STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

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VIA ELECTRONIC MAIL

February 27, 2020

Keith R. Ainsworth, Esq.
Law Offices of Keith R. Ainsworth, Esq., LLC
51 Elm Street, Suite 201
New Haven, CT 06510-2049

RE: **PETITION NO. 983** - BNE Energy, Inc. 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. **D&M Plan Modification.**

Dear Attorney Ainsworth:

The Connecticut Siting Council (Council) received the Application to Intervene under Connecticut General Statutes (CGS) §§22a-19, 16-50n and 4-177 and Motion to Open Proceedings (Application to Intervene), on February 26, 2020 that was submitted on behalf of the Nature Conservancy (TNC). Please be advised that the evidentiary record and public hearings for the above-referenced petition closed on April 26, 2011.

The Council issued a Declaratory Ruling to BNE Energy, Inc. (BNE) for the construction, maintenance and operation of **three wind turbines** at the Wind Colebrook South (WCS) site on June 2, 2011. Under the Uniform Administrative Procedure Act (UAPA), the Declaratory Ruling constitutes the final decision for Petition 983. Therefore, there is no pending matter or proceeding in which to intervene.

On January 9, 2020, BNE submitted a request to modify the Development and Management Plan (D&M Plan) for the WCS facility to relocate Turbine 3 (T3) 1,715 feet south of the initial location, as well as to construct, maintain and operate a different model turbine at that location. Condition No. 2 of the Council's June 2, 2011 Declaratory Ruling required BNE to submit a D&M Plan in one or more sections for approval by the Council prior to the commencement of facility construction.

BNE submitted its D&M Plan on September 16, 2011. It included all of the sections required under Condition No. 2 of the Council's June 2, 2011 Declaratory Ruling. The Council approved the site clearing and environmental monitor sections of BNE's D&M Plan on October 21, 2011. The Council approved all of the remaining sections of BNE's D&M Plan, including a request to relocate the temporary construction access road, on November 22, 2011.

Under Regulations of Connecticut State Agencies (RCSA) §16-50j-62, advance written notice shall be provided to the Council whenever a significant change to an approved D&M Plan is necessary. Significant changes to an approved D&M Plan include, but are not limited to, **"a change in structure type or location."**

After the Council's approval of BNE's D&M Plan, subsequent requests for modifications to BNE's approved D&M Plan were submitted and approved, including, but not limited to, a request to relocate Turbines 1 and 2 (T1 and T2) 135 feet east and 167 feet southwest, respectively, and to construct, maintain and operate a different turbine model at those revised locations. These D&M Plan modifications were approved in accordance with RCSA §16-50j-62.

A D&M Plan is not the subject of a proceeding nor is it a contested case under the UAPA. It is a condition of a final decision in a contested case proceeding that must be met in order to commence facility construction. A D&M Plan functions to "fill up the details" and constitutes the "nuts and bolts" of the facility approved by the Council.[1] **The D&M Plan cannot provide a substitute for matters not addressed during the application process.**

Pursuant to RCSA §16-50j-40, in its petition, BNE was required to provide notice to each abutting property owner and appropriate municipal officials and government agencies listed under Connecticut General Statutes §16-50*l*. According to the record of Petition 983, TNC received notice by certified mail of the submission of the petition to the Council on December 6, 2010. At that time, TNC had an opportunity to actively participate in the contested case proceedings held on Petition 983 either as a party or intervenor, or by providing a limited appearance statement. The Petition 983 record clearly demonstrates that TNC did not avail itself of the opportunity to request party or intervenor status or otherwise participate in the proceedings held on Petition 983.

Please note that the Council developed a deliberate schedule to provide all persons an opportunity to participate in the proceedings. This schedule included a public hearing in the Town of Colebrook for the benefit of the public. The Council continued the evidentiary hearings in New Britain to allow the parties and intervenors in this proceeding an opportunity to thoroughly review the petition and exhibits, and to prepare their own testimony and exhibits.

Under CGS §4-177a, a person may be granted intervenor status in a contested case if: "(1) such person has submitted a written petition and mailed copies to all parties, **at least five days before the date of hearing**..." (Emphasis added). The final hearing on this petition was held on April 26, 2011. The Council issued a Declaratory Ruling for this petition on June 2, 2011. Therefore, TNC's Application to Intervene is moot.

The Application to Intervene correctly notes that Beckley Bog is a National Natural Landmark, but it incorrectly notes that Beckley Bog Preserve, owned by TNC, is located in the Town of Colebrook. Beckley Bog Preserve is located in the Town of Norfolk. In the Application to Intervene, TNC claims BNE's D&M Plan Modification involves relocating T3 closer to Beckley Bog Preserve and violates the wind regulations. These claims are also incorrect.

The distance from the initial T3 location to Beckley Bog is 2,900 feet to the west. The distance from relocated T3 to Beckley Bog is 3,100 feet to the northwest. Furthermore, the distance from the initial T3 location to the TNC property line is 235 feet to the west. The distance from relocated T3 to the TNC property line is 324 feet to the west. Contrary to the claims in the Application to Intervene, both Beckley Bog and the TNC property line are farther from relocated T3 than they are from the initial T3 location.

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[1] *Town of Westport v. Conn. Siting Council*, 260 Conn. 266 (2002); *Town of Middlebury v. Conn. Siting Council*, 2002 Conn. Super. LEXIS 610 (Conn. Super. 2002).

On September 23, 2014, the Connecticut Supreme Court rendered a decision in the case of *FairwindCT, Inc. v. Connecticut Siting Council*. It held, in relevant part, that the wind regulations required to be adopted by the Council pursuant to Public Act (PA) 11-245 (codified at CGS §16-50kk) are not retroactive.[2] The Council issued a Declaratory Ruling to WCS on June 2, 2011. PA 11-245 took effect on July 1, 2011. The wind regulations are not retroactive and do not apply to WCS.

Finally, the Application to Intervene appears to also include a "Motion to Open Proceedings." However, TNC fails to cite to any statutory authority from which to form the basis for a "Motion to Open Proceedings" and TNC fails to provide any evidentiary support for a "Motion to Open Proceedings." CGS §§22a-19, 16-50n and 4-177 specifically relate to party status in a contested case proceeding and intervention in a contested case proceeding under the Connecticut Environmental Protection Act. Furthermore, TNC provides absolutely no basis or support for a motion to reopen in its Application to Intervene. Therefore, to the extent that TNC intended to file a "Motion to Open Proceedings" with its Application to Intervene, TNC's "Motion to Open Proceedings" fails on its face to meet the legal requirements for the proper submission of a motion to reopen under the statutes.

Sincerely,

Melanie A. Bachman
Executive Director

MAB/laf

cc: Parties and Intervenors
Council Members

[2] *FairwindCT, Inc. v. Conn. Siting Council*, 313 Conn. 669 (2014).