

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

APPLICATION OF KLEEN ENERGY : DOCKET NO. 225 C
SYSTEMS, LLC FOR A CERTIFICATE OF :
ENVIRONMENTAL COMPATIBILITY AND :
PUBLIC NEED FOR AN ELECTRIC :
GENERATING FACILITY AND :
SWITCHYARD IN MIDDLETOWN : September 2, 2010

KLEEN ENERGY SYSTEMS, LLC'S POST HEARING BRIEF

Kleen Energy Systems, LLC ("Kleen Energy") submits this Post-Hearing Brief in support of its request for extension of certificate dated June 22, 2010. Kleen Energy received a Certificate of Environmental Compatibility and Public Need for the construction, operation and maintenance of an electric generating facility and switchyard in Middletown, Connecticut by Decision and Order of the Siting Council dated November 21, 2002 (the "Certificate"). The Certificate is set to expire on November 30, 2010. Kleen Energy requested an extension of its Certificate through and including June 30, 2011 due to construction delays that resulted from the explosion that occurred on February 7, 2010 at the Kleen Energy facility and resulting investigation.

After submission of Kleen Energy's extension request, the Siting Council, on its own motion, moved to re-open this proceeding pursuant to Conn. Gen. Stat. § 4-181a(b) based on changed conditions and for the limited purpose of consideration of the attachment of conditions to Kleen Energy's Certificate extension in accordance with the findings of the Kleen Energy Investigation Review Panel Final Report (the "Nevas Commission Report"). Since Kleen

Energy has agreed to comply with the applicable findings of the Nevas Commission Report and has also agreed not to utilize natural gas as a medium to clean the remainder of the gas piping at the facility, Kleen Energy's extension should be granted with the condition that natural gas not be utilized as a cleaning agent to conduct any pipe cleaning activities at the facility.

I. FACTUAL BACKGROUND

By Findings of Fact, Opinion and Decision and Order dated November 21, 2002, Kleen Energy received a Certificate for a 620 MW natural-gas fired combined cycle electric generating facility (the "Facility") on River Road in Middletown, Connecticut (the "Site"). On February 7, 2010, the Kleen Energy Facility experienced an explosion caused by the release and combustion of natural gas during the process known as "gas blows," which were undertaken for the purpose of cleaning debris from the newly constructed natural gas lines located between the gas compressor station and the heat recovery steam generators. Since the time of the explosion, Kleen Energy has been cooperating with federal, state, and local authorities as they have been conducting investigations regarding the cause of the explosion.

As described more fully in Kleen Energy's pre-filed testimony, the damage to the facility is being thoroughly assessed, although such assessments have not been fully completed to date. The primary contractor for the project, O&G Industries, Inc ("O&G"), has begun repairs of the project while the damage assessments continue. Based on the information that has been received to date, O&G has informed Kleen Energy that it estimates that it will be able to complete

the Facility and turn it over to Kleen Energy on or about April 8, 2011. While this anticipated date of completion is still subject to change, it represents the best current estimate of completion. Accordingly, on June 22, 2010, Kleen Energy requested an extension of its Certificate through and including June 30, 2011.

Subsequent to the filing of Kleen Energy's request for extension, the Council, on its own motion, moved to re-open this docket based on changed conditions and the consideration of attachment of conditions to Kleen Energy's Certificate extension consistent with the findings of the Nevas Commission Report. The re-opening of this docket was specifically limited to the consideration of the attachment of conditions consistent with the Nevas Commission Report's findings and recommendations and did not involve a re-opening of the entire docket and Certificate. The Council held a public hearing on August 3, 2010.

II. LEGAL ARGUMENT

A. KLEEN'S REQUEST FOR EXTENSION OF CERTIFICATE SHOULD BE GRANTED

1. The Re-Opening of This Docket Is Limited to Consideration of the Imposition of Conditions Consistent with the Findings of the Nevas Commission Report

After Kleen Energy filed its request for extension of its Certificate, the Council, on its own motion, moved to re-open this docket pursuant to § 4-181a. The Uniform Administrative Procedures Act, Connecticut General Statutes § 4-181a(b), provides:

(b) On a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion. The procedure set forth in

this chapter for contested cases shall be applicable to any proceeding in which such reversal or modification of any final decision is to be considered. The party or parties who were the subject of the original final decision, or their successors, if known, and intervenors in the original contested case, shall be notified of the proceeding and shall be given the opportunity to participate in the proceeding. Any decision to reverse or modify a final decision shall make provision for the rights or privileges of any person who has been shown to have relied on such final decision.

The Council's motion was approved and the re-opening of this docket was specifically limited the Council's consideration of the attachment of conditions to the Certificate consistent with the findings of the Nevas Commission Report. See Record, Administrative Notice #29.

The Nevas Commission Report makes eight recommendations as a result of the February 7, 2010 incident. Most of these recommendations deal with further investigation and suggestions for regulatory and statutory changes.

These recommendations include:

1. Determine whether any other state or federal agency has developed a regulatory structure applicable to natural gas pipeline cleaning ("gas blows").
2. Consult with industry experts to determine which methods of gas blowing are used and/or recommended, and identify the advantages and disadvantages of each method.
3. Identify the agency, or agencies, best suited to regulate the gas blow process.
4. Recommend the level of training and expertise necessary for that agency to effectively establish and enforce necessary cleaning regulations.
5. Consider recommending that the Connecticut Siting Council impose safety conditions upon any entity constructing a power plant that will employ the gas blow cleaning process.

6. Consider recommending that the Connecticut Department of Consumer Protection and/or the Connecticut Department of Labor identify, if appropriate, special licensing, credentials and/or training for those assigned to effect power plant gas blows in Connecticut. Further, consider recommending that the latter agencies address whether work schedule limitations are appropriate for those assigned to perform power plant gas blows in Connecticut.

7. Consider recommending the establishment of regulations in seven different areas.

8. Recommend an agency or entity be responsible for serving as a “clearinghouse” to coordinate the efforts of every regulatory agency with responsibilities associated with the construction of a power plant. The agency or entity recommended would serve to track and record the work of all other regulatory agencies. The Department of Emergency Management and Homeland Security has expressed a willingness to identify models of the latter form of operating structure.

See Record, Administrative Notice Item #29.

In addition to these recommendations, the Nevas Commission Report includes reports on: 1) all of the twenty plus permits Kleen Energy received from various federal and state agencies in connection with the development of the Facility; 2) a review of the two notices of violation issued to Kleen Energy in connection with the development of the Facility, both of which were closed with no violation being issued; and 3) reports from the following state agencies:

a. Department of Public Utility Control (“DPUC”)– noting that “. . . all work observed on the project was in compliance with applicable safety standards, and there were no problems observed during the construction of the AGT pipeline.” In addition, the DPUC noted that the Kleen Energy project was approved as part of an RFP process initiated by the DPUC in response to the enactment of *Conn. Gen. Stat. § 16-243m* and that, after a review from experts at London Economics, Kleen Energy was selected as part of that RFP to fill much needed capacity requirements in the ISO-New England forward capacity market.

b. Department of Emergency Management and Homeland Security (“DEMHS”) – which noted the coordinated response to the events on February 7, 2010.

- c. Department of Consumer Protection (“DCP”) – noting no violations in worker licensing requirements to date and also suggesting the possibility of amendments to statutory language to include gas blow activities.
- d. Department of Labor (“DOL”) – finding “minor record-keeping violations and overtime wage violations did occur” but noting that these did not have an impact on the events of February 7, 2010.
- e. Department of Public Safety (“DPS”) – commented on the coordinated response to the events on February 7, 2010 and noted that, while the Facility is subject to an elaborate regulatory scheme, there appears to be no regulation applicable to gas blows.

See Record, Administrative Notice Item #29.

As can be seen from a review of the Nevas Commission Report, Kleen Energy has been subject to an extensive regulatory approval process and extensive ongoing regulatory oversight during its construction process. Despite the size and scope of the regulatory oversight and the size and scope of the construction of this Facility¹, Kleen Energy has only been issued two notices of violation, both of which were resolved with no violation actually being issued. *Id.*

Because the re-opening of this docket was specifically limited to consideration of the imposition of conditions consistent with the Nevas Commission Report, issues outside the purview of this report are necessarily beyond the scope of the Council’s consideration of its motion to re-open and Kleen Energy’s request for certificate extension.

¹ As the City of Middletown noted in its post-hearing brief, the Kleen Energy facility is one of the largest construction projects going on in New England to date with a project value of over \$1 billion.

2. Issues of Property Damage and Property Devaluation Cannot Be Considered

The Town of Portland, a party to this proceeding, submitted the testimony of several residents of the Town. The substance of that testimony focused mainly on issues of alleged property damage suffered as a result of the February 7, 2010 explosion and subsequent, alleged property devaluation as a result of the explosion. In addition, intervenors Senator Eileen Daily and State Representative James O'Rourke also suggested that no certificate extension should be granted until the property damage and diminution in property value claims are addressed by Kleen Energy.

These issues are not only outside the limited scope of the Council's re-opening of this docket but also are beyond the scope of the Council's jurisdiction in general. Specifically, pursuant to Conn. Gen. Stat. § 16-50p, when rendering a decision on a certificate application, the Council is permitted to weigh the public need for the facility against the probable environmental impact of the facility. The environmental impacts the Council is permitted to consider include: impacts of electromagnetic fields and conflicts with state policies concerning: 1) the natural environment; 2) ecological balance; 3) public health and safety; 4) scenic, historic and recreational values; 5) forests and parks; 6) air and water purity; 7) fish, aquaculture and wildlife. *Id.*

As such, the Council is not permitted to consider economic impacts or impacts to property values, such as were raised by the Town of Portland and its witnesses, in rendering a determination on a certificate application. The Council has acknowledged this limitation in other dockets and in this docket as well. See,

e.g., Connecticut Siting Council Docket 366 and Docket 396; see also TR at 13-15.²

Notwithstanding the fact that these issues are outside of the Council's jurisdiction, it is clear from the record that Kleen Energy has taken the appropriate steps to ensure that all property damage claims are appropriately addressed. Indeed, it is undisputed in the record that of the 65 property damage claims filed by Portland residents, 50 have been settled. TR at 130. In addition, Kleen Energy has extended an invitation to the Town of Portland to set up a meeting with Kleen Energy's insurance adjusters and impacted residents, as Kleen Energy had previously done with the City of Middletown. TR at 129-131. So, despite being outside the Council's jurisdiction, the Council can be assured that Kleen Energy will take the necessary steps to ensure that all property damage claims are resolved appropriately.

3. Kleen Energy Has Agreed to Comply with the Applicable Provisions of the Nevas Commission Report.

"The Kleen Energy Project embraces the philosophical mandate that Judge Nevas laid down in his comments when he delivered the report. And we embrace the goal, which is never to let anybody ever get hurt again while trying to build a plant of this type by completely avoiding the use of natural gas as a

² In fact, at least some of the Town of Portland's witnesses appear to be aware of the fact that the Council is not the appropriate forum for seeking redress for economic impact claims against Kleen Energy. This is evidenced by the fact that a state court summons and complaint were served on Kleen Energy the day after the August 3, 2010 hearing and was published in the Middletown Press on that same day. See Docket No. HHD-CV-10-6013522-S, where both Gilbert Cockfield and Beth Ann Sylvestro, among others, are plaintiffs suing, *inter alia*, Kleen Energy for alleged property damage and diminution in property value claims.

cleaning agent to achieve the pipe cleaning that is required by our warranties from our equipment people.” See 8/3/10 Hearing Transcript (“TR”) at 38-39.

The evidence is undisputed that Kleen Energy has agreed to comply with the applicable provisions of the Nevas Commission Report. See Pre-filed Testimony of William Corvo, Richard Audette; TR at 38-40. As can be seen from a review of the Nevas Commission Report recommendations, however, the majority of the recommendations cannot be implemented by Kleen Energy or imposed as conditions of the approval of a certificate extension since they simply suggest areas of regulatory or statutory change. However, Kleen Energy has agreed and is willing to accept, as a condition of approval, that it will not utilize gas blows to clean the remaining 600-800 linear feet of piping that will require cleaning. See Pre-filed Testimony of William Corvo; TR at 28; 36-38. In order to accomplish this, Kleen Energy is examining either replacing some of the piping and/or utilizing other media to clean the remaining piping including the use of pigging, nitrogen, air, or some combination thereof. TR at 24-25, 36-37.

4. No Additional Conditions of Approval Are Necessary

Kleen Energy does not believe that any additional conditions of approval are necessary other than the condition that natural gas not be used as a cleaning agent going forward.

As evidenced by the record, Kleen Energy has complied with the countless conditions of approval imposed not only by the Siting Council but also by other federal and state agencies. The record is undisputed that Kleen Energy has been monitoring noise at the Facility on a 24 hour basis at four different

points at the Facility and will make that information available to the Siting Council. TR at 97-98. Kleen Energy is already required, upon completion of the Facility, to conduct a post-construction noise study. TR. at 100. Kleen Energy has taken steps to ensure that there is no glare from the Facility and continues to monitor lighting conditions at the Facility. TR. at 54. Further, Kleen Energy continues its required environmental monitoring at the Facility as required by the Department of Environmental Protection. TR. at 131-133. This evidence is further supported by the reports of the various state agencies included in the Nevas Commission Report showing Kleen Energy's compliance with its various approvals. See Record, Administrative Notice #29.

5. The Department of Public Health's Comments Are Beyond the Scope of this Re-Opening and the Council's Jurisdiction

On July 23, 2010, the Department of Public Health ("DPH") submitted comments to the Council. See Record, Administrative Notice, State Agency Comments #2. The comments submitted are not only beyond the scope of the Department of Public Health's jurisdiction but, more importantly, are beyond the limited scope of this re-opening and the Council's jurisdiction and therefore are not germane to this proceeding. *Id.* Notwithstanding, Kleen Energy has stated that it can and will comply with items 1-4. Kleen Energy, on its own accord, has already implemented the items requested in #6-7 (Item 6 seeks the imposition of an independent site safety manager, and item 7 seeks to require applicants provide a flammable gas safety procedure and training to all contractors and workers). See TR at 93-94. Item 5 in the DPH's comments is inapplicable since it deals with processing chemicals and not fuel gas, which is why OSHA

exempted it from regulation. See TR at 94. Finally, Item 8 in the DPH's comments is well beyond DPH's jurisdiction, beyond the Council's jurisdiction and actually contradicts the information presented in the Nevas Commission Report. Specifically, as discussed *supra*, the DOL's report contained in the Nevas Commission Report found only minor recordkeeping and overtime wage violations, none of which had any impact on the events of February 7, 2010.

6. The Council Should Not Wait to Grant this Extension Until the Thomas Commission Has Completed its Review

Several individuals have suggested that the Siting Council should not decide whether to grant Kleen Energy's request for an extension of its Certificate until after the Thomas Commission has reached its conclusions. The reality is that there is no evidence available as to when the Thomas Commission will conclude its deliberations, or what the findings of the Thomas Commission might be. Given the very real expiration date of Kleen Energy's Certificate, it does not seem prudent for the Council to delay its decision on the extension of that Certificate.

Moreover, if the Thomas Commission does issue recommendations that the Council believes should directly impact Kleen Energy's Certificate, the Council has the ability, pursuant to Conn. Gen. Stat. to § 4-181a to reopen this docket on its own motion. The Siting Council proved that it had the ability to reopen Kleen Energy's docket based upon the changed conditions of the issuance of the Nevas Commission Report; the Council can engage in the same re-opening procedures if the Thomas Commission's findings give it cause to do so. Indeed, Senator Daily directly addressed this issue during the hearing,

suggesting that “the most prudent thing to do is reopen the docket when the Thomas Commission Report is available.” TR at 145. Against this backdrop, there is no compelling reason for the Siting Council to delay its decision on this matter.

7. The Benefit of the Project to the Citizens of the State of Connecticut Has Not Changed and Is Undisputed

While the events of February 7, 2010 were undoubtedly tragic, the incident, along with Kleen Energy’s request for extension of its Certificate and the Council’s subsequent limited re-opening of this docket, do not diminish the significant benefit that this Facility will bring to the City of Middletown, the State of Connecticut and the citizens thereof. In awarding a contract to Kleen Energy in connection with the Energy Independence Act (*Conn. Gen. Stat. § 16-243m*), the DPUC recognized the benefit that the Kleen Energy Facility would bring to Connecticut ratepayers of approximately \$500,000,000 over the life of the Kleen Energy contract. See TR. at 89. As the City of Middletown noted in its post-hearing brief dated August 13, 2010, the Facility has provided tax benefits to the City of Middletown, benefits that will continue for years to come assuming Kleen Energy’s certificate is extended and Kleen Energy is permitted to complete construction. The Facility has created hundreds of jobs. The importance of the Kleen Energy Facility was acknowledged by Senator and intervenor, Eileen Daily. See TR at 138.

IV. CONCLUSION

Based on the foregoing, Kleen Energy respectfully requests that its certificate extension be granted, extending its Certificate through and including June 30, 2011 with the condition that natural gas not be used a cleaning agent for any gas piping at the Facility.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing was delivered by electronic mail and/or U.S. Mail, first class postage prepaid, to all parties and intervenors of record as follows:

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