

**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

April 11, 2011

**OBJECTION TO MOTION TO STRIKE
PRE-FILED TESTIMONY OF WILSON FAUDE**

FairwindCT, Inc., Susan Wagner and Stella and Michael Somers (the “Grouped Parties”), hereby object to the Motion to Strike Pre-Filed Testimony of Wilson Faude, dated April 7, 2011, filed by petitioner BNE Energy Inc. (“BNE”), as it relates to the rules of the Federal Communications Commission (“FCC”). In its motion and its related motion to strike the testimony of Stella Somers on the same topic, BNE asks that the Council strike testimony regarding the FCC’s presumption that towers more than 400 feet tall are presumed to have an adverse effect on historic properties within 1.5 miles, on the grounds that BNE is seeking approval for wind turbines more than 400 feet tall.

There is no question that Rock Hall, a property on the National Register of Historic Places, is located within 1.5 miles of the proposed site. Therefore, the FCC presumption is extremely damaging to BNE, which explains BNE’s attempt to strike that presumption from the record. The Council should reject BNE’s motion for what it is – a ploy to get this Council to ignore the adverse effects of its proposed project on a property that is protected under federal law. The Council should not countenance BNE’s inappropriate attempt to strike evidence simply because it harms BNE’s case.

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

1. On March 15, 2011, Mr. Faude, a former member and chair of the Connecticut Historical Commission, submitted pre-filed testimony in this matter and in Petition No. 984. In his testimony, Mr. Faude references the 1.5 mile area of presumed effect that is applied by the FCC when reviewing the siting of telecommunications towers more than 400 feet high. The FCC applies its 1.5-mile rule when conducting reviews mandated by Section 106 of the National Historic Preservation Act, and presumes that siting towers of that height within 1.5 miles of historic properties will have an adverse effect on such properties.
2. Mr. Faude opines that in light of the size and function of the wind turbines that BNE proposes to install, the area of presumed effect is even larger than 1.5 miles. He also opines that BNE should carry the burden of proving that its proposed project will not have an adverse effect on Rock Hall and other historic and cultural resources in the area surrounding the site.
3. On April 7, 2011, BNE filed its motion to strike that portion of Mr. Faude's testimony from the record. In its motion, BNE argues that because the FCC rule makes no mention of wind turbines and the FCC has no jurisdiction over wind turbines, all references to the 1.5 mile area of presumed effect should be stricken.
4. BNE's argument is flawed for several reasons.
5. First, BNE ignores the fact that its own consultant first raised the FCC's area of presumed effect. (See Petition, Exhibit B.) If the FCC's 1.5-mile area of presumed effect is irrelevant to the determination of whether BNE's proposed 492-foot tall

wind turbines will have an adverse effect on historic and cultural properties, why did BNE refer to and rely on that presumption in its correspondence with the State Historic Preservation Office and in its petition?

6. The answer is that once again, BNE seeks to strike as irrelevant testimony and evidence offered by opponents to its petitions in response to statements made by BNE in its own petition. For example, BNE discusses at length in its petitions the alleged financial benefits and jobs created by its projects. Then, it refuses to answer interrogatories related to those claims on the grounds that the information is irrelevant – but offers pre-filed testimony on the same matters. Similarly, BNE claims in its petition and in pre-filed testimony that its project will have a 30 percent capacity factor – but then refuses to answer interrogatories related to those claims and moves to strike pre-filed testimony submitted by the Grouped Parties on the grounds that the information is irrelevant. (See BNE’s Motion to Strike Pre-Filed Testimony of David Pressman, dated Apr. 7, 2011.)
7. This motion to strike is yet another example of BNE’s attempt to game the system by presenting the Council with information in support of its petition that it later conveniently claims is irrelevant when opponents reveal that information is flawed. BNE’s claim to the SHPO and to this Council that its project will not have an adverse effect on historic and cultural resources in the area is based on its own analysis of that 1.5-mile area of presumed effect that it now claims is irrelevant. (See Petition, Ex. B.)

8. Second, there is no legal support for BNE's claim that the FCC's area of presumed effect is irrelevant. No witness has claimed that the area of presumed effect is binding on this proceeding. Instead, the Grouped Parties' witnesses who have testified on this issue, including Mr. Faude, state only that in the absence of turbine-specific rules, the area of presumed effect applied to stationary towers more than 400 feet tall is at least a minimum standard that should be applied here.
9. BNE seeks to exclude that testimony and any references to the area of presumed effect because if the 1.5 mile standard is applied here, BNE cannot overcome the presumption that its project will have an adverse effect on Rock Hall and other historic and cultural resources. In short, BNE seeks to exclude from evidence a presumption not because it is irrelevant, but because it is damaging to BNE's case. Judicial authorities regularly reject such attempts to exclude evidence that harms one party's case.
10. Generally, "[w]hile there is no precise test for relevancy, evidence is admissible if it tends to establish a fact in issue; and if its probative value is not far outweighed by its prejudicial effect. . . . Evidence that is inadmissibly prejudicial is not to be confused with evidence that is merely damaging. . . . All evidence adverse to a party is, to some degree, prejudicial." (Chouinard v. Marjani, 21 Conn. App. 572, 575-76 (1990) (reversing trial court decision to exclude evidence that was not prejudicial, merely damaging to the defendant's case)).
11. The FCC area of presumed effect is relevant because (1) BNE made it relevant by referencing it in its petition and by relying on the area of presumed effect in

making its erroneous statements that its project will have no adverse effect on historic or cultural resources; and (2) the Siting Council has a responsibility under state and federal law to take into account in its decisions the potential adverse effects of applications and petitions on natural, historic and cultural resources in the surrounding area.

12. This relevant evidence is unquestionably damaging to BNE's case, but it is not prejudicial. BNE's tactics should not be permitted.

WHEREFORE, for the foregoing reasons, the Grouped Parties object to BNE's motion to strike Mr. Faude's testimony as it relates to the FCC area of presumed effect.

By:



Emily A. Gianquinto
Reid and Riege, P.C.
One Financial Plaza, 21st Floor
Hartford, CT 06103
Tel. (860) 278-1150
Fax. (860) 240-1002


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 11th day of April, 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



Emily A. Gianquinto