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February 4, 2021

VIA ELECTRONIC AND U.S. MAIL

Katie Dykes  
Commissioner  
Connecticut Department of Energy and  
Environmental Protection  
79 Elm Street  
Hartford, CT 06106-5127

Re: Jefferson Solar LLC Petition for Declaratory Ruling regarding the 2020 Shared  
Clean Energy Facility Request for Proposals

Dear Commissioner Dykes:

Enclosed for filing with the Department of Energy and Environmental Protection  
(the "Department") is FuelCell Energy, Inc.'s Objection to Jefferson Solar's Petition for  
Declaratory Ruling that was filed with the Department on February 1, 2021.

Respectfully submitted,



Bruce L. McDermott

Enclosure

cc: Dean Applefield, Department of Energy and Environmental Protection  
Thomas Melone, Allco Renewable Energy Limited  
Daniel R. Canavan, Avangrid Service Company

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STATE OF CONNECTICUT  
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION

In Re: The 2020 Shared Clean Energy	:	
	:	February 4, 2021
Facility Request for Proposals	:	

OBJECTION OF FUELCELL ENERGY LLC TO  
PETITION FOR DECLARATORY RULING

FuelCell Energy, Inc. (“FCE”) hereby submits this objection to the Department of Energy and Environmental Protection (“DEEP”) in response to the February 1, 2021 Petition for a Declaratory Ruling (“Petition”) submitted by Jefferson Solar LLC (“Jefferson”). Over the past year, Jefferson has made a plethora of unsuccessful filings at the Public Utilities Regulatory Authority (“PURA”) and in Connecticut Superior Court in an attempt to disqualify FCE’s bid for a 2.8MW Shared Community Energy Facility (“SCEF”) Project in the City of Derby (the “City” or “Derby”). As with the numerous PURA filings and the Superior Court action, Jefferson’s Petition is without merit and should be denied pursuant to Conn. Gen. Stat. Section 4-176.

I. Relevant Facts

On April 30, 2020, the Connecticut Light and Power Company d/b/a Eversource Energy (“Eversource”) and The United Illuminating Company (“UI”) (collectively, the “EDCs”), issued a joint request for proposals (the “RFP”) seeking bids for renewable energy projects across Connecticut in conjunction with the SCEF Program.<sup>1</sup> See RFP,

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<sup>1</sup> The RFP is Exhibit 1 to the Petition.

§§ 1.1-1.2; 1.4; Public Act 18-50 and General Statutes § 16-244z(a)(6). The SCEF Program is intended to incentivize the creation of new renewable energy projects throughout the state.

Successful bidders under the RFP are awarded long-term contracts with either EDC for the purchase of electricity and associated renewable energy credits generated by the successful bidder's SCEF facility. See RFP, § 1.4. Of particular relevance to the Jefferson Petition, the RFP required bidders to demonstrate proof of "site control"—that is, proof that the bidder has control of the project site where its proposed SCEF facility is located, or has an unconditional right, provided by the owner of the project site, to acquire such control. See RFP, §§ 2.4.1; 4.4. According to the terms of the RFP, an unconditional option to lease agreement is sufficient to satisfy the site control requirement. See RFP, § 2.4.1.

The RFP expressly conferred broad discretion and decision-making authority on the EDCs concerning the evaluation and selection of bids submitted in response to the RFP. See RFP, page 1 ("EVERSOURCE AND UI RESERVE THE RIGHT TO REJECT ANY OR ALL OFFERS OR PROPOSALS"). Furthermore, the RFP stated that UI and Eversource "make no commitment to any [b]idder that it will accept any [b]id(s)" and that the RFP does not constitute "a binding offer to contract." See RFP, § 1.8.

SCEF1 Fuel Cell, LLC ("SCEF1 FC"), a subsidiary of FCE submitted its bid in response to the RFP for the first year of the SCEF Program on August 11, 2020 (the "SCEF1 FC Bid"). The SCEF1 FC Bid was for a 2.8 megawatt fuel cell facility on land owned by the City located at 49 Coon Hollow Road in Derby (the "Property"), within UI's service territory. Jefferson also submitted a bid in response to the RFP. UI selected the

SCEF1 FC Bid as a winning bid on September 28, 2020, and the bid received final approval by PURA on January 22, 2021. See Exhibit 1.

Following the rejection of its own bid, Jefferson has made numerous filings at PURA in an effort to invalidate the winning SCEF1 FC Bid. See, PURA Docket No. 19-07-01, “Motion of Jefferson Solar LLC for an Order to Show Cause Why the Bid of FuelCell Energy Inc. for a 2.8MW Project in Derby Should Not Be Disqualified,” dated October 8, 2020 (“Order to Show Cause Motion”)(denied); “Motion of Jefferson Solar LLC for a Ruling Disqualifying the Bid of FuelCell Energy Inc. for a 2.8 MW SCEF Project in Derby,” dated October 12, 2020 (“Disqualifying Motion”)(denied); and “Objection of Jefferson Solar LLC to United Illuminating’s Compliance Filing and Motion to Approve,” dated November 6, 2020. The Motions and Objection were not successful.

On November 2, 2020, Jefferson initiated a lawsuit against FCE and SCEF1 FC in the Superior Court for the Judicial District of New Haven. In the first count of the complaint, Jefferson seeks a declaratory ruling that the Option does not provide SCEF1 FC with site control of the Property. In the second count of the complaint, Jefferson alleges that FCE and SCEF1 FC violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a, *et seq.* (“CUTPA”) by “intentionally and knowingly submit[ting] an inaccurate bid certification in order to gain [an] advantage over other bidders including over [Jefferson].” The lawsuit is on-going.

Interestingly, soon after filing the Superior Court action, Jefferson clearly indicated that it no longer wished administrative agencies to review the award of a SCEF project to FCE. Jefferson asked PURA to “stay the award to FCE and maintain the status quo until the Superior Court rules on the dispute between Jefferson and FCE.” See “Reply of

Jefferson Solar LLC to Fuel Cell Energy Inc.'s Response re United Illuminating's Compliance Filing and Motion to Approve (Motion 46)" (Exhibit 2). Now, rather than wait for the judicial decision it once had hoped to rely on, Jefferson has decided to switch forums and seek that which has eluded it for so long: a favorable ruling.

In addition to the various actions set forth above in connection with the SCEF program, DEEP should also note that Jefferson's counsel has a history of meritless challenges that disrupts Connecticut's energy procurement process. Several times Mr. Melone has been a disappointed and failed bidder and has implemented scorched earth tactics, thankfully to no avail. *Allco Finance Ltd. v. Klee*, 2014 WL 7004024 (D. Conn. 2014) (Arterton, J.) (granting former Commissioner Klee's motion to dismiss); *Allco Finance Ltd. v. Klee*, 805 F.3d 89 (2015) (Appeals Court affirms the lower court's decision against failed bidder Allco); *Allco Finance Limited v. Klee*, 2016 WL 4414774 11 (D. Conn. 2016) (Haight, J.) (granting defendant's motion to dismiss against failed bidder Allco). Similarly, Mr. Melone has a history of wasting PURA's administrative resources after his failures in other bid processes of the state. See Docket No. 19-08-17, *Petition of Allco Renewable Energy Limited and Vineyard Sky LLC for Declaratory Ruling Regarding the Low and Zero Emissions Renewable Energy Credit Program* (November 6, 2019) (PURA decision involving Allco Renewable Energy Limited filing claims against FCE to secure bids through a different state-run RFP selection process); Docket No. 11-12-06, *Joint Petition by The Connecticut Light and Power Company and The United Illuminating Company for Approval of the Solicitation Plan for the Low and Zero Emissions Renewable Energy Credit Program* (December 20, 2017), (PURA decision in which PURA denied Allco's motion requesting that PURA vacate its December 15, 2016 ruling on a previous

motion because of disappointed bidder status). Creating additional unnecessary administrative burden at PURA and breaking from traditional norms, Jefferson has also replied with separate response filings to several of FCE's responses to Jefferson's filings—treating the PURA docket system as if it were an online messaging board with which to go back and forth. See, PURA Docket No. 19-07-01, "Reply Of Jefferson Solar LLC And Request For A Stay" dated October 22, 2020; "Reply Of Jefferson Solar LLC To Fuel Cell Energy Inc's [sic.] Response Re United Illuminating's Compliance Filing And Motion To Approve (Motion 46)" dated November 16, 2020; "Jefferson Solar LLC'S Status Report Regarding Superior Court Determination Of Fuel Cell Energy Inc.'s Rights (Motion 46)" dated December 22, 2020. DEEP should note Mr. Melone's wasteful and delaying practices going forward and withhold his admission into any future proceedings given his record of participation and demonstrated pattern of disorderly conduct.

## II. DEEP Should Follow PURA's Decision

The rationale used by PURA in ruling on Jefferson's numerous filings at PURA trying to invalidate the winning SCEF1 FC Bid is applicable here. Specifically, in ruling on the Order to Show Cause Motion and the Disqualifying Motion, PURA determined the motions involve a disagreement between two bidders over the application of the SCEF program rules to a specific bid submitted to UI. PURA noted that it "will not generally inject itself into ... the day-to-day management of the solicitations nor will PURA serve as an appellate panel for bidders who feel aggrieved." Citing Docket No. 19-07-01, Ruling on Motion Nos. 30, 31, 32, 33, 34, 36 and 38, dated November 16, 2020 (Revised Ruling), p. 3. PURA additionally noted,

Here, UI and [DEEP] reviewed the SCEF Year 1 bids and determined that FuelCell's bid satisfied the procurement requirements. These two entities have experience and expertise in the evaluation and procurement of energy projects. Therefore, absent evidence of a 'programmatic deficiency that . . . jeopardizes the ability of the Year 1 SCEF program to meet the overarching policy objectives of the program,' the Authority will not second-guess UI's or DEEP's determinations on particular bids.

January 22, 2021 Letter Ruling regarding Motions 39 and 41.

PURA's letter is exactly correct: DEEP and UI have the experience and expertise to evaluate the bids submitted in response to the RFP, including whether the SCEF1 FC bid demonstrated the unconditional right required by the RFP for site control. Nothing in the Petition suggests that DEEP or UI erred in reviewing the SCEF1 FC bid, and the Petition must therefore be denied.

### III. Jefferson is a Disappointed or Unsuccessful Bidder

DEEP should not consider the Jefferson Petition because Jefferson is a disappointed or unsuccessful bidder. It is well-established in Connecticut that a disappointed or unsuccessful bidder lacks standing to bring an action related to the outcome of a competitive bidding process. *Ardmare Const. Co. v. Freedman*, 191 Conn. 497 (1983). Under the limited exception to this general rule, a disappointed or unsuccessful bidder has standing only where there is fraud, favoritism, or corruption by the bidding officials, or where the object and integrity of the bidding process have been compromised. *Spiniello Construction Company v. Town of Manchester*, 189 Conn. 539 (1983). Here, Jefferson has not alleged, and cannot allege, any facts to fall within this limited exception. Consequently, this Petition must be denied.

In *Ardmare Const. Co. v. Freedman*, 191 Conn. 497, 502 (1983), the Connecticut Supreme Court set forth the principle that a disappointed bidder like Jefferson generally

“has no legal or equitable right in the contract” and “has no right to judicial intervention.” Although the court recognized a narrow exception providing for disappointed bidder standing where fraud, favoritism, or corruption seriously jeopardize the integrity of the bidding process, the court reaffirmed that in most instances “an unsuccessful bidder has no standing to challenge the award of a public contract.” *Id.* at 501 (internal quotation marks omitted). Consequently, courts typically dismiss actions brought by disappointed bidders who fail to allege that the successful bidder benefitted from secret information or received special treatment, or that the decision-maker acted in bad faith or evaluated bids and applied the relevant criteria in an inconsistent or discriminatory manner. *See, e.g., AIS Corp. v. Dept. of Administrative Services*, 93 Conn. App. 327 (2004), *cert. denied*, 277 Conn. 927 (2006); *St. John v. State*, 9 Conn. App. 514 (1987); *Kaestle Boos Associates, Inc. v. City of New Britain*, 2016 WL 6499066, at \*4 (Conn. Super. Ct. 2016); *Hamilton-Boxer, Inc. v. Frankel*, 1994 WL 50952 (Conn. Super. Ct. 1994).

Here, Jefferson’s request should be denied because Jefferson is a disappointed bidder who has failed to allege any fraud, favoritism, or corruption in the bidding process, or that the object and integrity of the bidding process have been compromised.<sup>2</sup> None of the allegations in the Jefferson suggest that UI selected the SCEF1 FC Bid for any reason other than merit, or that FCE and SCEF1 FC received an advantage from UI or the City not provided to Jefferson and other bidders. Jefferson does not allege that Section 22 of the City Charter or Conn. Gen. Stat. § 7-163e were applied inconsistently or in a

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<sup>2</sup> Before PURA, Jefferson conceded that this lawsuit would be governed by the law regarding disappointed bidder standing. *See* PURA Docket No. 19-07-01, “Motion of Jefferson Solar LLC for a Ruling Disqualifying the Bid of Fuel Cell Energy Inc. for a 2.8 MW SCEF Project in Derby,” dated October 12, 2020 (Motion No. 041), pages 4-5 (“The applicable legal standards related to bidders are not relevant to Jefferson’s right to bring [the PURA] motion. As noted above however, they may be relevant to any appeal to superior court.”)



discriminatory manner. Jefferson does not allege FCE and SCEF1 FC were privy to secret communications or information. Jefferson does not allege that any officials connected to the SCEF Program acted in bad faith or intended to provide FCE and SCEF1 FC with an advantage in the bidding process. Jefferson does not allege how the City's interpretation of Section 22 of the City Charter or Conn. Gen. Stat. § 7-163e equates to fraud, favoritism, or corruption in favor of FCE and SCEF1 FC. See *Metropolitan Dist. v. Connecticut Resources Recovery Authority*, 2011 WL 4347031, at \*12 (Conn. Super. Ct. 2011) (“[c]ourts in Connecticut have recognized that an important element of proving fraud, favoritism or corruption, or actions that compromise the integrity of the bidding process is evidence that a chosen bidder has received an advantage not afforded to other bidders”); *Kaestle Boos Associates, Inc. v. City of New Britain*, 2016 WL 6499066, at \*4 (Conn. Super. Ct. 2016) (favoritism includes evidence that the successful bidder “was selected for reasons other than merit”).

Rather, Jefferson's principal contention is that Derby officials did not comply with Section 22 of the City Charter and Conn. Gen. Stat. § 7-163e before executing the Option, and that as a result both the Option and SCEF1 FC's bid are invalid. There are multiple fatal flaws with this argument:

First, Derby officials were not required to comply with Section 22 of the City Charter and Conn. Gen. Stat. § 7-163e before executing the Option. Not only is an “option” not expressly referenced in either provision, but the provisions only apply to conveyances of property rights, not contract rights. According to Section 22, “[a]ll grants and leases of real estate shall be awarded to the highest responsible bidder, and shall be founded on sealed bids based upon terms and conditions as may be determined by the Board of

Alderman/Alderwomen from time to time.” (emphasis added). Section 7-163e (a) of the General Statutes provides that “[t]he legislative body of a municipality ... shall conduct a public hearing on the sale, lease or transfer of real property owned by the municipality prior to final approval of such sale, lease or transfer.” (emphasis added). The Option at issue here is a contract pursuant to which FCE and SCEF1 FC have “the sole and exclusive right, privilege and option to lease [the Property] from the City, for good and valuable consideration and upon terms and conditions to be negotiated upon exercise of [the] Option.” The actual conveyance of property rights will occur through the execution of the lease at a later date, after PURA approves the SCEF1 FC Bid.<sup>3</sup> Thus, Derby officials acted reasonably and in good faith in not applying Section 22 and § 7-163e before agreeing to the Option. FCE and SCEF1 FC, in turn, acted reasonably and in good faith in relying on the City’s determination and on the representations made by the City.<sup>4</sup>

Second, even if Section 22 and § 7-163e apply to the Option, which FCE and SCEF1 FC dispute, there is no authority to indicate that the failure to comply with Section

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<sup>3</sup> This very fact was seemingly acknowledged by the Derby Board of Aldermen and Alderwomen at the public meeting held on June 9, 2020. According to an unidentified speaker at the meeting: “we will look at whether under Section 22 of the Charter, when we go out for the lease, whether or not we will have to put this out for public bid and then hold a public hearing. So we will have that laid out. What we do not know at this time [is] when the potential lessee will be coming back. I don’t know how long the Siting Council process will take.” Transcript of June 9, 2020 Public Meeting of the Derby Board of Aldermen and Alderwomen, pages 4-5 (attached as Exhibit 3).

<sup>4</sup> The reasonableness of City officials’ actions and Defendants’ reliance thereon is further underscored by the futility of putting the Option out to bid here. The Connecticut Supreme Court has recognized that “[t]he law does not require the performance of a futile act.” *Luttinger v. Rosen*, 164 Conn. 45, 46 (1972). The sole purpose of the Option was to provide SCEF1 FC with site control over the Property so that it could properly submit a bid in response to the RFP. It would have been futile for the City to invite the general public to bid on the Option because the Option was executed in the context of the SCEF Program and the RFP. Additionally, given that Jefferson’s proposed SCEF facility is located in North Branford, not Derby, any claim by Jefferson that it would have participated in a bidding process with respect to the Option is disingenuous.

22 and § 7-163e would render the Option or the SCEF1 FC Bid void or invalid. There is simply no language in either Section 22 or § 7-163e imposing such a penalty.

Third, at most, Jefferson's allegations suggest a mere mistake or misinterpretation regarding the applicability of Section 22 and § 7-163e. Connecticut courts have consistently held that attempting to comply with a statute in good faith—even if the statute is misinterpreted in the process—is not enough to confer standing on a disappointed bidder. Allegations concerning a mistake or misinterpretation of statutory requirements do not equate to favoritism, fraud, or corruption. See *Premier Roofing Company, Inc. v. Department of Public Works*, 1992 WL 83803, at \*1 (Conn. Super. Ct. 1992) (dismissing unsuccessful bidder's claims, including for declaratory relief, where, at most, the allegations suggested that the decision maker misinterpreted a statute); *RAC Construction Corp. v. State Dept. of Public Works*, 1999 WL 61708, at \*1-2 (Conn. Super. Ct. 1999) (holding that an unsuccessful bidder lacked standing to assert a claim for declaratory relief against both the successful bidder and the decision maker given that decision maker's interpretation of the statute at issue was reasonable). A mistake or misinterpretation is—at most—what Jefferson has alleged here. Hence, DEEP lacks subject matter jurisdiction for the same reasons as in *Premier Roofing* and *RAC Construction Corp.* Jefferson's claims must be dismissed in their entirety.

#### IV. The "Option to Lease" is Unconditional Site Control

The RFP states in Section 2.4.1 that the bidder must demonstrate that it has control of the generation site, or an unconditional right, granted by the property owner to acquire such control. The requirements of the RFP go on to state that, "In order to be considered

to have site control for generation, the Bidder must provide copies of executed documents between the Bidder and property owner showing one of the following: ... (b) that the Bidder has an unconditional option agreement to purchase or lease the site for such term.” RFP at 5. With its proposal, SCEF1FC produced a copy of the fully executed Option to Lease Agreement with the City of Derby, executed by the City’s Mayor, with respect to the site on which the proposed SCEF facility will be located. The Option to Lease Agreement clearly grants to SCEF1FC “the sole and exclusive right, privilege and option to lease from the City” the optioned premises on which the SCEF facility will be located. See Petition Exhibit 3 at 1. UI accepted the Option to Lease Agreement as evidence of FCE’s site control following further review of UI, DEEP and PURA the project was selected. Jefferson has presented nothing new to this agency to support an unravelling of the Year I SCEF Program.<sup>5</sup>

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<sup>5</sup> See *also*, September 18, 2020 PURA ruling on Motion No. 23 and October 9, 2020 PURA ruling on Motions 30, 31, 32, 33, 34, 36 and 38 in which PURA reaffirmed the acceptable forms of proof of Project Site Control. In doing so, PURA did not further restrict the ability of Eversource “to interpret the definition of either an ‘executed Bid Certification Form’ or the specific forms (e.g., Lease vs. Memorandum of Lease) of acceptable proof of Project Site Control. Indeed, some degree of ambiguity in how to practically apply the SCEF program requirements and PURA’s Orders will always, to some degree, exist. It is the purpose, and frankly the function, of the SCEF program solicitation administrator to interpret and apply the program requirements in a fair, consistent, transparent, and reasonable manner, following the applicable statutes and PURA Orders, to best achieve the State’s public policy goals.”

V. Conclusion

For the reasons set forth above, the Petition for a Declaratory Ruling by Jefferson should be denied.

Respectfully submitted,

FUELCELL ENERGY INC.

A handwritten signature in black ink, appearing to read "Bruce L. McDermott", is written over a light gray rectangular background.

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

Bruce L. McDermott, Esq.  
Murtha Cullina LLP  
265 Church Street  
New Haven, CT 06510  
Attorney for FuelCell Energy Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy hereof has been furnished on this date via electronic

mail to:

Thomas Melone  
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By: \_\_\_\_\_  
Bruce L. McDermott

# **EXHIBIT 1**



**STATE OF CONNECTICUT**  
**PUBLIC UTILITIES REGULATORY AUTHORITY**

January 22, 2021  
In reply, please refer to:  
Docket No. 19-07-01  
Motion No. 46

Eileen Sheehan  
UIL Holdings Corporation  
180 Marsh Hill Rd.  
Orange, CT 06477

Re: Docket No. 19-07-01 – Review of Statewide Shared Clean Energy Facility Program Requirements

Motion No. 46

Dear Ms. Sheehan:

The United Illuminating Company (UI or Company) filed a motion, dated November 5, 2020 (Motion No. 46), seeking the Public Utilities Regulatory Authority's (Authority) approval of UI's final Subscriber Organization Bid selections in accordance with the Authority's ruling on Motion No. 8, dated March 13, 2020 (Motion No. 8 Ruling) and the Shared Clean Energy Facility (SCEF) Program requirements.<sup>1</sup>

On November 6, 2020, Jefferson Solar LLC (Jefferson Solar) submitted an objection to Motion No. 46. On November 13, 2020, FuelCell Energy, Inc. submitted a response to Jefferson Solar's objection. Jefferson Solar filed a further objection on November 16, 2020, and additional comments on December 22, 2020.

UI is required to submit to the Authority for approval the Company's final Subscriber Organization Bid Selections, "public copies of the Company's selected SCEF Subscriber Organization Tariffs with banking information redacted, along with a public summary sheet." Motion No. 8. Ruling, p. 1. Under the SCEF Modified Program Requirements, the Authority reviews the bid selections and related materials to "ensure consistency with the [SCEF] Program" and to confirm the proposed tariffs are "consistent with the [SCEF] Program." Modified SCEF Program Requirements, p. 5, 7.

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<sup>1</sup> The Authority approved the Modified SCEF Program Requirements as Exhibit B to its Decision, dated December 18, 2019, in Docket No. 19-07-01.

**10 Franklin Square, New Britain, CT 06051**

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UI provided the requisite compliance filings in Motion No. 46. The Authority has reviewed the filings and finds that the bid selections and associated tariffs for UI's Year 1 allocation of 5 megawatts (MW) are consistent with the SCEF Program. Consequently, UI's Year 1 Subscriber Organization Bid selections and Tariff Terms Agreements as presented in Motion No. 46 are approved.

Sincerely,

PUBLIC UTILITIES REGULATORY AUTHORITY



Jeffrey R. Gaudiosi, Esq.  
Executive Secretary

cc: Service List

# **EXHIBIT 2**

**STATE OF CONNECTICUT  
PUBLIC UTILITIES REGULATORY AUTHORITY**

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REVIEW OF STATEWIDE SHARED CLEAN  
ENERGY FACILITY PROGRAM  
REQUIREMENTS

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DOCKET NO. 19-07-01

November 16, 2020

**REPLY OF JEFFERSON SOLAR LLC TO FUEL CELL ENERGY INC'S RESPONSE  
RE UNITED ILLUMINATING'S COMPLIANCE FILING AND MOTION TO  
APPROVE (MOTION 46)**

*"If the facts are against you, argue the law. If the law is against you, argue the facts.  
If the law and the facts are against you, pound the table and yell like hell."*

~ Carl Sandburg

*"When you have no basis for an argument, abuse the plaintiff."*

~ Cicero, Roman politician and lawyer.

FCE's argument is a mix of Sandburg and Cicero. Attorney McDermott's 12-page litany of *ad hominem* attacks merely clutters the discussion with prattle rather than precise pronouncement of the facts and the issues. Once all the mud-slinging is set aside, the simple fact remains that the purported "option to lease" provides no enforceable rights to FCE to the site of its proposed facility.<sup>1</sup> FCE's argument boils down to its view that so long as the site control documentation submitted with a bid states that the bidder has site control, then the inquiry stops. Thus, under such a view, an option to lease and site affidavit could be signed by Mickey Mouse or Donald Duck.

As far as the "price" in the option to lease, Attorney McDermott is simply gaslighting. He is asking everyone to ignore the language of the document. He wants you to believe that a document that says that FCE has the option to lease "upon terms and conditions *to be*

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<sup>1</sup> Attorney McDermott states at p. 6 that FCE used the same (presumably unenforceable) option to lease for projects that FCE submitted to Eversource.

*negotiated upon exercise of this Option,”* and that FCE “*shall pay annual rent to City in an amount to be negotiated by the parties,*” should be ignored because another sentence states: “The sum of such amount plus the amount of any agreement for payment in lieu of Property Taxes negotiated among the Parties *shall not exceed* fifty thousand dollars per year.” (emphasis added.) Maybe Attorney McDermott believes that “not to exceed” \$X really means “equals” \$X, but in the real world it does not. *See, e.g., Dilieto v. County Obstetrics & Gynecology Group, P.C.*, 316 Conn. 790, 807 (2015) (provision stated “rate not to exceed 10 percent per annum” but a rate of 8% was applied). *See also*, every sentencing statute that states a term of imprisonment would not exceed X. FCE’s argument is simply frivolous.<sup>2</sup>

But FCE’s argument raises yet another deficiency in the purported option to lease—there has been no resolution approving a payment in lieu of taxes and no agreement related to taxes either. Any such agreement would need to have a statutory basis for such an abatement and be properly adopted and recorded. None of that has been shown or done. So FCE’s reliance on “not to exceed” language that itself relies on yet another unauthorized and unenforceable notion is unavailing, and shows the house of cards on which FCE’s bid is built.

Tellingly, the latest FCE filing, like every other one, fails to argue the merits. While Attorney McDermott’s filing is more colorful than FCE’s other filings, all have the same Achilles’ heel—in the eyes of the law, the “option to lease” grants no rights to FCE—it is an illusion. Although Attorney McDermott is a talented magician, the option to lease is an illusion nonetheless. Attorney McDermott is entitled to his opinion, but not his own facts.

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<sup>2</sup> Any client of Attorney McDermott that has executed a fee agreement stating that the legal fee shall not exceed \$X would likely be quite surprised to know of Attorney McDermott’s view that “not to exceed” really means “equals”. FCE’s argument regarding revoking Jefferson’s participant status is equally frivolous and should be ignored or rejected out-of-hand.

The plain fact is that the City of Derby could not grant any rights to the site until the City satisfied the public procurement process of both section 22 of the Derby City charter and Conn. Gen. Stat. § 7-163e. The City did neither and has so stated. The lack of a fixed lease price just adds another reason why the option to lease grants no rights to FCE. FCE has no more control over that site than Jefferson does, because Jefferson (like any other person) could win the future bidding process to control that site if and when the City initiates the required public procurement process for the lease of the site.

The simple fact is that FCE's purported option to lease is nothing more than a better-dressed, yet still unenforceable "letter of intent," and the Authority has already correctly ruled that a letter of intent is not acceptable. The SCEF RFP clearly requires unconditional, legally enforceable rights to enable the facility to be built and to operate. The label placed on a site control document does not determine what rights it provides to the site. Rather the document must be tested under the law applicable to real property rights. Here, the end result is FCE has no enforceable real property rights to the site, and FCE's latest filing does not dispute that fact.

The Authority should stay the award to FCE and maintain the *status quo* until the Superior Court rules on the dispute between Jefferson and FCE. Such a stay will not cause any harm to FCE or the public because FCE can still proceed with its application to the Connecticut Siting Council. The delay in this proceeding will not cause any delay in the actual in-service date of either the FCE or Jefferson project so there will be no adverse impact on the Shared Clean Energy Facility program.

I hereby certify service of this filing upon all parties or intervenors in this proceeding.

Dated: November 16, 2020

Respectfully submitted,

/s/Thomas Melone

Thomas Melone

Juris No. 438879

Jefferson Solar LLC

c/o Allco Renewable Energy Limited

157 Church St., 19th floor

New Haven, CT 06510

Phone: (212) 681-1120

Email: [Thomas.Melone@AllcoUS.com](mailto:Thomas.Melone@AllcoUS.com)

# **EXHIBIT 3**

Public Meeting held on June 9, 2020  
The City of Derby, CT  
Board of Aldermen and Alderwomen  
Transcribed from an audio recording

CAPITOL COURT REPORTERS, INC.  
P.O. BOX 329  
BURLINGTON, VT 05402-0329  
(802) 863-6067  
EMAIL: [info@capitolcourtreporters.com](mailto:info@capitolcourtreporters.com)



1 UNIDENTIFIED MALE SPEAKER 1: 9.3,  
2 possible fuel cell on (inaudible) Road. To authorize  
3 the Mayor to enter into Definitive Option Agreement  
4 and Lease with respect to a potential act --  
5 statutory -- fuel-cell powered generation facility at  
6 a site known as the Old Dog Pound Facility on Coon  
7 Hollow Road. Enter in to negotiate relating to a  
8 long-term tax utilization agreement for the same.

9 Discussion and possible action.  
10 Motion?

11 UNIDENTIFIED MALE SPEAKER 2: So moved.

12 UNIDENTIFIED MALE SPEAKER 1: Second.

13 UNIDENTIFIED MALE SPEAKER 3: Second,

14 Rob.

15 UNIDENTIFIED MALE SPEAKER 1: Go into  
16 discussion. Drew wants to --

17 UNIDENTIFIED FEMALE SPEAKER 1: What is  
18 this? Barbara, what is it?

19 UNIDENTIFIED MALE SPEAKER 1: Drew, do  
20 you want to step into this?

21 UNIDENTIFIED SPEAKER DREW: Sure. Same  
22 thing like we had at 251 Roosevelt Drive or 241  
23 Roosevelt Drive. It's a much smaller version of that  
24 fuel cell energy. The same company doing that 14  
25 megawatt fuel cell want to do a 2 megawatt fuel cell

1 on municipally-owned land. So Carmen and I directed  
2 them to the Old Dog Pound. It's got an unused piece  
3 of municipal property.

4 They came out. They liked the site.  
5 They still have to go through the application process  
6 to the state to be granted the project, but  
7 preliminary numbers look like that between a lease  
8 and/or a pilot tax payment similar to what we have on  
9 Roosevelt Drive, it will be about \$50,000 a year that  
10 we would get for a 20-year program. So another one  
11 million that we can get from a one building to a cell  
12 as opposed to the five building to a cell that's  
13 going on Roosevelt Drive.

14 UNIDENTIFIED SPEAKER 1: Any questions?

15 MR. SAMPSON: Charlie Sampson, Mr.  
16 Mayor. A Definitive Option Agreement and Lease. So  
17 the lease would have to come back before the board,  
18 no? Before it's actually executed?

19 UNIDENTIFIED SPEAKER DREW: Correct.  
20 Correct. This is just basically to support, and they  
21 have the document, the actual lease document. And  
22 it's the same exact structure that we did last time.  
23 The only difference is we actually own this property.  
24 Last time it was on IBA's property. So it would be  
25 more of a benefit to us as the state being a property

1 owner.

2 UNIDENTIFIED MALE SPEAKER 4: This is  
3 only -- this is granting just an option to lease,  
4 which the potential lessee requires in order to  
5 advance its application, I believe, with the Siting  
6 Council. If they do not get the option, then they do  
7 not have the ability to file the application because  
8 they have to have a proposed location.

9 This would come back to you for  
10 purposes of (inaudible) the lease.

11 UNIDENTIFIED MALE SPEAKER 1: Any other  
12 questions? Not hearing them, the motion is second.  
13 All in favor?

14 (Group responded aye.)

15 UNIDENTIFIED MALE SPEAKER 1: Opposed?

16 UNIDENTIFIED FEMALE SPEAKER 1: Aye.

17 UNIDENTIFIED MALE SPEAKER 1: Really?  
18 50,000 a year. No? (Inaudible). Same? Okay. I  
19 think that passed; right?

20 UNIDENTIFIED FEMALE SPEAKER 2: Yeah, I  
21 got it.

22 UNIDENTIFIED MALE SPEAKER: Just on  
23 that point again, we will look at whether under  
24 Section 22 of the Charter, when we go out for the  
25 lease, whether or not we will have to put this out

1 for public bid and then hold a public hearing. So we  
2 will have that laid out. What we do not know at this  
3 time when the potential lessee will be coming back.  
4 I don't know how long the Siting Council process will  
5 take.

6 UNIDENTIFIED MALE SPEAKER 1: Good.

7 9.4. Permission agreeing, discussion, possible  
8 action.

9 (End of audio transcription)

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