

**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 28, 2011

**MOTION FOR RECONSIDERATION OF PROTECTIVE ORDER
AS IT RELATES TO GE SETBACK RECOMMENDATIONS**

FairwindCT, Inc. (“FairwindCT”) hereby submits the within Motion for Reconsideration of the Council’s decision to overrule and deny FairwindCT’s Objection to and Motion to Modify Protective Order, dated March 7, 2011, as such Protective Order relates to certain information regarding recommended setbacks for the industrial wind turbines proposed by the Petitioner, BNE Energy, Inc. (“BNE”). FairwindCT moves for reconsideration on the basis of newly obtained facts related to the material filed under seal by BNE and Paragraph 7 of the Protective Order, which permits modification.

In support of this Motion, FairwindCT states the following:

1. On February 16, 2011, BNE filed a Motion for Protective Order and Motion to File Under Seal in which it indicated that it intended to file with the Council the recommended setback information, which it alleged was confidential and proprietary. (BNE’s Motion for Protective Order, Feb. 16, 2011, at 1-2.)
2. 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.)

3. At the February 24, 2011, evidentiary hearing, the Council granted BNE’s motion for protective order. That Protective Order – transmitted to the parties and intervenors nearly a week later – was stricter than BNE’s proposed order and did not contain any of the reasonable conditions requested by FairwindCT. Rather, the Protective Order approved by the Council imposed restrictions on the review and use of the BNE wind data that make it impossible for the parties and intervenors opposing the petition to effectively use the information at all.
4. As a result, on March 7, 2011, FairwindCT objected to the conditions of the protective order and moved to modify the order. At the March 15, 2011, evidentiary hearing, the Council voted to deny FairwindCT’s motion to modify, with one member of the Council dissenting.
5. FairwindCT now moves for reconsideration of the order in light of newly obtained evidence related to the content and scope of the material subject to the Protective Order.
6. On March 17, 2011, one of FairwindCT’s attorneys visited the Council offices to view the setback information filed in the above-captioned petition. An Affidavit in support of this Motion executed by that attorney is attached hereto.

7. The setback information subject to the protective order in place in this petition is contained in a single document that provides guidelines regarding appropriate setbacks for siting GE wind turbines.
8. FairwindCT objects to the sealing of that single document regarding setback information for several reasons.
9. First, GE's setback information directly implicates safety issues surrounding the proposed wind turbines. The public has a right to view and assess information provided by the turbine manufacturer related to recommendations regarding the appropriate distance between the wind turbines and any abutters.
10. The protective order currently in place in this petition not only keeps the setback information secret from the general public, but also prevents any meaningful inquiry into such information and denies FairwindCT and all other parties and intervenors any meaningful cross-examination whatsoever with respect to the setback information, in contravention of Conn Gen. Stat. § 4-178.
11. Second, the information is already publicly available, and as such is not only not exempt from public disclosure under the Freedom of Information Act, but also is not even protectable under the terms of the Mutual Nondisclosure Agreement between BNE and GE that BNE claims requires it to file the setback information under seal.
12. The setback information does not warrant exemption from the presumption that "... all records maintained or kept on file by any public agency . . . shall be public records and every person shall have the right to" inspect, copy or receive a

copy of such records. Conn. Gen. Stat. § 1-210. The Freedom of Information Act does provide for protection of trade secrets, but the setback information fails to meet the definition of trade secrets because it is not “the subject of efforts that are reasonable under the circumstances to maintain secrecy.” See Conn. Gen. Stat. § 1-210(5)(A)(ii).

13. The setback information that BNE has filed under seal is publicly available on the internet, currently hosted by the New York State Public Service Commission at <http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId=%7BF6A567D4-3F56-4125-968F-28CBF62BD6F6%7D>. Therefore, the setback information is in the public domain and should not be entitled to the “secrecy” afforded to trade secrets. See id.
14. The fact that the setback information is in the public domain through no fault of BNE’s also means that the information is not protected under the terms of the Agreement between GE and BNE. Pursuant to the terms of that Agreement, the setback information expressly does not constitute proprietary information requiring nondisclosure, because the Agreement excludes from coverage material that is publicly available through no fault of the recipient of the otherwise-proprietary information.
15. FairwindCT notes that this is not a case of two wrongs make a right, a concern expressed by former Chairman Caruso during the Council’s deliberation on FairwindCT’s motion to modify the protective order in this petition. Instead, the Agreement between GE and BNE expressly anticipates this occurrence and

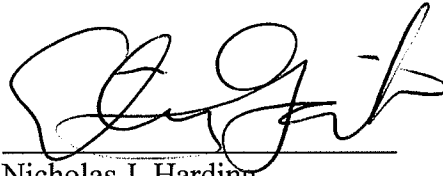
expressly excludes information that has been previously publicly disclosed from protection. Accordingly, the setback information document filed under seal by BNE is not subject to the Mutual Nondisclosure Agreement, is not exempt from disclosure under FOIA, and should be unsealed for the public's benefit. The setback information should also be unsealed to permit public cross examination on the information contained therein, and to prevent any further absurdity in this petition, where counsel for parties opposing the petition have been prevented from cross examining any of BNE's witnesses on information in the public domain because some of that information might have been improperly filed under seal.

16. Finally, FairwindCT reminds the Council that BNE has used significant sums of public money to fund its petition and gather all related information, including this setback information. Considering the substantial financial investment provided by the public in BNE's proposed industrial wind project, the public has a right to know whether the project will comply with the manufacturer's own safety standards. Given its acceptance of public funds, BNE should be required, at a minimum, to disclose the basic safety information contained in the setback information to the representatives of members of the public who oppose this petition, i.e., FairwindCT and all of the individual members of the public who are parties to this petition. Moreover, if BNE's proposed project does not comply with the manufacturer-recommended safety setbacks, the general public has a right to learn that fact through open cross examination.

17. If the Council grants BNE's motion and seals this otherwise publicly available information, 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.

WHEREFORE, in light of the above facts – newly discovered upon consideration of the contents of the actual setback information sealed pursuant to the Protective Order – FairwindCT moves the Council to reconsider its decision overruling and denying FairwindCT's Objection to and Motion to Modify Protective Order.

By:



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March 28, 2011

AFFIDAVIT OF JOHN W. LARSON

The undersigned being duly sworn does hereby depose and say:

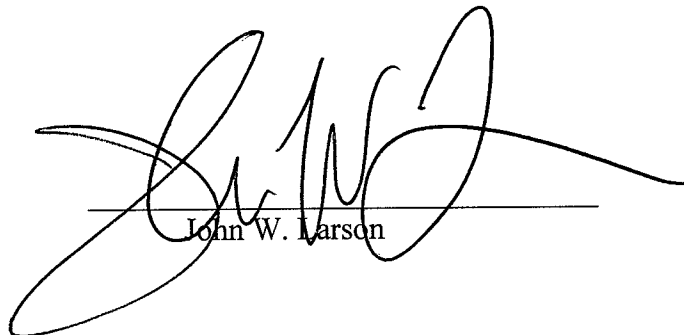
1. I am over the age of eighteen, understand the meaning and obligation of an oath, and am competent to testify as to the matters stated herein.
2. I make this Affidavit on personal knowledge.
3. I am an attorney at Reid & Riege, P.C., and I represent FairwindCT, Inc., party to Petition 980.
4. On March 17, 2011, I visited the offices of the Council in order to view the material filed under seal by BNE in Petition 980.
5. Included in such material was certain setback information provided to the Council by BNE related to that petition.
6. The setback information contains information related to safety risks from industrial wind turbines and therefore is related to possible adverse public health effects from siting the proposed wind turbines.
7. The setback information is identical to a document titled “Setback Considerations for Wind Turbine Siting,” publicly available on the internet at

<http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId=%7BF6A567D4-3F56-4125-968F-28CBF62BD6F6%7D>.

8. I previously had downloaded and viewed the document referenced in Paragraph 7 before visiting the Council office because I had searched for information in the public domain regarding setback guidelines provided by GE.


9. Also filed under seal in Petition 980 is a copy of a Mutual Nondisclosure Agreement between BNE and GE governing certain purportedly proprietary documents exchanged by the two parties to the Agreement.

10. Such Agreement contains a provision that, to the recollection of the undersigned (who was prevented from taking notes under the terms of the protective order), exempts from coverage under the Agreement information that is available to the public through no fault of the party receiving any otherwise-confidential information.



John W. Larson

Subscribed and sworn to before
me this 28th day of March, 2011.



Sylvie L. Poulin
Notary Public
My Commission Expires: 11/30/2012

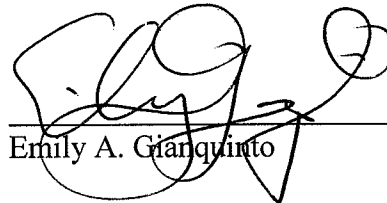
CERTIFICATION

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 28th 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 e-mail only to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King



Emily A. Gianquinto