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December 14, 2020

**VIA ELECTRONIC MAIL**

Melanie Bachman  
Executive Director/Staff Attorney  
Connecticut Siting Council  
10 Franklin Square  
New Britain, CT 06051

**Re: Petition No. 1408 - FairWindCT, Inc., et al. Petition for a Declaratory Ruling Pursuant to Connecticut General Statutes §4-176**

Dear Ms. Bachman:

I am writing on behalf of my client, BNE Energy, Inc. (“BNE”), in connection with the above-referenced Petition. With this letter, I am enclosing a copy of BNE’s Memorandum in Opposition to Petitioners’ Motion for Declaratory Ruling for the Council’s review.

Should you have any questions concerning this submittal, please contact me at your convenience. I certify that copies of this submittal have been made to all parties on the Petition’s Service List.

Sincerely,



Lee D. Hoffman

Enclosure

**STATE OF CONNECTICUT**  
**CONNECTICUT SITING COUNCIL**

**December 14, 2020**

**Petition No. 1408 - FairWindCT, Inc., et al petition, pursuant to Connecticut General Statutes §4-176, for a declaratory ruling that: (a) the January 9, 2020 Development and Management Plan (D&M Plan) Modification submitted by BNE Energy, Inc. in Petition No. 983 conflicts with the Connecticut Siting Council’s (Council) June 2, 2011 final decision on Petition No. 983; (b) the Council did not have jurisdiction over the D&M Plan Modification; (c) the Council did not have statutory authority to approve the D&M Plan Modification; (d) the D&M Plan Modification violated due process rights; and (e) the D&M Plan Modification violates the Connecticut Environmental Protection Act.**

**MEMORANDUM IN OPPOSITION TO PETITIONERS’ MOTION FOR  
DECLARATORY RULING TO VACATE SITING COUNCIL’S DEVELOPMENT AND  
MANAGEMENT PLAN APPROVAL FOR WIND COLEBROOK SOUTH**

**I. INTRODUCTION**

BNE Energy, Inc. (“BNE” or the “Company”) hereby respectfully submits this Memorandum in Opposition to the Motion for Declaratory Ruling of FairWindCT, Inc., Julia and Jonathan Gold, and the Grant Swamp Group (collectively, the “Petitioners”) to reverse or vacate the Connecticut Siting Council’s (the “Council”) Modification Decision dated March 6, 2020 and deny BNE’s request to modify the D&M Plans in the above-referenced Petition.

As is set forth in greater detail below: (i) the Modification is in compliance with applicable state law(s) and regulation(s); (ii) the Council has jurisdictional/statutory authority to approve the Modification; thus (iii) the Modification Decision should be upheld.

In Petition 983, dated December 6, 2010, BNE proposed utilizing three 1.6 MW wind turbines with 82.5 meter diameter blades and 100 meter hub heights. The Council approved the three turbine project with conditions on June 2, 2011. On December 12, 2013, the Siting Council considered and approved the D&M plan modification dated November 5, 2013 approving the construction, operation and maintenance of three GE 2.85-103 at 98.3 meter hub heights. Two of the wind turbines were constructed and began commercial operations on November 4, 2015.

On January 9, 2020, BNE filed a D&M plan modification in Petition 983 for the construction, operation and maintenance of the third turbine, an Enercon 4.2 megawatt (“MW”) wind turbine with a 128 meter hub height and a 138 meter diameter blade to be located at 29 Flagg Hill Road and 17 Flagg Hill Road in Colebrook, Connecticut. The D&M plan modification resulted in numerous benefits for the project and the surrounding area, including the production of significantly more renewable energy while minimizing wetland and environmental impacts and was approved by the Council on March 6, 2020. The Council’s decision on the D&M Plan modification was in the public interest at the time it was made and continues to be so. It should therefore be upheld by the Council in this proceeding by denying Petitioners’ requested relief

## **II. ARGUMENT**

### **A. The Council Has Jurisdiction Over the WCS Project Contrary to Petitioners’ Erroneous Claims**

The Council has jurisdiction over the WCS Project in accordance with Conn. Gen. Stat. § 16-50k. BNE filed a Petition for Declaratory Ruling with the Council on December 6, 2010 pursuant to § 16-50k requesting approval for three wind turbines.

At the time these turbines were originally approved by the Council, General Statutes § 16-50k provided: "Notwithstanding the provisions of this chapter or title 16a, the council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling . . . (B) the construction or location of any. . . gridside distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as such project meets air and water quality standards of the Department of Energy and Environmental Protection. . . ." General Statutes § 16-1(a)(43) defines grid side distributed resources as "the generation of electricity from a unit with a rating of not more than sixty-five megawatts that is connected to the transmission or distribution system, which units may include, but are not limited to, units used primarily to generate electricity to meet peak demand."

When it approved the project, the Council found that the proposed project complied with the applicable air and water quality standards and met all other requirements imposed by the Council and approved the three turbine project with conditions on June 2, 2011. The Council's decision was subsequently appealed by plaintiffs, FairwindCT, Inc. (FairwindCT), Stella Somers, Michael Somers and Susan Wagner who claimed among other issues that the Council did not have jurisdiction to approve the wind project or impose conditions through the development and management plan process. This argument was specifically rejected Connecticut Supreme Court in *FairwindCT, Inc. et al. v. Connecticut Siting Council*. By virtue of the Court's rejection of this argument, the Court upheld the Council's decision and issued its opinion on September 23, 2014.

In reaching its decision, the Supreme Court stated that "the trial court properly concluded that the council had jurisdiction over BNE's petitions because the projects were "facilit[ies]" for

the purpose of § 16-50k (a).<sup>1</sup> Regarding the Council’s authority to impose conditions through the D&M process, the Supreme Court reasoned that the Council “expressly found that the existing plans for protecting water quality on each of the proposed projects satisfied water quality standards, and merely required BNE to include those plans in the development and management plan to ensure ongoing compliance.”<sup>2</sup> Accordingly, the Supreme Court upheld the use of the D&M Plan process for this project.

As previously noted, BNE filed a D&M Plan modification on January 9, 2020 for the construction, operation and maintenance of the third turbine. BNE’s filing demonstrated continued compliance with the Council decision and order dated June 2, 2011 with respect to air, water and noise standards as upheld by the Supreme Court. BNE requested a modification to the location of the third turbine to minimize wetland and environmental impacts with the planned acquisition of two parcels adjacent to 29 Flagg Hill Road located at 45 and 53 Flagg Hill consisting of 37.2 acres that would be merged into 29 Flagg Hill prior to construction.

BNE’s D&M plan modification resulted in numerous benefits including a substantial increase to the expected amount of Class I renewable energy generated by the project, a 45% reduction in wetland activity from 4,250 square feet down to 2,320 square feet and a significant reduction to vernal pool impacts.<sup>3</sup> The Council appropriately approved the D&M filing on March 6, 2020. Based on the foregoing, the Council has the jurisdiction and the authority to approve

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<sup>1</sup>*FairwindCT, Inc. et al. v. Connecticut Siting Council*, Supreme Court (SC 19090) and (SC 19091), dated September 23, 2014 at 1.

<sup>2</sup> *Id.* at 11-12.

<sup>3</sup> See BNE response to Council Set 2, Interrogatory 3, dated March 2, 2020.

BNE's D&M plan modification to ensure ongoing compliance with air, water and noise requirements.

**B. BNE Demonstrated Ongoing Compliance with Air, Water and Noise Standards Contrary to Petitioners' Inaccurate Claims Regarding BNE's Wetland and Noise Filings**

Petitioners erroneously claim that BNE did not complete or verify its wetlands delineation or conduct on-site surveys for vernal pools or wildlife and failed to inform the Council of the true impacts of the Modification.<sup>4</sup> Petitioners go on to inaccurately claim that BNE's D&M modification request did not include any evidence or surveys of the resources present at 45 or 53 Flagg Hill Road.<sup>5</sup> These unfounded statements are simply untrue. BNE retained Davison Environmental, LLC to conduct a wetland review of all impacts from the proposed Modification including potential impacts to 45 and 53 Flagg Hill Road. The results of the wetland survey were incorporated into the detailed stormwater documentation, such as the SWMP & SWPPP civil plans prepared by Civill and filed with the Council.<sup>6</sup> Additionally, BNE provided numerous responses to Interrogatories detailing the wetland impacts and vernal pool activities associated with the D&M modification which clearly demonstrated the environmental benefits of the modification.<sup>7</sup>

Similarly, the Petitioners erroneously claim that BNE did not provide any data demonstrating compliance with state noise law. Petitioners go on to claim that the sound report provided by BNE in response to interrogatories from the Council did not demonstrate compliance

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<sup>4</sup> Petition for Declaration Ruling of FairWindCT, Inc. ("FWCT"), Julia and Jonathan Gold, and the Grant Swamp Group (collectively, the "Petitioners"), dated March 6, 2020 at 2.

<sup>5</sup> *Id.* at 21.

<sup>6</sup> See Exhibit E to BNE D&M filing, SWMP & SWPPP plans, Section 1.1.2 Project Description, dated Jan 9, 2020 at 1.

<sup>7</sup> See BNE responses to Council Set 1 Interrogatories 13, 25, 39, 40, 41, 44, 52, 54, 55 and Council Set 2 Interrogatory 3.

with both DEEP's noise regulations and the wind regulation requirements and does not provide any basis for the Council to conclude that the cumulative noise from the two turbines already in place and the proposed T3 will "comply with the DEEP Noise Control Standards."<sup>8</sup>

Petitioners' claims on noise compliance are similarly inaccurate. BNE submitted a Sound Level Report for T3 to the Council in response to Interrogatory 28 which was conducted by Dr. Howard R. Quin, INCE, dated February 6, 2020. The Sound Level Report reviewed applicable noise standards and criteria, described the modeling program that was conducted and concluded that acoustic sound levels from all the wind turbines located in Colebrook of 39-48 dBA at nearby residential receptors are in compliance with and well below the maximum allowable noise levels of 61 dBA during the daytime and 51 dBA during nighttime periods at the nearest residential receptors from the wind turbines.

Petitioners mistakenly claim that the noise levels must be measured by the Council at the property line and must be in compliance with the wind regulations that were enacted on July 1, 2011. The wind regulations were enacted subsequent to the Council's decision and order approving WCS on June 2, 2011 and therefore do not apply to this project. Additionally, the Council determined in its decision and order that the project complied with DEP noise requirements at the nearest residential receptors. The Sound Level Report submitted for T3 referenced above demonstrated continued noise compliance of the project at the nearest residential receptors.

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<sup>8</sup> *Id* at 25.

The Connecticut Supreme Court upheld the Council’s authority to determine noise compliance at the nearest residential receptors. The Supreme Court concluded that the council has jurisdiction to consider state noise law when ruling on petitions for declaratory rulings noting that Section 16-50x (a) expressly provides in relevant part that “[i]n ruling on . . . petitions for a declaratory ruling for facilities . . . the council shall give such consideration to other state laws . . . as it shall deem appropriate.”<sup>9</sup> The Supreme Court went further and concluded that the council had authority to approve BNE’s petitions even if it determined that the project did not comply with state noise law noting that § 16-50x (a) provides that, “[i]n ruling on . . . petitions for a declaratory ruling for facilities . . . the council shall give such consideration to other state laws and municipal regulations as it shall deem appropriate.”<sup>10</sup> The Supreme Court concluded, “therefore, that the legislature intended to authorize the council to approve petitions for declaratory rulings for proposed projects even if they do not comply with state laws outside of the act itself, including state noise law.”<sup>11</sup>

### **III. CONCLUSION**

WHEREFORE, for the reasons described herein, WCS respectfully requests that the Siting Council affirm that: (i) the Modification is in compliance with applicable state law(s) and

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<sup>9</sup> *FairwindCT, Inc. et al. v. Connecticut Siting Council* at 14.

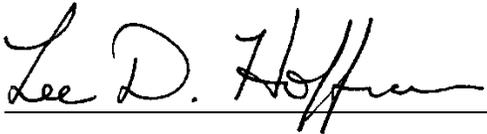
<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 15.

regulation(s); (ii) the Council has jurisdictional/statutory authority to approve the Modification; and, (iii) the Modification Decision is upheld without modification.

Respectfully submitted,

BNE Energy, Inc.

By:  \_\_\_\_\_

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