STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL
Ten Franklin Square, New Britain, CT 06051
Phone: (860) 827-2935 Fax: (860) 827-2950
E-Mail: siting.council@ct.gov
Web Site: portal.ct.gov/csc

VIA ELECTRONIC MAIL

August 28, 2020

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

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. **Petitioners' Objection and Motion to Strike BNE Energy, Inc. July 31, 2020 Correspondence**

Dear Attorney Ainsworth:

At a public meeting held on August 27, 2020, the Connecticut Siting Council (Council) considered and overruled the Petitioners' Objection to BNE Energy, Inc.'s (BNE) July 31, 2020 correspondence and denied the Motion to Strike BNE's July 31, 2020 correspondence with regard to the above-referenced matter on the following bases:

1. Discussions related to resolution of any substantive concerns among parties to a proceeding have an impact on the proceedings;
2. Correspondence filed with the Council by a party to a matter requiring action by the Council is part of the record under the Council's Rules of Practice;
3. Inter partes communications in a proceeding serve a proper purpose; and
4. Pursuant to Connecticut General Statutes §16-50o, any agreement entered into by the parties to a matter, or any correspondence related thereto, is relevant to the resolution of the matter.

Additionally, the record of the above-referenced matter reflects that on July 31, 2020, the counsel of record for this matter was Attorney Emily A. Gianquinto, the settlement discussions referenced in No. 1 had not yet occurred and BNE was granted party status for which participation in a proceeding cannot be limited by the Council.

Enclosed for your information is a copy of the staff report on Petitioners' Objection and Motion to Strike.

Sincerely,

Melanie A. Bachman

Melanie A. Bachman
Executive Director

MAB/MP/lm

Enclosure: Petitioners' Objection and Motion to Strike Staff Report, dated August 27, 2020

c: Service List, dated August 13, 2020

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL
Ten Franklin Square, New Britain, CT 06051
Phone: (860) 827-2935 Fax: (860) 827-2950
E-Mail: siting.council@ct.gov
Web Site: portal.ct.gov/csc

DATE: August 27, 2020

TO: Council Members

FROM: Melanie A. Bachman, Executive Director/Staff Attorney MAB

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. **DRAFT Staff Report - Petitioners' Objection and Motion to Strike BNE Energy, Inc. July 31, 2020 Correspondence**

On June 2, 2011, in Petition 983, the Connecticut Siting Council (Council) issued a declaratory ruling to BNE Energy, Inc. (BNE) for the construction, maintenance and operation of a 3-turbine wind electric generating facility on Flagg Hill Road in Colebrook, Connecticut (Wind Colebrook South) with the condition that BNE submit a Development and Management Plan (D&M Plan) for the facility prior to commencement of construction. In compliance with Condition 2 of the Council's declaratory ruling, BNE submitted its D&M Plan to the Council and the service list for Petition 983 on September 16, 2011. The Council approved BNE's D&M Plan on November 22, 2011 and subsequently approved four D&M Plan modifications between 2011 and 2020, including, but not limited to, changes in structure type and location of the three approved wind turbines.

Two of the three approved wind turbines (T1 and T2) at Wind Colebrook South achieved commercial operation in 2014. On July 17, 2018, pursuant to Condition 7 of the Council's declaratory ruling, BNE requested a three-year extension of time to September 23, 2021 to complete construction of the third approved wind turbine (T3). BNE's request was granted by the Council on August 31, 2018.

On January 9, 2020, BNE submitted a D&M Plan Modification specifically related to a change in structure type and location for T3. Regulations of Connecticut State Agencies (RCSA) §16-50j-62 allows for significant changes to an approved energy facility D&M Plan, including, but not limited to, changes in structure type and location. Consistent with Condition 2 of the Council's declaratory ruling, BNE provided copies of its D&M Plan Modification to the service list for Petition 983. The Council approved BNE's D&M Plan Modification on March 6, 2020.

On June 1, 2020, pursuant to Connecticut General Statutes (CGS) §4-176, FairwindCT, Inc., a party and Connecticut Environmental Protection Act intervenor to Petition 983, Julia and Jonathan Gold, and the Grant Swamp Group, collectively, the "Petitioners," submitted the above-referenced petition for a declaratory ruling (Petition) to the Council contending that BNE's January 9, 2020 D&M Plan Modification conflicts with the Council's June 2, 2011 final decision on Petition 983. Under CGS §4-176, any person may petition an agency for a declaratory ruling as to the applicability of specified circumstances of a final decision on a matter within the jurisdiction of the agency. Attorney Emily A. Gianquinto (Gianquinto) submitted the Petition on behalf of the Petitioners.

On June 2, 2020, the Council developed a schedule and provided notice of the Petition.[1] On June 19, 2020, BNE, through its counsel, Attorney Lee D. Hoffman (Hoffman), requested a 30-day extension of time for the public comment period, which was granted to July 31, 2020. On the same date, BNE, through its counsel, requested party status, which was granted by the Council on July 16, 2020. On July 20, 2020, the Town of Colebrook, a party to Petition 983, through its counsel, Attorney Patrick E. Power, requested party status, which was granted by the Council on August 13, 2020.

At the conclusion of the public comment period, on July 31, 2020, BNE submitted correspondence to the Council related to the comments of Senator Kevin D. Witkos received by the Council on July 27, 2020 (Witkos letter). Specifically, in its correspondence, BNE refers to this statement in the Witkos letter: "I am hopeful that the Siting Council will be able to work with the neighboring property owners, BNE Energy, and the respective municipalities in the weeks to come to find a mutually agreeable outcome."

BNE's July 31, 2020 correspondence directly addresses the possibility of "productive and meaningful discussions with other parties to this Petition" regarding a settlement. It states: "If that is the case, follow up meetings will likely be arranged between the parties in the coming weeks" and "the Council will be made aware" of any settlement "as soon as possible." It further states: "If settlement will not be possible," BNE will submit a response prior to the October 29, 2020 deadline for agency action pursuant to CGS §4-176. Under CGS §4-176, within 60 days after receipt of a petition for a declaratory ruling, an agency, in writing, shall: (1) Issue a declaratory ruling, (2) order the matter for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) initiate regulation-making proceedings, or (5) decide not to issue a declaratory ruling.

After the public comment period concluded, on August 3, 2020, Attorney Keith R. Ainsworth (Ainsworth), submitted correspondence to the Council related to his "indirect" receipt of BNE's July 31, 2020 correspondence, his representation of the Petitioners in lieu of Gianquinto and an Objection and Motion to Strike BNE's July 31, 2020 correspondence. It characterizes BNE's correspondence as "an improper attempt to influence the trier of fact with matters wholly outside of and irrelevant to the proceedings in [Petition] 1408." It further states: "The Petitioners will respond directly and privately to BNE," but they "object to the filing which should not be used to delay the proceedings."

The grounds for the Petitioners' Objection and Motion to Strike BNE's July 31, 2020 correspondence are as follows:

1. It does not serve to comment upon matters before the Council;
2. It has no foundation in the Council's Rules of Practice;
3. It appears transparently to be an improper attempt to influence the Council; and
4. It is irrelevant and should not serve to delay resolution of the Petition.

These grounds are baseless.

First, Petitioners indicate the correspondence does not serve to comment on matters before the Council and argue that settlement communications among the parties are "of no consequence to these proceedings unless these discussions might have an impact on the proceedings themselves." BNE's correspondence outright states in the second paragraph, "BNE is in the process of devising the terms of a settlement offer that it believes will address a

[1] Pursuant to Governor Lamont's Executive Order Nos. 7M and 7DDD, statutory and regulatory deadlines of state agencies may be extended for a period no longer than 90 days. The Council sent correspondence to the Towns of Colebrook, Norfolk and Winchester, and a memorandum to the Service List for Petition 983 seeking comments on the Petition.

number of substantive concerns that have been raised to date in this proceeding." Logically, discussions related to resolution of any substantive concerns among parties to a proceeding in which those substantive concerns have been raised has an impact on the proceedings themselves.

Second, Petitioners indicate the correspondence has no foundation in the Council's Rules of Practice and argue it is an "extraneous filing" that should be excluded from the record of the proceeding. RCSA §16-50j-9 states, "All orders, decisions, findings of fact, ***correspondence***, motions, petitions, applications and any other documents governed by these rules shall be deemed to have been filed or received on the date they are received by the Council..." and RCSA §16-50j-12(c) states, "All motions, petitions, applications, ***documents, or other papers relating to matters requiring action by the Council*** shall be filed at the office of the Council…" (Emphasis added).[2] On July 31, 2020, the Council and the service list for Petition 1408 received BNE's correspondence. Contrary to Petitioners' conclusion that the correspondence is not part of the record under RCSA §16-50j-26, this regulation specifically includes as part of the record, "(1) any notices, petitions, applications, orders, decisions, motions, briefs, exhibits, and ***any other documents*** that have been filed with the Council…" Clearly, correspondence filed with the Council by a party to Petition 1408, a matter requiring action by the Council, is not an "extraneous filing" and is part of the record of the proceeding.[3]

Third, Petitioners indicate the correspondence appears to be an improper attempt to influence the Council and argue that it serves no proper purpose. Under the Uniform Administrative Procedure Act (UAPA), there is a prohibition on ex parte communications in administrative proceedings. Ex parte communications occur when a party communicates directly with an administrative agency about issues in a matter without any other party's knowledge. Under the UAPA, there is no prohibition on inter partes communications in administrative proceedings. Inter partes communications occur when a party communicates directly with an administrative agency about issues in a matter with the other parties' knowledge. Transparently, BNE's July 31, 2020 correspondence serves a proper purpose.

Fourth, Petitioners indicate the correspondence is irrelevant and argue discussions between the parties should not delay the prompt resolution of the Petition. Under CGS §16-50o, the full text of the terms of any agreement between any party to a proceeding, or any third party, in connection with construction or operation of a facility shall be submitted into the record. Certainly, any agreement entered into by the parties to this Petition, or any correspondence related thereto, is relevant to the resolution of the Petition.

Also in its Objection and Motion to Strike, Petitioners describe BNE's July 31, 2020 correspondence as "striking" in two respects: it unilaterally announces an intent to contact the Petitioners without having contacted Petitioners' counsel in advance and it partially addresses substantive issues.

With regard to the claim that BNE unilaterally announces an intent to contact the Petitioners without having contacted Petitioners' counsel, when BNE's correspondence was submitted on July 31, 2020, Gianquinto was the attorney of record for the Petitioners. On July 31, 2020, Hoffman provided a certification that notice of BNE's July 31, 2020 correspondence was e-mailed to Gianquinto as the attorney of record for the Petitioners. In Petitioners' August 3, 2020 correspondence, Ainsworth unilaterally announced he is the attorney of record "in lieu of" Gianquinto and provided a certification that notice of Petitioners' August 3, 2020 correspondence was e-mailed to

[2] See also RCSA §16-50j-10 (2020) ("***Communications*** should embrace only one matter,...") (Emphasis added); RCSA §16-50j-12(a) (2020) ("… at the time motions, petitions, applications, ***documents or other papers are filed with the Council***,…") (Emphasis added).

[3] The Witkos letter is posted on the Petition webpage under "State Public Official Comments," BNE's July 31, 2020 correspondence is posted on the Petition webpage under "Party – BNE Energy, Inc. Correspondence," and Ainsworth's August 3, 2020 correspondence is posted on the Petition webpage under "Petitioners – FairwindCT, Inc., et al Correspondence."

Gianquinto as the attorney of record for the Petitioners. Ainsworth cannot object to the submission of BNE's July 31, 2020 correspondence to Gianquinto on July 31, 2020, particularly when Ainsworth also submitted Petitioners' August 3, 2020 correspondence to Gianquinto on August 3, 2020. It is clear that Gianquinto was the attorney of record for the Petitioners until Ainsworth submitted the August 3, 2020 correspondence.

With regard to the claim that BNE's July 31, 2020 correspondence partially addresses substantive issues, if settlement discussions hadn't commenced as of August 3, 2020 as referenced in the Petitioners' August 3, 2020 correspondence, Ainsworth cannot reasonably conclude that the settlement discussions referenced in BNE's July 31, 2020 correspondence that have yet to occur partially address substantive issues.

Finally, in its Objection and Motion to Strike, Petitioners' request the Council to use its authority under RCSA §16-50j-15a to "limit the participation of an ***intervenor*** so as to promote the orderly conduct of the proceedings by striking the letter from the record." (Emphasis added). The Council granted BNE ***party status*** in Petition 1408 on July 16, 2020. Under RCSA §16-50j-14, a party's participation in a proceeding may not be limited by the Council.

Therefore, staff recommends the Petitioners' Objection to BNE's July 31, 2020 correspondence be overruled and Petitioners' Motion to Strike BNE's July 31, 2020 correspondence be denied.