STATE OF CONNECTICUT
SITING COUNCIL

RE: Petition No. 1408 - FairWindCT, Inc., et al petition, pursuant to Connecticut General Statutes §4-176, for a declaratory ruling that: (a) the January 9, 2020 Development and Management Plan (D&M Plan) Modification submitted by BNE Energy, Inc. in Petition No. 983 conflicts with the Connecticut Siting Council's (Council) June 2, 2011 final decision on Petition No. 983; (b) the Council did not have jurisdiction over the D&M Plan Modification; (c) the Council did not have statutory authority to approve the D&M Plan Modification; (d) the D&M Plan Modification violated due process rights; and (e) the D&M Plan Modification violates the Connecticut Environmental Protection Act.

DECEMBER 15, 2020

REPLY MEMORANDUM TO BNE OPPOSITION MEMO

Petitioners, FairWindCT, Inc., the Grant Swamp Group and the Golds, ("Petitioners") hereby reply to BNE's Memo in Opposition to this Petition.

PETITION 1408 RAISES AN ISSUE OF FUNDAMENTAL FAIRNESS, NOT WHETHER THE APPLICANT BELIEVES IN ITS OWN RIGHTEOUSNESS

BNE attempts to characterize the use of the D&M process as being sanctioned by the Connecticut Supreme Court[1] in an over-broad dismissal of the point of Petition 1408. The Supreme Court has not, and without a major change in Connecticut law, is unlikely to, sanction the use of an obscure administrative procedure for the siting of a new facility on a new parcel of land.

Connecticut law contains a multi-faceted protection for public participation in administrative proceedings; part constitutional, part common law.

The Connecticut Supreme Court has shown a marked interest in protecting public participation. For example, in *Barry v. Historic District Commission of the Borough of Litchfield*, 289 Conn. 942 (2008), the Supreme Court upheld the Appellate Court and

[1] "*Accordingly, the Supreme Court upheld the use of the D&M Plan process for this project*." Opposition Mem at p.4.

trial court's decision declaring an agency action as fundamentally unfair.

The appellate court cited its decision in *Megin v. Zoning Board of Appeals*, noting that local administrative proceedings "are informal and are conducted without strict rules of evidence" but may not "violate the fundamental rules of natural justice. … the hearing must be fundamentally fair." *Megin v. Zoning Board of Appeals*, 106 Conn. App. 602 (2008).

Importantly, the *Megin* court observed as to fundamental fairness: "That common-law right is not coextensive with constitutional due process." In *Passalugo v. Guida-Seibert Dairy Co.*, 149 Conn. App. 478, 480 n. 6 (2014), the court said "there exists an inherent overlap between the right to due process and the right to fundamental fairness in administrative proceedings."

In *Grimes v. Conservation Commission*, 243 Conn. 266 (1997), a leading case, well known to this Council, the court raised fundamental fairness as the primary line of defense for the integrity of administrative proceedings, something the *Megin* court cited with approval:

> "The right to fundamental fairness in administrative proceedings encompasses a variety of procedural protections, including the right to adequate notice that is at issue in this case. … In a number of administrative law cases decided after [*Board of Regents v. Roth*, 408 U.S. 564 (1972)], we have characterized these procedural protections as 'due process' rights. … Although the 'due process' characterization, at first blush, suggests a constitutional source, there is no discussion in these cases of a property interest in terms of constitutional due process rights. These decisions are, instead, based on a line of administrative law cases and reflect the development, in Connecticut, of a common-law right to due process in administrative hearings. Although the facts of the present case do not require us to explore its boundaries, this common-law right is not coextensive with constitutional due process. … Therefore, to eliminate any further confusion, we will discontinue the use of the term 'due process' when describing the right to

> fundamental fairness in administrative proceedings." (Citations omitted.) *Grimes v. Conservation Commission*, 243 Conn. 266, 273 n. 11 (1997).
> *Megin*, *supra*.

That the Golds and the Grant Swamp Group failed to receive timely notice of the impact to their property interests is one failure of the process. That the public had no notice that the parcels at 45 and 53 Flagg Hill Road could be the subject of a siting of a different turbine of different size and power rating is an inexcusable failure.

THE D&M PROCESS CANNOT SWALLOW THE APPLICATION PROCESS FOR SITING NEW FACILITIES ON PREVIOUSLY UNEXAMINED PARCELS

The Council did not have jurisdiction over the Modification because BNE was proposing a new facility and otherwise addressed matters not raised during the petition process. In Petition 983, the Council voted to overrule various intervenor objections and approved the modification in December 2013, specifically noting that the three new wind turbines proposed by BNE were to be in the same locations and of the same height as the wind turbines approved by the Council in the original D&M Plan. That is materially different from a larger, higher turbine on new parcels of land.

In July 2018, BNE moved for an extension of time in which to complete construction of the third turbine that had been approved by the Council. In that motion, BNE specifically asked that the Council:

> grant a three-year extension until September 23, 2021 for the completion of construction of the Wind Colebrook South wind renewable generating facility located at 29 Flagg Hill Road and 17 Flagg Hill Road in Colebrook, Connecticut …

(Petition 983, BNE Motion for Extension at 4 (emphasis added).)

In August 2018, the Council approved the extension for 29 and 17 Flagg Hill Road, *not 53 and 45 Flagg Hill Road* where T3 is slated to be built. The Council's assertion, through staff, that there is precedent for using the D&M Plan process to relocate a

facility onto a new parcel of land that was never part of the underlying proceeding is wholly unsupported. Not a single one of the proceedings cited by Council staff in support of that assertion is comparable to the Council's actions here. Simply stated the Council cannot "confer jurisdiction upon [itself]" to site facilities in the D&M Plan process. See *Castro v. Viera*, 207 Conn. 420, 428 (1988).

BNE's Opposition Memorandum largely focuses on its subjective determinations of the benefits of the new turbine, conveniently skipping past the part of Conn. Gen. Stat. §16-50k's requirement that the Council does not have D&M jurisdiction over parcels of land not originally included in the petition process.

To be clear, the Petitioners are not arguing that the Council does not have jurisdiction to site T3 on 45 and 53 Flagg Hill Road. It just doesn't have jurisdiction under the D&M process set forth in R.C.S.A. §16-50j-60 to do so. It is fundamentally unfair to the Petitioners and the public to mis-use that process to achieve what should have been done by a petition under R.C.S.A. §16-50k.

CONCLUSION

This Petition raises critical issues of due process and fundamental fairness. The public's faith in the integrity of Council proceedings is at stake where basic rights like notice, opportunity for cross examination and the opportunity to present evidence at a hearing on material changes to a significant facility modification are absent.

Respectfully Submitted,

Petitioners,

Keith R. Ainsworth, Esq.

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was deposited in the United States mail, first-class, postage pre-paid this 15th day of December 2020 and addressed to:

Ms. Melanie Bachman, Executive Director, Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051 (1 orig, plus 1 electronic) (US Mail/electronic) siting.council@ct.gov .

And electronic copies to the service list as attached:

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