STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

Petition of BNE Energy Inc. for a Declaratory Ruling for the Location, Construction and Operation of a 3.2 MW Wind Renewable Generating Project on New Haven Road in Prospect, Connecticut ("Wind Prospect")	**Petition 980**
	March 30, 2011

PETITIONER'S OBJECTION TO FAIRWINDCT, INC.'S MOTION FOR MISTRIAL OR FOR CONTINUANCE, RECONSIDERATION AND TO ALTER SCHEDULE AND TO LAMONTAGNE'S MOTION FOR CLARIFICATION

The petitioner, BNE Energy Inc. ("BNE"), submits this objection to FairwindCT, Inc.'s ("Fairwind") motion for a mistrial, or in the alternative for continuance, reconsideration and to alter schedule, dated March 29, 2011, and to John and Cheryl LaMontagne's (the "Lamontagnes") motion for clarification, dated March 28, 2011.

I. FAIRWIND'S MOTION

As a preliminary matter, BNE notes that despite Fairwind's attempt to consolidate all three pending BNE petitions, Petitions Nos. 980, 983 and 984, the petitions have not actually been consolidated. Therefore, BNE will be responding to Fairwind's motion in three separate filings, one in each petition, as is appropriate.

A. This petition was filed on November 17, 2010, more than four months ago. Since then, a field review and numerous public hearings and evidentiary hearings have taken place, and parties and intervenors have submitted countless filings and issued and responded to hundreds of interrogatories. Fairwind now moves for a mistrial based on, at its worst, a 2-3 minute conversation regarding procedural matters that occurred on March 18, 2011.

A motion for a mistrial is entirely inappropriate given that this is an administrative proceeding – not a trial. Conveniently, Fairwind does not bother to address this issue, or to cite case law allowing a mistrial in an administrative proceeding, likely because none exists.

If a mistrial was even an option in this proceeding, which it clearly is not, any potential conflict created by the March 18, 2011 conversation between then-Chairman Daniel E. Caruso and Jeffrey Tinley, Esq. is entirely erased by virtue of Chairman Caruso recusing himself from this proceeding and his subsequent resignation from his position as Chair. Fairwind's allegation that the Chairman's resignation "points to the conclusion that there are larger problems than just an ex parte communication in this proceeding" is baseless at best, and conspiracy theorist at worst.

Furthermore, the point of the prohibition against ex parte communications is to protect parties and intervenors from off-the-record discussions between another party or intervenor and a member of the Council. In this instance, the conversation took place between Chairman Caruso and Mr. Tinley, who represents Save Prospect Corp., which has been grouped together with Fairwind. The only possible party or intervenor aggrieved as a result of the conversation is BNE, the petitioner. BNE takes no issue with a 2-3 minute conversation (at its worst) regarding procedural matters. In accordance with appropriate procedure, the conversation has been stated on the record, and the Chairman has recused himself from this proceeding and even resigned his position entirely. BNE sees no need for further disruption of this proceeding due to Fairwind's hysteria at this late juncture. As any possible conflict resulting from Chairman Caruso's 2-3 minute conversation with Mr. Tinley regarding procedural matters has now been cured by the Chairman's recusal and resignation, Fairwind's motion for a mistrial should be denied.

B. Perhaps recognizing that a mistrial is entirely inappropriate in this administrative hearing proceeding, Fairwind alternatively argues that the Council should continue the proceeding and reconsider all rulings in which Chairman Caruso participated. Fairwind spins yet another conspiracy theory – that the Chairman's "bias" "influenced other members of the panel" and the Council "may have deferred to him" and "voted with him." These allegations are supported by zero evidence and represent yet another attempt by Fairwind to muddy the waters to create some sort of basis for its inevitable appeal. Fairwind even goes so far as to allege that the Chairman "explicitly misled" members of the Council, giving the example of the Chairman's statement that the Council has 180 days from the time in which the petition is filed to render a decision, and that the Council "can't change that." Fairwind then triumphantly declares that the Administrative Procedure Act provides: "If an agency does not issue a declaratory ruling within one hundred eighty days after the filing of a petition therefor, **or within such longer period as may be agreed by the parties**, the agency shall be deemed to have decided not to issue such ruling. Conn. Gen. Stat. § 4-176(i)(emphasis added by Fairwind). Fairwind fails to elucidate exactly how the Chairman's statements were incorrect or misleading. The Council does, in fact, have 180 days in which to render a decision. The Council cannot change that – only the parties can. For Fairwind to allege that the Chairman "explicitly misled" the Council by correctly stating the law is shameful.

Furthermore, Fairwind seeks a reconsideration of each and every ruling made by the Council during the time that Chairman Caruso was acting as Chairman. Even taking Mr. Tinley's allegations in the light most favorable to Save Prospect and to Fairwind, the conversation between Mr. Tinley and the Chairman occurred on March 18, 2011. The

Council has not made a single ruling in this proceeding from March 18, 2011 to the present. Therefore, even if rulings made by the Council could arguably seen to be "tainted" as a result of the alleged ex parte communication between Mr. Tinley and the Chairman, no such rulings even exist. Again, the Chairman has now recused himself from this proceeding and resigned, so any rulings that the Council makes at its next scheduled hearing, March 31, 2011, will similarly be free from any alleged stain due to the Chairman's participation.

Furthermore, even assuming Fairwind's absurd argument that decisions prior to March 18, 2011 were somehow "tainted" by a yet to take place purported ex parte communication, BNE notes that virtually every single ruling that has occurred in this proceeding has been a unanimous decision, with the exception of a single "no" vote concerning BNE's motion for protective order. Therefore, Fairwind simply cannot make any plausible argument that votes that occurred prior to March 18, 2011 must be reconsidered since, even removing any vote lodged by the former Chairman would result in absolutely no change to any decision that has already been rendered.

C. Proceeding with its "kitchen sink" approach to set up issues for its inevitable appeal, Fairwind then argues that BNE should not be permitted to submit revised plans. As the Council is well aware, revising plans pursuant to Council, party, intervenor and abutter suggestions and recommendations is standard practice in proceedings before the Council. The first set of minor revisions to BNE's plans were made to accommodate requests of the Connecticut Water Company, an abutting neighbor to the proposed site and an intervenor in this proceeding. The second set of minor revisions to BNE's plans were made in response to neighbors' complaints regarding setbacks and involved re-locating one of the two proposed turbines 160 feet further away from nearby residents—a minor change in any estimation

when considering an almost 70 acre parcel of property. These changes prompted additional comments from Connecticut Water, which BNE addressed in additional plan revisions. Fairwind apparently seeks to put BNE in petitioner purgatory – it seeks to tear apart BNE's plans, but when BNE attempts to respond to concerns in a productive manner by modifying its plans (at its expense – including not only the revisions but the considerable cost of the revised measures, including siting turbines at less preferable locations in terms of wind speed), Fairwind shrieks prejudice.

Not only is BNE revising plans to accommodate abutters' concerns in accordance with standard Council practice, it is also consistent with procedure in judicial proceedings, in which parties may conform pleadings to the evidence presented.

Fairwind continues to resurrect its arguments regarding the protective order in place in this proceeding. This is now Fairwind's fourth attempt to modify or otherwise object to the protective order. This attempt should be denied by the Council for the same reasons that Fairwind's prior three objections have been rejected.

Fairwind also claims it has failed to receive electronic service from BNE. This is because Fairwind has not elected to receive electronic service. Fairwind's request for party status dated January 25, 2011 does not indicate what type of service Fairwind elected to receive. The service list in the Siting Council's "Prehearing Conference Results" memorandum dated February 4, 2011 indicates that Fairwind receives service via U.S. mail, not electronic mail (note that Fairwind was not yet approved as a party at this point in time). The Siting Council's order approving party status for Fairwind dated February 10, 2011 similarly includes a service list indicating that Fairwind receives service via U.S. mail. The

most recent service list issued by the Council indicates that Fairwind elected to receive service via U.S. Mail.

As explained in the Siting Council's "Information Guide to Party and Intervenor Status," which was provided to Fairwind by the Council, "Parties and intervenors may elect to receive documents by e-mail or by U.S. mail." (Emphasis in original). As counsel for BNE has previously informed counsel for Fairwind, if Fairwind would like to change its method of service to electronic service (in this or any petition), it must indicate as much to the Council and all parties of record. Fairwind has simply not done this. BNE has effectuated proper service to Fairwind in accordance with Fairwind's elected method of service – U.S. Mail. Therefore, Fairwind's meritless argument that somehow this entire proceeding should be subject to a "mistrial" or continued based on its own failure to change its service preference with the Council is just that—meritless.

D. Fairwind also seeks to regurgitate its now-familiar arguments regarding Epsilon. Again, Epsilon not a participant in this proceeding – it is simply a third party consultant retained by the Council in accordance with its statutory discretion. It is not a developer or proponent of BNE's proposed wind renewable generating project.

Fairwind's argument that Epsilon must be subjected to cross-examination regarding its work for the Council so that this evidence could then be produced as part of the record in this petition "is necessary for the Council's full and fair consideration of BNE's proposal" holds no water. Given that Epsilon is the Council's own consultant, the Council is already aware of "the work performed by Epsilon for the Council" and "any conclusions reached and recommendations made by Epsilon." Fairwind is essentially attempting to force the Council to reveal its internal deliberations and decision-making.

Fairwind's allegation that the letter from the Department of Environmental protection constitutes an ex parte communication is flawed due to the simple fact that the Department of Environmental Protection is not a participant in this proceeding, and therefore cannot have an "ex parte" communication.

II. LAMONTAGNE MOTION

The LaMontagne's Motion for Clarification, dated March 28, 2011, grossly distorts the content of both Mr. Tinley's letter and Chairman Caruso's letter filed in this proceeding. Chairman Caruso is but a single member of a 9-member panel, and a former member at that. The Chairman does not speak for the Council, and the Council does not adopt comments of Chairman Caruso as speaking for the entire Council. The Council need not vacate the comments of Chairman Caruso nor request legal argument from the parties on such comments, as the Council never adopted such comments in the first instance. Again, the Chairman has now recused himself from this proceeding and has resigned his position altogether, which cures even the slightest possible hint of impropriety or prejudice.

III. CONCLUSION

What is clear from the above is that Fairwind, along with other parties and intervenors, are grasping at straws and creating as many issues as possible in a desperate attempt to stall or prevent this proceeding from reaching conclusion. What is equally clear is that any purported impropriety that may have arisen from (at worst) a purported 2-3 minute ex parte conversation concerning procedural issues that took place between a former member of the Council and an attorney representing a participant in this proceeding has been completely alleviated by the fact that the former Chair recused himself and subsequently resigned from the Council. These tactics should not be permitted.

WHEREFORE, BNE requests that the Council deny Fairwind's motion for mistrial or for continuance, reconsideration and to alter schedule and deny the LaMontagnes' motion for clarification.

Respectfully Submitted,

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Certification

This is to certify that a copy of the foregoing has been mailed this date to all parties and intervenors of record.

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