

**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 29, 2011

PETITIONER’S REPLY RE: OBJECTION TO HEARING PROCEDURE

The petitioner, BNE Energy Inc. (“BNE”), submits this reply brief in response to party FairwindCT, Inc.’s (“Fairwind”) second objection to hearing procedure dated March 28, 2011. Fairwind’s objections to the hearing procedure are merely a regurgitation of its previous objections filed on February 16, 2011 coupled with objections based apparently on Fairwind’s failure or refusal to familiarize itself with Siting Council procedure. None of Fairwind’s objections have merit, as further discussed below, and the Council should proceed with the established schedule for this petition, which includes completion of the evidentiary hearing on March 31, 2011.

1. This petition was filed on November 17, 2010, more than four months ago.
2. The schedule for this proceeding was established when the Council voted to schedule a public hearing on January 6, 2011, more than two months ago. The schedule for this petition is the same schedule that the Council sets for all of its contested proceedings, which includes a public hearing, a deadline for all parties and intervenors to exchange interrogatories and a pre-filed deadline for direct testimony for all parties and intervenors seven days prior to the commencement of the public hearing.

3. In addition, the Council scheduled a pre-hearing conference for February 4, 2011. Notice of the pre-hearing conference, including pre-hearing procedures, was released prior to the pre-hearing conference.

4. Furthermore, in an effort to permit this proceeding to proceed in a timely manner, the Council issued a memorandum dated February 22, 2011 outlining time limitations for various portions of the evidentiary hearing and outlining appropriate topics—within the Council’s jurisdictional requirements for considering this petition—for both direct testimony and cross-examination.

5. As the Council is aware, the Council is subject to a statutory deadline of May 17, 2011 to render a decision on this petition.

6. Fairwind’s objection to the Council’s established hearing procedure and schedule for this petition is clearly an attempt to delay this proceeding yet again. Fairwind objects to the hearing procedure on the following grounds: 1) while cross-examination for the petitioner was taken out of order and party presentations based on the requests of Fairwind and grouped party Save Prospect Corp., Fairwind still astoundingly argues that this is prejudicial to Fairwind; 2) Fairwind allegedly served subpoenas on two proposed witnesses, which Fairwind fails to mention are untimely, irrelevant and are in direct violation of the hearing procedure set forth almost two months ago; 3) Fairwind seeks to present additional direct testimony for one of its witnesses, which, again, Fairwind fails to mention is untimely and in direct violation of the hearing procedure set forth almost two months ago; and 4) Fairwind objects because it does not have the ability to cross-examine a non-party to this proceeding, a right which again it fails to mention it does have in the first place. For the reasons set forth below, these objections should all be overruled.

7. First, Fairwind objects to the order of cross-examination of the petitioner. Of course, Fairwind fails to mention the fact that the order of the hearing program has already been adjusted in order to accommodate the requests of Fairwind and Save Prospect Corp. Now, inexplicably, after the program has been rearranged to accommodate Fairwind's out of state witnesses, it now objects to the adjustment in the hearing program. This argument is clearly flawed. In addition, the Council "skipped" over the Town of Prospect's cross-examination of BNE because the Mayor of Prospect had surgery and was unable to attend the hearing on March 3, 2011. Fairwind apparently now argues that this was inappropriate and essentially attempts to argue that the Town of Prospect is not entitled to any portion of the cross-examination time set aside for parties and intervenors' cross-examination of BNE. This argument is meritless. The Council set aside four hours total for parties and intervenors' cross-examination of the petitioner. Fairwind—only one of six participants to this proceeding—has already used half of that allotted time. Its argument that it is somehow entitled to even more of that time is unpersuasive. The Town of Prospect, Connecticut Water Company, CL&P and grouped parties Satkunas and Lamontagne have had no opportunity to cross-examine the petitioner. Fairwind's argument that these parties are not entitled to any portion of the four hours is simply meritless.

8. Second, Fairwind objects to the hearing procedure based on the fact that it allegedly issued subpoenas to two proposed additional witnesses. Fairwind conveniently fails to point out that it failed to identify these witnesses in advance or file pre-filed testimony for either of these witnesses—as is clearly required by the Council's hearing procedures, of which Fairwind has been advised for two months. BNE has objected to both of these subpoenas for these very reasons. Furthermore, Fairwind's opportunity to present

its case ended on March 15, 2011 when the cross-examination of Fairwind's panel was concluded. Fairwind's essentially argues that it should be permitted to continually present new witnesses and new testimony as well as additional testimony at any time during the process that it chooses and not be required to comply with disclosure requirements regarding witnesses and exhibits. This argument is unavailing. Not only does this argument fly in the face of Siting Council procedure, of which Fairwind has been advised, it is also inconsistent with any judicial or quasi-judicial proceeding. This petition has proceeded just as any judicial proceeding would—with disclosure requirements for witnesses and exhibits, the petitioner's direct case and cross-examination, the other parties' and intervenors' direct cases and cross-examination and then finally rebuttal by the petitioner. Fairwind's argument that it is somehow entitled to special procedures is baseless. Therefore, Fairwind's objection on this basis should be overruled.

9. Fairwind's third basis for objecting to the hearing procedure is equally unavailing. Fairwind argues that it should be permitted to provide additional testimony from one of its witnesses. Yet again, Fairwind fails to mention that its case—including direct testimony of its witnesses and cross-examination of the same—has concluded. Fairwind claims this testimony is necessary because of minor revisions that were made to BNE's site plans as a result of concerns raised by, *inter alia*, members of Fairwind concerning setbacks. Fairwind, of course, fails to mention that those plans were filed on March 8, 2011, prior to the March 15, 2011 hearing date, which provided the opportunity for Fairwind's witnesses to provide additional testimony concerning those plans. Similarly, this basis for Fairwind's objection should be overruled.

10. Finally, Fairwind makes the preposterous argument that the hearing procedure is inappropriate because it will not have time to cross-examine Epsilon Associates, Inc. (“Epsilon”). Conveniently, Fairwind fails to mention the fact that Epsilon is not a party to this proceeding. Therefore, Fairwind does not have the right to cross-examine Epsilon. Further, Fairwind again makes the preposterous argument that Epsilon has engaged in ex parte communications with the Council concerning this proceeding. This baseless argument wholly ignores the fact that an ex parte communication can only occur with a participant to this proceeding. Therefore, since Epsilon is not a participant to this proceeding, it cannot engage in ex parte communications. Therefore, Fairwind’s objection on this basis should likewise be overruled.

11. Essentially, throughout this proceeding, Fairwind has made the absurd arguments time and time again that Fairwind should be dictating the procedure of this hearing, the participants in this hearing and witnesses for participants in this hearing. Of course, Fairwind cites to no law to support these untenable arguments because no such law exists. This proceeding has proceeded in accordance with the schedule, of which every party and intervenor had notice prior to the commencement of the evidentiary hearings, and which is in accordance with judicial proceedings. Fairwind has no right to dictate who should be participating in this or any proceeding, just as Fairwind has no right to dictate participants’ witnesses. Fairwind’s objections to the hearing procedure are all meritless and should be overruled.

WHEREFORE, BNE requests that the Council overrule Fairwind's objections and proceed with the established schedule for this proceeding.

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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