

**STATE OF CONNECTICUT  
CONNECTICUT SITING COUNCIL**

**Petition of BNE Energy Inc. for a  
Declaratory Ruling for the Location,  
Construction and Operation of a 4.8 MW  
Wind Renewable Generating Project on  
Winsted-Norfolk Road in Colebrook,  
Connecticut (“Wind Colebrook North”)**

**Petition No. 984**

**May 4, 2011**

**PETITIONER’S OBJECTION TO GROUPED PARTIES’ OBJECTION TO  
AND MOTION TO MODIFY PROTECTIVE ORDER**

The petitioner, BNE Energy Inc. (“BNE”), submits this objection to FairwindCT, Inc., Stella and Michael Somers and Susan Wagner’s (collectively the “Grouped Parties”) objection to and motion to modify protective order dated April 29, 2011. The Grouped Parties seek to modify the protective order already voted on and approved by the Council. The Grouped Parties’ motion raises no new issues and no changed circumstances that would warrant the Council’s reconsideration of its already issued order. Therefore, the Grouped Parties’ motion should be denied. In support of this objection, BNE states as follows:

1. This petition was filed on December 13, 2010.
2. During the course of this proceeding, various parties and intervenors have requested documents from BNE that are confidential, proprietary and subject to a confidentiality agreement between BNE and General Electric (“GE”), the proposed manufacturer of the turbines proposed in this petition.
3. Notwithstanding the confidential nature of the documents, BNE has worked diligently to provide the Council and all parties and intervenors with the requested documents. BNE has done so pursuant to a motion for protective order, filed on March 24, 2011. The Grouped Parties objected to BNE’s motion for protective order on April 22, 2011 – almost one full month after BNE filed its motion – on the same grounds it raises now in its

current objection. Over the Grouped Parties' objections, on April 28, 2011, the Council granted BNE's protective order. The protective order issued by the Council permitted BNE to file the requested documents under seal but, at the same time, provides reasonable access to those documents to all parties, intervenors or witnesses. Those parties, intervenors and witnesses simply have to visit the Council's offices and sign a non-disclosure agreement in order to view the documents.

4. This is consistent with past practices of the Council when dealing with critical energy infrastructure information or confidential and proprietary information. *See, e.g.* Docket 366, *see also* petitions 980, 983. .

5. Council staff further instructed all parties and intervenors that, should they have questions of BNE and its witnesses regarding the confidential information, the parties and intervenors must do so by issuing written interrogatories under seal and the petitioner would respond in a similar fashion.

6. Until April 28, 2011, not a single party, intervenor or witness for any party or intervenor had availed themselves of the opportunity to visit the Council's offices and review the sealed documents. On April 28, 2011, during a brief recess of the evidentiary hearing in this proceeding, attorney Emily Gianquinto, representing the Grouped Parties, signed the required non-disclosure agreement and reviewed the sealed documents. No other party, intervenor or witness for any party or intervenor has executed the non-disclosure agreement and reviewed the protected documents filed by BNE.

7. As of the date hereof, not a single party or intervenor has issued any interrogatories to BNE concerning the documents filed pursuant to the protective order.

8. Despite choosing not to avail itself of the opportunities to review the sealed documents and issue interrogatories regarding the same, the Grouped Parties now argue that the Council must reconsider its already issued order. The Grouped Parties list no changed circumstances or new evidence to support its motion for reconsideration. Instead, the Grouped Parties regurgitate the same previously-rejected grounds asserted in their April 22, 2011 objections, claiming the following reasons for reconsideration: 1) the protective order applies to information that is not subject to confidential protection; 2) the protective order applies to information that is publicly available (which, conveniently, has never been filed by any party or intervenor as an exhibit in this proceeding); and 3) the protective order applies to site-specific wind data submitted by BNE. As the Council has previously recognized, all of these reasons are meritless as further discussed below.

9. First, the Grouped Parties argue that the protective order applies to information that is not subject to confidential protection. The only document that the Grouped Parties can credibly point to as not being subject to BNE's confidentiality agreement with GE is Exhibit A to BNE's petition. BNE does not dispute the fact that the document attached thereto is not a protected document—exemplified by the fact that BNE filed it without seeking a protective order. Therefore, the Grouped Parties' argument that this is somehow now being protected is simply false and any claimed prejudice by the Grouped Parties pertaining to this fact sheet is meritless.

10. Next, the Grouped Parties argue that documents that are publicly available or are in the public domain cannot be subject to the protective order. Conveniently, after making a representation to this Council during the Petition 980 proceeding that the GE setback document is available on GE's own website, counsel for the Grouped Parties now

apparently admit this representation was false and instead rely on a New York Public Service Commission website posting of the GE setback document as the basis for this argument.<sup>1</sup> Furthermore, counsel attempts to mislead this Council by hypothesizing that, because this single document is available, the rest of BNE's protected documents from GE *may* also be publicly available. However, counsel cites no basis for this contention. The Grouped Parties lack of candor to the Council is evidenced by the fact that they conveniently fail to point that in that single instance, that document is stamped "confidential and proprietary, do not reproduce without written permission" and no such written permission appears. The Grouped Parties argument appears to be that somehow two wrongs make a right here, but such an argument is without merit. Simply because the New York Public Service Commission inappropriately posted a document in violation of a protective order does not make it acceptable for this Council to do the same. Furthermore, the Grouped Parties cannot point to any other document for which BNE has sought protection that is publicly available. Unburdened by the responsibility to show actual evidence of public dissemination of the remaining documents, the Grouped Parties instead hypothesize that other documents must similarly be "available." This unsupported hypothesis that all of the documents must be publicly available is baseless. As this Council has noted previously in this proceeding, *every single document* filed under seal by BNE is stamped with an identical stamp referenced above.<sup>2</sup> As such, each document is entitled to protection pursuant to the Freedom of Information Act, Conn. Gen. Stat. § 1-210.

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<sup>1</sup> BNE notes that counsel for the Grouped Parties has not availed itself of an opportunity to clear up this misrepresentation to the Council in petition 980 or in this proceeding.

<sup>2</sup> Even if this Council deems the New York Public Service Commission's inappropriate disclosure of a confidential document an appropriate basis to reconsider its protective order, that in no way alleviates the fact that BNE is bound by its confidentiality agreement with GE and will not consent to waiving the confidentiality of any documents submitted pursuant to that agreement. Should this Council reconsider the protected classification of any of BNE's protected documents, BNE will be forced to withdraw those documents from

11. Yet again, the Grouped Parties have made the unsupported argument that because the mechanical loads assessments (MLAs) produced by BNE were misplaced and unavailable to counsel for the Grouped Parties in the singular hour that counsel chose to review the protected documents, the Grouped Parties conclude that BNE purposefully did not file those documents. The Grouped Parties conveniently fail to point out that the absence of the MLAs in the Council's record was addressed during the hearing on April 28, 2011 and it is clear that a clerical error occurred at the Council's offices and BNE committed to re-filing those documents since they had apparently been misplaced. BNE in fact re-filed those documents and they are available in the Council's offices.

12. Finally, yet again, the Grouped Parties make the preposterous argument that because BNE has received funding from the Connecticut Clean Energy Fund ("CCEF"), or any agency for that matter, BNE cannot claim that any of its business records and documents are confidential and proprietary to BNE. Not surprisingly, the Grouped Parties again fail to cite to a single statute, regulation or case that requires private companies receiving funding from CCEF to disclose any and all business records to the public or subjecting such companies to the Freedom of Information Act. That is because no such statute or regulation exists. While BNE does not dispute the fact that it received funding from CCEF, that fact is wholly irrelevant to the issue of whether BNE should be forced to publicly disclose confidential business records. There is no law, under the Freedom of Information Act or elsewhere, that requires public disclosure of confidential and proprietary documents of a private company, a fact that the Council has recognized time and time again

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this proceeding to avoid litigation, which will deprive not only this Council but also the parties and intervenors to this proceeding from utilizing the reasonable process that the Council has established to utilize those documents within the confines of the confidentiality agreement.

during its proceedings. *See, e.g.*, docket 416, docket 415, docket 414, docket 413, docket 412, docket 410.

13. As discussed herein, the Grouped Parties have presented no new evidence or changed circumstances that would warrant the Council's reconsideration of its already issued protective order. Instead, the Grouped Parties have simply regurgitated the same baseless arguments that they already put forth before the protective order was issued. The only arguably new evidence is the fact that, more than one month after the protective order was issued, a single individual from the Grouped Parties availed themselves of the opportunity to review the documents. However, an attorney's opinions regarding the usefulness or lack thereof of the protected information is not only wholly inappropriate for an affidavit, but is also not a compelling reason for the Council to reconsider its decision. The fact that the Grouped Parties waited more than a month after the protective order was entered to review the protected information and only sent an attorney and not any claimed expert to review BNE's data only further evidences the fact that the Grouped Parties' continued objections are nothing more than procedural posturing, which should not be tolerated by this Council.

**WHEREFORE**, the Grouped Parties has not offered any new evidence or changed circumstances that would warrant the Council's reconsideration of its already approved protective order in this proceeding. The Grouped Parties' motion to modify should be denied.

Respectfully Submitted,

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## Certification

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

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