**STATE OF CONNECTICUT**
**CONNECTICUT SITING COUNCIL**

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| **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 Winsted-Norfolk Road in Colebrook, Connecticut ("Wind Colebrook North")** | **Petition No. 984** |
| | **April 19, 2011** |

**PETITIONER BNE ENERGY INC.'S MOTION TO STRIKE TO REQUESTS FOR ADMINISTRATIVE NOTICE FILED BY FAIRWINDCT, INC., STELLA AND MICHAEL SOMERS AND SUSAN WAGNER**

Petitioner BNE Energy Inc. ("BNE") hereby objects to certain items listed in a request for administrative notice filed by FairwindCT, Inc., Stella and Michael Somers and Susan Wagner (collectively the "Grouped Parties") dated March 15, 2011 and a subsequent, supplemental request dated March 28, 2011. Specifically, items numbered 6, 13, 17, 18, 27 and 30-46 of the March 15, 2011 request should be stricken. Item #6 is not even remotely relevant to this proceeding and therefore should be stricken. Items listed as #13, #17 and #18 do not exist at the listed websites and therefore should be stricken. Item #27 simply states that certain items will be identified at a later date. This is inappropriate and should be stricken. Finally, items # 30-46 are not appropriate for inclusion as administrative notice items and likewise should be stricken as further detailed below.

In the Grouped Parties' subsequent request for administrative notice dated March 28, 2011, items numbered 1-10, 11-13, 17-20 should also be stricken. Items #1-10 are part of another, unrelated proceeding pending before the Council, some of which have not been included in the proceeding as exhibits because of witness unavailability. The inclusion of items from a separate pending proceeding is inappropriate and therefore these items should be stricken. Items #11-19 lack any foundation to establish the accuracy of the documents referenced and therefore

should not be included. Finally, item #20 is a document discussing transmission line rights-of-way. This petition involves three proposed wind turbines and is wholly unrelated to transmission line rights-of-way. Therefore, this document is irrelevant and should be stricken from the record.

## I. THE GROUPED PARTIES' ADMINISTRATIVE NOTICE ITEMS SHOULD BE STRICKEN

The purpose of administrative notice requests, like judicial notice requests, is to take notice of adjudicative facts—facts that are "not subject to reasonable dispute in that it is either (1) within the knowledge of people generally in the ordinary course of human experience, or (2) generally accepted as true and capable of ready and unquestionable demonstration." CT CODE OF EVIDENCE § 2-1. As the Council has noted in this proceeding and other pending proceedings, the purpose of administrative notice items is identifying that certain documents or reports exist. *See, e.g.*, Petition 980, February 24, 2011 Transcript at 32 (quoting Professor Tait) ("taking administrative notice just gets them into the record, that they exist. I don't see any objection that they don't exist."). Many of the items of which the Grouped Parties seek administrative notice simply do not exist and certainly are not documents that are generally accepted as true and capable of ready and unquestionable demonstration. Therefore, they are not appropriate for administrative notice as further discussed below.

### A. The March 15, 2011 Requests

#### 1. Item #6 Should be Stricken

The Grouped Parties request administrative notice of a Federal Communications Commission ("FCC") rule. The FCC rule was part of a Nationwide Programmatic Agreement which implemented Section 106 of the National Historic Preservation Act. See *In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process,* First Report and Order, FCC Docket No. 03-128. As indicated in

Attachment 2 to the Nationwide Programmatic Agreement (which is attached as Attachment A to the First Report and Order), the First Report and Order, along with the Agreement, *only* applies to communication facilities and activities. The FCC makes no reference to wind turbines nor does the FCC have any jurisdiction over wind turbines. Since the FCC has no jurisdiction over wind turbines, this document is wholly irrelevant to this proceeding and should be stricken from the record.

**2. Items #13, #17 and #18 Should be Stricken**

Items #13, #17 and #18 should be stricken from the record because they do not exist. An internet search for all three items demonstrates that these items do not exist. For item #13, a more general search of the New York Public Service Commission ("PSC") website does demonstrate that the purported GE document is available through this website. However, as discussed previously in this proceeding, the document available specifically states that the document is confidential and proprietary and cannot be reproduced without written permission from GE. No such written permission is demonstrated. Certainly, this Council should not be condoning the activities of the New York PSC in illegally posting this document by including it in the administrative notice items for this proceeding.

Items #17 and #18 do not exist and therefore should not be included. Item #17 purports to be a document filed in a pending docket #7628 at the Vermont Public Service Board. First and perhaps most importantly, there is no probative value that the Council can attach to a single document filed in a pending proceeding in another jurisdiction. The Council can only appropriately take administrative notice of the entire docket and can do so only if a decision has been rendered in that docket. Conveniently, the Grouped Parties did not request administrative notice of the document as officially filed with the Vermont Public Service Board ("PSB"). That

is because no such document exists. This certainly does not comply with the best evidence rule and therefore should not be condoned with this Council. A review of the docket on the Vermont PSB website reveals that there is no testimony submitted in docket #7628 on behalf of Scott McClane. Therefore, this item is entirely inappropriate as an administrative notice item.

Similarly, the Grouped Parties seek administrative notice of another single item from the same pending docket at the Vermont Public Service Board, item #17. Again, it is entirely inappropriate for this Council to take administrative notice of a single item filed in a pending docket from another jurisdiction. Furthermore, as with item #13, a search of the Vermont PSB website demonstrates that there was no order issued in docket #7628 on March 31, 2011. Therefore, as with item #13, item #17 simply does not exist and therefore clearly cannot be administratively noticed.

**3. Item #27 Should be Stricken**

Item #27 states that the Grouped Parties seek administrative notice of "setback regulations, rules and ordinances from various jurisdictions across the United States." This request is vague, blatantly deficient and should be stricken from the record.

**4. Items #30-46 Should be Stricken**

The Grouped Parties request administrative notice of items #30-#46, which are selected written testimonies submitted to the Connecticut legislature regarding pending bill #6249. The deficiencies with these requests are numerous. First, the Grouped Parties seek to administratively notice testimony regarding a pending bill, which is wholly irrelevant to this proceeding. As the Council is well aware, there are virtually thousands of bills pending before the Connecticut legislature this legislative session, the vast majority of which will not become law. Therefore, there is no probative value to administratively noticing any pending legislation.

The Grouped Parties compound the problem by not only **not** seeking administrative notice of the bill itself but also hand-picking selective testimony of which it seeks administrative notice. To the extent the Council entertains the notion of taking administrative notice of such testimony, then it must take administrative notice of all written testimony submitted regarding this bill.

### B. The March 28, 2011 Requests

#### 1. Items #1-10 Should be Stricken

In their March 28, 2011 supplemental requests, the Grouped Parties request that the Council take administrative notice of select testimony from the pending proceeding in petition 980 (items #1-10). These items should not be included for a variety of reasons. First, the petition 980 proceeding is not related to this proceeding and therefore any testimony from that proceeding is irrelevant. Second, that proceeding is still pending and therefore taking administrative notice of select portions of the incomplete record is entirely inappropriate. Compounding the problem again, the Grouped Parties seek administrative notice of only select portions of the petition 980 proceeding. If the Council even considers these requests appropriate, they should instead take administrative notice of the entire record of that proceeding, not just the select portions that the Grouped Parties request. Furthermore, BNE notes that at least one of the testimonies of which the Grouped Parties have requested administrative notice, # 3, was never admitted as evidence in that proceeding. Finally, BNE notes that item #10 requests administrative notice of testimony of a witness who has also proffered testimony in this proceeding, making this request wholly duplicative.

#### 2. Items #11-19 Should be Stricken

The Grouped Parties attempt to repair the obvious deficiency in #27 from their March 15, 2011 requests with equally deficient items #11-19 in their March 28, 2011 requests. Similar to

their requests for administrative notice of items from a pending docket at the Vermont Public Service Board, the Grouped Parties request administrative notice of items #11-19, which purport to be various ordinances and zoning regulations regarding wind turbines. However, not a single item complies with the best evidence rule. Rather than producing certified copies of those purported ordinances or providing a link to the official zoning regulations of the various jurisdictions, the Grouped Parties instead provide links to drafts or to anti-wind web sites. There is no credible evidence proffered that these purported documents actually exist. Therefore, they should not be included as administrative notice items. For example, the link provided for request #15 leads to a draft regulation. There is no evidence that this regulation was ever adopted. In addition, items #17-19 are proposed bills in jurisdictions outside the State of Connecticut and/or outside the United States. As the Council is well aware, there are countless proposed bills in this state alone that never become law. Even a proposed bill in Connecticut has no probative value before the Council. The Grouped Parties stretch even further to claim that proposed bills in other states or other countries, for which the Council has no idea whether those bills will become law, have some probative value in this proceeding. They simply do not and should be stricken from the record.

**3. Item #20 Should be Stricken**

Finally, item #20 in the Grouped Parties' request for administrative notice cites to a document from 1970 discussing siting of transmission lines in utility rights-of-way. BNE's project does not involve transmission lines nor does it involve utility rights-of-way. Therefore, this document is irrelevant to this proceeding and should be stricken from the record.

The Grouped Party's proposed administrative notice items are deficient and do not meet the Council's qualifications for documents to be administratively noticed. Therefore, these items should be stricken and not included in the record in this proceeding.

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## CERTIFICATION

This is to certify that a copy of the foregoing has been mailed this date to all parties and intervenors of record.

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