

**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

February 23, 2011

**FAIRWINDCT, INC.’S REPLY
TO BNE ENERGY INC.’S OBJECTION TO MOTION TO DELAY PROCEEDINGS**

FairwindCT, Inc. (“FairwindCT”), hereby submits this reply to petitioner BNE Energy Inc.’s (“BNE”) objection to FairwindCT’s motion to delay proceedings for the purpose of correcting a number of mischaracterizations and inaccuracies. First, the material requested by FairwindCT that BNE seeks to file under seal is relevant to this proceeding. Second, BNE’s pre-hearing conference submission did not provide notice that it would be submitting revised site plans. Third, BNE’s compliance with “typical Council procedure” is no excuse for deliberately delaying production of highly relevant information with the result of prejudicing those who oppose its petition. In support of this Reply, FairwindCT states the following:

1. On February 18, 2011, FairwindCT filed a motion to delay the evidentiary hearing in this matter. FairwindCT requested a delay in the proceedings to provide the parties with a fair and reasonable amount of time to adequately review certain materials that BNE provided to the parties and to the Council on February 16, 2011, and to provide time for the Council to issue an order permitting FairwindCT and other parties to review certain materials that BNE requested be filed under seal.

2. On February 22, 2011, BNE objected to FairwindCT's motion to delay proceedings. In its objection, BNE makes several arguments regarding the request. FairwindCT hereby replies to these arguments.
3. BNE argues that the hearing should not be delayed because FairwindCT's inability to consider BNE's documents filed under seal pending the Council's adjudication of BNE's motion for protective order are not relevant to these proceedings. (Objection ¶ 11.) Therefore, BNE reasons, FairwindCT has no need to review the materials.
4. First, BNE did not object to FairwindCT's interrogatories seeking production of the allegedly confidential materials – on relevance or any other grounds. Instead, in response to Questions 8, 12 and 13 of FairwindCT's first set of interrogatories, BNE stated: "The information requested is confidential and proprietary. Therefore, BNE is filing the [information requested] separate to these responses and subject to a protective order and under seal with the Council." (See Petitioner BNE Energy Inc.'s Interrogatory Responses to FairwindCT, Inc.'s Interrogatories dated February 9, 2011.) BNE has therefore waived any claim that the requested information is not relevant to this proceeding.
5. Second, the Council has now explicitly stated that that requested material is relevant to this proceeding. On February 22, 2011, the Council issued a notice that outlines the procedure governing the evidentiary hearing regarding this petition (the "Notice"). The Notice limits the substance of

cross examination to three general topics, namely, public health and safety, environmental impacts and facility operation. The Notice purports to do so on the grounds that only these topics “are relevant to the final decision to be rendered by the Council in this matter.”

6. The Mechanical Load Assessment, which according to BNE’s interrogatory responses is an assessment of the site layout conducted by GE with input from BNE and its consultants, is relevant to this proceeding under the topics of public safety and facility operation, since it likely discusses setback requirements, siting the turbines for purposes of maximizing capacity and reliability, necessary equipment and interconnection. GE rules regarding setbacks are relevant to this proceeding under the topic of public safety. The raw wind data collected by BNE at the site is relevant to this proceeding under the topic of facility operation, because such data will permit an assessment of the capacity and reliability of Wind Prospect.
7. Finally, the requested material is relevant under Section 16-50g of the Connecticut General Statutes, which, as the Council has stated in notices issued to the public, governs this matter. (See, e.g., Hearing Notice, issued by the Council on January 21, 2011 (“Applicable law for this proceeding includes the Public Utility Environmental Standards Act, General Statutes § 16-50g, et seq., and Sections 16-50j-1 through 16-50v-1a of the Regulations of Connecticut State Agencies.”) Section 16-50g states that

one of the purposes of the Public Utility Environmental Standards Act is “[t]o provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values.” The Council cannot analyze the adequacy and reliability of Wind Prospect or the cost of providing energy generated by Wind Prospect to consumers without reviewing the requested material.

8. There is no question that the requested material is relevant to this proceeding, and BNE has waived any objection on relevance grounds.
9. BNE next argues that the hearing should not be delayed because BNE provided “notice” that it would be filing revised site plans in its preliminary witness and exhibit lists filed at the pre-hearing conference on February 4, 2011. (Objection ¶ 4.) Therefore, BNE reasons, FairwindCT has no reason to seek a delay.
10. This argument is without merit. BNE’s pre-hearing conference submission states only that BNE planned to offer as an exhibit “BNE’s supplemental submission in response to Connecticut Water Company dated February 3, 2011.” This vague reference to a “supplemental submission” is not notice that BNE would be filing multiple revised site plans two weeks later. Furthermore, inadequate notice is no substitute for timely production of the revised site plans.


11. BNE also argues, with regard to its inexcusable delay in providing parties with copies of its revised site plans and final bat study, that such late filing “is in accordance with typical Council procedure.” (See Objection ¶ 8.) BNE also argues that because it filed its revised site plan and final bat study in accordance with the Council’s pre-filing deadline, the timing of its filings does not warrant a delay in the evidentiary hearing. (Id. ¶¶ 6-7.)
12. First, FairwindCT notes that because this petition is a matter of first impression for the Council, there can be no “typical Council procedure” regarding untimely and significant revisions to a petitioner’s submission.
13. Second, to the extent BNE is referencing “typical Council procedure” regarding applications to site cell towers or other communication towers, FairwindCT reminds BNE and the Council that this is a petition to site an electricity generating facility – a power plant – in a residential neighborhood. Moreover, this proposed power plant is at least twice as high as the typical tower. Surely a petitioner seeking approval to site a 492-foot tall power plant in a residential neighborhood should be held to a high standard and required to submit detailed plans in a timely fashion that allows opposing parties and the Council adequate time for analysis.
14. In light of the atypical and significant nature of this proceeding, BNE’s compliance with the Council’s pre-filing deadline does not mean that a delay in the proceedings is not warranted. BNE has a pattern of late disclosure of relevant material, and traditional notions of due process

require a delay of the evidentiary hearing to permit FairwindCT and the other adverse parties a reasonable opportunity to evaluate the materials disclosed by BNE on the eve of the hearing, especially those that represent substantial change in plans.

15. Even BNE concedes that it has the burden of demonstrating compliance with water quality standards. The revised site plans disclosed by BNE one week before the start of the evidentiary proceeding in this matter is directly relevant to the Council's consideration of Wind Prospect's impact on watercourses and wetlands due to its failure to comply with water quality standards.
16. The only way for the adverse parties to fairly and effectively participate in the hearing is if they have had adequate time to analyze the revised site plans that have been under consideration by BNE for two months. Unless the evidentiary hearing is delayed, FairwindCT and other parties opposing the petition will be unduly prejudiced in presenting their opposition to BNE's petition.

WHEREFORE, FairwindCT asks that the Council grant FairwindCT's motion to delay the evidentiary hearing scheduled for February 24, 2011 for a minimum of 15 days from BNE's production to the parties of the Mechanical Load Assessment, GE's rules, specifications and guidelines regarding setbacks and the raw wind data collected by BNE at the Site.

By:

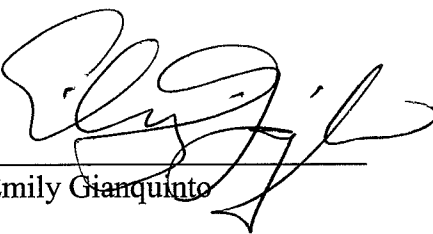


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CERTIFICATION

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 23rd day of February, 2011:

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