STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

PETITION OF PLAINFIELD RENEWABLE ENERGY, LLC FOR A DECLARATORY RULING THAT NO CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED IS REQUIRED FOR THE CONSTRUCTION, MAINTENANCE, AND OPERATION OF A 37.5 MW WOOD BIOMASS GENERATING PROJECT, PLAINFIELD, CONNECTICUT	)	Petition No. 784 June 19, 2008

RESPONSE OF PLAINFIELD RENEWABLE ENERGY, LLC TO MOTION OF THE FRIENDS OF THE QUINEBAUG RIVER TO REOPEN HEARING TO TAKE FURTHER EVIDENCE AND REASSESS ORIGINAL FINDINGS

I. Introduction

Plainfield Renewable Energy, LLC ("PRE") appreciates the opportunity to provide its response in opposition to the Motion to Reopen Hearing to Take Further Evidence and Reassess Original Findings ("Motion") of The Friends of the Quinebaug River ("FOQR"), dated May 20, 2008. In its Motion, FOQR asks the Connecticut Siting Council ("Council") to reopen the "evidentiary hearing" in this proceeding, over eleven months after its ruling, in order "to allow for the introduction of new information and appropriately reconsidering the findings of the [Council]." Motion, p. 1. As explained in this response, FOQR's Motion is completely without merit and should be denied. The Council followed a process in reaching its decision in this case that far exceeded the statutory and regulatory due process requirements for petitions for declaratory ruling. Further, the Council's decision was based on a full and complete record that was developed during an eleven month long proceeding, through an extensive discovery and hearing process. FOQR's assertions are irrelevant, inaccurate and completely lacking in factual support and thus provide no basis for the Council to reopen this proceeding. Accordingly, for the

reasons set forth herein, PRE opposes FOQR's Motion and respectfully requests that it be denied with prejudice.

II. Background

On August 14, 2006, PRE submitted a petition to the Council for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need was required for the construction, maintenance and operation of a 37.5 MW wood biomass-fueled electric generation project (the "Project") (the "Petition"). The proposed site for the Project was a 27-acre parcel in Plainfield, Connecticut, with an intake/outfall structure (the "Pumphouse") located on property adjacent to the Quinebaug River in the neighboring Town of Canterbury, Connecticut. After full deliberation, which included a public hearing and a site inspection by the Council on June 7, 2007, the Council ruled that the Project would not have a substantial adverse environmental effect and, pursuant to Connecticut General Statutes § 16-50k, would not require a Certificate of Environmental Compatibility and Public Need.

FOQR bases its Motion on alleged procedural defects in the proceeding on the Petition. It questions "whether the record findings of fact issued by the Council are complete and accurate." Motion, p.1 ¶ 1. It alleges that there were "lapses in procedure" (Motion, p. 1 ¶ 2) and that a "pre-hearing agreement between the [Council] and [PRE] was not honored." Motion, p. 1 ¶ 3. Lastly, it questions "whether application changes were openly and fully addressed." Motion, p. 1 ¶ 4. FOQR fails, however, in its two page Motion, to provide any factual or legal support for its claims. FOQR and not PRE has the burden of proving why the evidentiary hearing should be reopened. Since FOQR has unquestionably failed in that regard, the Council should deny FOQR's motion with prejudice.

At the outset, PRE notes that FOQR includes additional claims and alleged facts in the cover letter that accompanies its Motion ("Cover Letter"). Although not included in its Motion, PRE has chosen, in the interests of completeness, to address those claims and to correct errors in fact set forth in the cover letter.

III. Argument

A. PRE was not required by statute or regulation to follow the procedures set forth in C.G.S. §§ 16-50k et seq., which are applicable to applications for a Certificate

Significantly, while FOQR alleges "lapses in procedure" occurred during the hearing process, it does not identify the alleged "lapses" or otherwise point to any statutes or regulations that set forth applicable procedures. Motion, p. 1 ¶ 2. In the absence of such information, PRE has assumed, for purposes of this memorandum, that FOQR is relying on the procedures set forth in Public Utilities Environmental Standards Act ("PUESA"), C.G.S. §§ 16-50g et seq. Under PUESA, no person may construct a facility that may have a substantial adverse environmental effect in the state without first obtaining a Certificate of Environmental Compatibility and Public Need (a "Certificate") from the Council. C.G.S. § 16-50k(a). PUESA sets forth certain procedures that apply when a person files an application seeking a Certificate from the Council, including specific notice and hearing requirements. *See* C.G.S. §§ 16-50*l* through 16-50p.

In 2005, the Connecticut General Assembly, in recognition of the need to facilitate development of additional generation in the state, amended PUESA to include a streamlined approval process for small generating facilities. *See* P.A. 05-01 (June Special Session), *An Act Concerning Energy Independence* (the "Energy Independence Act").[1] Specifically, C.G.S. § 16-50k(a) allows the Council to consider and determine the siting of small generation facilities

[1] See PRE's September 21, 2006 letter to the Council in which it provides citation and discussion of the statutory basis for the Council's consideration of the siting of this generating plant as a petition rather than through an application for a Certificate.

through a petition for declaratory ruling rather than a Certificate proceeding. C.G.S. § 16-50k(a) (providing, in relevant part, that "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 . . . grid-side distributed resources project or facility with a capacity of not more than 65 megawatts . . . ." (Emphasis added.)). The notice and public hearing requirements set forth in C.G.S. §§ 16-50*l* through 16-50p that apply to Certificate proceedings do not apply to petitions for declaratory ruling. C.G.S. §§ 16-50k et seq.; *see also Town of Fairfield v. Connecticut Siting Council*, 238 Conn. 361, 358-360, 679 A.2d 354 (Conn. 1996).

In accordance with the amended statutory scheme, in August of 2006, PRE filed a petition for a declaratory ruling from the Council that no Certificate was needed for the Project. It did not file an application for a Certificate. Therefore, the Council and PRE had no statutory or regulatory obligation to comply with the notice and hearing requirements applicable to Certificate proceedings. Nevertheless, the Council chose in its discretion to convene a hearing and request certain procedures, and PRE therefore fulfilled the procedural requirements set forth under PUESA and in the Council's November 1, 2006 memorandum in order to facilitate an open and transparent process. Contrary to FOQR's claim, there were no "lapses in procedure." Rather, through the joint efforts and cooperation of PRE and the Council, the notice and hearing procedures observed during the proceeding far exceeded the statutory and regulatory due process requirements for petitions for declaratory ruling.

At no time did FOQR participate, or indicate an interest in participating, in the Council's proceedings on the Petition. It raised no issues before the Council and did not seek to appeal the final decision. There were no lapses in procedure, and FOQR cannot now be heard in a re-opened proceeding to raise baseless issues for the first time.

B. C.G.S. § 4-181a, upon which FOQR relies as grounds for reopening, is not applicable.

Citing facts discussed in detail below, FOQR requests that the Council reopen the evidentiary hearing so that "new evidence" can be entered into the record. Motion, p.1 ¶ 1. As grounds for reopening, FOQR relies on subsections (a), (b) and (c) of C.G.S § 4-181a. Section 4-181a sets forth the procedures for reconsideration of "*contested cases.*" C.G.S. § 4-181a; *see also Town of Fairfield v. Connecticut Siting Council*, 238 Conn. 361, 369-72, 679 A.2d 354 (Conn. 1996); *Town of Fairfield v. Connecticut Siting Council*, 37 Conn.App. 653, 659, 656 A.2d 1067 (Conn.App.1995), *rev'd on other grounds*, 238 Conn. 361, 679 A.2d 354 (Conn. 1996). A "contested case" is defined under C.G.S. § 4-166(2) as "a proceeding, including but not restricted to rate-making, price fixing and licensing, in which legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for a hearing or in which a hearing is in fact held, *but does not include proceedings on a petition for a declaratory ruling* under section 4-176 . . . ." (Emphasis added). C.G.S. § 4-166(2). This matter involves a petition for a declaratory ruling, which is not a contested case. Thus, C.G.S. § 4-181a, upon which FOQR relies, is not applicable.

The Connecticut Supreme Court's decision in *Summit Hydropower Partnership v. Commissioner of Environmental Protection,* 226 Conn. 792, 629 A.2d 367 (Conn.1993), supports this interpretation. In *Summit*, the Supreme Court interpreted C.G.S. § 4-166(2) as "manifesting a legislative intention to limit contested case status to proceedings in which an agency is required by statute to provide an opportunity for a hearing to determine a party's legal rights or privileges." 226 Conn. at 811. As set forth above, the Council had no statutory

obligation to hold a public hearing on PRE's Petition. Its decision to hold a public hearing was discretionary. Thus, C.G.S. § 4-181a does not apply.

Moreover, even if this were a contested case, FOQR fails to meet the threshold requirements set forth in C.G.S. § 4-181a for reconsideration. FOQR claims that the hearing may be reopened and new evidence entered into the record under C.G.S. § 4-181a(b).[2] Motion, p. 1 ¶ 1. Section 4-181a(b) provides that "on a showing of changed conditions, the agency may reverse or modify a final decision, at any time, at the request of any person or on the agency's own motion." FOQR has made no showing of changed conditions. Rather, it alleges procedural deficiencies and facts, which, for the reasons described below, are neither new nor relevant and, in some cases, just plain wrong.

Next, FOQR relies on C.G.S. § 4-181a(a) as grounds for reopening due to alleged "lapses in procedure." Motion, p.1 ¶ 2. Section 4-181a(a) provides that "a party in a contested case may, within fifteen days after the personal delivery or mailing of the final decision, file with the agency a petition for reconsideration . . . ." As noted previously, a petition for a declaratory ruling does not fall within the definition of "contested case." Furthermore, FOQR was not a "party"[3] to the proceeding and it did not file its motion until May 20, 2008, well beyond fifteen days from the Council's ruling on June 7, 2007.

Lastly, FOQR claims that the "pre-hearing agreement"[4] between the Council and PRE

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[2] The Motion cites "CGS 4-181a(B)." Since C.G.S. § 4-181a does not contain a subsection "(B)," PRE assumes that FOQR intended to cite to C.G.S. § 4-181a(b).

[3] A "party" is defined by statute as "each person (A) whose legal rights, duties or privileges are required by statute to be determined by an agency proceeding and who is named or admitted as a party, (B) who is required by law to be a party in an agency proceeding or (C) who is granted party status as a party under subsection (a) of section 4-177a." C.G.S. § 4-166(8).

[4] PRE understands the "pre-hearing agreement" to be the Memorandum from S. Derek Phelps, Executive Director of the Council, to all Parties and Intervenors regarding the Petition, dated November 1, 2006, in which the Council made certain requests related to the conduct and format of the November 16, 2006 public hearing on the Petition.

was not honored and that therefore the hearing should be reopened under C.G.S. § 4-181a(c).[5] Motion, p. 1 ¶ 3. Section 4-181a(c) permits an agency to modify a final decision "to correct any *clerical error*." (Emphasis added). Although a clerical error is not defined by statute, Connecticut courts are clear that "clerical errors are of a character different from errors of substance, of judgment, or of law." *National CSS, Inc. v. City of Stamford*, 195 Conn. 587, 596, 489 A.2d 1034 (Conn. 1985). Rather, "a clerical error is a mistake or omission in a judgment which is not the result of the judicial function. Such a claimed error does not challenge [a body's] ability to reach the conclusion that it did reach, but involves the failure to preserve or correctly represent in the record the actual decision of the [body]." *Bottass v. Bottass*, 40 Conn.App. 733, 739, 632 A.2d 129 (Conn.App. 1996). FOQR has not alleged any "clerical error," as required under C.G.S. § 4-181a(c). It stretches the imagination to construe the alleged failure of PRE to fulfill requests of the Council regarding the conduct and format of the public hearing as a clerical error.

Notwithstanding the foregoing, PRE fulfilled all requests made by the Council in its November 1, 2006 memorandum (referred to by FOQR as the "pre-hearing agreement") regarding the conduct and format of the November 16, 2006 public hearing. The Council's Findings of Fact document that proper notices were provided in connection with the Petition. Findings of Fact, ¶¶ 5-8. Moreover, the Council's decision to hold a public hearing at all was discretionary. As previously discussed, there are no statutory or regulatory requirements to have a public hearing on a petition for a declaratory ruling. When the Council opted to hold a public hearing, PRE had no obligation to comply with the "pre-hearing agreement." PRE did so –

[5] In paragraph 4 of its Motion, FOQR cites "CGS § 4-181b." There is no § 4-181b in the Connecticut General Statutes.

readily – in order to assist the Council in facilitating an open and orderly proceeding. FOQR's claim that PRE did not honor the "pre-hearing agreement" is therefore without merit.

C. The Town of Canterbury and the general public had notice of the change in location of the Pumphouse to the Man-Burch Property in November 2006.

Turning to FOQR's specific claims, FOQR first asserts that no notice of the change in location of the Pumphouse site was provided to the Town of Canterbury and that the Town was unaware of such change until March 2008. Cover Letter, ¶¶ 3-4. This claim has no merit.[6]

As the Council is aware, PRE originally proposed that the Pumphouse be located in Canterbury on property adjacent to the Quinebaug River and owned by Quinebaug Valley Regional Resources, LLC (the "Quinebaug Valley Property"), upstream of what is commonly known as the Yaworski Landfill. In early November 2006, PRE changed the location of the Pumphouse to property located off of Packer Road and owned by Man-Burch, LLC (the "Man-Burch Property").

Prior to the November 16, 2006 public hearing on the Project, PRE notified the First Selectman of the Town of Canterbury, Neil A. Dupont, that the location of the Pumphouse had been moved from the Quinebaug Valley Property to the Man-Burch Property. Exhibit A: Affidavit of Neil A. Dupont ¶ 6. Representatives of the Town of Canterbury[7] were also provided with notice of the November 16th public hearing, at which the change in location of the Pumphouse site from the Quinebaug Valley Property to the Man-Burch Property was presented to the Council. Exhibit A ¶ 7. On December 7, 2006, representatives of PRE met personally

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[6] Many of the claims FOQR raises appear to be made on behalf of the Town of Canterbury. Notably, the Town itself has raised no issues or concerns with respect to the Project.

[7] The following Canterbury officials received a copy of the Petition and notice of the hearing: Neil Dupont, First Selectman; Steven Sadlowski, Town Planner/Zoning Enforcement Officer/Inland Wetlands; David Norrell, Chair of the Planning and Zoning Commission; Mr. John A. Tetreault, Chair of the Canterbury Inland Wetlands &

with the First Selectman and discussed, among other things, the location of the Pumphouse on the Man-Burch Property and road and drainage improvements that would be constructed for the benefit of the Town of Canterbury in connection with the Pumphouse. Exhibit A ¶ 8. PRE held an additional meeting on January 17, 2007 with representatives of the Town of Canterbury, including the First Selectman, the Town Attorney, Richard Cody, and the Town Public Works Director, Al Botello. Exhibit A ¶ 9. At that meeting, PRE and the Town representatives discussed the location and installation of the waterline and the reconstruction of Packer Road. Exhibit A ¶ 9. The First Selectman, Public Works Director and Town Attorney were copied on follow up correspondence between the Town's consulting engineer, Donald R. Aubrey, and Mark Zessin, an engineer at Anchor Engineering Services, Inc. working on the Project, regarding several technical issues related to the construction of the waterline in Packer Road, providing further evidence that the Town knew that the proposed Pumphouse was to be located on the Man-Burch Property. *See* Exhibit B, Letters dated February 2, 2007 and February 6, 2007 from Donald R. Aubrey to Mark Zessin. On January 22, 2007, PRE sent the Town a copy of a water diversion permit application submitted by PRE to the Connecticut Department of Environmental Protection. Exhibit A ¶ 10. The water diversion permit application included two maps that depicted the Pumphouse on the Man-Burch Property. Exhibit C: Water Diversion Permit Application Maps. As set forth above, the record clearly shows that the Town had notice, from early November 2006, that the location of the proposed Pumphouse site had been changed to the Man-Burch Property.

In a similar vein, FOQR wrongly claims, and without additional factual support, that "the modified Pumphouse location was not made generally known to the public." Motion, p. 2 ¶ 3.

Watercourse Commission; Donald E. Williams, Jr., State Senator, 29th District; and Jack Malone, State Representative, 47th Assembly District.

As noted previously, the change in location of the Pumphouse site from the Quinebaug Valley Property to the Man-Burch Property was presented to the Council at the public hearing held on November 16, 2007 in connection with the Project.[8] The public hearing was well-attended by community members, local government officials, and other interested parties. All those in attendance had an opportunity to express their opinions about the Project. Furthermore, all documents, maps, and exhibits concerning the PRE project have been freely and openly available to the public on the Council's website since the inception of the Petition. FOQR's claim that the location of the Pumphouse was not made known to the general public is unfounded.

D. The Man-Burch Property on which the Pumphouse will be located has never been a part of the Yaworski Landfill Site.

Without providing any support, FOQR next alleges that the Pumphouse site approved by the Council (the Man-Burch Property) was "until 1996," part of the same contaminated site on which the Yaworski Landfill and Lagoon are located (the "Landfill Site"). Cover Letter, ¶ 6a. That is not correct. The Man-Burch Property is not and has never been a part of the Landfill Site. As shown on the Canterbury Tax Assessor's Map, the Man-Burch Property is a separate parcel of land located south of the Landfill Site. Exhibit D: Assessor's Map. Deeds to the Man-Burch Property recorded in the Land Records of the Town of Canterbury confirm that the Man-Burch Property has been a discrete, separate parcel since as early as 1894. Exhibit E: Chain of Title to Man-Burch Property and Supporting Deeds.[9]

[8] PRE first informed the Council of the change in the location of the Pumphouse in its interrogatory responses filed with the Council (and posted on the Council's website) on November 3, 2006.

[9] For the convenience of the Council, the property description of the Man-Burch Property in each of the deeds set forth in Exhibit E has been denoted with brackets.

E. The Man-Burch Property has no history of environmental contamination.

FOQR further contends that the Man-Burch Property does not have a "certificate of remediation" and that construction of the Pumphouse on the Man-Burch Property could result in the release of toxic materials into the environment, including specifically, methyl ethyl ketone and trimethylbenzene. Cover Letter, ¶ 6b,c. The basis for this contention is unknown.[10] Again, FOQR fails to provide any evidence in support of its contention. As noted previously, the Man-Burch Property has never formed part of the Landfill Site and has no history of environmental contamination. Exhibit F: Environmental FirstSearch Report, dated May 6, 2008. The property is not regulated by the United States Environmental Protection Agency or the Connecticut Department of Environmental Protection. Exhibit F. There is no history of contamination and as a result, no "certificate of remediation" is required.[11] Since the property is not known to be contaminated, it is not clear and FOQR provides no information concerning how construction of the Pumphouse on the Man-Burch Property will result in the release of toxic materials. Given its extraordinary request of the Council, FOQR should, at the very least, provide the Council and PRE with factual support for its allegations.

F. FOQR's claim that the Pumphouse could impact a recently-constructed public boat launch is neither supported nor relevant.

FOQR next asserts that the Man-Burch Property is "much closer to a recently constructed public boat launch" and that "approved activities *could* impact the public's ability to engage in

[10] FOQR has cited neither a source for the concentrations of toxins referenced in its cover letter, nor the locations where such concentrations were detected. In addition, it has not explained how construction of the Pumphouse would result in the release of the referenced toxins.

[11] PRE and its environmental consultants do not know what a "certificate of remediation" is.

recreational activities" in the Quinebaug River. (Emphasis added). Motion, p. 2 ¶ 3. Consistent with its prior claims, FOQR provides no support for this assertion. It fails to identify what this uncertain, speculative impact is or explain how the proposed Pumphouse could interfere with the boat launch, which is *located approximately .9 miles downstream* of the Man-Burch Property.

G. FOQR's assertion that the Man-Burch Property is zoned RA and enrolled in the PA 490 property tax reduction program is not relevant.

Lastly, FOQR states that the Man-Burch Property is "zoned RA (and enrolled in the PA 490 property tax reduction program)."[12] Motion, p. 2 ¶ 4. In fact, the Man-Burch Property is zoned RD.[13] However, even if it were zoned RA and enrolled in the 490 property tax reduction program , FOQR fails to explain how these alleged facts are relevant. Nevertheless, the Council has exclusive jurisdiction over the location and type of facilities such as the Project, subject to the *limited* jurisdiction of municipal zoning commissions. C.G.S. §§16-50x(a) and (d).[14] If necessary, the Council is empowered to decide that local concerns, such as zoning regulations, must give way. C.G.S. § 16-50x(d); *see also Preston v. Connecticut Siting Council*, 20 Conn.App. 474, 485-86, 568 A.2d 799 (Conn.App. 1990). The 490 Program is an agricultural land and open space conservation scheme that provides owners enrolled in the program with certain property tax relief. C.G.S. §§ 12-107a et seq. If a property owner sells the property

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[12] Again, FOQR appears to be raising these issues on behalf of the Town of Canterbury. The Town itself has raised no issues or concerns related to zoning or property tax assessment with respect to the Project.

[13] The Secretary of the Town of Canterbury Land Office confirmed that the Man-Burch Property is zoned RD by telephone on June 18, 2008.

[14] Section 16-50x(d) provides in relevant part: "Any town, city or borough zoning commission . . . may regulate and restrict the proposed location of a facility . . . . Such local bodies may make all orders necessary to the exercise of such power to regulate and restrict . . . . Each such order shall be subject to the right of appeal within thirty days after the giving of such notice by any party aggrieved to the council, which shall have jurisdiction, in the course of any proceeding on an application for a certificate or otherwise, to affirm, modify or revoke such order or make any order in substitution thereof by a vote of six members of the council."

within the ten years following enrollment in the program, he or she is assessed a special conveyance tax. This simply is not relevant whatsoever to the Project or the Petition.

IV. Conclusion

In recognition of the need to create additional energy generating capacity within the state, the Connecticut General Assembly has adopted laws and policies to encourage projects such as PRE's. The Council's decision, made in accordance with law, was an important step in helping to achieve the goals of the General Assembly, while assuring a full and complete record and protection of the rights of all interested persons. In an effort to derail this Project, FOQR now attempts to identify alleged procedural errors in the Petition proceeding without clearly articulating its claims or providing any factual or legal basis to support them. FOQR's claims are without merit. FOQR has provided no reason, in fact or under law, for the Council to "re-open" the hearing in connection with the Petition. PRE therefore respectfully requests the Council to deny FOQR's motion with prejudice.

Respectfully submitted,

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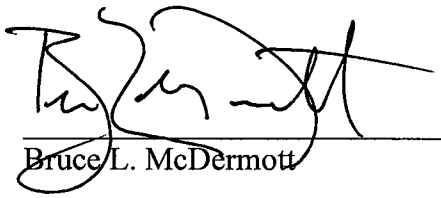
CERTIFICATION

This is to certify that on this 19th day of June, 2008, an original and twenty (20) copies of the foregoing were delivered by hand to The Connecticut Siting Council, 10 Franklin Square, New Britain, Connecticut 06051, one copy was served on all other known parties and intervenors by depositing the same in the United States mail, first class postage prepaid on this 19th day of June, 2008, and an electronic copy was provided to the Connecticut Siting Council and all other known parties and intervenors.



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