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**
Petitions of BNE Energy Inc. for a Declaratory Ruling for the Location, Construction and Operation of 4.8 MW Wind Renewable Generating Projects on Flagg Hill Road ("Wind Colebrook South") and Winsted-Norfolk Road ("Wind Colebrook North") in Colebrook, Connecticut	**Petition Nos. 983 and 984** **March 29, 2011**

FAIRWINDCT, INC.'S MOTION FOR MISTRIAL OR IN THE ALTERNATIVE FOR CONTINUANCE, RECONSIDERATION AND TO ALTER SCHEDULE

FairwindCT, Inc. ("FairwindCT")[1] moves for a mistrial or in the alternative a continuance in the above-captioned matters in light of the extraordinary events of March 18, 2011, namely, the undisputed report of events made by Jeffrey E. Tinley, Esq., counsel to Save Prospect Corporation ("Save Prospect") in his letter to Linda Roberts, Executive Director of the Siting Council, dated March 22, 2011 (the "Tinley Letter"), the letter of recusal directed to the Siting Council by Daniel F. Caruso, Chairman, dated March 24, 2011 (the "Caruso Letter") and the Chairman's subsequent reported resignation from the Siting Council.

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[1] For the sake of efficiency, this paper is being filed in the dockets for Petitions Nos. 980, 983, and 984. FairwindCT is a party in Petition No. 980 and when this paper is reviewed in that docket it should be read to include only FairwindCT. When reviewed in the dockets for Petition Nos. 983 and 984, the defined term "FairwindCT" includes the grouped parties FairwindCT, Inc., Susan Wagner and Stella and Michael Somers.

ORAL ARGUMENT REQUESTED

Mistrial must be granted as mistrial is the appropriate remedy when misconduct by the presiding authority results in recusal.

Alternatively, as discussed below, should mistrial not be granted, FairwindCT seeks a continuance in all three dockets to allow reconsideration of all rulings in which Chairman Caruso took part. Each ruling by Chairman Caruso must be reconsidered *de novo.*

As an additional alternative remedy, FairwindCT moves for a change to the hearing schedule in Petition 980 in light of filings made by the Department of Environmental Protection dated March 14, 2011 (the "DEP Letter") and the filing by BNE Energy Inc. ("BNE") dated March 28, 2011, which included pre-filed testimony by a new and until that date undisclosed witness, supplemental pre-filed testimony of several witnesses, a *fourth* set of revised site plans, a *third* erosion control plan, a third stormwater prevention plan and a response to the DEP Letter that *revealed, for the first time*, that BNE plans to conduct additional bird and bat studies on the Prospect site beginning next month. The DEP letter was received by FairwindCT's counsel on March 17, 2011. The complete BNE filing of March 28, 2011 has yet to be received by FairwindCT, as several attachments (including the new site plans, stormwater prevention plan and erosion control plan) were not delivered by e-mail. Unless the schedule is altered, FairwindCT will be denied its right to cross-examine the author of the DEP Letter and BNE's witnesses on their newly offered testimony.

Moreover, based on the text of the DEP Letter, the DEP official apparently believes that the Council intends to receive in evidence "independent expertise in the form of comment by Epsilon Associates, Inc." Since this schedule was originally published there has been no opportunity afforded to FairwindCT or any other party or intervenor to cross-examine any witness from or materials prepared by Epsilon Associates, Inc. ("Epsilon"). Any communication

by Epsilon is therefore an *ex parte* communication. Furthermore if Epsilon is to provide common in testimony in 983/984 the schedules must be changed to allow for orderly cross-examination of Epsilon.

BACKGROUND

BNE filed three petitions for declaratory ruling under General Statutes § 4-176. Petition No. 980 was filed on November 17, 2010 and the Council noticed the hearings in that proceeding through the issuance of a Hearing Notice dated January 21, 2011. Petition No. 983 was filed on December 6, 2010 and Petition No. 984 was filed on December 13, 2010. The Council noticed the hearings in those proceedings through the issuance of a Hearing Notice dated February 7, 2011. In each Hearing Notice, the Council declared that the applicable law for the proceedings included 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 the Connecticut State Agencies.

The hearing for Petition No. 980 commenced with a field review and public comment on February 23, 2011, followed by the commencement of the evidentiary hearing on February 24, 2011, and by additional public comment on that date. The Council continued the evidentiary hearing and heard evidence on March 3, 2011 and March 15, 2011 and has currently scheduled the last day of evidence for Petition No. 980 to be March 31, 2011. Hearings in Petitions Nos. 983 and 984 started on March 22, 2011, with a field review and public comment. The Counsel commenced the evidentiary hearing on March 23, 2011, and then took additional public comment that same evening. Additional evidence will be heard on dates in April and May of 2011. The Chairman recused himself on March 24, 2011 (*see* the Caruso Letter), and is reported to have resigned his position the same day.

LAW APPLICABLE TO THE CONDUCT OF THE CHAIRMAN AND PROCEEDINGS

Regulation § 16-50j-24 provides the rules of conduct for proceedings before the Siting Council:

> Where applicable, the canons of professional ethics and canons of judicial ethics adopted and approved by the judges of the superior court govern the conduct of the Council, state employees serving the Council, and all attorneys, agents, representatives and other persons who shall appear in any proceedings in a contested case before the Council in behalf on any public or private person, firm, corporation or association.

Rule 2.2 of the Code of Judicial Conduct (the "Code"), titled "Impartiality and Fairness," provides that a judge shall perform all duties fairly and impartially. Rule 2.3 of the Code, titled "Bias, Prejudice and Harassment," provides that a judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice or by words or conduct manifest bias or prejudice, or engage in harassment. Rule 2.6 of the Code, titled "Ensuring the Right to Be Heard," provides that the judge shall accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. Rule 2.8(B) of the Code, titled "Decorum, Demeanor, and Communication with Jurors," provides that a judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity. Rule 2.9 of the Code, titled "Ex Parte Communications," provides that a judge shall not initiate, permit, or consider *ex parte* communications except under certain permitted circumstances.

Rule 2.9 further provides:

> (A)(2) A judge may obtain the written advice of a disinterested expert *on the law* applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the written advice received.

(Emphasis added.)

The Uniform Administrative Procedure Act (the "Administrative Procedure Act"), as adopted by Connecticut, provides the right to cross-examine evidence in contested cases. General Statutes § 4-178 provides that in contested cases, "a party and such agency may conduct cross examinations required for full and true disclosure of facts" and provides that a "(7) party shall be notified in a timely manner of any material noticed, including any agency memoranda or data, and they shall be afforded an opportunity to contest the material so noticed . . ." Conn. Gen. Stat. § 4-178(5) and (7).

In the case of petitions for declaratory rulings, the Administrative Procedure Act provides the following:

> If and 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).

DISCUSSION

A. The Council Must Declare a Mistrial with Regard to all Three Petitions.

This is a case of first impression before the Council. No case dealing with the misconduct of a chairman of the Council and subsequent resignation has been found. The Caruso Letter tries to justify conduct described in the Tinley Letter. The facts recited in the Tinley Letter are undisputed and show both an *ex parte* communication and undisputed predisposition on the part of the Chairman, and perhaps the Council, to grant Petitions Nos. 980, 983, and 984 and site industrial wind turbines in residential neighborhoods. That the Chairman recused himself in the docket in which the misbehavior occurred, Petition No. 980, and also recused himself in Petition Nos. 983 and 984, in which there were no reported *ex parte* conversations, and then resigned,

points to the conclusion that there are larger problems than just an *ex parte* communication in Petition No. 980.

These problems include evidence of predisposition by the Chairman as found in the Tinley Letter. The sum of the statements demonstrates a predisposition to judge these petitions in favor of the petitioner, rather than on the merits of the claims made by the petitioner and those who oppose the petition.

Recusal was proper. Normally recusal is accompanied with the grant of a motion for mistrial. In *Abington Ltd. Partnership v. Heublein,* 246 Conn. 815 (1998), our Supreme Court reviewed the trial judge's *ex parte* site visit and interview with a potential witness an inspection of the witness' home, and then looked at the undisputed facts and considered whether a well-informed, thoughtful and objective observer reasonably could decide that there was, in that case, a significant risk of judicial impropriety as defined by what was then known as Canon 3(c)(1) of the Code. The Code adopted effective January 1, 2011, still carries this concept in Canon 1, titled "A Judge Shall Uphold and Promote Independence, Integrity and Impartiality of the Judiciary and Shall Avoid Impropriety and the Appearance of Impropriety." This thought is expressed in Rule 1.2, Promoting Confidence in the Judiciary:

> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated the code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as judge.

Indeed, appearance of impropriety was one of the very reasons that the Chairman resigned, as expressly stated in the Caruso Letter. Public confidence in the independence, integrity and the impartiality of the Council may be called into question. Indeed, recent publication in the Waterbury Republican-American reports that the history of the Siting Council

is to approve applications and petitions. According to the newspaper report of March 26, 2011, petitions and applications do not get denied.

In *Abington,* our Supreme Court acknowledged that each case of alleged judicial impropriety must be evaluated on its own facts, and in considering the totality of the circumstances. There, the Court concluded that the judge had improperly decided that his conduct had not created an appearance of impropriety and had improperly denied the plaintiff's motion for disqualification. 246 Conn. at 826. The Court also found that the plaintiff's motion for mistrial was improperly denied and remanded the case for a new trial.

Under the standard for a new trial set forth in *Abington,* the present circumstances warrant declaring a mistrial in each of the three dockets and setting them down for new hearings to commence after the appointment of a new presiding officer and panel. No well-informed, thoughtful and objective observer reasonably could conclude that Chairman Caruso did not violate the Code or engage in conduct that reflects adversely on the Chairman's impartiality. The undisputed facts in the Tinley Letter demonstrate a complete lack of impartiality by Chairman Caruso. Once the Supreme Court determined that recusal was part of the proper remedy it determined that it was improper to also deny the motion for mistrial.

B. In the Alternative, the Council Must Continue all Three Petitions and Reconsider all Rulings in Which Chairman Caruso Participated.

Should the Council deny FairwindCT's motion for mistrial, FairwindCT seeks a continuance[2] in each of these dockets to allow for the reconsideration of each and every ruling made by the Council during the time that Chairman Caruso was acting as chairman of the Council. Most of the rulings made by Chairman Caruso have been adverse to FairwindCT and

[2] In offering an alternative, FairwindCT does not concede that the alternative cures the problem created by Chairman Caruso's misconduct.

Save Prospect. After the Chairman's recusal in order for the Council's prior rulings not be perceived improperly by the public,[3] at a minimum these proceedings must be continued to allow reconsideration of each ruling made to date in Petition Nos. 980, 983, and 984.

Continuance and reconsideration is necessary because it is unknown how the Chairman's bias may have influenced the other members of the panel. The Council may have deferred to him as Chairman and as an experienced judge and lawyer. Not all members of the panel are lawyers and many may have voted with him with respect to legal issues out of deference to his position as Chairman, judge and lawyer. Moreover, on occasions Chairman Caruso explicitly misled the Council on the content of the applicable law. For example, whenever FairwindCT sought to amend or modify the schedule for the proceedings to provide more time for all of the parties, the Chairman would make statements regarding the Council's supposed inability to modify the time in which it must decide the petitions. For example:

9:16 CHAIRMAN CARUSO: It's been moved and
9:17 seconded.
9:18 Yes, our time limits are -- the limits we
9:19 have are those established by the General Assembly and
9:20 the action which -- in **the statutes we have 180 days from**
9:21 **the time it's filed. And we can't change that.**
9:22 Any further discussion? Then all those in
9:23 favor of denying this motion objection, please signify by
9:24 saying aye.
10:1 VOICES: Aye.
10:2 CHAIRMAN CARUSO: Opposed? The motion
10:3 carries, it is denied.
10:4 (Whereupon, the Motion Objections by [Save Prospect]
10:5 and [FairwindCT] to Pre-hearing Procedure were denied.)

(Petition No. 980, Hearing Tr. 2/24/2011, 9:16-10:5 (emphasis added).)

63:15 CHAIRMAN CARUSO: Okay. But I'm going to make this
63:16 very clear. **As you all know, the legislature has imposed upon us**
63:17 **a timetable.** And if you intend to do that, I think you have to

[3] FairwindCT does not concede that even this process will cure the defects created by the Chairman's misconduct.

63:18 consider in your allocation of time how we're going to address
63:19 that because --
63:20 MR. HARDING: Your Honor, I object to that because I
63:21 think that the submission of new plans -- the new plans should be
63:22 withdrawn because that's what we're prepared to go forward with.
63:23 That's what started the clock for 180 days were the original
63:24 plans.

(Petition No. 980, Hearing Tr. 3/15/2011, 63:15-24 (emphasis added).)

70:9 CHAIRMAN CARUSO: Unfortunately, that is not the
70:10 case. The fact is that there's an application -- there's a
70:11 petition before us. That petition as required is based on -- is
70:12 the proper filing based on the megawatts and based on the
70:13 statute. **The fact is that the statute gives us 180 days. That's**
70:14 **all we're allowed.**

(Id. 70:9-14 (emphasis added).)

71:5 CHAIRMAN CARUSO: I'm not going to belabor the point.
71:6 **The point is that we can only deal with the 180 days that we**
71:7 **have. If there are alternatives put forward, they are all within**
71:8 **the same petition. And that's all we can deal with. That's all**
71:9 **the time that we're allotted.**

(Id. 71:5-9 (emphasis added).)

In each of the above examples, the Chairman misrepresented the law to the members of the Council. In fact, the Administrative Procedure Act very clearly provides:

> If and 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).

The legislature has not tied the Council's hands; the Council must act within 180 days unless it asks the parties for more time, and the parties consent. A non-consenting petitioning party runs the risk of having the Council not issue a ruling within 180 days, in which case the petition will be denied. Under the circumstances, one can hardly imagine that there could be a petitioning party that would not consent to an extension of the terminal date. The Chairman's

insistence upon the fact that the legislature had imposed an absolute timetable is simply a fiction. The legislature imposed a timetable that is subject to modification, if only the Chairman would ask.

Recently in Petition No. 984, the Council granted BNE's motion for extension of time to file its pre-filed testimony, responses to interrogatories and revised plans for Wind Colebrook North. In granting BNE an additional 10 days to file the documents, the Council either failed to take into consideration the effect that such 10-day grant would have upon FairwindCT and other parties to Petition No. 984, or quite simply, in accordance with past practices, exercised its discretion in favor of the petitioner without regard to the rights of FairwindCT and the other three parties who objected to the extension request. By denying the objections to the extension filed by FairwindCT and other parties and extending the date for filing without also extending the terminal date, the Council prejudiced FairwindCT and the other parties.

C. How Often May BNE Change Its Plans With No Schedule Change?

On March 28, 2011, BNE filed a new set of plans in Petition No. 980 that has not yet been provided to the parties. Under Chairman Caruso's 180-day timetable, these plans were noticed to the parties by an e-mail bearing a timestamp of 4:40 p.m. Exhibits 1, 2 and 3, to the Supplemental Pre-filed Testimony of Melvin L Cline, dated March 28, 2011, were not attached to the e-mail as, according to the exhibits: "Due to the size of this document, an electronic version will be filed with the Siting Council on disk." FairwindCT assumes that BNE will have mailed FairwindCT its copy of the plans sometime on March 28, 2011, rather than send them to the undersigned's office by messenger or deliver them electronically, as has been repeatedly requested in accordance with FairwindCT's election of only electronic service. We observe that the Hartford office of counsel to BNE is at 90 Statehouse Square, Hartford, Connecticut, and is

visible from this writer's office window. Only Main Street and the Old Statehouse separate the offices of BNE's counsel and counsel for FairwindCT. No reason for not dispatching a copy of the plans on disk or in hard copy by messenger is provided.

Docket No. 980 commenced with the filing of the petition dated November 17, 2010. The March 28, 2011 site plans, stormwater prevention plan and erosion control plan, when disclosed, will be the *third* revisions to the plans in Petition No. 980. Evidence is set to close on March 31, 2011, and the site plans and related exhibits have not been disclosed or produced for examination. Instead, notice of the new plans was made 131 days after the filing of the original petition. The final day of evidence is scheduled to be March 31, 2011. FairwindCT does not know when it was be in receipt of these new plans. FairwindCT is prejudiced in the preparation of its case. One cannot help but ask, just how late will this Council allow BNE to amend its plans? Will BNE be permitted to amend its plans on day 170? Or 175? Or 179? Will BNE be permitted to amend its plans on day 225? No such amendment should be allowed at either day 131, day 179 or day 225. FairwindCT objects. Rules 2.2 and 2.6 of Code require continuance of these matters to allow consideration of the new plans.

FairwindCT continues to be prejudiced by the protective order granted in these Petitions. The terms of the protective orders prevent the sharing of information with FairwindCT's experts, prevent the taking of notes upon reviewing the information even though the information is large in scope, and include the protection of materials that are in the public domain. Some of the public domain information is included in the testimony of one of the "experts" disclosed by BNE. How is it that BNE gets to testify about the information that protected by the protective order and FairwindCT is denied access to the information, prevented from cross examining BNE's witnesses on the content of the protected information and is limited to issuing sealed

written interrogatories about the materials – interrogatories that must be prepared without the benefit of even notes? Each of the rulings by Chairman Caruso with respect to the protective orders needs to be reviewed by the new chairman and panel. The protective orders are so protective that the protected documents are essentially ex-parte evidence.

The existing process by which Chairman Caruso determined that the Council will not consolidate the Colebrook petitions for purposes of the evidentiary hearing in Petitions Nos. 983 and 984 will result in a significant hardship to FairwindCT and to the Town of Colebrook, as the process requires that experts hired by FairwindCT (some of them who must travel from out-of-state) and the Town of Colebrook must appear twice to verify their pre-filed testimony and must be available for cross-examination on two separate occasions. Such procedure is a waste of resources of the parties opposing the petitions, the citizens of the Town of Colebrook, the Council and those of the petitioner. FairwindCT's expert witnesses will be the same in each docket, as is the expert hired by the Town of Colebrook. Requiring FairwindCT to pay its experts for two appearances makes no sense when they can all be accommodated in one day's hearing. Given the dearth of questions asked by the Council and the petitioner of the same experts in Petition No. 980, one wonders if the decision of the Chairman to compound FairwindCT's expert expenses is designed to increase costs to FairwindCT rather than to reach a reasoned and efficient result.

D. Who is Epsilon? Another Ex-Parte Communication?

The current scheduling order calls for evidence to close on March 31, 2011, in Petition No. 980. That cannot be. As noted above, FairwindCT and the other parties and intervenors just received notice on March 28, 2011, that BNE intends to file a new set of site plans and related exhibits at some point in the future. No party or intervenor has yet received those new site plans

and related exhibits. FairwindCT has recently learned that Epsilon may have been playing an undisclosed role in these proceedings by way of commenting on evidence, or giving other advice to Council staff and Council members. If so, until there is disclosure of this material and cross-examination of Epsilon by the parties, all communications by the Council to and from Epsilon are *ex parte* communications.

According to multiple sources, Epsilon may have commented on the evidence in Petition No. 980 and may have commented or will comment on the evidence submitted in Petition Nos. 983 and 984. These sources include comments made in the DEP letter of March 14, 2011 referring to the Council "initiative to secure independent expertise in the form of Epsilon Associates Inc. to assist in evaluating this project" as "a wise decision." The Waterbury Republican-American of Saturday, March 26 reported: "For expertise, the council hired a Massachusetts consulting firm, Epsilon Associates, to advise members on the range of renewable energy projects that may come before it." What comments? Which projects? Which evidence? What impact do these comments in evidence have on the Council? When does Epsilon get cross-examined regarding the comments and evidence it has reportedly provided to the Council?

Moreover, each of the e-mails distributed to the service list by a staff analyst for Petition No. 980, have included distribution of a copy to an employee of Epsilon. Epsilon is a non-party. If Epsilon is playing the role of advisor and commenter as described in the Waterbury Republican-American and the DEP letter, Epsilon's communications with the Council and its staff must be (1) disclosed to the parties and (2) subjected to cross-examination, in accordance with the provisions of General Statutes § 4-178(5) and (7). Otherwise, the right afforded to parties to cross examine, a right required for full and true disclosure of facts, and the right afforded to parties to be notified in a timely manner of any material noticed, including any

agency memoranda or data and be afforded an opportunity to contest the material so noticed, will be denied. FairwindCT objects.

To date, there has been no notification in a timely manner of any memoranda or data prepared by Epsilon that has been noticed by the Council and there has been no opportunity afforded to contest or cross examine any material prepared by Epsilon. Until such opportunity is afforded to FairwindCT and the other parties to this proceeding, all communications between the Council and Epsilon are *ex parte* communications. Is it from communication with Epsilon that the Chairman came to the conclusion that the statements of the Massachusetts witnesses were "bull----"? Indeed, it may be necessary to hold an evidentiary hearing to determine how Chairman Caruso came to that conclusion.

The DEP letter suffers from the same infirmity. Until the parties have a full and fair opportunity to examine the DEP regarding its alleged conclusions, the DEP letter is an *ex parte* communication and should not be evidence in Petition No. 980.

CONCLUSION

Based on the rule in *Abington*, a mistrial must be granted in Petitions Nos. 980, 983 and 984. A mistrial is the only proper remedy to follow the recusal by the Chairman.

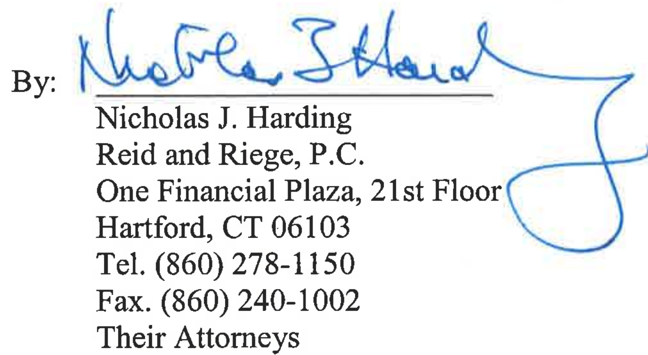
If the Council denies the motion for a mistrial, the Council must reconsideration of each ruling made by the Council during the time that Chairman Caruso oversaw these petitions.. That, however, would require the installation of the new chairman, the canvassing of each member as to each vote on each motion considered and denied during Chairman Caruso's tenure.

If the Council denies mistrial and proceedings move to conclusion the Council must afford FairwindCT and all other parties and intervenors a full and adequate opportunity to cross-examine the *ex parte* communications between the Council and its staff, Epsilon and the DEP.

The schedule must be altered to afford such right of cross-examination to FairwindCT and the other parties and intervenors to these proceedings.

Respectfully submitted,

FairwindCT, Inc., Susan Wagner
and Stella and Michael Somers

By: 

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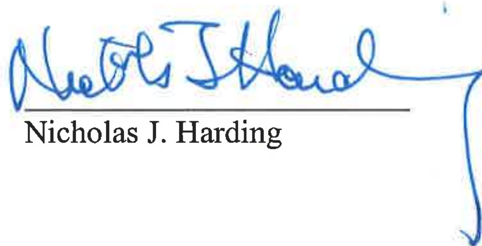
CERTIFICATION

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 29th 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
Eva Villanova
Jeffery and Mary Stauffer
Thomas D. McKeon
David M. Cusick
Richard T. Roznoy
David R. Lawrence and Jeannie Lemelin
Walter Zima and Brandy L. Grant

and sent via e-mail only to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King



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