

PETITION NO. 983 - BNE Energy, Inc. petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the construction, maintenance, and operation of a 4.8 MW Wind Renewable Generating facility located on Flagg Hill Road, Colebrook, Connecticut.	} } }	Connecticut Siting Council June 2, 2011
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Conclusions of Law

A. The proposed wind renewable generating project was properly filed as a petition for a declaratory ruling.

BNE Energy, Inc. (BNE) filed a petition for a declaratory ruling with the Connecticut Siting Council (Council) on December 6, 2010 that no Certificate of Environmental Compatibility and Public Need (CECPN) is required for the construction, maintenance and operation of a 4.8 megawatt (MW) wind renewable generating facility located on Flagg Hill Road, Colebrook, Connecticut (Petition). The proposed grid-side distributed resource project has a capacity of not more than 65 MW and utilizes wind renewable energy sources. Therefore, BNE’s proposed project was properly filed as a petition for a declaratory ruling under Conn. Gen. Stat. §16-50k (a).

Pursuant to Public Act 05-1, An Act Concerning Energy Independence (codified at Conn. Gen. Stat. §16-50(k), “[T]he Council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling... (B)... any ... grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as such project meets air and water quality standards of the Department of Environmental Protection.” The legislative purpose of P.A. 05-1 was to incent distributed resource projects and reduce peak electric demand, which is consistent with the energy policy of the state under Conn. Gen. Stat. §16a-35k to diversify the state’s energy supply mix and to develop and utilize renewable energy sources, such as solar and wind energy, to the maximum practicable extent.¹ The Act established a rebuttable presumption that there is a public benefit for a grid-side distributed resource project with a capacity of 65 MW or less.² Under the Public Utility Environmental Standards Act (PUESA), which governs the Council’s jurisdiction, a public benefit exists if a proposed electric generating facility is necessary for the reliability of the electric supply of the state or for the development of a competitive market for electricity.³

The Council’s standard of review under the PUESA for a petition for a declaratory ruling is to make a determination that the proposed facility will have no substantial adverse environmental effect and therefore, would not require a CECPN.⁴ Under Conn. Gen. Stat. §16-50p, the statutory criteria for a determination of substantial adverse environmental effect is: “The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, but not limited to, electromagnetic fields..., conflicts with the policies of the state concerning, the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish, aquaculture and

¹ 2005 Conn. Acts 1 (Spec. Sess.); Conn. Gen. Stat. §16a-35k (2011).

² *Id.*

³ Conn. Gen. Stat. §16-50p(c) (2011) (establishing a public benefit standard for an electric generating facility as opposed to a public need standard for other facilities under Conn. Gen. Stat. §16-50p(a)(3)(A)); *See also Citizens for Defense of Oxford v. Connecticut Siting Council*, 2000 Conn. Super. LEXIS 2994 (Conn. Super. 2000).

⁴ Conn. Gen. Stat. §4-176 (2011); Conn. Gen. Stat. §16-50k (2011); R.C.S.A. §16-50j-38.

wildlife.”⁵ The Council is required to state why the adverse environmental effects or conflicts with state policies are or are not sufficient reason to deny the project.⁶ In 2007, the Council approved a 37.5 MW wood biomass generating facility in Plainfield under Conn. Gen. Stat. §16-50(k) (a) and in accordance with the statutory criteria for a determination of substantial adverse environmental effect under Conn. Gen. Stat. §16-50p.⁷

Pursuant to the provisions of the Uniform Administrative Procedure Act (UAPA), within 60 days of receipt of BNE’s petition and based on the nature and scope of the proposed project, the Council decided to hold a public hearing on the matter.⁸ BNE provided the Council with information required for an application for a CECPN under the Council’s Application Guide for a Renewable Energy Facility.⁹ The Council held two public hearings in the Town of Colebrook on March 22, 2011 and March 23, 2011 at which members of the public attended and spoke both for and against the project.¹⁰ Evidentiary hearings were continued on April 14, 2011, April 21, 2011 and April 26, 2011.¹¹ Eleven parties and intervenors participated in the hearing process.¹² Based on the record developed in the proceeding, the Council found that the project complies with DEP air and water quality standards, is consistent with the state’s Class I Renewable Portfolio Standard and the state’s energy policy, and that the effects associated with the construction, operation and maintenance of the wind renewable electric generating facility at the proposed site, including effects on the natural environment; public health and safety; scenic, historic and recreational values are not in conflict with the policies of the state concerning such effects and are not sufficient reason to deny the petition.

B. The PUESA does not require public disclosure of proprietary information.

BNE filed a Motion for Protective Order consistent with Council Procedures for the Filing of Proprietary Information in this matter on March 15, 2011 seeking permission to file certain confidential and proprietary business information of BNE and GE under seal. Conn. Gen. Stat. §16-50o requires submission into the record “the terms of any agreement... entered into by the applicant and... any third party, in connection with the construction or operation of [a] facility,” but does “not require the public

⁵ Conn. Gen. Stat. §16-50p(a)(3)(B) (2011).

⁶ Conn. Gen. Stat. §16-50p(a)(3)(C) (2011).

⁷ Connecticut Siting Council, Petition 784, *available at*

<http://www.ct.gov/csc/cwp/view.asp?a=2397&Q=320968&PM=1> (last visited May 4, 2011) (The Council held a public hearing on the petition for the convenience of the public and to develop a full record for its decision. The Council requested that the petitioner publish notice of the petition and provide notice to abutting landowners. Members of the public attended the hearing and spoke both for and against the project. Based on the record developed in the proceeding, the Council found that the project would provide 15% of the state’s Class I Renewable Portfolio Standard, the facility would benefit the state by removing a renewable resource from the waste stream, prolonging the life of regional landfills and generating energy that may displace older, non-efficient generation without detriment to the local environment or surrounding community and that the effects associated with the construction, operation and maintenance of the facility at the proposed site, including effects on the natural environment; public health and safety; scenic, historic and recreational values were not in conflict with the policies of the state concerning such effects and were not sufficient reason to deny the petition. The Council approved the facility with conditions including a Development and Management Plan, an independent environmental consultant and a post-construction noise survey at the property boundaries and nearest residential receptors).

⁸ Conn. Gen. Stat. §4-176(e) (2011); Connecticut Siting Council, Meeting Minutes, January 20, 2011.

⁹ Connecticut Siting Council, Petition 983, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011) (the petitioner was not required to follow the Application Guide in filing a petition for a declaratory ruling).

¹⁰ Public Hearing Notice of the Connecticut Siting Council, February 7, 2011, *available at*

http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_983/p983p984hearingnotice.pdf (last visited May 27, 2011).

¹¹ Connecticut Siting Council, Petition 983, Findings of Fact ¶10, June 2, 2011.

¹² *Id.* at ¶8.

disclosure of proprietary information or trade secrets.”¹³ In its Motion for Protective Order, BNE sought to protect information and data regarding wind resources, wind speeds, wind generation and related proprietary information. In compliance with a Mutual Non-Disclosure Agreement between GE and BNE, BNE also sought to protect GE information and formulas relating to setback recommendations, mechanical loads assessments and related proprietary information.¹⁴ GE did not request party or intervenor status in the proceeding.

“Proprietary information” is defined in Black’s Law Dictionary as “information in which the owner has a protectable interest.”¹⁵ The Department of Public Utility Control defines “proprietary information” as information that may be exempt from public disclosure pursuant to Conn. Gen. Stat. §1-210(b).¹⁶ The Connecticut Freedom of Information Act (FOIA) defines “trade secret” as:

“...information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy...”¹⁷

The Connecticut Supreme Court defined “trade secret” as consisting of any “... compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”¹⁸ The Court set out several factors to be considered in determining whether given information qualifies as a trade secret, which are: 1) the extent to which the information is known outside of the business; 2) the extent to which it is known by others involved in the business; 3) the extent of measures taken to guard the secrecy of the information; 4) the value of the information to the business and competitors; 5) the amount of effort expended in developing the information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.”¹⁹

Applying the criteria to this petition, it is found that: 1) the petitioner and GE view the information as confidential and proprietary; 2) persons in the business with knowledge of the information are GE, the turbine manufacturer, Paul Corey, president of BNE, Carrie Larson, former attorney for BNE, Lee Hoffman, current attorney for BNE and members of BNE’s witness panel; 3) BNE and GE entered into a Mutual Non-Disclosure Agreement relating to the information and GE clearly indicates the information is proprietary and not to be disclosed on each page of the documents; 4) the wind data and formulas used in the assessments have independent economic value that, if generally known, would be a

¹³ Conn. Gen. Stat. §16-50o (2011).

¹⁴ Connecticut Siting Council, Petition 983, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011) (a copy of the Mutual Non-Disclosure Agreement was filed with the Council on March 16, 2011).

¹⁵ BLACK’S LAW DICTIONARY 1235 (7th ed. 1999).

¹⁶ State of Connecticut, Department of Public Utility Control, Basic Procedures for Filing Proprietary Information Under Protective Order, *available at* <http://www.ct.gov/dpuc/cwp/view.asp?a=3364&q=405172> (last visited May 27, 2011).

¹⁷ Conn. Gen. Stat. §1-210(b)(5)(A) (2011).

¹⁸ *Dept. of Public Utilities of the City of Norwich v. Freedom of Information Commission*, 55 Conn. App. 527, 530 (Conn. App. 1999), citing *Town & Country House & Homes Service, Inc. v. Evans*, 150 Conn. 314, 318-19 (1963).

¹⁹ *Id.*

disadvantage to GE and BNE, and would be an advantage to market competitors and future wind project proponents; 5) GE and BNE expended effort and incurred costs in development of the information; and 6) the wind data and formulas used in the assessments could not be properly acquired or duplicated by others.

In objections to BNE's Motion for Protective Order, other participants in the proceeding informed the Council that the GE setback recommendation documents are posted on the New York Public Service Commission website.²⁰ While posted on that website, the GE documents are clearly marked on each page: "Confidential and Proprietary – Do not copy without consent." There is no copy of a consent form from GE posted on that website, nor has a consent form from GE been submitted into the record for this petition. However, parties and intervenors in this proceeding, including, but not limited to expert witnesses, were afforded the opportunity to review the materials submitted under the protective order upon signing a Non-Disclosure Agreement.²¹ Furthermore, parties and intervenors were afforded the opportunity to submit interrogatory questions related to the confidential and proprietary information and responses to those interrogatories would have been provided by BNE under seal.²² The parties may also have availed themselves of the statutory process under the FOIA for a determination from the Freedom of Information Commission that the parties were denied access to public records.²³

In a recent decision, the Connecticut Supreme Court held that the review of documents "is guided by the principle that the party claiming an exemption from the disclosure requirements of the [Freedom of Information Act] bears the burden of establishing the applicability of the exemption."²⁴ The Court also stated that "whether a document expressly is marked "confidential" is not dispositive, but is merely one factor a court may consider in determining confidentiality. Certainly, however, the fact that a document is marked "confidential" creates a presumption of confidentiality. To the extent that the presumption may be rebutted, it is not dispositive. It is difficult to imagine a document that could be more clear on its face regarding whether and for what reason it is intended to be confidential."²⁵ The GE and BNE documents sought to be protected in this petition are clearly marked "confidential and proprietary – do not copy without consent." On that basis and absent a requirement under the PUESA to disclose proprietary information, the Council granted BNE's Motion for Protective Order on March 23, 2011 and reaffirmed that decision on April 14, 2011 and April 21, 2011.²⁶

C. The Council did not engage in ex parte communications with Epsilon Associates, Inc.

Anticipating receipt of applications and petitions for renewable energy facilities, in October 2010, the Council employed Epsilon Associates, Inc. (Epsilon) for a two year contract as a consultant to study and measure the consequences of proposed renewable energy facilities on the public health, safety and environment. Under Section Four of the contract, it states: "...2. Contractor will review and provide opinion, interrogatory suggestions, comments and recommendations on various renewable energy projects *on an as needed basis*; 3. Contractor will author proceeding documentation, including but not limited to, requested reports, comments, interrogatories, proposed conditions and pre-filed testimony; 4. Contractor

²⁰ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011).

²¹ *Id.*

²² *Id.*

²³ Conn. Gen. Stat. §1-206 (2011); *Spitz v. Board of Examiners of Psychologists*, 127 Conn. App. 108 (Conn. App. 2011).

²⁴ *Lash v. Freedom of Information Commission et al.*, 300 Conn. 45 (2011), citing *New Haven v. Freedom of Information Commission*, 205 Conn. 767 (1988).

²⁵ *Id.*

²⁶ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011).

will be available to attend, cross-examine, and testify at public hearings as an expert witness, *as necessary...*²⁷ Under Conn. Gen. Stat. §16-50n(e), “the Council may employ one or more independent consultants to study and measure the consequences of the proposed facility on the environment... any study and any report issued as a result thereof shall be part of the record in the proceeding.”

The Council did not request Epsilon to issue any study or report that would have been required to be made part of the record in this proceeding under Conn. Gen. Stat. §16-50n(e). According to the Supreme Court, administrative agencies “are entitled to technical and professional assistance in matters which are beyond their expertise and that such assistance may be rendered in executive session.”²⁸ However, the use of such assistance “cannot be extended to the receipt, *ex parte*, of information *supplied by a party to the controversy* without affording his opposition an opportunity to know of the information and to offer evidence in explanation or rebuttal.”²⁹ Epsilon was not a party to this proceeding. Pursuant to the contract, Epsilon was employed by the Council to provide technical and professional assistance in the review of proposed renewable energy facilities, including, but not limited to, this petition.

On March 29, 2011, FairwindCT, Inc. (Fairwind), a party to this proceeding, filed a Motion for the Council to Issue a Subpoena directing Michael Guski, principal of Epsilon, to testify at the April 14, 2011 evidentiary hearing regarding any analysis, advice, or assistance provided by Epsilon to the Council in considering this petition.³⁰ In that motion, Fairwind cites to Section Four of the Council’s contract with Epsilon at Paragraph 4, which states, “Contractor will be available to attend, cross-examine, and testify at public hearings as an expert witness, as necessary.”³¹ The Council did not request Epsilon to attend, cross examine or testify at any of the public hearings as an expert witness. The Council requested Epsilon to review and provide opinion on the petition and to provide the Council with recommended interrogatories. The portions of the interrogatories authored by Epsilon were ultimately issued to the petitioner and copies of the interrogatories were provided to all parties and intervenors in the proceeding. Furthermore, pursuant to a FOIA request dated April 12, 2011 from Nicholas Harding, the attorney representing Fairwind, the Council publicly disclosed all of its communications with Epsilon, including posting copies of those documents on the Council website. Therefore, the Council did not engage in *ex parte* communications with Epsilon.

D. The Council has a statutory duty to consult with and seek comments from other state agencies.

Under Conn. Gen. Stat. §16-50j, “prior to commencing any hearing... the Council shall consult with and solicit written comments from the Department of Environmental Protection... All such comments shall be made part of the record... Said departments and the Council shall not enter any contract or agreement with any party to the proceedings or hearings...that requires said departments or Council to withhold or retract comments, refrain from participating in or withdraw from said proceedings or hearings.” On February 7, 2011, pursuant to Conn. Gen. Stat. §16-50j, the Council solicited agency comments on this petition.³² The DEP submitted comments on April 6, 2011.³³ On April 7, 2011,

²⁷ Personal Service Agreement between Epsilon Associates, Inc. and the Connecticut Siting Council, dated October 1, 2010 (emphasis added).

²⁸ *Pizzola v. Planning and Zoning Commission of the Town of Plainville*, 167 Conn. 202, 208 (1974).

²⁹ *Id.* (emphasis added).

³⁰ Connecticut Siting Council, Petition 983, Motion for Council to Issue Subpoena, *available at* http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_983/983-20110329-fairwindmotioncouncilissuesubpoena.pdf (last visited May 27, 2011).

³¹ Personal Service Agreement between Epsilon Associates, Inc. and the Connecticut Siting Council, dated October 1, 2010.

³² Connecticut Siting Council, Petition 983, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011).

Fairwind submitted a Revised Witness and Exhibit List that listed as a witness the author of the April 6, 2011 DEP comments, Frederick L. Riese, “or such other DEP employee(s) who shall submit comments to the Siting Council in these matters.”³⁴ Unlike the fourteen other witnesses listed on the Revised Witness List, Fairwind did not submit any pre-filed testimony for Mr. Riese. The Council requested pre-filed testimony for any party or intervenor witnesses to be filed on or before March 15, 2011 and April 7, 2011 pursuant to R.C.S.A. §16-50j-25.³⁵ Furthermore, Fairwind failed to proffer what Mr. Riese would testify about, failed to demonstrate how its case would be impaired without Mr. Riese’s testimony and failed to show how Fairwind would be prejudiced without the testimony.

During the proceedings held by the Council in Petition 980, Fairwind, a party to the proceeding, issued a subpoena to Mr. Riese compelling him to appear at the March 31, 2011 hearing in that matter.³⁶ On March 29, 2011, the DEP requested a ruling from the Council that Mr. Riese not be compelled to appear and indicated that the submission of comments does not elevate DEP’s status to that of a party or intervenor and does not constitute pre-filed testimony.³⁷ The Council did not require Mr. Riese to appear at the March 31, 2011 public hearing in Petition 980. During that hearing, Save Prospect Corp., a party to the Petition 980 proceeding, filed a motion to strike the DEP comments from the record, which was denied by the Council as an improper motion on the basis that striking the DEP comments would violate the requirements of the statute that “all such written comments shall be made part of the record.”³⁸ In this proceeding, as in Petition 980, DEP was not a party nor did Mr. Riese or any other DEP employee submit pre-filed testimony. The DEP submitted comments in response to a request from the Council and the Council made those comments part of the record pursuant to Conn. Gen. Stat. §16-50j.

According to the state Appellate Court, the Council “has a statutory duty to seek input from and the expertise of other state agencies and the legislature clearly contemplated the involvement of other state agencies to supply information to the Council in order to render its decision... The Council [acts] properly by taking into account the [DEP] standard setting function in determining the degree of [environmental impact]. It is clearly within the statutory authority of the Council to grant [a petition for a declaratory ruling] subject to specific conditions, including subsequent compliance with DEP standards and regulations. The PUESA provides the Council with numerous means of acquiring information in addition to that which must be submitted by the [petitioner].”³⁹ Mr. Riese was not a witness for the Council or any party or intervenor in this proceeding. His comments were filed pursuant to a request from the Council that is statutorily required when the Council commences a public hearing. Those comments

³³ *Id.*

³⁴ Connecticut Siting Council, Petition 983, Revised Witness and Exhibit List of FairwindCT, Inc., Stella and Michael Somers and Susan Wagner, *available at* http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_983/prefiled/983-20110407fairwindrevised_witness_and_exhibit_list_of_fairwindct_somers_wagner.pdf (last visited May 27, 2011).

³⁵ Connecticut Siting Council, Petition 983, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011); R.C.S.A. §16-50j-25 (c) (“At the discretion of the Council, any evidence or testimony may be required to be pre-filed by a date specified by the Council. All pre-filed evidence and testimony shall be received in evidence with the same force and effect as though it were stated orally by the witnesses, provided that each such witness shall be present at the public hearing at which such prepared written testimony is offered, shall adopt such written testimony under oath, and shall be made available for cross-examination as directed by the Council.”)

³⁶ Connecticut Siting Council, Petition 980, *available at* <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=468692> (last visited May 27, 2011).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Town of Preston v. Connecticut Siting Council*, 20 Conn. App. 474 (Conn. App. 1990); *City of Torrington v. Connecticut Siting Council*, 1991 Conn. Super. LEXIS 2084 (Conn. Super. 1991).

were not submitted as pre-filed testimony for the DEP; the DEP has appointed a designee who is a voting member of the Council. Furthermore, those comments were not submitted as pre-filed testimony of a witness for Fairwind. Mr. Riese's comments were submitted into the record pursuant to the requirements of Conn. Gen. Stat. §16-50j, which imposes upon the Council a statutory duty to consult with and seek comments from other state agencies, including, but not limited to, DEP.

E. Consolidation of the evidentiary hearings for Petitions 983 and 984 would have been confusing to the public and unfair to parties.

The 180-day deadline for decision in this petition is June 4, 2011. On December 13, 2010, BNE filed a petition for declaratory ruling for the location, construction and operation of a 4.8 MW wind renewable generating project on Winsted-Norfolk Road in Colebrook, Connecticut, which was designated as Petition 984 by the Council.⁴⁰ The 180-day deadline for decision in Petition 984 is June 11, 2011. Pursuant to Conn. Gen. Stat. §16-50m and for the convenience of residents and members of the public who wished to express their concerns regarding the proposed wind projects in Petitions 983 and 984, the Council decided to hold two public hearing sessions in the Town of Colebrook on March 22, 2011 and March 23, 2011.⁴¹ Notice of the public hearings was published on February 7, 2011.⁴² On February 25, 2011, the Council held a pre-hearing conference for Petitions 983 and 984 where parties and intervenors were given the opportunity to informally discuss procedural matters, including, but not limited to, exchange of pre-hearing interrogatories and submission of pre-filed testimony.⁴³ At that time, the Council had not yet developed a schedule of dates for evidentiary hearings for either petition.

In a memorandum dated March 18, 2011, the Council announced a schedule for the evidentiary hearings indicating April 14, 2011, April 21, 2011 and April 26, 2011 for Petition 983, and indicating April 26, 2011, April 28, 2011 and May 5, 2011 for Petition 984, all to be held at the Council offices in New Britain.⁴⁴ During the pre-hearing conference and in motions dated February 8, 2011, March 15, 2011, and April 12, 2011, parties moved to consolidate the evidentiary hearings on both petitions and the petitioner objected. The Council denied the motions on the basis that aside from being confusing and inconvenient for the general public, each petition is on a different schedule because they were filed separately at different times, has different parties with different concerns that are specific to one of the projects, is on a separate parcel of land, has a different electrical interconnection and has a different assigned staff siting analyst.⁴⁵

The parties argued that the public notice issued by the Council included both petitions, however, the public notice was issued for the convenience of residents and members of the public who wished to

⁴⁰ Connecticut Siting Council, Petition 983, Findings of Fact ¶3, June 2, 2011; Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited May 27, 2011).

⁴¹ Conn. Gen. Stat. §16-50m (2011) ("At least one session of such hearing shall be held at a location selected by the Council in the county in which the facility or any part thereof is to be located after 6:30 p.m. for the convenience of the general public."); Council Meeting Minutes, January 20, 2011, available at <http://www.ct.gov/csc/cwp/view.asp?a=953&q=473656> (last visited May 27, 2011).

⁴² Connecticut Siting Council, Petition 983 Hearing Notice, available at http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_983/p983p984hearingnotice.pdf (last visited May 27, 2011); Connecticut Siting Council, Petition 984 Hearing Notice, available at http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_984/pe983_984_hrng_not.pdf (last visited May 27, 2011).

⁴³ Connecticut Siting Council, Pre-Hearing Conference Memorandum, available at http://www.ct.gov/csc/lib/csc/pendingproceeds/petition_984/pe984phcreresults.pdf (last visited May 27, 2011).

⁴⁴ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011); Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited May 27, 2011).

⁴⁵ *Id.*

provide comments and express their concerns to the Council regarding the proposed wind projects while the Council was present in the Town of Colebrook. The parties also argued that they would be prevented from presenting evidence and cross examination on the cumulative effects of the two petitions. Conn. Gen. Stat. §16-50p requires the Council to consider the environmental impact of a proposed facility alone and cumulatively with other *existing* facilities.⁴⁶ It is conceivable that the Council may approve one of the petitions and not the other, or that the Council may approve or deny both petitions. The UAPA permits members of an agency to use their experience, technical competence and specialized knowledge in the evaluation of evidence and the determination of factual issues.⁴⁷ This includes knowledge of agency records, such as Petition 984, that are subsequently submitted to the Council.⁴⁸

Fairwind filed a Motion Concerning Scheduling dated April 12, 2011 indicating the availability of their individual witnesses on the dates of the continued evidentiary hearings for Petition 983.⁴⁹ Fairwind argued that party and intervenor witnesses should be cross examined in both petitions on one day, however a total of six hours of cross examination of party and intervenor witnesses was allotted for each petition.⁵⁰ According to the state Supreme Court, “it is not unconstitutional for the Council, in good faith to balance its statutory time constraints against [a party’s] desire for more time to present their objections to [a] proposal.”⁵¹ If the evidentiary hearings were consolidated, the total cross examination time of Fairwind’s 14 witnesses would certainly have occurred over two hearing days.⁵² Furthermore, one pro se party, Jeffrey and Mary Stauffer, participated in Petition 984 only and one represented party, Robin Hirtle, participated in Petition 983 only.⁵³ According to the Supreme Court, “constitutional principles permit an administrative agency to organize its hearing schedule so as to balance its interest in reasonable, orderly and nonrepetitive proceedings against the erroneous deprivation of a private interest.”⁵⁴ Therefore, consolidation of the evidentiary hearings for Petitions 983 and 984 would have been confusing for the public and unfair to the Stauffers and Ms. Hirtle.

F. The hearing procedure was consistent with due process requirements.

Under the UAPA, each party and the agency conducting the public hearing shall be afforded the opportunity to respond, to cross examine other parties, intervenors and witnesses, and to present evidence and argument on all issues involved.⁵⁵ The Supreme Court recognizes that an agency is not required to use the evidence and materials presented to it in any particular fashion as long as the conduct of the hearings is fundamentally fair, and that due process requires not only that there be due notice of a hearing, but at the hearing parties involved have a right to produce relevant evidence, and an opportunity to know

⁴⁶ Conn. Gen. Stat. §16-50p(a)(3)(B)(2011) (emphasis added).

⁴⁷ Conn. Gen. Stat. §4-178 (2011); *Feinson v. Conservation Commission*, 180 Conn. 421 (1980); *Torsiello v. Zoning Board of Appeals*, 3 Conn. App. 47 (Conn. App. 1984).

⁴⁸ Connecticut Siting Council, Petition 983, Findings of Fact ¶3, June 2, 2011.

⁴⁹ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011).

⁵⁰ Connecticut Siting Council, Petition 983, Council memorandum dated March 18, 2011, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011).

⁵¹ *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990).

⁵² *Id.* (Fairwind’s witnesses were cross examined for four hours.)

⁵³ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011); Connecticut Siting Council, Petition 984, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469902> (last visited May 27, 2011).

⁵⁴ *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990).

⁵⁵ Conn. Gen. Stat. §4-177c (2011).

the facts on which the agency is asked to act, to cross examine witnesses and to offer rebuttal evidence.⁵⁶ Four evidentiary hearings of a total of 16⁵⁷ hours were held on this petition.

During a pre-hearing conference held on February 25, 2011, parties and intervenors were afforded an opportunity to informally discuss Council procedures for before, during and after the hearings. The Council also announced dates for submission of interrogatories and pre-filed testimony.⁵⁸ On March 18, 2011, the Council issued a memorandum addressing how the evidentiary hearings in this matter would proceed.⁵⁹ The Council indicated that cross examination would be limited to topics relevant to the final decision to be rendered by the Council under Conn. Gen. Stat. §16-50p: public health and safety, environmental impacts and facility operation. The Council also indicated additional deadline dates for the submission of interrogatories and pre-filed testimony.⁶⁰ Furthermore, the Council indicated that time for cross examination on the relevant topics would be limited pursuant to R.C.S.A. §16-50j-30, which states, “to avoid unnecessary cumulative evidence, the Council may limit the number of witnesses or the time for testimony upon a particular issue in the course of any hearing.” According to the Supreme Court, “it is well established that unless administrative regulations are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute.”⁶¹

Fairwind filed motions to compel interrogatory responses, or in the alternative to strike BNE’s exhibits and pre-filed testimony on April 11, 2011, April 15, 2011 and April 21, 2011, which were denied by the Council on the basis that Fairwind would have opportunities during the proceedings for additional cross examination of BNE.⁶² It is well settled that “parties to... quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right. Pre-trial discovery may be expressly authorized by statute, but, absent an express provision the extent to which a party to an administrative proceeding is entitled to discovery is determined by the rules of the particular agency.”⁶³ During the evidentiary hearing held on April 26, 2011, Fairwind’s attorney stated, “interrogatories are no substitute for proper cross examination.”⁶⁴ During that hearing, Fairwind had an opportunity to cross examine the petitioner.

The Connecticut Supreme Court held that limitation of cross examination of witnesses does not violate due process and the Court has held repeatedly that the “procedures required by the UAPA exceed the minimal procedural safeguards mandated by the due process clause.”⁶⁵ Under the UAPA, the agency

⁵⁶ *Connecticut Fund for the Environment v. Stamford*, 192 Conn. 247 (1984); *Palmisano v. Conservation Commission*, 27 Conn. App. 543 (Conn. App. 1992).

⁵⁷ Transcript, March 23, 2011; Transcript, April 14, 2011; Transcript, April 21, 2011; Transcript, April 26, 2011.

⁵⁸ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011) (pre-filed testimony and responses to interrogatories due March 15, 2011).

⁵⁹ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011).

⁶⁰ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011) (additional pre-filed testimony and responses to additional interrogatories due April 7, 2011).

⁶¹ *Webster Bank v. Oakley*, 265 Conn. 539 (2003).

⁶² Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011); Transcript, April 14, 2011, p. 12; Transcript, April 21, 2011, p.6; Transcript, April 26, 2011, p. 5-6 (BNE objected to certain interrogatories on the basis of relevance. However, without waiving objection, BNE provided limited responses to some of the interrogatories. To the extent that Fairwind seeks clarification or more information related to the subject interrogatories, they will have additional opportunities to cross examine the petitioner during these proceedings.).

⁶³ *Pet v. Department of Health Services*, 228 Conn. 651 (1994).

⁶⁴ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011); Transcript April 26, 2011 p. 170 (it should be noted that Fairwind submitted 266 interrogatories to BNE during the course of these proceedings).

⁶⁵ *Pet v. Department of Health Services*, 228 Conn. 651 (1994).

and the parties to a proceeding may conduct cross examination required for a full and true disclosure of the facts.⁶⁶ The Council provided parties and intervenors with twice as much time to cross examine the petitioner as the petitioner was provided to cross examine parties and intervenors. Although the four hours allotted to cross examination of the petitioner by parties and intervenors was to be divided among six parties and intervenors, Fairwind used more than half of that time.⁶⁷ Fairwind was also granted an additional 15 minutes of cross examination on the petitioner's rebuttal.⁶⁸ Therefore, Fairwind was afforded the opportunity to conduct cross examination required for a full and true disclosure of the facts.

Fairwind was also afforded the opportunity to fully and fairly present evidence in opposition to the petition. Fairwind presented its case during the April 21, 2011 and April 26, 2011 evidentiary hearings. One of Fairwind's 14 witnesses, Mr. Gerry Meyer, was unable to be present, adopt his written testimony under oath and be cross examined on either date. On April 21, 2011, the Council allowed Mr. Meyer's pre-filed testimony into the record.⁶⁹ According to the Supreme Court, "constitutional principles permit an administrative agency to organize its hearing schedule so as to balance its interest in reasonable, orderly and nonrepetitive proceedings against the erroneous deprivation of a private interest and it is not unconstitutional for the Council, in good faith to balance its statutory time constraints against a [party's] desire for more time to present their objections to a proposal."⁷⁰ Furthermore, the Council accepted submissions from parties after the close of the evidentiary record providing additional opportunities for parties to voice their concerns.⁷¹ Therefore, the hearing procedure was consistent with due process requirements.

G. The resignation of Council Chairman Daniel F. Caruso during the pendency of this proceeding did not warrant a "mistrial."

On March 22, 2011, Attorney Jeffrey Tinley (Tinley), representing Save Prospect Corp., a party to Petition 980, submitted a letter to the Council describing a conversation that had taken place between he and former Council Chairman Caruso (Caruso) in the chambers of Judge Caruso's Probate Court on March 18, 2011.⁷² Tinley accused Caruso of engaging in ex parte communications in violation of Conn. Gen. Stat. §4-181. Upon receipt of the Tinley letter, Caruso resigned as Council Chairman on March 24, 2011. During the evidentiary hearing held on April 14, 2011, the Council considered a Motion for Mistrial or in the Alternative for Continuance, Reconsideration and to Alter Schedule dated March 29, 2011 filed by Fairwind in response to the alleged ex parte communication in the Tinley letter.

⁶⁶ Conn. Gen. Stat. §4-178 (2011); R.C.S.A. §16-50j-28; *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990).

⁶⁷ Connecticut Siting Council, Petition 983, Council Memorandum dated April 19, 2011, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011); Transcript, April 14, 2011, p. 168 (A total of four hours was allotted collectively to six parties for cross examination of the petitioner. Divided equally among the six parties, a 40 minute increment was specifically reserved for a fair amount of cross examination by the attorney for Ms. Hirtle and the Mows who was out of the country until April 26, 2011).

⁶⁸ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011); Transcript, April 26, 2011, p. 209.

⁶⁹ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011); Transcript, April 21, 2011, p. 107.

⁷⁰ *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990).

⁷¹ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011) (The record closed on April 26, 2011. A letter from the State Historic Preservation Office was submitted on May 23, 2011. During a Council meeting held on May 26, 2011, the Council granted a request from Fairwind to submit a letter from the U.S. Army Corps of Engineers.)

⁷² Connecticut Siting Council, Petition 980, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=468692> (last visited May 4, 2011).

In its motion, Fairwind cited to a state Supreme Court case in which the Superior Court judge assigned to a judicial civil trial matter engaged in *ex parte* communications.⁷³ A public hearing on a petition for a declaratory ruling filed under the UAPA and the PUESA is not a trial; it is an administrative proceeding. Furthermore, Council decisions are rendered by nine voting members rather than one judge. During the public hearing held on April 14, 2011, the Council denied Fairwind's motion for mistrial, motion for continuance and motion to alter the schedule and granted the motion for reconsideration.⁷⁴ As a result, the Council reaffirmed all of the 18 previous rulings in this proceeding.⁷⁵ Therefore, the resignation of Caruso as Council Chairman and the reaffirmation of the 18 rulings during Caruso's chairmanship cured any alleged predisposition upon which to judge the merits of this petition by Caruso and the other eight Council members.

H. Chairman Stein met the requirements to participate in the deliberations and vote on this petition.

Robert Stein was named as Acting Chairman of the Council on March 24, 2011. He presided over the evidentiary hearings held in this petition on April 14, 2011, April 21, 2011 and April 26, 2011. At a public meeting of the Council held on April 18, 2011, Chairman Stein stated for the record that he fully intended to participate in the deliberations and the final decision on this petition.⁷⁶ On March 21, 2011, the Council issued a memorandum indicating Chairman Stein had met the requirements under the UAPA to make an informed decision on the matter and that any party or intervenor who had objections should notify the Council in writing no later than May 2, 2011.⁷⁷ On April 29, 2011, the Council received an objection from Fairwind to the participation of Chairman Stein in the deliberations and vote on this petition pending receipt of information with respect to the nature and scope of Chairman Stein's site visit, as well as presenting an interpretation of the Council memorandum to indicate that Chairman Stein had already decided to vote in favor of the petition.

It is well settled that members of an administrative agency need not be present at public hearings in order to participate in decisions if the member acquaints themselves sufficiently with the issues raised and the evidence and arguments presented at public hearings in order to exercise an informed judgment.⁷⁸ Chairman Stein announced during a public meeting of the Council on May 12, 2011 that he had read the transcripts of the hearings held on March 22, 2011 and March 23, 2011 over which he did not preside, reviewed the entire record and conducted a site visit.⁷⁹ He met the requirement of sufficient acquaintance with the issues raised and the evidence and arguments presented at the public hearings in this matter to exercise an informed judgment.

Fairwind's objection sought information from the Council with respect to the nature and scope of Chairman Stein's site visit. Site visits are not required by the UAPA or the PUESA. The purpose of a site visit is to acquaint members with the property at issue; the purpose of a hearing is to afford the parties the

⁷³ See *Abington Ltd. Partnership v. Heublein*, 246 Conn. 815 (1998).

⁷⁴ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011).

⁷⁵ *Id.*

⁷⁶ Connecticut Siting Council, Meeting Minutes, April 18, 2011.

⁷⁷ Connecticut Siting Council, Petition 983, available at <http://www.ct.gov/csc/cwp/view.asp?a=2397&q=469520> (last visited May 27, 2011).

⁷⁸ *New Haven v. Public Utilities Commission*, 165 Conn. 687 (1974); *Dana-Robin Corp. v. Common Council of the City of Danbury*, 166 Conn. 207 (1974); *Loh v. Planning and Zoning Commission of the Town of Fairfield*, 161 Conn. 32 (1971).

⁷⁹ Connecticut Siting Council, Meeting Minutes, May 12, 2011.

opportunity to present and to rebut evidence.⁸⁰ Site visits are neither a hearing nor an integral part of the hearing process.⁸¹ Courts recognize that site visits, although not required by statute, may be necessary for evaluation of property and that site visits are an appropriate investigative tool.⁸² Chairman Stein publicly disclosed that he had read the transcripts of the public hearings over which he did not preside, reviewed the entire record and conducted a site visit. Therefore, Chairman Stein met the requirements of the UAPA and the Supreme Court to exercise an informed judgment on this petition.

⁸⁰ *Manor Development Corp. v. Conservation Commission*, 180 Conn. 692 (1980); *Grimes v. Conservation Commission of the Town of Litchfield*, 49 Conn. App. 95 (Conn. App. 1998);

⁸¹ *Grimes v. Conservation Commission*, 243 Conn. 266, 277-9 (1997).

⁸² *Id.*