

STATE OF CONNECTICUT SITING COUNCIL

**WINDHAM SOLAR LLC AMENDED PETITION FOR
A DECLARATORY RULING PURSUANT TO
CONNECTICUT GENERAL STATUTES §4-176 AND
§16-50k, FOR THE PROPOSED CONSTRUCTION,
MAINTENANCE AND OPERATION OF ONE 1.0
MEGAWATT AND ONE 0.99 MW SOLAR
PHOTOVOLTAIC ENERGY GENERATING
FACILITIES LOCATED AT 31 BENZ STREET,
ANSONIA, CONNECTICUT**

PETITION NO. 1395A

November 13, 2020

**OPPOSITION OF WINDHAM SOLAR LLC
TO INTERVENTION OF THE CITY OF ANSONIA**

Submitted by:

Windham Solar LLC

I. Background:

The City of Ansonia (the “City”) was first informed of the intent of Windham Solar LLC (“Petitioner” or “Windham”) to develop a 1.0 megawatt (“MW”) solar facility and a 0.999MW solar facility (the “Projects”) at 31 Benz Street, Ansonia, Connecticut (the “Site”) on February 26, 2020 when the Siting Council (the “Council”) sent notice of Petitioner’s initial petition for a declaratory ruling to the City.

The City was well aware of the petition, initially proposed as three 1.0MW projects. *See, e.g., CT Insider, March 10, 2020 (Solar panel farm proposed for Ansonia’s Hilltop neighborhood: “ ‘I’m not in favor of it,’ said Mayor David Casseti, a Hilltop resident. ‘It’s not advantageous for the city. It creates no new income for the city. Plus there are houses nearby.’”)*¹

That initial petition was superseded by the Petitioner’s subsequent filing of an amended petition on June 23, 2020, which was deemed complete by the Council on July 2, 2020. Windham’s amendment redesigned the Projects providing additional buffer area to the surrounding residences *in light of comments made by some neighbors to the Council*. Now that Windham has already amended the Projects to respond to those neighbors’ concerns, the City wants a second bite at the apple without specifying any concerns, delaying the construction of the Projects and Windham’s ability to timely perform under its renewable energy credit contracts and provide much needed savings to a municipality under the virtual net metering program.

¹ Available at: <https://www.ctinsider.com/local/ctpost/article/Solar-panel-farm-proposed-for-Ansonia-s-Hilltop-15119891.php>. Notably, the CT Insider article noted that: “The area where the solar farm is proposed is just over a mile away from a planned four-story Assisted Living facility on 25 acres of wooded property near Hilltop Hose. Optimus Senior Living is seeking a zone change to allow its construction. Hundreds of people have protested the assisted living plan, saying the city cannot sustain a facility that large and that it would be a drain on local emergency services, add too much traffic and strain the water and sewer systems.” Here, the solar Projects will place no drain on local services, not add to traffic, and not strain the water and sewer systems. And since that article was published the plans have been amended to provide more than adequate buffers to neighboring residences.

The Council again provided written notice of the proceedings and the amended Projects to the City on June 26, 2020 requesting that comments be submitted by the City by the end of the public comment period on July 23, 2020. Notwithstanding having knowledge of the solar Projects since early 2020, no comments have been submitted by the City. Having ignored the request for comments from the Council as well as the schedule for these proceedings, the City on November 11, 2020 has submitted a petition to intervene (the “Intervention Petition”)² without providing any facts or specific concerns therein related to the Projects. The public comment period had ended, the interrogatories have been asked and answered and all that remains in these uncontested proceedings is for the Council to render a decision. As such, the last-minute untimely request for intervention by the City, which provides no details of how the City would be affected by the Projects, nor any concrete concerns regarding the Projects (let alone how the City could assist the Council in resolving them), should be denied by the Council.

II. CGS 4-177a(b):

The City is requesting intervention under CGS 4-177a(b), which states that:

“(b) The presiding officer may grant any person status as an intervenor in a contested case if that officer finds that: (1) Such person has submitted a written petition to the agency and mailed copies to all parties, at least five days before the date of hearing; and (2) the petition states facts that demonstrate that the petitioner's participation is in the interests of justice and will not impair the orderly conduct of the proceedings.”

These proceedings do not fall under the definition of a “Contested Case” under RSA 16-50j-2a. Because this is not a Contested Case, no hearing date has been set and, as such, the application of CGS 4-177a(b) which hinges on hearing date being set does not work. Even if it were somehow applicable to a non-contested case, the City has not met the requirements of prong

² The Intervenor Status Request Form is dated October 7, 2020 but was not faxed to the Council until November 5, 2020 and not received until November 11, 2020. The City provides no explanation as to what appears on its face to be further dilatory conduct.

(2) of C.G.S. 4-177a(b) because the Intervention Petition does not include a single fact demonstrating that the City's participation is in the interests of justice. The City did not recite a single specific issue it has with respect to the Projects. More importantly however, to the extent that the City does have specific issues with the Projects, it had since February 26, 2020 to raise the issues with Windham and/or the Council. Instead, it has been radio silence from the City for the better part of a year. Moreover, the Council instructed the Town to provide comments by July 23, 2020 pursuant the schedule established in these proceedings which has been in place since June 26, 2020. The City ignored that deadline. Not only did the City ignore the July 23, 2020 deadline, the Intervention Petition was filed in November of 2020, at a time when the public comment period has expired, the interrogatories have been asked and answered and all that remains in these proceedings is for the Council to render a decision.. Allowing the City to further delay these proceeding which have already been substantially delayed due to the COVID-19 outbreak and intervene at this late stage would completely derail these proceedings which are in the final stages, let alone impair them. The interests of justice require the Council to deny the Petition to Intervene. Simply put, the City's petition for intervention is not in the interest of justice, will harm Windham and the Connecticut municipality that is expecting substantial savings on its electric bills from participation in the virtual net metering program.³

The orderly conduct of these proceedings, which has been memorialized in a schedule issued by the Council in June of this year, will be severely disrupted by the requested intervention. The Petitioner has already made substantial changes to the Projects in response to timely concerns

³ Co-Operative Citizens Monitoring Network v. Public Util. Control Auth., 1995 Conn. Super. LEXIS 1871, 1995 WL 384584, FN8 (Department of Public Utility Control denied intervention to Co-Operative Citizen's Monitoring Network under 4-177(b) in part because of the late date of request); Horton v. Meskill, 187 Conn. 187, 445 A.2d 579, 1982 Conn. LEXIS 513 (Towns denied permissive intervention in part because of lateness of the attempt to intervene).

raised by neighbors with the Council in order to facilitate the development of the much-needed renewable energy generation in Connecticut.

Any delay to the commissioning of the Projects has a direct effect on the ability of Connecticut to satisfy its Renewable Portfolio Standard as the Petitioner has two Standard Contracts for the Purchase and Sale of Connecticut Class I Renewable Energy Credits (the “REC Agreements”). In addition to the impact on Connecticut’s renewable energy needs, further delay to these proceedings will directly result in harm to Windham and the Connecticut municipality that is expecting substantial savings on its electric bills from participation in the virtual net metering program.

III. CGS 16-50n:

The City has not explained which subclause of CGS 16-50n it seeks intervention under. Presumably the City is relying on CGS 16-50n(b), which references the Council’s ability to permit any person to participate as an intervenor in accordance with CGS 4-177a. For the reasons set forth in Section II above, the City does not meet the requirement for intervention set forth in CGS 4-177a.

IV. CGS 16-50o:

The City has not explained which subclause of CGS 16-50o it seeks intervention under. Nor does CGS 16-50o authorize intervention in these proceedings. CGS 16-50o allows for every party or group of parties as provided in section CGS 16-50n to present evidence and participate in cross-examination. However, for the reasons set forth in Section II above, the City does not meet the requirement for intervention set forth in CGS 16-50n, which relies on the substantive test set forth in CGS 4-177a.

V. CGS 22a-120:

The City references CGS 22a-120 in its Petition to Intervene. This provision relates to applications for certificates of public safety and necessity that are necessary to construct hazardous waste facilities. The Projects are not going to be used for the disposal, treatment, storage or recovery of hazard waste. As such, it is unclear how CGS 22a-120 is at all applicable to these proceedings.

VI. CGS 22a-163j:

CGS 22a-163j dealt with applications for certificates for low-level radioactive waste facilities and was repealed effective October 1, 2006.

VII. RSA 16-50j-15a:

The City cites four provisions of the Regulations of Connecticut State Agencies in their Intervention Petition. The first is RSA 16-50j-15a which applies to Contested Cases. These proceedings do not fall under the definition of a “Contested Case” under RSA 16-50j-2a. As such, RSA 16-50j-15a is not applicable. Even if it were somehow applicable to a non-contested case, subclause (b) of that section requires that the proposed intervenor describe the manner in which said person is affected by the proceeding. The Intervention Petition is silent as to how the Town may be affected by these proceedings. The Intervention Petition makes vague references to the “local concerns of residents, municipal land use boards, and Ansonia’s public safety departments” but makes no mention of what those concerns are or how the City would be affected by them. With absolutely no information whatsoever as to how the City may be affected by the Projects, the requirement of RSA 16-50j-15a(b) has not been met.

Likewise, subclause (c) of RSA 16-50j-15a is not applicable because these proceedings are not a Contested Case. Even if RSA 16-50j-15a did apply, however, subclause (c) is similar to the

substantive test for intervention under CGS 4-177a(b) in that it requires the Council to consider both (i) the interests of justice and (ii) the orderly conduct of the proceedings. As discussed above in Section II, the City has been aware of the Projects since February of 2020 yet has ignored the Council's requests to provide substantive comments. Now, when all that remains is for the Council to render a decision in these proceedings, the City seeks to completely upend the process through their late intervention without providing reference to a single specific concern. The interests of justice require a denial of the Intervention Petition.

Subclause (c) is also a more stringent test than CGS 4-177a(b) because it also requires the Council to take into account whether the City's participation will furnish assistance to the Council in resolving the issues of the case. The Intervention Petition makes vague references to "local and municipal concerns" but does not elaborate as to what those concerns may be or how the City can assist the Council in addressing them. When taking into account the late timing of this request, and the substantially detrimental effect the late intervention will have on the orderly conduct of these proceedings, the interests of justice heavily outweigh any possible assistance the City could have in these proceedings, especially considering the fact that Windham already redesigned the Projects to account for concerns neighbors' expressed to the Council. Even if RSA 16-50j-15a were somehow to be applicable to these proceedings prior to them becoming a Contested Case, given that the Intervention Petition fails each of the three requirements of RSA 16-50j-15a, intervention should be denied by the Council.

RSA 16-50j-15b is also referenced in the Intervention Petition. This provision states that

"The intervenor's participation shall be limited to those particular issues, that state of the proceeding, and that degree of involvement in the presentation of evidence and argument that the council shall expressly permit at the time such intervention is allowed."

Again, this provision only applies to a Contested Case, which this is not. In any case, this provision does not grant any substantive rights of intervention, rather it enables the Council to limit the intervenor's participation. As discussed above, it is the Petitioner's position that given (i) the state of these proceedings (i.e. the public comment period has expired, interrogatories have been asked and answered and all that remains is the rendering of the decision), (ii) the last-minute nature of the Intervention Petition considering the City knew of the Projects in February of 2020 and (iii) the complete absence of facts and specific allegations of potential harm in the Intervention Petition, the Intervention Petition should be denied.

VIII. RSA 16-50j-16:

RSA 16-50j-16 is not applicable because these proceedings are not a Contested Case. In any case, RSA 16-50j-16 relates to the addition of parties to these proceedings and the City has not applied for party status, the City has applied for intervenor status and therefore RSA 16-50j-16 is not applicable. An intervenor is defined in General Statutes § 4-166(5) as "a person, other than a party, granted status as an intervenor by an agency in accordance with the provisions of subsection (d) of section 4-176 or subsection (b) of section 4-177a." RSA 16-50j-16 differentiates between parties and intervenors and the Council has a separate form to request party status which is tailored to address the requirements of RSA 16-50j-16(a). Even if the City had requested to become a party to these proceedings, it has not provided any argument that its legal rights, duties, or privileges will be determined by the decision of the council after the proceedings or that the participation of the City is necessary. Vague references to "local concerns of residents, municipal land use boards, and Ansonia's public safety departments" are not sufficient to enable the Council to make the required findings under RSA 16-50j-16(a). Not only has the City not included supporting allegations as to the particular nature of the grievance, it has not even included a

statement that it is being aggrieved in any manner. Bongiorno Supermarket, Inc. v. Zoning Board of Appeals, 266 Conn. 531, 542-43, 833 A.2d 883 (2003)

IX. RSA 16-50j-17:

The Intervention Petition also references RSA 16-50j-17. RSA 16-50j-17 is not applicable because these proceedings do not constitute a Contested Case. In any case, RSA 16-50j-17 does not grant any substantive rights of intervention. This provision simply distinguishes between the status of an intervenor and a party. The City has not applied to be a party in these proceedings.

Respectfully Submitted,
Windham Solar LLC

By: /s/ Michael Melone

Michael Melone
Windham Solar LLC
c/o Allco Renewable Energy Limited
157 Church Street, 19th Floor
New Haven, CT 06510
Phone (212) 681-6974
mjmelone@ecosrenewable.com