

March 4, 2020

Melanie A. Bachman  
Executive Director  
Connecticut Siting Council  
10 Franklin Square  
New Britain, CT 06051

**BY EMAIL PDF AND HAND DELIVERY**

**Re: Petition No. 983 - Objection to D&M Plan Modification**

Dear Ms. Bachman:

Enclosed for filing please find an original and 15 copies of FairwindCT, Inc. ("FWCT")'s objection to BNE's D&M Plan modification, submitted on January 9, 2020. A copy of this correspondence and the objection are also being delivered to the service list.

Please enter my appearance for FairwindCT, Inc. ("FWCT") in this proceeding. My contact information is as follows:

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I ask that all communications and filings concerning this matter be directed to me by email.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Emily A. Gianquinto

Enclosure

**STATE OF CONNECTICUT  
CONNECTICUT SITING COUNCIL**

**Petition of BNE Energy Inc. for a  
Declaratory Ruling that no Certificate of  
Environmental Compatibility and Public Need  
is Required for the Construction, Maintenance,  
and Operation of a 4.8 MW Wind Renewable  
Generating Facility Located on Flagg Hill Road  
in Colebrook, Connecticut (“Wind Colebrook South”).**

**Petition No. 983**

**March 4, 2020**

**OBJECTION TO BNE ENERGY, INC.’S REQUEST FOR APPROVAL  
OF DEVELOPMENT AND MANAGEMENT PLAN MODIFICATION**

FairWindCT, Inc. (“FWCT”) hereby objects to the Development and Management (“D&M”) Plan “modification” submitted by petitioner BNE Energy, Inc. on January 9, 2020, as modified by its February 21, 2020, responses to interrogatories issued by the Council, and asks the Council to deny BNE’s request. In that filing, BNE is seeking permission to annex two additional residential properties to the current site of Wind Colebrook South so that it may add a third wind turbine – a taller turbine with longer blades and a much higher nameplate capacity that is manufactured by a different company than those previously approved – on those new properties, in a location never before proposed or analyzed by the Council that will impact new abutters and different wetlands and watercourses. FWCT objects because the scope of the “modification” demonstrates that BNE is in fact proposing to construct a new facility on a new site, which means that *the Council does not have jurisdiction to consider the request* under General Statutes § 16-50k(a). FWCT therefore asks that the Council reject BNE’s proposal, the result of which will be to require that BNE file a new petition, thereby ensuring that all interested parties will have a full and fair opportunity to assess the new wind turbine facility in a proceeding that will ensure due process for all involved and will allow the Council to fulfill its mission of balancing the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to

protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values while also assuring the welfare and protection of the people of the state.

**I. Brief History of Petition No. 983**

On December 6, 2010, BNE filed its Petition of BNE Energy Inc. for a Declaratory Ruling that no Certificate of Environmental Compatibility and Public Need is Required for the Construction, Maintenance, and Operation of a 4.8 MW Wind Renewable Generating Facility Located on Flagg Hill Road in Colebrook, Connecticut (“Wind Colebrook South”). In that petition, BNE asked the Council to:

issue a declaratory ruling for BNE’s proposed location, construction, operation and maintenance of three GE Energy (“GE”) 1.6-megawatt (“MW”) wind turbines, and associated ground equipment, an access road, an ancillary building and a 23-kiloVolt (“kV”) electrical interconnection (together, the “Project” or “Wind Colebrook South”) *at 29 Flagg Hill Road and 17 Flagg Hill Road* in Colebrook, Connecticut (together, the “Property”).

(Petition at 1 (emphasis added).) BNE noticed the abutters to what it defined as the “Property,” i.e., 29 Flagg Hill Road and 17 Flagg Hill Road at that time. Following several days of hearings, the Council granted the petition on June 2, 2011. In its opinion issued on that date, the Council described the proposed facility as being “located on a 79.4-acre site, comprised of two adjoining properties *at 17 and 29 Flagg Hill Road*, owned by BNE.” (Opinion at 1 (emphasis added).)

BNE submitted its original D&M Plan in September 2011, in which it proposed moving the location of one turbine and later moving the access road. The Council approved the D&M Plan in November 2011. BNE submitted a request to revise its D&M Plan in November 2013, in which it sought approval for its use of three 2.85 MW turbines rather than the three 1.6 MW turbines. In that request for modification, BNE expressly stated that it was seeking approval of a D&M Plan modification:

for the construction, operation and maintenance of three GE Energy (“GE”) 2.85-megawatt (“MW”) wind turbines with 98.3 meter hub heights and 103 meter

diameter blades to be located *at 29 Flagg Hill Road and 17 Flagg Hill Road* in Colebrook, Connecticut.

(BNE D&M Plan Modification, 11/5/13 at 1 (emphasis added).) The Council approved the modification in December 2013, specifically noting that the wind turbines were to be in the same locations and of the same height. BNE subsequently began construction of only two of the approved 2.85 MW turbines, which were built and went into commercial service in November 2015. Although BNE built two turbines with a total nameplate capacity of 5.7 MW, the turbines were “de-rated” to cap production at 5 MW per the limits of the power purchase agreement (“PPA”) BNE had in place with the utility company at the time.

The Council’s decision on this petition provided that it would be void if all construction was not completed within four years of its effective date or four years after all appeals were resolved. The final decision on appeals from the Council’s decision was issued in September 2014, and so in July 2018, BNE moved for an extension of time in which to complete construction of the third turbine that had been approved by the Council. BNE specifically asked that the Council:

grant a three-year extension until September 23, 2021 for the completion of construction of the Wind Colebrook South wind renewable generating facility located *at 29 Flagg Hill Road and 17 Flagg Hill Road* in Colebrook, Connecticut ...

(BNE Motion for Extension at 4 (emphasis added).)

On January 9, 2020, BNE filed another request to modify the D&M Plan. BNE asks the Council to approve a

modification for the construction, operation and maintenance of the third wind turbine, an Enercon 4.23-megawatt (“MW”) wind turbine with a 128 meter hub height and 138 meter diameter blade to be located at 29 Flagg Hill Road and 17 Flagg Hill Road in Colebrook, Connecticut.

(BNE D&M Plan Modification, 1/9/20 at 1.) BNE frames its request as seeking permission to move the location of the third turbine (referred to as “T3” herein) and to allow it to substitute a

different, larger turbine that has a higher nameplate capacity. (*See id.*) However, even a cursory glance at the request reveals that BNE is asking for permission to site T3 *on two different parcels of land*, located at 53 Flagg Hill Road and 45 Flagg Hill Road. Those properties are not part of the existing facility, either as built or as approved by the Council.

**II. The Council Does Not Have Jurisdiction Over Any Facility to be Located at 45 and 53 Flagg Hill Road**

This Council is a creature of statute. It, rather than the local zoning commission, had authority over Wind Colebrook South as originally proposed at 29 and 17 Flagg Hill Road only because BNE filed a petition for declaratory ruling, pursuant to General Statutes § 16-50k. The Council issued an opinion and decision and order that, pursuant to General Statutes § 16-50k(a), the project proposed in the petition was eligible to be approved by declaratory ruling as a grid-side distributed resource facility under 65 MW that complied with the air and water quality standards established by the Connecticut Department of Energy and Environmental Protection. The Council has continued jurisdiction over the project it approved pursuant to that statutory authority. It does not, however, have authority to approve a by the D&M process a “modification” that would so fundamentally change the project site. BNE’s proposed “modification” is for a different project on a different site, and it is therefore not properly before the Council under Section 16-50k.

Since it first filed Petition No. 983 in December 2010, BNE has sought the Council’s approval to develop a wind turbine facility at property *located at 29 Flagg Hill Road and 17 Flagg Hill Road* in Colebrook, Connecticut. Not once, through its many iterations of site plans, proposed turbine locations, proposed turbine heights or access road design changes has BNE *ever* proposed siting the Wind Colebrook South turbines on a different parcel of land. The Council’s opinion, findings of fact and decision and order concerned only 29 and 17 Flagg Hill Road. In short, more than nine years after its original filing and more than four years after Wind Colebrook South was

first put into service, BNE is asking the Council to approve a “modification” that permits it to place a third turbine, and the associated access road and related structures, on two entirely separate residential properties and bordering the town of Winchester. This is outside of the Council’s authority.

To mask the significance of this change, BNE states in a cursory manner that it will acquire and “merge” the two new properties into 29 Flagg Hill Road before construction. Based on that plan, BNE claims that “[t]he requested modification would not constitute a significant change or alteration of in the general physical characteristics of the facility....” (BNE D&M Plan Modification, 1/9/20 at 1.) BNE’s plan to eventually acquire and merge additional parcels of land does not change the analysis with respect to the Council’s jurisdiction. If this dramatic change is permitted by the Council in the abbreviated, “fill in the details” and complete the “nuts and bolts” D&M Plan process, it would mean that the Council is setting a precedent that would allow developers to site projects without any of the due process protections that apply to petitions and applications. The Council’s *purpose* is to site facilities and towers, and it did just that by approving a petition to site three wind turbines on two specific parcels of land in Colebrook. It did not approve a petition to site three turbines on four parcels of land, or to site one turbine at 45 and 53 Flagg Hill Road.

As the Council is aware, in connection with Wind Colebrook South, BNE has entered into various power purchase agreements (“PPAs”) with utility companies. In each of those agreements, filed with PURA, BNE has similarly represented that Wind Colebrook South is not only located at 17 and 29 Flagg Hill Road, but also that Wind Colebrook South consists of a 79.74-acre site. Even in BNE’s most recent PPA with Eversource, dated June 23, 2017, which relates only to the proposed T3, BNE described the “facility” subject to the PPA as follows:

**Facility:** Wind Colebrook South Phase II is a one turbine wind-powered electrical generation project with an expected capacity of 3.83 MW located on approximately 79.74 acres at 17 and 29 Flagg Hill Road in Colebrook, Connecticut 06021.

(See Ex. A to 6/23/17 PPA, PURA docket #17-01-11 Ex. C-21, attached hereto.) BNE also represents in that PPA that it has site control by way of ownership of the site, which totals 79.74 acres. (See Ex. B to same filing, attached hereto.) BNE has therefore been representing to other state agencies, and to the utility companies, that T3 will be located on the property that it already owns, the two parcels of land for which it originally received Council approval, as identified not only by street address but by total acreage. (It is also significant that BNE is referring to T3 as a “facility” that includes only one turbine, rather than the second or final phase of a three-turbine facility; its reference to this project as a standalone facility is more evidence that the Council does not have jurisdiction, as it sited a three-turbine facility.)

The Council’s own executive director recently noted that “[a] D&M Plan functions to ‘fill up the details’ constitutes the ‘nuts and bolts’ of the facility approved by the Council.” (Bachman letter to TNC, 2/27/20 at 2.) See also *Middlebury v. Conn. Siting Council*, Superior Court, judicial district of New Britain, No. CV010508047S, 2002 WL 442383, at \*5 (Feb. 27, 2002, Cohn, J.) (“the D&M plan functions to ‘fill up the details’ in the siting council’s final decision”); *Westport v. Siting Council*, 47 Conn. Supp. 382, 403 (2001). She further stated: “The D&M Plan cannot provide a substitute for matters not addressed during the application process.” (*Id.*) See also *Middlebury*, 2002 WL 442383, at \*3. The *reason* the D&M Plan process cannot act in that substitute manner is that it does not have the jurisdiction to do so.

**III. Approving BNE’s “Modification” Would Violate the Due Process Rights of Abutters, a Municipality and Others**

When a new petition is filed, state law and Council regulations have in place certain requirements of notice that is aimed at providing potentially interested parties with a certain level

of due process. Abutters must be noticed, towns and certain officials must receive copies of the filing, various state agencies are invited to comment. If the Council were to approve this new site in the D&M Plan process, *none* of those requirements will have been met. New abutters will not be permitted to participate in a hearing. The public will not be permitted to comment. The Council will not have review conducted by DEEP or other state and federal agencies. No one is served by that lack of due process.

In seeking to add two more residential parcels to its project site, BNE is also proposing to increase the size of Wind Colebrook South from 79.44 acres to 116.64 acres in size, a *46% increase*. The change will increase its direct impact on abutters and on local municipalities. BNE claims that the new turbine location would be “further away in the woods” and “further in the woods from the homes located on Flagg Hill Road and Route 44” (BNE D&M Plan Modification, 1/9/20 at 3-4), but if approved, the project site would suddenly include a third town, namely Winchester, on its southernmost border, at least two new abutters will be impacted, and the impact on the Nature Conservancy’s abutting property likely would be more significant. Residential abutters whose property lines were more than 1500 feet from the two turbines already in operation will now be as few as 321 feet from the third turbine, according to BNE’s own measurements. (BNE Interrog. Responses, 2/21/2020 at 5.) That proximity is so close to the property lines that were T3 to fall, it could land more on the abutters’ property than on 53 and 45 Flagg Hill Road. As BNE has not even provided measurements to all of the abutters’ property lines, that could be true for more than one property owner.

Unsurprisingly, several of those abutters have already submitted letters in opposition to BNE’s proposal, and are in the process of seeking party status in a proceeding in which the Council issued a decision and order on June 2, 2011, *eight and a half years ago*. According to a letter from

the Council's executive director, one abutter, The Nature Conservancy, apparently is being denied both party and CEPA intervenor status on the grounds that it had notice of the original petition (which of course was for a different project site), and the "proceedings" on the original petition are closed. (Bachman letter to TNC, 2/27/20.) It is not clear under what authority a Council staff member may make such a decision, but if that is indeed to be the Council's decision following a vote at a duly noticed and scheduled public meeting, it demonstrates exactly the problem with BNE's filing and the Council's attempt to consider this new project site during the D&M Plan process. Moreover, Ms. Bachman's focus on only distance from property lines ignores many other factors that may change the impact of the facility on an abutter. Mere distance from the property line is not the sole concern. For example, the proposed T3 blades sweep an area of approximately 3.69 acres, which is an *84% increase* over the previously approved 2.85 MW T3, and the height of the turbine to the tip of the blade is 150 feet higher.

These property owners never had the opportunity present testimony or evidence to the Council, have not been permitted to issue interrogatories to BNE, and in most cases *did not even receive notice of BNE's filing* until the Council asked BNE to provide proof that it had served notice on abutters in its responses to interrogatories. In fact, BNE has still not served all of the abutters, as the property at 47 Flagg Hill Road changed hands by way of a deed recorded with the Town of Colebrook on December 18, 2019. BNE served the previous property owner. They are suddenly being thrust into this proceeding at what is basically an end stage, with no rights to a hearing or to an appeal from the Council's decision on the "modification." (See Bachman letter to TNC, 2/27/20.) That is grossly unfair, and certainly does not comport with the Council's obligation to render its decisions while balancing the welfare and protection of the people of the state.

**IV. BNE’s “Modification” Does Not Provide the Council with Enough Information to Make any Informed Decisions with Respect to the Environmental or Public Health and Safety Impact of the New Project Site**

The dramatic nature of BNE’s proposed “modification” is also easily seen in the Council’s inability to assess any of the claims BNE has made about its impact. A cursory examination also shows that BNE’s new project, on its face, would violate at least the setbacks and shadow flicker requirements of the wind regulations – which likely explains why BNE is trying so hard to bootstrap this new facility into one to which the wind regulations do not apply.

BNE’s request makes many wholly unsupported assertions about the impact of the “modification,” as do its responses to many of the Council’s interrogatories. For example, BNE claims a “significant reduction to vernal pool impacts” because the third turbine would be further from the two high-value vernal pools known to be located on the current project site – yet it has not provided a shred of information indicating anyone has surveyed 45 and 53 Flagg Hill Road to determine if vernal pools exist on those sites. Nor has it provided any evidence with respect to whether vernal pools are present on any of the new abutters’ properties. Given the 100-foot vernal pool envelope and restrictions on clearing within 750-foot of any vernal pool to protect the upland habitat zone, considerations of which BNE and the Council are well aware and caused multiple changes to BNE’s original plans, it is impossible for BNE to support such claims of reduced impact. There could be high-value vernal pools located on a new abutter’s property, or even at 45 or 53 Flagg Hill Road, in which case the impact of this third turbine location would be greater. The Council should also consider that no post-construction vernal pool surveys were conducted, so even the impact on those vernal pools located at approved site of the turbines, namely 29 Flagg Hill Road, is not clear.

The Council should be especially wary of such claims by BNE given the history of this petition. As the Council should recall, BNE filed its original petition claiming that there were no

vernal pools on the site and that there was no evidence of habitat that would attract the presence of any state-listed species. Those claims were found to be false after an adequate site survey was conducted following concerns raised by FWCT's experts. Michael Klemens concluded that four cryptic vernal pools existed on the site and one was present just off site, that two of those on-site pools warranted protection in the design and construction process, and that the site contained habitat suitable for the state-listed threatened spring salamander as well as two state listed species of concern snakes. (*See* 4/20/11 Klemens Herpetological Assessment.) As a result, BNE had to make significant changes to its site plans and the Council imposed several years of monitoring requirements on BNE.

BNE similarly claims that the "modification" will reduce wetland activity by 45%. (BNE D&M Plan Modification, 1/9/10 at 2.) However, in response to the Council's interrogatories, BNE has already changed its calculations on direct wetlands impact in this newest modification request. As with the issue of vernal pools, BNE has not presented any indication that it has surveyed the new Flagg Hill properties or the new abutting properties for wetlands; its failure to do so again means that it cannot actually assess the true impact of the "modification" on wetlands. Moreover, further analysis is required to assess whether BNE is required to secure a permit from the U.S. Army Corps of Engineers. As the Council may remember from many years ago, BNE initially claimed that Wind Colebrook South met the requirements of the Connecticut General Permit and therefore it did not need to apply for an Army Corps permit. However, FWCT's experts determined that the project far exceeded the General Permit's requirements that projects have less than one acre of impact on wetlands. By their calculations, although the direct impact on wetlands was less than a quarter of an acre, the direct, indirect and secondary impact of the project amounted to more than 12 acres of impact, triggering Army Corps review rather than permitting self-

verification. The same may be true here, but at this stage, without the opportunity to review the plans with the assistance of a qualified professional, to ask BNE questions on this topic or to submit testimony and evidence, neither FWCT nor any other party will have the opportunity to make sure the new turbine is properly permitted following a review that will ensure the wetlands and waters in and around the site are adequately protected. Although BNE's submission to the Council is silent with respect to Army Corps review, Exhibit B to the PPA for T3 does list a Category 2 General Permit as a "required permit and authorization for the construction of the facility."

BNE's submissions with respect to ice throw, noise, visual impact and shadow flicker are similarly troublesome. In response to a Council interrogatory asking for technical documentation and setback considerations specific to the Enercon turbine that BNE seeks permission to install, BNE claimed that Enercon "does not have minimum ice throw setback requirements." (BNE Interrog. Responses, 2/21/2020 at 4.) The Council's request for setback documentation did not appear to be limited to requirements with respect to ice throw, and it is difficult to believe that any wind turbine manufacturer would not have its recommendations, requirements, or at least guidelines with respect to the proper siting of its turbines. In addition, the "site-specific risk assessment" attached to the interrogatories and conducted by Enercon is devoid of any explanation as to methodology and repeatedly and expressly states that it is based solely on inputs provided by BNE – inputs that apparently included only measurements to one abutter's residence, pool, barn and driveway, rather than the property lines of that abutter or any other. (*See id.* at Ex. C.) Regardless of what Enercon may recommend or require for setbacks, there is no question that the location of the new turbine violates the requirements of the wind regulations. The wind regulations require that turbines be sited at least 1.5 times the wind turbine height from any property lines.

Regs. § 16-50j-95(a)(1)(B). Here, the wind turbine height is 197.3 meters (128 hub height + (183.6 blade diameter/2)). Under the regulations, then, the turbine must be at least 295.95 meters, or just under 971 feet, from adjacent property lines. BNE wants to site its turbine just 321 feet from one abutter's property line and 523 feet from another. (BNE Interrog. Responses, 2/21/20 at 5.)

The shadow flicker information provided by BNE is even vaguer than the ice throw assessment. BNE claims that it had a flicker assessment done by a consultant, but does not provide a copy of any work product; instead, it asserts, without any context for methodology, inputs, assumptions or the like, that the two residences closest to the new turbine “will not receive any shadow flicker” and refers to two residences only by their “receptor” labels from a report originally submitted in March 2011. (*Id.* at 12.) Those two residences are projected to experience more than 30 annual hours of shadow flicker – in excess of what is permitted by the wind regulations. (*Id.*) *See* Regs. § 16-50j-95(c)(1).

The sound report provided by BNE in response to interrogatories from the Council at least provides information on methodology, but its content falls well short of the wind regulation requirements. The regulations require discussion of the existing sound levels at the site, details about the manufacturer's technical documentation of noise emission characteristics, calculations of sound levels at the property lines (*not* just at “residential receptors”), and projected levels of infrasonic and ultrasonic sound, impulsive noise and prominent discrete tones. Regs. § 16-50j-94(d). None of that information was provided by BNE. Indeed, it appears from BNE's interrogatory responses that it will not even commit to using the reduced sound output mode in its operation of T3.

The visual impact analysis is also lacking key information. The wind regulations would require a viewshed analysis out to 8 miles given the wind turbine height of 647 feet. Regs.

§ 16-50j-94(c)(3). The analysis provided by BNE at the request of the Council does not comply with that requirement.

BNE did not provide any bird or bat studies in support of its “modification” for T3. It is entirely possible that the new 37 acres, or even the properties of the new abutters, have wildlife resources that 17 and 29 Flagg Hill Road did not. Bat and bird migration patterns could be different. The significantly larger blade sweep area and higher turbine height may also cause increased impact. Due to nature of the Council’s D&M process, even the post-construction studies that were submitted for 17 and 29 Flagg Hill Road were never reviewed by DEEP or any other scientist, so it is not clear that the impact of the two turbines on the approved site has ever been adequately assessed. With its “modification” filing, BNE does not even pretend to have assessed the potential impacts on bats and birds.

**V. Conclusion**

For the reasons set forth above, FWCT objects to BNE’s D&M Plan “modification” because it is actually a petition for a new facility on a new project site and is therefore outside of the Council’s jurisdiction, it deprives interested parties of their due process rights, and it does not provide the Council with information that would permit an informed assessment of its impacts on the environment or on public health and safety.

**FAIRWINDCT, INC.**

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## CERTIFICATION

I hereby certify that a copy of the foregoing document was delivered by first-class mail and e-mail to the following service list:

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