a request by the Connecticut Siting Council ("Council") for a discussion of following three issues regarding condemnation powers as they relate to the instant substation application by the United Illuminating Company ("UI"):

- (1) Does the Council approve condemnation if a utility wants to acquire land;
- (2) if the utility does not want to acquire land, can the Council order that utility to acquire land; and
- (3) May the Town of Trumbull condemn land and then sell it to UI under the Town of Trumbull's condemnation powers.

CL&P, like UI, is a franchised public utility under the laws of the state of Connecticut and as such it has limited powers of eminent domain that it may exercise in meeting its public service obligation. As this brief will discuss, the Council does not have any authority to exercise eminent domain powers nor can it directly order a jurisdictional utility to exercise its eminent domain powers.

The Council's certification process permits the exercise by a utility to construct approved projects using the utilities condemnation powers restricted to property identified in the certificate. Thus the Council, through its authority to select alternative sites for a facility could indirectly cause an applicant utility to condemn property of a property owner who is unwilling to sell. The Town of Trumbull's authority to exercise its rights to eminent domain may best be answered by the Trumbull itself. Municipalities in Connecticut are generally allowed to take property for just compensation for valid public purposes. As a practical matter if the Council is going to issue a certificate, restricted to a certain site, it appears that it would not be necessary for a municipality to use its eminent domain authority to make property available for that public utility facility.

A. CL&P'S EMINENT DOMAIN POWERS

Source of Public Service Companies' Eminent Domain Powers

It is a fundamental principle of law that the power to appropriate private property for public use is an attribute of sovereignty and essential to the exercise of government. *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 587 (1952) The legislature may exercise this power itself or may delegate it to another. *Id.* (Statute delegating state power of eminent domain to interstate natural gas pipeline company was constitutional.) Eminent domain powers are often delegated to public service companies, such as the natural gas pipeline company in the *Northeastern Gas Transmission* decision cited above. In particular, the power is delegated to electric public service companies in order to enable them to take land necessary for electric transmission facilities. *Connecticut Light & Power Co. v. Costello*, 161 Conn. 430, 436 (1971) (approving taking

of easements for transmission line right of way for construction of a portion of the 345-kV Big 11 New England power loop.)

In Connecticut, the legislature has delegated eminent domain powers to electric public service companies in the special act by which the company is created, often referred to as a “charter” or “franchise,” and sometimes by supplementary grants by special acts amending the charter. The electric public service companies that exist today are the products of the merger of predecessor companies; as a result, the surviving company possesses all of the eminent domain powers in the charters of all of its predecessors. Thus, in *CL&P v. Costello, supra*, the court traced the history of several of the legislative grants and corporate mergers by which CL&P had acquired eminent domain rights that enabled it to take land necessary for constructing its facilities. 161 Conn. at 431, 435. Since the time of the *Costello* decision, CL&P has also acquired by merger the charter powers of the former Hartford Electric Light Company, authorizing it “to enter upon, take and use...land, interests in land and real estate as shall be necessary or convenient in the exercise of any of its right, power and privileges...” An Act Amending the Charter of the Hartford Electric Light Company, 1947 Special Act No. 177, § 1.

The legislature delegated the eminent domain power to UI in identical language in An Act Amending the Charter of the United Illuminating Company, Special Acts, 1951, Vol. XXVI, p. 348, § 1.

The Significance of Siting Council Approval of a Facility

Traditionally, the determination of what property was necessary for public utility purposes, and therefore subject to acquisition by the eminent domain power, was entirely

within the discretion of the public service company exercising the power, subject only to judicial review of the company's good faith in making the determination. *Connecticut Power Co. v. Powers*, 142 Conn. 722, 725-26 (1955). This discretion was limited by the legislation that created the Council's predecessor agency, the Connecticut Power Facilities Evaluation Council, and now governs proceedings before the Council relating to electric transmission facilities. This legislation, the Public Utility Environmental Standards Act ("PUESA" or the "Act"), as amended, now appears as Chapter 277a of the General Statutes, Conn. Gen. Stats. §16-50g *et seq.* With respect to facilities subject to the Council's jurisdiction, PUESA provides that, subject to limited exceptions, no one "shall exercise any right of eminent domain in contemplation of...a facility...without having first obtained a certificate of environmental compatibility and public need...issued with respect to such facility." Conn. Gen. Stats. § 16-50k(a) Electric and gas public service companies are also precluded from accepting voluntary conveyances of "real property" for "transmission facilities,¹" without first obtaining a certificate of environmental compatibility and public need ("Certificate"). Conn. Gen. Stats. § 16-50z(a). Further, even where the company has obtained a Certificate for a facility, if it seeks to take a residence by eminent domain, the homeowner may seek a determination from the Council that the taking is not necessary for the purpose for which the Certificate was issued. Conn. Gen. Stats. § 16-50z(c).

The Council has authority to approve advance land acquisition. If the Council has determined that a proposed facility will have no material adverse environmental effect,

¹ "Transmission facilities" are not defined by PUESA. The Council has interpreted the prohibition of § 16-50k(a) to apply to the acquisition of real estate for transmission lines, but not to the acquisition of land for a substation. Petition No. 237 – The Connecticut Light and Power Company (CL&P) petition for a declaratory ruling that Connecticut General statute 16-50z does not apply to electrical substations. Decision, July 26, 1989.

no certificate is required, and the company may proceed to acquire land for the facility by eminent domain, without first obtaining a Certificate. Conn. Gen. Stats. §§ 16-50k(a), 16-50z(a). In addition, the Act authorizes the Council to grant permission for advance land acquisition for electric and gas transmission facilities to avoid hardship for the property owner; to prevent development of a proposed transmission corridor pending the issuance of a certificate; or to allow adjustment of the boundaries of existing rights of way. Conn. Gen. Stats. § 16-50z(a). Finally, with respect to electric and gas transmission facilities, the company may acquire real estate rights, without the necessity of a certificate, for: (1) relocation of a facility required by a public highway project or other governmental action; (2) acquisition of additional rights or title to property already subject to an easement or other rights for electric transmission or distribution lines; and (c) widening a portion not exceeding one mile in length of a transmission right of way for reasons of safety or convenience of the public. Conn. Gen. Stats. § 16-50z(b). In its decision in *Petition 237, Connecticut Light & Power Electrical Substations*, July 25, 1989, the Council noted that restrictions of Conn. Gen. Stat. §16-50z do not apply to planned electrical substation.

B. IF A FRANCHISED ELECTRIC UTILITY DOES NOT WANT TO ACQUIRE LAND, CAN THE COUNCIL ORDER THE UTILITY TO ACQUIRE LAND.

The powers of administrative agencies are restricted by those that are articulated in the enabling statutes and PUESA does not grant the Council any power to order condemnation. (*Nazzardo v. State Traffic Commission*, 259 Conn. 131, 157 (2002)) As discussed the legislature has provided a supervisory role for the Council in a jurisdictional utilities exercise of their eminent domain powers but the legislature stopped there. While PUESA does not speak of such powers being vested in the Council the

Council can have the effect of requiring an applicant to use its eminent domain powers by selecting an alternative site which is owned by a property owner unwilling to sell his land. As a practical matter the applicant would have use its eminent domain power or reassess its approach to serve the need the application is proposing to solve.

C. MAY THE TOWN OF TRUMBULL CONDEMN LAND AND THEN SELL IT TO THE UNITED ILLUMINATING COMPANY (“UI”) UNDER THE TOWN OF TRUMBULL’S CONDEMNATION POWERS.

This question was asked to be addressed in light of Kelo v. New London, 268 Conn. 1, (2004). The central issue in that case was whether the New London Development Authority use its eminent domain power to acquire private property for use by a private developer. The decision turned on whether the City’s development plans amounted to a public use. It appears from the decision that acquisition of property for use by a public utility is a valid and traditional public use. Kelo v. City of New London, Supra p.26.²

In light of the eminent domain powers vested in the jurisdictional utilities a municipality would not need to condemn land for an investor owned utility to acquire suitable land for a certificated substation.

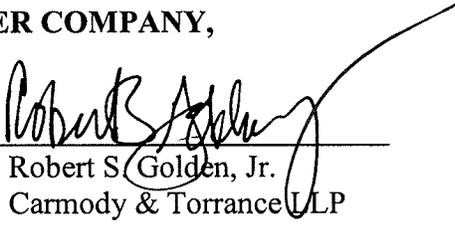
Moreover, there would not appear any advantage gained if a municipality owned a parcel since the sole determinants for a certificate is the compatibility with the environment and the ability of the site to meet the need for reliable service and to do so at the lowest reasonable cost. Conn. Gen Stat. § 16-50g and § 16-50p.

² Specifically, they claim that the condemnation of property for economic development by private parties is inconsistent with this court's prior public use decisions because: (1) the new owner will not provide a public service or utility; and (2) the condemnation will not remove blight conditions that are, in and of themselves, harmful to the public.

Finally, whether of not a jurisdictional utility has powers of eminent domain is not a qualifying condition for an application to the Council. Under the Superior Court decision in *Intercon Gas, Inc v the Connecticut Siting Council* 192 Conn. Super. LEXIS 732, (March 12, 1992) an applicant must be given a hearing even if an applicant does not have any eminent domain powers hearing. Acquiring the property necessary to satisfy the conditions of a certificate may lead to an insurmountable problem if the certificate holder does not have the means to acquire the sites property but apparently it is not prerequisite under Conn. Gen Stat. § 16-50m(a) and Conn. Gen Stat. § 16-50l(a) for an application.

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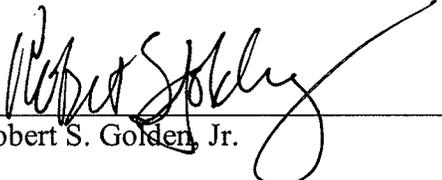
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