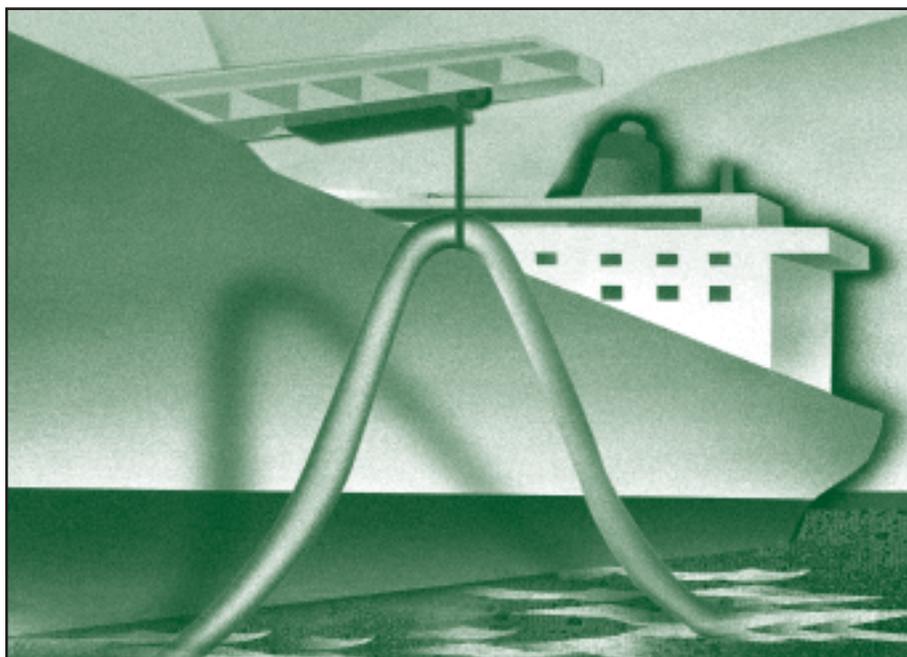


# infrastructure

VOL. 41, NO. 3 SPRING 2002



## Lessons from the trenches: Burying the lines is tough

By Alan G. Schwartz and Bruce L. McDermott

Before a company may site and construct a generating unit, transmission line or substation, it must comply with procedures established by overlapping elaborate regulatory schemes. It is natural to assume that after following the letter of the law (perhaps over a period of years) and proving that the project's economic benefits outweigh its environmental impacts to the satisfaction of all the governmental agencies having jurisdiction, the company may simply start digging. Think again.

### Cross-Sound Cable underwater transmission line

A case in point is the continuing quest by Cross-Sound Cable Co., LLC (Cross Sound), to install a submerged electric transmission line under the sea bed of Long Island Sound from New Haven, Conn., to Long Island, N.Y. (the cable project). On July 24, 2001, Cross-Sound applied to the Connecticut Siting Council (the

*Schwartz and McDermott are with Wiggin & Dana LLP in New Haven, Conn. The authors wish to thank Bethany L. Appleby at the same firm for her assistance.*

### INSIDE

■ *A new energy standards board is born, p.6*

■ *FERC's oil pipeline indexing methodology remanded, p.9*

■ *Find out about Annual Meeting, p.11*

Siting Council) for a Certificate of Environmental Compatibility in order to construct, operate and maintain the cable project as required under Connecticut law. On Jan. 3, 2002, after extensive public hearings, the Siting Council granted the requested certificate in Docket No. 208, after determining that the project:

- provided a significant public benefit,
- did not create any environmental impact that would provide a "sufficient reason to deny the application,"
- conformed to a long-range

*continued on page 2*

ISSN: 1097-251X

*Infrastructure* is produced quarterly by ABA Publishing for the ABA Section of Public Utility, Communications and Transportation Law.

©2002 by the American Bar Association. All rights reserved. No part of this periodical may be reproduced without the consent of the American Bar Association.

Articles and reports reflect the views of the individual authors and do not necessarily represent the position of the American Bar Association; the Section of Public Utility, Communications and Transportation Law; or the chair of the Member Communications Committee.

Readers are encouraged to send news, views, requests or suggestions.

**Send e-mail to:** [pubutil@abanet.org](mailto:pubutil@abanet.org)

#### **Chair, Member Communications Committee**

Clark Evans Downs

#### **Committee members**

William P. Boswell  
Frank J. Costello  
Richard D. Cudahy  
Katherine B. Edwards  
Thomas P. Gadsden  
David R. Hardy  
Erika Z. Jones  
Ferd Meyer  
William H. Penniman  
John Peirce  
David R. Poe  
J.P. Shotwell  
Barbara Swan  
Casey Wren

#### **Section chair**

Jerome F. Donohoe  
Mayer, Brown, Rowe & Maw  
Chicago

#### **Section director**

Susan Koz  
American Bar Association  
Chicago

#### **ABA Publishing**

Ray DeLong  
Editor

Gabriel Guzman  
Art Director

## trenches *continued from page 1*

plan for expanding electric power in this area and

- did not pose an undue hazard to persons or property along the area traversed by the line.

The Siting Council's approval followed its March 2001 denial of an earlier Cross-Sound project. The council rejected the earlier project because it would have crossed a large portion of cultivated shellfish beds in the New Haven Harbor. In response to the council's concerns, Cross-Sound's cable project will avoid all but 700 feet of actively cultivated beds by locating the cable within the Federal Navigation Channel (FNC) in the harbor. Also, Cross-Sound changed its proposed method of cable installation between landfall in New Haven and the FNC to directional drilling, which is a technique for drilling a tunnel under the seabed, to avoid impact to shellfish beds outside the FNC.

Despite these significant changes, local opposition to the project remained strong. Project opponents included the Connecticut attorney general, the city of New Haven, various state legislators and representatives from the shellfish industry. Nonetheless, after extensive consideration of any potential adverse environmental effects, the Siting Council concluded that the anticipated effect on shellfish in the sound was minimal or nonexistent, due in part to the fact that almost the entire cable route within the harbor is located within the FNC, which is regularly dredged for navigational purposes and where no shellfish cultivation takes place.

Also, the Siting Council conditioned its approval on Cross-Sound obtaining the necessary permits from the Connecticut Department of Environmental Protection (the Connecticut DEP) and the U.S. Army Corps of Engineers. Those permits, which Cross-Sound obtained in March 2002, require that all underwater construction within the FNC in New Haven Harbor occur only from April 1 through May 31 and from Oct. 1 through Jan. 15.

Other agencies have examined the cable project's environmental impact, including the New York Department of Environmental Conservation, the Connecticut DEP and the Army Corps of Engineers. The Connecticut DEP in particular found no evidence of unacceptable environmental impacts and concluded that the cable project's environmental impact was far less than the consequences of other activity permitted within the harbor, including dredging and the harvesting of oysters.

An official with the Independent System Operator – New England (ISO-NE) has emphasized that the cable project will improve the reliability of Connecticut's and the region's electric system and will reduce the probability of ISO-NE taking emergency actions to maintain system reliability and prevent the interruption of electrical service. In addition, the New York State Public Service Commission (NYPSC) found the cable project critical to ensuring the reliability of electric service and that it would provide important economic benefits to New York and New England.

The Federal Energy Regulatory Commission (FERC) has also approved the project, commenting that it will enhance competition and market integration by expanding capacity and trading opportunities between the New England and New York markets. Moreover, New York's attorney general has urged timely completion of the project, which he deems "vital to ensuring that both states have enough power to meet the energy demands of the peak summer season."

In spite of these approvals and support, there have been extensive efforts to stymie the project. These efforts have come from several fronts. After the Siting Council approved the project, numerous state legislators expressed outrage and one state senator issued a statement denouncing the administrative body as a "Kangaroo Court." The city of New Haven and Connecticut's attorney general – the state constitutional officer responsible for representing the state's administrative agencies – sued the Siting Council, appealing the agency's decision in a Connecticut superior court and requesting a stay to prevent Cross-Sound's continued

work on the project. In a highly unusual move, several legislators sought to intervene in this litigation.

Interestingly, while the city and the attorney general each cited environmental concerns as the principal basis for blocking the cable project during their appeals, those concerns were diametrically opposed. The city claimed that the cable's placement within the FNC would preclude the dredging necessary to deepen the channel, while the attorney general argued, on the other hand, that the "jet plowing" of the seabed within the FNC to bury the cable would result in the dispersal of large amounts of sediment, destroying the oyster beds. Both claims had already been considered and rejected by the Siting Council and the DEP.

A Connecticut superior court judge denied the stay requests, noting that:

The court is concerned about environmental harm, but the court recognizes that virtually every manifestation of societal growth, including subdivision development, placement of above-ground power lines, building of bridges and dredging of harbors, effects some change and undoubtedly poses some harm to our land, air and water. The key consideration is whether the environmental harm is minimized and whether there are benefits that justify the costs. The Siting Council and the other agencies reasonably found in the affirmative on both points. Given that situation, it is unwise and unfair to impose harm on the party likely to succeed on the merits and deprive the public of any immediate benefits that the project will confer.

The attorney general – still fighting a battle against the agency his office represents – appealed this decision to the Connecticut appellate court and then to the Connecticut Supreme Court. Both courts rejected the attorney general's campaign to prevent the project from going forward pending the outcome of the administrative appeal.

The fight, rather than being over, moved to a new forum. Within a few days after the favorable trial court decision, the Connecticut General Assembly, by a wide margin, approved and sent to the governor a retroactive moratorium bill that, among other things, would bring an immediate one-year halt to the construction of all electric and gas lines crossing the Sound, including specifically electricity transmission line projects crossing Long Island Sound that have already received final regulatory approval. The bill's retroactive ban on already-approved projects crossing Long Island Sound targeted one project – Cross-Sound's. In short, the legislature sought to achieve through legislation what it could not achieve through the courts – revocation of Cross-Sound's Siting Council permit.

The governor of Connecticut has vetoed the moratori-

um bill, highlighting the likely unconstitutionality of a bill that specifically targets and penalizes a single company that has obtained its regulatory permits in compliance with applicable law. An override vote did not succeed.

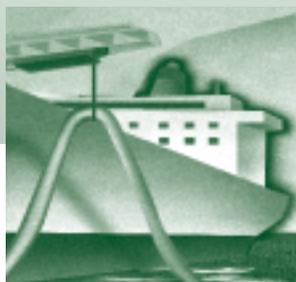
The General Assembly subsequently passed a prospective moratorium bill, which took effect at the beginning of June 2002. The law generally prohibits any state agency

from approving any application relating to "electric power line crossings, gas pipeline or telecommunications crossings of Long Island Sound" for nine months. Because Cross-Sound had obtained all required permits before the law took effect, the new moratorium bill did not appear to apply to it.

In late May 2002, the project's cable-laying ship was unable to bury approximately 1 percent of the 24-mile-long cable to the expected depth. The Army Corps of Engineers and the Connecticut DEP have reported that the cable in its present location does not pose a threat to navigation or the environment.

Nonetheless, the attorney general has claimed that the new moratorium law precludes the DEP from approving any changes to the permit or the operation of the line at its current depth. Stay tuned.

## The fight, rather than being over, moved to a new forum.



### Connecticut Light and Power overhead transmission line

On Oct. 15, 2001, Northeast Utilities Service Co. applied to the Connecticut Siting Council for a certificate of environmental compatibility and public need for the construction of a 345-kV electric transmission line and reconstruction of an existing 115-kV electric transmission line between The Connecticut Light and Power Co.'s (CL&P) Plumtree substation in Bethel, Conn., and the Norwalk Substation in Norwalk, Conn. The application (Siting Council Docket No. 217) concerns the first of three phases of transmission line construction and reconstruction planned by CL&P. Phase II involves an upgrade of the line running from Middletown to Norwalk and Phase III involves the installation of a buried submarine cable between Norwalk and Long Island, N.Y.

Even before the initial application was filed with the Siting Council, the CL&P project was strenuously opposed by various individuals, organizations and municipalities that oppose the project for a variety of reasons including the project's need for additional land along existing rights of way, the visual effects of new towers and claimed lack of direct benefit to Connecticut. Project opponents assert that the project is being constructed principally to transport power to New York.

Nearly all of the municipalities through which the project will pass have expressed opposition to the project and several grass roots organizations have been formed. These

organizations are actively participating in the political and administrative process by demonstrating their claim that the project will affect scenic, historic, recreational and property values. At least one Web site offers a form letter to send to the state's governor about the CL&P project.

After the first time the Connecticut General Assembly passed a bill imposing a one-year moratorium on electric and gas transmission lines under Long Island Sound (discussed above), Connecticut's governor issued an executive order providing for a six-month moratorium on approvals for construction of gas and electric transmission projects – including the CL&P overhead project. The executive order created a task force to study all transmission projects concurrently and to consider the environmental effects of all pending projects.

While the executive order does not prohibit administrative agencies from considering applications for gas or electric transmission projects, it could delay the Siting Council's approval of the CL&P project and it may impose an additional level of review of the project's impact. However, the executive order will likely be rendered moot if the governor signs the General Assembly's second moratorium bill, which specifically prohibits state agencies from rendering a final decision on this CL&P line until Feb. 1, 2003.

The CL&P project is also noteworthy for the involvement of ISO-NE, which was granted intervenor status in the Siting Council proceeding. ISO-NE has stated that CL&P's improvements to the line will have substantial effects on the reliability of the electric system in Connecticut and New England and that as the "custodian of New England's power system, ISO has significant interests at stake in this proceeding." While ISO-NE expressed its support for the Cross-Sound Cable Project (see above) in a letter to the Siting Council, this is the first time that ISO-NE has actively participated in a Siting Council proceeding.

### **Connecticut Light and Power Long Island sound lines**

On Feb. 15, 2002, Northeast Utilities submitted an application to the Siting Council for approval of the replacement of an existing submarine electric transmission cable system between Norwalk, Conn., and Northport, Long Island. Specifically, the project involves the replacement of seven fluid-filled paper insulated cables with three solid-dielectric cables.

According to CL&P, at the time of its installation, the existing cable system was the largest 138-kV submarine electric transmission installation in the world. One of the seven cables always serves as a spare while the remaining six cables generally operate as a single 300 MW circuit made up of two sets of three cables each with each set

having a capacity of 150 MW. For most of the cable route, the cable lies on the bottom of Long Island Sound but is buried as it approaches both landfalls. The three new cables will each have a capacity of approximately 150 MW and will operate at 138-kV. However, the capabilities of the terminal equipment will limit flow of power to 300 MW.

The current cable system's location on top of the sea bed makes it vulnerable to damage from external forces such as anchors or steel tow ropes. There have been more than 50 instances of physical damage to the system since it went into operation in 1970. The Northeast Utilities' Siting Council application states that since 1990 the costs related to the damage of the cable system have exceeded \$24 million.

Frequently, damage to the cable system results in the release of the insulating fluid into the environment. Therefore, by replacing the existing cable system with a solid, nonfluid filled cable system, the cables will be protected against damage and interruption thereby increasing the reliability of the system while also eliminating a significant environmental problem. The General Assembly's second moratorium bill does not apply by its terms to this line.

The future of another CL&P submarine transmission line is less certain. Previously, Northeast Utilities planned to construct a 300 MW merchant transmission line from Norwalk to the Long Island Power Authority's Shore Road Substation. Northeast Utilities held an open season during the summer of 2001. However, after an evaluation of the bids was conducted, Northeast Utilities concluded that it had not appropriately evaluated the project and it canceled the initial open season without selecting winning bidders.

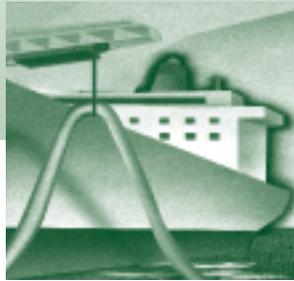
### **Neptune underwater transmission line**

Atlantic Energy Partners proposes to build an underwater HVDC (high voltage direct current) cable that will be capable of transmitting up to 4,800 MW from Canada to New Jersey. The Neptune Regional Transmission System is designed to connect the generating-rich regions in Maine, New Brunswick and Nova Scotia with capacity-constrained Boston, New York, Long Island and Connecticut.

Phase 1 of the project will connect New Jersey, New York City and Long Island and is scheduled to be in service in 2003; Phase 2 will connect New Brunswick and New York and is scheduled to be in service in 2004; Phase 3 will connect Nova Scotia and Boston and is scheduled to be in service in 2005; and Phase 4 will connect Maine and Connecticut and is scheduled to be in service in 2006.

On July 27, 2001, the cable network received approval

## **The executive order may impose an additional level of review.**



from the FERC. In approving the system, the FERC required Neptune to join the Northeastern RTO and authorized an open-season process for bids for transmission capacity. However, the FERC denied Neptune's request for a stand-alone tariff and directed Neptune to work with the RTO to ensure that the RTO's tariff is designed in a manner that accommodates Neptune's financing needs.

The New York ISO has approved Neptune's system reliability impact study for the New Jersey-New York link as well as the New York and New Brunswick link. The NYPSC is currently considering Neptune's application for permission to lay the two 600 MW cables that comprise

Phase 1. However, because of the number of proposed projects seeking to interconnect with the Consolidated Edison substation at West 49th Street in New York City, the New York PSC has announced its intention to consider the physical and environmental limitations of the substation to accommodate additional transmission facilities.

Who knew?