

**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**

**May 31, 2011**

**MOTION TO STRIKE  
DRAFT INTERIM REPORT**

FairwindCT, Inc., Susan Wagner and Stella and Michael Somers (the “Grouped Parties”), hereby move to strike from the record the Draft Interim Report related to Spring Raptor Migration Surveys (the “Draft Interim Report”), dated May 23, 2011, but submitted to the parties on May 25, 2011, filed by the petitioner, BNE Energy Inc. (“BNE”). The Draft Interim Report is untimely and has been filed at this late date without permission of the Council. Further, the timing of BNE’s filing will significantly prejudice the Grouped Parties and all other parties and intervenors, who will not be afforded an opportunity for cross-examination or to otherwise comment the Draft Interim Report. Accordingly, the Grouped Parties respectfully request that the Council strike the Draft Interim Report from the record.

At the evidentiary hearing on Petition No. 983 on April 14, 2011, the parties and the Council engaged in a lengthy discussion about the status of BNE’s migratory bird studies and certain follow-up studies that were being performed during the course of the Council’s hearings on BNE’s petitions, including the possibility that BNE could produce an interim report regarding those studies:

MR. TAIT: If you were to produce an interim report would it be early enough so that Mr. Harding's group could look at it and comment on it?

MR. TIDHAR: What is that period?

MR. TAIT: I think May 13th is it Counsel?

MS. BACHMAN: June 4th.

MR. TAIT: Oh for this one, I'm sorry, June 4th.

MR. TIDHAR: We could complete an interim report which would include the findings of the spring Raptor migration survey. That would be possible, yes.

MR. TAIT: In time for all parties to comment on it?

MR. TIDHAR: I don't know what the comment period would require, but --

MR. TAIT: Well, let's say May 15th?

MR. TIDHAR: -- if we provided a report by May 15th, is that -- that would be possible.

MR. COREY: Then we will do it.

MS. LARSON: I would just -- Mr. Tidhar, does that capture the entire spring migration season or is that sufficient to capture a portion?

MR. HARDING: Objection. I thought -- it's my cross-examination. She can't be examining the witness during my cross-examination.

MR. TAIT: Can I?

MR. HARDING: You certainly can, but she can't.

MR. TAIT: If you produce it by May 15th, put any caveats you want says it cannot include this because of the timing.

MR. HARDING: We'd like the opportunity to cross-examine on that report, not simply comment on it, cross-examine.

MR. TAIT: We'll take that under advisement. Right now they can do it if we order it.

(Petition No. 983, 4/14/11 Tr. 122:25-124:7.)

The above-quoted discussion reveals that the Council mandated that BNE file any interim report on or before May 15, 2011, a date set by the Council to allow the Grouped Parties to submit comment on and/or cross examine Mr. Tidhar regarding the study.

The evidentiary hearing on this petition on April 28, 2011, reveals the same understanding with respect to any "interim" study that would be produced for the record in this proceeding:

MR. ROZNOY: But you didn't have any on site specific bat or bird monitoring devices on 984 at the time all of those materials were submitted, is that correct?

MR. TIDHAR: That's correct. In 2010 there were no studies completed on Colebrook North. However, those studies are underway at Colebrook North in 2011.

MR. ROZNOY: So there was no on site survey for bats at Colebrook North before submitting the petition?

MR. TIDHAR: Yes.

MR. ROZNOY: Okay. That's correct. And any conclusions Colebrook North, as you just said, are all based on data from Colebrook South?

MR. TIDHAR: Currently, we will be submitting an interim report regarding interim findings from the spring 2011 bird studies that were initiated in early March at Colebrook North. And those -- that finding -- those findings will be prepared and submitted in mid-May.

MR. ROZNOY: Mid-May. Those will be final -- that will be finals or will those be draft?

MR. TIDHAR: They'll be -- it will be an interim report --

MR. ROZNOY: In mid-May --

MR. TIDHAR: -- from -- yes, from a portion of the work that's ongoing in the spring season only.

(4/28/11 Tr. 211:12-212:10.)

The transcript of a later evidentiary hearing on this petition further clarifies that BNE recognized that it was required to file any interim report by May 15, 2011:

MR. GOLEMBIEWSKI: Why -- why should -- why should I be comfortable with -- with your description of those resources on the Colebrook North site?

MR. TIDHAR: Well all I can say is that the analysis that we've provided to date for Colebrook North makes inferences from Colebrook South data, and that the data that's being collected at Colebrook North will be provided as soon as it's ready, including the interim report, which will be prepared hopefully the week after next, targeting that May 15th deadline.

(5/5/11 Tr. 297:18-298:1 (emphasis added).)

As BNE has noted in its own filings regarding timeliness, the schedule adopted by the Council in this proceeding required testimony to be prefiled by April 19, 2011. Not only did BNE fail to file the Draft Interim Report by that date, it also failed to file the Draft Interim Report by May 15, 2011, the date by which the Council mandated that BNE's supplemental studies be filed. Instead, BNE filed the Draft Interim Report and served copies on the parties on May 25, 2011, twenty days after the close of the evidentiary hearings. BNE offers no explanation for its inability to meet the deadline imposed by the Council, and BNE has failed to seek permission to late-file the Draft Interim Report, which has missed the two filing deadlines already. Accordingly, the Draft Interim Report is untimely and has been filed without permission from the Council, and it should be stricken from the record of this proceeding.

Not only should the Council strike the Draft Interim Report because it is untimely and is not in accordance with the deadline that the Council imposed on BNE on the record in this proceeding, but also because when BNE finally did get around to filing the document with the Council (and the other parties), it was too late for any party to comment on the findings contained therein.<sup>1</sup> That right to offer commentary addressing the petitioner's new findings and/or to cross-

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<sup>1</sup> Had the Grouped Parties been afforded the opportunity to comment on the Draft Interim Report, they would have raised issues concerning the methodology of the report, including that it was conducted only for six hours once a week between the hours of 9 a.m. to 5 p.m. and failed to survey for nocturnal species; its limited value in light of its lack of any conclusions; BNE's continued failure to conduct on-site studies at both proposed Colebrook project sites – in spite of witness's sworn testimony that spring migration studies would be conducted at the Colebrook North site; the existence of at least eight state and federal endangered, threatened and special concern species on and around the site, including three federal species of concern; and whether the proposed "formula" that WEST apparently plans to use to calculate the potential risk to these species if the proposed project is approved complies with the requirements of State v. Porter, 241 Conn. 57 (1997).

examine the petitioner's witness on those findings is protected by the Constitution and by the UAPA, which explicitly grants to a party in a contested case the right to "conduct cross-examinations required for a full and true disclosure of the facts." Conn. Gen. Stat. § 4-178(5); see also id. § 4-177(a) ("In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity . . . at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved."); id. § 4-178(7) ("parties shall be notified in a timely manner of any material noticed, including any agency memoranda or data, and they shall be afforded an opportunity to contest the material so noticed").

The Council itself recognized this concern during the hearing, and it was to allow the Grouped Parties to comment or cross-examine the petitioner's witness that was the very purpose of the May 15, 2011, deadline in the first place. BNE's failure to meet the Council's deadline, then, is not merely a technical violation of the Council's order but also deprives the Grouped Parties of the ability to comment in any way on the contents of the Draft Interim Report. As such, the evidence cannot be considered by the Council in light of the Grouped Parties' right to opposition, and the Interim Report should be stricken from the record.

WHEREFORE, for the foregoing reasons, the Grouped Parties hereby move the Council to strike the Draft Interim Report from the record.

By:



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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 31st day of May, 2011:

Lee D. Hoffman  
Paul Corey  
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



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