

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

**Petition of BNE Energy Inc. for a
Declaratory Ruling for the Location,
Construction and Operation of a 4.8 MW
Wind Renewable Generating Project on
Flagg Hill Road in Colebrook,
Connecticut (“Wind Colebrook South”)**

Petition No. 983

March 22, 2011

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

FairwindCT, Inc., Susan Wagner and Stella and Michael Somers (the “Grouped Parties”), hereby object to the Motion for Protective Order and Motion to File Under Seal, dated March 15, 2011, filed by Petitioner, BNE Energy Inc. (“BNE”), as it relates to certain information regarding recommended setbacks for BNE’s proposed industrial wind turbines. The Grouped Parties object to the motion because the anticipated protective order, likely to contain the same terms as those imposed in Petition 980, prevents disclosure of setback information that is relevant to the safety of the proposed turbines and which not only the parties, but also the general public, has a right to inspect. Additionally, the setback information filed under seal by BNE does not fall under the Mutual Nondisclosure Agreement that BNE claims requires it to file the setback information under seal, because it has been previously publicly disclosed.

In support of this Objection, the Grouped Parties state the following:

1. On March 15, 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 “certain confidential and proprietary information from GE relating to setback considerations” (BNE’s Motion for Protective Order, Mar. 15, 2011, at 2.)

2. Accordingly, BNE seeks permission to file the setback information under seal and further requests that such material be submitted to the Council subject to a proposed protective order. (Id.)
3. The Council has issued a protective order in Petition 980 covering the same type of setback information data that BNE seeks to protect in this petition. That protective order, dated February 24, 2011 but not provided to the parties and intervenors until March 2, 2011, permits review of the setback information only at the Council offices, prohibits any note taking with respect to the setback information, and further prohibits the information from being disseminated to parties' experts, notwithstanding whether those experts have agreed to be bound by the protective order. (Protective Order, Petition 980, dated Feb. 24, 2011.)
4. 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. On March 27, 2011, one of the Grouped Parties' attorneys visited the Council offices in his role representing FairwindCT with regard to Petition 980 in order to view the setback information filed in Petition 980. An Affidavit in support of this Objection executed by that attorney is attached hereto.
6. The setback information subject to the protective order in Petition 980 is contained in a single document that provides guidelines regarding appropriate setbacks for siting GE wind turbines.

7. The Grouped Parties object to the sealing of that single document regarding setback information for several reasons.
8. 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.
9. The protective order currently in place in Petition 980, if adopted in this petition, would not only keep the setback information secret from the general public, but would also prevent any meaningful inquiry into such information and would deny the Grouped Parties 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.
10. 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.
11. 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).

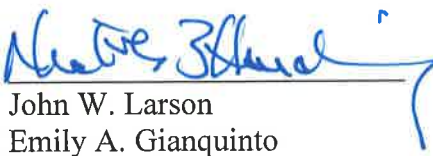
12. The setback information that BNE has filed under seal is publicly available on the internet, currently hosted by the New York State Public Service Commission at <http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId=%7BF6A567D4-3F56-4125-968F-28CBF62BD6F6%7D>. Therefore, the setback information is in the public domain and should not be entitled to the “secrecy” afforded to trade secrets. See id.
13. 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.
14. The Grouped Parties note that this is not a case of two wrongs make a right, a concern expressed by Chairman Caruso during the Council’s deliberation on FairwindCT’s motion to modify the protective order in Petition 980. 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 a repeat of the absurdity that occurred in Petition 980, where counsel for parties opposing the petition were 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.

15. Finally, the Grouped Parties remind 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.

16. 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.
17. In light of the above facts, the Grouped Parties object to BNE's motion for protective order as that motion relates to the setback information.

WHEREFORE, for the foregoing reasons, the Grouped Parties object to BNE's motion for protective order as such motion relates to the setback information.

By: 
John W. Larson
Emily A. Gianquinto
Nicholas J. Harding
Reid and Riege, P.C.
One Financial Plaza, 21st Floor
Hartford, CT 06103
Tel. (860) 278-1150
Fax. (860) 240-1002

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

**Petition of BNE Energy Inc. for a
Declaratory Ruling for the Location,
Construction and Operation of a 4.8 MW
Wind Renewable Generating Project on
Flagg Hill Road in Colebrook,
Connecticut (“Wind Colebrook South”)**

Petition No. 983

March 22, 2011

AFFIDAVIT OF JOHN W. LARSON

The undersigned being duly sworn does hereby depose and say:

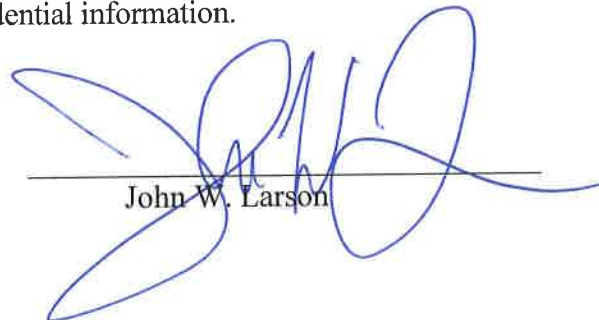
1. I am over the age of eighteen, understand the meaning and obligation of an oath, and am competent to testify as to the matters stated herein.
2. I make this Affidavit on personal knowledge.
3. I am an attorney at Reid & Riege, P.C., and I represent FairwindCT, Inc., Susan Wagner and Stella and Michael Somers, parties to the above-captioned petition.
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. FairwindCT is a party to Petition 980 and I represent FairwindCT with respect to that proceeding.
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 22nd day of March, 2011.



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

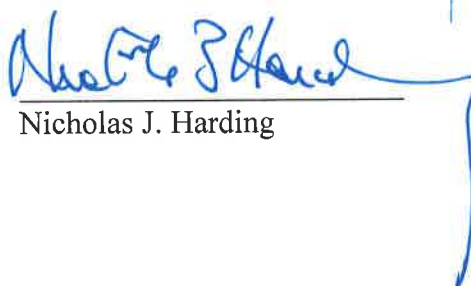
CERTIFICATION

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 22nd day of March, 2011:

Carrie L. Larson
Paul Corey
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
Eva Villanova

and sent via e-mail only to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King


Nicholas J. Harding