

**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 No. 980

March 7, 2011

OBJECTION TO AND MOTION TO MODIFY PROTECTIVE ORDER

FairwindCT, Inc. (“FairwindCT”), hereby objects to the Protective Order dated February 24, 2011, but not transmitted to the parties and intervenors until March 2, 2011, adopted by the Council governing the use of certain allegedly confidential and proprietary material provided to the Council by the petitioner, BNE Energy Inc. (“BNE”). FairwindCT objects to the unduly limited use of such material imposed by the Protective Order because: the Protective Order adopted by the Council: (1) goes even further than the proposed order requested by BNE, (2) applies to information that is subject to a confidentiality agreement that BNE has not provided to the Council or to any party or intervenor, (3) applies to information that is apparently available to the general public on the internet, and (4) applies to site-specific wind data collected by BNE. FairwindCT further objects to the procedure announced by the Council that will prevent parties and intervenors from cross examining any witness on the content of the allegedly confidential information. In light of these facts, in the alternative, FairwindCT moves the Council to modify its Protective Order in accordance with the attached proposed order.

In support of this Objection, FairwindCT states the following:

1. On February 16, 2011, BNE filed a Motion for Protective Order and Motion to File Under Seal. In that Motion, BNE indicated that it intended to file with the Council raw wind data collected by and belonging to BNE, GE’s setback rules

and the Mechanical Loads Assessment reportedly conducted by GE for BNE. BNE claimed that the setback rules and Mechanical Loads Assessment (collectively, the “GE Safety Information”) are proprietary and confidential pursuant to a confidentiality agreement between BNE and GE. (BNE’s Motion for Protective Order, Feb. 16, 2011, at 1-2.)

2. Accordingly, BNE sought permission to file the GE Safety Information and the BNE wind data under seal and requested that such material be submitted to the Council subject to a proposed protective order contemporaneously filed by BNE. (Id.)
3. BNE’s proposed protective order contained various provisions regarding the manner in which the GE Safety Information and the BNE raw wind data would be submitted to and disseminated by the Council. Specifically, BNE’s proposed order provided that the information be viewed only by Authorized Recipients who had signed non-disclosure agreements and that “[n]o copies shall be made of the Confidential Information unless expressly ordered by the Council.” (BNE’s Proposed Protective Order, Feb. 16, 2011, ¶ 4.) The proposed order required that if any material subject to the protective order were to be used in a filing to the Council, the material either would be submitted in a separate document marked confidential or would be referenced only by exhibit number in order to maintain the material’s confidentiality. (Id. ¶7.)
4. On February 23, 2011, FairwindCT filed a Response to BNE’s motion and proposed protective order, stating that “[a]lthough FairwindCT does not concede that the information BNE seeks to protect from disclosure is, in fact, confidential

and proprietary, FairwindCT does not object in principle to the entry of such an order, provided that certain conditions outlined in this response are met.”

(FairwindCT’s Response, Feb. 23, 2011, at 1.)

5. FairwindCT asked that any protective order entered contain reasonable conditions that would allow the parties to effectively use the GE Safety Information and the BNE wind data. The conditions included an order that the GE Safety Information and BNE wind data could be disclosed to parties’ experts who agree to the terms of the proposed protective order and an order that BNE make its witnesses available for cross-examination concerning the material requested at a later date in the evidentiary proceeding. (Id. ¶¶ 7, 9.)
6. FairwindCT further specified that the latter condition would permit all parties to have an opportunity to analyze the material requested and cross-examine BNE’s witnesses on the contents of the material requested. (Id. ¶ 9.)
7. At the February 24, 2011, evidentiary hearing, the Council granted BNE’s motion for protective order. The Protective Order that was transmitted to the parties and intervenors nearly a week later, however, does not resemble BNE’s proposed order, and does not contain any of the reasonable conditions requested by FairwindCT. Instead, the Protective Order now in place imposes restrictions on the review and use of the GE Safety Information and BNE wind data that make it impossible for the parties and intervenors opposing the petition to effectively use the information at all.
8. First, the Protective Order requires that any party or intervenor who is authorized to review the GE Safety Information and BNE wind data do so by traveling to the

Council's offices in New Britain during the Council's business hours. (Protective Order, Feb. 24, 2011, at ¶ 10.) Anyone who is authorized to review the material in that manner must first sign a non-disclosure agreement. The information may be reviewed but may not be copied. Parties reviewing the material may not even take notes. (Id.) These restrictions go far beyond the protective measures sought by BNE. In the case of the BNE wind data, which Council staff has stated is available on CD or DVD and would total more than 15,000 pages if printed out, those restrictions render the data useless.

9. The Protective Order also does not provide that the GE Safety Information and BNE wind data be made available to experts engaged by the parties and intervenors. That restriction deprives the parties and intervenors of the opportunity to meaningfully analyze and cross examine BNE's witnesses on the allegedly confidential and proprietary information. The GE Safety Information and BNE wind data only is of use to the parties if they are permitted to provide the raw data to their experts such that an independent study of BNE's data and the conclusions based thereon can be performed. That analysis is impossible under the Protective Order.
10. The Protective Order also provides that "[i]f the Protected Materials are used in any manner in any proceeding or hearing before the Council, such proceeding or hearing shall not be held before, nor any record of it made available to any person or entity not affiliated with the Council." (Id. ¶ 9.) Council staff has notified the undersigned that no portion of the hearing on BNE's petition shall be closed to the public. In order to cross examine BNE's witnesses on the GE Safety Information

and the BNE wind data, the parties and intervenors must submit written interrogatories under seal, which will be answered by BNE under seal. That position was re-stated by Vice Chair Colin Tait at the continued evidentiary hearing held on March 4, 2011. These restrictions deny FairwindCT any meaningful cross-examination whatsoever with respect to the materials subject to the Protective Order, in contravention of Conn Gen. Stat. § 4-178.

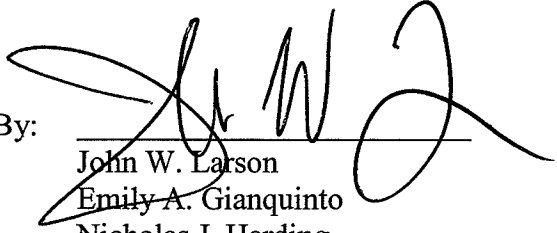
11. These restrictions are even more unreasonable considering that the GE setback information subject to the protective order – according to the description of such material by Council staff – is publicly available. As a result of the Protective Order, however, FairwindCT was prevented from cross examining BNE’s witnesses on that publicly available setback information and formula during the continued evidentiary hearing on March 4, 2011, and will continue to be prevented from doing so going forward.
12. Moreover, although BNE repeatedly claims that its “hands are tied” with respect to disclosure of the GE Safety Information, the wind data is owned by BNE. BNE may therefore disclose the wind data as it wishes. Because BNE bears the burden of establishing that the instant petition should be granted, BNE can and should be required to allow for reasonable use of that data in its attempt to obtain permission to site the proposed wind turbines. At an absolute minimum, the Council should require BNE to permit opposing parties to use and disseminate the raw wind data to their experts.
13. FairwindCT notes that in its pursuit of Wind Prospect, BNE has been awarded significant amounts of public funds. It used those public funds to put together its

petition and accompanying exhibits. It used those public funds to gather the raw wind data it now seeks to protect from public disclosure. It used those public funds to assist GE in conducting the Mechanical Loads Assessment. Given its acceptance of public funds, BNE should be required, at a minimum, to disclose the basic safety information and the raw wind data to the representatives of members of the public who oppose this petition, i.e., FairwindCT and Save Prospect Corp. Otherwise, BNE will succeed in using public money for a project without being required to cooperate with any attempt to determine if the proposal comports with basic safety standards as established by the manufacturer of the turbines that BNE seeks to site and without having its contention that Wind Prospect is a sound use of that public money.

14. In light of the above facts, FairwindCT objects to the Protective Order and moves the Council to modify its Order. Specifically, FairwindCT moves the Order be modified to require BNE to provide copies of the GE Safety Information and the BNE wind data to all parties and intervenors willing to sign a non-disclosure agreement, and that the parties and intervenors be permitted to make copies for review by their experts who sign a non-disclosure agreement. FairwindCT further moves the Order be modified to permit cross examination of BNE witnesses on the GE Safety Information and the BNE wind data, during which only individuals who have signed the non-disclosure agreement may be present.

WHEREFORE, FairwindCT objects to the Protective Order entered by the Council and, in the alternative, moves the Council to enter an order modifying the terms of the terms of the Protective Order in accordance with the attached draft order.

By: _____


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March __, 2011

PROPOSED ORDER

Whereas, the Council previously entered a Protective Order in this matter, dated February 24, 2011 and transmitted to the parties and intervenors on March 2, 2011;

Whereas, FairwindCT has objected to the Protective Order and moved the Council to modify the Protective Order;

Whereas, upon further review of the Protective Order, the Council has determined that its terms were more restrictive than is necessary to fulfill the Protective Order’s stated goal of preventing “the competitive positions of BNE and GE” from being “undermined”;

IT IS HEREBY ORDERED that the Protective Order is modified as follows:

1. BNE will immediately provide copies of the GE Safety Information and the BNE wind data to all parties and intervenors upon receipt of their executed non-disclosure agreements;
2. Parties and intervenors may provide copies of the GE Safety Information and BNE wind data to any experts who execute non-disclosure agreements;
3. Parties and intervenors shall be permitted to cross examine BNE’s witnesses on the GE Safety Information and BNE wind data during a portion of the evidentiary hearing that will be closed to the general public;

4. Parties and intervenors shall be permitted to cross examine BNE's witnesses about any information that is within the public domain, even if portions of that information is also claimed by BNE and/or GE to be confidential and proprietary;

SO ORDERED:

CONNECTICUT SITING COUNCIL

By: _____
Daniel F. Caruso, Chairman

Date: _____

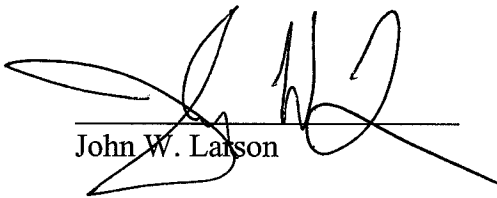
CERTIFICATION

I hereby certify that a copy of the foregoing document was delivered by first-class mail
and e-mail to the following service list on the 7th day of March, 2011:

Carrie L. Larson
Paul Corey
Jeffrey J. Tinley
Hon. Robert J. Chatfield
Thomas J. Donohue, Jr.
Eric Bibler
Andrew W. Lord
Cindy Gaudino

and sent via email to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King



John W. Larson