



# STATE OF CONNECTICUT

## CONNECTICUT SITING COUNCIL

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May 14, 2010

TO: Agenda E-mail Recipients, and Electric Utility Representatives

FROM: S. Derek Phelps, Executive Director *SDP/cmw*

RE: **PETITION NO. 863** - Examination of whether statutory changes should be made to clarify jurisdiction to renewable and/or alternative sources of energy (wind, solar, hydro, tidal, wave, geothermal, biofuel, biomass, etc).

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At a public meeting held on May 6, 2010, the Connecticut Siting Council (Council) considered and issued a declaratory ruling that the Council shall exercise jurisdiction over renewable energy facilities according to the definition of "electric generating facility" under Conn. Gen. Stat. §16-50i(a)(3) and according to the State of Connecticut Energy Policy under Conn. Gen. Stat. §16a-35k. No statutory changes are necessary to clarify jurisdiction over facilities utilizing renewable and/or alternative sources of energy.

Enclosed is a copy of the staff report relevant to this declaratory ruling.

## PETITION 863

### Staff Report

May 6, 2010

## Siting Council Jurisdiction over Renewable Energy Facilities

Federal and state energy policies seek to promote the use of alternative energy sources and to encourage power production facilities that use renewable fuels.<sup>1</sup> The Siting Council (“Council”) is responsible for encouraging research to develop new and improved methods of generating, storing and transmitting electricity and fuel, which necessarily includes renewables.<sup>2</sup> This report explores the statutory basis for the Council’s jurisdiction over the siting of renewable energy projects.

### A. Statutory Interpretation

The starting point for statutory interpretation is the statute’s plain meaning. C.G.S. §1-1(a) provides in relevant part, “In the construction of statutes, words and phrases shall be construed according to the commonly approved usage of the language.”<sup>3</sup> To ascertain the usage, courts often look to the dictionary definition of the term. Statutes are also interpreted according to their overall structure and the legislative intent behind them.

#### 1. C.G.S. §16-50i(a)(3)

Under C.G.S. §16-50i(a)(3), the Council has jurisdiction over “any electric generating or storage facility using any **fuel**, including nuclear materials, including associated equipment for furnishing electricity, but not including... a facility (i) owned and operated by a “private power producer”<sup>4</sup> ... (ii) which is a qualifying small power production facility or a qualifying cogeneration facility<sup>5</sup> ... or a facility determined by the Council to be primarily for a producer’s own use, and (iii) which has, in the case of a facility utilizing **renewable energy sources**, a generating capacity of one megawatt of electricity or less...” (emphasis added). The statute is silent as to whether the Council has jurisdiction over facilities utilizing renewable energy sources with more than one megawatt of electricity. Therefore, the plain meaning of the terms “fuel” and “renewable energy sources” must be defined to clarify the question of jurisdiction.

#### 2. The Definition of “Fuel”

In general, “fuel” is defined in Webster’s Dictionary as “combustible matter burned as a source of energy.”<sup>6</sup> The American Heritage Dictionary defines “fuel” as “anything consumed to produce energy...”<sup>7</sup> Based on these definitions, it would seem that fuel must be burned to produce energy. However, fuel cells convert fuel to energy through an electrochemical process rather than combustion. Therefore, it is possible for a facility to generate electricity without

<sup>1</sup> Federal Power Act, 16 U.S.C. §791 *et seq.* (2008); Public Utilities Regulatory Policies Act (“PURPA”), 16 U.S.C. §824 *et seq.* (2008) (Congress directs FERC to promulgate rules and regulations for state implementation).

<sup>2</sup> Public Utilities Environmental Standards Act, (“PUESA”), C.G.S. §16-50g *et seq.* (2008).

<sup>3</sup> CONN. GEN. STAT. § 1-1(a) (2008).

<sup>4</sup> A “private power producer” is one “... which generates electricity solely through ownership of ... a private power production facility,” C.G.S. §16-243b(3) (2008); A “private power production facility” is a facility which generates electricity solely through the use of cogeneration technology, solely through the use or renewable energy sources, or both. C.G.S. §16-243b(1) (2008).

<sup>5</sup> Federal Power Act, 16 U.S.C. §796(17)(A) (2008) and §796(18)(B) (2008) (Facilities that FERC determines by rule meet applicable requirements).

<sup>6</sup> THE NEW INTERNATIONAL WEBSTER’S POCKET DICTIONARY 203 (Trident Press International 1998).

<sup>7</sup> THE AMERICAN HERITAGE DICTIONARY 531 (Houghton Mifflin Company 1976).

burning fuel. Connecticut defines “fuel” as including “electricity, natural gas, petroleum products, coal..., wood fuels, radioactive materials and **any other resource yielding energy.**”<sup>8</sup> (emphasis added). Accordingly, fuel cells fit within this definition as “any other resource yielding energy.”

Congress defines “alternate fuel” as “electricity... or any fuel, other than natural gas or petroleum...”<sup>9</sup> Other states differentiate between “fossil fuels” and “renewable fuels” in their statutory schemes. For example, “fossil fuel” is defined as coal, petroleum products and fuel gases, but “renewable fuel” is defined as ... solar, wind... and hydrogen.<sup>10</sup> Two recent Connecticut cases held that electricity suppliers must necessarily purchase electricity generated from “renewable fuel” to meet state mandates for the use of renewable energy, and that contracts for facilities using renewable fuels should receive more favorable terms than for facilities using fossil fuels.<sup>11</sup> It is therefore apparent that Connecticut also differentiates between “fossil fuels” and “renewable fuels.”

### **3. The Definition of “Renewable Energy Sources”**

In general, “renewable energy” is energy generated from natural resources that are naturally replenished such as the sun, wind, rain, tides and geothermal heat.<sup>12</sup> Connecticut defines “renewable energy” as “solar energy, wind, ocean thermal energy, wave or tidal energy, fuel cells, landfill gas, ... hydrogen conversion technologies, ... biomass conversion technologies, ... and any other energy resources and emerging technologies which have significant potential for commercialization and which do not involve the combustion of coal, petroleum..., municipal solid waste or nuclear fission.”<sup>13</sup> C.G.S. §16-50i(a)(3) references facilities that use “renewable energy sources”, but it does not define them.

The federal government defines “renewable energy source” as “wind, ocean waves, biomass, solar, landfill gas, incremental hydropower, livestock methane or geothermal energy.”<sup>14</sup> Each of the enumerated sources is a natural resource that is naturally replenished. Other states define “renewable energy sources” in their statutory schemes as sources that generate electricity using resources that are capable of being continuously restored by natural means, including but not limited to, solar, wind, fuel cells, landfill gas, geothermal, tidal...<sup>15</sup> The Council has a responsibility to drive incentives for production and commercialization of renewable energy source technologies under PUESA. It is therefore apparent that Connecticut must use renewable energy sources to meet energy policy goals.

### **4. Explicit Statutory Exclusions and Legislative Intent**

In addition to interpreting words in a statute according to their plain meaning, traditional canons of statutory construction dictate that an exclusion from a statute must be explicit. C.G.S. §16-50i(a)(3) specifically excludes a facility, “... which has, in the case of facility utilizing

<sup>8</sup> CONN. GEN. STAT. § 16a-17 (2008).

<sup>9</sup> Power Plant and Industrial Fuel Use, 42 U.S.C. § 8302(a)(6) (2008).

<sup>10</sup> N.Y. ENERGY LAW § 1-103 (7) (2008); N.H. REV. STAT. ANN. § 362-A:1-a (I) (2008); N.J. STAT. ANN. § 52:27F-3(d) (2008).

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

<sup>12</sup> International Energy Agency, *Renewable Energy into the Mainstream*, Oct 2002, available at <http://www.iea.org>. (last visited November 26, 2008).

<sup>13</sup> CONN. GEN. STAT. § 16-245n(a) (2008).

<sup>14</sup> Rural Electrification, 7 U.S.C. § 918c(a)(4) (2008).

<sup>15</sup> MASS. GEN. LAWS ch. 25A § 11F(b) (2008); R.I. GEN. LAWS § 39-26-5(a) (2008); N.H. REV. STAT. ANN. § 362-F:4 (I) (2008); N.Y. ENERGY LAW §1-103(12) (2008).

renewable energy sources, a generating capacity of **one megawatt of electricity or less...**” (emphasis added). However, there is no explicit exclusion for, or reference to, a facility utilizing renewable energy sources with a generating capacity of **more than one megawatt of electricity** (emphasis added). Interpreted under this canon, the Council has jurisdiction.

Canons of statutory construction also dictate that the courts and administrative agencies must follow the intent of Congress. Under C.G.S. §16-50k(a), there is a provision for expedited siting by declaratory ruling which gives the Council jurisdiction over renewable energy projects that reduce federally mandated congestion charges (“FMCCs”) pursuant to a federal directive.<sup>16</sup> The Council has decided two petitions under this process: a 37.5 megawatt wood biomass generating facility in Plainfield and a 30 megawatt biomass gasification generating facility in Watertown.<sup>17</sup> C.G.S. §16-50k(a) operates in conjunction with C.G.S. §16-243m(g), which mandates the DPUC to “encourage responses from a variety of resource types and to encourage diversity in the fuel mix used in generation.”<sup>18</sup> The legislative intent here is to implement measures to reduce FMCCs; expedited siting accomplishes this goal. Interpreted under this canon, the Council has jurisdiction.

## **B. Renewable Energy Policy**

It is the intent of the federal legislature to encourage the use of renewable energy sources. Congress has determined that the U.S. has a quantity of renewable energy resources that will provide abundant, reliable and affordable energy for all citizens.<sup>19</sup> In addition, renewable energy production would promote important social and economic goals such as creating employment opportunities, protecting environmental values, fostering economic growth, husbanding resources for future generations, safeguarding health and welfare, maximizing efficiency and increasing competition in the marketplace.<sup>20</sup> Therefore, use of renewable energy sources will promote a sustainable energy system.

States have incorporated the renewable energy goals expressed by Congress into their own energy policies. Massachusetts established a governing board to support “the design, implementation, evaluation and assessment of renewable energy programs.”<sup>21</sup> Rhode Island “shall give priority to energy generation projects based on... criteria including: i) using renewable fuels... as their primary fuel...”<sup>22</sup> New York seeks “... to accelerate development and use within the state of renewable energy sources.”<sup>23</sup> New Jersey “declares that energy efficiency and conservation measures and increased use of renewable energy resources must be essential elements of the state’s energy future...”<sup>24</sup> Finally, New Hampshire declares it to be “... in the public interest to encourage and support diversified electrical production that uses... renewable

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<sup>16</sup> CONN. GEN. STAT. § 16-50k(a) (2008)(“...the council shall... approve by declaratory ruling (1) the construction of generating facilities that do not use nuclear materials or coal as fuel where a facility operated prior to July 1, 2004, (2) construction or location of a fuel cell ... with a capacity of less than sixty-five megawatts... and (3) siting of temporary generation solicited by the DPUC”).

<sup>17</sup> Petition 784 (May 22, 2007) and Petition 834 (April 24, 2008).

<sup>18</sup> CONN. GEN. STAT. §16-243m(g)(2008) (DPUC “shall give preference to proposals that 1) result in the greatest aggregate reduction of federally mandated congestion charges (“FMCCs”)... 2) make efficient use of existing sites and supply infrastructure, and 3) serve the long-term interests of ratepayers”).

<sup>19</sup> Energy Independence and Security, 42 U.S.C. § 17285 (2008).

<sup>20</sup> International Energy Agency, *supra* note 12; N.Y. ENERGY LAW § 3-101 (2008); CONN. GEN. STAT. § 16a-1 (2008).

<sup>21</sup> MASS. GEN. LAWS ch. 40J, § 4E (2008)

<sup>22</sup> R.I. GEN. LAWS § 42-98-2 (2008).

<sup>23</sup> N.Y. ENERGY LAW §3-101(1) (2008).

<sup>24</sup> N.J. STAT. ANN. § 26:2C-45 (2008).

fuels...”<sup>25</sup> Each state declares that the use of renewable energy resources is essential to their energy future.

Connecticut also declares that the use of renewable energy resources is essential to its energy future. It is the policy of Connecticut to “... (3) develop and utilize renewable energy resources, such as solar and wind energy, to the maximum practicable extent...;”<sup>26</sup> In addition, it is “declared that a shortage of energy supplies and resources exists in the state ... there is a necessity to implement the federal mandatory allocation order and other federal directives and federal statutes...”<sup>27</sup> For example, P.A. 08-168, “An Act Concerning Energy Scarcity and Security, Renewable and Clean Energy and a State Solar Strategy” calls for a study of how other states promote and increase the use and supply of renewable energy and clean energy. Also, the Connecticut Energy Advisory Board’s “Draft Report on Various Energy Issues for Connecticut” discusses Project 150<sup>28</sup> proposals to be reviewed and approved by the DPUC, then to obtain appropriate siting approval through the Council.<sup>29</sup> Therefore, the Council, in conjunction with other jurisdictional agencies, has a responsibility to ensure the state meets its renewable energy goals.

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<sup>25</sup> N.H. RSA 362-A:1 (2008).

<sup>26</sup> CONN. GEN. STAT. § 16a-35k (2008).

<sup>27</sup> CONN. GEN. STAT. § 16a-1 (2008).

<sup>28</sup> CONN. GEN. STAT. § 16-244c(j)(2) (2008)(statutory requirement that Connecticut utilities enter into long term contracts for 150 megawatts of instate renewable power).

<sup>29</sup> La Capra Associates, “*A Report on Various Energy Issues for Connecticut: Phase I,*” May 30, 2008 at 29-30.