

**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
Winsted-Norfolk Road in Colebrook,
Connecticut (“Wind Colebrook North”)**

Petition No. 984

April 22, 2011

**OBJECTION TO MOTION TO STRIKE
PRE-FILED TESTIMONY OF DAVID PRESSMAN**

FairwindCT, Inc., Susan Wagner and Stella and Michael Somers (the “Grouped Parties”), hereby object to the Motion to Strike Pre-Filed Testimony of David Pressman, dated April 19, 2011, filed by Petitioner, BNE Energy Inc. (“BNE”). In its motion, BNE asks that the Council strike Mr. Pressman’s testimony as irrelevant because he discusses the flaws in the claimed economic benefits of BNE’s proposed project, the lack of support for BNE’s claim that its proposed project will have a 30 percent capacity factor, the reduced output that is likely to result from BNE’s proposal to place the turbines too close together, the high cost of constructing and maintaining this proposed project and the minimal impact this project will have in helping Connecticut satisfy its Renewable Portfolio Standard (RPS). BNE claims that any evidence not related to the proposed projects ability to meet air and water quality standards is irrelevant to this proceeding. BNE also claims that Mr. Pressman is not qualified to opine on such matters.

The Council should reject BNE’s motion because BNE put all of the above subjects at issue in this proceeding by including such claims not only in its petition, but also in the pre-filed testimony of its own witnesses. Once again, BNE asks this Council to strike evidence and testimony submitted by opponents in direct response to claims and evidence submitted by BNE. If

Mr. Pressman's testimony is irrelevant, so is the testimony of Joel Rinebold, Paul Corey, Pierre Heraud, Michael Libertine, Michael Klemens n and Thomas Wholley, because not one of those witnesses offers opinions regarding BNE's alleged compliance with air and water quality standards. BNE asks this Council to decide that BNE can submit evidence and make claims on numerous subjects outside of air and water quality standards, but that no other party can submit such evidence. The Council should not countenance these tactics.

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

1. On March 15, 2011, Mr. Pressman submitted pre-filed testimony in this matter and in Petition No. 983. In his testimony, Mr. Pressman responds directly to many claims by BNE regarding the claimed efficiency of its proposed project, the alleged local benefits of the project, the inadequate distance between the turbines, the expenses of the project and the minimal impact the proposed project will have in assisting the state to satisfy its RPS.
2. Every single one of these subjects was first raised by BNE in its petition, and BNE has submitted prefiled testimony by witnesses that addresses each of these subjects and makes claims consistent with those made in BNE's petition.
3. On April 19, 2011, BNE filed its motion to strike Mr. Pressman's testimony from the record. In its motion, BNE argues that the only information relevant to the Council is evidence regarding whether the proposed project complies with DEP air and water quality standards. Because Mr. Pressman offers no opinion on those matters, BNE reasons, his testimony should be stricken.
4. BNE's argument is flawed for several reasons.

5. First, BNE ignores the fact that it first raised all of these subjects as a result of claims made in its petition. (See, e.g., Petition at 9, 11, 12 (claiming the project will operate at 30 percent capacity); 3-4, 11 (claiming the project will create jobs and have “numerous” other local benefits); 3, 10-11 (claiming the project will help the state meet its RPS).) If evidence on these subjects is irrelevant to the determination of whether BNE’s petition seeking approval to site 492-foot tall wind turbines should be approved, why did BNE include all of these claims 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, and moves to strike Mr. Pressman’s testimony on that subject – 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 Mr. Pressman’s testimony refuting those claims on the grounds that the information is irrelevant.
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.

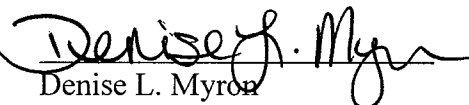
8. A further example of BNE's tactics is its claim that BNE's wind data has been released for independent review. (Motion at 2 n.2.) As both BNE and the Council are aware, the terms of the protective order the Council put in place restricts access to that wind data so that it is available only at the Council's offices until 4:30 p.m. each day. The wind data consists of tens of thousands of lines of data contained in an Excel spreadsheet on a computer disc, and the parties are not permitted to so much as take notes on that data. The wind data has therefore in no way been released for independent review.
9. Second, BNE's claim that the only relevant issues before the Council are whether the proposed project meets air and water quality standards is flawed. General Statutes § 16-50k(a) does not and cannot pre-empt all other state and federal statutes and regulations concerning, for example, protection of wildlife and wetlands, noise and other public health and safety concerns. The Council recognized as much in its memorandum outlining the topics relevant to its decision as including environmental issues, public health and safety issues and facility operation issues. (See Council Memorandum re: Hearing Procedures, dated Mar. 18, 2011.)
10. Therefore, testimony on issues outside of BNE's alleged compliance with air and water quality standards is relevant to the Council.

11. In short, it seems that again, BNE seeks to exclude evidence not because it is irrelevant, but because it contradicts BNE's claims regarding the benefits of its proposed project and therefore damages BNE's case. Judicial authorities regularly reject such attempts to exclude evidence that harms one party's case.
12. 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)).
13. Mr. Pressman's testimony is relevant because (1) BNE made it relevant by including the subjects on which he opines in its petition and its pre-filed testimony; and (2) the Siting Council has a responsibility under state and federal law to consider evidence beyond air and water quality standards.
14. BNE makes a final argument that Mr. Pressman is not qualified to offer opinions on the subjects of his pre-filed testimony because his resume does not demonstrate that he is "an engineer or expert in the erection, maintenance or placement of wind turbines." (Motion at 4.) This argument is also without merit.
15. First, Mr. Pressman does not claim to be an engineer or an expert on the erection, maintenance or placement of turbines. The only portion of his prefiled testimony that is remotely related to those subjects is his opinion regarding the inadequate

spacing between the proposed turbines. That testimony is offered in the context of his opinion regarding BNE's inflated and unsupported assumption that the output of its proposed project will be 30 percent.

16. Second, BNE's argument goes to the weight, not the admissibility, of Mr. Pressman's testimony. "The general standard for admissibility of expert testimony in Connecticut is simply that the expert must demonstrate a special skill or knowledge, . . . that, as properly applied, would be helpful to the determination of an ultimate issue. . . . Once the threshold question of usefulness to the jury has been satisfied, any questions regarding the expert's qualifications properly go to the weight, and not to the admissibility, of his testimony." DiPietro v. Farmington Sports Arena, LLC, 123 Conn. App. 583, 613 (2010).
17. BNE will have the opportunity to cross examine Mr. Pressman regarding his qualifications and the basis for his opinions. This argument is not grounds for striking Mr. Pressman's testimony.

WHEREFORE, for the foregoing reasons, the Grouped Parties object to BNE's motion to strike Mr. Pressman's pre-filed testimony.

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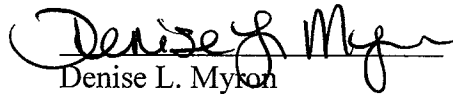
CERTIFICATION

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 22nd 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
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